



PROPOSED CLAIM FOR JUDICIAL REVIEW BY THE BAR COUNCIL

Background media briefing

This briefing note summarises the background to the Bar Council's pre-action protocol letter for judicial review of two consultations which are being conducted by the Ministry of Justice (MoJ) and the Legal Services Commission (LSC), a Non-Departmental Public Body of the MoJ. They concern Advocates Graduated Fees in Crown Court cases and Very High Cost Cases (VHCCs).

The Bar Council's claim is set out in detail in letters to the MoJ and the LSC of 17 February 2010. The text of these letters is available at www.barcouncil.org.uk.

The Bar Council is the governing body for all barristers in England and Wales. It represents (and through, the independent Bar Standards Board, regulates) about 15,000 barristers in employed and self-employed practice. Of those in self-employed practice, almost half depend to a greater or lesser extent on public funding for their livelihood.

The purpose of the Bar Council's action is twofold.

- First, it is to bring a co-ordinated and fair approach to the conduct of the Government's consultations on cuts in criminal legal aid, the outcome of which could have a significant impact on the provision of advocacy services by barristers. Those accused of crimes, victims and society as a whole have the most compelling interest in ensuring that the criminal justice system operates properly. But for that to happen, criminal legal aid work must be funded in a fair way.
- Secondly, it is to ensure that before deciding to slash legal aid the MoJ and the LSC conduct proper impact assessments bearing in mind their statutory equality duties. Their purpose is to ensure that those who are involved in the criminal justice system reflect society as a whole and not just certain sections of it.

The Bar is not seeking more money. It is acting to ensure that the justice system functions well and that criminal trials are conducted effectively. The Bar recognises that at a time of severe constraint on public expenditure it must bear its fair share of the pain which cuts in public spending necessarily incur. But consultations on cuts must be undertaken fairly and lawfully. The Government is undermining the system it claims to protect. In the public

interest, the Bar cannot stand by and let this happen. It has therefore taken the first steps towards initiating proceedings for judicial review of the MoJ and LSC consultations.

The Bar Council is therefore seeking:

- withdrawal of the current defective impact assessments;
- a full impact assessment of the combined effect of the current proposals and the proposed single graduated fee proposal (which has not been published);
- joining these consultations with the (as yet unpublished) consultation on a single graduated fee which is inextricably linked to the above consultations; and
- revised deadlines for consultation on all the proposals in order to allow consultees the opportunity to make informed and coherent responses to the consultations, based on properly conducted impact assessments.

Background

After 10 years of remaining the same, fees for defence advocates appearing in Crown Court cases were increased in 2007. The effect of the increase was to return rates of pay for advocates in real terms to what they had been 10 years earlier, taking into account the effects of inflation over this period. At the same time the Government introduced efficiency savings which were designed to achieve cost savings of 20%.¹

In December 2009, the MoJ published their consultation paper "Legal Aid: Reforming Advocates Graduated Fees."² This offered two options: First, a 17.9% cut in all defence advocates' fees for Crown Court cases, to be introduced in April 2010. Secondly, a 13.5% cut, phased in over three years. A 30%-50% cut in VHCCs was proposed in a separate consultation conducted by the LSC, together with further cuts following the replacement of the current fee scheme with a "single graduated fee". Details of the structure of this fee scheme and the level of cuts to be introduced have not yet been published.

The Bar Council's alternative proposals – the so-called "GFS Plus" scheme - which have been developed over more than a year with officials from the MoJ and the LSC, would have achieved considerable savings for the tax payer, but at the last minute they were dropped at the insistence of Ministers.

The MoJ's consultation paper purported to include an equality impact assessment. The Ministry admitted that it did not know the diversity impact of its proposals on different groups because the relevant data had not been collected by the LSC. It is clear that the improvements in the LSC's management information systems and diversity data collection and analysis announced in their Single Equality Scheme 2008-2011 have not been achieved.

The LSC spends £2.1 billion of public money a year on buying civil and criminal legal aid and a further £125 million on administration. Following a report by the National Audit

¹ "Legal Aid Funding Reforms: The Bar Council's response", paragraph 4.

<http://www.barcouncil.org.uk/consultations/responsetoconsultationpapers/ResponsesToConsultationPapers2009/>

² <http://www.justice.gov.uk/consultations/legal-aid-reforming-advocates-fees.htm>

Office last year into the LSC's performance in relation to the procurement of criminal legal aid,³ the influential House of Commons Public Accounts Committee (PAC) found⁴ the LSC to be an organisation with poor financial management and internal controls and deficient management information. These weaknesses resulted in the LSC having its accounts qualified for 2008-09 and an assessment that its procurement and administration of criminal legal aid posed risks to value for money.

The PAC also concluded that there was confusion and uncertainty between the MoJ and the LSC about the respective roles of these organisations, which had led to duplication of effort and lack of clarity about their responsibilities.

The PAC also criticised the LSC for constant changes in staff at senior level – which have been costly and disruptive – and poor planning of the changes to legal aid. As a result reforms of the legal aid system have not always kept to timetable and have not been properly evaluated to assess their impact.

To safeguard and promote the administration of justice, the Bar Council has tried, over many years, to develop constructive and workable proposals for reform of the legal aid system with the MoJ and the LSC. The Government has rejected the Bar Council's request that it carry out proper impact assessments and consult in a way that would enable those consulted to respond in a meaningful way. The Bar Council considers that, unless the Government relents, its only option is to initiate proceedings for judicial review. It has not taken this decision lightly. The last time it took proceedings against the Government was over 20 years ago.

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17th February 2010

³ http://www.nao.org.uk/publications/0910/procurement_of_legal_aid.aspx

⁴ <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmpubacc/322/32202.htm>