



The Response of the Criminal Bar Association of England & Wales to the Consultation on Reforming the Litigators' Graduated Fee Scheme & Court Appointees

The Criminal Bar Association of England and Wales ("the CBA") represents the views and interests of practising members of the criminal Bar in England and Wales.

The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education, training and assistance with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

The CBA is the largest specialist Bar association, with over 4,000 subscribing members, and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country.

This response to the Ministry of Justice's consultation on its proposed reform to the Litigators' Graduated Fee Scheme ("the LGFS") & Court Appointees has been prepared and provided on behalf of the membership of the CBA.

1. For the reasons that follow, the Criminal Bar Association invites the Ministry of Justice:
 - not to consider making cuts to the Litigator Graduate Fee until it has carried out its promised strategic review of the funding of criminal litigation;
 - to bring the strategic review forward;
 - to reach an acceptable compromise in relation to fees for Court-appointed advocates.

2. The Criminal Bar has a complex relationship with solicitors, as they are both our suppliers and our competitors for work in the Magistrates Court and in the Crown Court in the form of Higher Court Advocates (HCAs). We are dependent on instructions by solicitors acting as

litigators, and therefore we need a viable and sustainable body of litigators who work effectively. The CBA believes that the Bar continues to be the most reliable and cost-effective provider of criminal advocacy, with high standards of training, ability and ethics, and relatively low overheads. We believe that the public is well-served by a dual profession, with barristers specialising in advocacy, although we freely acknowledge that competition with solicitors can be also be in the public interest provided that the competition is fair and open.

3. It is therefore a matter of great concern to us that the proposed cut to solicitors' fees risks making many firms economically unviable. If they close, the public will lose a crucial service, and the Bar will lose its suppliers.
4. We recognise that the current system of payment by Pages of Prosecution Evidence (PPE) skews the proper relationship between work undertaken and payment. It leaves too many honest and hard working solicitors at the mercy of cases with high page-count for their economic survival, while allowing for abuses by others who merely game the system. It makes forecasts of receipts by firms, and spending by the Legal Authority, highly unpredictable. This is not a satisfactory way of working, or running a business, or distributing public funds.
5. The CBA has consistently urged the MOJ to improve funding for work that facilitates 'early engagement' and promotes the policy of 'Better Case Management'. That means increasing rates of pay for work at police stations and in the Magistrates Court. That would be a far more rational and equitable method of payment. It now appears from the latest Definitive Guideline by the Sentencing Council¹ that maximum credit for a plea will only be available at the first stage of any case – invariably, the first hearing in the Magistrates Court (barring exceptional circumstances). It is essential that solicitors are properly remunerated for work done in advance of that hearing, so that they can give appropriate advice. The consequential benefit to the Ministry and the public should be self-evident. Where work at the early stages is properly paid, the expense of unnecessarily delayed pleas and of trials will frequently be avoided.
6. If the high page-count cases go, as envisaged in the Consultation, then those firms which have come to rely on them are at a high risk of failing and going out of business. Such firms are largely SMEs, rooted

¹ Reduction in Sentence for a Guilty Plea, effective from 1 June 2017

in and serving their local communities. Knowledge of their clients, the police, and the local Courts gives their service a value that extends well beyond mechanistic representation. Those communities and the wider public will suffer. The early advice, and the trust and confidence they give, will not be available.

7. The alternative, that firms will be driven to recruit more HCAs, will also harm the Bar and will deprive the public of the cadre of independent advocates that serve it so well.
8. Measures that damage the Criminal Bar are not only contrary to the public interest, but are inconsistent with statements by Ministers. In the foreword to the AGFS consultation paper, Sir Oliver Heald QC MP wrote

Our current payment system does not focus enough on the skilled advocacy that barristers and solicitor advocates demonstrate in the Crown Court.

9. It is not in the economic interests of big firms to use counsel – they profit by retaining advocacy and litigator fees by using employees, and will pay as little as possible for their services in order to maximise profits. Quality of representation takes second place to profitability. Big firms already have a business model that all but excludes the independent Bar, except for a few cases that are considered too difficult or unprofitable. It will be taken up by others, to the public's detriment.
10. Don't spoil the ship for a ha'porth of tar. In the context of government spending, the sums are negligible, but the short-term saving on PPE, and the alternative cut of 8.75% across the board, will have a disproportionate impact on both sides of the profession. Smaller firms will go under; they will either be susceptible to take-overs by larger ones, or will simply disappear. Take-overs under threat of business failure represent market consolidation without a thought-through strategy, and present an unacceptably high risk that quality will be diminished. The issuing of a large number of legal aid contracts by the MOJ indicates that market consolidation from above is no longer government policy.
11. We note that the Impact Assessment takes no account of the likely knock-on effects for the Bar. This is a significant failing in the consultation exercise.

12. We therefore urge the MoJ to pause its plans for the reduction of PPE payments.
13. In relation to the fees for Court-appointed advocates, we recognise that the availability of private fees is somewhat anomalous, but we can see the justification for not fixing them at legal aid rates. These cases are particularly difficult and sensitive; they call for skill and experience both in dealing with demanding 'clients' and in the handling of vulnerable witnesses.

Answers to Questionnaire

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

No

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

No. See above.

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

No. See 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.