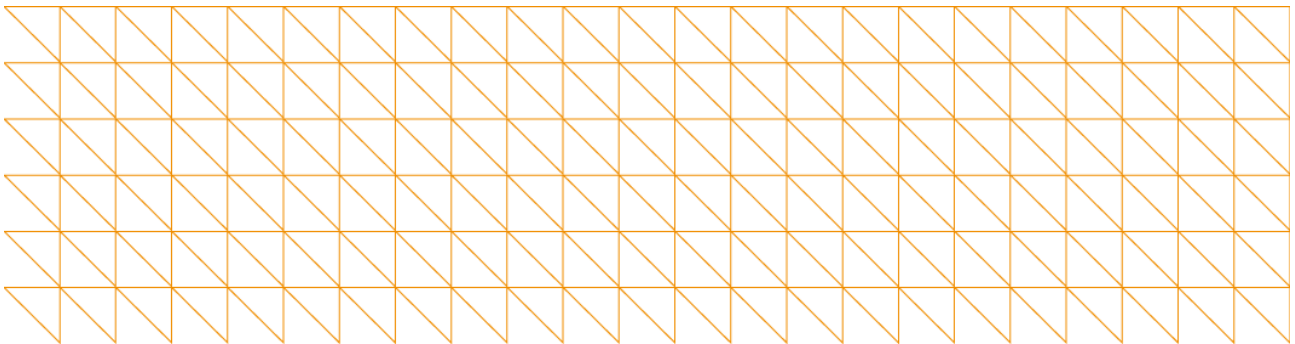




Ministry  
of Justice

# Litigators' Graduated Fees Scheme

This response is published on 24 October 2017



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Ministry  
of Justice

## **Litigators' Graduated Fees Scheme**

**Response to consultation carried out by the Ministry of Justice.**

**This information is also available at <https://consult.justice.gov.uk/>**



## Introduction and contact details

This document is the post-consultation report for the consultation on the Litigators' Graduated Fees Scheme.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting:

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### **Complaints or comments**

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

# Background

The consultation paper 'Litigators' Graduated Fees Scheme and Court Appointees' was published on 10 February 2017. It invited comments on proposed changes to (a) the Litigators' Graduated Fee Scheme, and (b) the costs of court appointees.

The paper set out our proposals:

(a) for a change to the Litigators' Graduated Fee Scheme in advance of a new scheme being introduced, which would reduce the number of pages of prosecution evidence used to calculate the graduated fee from 10,000 to 6,000, with the additional pages being remunerated at hourly rates, and

(b) to limit the costs payable from central funds to court appointees at the equivalent of legal aid rates.

The consultation period closed on 24 March 2017 and this report summarises the responses on the LGFS proposals, including how the consultation process influenced the final shape/further development of the proposals consulted upon. We are still considering the Court Appointees proposal and will separately respond to consultation on that later.

The Impact Assessment on LGFS proposals accompanying the consultation was updated to take account of evidence provided by stakeholders during the consultation period. The updated Impact Assessment is attached.

## Summary of responses

1. A total of 1,005 responses to the consultation paper were received, including a few from members of the public, but the vast majority were from legal representatives and their professional representative bodies.
2. Responses were analysed for possible new approaches to the questions and evidence of impact of the proposals.
3. The views expressed were almost entirely against the LGFS proposal although there was support from a small minority.

## Responses to specific questions

Pending longer term reform to modernise the LGFS, we proposed that action was needed to address a substantial rise in LGFS costs, including average case costs, which had occurred, despite a fall in the volume of cases, partly as a result of the Costs Judge decision in the case of *Napper* (R v Napper [2014] 5 Costs LR 947), which revised the interpretation of the definition of PPE, broadening its scope. The Government had never intended to pay for electronic evidence in this way. We proposed amending the LGFS to achieve a return to the types and amount of electronic evidence we pay for to the levels we saw prior to the Napper ruling by lowering the point at which we stop counting PPE and start assessing work reasonably and actually done in relation to considering any additional pages under the “special preparation” provisions set out in the Criminal Legal Aid (Remuneration) Regulations 2013.

### **Question 1. Do you agree with the proposed reduction of the threshold of PPE to 6,000? Please give reasons.**

The vast majority of respondents (97%) disagreed with the proposal, although a small minority agreed. The main reasons given are set out in this section. In addition, many respondents sought clarity and a final decision on the second 8.75% fee cut.

Most respondents opposed the proposal, over a third specifically on the grounds that such a reduction in fees will, they argued, damage the sustainability of the supplier base. Many referred to the Otterburn research carried out in relation to the dual contracts proposal<sup>1</sup>, which they said showed that the supplier base could not cope with a reduction in income. Some respondents said that there is a risk that implementing the proposal would create areas where the availability of legal aid may be reduced as firms cannot stay in the market and some pointed to the single firm rota for Kendal and Windermere as evidence of fragile supply. The Law Society, and others, said that the cases targeted by these proposals were the ones that ensure ongoing financial viability and that the Napper case (and others) showed that the LAA had been defining PPE incorrectly and therefore underpaying in the past. The Law Society pointed to the rising age profile of providers and the inability to attract new lawyers to this work, given the growing disparity between fees in private and publicly-funded matters.

Over 10% of respondents specifically argued that there was not a problem to be addressed. They pointed to savings having been made through a reduction in volumes and said that more savings are likely to be made in future if the Oxford Economics (OE) report is right. A similar proportion argued that costs have risen through a change in case-mix as a result of charging decisions, meaning more serious cases now make up a greater proportion of overall case-mix. In addition, respondents said that initiatives such as Transforming Summary Justice and Better Case Management will bring further savings. Some also said that spend has increased by moving former VHCCs into the LGFS in 2013<sup>2</sup>. Many respondents said that as rates have not changed since 1998 fees have fallen in real terms when inflation is taken into account. A number of respondents said that cases with more than 6,000 pages would be paid around 33% less than currently

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<sup>1</sup> <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/>

<sup>2</sup> This date was quoted, in error, in our Impact Assessment.



and that special preparation was not satisfactory as it is discretionary, only covers 'reading' the extra prosecution evidence and not the additional work associated with this material and is paid at much lower rates than PPE. Another point raised was that the GFS was designed to simplify assessment and payments, whereas this proposal would result in an extra administrative burden for both providers and LAA. On the other hand a small minority of respondents agreed with the proposition.

However, some agreed with the proposal because their firm did not deal with cases with more than 6,000 pages, so this proposal was preferable to the second fee cut, which would affect everyone.

The Criminal Law Solicitors Association, and some others, said that the Ministry does not understand the work that solicitors do or the costs of running a business. They also said that electronic material is not always searchable or there are limits to electronic searching as some material has to be reviewed manually. Some respondents said that the CPS serve evidence and the defence have no control over it and it was unfair to reduce fees for litigators because PPE volumes had increased.

Some respondents said that at the time the second fee cut was suspended the then Lord Chancellor promised a "review" before the final decision on the second fee cut was taken and that therefore a review should take place before pressing ahead with this proposal. Many felt we should abandon this and that we should continue to work on longer term reform.

### Our response

Having carefully considered the responses and the additional evidence provided, the Government continues to believe the current proposals are sustainable for the following reasons.

Around half the firms currently holding a contract will be unaffected by the proposal. We are seeking to return payments to pre-Napper levels, when the market was sustainable. While we accept the Napper judgment changed the definition of PPE, we do not think the Napper judgment reflected the original policy intention behind the LGFS. As stated in the consultation document, there is no evidence that the rise in PPE reflects a proportionate increase in workload for providers. It is understood that large volumes of served evidence can contain material of less relevance to the client's defence, and in many cases is capable of being searched electronically, e.g. downloads of the entire contents of a mobile phone including thousands of irrelevant SMS messages and pictures.

The LAA monitors the level of advice provision across England and Wales. In circumstances where a reduction in the number of duty scheme members threatens the viability of a duty scheme the LAA will consult on amendments to duty scheme boundaries. The LAA has recently conducted a consultation exercise on the merger of the Kendal and Windermere duty scheme into a neighbouring scheme, which resulted in the scheme being merged with the Barrow-in-Furness scheme.

We do not agree that there is not a problem to address. A combination of volumes, case-mix and supply side factors such as sitting days can mean expenditure in future years increases or decreases. A reduction in spend because volumes have decreased or cases have become less serious overall is a natural consequence of the number or types of cases. That is not a 'saving' as we would expect to pay less for fewer or less serious cases. Equally, if volumes increase or case-mix becomes more serious we would expect

to pay more. There is not a fixed budget that we would look to spend whether or not volumes or case-mix change.

Our PPE proposals are not designed to get us to a particular expenditure level (irrespective of volumes or case-mix). They are designed to return the element of payment driven by PPE to pre-Napper levels in line with our intended policy.

We do not agree that cases that were formerly VHCCs have significantly contributed to an increase in expensive LGFS cases since 2013-14. Although formally contracted as VHCCs, cases estimated to last between 40 to 60 days had actually been remunerated under the LGFS since 3 October 2011.

In our view, PPE is no longer a good proxy for complexity, which is particularly acute at the high end and we are reducing the threshold to target this small proportion of cases. We accept that not all electronic material will be searchable. Particularly complex material can however attract a higher rate for its consideration, factoring in the nature of the material and relevance to the client; and if the work is reasonably and necessarily undertaken in considering additional served material it will be paid on merit. In our view, electronic material is fundamentally different, and less time consuming as it is often electronically searchable, than other material such as witness statements, records of interview and expert reports as we set out in the consultation document. We do not accept that the huge increase in PPE volume seen in LAA payments since the Napper case is entirely driven by an increase in volume of evidence served by the CPS, rather that it is the result of the change in definition.

**Question 2. If not, do you propose a different threshold or other method of addressing the issue? Please give reasons.**

Over 90% of respondents did not propose a different threshold or other method of addressing the issue. In addition, around 10% of respondents, while not proposing a different threshold, specifically commented that there was not an issue to be addressed, as set out above, as costs were falling in any event. A similar proportion of respondents specifically said that we should consider this as part of the wider long term review of LGFS instead. Other suggestions included maintaining the 10,000 threshold or introduction of some form of assessment or taxation.

Our response

We do not agree that any of the alternatives proposed would satisfactorily address the problem.

As we said in the consultation document, the counting of pages, and counting of new forms of electronic evidence, converted to "pages", are no longer the most effective ways of assessing how much work a litigator needs to do in an individual case, and therefore how much that litigator should be paid.

We remain committed to working, as soon as possible, with the Law Society and other representative bodies to reform the scheme so that we measure the relative complexity of cases in a way that does not involve counting pages, but takes into account the totality of the evidence, whether paper or not. We would like to introduce a revised and future-proof

scheme in 2018. Full reform taking this length of time creates a need for a short-term measure in order to relieve the financial pressure on the Ministry.

## **Equalities Statement**

### **Question 4. Do you have any comments on the Equalities Statement published alongside this consultation and/or any further sources of data about protected characteristics we should consider?**

Some respondents commented on the Equalities Statement. A few respondents thought that the impacts on BAME and female practitioners had not been considered fully.

#### Our response

The proposals will apply to all people, irrespective of protected characteristics, and we do not therefore consider that they give rise to direct discrimination or discrimination arising from a disability. We also do not consider that they are likely to give rise to a need for any particular 'reasonable adjustments'. Nor do we consider that these reforms will have any impact on instances of harassment or victimisation.

The quality of the available data, and the fact that the proposal affects businesses rather than individuals directly, makes it difficult to draw meaningful conclusions about the impact on protected groups but no disproportionate impact is foreseen. If persons with protected characteristics are over-represented in the affected group as compared to the general population, we consider that this effect would be justified by the legitimate aim of paying properly and fairly for work actually and reasonably done and securing value for money for the taxpayer.

Some respondents commented on the Equality Statement. A few respondents thought that the impacts on BAME and female practitioners had not been considered fully. As set out above the quality of the available data makes it difficult to draw conclusions about the impact on particular groups of providers. We consider that the proposals are a proportionate means of achieving a legitimate aim for the reasons set out above.

## Conclusion and next steps

We will shortly lay regulations before Parliament that will implement the LGFS Proposal on 1 December 2017.

We can also confirm that the fee cut that was suspended in April 2016 will not be reintroduced.





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