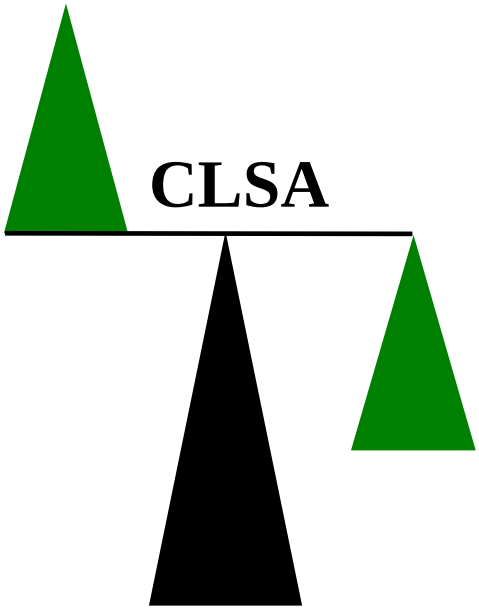

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CLSA Response to:

Litigators' Graduated Fees Scheme and Court Appointees Consultation

About the CLSA

The CLSA is an independent organisation representing lawyers in England and Wales. Its members specialise, often exclusively, in criminal defence litigation. Its members are defenders in the large majority, but it has prosecutors and court clerks within its membership.

The need for further cuts

In April 2013 the then Lord Chancellor, Chris Grayling, announced that the MoJ needed to make a cut of 17.5% to legal aid fees. At that time the Government's own experts, KPMG, acknowledged that the profession could not sustain cuts of this level without enforced consolidation.

As a direct consequence of this the Legal Aid Agency introduced two failed schemes in quick succession in an effort to try and create a sustainable market to absorb the second half of the cut, the first having been introduced in March 2014.

The first of these failed schemes was PCT (Price Competitive Tendering), the second being Dual Contracting (Two Tier).

Both schemes were vociferously opposed by the profession and both failed. Unfortunately the Legal Aid Agency refused to listen to the representations made by the profession and incurred substantial costs in pressing ahead regardless.

In January 2016 after legal challenges and months of engagement the successor to Chris Grayling, Michael Gove, announced that Two Tier should not proceed and that the 8.75% cut was suspended.

In his Ministerial Statement on the 28th January 2016 Mr Gove said "*I will review progress on joint work with the profession to improve efficiency and quality at the beginning of 2017, before returning to any decisions on the second fee reduction and market consolidation before April 2017.*"

Notwithstanding the change in Lord Chancellor a review must still be essential before contemplating any further cut which the government knows to be unsustainable. Indeed as it stands there is no evidence that any cut is necessary in light of what statistics show in relation to the current spend. In fact statistics show that between 2013 and 2016 there has been a decrease in expenditure and volume of 20%.

The LAA and MoJ are fully aware of the very grave concerns surrounding the sustainability of firms and we suggest should be engaging with the profession to avoid creating the problems similar to those experienced by us all over the last

few years rather than producing alternatives that will inevitably harm that sustainability.

The Law Society commissioned a report by Oxford Economics who have confirmed that if the MoJ were to further suspend the cuts, the criminal legal aid budget will continue to fall significantly.

The MoJ is also aware of a number of new schemes that have been implemented including a range of reforms proposed by Lord Justice Leveson and the Better Case Management Scheme. We are only just starting to see the impact of those programmes on billing trends but again the clear evidence is that they are succeeding in reducing costs to the MoJ. Any further rate cut to the rate paid to practitioners is not just a simple 8.75%. Instead it is a cut which will be subject to inflationary pressures over the proposed life of any contract.

A fixed fee for a police station in 2013 in Birmingham, for example, is £195. The same price applies now. If the cost had risen in line with inflation the fee should be £207.93. That is an actual decrease in real terms of £12.73 per police station or an overall 6% decrease in fees taking into account inflation from 2013.

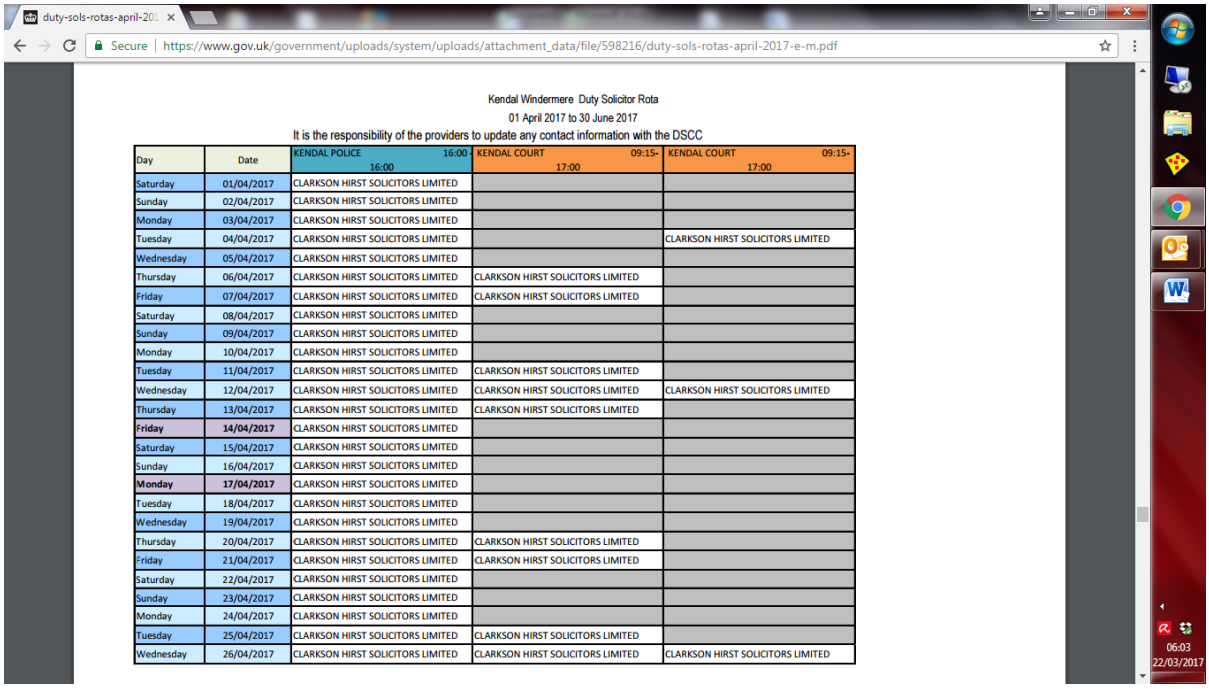
If the rate is cut by a further 8.75% this would mean that a police station attendance would pay £177.94 a decrease in real terms of £29.75 or 15.26% from the 2013 figure. Bearing in mind the average wage in 2013 was £27,000 the average wage in 2017 is now £28,000 [an increase of around 4%] the sustainability of firms can be seen to be in real jeopardy.

We do not know what the effect of Brexit will be on inflationary pressures although a lot of commentators appear to forecast a rise from the relatively low rates enjoyed over the last few years. The new April contract will run over the course of the Brexit tumult with all commentators appearing to agree that this will be [at least in the short term] a difficult time for small businesses.

With this in mind it is the submission of the CLSA that there is no need for **any** further cuts to legal aid and we will robustly oppose any further attempts to cut fees in whatever guise.

Economic issues

The CLSA and other representative bodies have been telling the Government that the failure to fund the CJS from a defence perspective will lead to advice deserts thus putting the government in breach of its obligations under LASPO. The precarious position that now exists is demonstrated visually by the Kendal and Windermere duty rota on the most recently published rota. One firm retains all of the slots for the duty scheme.



Kendal Windermere Duty Solicitor Rota

01 April 2017 to 30 June 2017

It is the responsibility of the providers to update any contact information with the DSCC

Day	Date	KENDAL POLICE 16:00 - 16:00	KENDAL COURT 09:15 - 17:00	KENDAL COURT 09:15 - 17:00
Saturday	01/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Sunday	02/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Monday	03/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Tuesday	04/04/2017	CLARKSON HIRST SOLICITORS LIMITED		CLARKSON HIRST SOLICITORS LIMITED
Wednesday	05/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Thursday	06/04/2017	CLARKSON HIRST SOLICITORS LIMITED	CLARKSON HIRST SOLICITORS LIMITED	
Friday	07/04/2017	CLARKSON HIRST SOLICITORS LIMITED	CLARKSON HIRST SOLICITORS LIMITED	
Saturday	08/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Sunday	09/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Monday	10/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Tuesday	11/04/2017	CLARKSON HIRST SOLICITORS LIMITED	CLARKSON HIRST SOLICITORS LIMITED	
Wednesday	12/04/2017	CLARKSON HIRST SOLICITORS LIMITED	CLARKSON HIRST SOLICITORS LIMITED	CLARKSON HIRST SOLICITORS LIMITED
Thursday	13/04/2017	CLARKSON HIRST SOLICITORS LIMITED	CLARKSON HIRST SOLICITORS LIMITED	
Friday	**14/04/2017**	CLARKSON HIRST SOLICITORS LIMITED		
Saturday	15/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Sunday	16/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Monday	**17/04/2017**	CLARKSON HIRST SOLICITORS LIMITED		
Tuesday	18/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Wednesday	19/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Thursday	20/04/2017	CLARKSON HIRST SOLICITORS LIMITED	CLARKSON HIRST SOLICITORS LIMITED	
Friday	21/04/2017	CLARKSON HIRST SOLICITORS LIMITED	CLARKSON HIRST SOLICITORS LIMITED	
Saturday	22/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Sunday	23/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Monday	24/04/2017	CLARKSON HIRST SOLICITORS LIMITED		
Tuesday	25/04/2017	CLARKSON HIRST SOLICITORS LIMITED	CLARKSON HIRST SOLICITORS LIMITED	
Wednesday	26/04/2017	CLARKSON HIRST SOLICITORS LIMITED	CLARKSON HIRST SOLICITORS LIMITED	CLARKSON HIRST SOLICITORS LIMITED

If there was to be a collapse of that particular firm it will immediately place the Government in breach of its obligations under LASPO. There is no PDS in the area, presumably because the Government does not see the area economically sustainable either.

To reduce fees by the proposed amounts must undermine the sustainability of all firms. It would cost the government vast amounts of money to try and rectify matters once firms start going out of business, thus negating any saving made by these wholly unnecessary cuts.

Crown Court Funding

In the Crown Court, criminal legal aid is paid to providers through two main graduated fee schemes (GFS): The Litigators' Graduated Fee Scheme ('LGFS') pays for litigators, and the Advocates Graduated Fees Scheme ('AGFS') pays for advocates. The AGFS is currently undergoing review and a recent consultation was published in connection with that scheme which proposed redistributing resources and reclassifying offences. The independent Bar, who are the principle recipients of payments under the AGFS, have been assured that the proposals are 'revenue neutral'. The AGFS has been the subject of an entirely separate consultation and the CLSA would submit that the two schemes should not be

considered in isolation. The results of the AGFS consultation have not yet been published and if there is opposition to the new scheme then we would strongly recommend that the two schemes are looked at afresh after the LASPO review which we understand is to take place in 2018.

The MoJ have already demonstrated the ability to suspend cuts indefinitely having done so with the cuts proposed to the Bar in 2013 which to this day remain suspended.

Background to the Scheme

For many years defence solicitors (litigators) were paid on an ex poste facto basis, which meant that at the conclusion of a case the solicitor would send a full file and bill to the National Taxing Team who would assess the amount of work done and pay for that work on an hourly rate basis.

PPE was introduced in 2008 by the Legal Aid Agency as their preferred method of remuneration for the work done in the Crown Court and as a method of reducing the administration burden. It was initially opposed by practitioners as it prevented payment for the time actually spent preparing cases. The Legal Aid Agency argued that it was necessary and in April 2013 they introduced guidance on Crown Court Fees. Paragraph 3.4(2) sets out exactly what the fees are to cover;

It is important to note the aspects of litigation included within the graduated fee. The LGFS was modelled on historical case data and most aspects of litigation for the case are included in the final graduated fee, and therefore do not attract separate remuneration. The main areas of litigation included in the graduated fee are:

-Attendance on the client

-Attendances at court

-Travel and waiting time (actual travel disbursements are remunerated separately)

-Viewing or listening to CCTV/audio/video evidence

-Unused material

-Sentence hearing if separate from the trial

-Interlocutory appeals

-Special measures hearings.

PPE was not designed to simply remunerate practitioners for reading the evidence. It is essential to note that Solicitors are responsible for the preparation of a case throughout. The litigator's fee and the advocate's fee remain separate for very good reasons.

It is the role of the solicitor to fully prepare a case ready for an advocate to present in court. This preparation includes, amongst other things;

- The first appearance at the Magistrates Court plus any bail application
- Completing and submitting legal aid
- Reading all of the evidence (including unused material which can run to many thousands of pages not incorporated within PPE)
- Attendance upon the client for full instructions
- Attendance upon the client for comment upon all of the evidence (and unused) served
- Attendance upon witnesses
- Viewing CCTV/listening to audio material
- Considering electronic evidence
- Attending at Court
- Instructing experts
- Preparing jury bundles

It is worthy of note that this is all work undertaken by Solicitors and not by Counsel. Due to the nature of a Barrister's role they spend the majority of their time in court as advocates and so rely heavily upon solicitors to conduct the preparation.

It is only fair to point out that PPE often works to the detriment of solicitors in many cases with a low number of pages that require a considerable amount of preparation which is not properly remunerated. A prime example of such matters are historic sex cases where the served evidence consists of a low number of statements but the work required by defence solicitors exceeds that which is paid out under the PPE scheme.

At its conception the PPE scheme was much maligned and faced widespread opposition as for many cases the formula represented a substantial cut to fees, and the overall scheme introduced what the MoJ refer to as a 'case mix' (commonly referred to as 'swings and roundabouts') whereby some cases ceased

to be profitable, others could be used to subsidise the overall volume of cases. As the principle driver of the LGFS formula, 'PPE' = pages of served prosecution evidence became the essential proxy, and so cases with high PPE were used to subsidise others where losses were inevitably incurred. The overall effect of the scheme was however a substantial saving to the legal aid budget.

A limit of 10,000 pages of evidence was set, and for cases larger than this which did not fall within the scheme below, an additional claim could be made for 'special preparation' which amounted to an hourly rate to read documents; it did not allow consideration of for example CCTV, nor did it pay for time spent preparing the case beyond simply reading the material that went beyond 10,000 pages. The LGFS scheme also failed to remunerate for the consideration of any unused material which in some cases exceeds the service of actual pages of evidence and despite the lack of remuneration solicitors are professionally obliged to consider.

Alongside the LGFS scheme operated a scheme for larger, more complex cases, referred to as the VHCC (Very High Costs Case) scheme. The purpose of that scheme was to add an element of control to the expenditure on long or complex trials with high PPE as it required prior approval for any given task to be completed and remunerated. In December 2013 the fees for VHCC cases were cut by 30% which in itself has led to huge savings for the legal aid budget.

SPEND ANALYSIS IN £M

	Crime Lower		**Crime Higher**				**Total**
	Police Stations	Magistrates Court	AGFS	LGFS	VHCC		
Year							
2013/14		376	226	292	56		950
2015/16		285	226	341	26		878
2016/17	*	282	234	314	28		858

(*2016/17 figures are a PROJECTION FROM FIRST 2 QUARTERS)
We also note that the numbers of VHCC contracts fell dramatically from 63 in 2008/9 to 28 (11/12), 20(12/13), 12(13/14), 3 (2014/15), 10(2015/26), and projection 2016/27 is 6. This is work that has transferred across to the LGFS scheme and spend on Crime Higher was in fact as follows.

Year	LGFS	VHCC	TOTAL
2013/14	292	56	348
2015/16	341	26	367
2016/17*	314	28	342

"Short Term Pressures"

The introduction to the Consultation cites that the reason for 'consulting' upon cuts to cases over 6,000 pages is because of the case of ***NAPPER*** has cost the Legal Aid Agency £30 million. In short the case of ***NAPPER*** allows for proper remuneration for work done in respect of electronically served evidence and not accounted for within the PPE where such evidence is pivotal to the prosecution case.

The case of ***FURNISS*** followed and broadened the scope of whether evidence served electronically should fall within PPE and held that practitioners must be properly remunerated for work done. In the case of FURNISS Mr Justice Haddon-Cave held firstly "a failure to ensure that Defence advocates are remunerated for examining material relied upon at trial by the Prosecution may amount to a breach of Article 6 ECHR." Mr Justice Haddon-Cave went on to state that "Defence advocates should not be put to the time, trouble and expense of bringing costs appeals or claims for "special preparation" in lieu of the page count. If they are forced to do so, consideration should be given to awarding indemnity costs against the LSC or LAA in respect of the unnecessary appeal hearing in question". The judgement concluded that the "rationale" for imposing an "arbitrary ceiling" of 10,000 page limit imposed on GFS claims is unclear and that it places an "artificial cap" on the work done.

It is essential to note two major themes from Napper and Furniss. The first is that there appeared to be a total misunderstanding by the LAA in relation to the obligations, role and work carried out by solicitors. The second was that in both cases it was considered that the evidence in question was essential and fundamental to the case and as such had to be considered. In both cases notwithstanding the fundamental nature of the evidence the LAA sought to argue that the defence should not be remunerated for considering it.

In its decision in the case of Lord Chancellor v (1) Edward Hayes and (2) Wrack the High Court specifically looked at these issues. That case concerned mobile telephone material, and the Court held:

"Given the importance of the text messages to the prosecution case it was, in my view, incumbent on those acting on behalf of the defendant to look at all the data on the disc to test the veracity of the text messages, to assess the context in which they were sent, to extrapolate any data that was relevant to the messages relied on by the Crown and to check the accuracy of the data finally relied on by the Crown. I regard the stance taken by the appellant in respect of the surrounding material on this disc as unrealistic. It fails to properly

understand still less appreciate the duty on those who represent defendants in criminal proceedings to examine evidence served upon them by the prosecution.' These cases apply equally to Advocates claims. There is no apparent impetus to factor in what has been referred to as "pressure" resulting from ***NAPPER*** in the AGFS review, both reviews having previously stated to be cost neutral.

It is therefore the case that what the Legal Aid Agency are now proposing is to stop paying for the preparation in any case where the page count exceeds 6,000.

By their very nature these cases are the most difficult to deal with. The level of detail is greater and the defendants are facing more substantial penalties. To try and counter any argument that we may have about our professional obligations to consider the evidence we are told by the Legal Aid Agency, that we may submit a claim for "special preparation".

This of course completely overlooks the fact that special preparation is paid out to consider the evidence only.

Just supposing special preparation is allowed for us to *read* the pages over the 6,000 limit how are we then funded to take full instructions on the evidence? Put quite simply it appears that what the Legal Aid Agency are proposing is that we should not be funded for anything over 6,000 pages which is fundamentally wrong on every level.

Evidence is served with good reason. It is not something that can be ignored and everything served must be properly considered by solicitors. To penalise the profession and expect work to be done "for free" in these cases is unacceptable and there can be no good reason for refusing to pay for evidence to be considered.

It must also be borne in mind that the original reason for the LAA having moved towards the PPE scheme was to reduce the administrative costs of determining bills. What is now being suggested will undoubtedly see a rise in special preparation claims for every case exceeding 6,000 pages which will see a substantial increase to the administration budget for the LAA.

Each claim will need to be considered individually and the case considered in full. The cutting of fees in this way appears to have been ill conceived given the knock in effect it will have to expenditure elsewhere. This is also at odds with the Ministerial Statement made by Mr Gove on the 28th January 2016 in which he states that he intended to explore;

"[Reduction] in unnecessary bureaucratic costs, eliminate waste and end continuing abuses within the current legal aid system".

The MOJ in their consultation set great store by the fact that information produced digitally is searchable and therefore reduces significantly the time required to perform the work required.

Initially there are limits; Optical Character Recognition

Text from a source with a font size of less than 12 points will result in more errors.

Source materials that often cause issues are:

- Forms
- Small text
- Blurry copies
- Mathematical formulas
- Draft copies
- Coloured paper
- Handwritten text
- Unusual or script-type fonts

Document formatting may be lost during text scanning (i.e, bold, italic and underline are not always recognized).

Many documents in high PPE cases are exhibits which are less likely to be in searchable format, then there are typographical errors and misspelled names which would not be picked up. If there is inconsistency in how something is referred to - Jim, James, the defendant, my brother, my neighbour, my husband, my son, Smith, the taller of the two, etc. could all refer to one person. Search 'James' and you would miss them all.

Results will always require spellchecking and proofreading.

"Searchable formats" produced by the prosecution are just that. They are documents produced from raw data held by the prosecution, distilling the information in its possession seeking to rely upon the distilled material as fact. The documents produced may contain significant errors or omissions which, if taken at face value, draw a different conclusion to that of the raw data itself. To seek to base a justice system on the word of the prosecution goes beyond the stated aims in the preamble of this consultation.

Even if it is accepted that the pages 6,000 onwards can be adequately "searched" [which it is not] then this is not an end to the work that is required.

In 2010 the Legal Services Commission, the forerunner of the LAA, issued guidance for work it considered necessary to be conducted on a case and where the responsibility lay for that work to be conducted.

It is worth setting out what the LSC concluded regarding when it comes to preparation of the defence case

Of the 125 tasks listed as necessary for the preparation of a proper defence [according to the LSC] , a total of 48 tasks were allocated to the litigator alone, whilst a further 21 were considered work to be conducted by both the litigator and the advocate,

In none of the tasks identified by the LSC in 2010 does it suggest work conducted as "special preparation" is sufficient to prepare a proper defence. The LSC in 2010 identified that there had to be amplification rather than just to "read the excess pages",

Description of task			**Responsibility**
Restraint (if applicable)	1	Preliminary review of Restraint Order and Application in Support and advising client on its effect	Both
	2	Taking instructions from client regarding his/her reaction to the Restraint Order	Litigator
	3	Drafting disclosure statement in response to the Restraint Order	Litigator
	5	Considering and/or settling disclosure statement in response to the Restraint Order if drafted by litigator	Advocate
	6	Liaising with Banks, prosecuting authority and other parties regarding payments for 'general living expenses'/outgoings/a restrained business's survival	Litigator
	7	Drafting application to discharge or vary Restraint Order	Litigator
	8	Considering and/or settling application to discharge or vary Restraint Order if drafted by litigator	Advocate

	9	Interviewing witnesses and drafting statements in support of application to vary discharge	Litigator
Contract management	10	Meetings with contract manager to discuss new stage task lists and end of stage audits	Litigator
	11	Drafting Case Plan and stage task lists	Litigator
	12	Case management and supervision meetings	Litigator
Counsel / Solicitor Liaison	13	Routine correspondence	Litigator
	14	Preparing initial brief to advocate	Litigator
	15	Considering instructions from solicitors	Advocate
	16	Preparing notes to advocate regarding issues arising from disclosure by the crown, instructions from defendant or general defence enquiries	Litigator
	17	Considering instructing solicitors' notes	Advocate
	18	Preparing written advice to instructing solicitor	Advocate
	19	Considering advocate's written advice	Litigator
	20	Attending advocate and instructing solicitor in conference	Both
Representation at Hearings	21	Bail applications (both magistrates' court and Crown Court)	Advocate
	22	Paper committal/transfer hearing	Litigator
	23	Preliminary hearings in the Crown Court	Advocate
	24	Mention/Review hearings in the Crown Court	Advocate
	25	Application to vary/discharge Restraint Order	Advocate
	26	Application to Dismiss in the Magistrates' Court	Litigator
	27	Application to Dismiss in the Crown Court	Advocate
	28	Application to Join/Sever	Advocate
	29	Application for 'third Party' disclosure	Advocate
Representation at Hearings	30	Application for disclosure under s8 CPIA	Advocate
	31	Application to extend custody time limit	Advocate

	32	Application for 'special measures'	Advocate
	33	Interlocutory appeal hearing against ruling made at a Preparatory Hearing	Advocate
	34	Noting Brief at 'linked' trial	Advocate
	35	PCMH	Advocate
	36	Preparatory hearings	Advocate
	37	Trial (including voire dire)	Advocate
	38	Sentence	Advocate
	39	Newton hearing	Advocate
	40	Confiscation hearing	Advocate
	41	Other hearings	Advocate
Reacting to disclosure by prosecuting authority	42	Considering tape recordings of evidential interviews with client (normally conducted under PACE), checking accuracy against transcripts, assessing whether to play tapes at trial and considering admissibility.	Litigator
	43	Considering advance information/courtesy disclosure, in particular: whether there is a prima facie case; the strength of the prosecution case (including the admissibility and availability of the evidence); the merits of putting the prosecution to proof; the advantage of claiming a sentence discount for a plea of guilty; plea (and when it should be entered); mode of trial; type of committal; the likelihood of bail. Also identifying shortcomings in the Crown's evidence and missing evidence, and considering what action, if any, to take.	Both

	44	Considering committal bundle/service of prosecution case following sending or transfer, in particular: is there is a prima facie case; the strength of the prosecution case (including the admissibility and availability of the evidence); the merits of putting the prosecution to proof; the advantage of claiming a sentence discount for a plea of guilty; plea (and when it should be entered); issues of joinder/severance; which witnesses need to give oral evidence; the likelihood of expert evidence to counter the prosecution case or assist the defence. Also identifying shortcomings in the Crown's evidence and missing evidence, and considering what action, if any, to take.	Both
	45	Considering prosecution's case summary/statement of case/case opening: does this accurately reflect the evidence served? Are there matters of law that need to be addressed prior to facts being opened to the jury?	Both
Reacting to disclosure by prosecuting authority	46	Considering notices of additional evidence served by the prosecuting authority, in particular: whether there is a prima facie case; the strength of the prosecution case (including the admissibility and availability of the evidence); the merits of putting the prosecution to proof; the advantage of claiming a sentence discount for a plea of guilty; plea (and when it should be entered); issues of joinder/severance; which witnesses need to give oral evidence; the likelihood of expert evidence to counter the prosecution case or assist the defence. Also identifying shortcomings in the Crown's evidence and missing evidence, and considering what action, if any, to take.	Both

	47	Considering primary disclosure by the prosecuting authority (consisting of material that in the prosecutor's opinion undermines the prosecution's case or assists the defence and a schedule of the other non-sensitive unused material) and identifying what, if any, further unused material that should have been disclosed	Both
	48	Considering prosecution application to adduce hearsay evidence (together with supporting documentation)	Both
	49	Drafting objections (if any) against prosecution's application to adduce hearsay evidence	Litigator
	50	Considering and/or settling objections against prosecution's application to adduce hearsay evidence if drafted by litigator	Advocate
	51	Considering prosecution application to adduce bad character evidence (together with supporting documentation)	Both
	52	Drafting objections (if any) against prosecution's application to adduce bad character evidence	Advocate
	53	Considering objections against prosecution's application to adduce bad character evidence if drafted by advocate	Litigator
	54	Reviewing draft admissions proposed by prosecution, checking their accuracy and merits in terms of progressing defence case	Both
Preparing the defence case	55	Considering application for 'special measures' and drafting objections (if any)	Both
	56	Drafting objections (if any) against application for special measures	Litigator
	57	Considering and/or settling objections against application for special measures if drafted by litigator	Advocate
	58	Taking client's instructions on his/her background (antecedents)	Litigator
	59	Considering client's instructions on his/her background (antecedents)	Advocate

	60	Taking client's instructions on his/her tape recordings of evidential interviews	Litigator
	61	Considering client's instructions on his/her tape recordings of evidential interviews	Advocate
Preparing the defence case	62	Taking client's instructions on advance information/overview of his/her comments on the allegations being made	Litigator
	63	Considering client's instructions on advance information/overview of his/her comments on the allegations being made.	Advocate
	64	Taking client's detailed instructions on committal bundle/service of prosecution case (or chronology and dramatis personae, as appropriate), including comments on statements and exhibits	Litigator
	65	Considering client's instructions on committal bundle/service of prosecution case (or chronology and dramatis personae, as appropriate), including comments on statements and exhibits	Advocate
	66	Taking client's detailed instructions on notices of additional evidence (or chronology and dramatis personae, as appropriate), including comments on statements and exhibits	Litigator
	67	Considering client's detailed instructions on notices of additional evidence (or chronology and dramatis personae, as appropriate), including comments on statements and exhibits	Advocate
	68	Taking client's instructions on primary disclosure by the prosecuting authority	Litigator
	69	Considering client's instructions on primary disclosure	Advocate
	70	Preparing Schedules (eg timeline/chronology of events, transaction analysis of bank transfers, telephone calls, internet traffic, etc; link analysis; narrative anomalies (THEMA), etc)	Litigator
	71	Considering Schedules prepared by the litigator under task 70	Advocate

	72	Preparing detailed/enhanced 'cast of characters/dramatis personae'	Litigator
	73	Considering detailed/enhanced 'cast of characters/dramatis personae'	Advocate
	74	Preparing CPIA Defence Case Statement in order to (a) avoid an adverse inference and (b) request disclosure of unused material	Litigator
	75	Considering and/or settling CPIA Defence Case Statement if drafted by litigator	Advocate
	76	Preparing Preparatory Hearing Defence Case Statement	Litigator
	77	Considering/settling Preparatory Hearing Defence Case Statement	Advocate
	78	Identifying potential defence witnesses who may give evidence as to fact	Both
	79	Interviewing potential defence witnesses who may give evidence as to fact	Litigator
Preparing the defence case	80	Considering potential defence fact witness statements	Advocate
	81	Identifying potential defence witnesses who may give evidence as to character	Both
	82	Interviewing potential defence witnesses who may give evidence as to character	Litigator
	83	Considering potential character witness statements	Advocate
	84	Instructing enquiry agent to trace potential defence witnesses	Litigator
	85	Identifying potential defence witnesses who may give evidence as to opinion (ie 'expert witnesses')	Both
	86	Instructing potential defence witnesses who may give evidence as to opinion (ie 'expert witnesses')	Litigator
	87	Considering advice from defence expert witnesses	Both
	88	Attending expert witness in conference	Both

	89	Conducting Land Registry / Companies House / Experian / internet searches on relevant companies / individuals / properties	Litigator
	90	Considering results reported by litigator in relation to enquiries of Land Registry / Companies House / Experian / internet searches on relevant companies / individuals / properties	Advocate
	91	Interviewing prosecution witnesses	Litigator
	92	Considering notes of interview of prosecution witnesses	Advocate
	93	Visiting the 'crime scene'	Both
	94	Considering findings from visit of crime scene	Both
	95	Attending and advising the client during post-charge identification procedures	Litigator
	96	Drafting application for Crown Court summons for witness to give oral evidence ('third party disclosure')	Litigator
	97	Considering and/or settling application for Crown Court summons for witness to give oral evidence ('third party disclosure') if drafted by litigator	Advocate
	98	Drafting application for Crown Court summons for witness to produce documentary evidence ('third party disclosure')	Litigator
	99	Considering application for Crown Court summons for witness to produce documentary evidence ('third party disclosure') if drafted by advocate	Litigator
	100	Considering and/or settling application for Crown Court summons for witness to produce documentary evidence ('third party disclosure') if drafted by litigator	Advocate
	101	Attending and advising the client during post-charge interviews under the SOCA regime (including advising on becoming an 'accomplice witness' and entering in to a formal contract with the Crown)	Litigator

Preparing the defence case	102	Advising the client during post-charge interviews under the SOCA regime (including advising on becoming an 'accomplice witness' and entering in to a formal contract with the Crown)	Advocate
	103	Drafting application for hearsay evidence to be adduced at trial	Litigator
	104	Considering and/or settling draft application for hearsay evidence to be adduced at trial if drafted by litigator	Advocate
	105	Drafting application for bad character evidence to be adduced at trial	Advocate
	106	Considering draft application for bad character evidence to be adduced at trial if drafted by advocate	Litigator
	107	Drafting application to introduce evidence or cross examine about a complainant's sexual behaviour	Advocate
	108	Considering draft application to introduce evidence or cross examine about a complainant's sexual behaviour if drafted by advocate	Litigator
	109	Drafting application to 'stay' case as an 'abuse of process'	Advocate
	110	Considering draft application to 'stay' case as an 'abuse of process' if drafted by advocate	Litigator
	111	Drafting applications to exclude evidence under s76 & s78 PACE	Advocate
	112	Considering draft applications to exclude evidence under s76 & s78 PACE if drafted by advocate	Litigator
	113	Drafting basis of plea	Advocate
	114	Considering draft basis of plea if drafted by advocate	Litigator
	115	Considering draft witness orders	Both
	116	Preparing Defence Case Opening	Advocate
	117	Preparing Closing Speech	Advocate

	118	Preparing for examination in chief of defendant (including preparation of any schedules to assist when examining defendant)	Advocate
	119	Preparing for cross-examination of prosecution witnesses (including preparation of any schedules to assist when cross-examining)	Advocate
	120	Preparing for cross-examination of witnesses	Advocate
	121	Attending co-accused legal representatives to discuss preparation, strategy and case management	Both
	122	Preparing demonstrative evidence (plans, charts, sketches, timelines, etc)	Litigator
	123	Considering demonstrative evidence prepared by the litigator under task 122	Advocate
	124	Considering contents of jury of bundle(s)	Both
	125	Preparing defence exhibit jury bundle(s) (ie creating file)	Litigator

Actual Effect of the proposed cuts

The argument of the MoJ is that once a case gets beyond 10,000 pages the extra costs involved can be absorbed in a "swings and roundabouts" way.

A further real reduction in the fees will not allow this governmental myth to exist anymore.

We calculate the fee reduction on category A, B, D, J and K [the most likely class of offence to have over 6,000 PPE] on 8,000 and 9,999 PPE as follows;

		Basic Figure		New Max Proposed PPE Fee		Reduction in £		Reduction as a Percentage
Class A								
Trials								
8000 PPE		£72,142.60		£55,974.64		-£16,167.96		-22.41%
9,999 PPE		£89,645.01		£55,974.64		-£33,670.37		-37.56%
Cracked								
8000 PPE		£32,466.25		£26,237.61		-£6,228.64		-19.18%
9,999 PPE		£38,700.71		£26,237.61		-£12,463.10		-32.20%
Guilty Plea								
8,000 PPE		£14,822.60		£12,645.68		-£2,176.92		-14.69%
9,999 PPE		£17,115.32		£12,645.68		-£4,469.64		-26.11%
Class B								
Trial								
8,000 PPE		£60,802.14		£46,617.93		-£14,184.21		-23.33%
9,999 PPE		£74,979.26		£46,617.93		-£28,361.33		-37.83%
Cracked								
8000 PPE		£20,618.49		£16,516.46		-£4,102.03		-19.89%
9999 PPE		£24,720.26		£16,516.46		-£8,203.80		-33.19%
Guilty								
8000 PPE		£12,251.35		£10,124.11		-£2,127.24		-17.36%

9999 PPE		£14,384.78		£10,124.11		-£4,260.67		-29.62%
Class D								
Trial								
8000 PPE		£69,174.74		£53,176.70		-£15,998.04		-23.13%
9999 PPE		£85,162.80		£53,176.70		-£31,986.10		-37.56%
Cracked								
8000 PPE		£30,210.79		£24,291.71		-£5,919.08		-19.59%
9999 PPE		£36,125.98		£24,291.71		-£11,834.27		-32.76%
guilty								
8000 PPE		£13,732.98		£11,608.03		-£2,124.95		-15.47%
9999 PPE		£15,861.79		£11,608.03		-£4,253.76		-26.82%
Class J								
Trial								
8000 PPE		£72,814.26		£55,974.64		-£16,839.62		-23.13%
9999 PPE		£89,645.06		£55,974.64		-£33,670.42		-37.56%
Cracked								
8000 PPE		£32,466.35		£26,237.62		-£6,228.73		-19.19%
9999 PPE		£38,700.71		£26,237.62		-£12,463.09		-32.20%
guilty								
8000 PPE		£14,882.60		£12,645.68		-£2,236.92		-15.03%

9999 PPE		£17,115.33		£12,645.68		-£4,469.65		-26.11%
Class K								
trial								
8000 PPE		£70,544.40		£52,865.75		-£17,678.65		-25.06%
9999 PPE		£88,214.79		£52,865.72		-£35,349.07		-40.07%
Cracked								
8000 PPE		£33,954.40		£26,459.12		-£7,495.28		-22.07%
9999 PPE		£41,440.89		£26,459.12		-£14,981.77		-36.15%
Guilty								
8000 PPE		£20,751.25		£16,593.86		-£4,157.39		-20.03%
9999 PPE		£29,904.04		£16,593.86		-£13,310.18		-44.51%

The state of the profession

The reality is that the supplier base, criminal defence solicitors, are an industry in crisis. Long seen as the poor relation to commercial lawyers, the disparity in remuneration has hit significant levels. An average duty solicitor nationally can expect an average salary of £33,978. By way of comparison, that is significantly less than a training contract at a Magic Circle firm (£42,000) and by 2-3 years qualified (when the majority have achieved duty status) those firms pay an average of £98,500. Within just 3 years of qualifying a commercial lawyer can earn as much as 3 times a duty solicitor. The average wage of a criminal solicitor after around seven years qualification is £45,585. Any suggestion that criminal defence lawyers are 'fat cats' is entirely unwarranted and inaccurate.

The difficulty the profession is facing is that the salary gap has not gone unnoticed. The Law Society has recently undertaken a survey as to the average age of criminal solicitors currently practising. The final results are awaited but early indications are staggeringly worrying. In most firms the average age is rising towards 50. Most firms have criminal lawyers in their 50s and 60s. Very

few have practitioners in their 30s, and next to none comparatively in their 20s. Decades of reform and underinvestment have discouraged talented young lawyers from practising in criminal law. Recruitment is increasingly difficult. Within a relatively short period of time the profession will be facing a real crisis – where are the future lawyers and judges going to come from?

In addition any further cut to Solicitors' fees presents an enormous risk to the Independent Bar. If Solicitors fees are cut then essentially they have two choices;

1. Find a way to survive by identifying additional sources of remuneration
2. Close

Due to the costs incurred of closing a business and the number of employees that firms have the first of the two options is the most viable. This will inevitably lead to firms considering conducting in-house advocacy whether by way of employment of in-house Counsel or Higher Rights Advocates. This is not a choice that many firms want to take but it must be recognised that with further cuts in the pipe line it will be the only way for them to survive. Many of these firms have briefed 100% of their Crown Court work to Counsel and so the net effect will be a substantial reduction in work being briefed out to Chambers.

Since 1992, there have been no rate rises for defence work, indeed the rates continue to fall in real terms. Overheads have risen. In just 20 years there have been 3000 changes in criminal law, and a resulting increase in work, procedures, and weighting against criminal practitioners have seen an increase in the burden on defence solicitors in presenting a case. Given the way remuneration is structured there has been no corresponding increase in fees. By way of example, bad character applications, special measures applications, the completing of case management forms where there is often insufficient evidence to complete one, applications for disclosure under the CPIA all such matters are included in the standard trial fee which is less than it was in 1978. Police Station rates have been capped for many years, the cost of travel, waiting, attendance does not take into account the true value of what is provided by practitioners, often overnight, often with vulnerable and scared clients. There is an increased move towards unifying the rates without consideration of increased overheads.

Summary/Conclusion

It is essential to the solicitors' profession as a whole that firms are able to remain sustainable. The concept of commerciality is not something that can be swept under the carpet.

Solicitors are tightly regulated with requirements to have in place recognised "quality marks" [Lexcel or SQM], to have a COLP, to have Supervisors, to have

staff on call 24/7, to have an office, to have access to digital evidence in court, to submit legal aid electronically and to conduct training.

These are significant overheads and further financial burdens upon Solicitors which *must* be taken into consideration.

The MOJ and LAA cannot on the one hand insist upon each of these elements when issuing contracts but ignore the fact they incur financial costs that must be covered.

To disregard the financial burden in respect of internal and external regulation of Solicitors when considering the impact of cuts is a recipe for disaster.

The new contracts for legal aid are due to commence on the 1st April 2017.

Solicitors have been expected to sign up to the contract for the minimum period of three years. The MoJ and LAA have had this timetable in mind for twelve months. It is inconceivable to think that at the commencement of the new contracts practitioners are to be faced with the prospect of either a 30% cut to cases involving 6,000 pages of evidence or an 8.75% cut across the board.

Moreover the stance taken by the LAA is that these decisions have increased costs to the Agency which is wholly inaccurate, on the contrary these cases have shown that the LAA has sought for years to withhold payment for work actually, properly and reasonably done by defence teams and continues to show a lack of understanding of the work of a Solicitor.

These are not inconsequential changes. They carry huge consequences in terms of finance and business sustainability. To seek to introduce such substantial cuts on the basis of "short term pressures" and against a back drop of savings already made would be a recipe for disaster and the MoJ would do well to heed the warnings.

Reply to questions

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

No. There can be no good reason to further limit the payments made to solicitors for consideration of evidence in paper heavy cases.

Any case involving service of evidence in excess of 6,000 pages are by their very nature the most serious and complicated of cases requiring detailed consideration by solicitors. This is not wok that is capable of remuneration by special preparation as instructions must be taken from the client and in turn sent to the instructed advocate who is entirely reliant upon these instructions.

The cases of Napper and Furniss emphasised the need for proper remuneration which should not be artificially restricted.

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

No. The methods of remuneration must remain the same unless and until the following occur;

1. Completion of the LASPO review.
2. Assurances that any new scheme will be cost neutral to ensure that all cases are properly remunerated.
3. Assurances can be given that there will be a proper mechanism for review.
4. A full and proper consultation takes place in relation to alternative schemes that allows proper meaningful engagement by the representative bodies and an appropriate expert.
5. Data collection exercises are properly conducted in relation to any proposed scheme.

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

No. There is no justification for reducing these rates.

This appears to be a hastily considered 'quick fix'. Solicitors are appointed by the Court, not by an individual to undertake cross examination of vulnerable witnesses. These cases are by their very nature difficult to deal with.

The defendant for one reason or another is ineligible for legal aid and unable or unwilling to pay privately which of course was another unintended consequence of pervious cuts to legal aid not identified by the Ministry. A defendant is content to conduct the case without the benefit of representation and often do not want a solicitor in place.

Recently the Lord Chancellor has expressed a view that vulnerable witnesses in family proceedings should not be cross examined in person. Notwithstanding this very public stance, these cuts threaten the protection of those same witnesses.

As indicated, in these matters we are instructed by the court and as such the Ministry pay us a commercial rate for doing the work. It is yet another measure of how far legal aid rates have fallen behind the rate deemed to be commercially acceptable when noting the disparity of the rates actually paid for this type of work compared to that of legal aid rates.

Q4. Do you have any comments on the Equalities Statement published alongside this consultation and/or any further sources of data about protected characteristics we should consider?

There has been a complete failure to consider the impact upon complainants and vulnerable witnesses who will be adversely affected by the proposed cuts to the rates payable under s38.