

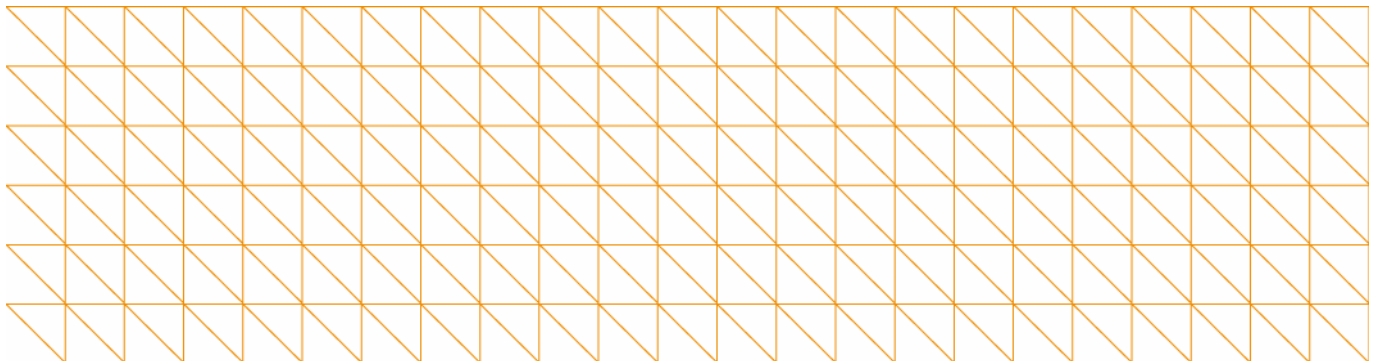


Reforming the Legal Aid Family Barrister Fee Scheme

Response to Consultation

CP(R) 12/08

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Ministry of
JUSTICE



Reforming the Legal Aid Family Barrister Fee Scheme

**Response to consultation carried out by the Ministry of Justice and
the Legal Services Commission.**

**This information is also available on the Ministry of Justice website:
www.justice.gov.uk and the Legal Services Commission's website:
www.legalservices.gov.uk.**

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Introduction and contact details

This document is the post-consultation report for the consultation paper, *Reforming the Legal Aid Family Barrister Fee Scheme*.

It will cover:

- the background to the consultation
- a summary of the responses to the consultation
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting Susan Chamberlain at the address below:

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Background

The Family Graduated Fee Scheme (FGFS) is a complex graduated payment scheme which sets out remuneration arrangements for barristers conducting family legal aid work in 4 categories: Family Injunctions (e.g. domestic violence); Public Law Children; Private Law Children (excluding ancillary relief); and Ancillary Relief.

In each of the categories, standard fees are payable for pre-proceedings work, hearings and conferences. Uplifts, such as Special Issue Payments (SIPs), Settlement Supplements, and the High Court uplift, are payable as a percentage multiplier of the basic fees. In addition, 'bolt-on' fees are payable in each of the categories, such as Special Preparation Fees (SPFs), Court Bundle Payments (CBPs), or Incidental Payments. Higher basic rates are payable to QCs.

Expenditure on FGFS cases is now £26m per year higher than it was five years ago –rising by over 30% from £74m to nearly £100m. Payments to family barristers now represent 10% of the entire civil legal aid budget. Legal aid operates within a fixed budget. The Department is obliged to take action to remain within budget, while ensuring that there are a sufficient number of competent persons and bodies to provide services to clients. The legal aid budget is under significant pressure from rising total expenditure and average case costs in the FGFS, which is unsustainable within our fixed budget. In addition, the existing disparity between solicitor and barrister family advocacy payment rates will continue unless action is taken. The consultation set out different options for reducing FGFS expenditure in order to live within budget, balanced against the need to ensure that the public can continue to receive the quality legal services they need, and taking the first step to harmonise advocacy payments.

The consultation paper *Reforming the Legal Aid Family Barrister Fee Scheme* was published on 18 June and closed on 10 September 2008. Comments were invited on options for reducing family barrister legal aid payments made under the Family Graduated Fee Scheme (FGFS). In the consultation paper we set out three broad options:

Consultation Proposals (a Summary)

Option A – Across the Board Reductions to FGF Rates and 'Bolt-Ons'

This option was to reduce all of the base and hearing unit fees by a fixed percentage. This reduction would not apply to SIPs, Settlement Supplements, or the High Court uplift (as these act as multipliers, so any reduction to the basic fees would also affect these multipliers indirectly), but it would apply to all other bolt-ons i.e. CBPs, Financial Dispute Resolution Payments, Incidental Payments and SPFs.

Option B – Abolition or reduction of Special Issue Payments

This option was to abolish or reduce SIPs. The abolition or reduction of SIPs would still mean that advocates could continue to claim base or hearing unit fees and other types of uplift (e.g. Settlement Supplements) or bolt-on (e.g. CBPs). Stakeholders including the professions and judiciary had indicated that the current payment scheme is too complicated, and that the role of SIPs should be reconsidered.

Abolition or reduction of all SIPs would reduce expenditure by more than intended; one solution was to recycle some of the money previously paid in SIPs into increases in the base fees.

Option C – Abolition or reduction of Special Preparation Fees and Court Bundle Payments

This option was to abolish or reduce SPFs and CBPs currently paid to advocates. SPFs are paid at fixed hourly rates, while CBPs are fixed amounts – depending on the bundle size and the type of hearing.

The consultation period closed on 10 September 2008 and this report summarises the responses, including how the consultation process influenced the final policy.

A list of respondents is at **Annex A**.

Summary of responses

1. A total of 19 responses to the consultation paper were received. We received 6 from solicitor and barrister representative bodies, 4 from individual barristers, 1 from a solicitor, and 8 from the judiciary or judicial representative bodies.
2. In considering the views of consultees we were interested in the desirability and / or practicability of the broad options we set out, whether they would achieve the desired reductions in expenditure in order to control rising average case costs, and whether they would allow us to maintain the supply of services to the public. We were also interested to receive alternative suggestions on how we could control expenditure under the FGFS while maintaining services.

Respondent Preferences

3. 6 of the 19 respondents (32%) did not express a preference for any of the options.
4. 4 of the 19 respondents (21%) preferred some variation on Option A (reduce all fees), mainly because this preserved the different elements of the FGFS which respondents felt helped to recognise complexity in cases.
5. 1 respondent of 19 (5%) favoured some variant of Option B (reduce SIPs), although this was only targeted at SIPs which were subjectively verified (as opposed to objectively verified).
6. 2 of the 19 respondents (10%) favoured some variant on Option C (reduction of CBPs / SPFs), and this mainly focused on reducing SPFs.
7. 6 of the 19 respondents (32%) favoured a combination of some variant of Option B and Option C.
8. 3 of the 19 respondents who favoured Options A or C also said that the SIPS system (Option B) could be improved. Therefore all told, 10 of the 13 respondents who expressed a preference (77%) thought some action on SIPs was appropriate.
9. 8 of the 13 respondents who expressed a preference (62%) thought some action on SPFs/CBPs was appropriate.
10. 12 of the 13 respondents who expressed a preference (92%) thought some action either on SIPs or SPFs/CBPs was appropriate.
11. Following the formal consultation, further representations were received from some of the representative bodies (The Family Law Bar Association (FLBA), and the Association of Lawyers for Children (ALC)). During these

discussions further suggestions were made, such as reducing all base fees by a fixed percentage, or reducing particular SIPs in particular categories of law. All of these suggestions were given careful consideration as part of the consultation process.

Responses to specific questions

Q1 Is option A (across the board reductions) preferable when compared to the others? What advantages does it offer?

4 of the 19 respondents (21%) expressed a preference for Option A, mainly because this preserved the existing elements of the FGFS unchanged, which these respondents felt helped to recognise complexity in cases. These tended to be solicitor representative bodies. This view was endorsed by Resolution and the Legal Aid Practitioners Group (LAPG).

One respondent said that this option was 'intrinsically fair, and easy to understand'. However, contrary to other respondents who favoured this option, they saw the retention of a 'complex system' to be a disadvantage.

Q2 Are there reasons not to pursue Option A? What are they?

The District Judges of the Principal Registry of the Family Division (PRFD) stated that further reductions to the fees would have a negative effect, as the base fees are already low in comparison to fees paid in the private sector. In addition, PRFD's view was that this option "may lead to an increased use of SIPs and SPFs, which would erode the perceived savings and make any potential savings less predictable".

The FLBA stated that Option A was the least equitable option of the three and would have the hardest financial impact on junior and part time, predominantly female barristers who will be unable to meet the financial shortfall with more complex cases.

PRFD expressed the view that the retention of SIPs and SPFs would present difficulties.

Resolution said that Option A would "leave the SIPs system in place unreformed".

Q3 Are there ways to mitigate any disadvantages of Option A?

Half of the respondents replied to this question in the negative.

Resolution suggested that the SIPs system could be simplified and that the LSC could act as alternative assessors to remove the administrative burden from the judiciary. (This was endorsed by LAPG). Resolution also suggested a general discretion for the advocate to claim an enhancement, where it was considered justified.

Q4 What level should such a reduction be set at? Why?

Most of the respondents who answered this question said that there should be no reduction to base fees at all.

Q5 Is option B (reduction or abolition of SIPs) preferable when compared to the others? What advantages does it offer?

Generally, there was good support for Option B. All told, 10 of the 13 respondents who expressed a preference (77%) thought some action on SIPs was appropriate. Some thought this should be done in concert with other changes.

The Law Society favoured retention of those SIPs which could be objectively certified. LAPG said that SIPs, as presently defined, are not easily assessed against objective criteria. The family judiciary said that there were problems with SIPs which were not objectively verified and these sometimes gave rise to argument in court.

The FLBA and family judiciary thought that in public law children cases the “more than two parties” SIP did not pick out a feature that merited an additional payment, as this SIP is claimed in most cases, and it could be abolished. The family judiciary thought it should be retained in private law cases.

The FLBA also suggested that the “conduct” SIP in private law cases could be abolished. The family judiciary said that this SIP may be being over-claimed and over-allowed, and gave qualified support for its abolition.

The FLBA suggested that the “Representation of a parent or parents of a child who is the subject of proceedings” SIP should be abolished and replaced with a “parent / perpetrator” SIP that applied less frequently, but would apply to private law as well as public law children cases. This suggestion was supported by the family judiciary, and a similar suggestion endorsed by the Western Circuit.

The ALC said it might be possible to abolish the “difficulty giving instruction or understanding advice” SIP.

Resolution said that abolition of SIPs had the advantage of reducing the administrative burden on the judiciary (a view supported by LAPG) and of bringing a potential administrative saving as well as simplifying the system. However, they tempered this by saying that the administrative burden was relatively minor and did not impinge a great deal on either judicial or LSC time.

The family judiciary felt that the definition of the “experts” SIP should be reviewed as it was being claimed when e.g. a GP’s letter needed to be considered, or there was a simple hair drug test, which may not always be appropriate.

Q6 Are there reasons not to pursue option B? What are they?

The FLBA did not support Option B as they felt that SIPs were an important way to maintain graduation in the scheme, and to ensure that more complex cases were rewarded appropriately.

The FLBA, Resolution, and the LAPG all took the view that the abolition of SIPs could deter counsel from taking complex cases and this could lead to barristers 'cherry-picking' straightforward cases.

The Council of Her Majesty's Circuit Judges felt that SIPs had become more satisfactory, having been somewhat arbitrary when introduced. They felt that the majority of Circuit Judges did not find the scheme too complicated, although there could be greater clarity for judges when dealing with the forms.

Q7 Are there ways to mitigate any disadvantages of option B?

PRFD judges suggest an increase in the base fee (as did other respondents) to reflect complex cases if the SIP element of fees is removed. They felt particularly strongly that this should apply to public law cases.

Q8 To what extent should SIPs be reduced or abolished?

Resolution suggested that SIPs be replaced by a simpler system, for example, a discretionary payment available for solicitors in cases that do not fall within the FGFS.

PRFD judges suggested that, if a fee reduction is compulsory, combinations of reductions/revisions of SIPs, CBPs and SPFs should be employed. Their view was that to modify one of these elements in isolation would distort the overall fee structure.

Q9 Is Option C (reduction or abolition of SPFs and/or CBPs) preferable when compared to the others? What advantages does it offer?

There was good support for this option. 2 of the 19 respondents (10%) favoured some variant on Option C (reduction of CBPs / SPFs), and this mainly focused on reducing SPFs. 6 of the 19 respondents (32%) favoured a combination of some variant of Option B and Option C. 8 of the 13 respondents who expressed a preference (62%) thought some action on SPFs/CBPs was appropriate. Some thought this should be done in concert with other changes.

The family judiciary felt that the SPF system "involves subjective interpretation and argument and the risk of over-claim and over-allowance". The Western Circuit said that "in our experience judges do not exercise their own judgement: they merely rubber stamp the opinions of the advocate making the claim". The Western Circuit felt that if something

had to go that it should be SPFs which “would eliminate some abuses - but at a price”.

The FLBA recognised that SPFs are not working as intended. The FLBA put forward proposals for the replacement of SPFs with “exceptional preparation fees”, and an extension of the existing CBP system. Exceptional preparation would be underpinned by a detailed schedule setting out what was being claimed and why. The introduction of a similar schedule for claiming SPFs was also suggested by the Western Circuit.

The FLBA also pointed out that the data on SPFs was poor as it did not adequately record the basis on which it had been claimed (e.g. particular complexity in law, or 700+ pages court bundle).

The ALC suggested abolishing SPFs for complexity and replacing it with a fixed bolt-on payment for 700+ page court bundles and split-hearing care cases.

PRFD Judges held the view that reductions to CPBs may be the most efficient way to proceed as the size of the bundle might not reflect case complexity and any extensive reading could be reflected via the SPFs.

Q.10 Are there reasons not to pursue Option C? What are they?

The FLBA thought that abolition of SPFs would remove the financial incentive for experienced practitioners to undertake complex cases.

PRFD judges expressed the view that SPFs are an important tool for the recognition and appropriate remuneration of complex cases and significant hearings. They gave as an example the Issues Resolution Hearing in public law and Financial Dispute Resolution in Ancillary Relief.

Resolution considered that advocates should be properly remunerated for extra preparation. They felt that SPFs and CBPs are easy to understand and administer.

Q.11 Are there ways to mitigate any disadvantages of option C?

The majority of respondents suggested an increase to the base fee.

PRFD judges reiterated their view that a combination of reductions or revisions of SIPs, CBPs and SPFs would be the only option they would consider.

Resolution considered that implementation of Option C should take place alongside a reform of the SIPs system to make it easier to understand and administer.

Q.12 To what extent should CBPs and/or SPFs be reduced or abolished?

LAPG felt that neither should be either reduced or abolished.

One respondent made the point that there was a lack of guidance about the expected level of preparation required for complex cases, therefore, CBPs and SFPs were good targets for fee reductions. They also made the point that experienced counsel may take less time to prepare and so claim less than not so experienced counterparts. Reduction or abolition of SPFs would promote fairness in this respect.

Q.13 Do you agree with our proposals regarding transitional arrangements? If not, please explain why.

Resolution and LAPG agreed with the proposed transitional arrangements.

The PRFD judges expressed concern that the proposed implementation might lead to uncertainty and unfairness. They were concerned that in a case with several hearings, the date of instruction might not be easy to determine.

The FLBA said that the transitional arrangements proposed were different to the approach usually taken with fee changes, and were unworkable. They suggested that this approach may lead to unexpected difficulties as barristers will be committed to cases which are continuing on a fee structure which would be different to the one applying when the case was taken on. They argued that chambers software was not set up to deal with this type of change, and suggested that MoJ / LSC speak to software providers.

Q.14 Have you any other comments or suggestions?

The ALC suggested reducing expenditure by paying differently for ex partes / inter partes child abduction hearings. They also suggested that in care cases where the final hearing is listed for and concluded in one day the counsel's fee should be reduced by 33%.

Resolution suggested removing the higher QC rates in the FGFS.

The Western Circuit suggested tightening up on separate representation for parents where there are no, or only latent, conflicts of interest. There was no need for automatic separate representation in childcare cases when parents wish to remain as a couple. They also suggested controlling numbers of joined parties who are funded by tightening up the merits test. The Western Circuit also suggested controlling the number of split hearings (e.g. separate investigation of abuse and 'welfare' considerations) and to reduce hearings investigating domestic violence where domestic violence will make no difference to eventual order.

The FLBA suggested that the SIP form itself incorporates the main advice from the LSC Guidance, to emphasise the appropriateness of the claim for the practitioner and the judge. The family judiciary similarly suggested that the SIPs form should bear on its face the precise basis for claiming each SIP, as provided by the FGFS Guidance.

Conclusion and next steps

General

Some respondents argued that we should not make any reductions to expenditure under the Family Graduated Fee Scheme (FGFS) for barristers. The FLBA in particular expressed very great concern at any reduction to their members' fees. The reasons for this were many, not least that it would lead to barristers ceasing to do this work, which would compromise access to justice, or that it would have a deleterious effect on the family justice system. Expenditure on FGFS cases is now £26m per year higher than it was five years ago –rising by over 30% from £74m to nearly £100m. Payments to family barristers now represent 10% of the entire civil legal aid budget. This increase in fees is unsustainable with a fixed legal aid budget. If we do not act to control rising average case costs, then we would be required to live within budget by taking other action. In all likelihood this would mean reductions in client eligibility or the scope of the civil legal aid scheme, and reductions in the numbers of people helped. Therefore we do not accept the arguments put that we should leave rising FGFS expenditure unaddressed, because this would be at the expense of client services.

FGFS Base Fees (Option A)

This option was attractive because it was simple and, as respondents pointed out, it left the structure of the existing FGF Scheme unchanged. However, this was also its weakness, and it left unreformed areas of the Scheme which were not working effectively. We were persuaded by respondents that there were other areas of the Scheme that were in need of reform, and that reform in these areas could deliver spending reductions while maintaining supply.

Special Issue Payments (SIPs) (Option B)

There was only very limited support for any general reduction or abolition of the SIPs system. However, respondents did identify various SIPs which could or should be abolished or reduced, or which could be amended.

We were impressed by the strong arguments received that the “more than two parties” SIP in public law was not working effectively, as it rewards an issue which arises in almost all care cases. This is borne out by data which shows that this SIP was claimed in 76% of all closed care cases in 2007-08. A considerable sum of money is spent on this SIP (£6.4m), and we were persuaded that this SIP should be abolished and this funding refocused. The family judiciary however said that this SIP was important in private law children cases, and we have retained this SIP for that work.

We also received strong representations from the professions that the “conduct” SIP in private law cases could be abolished. The family judiciary said that this SIP may be being over-claimed and over-allowed, and gave

qualified support for its abolition. While we thought this was a strong basis for abolishing this SIP, we were also mindful that it ostensibly provides an uplift in private law cases where significant harm to a child has occurred or is alleged to have occurred. Given the priority we afford to child protection work, we decided simply to reduce the uplift provided under this SIP (from 50% to 30%), rather than abolish it, in order to respond to the concerns raised with us by the judiciary and professions.

We were also told by the family judiciary that the “more than one expert” SIP in private law children cases was not always working effectively, and it was being claimed in cases where the “expert evidence” was just a GP’s letter or simple drug hair test. We considered that abolishing this SIP would be unfair where there were complex expert evidential issues to consider, but decided to control this uplift by reducing the increase to base fees that it provides from 50% to 20%.

In deciding which elements of the FGF Scheme should be amended, we had careful regard to the views of the respondents, our statutory obligations under section 25 of the Access to Justice Act 1999, and the Lord Chancellor’s Direction on the Funding Priorities of the Community Legal Service. The latter sets out that child protection cases, and cases where the client’s life is at stake, are of the highest priority for funding. Given the priority afforded to child protection and domestic violence work, we decided that reductions should fall primarily on the private family side, rather than on child protection or domestic violence cases. Consequently we decided to abolish four of the main SIPs claimable in ancillary relief cases (i.e. cases about financial provision on divorce), and to restrict two other ancillary relief SIPs. We decided to abolish the SIP for “assets not under the control of the parties”, “analysis of business accounts”, “conduct” and “one or more experts”. We also reduced the increase to base fees provided by the “litigant in person” and “relevant foreign element” SIPs from 25% to 20%. All of these ancillary relief SIPs are running at levels higher than that expected, given the spend on ancillary relief base fees.

In their response, the FLBA suggested that the “representation of a parent or parents of a child who is the subject of proceedings” SIP should be abolished and replaced with a “parent / perpetrator” SIP that applied less frequently, but would apply to private law as well as public law children cases. This suggestion was supported by the family judiciary, and a similar suggestion endorsed by the Western Circuit. We gave this suggestion careful consideration, and met with the FLBA to discuss it further. We saw the merit of a revised SIP that was more tightly focused on the representative of the accuser / accused. However we were not convinced that the proposal put forward would achieve that focus, or be claimable less often than the existing SIP. We were concerned the proposal could even lead to increased expenditure. Neither the MoJ, LSC or FLBA could provide reliable costing of the proposal. The FLBA suggested that this suggestion could be adopted and then subsequently reviewed to see if it had reduced or increased expenditure. However, we decided that to introduce a new element into the Scheme that had the potential to increase expenditure would be a significant risk, and one that could make reductions to client services even more likely. We are anxious to achieve better control over rising costs in the FGFS, and to reduce the risk

of needing to reduce client eligibility or the scope of services to pay for increasing barrister payments. We therefore decided not to adopt this proposal.

ALC said it might be possible to abolish the “difficulty giving instruction or understanding advice” SIP. We considered this proposal, but decided that the test for its payment – that the client be diagnosed as having a mental illness or impairment of intelligence or social functioning – is sufficiently tight. In addition, expenditure for this SIP is only slightly higher than that expected, given base fee spend, so this SIP seems to be adequately controlled.

Special Preparation Fees (SPFs)

We received strong representations from the judiciary that the SPF system was not working effectively. Judges found it difficult to determine whether a given claim for SPFs was appropriate, and they felt that there was very little upon which to base a decision. The advocate simply submits a claim form requesting a given number of hours of additional preparation.

SPF payments are significantly higher than expected – running at 800% of the level anticipated, given base fee spend. While some respondents have indicated that control over SPF claims is weak, we have not been provided with hard evidence that SPFs are being claimed inappropriately. We feel that simply reducing SPF payment rates is unlikely to provide strong control, and abolition of SPFs at this time is not supported by the evidence we have.

The Western Circuit suggested that a detailed schedule setting out the basis of any SPF claim would be of use. The FLBA suggested something similar in relation to their alternative proposal (see below). So, rather than reduce or abolish SPFs, we have decided to adopt this suggestion. In order to improve decision making around the grant of SPFs, we will require counsel to provide a detailed schedule setting out what additional preparation they are claiming, and why they are claiming it. This will assist the judiciary in deciding whether or not a particular SPF application should be granted by providing information about the basis of the claim. The preparation of this schedule setting out the basis of the claim need not be an onerous task, and we would not expect counsel to claim SPFs for the time taken to prepare the schedule itself.

The FLBA also pointed out that the data on SPFs was poor as it did not adequately record the basis on which it had been claimed (e.g. particular complexity in law, or 700+ pages court bundle). We have decided to amend the SIPs form so that the basis for any claim for SPFs is clear in future. We will keep SPF claims under review, and these amendments to the form will assist us in this regard. We will monitor SPF expenditure carefully, and if claims appear to be uncontrolled we may need to return to this area in the future.

In their response, the FLBA put forward proposals for the abolition of SPFs, and its replacement with a new payment for “Exceptional Preparation” (EP). Claims for EP would be assessed by the judge. It would be payable on an

entirely different basis to SPFs, for: "...exceptional skill or industry in the preparation or conduct of a case".

We carefully considered his proposal and met with the FLBA to discuss it further. We saw some merit in a payment linked more closely to the advocate's performance rather than features of the case. However, we were mindful of the views expressed by the judiciary that the existing SPF system was too subjective and gave very little basis upon which to decide whether or not to grant SPFs. We thought that EP suffered similarly, and may actually cause more difficulties in this regard. Under SPFs the judge can make an assessment as to whether the case was a particularly complex one in law or fact. Under EP, the judge would be making a judgment about an individual's performance, which may be open to even greater subjective interpretation. In addition, we were concerned the proposal could even lead to increased expenditure. Neither the MoJ, LSC or FLBA could provide reliable costing of the proposal. The FLBA suggested that this suggestion could be adopted and then subsequently reviewed to see if it had reduced or increased expenditure. However, we decided that to introduce a new element into the Scheme that had the potential to increase expenditure would be a significant risk, and one that could make reductions to client services even more likely. We are anxious to achieve better control over rising costs in the FGFS, and to reduce the risk of needing to reduce client eligibility or the scope of services to pay for increasing barrister payments. We therefore decided not to adopt this proposal.

Court Bundle Payments (CBPs)

There was relatively little enthusiasm among respondents for changing the CBP system. Where changes were suggested these were generally as a knock-on effect of another change that had been proposed. For example, the FLBA suggested abolishing SPFs and replacing them with EP. Payment for court bundles over 700 pages is currently made through the SPF system. As payment for court bundles does not sit within the definition of EP put forward, FLBA suggested extending the CBP system to cover 700+ page court bundles. While expenditure in this area is running at 200% of that intended, respondents argued that payments for CBPs are made on an objective basis - as they were based on the bundle size. We therefore decided not to pursue this proposal.

Childcare Base Fees

The package of changes set out above should reduce overall expenditure by £10.9m per year (based on £98m bills paid expenditure 07-08). As we set out in our consultation paper, our intention was to reduce FGFS expenditure by £6.5m per year. Therefore, bearing in mind the significant priority afforded to child protection cases, we have decided to reinvest £4.4m of the reduction into the basic fees for public law children work. This will mean increases in the base fees for e.g. hearings and conferences, which will benefit at least 2800 cases per year. While we will be increasing childcare base fees by £4.4m per year total, the multiplying effect of the various uplifts available in childcare cases needs to be factored in. This means that the direct childcare

reinvestment will be less than £4.4m, but this will be increased to £4.4m by the uplifts which multiply base fee payments.

Transitional Arrangements

Very few respondents expressed a view on the proposed transitional arrangements. Of those that did, 50% (2 respondents) agreed and 50% disagreed (2 respondents). The FLBA in particular were concerned that the new arrangements were unworkable.

We considered the arguments put forward and have decided to implement the changes with the proposed transitional arrangements. This will mean that the changes will apply to all new instructions received after the date of implementation (June 2009).

We do not think that there is anything intrinsically unworkable about applying the new fees to new instructions, instead of new funding certificates. The LSC will be speaking to software providers to ensure that they are fully aware of the changes (in fact some software vendors have already made contact with us). The LSC now provides electronic updates to barristers as well as solicitors and will be able to supplement the FLBA and Bar Council's usual communications with its members with its own reminders about forthcoming changes to FGFS, so counsel should be clear about the changes and when they will be implemented.

Next Steps and Timing

Having given full consideration to the views expressed in the consultation exercise, it has been decided to implement a variation of the proposal as set out under **Option B – abolition / reduction of Special Issue Payments**, along with some changes to SPFs suggested by respondents. The resulting changes to the scheme will take effect from June 2009. In summary they are:

- In public law children cases, abolish the “more than two parties” SIP
- Increase base hearing fees for public law children cases (£4.4m total p.a., though multiplication by remaining SIPs, etc need to be taken into account in calculating the direct increase to base fees)
- In private law children cases, reduce the uplift provided by the “conduct” SIP from 50% to 30%
- In private law children cases, reduce the uplift provided by the “more than one expert” SIP from 50% to 20%
- In ancillary relief cases, abolish the “conduct” SIP
- In ancillary relief cases, abolish the “assets” SIP
- In ancillary relief cases, abolish the “more than one expert” SIP
- In ancillary relief cases, abolish the “analysis of accounts” SIP

- In ancillary relief cases, reduce the uplift provided by the “litigant in person” SIP from 25% to 20%
- In ancillary relief cases, reduce the uplift provided by the “relevant foreign element” SIP from 25% to 20%
- Introduce a requirement that barristers claiming SPFs submit to judges a detailed schedule of the hours spent in preparation so that these payments are only made where appropriate.
- Redesign SIP Form to identify the basis for the SPF claim (i.e. complexity or 700+ pages bundle) to address problems with the data identified by the FLBA

The MoJ will shortly consult with stakeholders on changes to the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 to implement the changes set out in this paper. The LSC will consider whether it needs to make changes to its guidance.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 3334 4496, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Gabrielle Kann
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Ministry of Justice
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If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **Contact Details** section of this paper at page **Error! Bookmark not defined.**

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

The Bar Council / The Family Law Bar Association

The Law Society

Resolution

The Association of Lawyers for Children

The Legal Aid Practitioners Group

The Magistrates' Association

The Family Justice Council

Council of Her Majesty's Circuit Judges, Family Sub Committee

The South Eastern Circuit Bar Mess

The Rt Hon Sir Mark Potter, President of the Family Division, on behalf of the High Court Family Judiciary

Dennis O'Riordan, Senior Costs Officer, Supreme Court Costs Office

District Judge Lynn Roberts, Principal Registry of the Family Division

Senior District Judge Philip Waller, Principal Registry of the Family Division

Robin Tolson QC, Leader of the Western Circuit, Outer Temple Chambers, London

Miss S K E Probert, Barrister, 15 Winckley Square Chambers

Gail Wynter, Senior Partner, Messrs Avery Naylor, Solicitors, Swansea

Dinah Loeb, Barrister, Westgate Chambers, Lewes, East Sussex

David Anderson, Development and Support Services Manager, St Johns Buildings Chambers, Manchester

Craig Holt, Barrister, 7 Bedford Row Chambers

Annex B – Final Impact Assessment

Summary: Intervention & Options

Department /Agency: Ministry of Justice	Title: Impact Assessment for changes to family graduated fee scheme	
Stage: Consultation Response	Version: 1.0	Date: 9 February 2009
Related Publications: Legal deed of agreement between the MoJ, Legal Services Commission (LSC) and the Law Society of England and Wales (TLS). <i>Reforming the Legal Aid Family Barrister Fee Scheme</i> consultation paper.		

Available to view or download at:

http://www.legalservices.gov.uk/docs/civil_contracting/FinalDeedofSettlement.pdf and
<http://www.justice.gov.uk/publications/cp1208.htm>

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What is the problem under consideration? Why is government intervention necessary?

Legal aid operates within a limited budget but total expenditure and average case costs under the Family Graduated Fee Scheme (FGFS) for barristers has risen steadily. If barrister fee claims continue to increase, given our constrained budget, this could lead to cuts to client eligibility or scope, affecting the most vulnerable in society. There are also significant disparities in the ways solicitors and barristers are paid for the same advocacy work in family cases.

What are the policy objectives and the intended effects?

By reducing payments made to family legal aid barristers under the FGFS we will be able to live within our allocated resources, and ensure that the public can continue to receive the services that they need. In addition, this will be a first step towards harmonising the pay of solicitors and barristers providing advocacy.

What policy options have been considered? Please justify any preferred option.

Under existing contracts, the legal aid payments to solicitors cannot be changed until new contracts are awarded in 2010. Reductions in civil client scope or eligibility are undesirable as the Government wants to help as many people as possible within the existing resources. The consultation proposed reductions to payments to barristers, and the options set out in the consultation paper were (a) a reduction to all fees and rates, (b) the abolition or reduction of Special Issue Payments, and (c) the abolition or reduction of Special Preparation Fees and Court Bundle Payments. We also asked consultees for their own suggestions on how we could reduce expenditure.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

We are committed to monitoring and reviewing the impact of our policy, and to that end we will conduct monthly reviews to assess any changes in terms of supply of family advocacy services. We will also take into account the situation regarding the proposed 2010 Family Advocacy Scheme, on which we are currently consulting.

Ministerial Sign-off For final proposal/implementation stage Impact Assessment:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



Date: 20 February 2009

Summary: Analysis & Evidence

Policy Option: reduce fees	Description: consultation on changes to family legal aid fees for barristers
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' The main affected group will be the approximately 3000 self-employed family barristers who conduct family work funded by legal aid. More detail is set out below.			
	One-off (Transition) Yrs				
	£ 0				
	Average Annual Cost (excluding one-off)				
	£ £6.5m	Total Cost (PV)	£6.5m p.a.		
Other key non-monetised costs by 'main affected groups'					

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' Reductions to legal aid payments will benefit the Government and the LSC, allowing them to live within their allocated budget. Reductions will also indirectly benefit members of the public who seek civil legal aid assistance, as these changes reduce the risk that client services will need to be reduced. More details are set out below.			
	One-off Yrs				
	£ 0				
	Average Annual Benefit (excluding one-off)				
	£ £6.5m	Total Benefit (PV)	£6.5m p.a.		
Other key non-monetised benefits by 'main affected groups'					
Reductions will benefit solicitors who conduct family advocacy by taking a first step towards harmonised rates of pay.					

Key Assumptions/Sensitivities/Risks There is a small risk that reductions to rates could reduce the number of barristers willing to do this work, however these are moderate reductions made in the context of very significant increases in fees claimed in recent years. Access to counsel will be closely monitored by the LSC.

Price Base Year 07-08	Time Period Years	Net Benefit Range (NPV) £ 6.5m p.a.	NET BENEFIT (NPV Best estimate) £ £6.5m p.a.
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What is the geographic coverage of the policy/option?	England & Wales			
On what date will the policy be implemented?	June 2009			
Which organisation(s) will enforce the policy?	LSC			
What is the total annual cost of enforcement for these organisations?	£ 0			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	N/A			
What is the value of the proposed offsetting measure per year?	£ 0			
What is the value of changes in greenhouse gas emissions?	£ 0			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro see below	Small see below	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)				(Increase – Decrease)
Increase	£ 0	Decrease	£ 0	Net £ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

The Family Graduated Fee Scheme (FGFS) is a complex graduated payment scheme which sets out remuneration arrangements for barristers conducting family legal aid work in 4 categories: Family Injunctions (e.g. domestic violence); Public Law Children; Private Law Children (excluding ancillary relief); and Ancillary Relief. In each of the categories, standard fees are payable for pre-proceedings work, hearings and conferences. Uplifts, such as Special Issue Payments (SIPs), Settlement Supplements, and the High Court uplift, are payable as a percentage multiplier of the basic fees. In addition, 'bolt-on' fees are payable in each of the categories, such as Special Preparation Fees (SPFs), Court Bundle Payments (CBPs), or Incidental Payments. Higher basic rates are payable to QCs.

Legal aid operates within a limited budget. The Department is obliged to take action to remain within budget, while ensuring that there are a sufficient number of competent persons and bodies to provide services to clients. The legal aid budget is under significant pressure from rising total expenditure and average case costs in the FGFS, which is unsustainable within our limited budget. In addition, the existing disparity between solicitor and barrister family advocacy payment rates will continue unless action is taken. The consultation set out different options for reducing FGFS expenditure in order to live within budget, balanced against the need to ensure that the public can continue to receive the quality legal services they need, and taking the first step to harmonise advocacy payments.

Living Within Budget

Approximately a quarter of the £2bn legal aid budget is spent on family cases. For example, in 2006–2007 £535m (cash) was spent on family proceedings (certificated cases and legal help). Approximately 18% of family expenditure was paid to barristers through the Family Graduated Fee Scheme. Over 3000 barristers do family work funded through legal aid. Expenditure under the FGFS has continued to increase significantly.

INCREASES IN TOTAL EXPENDITURE (BILLS PAID)

FGFS – Bills Paid (cash)¹			
<i>Year</i>	<i>Private Law²</i>	<i>Public Law³</i>	<i>Total Expenditure</i>
2003–04	£38.3m	£35.9m	£74.2m
2004–05	£41m	£42.6m	£83.6m
2005–06	£45.4m	£45.2m	£90.6m
2006–07	£47.3m	£46.8m	£94.1m
2007–08	£50.8m	£47.4m	£98.2m
increase in expenditure 2003–04 to 2007–08			+32%

The table above shows LSC data on bills paid year-on-year. It gives the best indication of how much is paid out under the scheme each financial year. Total expenditure is shown to have risen from £74m to nearly £100m in just five years. Analysis indicates that the volume of bills paid between 2003–04 and 2007–08 has increased by **14%**.

¹ Expenditure figures fluctuate slightly as they are updated with the latest information regularly by LSC. These figures are based on current information.

² Private Law includes certificate categories family injunctions, private law children and ancillary relief and all other family work

³ Public Law includes certificate category public law children.

Bills paid figures are not the best guide to case costs, as the proportion of a case billed within a given year can vary. In order to understand how much is being spent on actual cases we need to look at the difference in closed case costs across this same period.

INCREASES IN TOTAL EXPENDITURE (CLOSED CASES)

FGFS – Closed Cases			
Year	Private Law ⁴	Public Law ⁵	Total Expenditure
2003–04	£17.2m	£15.9m	£33.1m
2007–08	£38.6m	£40.7m	£79.2m
increase in expenditure 2003–04 to 2007–08			+134%

The table above shows LSC data on total FGFS expenditure on family cases closing in the financial year indicated. Total expenditure on closed cases is shown to have risen from £33m to almost £80m in just five years.

INCREASES IN VOLUME (CLOSED CASES)

The table below sets out the volumes of family cases using counsel where payments under the FGFS are claimed.

year	public law children	private law children	ancillary relief	family injunctions
2003–04	6936	12,643	5418	5866
2007–08	12,094	16,094	7287	6481
volume change 03–04 to 07–08	+ 74%	+ 27%	+ 34%	+ 10%
Total increase in FGFS volumes				+36%

The tables above show that the overall increases in FGFS closed case volumes is **36%** – far lower than the increase in total closed case expenditure of **134%** over the same period. Clearly there has been a very significant increase in the payments received by barristers for these cases over a very short period. For every 1% that volumes have increased, costs have increased by almost 4%.

INCREASES IN AVERAGE CASE COSTS

In order to look at the trends in average case costs, the most reliable guide is the total amount paid at the end of a closed case. The tables below set out LSC data on the trends in average case costs. These figures differ from those set out in the draft Impact Assessment and Consultation Paper. Those figures included, in error, old hourly rates cases dating from before the introduction of the FGFS. The figures provided previously significantly underestimated the average cost of an FGFS case. The figures below are revised to exclude non-FGFS cases, and provide a much more accurate representation of FGFS average case costs.

Ancillary Relief	
year closed	average case cost of cases closing in this year
2003–04	£630
2007–08	£1099

Again, the table shows that the average payments to barristers for ancillary relief disputes have increased significantly. In five years, average costs have risen by **74%**.

⁴ Private Law includes certificate categories family injunctions, private law children, ancillary relief and all other family work.

⁵ Public Law includes certificate category public law children.

Private Law Children	
<i>year closed</i>	<i>average case cost of cases closing in this year</i>
2003–04	£789
2007–08	£1455

Again, the table shows that the average payments to barristers for private law children disputes have increased significantly. In five years, average costs have risen by **84%**.

Public Law Children	
<i>year closed</i>	<i>average case cost of cases closing in this year</i>
2003–04	£2288
2007–08	£3364

The average public law children payments to barristers have increased significantly. In five years, average costs have risen by **47%**.

Family Injunctions	
<i>year closed</i>	<i>average case cost of cases closing in this year</i>
2003–04	£680
2007–08	£1102

The average family injunction payment to barristers has increased significantly. In five years, average costs have risen by **62%**.

The tables above show clearly that the average fees claimed by barristers in these family cases have increased significantly in just five years. This is clearly unsustainable within the context of a limited legal aid budget. Family barrister fees now represent 10% of the entire civil legal aid budget. This budget is there to help people with family problems, debt and housing problems, and to assert their legal rights in a whole range of ways. If we take no action, then average case costs will continue to rise, and we will need to reduce the help available to the public in order to fund increasing barrister payments.

Consultation Options

The Department is obliged to take action to remain within its limited budget. The FGFS has not provided effective control over average case costs. The Legal Services Commission and MoJ are currently consulting on new payment arrangements for family advocacy work from 2010. The ongoing consultation proposes to abolish the FGFS for barristers and to replace it with a simpler fee scheme that pays the same to both barristers and solicitor advocates in family cases. Whether or not, following consultation, this proposed new scheme is introduced, we must take action now to control rising barrister fee claims under the existing FGFS.

Given the significant rises in family barrister payments, our consultation, *Reforming the Legal Aid Family Barrister Fee Scheme*, set out different options for reducing FGFS expenditure in order to live within budget, while ensuring the continued provision of services to the public by good quality advocates. We set out three broad options. We also asked consultees for their own suggestions on how we could reduce expenditure. The three options are summarised below.

Option A: Across the board percentage reduction to FGFS rates and bolt-ons

This option was to reduce all of the base and hearing unit fees by a fixed percentage. This reduction would not apply to SIPs, Settlement Supplements, or the High Court uplift (as these act as multipliers, so any reduction to the base and hearing unit fees would also affect these multipliers indirectly), but it would apply to all other bolt-ons i.e. Court Bundle Payments, Financial Dispute Resolution Payments, Incidental Payments and Special Preparation Fees.

Option B: Abolition or reduction of Special Issue Payments (SIPs)

This option is to abolish or reduce Special Issue Payments. The abolition or reduction of SIPs would still mean that advocates could continue to claim base or hearing unit fees and other types of uplift (e.g. Settlement Supplements) or bolt-on (e.g. CBPs).

Option C: Abolition or reduction of Special Preparation Fees (SPFs) and Court Bundle Payments (CBPs)

This option is to abolish or reduce Special Preparation Fees and / or Court Bundle Payments currently paid to advocates. SPFs are paid at fixed hourly rates, while CBPs are fixed amounts – depending on the bundle size and the type of hearing.

Decision

The views of consultees are summarised in *Reforming the Legal Aid Family Barrister Fee Scheme: The Government's Response to Consultation Paper CP12/08*. This paper also sets out our chosen course of action.

Option 1 was simple to implement and favoured by some consultees because it preserved the structure of the existing FGFS. However, the vast majority of consultees favoured action either on SIPs (Option 2) or on SPF and / or CBPs (Option 3). Following the consultation we have continued discussions with stakeholders and tried to develop a package of proposals that delivers the controls sought while ensuring a viable scheme.

In deciding how to proceed, we have had in mind the statutory obligations under section 25 of the Access to Justice Act 1999, the views of consultees, and the Lord Chancellor's Direction on Funding Priorities of the Community Legal Service, which sets out that child protection cases are of the highest priority for funding.

The Government has decided to adopt Option 2, action to control SIPs, which was generally supported by stakeholders. We have decided that reductions should fall primarily on private family law, bearing in mind the significant priority we afford to child protection cases. We will make the following changes to the FGFS:

- abolish the "more than two parties" special issue payment, which provides a 40% increase to fees when claimed in public law cases. We received strong representations from interested parties that this element of the scheme did not represent a sufficiently "special" issue to merit a fee increase, as there are more than two parties in the large majority of such cases.
- Redirect most of the funding spent on the "more than two parties" special issue payment into increasing by £4.4 million per annum the fees paid to barristers for hearings and conferences in child care or supervision proceedings. This will mean an increase in fees paid to lawyers in at least 2800 of these cases each year.
- In private law disputes concerning child contact or residence, reduce the special issue payments claimable by barristers for conduct issues and additional experts from 50% to 30% and 20% respectively. Both of these payments are currently running at 150% of the level intended.
- In private law disputes concerning financial settlement on divorce, abolish the most expensive special issue payments claimable by barristers for issues concerning conduct, analysis of accounts, assets which are outside the control of the parties, and more than one expert. In addition, we intend to reduce the special issue payments claimable for litigants in person or a relevant foreign element from 25% to 20%. All these payments are running at a level higher than that intended.
- Introduce tighter procedures for barristers' claims for special preparation fees, which was a suggestion made to us by interested parties. This is an area where fees are running at 800 % of the level that anyone expected. Barristers will be required to submit to judges a detailed schedule of the hours spent in preparation so that these payments are made only where appropriate.
- We will also revise the claim forms so that the basis of any claim is clear.

We are not reducing expenditure in the family injunction (e.g. domestic violence) category.

Impact on the family bar

The changes above will reduce expenditure in the 4 FGFS categories as follows:

<i>category</i>	<i>total spend (bills paid 07–08) p.a.</i>	<i>changes</i>	<i>reduction in spend</i>
ancillary relief and all other family work	£9.8m	abolish the “conduct” SIP abolish the “assets” SIP abolish the “more than one expert” SIP abolish the “analysis of accounts” SIP reduce the “litigant in person” SIP from 25% to 20% reduce the “relevant foreign element” SIP from 25% to 20%	- £1.6m (- 16%)
private law children	£31m	reduce the uplift provided by the “conduct” SIP from 50% to 30% reduce the uplift provided by the “more than one expert” SIP from 50% to 20%	- £2.9m (- 9.3%)
public law children	£47.4m	abolish the “more than two parties” SIP Increase base hearing fees for public law children cases	- £2m (- 4.2%)
family injunctions	£10m	no changes	£0m
total spend	£98.2m		
total net reduction			- £6.5m p.a.

In terms of controlling expenditure in the FGFS, some consultees suggested that we amend the scheme so that the majority of the reductions fall in the public law children area. Others recommended that the majority of any reductions should fall primarily in the private family law area. Given the significant priority we afford to child protection cases, we chose to implement changes that fall primarily on the private family law area.

The impact of these changes on the average case costs in different categories is set out in the tables below:

Ancillary Relief	
<i>year closed</i>	<i>average case cost of cases closing in this year</i>
2003–04	£630
2007–08	£1099
average case costs after reductions	£934 (£165 reduction)

Private law Children	
<i>year closed</i>	<i>average case cost of cases closing in this year</i>
2003–04	£789
2007–08	£1455
average case costs after reductions	£1345 (£110 reduction)

Public law Children	
<i>year closed</i>	<i>average case cost of cases closing in this year</i>
2003–04	£2288
2007–08	£3364
average case costs after reductions	£3271 (£93 reduction)

Ancillary relief average case costs have risen by 74% in five years. Our changes will likely reduce average ancillary relief case costs by 15%, back to a level comparable with average claims a few months earlier.

Private law children average case costs have risen by 84% in five years. Our changes will likely reduce average private law children case costs by 7.5%, back to a level comparable with average claims a few months earlier.

Public law children average case costs have risen by 47% in five years. Our changes will reduce average public law children case costs by 2.8%, back to a level comparable with average claims a few months earlier.

While costs appear to have risen excessively over the last five years, and we need to act to control this, we need to bear in mind the need to retain sufficient supply of good quality advocates. We consider that the reductions above are very moderate reductions in the face of excessive increases in recent years. We consider that these moderate restrictions will not mean that our clients will encounter any significant difficulties in securing counsel, or that these changes will make this work significantly less attractive for counsel.

Family Barrister Income

The LSC holds data on payments made by the LSC to barristers for family legal aid work. Total payments made to individual barristers in 2006–07 varied from negligible to over £200,000. LSC data indicates that the vast majority of counsel claiming under FGFS tend not to claim in only one category of work (e.g. public law only).

Modelled against the mid-point of the income ranges, the average reduction from a £6.5m per annum reduction in FGFS expenditure is set out below.

Family Legal Aid Income for Barristers, 2006–07⁶		
<i>family legal aid income 2006–07 (midpoint)</i>	<i>average reduction in family legal aid income from £6.5m reduction in FGFS</i>	<i>no. of barristers paid</i>
£1–20,000 (£10,000)	£650 (-6.5% reduction)	2315 (58%)
£21,000–40,000 (£30,000)	£1950 (-6.5% reduction)	450 (11%)
£41,000–60,000 (£50,000)	£3250 (-6.5% reduction)	417 (10.5%)
£61,000–80,000 (£70,000)	£4550 (-6.5% reduction)	328 (8%)
£81,000–100,000 (£90,000)	£5850 (-6.5% reduction)	242 (6%)
£101,000–150,000 (£125,000)	£8125 (-6.5% reduction)	192 (5%)
£151,000–200,000 (£175,000)	£11,375 (-6.5% reduction)	34 (1%)
over £200,000	£13,000+ (-6.5% reduction)	21 (0.5%)
		3999 (100%)

The estimate above assumes that claiming patterns are homogenous and that barristers in all payment brackets are equally as likely to claim from all categories, and that these form a similar proportion (circa 6.5%, i.e. £6.5m reduction on £98m 07–08 spend) of their FGFS fund take.

This essentially shows the effect of a 6.5% reduction in family legal aid incomes for family barristers. While the above impacts indicate reductions in fund take, they do not tell the whole story. Most self-employed family barristers also do either other types of legal aid work, and/or privately-paid work, and therefore to assess the impact on them we need to consider the overall impact of these changes on their total income.

Quality Assurance for Advocates Data Survey

Following publication of our consultation, we have identified further data relevant to assessing any impact. This data was gathered through a data survey of barristers run as a joint, collaborative, initiative between the LSC and the Bar Council. The LSC needed to collect data to inform the impact assessment for the Quality Assurance for Advocates Scheme and, with the support of the then Chairman, Geoffrey Voss QC and the Bar equalities team, it was agreed to collect as much data as

⁶ May include payments to barristers who are no longer practising for work carried out in previous years.

possible so that data from these analyses may be utilised and published to support Impact Assessments and policy work on initiatives that impact on advocates.

The Quality Assurance for Advocates programme possesses detailed data on barristers produced through a survey to which 5000 self-employed barristers responded in 2007. This survey included questions on barristers' total income, the proportion of work that was family law, and the proportion of this family work that was legally aided.

Based on a sample of 746 responses⁷ from self-employed barristers who do family legal aid work, MoJ analysts have estimated, taking into account all income streams, the impact on the total income of those barristers of the reduction in FGFS expenditure of £6.5m p.a. (based on £98m in 07–08).

Effect on total income of barristers who do family legal aid work of £6.5m reduction in FGFS expenditure, based on QAA data sample ⁸						
no. of barristers in the sample who do family work	% of the sample	% of total workload which is family legal aid work	average income from family legal aid (only)	average £ reduction in total annual income from £6.5m pa FGFS reduction	average % reduction to total annual income	average total annual income (of all types)
163	22%	1–10	£4810	–£313	–0.3%	£124,000 p.a.
131	17.5%	11–30	£20,180	–£1311	–1.3%	£99,000 p.a.
129	17%	31–50	£40,130	–£2608	–2.3%	£101,000 p.a.
161	21.5%	51–70	£63,630	–£4136	–3.9%	£107,000 p.a.
122	16.5%	71–90	£80,670	–£5244	–5.1%	£102,000 p.a.
40	5.5%	91–100	£84,410	–£5487	–6%	£89,000 p.a.
total 746	100%		average £49,000	average £3183	average –3.15%	average £104,000 p.a.

Our analysis estimates that the effect on barrister incomes will vary depending on how much of their time is spent on family legal aid work.

For the majority of barristers who do family legal aid work, this work forms no more than half of their workload (for 56.5% of the sample, family legal aid work is 1–50% of their total workload), and the average impact on their total income varies between 0.3%–2.3%.

For a minority of barristers, family legal aid work takes up a majority of their workload (for 43.5% of the sample, family legal aid makes up 51–100% of their workload), and the average reduction to their total income ranges from 3.9%–6%.

Looking at this sample gives an indication of the overall effect of a £6.5m per annum reduction in FGFS expenditure on barristers who do family legal aid work. As the proportion of total workload from family legal aid diminishes, so too does the impact of the changes.

Based on this sample, we estimate, on average, barristers who do family legal aid work will see a 3% reduction to an average total income of £104,000 per annum from our reductions to the FGFS.

Bearing in mind our obligations to secure services from a sufficient number of competent persons, to have regard to the cost to public funds, and to secure value for money, we consider that the impact on barristers of a £6.5m reduction in FGFS expenditure is justified. Reducing expenditure under FGFS will help us to avoid reducing the services offered to civil legal aid clients, and will help us to move towards paying the same fee for the same advocacy services to clients.

⁷ 746 respondents gave logically consistent answers to all relevant questions.

⁸ assumes that the proportion of total income that comes from family legal aid is proportionate to the proportion of time spent on family legal aid work (e.g. assumes that if 5% of total workload is family legal aid, that generates 5% of total income).

Quality / Supply

In considering whether the quality of advocacy services delivered will be affected by the reduction, we need to bear in mind that there is currently no quality assurance scheme available for publicly funded family advocates. A multi-agency initiative, coordinated by the LSC and MoJ, is already underway to develop a competency-based quality assurance scheme for advocates (QAA). This will cover both solicitor advocates and barristers, with pilot assessments, initially in criminal defence work only, due to begin in 2009. In line with Lord Carter's recommendation⁹, the pilot will include a full Impact Assessment and evaluation, and this will inform thinking on potential operational implementation and extension of the scheme to cover all areas of advocacy including family and civil law categories.

In advance of such a scheme being consulted on, there are some mechanisms in place that help to ensure that advocates possess sufficient skills and competence to accept instructions. The Specialist Quality Mark requires feedback on an advocate's performance to be recorded by instructing litigators. In addition, the Bar's and Solicitors' Code of Conduct requires the advocate to only accept instructions for which they have sufficient competence to act. We do not think that the reduction in fees will materially impact on the quality of family advocacy.

Small Firms Impact Test

We reviewed the BERR Small Firms Impact Test. Barristers are usually organised in 'chambers' which could arguably qualify as micro (1–9) or small (10–49) businesses. According to Bar Council statistics (December 2007) on the Bar Council website, there are 12,058 junior barristers in the self-employed Bar, and 1223 Queen's Counsel (13,281 total). Figures indicate that there are 643 barristers' chambers, and 309 sole practitioners (2.3%). These sole practitioners may qualify as 'sole traders'.

According to the Bar Council "perhaps 50% of barristers undertake publicly funded criminal (defence or prosecution), family, immigration or administrative work..." (*Legal Aid and the Public Interest: towards an effective public-private partnership*, May 2008). LSC statistics show that approximately 3000 barristers provide publicly funded services in family cases each year. If the proportion of barristers practising as sole practitioners remains constant for barristers who do family work as for barristers generally, then we would expect approximately 69 (2.3% of 3000) of the barristers providing publicly funded services in family cases to be sole practitioners, with the vast majority (2931 – 97.7%) in chambers. Excluding the sole practitioners, the average chamber has 20 barristers (12,972 divided by 643 chambers), which would mean that the average barristers' chamber may qualify as a small business (unless they should be seen as aggregates of sole traders). Based on the estimate above, barristers who do family legal aid work will on average see a 3% reduction on a total average income of £104,000. We do not have figures for what proportion of the barristers in an average chambers do family legal aid work. If we use an estimate that 25% of barristers in an average chambers do family legal aid work, then an average chambers would see a decrease in income of –0.8% from our changes.

As set out above, we consider that the reductions we are making are very moderate reductions in the face of excessive increases in recent years. We consider that these moderate restrictions, which will restore fees to a level comparable with 2006–07, will not mean that our clients will encounter any significant difficulties in securing counsel, or that these changes will make this work significantly less attractive for counsel.

⁹ Recommendation 5.3

Equality Impact Assessment

Name of the legislation, policy or service being assessed

This is the full Equality Impact Assessment for the reduction by £6.5m per annum in expenditure under the Family Graduated Fee Scheme for barristers. We are required to assess the impact of policies on different racial groups, disabled people and men and women, and to consider the impact on those of different religion or belief, sexual orientation, age and with caring responsibilities.

Statutory Duties

Public authorities in Britain have a legal duty to promote race equality. This means that they must have due regard to how they will eliminate unlawful racial discrimination, promote equal opportunities and promote good relations between people from different groups. The MoJ is also under a specific duty to conduct race equality impact assessments of its policies in relation to the public duty to promote race equality and within this, to identify whether there is a differential and adverse impact on particular racial groups.

The Disability Equality Duty came into force on 4 December 2006. The MoJ has published a Disability Equality Scheme, which is available at our website at: <http://www.justice.gov.uk/publications/equality-schemes-2008.htm>.

This sets out the actions that the MoJ will be taking to promote disability equality. When carrying out our functions, the MoJ must have due regard to the duties placed upon us by the Disability Discrimination Act 2005. From 4 December 2006, the MoJ is also under a specific duty to conduct disability equality impact assessments of its policies in relation to the public duty to promote disability equality and within this, to identify whether there is a differential and adverse impact on disabled people and other people.

The Equality Act of 2006 places a statutory duty on all public authorities when carrying out their functions to have due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women. The MoJ also has a specific duty to conduct gender equality impact assessments of its policies in relation to the public duty to promote gender equality and within this, to identify whether there is a differential and adverse impact on people of different genders.

What is the aim, objective or purpose of the policy, legislation or service and who will benefit from it?

The policy objective is to ensure that the Legal Services Commission (LSC) and Department can enable the provision of high quality services to as many people as possible, within a limited budget, which provides value for money by reducing expenditure under the Family Graduated Fee Scheme (FGFS). This will also help us to take the first step towards harmonising barrister and solicitor advocacy payments so that they are paid the same fee for the same work.

What are the intended outcomes?

Successful outcomes will include a reduction in expenditure under FGFS helping us to avoid restrictions to client services, and reducing the gap between what barristers and solicitors are paid for the same advocacy work, while continuing to fund a sufficient number of competent persons to deliver services to the public.

Do you share responsibility for this legislation, policy or service with another Government Department or organisation (e.g. criminal justice partners). If so, who defines it and who implements it?

The Ministry of Justice (MoJ) sponsors the LSC, which operates the legal aid scheme. The consultation is a joint MoJ / LSC consultation (led by MoJ). MoJ will implement any changes through

subsequent changes to secondary legislation, and LSC will be responsible for any changes to guidance.

Who are the key stakeholders in relation to the legislation, policy or service? What outcomes do they want? Does the list of stakeholders include representatives from all relevant/interested groups of people? If not, why not?

Key stakeholders are family barristers, and the solicitors who instruct them, the family judiciary, and the clients for whom services are provided. We consulted the public, barristers, solicitors, the professional representative bodies, other relevant representative bodies, including barrister equality and diversity groups, judges, and relevant public authorities. We welcomed the views of anyone who wished to respond to the consultation, even if they were not covered by this list.

What Data Will We Use?

The Bar Council publishes equalities data on its website giving statistics for gender and ethnicity in the Bar. This shows that the vast majority of self-employed barristers (not limited just to those who do legal aid work) are from white ethnic backgrounds (9489 of 10590 – 89% (excluding ‘no ethnic group information held’ responses)), and are male (8330 of 12050 – 69%) (source: *Number Of Barristers In Self-Employed Practice By Ethnic Group And Gender (Excluding Pupils) As At December 2007*, Bar Council website).

Following publication of our consultation, we have identified further data relevant to assessing any impact. This data was gathered through a data survey of barristers run as a joint, collaborative, initiative between the LSC and the Bar Council. The LSC needed to collect data to inform the impact assessment for the Quality Assurance for Advocates Scheme and, with the support of the then Chairman, Geoffrey Voss QC and the Bar equalities team, it was agreed to collect as much data as possible so that data from these analyses may be utilised and published to support Impact Assessments and policy work on initiatives that impact on advocates.

We have tried to supplement the QAA data by sending our consultation paper to equality and diversity groups representing lawyers. On 13 August 2008, the LSC also wrote to equality and diversity stakeholder groups, informing them of the consultation and of the availability of the EIA on the MoJ website, inviting comments, and offering to meet with them to discuss our proposals. These organisations were specifically targeted because they had an interest and knowledge of the areas where potential impacts had been identified e.g. disability.

We also used data provided by LSC on expenditure, research commissioned by the LSC from Professor Fenn of Nottingham University Business School in 2007, and research conducted by an MoJ analyst.

Assessment of Impact

Impact on Barristers

The proposed reductions to FGFS expenditure will apply to all barristers who claim under the scheme equally, and irrespective of their gender, race or disability status, therefore we consider that £6.5m reduction will have no *direct* disproportionately negative impact on any equality group.

The Bar Workforce Survey data that we have received indicates that a higher proportion of female barristers do family legal aid work than male barristers (47.9% female compared to 20.9% of men), and that female barristers doing family legal aid work tend to have lower incomes from this work than male barristers who do this work. Female barristers who did family legal aid work had median incomes from this work of £80–100,000 p.a. By contrast, male barristers who did family legal aid work had median incomes from this work of £100–125,000 p.a.

Where female barristers have caring responsibilities those responsibilities tend to impact more on their caseload or the type of cases they were able to take on significantly more than they do for male

barristers with caring responsibilities. Although a higher percentage of male barristers had dependent children (58.6% of males vs. 42.4% of females), and male and female barristers had similar caring responsibilities for an elderly or dependent adult (11.7% of males and 10.6% of females), female barristers had their caring responsibilities impact upon their caseload or the type of cases they were able to take on significantly more than male barristers (16.6% of males vs. 36.2% of females).

The Bar Workforce Survey data also indicates that a higher proportion of BME barristers do family legal aid work than white barristers (33.2% BME compared to 26.9% white), and that BME barristers doing family legal aid work tend to have lower incomes from this work than white barristers who do this work. BME barristers who did family legal aid work had median incomes from this work of £60–80,000 p.a. By contrast, white barristers who did family legal aid work had median incomes from this work of £80–100,000 p.a.

The proportion of barristers with a disability or health problem and those without who do family work is similar (26.6% said they had a disability or health problem, compared with 29.3% who stated they did not), but those with a disability or health problem tend to earn less from this work than barristers without one. Barristers with a disability or health problem who did family legal aid work had median incomes from this work of £60–80,000 p.a. By contrast, barristers without a disability or health problem who did family legal aid work had median incomes from this work of £80–100,000 p.a.

We do not have any detailed data on sexual orientation of barristers doing family legal aid work. We do not hold data on religion or belief of barristers doing family legal aid work. We have tried to supplement our data in this area by contacting equality and diversity groups to seek data or their views. On 13 August 2008, the LSC also wrote to equality and diversity stakeholder groups, informing them of the consultation and of the availability of the draft EIA on the MoJ website, inviting comments, and offering to meet with them to discuss our proposals. These organisations were specifically targeted because they had an interest and knowledge of the areas where potential impacts had been identified e.g. disability. Despite our efforts, no additional data or information was made available to us, therefore we are unable to assess the impact in these areas.

Overall we conclude that indirectly, because of the current composition of the family bar, and the disparities in earning profiles, the proposed reductions in FGFS could have a greater impact on female, BME, or barristers with caring responsibilities, or those with a disability or health problem. The Government does not have any control over the composition of the family bar, or over the allocation of work to individual barristers. Likewise, the LSC and MoJ have no control over the composition of the solicitors' profession, on which the changes to counsel's fees may also have a beneficial indirect impact, therefore we cannot directly act to ameliorate the impact in that way.

We have considered off-setting any negative impact by altering the fees. For example, we could allow female, BME or barristers with a disability to claim higher rates than male, white and non-disabled barristers who do family work. In doing so we would need to reduce the fees of male, white, and non-disabled family barristers further if we were to reduce expenditure to live within our means and reduce the gap between solicitor and barrister fees for advocacy. However, we do not consider such a move compatible with the principles of the Equal Pay Act 1970. Nor do we consider such a move appropriate given that any impact of our changes on these groups is indirect, and are as a result of the current composition of the family bar. We therefore do not consider that there is any mitigating action that it is appropriate to take. That said, we consider that the reductions we are making are very moderate reductions in the face of excessive increases in recent years. We consider that these moderate restrictions, which will restore fees to a level comparable with 2006–07, will not mean that our clients will encounter any significant difficulties in securing counsel, or that these changes will make this work significantly less attractive for counsel.

Impact on Clients

The gender profile of clients is set out below. The vast majority of clients receiving legal help for ancillary relief and domestic violence cases are women. In children cases, the proportions are more even.

% of certificates where client gender known	public law children	private law children	ancillary relief	family injunctions
female	58%	57%	72%	72%
male	42%	43%	28%	28%

It is our view that these changes will not significantly reduce the availability of good quality counsel to provide services to the public. We therefore consider that there will be no negative impact on the public from these changes.

Reduction of FGFS expenditure by £6.5m per annum will help us to live within our budget, thus protecting client services. **Without these reforms, we would likely be forced to cut the scope of legal aid or restrict people’s eligibility, which we consider would have a negative effect on the public, and in particular vulnerable women, disabled persons, and victims of domestic violence.**

The Legal Services Commission Strategy for Family Legal Aid published in March 2007 outlined the LSC’s intention to:

- Direct funding towards services for children and adults at risk of abuse and parents whose children are the subject of care proceedings
- Provide further incentives for parents in private law proceedings to resolve cases without going to court
- Increase access to services for those at risk of domestic abuse
- Pilot specialist family advice through the Community Legal Advice helpline (previously CLS Direct)
- Review the operation of the Funding Code to reflect funding priorities
- Purchase integrated family and social welfare law services.

These priorities have been informed by findings from the 2001 and 2004 English and Welsh Civil and Social Justice Surveys which show that the experience of civil justiciable problems are, despite being frequently reported by people from all walks of life, not randomly distributed across the population. Certain population groups, including people with a long-standing illness or disability and lone parents, are more vulnerable than others to a range of justiciable problems:

- People with long standing ill health or disability are more at risk of abuse or domestic violence
- Female lone parents are more likely to report divorce, other problems ancillary to relationship breakdown, maintenance problems, the division of assets, and domestic violence
- People in their 30s and 40s are more likely to experience family problems
- Respondents who had experienced multiple problems reported domestic violence frequently

If we fail to address the rise in expenditure under the FGFS and are required to live within our constrained budget by reducing services to the public, then those more vulnerable groups who have been found to experience multiple justiciable problems would be disproportionately impacted upon. Ultimately, in ensuring access to justice for people in need, the aim of this policy with regard to equality and diversity is to avoid cutting the scope of legal aid or restrict people’s eligibility.

Conclusion

The evidence shows that indirectly, because of the current composition of the family bar, the proposed reductions in FGFS could have a greater impact on female, BME, or barristers with caring responsibilities, or those with a disability or health problem. We have considered, above, ways in which we could mitigate this impact. However, we do not consider that there is any mitigating action that it is appropriate to take. We consider that the reductions above are very moderate reductions in the face of excessive increases in recent years. We consider that these moderate restrictions will not mean that our clients will encounter any significant difficulties in securing counsel, or that these changes will make this work significantly less attractive for counsel. We have considered the impact on clients if we cannot control expenditure on family barrister fees. Given the finite legal aid budget, failure to control payments to family barristers will likely result in restrictions on client eligibility or access to civil legal aid services. The evidence, referred to above, shows that such restrictions could have a greater impact on members of the public with a disability or ill health, female lone parents, and victims of domestic violence. Given that the community legal service legal aid scheme exists principally to provide services to members of the public, and given the significant impact on clients of restrictions to the scope of civil legal aid services, we consider that the intended moderate reductions to FGFS expenditure are justified, in that they are appropriate, proportionate and necessary to control growing costs in this area to help us to protect services to vulnerable members of the public.

Full EIA Approved by: Mark Taylor, Legal Services Strategy Directorate, MoJ

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No

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