

Litigator Graduated Fee Scheme Post Implementation Review

August 2010

Foreword

Legal aid litigators play a vital role in the Criminal Justice System. The Legal Services Commission (LSC) recognises that defence litigators working on Crown Court cases ensure that some of the most vulnerable members of society have access to justice.

Following Lord Carter's July 2006 review 'Legal Aid: A Sustainable Future', and the Department for Constitutional Affairs and LSC November 2006 response 'Legal Aid Reform: the Way Ahead', the LSC implemented the Litigator Graduated Fee Scheme (LGFS).

I am grateful to all of the members of the review group who have, since August 2008, been working together to undertake a comprehensive review of the LGFS. I am also grateful to colleagues from the profession's Representative Bodies and our Criminal Justice System partners for their involvement and contributions.

It is particularly welcome to note the significant steps taken to better control Crown Court expenditure, whilst maintaining quality of legal services. We recognise, however, that there is more that can be done. The findings and recommendations in this report will be invaluable in helping us to achieve this and to inform the future of legal aid in the Crown Court.

We are committed to improving the value for money we obtain from the funds available, so that clients continue to have access to the quality legal services that they need.



Hazel Parker-Brown
Executive Director, on behalf of the Chief Executive in her absence

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Executive Summary

Since August 2008, the Legal Services Commission (LSC) has been working with representatives from The Law Society (TLS), the Bar Council (BC), Legal Aid Practitioners Group (LAPG), Criminal Law Solicitors Association (CLSA), Solicitors' Association for Higher Court Advocates (SAHCA), London Criminal Courts Solicitors Association (LCCSA), Her Majesty's Court Service (HMCS), and the Ministry of Justice (MoJ) to undertake a comprehensive review of the Litigator Graduated Fee Scheme (LGFS).

There were a number of expected benefits with the implementation of the LGFS. The review group focused on financial control and quality of legal services. The LSC reviewed internal benefits such as financial stewardship, IT and resource savings.

This report outlines the findings of the review. A complete summary of recommendations can be found in Chapter six.

Financial control and quality of legal services

The review group analysed LSC data, the Pages of Prosecution Evidence (PPE) validation process, specific cases and other issues raised by members of the group to analyse whether the LGFS met its expected benefits.

The key findings include:

- Overall savings of 1.6%
- There has been an unexpected growth in Very High Cost (Crime) Cases (VHCC) remunerated under the LGFS – excluding these cases, the LGFS is saving 6%
- There have been significant movements in average spend on certain offence and case types
- There have been difficulties with validation of Pages of Prosecution Evidence (PPE)
- The LGFS has enabled simpler and more predictable forecasting of litigator Crown Court expenditure.

Recommendations include restructuring the fee, improvements to the PPE process, undertake a further review to assess the impact of high end cases on the overall savings, examine the movement of VHCCs and examine cracked trials.

Financial Stewardship

The LSC examined the scheme design, IT and operational controls that were implemented to ensure accuracy of payments.

The key findings include:

- The scheme has not prevented misclaiming (and consequential overpayments/recoups) (e.g. over £1.5m has been recouped on duplicate claims)
- The validation process has been modified since implementation but this has been essential to ensure accuracy of payments (e.g. requiring additional supporting documentation)

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- The Litigator Fee Team (LFT) have implemented actions to improve internal quality assurance but would benefit from refresher training
- Communication between the LFT and the Complex Crime Unit (CCU) is not systematic and could be improved.

Recommendations include improving IT controls, the communication process in relation to VHCCs, revisiting the design of the scheme, additional resource for financial stewardship work and refresher training.

Processes and Operations

The LSC examined whether the original administrative objectives as defined in the business case were met.

The key findings were:

- All litigator Crown Court work¹ is remunerated under the LGFS except confiscation proceedings
- CREST data feed contains the fields required for validation but the data is not always accurate and the Service Level Agreement (SLA) with HMCS is yet to be agreed
- CREST database allows 60% of claims to be validated without additional information requests. It is user-friendly but is unsustainable in its current form.
- The claiming process has been modified since implementation but this has been essential to ensure accuracy of payments (e.g. requiring additional supporting documentation)
- CCLF was built to specification but issues with validation have been identified following implementation
- The online calculator is a useful tool for both the LSC and providers
- LGFS turnaround times were within target for 09/10
- Redeterminations account for 6.2% of total litigator fee claims and appeals to Costs Judges account for less than 0.1%
- Improvements can be made to the redetermination and appeals process
- There has been an administrative saving.

Recommendations include bringing confiscation proceedings within the LGFS, additional resource to oversee the redetermination and appeals process, bi-annual amendments to the LGFS guidance, consider alternatives to the current appeals process.

IT Infrastructure

The LSC examined whether the financial and operational benefits of taking the processing of bills in-house were realised.

The key findings were:

¹ Except cases with a representation order dated before 14 January 2008 and VHCCs which fall outside the LGFS

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- Making changes to the in-house CCLF system is quicker, more flexible and cheaper than the previous scheme
- Systems and user testing took place
- There is minimal disruption to day to day processing
- The Business Intelligence (BI)² facility was delayed but most information is now available and fit for purpose
- The LFT would benefit from additional standard reports to assist with financial stewardship work
- Further training on the BI facility would benefit the LFT.

Recommendations include additional resource and training dedicated to BI to assist with financial stewardship and additional reporting functions.

² BI being a computer based technique used to analyse business data to support better decision-making.

1. Chapter One: Introduction

Background

- 1.1 The Litigator Graduated Fee Scheme (LGFS) was introduced on 14 January 2008 following recommendations from Lord Carter's review 'Legal Aid: A Market Based Approach to Reform'¹ and two consultations 'Legal Aid: A sustainable future'² and 'The Litigator Graduated Fee Scheme – A consultation paper'³ to address increasing Crown Court expenditure and secure a sustainable future for legal aid.
- 1.2 The LGFS replaced the ex post facto (EPF) and Standard Fee (SF) payment schemes for litigators in the Crown Court. EPF assessment involved an examination of the litigators' bill, together with attendance notes, invoices and other supporting documentation by a taxing officer at the end of the case. The taxing officers would make an assessment of the work done based on sums they thought reasonable for work they considered to be reasonably undertaken. The SF was a fixed fee scheme, which covered some trials of one to two days and some guilty pleas. Her Majesty's Court Service (HMCS) and the National Taxing Team (NTT) were responsible for processing claims under the SF and EPF schemes respectively.
- 1.3 This system of remuneration made it difficult to predict and control costs. It did little to reward efficiency and provided little certainty to firms in terms of the amount of payment they would receive. From 1997/98 to 2004/05 there was an increase in real terms of 86% on Crown Court expenditure. Crown Court costs had consistently grown ahead of mainstream economic indicators and were taking an increasing amount of the overall legal aid budget.
- 1.4 The LGFS is a graduated and fixed fee scheme similar to the Advocates' Graduated Fee Scheme (AGFS). The graduated fee was designed to remunerate based on objective case information (outputs) rather than hours worked (inputs). The case information (known as proxies) used to calculate the fee includes: case type (e.g. guilty plea, cracked trial, trial), class of offence, trial length and the number of pages of prosecution evidence (PPE). An uplift is provided where a litigator represents more than one defendant. The LGFS includes fixed fees for certain Crown Court hearings that normally occur following magistrates' court proceedings. The scheme also relies on the principle of 'swings and roundabouts'.⁴
- 1.5 It was the view of Lord Carter, accepted by both the LSC and MoJ, that the LGFS was a necessary step in order to secure a sustainable future for this area of criminal legal aid. The LGFS would achieve this by increasing control of Crown Court expenditure, reducing inefficiency, minimising duplication of work done by litigators and advocates, providing greater certainty to litigators around timing and value of payments and maintaining provision of quality legal services for clients.

¹ <http://www.legalaidprocurementreview.gov.uk/publications.htm>

² <http://www.dca.gov.uk/consult/legal-aidsf/sustainable-future.htm#cons>

³ <https://consult.legalservices.gov.uk/consult.ti/litigator.graduated.fee/consultationHome>

⁴ The fee is not intended to be an accurate individual case payment system, but rather a means of providing a reasonable overall payment for a 'basket' of cases.

- 1.6 Additionally, the LSC also decided to bring the management of the payment system in-house to enable control and expenditure on IT changes and resources. This was expected to bring additional administrative savings.
- 1.7 The scheme has now been running for over two years and as agreed with Representative Bodies during the consultation, has been subject to a comprehensive and systematic Post Implementation Review (review). It was envisaged by Lord Carter's review that the scheme would be an interim measure prior to the introduction of market-based reforms based on the principle of a single graduated fee for Crown Court work. However, whilst the option of a single graduated fee remains a consideration – as noted in the recent MoJ paper 'Restructuring the delivery of criminal defence services'⁵ – it falls outside of the scope of this review.

Scope and Purpose

- 1.8 The review focused on the financial and operational controls of the legal aid fund and the financial and operational impact on the LSC and legal aid providers.
- 1.9 The purpose of the review was to:
- assess whether the expected benefits have been delivered:
 - Financial control and quality of legal aid services*
 - Increased control of expenditure with savings of 5.5% (approximately £11m based on 05/06 expenditure) when fully operational
 - Adequate remuneration under swings and roundabouts
 - Efficient operational delivery (validation of Pages of Prosecution Evidence (PPE))
 - Maintain provision of quality legal services
 - Better financial management and forecasting of Crown Court payments
 - Financial Stewardship*
 - Fraud prevention and control of costs
 - Processes and operations*
 - A single payment system for litigators for Crown Court work
 - Simplification of claims processing
 - Reduction in cost of processing claims
 - IT infrastructure*
 - Control of IT infrastructure and costs
 - A reliable IT infrastructure
 - Better quality information on Crown Court cases
 - if applicable, examine why benefits were not realised
 - where changes were agreed, ensure they did not compromise the original business case or operating arrangements

⁵ <http://www.justice.gov.uk/publications/docs/restructuring-delivery-criminal-defence-services.pdf>

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- confirm that the necessary resources for the ongoing administration of the project are in place
- where necessary, make recommendations for changes to the scheme and/or operational practices.

1.10 In addition, the review team considered the transfer of processing AGFS claims from Her Majesty's Court Service (HMCS) to the LSC.

Approach

1.11 The review began in August 2008 with a meeting of representatives (LGFS review group or group) from the LSC, The Law Society (TLS), Legal Aid Practitioners Group (LAPG), Criminal Law Solicitors Association (CLSA), HMCS, and the Ministry of Justice (MoJ). The Bar Council was represented from November 2008. This was called the interim review as the group agreed it was too soon to undertake a full review due to an insufficient dataset of graduated fee cases.

1.12 The Terms of Reference of this group were to examine fixed fees and to address any anomalies or omissions within the Criminal Defence Service (Funding) Order 2007 (Funding Order). The group's Terms of Reference and findings can be found at Appendix A and the group's recommendations were implemented in full on 3 August 2009.

1.13 The full review began in February 2009 and consisted of representatives from the LSC, TLS, the Bar Council, Solicitors' Association for Higher Court Advocates, LAPG, CLSA, London Criminal Courts Solicitors Association, HMCS and the MoJ.⁶ The group agreed that it was still too soon to review the graduated fee element of the scheme and recommended the analysis be undertaken in March 2010. The group used the intervening period to review other aspects of the scheme.

1.14 Information was gathered from a number of departments across the LSC, HMCS and the NTT by the Crown Court team to review the expected financial stewardship, operational and IT benefits following LSC project principles.

Structure

1.15 The review is broken up into five chapters:

1. *Introduction*
2. *Financial control and quality of legal services* contains the group's findings and analyses whether the LGFS has delivered expected savings, provides adequate remuneration, provides efficient operational delivery for legal aid providers, maintains quality of legal services. It also reviews whether forecasting of Crown Court expenditure has been simplified/improved.
3. *Financial Stewardship* examines the prevention of fraud and control of the legal aid fund by looking at the scheme itself, the IT system and the operational processes in place.

⁶ The Terms of Reference for the full review can be found at in Appendix B

4. *Processes and Operations* examines whether the original administrative objectives as defined in the business case were met.
5. *IT Infrastructure* reviews whether the financial and operational benefits of taking the processing of bills in-house were realised.
6. *Summary of Recommendations* outlines all of the recommendations made as part of the review.

2. Chapter two: Financial control and quality of legal services

Background

2.1 The LGFS was modelled on a dataset taken from the 2004/05 financial year that amounted to approximately 263,000 claims. Following consultation, the LSC remodelled the scheme using 2006/07 data and the expected savings were reduced from £28m to £11m. During consultation, the LSC outlined what it was trying to achieve. As mentioned above, a group was established to review some of these expected benefits and concentrated on financial control, adequacy of remuneration, operational delivery and quality of services.⁷ This chapter looks at the group's findings and recommendations along with whether the expected benefit of improved forecasting has been achieved.

Savings, adequate remuneration, operational delivery, quality of legal services

What was expected?

2.2 There were a number of expected benefits with the introduction of the LGFS. The group focused on the following:

- Increased control of expenditure with savings of 5.5% (approximately £11m based on 05/06 expenditure) when fully operational
- Adequate remuneration under swings and roundabouts
- Efficient operational delivery (validation of PPE)
- Maintain provision of quality legal services.

What was reviewed?

2.3 The group analysed case starts for 2007 and 2008 along with the following data sets:

- Spend, Volume, Average Spend and Average Weighted Spend⁸ for all cases
- Spend, Volume, Average Spend and Average Weighted Spend for cases with a duration of up to 12 months
- Spend, Volume, Average Spend for cases with a duration up to 12 months by case type, offence type and trial length
- All of the above with Very High Cost (Crime) Cases (VHCC) included and excluded.

2.4 The group also reviewed the PPE validation process, specific cases and any other issues raised by members of the group.

⁷ The findings and recommendations for the interim review are not repeated here as these were implemented on 3 August 2009.

⁸ Given the increase in Crown Court starts in 2008, the group agreed to use the average spend for both EPF and LGFS but only volume for EPF to remove the effect of the increase in Crown Court starts.

Key Findings

2.5 The group's analysis led to the following key findings⁹:

- Overall savings of 1.6%
- There has been an unexpected growth in VHCCs remunerated under the LGFS – excluding these cases, the LGFS is saving 6%
- There have been significant movements in average spend on certain offence and case types
- There have been difficulties with validation of PPE.

Detailed Findings

Control of expenditure

2.6 Using the methodology set out in Appendix C for establishing a suitable dataset, the group analysed spend and volume across 2007 and 2008. Given the increase in Crown Court starts for 2008, the group agreed to use the average spend for both EPF and LGFS but only volume for EPF to remove the effect of the increase in Crown Court starts. Table 1 demonstrates that there has been a saving of 1.6% to date.

Table 1 – Overall position

	2007 (EPF)	2008 (LGFS)	Movement EPF vs LGFS
Spend	£122,210,024	£141,546,008	15.8%
Volume	84,365	96,734	14.7%
Average spend	£1,449	£1,463	1%
Average weighted spend	£1,449	£1,425	-1.6%

2.7 During analysis, the group recognised that there had been an increase in cases that meet the VHCC definition within the LGFS data. This coincided with a 10% reduction in the number of VHCC notifications from 2006/07 to 2008/09 and a decrease in VHCC spend. The change in the VHCC definition in 2008 was expected to increase the number of VHCCs, and therefore, the number of notifications. The review group discussed reasons for the unexpected decrease in VHCCs (and corresponding increase in VHCCs within the LGFS). These include:

- a) Insufficient numbers of VHCC Panel Advocates to undertake VHCC work
- b) Non Panel Litigators reluctant to transfer the case
- c) Financial incentives
- d) Other incentives such as a preference not to be managed on a day-to-day basis under the VHCC scheme
- e) External factors such as decisions around charging
- f) CCU's decision making on VHCC classification.¹⁰

⁹ Please note the data limitations outlined in Appendix C

¹⁰ Although these factors could help explain the VHCC effect on the LGFS, the group agreed that as trial length impacts on the courts, they can and do act as a control to potential collusion with overestimating and underestimating trial estimates.

2.8 The group agreed to look at the data with the VHCCs removed as this was an unexpected impact on the LGFS which had not formed part of the initial scheme model. Therefore, all cases with a trial length of 41+ days or more (and corresponding guilty plea and cracked trial case numbers) and those with a trial length of 25-40 days and greater than 10,000 PPE were removed from both datasets.¹¹ Table 2 demonstrates that by removing the unexpected VHCC increase, there is a saving in line with the expected saving of 5.5% when fully operational.

Table 2 – Overall position (excluding VHCCs)

	2007 (EPF)	2008 (LGFS)	Movement EPF vs LGFS
Spend	£120,476,909	£133,324,618	10.7%
Volume	84,312	96,633	14.6%
Average spend	£1,429	£1,380	-3.4%
Average weighted spend	£1,429	£1,344	-6%

2.9 However, it was agreed that there were still insufficient volumes of cases at the high end of the LGFS to fully appreciate the shift of VHCCs in order to review the movement between the LGFS and VHCC schemes. The group therefore recommends that further analysis still needs to be undertaken to ensure that all of the impacts and costs of these very high cost cases are reviewed and analysed.

2.10 Notwithstanding these limitations, the analysis showed a 22.8% increase in trials, cracked trials and guilty pleas in the Crown Court.¹² HMCS confirmed that this is consistent with their analysis of Crown Court starts over this period. The group noted that one reason for this increase could be the magistrates' court not having or declining jurisdiction. However, the group also discussed remuneration of either way cases, focusing on remuneration of early guilty pleas in the magistrates' court and committal for sentence in the Crown Court. Members of the group suggested committal for sentence fees were sometimes inadequate for certain types of cases and could be providing an incentive to providers to advise their client to elect Crown Court. The group agreed this issue was wider than the LGFS review group and recommended that further work be undertaken outside of this group on funding and motivations between the two courts, but that the group is kept informed.

Recommendations

A. *Undertake a further Review in twelve months to:*

- *Analyse the impact of the high-end cases that are still to come through the system*
- *Analyse the impact of the PPE cap*
- *Further analyse movement of VHCCs*
- *Consider remuneration of cases that crack immediately before the jury is sworn.*

¹¹ The group accepted that this may not capture all VHCCs and may include some cases that would not be classified as VHCCs. However, it provided a sound indication of the effect of VHCCs on the LGFS.

¹² The 14.7% increase in Table 1 includes all Crown Court starts including Breach of Crown Court orders, contempt proceedings, confiscation proceedings etc.

B. Further work be undertaken outside of the review group on funding and motivations between the magistrates' court and Crown Court.

Adequate remuneration under swings and roundabouts

2.11 The group looked at the increases and decreases in spend of all case and offence types from 2007 and 2008. Figures 1 and 2 demonstrate there are some significant movements between certain case and offence types, and these movements are the same when including or excluding VHCCs.

Figure 1 – Movement for Average Weighted Spend by case and offence type (including VHCCs)

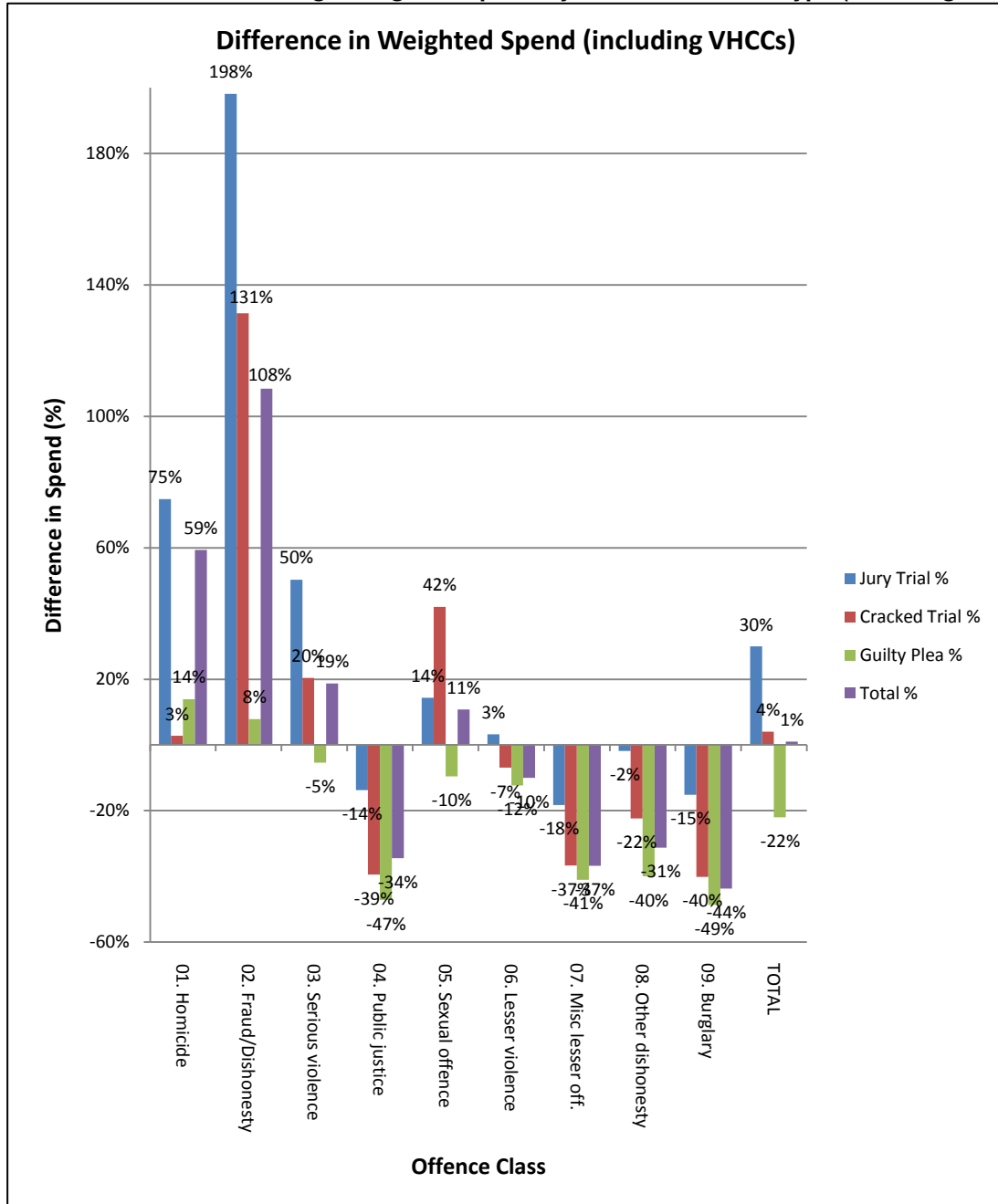
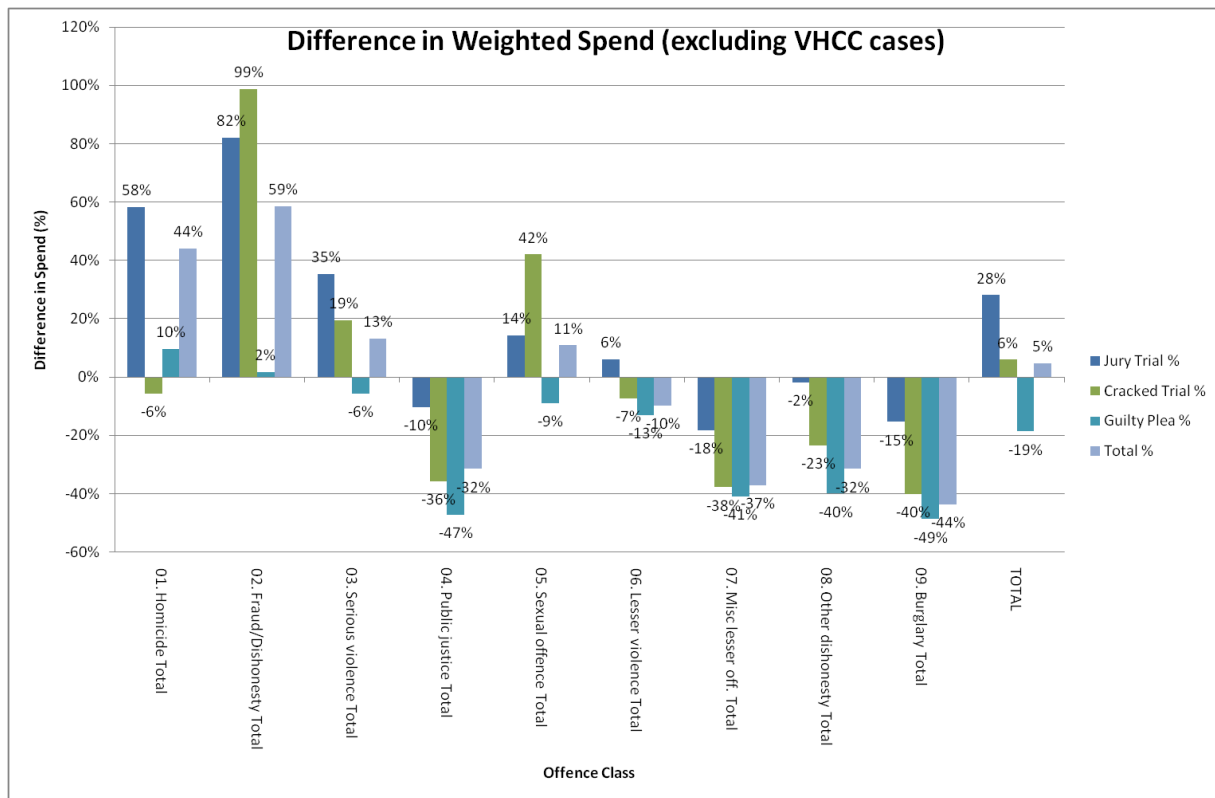


Figure 2 – Movement for Average Weighted Spend by case and offence type (excluding VHCCs)

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- 2.12 Based on this analysis, the group recommended that there should be a redistribution of funds between some ‘winners’ and ‘losers’ to ensure a more balanced fee structure across all case and offence types.
- 2.13 Members of the group also raised specific examples of cases where large volumes of CCTV/audio evidence and bad character/hearsay evidence have been served. The group was restricted by the data that is currently captured on payments made under the EPF and the LGFS so was unable to review these aspects of the scheme in detail to assess whether they are adequately remunerated under the swings and roundabouts principle.
- 2.14 Members of the group also questioned the effectiveness of the current system of applying the legal aid impact test to new legislation. The group agreed all representatives had an interest in any changes that are made to the criminal justice system and could therefore act as a reference group to feed into the legal aid impact assessment process.

Recommendations

- C. *Redistribute funds within the LGFS to bring certain fees to a cost neutral position when compared with 2007 spend by diverting money from homicide (A), fraud/dishonesty >£30k (G and K) and serious violence (B) trials, to:*
- (a) *guilty plea fees for all offence types or all offence types except homicide (A) and fraud/dishonesty where the value is greater than £30k (G and K) and*
 - (b) *cracked trial fees for burglary (E), miscellaneous other offences (H) and public justice offences (I).*

D. Collect data on the following:

- *Bad character/hearsay evidence*
- *CCTV/audio evidence.*

E. Where the MoJ is undertaking a legal aid impact assessment, or where it is aware of any other changes that may impact on the criminal justice system, it should make use of the expertise of the group and invite comments prior to implementation.

Operational Delivery (validation of PPE)

- 2.15 Following implementation of the LGFS, the LSC experienced difficulties establishing and validating PPE. Following these difficulties, a PPE review group was set up in November 2008. The PPE group recommended an improved process whereby the CPS would provide running totals of PPE and the PPE figure would be confirmed between the defence and prosecution at the end of a case. This PPE figure would then be entered onto HMCS' case management system (CREST) by the court clerk. The new PPE process was introduced on 1 May 2009.
- 2.16 In September 2009, during routine processing activity, the LSC discovered large-scale disparities between the PPE claimed, PPE on CREST and actual PPE. The size of these discrepancies represented an unacceptable level of risk to the legal aid fund. The LSC therefore took remedial action on 17 September 2009 and agreed that evidence in support of the PPE being claimed should be provided.
- 2.17 The LSC recognise that this process is not sustainable so reconvened the LGFS review group to discuss long term solutions.
- 2.18 The group considered judicial involvement to establish the PPE as well as ways in which the reliance on individual pages could be reduced (e.g. banding of PPE into PPE ranges). However, the group agreed that neither option would resolve the issue because:
- (a) Judicial involvement in counting pages of evidence was not appropriate use of judicial and/or court time
 - (b) Banding of PPE would not fully resolve the validation issue and would increase swings and roundabouts.
- 2.19 The group agreed that the LSC must ultimately be able to confidently validate claims against CREST and that the main reason why this has not been achieved is a general misunderstanding over what evidence falls within the PPE definition. Therefore, until there is a sufficient level of confidence in being able to validate claims against CREST, the LSC requires objective evidence to be submitted supporting each claim.
- 2.20 The group discussed the PPE process that was introduced on 1 May 2009 and all agreed that the benefits of this process are starting to be realised as each party becomes accustomed to the process.

2.21 The group made the following recommendations:

- Prepare draft proposals to incorporate a pagination and indexing requirement into the Criminal Procedure Rules (CrimPR). A sub-group was established and the draft proposals were presented to the CrimPR Committee in April 2010. The committee endorsed the proposal and it is now subject to approval by the Lord Chief Justice. *[If approved, the pagination and indexing requirement will be incorporated into the Consolidated Criminal Practice Direction later this year.]*
- Prepare detailed PPE Guidance to be used as a reference by providers, the LSC, HMCS, and prosecuting authorities. The LSC published PPE Guidance on 17 December 2010. *[Completed]*
- All parties continue to work together and report where the PPE process has not been followed. *[Ongoing]*

2.22 A review of the use of proxies in relation to financial stewardship is discussed in more detail in section 5.

Recommendations

- F. Prepare draft proposals to incorporate a pagination and indexing requirement into the Criminal Procedure Rules.*
- G. Prepare detailed PPE Guidance to be used as a reference by providers, the LSC, HMCS and prosecuting authorities.*
- H. All parties continue to work together and report where the PPE process has not been followed.*

Provision of quality services

2.23 The group discussed the following issues which had previously been raised by litigators and advocates:

- Decrease in litigator attendance at court to assist the advocate¹³
- Decrease in litigator attendance on the client

2.24 The LSC and the MoJ have agreed to keep these issues under review and welcomes specific examples and evidence of any behavioural changes.

2.25 The group also recommended that they continue to meet to review any issues in relation to funding, quality and/or operations.

Recommendation

- I. The LGFS Review Group to continue to meet on a quarterly basis.*

¹³ The Bar Council has requested that this report note that they maintain the view, as expressed in their 30 June 2009 response to the MoJ's consultation on the draft Funding Order, that the LGFS be adjusted to allow for separate remuneration for attendance at court.

Better financial management and forecasting of Crown Court payments

What was expected?

2.26 It was envisaged that a scheme designed to calculate a fee based on case outputs rather than inputs, would enable better financial management and forecasting of Crown Court payments.

What was reviewed?

2.27 The review interviewed members of the LSC's forecasting team and questioned the differences in forecasting methodology before and after implementation of the LGFS.

Key Findings

2.28 The review found that the LGFS has enabled simpler and more predictable forecasting of litigator Crown Court expenditure.

Detailed Findings

2.29 The EPF and SF scheme was vulnerable to uncontrollable factors so forecasting litigator Crown Court costs was difficult and unpredictable. The forecasting teams have found that the LGFS gives them more confidence in forecasting litigator Crown Court costs and when combined with the AGFS, overall Crown Court costs.

2.30 Also, with an in-house IT system and processing centre, there have been improvements with knowledge of, access to and quality of Business Intelligence (BI).¹⁴ As set out in Appendix C, there were unknown variables with the EPF data where some offence types were not classified or some case types were misclassified. These unidentifiable variables have been removed with the introduction of the LGFS.

2.31 If there is questionable data, the forecasting team can liaise directly with the LFT and resolve any anomalies quickly. For example, the forecasting team identified a group of extraordinary lengthy trials that appeared to have been remunerated under the LGFS. On closer investigation, it became clear that this was a data entry issue where the PPE had been entered into the trial length field on Crown Court Litigator Fee (CCLF), the online system for providers to submit claims electronically, and was quickly rectified by the LFT.¹⁵ When compared to the previous scheme, the forecasting team had to use the data from an external source so questionable data took longer to rectify or it could not be rectified (and therefore used) at all.

2.32 The review did identify some issues in relation to quality of data and potential improvements that could be made to the BI and these are discussed in more detail Chapter four.

¹⁴ BI being a computer based technique used to analyse business data to support better decision-making.

¹⁵ Please note these data entry errors had no impact on the fees paid

3. Chapter three: Financial stewardship

Background

- 3.1 Under the EPF and SF scheme, the taxing officers were responsible for monitoring and addressing fraudulent activity while determining payments. This was done by assessing and validating the work and hours claimed against evidence supplied by the litigator and/or with other institutions such as the prison authorities – for conferences with the client. Assessment was also based on whether the work undertaken was necessary and reasonable for that particular type of case.
- 3.2 Designing the LGFS with reference to objective case outputs (proxies) rather than case inputs (hourly rates), was a conscious attempt to minimise the need for subjective assessments. The case proxies include:
- Offence class (e.g. Offence Class A – homicide)
 - Case type (e.g. guilty plea, trial etc)
 - Trial length
 - Pages of Prosecution Evidence (PPE)
 - Number of defendants represented by the firm
 - Transfer status
 - Retrial status
- 3.3 In order to ensure that claims were legitimate and accurate, a level of validation against the existence of the case and the parameters within the case that trigger higher payments was also implemented. Such controls included:
- Requirement to submit a copy of the Representation Order and actual disbursement vouchers
 - Validation of proxies against information contained on the court's case management system (CREST)
- 3.4 Prior to implementation, the LSC carried out a survey to determine the preferred method of training for practitioners and the outcome was to provide written guidance/training manuals. This was also the central medium of training for LSC staff. A list of guidance manuals was provided and these are discussed in more detail in paragraph 3.27. The training was focussed on how best to ensure that claims, and payments, were accurate.
- 3.5 In addition to modelling the scheme to minimise misclaiming and having sufficient internal processing controls, CCLF was also designed to minimise fraudulent activity. For example, the system was designed to allow one claim per case, apart from where one of the claims is a retrial. It also prevents pre 14 January 2008 cases from being entered onto the system.
- 3.6 As part of the LGFS consultation, practitioners voiced their concerns with remuneration for the larger cases. To address these concerns and to avoid any incentive for practitioners to misreport their case as a VHCC, the fee was remodelled to bring payment for larger cases under the LGFS more in line with the fees under the VHCC scheme.

Fraud prevention and control of costs

What was expected?

- 3.7 As with all new fee schemes, it was anticipated that the financial stewardship aspects of the LGFS would be under constant review. Nevertheless, the scheme design included a number of measures that were intended to limit the scope for incorrect payments. These included the use of objective proxies, a validation process to ensure accurate payments were made and an IT system that prevented multiple claims under the one case number.
- 3.8 It was also envisaged that use of objective proxies and delivery of appropriate training would ensure a high accuracy rate with claims and payments.
- 3.9 Finally, it was expected that unless there are exceptional circumstances, cases that meet the VHCC criteria would be remunerated under the VHCC scheme.

What was reviewed?

- 3.10 The review looked at:
- Whether use of case proxies, the assessment process, and the CCLF controls prevent misclaiming and/or overpayments by looking at instances identified by the LFT, the validation process and CCLF limitations
 - Whether the assessment process provides adequate quality assurance by looking at quality assurance reports and interviewing the LFT
 - What VHCC controls are in place to ensure VHCCs are remunerated under the VHCC scheme by looking at VHCC data and the established internal controls. The review also conducted interviews with the LFT and the Complex Crime Unit (CCU), the unit responsible for administering VHCCs.

Key findings

- 3.11 The key findings were:
- The scheme has not prevented misclaiming (and consequential overpayments/recoupments) (e.g. over £1.5m has been recouped on duplicate claims).
 - The validation process has been modified since implementation but this has been essential to ensure accuracy of payments (e.g. requiring additional supporting documentation)
 - The LFT have implemented actions to improve internal quality assurance but would benefit from refresher training
 - Communication between the LFT and the CCU is not systematic and could be improved.

Detailed findings

Minimising fraud through design

- 3.12 As part of the review, the LFT were required to validate some data on high end cases that had been paid under the LGFS. This exercise led to the identification of duplicate or incorrect claims/payments. In addition to identifying inflated PPE claims, the LFT have also identified issues with validating some offence types and retrials.
- 3.13 The review therefore investigated such cases and identified the following main areas of misclaiming and/or overpayment:
- PPE
 - Class of Offence
 - Retrials
 - Duplicate claims in the following instances:
 - when representing multiple defendants on the one case
 - when representing one defendant with joined indictments
 - using different office account numbers
 - Submitting claims for hardship payments and the final fee using different case numbers
 - Claiming incorrect or duplicate transfer scenarios
 - Claiming disbursements for work that is included in the fee.
- 3.14 The review has found no evidence of claims where the representation order is dated before 14 January 2008 being claimed and paid under though the LGFS.

Case proxies

- 3.15 As mentioned in Chapter two, the LFT identified discrepancies with the PPE claimed, PPE on CREST and actual PPE in September 2009. The review group looked at ways to address validation of PPE and made the recommendations contained in paragraph 2.21. Whilst the group did not consider banding of PPE to be a solution at the time, there may be scope for banding as a long term consideration following a review of the impact of the recommendations made by the group.
- 3.16 Validating PPE continues to be a resource intensive exercise. There are a number of queries outstanding with prosecuting authorities so further resource would alleviate the pressures on turnaround times and would assist with improving communication channels with prosecuting authorities and the courts.
- 3.17 Some offence types require additional case information that is not contained in CREST. These include armed robbery and value of fraud which can require an element of subjective assessment. However, with the additional requirement to submit the case summary and indictment, and the LSC working with HMCS/NTT to produce further guidance, the review found that knowledge of the LFT is increasing as such assessments become more streamlined.

3.18 In relation to retrials, the LGFS Guidance was updated to bring it in line with the AGFS Guidance – this was necessary as the existing LGFS Guidance had omitted a key Cost Judge decision. However, there still appears to be confusion among providers in relation to classification of retrials and the review identified the following possible contributing factors:

- The Funding Order does not define trial or retrial. However, the Funding Order does specify that a retrial must be ordered by the court.
- The scheme does not provide additional remuneration for certain trials where the PPE has reached a certain level. For example, a homicide case (offence type A) with 3,000 PPE would attract a fee of £40,752.22 whether the trial lasted 5 days or 25 days. If there were to be a break of more than one day during the trial, there could be an incentive to seek a retrial fee, irrespective of whether the court ordered a retrial.

3.19 In relation to case proxies other than PPE, offence type and retrial, the validation controls appear to be adequate.

Duplicate claims

3.20 The review looked at the wording of the Funding Order and other regulations in relation to the instances of duplication listed in paragraph 3.13. The LSC is satisfied that the intention behind the regulations is clear and that such duplicate claims should not be made. The LSC is also satisfied that the guidance and LF1 form are clear and will continue to make amendments where appropriate.

3.21 The review found that the validation process could not have prevented a majority of duplicate claims because it was the limitations of the IT system that allowed payment.

3.22 The LSC will therefore continue a detailed programme of auditing payments after the event. This has been an effective means of identifying the limitations of the system and identifying instances of misclaiming and overpayment, which has achieved over £1m in recoupments to date. This process has also demonstrated the benefit of closer working relationships with the regions and Relationship Managers and the LFT will continue to build on these relationships.

3.23 Due to the volume of misclaiming and value of recoupments, it is clear that neither the use of proxies, the validation or IT controls prevented misclaims so the expected benefit has not been fully realised. Consequently, the LSC has chosen to undertake the following additional actions to assure the accuracy of scheme payments:

- Created a role within the team to solely audit payments
- Add the requirement for a copy of the case summary, indictment and objective evidence of the PPE to be submitted with all claims
- Amended the LF1 form to include the number of defendants represented and to provide further clarification on PPE and VHCCs
- Formed the PPE group to establish an improved PPE process
- Published detailed PPE Guidance

- Updated the LGFS Guidance
- Review and revised internal authorisation levels
- The LSC Chief Executive reinforced the contractual requirement to submit accurate claims.

3.24 The LSC IT team has indicated that some modifications to CCLF to address some of the issues with duplicate claims identified in paragraph 3.13, may be possible as part of the AGFS transfer project. There is therefore scope to supplement existing controls that would enable the LFT to prevent overpayments rather than solely rely on a process that audits payments after they have been made. While the auditing process should remain, as originally intended, the LFT should work closely with the IT team to feedback knowledge and expertise they have obtained as part of the auditing process and discuss what additional IT controls are possible.

3.25 Reviewing financial stewardship and financial controls will be an ongoing exercise. Additional resources would allow the LSC to build on the successful work undertaken so far to identify instances of misclaiming.

Recommendations

- A. *Subject to a review of the recommendations made by the group in relation to PPE, consider banding of PPE to reduce the reliance on individual pages.*
- B. *Further review incentives in relation to retrials.*
- C. *Provide additional resource for validation of PPE and to provide additional support to the financial stewardship process.*
- D. *LFT to feedback additional IT controls that could be built in as part of the AGFS transfer project.*

Quality Control

3.26 The LSC completed an internal audit looking at quality control within the LGFS processing teams. That audit, completed in November 2009, resulted in a number of recommendations aimed at improving consistency across the two processing offices (Nottingham and Merseyside). The review found evidence that the recommendations from the internal audit have been actioned.

3.27 The review looked at the training that was provided to ensure accurate claims and payments. The following training was supplied prior to implementation:

- LGFS Guidance for staff and providers
- CCLF Guidance for staff and providers
- Step-by-step CCLF simulator on CD for providers
- Technical IT assistance was made available to the profession
- Training for HMCS
- Face-to-face training for the LFT
- Face-to-face training for providers
- Face-to-face training for Costs Judges.

- 3.28 Once the scheme went live the LFT discovered that some litigators were having difficulties with the new scheme and the online system. The team offered further face-to-face training for those litigators.
- 3.29 Initially, ongoing training for LFT staff was considered insufficient. The internal audit highlighted a number of areas that needed improving within a detailed action plan. The LFT have put in place a number of measures such as reviewing and assigning ownership to crime processing training manuals.
- 3.30 Following interviews with the LFT, the review identified the following specific areas for refresher training:
- Assessing special preparation
 - Assessing expert disbursements
 - Changes to the Funding Order.
- 3.31 Training is being provided on the AGFS so this will provide further refresher training.
- 3.32 The LGFS Guidance is a document used by both litigators and the LFT. It has been updated three times since implementation. The LFT would benefit from maintaining a joint log of LGFS Guidance amendments and update on a bi-annual basis to coincide with the e-forms update. There is also further scope to start incorporating Costs Judge decisions as points of principle, similar to the AGFS Guidance.
- 3.33 The transfer of responsibility for processing AGFS claims, from HMCS to the LSC, raises the possibility of a combined Graduated Fee Guidance document and responsibility for this should be considered in due course.

Recommendations

- E. *Provide refresher training to the LFT on:*
- *Assessing special preparation*
 - *Assessing expert disbursements*
 - *Changes to the Funding Order.*
- F. *The LFT would benefit from maintaining a log of suggested amendments to inform the bi-annual update of the LGFS Guidance.*

VHCC Controls

- 3.34 A change in provider behaviour was originally raised as a risk prior to implementation of the LGFS and the VHCC Panel scheme. The LSC remodelled the scheme to ensure there was no incentive or disincentive for providers to misreport the case as a VHCC. As discussed in Chapter two, there has been a movement of VHCCs to the LGFS and the reasons for this movement are outlined in paragraph 2.7. Given the limited data on longer cases that have come through the LGFS, we were unable to review the relationship between the high end LGFS cases and VHCCs.

3.35 The review turned to the controls that are in place to ensure VHCCs are notified and remunerated appropriately. The following actions were undertaken to ensure the VHCC notification requirements were known:

- Communications to providers both prior to, and following, implementation of the LGFS and VHCC Panel scheme
- VHCC Notification guidance was produced¹⁶
- The requirement to notify was contained in the VHCC Panel contract, crime contract and regulations¹⁷ to ensure the obligation was on Panel members and non-Panel members irrespective of whether they hold a crime contract.

3.36 In addition to the above, caseworkers within the LFT inform CCU if they receive a claim for a case that meets the VHCC criteria. This allows the CCU and the LFT to investigate and determine whether the case was a VHCC and has been paid under the VHCC scheme, or whether the case was or should have been notified as a VHCC. The review also identified some efficiencies that could be made to this process such as:

- Sharing VHCC classification information so the LFT is given notice of potential high value claims and the LFT can check whether a case is a VHCC without contacting CCU
- Sharing information at specified periods to allow for more efficient planning of work within each team
- More joined up working to monitor behaviours in relation to notifying VHCCs.

Recommendations

G. *Improve the communication process between the LFT and CCU by:*

- *Sharing VHCC classification information so the LFT is given notice of potential high value claims and the LFT can check whether a case is a VHCC without contacting CCU*
- *Sharing information at specific periods to allow for more efficient planning of work within each team*
- *More joined up working to monitor behaviours in relation to notifying VHCCs.*

¹⁶ Guidance on notifying CCU of a VHCC case can be found at http://www.legalservices.gov.uk/criminal/contracting/the_complex_crime_unit.asp

¹⁷ Criminal Defence Service (General) (No. 2) Regulations 2001

4. Chapter four: Processes and operations

Background

- 4.1 Previously, Crown court litigator bills were processed by 77 Crown Courts (SF) and six NTT offices (EPF). For EPF claims, the practitioner would send all case papers to the relevant office for the claim to be logged. The bill would be allocated to a determining officer to assess, then the file and determination would be sent back to the office where it was originally logged for payment. The target for processing a claim was 85% of claims to be determined within three months from the date it was received.¹⁸
- 4.2 Due to the subjective nature of determining a claim and the number of staff and locations that a claim passed through, a practitioner was never offered any certainty of how much they would be paid when submitting a claim and may have to wait a considerable amount of time before they knew the outcome.
- 4.3 It was also both labour and time intensive and, although the NTT had considerable knowledge of the Crown Court and assessing EPF claims, consistency between case payments was difficult to measure.
- 4.4 The work of the NTT is divided between legal aid (25%) and central funds (75%).
- 4.5 It was expected that the LGFS would provide a single, straightforward claims process that reduced overheads and provided assurances for practitioners.

A single payment system for litigators for crown court work

What was expected?

- 4.6 The intention was to create a single payment system for litigators for Crown Court work excluding VHCCs.

What was reviewed?

- 4.7 Whether we have a single payment system for litigators for Crown Court work and if not, why not?

Key Findings

- 4.8 All litigator Crown Court work is remunerated under the LGFS except confiscation proceedings

¹⁸ In 2007-2008, 93.5% of claims were determined within three months.

Detailed Findings

- 4.9 In response to the consultation, confiscation proceedings were removed from the LGFS. The original benefits of the LGFS such as minimising duplication of work between litigators and advocates have therefore not been carried through to the confiscation stage of Crown Court cases.
- 4.10 The review was unable to consider expenditure on confiscation for the reasons outlined in Appendix C, but in order to fully realise the benefits of the project, further consideration should be given to the benefits of bringing confiscation proceedings within scope of the graduated fee. There may also be further administrative savings if processing of confiscation were to move in-house.

Recommendations

- A. *Confiscation proceedings be brought within the graduated fee model and processing of claims to move in-house.*

Simplification of claims processing

What was expected?

- 4.11 The scheme was originally modelled so litigators would submit their claim online, LFT staff would validate the claim against CREST and the fee would be paid within eight weeks. The original intention was to introduce a paperless system but the LSC realised prior to implementation that copies of representation orders and disbursement vouchers were required. The LGFS also anticipated, from the outset, that further efficiencies would be made as the LSC became more experienced in processing Crown Court claims and, through BI, would be able to focus resources on areas of greatest risk.
- 4.12 There were also the following expected benefits:
- the CREST data feed would be an interim measure until the team had access to the court's alternative case management system (XHIBIT)
 - Claims would be processed within eight weeks in two business delivery centres; Merseyside and Nottingham.
 - A simple online claims system
 - An online LGFS calculator to provide early financial assurances
 - An efficient redetermination and appeals process with minimal original decisions being redetermined and appealed.

What was reviewed?

- 4.13 In order to determine whether the system had achieved its objectives we reviewed whether CREST data was fit for purpose, the assessment and appeals process, the working relationship with HMCS, whether CCLF and the online calculator were fit for purpose and claim turnaround times.

Key Findings

4.14 The review found the following:

- CREST data feed contains the fields required for validation but the data is not always accurate and the Service Level Agreement (SLA) with HMCS is yet to be agreed
- CREST database allows 60% of claims to be validated without additional information requests. It is user-friendly but is unsustainable in its current form
- The claiming process has been modified since implementation but this has been essential to ensure accuracy of payments (e.g. requiring additional supporting documentation)
- CCLF was built to specification but issues with validation have been identified following implementation
- The online calculator is a useful tool for both the LSC and providers
- LGFS turnaround times were within target for 09/10
- Redeterminations account for 6.2% of total litigator fee claims and appeals to Costs Judges account for less than 0.1%
- There is scope to improve the redetermination and appeals process.

Detailed Findings

CREST data feed

- 4.15 The CREST data feed was tailor made for the LFT to validate LGFS claims. As the content of the data feed could not be changed with ease (due to limited resources and cost), a lot of work was done on the requirements and the data fields are currently considered appropriate.
- 4.16 Once a month, HMCS transfers the data to the LFT via the criminal justice secure mail system. The CREST data feed is transferred into an access database ready to be crosschecked by the LFT against the data submitted by the litigator. The access database is considered a user-friendly and efficient method to processing claims by its users.
- 4.17 In addition the CREST data feed enables approximately 60% of cases to be validated without any additional information requests. For the remaining 40%, the LFT seek additional information (from HMCS, the prosecution or the firm). An automated validation process is being considered as part of the AGFS transfer project.
- 4.18 There are limitations with the database as it was created as a temporary measure until XHIBIT replaced CREST. The volume of data being accumulated each month means that the system is increasingly running slower. The system was reviewed and as a result of the amendments made the speed of accessing the CREST data feed improved, although the long term capabilities is still a concern.
- 4.19 Whilst the access database has improved the efficiency of processing claims, some data contained on CREST is currently unreliable. As mentioned previously, following the identification of high value PPE discrepancies, the LFT agreed they

could not rely on the PPE figure on CREST and now request objective evidence be submitted with each claim.

Relationship with HMCS

4.20 An SLA exists between the LSC and HMCS outlining the responsibilities of HMCS in relation to legal aid work undertaken on behalf of the LSC and the targets they have to meet in exchange for a service charge. In 2009/10, work done for the LGFS does not feature in the SLA because this is wrapped up in the unit cost for processing AGFS claims (the same proxies are required for both schemes). However, work is ongoing to include LGFS in the SLA and introduce quality assurance targets.

Claim submission

4.21 As a result of the changes made to the claiming and assessment process already outlined in this report, the scheme has become more paper intensive than originally envisaged.

4.22 It is also not mandatory for a practitioner to claim online, and with the need to submit paper evidence, around 60% of claims are submitted in paper format only, requiring the LFT to enter the details of a claim. Encouraging online submission may assist the expedition of turnaround times.

4.23 Overall the process is not what was expected because:

- The system is not paperless
- Cross-checking with the courts and prosecution to validate the data is more voluminous than envisaged
- Not all practitioners submit their claims online.

4.24 However, when compared to the EPF scheme, the amount of supporting evidence has significantly reduced. Nonetheless, the LSC continues to work towards a simpler process while balancing the need to ensure accuracy of payments.

Recommendations

B. Encourage online submission of claims.

Focusing resources

4.25 As LGFS was an entirely new scheme, the LSC decided that all claims should be validated, rather than focusing on areas of greater risk. However, it was felt that there must be a risk/benefit balance struck between the rigorous policing of claims and the alleviation on resources.

4.26 In October 2008, the LFT measured payment profiles against the proxies and decided that it would be beneficial to employ an automatic threshold for some low risk claims.

4.27 Introducing this form of risk-based billing has alleviated resources. Before this approach was taken, the resource requirement for processing claims per year was 37.3 FTE; this has now reduced to 35.7 FTE resulting in an administrative saving. It also had the beneficial impact of increasing turnaround times and was in part responsible for reducing a six month backlog to three weeks. This has helped the project meet one of its key objectives to expedite turnaround times. The National Audit Office (NAO) is aware of the risk based billing assessment that the LFT have implemented.

Appeals process

4.28 Information on redeterminations and appeals could not be accessed from CCLF as the BI systems had not been activated (see Chapter five). The LFT therefore started recording LF2 redeterminations and Costs Judge appeals manually on an excel spreadsheet.

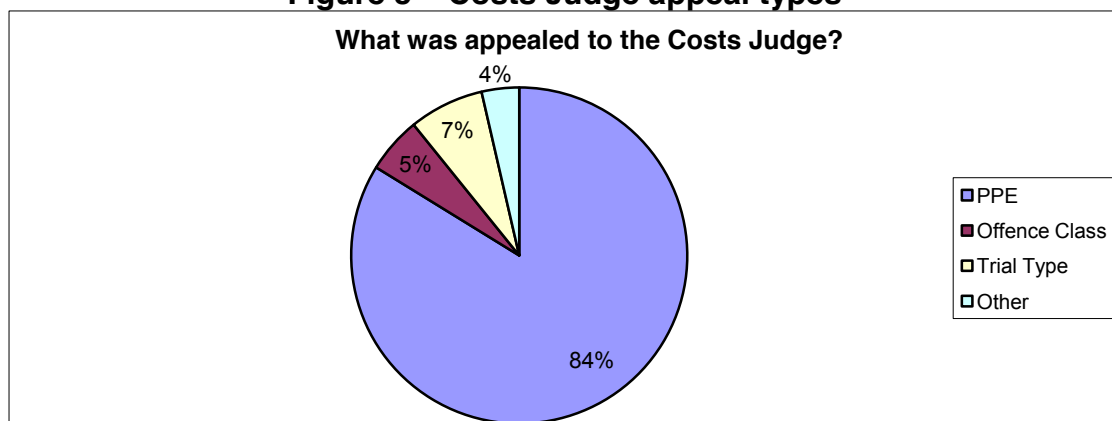
4.29 The total number of LF2 redeterminations received between February 2009 and January 2010 was 9,237. This equates to approx 6.2% of LF1 intake.

4.30 With the significant volume of claims that the LFT need to process, they were using the redetermination process to clarify or seek further information. However, some of this could be done at an earlier stage avoiding the need for the litigator and the LFT to make and consider additional representations. Targets could also be introduced to encourage a high accuracy rate of the original decision and reduce LF2 redeterminations.

4.31 The total number of appeals between February 2009 and January 2010 was 111 Costs Judge appeals and this equates to less than 0.1% of LF1 intake. This figure is very low and indicates a high accuracy rate following redetermination.

4.32 Figure 3 outlines the main areas of LGFS appeals¹⁹ and the percentage of total appeals they represent and it is clear that PPE remains the main disputed proxy. This review has made a number of recommendations in relation to PPE and these will not be repeated here but it is envisaged that such recommendations would reduce the volume of appeals in relation to PPE.

Figure 3 – Costs Judge appeal types



¹⁹ The review was unable to look at data on historical AGFS Costs Judge decisions as these are not logged.

- 4.33 Throughout the review, the LFT have improved the quality of written reasons. However, following a review of pending appeals with the MoJ, some written reasons were still insufficient and some LSC decisions were incorrect. A further internal control could provide greater consistency, improve decision making and reduce the volume of redeterminations and appeals. Additionally, consideration should be given to making use of Article 29(5) where an internal hearing could take place prior to invoking the Costs Judge appeal process. This would save both time and money.
- 4.34 The review also found that while there is a regulatory obligation on litigators to seek a redetermination before appealing to a Costs Judge and to inform the appropriate officer if they are appealing, there have been instances where the LFT were unaware of the appeal. Furthermore, while the Senior Court Costs Office (SCCO) normally inform the MoJ of pending appeals, this is not consistent and there have been instances of appeals being heard without both the LSC and the MoJ knowing and therefore without the opportunity to make further representations. Improvements could be made to the communication links the LSC and the MoJ have with the SCCO.
- 4.35 While some recommendations may improve the efficiency of the appeals process, there is scope to consider alternative options for the following reasons:
- The LSC makes use of single adjudicators and Cost Committees for all other funding disputes
 - The current appeals process is more expensive than the administration of other LSC appeals processes.

Recommendations

- C. Provide additional resource to maintain redetermination and appeal records across both offices, advise on the Funding Order, oversee the redetermination and appeal process, and improve communication channels with SCCO and the MoJ.*
- D. Introduce targets for LF2 redeterminations.*
- E. Establish a working group to discuss Cost Judge decisions and update graduated fee guidance on a bi-annual basis to include key decisions on points of principle and suggested LFT amendments.*
- F. LFT to consider making use of article 29(5) of the Funding Order.*
- G. Consider alternatives to the current appeals process.*

CCLF and the online calculator

- 4.36 The online calculator is a useful tool and has received positive feedback from both LSC staff and providers. The calculator has been updated to reflect changes to the scheme and recently, guidance has been provided to assist with selecting the correct calculator. The online calculator also gives practitioners the opportunity to calculate how much they will be remunerated on a case which allows for better financial planning.

- 4.37 CCLF is also considered a user friendly system that processes a significant volume of claims on a daily basis. There have been no instances of the IT system failing to make payment.
- 4.38 CCLF was built to the LGFS specification but issues were identified following implementation. Changes were made to CCLF but this led to parts of the system crashing for periods of time.
- 4.39 These issues did not prohibit the processing of claims as workarounds were created by the LFT; however, there was an initial impact on turnaround times which is discussed in more detail below.
- 4.40 Interviews with project members and the LFT highlighted the need to improve liaison between the project team and operational team during the early stages of the project. Lessons have been learned as the operational team are much more alive to IT issues and validation requirements and are involved in the operational IT testing of the committal for trial fee and the AGFS transfer project. This should help prevent the need for a manual work-around in the future.

Turnaround Times

- 4.41 The target turnaround for the LFT is 95% of claims being paid within eight weeks. This target was met for the 09/10 financial year. This is a significant improvement on the three-month turnaround time under the previous scheme.
- 4.42 The review did find that following implementation, the additional validation requirements and IT issues led to a backlog. This was compounded by the increasing pressures on HMCS to process LF4 validation requests from the LFT.
- 4.43 The LFT took the following actions to reduce the backlog:
- Employed additional agency staff
 - Moved resources between departments
 - Worked overtime
 - Processed claims on the basis of a production line
 - Created BI workarounds reducing the need for excel trackers
 - Worked with HMCS to prioritise LF4 validation requests.
- 4.44 The LFT reduced the six month backlog to three weeks in less than eight months.
- 4.45 The review found that currently, approximately 80% of LF4s are turned around within four weeks. The HMCS is continuing to improve their turnaround targets and these are being incorporated into the SLA.
- 4.46 The LSC continues to focus resources on turning around the 14,000 claims they receive every month as quickly as possible. The LSC is considering publishing updates on processing times which would assist providers even more with financial planning.

Recommendation

H. *Publish turnaround times on the LSC website*

Reduction in cost of processing claims

What was expected?

- 4.47 The LGFS envisaged administration savings to the LSC and the NTT because the process was IT enabled and, since it was based on objective proxies it was anticipated that it would be less resource intensive.
- 4.48 Originally staffing requirements for the litigator fee was identified at approximately 18 FTE to process claims and perform related administration tasks. This figure was based on the following assumptions:
- Litigators would make online claims
 - Focused resourcing
 - It would be a paperless system.

What was reviewed?

- 4.49 Resources levels in the LFT and the NTT were considered to assess whether a reduction in costs occurred.

Key Findings

- 4.50 There has been an administrative saving due to reduction in FTE to process litigator Crown Court claims.

Detailed Findings

- 4.51 The level of staff within the LFT has fluctuated since implementation. Presently, staff levels sit at 36.8 FTE. The number of staff required increased because of the need for additional validation.
- 4.52 However, with NTT office closures and a reduction in NTT headcount since 2008, there has been an overall administrative saving.
- 4.53 While the LFT are currently sufficiently resourced to process litigator fee claims in their current form, they are susceptible to fluctuations in volume. Also, this review has found that additional resource is required to progress the financial stewardship work undertaken to date as well as oversee the redetermination and appeals process.
- 4.54 The AGFS transfer project is also expected to impact on staffing levels. The number of LFT staff required is expected to reduce by 4.1 FTE as a result of the expected increased efficiency of the system (i.e. the automatic validation). The recommended additional resource would assist the AGFS transition.

5. Chapter five: IT infrastructure

Background

- 5.1 The NTT used their IT system to record basic information such as case number, court, hearing dates, and claim and payment details. They had the ability to produce monthly reports on turnaround times for each region for determinations and re-determinations.
- 5.2 These reports were helpful to the NTT as they could monitor performance. However, they were not able to produce BI reports that enabled analysis of Crown Court cases (e.g. trial length).²⁰
- 5.3 The implementation of the LGFS introduced an in-house IT system with the ability to submit and process claims online with specific data being captured for BI. Implementing an in-house system would also increase the speed and flexibility of making any necessary changes to the IT and allow the LSC to control the costs.

Control of IT infrastructure and Costs

What was expected?

- 5.4 A key benefit to designing an in-house system for the LGFS was the ability to control the speed, flexibility and cost of making changes to the system.

What was reviewed?

- 5.5 The review looked at the speed that changes have been made following implementation and changes made to external IT systems.

Key Findings

- 5.6 Making changes to the in-house CCLF system is quicker, more flexible and cheaper than the previous scheme.

Detailed Findings

- 5.7 In order to make changes to the IT system the LSC has to ensure that the funding is available before making a change request. Once a change request has been issued a priority score is given to the change to determine if the change should be made. The costs, estimates and impact analysis will be considered and if funding has been secured the change will be given priority. External systems often have competing external requests.
- 5.8 Due to the direct control that the LSC has over the IT, the issues identified at an early stage were rectified quickly.

²⁰ For the purpose of modelling the fee the data was gathered from the paper file rather than the NTT's IT system.

- 5.9 The review looked at other projects where IT changes are required on external systems. For example, minor IT changes are similar in cost (e.g. VAT changes). However, a comparison of substantial IT changes²¹ suggested that CCLF changes were approximately 10% the cost of the CREST changes, indicating a significant saving.

Reliability of IT infrastructure

What was expected?

- 5.10 It was expected that the in-house CCLF system would be reliable with minimal disruption to day to day processing of LGFS claims.

What was reviewed?

- 5.11 We reviewed whether IT testing was performed prior to implementation and whether the current system was user friendly and fit for purpose.

Key Findings

- 5.12 The review found:

- Systems and user testing took place
- there is minimal disruption to day to day processing

Detailed Findings

- 5.13 Systems and user testing took place prior to implementation. Nevertheless, as is common to all new IT builds, the user acceptance team were unable to identify all potential issues until after implementation, when they were quickly remedied.
- 5.14 Following interviews with the LFT, the review found that due to the system's simplicity, it is reliable and there is minimal disruption in day-to-day processing.
- 5.15 Overall, there have been few issues with the system and few deviations from the original business specification. However, two central concerns remain:
- a) The temporary CREST system is running slower each month due to the monthly data dumps it receives from HMCS and it is reaching full capacity.
 - b) The reliance placed on inaccurate data coming from CREST.
- 5.16 These areas are being addressed as part of the AGFS transfer project and with the additional LGFS validation requirements introduced by the LSC.

²¹ Please note we were unable to compare like with like and this was a comparison of two different changes made to two different IT systems. However, it was the closest comparison available and the large difference in costs indicates the benefit of having an internal IT system.

Better quality information on Crown Court cases

What was expected?

- 5.17 The intention was to have an improved BI system in place. The system would be designed to export the data gathered on CCLF to a data warehouse, which was readily accessible. The system was built to produce data for a number of reports that would aid in managing suppliers and monitoring performance, operational targets, and payment information.
- 5.18 Following consultation with internal departments, eight specific reports were designed. It was anticipated that it would be possible to develop additional reports based on the data stored within the CCLF system.

What was reviewed?

- 5.19 We reviewed whether the LFT had access to BI as expected.

Key Findings

- 5.20 The review found:
- The BI facility was delayed but most information is now available and fit for purpose
 - The LFT would benefit from additional standard reports to assist with financial stewardship work
 - Further training on the BI facility would benefit the LFT.

Detailed Findings

- 5.21 The IT team designed and implemented the specified BI requirements. For the first six months following implementation, the LFT had access to the facility. However, as they were still adjusting to CCLF and assessing its capabilities, they were unable to make full use of the facility.
- 5.22 The BI facility stopped working following changes made to CCLF. This was because the tool used to extract the BI information could no longer locate the data. This was rectified in December 2009 and the LFT have made full use of this facility with the financial stewardship work undertaken to date. The LFT has one analyst and additional training to this member of the team along with one other member of the team would enable further work to be done.
- 5.23 The LFT are working closely with the IT team to improve the BI facility for LGFS and to inform the BI facility for AGFS.

6. Chapter six: Summary of recommendations

Chapter two

- A. *Undertake a further Review in twelve months to:*
- *Analyse the impact of the high-end cases that are still to come through the system*
 - *Analyse the impact of the PPE cap*
 - *Further analyse movement of VHCCs*
 - *Consider remuneration of cases that crack immediately before the jury is sworn.*
- B. *Further work be undertaken outside of the review group on funding and motivations between the magistrates' court and Crown Court.*
- C. *Redistribute funds within the LGFS to bring certain fees to a cost neutral position when compared with 2007 spend by diverting money from homicide (A), fraud/dishonesty >£30k (G and K) and serious violence (B) trials, to:*
- (a) guilty plea fees for all offence types or all offence types except homicide (A) and fraud/dishonesty where the value is greater than £30k (G and K) and*
 - (b) cracked trial fees for burglary (E), miscellaneous other offences (H) and public justice offences (I).*
- D. *Collect data on the following:*
- *Bad character/hearsay evidence*
 - *CCTV/audio evidence*
- E. *Where the MoJ is undertaking a legal aid impact assessment, or where it is aware of any other changes that may impact on the criminal justice system, it should make use of the expertise of the group and invite comments prior to implementation.*
- F. *Prepare draft proposals to incorporate a pagination and indexing requirement into the Criminal Procedure Rules.*
- G. *Prepare detailed PPE Guidance to be used as a reference by providers, the LSC, HMCS and prosecuting authorities.*
- H. *All parties continue to work together and report where the PPE process has not been followed.*
- I. *The LGFS Review Group to continue to meet on a quarterly basis.*

Chapter three

- A. *Subject to a review of the recommendations made by the group in relation to PPE, consider banding of PPE to reduce the reliance on individual pages.*
- B. *Further review incentives in relation to retrials.*

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- C. *Provide additional resource for validation of PPE and to provide additional support the financial stewardship process.*
- D. *LFT to feedback additional IT controls that could be built in as part of the AGFS transfer project.*
- E. *Provide refresher training to the LFT on:*
 - *Assessing special preparation*
 - *Assessing expert disbursements*
 - *Ongoing refresher training on changes to the Funding Order.*
- F. *The LFT would benefit from maintaining a log of suggested amendments to inform the bi-annual updates of the LGFS Guidance.*
- G. *Improve the communication process between the LFT and CCU by:*
 - *Sharing VHCC classification information so the LFT is given notice of potential high value claims and the LFT can check whether a case is a VHCC without contacting CCU*
 - *Sharing information at specified periods to allow for more efficient planning of work within each team*
 - *More joined up working to monitor behaviours in relation to notifying VHCCs.*

Chapter four

- A. *Confiscation proceedings be brought within the graduated fee model and processing of claims to move in-house.*
- B. *Encourage online submission of claims.*
- C. *Provide additional resource to maintain redetermination and appeal records across both offices, advise on the Funding Order, oversee the redetermination and appeal process and improve communication channels with SCCO and the MoJ.*
- D. *Introduce targets for LF2 redeterminations.*
- E. *Establish a working group to discuss Costs Judge decisions and update graduated fee guidance on a bi-annual basis to include key decisions on points of principle and suggested LFT amendments.*
- F. *LFT to consider making use of article 29(5) of the Funding Order.*
- G. *Consider alternatives to the current appeals process.*

Appendix A

LGFS 6-month Post Implementation Review

Introduction

1. The Litigator Graduated Fee Scheme (LGFS) was introduced in January 2008. It is a complex system and it was agreed during the consultation process with providers that the LSC would review the payment levels of the scheme at an early stage and then at a later point when a larger quantity of payments had been made under the scheme.

Terms of Reference of the Review

2. The 6-Month Review LGFS commenced in August 2008 with a meeting of LSC, MoJ, Law Society, representatives and HMCS.
3. Prior to this meeting, the Law Society raised some concerns with the scheme, on behalf of providers, and also shared information on a recent survey that they had undertaken regarding providers' views of the payment process.
4. A number of the concerns related to the graduated fee payments within the scheme. However, due to the length of most graduated fee cases, few have been paid so far under the new scheme, which makes it difficult to review concerns against actual payment data. Therefore, LSC suggested to the review group stakeholders that concerns with the graduated fee element of the scheme should be considered once there is sufficient data on the longer cases. Whilst the stakeholders were keen that the concerns were addressed at the earliest opportunity, it was agreed that it was necessary for more cases to have been completed and paid before a proper review of the scheme could be conducted.
5. It was therefore agreed that the Terms of Reference for the 6-month review should be to examine the impact of the scheme to date on the fixed fees and to address any anomalies or omissions within the Funding Order. Also, where possible, suggestions to resolve the processing issues raised through the Law Society's survey should also be raised and recommended within this review. However, it should be noted that action to address some of the processing issues has already commenced independently to the 6-month review and will continue to be progressed outside of the remit of this review.
6. The LSC has committed to run a further full Post Implementation Review (PIR) to examine the impact of the graduated fee scheme on the longer Crown Court cases. This full PIR will commence by January 2009, which is 12 months since commencement of the scheme. The outstanding concerns raised by the Law Society in their summary paper (Annex A) that have not been addressed in the 6-month review will be included in the Terms of Reference for the full PIR. A high level plan of the proposed Terms of Reference for the proposed full PIR can be found at paragraphs 47 to 51.

Summary of the Recommendations

7. A summary of the recommendations under this review are as follows:
- Raise the payment for appeals against conviction, appeals against sentence and committals for sentence by £50 for each claim.
 - Allow all firms to claim for breach of Crown Court order hearings.
 - Introduce an additional fixed fee to cover statutory reviews or applications made by the prosecution to vary Crown Court orders. This should be paid at a similar rate to appeals against sentence.
 - Amend the definition of a transfer to cover all appropriate changes – to be defined and consulted upon through Funding Order amendments and consultation
 - Introduce new scenarios for transfers after trial and retrial to cover sentence hearings only (see paragraphs 41 to 43 below for details)
 - To continue to progress business process improvements through liaison with the CPS and through the joint HMCS/LSC Kaizen event.
 - To hold a full PIR in 2009 covering the payment scheme, in particular the graduated fee element of the scheme and operational delivery of the scheme
 - To cap PPE at 10,000 PPE and ensure that the special preparation provisions are available where appropriate to providers whose LGFS cases contain more than 10,000 PPE.

Fixed Fees

8. There are 5 fixed fees in the Litigator Graduated Fee Scheme. These are:
- Appeals against conviction - £400
 - Appeals against sentence - £150
 - Committals for sentence - £250
 - Contempt (free standing) - £150
 - Breach of Crown Court order (new solicitor) - £100
9. The review of the fixed fees has mainly focused on whether the actual payments under the scheme compare accurately to the historic averages of payments made for such cases in the previous financial year, examining each of the fixed fees in turn. LSC finance also initially attempted to examine individual firms to see how the 'swings and roundabouts' element of the fixed fee has worked, but there are currently too few cases in the scheme at this stage to make this very specific type of review viable. This could be reviewed under the full PIR in 2009 if considered appropriate.
10. Of the 5 fees within the scheme, only 4 have enough data to allow any type of analysis. These are reported on below. The fee not reviewed is the payment for contempt. This payment is made where an individual, who is not the defendant in Crown Court proceedings, requires representation for contempt. Such contempt proceedings are unusual and payments under the LGFS will be rare as usually representation for such clients will be provided by an advocate or solicitor advocate and claimed under the AGFS scheme. Because of these reasons, the LSC has not reviewed the contempt fixed fee.

Appendix A - Litigator Graduated Fee Scheme – Post Implementation Review

11. Of the four fixed fees analysed under this review, the three appeals and committals fees have been examined against historic payments and the breach of crown court order fixed fee has been reviewed in terms of whether the availability of the fee is currently appropriate or whether it should be paid in more cases.
12. All figures quoted in this paper are inclusive of VAT.

Appeals from Magistrates and Committals for Sentence

13. These three fixed fees make up approximately 15% of the caseload within the LGFS scheme. In the four years leading up to the introduction of the fixed fees under LGFS, case volumes remained relatively static for the appeals and grew slightly for the committal for sentence hearings. The 2007/8 average payments for appeals against conviction and appeals against sentence are higher than those in 2004/5. Conversely, the average payment for a committal for sentence hearing has reduced slightly, using the same financial years for comparison.
14. The historic average costs of such cases have been reached by removing void or flawed cases and then finding the average of the remaining cases. For each average cost, LSC have also assessed how many cases were historically paid less than the average cost. This percentage can be seen in the column 'volume %' in tables 1a and 1b below, and denotes the percentage of cases that would 'win' should a fixed fee be set at the 2006/7 average payment level.

Table 1a

	2004/05			2005/06		
	Volume %	Volume	Avg cost	Volume %	Volume	Avg cost
Appeal Against Conviction	66%	1,662	439	65%	1,748	437
Appeal Against Sentence	47%	2,006	192	45%	1,864	197
Committal for Sentence	56%	10,073	294	57%	11,765	304

Table 1b

	2006/07			2007/08		
	Volume %	Volume	Avg cost	Volume %	Volume	Avg cost
Appeal Against Conviction	65%	1,713	466	62%	1,583	517
Appeal Against Sentence	45%	1,882	195	45%	1,598	204
Committal for Sentence	59%	13,044	298	63%	13,789	284

15. Graphs showing volumes and values are attached this report at Annex B.
16. The LGFS scheme was modelled on the historic payments of the 2005/6 financial year and was later checked against approximately 5,000 2006/7 cases to ensure a

Appendix A - Litigator Graduated Fee Scheme – Post Implementation Review

continued match. However, using either year as a comparator shows that the current fixed fees are lower than the average costs per case.

17. LSC intended to model the fixed fees on a cost neutral basis to the 2006/7 average costs, despite the savings that were required of the LGFS as a whole. Cost neutrality of the fixed fees was considered important to offset the rigidity of the scheme. This would mean that a small majority of cases would be paid more than under ex post facto (for both appeals against conviction and committals for sentence).
18. Comparing both the 2005/6 and 2006/7 payments with the fixed fees shows that all the fixed fees are lower than the epf average costs. This was not the intention of the scheme and the recommendation is that this is corrected. An increase of £50 for each fee appears to be appropriate to bring the fixed fees in line with the 2005/6 and 2006/7 average payments.
19. A comparison is provided in table 2 to show the total spend per financial year under epf and Crown Court standard fees for the last four years for the three hearings in question, compared to what would have been spend had the current fixed fees been in place. Finally a comparison is made with 2006/7 with what would have been spent overall had the fixed fees been in place and had they each been increased by £50 per fee. The overall payment is a very close match to the historic overall payment.

Table 2

	2004/05	2005/06	2006/07	2007/08
Total spend	4,071,886	4,710,144	5,058,751	5,064,333
Total spend under fixed fee	3,483,950	3,920,050	4,228,500	4,320,150
total spend under new fixed fee			5,060,450	

20. Increasing the fees for appeals against conviction or sentence, or committals for sentence by £50 would not have to be offset by any counterbalancing changes to the scheme, as the intention of the original scheme was to apply cost neutral fixed fees and this does not quite appear to have been achieved with the fees as originally set.

Contempt payments

21. As explained above, there is no meaningful data so far for analysis as only 5 claims have been paid under this fixed fee to date.

Breach of Crown Court Order payments

22. Payments for breaches of crown court order hearings are currently 'wrapped up' in the LGFS fee. The exception is where a new solicitor undertakes the breach hearing. New firms can claim a breach of crown court order fixed fee of £100.

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23. The fee was based on comparisons with other fixed fees due to the fact that there is no available data (in the required volume to make it usable) on the historic costs of such hearings. Therefore, no analysis has been undertaken on the fee level for breach of Crown Court order payments.
24. Early feedback from HMCS suggests that a trend appears to be forming of defendants attending breach hearings with no legal representation. There is no concrete evidence as to the cause of this but anecdotally it appears that the lack of an additional fee for the original representing firm may be driving new behaviours, such as being unavailable to represent previous clients on subsequent breach matters, especially as the firms, in most cases, will have already been paid the LGFS payment for the substantive case.
25. Unrepresented defendants at hearings cause delay and the wasted resources of judges, HMCS and the prosecution.
26. Although payment has been modeled into the LGFS for breach hearings, ensuring continue to represent clients after receiving their LGFS payment is near impossible.
27. In order to address the inefficiencies to the system that appear to have been created by wrapping up the breach payment into the LGFS, the fixed fee could be extended to pay for all breach hearings. What is not certain is how many additional hearings and consequent payments would be generated by this extension. Numbers of breach hearings are increasing in the Crown Court year on year. The number of breach hearings currently being claimed under the LGFS fixed fee is also not certain yet, as the trends for the first 6 months' of the scheme continue to increase.
28. Some information has been made available by HMCS and through LSC finance for analysis and the following can be ascertained. The number of breach hearings has more that trebled between 2004/5 and 2007/8 from 3,377 to 12,418. By projecting a similar pattern of increase, LSC may see 22,683 breach hearings by 2011/12.
29. The number of breach hearings managed by new firms (and thus paid under LGFS) has been steadily growing over the first 6 months of the scheme. Table 3 shows that 666 breach payments were made in July 2008.

Table 3

Month	No. of breach payments
Feb-08	15
Mar-08	161
Apr-08	369
May-08	477
Jun-08	507
Jul-08	666

30. The risk to the fund is not completely clear. On the 'worst case' scenario, if the number of breach hearings overall continue to increase (projected trend adopted)

Appendix A - Litigator Graduated Fee Scheme – Post Implementation Review

but the numbers of breach hearings accounted for in the LGFS scheme remain static, then the increase in fund spend would amount to just under £1.5m per annum by 2011/12.

31. It would be extremely complex to try to remove a proportion of such a sum of money from each case within the LGFS graduated element of the fee to cover the cost of paying breach hearings separately. This is for two reasons. The first is that the sum is relatively small so the reduction in each Crown Court LGFS payment would also be almost impossible to achieve accurately. Second, each part of the graduated fee is linked by formulae to each of the other parts of the fee, so to reduce the base fee by even a few pounds would necessitate the remodeling of each PPE uplift and each trial length uplift.
32. It is proposed that the LSC increase scope of the payment of the breach of crown court order fixed fee to all representing firms with a Representation Order. In order to prevent LGFS spend from reducing the funds available to spend on civil legal aid, a possible balancing reduction, or 'offsetting' measure, has been identified and is set out in paragraphs 52 to 59 below.

Funding Order

33. Following the introduction of the LGFS scheme, a number of claim queries have resulted in LSC and MoJ identifying areas that could benefit from amendment within the CDS Funding Order Schedule 2 (Litigators' Crown Court payments), which govern the LGFS provisions.
34. In particular, two areas were identified prior to the 6-month review and are detailed below at paragraphs 34 to 40 of this document. Since commencing the review, recommended additional amendments have been identified by MoJ and LSC lawyers and are attached at Annex C.

Definitions and clarifications of terms:

35. The first amendment identified by LSC and MoJ is to the definition of a 'transfer' when used as a scenario definition.
36. 'Transfers' are referred to in the Funding Order (2007 amendment order) at paragraph 10. The paragraph covers transfers between solicitors and transfers between schemes, from LGFS to VHCC.
37. In the context of the scenarios, the term 'transfer' was anticipated as also covering other changes in the circumstances of representation in a case, such as fee status (e.g. from private paying client to publicly funded client, where the same firm represents). This should be reflected in the Funding Order.
38. It is proposed that these amendments are recommended to the Commission and MoJ for inclusion in the next iteration of the Funding Order at the earliest opportunity.

Additional payment types

39. Currently, the LGFS payment scheme and the Funding Order do not include provisions for cases or retrial cases where there is a ‘Transfer before sentence hearing’. This means in practice that there is a lacuna in the payment scheme and that firms may not be adequately compensated where such a transfer has occurred.
40. It is recommended that two new payment scenarios be introduced to cover this eventuality. The payment would be based on a percentage of the trial (or retrial) fee, similar to other transfer payment scenarios.
41. The proposed percentage for the original solicitor in the transfer before sentence hearing scenario would be 100% of the trial fee. The proposed percentage for the new solicitor in the transfer before sentence hearing scenario would be 10% of the trial fee.
42. The proposed percentage for the original solicitor in the transfer before sentence hearing (retrial) scenario would be 25% of the trial fee. The proposed percentage for the new solicitor in the transfer before sentence hearing (retrial) scenario would be 10% of the trial fee.
43. It is proposed that the current scenarios for transfer during or after retrial (original and new solicitors) should be amended to cover transfers during retrial only. The percentages would remain unchanged.
44. We have also consulted LSC and MoJ lawyers to identify any further changes that could usefully be made to the Funding Order at this point, to improve clarity or amend anomalies. A list of additional recommended changes is attached at Annex C. There are also other matters, relating to AGFS and VHCCs that might be worth clarifying in the Funding Order. These will be properly communicated once drafting and consultation has commenced.

Business Process

45. The Law Society’s report raised concerns regarding:
 - CREST – PPE
 - CREST – Offence codes
 - Payment delays
46. These concerns are being addressed outside of the 6-month review and will also be revisited under the full Post Implementation Review. An update on the current position regarding improvements to business processes is attached at Annex D.

Full Post Implementation Review

47. A number of other issues relating to the LGFS payment scheme have been raised by the Law Society in their report at Annex A.
48. It is proposed that these issues are examined under the full PIR to be commenced in 2009. So far, the proposed Terms of Reference for the full review are as follows:

Appendix A - Litigator Graduated Fee Scheme – Post Implementation Review

- The payment scheme, in particular the graduated fee element of the scheme
 - Operational Delivery of the scheme
49. The graduated fee payment issues raised by the Law Society in their paper are:
- Unused material
 - Electronic evidence
 - Travel in rural areas
 - Clients with specific issues
 - Section 51 work
50. Other issues that should also be addressed under the review of the payment scheme include (a) graduated fee payments compared to historic trends, (b) the effect of ‘swings’ and roundabouts’ in practice, with regard to particular firms if appropriate, and (c) the impact of the scheme on specific case payments, e.g. fraud cases.
51. Regarding the operational delivery of the scheme, the review will include (a) the checking mechanisms in place with HMCS (e.g. CREST) and (b) the suitability of the scheme to progress to a more ‘risk-based’ approach to audit.

Proposed Offsetting Measures

52. Introducing payments for all breach hearings may cost an additional £1.5m. Added to this, the introduction of the new fixed fee to cover statutory reviews or applications by the prosecution to vary Crown Court orders (see Annex C) are also likely to incur further, unplanned costs under the scheme.
53. To ensure cost neutrality at this stage, at least within projected costs under the scheme (if not actual payments), it is proposed that a cap is placed on the PPE uplift for the graduated fee cases.
54. The proposal is that PPE uplifts are capped at 10,000PPE for all offences. This would bring the LGFS provisions in line with the AGFS provisions. Very few cases should be affected by this change. Cases with offence types A, B, J and K are most likely to be affected as they tend to include the most serious offences and the ones more likely to be VHCCs.
55. When modelling the LGFS, LSC projected that less than 100 cases a year would contain more than 9,000PPE. It is anticipated that this figure might be even less, as such cases are likely to be notified as VHCCs and many will run under contract. Based on a projected 100 cases, the cost to the fund to pay for pages over 10,000PPE amounts to approximately £1.8m. This may be an overestimate, as the number of projected cases is possibly on the high side.
56. The reasons behind a cap on PPE as a suitable means of remaining cost neutral under the scheme are as follows:
- It will encourage notification of cases to the CCU and reduce the risk of non-Panel firms holding onto VHCC-type cases

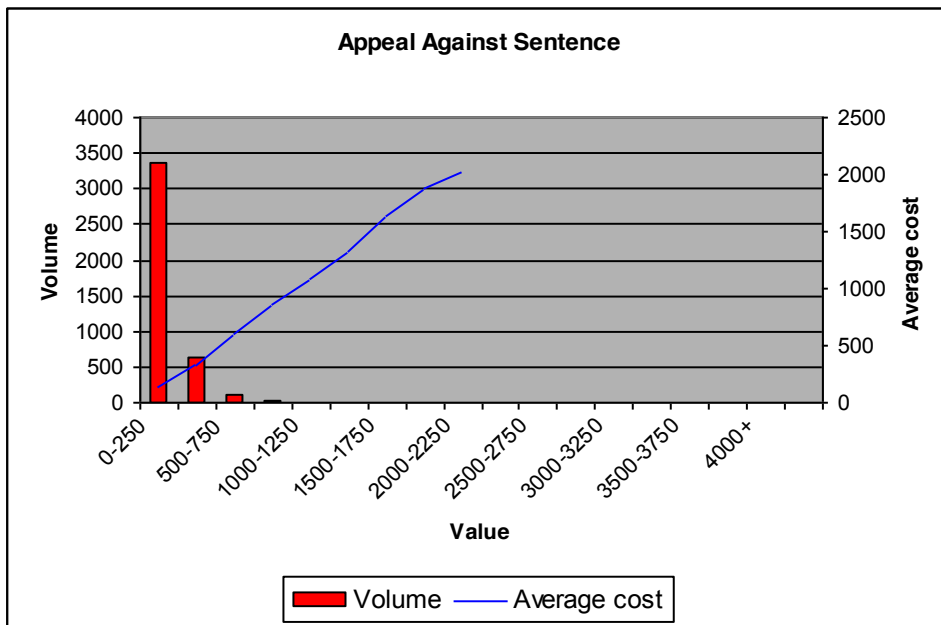
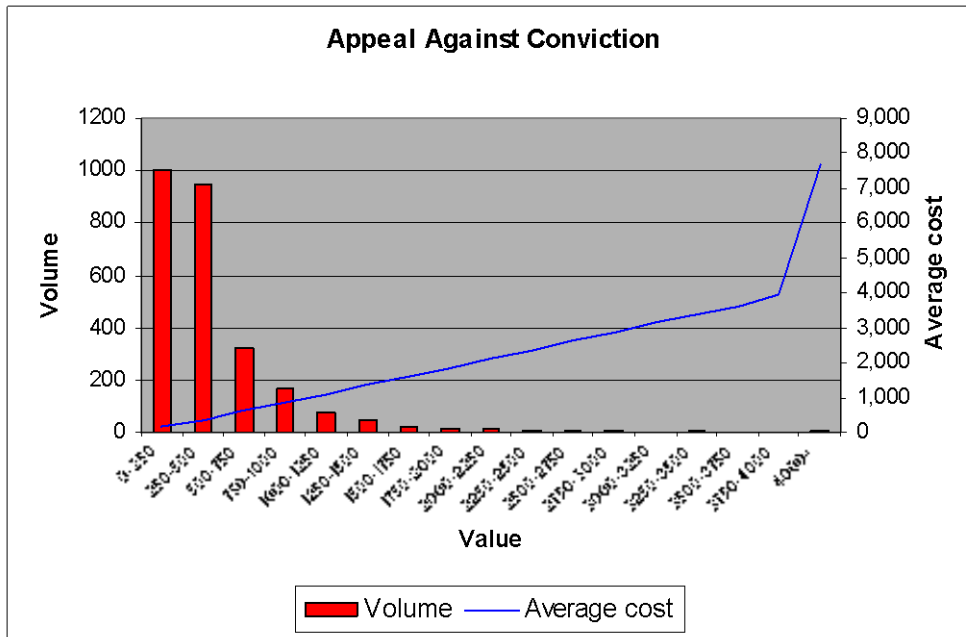
Appendix A - Litigator Graduated Fee Scheme – Post Implementation Review

- It will reduce anomalous payments under the LGFS for cases where quantities of material is 'served' which, in other cases, would have been part of the unused, although deserving cases could be able to make use of the special preparation clause in the Funding Order, as per AGFS rules
- It will ensure that VHCC provisions cover the most expensive cases, as a cap on PPE at 10,000PPE would mean that the highest sum payable to an LGFS case, based on a trial with one defendant, would be £143,565.59, which seems to be appropriate for a graduated fee scheme.

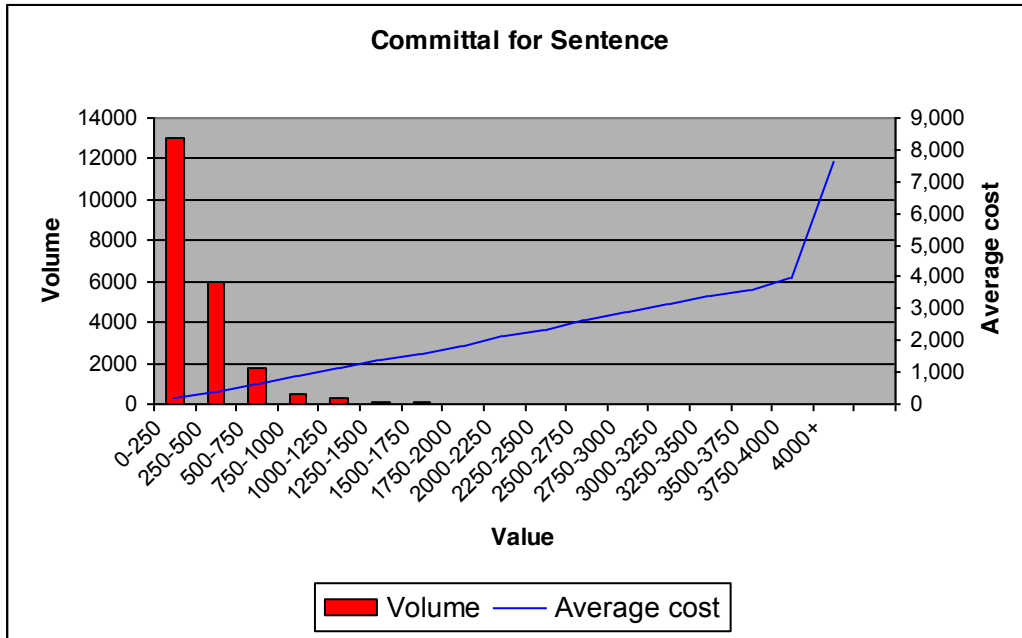
57. Lord Carter's report recommended a cap on PPE at 10,000PPE and a cap on trial length at 40 days for the LGFS scheme. Both were removed because the effect of the caps was that no case (with one defendant) could be paid more than approximately £60K, which seemed an inadequate ceiling for the scheme. Also, at the time, the LGFS had not been modelled with a special preparation provision and having a cap on PPE would mean that no higher payments could ever be made, which seemed unfair.
58. Removing the cap on trial length alone resolves the low payment issue for cases with a smaller amount of PPE but a lengthy trial. The introduction of the special preparation arrangements resolves the cap on PPE issue for those few LGFS cases that might have over 10,000PPE but not be eligible for a VHCC contract.
59. It is recommended that a cap is put in place for PPE at 10,000PPE and that the special preparation definition is reviewed to ensure that PPE over the cut off could fall within scope of additional funding.

Next Steps

60. Discussion and sign off to the proposed recommendations is needed by:
- The stakeholder review group
 - The Commission
 - Ministers
61. Proposed changes will need to be consulted upon both in terms of policy changes and changes to the Funding Order.



Appendix A - Litigator Graduated Fee Scheme – Post Implementation Review



Additional Recommended Amendments to the CDS Regulations

1. VHCC cases where non-Panel firms work on the case prior to transfer to panel firms – non-Panel firms should be remunerated by the CCU in accordance with VHCC pre-contract rates and should not obtain an LGFS payment.
2. An additional fixed fee should be included to cover statutory reviews or applications made by the prosecution to vary Crown Court orders. This should be paid at a similar rate to appeals against sentence.
3. Paragraph 2(1) c of Schedule 2 Part 1 concerning miscellaneous (Crown Court) proceedings classified as criminal in reg 3(2) of the CDS General No 2 Regs (such as ASBO appeals) should be removed as this is duplication.
4. Where litigators move from one firm to another and take cases with them, these should not be treated as transfers under the LGFS. This should be clarified in the Regulations.

Update on Business Process Progress – LGFS

1. As of 14 November 2008, processing backlogs have fallen and processing times have now reduced from 7 weeks (a couple of months ago) to 5 weeks. This covers all final bills. Interim bills are processed on the date of receipt. There are still a number of reviews, which can take longer to complete. Now that processing backlogs have been reduced, the Litigator Fee Teams (LFTs) are renewing their focus on chasing LF4s (the form completed by HMCS with review information from the paper files).
2. A joint review has been organised between HMCS and LSC to be held in January 2009 to look at improving procedures between the two organisations.
3. Some providers are using an informal form, developed by HMCS, to ensure that prosecution and defence teams agree the number of pages of evidence (PPE) on the case. This form has now been submitted to MoJ for their views.
4. A training update has been circulated in HMCS for courts to remind them to use the case paper file when completing LF4s, rather than CREST. This should ensure that where CREST has not been updated in a timely manner, the correct case detail is supplied on review. Some courts are struggling with this area and we intend to look into the reasons for this under the joint review.
5. Small discrepancies between claims and CREST will no longer be amended. This is the first step towards a more 'risk based' approach to auditing.
6. A letter has recently been sent to the CPS to progress the PPE issue. LSC would like to introduce a more formal approach to agreeing PPE between the parties at the end of a case. A meeting is due to be held between CPS, LSC and will be attended by Joy Merriam, chair of CLSA.

Appendix B

Litigator Graduated Fee Scheme – Full Review Terms of Reference

1. Background and Objectives

The LGFS scheme was implemented in January 2008. Following consultation on the policy and the regulations, the LSC committed to review the scheme once enough cases had been processed through the new system.

In August 2008, the LSC undertook an interim review of the scheme, focusing on the fixed fees and the funding order (definitions, omissions etc). This review has concluded and the recommended changes are now being included in a revised funding order. This will be subject to consultation. The interim review recommendations are attached at Annex A.

The Interim Review Group recommended that a full review commence as soon as practicable in 2009.

The broad objectives for the LGFS scheme were set out in the Consultation paper and Response to consultation document. These can be found at Annex B.

The full review will focus on whether the fee scheme achieves the following:

- increased control of expenditure in Crown Court cases has been achieved, within a budget of £255m per annum. (This represents a 5% drop in budget on 2007/8 spending levels).
- the fee model provides a fixed or graduated fee payment for all Crown Court cases that fairly and adequately remunerates litigators on the principle of 'swings and roundabouts'.
- quality of provision of legal services for clients has been maintained;

These will form the review's main objectives. More detail is provided in the following section.

2. Scope of the Full Review

It is proposed that the full review examines all the elements that make up the LGFS payment. The operational delivery aspects of the scheme will be reviewed separately under the Project Post Implementation Review, which will be managed internally following LSC project principles.

Appendix B Litigator Graduated Fee Scheme – Post Implementation Review

This full review will examine the payment scheme as follows:

(a) Increased control of expenditure

- examine the financial impact of the scheme.
- examine whether the scheme is maintaining overall litigator Crown Court payment levels at the set financial target of £255m per annum.

(b) Adequate remuneration under ‘swings and roundabouts’

- drill down into the detail of the payment scheme, examining payments for different types of cases, e.g. by offence type and by case type (trial/crack/guilty).
- examine the volume and case mix trends (and identify behavioural changes in terms of provider claims – e.g. more cracked cases, less guilty pleas).
- examine the ‘swings and roundabouts’ element of the scheme, to identify the impact on providers.

(c) Operational aspects of the scheme

Originally, matters such as validation of PPE and processing times were not within the remit of this group. However, as members of this group have largely been involved in resolving these issues, this group will continue to consider such operational issues that impact on litigators. Internal operational issues such as quality control are not within the remit of this group and are being reviewed by an internal review team.

(d) Quality of provision of service to clients

Issues of quality within the scheme will need to be examined.

If the scheme is not meeting the objectives set out above, the Full Review Group will need to make recommendations as to how to address the issues.

In anticipation of the need to make such recommendations, the following specific elements have been identified by stakeholders as possibly requiring examination:

(i) Graduated Fee

The Law Society collated responses from providers to a questionnaire regarding LGFS. The specific concerns raised, through this and other feedback routes, regarding the graduated fee payments were as follows:

- Unused material
- Electronic evidence

Appendix B Litigator Graduated Fee Scheme – Post Implementation Review

- Travel in rural areas/general travel
- Clients with specific issues (vulnerable/non- English speaking) and 'niche' firms
- Section 51 work
- Clarification of the transfer rules (especially definition of original (old) and new solicitors)
- Payment levels for guilty plea cases

(ii) Fixed Fee

Fixed fees were covered in the most part by the interim review of LGFS. The interim review requires consultation on the draft funding order before the proposals can be implemented. It is proposed that the full review can keep a watching brief on the progress of the implementation of the interim review recommendations.

Further fixed fee issues not raised under the interim review include the following:

- Appeals from the Youth Court
- Payment parity between breaches of crown court orders and committals for sentence

3. Governance

This group will be chaired by the LSC. The list of members is:

Derek Hill (Chair)	LSC
Neil Lewis	LSC
Jackie Hislop	LSC
Ed Helmer	LSC
Raj Mundra	LSC
Keely Riordan	LSC
James MacMillan	MoJ
David Carter	MoJ
Sue Adams	HMCS
Andrew Caplen	Law Society
Ian Kelcey	Law Society
Jim Meyer	Law Society
Alice Mutasa	Law Society
Rodney Warren	Law Society
Greg Powell	Law Society
Chris Clarke	Law Society
Mike Jones	CLSA
Jo Cooper	SAHCA
Tom Little	Bar Council
Adrian Vincent	Bar Council
Mark Lucraft	Bar Council

4. Timescales

This full review will aim to report with recommendations by the end of July 2010, subject to the extent of the need to undertake further data collection exercises.

LGFS Interim Review Summary of Recommendations

- Raise the payment for appeals against conviction, appeals against sentence and committals for sentence by £50 for each claim.
- Allow all firms to claim for breach of Crown Court order hearings.
- Introduce an additional fixed fee to cover statutory reviews or applications made by the prosecution to vary Crown Court orders. This should be paid at a similar rate to appeals against sentence.
- Amend the definition of a transfer to cover all appropriate changes – to be defined and consulted upon through Funding Order amendments and consultation
- Introduce new scenarios for transfers after trial and retrial to cover sentence hearings only
- To continue to progress business process improvements through liaison with the CPS and through the joint HMCS/LSC Kaizen event.
- To hold a full PIR in 2009 covering the payment scheme, in particular the graduated fee element of the scheme and operational delivery of the scheme
- To cap PPE at 10,000PPE and ensure that the special preparation provisions are available where appropriate to providers whose LGFS cases contain more than 10,000 PPE.

LGFS Project Objectives

- Design & develop a fee model that provides a fixed or graduated fee payment structure for all Crown Court cases that are not VHCCC cases.
- Consider and determine a cost effective method of delivery that allows for LSC control within the need to rely on outdated systems or information and that fits with the LSC vision for its relationships with suppliers in the future (preferred supplier)
- Develop & implement IT infrastructure that fits with the LSCs vision for I.T. development in the future (Business Transformation/e-business)
- Implement relevant changes to the Regulations
- Consult with the profession

The Response to Consultation document added the following:

The aim of these proposals is to:

- Ensure the provision of quality legal services for clients;
- Ensure a high quality, sustainable supplier base that enables efficient legal aid providers to prosper;
- Replace the existing *ex post facto* (EPF) payment scheme in the Crown Court for litigators;
- Pave the way for best value tendering (BVT) and introduction of a single fee for advocates and litigators in the Crown Court;
- Reduce inefficiency and minimise duplication between work done by litigators and advocates;
- Enable increased control and forecasting of expenditure in Crown Court cases;
- Provide greater certainty to litigators around the timing and value of payments;
- Ensure the government and taxpayer receive value for money by implementing cost control and generating savings against current legal aid expenditure, in order to secure a sustainable future for Legal Aid and safeguard the provision of civil and family legal aid services.

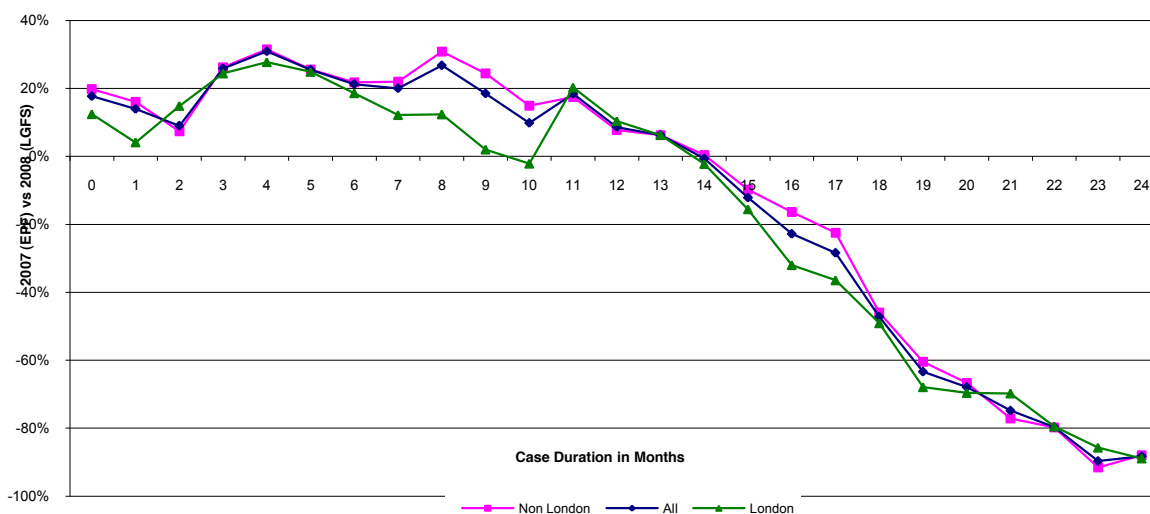
Appendix C Methodology and limitations

The group had to establish a comparable and complete dataset. The raw data consisted of litigator Crown Court case starts for 2007 (EPF) and 2008 (LGFS) that had concluded and been paid. The LSC provided 2007 and 2008 data instead of 2005/06 (which was used along with some 2007 data to model the fee) and 2008. Although the 2005/06 data was used to model the LGFS, a population of cases in this dataset had no AGFS bill which is why additional data from 2007 was used. Using the complete 2007 data provided more key parameters on offence type to enable a better comparison.

Using the date of the representation order, and the conclusion date, the cases were grouped by duration and this enabled the group to establish whether the high end cases had come through the LGFS.

Figure 4 contains the change in volume by duration from 2007 to 2008 and demonstrates a reasonably static volume increase of approximately 20% up to the 11 month duration point (or cases with duration of up to 12 months)¹. There is then a steady reduction of cases with duration of >12 months which means that such cases have not yet come through the LGFS. The group therefore agreed to exclude these cases from the analysis as the data would not be comparable with 2007.

Figure 4- Change in Case volume by month
Year on year case volumes for old (EPF/Standard Fee) and new (Lit Fee) schemes



During these initial stages of the review, the group had to address some limitations with the data:

- Some fields in the LGFS data were not verifiable so AGFS fields were applied to both sets of data
- Some low value data was not classified or was misclassified in EPF
- The data had to be grouped by case and not claim as there was no identifiable claim value in EPF
- The LGFS data is made up of cases that were not subject to the PPE cap

However, the group had a reasonable level of confidence in the data to continue their analysis.

¹ The approximate 20% increase is consistent with HMCS analysis of Crown Court starts.