



House of Commons  
Justice Committee

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# Criminal Legal Aid

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**Twelfth Report of Session 2017–19**

*Report, together with formal minutes  
relating to the report*

*Ordered by the House of Commons  
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## Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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## Summary

This report considers recent changes to criminal legal aid—in particular, the Litigators’ Graduated Fee Scheme (LGFS) and the Advocates’ Graduated Fee Scheme (AGFS) that apply to Crown Court cases; expenditure on criminal legal aid generally; and declining expenditure on the criminal justice system as a whole. It also considers the absence of legal aid for defence lawyers to review unused prosecution material. We do not consider the remuneration of prosecution lawyers as they do not fall within the scope of the LGFS and AGFS schemes.

An emerging pattern in the evidence to our separate inquiry on disclosure of evidence in criminal cases was that the AGFS and the LGFS were working against the ability of the defence properly to fulfil its role, as neither scheme offers remuneration for time spent reviewing unused prosecution material. This, together with the dispute that had emerged between the Criminal Bar and the Ministry of Justice over the revised AGFS, prompted us to take oral evidence from the Criminal Bar and solicitors’ representative organisations. Based on this oral evidence, together with our understanding of the background to the AGFS dispute and our exchange of correspondence with the Secretary of State for Justice, we decided to publish this short report on criminal legal aid.

In criminal cases, it has been recognised that there is a common law right to legal advice, together with a right to legal representation under Article 6 of the European Convention on Human Rights. We conclude that there is compelling evidence of the fragility of the Criminal Bar and criminal defence solicitors’ firms, which places these rights at risk—a risk that can no longer be ignored. We recommend that the output from the criminal legal aid workstream within the post-implementation review of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 be used to underpin a comprehensive and independent review of criminal legal aid—similar to the recent independent review of legal aid in Scotland—with the aim of devising a scheme that is sustainable and user-focused; the review should be launched no later than March 2019 and be concluded within 12 months.

An effective criminal justice system is one of the pillars on which the rule of law is built; effectiveness also demands that the fabric of the criminal courts is maintained. The under-funding of the criminal justice system in England and Wales threatens its effectiveness, so undermining the rule of law and tarnishing the reputation of our justice system as a whole, which is widely admired. We conclude that the under-resourcing of the criminal justice system undermines the prospects of successfully promoting our legal system abroad, a stated Government objective.

We therefore recommend that the Government conduct an urgent cross-departmental review of funding for all elements of the criminal justice system, with the aim of restoring resources to a level that enables the system to operate effectively. The details of the review should be published in advance; its timetable must ensure completion in time to influence the conclusions of the 2019 Spending Review.

Our other principal conclusions and recommendations can be summarised as follows:

- Solicitors appear to have serious grievances about the LGFS, given the absence of index linking, the 8.75% cut in fees imposed in 2014, and the recent cap on pages of prosecution evidence. There is also evidence indicating a worrying level of demoralisation among criminal defence solicitors and threats to the sustainability of criminal defence firms.
- We consider it regrettable that the Law Society has had to resort to bringing a judicial review to pursue its grievances about the LGFS, and we recommend that the Ministry of Justice take urgent steps to avoid this dispute having to be resolved by the courts; whatever the outcome of the case, there should be a wider review of criminal legal aid.
- We also consider it regrettable that the Criminal Bar felt compelled to take direct action in response to the new AGFS, given the potential for adverse impact on defendants, claimants and the functioning of the courts. However, the underlying reasons for the dispute can be understood: the staged reductions in fees from April 2010 onwards, unhappiness about the revised scheme and the Criminal Bar's genuine and heartfelt concerns about the future of their profession and under-funding of the criminal justice system.
- While we welcome the Government's additional funding for the AGFS, and the Criminal Bar's acceptance of the offer, we do not believe that the underlying issues have been resolved; it is clear that many barristers remain deeply unhappy about their situation and about the future of the criminal justice system.
- We acknowledge the challenges facing the Ministry of Justice in reworking the AGFS so that it is fair to all advocates, and in ensuring that the scheme is future-proofed against changes in the profile of Crown Court cases. We also acknowledge that the Ministry has made genuine efforts to address the concerns of the Criminal Bar. We recommend that, without further delay, a system of annual review be built into the AGFS, overseen by a panel which includes representatives from the Criminal Bar and solicitor organisations; the panel's remit should include considering the inter-dependency between the AGFS and the LGFS.
- The pressure placed on defence lawyers to fulfil their professional obligations by reviewing increasing quantities of unused prosecution material is fundamentally unfair and likely to become unsustainable, and increasingly prejudicial to the defendant. We recommend that restoring legal aid payments for reviewing unused material above a certain page threshold be considered as part of the comprehensive and independent review of criminal legal aid that we have recommended above.

# 1 Background to this report

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## Our inquiry on disclosure of evidence in criminal cases

1. On 22 February 2018 we launched an inquiry into disclosure of evidence in criminal cases, prompted by several reports of criminal cases collapsing due to prosecution failings in disclosure of evidence. The inquiry aimed to investigate disclosure procedures to ensure they were fit for purpose and that the steps proposed (including by the National Disclosure Improvement Plan) to address existing issues were sufficient to resolve them.
2. An emerging pattern within the evidence that we received was that the criminal legal aid fee schemes for both advocates and litigators were working against the ability of the defence properly to fulfil its role, by making no provision for the time spent reviewing unused prosecution material.<sup>1</sup> Although this work may involve reviewing thousands of pages of electronic evidence, it depends on the professionalism and commitment of the legal representative involved, who is not paid for the time that they spend engaged in this activity.

## Correspondence with the Secretary of State

3. Criminal defence advocates, both barristers and suitably qualified solicitors,<sup>2</sup> receive legal aid payments under the Advocates' Graduate Fee Scheme (AGFS); fee rates have not been increased since 2007 and have also been subject to various reductions. In 2017, the Ministry of Justice (MoJ) consulted on changes to the scheme that were designed to be cost neutral; it published the revised AGFS on 23 February 2018. On 29 March 2018, the Criminal Bar Association (CBA), the representative body for practising members of the Criminal Bar in England and Wales, made an announcement describing the criminal justice system as "collapsing", and suggesting that the Government's lack of investment in legal aid was "the final straw" for the Criminal Bar, which it said was currently facing a recruitment and retention crisis. The announcement recommended that CBA members consider declining new legally aided cases as from 1 April 2018—the day that the new AGFS scheme was due to be implemented. A statement from the Bar Council, issued the same day, expressed support for the stance taken by the CBA and the Criminal Bar.<sup>3</sup>
4. On 24 April 2018, the Criminal Bar's decision to take direct action prompted us to write to the Secretary of State for Justice, the Right Hon David Gauke MP, expressing dismay about this development.<sup>4</sup> While we took no view as to whether the direct action was appropriate, we drew attention to evidence indicating that the perception of a crisis was justified, including a Bar Council survey indicating worryingly low levels of morale among criminal barristers. Our letter also expressed concern about the newly revised Litigators' Graduated Fee Scheme (LGFS) that had generated lower payments for criminal defence solicitors, prompting an application for judicial review by the Law Society; the Society's survey evidence indicated a shortage of duty solicitors in England and Wales,

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1 The prosecution has a duty to disclose to the defence material gathered during the investigation of a criminal offence, which is not intended to be used as evidence against the defendant, but which may undermine the prosecution case or assist the defence case.

2 See Paragraph 20 below.

3 [Bar Council: "We stand by the Criminal Bar Association and the Criminal Bar". 29 March 2018](#)

4 [Letter from the Chair of the Justice Committee to the Secretary of State for Justice, 24 April 2018](#)

with this being an increasingly ageing sector of the profession.<sup>5</sup> Our letter also referred to evidence to our inquiry on disclosure of evidence in criminal cases suggesting that the lack of legal aid payments to defence lawyers for reviewing unused prosecution material<sup>6</sup> could be exacerbating the risk of miscarriages of justice.

5. The Secretary of State responded to our letter on 14 May 2018.<sup>7</sup> While confirming the great value that he placed on the work of criminal advocates, without whom “our justice system would simply not function”, he expressed disappointment that the CBA had encouraged its members to take action, given that the MoJ had worked closely with the profession in designing the new fee scheme. He said that, under the reformed AGFS scheme, money is redistributed to ensure that advocates “are paid more accurately for work done”—for example, by increasing fees for more serious cases and remunerating each standard court appearance separately; no fees were reduced following the MoJ’s consultation.

6. In his response to us, the Secretary of State also acknowledged that concerns had emerged during the AGFS consultation about the potential adverse impacts on junior advocates and solicitor advocates, as a result of which: “we made significant changes to the scheme including allocating an additional £9m pa.” He went on to state that a financial risk linked to the new scheme [not further explained] was “likely to lead to another £9m expenditure per year”; in total this represented an increase of £18 million against expenditure for 2014–2015. The MoJ had committed to undertaking a full appraisal of the reforms, which was likely to take place between 18 months and two years following implementation. With regard to the LGFS, the Secretary of State explained that this had been amended in 2017 to address the “unintended consequences” of the decision of a Costs Judge affecting certain Crown Court cases.

## Evidence sessions with criminal defence lawyers

7. The continuing dispute between the MoJ and the Criminal Bar prompted us to take oral evidence from representatives of the two main legal professions, to gain a better understanding of the underlying reasons for their grievances about the AGFS and the LGFS and the potential for resolving them. We held an oral evidence session on 22 May 2018, where the witnesses were Richard Miller, Head of Justice at the Law Society, and Daniel Bonich, Vice-Chair of the Criminal Law Solicitors’ Association (CLSA); and another on 12 June 2018, with Andrew Walker QC, Chair of the Criminal Bar and Angela Rafferty QC, Chair of the CBA; the CBA and the CLSA also provided us with a helpful written submissions which we have published.<sup>8</sup> We are grateful to all the witnesses for their oral evidence and to the CBA and CLSA for providing us with written evidence.

5 There are two duty solicitor schemes, operating in parallel: the police station duty solicitor scheme enables an arrested person to consult with a solicitor in the police station, and the court duty solicitor scheme allows someone charged with an offence to consult with/be represented by a solicitor on their first appearance in the Magistrates’ Court if they do not have their own solicitor.

6 See Footnote 1

7 [Letter from Secretary of State for Justice to the Chair of the Justice Committee, 14 May 2018](#)

8 [Criminal Bar Association Briefing Note on the Advocates’ Graduated Fee Scheme](#); Written evidence from the Criminal Law Solicitors’ Association [[AID0001](#)]

8. The CBA had been set to step up its action on 25 May 2018 by adopting a “no returns” policy.<sup>9</sup> However, shortly before this date, negotiations with the MoJ led to a breakthrough offer of £15 million in additional Government investment into the AGFS. In response, the CBA suspended implementation of the “no returns” policy while it balloted its members. On 12 June 2018, the day of our second evidence session, the CBA announced the result of the ballot, indicating that the revised offer had been accepted by a narrow margin of its members. Nonetheless, as discussed below, in oral evidence the CBA and the Bar Council expressed a view that the underlying problems within the criminal justice system, particularly the lack of investment, had not been resolved.

## Our report

9. Based on the oral evidence that we received, together with our understanding of the background to the lengthy dispute between the legal professions and the Government over the AGFS and the LGFS, we decided to publish a short report. We are mindful of the fact that, on this occasion, we have not launched a public call for evidence, nor have we invited the Government to provide written or oral evidence since the original exchange of correspondence with the Secretary of State. However, we have concluded that the issues facing the criminal justice system—and in particular, their impact on lawyers who conduct criminal defence work—are sufficiently urgent for our report to be published without further delay.

10. In producing this report, we have considered the Government’s published material on the AGFS and the LGFS, including its consultation papers on proposed changes to the two schemes, and its responses to these consultations; we have also taken into account our own correspondence with the Secretary of State. We recognise below the efforts made by the Ministry of Justice to resolve the dispute that arose with the Criminal Bar, as well as the impact of funding constraints under which it currently operates—a matter to which we return in the final chapter of our report.

11. In the next chapter, we consider the rationale for criminal legal aid and summarise the history of criminal legal aid system, in particular the LGFS and the AGFS. The following two chapters consider the recent changes to the LGFS and the AGFS, and the dispute that has arisen between the Ministry of Justice and the Criminal Bar. In the final chapter, we consider some wider concerns: overall expenditure on criminal legal aid, and on the criminal justice system as a whole. We also look at the disclosure of unused prosecution material; as noted above, this formed part of the subject matter of our inquiry on disclosure of evidence in criminal cases; the report of that inquiry<sup>10</sup> has thrown into sharp relief the relationship between the absence of legal aid remuneration and the handling of unused material and has informed the conclusions of the present report.

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9 A “return” is a case that a barrister agrees to take over from a colleague in their chambers who can no longer provide advocacy as a result of a diary clash.

10 House of Commons Justice Committee: [Disclosure of evidence in criminal cases](#). Eleventh Report of Session 2017–19

## 2 Criminal legal aid

12. As observed by the former Minister of State for Courts and Justice, the Rt Hon Oliver Heald QC MP, “[t]he rule of law is the basis on which a fair and just society thrives”; it is “underpinned by an independent judiciary, and expert advocates defending those accused of a crime in open court.”<sup>11</sup> The right of access to legal advice has been recognised by the courts as closely linked to the common law right of effective access to a court;<sup>12</sup> as well as being a fundamental common law right in its own terms;<sup>13</sup> and central to a democratic civilised society.<sup>14</sup> In addition, Article 6 of the European Convention on Human Rights gives a person accused of a criminal offence the right to legal representation “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”<sup>15</sup> The operation of our criminal legal aid scheme must be viewed in this legal context.

13. The rules governing entitlement to criminal legal aid are set out in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 and in Regulations under that Act.<sup>16</sup> Determining whether someone qualifies for criminal legal aid involves applying a financial means test and an “interest of justice” test; the more serious the criminal charge, or the consequences for the accused, the more likely it is that they will qualify for legal aid.<sup>17</sup> Most legally aided advice and representation for defendants is provided via payments from the Legal Aid Agency<sup>18</sup> to solicitors’ firms and the independent Bar—although there is also a small Public Defender Service, part of the Legal Aid Agency.<sup>19</sup>

### The Litigators’ Graduated Fee Scheme

14. Before the introduction of fixed fees under the Litigators’ Graduated Fee Scheme (LGFS) in 2008, criminal legal aid payments were calculated very differently. Under the Legal Aid Act 1988, payment for work in the Crown Court was based on the time reasonably spent in conducting any particular case. The rates were similar to those paid to lawyers prosecuting cases on behalf of the Crown and slightly lower than fees paid by private (non-legally aided) clients. The Act allowed for remuneration rates to be annually increased in line with inflation. Richard Miller, Head of Justice at the Law Society, explained to us:

11 Foreword to [Reforming the Advocates’ Graduated Fee Scheme](#). Ministry of Justice, January 2017.

12 [R \(Daly\) v Secretary of State for the Home Department \[2001\] UKHL 26](#); per Lord Bingham of Cornhill, paragraph 5

13 [R v Shayler \[2002\] UKHL 11](#); per Lord Hope of Craighead, paragraph 73

14 [R \(Daly\) v Secretary of State for the Home Department \[2001\] UKHL 26](#); per Lord Cooke of Thorndon, paragraph 30

15 Article 6(3)(c), European Convention on Human Rights

16 [Criminal Legal Aid \(General\) Regulations 2013](#)

17 The “interests of justice” test involves considering factors such as the person’s previous convictions, the complexity of the case, the nature of the offence and the possible consequences of conviction - for example, the risk of imprisonment, the risk of losing one’s livelihood or consequences for personal reputation. Cases tried in the Crown Court are deemed to satisfy the test.

18 The Legal Aid Agency is an Executive Agency of the Ministry of Justice. It is led by the Director of Legal Aid Casework, appointed by the Lord Chancellor under section 4 of the LASPO Act 2012.

19 The Public Defender Service, established in 2001, undertakes litigation and advocacy in all types of criminal cases. It operates from offices in Cheltenham, Darlington, Pontypridd and Swansea.

At the time, the rates paid under legal aid were a little bit below the rate paid for private work. The basis of that was that it was Government funding and therefore guaranteed, so some discount was considered reasonable, but it was broadly commensurate with the returns from private work.<sup>20</sup>

15. However, as Mr Miller went on to state, criminal legal aid payments for solicitors have had no inflationary increase for 20 years and have also been subject to significant reductions, leading to a situation where according to his estimate “legal rates are probably, at most, a third of the rates paid for private work.”<sup>21,22</sup> Daniel Bonich, Vice-Chair of the Criminal Law Solicitors’ Association, estimated that there had been a cut of about 42% in real terms since 1997; and “[t]hat is without taking into account the actual cuts, such as the most recent 8.75%.”<sup>23</sup> [see paragraph 19 below]

16. In 2008, the previous method of calculating legal aid payments for Crown Court work based on the amount of work carried out was abandoned in favour of a Litigators’ Graduated Fee Scheme (LGFS), which is a fixed fee model;<sup>24</sup> a separate fixed fee scheme was introduced for providing legal advice at the police station and for magistrates’ court work.<sup>25</sup> Under the LGFS, litigators are paid a “graduated fee”, determined by “proxies”: the type of case, the offence type, trial length and the number of pages of prosecution evidence (PPE). An important change introduced by the LGFS was that defence solicitors could no longer make a claim for an uplift payment for work that required particular diligence.

17. In addition, the LGFS no longer permitted any separate payment for reviewing unused prosecution material, as this work was considered to be wrapped up within the graduated fee. Under the previous regime, if a defence solicitor had spent time considering unused material, provided they could justify to the Legal Services Commission<sup>26</sup> that the work was reasonably done, they would receive payment.

18. Daniel Bonich accepted that the LGFS saved on administration costs for the legal aid scheme, and that, for criminal defence solicitors, there was “a degree of certainty that comes in from fixed fees because you know pretty early on what you are likely to be paid.”<sup>27</sup> However, he also thought that the LGFS had significant disadvantages for practitioners:

As much as anything, it is the lack of any uprating. It is a lack of flexibility to reflect changes in practices; for example, the amount of unused material and the amount of digital material has ballooned massively ... .

20 [Justice Committee, oral evidence: Criminal Legal Aid, HC1069, 22 May 2018. Q9](#)

21 [Q9](#)

22 NB The fixed fees that were introduced for all types of criminal defence work, replacing fees reflecting the time actually spent on cases, were based on the existing spend redistributed into the new fee schemes.

23 [Q9, Q10](#)

24 The LGFS does not apply to Very High Cost Cases [VHCCs]. A case designated as a VHCC must be conducted by accredited VHCC providers. Under current arrangements, the defence team (solicitors and advocates) for a VHCC will be assigned a dedicated case manager in the Legal Aid Agency who negotiates with them as to what work they will do under an individual case contract.

25 Fixed fees were introduced for Crime Lower work, which includes work at the pre-charge and police station stages, in the magistrates’ courts and for prison assistance; these are the relatively high volume, lower cost units of criminal legal aid.

26 The Legal Services Commission, a non-departmental public body sponsored by the Ministry of Justice, administrated the legal aid scheme from 2000 until it was abolished in 2013.

27 [Q13](#)

19. In 2013, the MoJ put forward controversial proposals for competitive tendering of duty solicitor contracts, restricting participation in the duty legal aid rota;<sup>28</sup> these contracts would have allowed a limited number of firms the chance to represent new entrants to the criminal justice system.<sup>29</sup> The MoJ modified these proposals following a successful judicial review by solicitor organisations, but implementation of a revised scheme was delayed after 99 separate legal challenges to the procurement process, preventing the start of the contracts. In 2014, the MoJ imposed an 8.75% reduction in LGFS fees as part of the phased implementation of a 15% fee cut; the second reduction of 8.75% was planned for the following year. In January 2016, the then Lord Chancellor, Michael Gove, announced that the new contracting model would be abandoned and that the second 8.75% reduction in fees would also be suspended.<sup>30</sup> However, as we discuss below, this was to be followed in 2017 by proposals for major revisions to the LGFS.

### Advocates' Graduated Fee Scheme

20. Like the LGFS a decade or so later, the Advocates' Graduated Fee Scheme (AGFS) had been introduced in 1997 as a fixed fee model for legal aid remuneration for criminal defence advocates in the Crown Court; such advocates are generally barristers, but may also be solicitor advocates—that is, solicitors who are qualified to represent clients at hearings in the higher courts, usually called Higher Court Advocates (HCAs). Prior to the introduction of the AGFS, payment for criminal advocacy—as for criminal litigation work—was based on an individual assessment of the work that had been undertaken in any particular case; this would be carried out by the Legal Services Commission, the precursor to the Legal Aid Agency.<sup>31</sup> The AGFS determined fees through a complex formula, taking into account the type of advocate; the nature of the offence; the length of trial; the number of pages of prosecution evidence (PPE); and the number of prosecution witnesses. The scheme “bundled” certain hearings into the graduated brief fee, rather than paying for them individually, with additional daily attendance fees for longer trials only.

21. Andrew Walker QC, the Chair of the Bar, explained to us in oral evidence that, originally, the AGFS:

... applied only to cases where the trial was going to be between one and 10 days—the less significant cases. Four years later, in 2001, it was extended to trials up to 25 days. When that change was made, there was a commitment to cost neutrality, which is a term that has become, and is currently, contentious.<sup>32</sup>

Mr Walker went on to tell us that, in 2004, the Government accepted that the 2001 restructure of AGFS fees had actually led to an unintended cut; it agreed to amend the AGFS rates, but not sufficiently to take account of inflation. At the same time, the AGFS was extended to include trials of up to 40 days and, in 2005, all rates for Queen's Counsel

28 [Transforming legal aid: delivering a more credible and efficient system](#). Ministry of Justice, April 2013

29 Of the 1,500 firms that had had crime contracts, only 527 were awarded the new 'duty' contracts; for the remaining firms, their contracts would be restricted to "own client" work.

30 Following further consultation, a new criminal legal aid contract was introduced from 1 April 2017 and over a thousand providers were awarded contracts, most of which are for both 'own client' work and duty solicitor work.

31 The Legal Services Commission, established under the Access to Justice Act 1999, replaced the Legal Aid Board in 2000.

32 [Q119](#)

(QCs) were reduced by 12.5%. In 2007, following publication of Lord Carter’s review of legal aid procurement,<sup>33</sup> fees were increased by 18%—although this was 8% less than the rate of inflation since 1997, estimated to be 26%.<sup>34</sup>

22. Following a 2009 consultation on reforming the AGFS, the MoJ implemented a staged reduction in the fees paid to defence advocates, with the aim of bringing them more closely in line with fees paid to advocates representing the Crown Prosecution Service. AGFS fees were reduced by 4.5% per annum with effect from April 2010 for a three-year period—a 13.5% reduction in total. The MoJ’s 2013 Transforming Legal Aid consultation led to an initial decision to implement a new, simplified, version of the AGFS that would have further reduced barristers’ fees by, on average, 6%.<sup>35</sup> In response to this announcement, the leadership of the Bar introduced a “no returns” policy and organised days of action. Mr Walker explained the context in which the Bar had decided to take action:

... our assessment, statistically, in 2013 was that the cuts just from 2007 to 2013 had been 21% in cash terms and 37% in real terms based on the CPI. For some cases, it was even more. For the mid-range dishonesty cases there were cuts of 60% in real terms over that six-year period.<sup>36</sup>

23. On 27 March 2014, criminal barristers called off their action after reaching a deal with the MoJ to suspend cuts until after the next general election in May 2015. The then Secretary of State for Justice, the Rt Hon Chris Grayling MP, was reported as commenting on that day:

Following constructive discussion with leaders of the bar and Law Society, we have agreed further measures to help lawyers as they prepare for legal aid savings. In return the leaders of the bar have dropped their objection to working at reduced rates on very high cost cases, and have agreed to call off their action to disrupt courts. An efficient and fair criminal justice system—both for the public and people that work within it—is my top priority, and I believe this agreement is a positive step forward.<sup>37</sup>

24. Mr Walker told us that this marked what was effectively a truce between the Bar and the Ministry of Justice: “it was that truce that kept action at bay until now; the truce was the backdrop to the new scheme being formulated and, in due course, brought into effect.”<sup>38</sup> As we note below, the Government continued to engage constructively with the Bar in the formulation of a new AGFS scheme, modifying its proposals to take on board responses to its consultation; however, these modifications have failed to address all the Bar’s concerns.

25. In Chapter 3 and Chapter 4 of this report, we consider in turn the recent changes to the LGFS and to the AGFS, and the reaction of the legal professions to these changes.

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33 [Legal Aid: A market-based approach to reform](#). Lord Carter of Coles, July 2006

34 [Q120](#)

35 [Transforming Legal Aid: delivering a more credible and efficient system, CP14/2013](#). Ministry of Justice, April 2013.

36 [Q121](#)

37 [The Guardian: barristers call off walk-out after legal aid cuts suspended](#), 27 March 2014

38 [Q121](#)

## 3 Recent changes to the LGFS

### The LGFS cap on pages of prosecution evidence

26. The LGFS includes a cap on the number of pages of prosecution evidence (PPE) for which the defence solicitor receives payment under the graduated fee; up until 1 December 2017, the cap was set at 10,000 pages. Every page up to this cap raises the graduated fee that is paid. A defence solicitor who reviews any PPE over this cap may only be remunerated at the discretion of the Legal Aid Agency once the case has concluded, and at much lower “special preparation” rates that only cover time spent reading the material; Daniel Bonich estimated that this was just below £45 an hour.<sup>39</sup>

27. Because of the evolution of various forms of electronic evidence, the legislation then governing criminal legal aid payments was amended in 2012 to give discretion to include as PPE certain types of intrinsically electronic evidence (such as on CD-ROM) that had never previously existed in paper form.<sup>40</sup> Official guidance interpreted this discretion very narrowly. In September 2014, the costs case of *Napper* was decided by the courts;<sup>41</sup> this decision adopted a much broader definition of the electronic evidence that could be claimed as PPE, including mobile phone records, social media content and computer hard drives. The effect of this ruling was to reverse the interpretation given in the Legal Aid Agency’s guidance.

### The MoJ’s 2017 proposals for revising the LGFS

28. In response to this judgment, and as an alternative to the additional 8.75% fee cut that Michael Gove, the then Lord Chancellor, had suspended in January 2016, the MoJ consulted in February 2017 on proposals to reduce LGFS payments for Crown Court work; proposals were also put forward to cap the fees for court appointees at legal aid rates.<sup>42</sup> The MoJ expressed its justification for the proposed changes by explaining that it had needed to address a substantial rise in LGFS costs:

...which had occurred, despite a fall in the volume of cases, partly as a result of the Costs Judge decision in the case of *Napper* [ ... ] which revised the interpretation of the definition of PPE, broadening its scope. The Government had never intended to pay for electronic evidence in this way. We proposed amending the LGFS to achieve a return to the types and amount of electronic evidence we pay for to the levels we saw prior to the *Napper* ruling by lowering the point at which we stop counting PPE and start assessing work reasonably and actually done in relation to considering any additional pages under the “special preparation” provisions ... ..<sup>43,44</sup>

39 [Q23](#)

40 [The Criminal Defence Service \(Funding\) \(Amendment\) Order 2012](#)

41 *R v Napper* [2014] 5 Costs LR 947

42 Under section 38(4) of the Youth Justice and Criminal Evidence Act 1999, where a defendant is prohibited from personally cross-examining a prosecution witness, the court can appoint a lawyer to cross-examine the witness(es) on behalf of the defendant. Under section 4A of the Criminal Procedure (Insanity) Act 1964, a defendant found unfit to stand trial can be represented by a court-appointed lawyer. Such work was paid at private rates, four to five times higher than legal aid rates.

43 [Litigators’ Graduated Fees Scheme: response to consultation](#). Ministry of Justice, October 2017

44 A general downward trend in the volume of LGFS cases, along with an upward trend in value, is evidenced by Table 2 in the Annex to this report.

29. From the outset, the February 2017 proposals met with a negative reception from solicitors. In total, 1,005 responses to the consultation paper were received, the vast majority of which were from legal representatives and their professional bodies; almost all expressed opposition to the proposals. In its response to the consultation, the MoJ announced that the second intended fee cut of 8.5% for criminal legal aid would not be implemented, but it would proceed to reduce the cap on the number of claimable pages of prosecution evidence from 10,000 to 6,000. The Ministry’s Impact Assessment that accompanied its response to the consultation estimated that legal aid providers would receive around £26m to £36m less for LGFS payments as a result of reducing the cap.<sup>45</sup> However, the MoJ claimed that around half of the firms currently holding a contract would be “unaffected by the proposal”; according to the MoJ, electronic and social media evidence is not always relevant to the case, and it is possible to carry out electronic searches rather than reading all the material.<sup>46</sup>

30. Richard Miller from the Law Society told us that he believed that the nature and mix of criminal cases had changed:

The reason [the MoJ] gave was that they felt they were paying more now [per case] than they had in the past. We think that is not correct. We think that they have read the data in a particular way that does not actually match what is going on in reality, and that there are other factors to do with changes in the case mix, with more historical sex abuse cases, for example, and perhaps the CPS is now prosecuting only more serious cases because of its resource constraints.<sup>47</sup>

31. Mr Miller also expressed the view that the MoJ’s consultation process on the new LGFS had been flawed. As the LGFS consultation process is the subject of an application for judicial review by the Law Society, we do not discuss this issue further or offer any comment on the merits of the judicial review application.

### Impact of the revised LGFS on criminal defence solicitors

32. We asked Richard Miller and Daniel Bonich what concerns they had about the impact of the revised LGFS.<sup>48</sup> Mr Bonich emphasised that the concept of case mix was one of the features of a fixed fee model; the so-called “swings and roundabouts” approach. He explained that some areas of work did not pay well, compared to the time they demanded, “but other cases perhaps [pay] disproportionately more, so, if you had a good mix of cases, you would be fine.” Mr Miller observed that, while the average claim under the LGFS scheme was around £1,500 to £2,000, many firms relied on a small proportion of higher value LGFS cases to bring in most of their income—he thought perhaps 1% of cases could account for about 30% of LGFS payments. He illustrated the financial impact of reducing the PPE cap by citing an example quoted to him by a solicitors’ firm of one of these unusually high value cases; their LGFS fee for a multi-handed murder case had previously been around £90,000, but under the revised scheme this would drop to somewhere in the region of £60,000.

45 [Litigators’ Graduated Fees Scheme, final stage Impact Assessment IA No: MoJ013/2017](#), October 2017

46 [Litigators’ Graduated Fees Scheme: response to consultation](#). Ministry of Justice, October 2017. Page 5

47 [Q27](#)

48 The revised LGFS was introduced by the [Criminal Legal Aid \(Remuneration\) \(Amendment\) Regulations 2017](#) (SI 2017 No. 1019)

33. Mr Miller also discussed some other practical implications of reducing the PPE cap for criminal defence cases:

The scheme was set up on the basis that you would be paid on the PPE and the other factors, in a system calculated to ensure that it reflected both the work done in considering that material and all the further evidence you had to get—the interviews with your client, the statements that had to be prepared and the expert evidence you had to commission. Now, for all cases where there are more than 6,000 pages, the LAA has just dropped the axe, so that work is no longer paid for.<sup>49</sup>

34. The witnesses explained to us that special preparation payments only cover the cost of reading pages above the cap; they do not cover any work arising out of this, such as taking instructions from the client or interviewing additional witnesses.<sup>50</sup> When asked about the potential role of the “special preparation” rate in relation to PPE in excess of the new cap of 6,000 pages, Mr Miller described this as:

... a low hourly rate, relatively speaking. It is discretionary and many claims are knocked back. It is quite expensive for firms to submit those claims, so, in many cases, even when potentially it would be possible to make a claim for special prep, it is not economically viable to do so, and a lot of times firms feel that the only economic way to go is to write off that work.<sup>51</sup>

### The sustainability of criminal defence firms

35. Daniel Bonich observed that the changes to the LGFS were part of a cumulative problem, taken alongside the inflationary pressures on the fees paid under the scheme and the imposition of the 8.75% cut in 2014. He commented:

The difficulty is that, when you take all of that together, even the slightest change puts the market at risk. [...] Fast forward to 2018, and anything that reduces the amount that firms can claim for the work they are doing causes concern.<sup>52</sup>

36. Both Mr Bonich and Mr Miller drew our attention to the findings of analysis undertaken by Otterburn Legal Consulting, jointly commissioned by the MoJ and the Law Society in 2013, when the Government was considering introducing competitive tendering for duty solicitor contracts, together with a 17.5% reduction in LGFS fees (the first tranche of which—8.75%—was implemented the following year). The findings of the Otterburn report<sup>53</sup> included the following:

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49 [Q29](#)

50 [Q14](#), [Q30](#)

51 [Q30](#)

52 [Q31](#)

53 [Transforming Legal Aid: Next Steps; A Report for The Law Society of England and Wales and the Ministry of Justice](#). Otterburn Legal Consulting, February 2014

- On average firms were achieving a 5% net profit margin in crime, although larger firms (those with 40 solicitors or more) had lower margins than smaller firms.
- The finances of many crime firms were fragile, with most of them lacking significant cash reserves or high excess bank facilities.<sup>54</sup>
- If the first reduction in fees of 8.75% were to take place before the market had any opportunity to adjust to the change, firms' profitability could be significantly weakened.

37. Mr Miller also referred to 2013 research by the Solicitors Regulation Authority (SRA),<sup>55</sup> which requested data from 2,000 firms based on criteria relating to the probability and impact of financial difficulty. The SRA found that 5% of these firms had a high risk of financial difficulty and 45% faced a medium risk. Generating at least 50% of a firm's revenue from legal aid, particularly crime or family, was identified as a risk factor.<sup>56</sup>

38. Daniel Bonich considered it possible that, following the recent changes to the LGFS, firms might decline more complex cases: "you are asking them to make a choice, because they cannot continue to subsidise the lower [paying] cases". He believed there was already some evidence of firms refusing to take on cases that did not generate sufficient payment to justify the work involved; it was also significant, in his view, that the Law Society had issued guidance 18 months previously to remind solicitors that they had an obligation to consider declining work that did not pay enough and that might consequently place the firm's financial stability at risk. He suggested that many such cases might involve vulnerable defendants and witnesses or those with mental health problems, as well as historical sex offences, and that it would be "a real concern if firms start blanket-refusing that type of case just so they can keep the lights on."<sup>57</sup>

39. There are also broader concerns about the sustainability of criminal defence firms, and particularly of duty solicitor schemes that operate in the police station and the magistrates' court. In April 2018, the Law Society published a "heatmap"<sup>58</sup> which indicated that the average age of duty solicitors was 47, and in many regions the average is higher. For example, in Dorset, Somerset, Wiltshire, Worcestershire, West Wales and Mid Wales, over 60% of criminal law duty solicitors are over 50 years old; and in Norfolk, Suffolk, Cornwall and Worcestershire, there are no criminal law solicitors aged under 35, with only one each in West Wales and Mid Wales, and two in Devon. In comparison, across the whole solicitors' profession, only 27% of solicitors are aged over fifty.

40. In a media release accompanying the heatmap,<sup>59</sup> the Law Society suggested that "[c]riminal defence lawyers in England and Wales could become extinct". According to the Society, government cuts to criminal legal aid are deterring young lawyers entering the field of criminal defence work, leading to concerns that in five to ten years' time there could be insufficient criminal defence solicitors in many regions. This would appear to throw into question the viability of duty solicitor schemes in some parts of England and Wales.

54 le, the difference between a firm's actual bank balance and its overdraft facility.

55 [Navigating stormy seas: Financial difficulty in law firms](#). Solicitors' Regulation Authority, November 2013

56 [Q20](#)

57 [Q32](#)

58 <http://www.lawsociety.org.uk/policy-campaigns/campaigns/criminal-lawyers/>

59 [Criminal defence lawyers face extinction amid justice crisis, 17 April 2018](#)

41. Richard Miller of the Law Society gave us his personal view, which was similarly pessimistic.

The situation is that the scheme is becoming threadbare, and we are on the point of the crisis really biting. What I mean by that is that, as far as I am aware, we have not yet had an example of someone in the police station who has requested a solicitor not being provided with a solicitor, but we are getting very close.<sup>60</sup>

Mr Miller gave an example of a duty solicitor scheme in Kendal where only one solicitor remained, forcing a merger with a neighbouring scheme; the consequences of doing so were that the lawyers had to travel greater distances to provide their service, making the work less economic, “so it becomes a vicious spiral”.<sup>61</sup>

42. Richard Miller described criminal defence work as a “vocation”, a factor that for many years had overcome the problems of making an economically viable career in this field.<sup>62</sup> He now feared that young lawyers considering whether they had a future in this work would have taken a clear message from recent reductions to LGFS fees, together with criminal defence solicitors’ low morale, that there was no prospect of the situation getting better:

Lawyers are retiring. Lawyers are dropping out of the schemes. Lawyers are choosing to go off and do other types of work. Young lawyers are not coming in to replace them. The schemes will continue to shrink and shrink, and there is nothing happening to turn that trend around.<sup>63</sup>

Likewise, Daniel Bonich warned that these trends would take a long time to reverse: “[i]f we decide to fix it today, it may be years before we have qualified people entering the profession again.” He also pointed out that there needed to be at least two criminal defence firms in any area, to deal with situations where there was a conflict between two defendants, as one firm cannot represent both people.<sup>64</sup> He was aware of more senior solicitors who were turning down offers of partnerships<sup>65</sup> in criminal law firms, because “they do not want to have to face the burden and the risk to their own finances of subsidising a practice that may be struggling.”<sup>66</sup>

**43. The evidence we have received suggests that solicitors have serious grievances about the Litigators’ Graduated Fee Scheme, given the absence of index linking for two decades, the 8.75% cut in fees imposed in 2014, and the recent reduction to the cap on pages of prosecution evidence.**

**44. The Law Society’s judicial review of the Government’s decision to revise the LGFS means that it would not be appropriate for us to offer comment on the details of the scheme at this point in time. However, we have received evidence indicating a**

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60 [Q87](#)

61 [Q87](#)

62 [Q91](#)

63 [Q87](#)

64 [Q89](#)

65 Many criminal defence firms operate as unincorporated partnerships; partners share the profits and also share personal responsibility for the firm’s liabilities.

66 [Q96](#)

worryingly high level of demoralisation among criminal defence solicitors and threats to the economic sustainability of criminal defence firms, with negative implications for the criminal justice system—especially for defendants. We return to this issue below.

45. We consider it regrettable that the Law Society has had to resort to bringing a judicial review to pursue its grievances about the LGFS. *We recommend that the Ministry of Justice take urgent steps to avoid this dispute having to be resolved by the courts. Whatever the outcome of the judicial review, we consider there should be a wider review of criminal legal aid.*

## 4 Recent changes to the AGFS

46. In the previous chapter, we discussed the recent changes to the LGFS and their actual and potential impact on criminal defence solicitors. In this chapter, we consider the parallel changes that have been made to the AGFS, affecting members of the Criminal Bar and solicitors qualified as Higher Court Advocates.

### The MoJ proposals for revising the AGFS

47. In 2015, the Bar Council published its own proposals for a revised AGFS, which led to a working group being set up with membership drawn from both legal professions. Andrew Walker QC summarised for us what had happened after the March 2014 “truce” with the Ministry of Justice:

Part of the arrangement was that the Ministry would look at an alternative scheme—an alternative to imposing the cuts. [...] The aim was to try to design a new scheme that the Ministry could be persuaded to put in place, which would persuade it that at the same time it needed to invest more money. [...] One of the difficulties we have encountered is that, even when we have put forward and costed a scheme, it would cost more than the existing scheme. The fundamental problem has been lack of money.

48. The MoJ says that it “carefully considered” the proposals for reform put forward by the working group of the legal professions<sup>67</sup> before setting out its own proposals for revising the AGFS in a consultation paper published on 5 January 2017.<sup>68</sup> Mr Walker considered that the MoJ proposals were put forward in a spirit of genuine consultation:

As regards the Ministry’s attitude in the consultation paper, it was very much a matter of them saying, “We were presented with an alternative.” [...] As was always inevitably going to have to happen, there was a consultation, and it was genuinely a consultation.<sup>69</sup>

49. Signalling a move away from reliance on PPE, the Ministry summarised its approach as follows:

The counting of pages, and counting of new forms of electronic evidence converted to “pages” is no longer the most effective way of assessing how much work an advocate needs to do in an individual case, and therefore how much that advocate should be paid. Our proposed scheme reduces reliance on counting pages, and instead would introduce a more sophisticated system of classifying offences—based on the typical amount of work required in each case. The time spent in court, conducting the advocacy upon which our justice system relies, would also become a more important driver for the fee paid. The proposed scheme is designed to be cost neutral...<sup>70</sup>

The MoJ suggested that its approach would provide greater transparency and certainty for advocates, including by making it easier to apportion fees between different advocates

67 [Reforming the Advocates’ Graduated Fee Scheme](#). Ministry of Justice, 5 January 2017, paragraph 1.3

68 *Ibid*

69 [Q128](#)

70 *Ibid* paragraphs 3 to 5

appearing in the same case; in addition, the junior Bar would be better protected, because of the separate payments for hearings often undertaken by junior barristers—such as Plea and Trial Preparations Hearings (PTPH) and Sentence Hearings. (We discuss the perceptions of a recruitment crisis in the junior Criminal Bar later in this chapter.)

50. In essence, the MoJ proposed a more sophisticated approach to the categorisation of offences, moving from 11 offence categories (with no sub-categorisation) to 16 categories, each of which would be subdivided into bands—with 42 bands in total.<sup>71</sup> A key factor in determining the “basic graduated fee” payment would be the category/band of the case, designed to reflect the average amount of work required in a typical case of that type; the other factor would be the category of advocate. The basic fee would cover the first day of the trial and three “conferences and views”,<sup>72</sup> together with “standard appearances” (such as PTPH and Sentence Hearings) in excess of six; separate fees would cover the first six standard appearances.<sup>73</sup> There would be an additional daily attendance fee for each trial day after the first day, once again determined by case category/banding and the category of advocate. In addition to the basic fee, there would be revised fixed fee payments for guilty pleas and “cracked trials”,<sup>74</sup> according to the circumstances and type of case and the category of advocate; and an enhanced daily fee for ineffective trials.<sup>75</sup> Departing from the existing AGFS scheme, which allowed special preparation for “very unusual” cases, special preparation would be reserved for “outlying cases” where there are novel points of law or fact, or where there is an exceptional amount of evidence—defined as PPE of over 10,000.<sup>76</sup>

## Response of the Criminal Bar to the consultation proposals

51. The Bar Council’s initial response to the proposed AGFS was positive. In a press release,<sup>77</sup> it commented as follows:

The Bar Council and the Young Barristers’ Committee welcome new proposals published today by the Ministry of Justice which will mean barristers and other advocates will be paid fairly for the work they do in publicly funded criminal cases. The new, fairer Advocates’ Graduated Fee Scheme (AGFS), if implemented, will mean barristers’ fees are no longer based on outdated and distorting factors such as the number of pages in a case, but instead are paid according to the seriousness and complexity of the work.

71 Annex 4 of the MoJ consultation paper maps individual offences onto categories and bands, while Annex 3 contains worked examples.

72 A conference refers to an advocate’s attendance away from the court on the accused or an expert witness; a view refers to an advocate’s visit to the scene of the alleged crime.

73 Standard appearances had previously been bundled into the basic graduated fee.

74 A cracked trial is a trial that has been listed for a not guilty hearing on a particular day but does not proceed, either because the defendant pleads guilty to the whole or part of the indictment, or an alternative charge, or because the prosecution offers no evidence.

75 An ineffective trial is one that is not ready on the day when it is due to start, and is relisted for a later date.

76 However, in drugs cases the threshold would be 15,000 PPE and in dishonesty cases 30,000 PPE.

77 [“New AGFS plan will mean fairer pay for advocates”](#), 5 January 2017

When we asked Andrew Walker QC about the Bar Council’s initial response to the MoJ’s proposals for the AGFS, he explained:

There was appreciation that lots of people had been involved in trying to produce something that was an improvement on the former scheme. The overall reaction was to recognise that there were many positive elements in the structure. The difficulty, inevitably, is when you get into the detail. It would be wrong to say that even the initial response from the Bar Council in 2017 was a full welcoming of the scheme.<sup>78</sup>

52. In the Bar Council’s written response to the consultation (submitted two months after its initial press release),<sup>79</sup> preceding its comments on points of detail—particularly on the categorisation of cases and the level of fees, it again expressed support in principle for the new structure, but pointed out that many barristers and chambers had undertaken calculations which led them to conclude that they would face fee cuts—raising doubts as to whether the scheme would in fact be cost neutral as the MoJ had promised. The Council noted that the “cost neutrality” calculation had been based on the AGFS case mix in 2014/15; however, the costings for the new scheme represented a reduction in funding when matched against the 2015–16 AGFS expenditure data that had subsequently become available, showing an increase in expenditure that year; this much had been accepted by the MoJ’s January 2017 Impact Assessment,<sup>80</sup> which had stated: “Using 2015–16 data the proposed scheme was estimated to cost around 3% less than the current scheme.”

53. Similar views had been expressed in the CBA’s consultation response, as Angela Rafferty QC explained to us:

From our perspective, we were more cautious, but our concerns were the same. We made it clear, in the response and throughout, that funding was inadequate for the entire budget.

Like the Bar Council, the CBA made various comments on detailed aspects of the proposals; we do not discuss these here, as the main focus of this chapter is on the overall approach to revising the AGFS and the funding available to support the scheme.<sup>81</sup> The CBA expressed a similar view to that of the Bar Council on the need for a review mechanism for the scheme, together with index linking to avoid further erosion of fees. Although the CBA acknowledged that the principles underlying the proposals were rational, it took issue with the MoJ’s focus on cost neutrality, the lack of new investment and the shift of money away from the basic graduated fees to allow for separate payments that had previously been part of the single, bundled fee. The CBA expressed particular concerns about proposed fees for the junior Bar—a view potentially at odds with the Bar Council’s insistence that the AGFS should have larger graduations to promote diversity and support career development, thus encouraging more senior barristers to remain part of the Criminal Bar rather than moving to better remunerated commercial work.

78 [Q129](#)

79 [Bar Council response to the “Reforming the Advocates’ Graduated Fee Scheme” consultation paper](#), March 2017.

80 [Reform the Advocates’ Graduated Fee Scheme IA No: MoJ033/2016](#), paragraph 69. Ministry of Justice, January 2017.

81 [The Response of the Criminal Bar Association of England & Wales to the Consultation on Reforming the Advocates’ Graduated Fee Scheme](#), 2017.

## The final version of the revised AGFS scheme

### *The MoJ's response to the AGFS consultation*

54. In February 2018, the Ministry of Justice published the Government response to the consultation.<sup>82</sup> This set out a number of changes to its original proposals that the MoJ would make in the final version of the AGFS, having considered the views of respondents. The document explained the Government's approach as follows:

The Government intends to proceed with a revised AGFS which is in large part the vision for reform we set out at consultation. However, following careful consideration of consultees' views, we have adjusted our original proposals to ensure the scheme more accurately rewards 'work done', particularly for junior advocates.<sup>83</sup>

The final version of the scheme incorporated various amendments that had been suggested by the Bar Council and/or the CBA, including: increased standard appearance fees, with separate remuneration for each standard appearance (not limited to six in any one case); increased fees for PTPH and sentence hearings; and adjustments to the bandings/categories for particular offences.

55. As noted above, the MoJ had originally intended the revised AGFS to be cost neutral. However, its response to the consultation acknowledged that the increases to fees and other changes in the final version meant that "the scheme can no longer be considered 'cost neutral' against 2014–15 spend."<sup>84</sup> The Final Stage Impact Assessment indicated that, when benchmarked against AGFS expenditure in 2014–15, expenditure under the planned new scheme would be £9 million higher.<sup>85</sup> However, when benchmarked against expenditure for 2016/17, spend on the planned scheme is estimated to be £2 million less.

#### **Difference between actual and modelled planned spend on AGFS, 2014/15 to 2016/17**

|         | <b>Volume</b> | <b>Actual Spend</b> | <b>Modelled Planned Spend</b> | <b>Difference between actual and Planned</b> |
|---------|---------------|---------------------|-------------------------------|--|
| 2014-15 | 112,900       | £213m               | £222m                         | £9m  |
| 2015-16 | 111,000       | £227m               | £230m                         | £3m  |
| 2016-17 | 103,800       | £226m               | £224m                         | -£2m   |

Source: Table 9, Final Stage Impact Assessment on reforming the Advocates' Graduated Fee Scheme. Ministry of Justice, February 2018

### *Response of the Criminal Bar to the final AGFS scheme*

56. Notwithstanding the revisions that the MoJ made to the AFGS in the final version, the leadership of the CBA reacted to its publication by describing it as "rearranging the deck chairs on the Titanic".<sup>86</sup> The CBA's written submission explained that it considered three principal problems remained with the AGFS:<sup>87</sup>

<sup>82</sup> [Reforming the Advocates' Graduated Fee Scheme: Government Response](#). Ministry of Justice, 23 February 2018

<sup>83</sup> *Ibid*, Executive summary, paragraph 3

<sup>84</sup> *Ibid*, paragraph 4.23

<sup>85</sup> Table 9, [Reform the Advocates' Graduated Fee Scheme IA No: MoJ033/2016](#). Ministry of Justice, February 2018

<sup>86</sup> [CBA Monday Message, 26 February 2018](#)

<sup>87</sup> [Criminal Bar Association briefing note on the Advocates Graduated Fee Scheme](#)

- The MoJ should not have taken a “cost neutral” approach nor should it have used the 2014/15 expenditure on AGFS (£213 million) as its baseline for expenditure on the new scheme, as this represents the lowest level of spend to date.
- The revised AGFS redistributes money from middle/senior junior barristers to the most junior barristers, and to a limited extent to QCs; however, benefits to junior barristers are modelled by the MoJ to be only 1% or 2% overall.
- There are no adequate mechanisms to reflect (a) the different levels of complexity of cases within the same category; for example, those with a large number of PPE or those with multiple victims and defendants (for example, the Rotherham and Oxford grooming cases); or (b) specialist skills required for dealing with vulnerable witnesses, children and the mentally unwell.

In her oral evidence to us, Angela Rafferty expanded on this final point:

At the moment, the criminal Bar as a whole is, effectively, training itself in how to deal with vulnerable witnesses—completely free, with no Government funding at all. It is being done at the weekend, using our experience and skill. [ ... ] Far more cases are coming to court in relation to vulnerable witnesses. It takes a specialised approach, and it generates further hearings, such as ground rules hearings,<sup>88</sup> which were not thought of when the initial [AGFS] scheme was inception.<sup>89</sup>

57. In a similar vein, the Bar Council’s press statement responding to publication of the final version of the AGFS scheme referred to “real and pressing concerns about the viability and sustainability of practice for many at the Criminal Bar, and about whether the Bar will be able to continue to recruit and retain the practitioners needed to do this vital work for the future”.<sup>90</sup> It stated that there was no real increase in the money committed to the scheme, even though some of the fees would be higher than those originally proposed and some of the shortcomings in the consultation version of the scheme had been addressed. The statement concluded:

The Bar Council will continue to argue the Bar’s case for proper funding of the criminal justice system in all respects (including the provision of legal aid), not least so as to ensure that we can develop and preserve the quality of advocacy in our justice system.

58. The CBA’s written submission suggested that barristers undertaking criminal work are poorly remunerated,<sup>91</sup> and that these limited income prospects have led to a recruitment crisis for the Criminal Bar, with prospective entrants already facing a high level of debt from university courses and from their professional training. The CBA also pointed to the uncertainty of a career at the Criminal Bar; for example, the unpredictability of criminal trials means that a barrister may make preparations for a trial that does not go ahead, or

88 Ground Rules hearings may be used to establish how vulnerable witnesses will be enabled to give their best evidence.

89 [Q141](#)

90 [Bar Council responds to new AGFS announcement, 23 February 2018](#)

91 According to the CBA, in 2014/15 the median gross income of criminal barristers most engaged in criminal work was £56,000, without allowing for deductions and expenses such as chambers’ fees; this equates to a pre-tax salary of £28,000.

may find themselves unavailable on the day when one of their cases is listed, requiring a new barrister to prepare the case overnight; only exceptionally is the original barrister paid for their preparation work.

59. The Bar Council and the CBA also disputed the assertion in the MoJ's final stage Impact Assessment that the new AGFS would increase legal aid expenditure by £9 million per year, and drew the attention of the Secondary Legislation Scrutiny Committee of the House of Lords to their concerns about discrepancies in the Impact Assessment. The Committee's subsequent report<sup>92</sup> called on the Minister, Lucy Frazer QC MP, to explain these cost discrepancies. In response, the Ministry of Justice published additional tables to clarify the final stage Impact Assessment,<sup>93</sup> modelling expenditure by different types of advocate and offence classification for the years 2014/15, 2015/16 and 2016/17 (the tables in the original Impact Assessment only considered expenditure for 2014/15).

60. We note that, on 8 May 2018, the House of Commons debated a motion in the name of the official opposition seeking to revoke the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018<sup>94</sup>—the statutory vehicle through which the new AGFS would be introduced. Although the motion was defeated by 300 votes to 252, the debate presented an opportunity for Members to air concerns about the AGFS scheme, as well as wider concerns about the criminal justice system. It was suggested by some Members that the new AGFS might disincentivise lawyers from taking on complex cases; that the new scheme failed to recognise the increasing amount of evidential and unused material; and that it amounted to a cut, as opposed to being cost neutral. In response, other Members (including Sir Oliver Heald MP, the then Minister when the new AGFS scheme was agreed with the Bar) and the current Minister, Lucy Frazer QC MP, pointed out that the Bar leadership had been in favour of the AGFS proposals when consulted by the Ministry of Justice; that the new scheme treated members of the junior Bar more fairly; and that the final version of the scheme, which would be reviewed in 18 to 24 months' time, was likely to give rise to an increase in expenditure.<sup>95</sup>

## The Bar's direct action and its impact

61. In the weeks that followed publication of the final version of the AGFS, there were extensive discussions between the Bar Council, the CBA, and Heads of Chambers. On Thursday 29 March, with the support of the Bar Council,<sup>96</sup> the CBA announced the result of a poll of its membership;<sup>97</sup> 90% of those who voted said they wanted to take action "to secure proper investment in the Criminal Justice System." The CBA requested its members to consider refusing any work under new legal aid representation orders dated from 1 April 2018 onwards, the implementation date of the reforms. The CBA also asked members to take part in targeted Days of Action to highlight the crisis in the criminal justice system. The statement was followed by the CBA's proposals to the Ministry of Justice, which included:

92 [Secondary Legislation Scrutiny Committee Twenty First Report of Session 2017–19, 8 March 2018](#) - HL Paper 88

93 [Reforming the Advocates' Graduated Fee Scheme: Impact assessment additional tables](#)

94 [Criminal Legal Aid \(Remuneration\) \(Amendment\) Regulations 2018; SI 2018, No. 220](#)

95 [House of Commons Hansard, 08 May 2018 Volume 640, column 627](#)

96 [Bar Council: "We stand by the Criminal Bar Association & the Criminal Bar", 29 March 2018](#)

97 [CBA Members Announcement, 29 March 2018](#)

- Suspension of the new AGFS scheme pending more detailed consultation as to its impact on the criminal bar and the wider Criminal Justice System.
- Greater investment in the more complex cases to allow remuneration for cases with a large volume of evidence (“paper heavy cases”)
- Commitment to a full, costed review of the scheme within 12 months against 2016/17 figures to ascertain whether it was under-funded.
- Commitment to an index linked increase in AGFS fees

62. Because it takes several weeks for new cases to come to trial, the call to decline new work had limited impact—although there were some reports of cases being delayed as a result of the strike action, including a murder case that was due to be heard at the Old Bailey.<sup>98</sup> The submission we received from the CLSA also sets out examples of the effects of a lack of available Counsel on solicitors’ firms.<sup>99</sup> On 9 May, the dispute was escalated by a further announcement by the CBA calling on barristers to consider stepping up their action by operating a “no returns” policy on all criminal cases from 25 May 2018—a move that was widely expected to be disruptive to the functioning of the criminal courts. The CBA’s announcement argued that remuneration levels were only part of the general crisis in the criminal justice system:

The crisis in court buildings [is] now well known. The conditions for all court users are completely unacceptable. This must change. We repeat that the poor and vulnerable in society are being denied access to justice due to the continued onslaught of cuts. Members of the public are at risk of miscarriages of justice and the faith of the public in the jury system is being undermined by the chaos in courts.<sup>100</sup>

63. We asked Angela Rafferty whether the action taken by barristers from 1 April had affected the conduct of trials. She responded:

The action was carefully calibrated to try to minimise disruption. Given the way listing works in relation to cases, it takes a while for trials to come through the system [...] From my knowledge, no trial has as yet been disrupted to the extent that it cannot go ahead [...] It is difficult for me to say how all barristers feel about it, but my body of members are highly committed professionals, and they are very concerned about the rule of law. As you will have seen from everything that we have written and published about this, no one wanted to take the action, and no one wanted it to escalate.<sup>101</sup>

64. Three weeks before we heard evidence from the Bar, we had taken oral evidence from Richard Miller of the Law Society and Daniel Bonich of the Criminal Law Solicitors’ Association. When we asked for comments on the AGFS dispute, Mr Bonich told us that that there was a lot of pressure being put on solicitors to help cases stay on track; and that

98 [“Murder case first to be hit by barrister action”](#), Law Gazette, 4 April 2018

99 Written evidence from the Criminal Law Solicitors’ Association [[AID0001](#)]

100 [CBA Members Announcement, 9 May 2018](#)

101 [Q153](#)

he was aware of one case where a secretary conducted a sentencing hearing and another where someone received a life sentence without an advocate in court to represent them.<sup>102</sup> He went on to say:

While I recognise why the Bar are engaged in the decision that they have taken, it has placed solicitors under a huge amount of strain. We are the client-facing part of the profession. We are the ones who have to explain to our clients why they do not have counsel, and that we have to try to guess how the particular court centre is going to deal with the issue. [ ... ] In cases where firms have said, “We will send a paralegal or somebody similar,” the court has directed that a representative attend. That representative may then be put under pressure to conduct the hearing. That is a massive worry for our members.

65. Richard Miller pointed out that the Legal Aid Agency requires solicitors to maintain lists of approved counsel, and that “[i]t should be absolutely exceptional for a lawyer to instruct someone who is not on their list.” He also drew attention to solicitors’ professional obligation not to undertake work that is beyond their competence.<sup>103</sup>

66. We note that the CBA’s announcement prompted guidance to be issued by the Senior Presiding Judge on practical management of cases in the Crown Court that were affected by the Criminal Bar’s action.<sup>104</sup> The guidance emphasised that a judge may explain the law, but may not give advice; that the judge may seek assistance from the Public Defender Service (PDS) to provide defence representation in legally-aided cases; and that a solicitor attending court for a pre-trial preparation hearing may be permitted to address the court.

### The Ministry of Justice’s offer of additional funding

67. In the event, the CBA’s ‘no returns’ policy, scheduled to take effect from 25 May 2018, was not put into effect. On 24 May 2018, the Association announced that there had been a breakthrough in negotiations with the Ministry of Justice, resulting in an offer of £15 million additional investment in the AGFS; as a result of this development, the ‘no returns’ policy would be suspended until 12 June 2018 with immediate effect.<sup>105</sup> The details of the MoJ’s offer, on which the CBA would ballot its membership, were set out in the Association’s Monday Message of 29 May 2018. In summary:

- The additional investment of £15 million into the AGFS will be new investment from the Treasury: “[t]he money will not be reallocated from any other funding and no other agency will lose by our ‘gain’.”
- The first £8 million will be targeted towards the categories of case that lose heavily following the abolition of PPE as a proxy for calculating how much is paid to an advocate under the AGFS (fraud, drug and sex cases with high page counts).

102 [Q77](#). Further details of both cases were provided to us in the CLSA’s written submission [[AID0001](#)].

103 [Q81](#)

104 [Advocates’ Graduated Fee Scheme Dispute - note from the Senior Presiding Judge, the Rt Hon Lady Justice Macur](#)

105 [CBA Members Announcement, 24 May 2018](#)

- £4.5 million will be targeted towards the fees of junior barristers. It is envisaged that these funds would be utilized in a negotiated way to reflect career progression and sustainability for juniors.
- There will be a 1% increase in April 2019 across all fees.
- The planned review of the scheme will then take place within 18 months.
- The financial offer represents around 5.5% of the overall AGFS budget, plus an extra 1% in April 2019.<sup>106</sup>

68. The CBA's ballot of its membership had been announced on 24 May 2018; in the morning of 12 June 2018, just before the start of our evidence session with the Bar Council and the CBA, the result of the ballot was announced:

The Criminal Bar has very narrowly voted to accept the AGFS proposal made by the government. 3038 barristers voted, a massive turn out. 1566 (51.55%) voted to accept and 1472 (48.45%) voted to reject. Whilst the majority wishes to accept the proposal it cannot be said that the anger and disillusionment has gone away. Indeed, it is exceptionally strong. The Criminal Bar is not going to be quiet.

The CBA's statement described the outcome as "neither a defeat nor a victory." The announcement concluded by saying: "the Criminal Bar has faced degradation and despair and it still does. This is a step forward. We must all ensure we do not take any more steps back."<sup>107</sup>

69. At the oral evidence session immediately after the announcement had been made, we asked Angela Rafferty whether she thought the junior Bar had done better from the settlement than, say, those who are of 10 years' call.<sup>108</sup> Ms Rafferty responded:

The details of the proposal have yet to be worked out, but we were concentrating on three areas in relation to this investment: first, to plug a gap that we identified in relation to those who do very complex cases with high evidence turnover; a second tranche of money in relation to the junior Bar, which we are hoping will ameliorate the situation for them; and then the 1% in April. [ ... ] We do not want it just to benefit one level of the Bar, but it would be right for you to know that the level of the Bar that it does benefit, in the middle, were the real losers. Some people were losing 30% of their income almost overnight in the scheme.

Andrew Walker went on to explain:

For those who voted in favour or against, no one was voting on the basis of its being a permanent or long-term solution; it is a patch repair. There is unanimity across the Bar about all the factors that drove the action. The result of the vote is really just a decision about what to do at this point in time.

106 [CBA Monday Message, 29 May 2018](#)

107 [CBA Monday Message 12 June 2018](#)

108 A would-be barrister is eligible to be "called to the Bar" by one of the Inns of Court when they have completed the Bar Professional Training Course and completed some additional training.

70. When we asked the witnesses whether, now the MoJ offer had been accepted, the dispute had been resolved, they emphasised that the Bar’s underlying concerns had not gone away and that the narrow margin of the CBA members’ ballot indicated that, if things did not move in the right direction, there would be renewed willingness to take action.<sup>109</sup> Ms Rafferty told us:

It has not been a dispute just about pay. It is a dispute about many and much wider things. [ ... ] I do not think it has been resolved, but there is now some time to resolve it. There are also some signs that we can work together, possibly cross-party, to resolve it. That is what we would like to do if we can.<sup>110</sup>

71. After we had taken evidence from the Bar Council and the CBA, we received a written submission from Daniel Bonich, Vice-Chair of the CLSA. The submission described the MoJ’s offer of additional funding for the AGFS as “good news for our members”, given the pressures they had faced because of the action taken by the Bar. However, his submission raised two concerns relating to the MoJ’s offer. First, the amount of money made available “is still very small and given the pressure of inflation is little more than a patch repair”. The second concern was that solicitors’ associations, including the Law Society, “did not take part in the discussions with the Ministry as they were not invited to do so.” Mr Bonich expressed particular disappointment in this regard, “as for some types of work up to 40% of Crown Court advocacy is now conducted by solicitor advocates and paid under this scheme.” However, his Association did have a meeting arranged with MoJ at which they hoped they would be able to make their position clear on the AGFS.

### The future of the AGFS

72. Both Angela Rafferty and Andrew Walker confirmed that, notwithstanding the settlement, they considered that unresolved issues remained within the AGFS. Mr Walker explained that the aim behind the new scheme was to achieve greater graduation of fees, providing a career path that allowed junior barristers “to go right the way up the ladder.” However, the need to provide proxies for the degree of case complexity and the barrister’s level of skill was problematic; in particular, he thought that the current scheme made insufficient allowance for cases that were evidence-heavy or for more serious cases. On the AGFS fixed fee model, he commented:

We are talking about everything from the most straightforward assault cases to the most complex multi-complainant serious sexual offences cases, gang murders and so on. There is a very wide range of cases. In any fixed fee scheme, there will be compromises. The problem, we feel, is that there were certainly too many compromises with the previous scheme, and there are still too many compromises.<sup>111</sup>

73. Mr Walker accepted that there were difficulties in predicting the mix of cases in the Crown Court in future years, which “inevitably means that you are modelling based on historical information.”<sup>112</sup> He told us that, while the number of Crown Court cases is

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109 [Q159](#)

110 [Q157](#)

111 [Q135](#)

112 [Q137](#)

falling, their complexity is increasing and they involve a lot of evidence—for example, historical sexual offences cases.<sup>113</sup> He went on to suggest to us that the “swings and roundabouts” model did not necessarily accommodate the fact that more senior junior barristers were doing the more difficult cases, “so you need to make sure that the swings and roundabouts work on those more difficult cases;” he thought that this would require the MoJ to increase its analytical capacity.<sup>114</sup> Ms Rafferty suggested that an hourly paid model might be fairer for more complex cases:

I personally would like to see some sort of mechanism whereby those who do serious and intense work on such cases as we were discussing a minute ago could be paid on an hourly basis, or something like that. That would be fairer.<sup>115</sup>

**74. We consider it regrettable that the Criminal Bar felt compelled to take direct action in response to the new Advocates’ Graduated Fee Scheme, given the potential for adverse impact on defendants and complainants, as well as on the functioning of the courts. However, the underlying reasons for the dispute can be understood, including the failure to ensure that fees keep pace with inflation, the staged fee reductions from April 2010 onwards, unhappiness about aspects of the revised AGFS and the Criminal Bar’s genuine and heartfelt concerns about the future of their profession and underfunding of the criminal justice system.**

**75. While we welcome the Government’s decision to offer additional funding for the AGFS and the Criminal Bar’s decision to accept the offer, we do not believe that ending this specific dispute has resolved the underlying issues and it is clear that many barristers remain deeply unhappy about their situation and about the future of the criminal justice system.**

**76. We acknowledge the challenges facing the Ministry of Justice in reworking the AGFS so that it is fair to advocates at all levels of seniority, and in ensuring that it is future-proofed against inevitable changes in the profile of Crown Court cases. We also recognise that the Ministry of Justice has made genuine efforts to address the concerns of the Criminal Bar. *To provide for ongoing collaboration with the legal profession on refinements to the AGFS, we recommend that, without any further delay, a system of annual review be built into the AGFS, overseen by a panel which incorporates representatives from the Criminal Bar and solicitor organisations, alongside Government representatives. The panel’s remit should include considering the inter-dependency between the AGFS and the LGFS, and the impact of changing the former on the operation of the latter.***

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113 [Q137](#)

114 [Q149](#)

115 [Q149](#)

## 5 Some wider concerns

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77. In the previous two chapters, we have considered the disputed changes to the LGFS and the AGFS, and steps that might be taken to address the most immediate issues. In this chapter, we turn to wider, but related, concerns about expenditure on the whole criminal legal aid system; expenditure on the criminal justice system as a whole; and disclosure of unused prosecution material.

### Expenditure on criminal legal aid

78. In relation to criminal legal aid as a whole—that is, for the AGFS and LGFS, Very High Cost Cases<sup>116</sup> and Crime Lower work<sup>117</sup>—we note that the proportion of Departmental expenditure that it represents is relatively small. Government data indicate that, in 2017–18, expenditure on criminal legal aid was £959 million;<sup>118</sup> this is just over 10% of total gross Departmental expenditure of £9,498 million.<sup>119</sup> The chart below shows that, of the MoJ’s gross expenditure in 2017–18, £1,895 million supported the operation of the Legal Aid Agency, £1,807 million of which was expended on legal aid (civil legal aid, criminal legal aid and central funds).

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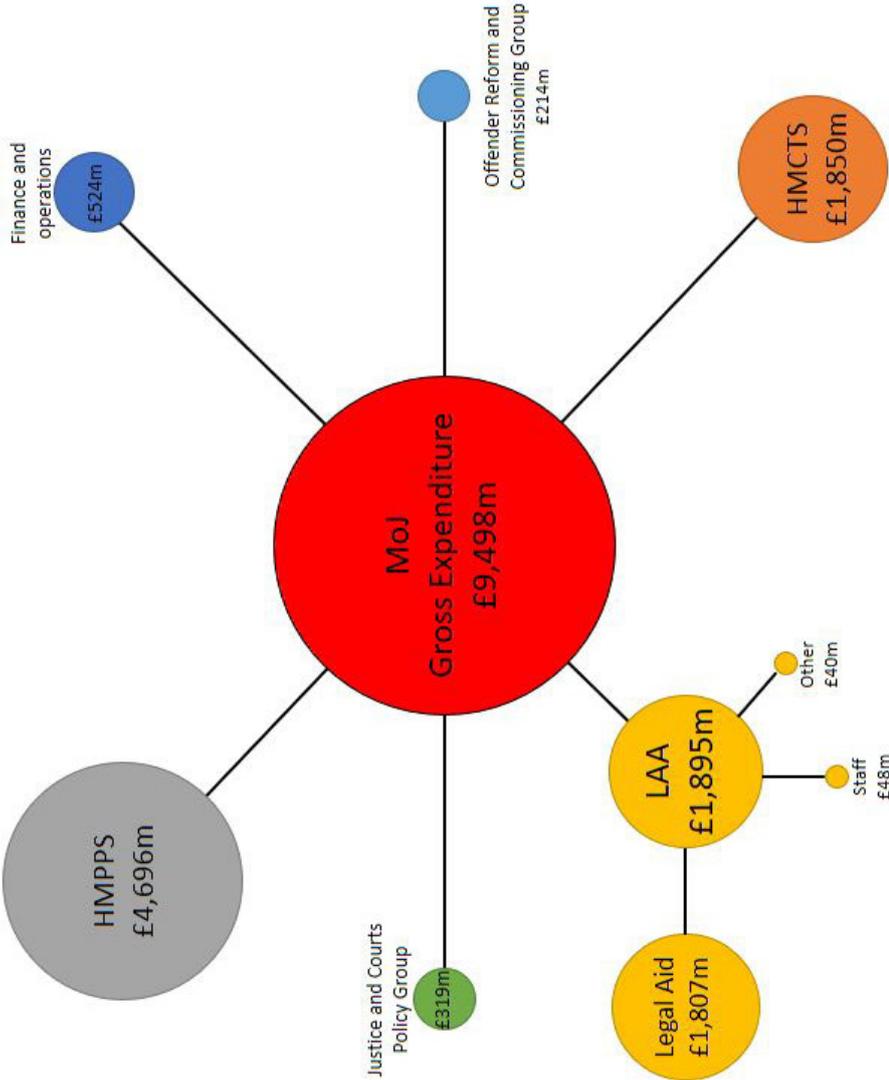
116 See Footnote 24

117 Crime Lower includes work at the pre-charge and police station stage, in the magistrates’ courts and prison assistance.

118 [Legal Aid Agency Annual Report and Accounts 2017–18](#), page 82

119 [Ministry of Justice Annual Report and Accounts 2017–18](#), page 114

Ministry of Justice Departmental Spending 2017-18



Notes to the chart:

Gross expenditure analysis based on the Statement of Operating Expenditure by Operating Segment in the MoJ Annual Report and Accounts 2017-18.  
LAA gross expenditure based on the Statement of Comprehensive Net Expenditure in the LAA Annual Report and Accounts 2017-18.

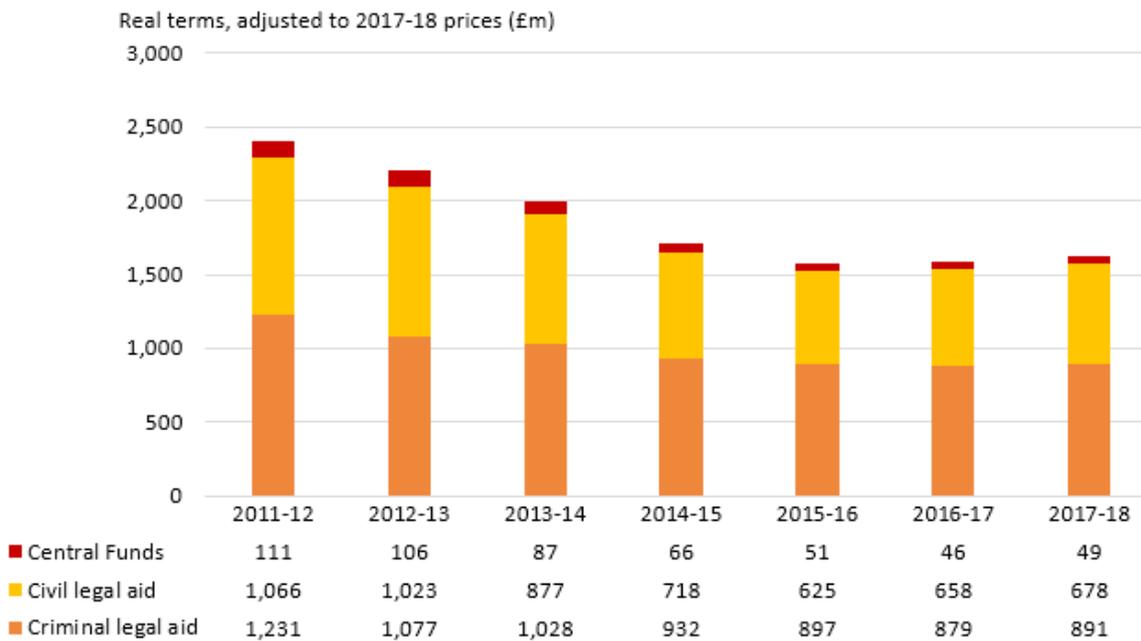
Chart format based on segmental breakdown contained in the MoJ Annual Report and Accounts 2016-17. 'Finance and operations' combines CFOG and Operations segments, minus LAA gross expenditure

Key: LAA = Legal Aid Agency; HMPPS = HM Prisons and Probation Service; HMCTS = HM Courts and Tribunals Service

Daniel Bonich drew our attention<sup>120</sup> to the size of the legal aid budget in comparison to income raised by the Ministry of Justice. We note that gross expenditure on legal aid for 2017–18—£1,807 million<sup>121</sup>—was comparable to the total income of £1,806 million (derived mainly from fees income, fines income, recoveries of money by the Legal Aid Agency, and income from sales of goods and services).<sup>122</sup>

79. The general downward trend in expenditure on legal aid is illustrated by the following table, which shows a fall of 33% in real terms between 2011–12 and 2017–18.

**Overall criminal legal aid expenditure**



Source: Office for National Statistics Legal Aid statistics: January to March 2018

80. The previous two chapters of our report have documented concerns expressed by witnesses from the Criminal Bar and solicitors’ organisations about the sustainability of criminal legal aid, especially because of difficulties in attracting more junior lawyers to this area of work. A related concern is the impact of current recruitment difficulties within the Criminal Bar on the recruitment and diversity of the next generation of judges, including those who sit in the criminal courts; this issue has been raised by several members of the senior judiciary.<sup>123</sup>

81. The report of the Lammy Review concluded that “[a] fundamental source of mistrust in the [Criminal Justice System] among BAME communities is the lack of diversity among those who wield power within it. Nowhere is this more apparent than in our courts, where there is a gulf between the backgrounds of defendants and judges.”<sup>124</sup> We are aware that the

120 [Q36](#)

121 [Legal Aid Agency Annual Report and Accounts 2017–18](#), page 82

122 [Ministry of Justice Annual Report and Accounts 2017–18](#), page 114

123 For example, Sir Brian Leveson: [“The pursuit of criminal justice”, Criminal Case Review Commission annual lecture, 25 April 2018](#); paragraph 39

124 [The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System, September 2017](#)

senior judiciary, together with the Judicial Appointments Commission, have undertaken a wide range of initiatives to encourage those from under-represented groups to consider a judicial career or progress to higher judicial office.<sup>125</sup> The written submission of the CBA made the following observation:

[The ability of chambers to recruit] is having a deleterious impact on diversity and social mobility. This impacts on trust and confidence, and will have consequences for the future profile of the judiciary. This has profound consequences for public confidence in its ability to reflect British society and represent the communities it serves, as has been highlighted by the Grenfell tragedy.<sup>126</sup>

82. We are aware that the Lord Chief Justice, the Right Hon Lord Burnett of Malden, was recently asked by the House of Lords Constitution Committee whether he thought the current arrangements for criminal legal aid posed a threat to the rule of law. He responded:

...what appears to be happening, according to the Law Society, is that the cadre of legal aid solicitors acting in the criminal sphere is getting older and older. That is happening at the Bar as well. There is fairly convincing evidence from the Bar Council that, at the bottom, the junior Bar is not recruiting many to criminal work. In the long run, whatever the causes—and remuneration may well be at the heart of them—it cannot be good for the rule of law or the administration of justice, because it will mean that there are simply insufficient suitably qualified solicitors and barristers properly to represent those who need representing in the criminal courts.<sup>127</sup>

83. We note the emerging evidence of increasing numbers of defendants who are representing themselves,<sup>128</sup> and the potential consequences of this not only for defendants, but also for witnesses and victims—as well as for the courts. Exploratory MoJ internal research (now placed in the public domain following a Freedom of Information request) based on in-depth interviews with Crown Court judges and prosecutors, together with sample magistrates' courts data, indicates some of these consequences. We consider many of these research findings, summarised here, to be relevant to the subject matter of our report:

- Unrepresented defendants were seen as having a varied but limited understanding of the court process by the majority of interviewees and were considered less able to participate effectively in the process.
- A consistent theme was the perception that unrepresented defendants' cases had longer hearings and case progression was slower.
- Interviewees saw unrepresented defendants as a barrier towards achieving early guilty pleas because they had a less detailed understanding of the discount scheme.

125 For example, see [The Lord Chief Justice's Report, 2017](#)

126 [Criminal Bar Association Briefing Note on the Advocates' Graduated Fee Scheme](#)

127 [House of Lords Select Committee on the Constitution, oral evidence from the Lord Chief Justice, Wednesday 25 April 2018, Q11](#)

128 [Justice denied? The experience of unrepresented defendants in the criminal courts.](#) Transform Justice, 2016.

- Interviewees also expressed concern about unrepresented defendants' effect upon witnesses, with particular worries about defendants undertaking cross-examination, including of their alleged victim.<sup>129</sup>

84. The Ministry of Justice is currently undertaking a post-legislative review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 and its associated delegated legislation; the review is expected to report by the end of 2018.<sup>130</sup> Although Part 1 of the Act was primarily concerned with legal aid for areas of civil and family law, the terms of reference for the review's evidence-gathering exercise<sup>131</sup> confirm that the MoJ has established stakeholder consultative groups that cover criminal justice as well as civil justice, family justice, and the advice sector. The published agenda for the first meeting of the criminal law consultative group<sup>132</sup> suggests that one of three topics for discussion should be the impact of remuneration changes on recipients and providers of legal aid; further sub-topics are identified:

- a) The impact on the provision of legal aid services that may have affected the experiences of individual recipients.
- b) The impact of changes on the demographics of the legal aid professions.
- c) The impact of changes to remuneration aimed at reducing the incidence of adjournments and cracked trials on recipients of legal aid.
- d) Evidence gaps in this area.

85. In Scotland, which has a separate legal system, there is distinct legal aid scheme operated by the Scottish Legal Aid Board. An independent review of legal aid was completed in March 2018.<sup>133</sup> The review report set out a 10-year vision for legal aid, making recommendations designed to ensure Scotland's legal aid system is simpler, user focussed and more flexible—as well as sustainable and cost-effective. The legal professions and the Scottish Government both agreed beforehand that they would abide by the outcome of the review, and it was supported by an expert advisory group. When we asked the witnesses from the Bar and solicitor representative bodies whether the Government should adopt similar approach for the legal aid system in England and Wales, they agreed. Richard Miller explained that:

Many of the changes we have seen over the past few years have been driven by the financial constraints that the Ministry is facing. It has to make savings. It cannot carry on spending as it has because of the Treasury imposing cuts on it. That has driven decisions that perhaps could not be justified on policy terms if you took out the financial considerations. The other thing that was so refreshing about the Scottish approach was that they started from the principle that they wanted the best legal aid system possible.<sup>134</sup>

129 [Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales and indicative volumes in magistrates' courts](#). Ministry of Justice Internal Report, February 2016

130 [The work of the Ministry of Justice - oral evidence given by Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice; 7 March 2018, Q122](#)

131 [Post-Implementation Review Evidence Gathering Exercise Terms of Reference](#)

132 [LASPO Post-Implementation Review Criminal Law Consultative Group - Meeting 1](#)

133 [Rethinking Legal Aid: An Independent Strategic Review](#). Martyn Evans, February 2018

134 [Q50](#)

In response to a similar question, Angela Rafferty QC and Andrew Walker QC supported the idea of an independent review of legal aid, emphasising the importance of making legal aid politically neutral: “I think the politics should be taken out of justice as much as possible. It should be a protected budget ... ..”<sup>135</sup>

86. **As we have observed [paragraph 12], there is a common law right to legal advice, together with a right to legal representation for an accused person under Article 6 of the European Convention on Human Rights. We conclude that there is compelling evidence of the fragility of the Criminal Bar and criminal defence solicitors’ firms placing these rights at risk; we conclude that this risk can no longer be ignored.**

87. **We also conclude that current difficulties in recruitment to the Criminal Bar could potentially have a negative impact on future recruitment to, and diversity within, the judiciary—in particular for judicial office holders in the criminal courts.**

88. **Given these risks, we welcome the decision of the Ministry of Justice to consider legal aid for criminal law within the LASPO post-implementation review, as a first step in understanding the crisis that criminal legal aid is facing. *We recommend that the output from this workstream be used to underpin a comprehensive and independent review of criminal legal aid, with the aim of devising a scheme that is sustainable and user-focussed; the review should adopt a similar approach to that of the recent independent review in Scotland. This review should be launched no later than March 2019 and should be concluded within 12 months.***

## Declining expenditure on the Criminal Justice System

89. Witnesses at both our evidence sessions raised serious concerns about the decline in expenditure on the criminal justice system as a whole. Angela Rafferty commented:

There is a wider point [ ... ] of the general position of justice, and the justice budget, in society. We hope that there are some signs that it is being accepted that continual cuts to the Ministry’s budget are causing real difficulty in the system as a whole. We need to start looking differently at the justice system and to fund it better, generally speaking. That is not just to do with fees; it is across the board.<sup>136</sup>

We were also reminded by Daniel Bonich about the importance of the criminal justice system, as part of the rule of law, in securing the international reputation of this country:

If we are to continue to sell ourselves as a country that really prides itself on the rule of law—our legal services industry is worth about £25 billion a year—it is not going to help our international reputation when people have secretaries representing them on serious matters.<sup>137</sup>

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135 [Q151](#)

136 [Q139](#)

137 [Q80](#)

A similar comment was made by Andrew Walker, who considered that the justice system had to be understood as being linked to the rule of law: “[t]he problem we have had for years is that, too often, we have been a soft target for cutting budgets, without reference to the impact on the rule of law.”<sup>138</sup>

90. Richard Miller expressed concerns about inefficiencies in the criminal justice system, attributable to inadequate resources, that give rise to further wastage in the system; for example, the courts’ practice of listing multiple cases together, in the expectation that at least one of them will not go ahead. In relation to the Crown Prosecution Service (CPS), he also observed:

...because the CPS is also significantly under-resourced, some of the conversations that can get rid of cases do not happen until the day of trial. For example, it is not uncommon on the day of trial for the defence and the prosecution to talk and agree, “Yes, we can accept a plea to a lesser offence.” That could have been agreed weeks beforehand, saving a lot of costs on both sides, but it is just impossible to have those conversations.<sup>139</sup>

The potential cost to the criminal justice system of an increasing number of self-represented defendants has been mentioned in this report, although not addressed in detail. We are also aware that serious concerns have been expressed by some commentators about under-resourcing and inefficiencies within the criminal justice system and the impact of this on defendants, victims and witnesses.<sup>140</sup> The condition of the courts estate, including the criminal courts, was raised as a matter of concern by the Lord Chief Justice in his recent evidence to the House of Lords Select Committee on the Constitution; he remarked that “many of our buildings are terrible. Indeed, they are frankly an embarrassment. I do not say that they are an embarrassment for me as a judge, but they are an embarrassment in that we expect the public to have to operate in them.”<sup>141</sup>

91. It can be seen from the table below that, compared to the financial year 2010–11, the cumulative real terms decrease in the MoJ’s resource departmental expenditure limit [DEL]<sup>142</sup> is projected to reach 40% by 2019/20.

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138 [Q151](#)

139 [Q104](#)

140 For example, *The Secret Barrister: stories of the law and how it is broken*. Macmillan 2018

141 [House of Lords Select Committee on the Constitution, oral evidence from the Lord Chief Justice, Wednesday 25 April 2018, Q7](#)

142 Resource DEL covers most types of day-to-day spending, such as staff costs and the purchase of goods and services. The figures included in the table do not include depreciation, meaning spending on wear and tear.

### Annual Change in the Ministry of Justice's funding from HM Treasury in real terms

(figures represent £ billion)

|   | 2010/11    | 2011/12    | 2012/13    | 2013/14    | 2014/15    | 2015/16    | 2016/17    | 2017/18    | 2018/19    | 2019/20    |
|---|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|
| Total Resource DEL *  | 8.3        | 8.1        | 7.7        | 7.4        | 7.0        | 6.2        | 6.5        | 6.4        | 6.0        | 5.8        |
| <b>Total Resource DEL (restated in 2017/18 prices)</b>                                  | <b>9.3</b> | <b>8.9</b> | <b>8.3</b> | <b>7.9</b> | <b>7.3</b> | <b>6.4</b> | <b>6.6</b> | <b>6.4</b> | <b>6.0</b> | <b>5.6</b> |
| Annual real terms increase/ (decrease)  |            | -4%        | -7%        | -6%        | -7%        | -12%       | 3%         | -3%        | -7%        | -6%        |
| Cumulative real terms decrease  |            | -4%        | -10%       | -15%       | -21%       | -31%       | -29%       | -31%       | -36%       | -40%       |
| * excludes depreciation/reserve claims/machinery of government changes/budget transfers |            |            |            |            |            |            |            |            |            |            |

Source: Ministry of Justice: Public Expenditure: Written question 112641, 16 Nov 2017<sup>143</sup>

92. As we noted in our recent report on Disclosure of evidence in criminal cases,<sup>144</sup> net expenditure on the CPS fell by 27% between 2009 and 2017: from £672 to £491m. The number of full time equivalent staff employed by the CPS fell from around 6,200 to approximately 5,500 between January 2014 and December 2017, representing a reduction of 11%.<sup>145</sup>

93. **An effective criminal justice system which successfully prosecutes those who commit crime but which also protects the innocence of the accused unless the prosecution can prove their guilt is one of the pillars on which the rule of law is built. The effectiveness of the system also demands that the fabric of the criminal courts is properly maintained. We conclude that the under-funding of the criminal justice system in England and Wales threatens its effectiveness, and in doing so undermines the rule of law and tarnishes the reputation of the justice system as a whole.**

94. **Our justice system is widely admired and the UK is a jurisdiction of choice for many individuals and corporate bodies that need to resolve disputes; nonetheless, it faces competition from other jurisdictions. We conclude that the under-resourcing of the criminal justice system undermines the prospects of successfully promoting our legal system abroad, a stated objective of the Government.**

143 <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-11-13/112641/>

144 House of Commons Justice Committee: [Disclosure of evidence in criminal cases](#). Eleventh Report of Session 2017-19

145 [CPS Annual Report and Accounts 2016-2017](#)

95. *We recommend that that the Government conduct an urgent cross-departmental review of funding for all elements of the criminal justice system, including criminal legal aid and the Crown Prosecution Service, with the aim of restoring resources to a level that enables the system to operate effectively; the details of this review should be published in advance and its timetable must ensure completion in time to influence the conclusions of the 2019 Spending Review.*

## Disclosure of unused material

96. In the final section of this report, we consider the review of unused prosecution material by the defence. As we noted above, since the advent of the AGFS and the LGFS, reviewing unused material does not attract an additional payment; the work is supposed to be bundled into the graduated fee. The question of unused prosecution material was the primary focus of our recent report on Disclosure of evidence in criminal cases,<sup>146</sup> and this report expressed concern about the lack of remuneration for reviewing unused prosecution material.<sup>147</sup> Our inquiry heard evidence that cases that were previously straightforward had become more difficult; an example was given of a domestic violence case where 17,000 pages of unused prosecution material was served on the defence on the first day of the trial, which had to be reviewed without additional remuneration.<sup>148</sup> Similarly, criminal defence barristers are expected to deal with unused prosecution material “unpaid and under pressure.”<sup>149</sup>

97. In relation to the present report, Daniel Bonich reiterated in his oral evidence that there had recently been a significant increase in the amount of unused material, in particular because prosecutors come across more material during the course of their investigation:

It is not just digital material, but third-party or medical material. All of that is now in unused material, so typically the unused material can often be significantly more than the volume of the witness statements in a case.<sup>150</sup>

Mr Bonich also explained that, in addition to time spent reviewing unused material, ancillary work may arise:

That would be attending upon a client, possibly instructing your own experts, preparing schedules and analysis of the work. All of that material has significantly increased, and the workload has increased, but the scheme as it is currently does not recognise any changes.<sup>151</sup>

98. Angela Rafferty confirmed that the evidence picture had changed considerably over the last 10 years, with the result that “hours and hours of barristers’ time on both sides of

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146 House of Commons Justice Committee: [Disclosure of evidence in criminal cases](#). Eleventh Report of Session 2017–19

147 *Ibid*, paragraph 50

148 [Justice Committee, Oral evidence: Disclosure of evidence in criminal cases, HC 859, Tuesday 1 May 2018](#). Daniel Bonich Q159

149 *Ibid*, [Angela Rafferty Q80](#)

150 [Q16](#)

151 [Q14](#)

the case are spent considering unused material, for which there is absolutely no prospect of payment”.<sup>152</sup> She suggested that payment could be made for dealing with unused material through a page threshold or an ex post facto hourly rate.<sup>153</sup>

**99. We conclude that the pressure placed on defence lawyers to fulfil their professional obligations by reviewing unused prosecution material without remuneration is fundamentally unfair and—with the continual increase in the amount of such material—likely to become unsustainable, and increasingly prejudicial to the defendant. We recommend that restoring legal aid payments for reviewing unused material above a certain page threshold be considered as part of the comprehensive and independent review of criminal legal aid that we have recommended above.**

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152 [Q135](#)

153 [Q136](#)

## Conclusions and recommendations

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### Recent changes to the LGFS

1. The evidence we have received suggests that solicitors have serious grievances about the Litigators' Graduated Fee Scheme, given the absence of index linking for two decades, the 8.75% cut in fees imposed in 2014, and the recent reduction to the cap on pages of prosecution evidence. (Paragraph 43)
2. The Law Society's judicial review of the Government's decision to revise the LGFS means that it would not be appropriate for us to offer comment on the details of the scheme at this point in time. However, we have received evidence indicating a worryingly high level of demoralisation among criminal defence solicitors and threats to the economic sustainability of criminal defence firms, with negative implications for the criminal justice system—especially for defendants. We return to this issue below. (Paragraph 44)
3. We consider it regrettable that the Law Society has had to resort to bringing a judicial review to pursue its grievances about the LGFS. *We recommend that the Ministry of Justice take urgent steps to avoid this dispute having to be resolved by the courts. Whatever the outcome of the judicial review, we consider there should be a wider review of criminal legal aid.* (Paragraph 45)

### Recent changes to the AGFs

4. We consider it regrettable that the Criminal Bar felt compelled to take direct action in response to the new Advocates' Graduated Fee Scheme, given the potential for adverse impact on defendants and complainants, as well as on the functioning of the courts. However, the underlying reasons for the dispute can be understood, including the failure to ensure that fees keep pace with inflation, the staged fee reductions from April 2010 onwards, unhappiness about aspects of the revised AGFS and the Criminal Bar's genuine and heartfelt concerns about the future of their profession and under-funding of the criminal justice system. (Paragraph 74)
5. While we welcome the Government's decision to offer additional funding for the AGFS and the Criminal Bar's decision to accept the offer, we do not believe that ending this specific dispute has resolved the underlying issues and it is clear that many barristers remain deeply unhappy about their situation and about the future of the criminal justice system. (Paragraph 75)
6. We acknowledge the challenges facing the Ministry of Justice in reworking the AGFS so that it is fair to advocates at all levels of seniority, and in ensuring that it is future-proofed against inevitable changes in the profile of Crown Court cases. We also recognise that the Ministry of Justice has made genuine efforts to address the concerns of the Criminal Bar. *To provide for ongoing collaboration with the legal profession on refinements to the AGFS, we recommend that, without any further delay, a system of annual review be built into the AGFS, overseen by a panel which incorporates representatives from the Criminal Bar and solicitor organisations,*

*alongside Government representatives. The panel's remit should include considering the inter-dependency between the AGFS and the LGFS, and the impact of changing the former on the operation of the latter. (Paragraph 76)*

### Expenditure on criminal legal aid

7. As we have observed, there is a common law right to legal advice, together with a right to legal representation for an accused person under Article 6 of the European Convention on Human Rights. We conclude that there is compelling evidence of the fragility of the Criminal Bar and criminal defence solicitors' firms placing these rights at risk; we conclude that this risk can no longer be ignored. (Paragraph 86)
8. We also conclude that current difficulties in recruitment to the Criminal Bar could potentially have a negative impact on future recruitment to, and diversity within, the judiciary—in particular for judicial office holders in the criminal courts. (Paragraph 87)
9. Given these risks, we welcome the decision of the Ministry of Justice to consider legal aid for criminal law within the LASPO post-implementation review, as a first step in understanding the crisis that criminal legal aid is facing. *We recommend that the output from this workstream be used to underpin a comprehensive and independent review of criminal legal aid, with the aim of devising a scheme that is sustainable and user-focussed; the review should adopt a similar approach to that of the recent independent review in Scotland. This review should be launched no later than March 2019 and should be concluded within 12 months.* (Paragraph 88)

### Declining expenditure on the Criminal Justice System

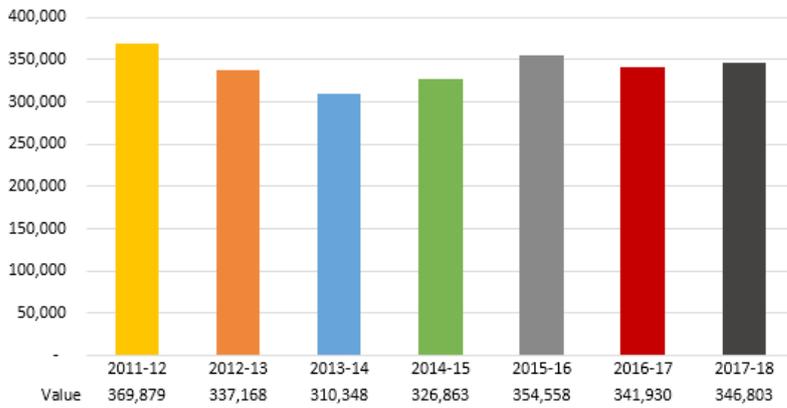
10. An effective criminal justice system which successfully prosecutes those who commit crime but which also protects the innocence of the accused unless the prosecution can prove their guilt is one of the pillars on which the rule of law is built. The effectiveness of the system also demands that the fabric of the criminal courts is properly maintained. We conclude that the under-funding of the criminal justice system in England and Wales threatens its effectiveness, and in doing so undermines the rule of law and tarnishes the reputation of the justice system as a whole. (Paragraph 93)
11. Our justice system is widely admired and the UK is a jurisdiction of choice for many individuals and corporate bodies that need to resolve disputes; nonetheless, it faces competition from other jurisdictions. We conclude that the under-resourcing of the criminal justice system undermines the prospects of successfully promoting our legal system abroad, a stated objective of the Government. (Paragraph 94)
12. *We recommend that that the Government conduct an urgent cross-departmental review of funding for all elements of the criminal justice system, including criminal legal aid and the Crown Prosecution Service, with the aim of restoring resources to a level that enables the system to operate effectively; the details of this review should be published in advance and its timetable must ensure completion in time to influence the conclusions of the 2019 Spending Review.* (Paragraph 95)

### Disclosure of unused material

13. We conclude that the pressure placed on defence lawyers to fulfil their professional obligations by reviewing unused prosecution material without remuneration is fundamentally unfair and—with the continual increase in the amount of such material—likely to become unsustainable, and increasingly prejudicial to the defendant. *We recommend that restoring legal aid payments for reviewing unused material above a certain page threshold be considered as part of the comprehensive and independent review of criminal legal aid that we have recommended above.* (Paragraph 99)

# Annex 1: LGFS and AGFS: expenditure and volume of cases

**Table 1: Expenditure on Litigators’ Graduated Fee Scheme (£000s)**

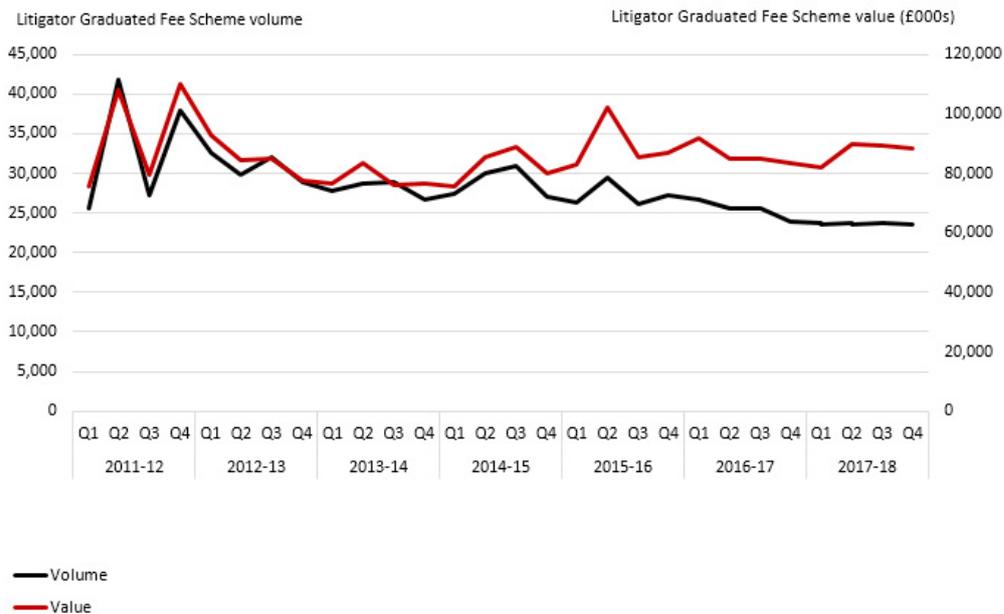


Notes:

- 1. Value has been adjusted for inflation to 2017-18 Q4 prices
- 2. Data in the most recent quarter for expenditure is provisional and likely to be revised upwards in the next release

Source: Office for National Statistics Legal aid statistics: January to March 2018

**Table 2: Litigators’ Graduated fee scheme by volume and value (£000s)**



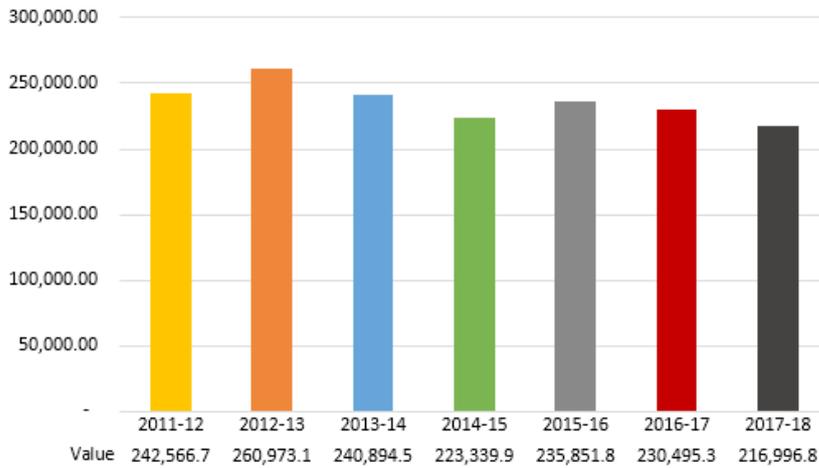
— Volume  
— Value

Notes:

- 1. Value has been adjusted for inflation to 2017-18 Q4 prices
- 2. Data in the most recent quarter for expenditure is provisional and likely to be revised upwards in the next release

Source: Office for National Statistics Legal aid statistics: January to March 2018

**Table 3: Expenditure on Advocates' Graduated Fee Scheme (£000s)**

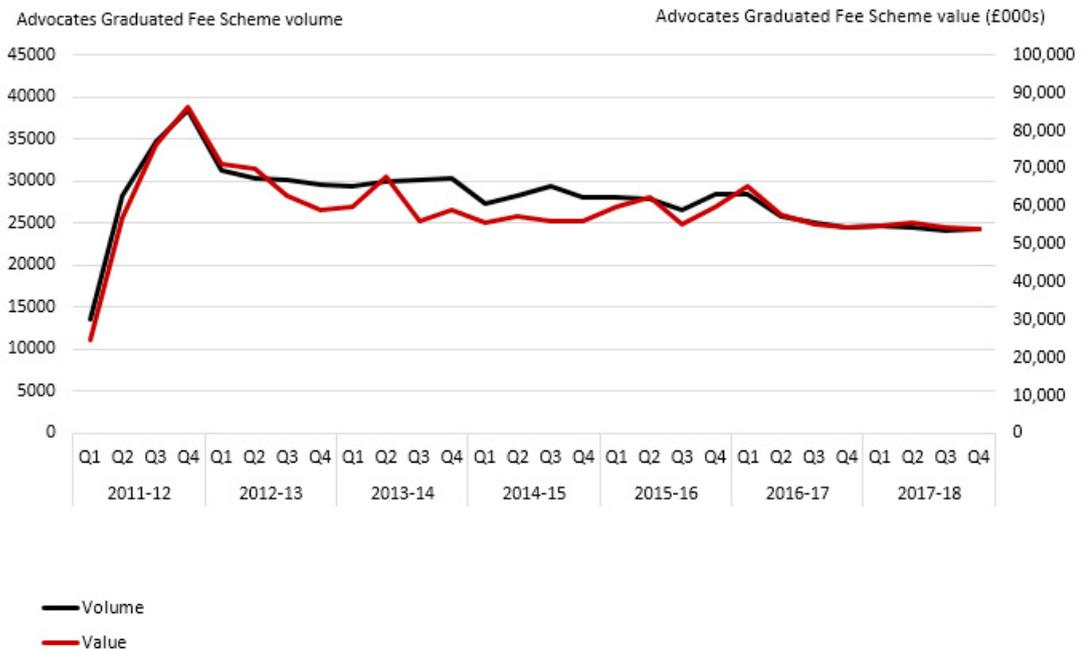


Notes:

1. Value has been adjusted for inflation to 2017-18 Q4 prices
2. Data in the most recent quarter for expenditure is provisional and likely to be revised upwards in the next release

Source: Office for National Statistics Legal aid statistics: January to March 2018

**Table 4: Advocates' Graduated fee scheme by volume and value (£000s)**



Notes:

1. Value has been adjusted for inflation to 2017-18 Q4 prices
2. Data in the most recent quarter for expenditure is provisional and likely to be revised upwards in the next release

Source: Office for National Statistics Legal aid statistics: January to March 2018

# Formal minutes

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**Wednesday 18 July 2018**

Members present:

Robert Neill, in the Chair

Ruth Cadbury      Gavin Newlands

Alex Chalk        Ellie Reeves

David Hanson

Draft Report (*Criminal Legal Aid*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 99 read and agreed to.

Annex agreed to.

*Resolved*, that the Report be the Twelfth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 5 September at 9.30am

## Witnesses

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The following witnesses gave evidence. Transcripts can be viewed on the [criminal legal aid page](#) of the Committee's website.

### Tuesday 22 May 2018

**Daniel Bonich**, Vice-Chair, Criminal Law Solicitors' Association and **Richard Miller**, Head of Justice, The Law Society.

[Q1-109](#)

### Tuesday 12 June 2018

**Andrew Walker QC**, Chair, Bar Council and **Angela Rafferty QC**, Chair, Criminal Bar Association.

[Q110-180](#)

## List of Reports from the Committee during the current Parliament

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All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2017–19

|                       |   |                     |
|-----------------------|---|---------------------|
| First Report          | Disclosure of youth criminal records  | HC 416<br>(Cm 9559) |
| Second Report         | Draft Sentencing Council guidelines on intimidatory offences and domestic abuse   | HC 417              |
| Third Report          | Pre-legislative scrutiny: draft personal injury discount rate clause  | HC 374              |
| Fourth Report         | Draft Sentencing Council guidelines on manslaughter   | HC 658              |
| Fifth Report          | HM Inspectorate of Prisons report on HMP Liverpool  | HC 751<br>(HC 967)  |
| Sixth Report          | Draft Sentencing guideline on terrorism   | HC 746              |
| Seventh Report        | Small claims limit for personal injury  | HC 659              |
| Eighth Report         | Young adults in the criminal justice system   | HC 419              |
| Ninth Report          | Transforming Rehabilitation   | HC 482              |
| Tenth Report          | Draft Sentencing Council guideline on child cruelty offences  | HC 892              |
| Eleventh Report       | Disclosure of evidence in criminal cases  | HC 859              |
| First Special Report  | The implications of Brexit for the Crown Dependencies: Government Response to the Committee's Tenth Report of Session 2016–17   | HC 423              |
| Second Special Report | Government Responses to the Committee's Reports of Session 2016–17 on (a) Prison reform: governor empowerment and prison performance (b) Prison reform: Part 1 of the Prisons and Courts Bill | HC 491              |
| Third Special Report  | The implications of Brexit for the justice system: Government Response to the Committee's Ninth Report of Session 2016–17   | HC 651              |
| Fourth Special Report | HM Inspectorate of Prisons report on HMP Liverpool: Government Response to the Committee's Fifth Report   | HC 967              |