



House of Commons
Justice Committee

**Family legal aid
reform: further
Government response
to the Committee's
Eighth Report of
Session 2008–09**

**First Special Report of Session
2009-10**

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The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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Committee staff

The current staff of the Committee are Fergus Reid (Clerk), Dr Sarah Thatcher (Second Clerk), Hannah Stewart (Committee Legal Specialist), Gemma Buckland (Committee Specialist), Ana Ferreira (Senior Committee Assistant); Sonia Draper (Committee Assistant), Henry Ayi-Hyde (Committee Support Assistant) and Jessica Bridges-Palmer (Committee Media Officer).

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First Special Report

The Justice Committee published its Eighth Report of Session 2008–09 on Family legal aid reform on Wednesday 15 July 2009 (HC 714).

Since then the Government has responded in a number of ways.

- On 20 July 2009, Lord Bach, Parliamentary Under-Secretary of State, Ministry of Justice, and responsible for legal aid, announced that he was deferring his decision on the way ahead for family legal aid subject to further work.¹
- On 14 September 2009, Lord Bach wrote to the Committee saying that—while he felt it was right, in principle, to proceed with a harmonised family advocacy scheme—it was important to ensure that the models, and underpinning assumptions, were accurate and that the Legal Services Commission was working with the legal professions on the detail and a good deal of progress had been made in recognising and rewarding complexity within a revised scheme (but that he intended no further public consultation).²
- On 13 October 2009, The Secretary of State and Lord Chancellor, Rt Hon Jack Straw MP, announced a review, led by Sir Ian Magee, of the existing delivery and governance arrangements of the legal aid system (including options for separating the Criminal Defence Service and the Community Legal Service).³
- On 21 October 2009, Lord Bach announced that more graduation had been introduced into the family legal aid fee scheme structure to reward fairly those advocates undertaking the more difficult and complicated cases and that independent social work in private law cases would continue to be eligible for legal aid funding. He described the reforms as a move of some funding from barristers to solicitor advocates (as barristers and solicitor advocates will now receive the same fees for the same work) and as cost-neutral against average case costs in 2007-08.⁴

Most recently, 29 November 2009, the Committee received a further response from the Government in the form of a letter from Lord Bach to the Chairman of the Committee which is appended below.

¹ Written Ministerial Statement, 20 July 2009, Official Report, col. WS 156

² Fifth Special Report, Justice Committee, Session 2008-09, HC 1018

³ Written Ministerial Statement, 13 October 2009, Official Report, col WS 23

⁴ Written Ministerial Statement, 21 October 2009, Official Report, col. WS 65

Appendix: Further Government response

I am writing further to my letter to you of 14 September and following my recent Written Ministerial Statement (Official report, Column WS 65) of 21 October, announcing the way ahead following our joint consultation with the Legal Services Commission (LSC) on “Family Legal Aid Funding from 2010”.

You will recall that I stated in my previous letter, that I would submit a fuller response to the Committee’s report on our family legal aid reforms, (Eight Report of Session 2008/09) once I had decided on and announced the way ahead. The Consultation response and Impact Assessment were published on the Legal Service Commission’s (LSC) website on the same day as my announcement. I understand that the LSC has already ensured that hard copies of the response were made available to the Committee, but for ease of reference, I also attach the relevant link to their website, below, where the Impact Assessment and other relevant documentation can be found.⁵

I am sure that the Committee will by now have examined both documents in detail and will therefore appreciate that many of the issues raised in its report have effectively fallen away. Where possible, I believe our final proposals have taken account of a number of the key points of concern raised and I am very grateful to the Committee for their input into the consultation and final development process.

On 20 July, I announced that I was deferring my decision on the way ahead (Official Report, Column WS 156) and asked my officials to undertake further analysis of the assumptions that underpin the modelling of the fee schemes, to ensure the accuracy of that modelling. I believe this additional work was necessary—not only due to concerns that had been expressed about the accuracy of the data used to model the scheme—but also because we had made some significant changes to our original proposals following detailed discussion with stakeholders about the structure of both the advocacy and representation schemes.

In particular and as I think is evident, we have introduced more graduation into the fee scheme structure to ensure that those advocates who take on the more difficult and complicated cases are fairly rewarded. In addition, I decided not to proceed with our proposal to remove independent social work from scope in private law (Rule 9.5) cases. I know that the Committee was particularly concerned about this proposal following representations made by the National Youth Advocacy Service and their supporters. We had corresponded on this issue well before the final proposals were published and because of the strength of the responses received on this, it was decided not to proceed, but I will return to this in more detail later in this letter.

I am now satisfied that the new fee schemes are based on robust data and accurate modelling, and that the final scheme will allow us to achieve a reasonable balance between complexity and value for money. The new fee schemes direct more money into complex public law cases to ensure that children at risk of abuse take the highest priority for legal services. They do not represent cuts to the family legal aid budget or to the services

⁵ Family Legal Aid Funding from 2010: A Consultation Response, Legal Services Commission, October 2009 (<https://consult.legalservices.gov.uk/inovem/consult.ti/FamilyFees2008/listdocuments>)

received by children and families, but some funding has moved from barristers to solicitor advocates, as barristers and solicitor advocates will now receive the same fees for the same advocacy work. The schemes have been designed to be cost neutral against 2007-08 average case costs.

Although the consultation response and impact assessment represent our formal and detailed response to the consultation process, it may be useful if I summarise the Committee's main issues and our response to them again, here.

Consultation process

Throughout the consultation period—which we extended at stakeholder's request—and beyond, there has been a significant amount of engagement with a range of stakeholders on the shape of the final schemes. The LSC continued a close dialogue with contracted providers, through regular meetings with stakeholder groups such as the Family Representative Body Group and its' Family Stakeholder Group. Membership of both these groups include representatives from the Law Society, Resolution, the Family Law Bar Association, the Legal Aid Practitioners Group, the Department for Children Schools and Families (DCSF), Cafcass and Cafcass Cymru.

The LSC also ran a series of workshops around the country to help facilitate understanding of the impact of the proposals and to gather further views from stakeholders. I understand that these events were considered to have been useful by the majority of attendees. As well as the legal profession, the LSC met with local judiciary, attended local Family Justice Councils and spoke to other individual providers including the National Youth Advocacy Service (NYAS) and independent social workers.

After the consultation closed, they set up a Working Group with representatives from the Family Law Bar Association (FLBA), the Law Society (TLS), the Association of Lawyers for Children (ALC), Resolution and the Legal Aid Practitioner's Group, (LAPG) to discuss proposed amendments to the scheme we consulted on, and also the alternative schemes suggested by individual representative bodies. The Working Group met five times between 21 May and 7 October 2009.

The LSC also took account of new evidence that became available following publication of the consultation paper, and in particular, the findings from the research undertaken by Dr Debora Price on behalf of the FLBA *The Work of the Family Bar—the Week at a Glance* survey (Week-At-A-Glance Survey); and the evaluation of the Public Law Outline (PLO).

I am aware that some stakeholders had wanted the consultation process to continue beyond October, but I am satisfied that further consultation was no longer necessary. The level and results of the engagement that both my Department and the LSC had with stakeholders was acknowledged by the ALC in their press release following publication. They acknowledge that “the original scheme has been radically restructured and revised following in particular extensive input from the leading practitioner groups”. They broadly welcome the announcement and go on to state that “the scheme now proposed is immeasurably better, fairer and more practice-reflective than that originally devised. That shows the benefits of collaborative working within the family justice system.”

Data quality

The LSC has been sharing the available data and the methodology behind the modelling of the fee schemes with members of the representative bodies working group since April 2009. Full details of how the LSC collected and used the data to model the schemes, is set out in Annex B of the response document.

However, in summary—and as highlighted in the Committee’s report—although it was thought that agreement had been reached about the best approach to take in the use of the available data, some issues of concern remained about the risks associated with the use of one data set in particular. As work continued between the LSC and FLBA analysts to try and resolve the remaining issues, it was clear that, following an analysis of the consultation responses that significant changes would need to be made to the original proposals. The emerging changes were significant enough to also require additional modelling and so I then asked my officials to undertake the analysis work of these changes over the summer recess.

During this time, the LSC model itself was tested and found to be sound and the data sources and the estimates and assumptions built on them were improved. In particular, a sensitivity analysis was undertaken of the fee levels which had caused the most concern, so the risks associated with each could be seen. Following this work, MoJ and LSC analysts discussed options to further improve the veracity and robustness of fee modelling process. A different approach to calculating the fee values was agreed and the fee levels recalculated. It is important to note that these changes made had minimal effect on the structure of the fees but simply eradicated several—although unfortunately not all—of the issues raised and discussed by the Bar.

The revised fee levels and the assumptions underpinning them were shared with the working group before publication and are set out in the response document from pages 45 to 47. As I mentioned earlier, members of the stakeholder working group requested more time to analyse the new fee levels, but I was satisfied that there had been a continuous dialogue and protracted consultation with the working group and their analysts while the analysis was taking place. I was also now satisfied that the data and fee model was robust, and so decided to go ahead and publish on 21 October as I did not believe that further consultation was necessary. Furthermore, I believe that additional consultation and further delay to the implementation of the new contract in 2010 would have led to greater uncertainty for those stakeholders who were already anxious to proceed.

Fee levels—reward for complexity

Many respondents from the Bar had expressed disappointment with the fee levels published in the consultation paper, describing the schemes as too ‘flat’ and not including sufficient complexity to reward experience. The LSC gained a considerable amount of valuable advice on this from the stakeholder working group following the analysis of responses. There were a number of suggestions put forward which were not adopted, such as an alternative scheme modelled by the ALC, or paying solicitors under a suitably modified version of the Family Graduated Fee scheme. These two alternative schemes—as well as all comments on the proposed scheme—were considered, modelled and costed, but both were eventually rejected on cost or other issues of concern. However, a number of

substantive changes were made to the structure of the scheme, to ensure that those advocates who take on the more difficult or complicated cases are fairly rewarded.

In particular, we have introduced more graduation into the fee scheme structure to ensure that those advocates who take on the more difficult and complicated cases are fairly rewarded. For example, hearings will be paid on a time unit basis and not per hearing. There are 2 hearing units, one of 60 minutes and the other two and a half hours. There are bolt-on payments to reward the more complex cases, in public and private law children cases. There is a settlement fee payable in finance cases, 3 levels of court bundle payments, depending on the number of papers and an uplift for work in the county and High Court. Some of the most complex cases are excluded from the scheme, for example, Rule 9.5, forced marriages, Inheritance Act and Trusts of Land Act applications. A table of the fees payable under the Family Advocacy Scheme is set out on pages 45 to 47 in the consultation response document.

Many respondents expressed the view that consideration of the Public Law Outline (PLO) hearings were important, as adjournments are frequent and in the majority of cases at least one more hearing than is specified in the PLO is necessary. The time unit payment basis and introduction of bolt-ons in the revised scheme will mean that cases requiring more time at court will be appropriately remunerated.

Supply & discrimination

The Committee highlighted concerns brought by the Family Bar that any cuts to family legal aid advocacy rates would have a disproportionate effect on female practitioners and those of black and minority ethnic origin (BAME) and lead to an exodus from publicly funded family work.

I believe that the substantial changes made in relation to payment for complexity in the fee levels published, have mitigated the overall effect on the Family Bar. The LSC made considerable efforts to engage with BAME advocates throughout the consultation process in workshops and with the Bar Council Equality and Diversity committee. The Committee agreed that the best way of mitigating impacts on the Bar was to develop a scheme which better reflects complexity.

However, and as the LSC acknowledge in the impact assessment, (at section 7, page 36) female and BAME advocates are still more adversely affected by the new scheme than their white male counterparts, but this is due to their reliance on legal aid as a proportion of overall income, not on anything inherent in the published scheme.

Female barristers, and in particular female BAME barristers, are over-represented in legally aided family work. This means that any proposal involving a reduction in the legal aid fees of self-employed barristers for family work is likely to have a negative disparate impact on female barristers and on female BAME barristers. Neither the Government, nor the LSC has any control over the composition of the family law Bar, the allocation of the work to individual barristers or any disparities in their earning profiles. The LSC report that there was consensus among those attending diversity focus groups they ran during the Quality Assurance for Advocates project, that barriers to progression for women included the influence of clerks and instructing solicitors over the type of work allocated. I understand

that the Bar are doing work to ensure equality in the allocation of work in future and believe this is likely to be the best way to tackle the issue.

Although it is acknowledged, therefore, that these proposals may have an adverse impact on female and/or BAME barristers, those impacts are seen to be necessary to achieve our overall aim of preserving and protecting the legal aid fund for those who need it most.

On the impact of these proposals on entry, retention and progression of the profession in publicly funded work and ultimately the future of the judiciary, there does not appear to be a shortage of pupillages relative to the availability of new tenancies in Chambers, or relative to the needs of prospective employers. There is evidence that significant numbers of female barristers and BAME already leave the self-employed Bar in the early years of practice. Many barristers who are leaving the independent Bar have transferred to the employed Bar, however, and they will therefore still be available as part of the pool from which the judiciary may be chosen—as will the many solicitor advocates that will benefit from the introduction of the harmonised scheme.

Additional changes following consultation

A high level summary of amendments made to the original consultation proposals is set out in the consultation response document on pages 19 to 26. However, one of the main issues that concerned the Committee, was the proposal that the LSC would stop funding for independent guardians and social work in cases where a guardian is required (but not otherwise provided) under Rule 9.5 cases (Rule 9.5 of the Family Proceedings Rules allows a judge to order a child to be made a party to family law proceedings with separate representation). It was also proposed that fees paid by the LSC for independent social work, would be capped at the same level as those paid by the Children and Family Court Advisory Support Service (Cafcass) and CAFCASS Cymru.

On the capping of rates it was established that, although independent social workers undertake a variety of work for different organisations, the qualifications and experience of those undertaking that work, plus similarities in the work undertaken mean that it would not be an effective use of public money for the LSC to pay a higher rate. There is no cap on the number of hours spent on a case, however, and in complex cases it will be reasonable to spend more time on a case. This proposal will therefore be implemented.

Respondents did express the view that experts' costs in general, are very high. Both the Government and LSC acknowledge this point and the Committee will be aware of the recent Ministry of Justice consultation entitled, "Legal Aid: Funding Reforms" which closed on 12 November and proposed standardising and setting maximum payments to experts in criminal and civil legal aid work. We received a good response to this consultation and the results are currently being analysed.

On the funding of independent social work in rule 9.5 cases, a number of respondents agreed that although it was probably not for the LSC to fund this work, (and that this should properly fall to Cafcass) children involved in these proceedings would suffer if LSC funding was simply stopped. The LSC is aware of the issues surrounding the appointment of guardians around the country and the concerns about Cafcass resourcing. Both my Department and the LSC have worked closely with Cafcass and the DCSF on this both during and since the consultation. As a result, it was decided that funding for independent

social work will not be removed at the present time. However, this position remains a concern and we will continue to work with Cafcass to determine the best way to use our mutual resources for the benefit of vulnerable children. Full details on both issues can be found at section 5, pages 65 to 67.

On Family Justice issues more generally, the Ministry of Justice is committed to working with all the agencies and departments involved in delivering family justice, in particular the DCSF, the LSC, Cafcass and CAF/CASS Cymru. To support this, the National Family Justice Board (NFJB) has been established which includes all of these bodies in its membership. It is co-chaired by three ministers representing DCSF, MoJ and the Welsh Assembly Government. The NFJB takes a strategic view of whole system reform across the family justice system.

I am grateful to the Committee and to all stakeholders who made a substantial contribution to the outcome of this consultation and who continue to assist with the policy making process. As the ALC stated in their press statement following publication of the way ahead on family fees, this does show the benefit of collaborative working across Government. I am confident that the fees we are offering are fair and will ensure that people will be able to receive the legal advice and assistance they need. The published scheme also allows us to achieve a reasonable balance between payment for complexity and value for money, which will help achieve our overall aim of sustaining access to the most vulnerable in society.

Lord Bach

Parliamentary Under-Secretary of State

Ministry of Justice

29 November 2009