

Litigator Graduated Fee Scheme Review Group Findings and Recommendations

Introduction

1. The Litigator Graduated Fee Scheme (LGFS) was introduced on 14 January 2008 and replaced the previous Ex-post facto and Standard Fee schemes (EPF). It was agreed during the consultation process with providers that the Legal Services Commission (LSC) would undertake a Post Implementation Review (review) as soon as possible following implementation.

Background

2. The review began in August 2008 with a meeting of representatives (LGFS review group or group) from the LSC, The Law Society (TLS), Legal Aid Practitioners Group (LAPG), Criminal Law Solicitors Association (CLSA) and Her Majesty's Court Service (HMCS), and the Ministry of Justice (MoJ). The Bar Council was represented from November 2008. This was called the interim review as the group agreed it was too soon to undertake a full review due to an insufficient dataset of graduated fee cases.
3. Therefore, the Terms of Reference of this group were to examine fixed fees and to address any anomalies or omissions within the Criminal Defence Service (Funding) Order 2007. The group's recommendations can be found at Annex A and these were implemented on 3 August 2009.
4. The full review began in February 2009 and consisted of representatives from the LSC, TLS, the Bar Council, Solicitors' Association for Higher Court Advocates, LAPG, CLSA, London Criminal Courts Solicitors Association, HMCS and the MoJ. The group agreed that it was still too soon to review the graduated fee element of the scheme and recommended the analysis be undertaken in March 2010. The group used the intervening period to review other aspects of the scheme. This paper provides the key and detailed findings and recommendations on behalf of the review group.¹

What was expected?

5. There were a number of expected benefits with the introduction of the LGFS. The group focused on the following:
 - Increased control of expenditure with savings of 5.5% (approximately £11m based on 05/06 expenditure) when fully operational
 - Adequate remuneration under swings and roundabouts
 - Efficient operational delivery (validation of Pages of Prosecution Evidence (PPE))
 - Maintain provision of quality legal services.
6. Other operational and IT expected benefits and financial stewardship were reviewed internally following LSC project principles and will be made available in a combined final report.

¹ A summary of recommendations for the full review can be found on page 8 of this paper.

Key Findings

7. The group's analysis led to the following key findings²:

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

Detailed Findings

Control of expenditure

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

Table 1 – Overall position

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

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

- 1) Insufficient numbers of VHCC Panel Advocates to undertake VHCC work
- 2) Non Panel Litigators reluctant to transfer the case
- 3) Financial incentives
- 4) Other incentives such as a preference not to be managed on a day-to-day basis under the VHCC scheme
- 5) External factors such as decisions around charging
- 6) CCU's decision making on VHCC classification.³

10. The group agreed to look at the data with the VHCCs removed as this was an unexpected impact on the LGFS which had not formed part of the initial scheme model. Therefore, all cases with a trial length of 41+ days or more (and corresponding guilty plea and cracked trial case numbers) and those with a trial length of 25-40 and >10,000 PPE

² Please note the data limitations outlined in Annex B

³ Although these factors could help explain the VHCC effect on the LGFS, the group agreed that as trial length impacts on the courts, they can and do act as a control to potential collusion with over and underestimating trial estimates.

were removed from both datasets.⁴ Table 2 demonstrates that by removing the unexpected VHCC increase, there is a saving in line with the expected saving of 5.5% when fully operational.

Table 2 – Overall position (excluding VHCCs)

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

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

12. Notwithstanding these limitation, the analysis showed a 22.8% increase in trials, cracked trials and guilty pleas in the Crown Court.⁵ HMCS confirmed that this is consistent with their analysis of Crown Court starts over this period. The group noted that one reason for this increase could be the magistrates' court not having or declining jurisdiction. However, the group also discussed remuneration of either way cases, focusing on remuneration of early guilty pleas in the magistrates' court and committal for sentence in the Crown Court. Members of the group suggested committal for sentence fees were sometimes inadequate for certain types of cases and could be providing an incentive to providers to advise their client to elect Crown Court. The group agreed this issue was wider than the LGFS review group but recommended that further work be undertaken outside of this group on funding and motivations between the two courts, but that the group is kept informed.

Recommendations

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

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

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

Adequate remuneration under swings and roundabouts

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

⁴ The group accepted that this may not capture all VHCCs and may include some cases that would not be classified as VHCCs. However, it provided a sound indication of the effect of VHCCs on the LGFS.

⁵ The 14.7% increase in Table 1 includes all Crown Court starts including Breach of Crown Court orders, contempt proceedings, confiscation proceedings etc.

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

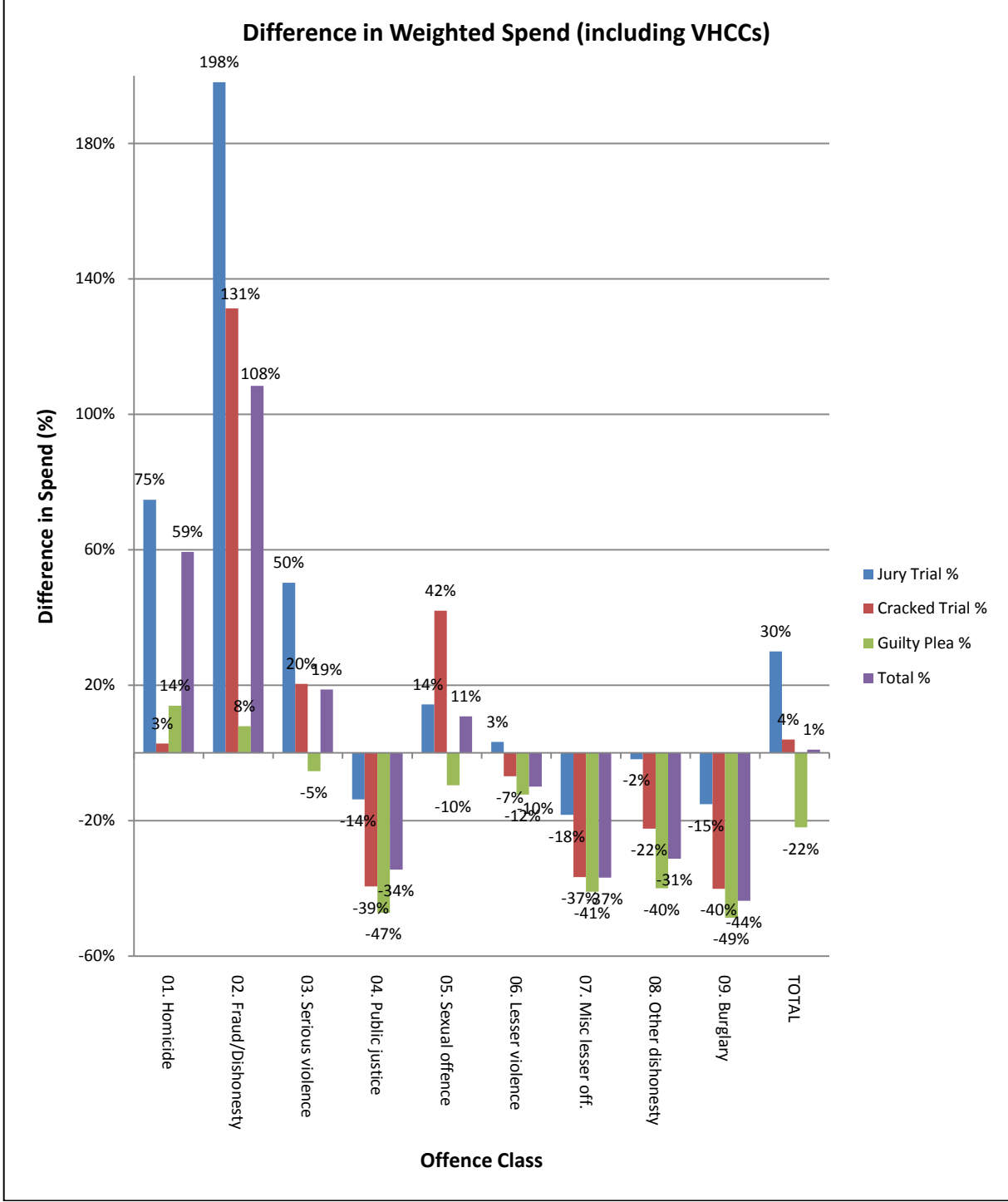
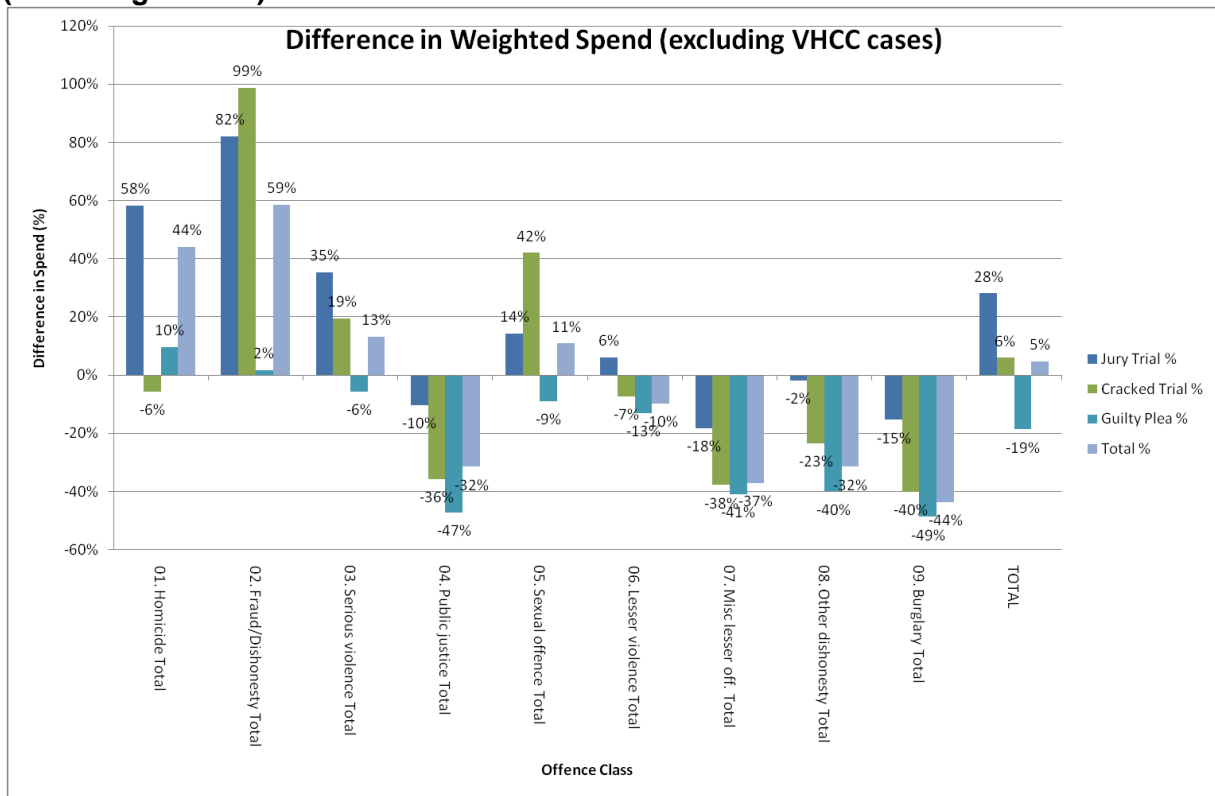


Figure 2 – Movement for Average Weighted Spend by case and offence type (excluding VHCCs)



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

Recommendations

C. *Redistribute within the LGFS to bring certain fees to a cost neutral position when compared with 2007 spend by diverting money from homicide (a), fraud/dishonesty >£30k (G and K) and serious violence (B) trials, to:*

- (a) *guilty plea fees for all offence types or all offence types except homicide (A) and fraud/dishonesty >£30k (G and K) and*
- (b) *cracked trial fees for burglary (E), miscellaneous other offences (H) and public justice offences (I)*

D. *Collect data on the following:*

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

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

Operational Delivery (validation of PPE)

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

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

Recommendations

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

Provision of quality services

24. The group discussed the following issues which had previously been raised by litigators and advocates:
- Decrease in litigator attendance at court to assist the advocate⁶
 - Decrease in litigator attendance on the client
25. The LSC and the MoJ have agreed to keep these issues under review as and welcomes specific examples and evidence of any behavioural changes.
26. The group also recommended that they continue to meet to review any issues in relation to funding, quality and/or operations.

Recommendation

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

Next Steps

25. These recommendations will be incorporated into the final combined report and presented to ministers for consideration.

⁶ The Bar Council has requested that this report note that they maintain, as expressed in their 30 June 2009 response to the MoJ's consultation on the draft Funding Order, that the LGFS be adjusted to allow for separate remuneration for attendance at court.

Summary of recommendations for full review

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

Annex A – Summary of Recommendations for LGFS interim review

A summary of the recommendations under the interim review are as follows:

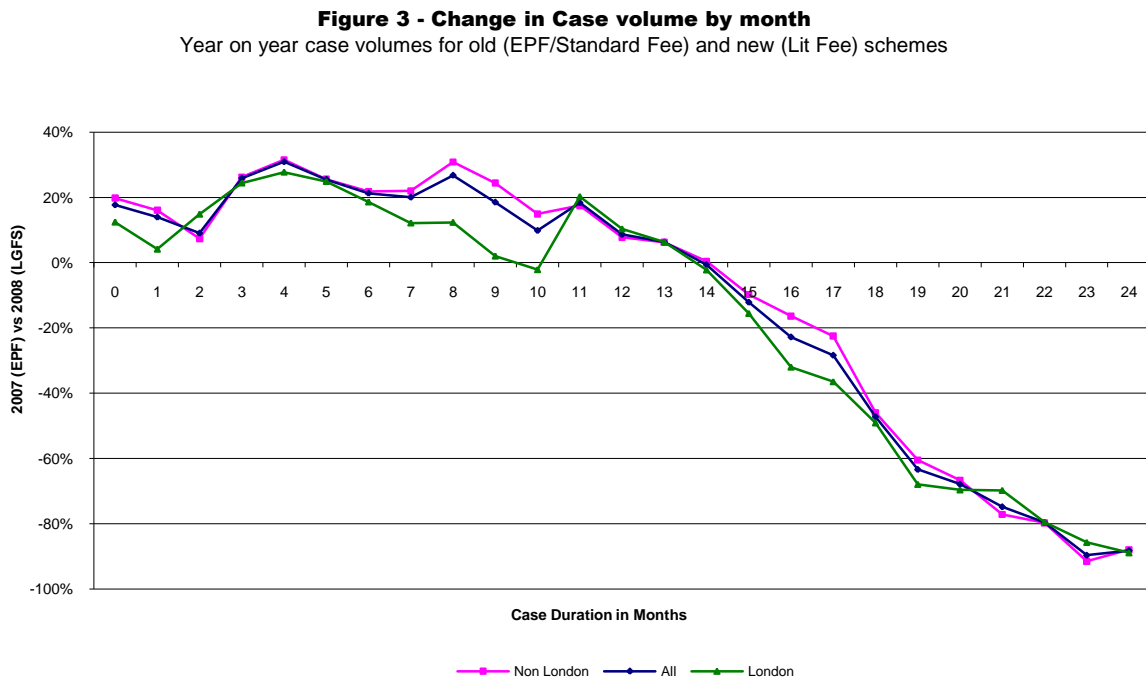
- Raise the payment for appeals against conviction, appeals against sentence and committals for sentence by £50 for each claim.
- Allow all firms to claim for breach of Crown Court order hearings.
- Introduce an additional fixed fee to cover statutory reviews or applications made by the prosecution to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

Annex B – Methodology and limitations

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

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

Figure 3 contains the change in volume by duration from 2007 to 2008 and demonstrates a reasonably static volume increase of approximately 20% up to the 11 month duration point (or cases with duration of up to 12 months)⁷. There is then a steady reduction of cases with duration of >12 months which means that such cases have not yet come through the LGFS. The group therefore agreed to exclude these cases from the analysis as the data would not be comparable with 2007.



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

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

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

⁷ The approximate 20% increase is consistent with HMCS analysis of Crown Court starts.