

# June 07 Legal Aid Reforms Crime

## The Litigator Graduated Fee Scheme Consultation

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The Legal Services Commission ('LSC') has published the Litigator Graduated Fee Scheme Consultation. The consultation period began on 26 June 2007 and will run for six weeks. The deadline to respond to the consultation is 7 August 2007. These notes summarise some of the more important provisions.

The summary is designed to provide an overview of the main provisions and you should not therefore assume that all you need to know is included in this summary. A full copy of the published Fee Scheme can be accessed from the LSC's website or by copying the following link into your internet browser:

[http://www.legalservices.gov.uk/docs/criminal\\_consultations/lit\\_fee\\_scheme\\_con\\_doc\\_260607.pdf](http://www.legalservices.gov.uk/docs/criminal_consultations/lit_fee_scheme_con_doc_260607.pdf)

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### Introduction

This consultation develops the LSC's response to the proposals set out in Lord Carter's review which were consulted on in 'Legal Aid: A Sustainable Future'. The Government's and LSC's response to this consultation was published 'Legal Aid Reform: The Way Ahead' (November 2006).

In this consultation the LSC puts forward proposals which take the responses to the previous consultation into account, for the introduction of a fixed and graduated fee scheme for solicitor remuneration in all Crown Court cases. The proposals aim to further improve value for money and sustainability through a shift from paying for inputs (i.e. time spent, letters written) to paying for outputs, such as completed cases.

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### Litigator Graduated Fee Scheme ('LGFS')

Subject to the outcome of the consultation, the LSC intends to introduce a revised fee scheme for litigation services in the Crown Court on or after 3

**December 2007.** The fee scheme will become the means of paying for most work in the Crown Court. The exceptions will be paid by fixed fee.

The proposed graduated fee is based on the elements of a case that appear best to predict complexity and costs of a case.

The fees have been calculated by using the elements of a case and dividing them into those that occur in all cases ('proxies') and those that occur in some cases ('uplifts'). Proxies have been used to develop a formula for calculation of the fee. Uplifts have been considered to determine whether evidence exists for an additional uplift to be applied to the payment where appropriate.

The fee scheme provides payment for a case which is not intended to be an accurate individual case payment, but a means of providing the firm with a reasonable overall payment for a large 'basket' of cases. This method of remuneration is often referred to as 'swings and roundabouts'. The consultation states that over a period of time, the average payments should level out, and firms should examine their profit margins not on a case-by-case basis but over the course of the financial year.

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### **How the LGFS has been developed**

- LGFS developed following 18 months' detailed analysis of historic spend on Crown Court cases.
- The cases examined spanned a period of approximately 4 years.
- Cost drivers were identified within these cases by examining various factors within a case and comparing them to the financial spend.
- The subsequent fee is based on those cost drivers that appear best to predict the costs of a case.
- The elements have been divided into those that occur in all case ('proxies') and those that occur in some cases.
- Proxies have been used to develop a formula for the calculation of the fee.
- The elements that occur in some cases have been added to the litigator model as possible additional uplifts to be applied where appropriate.
- An uplift is an increase (a percentage increase on the whole fee), which is paid for a factor that has been identified as being a cost driver in certain cases. The graduated element of the fee is brought about by a

formulaic combination of the proxies. An uplift is added as a percentage of the whole fee thereafter.

- The fees are based on average historic spends for different case types, offence types and trial lengths.

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### Proxies

The proxies in the LGFS have been identified following detailed research on historic payments made to litigators in the Crown Court.

1. Case Type – i.e. when the case concludes
2. Offence Type – where the case involves more than one offence, the more serious offence type within the case will form the second proxy.  
*The first building block of the litigator fee formula is a cross reference between Case Type and Offence Type. The basic fee for each case type plus offence type pairing is in **Annex B** of the consultation.*
3. Trial length – this applies only to trial cases i.e. not to guilty pleas or cracked trial cases.  
*When a case has gone to trial, the basic fee is combined with the trial length to provide a length of trial payment. The payments are contained in **Annex C** of the consultation.*
4. Gross PPE (prosecution evidence) – this caters for cases where the gross PPE exceeds the PPE threshold.  
*The payments for the gross PPE proxy are contained in **Annex D** of the consultation.*

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### The Options

In the consultation the LSC put forward two options for the proposed LGFS.

Option 1: Contains proxies and three uplifts

Option 2: contains proxies and one uplift, catering for multiple defendants.

*The uplift rates for multiple defendants are contained in **Annex E** of the consultation.*

The LSC's preferred option is Option 2. Whichever option is chosen, the LSC expects overall remuneration for Crown Court work to be the same. The level of remuneration is expected to provide a £28 million saving to legal aid funds, therefore if either or both options achieve greater or lesser savings than £28 million, the LSC reserves the right to adjust the options accordingly until the right level is achieved.

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**Examination of the uplifts**

Following the Carter consultation responses were received from the Law Society and practitioners regarding the need to address more unusual aspects of some cases that did not apply to all cases. The LSC believe that the graduated fee model includes payments for unusual aspects through the 'swings and roundabouts' basis. However, in response the Carter consultation, practitioners suggested that whilst the 'swings and roundabouts' principle would work for firms with a varied case mix, firms that deal with specific clients or offences would suffer. The general practitioner view was that certain clients generated the need to for more work to be undertaken on a case.

The LSC agrees to consult further on the view of the Law Society that this may impact uniquely on the litigator in the defence team, as a result of their work receiving the client's instructions and drafting the proof of evidence.

Specifically, providers argued that vulnerable clients, client's who provided Queen's evidence, client's in custody and client's who required interpreter's affected preparation time (and therefore cost) to a significant degree. The LSC conducted research on a sample of 1,000 cases to examine this assertion.

*Information on the data collection exercise and analysis is contained in **Annex F** of the consultation.*

The LSC found the results to be inconclusive due to the limited availability of data on cases containing these complicating factors. Furthermore, due to the lack of consistency when examining similar cases under the EPF regime around (a) the level of payment awarded and (b) the varying amounts of work undertaken by litigators, the value of a potential uplift to remunerate for each complicating factor has been difficult for the LSC to quantify.

The LSC do not intend to introduce a fee scheme based on this data, however they welcome any additional input from practitioners on both the type of uplifts outlined in the consultation (including those that they have concluded do not

justify an additional payment) and on the level of remuneration for the uplifts proposed.

The LSC reminds practitioners of the fact that there is a fixed financial envelope, therefore any increase to one or more of the uplifts would require a proportional decrease in another element of the fee; to either one of the uplifts, or the proxies.

The following uplifts were examined by the LSC:

1. Client in custody

As 50% of Crown Court cases have client's in custody it does not appear to be an unusual factor in a Crown Court case. As the LGFS was based on historical data, the added complexity for client in custody has been modelled into the fees already. Furthermore, there is higher PPE in cases where the client is in custody, and the litigator fee has captured that disproportionate payment making an uplift unnecessary in these cases.

2. Non-English speaking client

The LSC suggests that a large element of the impact of non-English speaking clients would be picked up through the trial length proxy, as it is believed that cases with non-English speaking clients would take longer at trial than cases where there is no need for interpretation or translation services. Therefore, trials with non-English speaking clients are adequately funded on. However, the LSC would like practitioner's views on this. Cases where the client pleads guilty or where the case cracks before trial are not compensated by trial length. Therefore, the LSC seeks practitioner's views on the possible inclusion of an uplift for cracked trial and guilty plea cases with non-English speaking clients. The proposed percentage of the uplift is 10% of the whole fee for cracked trial and guilty plea cases.

3. Vulnerable client

The LSC accept that cases with vulnerable client's cost more. Factors such as PPE and trial length did not account for the whole cost, therefore an uplift might be appropriate. They found it difficult to define 'vulnerable' due to the wideness of definitions provided in the Mental Health Act, PACE 1984 and the Care Standards Act 2000. To fit in with the philosophy of graduated fees, 'vulnerability' has to be based on objective, verifiable criteria. The LSC welcomes practitioners' feedback on any objective definitions for 'vulnerable' client.

The LSC suggests defining vulnerable client as any of the following:

- Juvenile clients (defined in Magistrates Court Act 1980, s.29 (1)(a) "a person under the age of 18")
- Clients who are unfit to plead

- Clients in cases where a Restriction Order under the Mental Health Act has been imposed (which requires the permission of the Secretary of State to authorise the release of a convicted defendant)

The proposed percentage of the uplift is 10% of the whole fee.

For a cracked trial/guilty plea where the client is both non-English speaking and vulnerable the proposed uplift is 20% of the whole fee.

4. Defendant informant

Only 0.3% of the cases within the data sample included this element, making it impossible for the LSC to reach any conclusions. These cases should be treated as catered for within the fee and exceptionally examined on a case-by-case basis by the Complex Crime Unit where appropriate and where the case falls into the 25-40 day group. The definition of an appropriate case for examination by the CCU will be provided in due course.

5. Tapes

Due to the percentage of cases affected by the potential uplift, the LSC believe the 'swings and roundabouts' rule would adequately cover this aspect.

6. Exceptional levels of unused of 3<sup>rd</sup> party material (including tapes)

The LSC seek practitioners' views on the option of a possible escape to the VHCC contracting system for cases of 25 days or more where the unused exceeds 10,000 pages, and where the case meets an additional factor as set out in the VHCC scheme 25 – 40 day criteria as set out below:

*"We will contract all 25 – 40 day cases from the SFO, all Terrorism cases and all those with 5 defendants or more.*

*We will contract all those which have 2 or more of:*

- 10,000 or more PPE
- 10,000 or more pages of unused
- a Representation Order exists for QC and led junior
- expenditure on experts likely to be at least £10,000."

The LSC is wary of introducing Option 1 due to the inconclusive nature of the some of the data. Option 2 would increase the base fee for all LGFS cases by the same proportion (12.5%). The base fee is paid for all 1-2 day cases. Longer cases are paid the same fee but with increases for trial length and PPE.

*Some examples of both Option 1 and Option 2 of the litigator fee have been provided in **Annex G**.*

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### **Method of Calculation**

- The LGFS is calculated by means of a formula.
  - For guilty plea, cracked trial and trial cases, where the case falls below the PPE\_threshold, then the total fee payable to the litigator will be the basic fee, and any\_applicable length of trial proxy.
  - For guilty plea and cracked trial cases with PPE above the PPE threshold, the final fee will be calculated from gross PPE proxy by case type and offence type.
  - For trial cases with PPE above the PPE threshold of the length of trial proxy, the final fee will be calculated from the gross PPE proxy by offence type.
  - For Option 1, uplifts will be added after the fee has been calculated. For both\_options, the defendant uplift will be applied last.
  - Two calculators have been published on the LSC's website alongside this consultation paper, to assist interested parties in understanding the effects of the new fee scheme proposals without having to manually calculate fees using the various tables in the attached annexes.
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### **Other considerations**

There were various other factors that the LSC need took into consideration when examining the LGFS. The factors are:

- Exceptional levels of unused and 3rd party material (see above)
- Confiscation (and related) hearings  
These hearings will be paid through the LGFS through the graduated fee formula rather than an uplift. For additional hearings, an additional trial day will be added to account for the additional work.
- Transfers and retrials (refer to Annex H)  
A percentage of the fee will be paid according to the stage at which the case was transferred or where there is a retrial.

*The fee table is contained in **Annex H** with examples of how the payments would work in practice in **Annex G**.*

- Travel and waiting  
Time take traveling and waiting has been included in the LGFS base fee.
- Travel disbursements  
The majority of travel disbursements are included in the base fee. However, where there is exceptional expenditure on travel e.g. long haul air travel, the LSC propose that it should be considered along with other disbursements (see below). A definition of exceptional travel disbursements will be provided prior to the introduction of the scheme.
- Other disbursements  
Other disbursements such as expert's reports will be paid for separately. Providers are advised to obtain prior authority for more unusual disbursements.
- Complex cases  
It is proposed that cases likely to last between 25-40 days should be dealt with by contract under the VHCC system.
- Committal hearings and sent cases  
Cases that are transferred under Section 51 already contain an element for payment for the transfer within the LGFS. All other committal (and similar) proceedings will continue to be remunerated in the Magistrates' Court.

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### **Claiming the Litigator Fee**

Currently, litigators' claims in the Crown Court are processed by HMCS NTT. The LSC propose that claims for cases granted Representation Orders after the implementation of the LGFS (currently anticipated to be on or after 3 December 2007) be processed by the National Courts Team (NCT) in the LSC.

From the date of implementation of the new LGFS, claims will be made either on-line or by submission of a claim form to the NCT, together with copies of prior authorities and invoices as appropriate. The claims will be paid in the next available BACS payment run.

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### **Appealing the Litigator Fee**

There will be provisions to appeal the litigator fee. These will be set out in the Funding Order and in guidance material. There will be an initial stage of review within the NCT processing centre, with a right to appeal to a Cost Judge. The appeal to the Cost Judge will be identical to the appeals process currently used by litigators following a re-determination of a bill. Final appeals will go to the High Court.

Litigators will be able to appeal disputed case data (e.g. offence type or length of trial) and also disputes where cases are thought to be eligible for inclusion in the VHCC contracting scheme.

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### **Litigator Fixed Fees**

There are a number of hearings in the Crown Court that do not pertain to a Crown Court case. These are:

- Committals (for sentencing)
- Appeal against sentence
- Appeal against conviction
- Contempt of court (other than defendant in a Crown Court case)

These hearings are currently paid by standard fees and/or an escape to EPF determination.

The LSC propose to introduce fixed fees based on average payments for the majority of cases (70%), which they state will have the effect of reducing the fixed fees from the Carter proposals, but will enable them to recycle the savings into the LGFS where it will be more beneficial to firms.

The proposed fixed fees are:

- Committals for sentence - £250
- Appeals against conviction - £400
- Appeals against sentence - £150
- Contempt - £150

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### **Consultation Timetable and Response**

The consultation will run for 6 weeks from 26 June 2007.

A response to the consultation will be published by the LSC on 31 August 2007.

The new LGFS will be implemented on or after 3 December 2007.

The closing date for the consultation is **7 August 2007**.

A list of all the consultation questions can be found at pages 31 & 32 of the consultation paper.

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