



## **Bar Council response to the “Litigators’ Graduated Fee Scheme and Court Appointees” consultation paper**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper entitled “Litigators’ Graduated Fee Scheme and Court Appointees”.<sup>1</sup>
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

### **Overview**

4. The Litigators’ Graduated Fee Scheme (LGFS) is primarily a matter for the Law Society, but the close working relationship between advocates (barrister or solicitor advocate) paid under the Advocates’ Graduated Fee Scheme (AGFS), and litigators paid under the LGFS for the same case, means that the Bar Council has a legitimate interest in the LGFS.
5. If the LGFS and AGFS operate in fundamentally different ways with different proxies and cost drivers, this can create unhelpful tensions, including the cumbersome bureaucracy of recording and justifying the various proxies to the LAA in order to obtain payment.
6. The AGFS is in a process of fundamental restructure, with proposed new proxy of more detailed case categorisation largely replacing the proxy of page count. The Bar Council

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<sup>1</sup> Ministry of Justice, 2017, “Litigators’ Graduated Fee Scheme and Court Appointees”  
<https://consult.justice.gov.uk/digital-communications/lgfs-and-court-appointees/>

has responded<sup>2</sup> constructively to that consultation. The current LGFS consultation says that the proposals are for the short term, to contain LGFS page count spend, and that there will be a second consultation for the “longer term”:

“Over the next 12 months we want to work 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 by early 2018.” (Page 3).

It is important that the “longer term” ambition for LGFS moves as swiftly as possible, so that the two schemes can operate in harmony.

7. The substantial review should include addressing the situation of the absence of support that counsel often have from solicitors at court. This change of solicitors’ practice began when the LGFS rolled up the separate fee for attendance at court into the basic fee, with the result that solicitors in most cases ceased to attend. It is not reasonable for counsel to carry out the advocacy whilst also managing the needs of the client and dealing with documents such as for cross-examination, and marshalling defence witnesses. Also, just as the Bar Council has made the point in the AGFS consultation response, any fees need to be index linked and regularly reviewed.

8. We now turn to the specific questions in the consultation.

## **The consultation questions**

**Q1: Do you agree with the proposed reduction of the threshold of PPE to 6,000?**

**Please give reasons.**

9. As stated above, the important change that is needed is to restructure the LGFS so that it pays based on the amount of work required - particularly in early preparation of the case - rather than have a system which is bound to counting numbers of pages.

10. The Bar Council questions the MoJ assertion that Cost Judge decisions have changed the definition of what is included as Pages of Prosecution Evidence (PPE). It is the increase in mobile phone and other electronic evidence that has primarily led to increases in PPE claims and this material does need to be worked on and therefore remunerated.

11. The Bar Council does appreciate the MoJ logic in paragraphs 9 and 10 of the consultation that reducing the page threshold to 6,000 pages, and moving to individual cost assessment for PPE above that, is a reasonable attempt at short term cost containment:

“we propose reducing the 10,000 threshold for PPE and moving claims for pages in excess of 6,000 into the special preparation provisions. It is in cases with 6,000 or more

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<sup>2</sup>[http://www.barcouncil.org.uk/media/555846/20170302\\_bar\\_council\\_response\\_to\\_agfs\\_consultation.p  
df](http://www.barcouncil.org.uk/media/555846/20170302_bar_council_response_to_agfs_consultation.pdf)

pages that we have seen a significant increase in PPE caused in in part by electronic evidence now coming within the definition of PPE, most commonly mobile phone or computer downloads in serious drugs and fraud cases. Applying the special preparation provisions will mean that where there are more than 6,000 pages we will allow payment for work reasonably and actually undertaken.

10. It should be noted that the special preparation scheme is designed to compensate litigators for time spent considering evidence rather than using that evidence as a proxy for an overall assessment of adequate compensation for dealing with the case as a whole. Special preparation claims are assessed on merit, with a higher number of hours able to be authorised for reading particularly complex and/or relevant documentation, so there is a degree of flexibility available for the most complex/exceptional cases"

12. This short term proposal is in no way ideal. Individual case assessment is time consuming and bureaucratic for all parties and can be a frustrating experience for lawyers who have worked on the case, to persuade LAA assessors who have not, that the lawyer did indeed need to spend the time working on the case that they did. Too often, the LAA assessor is inclined to 'tax down' an application, resulting in a further time consuming appeal process. Therefore, if this change is introduced, it needs to be both short term and closely monitored.

**Q2. If not, do you propose a different threshold or other method of addressing the issue? Please give reasons**

13. The issue should be addressed by a full revision of LGFS.

**Q3. Do you agree with the proposed capping of court appointees' costs at legal aid rates? Please give reasons.**

14. No. The logic in the consultation document is extraordinary. The paper states (page 9) that court appointed legal representatives are paid a "proper fee", and that this "proper fee" "can be four to five times higher than legal aid rates." The Bar Council agrees with that statement of facts. The logical solution therefore is to increase legal aid rates so that they are also paid a "proper fee" to match that of court appointed legal representative rates. The MoJ proposed 'solution' is to reduce court appointed rates so that there is no fee in the system which is at the level of a proper fee.

15. The paper states (page 10) that the work is "in reality no different to that undertaken by lawyers acting for a defendant under legal aid." This fails to recognise that the task is more onerous, and that the prospect of the advocate being the subject of a complaint by a convicted defendant is much greater in the circumstances where the defendant has not selected the advocate, but the advocate has been selected for them. If this role is not paid at a proper fee there are unlikely to be sufficient numbers of advocates prepared to undertake this work.

**Q4. 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?**

16. No.

**Bar Council**  
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