

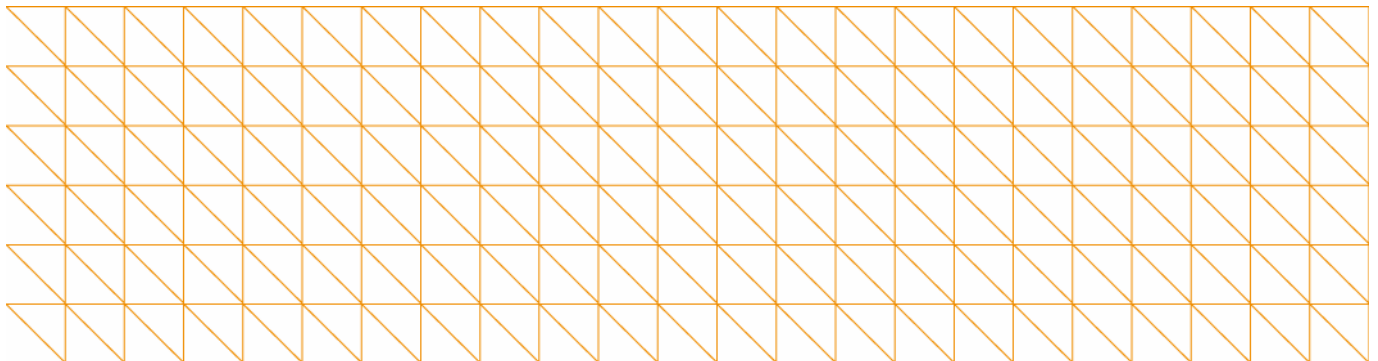


Public Law Family Fees

Response to Consultation

CP 32/07 (R)

June 2008





Ministry of
JUSTICE

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hmcs

Public Law Family Fees

Response to consultation carried out by Her Majesty's Courts Service, part of the Ministry of Justice. This information is also available on the Ministry of Justice website at www.justice.gov.uk

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Introduction

This document is the post-consultation report for the consultation paper, Public Law Family Fees.

It will cover:

- the background to the consultation paper
- a summary of the responses to the consultation generally
- an analysis of the responses to the specific questions raised in the consultation paper
- a reply to some of the comments made
- the next steps following the consultation.

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Background

The consultation paper 'Public Law Family Fees' was published on 19 December 2007. It invited comments to questions concerning specific proposals to increase court fees for public law Children Act and adoption proceedings.

The Consultation Paper explained that the proposed changes are the next step in our wider fees strategy.

The overall objectives of the strategy are to ensure that the system:

- meets its financial targets for cost recovery and net expenditure;
- protects access to justice through a well-targeted system of fee concessions for the less well-off;
- remains viable when patterns of demand change, by achieving as close a match between income and costs within the system as reasonably practicable.

A financial target of full cost recovery for public law family proceedings was set as part of the Government's Comprehensive Spending Review (CSR) 2007. This was reflected in the HMCS and Local Authority funding totals for 2008-09 onwards. The proposals in this consultation are intended to enable HMCS to meet that target.

Views were sought on how fees could be structured in relation to Care Proceedings. The Options discussed were:

- A Single Full Fee payable at issue.
- Variable Application Fee based on quality of preparation – this option reflecting a recommendation of the *Review of the Child Care Proceedings System in England & Wales*, published in May 2006.
- Three fees payable at successive stages of a case (based on the new 'Public Law Outline' procedure introduced in April 2008).

Comments were not sought on the underlying fee policy and the need to cover costs through fees, although comments were made in relation to this. These comments are reflected in this report.

The consultation period closed on 11 March 2008 and this report summarises the responses, including how the consultation process influenced the final shape of the proposals consulted upon.

A list of respondents is at Annex A.

Summary of Responses

Printed copies of the Consultation Paper were sent to more than 200 consultees, and 111 responses were received. The numbers and categories of respondents were as follows:

- 71 Local Authorities
- 16 Legal professions
- 12 Judiciary & Magistracy
- 10 Representative & Other Bodies
- 2 Individuals

Most responded in general terms rather than address the six questions asked. Therefore this analysis is set out in terms of specific points or comments made under a variety of themes, rather than counting responses for/against each question. 1478 comments were made in total.

It was clear that the majority of respondents were against full cost fees for public law child care proceedings.

Three main themes emerged:

1. Full cost recovery was wrong in principle, either generally or where proceedings are cases brought under a statutory obligation
2. Local Authorities would not be able to afford the increased fees
3. Children would be put at risk

1. Full Cost Recovery

Overall one hundred and fifteen comments were received in relation to the principle of full cost recovery (FCR). The total number of comments by category of respondent (with some making more than one point) is as follows:

- 67 Local Authorities
- 19 Legal professions
- 13 Judiciary & Magistracy
- 15 Representative & Other Bodies
- 1 Individual

The comments showed that many respondents did not agree with the principle of full cost recovery generally, or more specifically in relation to public law children cases. Concern was expressed that there had not been any consultation regarding the underlying policy.

Some respondents thought that access to the courts and the provision of the courts should be a public service available as of right to all, and that the 'pay-for-what-you-get' proposal treats access to justice as a consumable rather than a basic human right.

Eleven comments suggested that Care Proceedings work is unique, and as no other work demands the level of intervention that this work does, it should be treated differently. This type of work should be subsidised, or the charges abolished altogether.

Seventeen comments noted that the Crown Prosecution Service is not charged fees to pay for the criminal courts. Local Authorities, when discharging their statutory child protection duties, are in a position analogous to CPS prosecutors in criminal cases. This was perceived as inconsistent. Some added that if HMCS charged for the criminal courts, it should in turn be charged a fee for each criminal punished to pay for prisons and community orders.

There were eighteen comments to the effect that charging fees within the public sector simply re-circulated money and created unnecessary administrative costs.

Response to the comments made on full cost recovery

Government's general policy on fee-charging is set out in *HM Treasury's Fees and Charges Guide*. This makes clear that it is appropriate and desirable to charge for services provided by one department to another (and therefore, even more so, for services within the wider public sector). There are two general reasons given for this:

- it promotes the efficient allocation of resources, by providing paying authorities with a greater incentive to use services economically and efficiently; and
- it improves decision-making and accountability by providing greater visibility of the true cost and benefits of the services provided by charging and paying authority.

In short, the principles of fee-charging policy apply equally to public sector bodies as to other users. Nor is it relevant whether the public body can be said to be acting pursuant of a specific statutory duty or its more general objectives. Indeed, it is axiomatic that court proceedings generally are, or should only be, brought in pursuit of some important objective, whether public policy or access to justice for an individual user. The significance of the issues at stake does not in itself provide a basis for differences in fee policy.

It has long been the case that fees are not charged at all to bring criminal proceedings. So the principles of the Fees & Charges Guide do not apply. There are no plans to change this policy.

The Guide also makes clear that fees should normally be set to recover the full cost of a service (but no more). This has been the long-standing policy in

respect of the civil courts. It has generally been achieved with regard to civil business but not family business. Interim targets to recover a proportion of the cost of family business have been set in recent public expenditure reviews. The target of full cost recovery for public law family proceedings was set in the Comprehensive Spending Review 2007. There was no consultation on this as it is not customary for Government to consult on overall financial plans and targets.

It is recognised that the policy of fee-charging within the public sector necessarily involves some additional transaction costs. These should be kept to a minimum, and HMCS is taking steps to minimise administrative costs in these cases by developing systems to allow local authorities to pay their court fees through overall accounts rather than making separate payments in every case.

2. Funding for Local Authorities

Overall, one hundred and seventy-seven comments expressed concern about whether adequate money had been provided to Local Authorities to enable them to pay for the increases.

The number of comments by category is as follows:

- 93 Local Authorities
- 33 Legal professions
- 23 Judiciary & Magistracy
- 27 Representative & Other Bodies
- 1 Individual

Sixty-one comments questioned whether increases to local authority funding had been included in the Comprehensive Spending Review (CSR), and whether the individual amounts allocated to each authority were adequate.

Six responses received early in the consultation period showed that some authorities were not then aware that the increases had been reflected in the local authority funding settlement.

Other responses accepted that provision had been made, but said that the late notification of the allocation of funds via the Revenue Support Grant had led to difficulties.

Some respondents were concerned that the calculation of each local authority's share of the funding had been based on the Standard Spending Assessment rather than the number of proceedings. This meant that some would receive an inadequate allocation (and others too much).

Twelve local authorities gave specific examples of the amount of funding received in their budgets stating that the amount would be insufficient if based on the actual number of current care proceedings.

Five comments questioned whether there would be sufficient future funding, believing that the amount allocated was a temporary arrangement and not guaranteed for the future.

Twenty comments were made stating that the funding should be ring-fenced. If the monies were not ring-fenced then there may be pressure to use the funding received for other areas of urgent expenditure.

There were a number of specific questions raised regarding how the costs had been calculated. Two comments highlighted that neither the data used to calculate full cost court fees nor the source of the costing for alternative interventions is set out in the paper.

Some respondents stated that local authorities do not have administrative procedures in place to pay large fees at short notice.

Response to the comments made on Local Authority funding

The additional pressure on local authorities, requiring extra funding to cover an increased liability for court fees of up to £40m, has been reflected in the local authorities CSR07 spending settlement and built into the Revenue Support Grant totals. This applies to all three years of the settlement period (2008/09-2010/11) and will form part of the baseline for future spending reviews.

John Healy in a Written Ministerial Statement on 24 January 2008 made adjustments to the local government finance settlement figures to reflect specifically the transfer to local authorities of full funding for public law cases from April 2008.

The basis for the allocation between local authorities was agreed by the Departments of Communities and Local Government and the Department for Children, Schools and Families with the relevant local authority representative committee.

They also agreed that, in line with the general policy on local authority funding, the money should not be formally ring-fenced. As part of the reforms announced in the 2006 Local Government white paper '*Strong and Prosperous Communities*' the Government committed itself to ensure that grants to local authorities would be increasingly paid on an un-hypothecated basis, either through formula or new area based grants. This gives local authorities much greater freedom to spend money in a way that suits their particular local circumstances and priorities.

But in this context, their statutory duty to protect children at risk effectively requires authorities to ensure that sufficient funding is available from their overall resources to pay court fees and other necessary expenditure pursuant to that duty.

The total £40m cost to HMCS of public law proceedings was calculated using a detailed model used to calculate all court fees. This is based on actual total

costs incurred and the volume of different types of case and process. The volume of cases is calculated on the number of fees paid (and does not use the figures published in *Judicial Statistics* which, as some respondents noted, are not accurate for this purpose because they count the number of children involved, not the number of cases).

The figure of £40m is the total cost to HMCS. It does not allow for any savings that may arise from early resolution or fast track procedures under the new Public Law Outline. It is therefore likely to over-estimate the total fees payable by local authorities.

3. Children would be put at risk

Overall thirty-three comments were received about children being at risk because of the increases to court fees. The number of comments by category of respondent is as follows:

- 12 Local Authorities
- 12 Legal professions
- 4 Judiciary & Magistracy
- 5 Representative & Other Bodies

Twenty-seven comments showed that respondents considered children would be left at greater risk, some even going so far as to suggest that children would die, as a result of local authorities being deterred from commencing proceedings by the high amount of the court fees. It was suggested that this might be more likely in regard to chronic cases and in the less well resourced local authorities.

In order to save money, local authorities would instead look at alternative ways to protect children, for example pressurising parents to agree to care under s.20 Children Act 1989 (voluntary applications for secure accommodation). This would deny the child the right to be legally represented.

Some respondents stated that, if these proposals were implemented, the Government could be in breach of its obligations under the UN Convention on the Rights of the Child to ensure children have access to justice.

Response to the Comments Made on Children would be put at risk

Local authorities, through their children's services departments, are under a statutory obligation to protect the interests of children. This means it would be unlawful for them to avoid taking court proceedings for financial reasons.

There is no evidence to suggest that local authorities would act inappropriately in this sense. The Local Government Association (LGA) and the Association of Directors of Children's Services (ADCS) both stated in their responses that they do not accept that Local Authorities are influenced in their approach to initiating proceedings by cost considerations.

We understand that local authorities pay court fees from legal or other budgets, not children's services budgets. So there is no reason to think that those making the decisions in individual cases would be improperly influenced by budgetary considerations.

The 2006 Review of the Child Care Proceedings System in England & Wales found that the average cost to authorities of a care case in legal fees etc. is £35,000. And it costs about £40,000 to keep a child in care for a year and the average duration of a care order is 6 years. If local authorities were influenced by financial considerations, these existing costs would be far more significant than the new court fees.

Responses to Specific Questions

Option 1 – Full fee payable on issue.

Question 1 – Given that fees need to be set to cover the full cost, do you agree that a single application fee is not the best approach? If not, why not?

There were eighty-nine responses, with one hundred and twenty-eight comments (figures in brackets) in relation to this question, and they were made from the following categories of respondents:

- 63 (98) Local Authorities
- 9 (9) Legal professions
- 10 (14) Judiciary & Magistracy
- 6 (7) Representative & Other Bodies
- 1 (0) Individual

Forty-two (47%) respondents agreed, generating 70 comments; and forty-seven (53%) disagreed, generating 57 comments. There was one additional view in relation to this question.

Those that agreed a single application was the best approach did so because it offered more certainty and control over budgets for the local authority.

The main concern, of those who did not agree, was the amount of the fee being too high, and that it might prove to be a deterrent in starting proceedings. Many questioned how the fee had been calculated.

Concerns were raised about the effect of a case settling early once the local authority had paid the full fee, in that the local authority would pay for court time and services not received.

A common concern between those that agreed to a single fee, despite its size, and those that did not agree, was that it should be paid per case not per child.

More than half preferred a single-up front payment, although it appeared from the responses that a lack of understanding or confidence in the way the staged fees has been calculated may have been a big factor in making underlying these views.

Response to the Comments Made on Option 1

Setting single up-front fees would not follow our overall strategy that seeks to achieve a clearer match between costs of the system and income. The continuation of a single fee structure would penalise authorities where cases can be resolved earlier, and do nothing to support the Public Law Outline.

A particular issue was whether court fees were per case or per child. The amount charged will remain per case and will not change to per child.

Option 2 – Variable application fee based on quality of preparation.

Question 2 - Do you agree that a variable fee based on the assessed quality of case preparation is likely to be impracticable? If not, please explain why?

There were ninety responses, with one hundred and eighty-four comments (figures in brackets) in relation to this question, and they were made from the following categories of respondents:

- 63 (134) Local Authorities
- 9 (20) Legal professions
- 11 (14) Judiciary & Magistracy
- 6 (15) Representative & Other Bodies
- 1 (1) Individual

Eighty-eight (98%) respondents agreed generating 183 comments and two (2%) disagreed generating 1 comment.

Of those that agreed, sixty-two comments set out that it would be impracticable to base a variable fee on the assessed quality of case preparation because of the difficulty in assessing case preparation. The queries raised were mostly concerned with: how case preparation would be assessed, by whom, and based on what criteria? Comments pointed out that any assessment process would lead to delay.

Thirty two comments highlighted if assessment were to be introduced then local authorities would need a right of appeal, in that decisions regarding assessments could give rise to challenge and judicial review.

Fifty-nine comments stated that as local authorities would not be in control of all the factors affecting case preparation, it would therefore be unfair for them to carry the burden of variable fees as a result. Factors given as outside the control of the local authority included: the other parties' preparations, unforeseen illness, availability of court time, and whether expert assessment would be required.

Another key point made regarded emergency cases, which by their nature, would be prepared less fully, and could therefore attract a penalty, which was seen as being unfair.

The one comment agreeing with the proposal acknowledged that a variable fee would be challenging, but that it supported the overall direction in terms of good child-care practice.

Response to the Comments Made on Option 2

It is agreed that variable application fees based on quality of preparation would be difficult to manage and/or enforce for a number of reasons given by the respondents.

Option 3 – Incremental fees structured around the Public Law Outline

Question 3 - Do you agree that there should be an incremental structure for care proceedings fees?

There were ninety responses, with one hundred and seventy-one comments (figures in brackets) in relation to this question, and they were made from the following categories of respondents:

- 63 (131) Local Authorities
- 10 (17) Legal professions
- 11 (12) Judiciary & Magistracy
- 5 (11) Representative & Other Bodies
- 1 (0) Individual

Thirty-six (40%) agreed, generating 38 comments; and fifty-four (60%) disagreed, generating 124 comments. There were eight additional comments.

Those that agreed thought that an incremental fee structure was similar to the way other civil fees were charged.

Responses showed an understanding that paying in stages reflected that cases could have early final hearings, which would mean paying fewer fees.

Some Local authorities stated it would help with managing their budgets more effectively as funds would be kept within the local authority for a greater amount of time would be of benefit.

Forty-two comments argued that the level of incremental fees would be dependent on factors outside the control of local authorities.

Concern was expressed that to maximise income courts could hold cases to final hearing.

A number of suggestions were made that included the following:

- Being able to pay fees retrospectively with a system of refunds.
- Paying for the actual time taken and the number of hearings.
- Paying up-front and being refunded for any unmet stages.

Response to the Comments Made on Option 3

It appears from the responses that a lack of understanding of this proposal led to some of the answers made.

Under the Public Law Outline (PLO) final orders can be made at any stage. So it is right that fees are set to reflect the cost of each stage so local authorities do not pay for services needed.

Given the three charging points, this is considerably less than the old process when payment of the ICO and ISO was required every 28 days throughout the life of the case.

Creating a system to refund fees is administratively expensive for both local authorities and the court service with increased costs to process additional transactions.

HMCS is developing new payment systems that should mean local authorities will be able to set up accounts with magistrates' courts enabling them to pay court fees incurred periodically in bulk. This should substantially reduce the administrative cost for local authorities and HMCS associated with drawing and banking a cheque in every case.

Question 4 - Do you agree that the proposed structure strikes the right balance between simplicity and ensuring that paying authorities only pay for what they get?

If you do not agree, please explain why and indicate what alternative structure you would propose.

There were eighty-five responses, with one hundred and five comments (figures in brackets) in relation to this question, and they were made from the following categories of respondents:

- 60 (74) Local Authorities
- 9 (8) Legal professions
- 10 (15) Judiciary & Magistracy
- 5 (7) Representative & Other Bodies
- 1 (1) Individual

Twenty-eight (33%) agreed, generating 21 comments; and fifty-seven (67%) disagreed, generating 74 comments. There were ten additional comments.

Of the twenty-one comments agreeing, seventeen did so in principle, or without giving further details.

There were a number reasons for disagreeing, which included:

Regardless of the structure, local authority respondents questioned whether they would get what they paid for from the high fees, and more specifically

would they get value for money from the services provided by Her Majesty's Courts Service.

Comments included the view that the local authority does not 'get something', as the gain is to society.

There was concern that that the proposed structure would create a disincentive to proceed with more complex cases.

Four comments highlighted that it was not clear from the proposals who would pay if the court required extra hearings, and made the point that no additional fee should be paid if a judge adjourns because of lack of court time to complete the hearing.

Seventeen comments showed concern about how fees had been calculated, wanting more information about the rationale behind the division of fees, especially as there was no evidence on how many cases would end at each stage particularly as the IRH is new.

The following suggestions were made:

- One Local Authority agreed to the question, and suggested that if the 3 stages were adhered to then all stages should start with a flat fee of £1725, and if the case proceeds beyond CMC then a charge of £500 should be made automatically to the local authority.
- The charging point would need to be clearly identified. The Final Hearing fee should only become payable if a matter continues beyond Issues Resolutions Hearing (IRH).

Some respondents raised the following questions:

- What would make an IRH into a Final Hearing?
- Why the proposed cost for PLO2 is more than for PLO3?
- Would the issue fee of £2225 include all interlocutory applications except IRH?
- Would the standard £1900 fee for a Final Hearing be appropriate for all Final Hearings as they could vary in length, it was not felt to be fair that a one hour hearing raised the same fee as a 10 day hearing.

Response to the Comments Made on Question 4

The proposals set the fees at three stages of the case, with no intentions at this time to add additional fees. There is no suggestion of paying again if cases do not get heard or apportioning blame or penalties for cases that are more complex to administer.

The Consultation Paper set out that one of the options showed an initial application fee of £1,725 on the basis that the final order is made at the CMC. A decision has been made to charge £2,225 for all applications. Given that it is

less likely that cases will settle at the CMC stage it was decided to impose the higher fee and refund £500.

There are only three fees:

£2,225 fee for the application

£700 for the IRH hearing or Pre-Hearing Review

£1,900 for a Final Hearing.

Where the court lists more than one IRH or Pre-Hearing review the fee is payable only once. Should either the IRH or Final Hearing not be required, because a final order has been made before either hearing, then the fee is not charged.

Paying in stages, related to the progression of the case according to the PLO process could potentially lead to a minimum fee of £1,725; as opposed to paying the whole fee up-front (as in option 1) with a potentially maximum fee of £4,825.

HMCS has statutory powers to charge fees for the civil and family business in the county, high and magistrates' courts. We use a Full Cost Pricing Model to calculate the average cost for the majority of fees charged under those business streams. The Model contains worksheets that pull together into a 'Recovery by Fee' worksheet the following data:

The volume of fee charge type

The amount of fees received for the year (gross fee income)

The amount of fees received for the year (net fee income)

The direct cost by fee charge type

The calculation of the indirect costs. These costs are an apportionment of costs that belong to global work tasks that span multiple fees, e.g. correspondence, filing etc.

The total cost (administrative staff and judiciary) to process the work from issue to completion

The percentage rate of fee recovery against total cost

The average unit cost

The current cost recovered by way of fee income

The percentage rate of fee recovery against cost.

Many factors will influence the volume of cases, not the least of which will be the new Public Law Outline and the revised guidance to local authorities. We will be closely monitoring fee volumes and comparing these to historical trends and equivalent fees.

Additional Fees

Question 5 - Do you agree with the proposals on additional fees? If not, why not?

There were eighty-two responses, with one hundred and one comments (figures in brackets) in relation to this question, and they were made from the following categories of respondents:

- 57 (73) Local Authorities
- 8 (10) Legal professions
- 10 (12) Judiciary & Magistracy
- 6 (5) Representative & Other Bodies
- 1 (1) Individual

Forty-six (56%) agreed, generating 59 comments; and thirty-six (44%) disagreed, generating 42 comments.

Forty-six comments agreed and either gave no extra comment or agreed with some of the fees being abolished and those remaining the same, but did not agree with the level of the fees.

There were fifteen comments that disagreed, or did not think that court fees should be increased.

Of those comments showing disagreement, fourteen specifically considered that the proposed fees were extortionate with a lack of transparency about how the fees had been calculated. They wondered why some fees had been abolished but others not. Other points made regarded that any savings on these additional fees paled into insignificance compared to the increases in other fees.

Respondents suggested the following:

- The fee should be waived where an application is consolidated with the existing proceedings.
- There should be consistency throughout the courts when charging fees, as some fees are not charged, particularly the fee for s38 when an order is made in the course of proceedings not on the application of the local authority.

Response to the Comments Made on Question 5

Charging of fees is a statutory function, and all courts have to charge the fees as given in the Statutory Instruments at the points required by the rules.

Fee charging in the courts is an administrative function with the authority to charge laid out in the fee orders. We promote consistency of fee taking in the courts by providing comprehensive guidance to court staff.

Question 6 - Do you agree with the proposals to retain a single application fee, rather than an incremental fees structure, in adoption cases?

If not, please explain why and indicate what alternative structure you would propose.

There were eighty-one responses, with one hundred and sixty comments (figures in brackets) in relation to this question, and they were made from the following categories of respondents:

- 55 (108) Local Authorities
- 9 (17) Legal professions
- 10 (22) Judiciary & Magistracy
- 6 (12) Representative & Other Bodies
- 1 (1) Individual

Sixty-eight (84%) agreed, generating 74 comments; and thirteen (16%) disagreed, generating 6 comments. There were 80 additional comments regarding this question.

Sixty-two comments agreed with the proposal to retain a single application fee in adoption cases, as it is government policy to encourage speedy adoption.

As with the other fee options, respondents thought that the fee should be per adoptive family, not per child.

Of the few comments that specifically disagreed with this option the main reason was that the fee(s) were felt to be too high, or that any increase should be a notional amount.

One respondent thought the £400 fee was modest.

Adoption

There were thirteen comments highlighting variations between local authorities regarding the payment of adoption fees and costs for prospective adopters. These variations were that:

- Some local authorities pay the legal adoption fees and/or the costs of the legal representation (which could amount to £3000) for prospective adopters/adoptive parents
- Some local authorities fund private law applications made by family members
- Some local authorities pay the fees for applicants who are not eligible for public funding

Comments were made over specific fee issues; such as if adoption proceedings were concurrent with care proceedings only a nominal fee should be taken.

Placement Application Orders

Forty-seven comments stated that the fee for Placement Orders should be abolished, waived, lowered, or reduced, as most Placement Order applications are consolidated and heard together with existing care order applications.

Seven comments questioned whether the £400 fee would cover both the Placement Order application and Adoption applications, as it was confusing.

One comment asked whether the fee should not be greater than £400 if the Placement Order is not dealt with at the same time as final Care Hearing another final hearing is required.

Additional Comments

Respondents took the opportunity to offer additional comments on a number of topics, which are detailed below. There were a total of **629** extra comments received.

1. Fee payable per case or per child

Concern was expressed, within sixty comments in relation to Question 1 and Question 6, that the proposed fees would be payable for each child and should be payable for each case.

Response to the Comments Made on Fee payable per case or per child

The fees are intended to be for each application made, regardless of the number of children concerned.

2. Public Law Outline (PLO)

Sixty-six comments were made in relation to the Public Law Outline (PLO). The number of comments and categories of responses are as follows:

- 43 Local Authorities
- 9 Legal professions
- 5 Judiciary & Magistracy
- 8 Representative & Other Bodies
- 1 Individual

Thirty-nine comments made set out concern that the consultation had been planned before the PLO had had time to 'bed-down', without sufficient opportunity to synthesise feedback or monitor the number of cases concluding at each stage. A suggestion made was that the staged fees, or new proposals generally, should either be postponed until April 2009 or until the PLO had been established.

Comments made stated that it would be impossible to measure the consequences of increased fees because of the introduction of the fixed fee for remunerating children's lawyers, as well as the introduction of the PLO.

Twelve comments stated that the proposed PLO initiatives are intended to reduce the duration of proceedings and court time taken. This reduction in time would result in a decrease in the cost of care proceedings, and which should result in a reduction of fees.

Response to the Comments Made on Public Law Outline (PLO)

We will monitor fee volumes and compare to historical trends and equivalent fees. However, it will, as always, be difficult to fully understand the precise link between fee levels and volume of cases or new applications. That is because there are many external factors that influence cases, not least of which will be the new PLO and the revised guidance to local authorities. The combined effect of these two initiatives may be to reduce the number of care applications dealt with in court as the revised guidance will lead to fuller exploration of alternatives to care applications with parents, with parents now having access to legal advice when considering the local authorities outline of concerns. The Public Law Outline will ensure robust judicial case management designed to clarify and narrow the issues in dispute which should lead to greater focus and fewer unnecessary hearings.

3. Consultation Process and Impact Assessment

Fifty-seven comments were made regarding the Consultation Process and Impact Assessment. The number of comments and categories of responses are as follows:

- 29 Local Authorities
- 15 Legal professions
- 3 Judiciary & Magistracy
- 10 Representative & Other Bodies

Over half the comments highlighted there was in effect no consultation process, and questioned whether any notice would be taken of the responses.

Nine comments believed they were only being consulted on how the fee structure was to be implemented not whether it should be implemented.

Respondents requested that the government to allow time for proper debate on all matters regarding charging for Public Law work.

Five comments made were with regard to the calculation of the new court fees. They were unclear how the number of applications and the actual 'cost' of providing the court system have been calculated. What figures were used – the number of care cases, the number of applications for a care order, or only those resulting in a care order?

One comment made stated that if there were to be a fall in the number of applications this would result in less revenue from court fees which would in turn lead to a resultant 'hole' in HMCS revenue – and lead arguably to increase in court fees.

No consideration seemed to have been given to how the fees will work in relation to /impact on the new Family & Drug Alcohol Court at Wells Street involving frequent hearings enabling the judge to review progress.

Response to the Comments Made on Consultation Process and Impact Assessment

It is not customary for Government to consult on financial policy, although consideration was given to the policy on full cost. It was decided to move ahead with plans on the basis that the cost of these cases will always be met by the Public Purse and the proposals only sought to transfer the cost from one Department to another.

The consultation paper ran for the standard twelve-week period.

A letter with a copy of the consultation paper went to every local authority asking them to note that public spending plans from April 2008 reflected the proposals and inviting their comments.

DCLG (Department of Communities and Local Government) confirmed to Local Authorities on 7 January that increases to court fees had been taken into account in spending plans for the next three years.

The Regulatory Impact Assessment prepared for the Review of Care Proceedings System in England and Wales (May 2006) identified potential cost savings from reducing delay and/or increasing the number of cases that are addressed without recourse to court proceedings (e.g. through the wider exploration of safe and appropriate alternatives to care proceedings by the local authority).

The argument that court fees will rise as the number of cases fall should not occur given the three stages payments have been set to reflect on average the costs involved in each stage.

The details of how the fees have been based on costs involved can be found at page 16.

4. Local Authorities: consider alternative interventions

Sixty-five comments were made in relation this topic of concern. The number of comments and categories of responses are as follows:

- 26 Local Authorities
- 20 Legal professions
- 6 Judiciary & Magistracy
- 13 Representative & Other Bodies

Nine comments noted costs of court fees being passed to local authorities might act as a disincentive to protect children through the court process. This could lead to a rise in alternative interventions, for example accommodating children under s20, or pressuring relatives or friends of the child to issue applications for residence/special guardianship.

Four comments highlighted that there was no evidence that inappropriate use of the courts was the real issue. The *Research Review: Child Care Proceedings under the Children Act 1989 DCA Research Series 2/06 May 2006* identified a number of other factors outside the control of the local authorities which affected the interventions local authorities took.

Nine comments indicated that their local authorities already consider the possibility of avoiding court proceedings through early intervention, preventative work, alternate family placements with extended family and draw up detailed action plans accordingly with care proceedings as the last resort.

Response to the Comments Made on Local Authorities: consider alternative interventions

There is no reason to suggest that local authorities would act inappropriately in dealing with children at risk.

Children's services have a statutory obligation to protect the interests of children; it would be unlawful for them to avoid taking court proceedings for financial reasons.

The Local Government Association (LGA) and the Association of Director's of Children's Services (ADCS) both stated in their responses that they do not accept that local authorities are influenced in their approach to initiating proceedings by cost considerations.

5. Local Authorities: case preparation

Thirty comments were made in relation the topic of Local Authority case preparation. The number of comments and categories of responses are as follows:

- 22 Local Authorities
- 3 Legal professions
- 1 Judiciary & Magistracy
- 4 Representative & Other Bodies

All comments objected to the inference that local authorities brought cases unnecessarily without complying with statutory guidance, and that they required a financial 'incentive' to so. They were adamant that there was no evidence that local authorities brought case inappropriately as evidenced in the research work of Julia Brophy presented alongside the Care Proceedings Review in 2005.

It was pointed out that if anything, local authorities might be criticised for being too slow in bringing proceedings.

Response to the Comments Made on Local Authorities: case preparation

It is fully accepted that local authorities are not solely responsible for the issues in individual cases that could affect its length and complexity and

ultimately the costs. However, given the new Public Law Outline has four stages and allows a final order to be made at any one of the stages after the first appointment, it is only right that the new fees reflect this and do not impose the full fee where less court time and resources are required.

6. Quality of Service

Twenty-six comments were made regarding Quality of Service. The number of comments and categories of responses are as follows:

- 22 Local Authorities
- 1 Legal professions
- 1 Judiciary & Magistracy
- 2 Representative Bodies

Fourteen comments were made regarding the view that currently courts have difficulty providing an acceptable level of service, and that increasing the fees would not give rise to a better service. The view held was that the proposed changes would require courts to provide value for money and an effective and efficient service.

Comments made the point that the Court Service should examine whether the current service delivery model provides 'value for money' to its customers. Currently, respondents experience problems with: court backlogs, block listing, the court interposing other matters into the lists, adjournments due to lack of court time, barristers and solicitors being kept waiting at court, orders not processed.

Three comments indicated that, in fact, the 'pay as you go' structure would provide less incentive for the Court Service to improve its efficiency.

Two respondents wondered whether there were any proposals to introduce quality assurance standards or service level agreements?

Response to the Comments Made on Quality of Service

HMCS is committed to continually improving the level of service that our court users experience, and we both encourage and value feedback from our customers. During 2007, Ipsos Mori (independent market research company) interviewed over 11,500 court users on their level of satisfaction with the services they had received. Data available as at end March 2008 indicated that overall satisfaction, as compared with the previous year's results, has increased by 3% to 83%. Overall satisfaction of those identified in the family courts was 87%, an increase of 2% on figures for 2006/07. (*The data for 2007/08 is provisional and the final figures will be published in July 2008*).

We recognise there are areas where we can improve further and one of our priorities is around waiting times. We have a programme of activities designed to deliver consistent and high standards of customer service, which supports our commitment to work towards achieving corporate accreditation of the new

government Customer Service Excellence Standard. We will continue to engage and involve our customers in service development and improvement.

7. Legal Aid Reforms & Legal Services Commission

Nineteen comments were made regarding Legal Aid Reforms & the Legal Services Commission. The number of comments and categories of responses are as follows:

- 13 Local Authorities
- 5 Legal professions
- 1 Judiciary & Magistracy

Comments made in relation to changes made by the Legal Services Commission regarded the withdrawal of funding for residential assessments and also the introduction of a fixed fee structure for lawyers. Comments highlighted that changes would directly increase costs to local authorities, as they would then bear the cost of assessments.

Response to the Comments Made on Legal Aid Reforms & Legal Services Commission

Children at risk of abuse take the highest priority for legal services. This priority is reflected in the way that legal aid is provided for children and parents in care proceedings without reference to their financial resources.

No money is being taken out of Civil and Family Legal Aid. The new fee schemes are about spending the budget more effectively so that they can help as many people as possible.

The legal aid reform programme is focused on the needs of clients, rather than providers, and standard fees are essential to this because every increase in average costs means that fewer people can be helped.

8. Public Family Law Fees / Private Family Law Fees

Eighteen comments were made regarding the difference between Public Family Law fees and Private Family Law fees. The number of comments and categories of responses are as follows:

- 14 Local Authorities
- 2 Legal professions
- 2 Judiciary & Magistracy

Thirteen comments pointed out there was no justification for only increasing the fees relating to local authorities whilst leaving unchanged the fees payable by private individuals.

One respondent asked how the 'pay-as-you-go' structure would work where Public Law proceedings arose out of Private Law proceedings?

Response to the Comments Made to Public Family Law Fees / Private Family Law Fees

The consultation on public law fees represents one step in a wider strategy. We will be looking at private law fees at a future stage.

9. Family Proceedings Courts (FPC) & Care Centres

Twelve comments were made regarding the Family Proceedings Courts (FPCs) and Care Centres. The number of comments and categories of responses are as follows:

- 7 Local Authorities
- 1 Judiciary & Magistracy
- 4 Representative & Other Bodies

Four comments made the point that Family Proceedings Courts (FPC) were presumably less costly to operate, as the decision makers were not paid, and therefore local authorities should be charged a reduced fee for pursuing cases through the Magistrates' Courts.

One respondent made the following suggestion that as more complex cases are transferred to the county court – where proceedings take longer, final hearings have greater time estimates, and decisions are made by a member of the judiciary who incurs a salary – perhaps it would be cheaper to deal with all public law cases in a county court given that if they are able to deal with complex matters at virtually the same price – perhaps they could achieve a significant saving on the simpler cases?

Questions raised issues about whether the data used in the Judicial Statistics used the number of care applications or care orders.

Response to the Comments Made on Family Proceedings Courts (FPC) & Care Centres

The calculation of fees for civil and family proceedings is based on taking account of the cost of all resources needed to run the system. This includes the salaries of relevant judiciary and court staff, general administrative costs including the cost of supporting Information Technology systems, accommodation and an appropriate share of overheads.

Given the number of Magistrates' Family Proceedings Courts and Family County Courts that are combining, with more planned for the future, it was not sensible to have different charging levels. The costings therefore take the average of both administrative and judicial time spent on each case. The judicial element in the magistrates' court being the Justices Clerk or equivalent in attendance, whose salary costs are very similar to that of a District Judge in the county court.

Conclusion

After careful consideration of the responses received, ministers decided to proceed with the proposed changes, which took effect on 1 May 2008.¹ The fee increases are necessary to ensure that the family courts are properly funded and are designed to fit with wider reforms of child protection proceedings.

The changes will only affect fees paid by public bodies and not individuals. Fees for applications by parents in care and adoption proceedings remain unchanged.

As set out at the start of this response paper, three main themes emerged from the consultation:

- the principle of setting fees to reflect cost;
- the funding for local authorities
- the concern that children would be put at risk.

For the reasons given earlier and summarised below, ministers were satisfied that these concerns were misplaced, and did not constitute reasons to abandon the proposals.

Government policy on fee-charging, including the expectation of full cost recovery, is clear and long-standing. In particular, HM Treasury's *Fees and Charges Guide* makes clear that the principles of fee-charging policy apply equally to public sector bodies as to other users. It is not relevant whether a public body can be said to acting pursuant of a specific statutory duty or its more general objectives. The significance of the issues at stake does not provide a basis for differences in fee policy.

Adequate funding was provided for local authorities as part of the 2007 spending settlement. During the course of consultation, the Government introduced an adjustment into the Local Government Finance Settlement figures to make visible the sums attributable to these proposals. The basis for the allocation between authorities was agreed with the relevant local authority representative committee, as was the decision that the money should not be formally ring-fenced.

The total figure of £40 million does not take account of any savings that may arise from early resolution or fast track procedures under the new Public Law Outline. It is therefore likely to over-estimate the total fees payable by local authorities resulting in savings to them.

¹ SI 2008 No. 1054 (L.6) *The Family Proceedings Fees Order 2008* and SI 2008 No. 1052 (L.4) *The Magistrates' Courts Fees Order 2008*, laid before Parliament on 9 April.

It is not accepted that children would be put at risk. Local authorities are under a statutory duty to protect children at risk of significant harm. Both the Local Government Association and the Association of Directors of Children's Services, in their responses to the consultation, confirmed that local authorities are not influenced by cost considerations in their approach to initiating proceedings or in their decisions about appropriate pre-proceedings work.

The practical effect of the statutory duty in this instance is to require authorities to ensure that adequate budgetary provision is made to pay the necessary court fees, and to ensure that individual decisions are not affected by budgetary considerations.

Next Steps

The changes form part of our wider strategy for reforming the system of court fees so ensure that it meets financial targets and remains fair and sustainable. We will continue to implement this strategy over the next few years. Future steps will include:

- changes in the way fees can be paid in order to reduce the administrative cost to users and HMCS;
- a review of the financial objectives and fee structure for private law family business; we plan to consult on this during 2008 and introduce changes from 2009-10;
- further increases to magistrates' court civil fees to bring them to full-cost price levels during 2009-10;
- a review of probate fees during 2009-10;
- further changes in civil fees to improve balance of cost and income drivers and eliminate any over-recovery in that area of the business; and
- further consideration of the possibility of daily trial fees in larger civil cases to help increase further the match within the system between where costs arise and where individual fees are charged.

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 on page 3.

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 timescale 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 a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Annex A – List of Respondents

Local Authority

Local Government Association

Association of Directors of Children's Services

Bedfordshire County Council, Legal Services

London Borough of Bexley, Children's and Young Peoples' Services

Blackburn with Darwen Borough Council, Social Care Services Team

Blaenau Gwent County Borough Council, Children's Services

Birmingham City Council, Local Authority Child Care Lawyers

Birmingham City Council, Children Young People & Families

London Borough of Brent

London Borough of Bromley

Bristol Safeguarding and Specialist Services

Caerphilly County Borough Council

Cambridgeshire County Council, Child Protection Legal Team

London Borough of Camden, Children, Schools and Families

Cardiff Council

Conwy County Borough Council

Cumbria County Council

Darlington Borough Council

Denbighshire County Council, Social Services Department

Derby City Council, Children and Young People's Department

Derbyshire County Council

London Borough of Ealing

East Sussex County Council, Children and Families

Flintshire County Council

Gateshead Council

Gloucester County Council

Gwynedd Council

Hackney Council, Children's Social Care

Halton Borough Council, Children and Young People's Services

Hartlepool Borough Council

Hertfordshire Safeguarding Children Board and Hertfordshire County Council
London Borough of Hillingdon, Social Services
Isle of Wight Council
London Borough of Islington
Royal Borough of Kensington and Chelsea
Kent County Council, Policy and Performance Children's Social Services
Royal Borough of Kensington, Children's Services and Safeguarding
Kirklees Metropolitan Council
Leeds City Council, Social Care
Leicestershire County Council, Children and Young People's Services
Merthyr Tudful County Borough Council
Newcastle City Council
Northumberland County Council, Child Care and Prosecutions Team
Peterborough City Council, Family and Communities
Powys County Council
Reading Borough Council
Rhondda-Cynon-Taff
London Borough of Richmond, Adults' and Children's Services
Rotherham Borough Council, Children and Young People's Services
Salford City Council, Community and Family Law Team
Solihull Metropolitan Borough Council
Somerset County Council
South Tyneside Council
Southampton City Council, Social Services Child Protection and Education
London Borough of Southwark Council, Legal and Democratic Services
Stoke on Trent City Council
Suffolk Adoption Agency
Suffolk County Council
Sunderland City Council
Surrey County Council
Telford and Wrekin Council, Safeguarding and Corporate Parenting
Thurrock Council
Torfaen County Borough Council, Social Care and Housing
London Borough of Tower Hamlets, Children's Services

Trafford Metropolitan Borough Council, Legal and Democratic Services
Vale of Glamorgan Council
Walsall Metropolitan Borough Council, Services and Care
Warwickshire County Council
Wolverhampton City Council
Wrexham County Borough Council, Children and Young People Service
City of York Council

Legal Professions

Association of Lawyers for Children
Bar Council
Justices' Clerk's Society
The Law Society
Jason Tucker, Cardiff Law School, Cardiff University
Solicitors in Local Government
Dorthea Gartland, Barrister
Graham Cole, Child Care Lawyer
Ben Hoare Bell, Solicitors
Fairweather Stephenson & Co, Solicitors
Fisher Jones Greenwood LLP
J A Hughes, Solicitors
Nicol Denvir & Purnell, Solicitors
Foster and Partners, Solicitors
Lynn Davis, Solicitor/Consultant
Bruce Edgington, Solicitor/Advocate

Judiciary and Magistracy

Association of District Judges
Bridgend Family Proceedings Panel, SE Wales Area
Dorset Family Legal Team
Greater London Family Panel of Justices
Grimsby & Scunthorpe Combined Family Proceedings Court Panel
His Honour Judge Donald Hamilton

His Honour Judge Michael Horowitz QC Principal Registry of the Family Division

His Honour Judge Jenkins, Family Sub-Committee of the Council of Her Majesty's Circuit Judges

Helen M Jones, JP, Chairman Cymon Valley Family Panel

Magistrates' Association

District Judge Lynn Roberts

Wiltshire Combined Family Proceedings Court Panel

Representative and Other Bodies

British Association for Adoption and Fostering (BAAF)

CAFCASS CYMRU

Child Care Special Interest Group (Eastern Region)

Family Courts Union Parliamentary Group

Family Justice Council

His Honour Judge Masterman, Local Family Justice Council, South Wales

National Children's Bureau

National Society for the Protection of Cruelty to Children (NSPCC)

Public and Commercial Services Union

Suffolk Family Justice Council

Individuals

Jean Cole

Elizabeth Harris

Annex B – Questions posed in the Consultation Document

Option 1 Full fee payable on issue

Q.1 Given that fees need to be set to cover the full cost, do you agree that a single application fee is not the best approach?

If not, why not?

Option 2 Variable application fees based on quality of preparation

Q.2 Do you agree that a variable fee based on the assessed quality of case preparation is likely to be impracticable?

If not, please explain why?

Option 3 Incremental fees structured around the Public Law Outline

Q.3 Do you agree that there should be an incremental structure for care proceedings fees?

Q.4 Do you agree that the proposed structure strikes the right balance between simplicity and ensuring that paying authorities only pay for what they get?

If you do not agree, please explain why and indicate what alternative structure you would propose.

Q.5 Do you agree with the proposals on additional fees?

If not, why not?

Q.6 Do you agree with the proposal to retain a single application fee, rather than an incremental fees structure, in adoption cases?

If not, please explain why and indicate what alternative structure you would propose.

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FeesPolicy@hmcourts-service.gsi.gov.uk.