

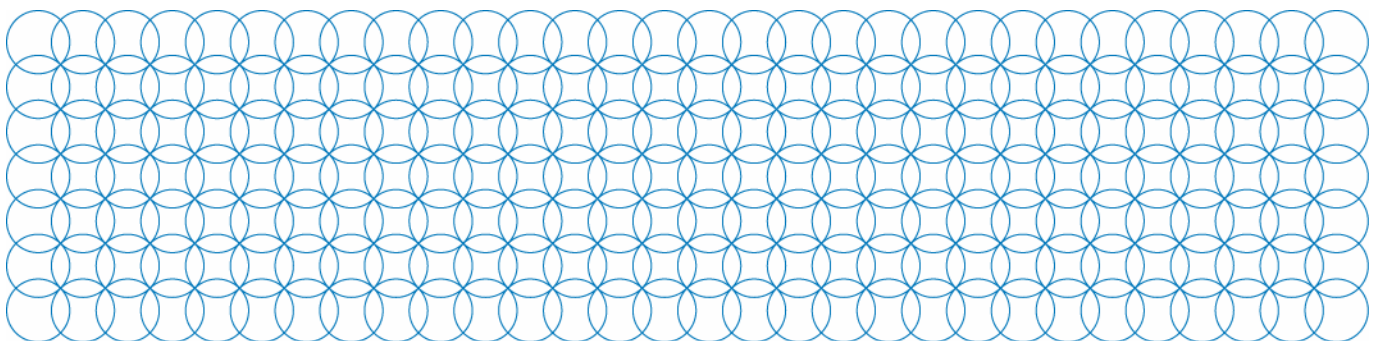


Reforming the Legal Aid Family Barrister Fee Scheme

Consultation Paper CP12/08

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Ministry of
JUSTICE



Reforming the Legal Aid Family Barrister Fee Scheme

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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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Executive Summary

Legal Aid

- 1.1 The Government believes that legal aid is a fundamental underpinning of the justice system, enabling access to justice for those who cannot afford to pay for legal advice and representation. This is reflected in the fact that the legal aid system in England and Wales is the best funded in the world. We spend £38 per head of the population compared to between £3 and £4 in France and Germany. Even countries with a legal system more like ours spend less: for example, both New Zealand and the Republic of Ireland spend around £8 per head.
- 1.2 Legal aid has been one of the fastest growing areas of public sector spending over the last 25 years. Spending has increased from £522m in 1982 (in today's prices) to around £2 billion today: a real terms increase of 5.7% per annum.
- 1.3 The Government is concerned that this extra spending has not always represented value for money, so our legal aid reforms are designed to achieve that. This means two things in particular: helping more people to solve their problems within the available resources, and making sure that legal aid operates effectively as part of the wider justice system. Value for money includes things such as quality of service, price, accessibility and accountability. Spending on legal aid is forecast to remain at around £2 billion per year as a result of the reforms.

Legal Aid Reform

- 1.4 The civil legal aid scheme – the Community Legal Service (CLS) – provides vital legal advice and representation to the public on a range of issues which affect their lives, from family break up to child protection and holding public bodies to account. The Government recognises that these vital services have to be provided to a high quality, to as many people as possible, and within a fixed budget that provides value for money to taxpayers.
- 1.5 In order to ensure that legal aid can go on delivering high quality legal services to as many people as possible, the Government has embarked on a programme of reform to the way that it pays for legal services to be delivered to the public. In July 2006, Lord Carter of Coles issued his report, *Legal Aid: A Market-Based Approach to Reform*. At the same time the Government and the Legal Services Commission (LSC) consulted (*Legal Aid: a sustainable future*) on moving from the old system of paying solicitor and Not for Profit organisations for legal services by hourly rates to a series of standard and graduated fee schemes.

- 1.6 Different legal services providers (i.e. solicitors' firms, barristers and Not for Profit organisations) have historically been remunerated at very different rates for the delivery of some of the same services. Moving to standard fee schemes rewards those providers who deliver an efficient and effective service, and encourages less efficient providers to improve. The move to standard fee schemes also assists providers to understand better their own business costs. This is important as the LSC continues the move towards integrated services as set out in the family and civil strategies, because providers will need to have a clear understanding of their business costs in order to bid effectively for parcels of work and, in time, to bid for those parcels on a price basis, if the LSC proceeds to introduce Best Value Tendering (BVT) in the civil legal aid services market in 2013.
- 1.7 Before 2013 LSC will consult representative bodies on civil BVT, and, as was announced in *Civil Legal Aid Contracts: the next five years*, conduct trials for best value tendering for mainstream services in a small number (two or three) of geographical areas between 2010 and 2013, offering a mix of dispersed and non-dispersed populations. LSC will discuss the criteria for choosing these areas with representative bodies and any trial areas will have been identified before the award of contracts in 2010, so that practitioners signing contracts in those areas will be aware of the position.
- 1.8 Following the consultation on the introduction of standard fee schemes, the Government and LSC published *Legal Aid Reform: the Way Ahead* in November 2006. *The Way Ahead* set out plans to proceed with the implementation of a series of standard and graduated fee schemes (and a further consultation on family fees). In October 2007 standard fee schemes were introduced for civil advice, child care proceedings work, family help (private) (advice and negotiation only), family mediation, and asylum and immigration. In January 2008 a standard fee scheme was introduced for mental health work.
- 1.9 These new schemes did not introduce cuts to the civil legal aid budget. Under the new schemes the same amount of money would be spent on each category of work, based on the same volume of cases. If volumes increase, so would expenditure. On 10 December 2007 the LSC published a cumulative impact assessment. This assessment showed that, without adapting their businesses, approximately 60% of civil providers, responsible for approximately 60% of civil work, would see increased incomes under the new schemes. Those providers who adapted to the new schemes and increased efficiency could benefit even further.

Family Graduated Fee Scheme

- 1.10 During the *Sustainable Future* consultation the Government received strong representations during the consultation that it was sensible to look at family remuneration across both solicitors and barristers. Therefore, in *The Way Ahead*, we stated our intention to hold a

consultation on family advocacy in summer 2007, followed by implementation, in April 2008, of a new single advocacy scheme covering solicitors and barristers. The new scheme would remove the current imbalance between payments to solicitor and barrister advocates for the same work, and would move to paying the same for the service received by the client, regardless of which kind of advocate delivers it.

- 1.11 This approach reflects changes in the legal services market, where solicitors are increasingly being recognised as advocates in higher courts, as well as proposed reforms which will also impact on this market. Currently there are 917¹ solicitors with higher rights of audience. The Solicitors Regulatory Authority (SRA) are consulting on proposals for new competence standards intended to be the benchmark for solicitors operating as advocates in the higher courts. From next year, solicitors will be able to enter multi-disciplinary partnerships with barristers and we are gradually seeing the removal of traditional differences between the two branches of the profession, and a harmonised advocacy scheme reflects these important changes. In addition, a harmonised scheme will further assist bidders in an environment of competing for work, whether or not this is with a price element.
- 1.12 In the course of 2007 legal proceedings were brought against a contract amendment clause in the LSC's new Unified Contract, introduced for civil providers in April 2007. A judgment by the Court of Appeal in November 2007 found that the amendment clause was incompatible with the European Union public contracts procurement directive and UK regulations. Following the judgment, the Ministry of Justice (MoJ), LSC and Law Society of England and Wales reached agreement, on 2 April 2008, on the best way forward for civil legal aid providers in the light of the judgment. Part of the agreement involved deferring implementation of the new family advocacy scheme until April 2010.
- 1.13 A consequence of this deferral is that barristers continue to be paid more than solicitors for the same advocacy work for a longer period than had been intended or expected. This consultation document makes proposals for partly closing that gap.
- 1.14 The LSC will be conducting a consultation, from September 2008, on proposals for family advocacy payments to solicitors and barristers from April 2010. These proposals are likely to suggest the restructuring or removal of the FGFS, and removal of some or all of the differentials in payments between solicitors and barristers conducting family advocacy.

¹ Source – The Law Society Database as at May 2008.

Introduction

- 2.1 This paper sets out for consultation options for reducing family barrister legal aid payments made under the Family Graduated Fee Scheme (FGFS). This is necessary to help to harmonise the rates of pay for different advocates doing the same work, and in order that the legal aid fund can live within its means.
- 2.2 The consultation is aimed at representative bodies, barristers, whether sole practitioners or in chambers, family solicitors, relevant public authorities, the judiciary and the public in England and Wales.
- 2.3 This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 41 have been followed.
- 2.4 An Impact Assessment has been completed and indicates that family barristers are likely to be particularly affected. The proposals are likely to lead to additional savings for the public sector. An Impact Assessment is included at page 30. Much of the data and analysis in the Impact Assessment is also set out in this consultation paper for convenience. Comments on the Impact Assessment are welcome. Copies of the consultation paper are being sent to:

The Bar Council

The Family Law Bar Association

The Law Society of England and Wales

The Legal Aid Practitioners Group

Resolution

The Association of Lawyers for Children

Association of Child Abuse Lawyers

Child Poverty Action Group

Institute of Barristers' Clerks

Department for Children, Schools and Families

Association of Directors of Children's Services

CAFCASS

CAFCASS Cymru

Welsh Assembly Government

The Rt Hon Lord Justice Leveson, Senior Presiding Judge

The Rt Hon Sir Mark Potter, President of the Family Division

Lord Justice Thorpe
Association of District Judges
Magistrates' Association
High Court Masters' Group
Council of Circuit Judges
National Bench Chair Forum
Judicial Communications Office
Judges' Council
Family Justice Council
Sir Mark Potter, President of the Family Division
Judges' Council
Supreme Court Costs Office
Association of Women Barristers
Society of Black Lawyers
Black Solicitors Network
Society of Asian Lawyers
Association of Muslim Lawyers

- 2.5 However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The Family Graduated Fee Scheme

- 3.1 The Family Graduated Fee Scheme (FGFS), which applies to England and Wales, was introduced in May 2001, after being developed over a number of years, in close consultation with the Bar Council and the Family Law Bar Association (FLBA). It is based on fixed rates for specific activities (functions) carried out in a case, dependent on the complexity and length of the case.
- 3.2 It was hoped that the FGFS would give the Department greater control over expenditure, allow it to forecast expenditure of public funds on family cases with greater accuracy, and pay barristers fairly for work done. Also, in comparison with the previous arrangements, barristers receive payments more quickly and benefit from better cash flow.
- 3.3 Following the introduction of FGFS, the then Lord Chancellor, Lord Irvine, agreed to a joint Departmental/Bar review of the scheme after a year of its operation. This review began in May 2002. Members of the judiciary, barristers and solicitors were consulted about the structure and rates of the FGFS. The review also comprised a written consultation which covered, amongst others, High Court, Circuit and District Judges, the Courts Service, and organisations such as the Solicitors' Family Law Association (now Resolution), the Legal Aid Practitioners Group, the Justices' Clerks' Society, the Law Society, the Bar Council and the FLBA, along with individual practitioners.
- 3.4 While the review continued, to accommodate the work to be done under the new *Protocol for Judicial Case Management in Public Law Children Act Cases*, revisions to the FGFS were implemented from 1 November 2003, following consultation.
- 3.5 In 2004 analysis appeared to indicate that the FGFS had been more successful than intended in controlling expenditure. It appeared at the time that FGFS had reduced expenditure by approximately 13% from that under the ex post facto scheme, rather than approximately 5% as anticipated. The then Lord Chancellor agreed to further revisions to the scheme, including an increase in some fees, to increase FGFS expenditure by approximately 8% from February 2005.
- 3.6 While there was no evidence to show that family cases were in fact lacking appropriate representation under FGFS, evidence was presented at the time of a perception amongst solicitors of it being more difficult to obtain counsel for family cases, and this was also a factor in the increases in the fees. A survey of solicitors' firms contracted to the LSC for family work undertaken by the National Centre for Social Research, and a report by Frontier Economics (commissioned by the Department for Constitutional Affairs) – *A market analysis of legal aided services provided by barristers* (March 2004) – were presented.

Both reports found that solicitors reported that there was a proportion of the Family Law Bar that were more reluctant to undertake publicly funded work following the introduction of the FGFS.

3.7 The Frontier Economics report found that 37% of solicitors reported at least one occasion in the previous year (2003) when they had they sought the services of a barrister who was of the appropriate expertise and experience and they had not been able to secure their services. Of the 18,570 family cases conducted by the solicitors in the survey, in 420 cases solicitors were unable to obtain the services of a particular barrister (2.3%) (although they may have subsequently instructed a different barrister). In these cases this was said to be to the detriment of the case in 260 of these 420 cases (approximately 1% of the total cases in the survey). In the vast majority of cases there was no perceived detriment, but there was a perception, based on these anecdotal reports, that some family barristers were ceasing to do this work.

3.8 The report is subject to important caveats: that the results do not present accurate estimates of the *degree* of under supply. That consideration should be given to two potential sources of error:

“the survey required solicitors to judge the expertise and experience of barristers required to provide advocacy and advice on particular cases. Since solicitors do not pay the barristers’ fees (for the majority of cases), it could be the case that solicitors have the incentive to seek the services of barristers with the greatest expertise and experience and there may be a question as to whether this is the required expertise and experience”, and

“the survey relies on solicitors accurately reporting the number of cases undertaken in 2003, the number of cases for which barristers’ services were sought and the number of cases for which they were unable to secure barristers’ services. Moreover, with regard to the number of cases on which barristers were used, estimates were reported in a broad range only”

3.9 Research² conducted in 2007 by Professor Fenn of Nottingham University Business School shows that the use of, and expenditure on, counsel for family cases actually rose well before the fees were increased in 2005. The increase in use of counsel shown in this study may indicate that the anecdotal reports made by solicitors to Frontier Economics did not reflect the reality of supply. This research indicates that barristers were increasingly taking on this work, even at the lower rates. We are confident that the proposals set out in the consultation would help to control the expenditure of public funds, achieve value for money while ensuring that services continue to be provided to clients by a sufficient number of competent advocates.

² Commissioned by the Legal Services Commission, available at www.legalservices.gov.uk.

Public Law Outline Changes

- 3.10 From 1 April 2008 the *Protocol for Judicial Case Management in Public Law Children Act Cases* was replaced by the *Public Law Outline (PLO)*. The PLO is a revised judicial case management protocol intended to reduce delay in public law children proceedings, including care proceedings, and improve processes bringing benefits in particular to families and children involved in these proceedings, but also to the courts and the legal aid fund.
- 3.11 From 1 April 2008 the FGFS was revised to allow payments to barristers operating under the PLO, and the LSC made available guidance to practitioners. The guidance clarified that, in care proceedings, Advocates' Meetings conducted by video-conference would be paid as if they were face-to-face meetings. By remunerating these video-conferences as if they were face-to-face meetings, these changes help the PLO to achieve its aims of reducing delay and bringing better outcomes for children and families.

FGFS Structure

- 3.12 The FGFS is a complex, graduated payment scheme that is significantly different from the new standard family fee schemes introduced for solicitors from October 2007. The principal difference is the number, complexity and variety of 'uplifts' and 'bolt-ons' which can be paid under the scheme.
- 3.13 The scheme applies to barristers in independent practice who undertake family work under funding certificates granted on or after 1 May 2001. The FGFS does not apply:
- a) to appeals carried out in either the Divisional Court on appeal from the Family Proceedings Court (FPC);
 - b) to cases where the main hearing exceeds 10 days; or
 - c) where the case is the subject of a high costs case contract from the LSC's Special Cases Unit.
- 3.14 The FGFS covers 4 categories of work:

Category 1 – Family injunctions	Category 3 – Private law children
Category 2 – Public law children	Category 4 – Ancillary relief and all other family work

- 3.15 Standard fees and various uplifts are payable in each of the categories, but the exact amount of the fee or uplift varies from category to category. When the continuing proceedings fall within more than one category, counsel must choose the category under which they wish to be paid for all the work performed when making a claim for payment. Usually, counsel would be expected to choose the category that pays the highest rate.

3.16 Standard fees are payable for different types of activity. These vary from a static one-off base fee (paid once per function claimed), or hearing unit fees (paid once per hearing unit for each function claimed). These activities are:

- Pre-proceedings work (function F1): work carried out prior to the issue of proceedings (does not include work carried out in connection with a conference). Base fee payable.
- Injunctive Relief or Enforcement Hearings (function F2): work carried out relating to injunctive relief or enforcement procedures, except a committal hearing. Hearing unit fee payable.
- Hearing (function F3): all work carried out in connection a hearing, including a committal hearing. Hearing unit fee payable.
- Conferences (function F4): all work carried out in connection with a conference, including a telephone or video conference. Base fee payable.
- Main Hearing (function F5): all work carried out in connection with the main hearing. Hearing unit fee payable.

3.17 There are various types of uplift and bolt-on payable in addition to the standard fees. The main ones are set out below.

Uplift: Special Issue Payments

3.18 Special Issue Payments (SIPs) are the most complex of the uplifts. For each Special Issue that is relevant, the base or hearing unit fee is multiplied by a percentage. For each category of work, each SIP offers a specific percentage increase. These percentage increases are added together for each authorised SIP, and then the base or hearing unit fee is multiplied appropriately. For example, an advocate (non-QC; different rates apply for QCs) claiming a “Conduct” SIP in a private law case (category 3) would receive a 50% increase to any fees claimed to which that SIP applied. The same advocate claiming the same SIP in a public law case (category 2) would receive a 20% increase to any fees claimed to which that SIP applied.

3.19 A special issue may arise where the proceedings involve (or, with regard to certain SIPs, are alleged to involve):

- a litigant in person;
- more than two parties;
- representation of more than one child by counsel;
- representation of a person who has difficulty giving instruction, or understanding advice attributable to a mental disorder or to a significant impairment of intelligence or social functioning;

- representation of a parent or parents of a child who is the subject of proceedings;
- representation of another person (including a child) against whom allegations are made that he has caused or is likely to cause significant harm to a child;
- analysis of the business accounts of an individual, partnership or company;
- in respect of ancillary relief (category 4) proceedings, one or more experts;
- in family injunction, public law children and private law children (category 1, 2 and 3) proceedings, more than one expert;
- a relevant foreign element;
- relevant assets which are not or may not be under the exclusive control of any of the parties;
- a party who has or may have been involved in conduct by virtue of which a child who is the subject of the proceedings has, may have or might suffer very significant harm; or
- a party who has or may have been involved in intentional conduct which has, could have or might significantly reduce the assets available for distribution by the court.

3.20 These SIPs are certified on a form by the judge hearing the case at the end of the relevant hearing. While some SIPs are clearly objective, others (for example, relating to a party's conduct) are more subjective. Any claim requesting SIPs has to be supported by a copy of the certification.

Bolt-on: Financial Dispute Resolution

3.21 In ancillary relief proceedings, additional fixed payments are made for Financial Dispute Resolution hearings, with a larger payment applying to Queen's Counsel.

Bolt-on: Court Bundle Payments

3.22 A court bundle payment (CBP) is paid where the court bundle comprises between 176 and 350 pages; and a larger payment where the court bundle comprises more than 350 pages. Where there is no court bundle, equivalent provisions apply to counsel's brief.

Uplift: Settlement Supplements

3.23 A settlement supplement (SS) is paid, as a percentage of the base fee or the hearing unit fee applicable to the function in which the settlement takes place, where a settlement takes place which leads to the resolution of the set of proceedings.

Bolt-on: Incidental Payments

- 3.24 An incidental item (IP) payment is paid where an advocate has reasonably incurred expenses for: listening to or viewing evidence recorded on tape, disc or video cassette; time spent travelling; travel expenses; overnight hotel expenses.

Bolt-on: Special Preparation Fee

- 3.25 A Special Preparation Fee (SPF) is payable where the case involves exceptionally complex issues of law or fact, or was otherwise an exceptional case of its nature.
- 3.26 An SPF is also payable in public law children proceedings, in relation to work carried out within the secondary hearing unit of function F5, where the main hearing is split so that a period of at least four months elapses between its commencement and the time at which it resumes, such that it has been necessary for counsel to carry out work by way of preparation substantially in excess of the amount normally carried out for proceedings of the same type.
- 3.27 An SPF is also payable where the court bundle comprises more than 700 pages.
- 3.28 The amount of the special preparation fee is calculated by multiplying the number of hours of preparation in excess of the amount normally carried out for proceedings of the same type by an hourly rate.

Bolt-on: Contested Injunctive Relief and Enforcement

- 3.29 For ancillary relief and all other family proceedings (category 4), if there is an injunctive relief hearing which is contested, or enforcement procedures (under F2), then an additional £100 is payable, with a larger payment applying to Queen's Counsel.

Uplift: High Court

- 3.30 The total fee is increased by 33% in respect of all work carried out while the proceedings are in the High Court.

Child Care Proceedings

- 3.31 Additional complications are introduced for care cases. In these proceedings advocates' meetings are remunerated as if they were hearings, instead of as conferences. In addition, a Pre-Hearing Review or Issues Resolution Hearing (normally an F3 hearing) can be remunerated as if it were a main hearing where the same counsel attends both that hearing and the main hearing.

Background to the Current Proposals for FGFS

Harmonisation of Rates

- 4.1 Section 25 of the Access to Justice Act 1999 requires that the Lord Chancellor, when making any remuneration Order, has regard to:
- a) the need to secure the provision of services of the description to which the Order relates by a sufficient number of competent persons and bodies,
 - b) the cost to public funds, and
 - c) the need to secure value for money.
- 4.2 The Government seeks to ensure value for money in the legal services it purchases by moving to a system where the same fee is paid for the same service to the client, regardless of the type of advocate who delivers it. Currently there is a significant difference between the rates for advocacy paid to solicitors and those paid to barristers under FGFS.
- 4.3 While it is difficult to directly compare the two payment arrangements as they are very different, analysis of solicitor advocacy in public law children cases³ indicates that barristers can be paid between 50% to 75% more for advocacy under the FGFS than solicitors are for advocacy remunerated at their hourly rates.
- 4.4 As set out above, later this year the Legal Services Commission will consult on proposals for a combined solicitor and barrister advocacy scheme to apply from 2010. This harmonisation is necessary so that we can ensure that the family advocacy services we procure provide value for money, ensure sufficient competent advocates, and are provided within budget.
- 4.5 Proposals are likely to include options in which the payments currently made to solicitors conducting family advocacy are increased, and the fees currently paid to barristers are lowered. As well as offering the same fee for the same service to the client, this harmonisation also has the advantage of lending greater transparency to the payment system, which is important if we move, as has been proposed, towards Best Value Tendering (BVT) from 2013.

³ This analysis assumed a similar claim profile (incl. SIPs & CBPs) by solicitors as for barristers if solicitors were to claim under FGFS for advocacy. As conduct and multiple parties SIPs are claimed in almost all cases, the calculation assumed that these would also be claimed under FGFS by solicitors. The same claim pattern of FGFS Incidental Payments and SPFs were assumed for solicitors as for barristers.

4.6 Given our intention to move towards harmonising solicitor and barrister advocacy payments, the consultation options below set out ways in which the currently higher rates paid to barristers under FGFS are reduced to pave the way for further harmonisation, if that is the outcome following the consultation beginning in the autumn of this year.

Living within Budget

4.7 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.

4.8 Expenditure under the FGFS has continued to increase significantly. Figures are set out in the **Impact Assessment** (page 30) and replicated below for convenience. **Table 1** shows the approximate total expenditure under FGFS in the last five years.

Table 1 - FGFS – Bills Paid (cash)⁴

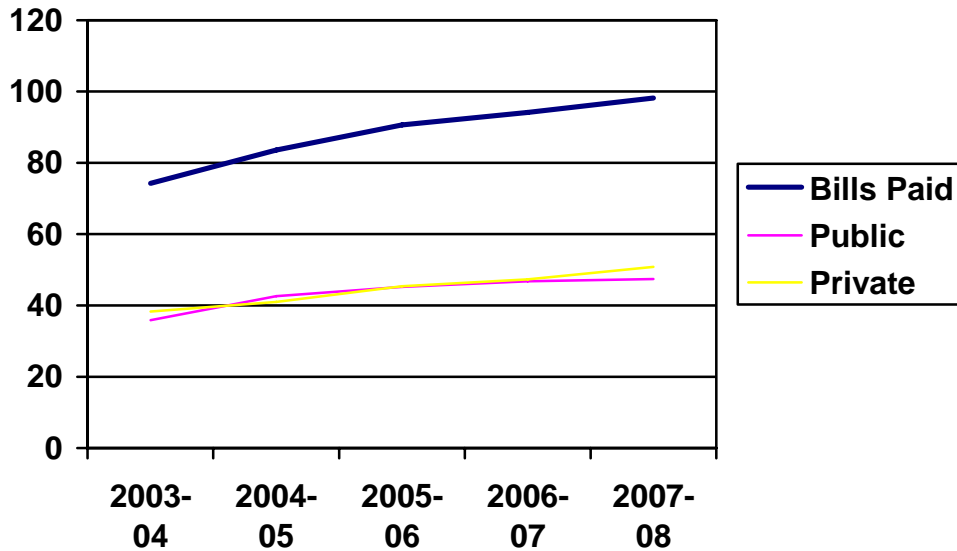
Year	Private Law ⁵	Public Law ⁶	Total Expenditure	Change year-on-year
2003-04	£38.3m	£35.9m	£74.2m	
2004-05	£41m	£42.6m	£83.6m	+12.7%
2005-06	£45.4m	£45.2m	£90.6m	+8.5%
2006-07	£47.3m	£46.8m	£94.1m	+3.7%
2007-08	£50.8m	£47.4m	£98.2m	+4.4%

4.9 Table 1 represent 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 significantly. We have not broken down the bills paid figures into averages per case because the proportion of a case billed in a given year fluctuates due to various factors and therefore bills paid trends at the level of an individual case are not necessarily significant. Table 1 is set out visually in **Figure 1** below:

⁴ Expenditure figures fluctuate slightly as they are updated with the latest information regularly by LSC. These figures are based on current information. The latest figures will be used in deciding the way forward following consultation.

⁵ Private Law includes category 1 (family injunctions), 3 (private law children) and 4 (ancillary relief) FGFS work

⁶ Public Law includes category 2 (public law children) FGFS work.



4.10 In order to look at the trends in average case costs, a more reliable guide is the total amount paid at the end of a closed case. **Table 2** sets out the total expenditure on closed cases and the trends in average case costs over the last four years for which we have figures (confirmed figures for 2007-08 are not yet available).

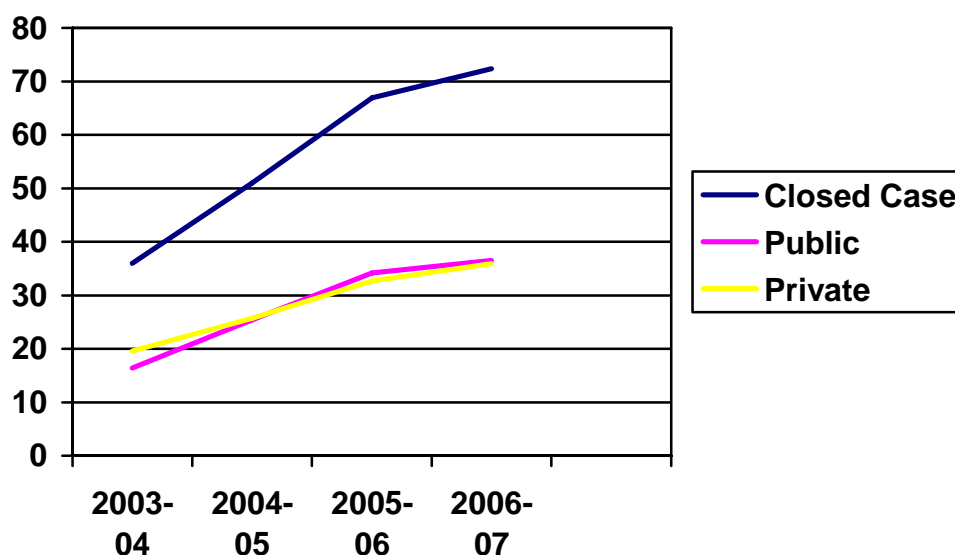
Table 2 - FGFS – Closed Case Costs⁷

Public Law			
<i>year closed</i>	<i>No. of cases using counsel</i>	<i>Average FGF per case</i>	<i>Total FGFS expenditure</i>
2003-04	10,391	£1,576	£16.4m
2004-05	11,003	£2,307	£25.4m
2005-06	12,208	£2,803	£34.2m
2006-07	12,857	£2,837	£36.5m
Private Law			
<i>year closed</i>	<i>No. of cases using counsel</i>	<i>Average FGF per case</i>	<i>Total FGFS expenditure</i>
2003-04	42,853	£458	£19.6m
2004-05	40,046	£641	£25.7m
2005-06	40,785	£801	£32.7m
2006-07	40,336	£890	£35.9m

⁷ Expenditure figures fluctuate slightly as they are updated with the latest information regularly by LSC. These figures are based on current information. The latest figures will be used in deciding the way forward following consultation.

Overall		
year	Total FGFS expenditure	Change year-on-year
2003-04	£36m	
2004-05	£51m	+42%
2005-06	£66.9m	+31%
2006-07	£72.4m	+8%

4.11 Table 2 shows that total expenditure for both Public and Private Law has increased significantly in the last four years, doubling over that period. Expenditure increased despite a reduction in the number of private law certificates issued, and, in both public and private law, expenditure increased in excess of volume increases. Average case costs in both Public and Private Law have also risen significantly, almost doubling in four years. This is set out visually at **Figure 2**:



4.12 The aim of a new family advocacy scheme in April 2008 would have been to maintain current expenditure on solicitor and barrister family advocacy. This would have meant that total expenditure would have remained constant, based on the same volume of work. If volumes increased, more would be spent. However, the scheme would have effectively capped costs and prevented further year-on-year increases in average costs, so removing the inflationary element of expenditure increases.

4.13 The Department's budgetary projections had taken into account this capping of expenditure, and reduced expenditure of approximately £13m was anticipated over the next two years, as set out in **Table 3**.

Table 3 - Anticipated Expenditure Reductions under April 2008 Family Advocacy Scheme (RAB) ⁸

2009-10	£1m
2010-11	£12m

4.14 Legal aid operates within a fixed budget. Given the deferral of the new family advocacy arrangements until 2010, the Department is obliged to take action to remain within budget. Therefore the consultation proposals below set out different options for reducing FGFS expenditure in order to live within budget, while ensuring the provision of services by sufficient numbers of competent advocates.

4.15 The MoJ and LSC will also keep under review whether any measures to limit demand for specific types of civil legal aid are needed, particularly for the later part of the period covered by current Expenditure Plans. If any do have to be put forward, they will be based on an assessment of relative priorities and will be the subject of consultation. Clearly, if we do not take action to reduce expenditure on FGFS and live within budget, any proposed limitations to client demand would need to be more significant.

⁸ Expenditure figures fluctuate slightly as they are updated with the latest information regularly by LSC. These figures are based on current information. The latest figures will be used in deciding the way forward following consultation.

Consultation Proposals

- 5.1 Below are set out several options intended to both (a) move towards harmonising the rates paid to solicitors and barristers for family advocacy, and (b) reduce FGFS expenditure to ensure that the Department lives within its budget, while also considering the factors set out at section 25 of the Access to Justice Act 1999.

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

- 5.2 This option is 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.
- 5.3 This option would help to harmonise solicitor and barrister family advocacy payments. It would also help the Department to live within budget. For example (based on £98m 07-08 bills paid), a **7%** reduction in expenditure, applying to all new work from implementation, would reduce expenditure by approximately **£7m** (RAB) per annum. This could deliver approximately **£14m** in reductions over 2009-10 to 2010-11.
- 5.4 This option is also fair, in that it applies to all categories of work equally, and all advocates equally regardless of their claiming pattern. An across the board reduction would reduce FGFS expenditure and therefore help to harmonise solicitor and barrister family advocacy payments. This option would be straightforward to understand, apply and administrate.

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

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

Q3: Are there ways to mitigate any disadvantages of option A?

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

Option B – Abolition or reduction of Special Issue Payments

- 5.5 This option is to abolish or reduce Special Issue Payments (SIPs). SIPs are claimed fairly regularly. For example, in 2006-07 SIPs were claimed in 62% of FGFS claims (in closed cases). Where they were claimed, an average of 7.37 SIPs were claimed (many SIPs are claimed more than

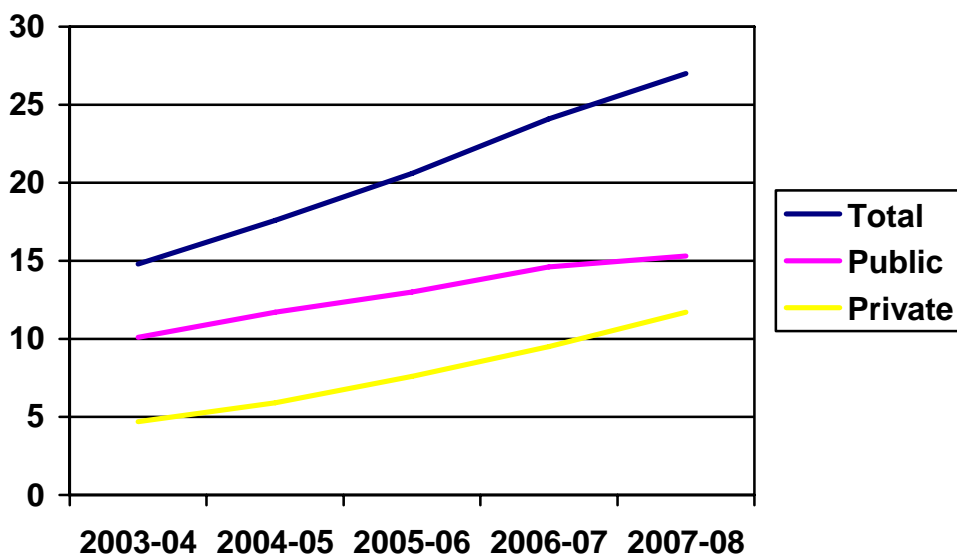
once; on average 2.4 different SIPs are claimed). In 2007-08 the proportion of SIPs claimed remained static at 62%.

- 5.6 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).
- 5.7 Stakeholders including the professions and judiciary have indicated that the current payment scheme is too complicated, and that the role of SIPs should be reconsidered. It is therefore likely that proposals for the new family advocacy scheme planned for April 2010 will include radically simplifying it. The abolition of SIPs would lay the foundations for this simplification (but see below).
- 5.8 The abolition of SIPs would reduce FGFS expenditure and therefore help to harmonise solicitor and barrister family advocacy payments. For example, total expenditure on SIPs is set out in **Table 4** below:

Table 4 - FGFS – SIPs – Bills Paid (Cash)

Year	Private Law	Public Law	Total Expenditure
2003-04	£4.7m	£10.1m	£14.8m
2004-05	£5.9m	£11.7m	£17.6m
2005-06	£7.6m	£13m	£20.6m
2006-07	£9.5m	£14.6m	£24.1m
2007-08	£11.7m	£15.3m	£27m

5.9 And again visually at **Figure 3**:



- 5.10 It could also make the FGFS much simpler, removing the need to calculate the effect of the relevant SIPs on the fee. It could also preclude the need for judges to certify the SIPs claimed by advocates, and so might help to reduce any administrative burden on the judiciary. Where bills are processed by the LSC, the assessment process would be simplified, potentially bringing small administrative savings.
- 5.11 One issue to consider with this option is that SIPs contribute differing amounts to expenditure in different categories of work. For example, SIPs form 29.4% of the expenditure in Special Children Act cases (category 2), but only 20.6% of expenditure in financial provision cases (category 4). Abolition of all SIPs could reduce the remuneration of some categories of work more than others.
- 5.12 One solution to this would be (if we were to abolish SIPs and gain the benefits described above) to recycle some of the money previously paid in SIPs into increases in the base fees. This money could be targeted so that any anomalies caused by SIPs contributing to different categories of work in different proportions could be smoothed out. For example, based on 07-08 figures, if SIPs were abolished for all new work from implementation, and 75% of the spend on SIPs were recycled back into base fees, expenditure could be reduced by **£6.75m** (RAB) per annum. This could deliver **£13.5m** in reductions over 2009-10 to 2010-11.

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

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

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

Q8: To what extent should SIPs be reduced or abolished?

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

- 5.13 This option is to abolish or reduce Special Preparation Fees (SPFs) (see para. 3.25 above) and Court Bundle Payments (CBPs) (see para 3.22) currently paid to advocates.
- 5.14 SPF are paid at fixed hourly rates, while CBPs are fixed amounts – depending on the bundle size and the type of hearing. The expenditure saved by this reduction would not be recycled back into other uplifts or base fees.

Special Preparation Fees

- 5.15 SPFs are claimed quite regularly. In 2006-07 they were claimed in 29% of closed cases. In 2007-08, they were claimed in 28% of closed cases. Analysis carried out by the MoJ has shown that expenditure on SPFs is

running at eight times higher than that originally planned for in 2005. For example, in 2007-08 SPF spend was modelled to be approximately £700k, but was in fact £5.5m – this overspend increased FGFS expenditure by **£4.8m**.

Table 5 - FGFS – SPF expenditure in closed cases

Year	SPF
2003-04	£4.6m
2004-05	£6.6m
2005-06	£6.4m
2006-07	£6m
2007-08	£5.5m

Court Bundle Payments

5.16 CBPs are claimed regularly. In 2006-07 they were claimed in 45% of closed cases. In 2007-08 they were claimed in 46% of closed cases. In both years on average 1.9 different CBPs were claimed. CBPs are contributing significantly more to FGFS expenditure than envisaged. CBPs are running at over twice that originally planned for in 2005. For example, in 2007-08 CBP expenditure was modelled to be approximately £3.8m, but was in fact £8.6m – this increased FGFS expenditure by approximately **£4.8m**.

Table 6 - FGFS – CBP expenditure in closed cases

Year	CBP 1 and 2
2003-04	£5.1m
2004-05	£6.9m
2005-06	£8.1m
2006-07	£8.3m
2007-08	£8.6m

5.17 Table 7 summarises total expenditure over the last five years on SPFs and CBPs.

Table 7 - FGFS – Total SPF and CBP expenditure in closed cases

Year	CBP 1 and 2
2003-04	£9.7m
2004-05	£13.5m
2005-06	£14.5m
2006-07	£14.3m
2007-08	£14.1m

5.18 **Table 8** below indicates how current spend on SPFs and CBPs is distributed between the 4 categories of the FGFS.

Table 8 - Breakdown by FGFS category of SPF/CBP Closed Case Spend (2007-08)

	Public Law	Private Law	Ancillary Relief	Injunctions
SPF	£3.4m	£1.3m	£0.5m	£0.3m
CBP	£5.3m	£1.9m	£0.9m	£0.5m

5.19 Given the significant increase in expenditure on SPFs and CBPs and our need to provide services within our fixed budget, this option proposes to abolish or reduce the SPF and CBP payments in the FGFS.

5.20 As can be seen from table 8, SPFs and CBPs contribute different amounts to different categories of work. Abolition of CBPs or SPFs would mean a more pronounced reduction in expenditure in some categories than others. However both bolt-ons are currently contributing significantly more to expenditure in all categories than was planned for them.

5.21 One option is to reduce CBPs and SPFs by a percentage. Such a reduction would apply evenly to all categories of work, and would preserve the differential expenditure in different categories of work on these bolt-ons (although at a lower rate). If, for example, SPFs and CBP payments were reduced by 50% for all new work from implementation, then this would reduce FGFS expenditure by approximately **£7m (RAB)** per annum. This could deliver expenditure reductions of approximately **£14m** over 2009-10 to 2010-11.

5.22 Reducing or abolishing SPFs and CBPs would reduce FGFS expenditure and therefore help to harmonise solicitor and barrister family advocacy payments. It would be simple to apply and to understand. It

would also provide the means for the Department to live within its budget.

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

Q10: Are there reasons not to pursue option C? What are they?

Q11: Are there ways to mitigate any disadvantages of option C?

Q12: To what extent should CBPs and/or SPFs be reduced or abolished?

Proposed Transitional Arrangements

5.23 Subject to the outcome of this consultation, we propose to apply the changes to all family advocacy work where counsel is instructed to conduct that work on or after the date of implementation (in early 2009).

5.24 The single family advocacy scheme which is currently being developed by the LSC will be consulted on in September 2008. That scheme is expected to be implemented on 1 April 2010. It is expected that it will apply only to new cases on or after that date.

5.25 This means that the proposals set out in this paper will apply immediately upon implementation, and will continue to apply to the cases affected until the end of the case. Cases which are remunerated under these changes to the FGFS are unlikely to be affected by the introduction of the single family advocacy scheme.

5.26 If the changes to FGFS introduced through this current consultation were instead applied to new cases only (instead of all family advocacy work where counsel is instructed to conduct that work on or after the date of implementation, as set out above), then reductions in expenditure would occur more slowly. This is because cases take a certain amount of time to work through the courts, and the reductions apply only to work done as the new cases progress. If this was the transitional arrangement chosen, this would mean that in order to achieve the necessary reductions to FGFS expenditure over 2009-2011 then any reductions to FGFS, such as those described above, would need to be significantly greater than those needed under our preferred transitional arrangement.

Q13: Do you agree with our proposals regarding transitional arrangements? If not, please explain why.

Q14: Have you any other comments or suggestions?

Questionnaire

Below is set out a summary of the consultation questions.

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

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

Q3: Are there ways to mitigate any disadvantages of option A?

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

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

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

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

Q8: To what extent should SIPs be reduced or abolished?

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

Q10: Are there reasons not to pursue option C? What are they?

Q11: Are there ways to mitigate any disadvantages of option C?

Q12: To what extent should CBPs and/or SPFs be reduced or abolished?

Q13: Do you agree with our proposals regarding transitional arrangements? If not, please explain why.

Q14: Have you any other comments or suggestions?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by **Wednesday 10 September 2008** to:

Susan Chamberlain
Civil and Family Legal Aid Strategy
Ministry of Justice
3.17 Selborne House
54-60 Victoria Street
London SW1E 6QW

Fax: 020 7210 8780

Email: susan.chamberlain@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.justice.gov.uk/index.htm>.

Alternative format versions of this publication can be requested from the address above.

Publication of response

A paper summarising the responses to this consultation will be published within 3 month's time. The response paper will be available online at <http://www.justice.gov.uk/index.htm>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that

confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Indicative Consultation Timetable

Date	Event
18 June – 10 September 2008	12-week consultation on proposals
September 2008	Publication of consultation paper on family phase 2, including a single advocacy fee scheme for solicitors and barristers from 2010
November 2008	Publication of consultation response paper and final Impact Assessment
Late 2008 / Early 2009	4-week consultation on amending FGF Order
January / February 2009	Order made
February / March 2009	Amending FGF Order comes into force

Impact Assessment

The following pages contain the initial Impact Assessment.

Summary: Intervention & Options		
Department /Agency: Ministry of Justice	Title: Impact Assessment of consultation on changes to family legal aid fees for barristers	
Stage: Consultation	Version: 1.0	Date: 18 June 2008
Related Publications: Legal deed of agreement between the MoJ, Legal Services Commission (LSC) and the Law Society of England and Wales (TLS)		

Available to view or download at:

http://www.legalservices.gov.uk/docs/civil_contracting/FinalDeedofSettlement.pdf

Contact for enquiries: Selma Waley

Telephone: 0207 210 8355

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

Legal aid operates within a fixed budget but expenditure under the Family Graduated Fee Scheme (FGFS) for barristers has risen steadily. If this continues unaddressed it could lead to cuts to client eligibility or scope. 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 Family Graduated Fee Scheme (FGFS) we will be able to live within our allocated resources. This will help to reduce the risk of cuts to legal aid services to clients. In addition, this will be a first step towards harmonizing 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 issued in 2010. Reductions in civil client scope or eligibility are undesirable the Government wants to help as many people as possible within the existing resources. The consultation proposes reductions to payments to barristers. The policy options set out in the consultation paper are (a) a straight 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.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The LSC conducts ongoing data gathering to assess expenditure on legal aid, which is summarised at the start of each financial year in their Annual Report.

Ministerial Sign-off For consultation stage Impact Assessments:

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:

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 members of the family bar who conduct family work funded by legal aid.
	One-off (Transition)	Yrs	
	£	2	
	Average Annual Cost (excluding one-off)		
£ circa £6.5m		Total Cost (PV)	£ circa £13m
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 LSC, allowing them to live within their allocated budget. Reductions will also indirectly benefit clients as services will not need to be reduced in order to meet this particular shortfall.
	One-off	Yrs	
	£ 0	2	
	Average Annual Benefit (excluding one-off)		
£ circa £6.5m		Total Benefit (PV)	£ circa £13m
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 risk that reductions to rates could reduce the number of barristers willing to do this work, and this needs to be monitored. However, use of counsel has risen significantly in recent years, and was continuing to rise in some areas even when fees were lower before 2005.

Price Base Year 2008	Time Period Years 2	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	England & Wales			
On what date will the policy be implemented?	February 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	Small	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; Public law children; Private law children (excluding ancillary relief); and Ancillary Relief. Standard fees, uplifts and bolt-ons are payable in each of the categories, but the exact amount of the fee or uplift varies from category to category. Standard fees are payable for different types of activity.

Legal aid operates within a fixed budget. The Department is obliged to take action to remain within budget, while maintaining services by a sufficient number of competent persons and bodies. The deferral until 2010 of the new family advocacy arrangements originally planned for April 2008 as part of the Unified Contract dispute agreement means that the anticipated reductions in FGFS expenditure of £13m over 2009-2011 will not now be realised. In addition, the existing disparity between solicitor and barrister family advocacy payment rates will continue unless action is taken. Therefore the consultation proposals below set out different options for reducing FGFS expenditure in order to live within budget, while ensuring the provision of services by sufficient numbers of competent advocates, 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. **Table 1** shows the approximate total expenditure under FGFS in the last five years.

Table 1 - FGFS - Bills Paid (cash)¹				
Year	Private Law²	Public Law³	Total Expenditure	Change year-on-year
2003-04	£38.3m	£35.9m	£74.2m	
2004-05	£41m	£42.6m	£83.6m	+12.7%
2005-06	£45.4m	£45.2m	£90.6m	+8.5%
2006-07	£47.3m	£46.8m	£94.1m	+3.7%
2007-08	£50.8m	£47.4m	£98.2m	+4.4%

Table 1 represent 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 significantly. We have not broken down the bills paid figures into averages per case because the proportion of a case billed in a given year fluctuates due to various factors and therefore bills paid trends at the level of an individual case are not necessarily significant.

In order to look at the trends in average case costs, a more reliable guide is the total amount paid at the end of a closed case. **Table 2** sets out the total expenditure on closed cases and the trends in average case costs over the last four years for which we have figures (confirmed figures for 2007-08 are not yet available).

¹ Expenditure figures fluctuate slightly as they are updated with the latest information regularly by LSC. These figures are based on current information. The latest figures will be used in deciding the way forward following consultation.

² Private Law includes category 1 (family injunctions), 3 (private law children) and 4 (ancillary relief) FGFS work

³ Public Law includes category 2 (public law children) FGFS work.

Table 2 – FGFS – Closed Case Costs⁴			
Public Law			
<i>year closed</i>	<i>No. of cases using counsel</i>	<i>Average FGF per case</i>	<i>Total FGFS expenditure</i>
2003-04	10,391	£1,576	£16.4m
2004-05	11,003	£2,307	£25.4m
2005-06	12,208	£2,803	£34.2m
2006-07	12,857	£2,837	£36.5m
Private Law			
<i>year closed</i>	<i>No. of cases using counsel</i>	<i>Average FGF per case</i>	<i>Total FGFS expenditure</i>
2003-04	42,853	£458	£19.6m
2004-05	40,046	£641	£25.7m
2005-06	40,785	£801	£32.7m
2006-07	40,336	£890	£35.9m
Overall			
<i>year</i>	<i>Total FGFS expenditure</i>		<i>Change year-on-year</i>
2003-04	£36m		
2004-05	£51m		+42%
2005-06	£66.9m		+31%
2006-07	£72.4m		+8%

Table 2 shows that total expenditure for both Public and Private Law has increased significantly in the last four years, doubling over that period. Expenditure increased despite a reduction in the number of private law certificates issued, and, in both public and private law, expenditure increased in excess of volume increases. Average case costs in both Public and Private Law have also risen significantly, almost doubling in four years.

The aim of a new family advocacy scheme in April 2008 would have been to maintain current expenditure on solicitor and barrister family advocacy. This would have meant that total expenditure would have remained constant, based on the same volume of work. If volumes increased, more would be spent. However, the scheme would have effectively capped costs and prevented further year-on-year increases in average costs, so removing the inflationary element of expenditure increases.

The Department's budgetary projections had taken into account this capping of expenditure, and reduced expenditure of approximately **£13m** was anticipated over the next two years, as set out in **Table 3**.

Table 3 – Anticipated Expenditure Reductions under April 2008 Family Advocacy Scheme (RAB)⁵	
2009-10	£1m
2010-11	£12m

Legal aid operates within a fixed budget. Given the deferral of the new family advocacy arrangements until 2010, the Department is obliged to take action to remain within budget. Therefore the consultation proposals below set out different options for reducing FGFS expenditure in order to live within budget, while ensuring the provision of services by sufficient numbers of competent advocates.

The MoJ and LSC will also keep under review whether any measures to limit demand for specific types of civil legal aid are needed, particularly for the later part of the period covered by current Expenditure Plans. If any do have to be put forward, they will be based on an assessment of relative priorities and will

⁴ Expenditure figures fluctuate slightly as they are updated with the latest information regularly by LSC. These figures are based on current information. The latest figures will be used in deciding the way forward following consultation.

⁵ Expenditure figures fluctuate slightly as they are updated with the latest information regularly by LSC. These figures are based on current information. The latest figures will be used in deciding the way forward following consultation.

be the subject of consultation. Clearly, if we do not take action to reduce expenditure on FGFS and live within budget, any proposed limitations to client demand would need to be more significant.

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

This option is 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.

This option would help to harmonise solicitor and barrister family advocacy payments. It would also help the Department to live within budget. For example, a **7%** reduction in expenditure, applying to all new work from implementation (07-08 bills paid), would reduce expenditure by approximately **£7m** (RAB) per annum. This could deliver **£14m** in reductions over 2009-10 to 2010-11.

This option is also fair, in that it applies to all categories of work equally, and all advocates equally regardless of their claiming pattern. An across the board reduction would reduce FGFS expenditure and therefore help to harmonise solicitor and barrister family advocacy payments. This option would be straightforward to understand, apply and administrate.

Option B: Abolition of all Special Issue Payments (SIPs)

This option is to abolish or reduce Special Issue Payments (SIPs). SIPs are claimed fairly regularly. For example, in 2006-07 SIPs were claimed in 62% of FGFS claims (in closed cases). Where they were claimed, an average of 7.37 SIPs were claimed (many SIPs are claimed more than once; on average 2.4 different SIPs are claimed). In 2007-08 the proportion of SIPs claimed remained static at 62%.

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 have indicated that the current payment scheme is too complicated, and that the role of SIPs should be reconsidered. It is therefore likely that proposals for the new family advocacy scheme planned for April 2010 will include radically simplifying it. The abolition of SIPs would lay the foundations for this simplification (but see below).

The abolition of SIPs would reduce FGFS expenditure and therefore help to harmonise solicitor and barrister family advocacy payments. For example, total expenditure on SIPs is set out in **Table 4** below:

Year	Private Law	Public Law	Total Expenditure
2003-04	£4.7m	£10.1m	£14.8m
2004-05	£5.9m	£11.7m	£17.6m
2005-06	£7.6m	£13m	£20.6m
2006-07	£9.5m	£14.6m	£24.1m
2007-08	£11.7m	£15.3m	£27m

It could also make the FGFS much simpler, removing the need to calculate the effect of the relevant SIPs on the fee. It could also preclude the need for judges to certify the SIPs claimed by advocates, and so might help to reduce any administrative burden on the judiciary. Where bills are processed by the LSC, the assessment process would be simplified, potentially bringing small administrative savings.

One issue to consider with this option is that SIPs contribute differing amounts to expenditure in different categories of work. For example, SIPs form 29.4% of the expenditure in Special Children Act cases (category 2), but only 20.6% of expenditure in financial provision cases (category 4). Abolition of all SIPs could reduce the remuneration of some categories of work more than others.

One solution to this would be (if we were to abolish SIPs and gain the benefits described above) to recycle some of the money previously paid in SIPs into increases in the base fees. This money could be targeted so that any anomalies caused by SIPs contributing to different categories of work in different proportions could be smoothed out. For example, based on 07-08 figures, if SIPs were abolished for all new work from implementation, and 75% of the spend on SIPs were recycled back into base fees, expenditure could be reduced by **£6.75m** (RAB) per annum. This could deliver **£13.5m** in reductions over 2009-10 to 2010-11.

Option C: Abolition of Special Preparation Fees (SPFs) and 50% reduction of Court Bundle Payments (CBPs)

This option is to abolish or reduce Special Preparation Fees (SPFs) and Court Bundle Payments (CBPs) currently paid to advocates.

SPF are paid at fixed hourly rates, while CBPs are fixed amounts – depending on the bundle size and the type of hearing. The expenditure saved by this reduction would not be recycled back into other uplifts or base fees.

Special Preparation Fees

SPFs are claimed quite regularly. In 2006-07 they were claimed in 29% of closed cases. In 2007-08, they were claimed in 28% of closed cases. Analysis carried out by the MoJ has shown that expenditure on SPFs is running at eight times higher than that originally planned for in 2005. For example, in 2007-08 SPF spend was modelled to be approximately £700k, but was in fact £5.5m - this overspend increased FGFS expenditure by **£4.8m**.

Table 5 – FGFS – SPF expenditure in closed cases	
Year	SPF
2003-04	£4.6m
2004-05	£6.6m
2005-06	£6.4m
2006-07	£6m
2007-08	£5.5m

Court Bundle Payments

CBPs are claimed regularly. In 2006-07 they were claimed in 45% of closed cases. In 2007-08 they were claimed in 46% of closed cases. In both years on average 1.9 different CBPs were claimed. CBPs are contributing significantly more to FGFS expenditure than envisaged. CBPs are running at over twice that originally planned for in 2005. For example, in 2007-08 CBP expenditure was modelled to be approximately £3.8m, but was in fact £8.6m - this increased FGFS expenditure by approximately **£4.8m**.

Table 6 - FGFS – CBP expenditure in closed cases	
Year	CBP 1 and 2
2003-04	£5.1m
2004-05	£6.9m
2005-06	£8.1m
2006-07	£8.3m
2007-08	£8.6m

Table 7 summarises total expenditure over the last five years on SPFs and CBPs.

Table 7 - FGFS – Total SPF and CBP expenditure in closed cases	
Year	CBP 1 and 2
2003-04	£9.7m
2004-05	£13.5m
2005-06	£14.5m
2006-07	£14.3m
2007-08	£14.1m

Table 8 below indicates how current spend on SPFs and CBPs is distributed between the 4 categories of the FGFS.

Table 8 – Breakdown by FGFS category of SPF/CBP Closed Case Spend (2007/08)				
	Public Law	Private Law	Ancillary Relief	Injunctions
SPF	£3.4m	£1.3m	£0.5m	£0.3m
CBP	£5.3m	£1.9m	£0.9m	£0.5m

Given the significant increase in expenditure on SPFs and CBPs and our need to provide services within our fixed budget, this option proposes to abolish or reduce the SPF and CBP payments in the FGFS.

As can be seen from table 8, SPFs and CBPs contribute different amounts to different categories of work. Abolition of CBPs or SPFs would mean a more pronounced reduction in expenditure in some categories than others. However both bolt-ons are currently contributing significantly more to expenditure in all categories than was planned for them.

One option is to reduce CBPs and SPFs by a percentage. Such a reduction would apply evenly to all categories of work, and would preserve the differential expenditure in different categories of work on these bolt-ons (although at a lower rate). If, for example, SPFs and CBP payments were halved for all new work from implementation, then this would reduce FGFS expenditure by approximately **£7m** (RAB) per annum. This could deliver expenditure reductions of approximately **£14m** over 2009-10 to 2010-11.

Reducing or abolishing SPFs and CBPs would reduce FGFS expenditure and therefore help to harmonise solicitor and barrister family advocacy payments. It would be simple to apply and to understand. It would also provide the means for the Department to live within its budget.

Small Firms Impact Test

Scope of Impact

We reviewed the BERR Small Firms Impact Test. Barristers are usually organised in ‘chambers’ which would arguably qualify as micro (1-9) or small (10-49) businesses. Accordingly to Bar Council statistics (December 2007) on the Bar Council website there are 12, 058 barristers in the self-employed Bar, and 1223 Queen’s Counsel (13,281). 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. 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. Therefore the policy proposals in the consultation paper will predominately affect micro- and small-businesses, rather than sole traders. An alternative interpretation would be to view chambers as aggregations of 'sole traders', rather than as micro- or small- businesses, in which case the proposals will predominately affect sole traders.

Following implementation of the Legal Services Act 2007, barristers will be able to form business partnerships with lawyers and non-lawyers. This is likely to increase the size of the businesses to which barristers belong, and shift some of the effect of these policy proposals on to larger businesses. However, this is unlikely to be implemented much earlier than 2010, so this effect may be of limited relevance.

Impact on Family Barristers

It has not been possible to accurately assess the financial impact of the proposed changes on family barristers who conduct this legal aid work.

In order to begin to fully calculate the effect of family fee changes, we would need to know the monetary value of the family legal aid work that individual barristers conduct and we would also need to know how much additional income individual barristers earned from both other types of legal aid work (e.g. civil non-family or criminal), and from privately-earned income. Understanding these factors would give an indication of the proportion of barristers' income which would be affected by the proposed reductions. While the LSC holds some data on legal aid payments, we do not hold information on the privately-earned income of individual family barristers. We encourage representative bodies and other stakeholders to provide relevant data that they hold that would assist in quantifying the effect of the changes.

In 2004 analysis appeared to indicate that the FGFS had been more successful than intended in controlling expenditure. It appeared at the time that FGFS had reduced expenditure by approximately 13% from that under the ex post facto scheme, rather than approximately 5% as anticipated. The then Lord Chancellor agreed to further revisions to the scheme, including an increase in some fees, to increase FGFS expenditure by approximately 8% from February 2005.

While there was no evidence to show that family cases were in fact lacking appropriate representation under FGFS, evidence was presented at the time of a perception amongst solicitors of it being more difficult to obtain counsel for family cases, and this was also a factor in the increases in the fees. A survey of solicitors' firms contracted to the LSC for family work undertaken by the National Centre for Social Research, and a report by Frontier Economics (commissioned by the Department for Constitutional Affairs) - *A market analysis of legal aided services provided by barristers* (March 2004) - were presented. Both reports found that solicitors reported that there was a proportion of the Family Law Bar that were more reluctant to undertake publicly funded work following the introduction of the FGFS.

The Frontier Economics report found that 37% of solicitors reported at least one occasion in the previous year (2003) when they had sought the services of a barrister who was of the appropriate expertise and experience and they had not been able to secure their services. Of the 18,570 family cases conducted by the solicitors in the survey, in 420 cases solicitors were unable to obtain the services of a particular barrister (2.3%) (although they may have subsequently instructed a different barrister). In these cases this was said to be to the detriment of the case in 260 of these 420 cases (approximately 1% of the total cases in the survey). In the vast majority of cases there was no perceived detriment, but there was a perception, based on these anecdotal reports, that some family barristers were ceasing to do this work.

Research⁶ conducted in 2007 by Professor Fenn of Nottingham University Business School shows that the use of, and expenditure on, counsel for family cases actually rose well before the fees were increased in 2005. The increase in use of counsel shown in this study may indicate that the anecdotal reports made by solicitors to Frontier Economics did not reflect the reality of supply. This research indicates that barristers were increasingly taking on this work, even at the lower rates. We are confident that the proposals set out in the consultation would help to control the expenditure of public funds, achieve value for money while ensuring that services continue to be provided to clients by a sufficient number of competent advocates.

⁶ Commissioned by the Legal Services Commission, available at www.legalservices.gov.uk.

Equality Impact Assessment – Initial Screening Summary

The Ministry of Justice is consulting on changes to the legal aid Family Graduated Fee Scheme (FGFS) under which barristers are remunerated for work in family cases. The consultation proposes various ways to reduce expenditure under FGFS in order to live within budget and to avoid needing to cut services to clients, and to take the first step in paying the same for advocacy services, regardless of whether the advocate has a background as a solicitor or barrister. Bar workforce survey data indicates that female and BME barristers, and barristers with a disability or health problem, or those with caring responsibilities, may be impacted by the proposals more. We are therefore developing a full EIA so that any impacts can be considered before a final decision is made.

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

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

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 7210 1326, or email her at consultation@justice.gsi.gov.uk.

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

**Gabrielle Kann
Consultation Co-ordinator
Ministry of Justice
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW**

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 How to respond** section of this paper at page 27.

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