

**Litigators’ Graduated Fees Scheme & Court Appointees**

**Response to Consultation**

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# Introduction to the Big Firms’ Group

The Big Firms’ Group is an association of 40 large criminal legal aid firms[[1]](#footnote-1) from across the country, including 19 of the largest 25 firms by criminal legal aid spend in 2015/2016. We estimate that whilst BFG firms currently make up around 3% of criminal defence firms, they provide the services which account for between 12% - 15% of the overall criminal legal aid spend (including all Crown Court advocacy).

Further, its members are also key stakeholders in the criminal defence sector in a number of other ways; for example:

* Larger criminal legal aid firms are more likely to provide training contracts in criminal defence work to try and develop criminal lawyers for the future.
* Larger firms are more likely to have superior case management and supervision procedures in place allowing for more a more cost-efficient auditing process by the LAA.
* BFG members have been key partners for numerous of the Criminal Justice Efficiency programme, contributing (unpaid) time and resources to assisting the development and testing of projects including:
	+ PCU Wifi
	+ eCRM14
	+ LGFS & AGFS online billing
	+ Crown Court Digital Case System

BFG firms contribute to the CCCG liaison between the Legal Aid Agency and criminal defence suppliers, make representations to the Law Society’s Practitioners’ Group, have members on the Law Society’s Criminal Law Committee as well as representatives on regional Law Society committees, have had past Chairs & Vice-Chairs of the Criminal Law Solicitors’ Association and a past President of the London Criminal Courts Solicitors Association. We meet to share the experience from across the country and to share the impact of the contributions our members make to the wider criminal justice system.

# A Criminal Justice System in Crisis – No More Cuts

The Foreword to the consultation document succinctly states:

*“…the rule of law is the basis on which a fair and just society thrives.*

and

*That is underpinned by an independent judiciary, and expert litigators defending those suspected or accused of a crime”.*

The Criminal Justice System (“CJS”) is in crisis. The MoJ has recently had quickly mitigate crises in the prison service and the judiciary by increasing pay and pensions at short notice. However, we submit that these issues are symptoms of the wider problem and in fact the crisis pervades the whole of the CJS.

For our part, real term cuts continue to be visited on Criminal Defence firms, particularly with inflation returning to levels above 2% and predicted to rise further. At the same time, headline expenditure on criminal legal aid is falling, seemingly in line with the MoJ’s previous budget requirements. The dual pressures of reduction in work and increased costs creates real risk of wholesale failure within the provider market.

Against the background of this level of risk it is unclear as to what is driving the current obsession with cutting criminal legal aid budget given that the ‘organic’ reduction in spending that has occurred over the last few years (due to a decrease in policing and/or criminal activity and therefore charging) has meant that no further cuts are required to meet the MoJ’s stated budget targets. There is nothing in the Consultation that would justify the further cuts that the MoJ is seeking to impose – particularly at risk of accelerating a crisis in the CJS which will not be easily reversed. From any perspective the risks far outweigh the benefit of saving what is a very small amount of money in total budgetary terms and what is risked is the basis of the rule of law as stated in the consultation itself: expert litigators defending those suspected or accused of a crime.

# The “Justification” for Cuts

To impose further cuts on the LGFS and to amend the rules relating to payment of Court Appointed lawyers, without regard to the wider ramifications is obtuse. Criminal legal aid was not the beneficiary on any pre-austerity largess. Rates have not moved in line with inflationary pressures since 1998, meaning that in real terms the rates have fallen by around 40% in 20 years. In addition, there have been cuts to rates. It would seem that the overall spend on criminal legal aid has already fallen further and faster than the amount that the MoJ was targeting in the original Transforming Legal Aid: Next Steps consultation of September 2013. Based on the research by Oxford Economics, commissioned by the Law Society, there is every reason to believe that it will continue to do so – ***without*** the need for further cuts. The impacts of other efficiencies within the CJS have not yet been analysed (ie; Transforming Summary Justice and Better Case Management) and these are likely to deliver further savings organically.

## The MoJ’s analysis

The stated aim of the Consultation is set out as follows:

1. To ‘modernise’ the LGFS to take into account new forms electronic evidence (long-term goal)
2. To consider the effect of *Napper*, and specifically to address the perceived disconnection between payments and work done. The proposal is to adjust the scheme to force payments back to ‘pre-Napper’ costs and to assess work actually done under the ‘special preparation’ provisions.
3. To align payments for court appointees with legal aid rates.

### Modernisation of the LGFS

The stated intention of the MoJ is to radically rethink the structure of the LGFS. The Consultation fails to justify any need to make changes to the current fee scheme. Given the stated intention to spend time working with all stakeholders to restructure the LGFS, it would make far more sense to consider all issues at the same time.

### Litigators’ Graduated Fee Scheme and Napper.

To ascribe the increased cost of the LGFS to the service of electronic documents such as phone records, or indeed wholly to the effect of *Napper*, is at best misleading. The Ministry is aware that a proportion of cases that were previously under the VHCC regime are now no longer designated VHCC and have been absorbed into the LGFS scheme: “VHCC costs have fallen due to changes in fee rates paid and also a reduction in the proportion of cases classified as a VHCC” (Legal aid Statistics England and Wales bulletin Jul to Sep 2016). Whilst there has been an increase of £49m which the MoJ attribute to cases with a PPE in excess of 6000 there has been a reduction in VHCC payments of £30m.[[2]](#footnote-2)

It is concerning to see the MoJ selectively quote figures to create the impression of a loss of control of criminal legal aid spending, when the overall downward trajectory of spending has largely delivered the budget savings targeted by the MoJ for the last few years. To do so actively undermines the objective of this consultation and the role of the government in providing a criminal justice system of sufficient stability and quality to guarantee the rule of law. It is imperative that the Government not seek to cut beyond the ability of the system to sustain it, and in order for the discussion of funding within the criminal justice system to have any merit it must be based upon objective reality, without spin or obscuration.

While in paragraph 8 of the consultation document reference is made to the change in case mix, its effect on the overall fees paid is dismissed without explanation. Reference is made to a fall in the proportion of *successful* claims, which could indicate nothing more than that the LAA is refusing more claims for special preparation, a supposition which is backed up by a great deal of anecdotal evidence from suppliers.

In respect of *Napper*, the question is not whether it has caused costs to rise, but rather whether the costs that the case allowed was in fact for work that was *actually being done*. It is in fact fair to say that whenin the consultation document the MoJ seeks to assess work that is “reasonably and actually done” it is talking, in part, about the work being done that *Napper* decided should be paid for. The issue in discussion should not be how to reverse the decision in *Napper*, but rather to make sure that in any funding structure covering this type of work, work reasonably and actually done, is paid for at a sustainable level. We would submit that we should be using *Napper* as guidance, not seeking to circumvent it.

### To align payments of court appointed with legal aid rates.

There is actually no analysis whatsoever of the financial impact of these proposals in the Consultation, so it is difficult to provide a considered response to the MoJ’s justification for this change. However, there are a number of important issues that should be taken into account when considering this proposed change in fees:

1. The nature of the cases involved are highly sensitive, not only to those complainants who face cross-examination, but in terms of government policy in respect of how such matters are dealt with at court. Indeed, the timing of this proposal seems extraordinary given the concurrent policy announcements regarding the aims of not allowing victims of, say, domestic violence to be cross examined by their alleged attackers. It is imperative that adequate protection is given to those who are most vulnerable to pressures applied by the adversarial nature of the criminal justice system. Any changes must be careful not to create unintended consequences which may further reduce the likelihood of successful prosecution of unrepresented defendants in domestic violence cases. The very real cost to complainants that may arise from these proposals are not easily compared to the relatively low levels of savings that would be achieved – not least because there are no figures with which to undertake any comparison.
2. Defendants involved in these cases are, by the very nature of the alleged offences, often difficult to deal with. This is demonstrated by the fact that they refuse, or sometimes are unable, to be represented. Costs that arise as a result of the courts undertaking work that would otherwise be undertaken by an appointed defence practitioner will potentially dwarf any savings made. It is very clear to all practitioners that undertake this work that the courts are eager to have defence practitioners involved as they facilitate the efficient running of the Courts.
3. The Consultation is based on a false premise that this work is no different to that undertaken by lawyers acting for a defendant under legal aid. This work cannot be properly compared in such a way as to consider that the same legal aid rates should apply. In many, if not most, cases of this nature where the matter has gone to trial the fixed fee would be at the ‘Higher Standard’ rate, if not in fact paid as an escape fee under CRM7. These payments may reflect work done by several levels of fee earner and as such the cost to firms of producing the work can be managed appropriately. In respect of court appointed work the work can only be done by a senior solicitor and often under considerable time pressure. Legal aid rates can only be understood within the context of the fixed fee system, and should not be taken as a properly hourly rate for work done at this level under these circumstances.

To treat work done by a court appointed solicitor with the regular work of a solicitor dealing with the entirety of a case is not a valid comparison. Firms will not undertake this work at legal aid rates as it is a wholly inefficient use of experienced advocates and the negative impact on vulnerable victims and the efficiency of courts will be considerable.

## The Abandonment of “Swings & Roundabouts”

This latest proposal from the MoJ is targeted at a very small number of the overall cases – in a system in which many cases are already woefully underpaid and do not reflect the work that needs to be done. It flies in the face of the long standing rhetoric of the LAA, of solicitors having to accept a certain arbitrariness due to the “swings & roundabouts” nature of the fee structure. In other words, whilst undertaking categories of work that were not financially viable – this was offset by cases which were remunerated more generously.

The logic of the Consultation is inescapable. The approach is that there will continue to be cases in the system which are woefully underpaid and which do not reflect the work that needs to be done ***and*** now intention is to reduce remuneration for the cases which might have had the effect of cross subsidising overall criminal defence provision.

The logical response is equally plain. If it is the intention of the MoJ that any non-profitable areas of work should no longer be cross subsidised by working on better remunerated cases, then firms will need to reflect on whether they should (indeed whether they have a regulatory obligation) not undertake cases in categories of offence class that do not in any sense have fees paid under the LGFS which make those cases sustainable in their own right.

# Crisis in the “Integrated” CJS

The Ministry of Justice (MoJ) needs to urgently reflect on the sustainability of the CJS. Whilst it is understood that there are budgetary pressures to which the country and the MoJ are subject to, reductions in spending on criminal legal aid have already been achieved and are predicted to continue – as set out in the report commissioned by the Law Society from Oxford Economics.[[3]](#footnote-3) The MoJ cannot ***solve*** its budgetary conundrum through further cuts in criminal legal aid rates. However, there is a crisis looming in the CJS which will be further compounded by such cuts.

The MoJ needs to widen its perspective when considering the issue of further defence cuts. Criminal Defence firms to not exist in isolation from the rest of the CJS. They are one of the moving parts of an ***integrated*** CJS that work together. All parts of that system are showing signs of stress. Remedying a crisis in the defence sector will cost the MoJ far more than the current configuration of the supplier base.

There is evidence available to the MoJ, if it chooses to scratch beneath the surface, which will confirm that:-

* The Criminal Defence sector is much smaller than the MoJ previously believed, is ageing dramatically and cannot retain staff.
* There is a recruitment crisis in the CPS, partly the result of the flow of lawyers historically drawn from the defence sector
* The Criminal Bar is similarly shrinking and ageing
* The alternatives to private practices providing criminal defence services are more expensive than the current system

## The Malfunctioning Supplier Base

The supplier base is not as big as the MoJ believed it to be and the ways in which it is collapsing mean that the position is not sustainable.

### No future for duty solicitors?

The number of firms in the sector actually appears to have fallen for the first time in any non-competitive contracting round following the verification of the 2017 Criminal Contracts. However, more significant is that the rules to cleanse the system of “ghost” duty solicitors has been partly successful and the number of duty solicitors on the rota fell from 6,341 to 5,444 between October 2016 and April 2017 (15%). Further enforcement of new compliance requirements are likely to lead to a further significant reduction in numbers.

Of those that remain, the furore over the requirement that a duty solicitor should be required to undertake 14 hours “contract work” for the office to which their slot is allocated, suggests that it would be folly to believe that the supplier base consisted of anything like 5,000 full time equivalent duty solicitors.

Proper analysis should be done of the age profile of the remaining supplier base. Whilst this should be done nationally, it is likely that there will be specific geographical areas where deserts of provision will arise first. A small survey conducted amongst firms in an area of Kent revealed a total of 83 duty solicitors had a mean average age of 48.

|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | Age | ≤ 29 | 30-35 | 36-40 | 41-50 | 51-60 | 61-70 | 71-80 |  |
|  | Number | 3 | 4 | 18 | 24 | 21 | 12 | 1 | 83 |
|  |  | 3.60% | 4.80% | 21.70% | 28.90% | 25.30% | 14.50% | 1.20% |  |
|  | Av age | 48.20 |  |  |  |  |  |  |  |

Less than 8% of solicitors were 35 or under. This compares with an average across the solicitors’ profession of 31% of all solicitors being 35 or under. There is a reduction in newly qualified solicitors coming through into the criminal legal profession and, worse, it is increasingly difficult to retain those that qualify as criminal lawyers because of their calling to the work – because the pay, conditions and prospects of remaining a criminal practitioner are so dire as to cause them to seek work in other areas of law.

### The Russian Roulette of Failing Firms

In the short term, a recruitment crisis is being experienced by nearly all big firms in all nearly areas of the country, means that there is unsustainable inflation in wages for the ageing solicitors that remain. Combined with ever increasing business costs, including those associated with making the transition to digital working, firms are being pushed beyond the point of being viable.

The MoJ should ***not*** console itself with the thought that this is the consolidation of the sector that it previously sought. It is the manner in which the provider base will shrink that should not be welcomed.

In some cases, the number of practices in a particular area is already unsustainably low. All one must do is consider the recent dual contract tender process, where certain areas were under-subscribed and other areas, such as Essex, received the same number of bids as contracts available. Kendal & Windermere is already reliant on only a single provider. If it was to withdraw from the market, then the MoJ would immediately be in breach of its statutory duty to provide duty solicitor services. There are a number of such areas where it would not take the failure of many firms to produce a profound and lasting gap in provision.

On the other hand, there are areas where there are still too many providers for the firms in that area to remain viable. Compound this over-subscription with the reduction in new solicitors coming to the market and the result is spiralling wage-inflation which will inflict further financial pressure on the provider market.

For those firms in financial distress who wish to exit the market there are severe limitations to being able to do so in an orderly way, largely due to the structure of the LGFS regulations[[4]](#footnote-4). As they stand, there is no way for such firms to leave the market in an orderly manner, if they are not able to exit through merger or acquisition. The regulations do not provide a robust mechanism for a closing firm to retain value for the work it has done up to the point of closure. Faced with no way of retaining any value from a business they want to leave, business owners are forced to wait and hope that their neighbour firms go bust before they do in order to survive. That firms are unable or unwilling to undertake a managed exit from the market serves to increase costs to the public purse, both in terms of the increased financial burden to the LAA of administering a bankrupt firm, as well as an increased likelihood that there will be insufficient funds remaining to meet any debts to the LAA.

A further issue with provider reduction through bankruptcy is that there is inevitably an inherent unpredictability as to ***which*** firms will fail as a result of financial instability. Mixed-practices may be viewed as more sustainable from the perspective of the MoJ - but increasingly business owners are choosing not to continue subsidising criminal law with other areas of their business. The market will become increasingly dependent on firms which have criminal legal aid as their main source of income, and it is such firms that are the most vulnerable to the proposed changes.

The likely outcome is an unmanaged erosion of the provider market leading to unpredictable and incomplete coverage. The MoJ will be forced to incur costs in providing incentives to undertake work in particular areas or create new Public Defence Service practices across the country. In either case, the issue of sustainability will continue as fewer solicitors choose to qualify into criminal law and where criminal solicitors are driven into other areas of law.

## Recruitment Crisis in the CPS

The Criminal Defence sector has historically been a fertile breeding ground for prosecuting lawyers. The CPS continues to recruit from the defence sector. However, notwithstanding remuneration significantly better in the public sector for prosecution work than currently is the case for defence work, the MoJ will be aware of the difficulties it is having in recruiting appropriately qualified members of staff in many areas of the country.

By way of example, the CPS posted a job advert on 21 March 2017.[[5]](#footnote-5) The CPS seeks to recruit in 6 of the major legal centres in England & Wales, seemingly at every level of qualification. The salary levels at the lowest levels of qualification are now higher than the equivalents in private practice (even before considering additional public sector pension entitlements). The career progress evident in the pay structure is completely absent in the private sector - as fixed fees means that there is little to distinguish the commercial value of a relatively inexperienced lawyer compared to a very experienced one.

Many criminal defence firms have experience of losing defence solicitors and advocates to the CPS because of the ostensibly better financial rewards and job security. Notwithstanding this, anecdotally, almost as many have experience of the phenomenon relating to those who leave of “yes – but they will have left the CPS within a year”, as conditions of working within the CPS are not as verdant as hoped.

The CPS have also confirmed that it is not just in respect of permanent recruitment that it is struggling. The CPS have admitted to Parliament[[6]](#footnote-6) that

*“there are fewer lawyers doing criminal law work than there used to be and this means it sometimes has difficulty finding counsel or that barristers, who were going to represent the prosecution in court, return cases to the CPS at the last minute.”*

Already, the MoJ has within its own department evidence that there is an unsustainable lack of supply of lawyers for its employed posts to undertake prosecution work ***and*** that there is a vacuum in the supplier base in private practice to fill that void.

## The Shrinking and Ageing Criminal Bar

On 23 January 2017, Francis Fitzgibbon QC wrote in his “Monday Message” [[7]](#footnote-7) to the Criminal Bar that

*“Research by the Bar Council shows that in the last ten years the junior Bar has shrunk: the 10-15 years call bracket is down by 10%; 5-10 years by 20%; and 0-5 years by 30%. Our profession is aging and not replenishing itself.”*

The primary reasons given were the poor pay and lack of career prospects in undertaking publicly funded work and the comparatively high costs of training to be afforded access to such work in any event. There are currently no root and branch proposals to address these issues and it would be folly to believe that the current trend will not continue for the foreseeable future.

As with the supplier base of criminal defence firms, the MoJ should not reflect that this is a helpful correction to a previous oversupply of criminal barristers. The MoJ must concern itself with the issue of ***sustainability.*** A system is not sustainable when the supplier “pyramid” is the wrong way up. As was noted by many in the Responses to the Consultation in respect of the AGFS, there is no lack of supply in the highest grades of advocate – to the contrary, the number of “QC Briefs” are unfavourably compared to the prevalence of hen’s teeth. However, all criminal defence firms will have experience of the difficulty of obtaining a suitable junior advocate for preliminary hearings and, increasingly commonly, for trials in the Crown Court.

## The Costs of the “Alternative” are Prohibitive

The government has a statutory duty to ensure the continuity of supply of criminal defence services in addition to its oft stated pride in the fact that our Justice system is revered around the world. Rather than taking a cut at any price approach to the criminal defence sector, surely there should be pause for thought with regards its sustainability – particularly where the alternatives available would come at a much higher cost to the public purse.

The MoJ has an effective live “pilot” of an alternative model in the form of the Public Defender Service (“PDS”). There has only been one comprehensive analysis of the comparative costs of the PDS versus private practice[[8]](#footnote-8) and it is significantly out of date. Whilst the conclusions must, therefore, necessarily be treated cautiously as potentially not being an accurate reflection of the current position, it would be remiss not to reflect on some of the conclusions, such as

*“Even on a ‘low’ estimate, based on their running costs only, the research PDOs had an average cost of £176 per chargeable hour in 2001-2, reduced to £100 in 2002-3 and to £95 in 2003-4. Although these figures include disbursements, they still are substantially higher than the hourly rates on which criminal legal aid payments are normally paid to solicitors in private practice.”[[9]](#footnote-9)*

There was something of an outcry when the PDS sought to expand its advocacy provision[[10]](#footnote-10) in April 2014. An analysis of the cost effectiveness of this recruitment at significant salaries would be useful, along with an update of the previous research. The MoJ has direct experience and ability to compare the viability of providing criminal defence services that it pays to private practice. It should do so before cutting rates further without understanding the consequences of its actions.

Where the previous analysis of the PDS was overwhelmingly clear was with regards the start up costs of the PDS:-

*“These high hourly costs of the PDOs during their first three year’s of operation translated in substantially higher cost per case when compared with private practice, especially at the investigation and magistrates’ court proceedings stage.”[[11]](#footnote-11)*

In other words the costs of sorting out the mess of a failed area in terms of duty provision pursuant to the government’s statutory duty will be much higher than the costs of sustaining supply in private practice.

## Summary

Simply put, the supply of criminal lawyers within the CJS is decreasing rapidly. However, this is not an adjustment to meet demand. It is a crisis-led abandonment of criminal defence work by talented junior lawyers due to pay and prospects, whilst the wheels (for the time being) continue to turn off the backs of an ageing cohort of criminal practitioners.

The inverted pyramid of the supplier base is already directly affecting the ability of the prosecution and defence to access advocates required to meet listings in Magistrates’ Courts and Crown Courts up and down the country. It is not sustainable and there is no Plan B. Further cuts will take the MoJ further down the road of not being able to meet its statutory obligation to provide criminal defence services. By driving solicitors out of the market now, the MoJ is emasculating any ability to fix future problems that will arise from any further cuts in funding.

# Consultation Questions

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

No. For the reasons given above.

## Q2. If not, do you propose a different threshold or other method of addressing the issue?

The BFG would be happy to engage with the MoJ to discuss any sensible changes to the LGFS. We believe that some of the underlying principles that emerged during the recent AGFS consultation such as payment for work done and each case being remunerated sustainably in its own right are sensible starting points.

## Q3. Do you agree with the proposed capping of court appointees’ costs at legal aid rates?

No. For the reasons given above.

## 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?

No

# Annex 1

## List of Firms

|  |
| --- |
| **Firm Name** |
| ABR Solicitors | Grech Gooden | Martin Murray & Associates | Stephensons |
| Bhatia Best | Gurney Harden | McCormacks | Stevens Solicitors |
| Blackfords | Hodge Jones & Allen | Nobles Solicitors | Switalskis |
| Burton Copeland | Howells LLP | Olliers | Taylor Street |
| Cartwright King | IBB Law | One Legal Limited | THB Legal |
| CJCH Solicitors | JD Spicer | Petherbridge Bassra | The Johnson Partnership |
| Cobleys | Jonas Roy Bloom | Reeds Solicitors | The Smith Partnership |
| DJMS Solicitors | Lawrence & Co | Riley Hayes | Tuckers Solicitors LLP |
| EBR Attridges | Lawtons  | Rowe Sparks | TV Edwards |
| Forbes Solicitors | Maidments | Sansbury Douglas | VHS Fletchers |

1. See Appendix 1 [↑](#footnote-ref-1)
2. Figures taken from the LAA Statistics July-September 2016 [↑](#footnote-ref-2)
3. <https://tinyurl.com/n5ye4xx> [↑](#footnote-ref-3)
4. <http://www.legislation.gov.uk/cy/uksi/2013/435/made> [↑](#footnote-ref-4)
5. <http://www.cps.gov.uk/careers/legal_professional_careers/specialist-fraud-division/> [↑](#footnote-ref-5)
6. House of Commons Committee of Public Accounts “Efficiency in the Criminal Justice System” First Report of Session 2016-17 Paragraph 19 (page15) [↑](#footnote-ref-6)
7. <https://www.criminalbar.com/latest-updates/news/q/date/2017/01/23/monday-message-23-01-17/> [↑](#footnote-ref-7)
8. <http://orca.cf.ac.uk/44472/1/1622.pdf> [↑](#footnote-ref-8)
9. <http://orca.cf.ac.uk/44472/1/1622.pdf> at page 231 [↑](#footnote-ref-9)
10. <https://www.lawgazette.co.uk/practice/public-defender-service-hires-11-advocates/5040880.article> [↑](#footnote-ref-10)
11. <http://orca.cf.ac.uk/44472/1/1622.pdf> at page 231 [↑](#footnote-ref-11)