

## QUESTIONS AND ISSUES ARISING FROM FAMILY FEES SEMINARS

January 2009

### Operations Public Law

1. Although Residential and viability assessments are out of scope, will the LSC still pay for the attendance of experts at a hearing when they have been directed to attend for consideration of whether a residential assessment is viable?

**Costs and expenses in relation to residential assessments (and any assessment of viability) are excluded from the scope of funding by Criterion 1.3 of the Funding Code. However, applications for section 38(6) directions remain within the scope of a public funding certificate granted for care and supervision proceedings. The costs and expenses of any witness called to attend the hearing of the section 38(b) application could therefore be payable under that certificate.**

2. Does the 3 month time limit for submission of claims apply to CLAIM1A's as it does with CLAIM1's?

**The right of assessment is set out in paragraph 8.17 of the Unified Contact – Civil Specification. In accordance with this all claims (whether on CLAIM 1 or CLAIM 1A) must be submitted within six months of the right to the claim accruing. For bills assessed by the court this will be when the assessment certificate is issued by the court. For claims assessed by the Commission it will usually be the final order of the court for detailed assessment or if this does not apply the date of discharge or revocation of the certificate.**

3. In a case where a provider is acting for the parent in care proceedings in relation to one child, and entirely separate proceedings (with separate directions) are issued in relation to siblings, would separate certificates and separate fees be justified?

**In most cases any proceedings in respect of a new baby would be joined or heard together with the existing proceedings. However, if this was not the case and the proceedings, were conducted separate and apart from the existing proceedings then a new certificate would be issued and a separate fee would be claimed for those separate proceedings.**

4. In cases where social services advise care proceedings will not be issued if the parent places the child with an extended family member (and that child is not on the child protection register but has had a core assessment carried out), at Controlled Work level, is this a public or private law matter?

**This would be a public law matter. The definition of public law in the Family Specification is work which either falls within section 11.7, 11.8 or 11.9 of the Funding Code Criteria (ie Special Children Act proceedings, Related proceedings or other Public Law Children cases) or relates to a family dispute which if it proceeded to Legal Representation would fall within these sections. In this matter the issue is one which if it went on to proceedings would be likely to be care proceedings issued by the local authority.**

5. If a child is on the Child Protection Register and the local authority have followed the PLO and contacted an extended family member, then encouraged them to issue Private Law proceedings to obtain a residence order (in order to avoid care proceedings), is it permissible for the provider to claim a Public Law Level 1 fee, then apply for a Private Law certificate?

**Yes. The issue at Controlled Work level will be public law – there is the potential for the local authority to issue care proceedings. However, if an application for a residence order was subsequently issued an application could be made for funding to be represented on that residence application.**

6. What happens if the provider has received a pre-proceedings letter but the client will not come in to sign a CW1PL and does not turn up to the meeting with the local authority? Can the provider still claim the level 2 fee or would the claim be under Level 1 if a Legal Help form had already been signed?

**If the client is refusing to provide instructions either by coming to the provider's office or attending the meeting with the local authority then it is difficult to see how the solicitor could act. The provider is not obliged to attend any meeting just because he has received the letter before proceedings if he has not been instructed or has no instructions. If the provider attends a meeting expecting to see the client and sign the form but the client does not attend then the solicitor cannot claim (as the form is unsigned). Legal Help should not be used for work which would otherwise fall within level 2.**

7. If a client is an intervener in care proceedings, is this a fixed fee case (i.e. joined party fee) or is it claimed at hourly rates?

**The definition of a "joined party" in paragraph 10.28 of the Family Specification is "all other clients in section 31 care proceedings". Therefore any client who is a party to the proceedings and is not a parent or child will be a joined party and the fixed fee will be payable.**

8. Can enhancement be claimed on Advocacy rates at Level 3 Public Law?

**Yes, enhancement can be claimed on advocacy rates in accordance with paragraph 10.39 of the Family Specification.**

9. If costs are recovered under Level 1 and/or Level 2 Private Law only and no charge applies, does the provider keep the costs and also receive the fixed fee?

**No. In accordance with paragraph 10.77 of the Family Specification the provider must either retain the costs recovered but make no claim from the fund for any work falling within the scope of the standard fee or pay all costs recovered into the fund and claim remuneration in the usual way.**

10. Is travel and waiting in relation to Advocacy at Level 3 claimable at the advocacy rate?

**No, the advocacy rate is only applicable to time spent as an actual advocate before the judiciary. All other work claimed under the general heading of advocacy is subject to the applicable prescribed rates (paragraph 10.41 Unified Contract Civil Specification).**

11. On a change of solicitor, where at the time of the transfer of the proceedings they are in the High Court, does the first firm need to wait until the proceedings are finished to know what fee to claim (the fee payable being dependent upon the court in which the proceedings end) or can they claim the High Court fee?

**If the provider wishes to claim the High Court fee they would need to know that the proceedings completed in the High Court. This would not be apparent until the end of the case. An application for a payment on account of costs to date could be made in the meantime.**

12. Where a provider acts for multiple clients at Level 3 and one transfers, the original solicitor will be paid the full multiple client fixed fee if they have represented both clients at at least one hearing, or the full single client fee if they have not represented both clients at at least one hearing (as they continue to act for one client). What will the second firm be paid?

**Where a provider acts for more than one client and one client transfers to a new solicitor but the first provider continues to represent one or more clients the first provider is entitled to the full standard fee in the usual way (including the fee for two or more clients) if the provider represents more than one party at at least one court hearing.**

**The new provider will claim half the standard fee if their costs calculated on an hourly rate basis are less than the standard fee. If the costs are equal to or more than the standard fee the full standard fee will be claimed. If the new solicitor represents two or more clients at at least one court hearing during the case the relevant standard fee will be that for representing two or more clients.**

**In deciding whether a case escapes from the standard fee each provider will be considered separately.**

13. What is the point of the 'family proceedings number' in the letter of intention? Local authorities rarely provide them.

**The local authority should allocate a number to each child. At present local authorities have their own method of allocating numbers. However, work is being done on a standardised number for each child and this will assist in ensuring that cases can be tracked in the future.**

14. Can a psychologist's fee be claimed as a disbursement at Level 2 Public Law?

**No. Under Level 2 public law only out of pocket expenses can be claimed. Other disbursements eg expert's fees should not be incurred under this level of services (see Family Decision making guidance paragraph 20.11 (3C-177)).**

15. Where a client applies to be joined in care proceedings and permission is refused, however the Judge still requires the party to be represented in the proceedings, is this claimed on a CLAIM1 or CLAIM1A as hourly rates will apply?

**If a court did not join the client as a party to the proceedings the issue would be whether Legal Representation continued to be justified. It is unlikely that in these cases Funding Code Criteria 11.9 and in particular the Criteria as to reasonableness would be met.**

16. Where a case becomes exceptional at Public Law Levels 1 and 2, guidance says providers will be paid on corresponding hourly rates. However, where providers have acted under Levels 1 and 2 they use Controlled Legal Representation (CLR) rates to calculate whether a case is exceptional. Does this mean there is the potential for an exceptional claim to be rejected when the LSC applies the corresponding rates (as this would potentially bring it back under the exceptional case limit)? I.e. does the LSC pay Level 1 at Legal Help rates and Level 2 at CLR rates, or both at CLR rates?

**Where the provider has acted for the client at both Level 1 and Level 2 then for the purposes of calculating whether a case escapes from the standard fee the relevant hourly rate is that specified in section 7(c) of the Payment Annex (ie the Level 2 rates). In cases where Legal Help is provided but there is no grant of Family Help (Lower) (Level 2) the relevant hourly rate is that specified in section 7(b) of the Payment Annex (ie Legal Help rates).**

17. Can preparation of a draft order within the court precincts be claimed at the advocacy prescribed rate? The court may adjourn the hearing for the provider to draft an order in the terms the Judge has dictated, and then reconvene.

**Drafting of an order at court will be at preparation rates as would preparation of any other document although it falls within the more general definition of “advocacy” and will therefore be paid at hourly rates. However, in accordance with paragraph 10.41 of the Family Specification the rate for advocacy may only be claimed for time spent providing advocacy in court. If the provider is not providing advocacy but is drafting documentation the time spent is not paid at advocacy rates.**

18. In a high cost case where a provider has two certificates, one under the old hourly rates (for which they have a high cost case contract), and the other under the fixed fee scheme, and the proceedings are consolidated, do they simply apply to amend the existing contract in view of the consolidation?

**For the purposes of deciding whether the cost threshold of £25,000 is met the Special Cases Unit has a discretion to treat more than one set of proceedings or certificates as a single case. This is particularly likely in public law Children Act proceedings where the same solicitor is acting for siblings or parents and the cases are proceeding through the courts together (so that the contract would be likely to be amended).**

19. A solicitor is acting for one child in care proceedings. His two siblings, for whom the solicitor also acts, are not subject to care proceedings but are subject to a Rule 9.5 appointment and continue to play a part in the proceedings. Are the siblings considered to be joined parties and the joined party fee will be paid in each case, or are the cases paid at hourly rates?

**The definition of Child for the purposes of the Family Specification is a child who is the subject of the proceedings. If a child is not the subject of the proceedings s/he will fall into the category of joined party and the joined party fee will be payable in that case.**

20. A solicitor acts for a parent under a non-means/non-merits tested certificate. The client ceases to provide instructions before the case concludes; the solicitor submits his claim for costs and the certificate is discharged. The client then returns before the final hearing seeking representation. Does the solicitor submit a further CLSAPP5 and get paid a further fixed fee?

**A fee is payable by reference to the proceedings rather than the certificate and therefore only one fee will be payable for the same client in any set of proceedings. In these circumstances the solicitor should notify the regional office who will re-open the certificate as appropriate so that work can be continued.**

21. If a solicitor leaves to join another firm, and the certificates are subsequently transferred to the new firm, is that a transfer for the purposes of generating a further fixed fee?

**Yes, this will be a transfer of a certificate for the purposes of the Specification as the client will have transferred supplier (defined in the standard terms as a party to a LSC Unified Contract).**

22. A provider acts for a father, who has five non-resident children who are subject to care proceedings, under a non-means/non-merits certificate. The local authority have withdrawn proceedings in respect of one of the children. However the father still seeks contact to that one child who has returned to live with the mother. The court has agreed to deal with this within the continuing care proceedings in relation to the other four children. Does the provider need to submit a new means and merits tested private law application, or can he continue under the existing non-means/non-merits certificate as the matter is still being dealt with within the care proceedings for the other four children?

**If the matter continues to be dealt with within the care proceedings then this will be under the non means tested certificate as “related proceedings”.**

### **Policy Public Law**

23. Will the LSC provide guidance on what constitutes a reasonable period so that parental responsibility (PR) can be assumed to have been delegated?

**There is no specific time requirement for PR to have been delegated. However, it is expected that this will be evidenced by a past course of conduct ie the facts will show a course or conduct – more than one action/incident – and it will not have been delegated immediately prior to the local authority issuing proceedings.**

24. If the Local Authority places the child with an extended family member, is this delegated PR?

**No, a local authority will not be treated as having delegated PR by placing the child (see family decision-making guidance 3C-191, sub paragraph 2).**

25. If a parent disputes they delegated PR to another person, despite the apparent conduct of the parent indicating they had done so, can the 'other' person still be considered to have delegated PR and therefore remain eligible for non-means/non-merits funding?

**If a parent disputes that they have delegated PR then PR cannot be delegated. The decision-making guidance states that it is not required to be in written form. However, written evidence of the delegation must be supplied with the application. The fact that a child is living with someone other than the parent does not mean that PR has been delegated.**

26. If the person with delegated PR is refused permission to join the proceedings, are they still entitled to non-means/non-merits tested funding?

**If a person is refused permission to join the proceedings then there will be no further work to be done. Where a client who applies to be joined is not joined then the work will be paid at hourly rates. This is because they are not a "joined party". However, if it is accepted that they have PR then they become a "parent" and entitled to the full fee.**

27. Is a person with delegated PR eligible for Level 2 funding?

**Only parents and those with formal parental responsibility (eg by way of a residence order) who have been served with a letter before proceedings by the local authority are eligible for non means tested Level 2 funding. The availability of non means tested advice at this level is more restricted than Legal Representation. It does not apply to children or other extended family members and it is only available in potential section 31 proceedings.**

28. What is the position where delegated PR is interrupted e.g. the natural parent removes the child from another family member with whom the child has been residing, then returns the child shortly before proceedings?

**The issue is whether PR has been and remains delegated at the time that the application for funding has been made and can be evidenced by a past course of conduct in this respect. This may**

**depend on the circumstances in which the child was removed and when child is returned.**

29. What is the position where the parent removes the child from the care of a person with delegated PR shortly before proceedings? Is the person with delegated PR still eligible for non-means/non-merits funding, or does the child still actually have to be residing with them?

**If the child is not living with the applicant then it is difficult to see how they could be exercising parental responsibility or how the parent could have delegated parental responsibility to them to exercise.**

30. What is the position in relation to delegated PR where:
- a) The parent is sharing residence (without a formal order) with extended family members e.g. grandparent have the child for 4 days, mother for the remaining 3 days per week. Is this sufficient to say the extended family member has delegated PR throughout, or only whilst the child resides with them?
  - b) The parent is leaving the child with grandparents for a few weeks at a time, takes the child back, then leaves the child with the grandparents again etc. Is PR only delegated whilst the child lives with the grandparents?

**It is expected that those exercising delegated parental responsibility will have the child living with them. If the child is not living with the client on a permanent basis ie the child is still living with the parent then this will not be sufficient to show delegated PR.**

31. What is the position where a child is removed from the client with delegated PR during proceedings for which the client already has non-means/non-merits tested funding?

**There may be cases where the client's status during the proceedings changes. PR could be lost, for example, if the client has PR by way of a residence order and an interim care order is subsequently made. In these cases Funding Code Criterion 15.2 indicates that funding may be withdrawn where the criteria under which funding was originally granted are no longer satisfied. Therefore there is always a discretion on withdrawal of funding and the fact that the certificate was correctly granted at the outset does not mean that it cannot be withdrawn nor that a change in circumstances means that it must be terminated. Any relevant changes should therefore be notified to the Commission who will consider each on a case by case basis.**

32. Will the LSC provide detailed guidance on what constitutes exceptional circumstances for attendance at a Child Protection Conference?

**The Decision-Making Guidance in paragraph 20.10.3 states that there will usually be more appropriate support to clients attending child protection conferences than attendance at those conferences where providers may only be able to take a limited note. However, there may be exceptional circumstances where the attendance of the provider is necessary, not merely to provide support for the client but to enable proper legal advice to be given at the conference itself. To provide more prescriptive with defined criteria may not be helpful as it may restrict the possibility of attendance being justified on its own particular facts.**

33. Why can't the LSC pay at least 50% of the fixed fee on account immediately as, even if there is a change of solicitor, this is the least they can expect to receive?

**The provisions for payment on account are set out in the Civil Specification. It is not appropriate to pay half of the fixed fee immediately on the issue of a certificate in section 31 proceedings only. In addition, there may be some cases where the fixed fee is not payable in any event, for example, where a certificate is issued for a joined party who is not ultimately joined into the proceedings.**

34. Courts are frequently adjourning CMC and IRH and directing further advocates' meetings. In view of this, will the LSC revisit the policy to pay only two advocates' meetings as "advocacy" outside the fixed fee scheme?

**Advocates' meetings held in accordance with the PLO which provides for two such meetings can be claimed at the applicable hourly rates. If there are more than two advocates' meetings, for example, because a stage is repeated, these can be remunerated at hourly rates provided that the meetings are directed by the court and take place in accordance with the PLO.**

35. Can the LSC allow all work under the heading of "advocacy" at Level 3 to be claimed at advocacy prescribed rates?

**The provisions in relation to this are contained in paragraph 10.41 of the Family Specification. Work falling within the definition of advocacy continues to be paid at hourly rates. However, as before this work is remunerated at the appropriate rate for the particular work eg travel and waiting will be claimed at the travel and waiting rate. It is not appropriate that time spent other than on advocacy before the court should be remunerated at the advocacy rate.**

36. Is the father of an unborn child, where the local authority have issued the pre-proceedings letter, eligible for Level 2 funding?

**Yes. Family Help (Lower) prior to care proceedings is available for: (i) a parent of a child, or person with parental responsibility for a child (within the meaning of the Children Act 1989) or (ii) in the case of an unborn child, any person who following the birth of the child will be the mother or father of the child and will have parental responsibility for the child.**

37. Will the LSC pay for more than two advocates' meetings in circumstances where advocates' meetings have already taken place in the Family Proceedings Court before the case is transferred to the County Court, where further advocates' meetings then take place?

**See question 34 above.**

38. When acting for a child in potential public law proceedings who is able to provide instructions and understand the advice they are given, can the provider give move to Level 2 after the issue of a pre-proceedings letter?

**No, non means tested advice is only available for parents and those with parental responsibility. The purpose of the advice and assistance at this stage is to ensure that parents and those with parental responsibility have access to legal advice before care/supervision proceedings are commenced. It is hoped that in this way they will engage or re-engage with the local authority and that the local authority will work with them to avoid proceedings or, where this is not possible, to narrow the issues in proceedings so that they can be dealt with more quickly. Advice can be given under Level 1 if necessary in these circumstances.**

39. When instructed by the Guardian of a child, can Level 1 funding be used simply to complete legal aid application forms?

**Where on the day that work is carried out the provider is satisfied that the Funding Code Criteria are met for a grant of emergency representation or other Licensed Work funding in relation to the same matter and the provider intends to grant such funding, a new matter start is not justified. For example, in Special Children Act cases where funding will be granted by the provider using devolved powers Legal Help is not appropriate. Instead all work carried out on the day of the grant of funding (including the completion of legal aid application forms) may be claimed under the certificate (Civil Specification, paragraph 5.19).**

**In cases where devolved powers are not used in Other Public Law Proceedings then a new matter start may be appropriate. In these cases the Legal Help form would need to be completed by the guardian.**

40. Will the LSC increase standard cost limits on certificates to at least twice the fixed fee (the exceptional limit) plus the standard 15% uplift?

**The cost limitation remains as previously at £5000. There are, of course, different fees depending upon the region in which the provider is based. This will mean that providers in London may need to apply for a costs increase at an earlier stage than, for example, a provider based in the North. However, it was considered that it cause further confusion if there were differing limits on certificates for the same proceedings according to where the supplier was based. Where the provider is acting for more than one client (in which case a higher fee will be payable), then there will be two certificates issued each with a cost limitation of £5000. The costs of the two proceedings will be apportioned between the two certificates. Cases which end in the High Court are likely to be exceptional and require applications for amendment in any event.**

**If a case becomes exceptional it will usually be appropriate to extend the costs limitation. However, every case which a provider has will not be exceptional. The LSC will continue to keep costs limitations under review in terms of additional advocacy and disbursement costs.**

41. Where a freelance solicitor advocate is instructed, will their costs fall outside the fixed fee (as counsel does, under the FGF) and be paid as a separate disbursement at the freelancers rate, are they part of the fixed fee or are they subject to the normal prescribed rates?

**Where a solicitor advocate is instructed to undertake advocacy they will not be paid under the FGF scheme. Instead they will be remunerated as an agent of the solicitor under paragraph 5.29 of the Civil Specification. They will therefore be subject to the usual prescribed rates. If the work being undertaken is work that is included within the fixed fee, then a separate charge cannot be made to the Fund for this work.**

42. A solicitor represents several children, and one of the children holds a different view to that of the Guardian and their certificate is transferred to another firm. The Guardian remains involved with that child (despite there being an apparent conflict between the Guardian and the child) in relation to 'welfare issues'. The solicitor prepares a separate bill for the work done by the Guardian and splits it 50/50 between the Child's certificate and CAFCASS. Should the LSC be paying any costs in relation to the Guardian?

**No. The fund does not pay the costs of the CAFCASS guardian. Should the CAFCASS Guardian continue to require legal advice once the child is instructing the solicitor direct then this will be provided by CAFCASS.**

43. Can providers claim for the costs of writing to experts regarding viability assessments i.e. will it count toward exceptional case calculations and be paid?

**The exclusion in relation to residential assessments is widely drafted in that it excludes all costs and expenses not only in relation to residential assessments themselves but also any viability assessment where this is with a view to the possibility of a residential assessment.**

**However, an application to the court for a section 38(6) assessment and work directly to support the making of this application including contacting an expert or experts would be within the scope of the certificate. However, the costs of any such assessment itself (or any assessment as to viability) could not be met by the Fund.**

## Operations Private Law

44. If a provider has commenced work at Level 1, and the client then moves, lives abroad, or is in prison and it is not possible to have a further face to face meeting, where there are negotiations or substantial follow up work, can this move to Level 2?

**Under paragraph 10.55 of the Family Specification Level 2 may not be granted for those disputes which do not require or involve more than one meeting with the client, whether or not followed up by written or telephone advice. In these cases therefore the matter could not move to Level 2. When the scheme was implemented the Specification was drafted to strike a balance between managing the move from Level 1 to Level 2 by providing an objective event with ensuring that it did not create perverse outcomes for clients. We have received comments in relation to this and will be considering this as part of the Phase 1 review.**

45. When acting for a child where a Guardian has been appointed under Rule 9(5), can the costs of completing the application forms be claimed at Private Law Level 1?

**See question 40 above.**

46. What evidence of financial means is acceptable for child applicants? What information do we expect the Guardian to obtain?

**When assessing the means of the child, the resources of a parent, guardian or other person who is responsible for maintaining the child or who usually contributes substantially to the child's maintenance must be taken into account as well as the assets of the child. There is a discretion not to aggregate assets in this way if it appears inequitable to do so, although the joinder of the child as a party to private law proceedings does not lead to automatic non aggregation with one or both parents.**

**In Special Children Act cases the child will be non means tested in any event and in most Other Public Law Children Act cases it would be inequitable to do so.**

**In many cases the child will have no access to income or assets and no evidence will therefore be required. If the child does have assets or non aggregation is not being put forward then the usual evidence in relation to these should be provided.**

47. Peer review requires the provider to address all issues. In a case where there are two separate fathers of a client's children, and the client has a dispute with one of the fathers who has PR (the other not), the provider is obliged to advise the client on the issue of the

second father not having PR. If the client wants the provider to write to the second father regarding PR, at what point does it become a new matter start?

**Identifying a potential issue does not mean that this is sufficient to justify a new matter start. If it did become a substantial issue because the other father issued proceedings/asked for more contact then a second matter start may be justified. This would be in accordance with paragraph 10.68 of the Family Specification on the basis that the issues relate to family disputes which are entirely separate (typically because they arise out of different relationships) and which would, if they resulted in proceedings, be issued and heard separately. However, in accordance with paragraph 5.8(b)(ii) of the Civil Specification each problem must require substantial legal work which does not address the other problem. This is not the case in the scenario presented.**

48. If the client does not qualify for an exemption from court fees when advised under controlled work at Level 2 Private Law and requires a formal consent order, is the fee payable for obtaining the order claimable?

**Yes, court fees are an allowable disbursement under Family Help (Lower) where they are incurred for the purpose of obtaining a consent order under paragraph 10.61 of the Family Specification. In this case no application for fee exemption would be made to the court.**

49. If the solicitor's charge applies, do providers report a nil claim and obtain their actual costs from the client?

**Where the charge arises the provider should complete the CMRF as usual with details of the profit costs and disbursements. The value of costs/damages recovered field should be filled in with the total amount recovered by the client to which the charge applies (eg the value of the matrimonial home should not be included where this is exempt.) The LSC supplier management system will then calculate the amount payable.**

50. If conveyancing is required as part of the implementation of an agreement, but the firm does not have its own conveyancing department, will they be able to instruct another firm and claim the costs as a disbursement?

**Where it is reasonable for this work to be done, an agent could be used, where the provider does not do this work in-house. Use of agents is governed by paragraph 5.29 of the Civil Specification. The use of an agent cannot increase the costs payable by the Legal Services Commission. Therefore, unless**

**the claim becomes exceptional any costs of the agent would be met by the firm from the standard fee. If the case becomes exceptional, any duplication of work or increase in costs due to the fact that this work was not done by the firm itself, would be reduced on assessment.**

51. Can the fee paid to a pension provider to implement a pension sharing order be claimed as a disbursement?

**No, this is a client cost rather than a solicitor disbursement which can be met by the Fund.**

52. Can the costs of DNA testing be met under Level 2?

**A DNA test can be incurred as a solicitor's disbursement under Legal Help/Family Help (Lower). However, it should only be used for this purpose if the Funding Code Criteria for Legal Help (ie sufficient benefit) and Family Help (Lower) (significant family dispute and cost benefit) are met. It must be reasonable to incur the disbursement for the purpose of allowing the solicitor to give Controlled Work to the client and the amount involved must be reasonable. Legal Help or Family Help (Lower) cannot be used just as a vehicle to incur the disbursement and pass on the report where there is no legal advice that needs to be given in relation to the particular circumstances (paragraph 5.28 of the Civil Specification).**

53. Is the end code for 'L2 work only' to be used only when the matter involves a returning client?

**It is most likely that the code for Level 2 work only would be used when a client was returning. In other cases where a new matter start was appropriate there would be an initial interview and work under Level 1.**

54. Can providers claim the higher petitioner fee where a petition is prepared and issued but the client provides no further instructions?

**Yes. The provisions for claiming the higher petitioner fee are set out in paragraph 10.53 of the Family Specification. The requirements are that the client requires advice and assistance in order to initiate divorce proceedings, those proceedings are issued and no further services are required. Therefore once the petition is issued the higher fee will become payable even if the client then ceases to provide instructions.**

55. Is Help with Mediation exempt from the charge under the transitional arrangements?

**Help with Mediation no longer exists as a level of service after 1 October 2007 and therefore cannot be granted even if a Legal Help matter was started prior to that date. If a Legal Help matter was commenced prior to 1 October and the client was subsequently referred to mediation then further assistance from the solicitor can either be provided under the existing Legal Help matter start or if appropriate by application for a certificate for Family Help (Higher). Although a certificate for Family Help (Higher) is to cover the issue of proceedings there is a discretion for it to cover pre-proceedings work in cases such as this where Level 2 is not available.**

**The position in these cases with regard to the statutory charge is as before ie the statutory charge will apply where the matter completes at Legal Help, subject to the exemptions from the charge which apply to Controlled Work. In addition, under Controlled Work where the charge is in favour of the provider the client's main or only dwelling is exempt and the supplier may waive the charge where to enforce it would cause grave hardship or distress to the client or would be unreasonably difficult because of the nature of the property. If a certificate is issued, then all work carried out under Legal Help will also attract the charge. Mediation itself remains exempt from the charge.**

56. In a case where there is an early referral to mediation at Level 1, the client and other party enter the mediation process, and the next time the provider sees the client is when an agreement has been reached, is this classed as the second meeting for the purposes of moving to Level 2 and getting a consent order plus settlement fee?

**Yes, as the client will need advice on the settlement and in particular where there are assets to obtain a consent order.**

57. In a finance case where the client believes there are assets the opponent is not disclosing, having already moved to Level 2 the provider refers the client to mediation and it transpires during mediation there are no assets, will the provider:
- a) Still be able to justify claiming the Level 2 fee?
  - b) If the client returns seeking a clean break order, having reached agreement and it having transpired there are no assets, can the provider claim the Level 2 settlement fee?

**If the provider is satisfied that the criteria for level 2 are met at the relevant time, they will be able to claim the level 2 fee even if it transpires later that there were no assets. However, to claim the settlement fee, the criteria in paragraph 10.62 of the Family Specification must met, ie there must have been a genuine settlement to conclude that aspect of the case, rather than, for example a reconciliation or one client disengaging. In addition, the**

**cost benefit test must be met as to whether a private paying client would have a consent order prepared.**

58. After having advised a client under Level 1 and Level 2 and no agreement having been reached, the provider applies for a certificate to issue proceedings. Before proceedings are issued the case settles.
- a) Can the provider claim the settlement fee at Level 2 if no costs have been incurred under the certificate yet?
  - b) If costs have been incurred under the certificate can the Level 2 settlement fee be claimed if they agree not to make a claim under the certificate?
  - c) Does the issue of the certificate mean they are no longer entitled to the settlement fee regardless of the scenarios above?

**If the provider makes no claim under the certificate and only claims under Level 1 and 2, then the settlement fee can be claimed.**

59. When reporting a case on a CMRF when the solicitor's charge attaches, do providers enter the amount to which the charge attaches i.e. the amount of actual costs above the exceptional threshold at Level 2, or the full value of assets recovered/preserved?

**The value of the costs/damages recovered field should be filled in with the total amount recovered by the client to which the charge applies (eg the value of the matrimonial home should not be included where this is exempt under Controlled Work). The details of the profit costs and disbursements should also be included in full ie the total amount of costs rather than those above the exceptional limit only. SMS will then calculate the amount payable.**

### **Policy Private Law**

60. Peer review requires solicitors to advise a client with no assets that they should obtain a clean break order. If the client agrees and wants the provider to do this work, as there is no dispute and/or no significant assets they cannot move to Level 2 Private Law. As a result, the solicitor has to do extra work at Level 1, and the client has to pay the court fee which is not a recoverable disbursement at Level 1. In many cases, when the client discovers they are responsible for the court fee, they decide not to proceed, which is not in their best interests. This cannot have been the intention of the LSC?

**The peer review improving quality guide asks if clients have been advised of the possibility of a "clean break" consent order where appropriate. This does not mean that in all cases it will be appropriate to prepare a clean break order rather than advice being given at level 1.**

**Where there are no assets at all the criteria for level 2 is unlikely to be met as there is no significant family dispute for the purpose of the Family Specification. In particular, paragraph 10.55(iii) states that Family Help (Lower) may not be granted where the dispute, if unresolved, would be unlikely to lead to family proceedings. In addition, the cost benefit criteria must also be met as to whether a private paying client would be prepared to proceed in the circumstances. If advice is required this can be given under Legal Help.**

**If the client did wish a consent order to be filed with the court then the client could apply for a fee exemption in the usual way.**

61. Why does the fee payable at Level 1 when acting for a petitioner revert to the lower fee if the client requires advice at Level 2?

**The fees for Levels 1 and 2 were calculated based on the historical cost of children and finance cases at this level including profit costs in connection with advising on a divorce. Initially, therefore no additional fee was proposed at level 1 for providing assistance in divorce proceedings but following the consultation process and feedback from providers a separate fee was created for the petitioner in these circumstances. However, where there are other issues which take the matter on to level 2 any work carried out in relation to the divorce will be covered by the combined level 1 and level 2 fee.**

62. What is our approach going to be where a provider has already claimed a Level 2 payment, but there has been no second face to face meeting?

**If there has been overclaiming Regional Offices will need to investigate this and take appropriate action, including possible recoupment.**

63. Where there is an issue over paternity, do we expect providers to incur the costs of DNA tests at Level 2, or to apply for Family Help (Higher) and claim them under a certificate?

**See Question 52 above. A certificate of Family Help (Higher) would not be issued merely to incur a disbursement.**

64. Can the LSC provide improved guidance on what constitutes a 'significant family dispute'?

**The detailed Criteria are set out in Paragraph 10.55 of the Family Specification. The requirement for a second meeting will be considered as part of the Phase 1 review.**

65. What constitutes a binding agreement for the purpose of obtaining the settlement fee at Level 2 Private Law?

**In ancillary relief and other finance cases, settlement will be evidenced by a consent order or formal written agreement under paragraph 10.62 of the Family Specification. This may not be appropriate in Children Act cases and, in these cases, settlement will usually be evidenced by the exchange of letters on the file showing that agreement was reached.**

66. Does a second attendance upon the client simply to sign legal aid forms trigger Level 2 funding?

**The additional criteria set out in paragraph 10.55 of the Family Specification must also be met. The decision-making guidance states that Legal Help can also cover the completion of the forms for certificated funding. However, there may be cases where there is a second meeting to take further instructions at which the funding forms are completed. In these situations a Level 2 fee may be appropriate.**

67. Can the LSC extend the time an APP7 is valid beyond the current 4 months? If the LSC expect early referral to mediation, and mediation breaks down, providers are expected to attempt negotiations, which can be lengthy. If they then break down after 4 months providers have to refer the client back to mediation.

**Referral to mediation should be at the most appropriate time in the case. If referral to mediation is made and this breaks down, further negotiations may not always be appropriate. If there is a referral to mediation which breaks down and the provider wishes to apply for funding more than 4 months after the CLS APP7 has been signed, the provider should contact the mediator to discuss whether there has been any change in circumstances or if a further assessment meeting is appropriate.**

68. Some providers do not claim the settlement fee when entitled to do so on the basis that a high proportion of settlements break down within 6 months, and the administrative cost of reporting these cases and adjusting their accounts makes claiming the settlement fee prohibitive.

**It is less likely that there will be a breakdown of settlement in finance matters following a consent order. However, the settlement fee for children is £153 for London and £132 for non-London cases which is a significant percentage of the total fee payable and should be claimed by providers. The breakdown of settlement is something which will be monitored as part of the Phase 1 review.**

69. In private law children matters at Level 2, where an agreement is reached, are there any circumstances where a provider may issue proceedings for the purposes of obtaining a consent order e.g. where there is a history of agreements being reached and then breaking down? If so, can the LSC provide detailed guidance?

**The guidance says that applications to the court in children matters at Level 2 are likely to be exceptional having regard to the “no order principle” which will be adopted by the court. However, if it were appropriate to make such an application this could be done under Level 2 although the assistance would be limited to help in preparing the application. It is not considered to be necessary to provide further guidance on this which may, in attempting to be prescriptive, exclude situations where such applications may be appropriate.**

70. Can the terms for the levels of service Family Help (Lower) and Family Help (Higher) be changed? It makes it very confusing and difficult to explain to a client the impacts of work being done under the different levels of service, especially in relation to the statutory charge.

**These terms are contained in the Funding Code and as such can only be changed if there is an amendment to the Funding Code approved by both Houses of Parliament. The terms Level 1, 2 and 3 can be used.**

71. With regard to eligibility for funding:
- a) What is acceptable evidence of income for Level 1/Level 2 funding?
  - b) What dates/period are/is relevant in terms of showing when the client qualified for funding?
  - c) What information do we expect the client to provide in domestic violence or homelessness cases?

**Details and examples of acceptable evidence of means are set out in Volume 2 of the Legal Services Commission Manual at paragraph 2F-012. In exceptional cases (eg homelessness) the personal circumstances of the client may make it impracticable for any evidence to be supplied. In such cases, eligibility can be assessed without evidence. However, the attendance note must give the reason why evidence could not be obtained and providers must be prepared to justify this on audit if necessary. This is also set out in paragraph 2F-012.**

72. Should providers apply for a court fee exemption at Level 2 where they are obtaining a consent order, even though this is a recoverable disbursement?

**No, as this is a recoverable disbursement under Level 2 it will be paid as such. The completion of a fee exemption form is not**

**necessary. This is work which would previously have been carried out as pre-proceedings work under a General Family Help certificate and as such the fee for this remains payable by the Fund.**

73. A client has sought advice in a private law matter that has progressed to Level 2, and agreement has been reached, the provider has reported and claimed the settlement fee. The agreement breaks down and the client seeks further advice, but from a different solicitor. When asking for the file of papers, is the second solicitor under a duty to inform the former solicitor that the agreement has broken down, which, if within 6 months, would require the first solicitor to report the breakdown to the LSC resulting in recoupment of the settlement fee? If so, does this not breach the confidentiality provisions?

**The obligation is on the first provider to notify the LSC if they become aware that the settlement has broken down. There is no obligation on the second provider, who may not necessarily be aware of the claims that have been made by the first provider to update them on the current position. However, the fact that the file is being requested and that the client has again instructed solicitors is likely to alert the first provider to the fact that settlement has broken down.**

74. Does the LSC expect there to be second face to face meetings in respect of both the Children and Finance issues to move to Level 2 in each instance i.e. where the disputes arise at different points in time?

**The Funding Code Criteria must be considered and satisfied for each issue separately. If the client's divorce raises significant finance issues and also children issues but the children issues would not satisfy the cost benefit criterion for Family Help (Lower), then the client may be assisted generally under Legal Help for this and Family Help (Lower) should be granted for the finance issue only. However, if the criteria are satisfied and a second meeting is held to discuss both finance and children issues at the same time this will be sufficient to satisfy the requirement for a second meeting. However, if the disputes arose at different points in time, then a second meeting would be necessary to satisfy the criteria for the additional matter.**

## General Operations

75. If a client fails to provide evidence of means despite the best efforts of the provider, can the provider make any claim for the work undertaken? Under TFF this was previously limited to two hours worth of work.

**Under paragraph 2.5 of the Civil Specification a client's means may be assessed without the accompanying evidence where (amongst other things) this is not practicable before starting Controlled Work. In these cases the supplier must require the client to provide the evidence as soon as practicable. If it is not provided, then the supplier can still claim a new matter start provided s/he has acted reasonably in undertaking the work before obtaining evidence and in assessing financial eligibility. If the matter is remunerated at hourly rates then the supplier cannot claim for more than two hours work. This will mean that in cases where the fixed fee applies only the Level 1 fee could be claimed in these circumstances.**

76. In a public law case, when a provider acts for two clients and a certificate for one is transferred, does the provider have to tell the second firm what the actual costs incurred were under each client's certificate for the purposes of the costs limitation?

**Yes. The provider should ensure that an estimate of all the costs incurred on that certificate (as apportioned if necessary) are given to the second provider so that they are able to apply for any increase in the costs limitation as necessary.**

77. Can you submit Level 1 and Level 2 claims that are more than 3 months old, and are there any penalties for late submission?

**There is no specific provision to apply deductions for late submission of claims. However, it is important to submit claims within the time period specified otherwise it is difficult for the LSC to forecast expenditure. Frequent failure to submit claims within the time periods specified may lead to contract sanctions or termination of the contract (see paragraph 15.6 of the Unified Contract Standard Terms).**

78. Can another column be added to the CMRF to show what they expect to be paid under fixed fees? This could simplify the accounting process, help providers spot incorrect claims/payments and save on administrative costs.

**These comments have been noted. However, such a change would have to be balanced against the increased administration for the provider in having to complete a further column on the**

**CMRF and work out the fee payable in that particular case. Not all providers may find it helpful.**

79. Are providers paid for the initial work they do when a client wishes to change solicitor to them i.e. the initial appointment and applying for transfer of the certificate?

**A claim for Legal Help is permissible in these circumstances. Although the new matter start will be subject to the provisions of the Civil Specification and the previous Controlled Work, it is likely to be justified under the Funding Code Procedures/Specification for the same reason that the certificate is being transferred. However, this work would be at Level 1. There would be no element of resolving the dispute itself as set out in the Family Help (Lower) definition. The work that the provider would do in meeting the client and completing the application for transfer is all Level 1 work.**

80. How do costs limitations work in relation to fixed fee cases? How do providers calculate whether they are within the costs limit i.e. do they ensure the cost limit is at least:
- a) The fixed fee + disbursements + advocacy;
  - b) Their actual costs + disbursements + advocacy or;
  - c) Does it depend upon whether their actual costs are above or below the fixed fee?

**Providers will need to be aware of their actual costs so that they are aware whether a case is likely to become exceptional. This information is also recorded on the CLS CLAIM 1A. Unless a case becomes exceptional the costs of the case on which the cost limit are based should be the fixed fee + disbursements + advocacy. However, once a case becomes exceptional (ie 2x the standard fee) the costs limitation should be calculated on the basis of actual costs + disbursements + advocacy.**

81. In a case where there has been a change of solicitor and the initial solicitor's non-core costs exceed £2500 but there is no order for assessment and the certificate has not been discharged, can the court assess these cases?

**In cases where the right to detailed assessment has not arisen then the provider will need to wait to the end of the case and all costs, if appropriate will then be assessed (taxed) by the court. The provider can, in the meantime, make a claim for payment on account.**

82. What costs form assessable costs over the £2500 limit? E.g. Advocacy £1500, Counsel £1500, disbursements £500. Would this case be one for assessment by the court?

**In section 31 cases subject to the fixed fee, where the £2500 limit for assessable costs is exceeded solely by virtue of the claim for disbursements and/or payments to counsel made under the FGF scheme, the bill should be submitted to the Commission for assessment. Therefore, bills should only be submitted to the court where the supplier's profit costs (not covered by the standard fee) exceed £2,500. In this example, if a standard fee is payable then the only additional profit costs will be the £1500 advocacy. As this is below the £2500 limit the bill should be submitted to the Commission.**

### **General Policy**

83. Where can information on the new hourly rates be found, and do they apply retrospectively or only for cases signed on or after 1 July 2008?

**The new rates which apply from 1 July 2008 can be found on the LSC website at [www.legalservices.gov.uk/civil/unified\\_contract\\_civil.asp](http://www.legalservices.gov.uk/civil/unified_contract_civil.asp) in the Payment Annex 2008. These rates apply to those matters started after 1 July – they do not apply retrospectively.**

84. Are court fees to be revisited as disbursements in view of exemption from fees disappearing?

**Court fees are not allowable disbursements under Controlled Work (with the exception of the fee for a consent order under Family Help (Lower). There are no plans to revisit this. The HCMS fee exemption policy was reviewed because the eligibility limits for Legal Help had become more generous (and no contribution is payable) than those for the court fee exemption. This meant that those in receipt of Legal Help would be eligible for a full exemption whilst those who may have been acting in person were not, even though their income may have been the same.**

85. Court fees exemption applications are taking a considerable length of time to complete, frequently using up the equivalent of a provider's fixed fee. This could not have been taken into account when the LSC devised the fixed fees. Is there any intention to increase the fixed fee in view of this extra work providers now need to carry out?

**In order for a client to be exempt from any court fee payable it has always been necessary to complete a fee exemption form. The difference is that whereas previously a box was ticked to confirm that the client was in receipt of Legal Help a client will now be assessed on income if they are not in receipt of a qualifying benefit. The form is still only two pages long in total.**

**If the client is in receipt of a qualifying benefit there is still just a box to be ticked. If not, a section on income and expenditure needs to be completed. Where gross income is below a certain amount then the gross income only needs to be given and the client will be automatically exempt. It is likely that the majority of clients on Legal Help will fall into one of these two categories.**

**If the client is above a certain income limit then they will need to complete a section on their monthly income and expenditure to get a partial remission. It is expected that the client would complete this section and it is not expected that the solicitor would need to undertake this additional work. It is not considered that any increase to the fixed fee is justified in respect of the completion of this form.**

86. When does the 6 month time limit run from when a client returns for advice on the same matter? Is it from the date the provider closes the file, or from when the provider reports the claim?

**The period which must have elapsed is six months from when the claim was submitted (paragraph 5.15 – Civil Specification).**

87. Are file reviews paid for and will they contribute to a case becoming exceptional?

**Detailed guidance as to what will be allowed for reviewing files is contained in the Costs Assessment Guidance at paragraph 2.39 onwards. This can be found at paragraph 2E-019 of the LSC Manual. If the work is allowable then it will form part of the profit costs taken into account when calculating the exceptional case limit.**

88. When calculating actual costs incurred, for controlled work signed prior to 1/7/08, do providers apply the new or old rates for post 1/7/08 work?

**The new Payment Annex effective from 1 July 2008 applies to all matters or cases where the application for funding was made on or after 1 July. For matters which were commenced prior to 1 July the rates contained in the original Payment Annex will continue to apply.**

89. Will it be possible to report a positive outcome if the provider writes to the client seeking confirmation they don't require any further advice, and the client does not respond?

**There are many codes that could be said to be of some benefit for the client but the decision was made to class clear positive results as substantive benefit and set the benchmark at 40% rather than including other potentially unclear codes and setting**

**the benchmark higher. In this case it is not possible to say whether this would be reported as client failing to give instructions or whether it is part of the closing letter from the provider as there has been settlement of the matter. The outcome codes are being kept under review.**

90. Will the policy team be issuing data on how the schemes are working, the allowed and disallowed claims in exceptional cases, and average costs per region i.e. above or below the fixed fee?

**Yes, there will be a review of the Phase 1 fee schemes which in accordance with the Civil Routemap is due to be published in early in 2009.**

91. Is the cost of completing an EC1 (exceptional case claim form) claimable?

**In exceptional cases the time spent in preparing form EC-Claim 1 may in principle be claimed within that form on the same basis as time spent in preparing a CLAIM 1 in Licensed Work proceedings. However, the cost of preparing the EC-Claim 1 cannot be taken into account in calculating whether a case has become exceptional (see Costs Assessment Guidance paragraph 7.2).**

## **Public Law Issues**

### **Level 2 Funding**

#### **Counsel**

92. Providers reported that Counsel are frequently refusing to attend further advocates meetings, CMC and IRH directed by the court as they will not be paid.

**For the purposes of the CLS Funding Order a hearing in care proceedings includes a case management conference, advocates meeting or issues resolution hearing. There is no limit on the number of such hearings provided that they are the meetings as described and take place within the Public Law Outline. However, the provision which allows the IRH to be paid as the function F5 primary hearing fee only applies to the first such IRH. Any other would be paid as an F3.**

### **Change of solicitor at Level 3**

93. Providers report they are reluctant to take on clients changing solicitors under a L3 Public Law certificate as they will have to undertake work to at least the value of the fixed fee to obtain the full fixed fee. This means they will always make a loss when taking on

clients transferring from another firm unless a case becomes exceptional, which is (apparently) rare. As a result, clients whose relationship with the original solicitor has broken down are finding themselves in limbo, the original firm no longer willing to act, or the client unwilling to go back to them, and firms approached by the client unwilling to take them on.

**Under the provision relating to transfer in the Family Specification if the profit costs of the second provider calculated at hourly rates are the same as or more than the standard fee they will get the full standard fee. If the profit costs are less than the standard fee they will get half the standard fee. These may be cases which are already near to completion and the actual costs of the solicitor could in these circumstances be less than the half fee which they receive. In addition, the standard fee only applies to attendances in the office and preparation work. It does not apply to advocacy work undertaken by the solicitor. All advocacy undertaken, including travel to court and attendance at advocates meetings is paid separately at hourly rates for the work done by that supplier. Counsel's fees and disbursements are also outside the standard fee.**

**The fee schemes will be considered as part of the Phase 1 review due to be published early in 2009.**

94. Where a provider acts for more than one client at L3, the current change of solicitor rules incentivise the provider to represent both clients at, at least, one hearing even where they suspect, or know, there is likely to be a conflict of interest before referring them to another firm as they will then obtain payment under the multiple client fees.

**Guidelines for providers in relation to conflicts of interest are set out in the Good Practice in Child Care cases guidance issued by the Law Society and also in accordance with the SRA rules. Providers should be alert to recognise any conflicts of interest.**

## Private Law Issues

### Divorce

95. Providers reported that many clients do not proceed to Decree Absolute when they find they are denied a fees exemption. They are concerned this will impact upon their KPI outcomes, and also in relation to what they will be paid (See Private Law operations questions above).

**The fee for applying for a decree absolute is £40. Many of the clients who are eligible for Legal Help will also be eligible for the full exemption from the court fee. Others may be eligible for a partial exemption. It seems unlikely that a large number of clients will decide not to apply for decree absolute because they do not want to pay £40 or part of this fee.**

## General Issues

### Outcome Codes

96. The Outcome Codes do not fit all the circumstances in family cases and some force reporting of negative outcomes when it is clearly not the case. Specifically, where a client seeks advice on an injunction, which they subsequently decide to pursue, this is not a positive outcome, even though the client may be successful in obtaining an injunction. If the majority of their client base is made up of this type of client, this may be flagged on a KPI as 'failing'.

**It is not possible to provide a code for every situation. Most of the issues appear to arise with the use of certain codes and whether they result in a substantive benefit KPI – see question 89 above, but any comments in relation to the use of these codes will be considered.**

97. The relevance of outcome codes are not understood in particular that the outcome code determines what fee they are paid at the end of a case.

**It has become apparent that some providers are not using outcome codes correctly. Historically there has not been correctly used the codes which were previously used by the LSC for obtaining information on cases. However, with the introduction of KPIs, use of the correct codes is now important for both reporting the correct fee and the outcome of the case.**

98. Many of the finance codes refer to the provider having settled the case and obtained a consent order, there being no reference to other binding agreement, which has caused confusion.

**There is reference to a consent order having been obtained in the guidance to using the fee codes. We will also add a reference to a written agreement if this is helpful for reporting TLATA matters.**