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The Constitutional Affairs Committee

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Summary

This report examines the Government's proposals for radical reform of the Legal Aid system. The Government plans to change the basis on which Legal Aid is to be procured by introducing a transitional system of fixed and graduated fees for cases (rather than payment on an hourly basis as is the practice now in many areas of legal aid work) as a way of preparing for full competitive tendering for Legal Aid contracts by solicitors.

The Government is rightly concerned about the considerable increase in the Legal Aid budget in recent years. The purpose of these reforms is to find a way of halting these increases and easing the pressure on civil legal aid. To do this, it suggests a wholesale reform of the Legal Aid system, even though the two main areas in which expenditure has risen unsustainably are Crown Court defence work and public law children cases — other areas of expenditure are either stable or, in real terms, declining. Despite the rise in Legal Aid expenditure, in recent years there has been considerable financial pressure on solicitors providing Legal Aid services. Many have stopped doing Legal Aid work.

Legal Aid practitioners and others have criticised the plans for imposing fixed and graduated fees in the transitional period. They are seen as over-complex, rigid and likely to impose unsustainable cuts in the fee income of solicitors' firms. The plans have not been based on adequate data. The most vulnerable clients — those most in need of Legal Aid assistance — are likely to suffer. The plans for a transitional scheme should not proceed.

The Government's goal is to introduce a market-based approach by way of Best Value Tendering. No detailed plans for how this will work have been made public. The Legal Services Commission has not yet thought through how it intends to implement this reform. There is a complete lack of reliable research into the potential effects of competitive tendering on legal aid suppliers and clients. These proposals need to be tried out in a geographically limited area before any general scheme is introduced.

The drive to limit the cost of provision of Legal Aid by ensuring price competitiveness raises questions about the continuing quality of the advice provided by Legal Aid solicitors, especially in areas of specialist expertise. A system of peer review is proposed to ensure the maintenance of high quality. There are concerns about peer review's effectiveness, particularly under a system of competitive tendering.

The Government's plan is to involve fewer but larger solicitors' firms in the Legal Aid system in order to achieve administrative savings. We doubt whether the potential savings resulting from such a move would justify the risks inherent in this change. There is no evidence to suggest that larger providers would necessarily be more efficient and deliver legal aid work at a higher quality than smaller providers.

The impact of the reforms on black and minority ethnic (BME) firms and their clients is one of our main areas of concern. Such firms will be disproportionately disadvantaged by these proposals. The question has been raised whether they would constitute a breach of Race Equality legislation.

The clear breakdown in the relationship between the Legal Services Commission and

suppliers has been a disquieting aspect of the inquiry. This has recently come to a crisis point. Before any successful reform can be implemented, the two sides must rebuild a sense of trust in each other.

Overall, while we support the fundamental aims of the reforms and recognise that there is an urgent necessity to limit Legal Aid expenditure, we believe that the Government has introduced these plans too quickly, in too rigid a way and with insufficient evidence.

1 Introduction

The inquiry

1. On 13 July 2006 Lord Carter of Coles published his long awaited final Report *Legal Aid – A market-based approach to reform* (the Carter report),¹ proposing “radical changes”² to the procurement of publicly funded legal advice and representation. Following a year’s intensive review of the current legal aid procurement arrangements, Lord Carter suggested a staged move from the present mixed system of fixed and graduated fees and payment by hourly rate in different areas of the law to a market-based system of competitive tendering for block contracts, where competition would determine the rates the Legal Services Commission (LSC) has to pay for legal aid work. Competition was to be introduced in April 2009, after a comprehensive move to fixed or graduated fees from April 2007. Very High Cost Cases (VHCC) in the Crown Court would continue to be contracted individually and paid on the basis of hourly rates.

2. Detailed plans for graduated fee schemes for civil and family legal aid for the transitional period between 2007 and 2009 were published alongside Lord Carter’s Report in the consultation paper *Legal Aid: a sustainable future*³ by the Department for Constitutional Affairs (DCA) and the LSC, the body responsible for administering legal aid in England and Wales.

3. We decided to inquire into the reform proposals because: a) legal aid is of pivotal importance as a vehicle for access to justice, b) the proposals for legal aid procurement were radical in the extreme and c) the reaction of the legal profession and other commentators was overwhelmingly hostile. This inquiry builds upon the two legal aid inquiries the Constitutional Affairs Committee in the last Parliament carried out in Session 2003-04, dealing with the adequacy of civil legal aid and the draft Criminal Defence Service Bill.⁴

4. We received almost 300 memoranda - the largest number of submissions of any of our inquiries so far. We took oral evidence in January and February 2007 from the witnesses listed in the back of this Report⁵.

5. We are grateful to our specialist advisers during this inquiry: Professor Richard Moorhead and Professor Steve Martin, both of Cardiff University.

6. Legal aid procurement reform is a moving target. Lord Carter published his final Report in July 2006 and most of the initial proposals have been significantly modified from November 2006⁶ onwards. In addition, important elements of the reform proposals are yet

1 www.legalaidprocurementreview.gov.uk

2 Department for Constitutional Affairs/Legal Services Commission, *Legal Aid Reform: the Way Ahead*, Cm 6993, November 2006, p 4

3 CP 13/06, July 2006

4 Constitutional Affairs Committee, Fourth Report of Session 2003-04, *Civil Legal Aid: adequacy of provision*, HC 391; Fifth Report of Session 2003-04, *Draft Criminal Defence Service Bill*, HC 746

5 See page 90

6 DCA/LSC, *Legal Aid: the Way Ahead*, Cm 6993, November 2006

to be published, such as the details of the competitive tendering processes and the consultation on standard fees for experts. The wealth of consultation papers, response papers, regulatory impact assessments and final proposals emanating from the LSC in rapid succession has made this inquiry a complex process: the frequent changes have been bewildering for legal aid practitioners and, we suspect, the LSC. This speed and complexity is an important indicator of the difficulties posed to the LSC and practitioners in successfully implementing change.

7. Most of the memoranda were sent to us by representative groups and legal aid practitioners across the country, ranging from sole practitioners to some of the largest legal aid firms in England and Wales. With few exceptions, the reactions to the Carter Report and the initial DCA/LSC plans were negative, with most of the submissions focusing primarily on the design of the fixed and graduated fees for the transitional period and the levels at which they were set. Almost all legal aid practitioners informed us that they were contemplating leaving the legal aid market or that they had done so already as a direct response to the proposed reforms. Since we received most memoranda before November 2006, no account could be taken by most of those who wrote to us of the changes to the initial proposals announced after then; however, we have kept in touch with the LSC and major representative groups by way of requests for further written evidence and direct communication in order to assess the more recent proposals.

8. As most of the procurement reform proposals will primarily affect solicitors and Not for Profit organisations rather than the Bar, we focused our inquiry on the impact of the proposals on solicitors. The Bar Council's primary concern as to the impact of the proposals on its members was the eventual introduction of a single graduated fee for defence work in the Crown Court covering both litigators (solicitors) and advocates (mainly barristers). In the absence of detailed proposals for this fee scheme, our inquiry could not sensibly pursue it.

9. In looking into the reform proposals at their varying stages, we concentrated on the guiding principles of the reforms — fixed and graduated fees, competitive tendering and quality maintenance — and their timing and sequence, rather than the minutiae of some of the fee schemes. We believe that the fine tuning of the proposals, in particular the detailed calculation and fixing of fee levels etc, is a matter best left to the LSC and the representative bodies of legal aid practitioners. In focusing on the issues of procurement and remuneration for publicly funded legal work, we decided not to extend our inquiry to the LSC's strategic planning for the development of the Community Legal Service (CLS) but only to comment on this issue where it relates to the procurement reform proposals.

Legal aid and access to justice

10. Legal aid is crucial for access to justice and a fundamental part of a fair criminal trial system. Vera Baird QC MP, Parliamentary Under Secretary of State at the DCA and as such the legal aid minister, has affirmed that “the hallmark of a decent society is good legal advice and representation for the community”.⁷ No country spends more money per capita

7 HC Deb, 6 March 2007, col 1379

on legal aid than England and Wales.⁸ The legal aid system in England and Wales has been held in very high esteem for many decades, but over the last decade it has come under considerable financial strain, in particular through the rapid increase in expenditure for legal aid in serious criminal cases in the Crown Court and child care proceedings in the family courts. This pressure on the legal aid budget has been particularly felt in the areas of civil legal aid. The Constitutional Affairs Committee in the last Parliament criticised this in its Report on the adequacy of civil legal aid in 2003-04.⁹ Nonetheless, in 2005-06 the LSC was able to report a record increase in the number of acts of assistance in civil legal help (i.e. initial advice and assistance in civil matters) and in the number of people helped since the year 2000.¹⁰

11. We welcome the opportunity which the current procurement and remuneration reform proposals offer to address shortcomings and inefficiencies in the current system. Any money saved under the proposals might fund further acts of assistance and increase the number of citizens receiving legal advice. However, we must sound a note of caution. Access to justice and “value for money” for publicly funded legal work, which are major considerations behind the current reform proposals, are not only about the quantity of legally aided acts, but equally about the quality, nature and adequate geographic spread of those acts of assistance.

12. Quality of legal aid work depends in part on an adequate level of remuneration. At the same time, “legal aid, like any public service, has to live within the budget set by Government and deliver value for money”.¹¹ The legal aid system is not put in place to guarantee lawyers a comfortable and secure income. Its focus is, and always has to be, the needs of the client. It would be wrong, however, to dismiss practitioners’ concerns simply as special pleading; if these reforms damage the supplier base, they may also damage clients’ interests. The Access to Justice Committee of the Civil Justice Council stressed in its reply to the DCA/LSC consultation *Legal Aid: a sustainable future* that it:

“[...] considers it of vital importance to recognise that in order to assess how the Carter and DCA/LSC reforms may affect the clients whom legal aid is intended to benefit, it is artificial to separate the interests of the clients from the practitioners delivering advice and representation services. If practitioners cannot continue to provide the service due to adverse changes in the way that the services are procured, then they will continue to leave the legal aid ‘profession’ and there will be no supplier base to serve the clients.”¹²

13. This view was echoed by Sir Anthony Clarke, the Master of the Rolls, when he emphasised in his oral evidence to us that:

8 Lord Carter’s Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p 3

9 Constitutional Affairs Committee, Fourth Report of Session 2003-04, *Civil Legal Aid: adequacy of provision*, HC 391-I, para 148

10 LSC, *Annual Report 2005-06*, p 2

11 Ev 291

12 Civil Justice Council, Access to Justice Committee, *Response to DCA/LSC Consultation Paper ‘Legal Aid: A Sustainable Future’*, Autumn 2006, para 10

“[...] it is obviously very important that these new contractual arrangements do provide reasonable remuneration whatever numbers are arrived at. There have been problems in the past with civil practitioners giving up publicly funded work for economic reasons and it is obviously very undesirable that that should occur.”¹³

14. Legal aid is a public service under significant financial pressure. However, only a properly resourced supplier base will be able to continue to provide the quality legal advice and representation to which legally aided clients are entitled. The impact upon access to justice will be the litmus test for these reforms. Providing effective access to justice is a basic tenet of the rule of law and a core characteristic of the welfare state. The reform proposals must not be allowed to cause irreversible damage to the legal aid system.

The reform proposals

15. The DCA set out its strategy for reform in *A Fairer Deal for Legal Aid* in June 2005.¹⁴ In July 2006 Lord Carter presented detailed proposals to implement this strategy, with the main element of his reform proposals being a phased move to procurement of legal aid work through competitive tendering by legal aid providers for contracts with the LSC on the basis of quality, capacity and price. The market is supposed to set the rates the LSC has to pay legal aid providers for the cases they complete. Tendering rounds should take place in three-yearly intervals.

16. As a transitional measure in order to prepare the legal aid market for the introduction of ‘best value tendering’, Lord Carter and the DCA/LSC proposed to introduce new, or modify existing, fixed or graduated fee schemes for most areas of legal aid work. This covered, in particular, criminal defence work by solicitors in the police station, magistrates’ courts and the Crown Court, civil legal advice (‘legal help’) and advice and representation in family law cases (including child care proceedings), asylum and immigration and mental health cases. Almost all legal aid work would be remunerated per case completed, rather than per hours worked. The initial fixed and graduated fee scheme proposals of July 2006 have been modified and re-published since November 2006, with the final proposals to be published by the LSC this Summer.

17. Some of these fee schemes consist of a fixed fee, such as for police station defence work, where this fee would vary between different boundary areas, with an escape mechanism for exceptionally long and complex cases which would be remunerated on an hourly basis. Other fee schemes are made up of different levels of fees for different procedural steps between the provision of initial advice and full representation at a final court hearing.

18. In order to encourage efficiency by legal aid providers, most fixed and graduated fees would include average costs for lawyers’ travel and waiting time previously paid on top of the hourly rate or case fee. The new fees for defence work in the police station and magistrates’ court in major urban areas would include an element for travel and waiting costs below the average historic travel and waiting costs claimed by providers in order to

13 Q 131

14 DCA, *A Fairer Deal for Legal Aid*, Cm 6993, June 2005

increase the pressure on them in these areas to seek greater efficiencies by changing their working practices. The LSC has also consulted on the implementation of minimum contract sizes for legal aid contracts: providers would have to demonstrate to the LSC that they had completed a minimum value of case work in a specific geographical area in order to qualify for a contract in this or another area. These minimum contract values would vary between police station boundary areas (ranging from £1,000 in very rural areas to potentially £250,000 in London) and would initially only be set for criminal legal aid contracts.

19. Defence work in criminal cases in the Crown Court which are expected to last longer than 40 days (VHCC), would still be remunerated on an hourly rate basis under individual case contracts. Legal aid defence work in these cases would be restricted to a panel of experienced specialist providers bidding for entry to the panel on the basis of quality, capacity and price. Lord Carter's report also envisaged stricter case auditing and more comprehensive and strict timetabling of these cases by the trial judge.

20. Lord Carter and the DCA/LSC initially intended to introduce the new fixed or graduated fee schemes in April 2007 and move to competitive tendering from April 2009. In November 2006, the DCA/LSC announced that the implementation of the new fee schemes would be delayed until October 2007 and that "best value tendering" would start for criminal legal aid in October 2008. Only competitive tendering for civil legal aid contracts would begin in May 2009, as initially envisaged.

21. A central element of the Government's procurement reform plans is the introduction of a robust quality control mechanism for solicitors under the LSC's 'Preferred Supplier' scheme. Only legal aid providers whose legal aid case work was peer reviewed and who attained a sufficiently high quality rating at this review would eventually be allowed to hold legal aid contracts and bid for contracts once competitive tendering was introduced.

22. These complex reforms have been made even harder to understand as a result of the changes made to the initial proposals. We appreciate that many of these changes have been made as result of the DCA and LSC listening to points made by practitioners and others. Nevertheless, the final proposals for reform are still not clear, even though solicitors have had to sign up to new contracts which paved the way for introducing the planned changes. Up to date details of the most current reform proposals are available on the LSC's web site.¹⁵

2 Business background

The Legal Aid budget

23. While the Carter review of legal aid procurement seeks to focus on the issue of value for taxpayers' money in procuring publicly funded legal advice and representation, one of the main objectives of the review and, indeed, the current reform proposals, is to limit the increase in legal aid expenditure and achieve savings of about £100 million by 2010 against the amount spent in 2005-06.¹⁶ As Lord Carter told us: "I think it was clear that the system was under financial pressure and one can never ignore that. That was always there as a sort of *leitmotif* in the background".¹⁷

24. This motive for reform is understandable considering the pressure on the legal aid budget. We therefore support attempts to tackle the sharp rise in expenditure in the 'problem areas' of the legal aid budget (Crown Court defence cases and child care proceedings)¹⁸. As Lord Carter confirmed, easing the pressure on civil legal aid by containing the explosion in spending on criminal legal aid will be the crucial objective of the current reform proposals.¹⁹

Increases in the Legal Aid budget

25. Between 1996-97 and 2003-04, overall legal aid expenditure increased from approximately £1.5 billion to nearly £2.1 billion. While it appears that overall legal aid expenditure peaked in 2003-04 and may even be slowly decreasing (£2.077 billion in 2003-04; £2.028 in 2005-06), two areas of legal aid spending remain of considerable concern in terms of high expenditure: criminal defence in the Crown Court, which now accounts for £696 million compared to £313 million in 1996-97 (with, as yet, no sign of peaking); and litigation and advice in child care proceedings, where gross spending rose from £94 million in 1999-01 to £209 million in 2005-06²⁰ and is projected to rise even further.²¹

26. However, a more complex picture emerges when costs per case in the different areas of the legal aid budget are explored. The LECG study of Lord Carter's proposals of September 2006, commissioned by the Law Society, provides this concise summary of the development of the legal aid budget:

"It is correct that total legal aid costs have increased significantly over the past decade. However, it is also important to recognise that the increases do not apply to all areas of legal aid or over the most recent period. In the past three years, 2002-06, costs in most areas of criminal and civil work have increased only slowly if at all, and on a per case basis have often decreased. During 2002-06 total legal aid cash

16 Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p 3

17 Q 2

18 Rt Hon Lord Falconer QC, Secretary of State and Lord Chancellor, DCA, described these areas in his oral evidence to us "the big drivers": Q 306.

19 Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p 3

20 Figures as supplied by the DCA.

21 *The Times*, 28 December 2006, p 14

payments have risen at a rate of 2.1% per year. Within this CLS [Community Legal Service] payments have risen at 0.7% per year and lower CDS [Criminal Defence Service] payments (excluding crown court) have fallen at - 1.6%. Within lower CDS, police station attendance costs have risen at an average 4.4% per year, but adjusted for higher case loads risen only at 0.4% per year. Magistrates' court costs have fallen by 0.1% per year and per case by 0.5%. After allowing for inflation these each represent net decreases in real per case costs. The main area of increase has been in crown court and higher court costs, which (combining solicitors' and barristers' costs), have increased at an annual rate of 7.4%, or 8.1% per case. LSC administration costs have also increased at an annual rate of 10.6% during the period.”²²

27. Similar trends were identified by Professor Ed Cape, of the University of the West of England, and Professor Richard Moorhead, our specialist adviser, in their study of cost drivers in the criminal legal aid budget completed in July 2005.²³ We were particularly struck by the rise in Crown Court expenditure since 1997, which Professor Cape and Professor Moorhead described as “little short of dramatic”.²⁴ When we asked Professor Cape about this rise in Crown Court costs, he informed us that:

“The only area of major increase in expenditure has been Crown Court legal aid and that has been true over the past five or more years.[...] What we found with the Crown Court was that quite a large part of the increase could be accounted for by an increase in volume, an increase in the number of claims, and since most defendants in the Crown Court get legal aid that meant that there was an increase in the number of cases appearing before the Crown Court and that was obviously exerting upward pressure on expenditure. The average cost per claim did not and has not significantly increased; it has increased, but not that significantly.”²⁵

The survey by Professor Cape and Professor Moorhead found that the average costs per case in the Crown Court where solicitors were paid on an hourly rate basis had only increased at a rate of 2.7% per annum in the period between 2001-02 and 2004-05 and thus more or less in line with inflation.²⁶ The LSC confirmed these findings, when it wrote in its *Crime Change Programme Q&As* of 2 April 2007 that “we are generally satisfied that whilst costs have risen because volumes have risen, in fact unit cost has remained fairly stable”.²⁷

28. The picture in the other problem area of legal aid, child care proceedings (sometimes also referred to as Public Law children cases), is less clear; indications point to an increase in average costs per case as the cause of rising expenditure: according to the DCA, volumes

22 LECG, *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary*, September 2006, para 1.5 (p 3), www.lawsociety.org.uk

23 Ed Cape/Richard Moorhead *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (London, July 2005)

24 *Ibid*, p 53

25 Q 104

26 Ed Cape/Richard Moorhead, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (London, July 2005), p 55

27 LSC, *Crime Change Programme Q&As*, April 2007, p 35, www.legalservices.gov.uk

in child care cases have grown by 37% since 1999-2000, while expenditure has increased, in real terms, by 77%, implying a significant rise in cost per case.²⁸

29. As opposed to spending on publicly funded Crown Court defence work and child care proceedings legal aid, legal aid expenditure for non-family civil legal aid, especially in the categories of social welfare law, has not increased over the last decade: gross cash spending on civil legal help (i.e. legal advice, excluding representation in court) fell from £320 million in 2003-04 to £227 million in 2005-06, and now is just slightly above the level of £210 million in 2001-02.²⁹ The Civil Justice Council's Access to Justice Committee, in its response to the initial DCA/LSC consultation on the Carter proposal of July 2006, was of the opinion that no clear case had been made in either the Carter report or the DCA consultation for a pressing need for reform of civil legal aid; it concluded that:

“[...] the proposals, if implemented, carry greater risks in terms of damage to civil legal aid provision, and access to justice, than the minimal financial improvements to the overall legal aid budget.”³⁰

While these comments predate the modification of the proposals for new civil fee schemes, they still make an important point in calling for a risk-based approach to legal aid procurement reform. We agree with the Civil Justice Council.

30. While there is no room for complacency about the cost of legal aid even where expenditure in certain categories has peaked or is declining, reforms should first tackle those areas of legal aid where expenditure is continuing to rise unsustainably, especially where these reforms are radical in their nature, untested and associated with an unpredictable risk to the stability of the legal aid market. A risk-oriented, staged approach to procurement reform is required, where the expected benefits to the legal aid system are carefully balanced against the risks in each separate area of provision.

Identifying the major cost drivers

31. In order to assess the current reform proposals it is imperative to identify the real cost drivers in the two high cost areas of legal aid. Only where reforms tackle these cost drivers can they have the potential of delivering a long-term sustainable legal aid budget and be justified in the light of the considerable risk to the viability of a high quality legal aid supplier base.

32. However, neither the precursor to Lord Carter's report, the DCA command paper: *A Fairer Deal for Legal Aid* of July 2005, nor the Carter Report itself contain a thorough analysis of the factors leading to the increase in legal aid expenditure for Crown Court and child care cases. Professor Cape told us that there was inadequate research on cost drivers on which Lord Carter could have based his Report:

28 DCA, *A Fairer Deal for Legal Aid*, Cm 6591, July 2005, , para 2.37

29 Figures supplied by the DCA

30 Civil Justice Council, *Access to Justice Committee Response to DCA/LSC's Consultation Paper 'Legal Aid: a sustainable future'*, para 13

“[...] Carter did not really conduct any research to try to understand in any greater detail why legal aid costs have been increasing and that is a fundamental problem. If you do not understand why they have been increasing and do not understand the true nature of that increase – because, although in overall terms it is quite significant, the vast majority of that comes from the Crown Court and quite a large proportion of that increase is accounted for by a very small number of cases - if you do not understand why it has been going up, I do not understand how you can know whether the proposed solutions are going to solve the problem. In general terms my view is that the proposed solution will not solve the problem because the fundamental causes have not been understood, let alone been tackled.”³¹

33. These comments were echoed by Professor Judith Masson, of Bristol University, a family law expert and member of the Family Justice Council, who said with regard to cost drivers in child care proceedings:

“The real difficulty in relation to public childcare proceedings is that the Legal Services Commission and Lord Carter know much, much less about this system than they know about the criminal system. Lord Carter did a lot less work. He did not even speak to the Family Justice Council [...], it was a great shame that he only sent questions rather than came to speak to the Family Justice Council and the questions suggested that he had a very limited understanding of the system. I have to say that goes too far for the childcare proceedings review that the DCA commissioned prior to Carter out of *A Fairer Deal for Legal Aid*. They really did not understand how care proceedings operated. They did not understand the sort of proceedings that there were. They had no idea how much they cost. [...] I would reiterate the things Professor Cape has said about lack of knowledge in the Legal Services Commission about care proceedings’ costs.”³²

34. We were not surprised to hear those comments. The terms of reference for Lord Carter’s review did not go beyond the immediate issue of devising a new procurement system for publicly funded legal services and therefore severely limited the scope of his review. Much of our evidence made this point. We agree with the comments submitted to us by Alderson Dodds Solicitors:

“The extremely narrow scope of its terms of reference to procurement in our view has made it something of a sterile exercise. No consideration has been given to the external factors affecting the cost of Legal Aid. No consideration has been given to alternative sources of funding, such as a diversion of local authority and charitable funding away from the Not for Profit sector to the more cost effective front line providers. Defendant Cost Orders and alternative directions for funding of experts are all matters which could usefully have been considered in the wholesale review which is needed.”³³

31 Q 104

32 Q 122

33 Ev 205

35. The Constitutional Affairs Committee in its 2003-04 inquiry into the Criminal Defence Service Bill and the re-introduction of means testing for criminal legal aid in the magistrates' court lamented the paucity of available research into the cost drivers of criminal legal aid expenditure. The Committee hoped that "the Fundamental Legal Aid Review will enable the Department [for Constitutional Affairs] to identify the major factors which have caused the increase in the Criminal Defence Service expenditure".³⁴ That hope has not been realised.

36. We received a great deal of largely anecdotal evidence about the cost drivers in the legal aid budget. Increases in case volumes, the number of criminal offences on the statute book, complexity of procedural law and the increase in the number of expert assessments in care proceedings were only some of the reasons cited for the increase in legal aid spending over the last decade.³⁵ Views differed as to whether the procurement and remuneration reform proposals would address the major cost factors.³⁶ In the absence of comprehensive qualitative and quantitative research into the true cost drivers in legal aid expenditure on Crown Court and care proceedings, we are not able to judge whether the reform proposals will indeed tackle the major cost drivers and lead to a more sustainable development of the 'problem areas' in the legal aid budget.

37. However, we understand that certain factors widely believed to be important cost drivers in the Crown Court and child care legal aid budget, such as rising legal aid expenses for expert evidence, are about to be examined by the DCA and LSC through further research.³⁷ We also noted with interest the promising positive results of the magistrates' courts tests in 2006 which formed part of the overall *Criminal Justice: Simple, Speedy, Summary* Review by the DCA, the Home Office and the Attorney General's Office: this programme led to a 70% reduction in first hearing adjournments in the magistrates' courts and significantly increased the number of cases where guilty pleas were entered at the first hearing and which could then be dealt with on the day of that hearing.³⁸ When introduced nationally, these reforms to case management in the magistrates' courts may have a beneficial impact on legal aid expenditure.

38. The major cost drivers in the criminal legal budget and in the budget for child care proceedings are not fully understood. We believe that radical reforms of the criminal and civil legal aid system, intended to put legal aid on a more sustainable footing, can only be planned on the basis of a fuller understanding of the actual reasons for the increase in expenditure in the areas of concern. Necessary qualitative and quantitative research into the cost drivers in criminal legal aid and child care proceedings needs to be carried out as a matter of urgency.

34 Constitutional Affairs Committee, Fifth Report of Session 2003-04, *Draft Criminal Defence Service Bill*, HC 746-I para 40

35 E.g. Q 154 [Lord Justice Thomas]; Ev 284 [Sir Mark Potter P]; Ev 195 [Campbell Sansbury Solicitors]

36 E.g. Q 155 [Lord Justice Thomas], Q 181 [Professor Cape]

37 LSC, *Legal Aid Reform: Family and Family Mediation Fee Schemes*, consultation paper, March 2007, paras 2.56-2.58

38 DCA, *Delivering Simple, Speedy, Summary Justice – an evaluation of the magistrates' courts tests*, March 2007, www.dca.gov.uk

The supplier base

The decline in the supplier base

39. Change in the legal aid supplier base is already a matter of considerable concern. Various studies commissioned in the context of the Carter reform discussions confirm this. The number of solicitors' offices holding a civil legal aid contract with the LSC is in steady decline: while 4,854 solicitors' offices held civil contracts in 2001, only 3,632 firms held contracts in March 2006, a decline of about 25%. This trend, as the LSC noted in its Annual Report 2005-06, is a continuing one.³⁹ In some of the civil law contract categories the decline is even more marked (N.B. A firm usually holds LSC contracts for more than one category of the law):

Civil contracts by category								
		00/01	01/02	02/03	03/04	04/05	05/06	change
Family	4243	4039	3591	3595	3273	3118	2887	-32%
Housing	840	788	707	662	598	604	587	-30%
Welfare Benefits	673	636	588	556	506	483	459	-32%
Debt	618	549	515	475	418	405	401	-35%
Immigration	483	548	591	644	604	498	367	-24%
Employment	403	373	316	288	264	238	216	-46%
Mental Health	334	355	352	355	317	309	283	-15%
Clinical Negligence	250	251	300	295	304	290	273	9%
Consumer	193	151	113	94	68	49	40	-79%
Education	35	44	52	61	58	61	55	57%
Community Care	27	38	49	62	58	72	76	181%
Public Law	9	26	28	39	34	46	46	411%
All (excl person. Injury)	8108	7798	7202	7126	6502	6173	5690	-30%

40. Legal aid supplier groups provided graphic examples of the present composition of the specialist supplier base and the decline in the number of cases dealt with. The family law solicitors' association Resolution, for example, noted that not only had family legal aid contracts reduced by over a third between 2000 and now, but also that matter starts (i.e. the

39 LSC, *Annual Report 2005-06*, p 18; see also R Moorhead, "Legal aid and the decline of private practice: blue murder or toxic job?", (2004) 11 *International Journal of the Legal Profession*, pp 159 ff

beginning of cases) had declined from 410,916 cases in 2000-01 to 283,274 in 2005-06.⁴⁰ This represented a huge decline in access to justice for people with family problems as firms gave up legal aid work because of the poor rates of pay, the bureaucracy and costs of administering legal aid contracts and difficulties in recruiting and retaining suitably qualified staff. The Mental Health Lawyers Association (MHLA) wrote that “the number of Law Society Panel Mental Health Panel Specialists has declined by close to 25% since 2000, whilst those mentally unwell clients requiring representation at Mental Health Review Tribunals has risen by over 10% in the same period”.⁴¹

41. The decline in the number of solicitors’ offices holding a criminal legal aid contract was not as marked as that on the civil and family side, but still declining about 10% from 2,925 in 2000-01 to 2,608 in 2006.⁴²

42. Whilst the supplier base has contracted, the LSC has emphasised that in 2005-06 it had financed more acts of assistance at civil and family legal help (i.e. initial advice and assistance) than at any point since 2000-01.⁴³ The number of acts of legal help rose to almost 710,000. The number of acts of representation in court proceedings, however, has continued to decline.

Acts of Assistance (civil) in thousand					
	2001-02	2002-03	2003-04	2004-05	2005-06
Civil & Family Representation	225	205	215	202	195
Civil & Family Legal Help	646	657	590	560	710
Immigration and Asylum	134	156	120	94	91

The LSC stated that “access [to justice] is about the numbers of people helped, and the way in which they use those services, rather than the number of provider organisations”.⁴⁴ That is true up to a point, but the geographical distribution of legal advice and assistance is also important. The evidence we received during the course of our inquiry has increased our concerns as to the current coverage of publicly funded legal services throughout the country. It suggests that some areas of England and Wales, including rural and some urban areas, do not have adequate supply of publicly funded legal services.

43. The Director of the Advice Services Alliance, Richard Jenner, for example, informed us that provision in social welfare law (including housing, debt, welfare benefits and community care) remained patchy in different areas of the country and in some areas even “fairly poor”; where there were providers, they frequently lacked capacity under their

40 Ev 81

41 Ev 207

42 Figures supplied by the DCA.

43 LSC, *Annual Report 2005-06*, p 21

44 Ev 292

contract to deal with demand in their local area.⁴⁵ Nicola Mackintosh, a Legal Aid solicitor, confirmed this: “legal aid practitioners in social welfare law regularly turn away several clients each day” and “these clients are not taken up by other suppliers as they are already at full capacity”.⁴⁶ This assessment was echoed by Richard Charlton, Chair of the MHLA, talking about mental health law, where he identified areas such as East Anglia, Hull and North Yorkshire as areas of unmet need.⁴⁷ In criminal legal aid, Rodney Warren, the Director of the Criminal Law Solicitors’ Association, pointed to shortages in the south-west of England, in south-west Wales and the north-east of England.⁴⁸ Other witnesses added Cumbria and certain parts of Wales to this list.⁴⁹

44. David Emmerson, Chair of Resolution’s Legal Aid Committee, told us about the balance between supplier base and demand in family law:

“If you plot a map round the country of all the different contracts in family law there would be reasonable coverage, but in places like East Anglia and Wales there would be a fairly clear lack of provision, but the real issue is what the capacity of those existing organisations is. Our experience is that firms are not able to use all of their allocation of matter starts, they are not able to cope with the volume of work they are getting in to their offices because they cannot afford to expand sufficiently to meet the local need, so, in my view, it is not a question of advice deserts, it is a question of capacity throughout the country as a whole, and I think throughout the country there are problems.”⁵⁰

Susan Harlow from HCL Hanne & Company and Jenny Edwards, from the East London firm T.V. Edwards, both confirmed this analysis and stressed that their large firms routinely had to turn away between 20% and 75% of family cases⁵¹ and, in the case of T.V. Edwards, 40-50% of those approaching the firm for advice in social welfare law.⁵²

45. While the LSC informed us in its supplementary evidence that there were currently no signs of a significant increase in the number of legal aid practitioners leaving the market,⁵³ numerous providers who submitted evidence to this inquiry indicated that under the fee levels as proposed by Lord Carter and the DCA/LSC they would consider giving up legal aid work. The mood of many legal aid providers appears to be captured by Jacqueline Everett’s comments in her written submission to us:

“20 years ago, in my view, this country’s legal aid system was unparalleled and one I felt both proud and privileged to be part of. I am 50 this year, as indeed are many of my colleagues working in legal aid firms (described by the law society as the “aged

45 Q 174

46 Ev 106

47 Q 202

48 Q 274

49 Q 206 [Roy Morgan] and Q 181 [Adam Griffith]

50 Q 206

51 Ev 230

52 Ev 141

53 Ev 301, 302

supplier base”). We feel tired, demoralised, betrayed and angry. We have jumped through all the hoops set by the Legal Services Commission have set; they are now changing the rules yet again and expect us to continue to invest yet more time and money in a system which will not work. I believe that the Carter proposals, together with the LSC’s interpretation of them will mean that it will be impossible to offer clients an adequate (let alone high quality) service. I will give up my legal practice. I will not go into another area of law, as this was not why I became a solicitor: I will probably look for a teaching post. I know from speaking to other legal aid practitioners, that they are also considering giving up. There is no-one coming up behind us; a pool of experienced and dedicated people will be lost. I do not ask for sympathy for myself or for them; we will no doubt find better paid jobs with shorter hours and better conditions of employment. My concern is that the disadvantaged and socially excluded will not have access to justice.”⁵⁴

46. Such anecdotal impressions fall short of reliable statistical evidence of current undersupply in certain categories of legal aid in some areas of the country or of a rise in the number of legal aid lawyers leaving the system. Yet, they indicated that the reforms may lead to a further decline in the number of legal aid providers with potentially severe effects on the provision and availability of publicly funded legal services in certain areas of the country and particular categories of legal aid work.

The fragility of the legal aid supplier base

47. The legal aid supplier base across the country is generally economically vulnerable. The LECG study⁵⁵ on the Carter proposals and the two studies commissioned by the LSC from Otterburn Legal Consulting⁵⁶ came to the conclusion that most criminal legal aid firms operate on the edge of their profitability, as was recognised in the Carter Report.⁵⁷ The overall assessment of the current situation was that the financial position of many criminal suppliers was highly fragile. Some firms were financially strong, “however these are very much in the minority”.⁵⁸

48. Because of the general lack of management information and reliable data on firm income etc, which was remarked upon by Lord Carter,⁵⁹ Otterburn Legal Consulting, in its analysis, primarily relied on a very limited dataset to assess current, and project future, profitability, largely drawn from 38 questionnaires from the top 100 criminal law firms. Andrew Otterburn therefore cautioned that “these firms are not representative of suppliers generally – they are amongst the largest firms, and most successful in terms of profitability.

54 Ev 99

55 LECG, *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary*, September 2006, www.lawsociety.org.uk

56 Otterburn Legal Consulting, *Lord Carter’s Review of Legal Aid Procurement – 2005 and 2006 Surveys of Crime Firms*, June 2006; Otterburn Legal Consulting, *The impact on the supplier base of reductions in criminal fees from April 2007*, November 2006, www.dca.gov.uk

57 Lord Carter’s Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p43

58 Otterburn Legal Consulting, *The impact on the supplier base of reductions in criminal fees from April 2007*, November 2006, p 1, www.dca.gov.uk

59 Lord Carter’s Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p iii

Whatever the results for these firms, the profitability of the supplier base generally is likely to be worse”.⁶⁰

49. On the basis of a wider survey of mainly smaller legal aid firms in 2003, Otterburn concluded that in 2003 publicly funded defence work had a profit margin of 15% compared to -3% for publicly funded civil and family work.⁶¹ In 2005, data for the smaller, elite group of the 100 top criminal law firms indicated that profit margins for criminal legal aid work were down to 4.5%. Otterburn observed therefore that “a like for like comparison would probably have seen an even greater reduction”.⁶² Based on the data of Otterburn’s first study on criminal legal aid firms’ profitability, the LECG in their study arrived at profitability ranges of between -6% for firms with between one and five fee earners and 2.3% for firms with 13-40 fee earners; firms with more than 40 fee earners only achieved a profit margin of 1.0%.⁶³

50. Civil legal aid suppliers are generally believed to be in an even more economically precarious position, as civil legal aid work has been found to be even less profitable than criminal legal aid work.⁶⁴

51. Where the legal aid supplier base is generally economically fragile and in continuing, significant decline, reforms to legal aid remuneration and procurement must not lead to a further acceleration of this decline and reduction of the profitability of legal aid work.

60 Otterburn Legal Consulting, *The impact on the supplier base of reductions in criminal fees from April 2007*, November 2006, p 13, www.dca.gov.uk

61 *Ibid*, p 11

62 *Ibid*, p 12

63 LECG, *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary*, September 2006, para 4.49, www.lawsociety.org.uk

64 Otterburn Legal Consulting, *The impact on the supplier base of reductions in criminal fees from April 2007*, November 2006, pp 9, 11, 37, www.dca.gov.uk

3 Fixed and graduated fees in the transitional period

52. A main element of Lord Carter's and the DCA/LSC's proposals for legal aid procurement and remuneration reform is an almost comprehensive move away from payment for publicly funded legal services on the basis of hourly rates set by the LSC to a market-based system. As a temporary arrangement to prepare for this, the LSC will establish a system of remuneration on a *per case* basis by fixed or graduated fees. It is planned that this arrangement will last only until the introduction of competitive tendering in October 2008 and April 2009. This change to new fee schemes and remuneration arrangements attracted the most immediate and sustained criticism from legal aid providers; most of the memoranda we received from legal aid solicitors and representative groups complained about the too low levels of the proposed fee schemes and the lack of, or insufficient, graduation of the new fee schemes. While most of the memoranda and the oral evidence predate the current modified DCA/LSC fee scheme proposals, we are convinced that the criticisms voiced in these submissions, by and large, remain valid.

The move from hourly rates to fees per case – a continuing process

53. The current proposals for new or modified existing fixed or graduated fee schemes is only one step in what has been a continuing process for the last one and a half decades. Fixed or graduated fees are not Lord Carter's invention; standard or graduated fee schemes have been in operation for different areas of legal aid for some time. Sir Michael Bichard, Chairman of the LSC, said: "we must [...] not give the impression that somehow we are starting this process with Carter. What we are actually doing is developing the journey, if you like, which is going to be learning from tailored fixed fees in these other innovations".⁶⁵

54. Solicitors' defence work in the magistrates' courts since 1993 has been subject to a standard fee scheme: it is paid in three categories (guilty pleas, contested or cracked trials and committal proceedings to the Crown Court) with two levels of standard fees, a lower and a higher standard fee. The level of the standard fee is determined by the amount of work a solicitor carries out on the case (on the basis of an hourly rate calculation). Up to a certain case-value the lower standard fee is payable, beyond this threshold the higher standard fee will be paid. If the solicitor's costs go above the limit set for the higher standard fee, remuneration will be on an hourly rate basis, calculated after the event. This fee scheme has been considered as successful in containing magistrates' courts legal aid spending.⁶⁶

55. Similarly, in the Crown Court, since 1988 there has been a standard fee scheme for litigators (i.e. solicitors), which, however, because of too wide escape clauses, has not been applied widely.⁶⁷ For defence work of advocates (i.e. barristers and solicitor-advocates) in

65 Q346

66 Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p25

67 *Ibid*, p 26

the Crown Court, a graduated fee scheme has been in application since 1997 and was extended to apply to most cases, apart from Very High Cost Cases expected to last longer than 40 days, in October 2005. This fee scheme uses a formula made up of a base fee which varies with advocate type and offence type, uplifts for length of trial, a daily refresher and uplifts for the number of pages of prosecution evidence and prosecution witnesses. It includes a range of additional payments to cover smaller events (such as sentencing hearings) and preparation activities (such as the viewing of video tapes).⁶⁸

56. In the family courts, a graduated fee scheme for advocacy by barristers in both public law and private law family law matters has been in operation since 2001 but does not extend to legal aid work by solicitors.

57. The most comprehensive fixed fee scheme in operation so far is the Tailored Fixed Fee Scheme which was piloted on a voluntary basis in 2004 and became mandatory for solicitors for most areas of family and civil legal help (i.e. advice and assistance but not litigation in the courts) in April 2005. It excluded only asylum and immigration cases and currently remains voluntary for mental health law cases. Under this scheme legal help cases are paid on a per case basis rather than an hourly rate calculation. The per case rate is different from solicitors' firm to solicitors' firm as it is calculated on the basis of average cost per case in each individual solicitors' firm in 2003-04 (with a 2.5% inflation increase per annum) - the "*Tailored*" element. These fees exclude disbursements and the costs for travel and waiting time by the solicitor, which are paid on an hourly rate basis. The same applies to the current standard and graduated fee schemes in the magistrates' courts, Crown Court and the family courts.

The new fee schemes

58. Lord Carter and the Government regarded those legal aid remuneration schemes that were still based on hourly rates as potentially rewarding inefficient providers and not providing sufficient economic incentives for efficient providers. A similar reasoning applies to planned replacement of the current Tailored Fixed Fee Scheme for civil legal help: because the individual firm's rates per case are set according to that firm's average case cost as calculated on the basis of hourly rates for the year 2003-04, it may be that two firms which work to a comparable standard of quality and have a very similar case mix charge different rates per case. This may result from one firm working more efficiently than another and achieving lower average case costs in 2003-04. Alternatively, the differences in average case costs may be justified by differences in case complexity and client type. Unfortunately, the LSC has no reliable way of discerning between these two situations.

59. The Carter Report says, under the plans for the transitional period:

“There should be a wholesale move towards fixed pricing for work. Fixed pricing rewards efficiency and suppliers who can deliver increased volumes of work.

68 *Ibid*, p 27

However, pricing should be graduated for more complex work so that cases genuinely requiring more expertise and effort are priced fairly.”⁶⁹

Lord Carter and the DCA/LSC initially published fee scheme proposals for solicitors’ publicly funded defence work in the police station and the courts, for general civil legal help, mental health and asylum and immigration work as well as family work.⁷⁰ These fee schemes were based on a fixed fee per case; the mental health, asylum and immigration and family fee scheme proposals envisaged different fees for different stages in the progress of a case up to a court or tribunal hearing. The fee schemes provided for an escape clause to payment by hourly rates where the value of the work, when calculated on an hourly basis, exceeded four times the value of the fixed fee for the case or stage of the case. The escape clause for the police station scheme was set in Lord Carter’s report on a basis of hours worked and varied between 24 hours in London and 13 hours in Humberside.

60. These initial plans were partially withdrawn following a consultation process in the autumn 2006 and new proposals for the different fee schemes were published by the DCA/LSC.⁷¹ The main changes are modifications to fee levels for the family fee schemes and the general lowering of the escape clause to three times the fixed fee value and twice the value for solicitors’ preparation of child care court proceedings (level 3 of the Care Proceedings Graduated Fee Scheme).⁷² For this latter category of legal aid work, the current LSC proposal also provides for four regional differentiations in the fee levels.⁷³

61. For solicitors’ defence work in the magistrates’ court, the Government decided in November 2006 only to revise the current standard fee scheme for urban areas by including in the fee a reduced element for travel and waiting, which are currently remunerated separately on an hourly basis. For solicitors’ defence work in the Crown Court, Lord Carter suggested a graduated fee scheme similar to the present fee scheme for advocacy in the Crown Court, with base fees according to offence type, uplifts according to the length of trial and, in certain cases, further uplifts for the number of pages of prosecution evidences and the number of prosecution witnesses.

62. Most witnesses agreed that they had no objection in principle to legal aid remuneration on the basis of graduated fees rather than hourly rates. The only qualification of this general agreement was that the fees should be appropriately graduated so as to reflect as much as possible the complexity of a case.⁷⁴ Sir Mark Potter, President of the Family Division of the High Court, called the initial DCA/LSC proposals for the family fee schemes “a betrayal” of Lord Carter’s general suggestions in the sense that these proposals

69 *Ibid*, p 4

70 In the Carter report and the simultaneous DCA/LSC consultation paper *Legal Aid; a sustainable future*, CP 13/06, July 2006

71 DCA/LSC, *Legal Aid Reform the Way Ahead*, Cm 6993, November 2006

72 DCA/LSC, *Legal Aid Reform: the Way Ahead*, Cm 6993, November 2006, p 27; LSC, *Legal Aid Reform: Family Law and Family Mediation Fee Schemes*, March 2007, p 3; LSC, *Legal Aid Reform: Final Immigration and Asylum Fee Schemes*, March 2007, p 9; LSC, *Police Station Reforms: Boundaries, Fixed Fees, and New Working Arrangements*, February 2007, p 13

73 LSC, *Legal Aid Reform: Family Law and Family Mediation Fee Schemes*, March 2007, p 10

74 Qq 281, 282 [Rodney Warren]; Q 223 [David Emmerson]; Q 192 [Richard Jenner]

did not envisage a proper graduation according to case complexity, which he thought Lord Carter had in mind when writing his report.⁷⁵

63. Similarly, the legal profession criticised the relative rigidity and absence of a proper graduation of the fixed fee for police station work, civil legal help and family legal aid work. David Emmerson, Chairman of the Legal Aid Committee of the family solicitors' association Resolution, summed up what we were told by many providers: "as an organisation, we do not have a problem with fixed fees. Fixed fees can be advantageous but they have got to be pitched."⁷⁶

64. The Government countered that:

"[...] in order for efficiency to be fully encouraged, the fees must generally be as simple as possible, without an array of 'bolt-ons': if additional payments were available as a matter of course in more expensive cases, there would be far less of an incentive to seek more efficient working practices. Fixed and graduated fees revolve around the concept of 'swings and roundabouts' – that is, a case that is more expensive than the standard fee to a firm will be balanced, in the long run, by one that is cheaper."⁷⁷

65. We agree with Lord Justice Thomas that simple payment by time for legal aid work encourages inefficiency on the part of the provider,⁷⁸ even where fees are subject to strict taxation and auditing. However, it is readily apparent that a per case remuneration system based on a single fixed fee without further graduation or fine-tuning to match case complexity, except for an escape clause set at a relatively high level (three times the fixed value), will tend to reward large providers dealing with a high volume of straightforward cases, benefiting from the swings and roundabouts effect inherent in fixed fees.

66. Under this remuneration model, a significant number of smaller firms and sole practitioners would have to grow, merge and significantly change working practices and case mix in order to create the case volume and make sure that the fixed fee system could work for them. Where they would not succeed in this, they might be forced to leave the legal aid market. However, not everywhere is the legal aid market suited for the development of large providers. We have particular doubts with regard to the area of social welfare law. The introduction of flat fixed fee schemes for police station work, civil legal help, mental health, asylum and immigration and family legal aid work may thus have unintended adverse consequences for the quality and availability of publicly funded legal services across the country.

Flat fixed fees and the quality of legal aid

67. In Scotland after the introduction of rigid fixed fees for criminal legal aid work in summary cases in 1999, as Professor Frank Stephen, of Manchester University, informed us, firms which were heavily involved in this kind of legal aid work dramatically increased

75 Q 138

76 Q 223

77 DCA/LSC, *Legal Aid Reform: the Way Ahead*, Cm 6993, November 2006, pp 8/9

78 Q 165

the number of cases they undertook. He predicted a similar development in England and Wales (certainly in criminal legal aid work in the police station), once the fixed fee schemes were introduced. However, Professor Stephen also noted that following the introduction of the fixed fee scheme in Scotland, legal aid defence lawyers dramatically reduced the number of interviews they conducted with prosecution witnesses in preparation for the eventual trial (the ‘precognitions’). Generally, Professor Stephen’s research suggested that the fixed fee scheme led to an overall reduction in client contact and the amount of case preparation defence lawyers undertook. While he did not make a judgment about the quality of the Scottish defence lawyers’ work either before or after 1999, he predicted that the introduction of fixed pricing for legal aid work in England and Wales “would result in similar behaviour of English legal aid specialists”.⁷⁹

68. Based on this experience we are concerned that while flat fixed pricing per case may indeed lead to an increase in the number of people helped, both in criminal and civil legal aid, this increase may be achieved at the expense of quality of legal advice and representation provided.

69. Significant diminution in the quality of legal aid advice and representation may or may not be picked up by peer review. Reliance on case volume as a precondition of adequate remuneration for legal aid work should therefore be limited in order to prevent a reduction in quality as a result of mass provision of legal advice by providers seeking to increase case volume to deal with the swings and roundabouts inherent in fixed fee schemes with little graduation.

70. We have no objection in principle to a system of graduated fees provided that system adequately captures the amount of work a legal aid supplier has to undertake to provide high quality advice and representation. For most kinds of legal aid work, such a system will require appropriate graduation.

Protecting vulnerable clients

71. A constant warning we received throughout our inquiry was that the relatively inflexible new fee schemes would reward suppliers for handling primarily simple cases. This might increase the risk of legal aid providers engaging in ‘cherry picking’ of simpler cases to the detriment of vulnerable clients, such as those with little command of English or who are disabled, who might require more attention and time from the legal aid practitioner dealing with their case.⁸⁰

72. The Law Society has warned us that:

“[...] the proposals will adversely affect access to justice for disabled clients. Casework for disabled clients can be extremely time consuming as more assistance may be required, e.g. in the taking of instructions and explanation of options as well as additional expenses such as sign language interpreters or home visits. Within a fixed fee structure there is a risk that suppliers will have less economic incentive to take on these cases. Even those suppliers who regard this work as part of their public service

79 Ev 290

80 Q 245 [Richard Miller]

duty may find that economic constraints will reduce the number of disabled clients they can assist.”⁸¹

Similarly, the Civil Justice Council’s Access to Justice Committee described the expected effect of the civil legal aid reforms on citizens with mental health needs or disabilities as “potentially discriminatory”.⁸²

73. We asked the LSC about the risk of cherry picking and the consequences for vulnerable clients; they told us that they were confident that the introduction of the new fee schemes would not lead to cherry picking of simpler cases by legal aid providers in order to remain economically viable. Based on case mix monitoring after the introduction of the present Tailored Fixed Fee Scheme for civil legal help, the LSC concluded that cherry picking had not occurred when remuneration in civil cases moved away from hourly rates to fixed fees per case under the Tailored Fixed Fee Scheme in 2005.⁸³ We fear, however, that the introduction of the Tailored Fixed Fees in 2005 may not be comparable to the situation civil legal aid provider are faced with now: while the Tailored Fixed Fee Scheme was ‘firm-sensitive’ and tailored to a firm’s individual case mix in 2003-04, the Replacement Scheme will be based on the average case costs of *all* civil legal aid providers per category. Firms which dealt with a larger number of complex cases routinely or on the basis of informal local referral practices will now be faced with losses unless they change their case mix. As opposed to the situation in 2005, there is now a very real pressure on certain firms to change their case mix in order to ‘adjust’ a real or perceived case load of above average complexity and costs.

74. We asked Lord Carter about the risk of cherry picking associated with fixed fees with very limited graduation. He was adamant that this issue had to be taken care of in contracting arrangements.⁸⁴ The LSC informed us that the new Unified Contract, in its specifications, contained provisions prohibiting cherry picking by suppliers. The LSC would continue to monitor actively legal aid providers’ case mix and take action where it detected significant unjustifiable change to a firm’s previous case mix.⁸⁵ Doubts remain, though, about how the LSC could identify cherry picking. Peer review is considered unlikely to be an effective mechanism, as Richard Jenner, Director of the ASA, anticipated: “If suppliers cut corners because of the pressures of fixed fees, it may pick that up, but if suppliers simply decide they are not going to take on the complex cases that we were talking about earlier, there is no reason to think peer reviews will pick that up.”⁸⁶

75. We doubt the ability of any case mix monitoring system to notice the less obvious practices of cherry picking. A firm’s case mix and ‘key performance indicators’ may conform to the LSC’s benchmark objective case mix profile but the firm may still turn away clients with complex cases. Unless the client complains, we see no way that the LSC could

81 Ev 158-159

82 Civil Justice Council, *Access to Justice Committee Response to DCA/LSC’s Consultation Paper ‘Legal Aid: a sustainable future’*, para 14

83 Ev 296

84 Q 57

85 Ev 296

86 Q 186

pick up on this behaviour. Yet, it is the vulnerable, already disadvantaged client who will be the least likely to complain about being turned away by a lawyer.

76. Fee schemes which only provide for relatively flat fixed fees with very little graduation provide economic disincentives to taking on more complex cases. This is likely to disadvantage already vulnerable clients. Only appropriately graduated fee schemes which allow adequate remuneration for more complex cases and those where attendance by, or communication with, a client is unusually difficult would encourage providers to devote the time needed to deal with such cases. This might go some way to help prevent cherry picking of cases to the detriment of vulnerable clients.

A risk to specialist providers

77. Closely linked to the issue of cherry picking and case mix is the risk posed by the current proposals for legal aid remuneration schemes to specialist legal aid practitioners. The LSC stressed in its supplementary memorandum to us that the current reforms were “aimed at securing high quality and specialist advice and representation”.⁸⁷ However, throughout our inquiry, we were warned that these reforms would make the provision of such legal advice by qualified providers very difficult, if not impossible, as cases dealt with by specialist providers generally tend to be more complex and time-consuming and thus are more likely to be unprofitable under a fixed fee scheme. In addition, specialist providers will be expected to take on a more general case mix.

78. In its response to the DCA/LSC consultation on Lord Carter’s and the Government’s initial reform plans and fee schemes in Autumn 2006, the Access to Justice Committee of the Civil Justice Council warned:

“We are aware that some firms specialize in dealing with particular types of case which are more complex than others within a case category, and standardization of case costs across all case types within a category would penalize practitioners from undertaking any case type which is complex and costly. The outcome is unlikely to be that all practitioners working in a category will accept instructions on all case types – they may not have the expertise, or the clients may not present with the types of problem covered by the firm’s contract with the LSC.”⁸⁸

This assessment was shared by the Law Society, who, in their written evidence to us, cautioned that the proposed fee schemes “will lead to reduced access to justice with those remaining suppliers, of necessity, offering a one-size-fits-all standardised service which may well be incapable of addressing many client needs”.⁸⁹

79. Richard Jenner, Director of ASA, said that the problems providers of specialised legal advice would face under the reform proposals was an issue of particular concern for Not for Profit organisations offering publicly funded legal advice. Many of those organisations

87 Ev 291

88 Civil Justice Council, *Access to Justice Committee Response to DCA/LSC’s Consultation Paper ‘Legal Aid: a sustainable future’*

89 Ev 159

specialised in more complex types of case and would thus face a real struggle to be able to work within the fixed fee structure:

“I think what the Government wants to achieve is basically to say that everyone should be doing a bit of everything and it will balance out by swings and roundabouts. We do not think at the moment the system has the capacity, the spread of expertise, for that to happen. What is far more likely to happen is that those higher specialist agencies will be forced [...] to start taking on simpler cases in order to make the swings and roundabouts work. There will be clients being pushed from pillar to post and you will not be able to find anyone who is prepared to take them on.”⁹⁰

80. Sir Anthony Clarke, the Master of the Rolls, stressed the important role of specialist practitioners, for example in the fields of mental health law or housing, and warned that it was “very important that when these proposals are taken forward these specialists should not be lost to the publicly funded community”.⁹¹ The likely consequences of this loss were pointed out to us by Professor Masson when we asked her about the potential effect of the abolition of the fee uplift in care proceedings for solicitors on the Law Society’s Children Panel. She predicted that these very experienced and specialised providers:

“[...] will leave, retire and not be replaced and, increasingly, we will have all the parties represented by non-specialist solicitors, who will move away from the negotiation and identifying what are the real issues and focusing [...] much more into litigation and fighting the cases. I would expect there to be more contested final hearings, more delays when people do not ask at the right time for expert assessments of their clients so the cases will take longer”.⁹²

81. The fixed fee schemes might also bring an end to effective informal local referral practices between specialist legal aid practitioners and their generalist colleagues. The South London-based firm Fisher Meredith told us in their written submission that they have:

“[...] for a number of years filtered out simpler cases so that these could be dealt with by for example, Not For Profit agencies or the like and concentrated, with a cadre of experienced solicitors, on specialist complex cases particularly those challenging public authorities. We consider this to be the best use of the Legal Aid Fund and the best use of the skill sets available to us.”⁹³

82. It is of crucial importance that any fixed or graduated fee system allows specialist and niche suppliers to obtain a reasonable return for their work in order to guarantee the provision of high quality advice for complex cases and thus to ensure access to justice for those requiring specialist advice and representation. There is a major risk that specialist providers will be lost to the legal aid system.

90 Q 178

91 Q 131

92 Q 125

93 Ev 176

Regional differentiations in fees

83. An issue raised in numerous submissions to us was the need for geographical sensitivity of the new fee schemes. London providers especially were adamant that the costs of running legal aid firms in London were considerably higher than in most other regions. The DCA/LSC conceded this in their initial civil and family fee schemes consultation paper in July 2006.⁹⁴

84. However, in November 2007 the DCA/LSC published its final Tailored Fixed Fee Replacement Scheme with only national rates.⁹⁵ The modified family graduated fee scheme proposals of March 2007 also envisage a single national rate for legal advice (levels 1 and 2 of the fee schemes) and only a regional differentiation for solicitors' fees for the preparation of court proceedings (level 3). In contrast, the new police station fixed fee proposals of February 2007 are geographically specific, with the fixed fee for a police station case in Hartlepool set at £177 and at £377 in the City of London.⁹⁶

85. Given the considerable geographical spread in the costs of running a legal aid firm, where fixed or graduated fees are set administratively, we recommend that they should, wherever possible, reflect these variations. Only then will comparable work in effect be remunerated on a true like for like basis.

The inclusion of travel and waiting time costs in the fee schemes

86. One of the most controversial issues of the current remuneration and procurement reforms is the way in which travel and waiting time of legal aid providers will be paid for. On the basis of Lord Carter's proposals, the DCA/LSC intends to roll-up payment for travel and waiting time in the proposed fixed and graduated fees so as to encourage more efficient working practices by legal aid providers through more localised work and thus reduced travel costs. In more concentrated urban areas where the LSC expects "opportunities for savings from efficiency and greater security of supply of services than in rural areas", reductions to the average travel and waiting costs have been made in the new police station fixed fee scheme and the modified magistrates' courts standard fee scheme.⁹⁷

Travel time and costs

87. In his final report, Lord Carter noted that travel and waiting costs for police station legal aid work rose between 2001-02 and 2005-06 from £55 million to £90 million and that around 20% of the value for all police station costs were for travel (with a further 6% from waiting).⁹⁸ According to the LSC, 26% of police station costs were spent on travel and waiting in London as opposed to 18% nationally.⁹⁹ As the Criminal Law Solicitors'

94 DCA/LSC, *Legal Aid: a sustainable future*, consultation paper, CP 13/06, July 2006, p 28

95 DCA/LSC, *Legal Aid Reform: The Way Ahead*, Cm 6993, November 2006, p 51

96 LSC, *Police Station Reforms: Boundaries, Fixed Fees and New Working Arrangements*, Annex A, February 2007

97 LSC, *Police Station Reforms: Boundaries, Fixed Fees and New Working Arrangements*, consultation paper, February 2007, para 3.7

98 Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p 24

99 LSC, *Police Station Reforms: Boundaries, Fixed Fees and New Working Arrangements*, consultation paper, February 2007, para 4.9

Association commented in its submission to us, “there may be room for efficiency gains within the London area by reducing the number of firms who travel to distant police stations and courts for individual cases”.¹⁰⁰

88. However, the LECG study on the Carter reform proposals¹⁰¹ and the literature survey on the cost drivers of July 2005 undertaken for the Legal Services Commission by Professor Moorhead and Professor Cape¹⁰² both indicate that a more nuanced approach to the issue of travel costs in the police station (and magistrates’ courts) might be called for. The LECG study found that:

“[...] travel and waiting costs, stressed in the Carter Report as a potential for cost savings with larger contracts, have also often been declining when measured on a per attendance basis. Travel costs per attendance at police stations during 2001-05 declined at a rate of 1.3% per year, waiting costs per attendance rose at 4.3% For magistrates' court the figures were declines of about 3% and 1% respectively.”¹⁰³

89. An increase in the number of practitioners’ attendances at the police station per case was also identified by Professors Cape and Moorhead in their research, as they found an increase in the number of attendances per case between late 2001 and the first half of 2004 of 6%. “In the last six months of 2001 there were 50,879 police station attendances after a first attendance, but by 2004 the figure had jumped to 86,821.”¹⁰⁴ This raise may be explained by an increase in police station practice of ‘bail-backs’ where a suspect is released after an initial interview on police bail but required to return for further interviews and/or charging. Bail-backs are almost always the result of police action and not initiated by the defence solicitor.

90. Generally, we can see merit in limiting travel costs in geographical areas and for categories of legal aid work where there is ample local supply of legal advice, such as for criminal defence work in most areas of London. It should be incumbent on local legal aid providers to ensure that unnecessary travel costs are not incurred. Factoring in appropriate elements of travel costs in major conurbations to graduated fee schemes is a justifiable step to achieve control over unreasonable travel costs, but care will have to be taken that this does not lead to unsustainably low fee levels.

91. Established police station practice, such as bail-backs, is likely to have contributed to the increase of police station travel costs over the last few years. Therefore, a proper graduation of the police station case fee that took account of the number of attendances, or a time-related banding as in the Magistrates’ Courts Standard Fee Scheme, would provide an adequate sharing of economic risk of rises in defence practitioners’ travel cost between the supplier and the Government.

100 Ev 258

101 LECG, *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary*, September 2006, www.lawsociety.org.uk

102 Ed Cape/Richard Moorhead, *Demand Induced Supply – a Report to the Legal Services Commission* (London, July 2005)

103 LECG, *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary*, September 2006, p 3, www.lawsociety.org.uk

104 Ed Cape/Richard Moorhead, *Demand Induced Supply – a Report to the Legal Services Commission* (London, July 2005), p 33

92. We do not consider that a case has been made out for the inclusion of travel costs in the fixed or graduated fee schemes for civil and family work. Generally, in social welfare and family law cases it is the client who attends at the legal aid provider's office. It is usually only in cases where the client is immobile, hospitalised or detained that legal aid lawyers have to incur travel costs when providing legal help to clients. Therefore, it is more likely that it would primarily be already vulnerable clients who would require their lawyers to travel.

93. The inclusion of travel costs in the civil and family fees may affect vulnerable clients disproportionately by providing an economic disincentive to providers to take on their cases for fear of incurring travel costs beyond the element provided for in the fixed or graduated fee. This would be exacerbated in rural areas and small towns where provision by civil and family legal aid providers will be more uneven. We therefore disagree with the Government's plans to include them in the fixed fees.

Waiting costs

94. Both Lord Carter¹⁰⁵ and Lord Falconer of Thoroton, the Lord Chancellor,¹⁰⁶ recognised that there was a variety of reasons for waiting costs of legal aid suppliers and that much of those causes were outside the effective control of legal aid providers. While legal aid suppliers should generally be encouraged to make best use of waiting time, there are compelling considerations against the inclusion by the DCA/LSC of waiting costs in the fixed and graduated fee schemes. There is agreement that this cost factor is largely not in the control of the legal aid provider; it would therefore be manifestly unjust to make the provider bear the economic risk of increases in waiting time beyond what is included in the case fee as remuneration for average waiting time. Rather, there should be an economic incentive for the Government to improve police station procedure, court listing practice and case preparation by the CPS or local authorities in order to reduce waiting costs to the legal aid budget.

Not for Profit organisations – a special case?

95. The number of Not-for-Profit (NfP) organisations which hold civil legal help contracts has steadily increased over the last years and, on 31 March 2006, stood at 469.¹⁰⁷ In the categories debt and welfare benefits, NfPs hold the majority of civil legal aid contracts (60 %).¹⁰⁸ Until now, civil legal help provided by NfP organisations has been remunerated on a funded post model according to which the LSC funds fractional or one or more posts within an NfP organisation for legal aid work.

96. In his final report, Lord Carter said of the NfP funding arrangements that it would “not always incentivise effective working”¹⁰⁹ as the funding model paid the same salary for a post-holder regardless of the number of cases started. He therefore proposed to extend the

105 Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p 56

106 Q 384

107 LSC, *Annual Report 2005-06*, p18

108 Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p 45

109 *Ibid.*, p 29

implementation of the new civil and family legal aid fee schemes to NfP providers.¹¹⁰ The DCA/LSC agreed and proposed to extend the Tailored Fixed Fee Replacement Scheme for civil legal help upon its general introduction to NfP providers.

97. Initially, the fee levels under the LSC's proposal of July 2006 for the Tailored Fixed Fee Replacement Scheme were calculated only on the basis of average case costs of solicitors' firms, which caused considerable concern to NfP organisations as their average case costs were significantly higher than those of solicitors' firms.¹¹¹ This difference in average case costs may be partly explained by the fact that solicitors had a higher percentage of matters where there were no complicating factors (67%) compared to NfPs (52%) and that NfP providers were more likely to see clients who had a disability, medical, health or psychological problems.¹¹² Eventually, the LSC remodelled the fee scheme the fixed fee for both solicitor and NfP suppliers. The revised fees have now been calculated on the average of *both* solicitors' firms and NfP providers. Thus, on account of the higher average costs per case for NfP providers, the fixed fees have now increased.

98. Under the initial LSC proposals, the draft Regulatory Impact Assessment estimated that 92% of NfP providers would have been faced with a reduction in fees. The new figures would only lead to a reduction in fees for 44% of all NfP providers.¹¹³ However, the Regulatory Impact Assessment does not contain data on the level of reductions NfP providers will have to bear.

99. When we asked the Director of the Advice Services Alliance, the umbrella group of NfP legal aid providers, whether he considered retaining the difference in pay schemes between NfP providers and solicitors justifiable, he informed us that:

“There are mixed views about the principle of having a unified contract. Our position is that it is difficult to argue as a matter of principle that people should be paid on an entirely different basis for doing the same work. We would not want to start by saying that advice agencies should be paid fundamentally differently. The issue is what the terms are on which the payments are being made.”¹¹⁴

He stressed, however, that:

“[...] one of the biggest concerns raised by our members, is the move from paying in advance at the moment to a situation where you would be paid in arrears. Two things need to be said about that. Firstly, the transitional arrangements for that will need to be very carefully handled because in practice there is a real risk that that will create huge cash flow problems for agencies suddenly moving from one system to another. Certainly our members are very anxious about that. Secondly, that approach to payment certainly does not appear, in our view, to comply with the compact that has been agreed between the Government and the voluntary sector,

110 *Ibid.*, p 84

111 *Ibid.*, p 45

112 Richard Moorhead et al., *Quality and Cost Final Report on the contracting of civil, non-family advice and assistance pilot* (London, 2001), p74.

113 DCA/LSC, *Regulatory Impact Assessment: Legal Aid Reform: the Way Ahead*, January 2007, para 7.3.3.

114 Q 189 [Richard Jenner]

which does say that in normal circumstances voluntary sector organisations should be paid in advance for work being done. We are not entirely clear why the Commission feels that payment under legal aid contract should be done differently from what is suggested by the compact. That is an issue about which we are also still in discussions with them.”¹¹⁵

100. Some of these concerns seem to have been addressed by the transitional arrangements agreed between NfP providers and the LSC. Under the Unified Contract in force since April 2007, NfP providers will be paid under a post funding model until the envisaged entry into force of the new fixed and graduated fee schemes in October 2007, but funding arrangements change from quarterly payments in advance to monthly advance payments.¹¹⁶ From October 2007 while the new fixed and graduated fee schemes will apply also to NfP providers the LSC will continue to make payments monthly in advance for 18 months with reconciliation of the advance payments with actual case work delivered after that time. Eventually, payment arrangements will be aligned with those for solicitors.

101. Not-for-Profit suppliers of legal advice play a crucial and invaluable role in the provision of social welfare advice and assistance to some of the most disadvantaged clients. Yet, where advice centres and comparable other NfP institutions undertake similar work for similar clients to that of legal aid solicitors, the current difference in the level of remuneration is not sustainable in principle. However, care will have to be taken that the transitional arrangements put in place for the adaptation of NfP providers to new remuneration arrangements will allow these organisations to adjust appropriately to the new funding schemes, as the impact of the transition to fixed or graduated fee schemes is likely to be a significantly more difficult process for a large number of NfP providers than for solicitors with an experience of working under the current Tailored Fixed Fee Scheme.

Detailed impact of the new fee schemes

The criminal fee scheme

102. In the area of criminal work, practitioners made the point that the new fee schemes created potential for difficulty at police stations where officers, who would all be aware that defence practitioners were on a fixed fee, might ‘play the system’ by consciously delaying interviews or procedures.¹¹⁷ In the magistrates’ courts or the Crown Court, practitioners, under the new fee schemes would have an economic incentive to advise their clients to plead guilty at the earliest opportunity, as fees will be tapered and concentrated on the earlier stages of a trial.¹¹⁸

103. Although both risks may be minimal because of the professionalism of those involved, we are concerned that clients may lose confidence in the system if there is a real or perceived benefit to those who advise them to force an issue to an early conclusion.

¹¹⁵ *Ibid.*

¹¹⁶ Note by the LSC on the Not-for-Profit Contract 2007, 29 January 2007, www.legalservices.gov.uk

¹¹⁷ Q 280 [Helen Cousins]; Ev 96 [Simon Hutchence]; Ev 258 [CLSA]

¹¹⁸ Lord Carter’s Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, pp 75-78

The economic impact

104. The modified proposals for fee schemes for police station work of February 2007 and for defence work in the magistrates' courts also raised serious concerns about the financial effects on the criminal legal aid supplier base. The LSC consultation paper *Police Station Reforms: Boundaries, Fixed Fees and New Working Arrangements*, published in February 2007, states that the calculation of the fee schemes for the new boundary areas in non-urban areas was generally designed to be cost neutral.¹¹⁹ However, as the LSC intends to make savings on police station legal aid expenditure of £8 million pounds per annum, it plans to implement reductions from historic average case costs of 12.2% in urban areas outside London and 8.3% in boundary areas in London.¹²⁰ The LSC justified this on the basis that “in more concentrated, urban areas, there are greater opportunities for savings from efficiency and greater security of supply of services than in rural areas”.¹²¹

105. Similarly, significant cuts in remuneration rates are envisaged under the modified proposals for the standard fees for publicly funded work in the magistrates' courts, which the LSC intends to introduce in urban areas from October 2007. The Regulatory Impact Assessment for the modified magistrates' court standard fee scheme shows the rate cuts for the urban areas in the following table:

119 LSC, *Police Station Reforms: Boundaries, Fixed Fees and New Working Arrangements*, February 2007, Para 3.7

120 Ev 297

121 *Ibid.*

	Area	Current Value	Change
CJS areas	Greater Manchester	£185,481,098	-5%
	London	£53,645,331	-16%
	West Midlands	£19,222,497	-5%
	Sub Total	£91,348,926	-11%
Local and Unitary Authority areas	Merseyside ¹	£9,153,647	-1%
	Leeds & Bradford	£7,739,108	0%
	Nottingham	£6,277,908	-7%
	Leicester	£3,933,023	-6%
	Bristol	£3,680,846	-7%
	Cardiff	£3,650,596	-5%
	Derby & Erewash	£2,933,137	-9%
	Portsmouth & Gosport	£2,667,191	-1%
	Brighton & Hove	£2,649,893	-7%
	Sheffield	£2,595,259	-5%
	Newcastle-upon-Tyne ²	£2,234,945	-6%
	Kingston-upon-Hull	£1,962,650	2%
	Southampton	£1,688,148	-1%
	Sub Total	£52,226,351	-4%
TOTAL		£143,575,277	-8%
¹ Merseyside CJS area ² Includes Sunderland, Gatheshead, Blyth Valley, North Tyneside and South Tyneside			

Source: Legal Services Commission

106. The Regulatory Impact Assessment explained:

“While the LSC has calculated from 2005/6 data that firm income for magistrates’ court work in the main urban areas would be reduced overall by 8%, we would however expect firms to benefit from standard fees as it will allow them to benefit from improvements in their own efficiency. 13% of providers, accounting for 16% of expenditure would have their fee income increased by the new scheme by an average of 4%, and 86% of providers accounting for 84% of current expenditure, if they made no adjustments to working practices, would have their fee income reduced by an average of 12%. [...] The impact of the changes is deliberately higher in London (16%) as travel costs reported by London firms are much higher than the rest of the country and we believe there is even greater scope for improvement in efficiency.”¹²²

In the light of the current economic fragility of the criminal legal aid supplier base, these planned reductions in income for criminal defence practitioners may be prove to be unsustainable. It remains unclear whether criminal legal aid lawyers have the capacity to absorb such rate cuts by changing their working practices or through business restructuring, especially in the short time of the transitional period.

¹²² LSC, *Regulatory Impact Assessment: Legal Aid Reform: the Way Ahead*, January 2007, paras 6.2.7 and 6.2.8

The family fee schemes

107. The DCA/LSC's initial proposals for both public and private law family graduated fee schemes attracted severe criticism from practitioners and senior members of the judiciary. The fee schemes were considered to be too rigid, being fixed fees in all but name. The Care Proceedings Graduated Fee Scheme was particularly condemned for lack of sensitivity to individual cases. Sir Mark Potter, the President of the Family Division, described the initial fee scheme proposals as "a series of extremely crudely averaged fixed fees which says that for step one in the [judicial child care proceedings] protocol, whether you act for father, mother or child, you will get X pounds and so on". He concluded that "the whole thing has to be radically revised".¹²³

108. We agree with the criticism and appreciate the LSC's efforts to re-design the fee schemes. However, the new proposals published for consultation in March 2007¹²⁴ do not appear to represent a significant shift in the LSC's approach to appropriate fee graduation. While fees for solicitors preparing court proceedings (level 3) are now regionally sensitive and banded according to court level and to the family member the legal aid lawyer is representing, there is still no graduation within each fee depending on the complexity of the case. The Legal Aid Practitioners' Group (LAPG) judged the new proposals in the following terms:

"The structure set out in these revised proposals is a distinct improvement on the proposals from the Way Ahead document, particularly for care proceedings. Nonetheless, we are still sceptical as to whether fixed fee systems can be appropriate for all family work; and we remain seriously concerned that the rates payable under these proposals will not be sufficient to ensure an adequate supplier base for this work."¹²⁵

109. Some considerable improvement to the initial fee scheme proposals may be seen in the lowering of the escape threshold at level 3 of the proposed Care Proceedings Graduated Fee Scheme from four times to just twice the value of the fixed fee.¹²⁶ In effect, instead of designing a proper graduation, the LSC now appears simply to have limited the ambit of the graduated fee scheme to 'average' cases and decided to remunerate the more complicated ones on an hourly basis. While this may go some way to solving the problem of the very limited graduation of the fee scheme, it cannot be interpreted as a sign that the LSC has worked out how to design a proper graduated fee scheme for care proceedings. Given that care cases are one of the main areas of significant cost growth in the system, this failure is a significant concern.

The economic impact

110. Particular concerns were raised with regard to the effect of the Care Proceedings Graduated and Family Help Fee Schemes, which the LSC published for consultation on 1

123 Q 138

124 LSC, *Legal Aid Reform: Family and Family Mediation Fee Schemes*, consultation paper, March 2007

125 LAPG, Press release, 4 March 2007, www.lapg.co.uk

126 LSC, *Legal Aid Reform: Family and Family Mediation Fee Schemes*, consultation paper, March 2007, para 2.45

March 2007. The financial impact by region of the Care Proceedings Graduated Fee Scheme (public law) is shown in the following table:¹²⁷

Region	Current No of Providers	% of providers whose fees would have increased	% of providers whose income would have decreased
Birmingham	274	64.60%	35.40%
Brighton	173	64.74%	35.26%
Bristol	304	55.59%	44.41%
Cambridge	266	64.29%	35.71%
Cardiff	246	60.57%	39.43%
Leeds	263	63.50%	36.50%
Liverpool	73	64.38%	35.62%
London	337	53.41%	46.59%
Manchester	345	51.01%	48.99%
Newcastle	205	75.12%	24.88%
Nottingham	212	59.43%	40.57%
Reading	164	62.80%	37.20%
Total	2862	60.48%	39.52%

Source: Legal Services Commission

111. The table below shows the financial impact by region of the Family Help Fee Scheme which applies to all advice and assistance and certain elements of court representation in private law family proceedings:¹²⁸

Region	Current No of Providers	% of providers whose fees would have increased	% of providers whose income would have decreased
Birmingham	463	62.63%	37.37%
Brighton	301	59.80%	40.20%
Bristol	470	69.15%	30.85%
Cambridge	413	42.86%	57.14%
Cardiff	364	61.81%	38.19%
Leeds	406	64.53%	35.47%
Liverpool	133	48.12%	51.88%
London	595	46.22%	53.78%
Manchester	549	44.08%	55.92%
Newcastle	260	89.23%	10.77%
Nottingham	326	71.78%	28.22%
Reading	272	65.44%	34.56%
Total	4,552	58.96%	41.04%

127 LSC, *Draft Regulatory Impact Assessment: Family law proposals March 2007*, para 6.3.5

128 *Ibid.*, para 6.4.7

Sources: Legal Services Commission

Again, the Regulatory Impact Assessment does not contain further information apart from the fact that in Manchester, 49% of family help providers would see their income decrease by more than 2%.¹²⁹ The Regulatory Impact Assessment for the new Asylum and Immigration Fee Schemes, published on 21 March 2007, notes that 74% of asylum advice and representation providers would see an increase in pay rates, but that in certain regions because of the high percentage of Not-for-Profit providers dealing with asylum cases under legal aid, 63% of cases would be conducted by providers facing a pay cut.¹³⁰

112. Again, we are deeply concerned that the effective reduction in case fees for a significant number of specialist family legal aid suppliers will make it increasingly unattractive to practice in this field of law. It is unlikely that these fee schemes would halt the trend of family lawyers leaving the legal aid system, let alone reverse it.

The civil fee schemes

113. Like most other schemes, the proposals for fixed and graduated fee schemes for general civil legal aid work, consisting predominantly of social welfare law cases, and for mental health and asylum and immigration work, have faced criticism for a lack of adequate fine-tuning of the fee schemes.

The economic impact

114. In terms of the financial impact of the Tailored Fixed Fee Replacement Scheme applying to the provision of legal advice in the categories of social welfare law, the Regulatory Impact Assessment¹³¹ for this scheme predicts that nationally 61% of solicitors and Not-for-Profit providers holding a civil contract would see their remuneration increased; over 38% of providers would face a reduction in average payments. However, there was a starkly varying picture across different areas of law and in different parts of the country, as illustrated in the tables below:

129 LSC, *Draft Regulatory Impact Assessment: Family law proposals March 2007*, para 6.4.9

130 LSC *Final Regulatory Impact Assessment: Immigration and asylum final fee scheme*, March 2007, para 6.3.12

131 DCA/LSC, *Regulatory Impact Assessment: Legal Aid Reform: the Way Ahead*, January 2007, para 6.2.16

Work Category	Current No. of Providers	No. of Providers whose fees would have increased
AAP	394	268
COM	193	109
CON	769	506
DEB	1363	866
EDU	266	184
EMP	669	426
HOU	1558	999
MED	189	117
MSC	1324	894
PI	657	432
PUB	192	124
WB	964	565

(AAP: actions against the police; COM: community care; CON: consumer; DEB: debt; EDU: education; EMP: employment; HOU: housing; MED: clinical negligence; MSC miscellaneous civil cases; PI: personal injury; PUB: public law; WB: welfare benefits)

Region	Current No. of Providers	No. of Providers whose fees would have increased	% with decrease
Birmingham	233	145	37.77%
Brighton	139	87	37.41%
Bristol	319	195	38.87%
Cardiff	247	191	22.67%
Cambridge	213	121	43.19%
Leeds	237	160	32.49%
Liverpool	69	52	24.64%
London	385	124	67.79%
Manchester	241	164	31.95%
Newcastle	213	171	19.72%
Nottingham	224	153	31.70%
Reading	124	64	48.39%
Total	2644	1627	38.46%

Source: Legal Services Commission

115. The Regulatory Impact Assessment indicated that almost 68% of London civil legal aid providers would face a pay cut, whereas in Wales only 23% and in Newcastle 20% would suffer a cut in fees. However, the Regulatory Impact Assessment did not contain much information on the anticipated level of pay cuts, it only noted that around 44% of

Not-for-Profit providers would be faced with a rate cut and that only 0.7% Not-for-Profit providers and 5.16% of solicitors would see a reduction of their income exceeding 33%.¹³² Shortly before we finally agreed this Report, we were sent figures relating to the expected changes in Firms' income under the new transitional fee system.¹³³

116. When we asked David Jockelson of the East London legal aid firm Miles and Partners about the anticipated reduction in income under the fee scheme, he told us that the return for 210 cases the firm had done under the current Tailored Fixed Fee Scheme had been £80,000 and was now expected to drop to £50,000.¹³⁴ Similarly, Roy Morgan of Wales-based Morgans Solicitors, one of the largest social welfare legal aid providers in the country, estimated that the new fee scheme would see the fee income for his firm in housing cases reduced by 16% and by 39% for work relating to welfare benefits.¹³⁵

117. To date, there has been no significant research which would enable us to judge the potential effect of these rate cuts or increases on the civil legal aid supplier base as a whole, or the social welfare law providers in particular. However, if the Regulatory Impact Assessment proves to be correct, and 68% of providers in London, a city with large areas of social deprivation, face rate cuts, this is likely to have a significant impact on the numbers of providers. Firms may close or merge, solicitors may retire or leave the legal aid market in favour of better paying private work. In evidence, the Lord Chancellor said: "How do you get people to go to places like the North-East, for example, where there is not advice available at the moment? The corollary of the 68% [...] of firms who are losers in London (and I'm not saying this is the only winner), for example, in the North-East is a 77% increase. For Wales, [...] a 77% increase in the number of winners."¹³⁶ Even in the North-East, however, 21% are assumed to be losers, and no one can predict with certainty the effect of the Tailored Fixed Fee Replacement Scheme or the promised gains. Naturally, we welcome the rates increases for a large number of civil legal aid providers in areas associated traditionally with legal advice deserts, such as Wales or the North East. In theory, this may attract other firms to move into these areas, although we have seen no evidence that this will occur, as even in these areas some 20%-30% of providers still face rate cuts. We doubt, therefore, whether the TFF Replacement Scheme will lead to an increase in the number of providers in these areas of hitherto unmet need. The overall picture this Regulatory Impact Assessment paints in respect of the effect of the TFF Replacement Scheme on remuneration levels for social welfare legal aid will not encourage providers to specialise in these areas of the law.

118. The Carter reforms were intended to ease the pressure on civil and family legal aid. We doubt that the fee levels as suggested would achieve this objective. If at all, it would represent a very uneven easing of the pressure for between 38% to 80% of providers. While we believe that graduated fees as such could be made to work in most areas of legal aid law, we have great sympathy for the criticism voiced by the Civil Justice Council,¹³⁷ the Family

132 DCA/LSC, *Regulatory Impact Assessment: Legal Aid Reform: the Way Ahead*, January 2007, para 6.2.16

133 Ev 321 ff

134 Q 210

135 Qq 213-214

136 Q 310

137 Civil Justice Council, *Access to Justice Committee Response to the DCA/LSC consultation paper Legal Aid – A sustainable future*, para12

Justice Council¹³⁸ and individual representatives of the senior judiciary¹³⁹ with regard to the precursors to the current fee schemes. The Civil Justice Council warned that:

“[...] the proposals, if implemented, carry greater risks in terms of damage to civil legal aid provision, and access to justice, than the minimal financial improvements to the overall legal aid budget. [...] The proposals in the consultation paper, however, will not correct the imbalance in what is a fragile civil legal aid supplier base.”¹⁴⁰

119. We see a risk to the supplier base in the current proposal for the civil legal help fee proposals. Imposing national fixed fees on large swathes of legal aid work that rapidly force unit cost cuts in a significant proportion of providers is an exceptionally risky strategy. These providers will be faced with a stark choice between cutting by reducing staff costs and time spent on cases or leaving the legal aid market. A full analysis of the likely effects of the fee structure and levels of the new proposals is needed as a matter of urgency.

The combined impact of the fee schemes

120. We were warned it would not be enough to look at each individual new crime and civil/family fee scheme in isolation.¹⁴¹ In criminal legal aid, “firm earnings should be seen as a package of expected earnings from police station, magistrates’ court and crown court work”,¹⁴² as a large number of firms cross-subsidise their defence work in the police station and magistrates’ courts with the economically more viable fees made in the Crown Court. Thus, “reductions in crown and higher court earnings reduce the ability of firms to use these cases to offset lower earnings elsewhere”.¹⁴³ The overall effect on the supplier base of the planned rate cuts in urban areas, combined with eventual cuts to the average return on cases in the Crown Court, could thus be stronger than the individual rate cuts might suggest.

121. Sir Anthony Clarke, the Master of the Rolls, also warned of the potential spill-over effects of the reforms of criminal legal aid on civil and family legal aid. He noted that the criminal legal aid reforms “may give rise to quite a radical shake-up of firms” and warned:

“Maybe they are designed to do that, but at present some firms do crime, civil and indeed family. If the result of this shake-up were that some of those existing firms might go out of business, one does have to ask what is going to happen to the people in those firms who are presently doing civil and perhaps also family.”¹⁴⁴

138 Family Justice Council, *Access to Justice Committee Response to the DCA/LSC consultation paper Legal Aid – A sustainable future*, p 2

139 Lord Justice Wall in his lecture in honour of Professor Mervyn Murch at Cardiff University on 20 November 2006, www.judiciary.gov.uk

140 Civil Justice Council, *Access to Justice Committee Response to the DCA/LSC consultation paper Legal Aid – A sustainable future*, para 12

141 Q 281 [Rodney Warren]; Q 272 [Brian Craig]

142 LECG, *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary*, September 2006, p 6, www.lawsociety.org.uk

143 *Ibid.*, pp 30/31

144 Q 131

The Civil Justice Council concluded that this would have a highly detrimental effect on the supply of civil legal aid services, particularly in areas such as social welfare law.¹⁴⁵ Little appears to be known of the impact on the 39% of firms that do civil and family work as well as crime of changes to the way criminal legal aid is procured and remunerated.¹⁴⁶

Conclusion

122. As the regional financial impact figures for the Tailored Fixed Fee Replacement Scheme, the family fee schemes and the police station and magistrates' courts fee schemes indicate, their proposed implementation in October 2007 will have considerable negative financial consequences for a significant number of legal aid suppliers, especially in major urban areas.

123. We agree that remuneration solely on the basis of time spent on a case is a disincentive to dealing with cases efficiently. Continuing the journey away from remuneration of publicly funded legal services on the basis of hourly rates towards remuneration on a per case basis, whether the price is set administratively or through competitive tendering, is therefore the right course of action.

124. However, fairness in remuneration demands that the rate for dealing with a legal aid case, be it in the field of criminal law, civil or family law, should ideally be based on objective criteria that adequately capture the complexity of cases and allow a more accurate determination of the likely work which a provider has to invest in a case in order to deal with it appropriately.

Lack of adequate data

125. Administrative setting of per case fee schemes can only lead to satisfactory results where the LSC holds the right data and has a general understanding of variations in case costs across different geographical areas and categories of legal aid work. However, the Access to Justice Committee of the Civil Justice Council commented in its response to the DCA/LSC initial civil and family fee scheme consultation paper of July 2006 "we are not convinced that any research or analysis has been undertaken to explore the reasons for there being different costs for different cases as between firms, areas of the country, or within each case category".¹⁴⁷

126. With regard to the DCA/LSC proposals for a Care Proceedings Graduated Fee Scheme, the Association of Lawyers for Children noted in its written evidence that:

"The figures supplied by the LSC are derived from a data collation system created for administrative use. The proposed system is calculated on certificates not cases. The data shares the same inherent inadequacies as that produced for the CCPR [joint 2006 Child Care Proceedings Review carried out by the DCA and Department for

¹⁴⁵ Access to Justice Committee Response to DCA/Legal Services Commission's Consultation Paper 'Legal Aid: A Sustainable Future', paras 7, 8

¹⁴⁶ Otterburn Legal Consulting, *The impact on the supplier base of reductions in criminal fees from April 2007*, November 2006, p 38, www.dca.gov.uk

¹⁴⁷ Civil Justice Council Access to Justice Committee Response to DCA/LSC's Consultation Paper 'Legal Aid: a sustainable future'.

Education and Skills]. It cannot provide case management and costing information upon which reasonable decisions can be based. The LSC is unable to assess the cost of each case, or its parts. The irrationality of a per certificate basis for standard fees rather than a per case renders the present calculations completely inadequate.”¹⁴⁸

When we asked Professor Masson to comment in writing on the most recent revised LSC proposals for the Care Proceedings Graduated Fee Scheme of March 2007, she reiterated that the LSC still did not have adequate data on case characteristics to determine case costs correctly for the structuring of the graduated fee scheme and the setting of fee levels.¹⁴⁹

127. Where the LSC embarks upon the creation of a comprehensive system of fixed and graduated fee schemes intended to provide a sustainable basis for the future of the legal aid market, fair to both the suppliers and the tax payer, it can only do so meaningfully on the basis of adequate knowledge of the reasons for variations in case costs between firms, areas of the country and within each category of legal aid. This knowledge presupposes collection of the right data and of statistical research. It appears that the LSC has inadequate information on which to base its proposed fixed and graduated fee schemes.

128. Equally, there is very little reliable statistical information about the economic situation of the legal aid supplier base on which valid predictions of the impact of changes to remuneration or procurement arrangements could be based. The Government does not have all the information required to assess the true impact on legal aid suppliers of the reform proposals, especially of the new fee schemes on the legal aid market. It cannot know if, and how, legal aid suppliers in different regions and categories of the law will be able to absorb the planned rate cuts, especially in London and other urban areas, if it does not have sufficient detailed information about the economic situation of legal aid suppliers by region and contract category. Furthermore, the evidence it does have points to significant problems in forcing radical change on the profession.

129. We appreciate that, as Sir Michael Bichard, the Chairman of the LSC, pointed out to us, it is extremely difficult to draw conclusions about how the firms are going to respond to a very different set of circumstances.¹⁵⁰ In the light of this uncertainty and the general lack of data, the DCA/LSC’s intention of a nationwide imposition of fixed fees followed rapidly by competitive tendering across the entire legal aid system is a breathtaking risk. It puts a great deal of faith in economic argument in the teeth of LSC commissioned evidence which casts doubt on the capacity of supplier to respond. This risk might be justified where the whole system is in utter crisis but large parts of the system (especially non-family civil legal aid) are stable in cost terms. We recommend a reconsideration of the plans and the adoption of a much more measured, risk-based strategy for reform.

148 Ev 275

149 Ev 317 [Professor Masson]

150 Q 334

Risks in the transitional period

130. The preceding analysis of the anticipated financial impact of the new or modified fee schemes for the transitional period prior to the introduction of competitive tendering in October 2008 and April 2009 indicates that they pose a considerable risk to the stability of an already fragile legal aid market. Suppliers fear that the transitional fixed and graduated fee schemes, which would only be in operation for a period of between one and three or four years, might prove not to be economically viable for them. They believe that they might have to leave the legal aid market in order to survive.

131. Larger criminal legal aid suppliers especially have warned us in their submissions that, whilst they were well positioned for competitive tendering, they might find the transitional period with its new fee schemes the most challenging part of the reform process.¹⁵¹ The Law Society commented that this problem might even be more acute for smaller suppliers.¹⁵² These fears were echoed in the Otterburn study on the impact of the Carter reform proposals: “we are concerned that any reductions in fees paid during the transition before firms have had an opportunity to increase their efficiency will force firms into financial difficulty.”¹⁵³

132. The long-term impact on supply might not be serious: if firms closed, many of their fee earners would switch to other firms. However, in the short term the disruption to supply could be significant.¹⁵⁴ Otterburn agreed with the LECG study that “the proposals represent major change and that it is difficult to anticipate fully potential problems and where they might occur,” and cautioned:

“[...] as far as financial evidence is concerned, there is actually very little reliable up to date available to the Commission. This Report has relied heavily on the small sample of large crime firms as that is the only reliable, recent data available, however that is not representative of the supplier base as a whole. As a result considerable caution is needed in proceeding with reforming criminal legal aid procurement.”¹⁵⁵

133. The short term introduction of transitional fixed and graduated fee schemes at breakneck speed will not allow providers to make best use of what should be a transitional period in which firms can carry out carefully planned business restructuring, where potential for efficiency gains in restructuring exists at all. Quality legal aid suppliers might be forced out of the legal aid market on grounds of the income reduction expected in the transitional period before they even have a chance to compete on the basis not just of price but also on quality in the best value tendering process.

134. We strongly recommend that the Government reconsider the timing and comprehensiveness of the reforms. The problem areas of the legal aid budget (Crown

151 Ev 183 [Association of Major Criminal Law Firms]; Ev 176 [Fisher Meredith]

152 Ev 159

153 Otterburn Legal Consulting, *The impact on the supplier base of reductions in criminal fees from April 2007*, November 2006, p 30

154 Otterburn Legal Consulting, *The impact on the supplier base of reductions in criminal fees from April 2007*, November 2006, p 30, www.dca.gov.uk

155 *Ibid.*, p 38

Court defence work and child care proceedings) should be addressed swiftly, but we fail to see the need for potentially short-sighted transitional arrangements for legal aid remuneration in anticipation of the roll out of competitive tendering from October 2008, where there are already mechanisms for controlling unit costs or where the costs of cases appears to be under control. We can see merit in time in moving beyond Tailored Fixed Fees for instance, but the desire to impose inflexible national fixed fees against a shaky evidence base is unwise in the extreme. It is more so given the proposed move to competitive tendering. The LSC's time would be far more wisely devoted to designing an appropriate system of competitive tendering, than it is to designing and implementing a suite of reforms which are fraught with difficulties and which are, in any event, only likely to be in place for a short period of time.

135. Given the current fragility of the legal aid supplier base and the time suppliers will need to restructure their businesses where necessary, the introduction of ill-thought out new fee schemes, which are predicted to result in significant reductions in income for a considerable number of suppliers for little more than one to three years' time prior to competitive tendering, poses a great risk for suppliers and clients alike. The introduction of these fee schemes for the short transitional period should therefore be halted.

4 'Best Value Tendering' – the market-based approach

136. We now turn to consider the eventual goal of the reform proposals, which is intended to be the adoption of a market-based approach to the funding and procurement of legal aid work. This, in effect means that legal aid rates would be determined under competitive tendering for block contracts, potentially on the basis of quality, capacity and price.¹⁵⁶

137. Legal aid firms which have attained the relevant rating at peer review and thus qualify as preferred suppliers, would be expected to bid for a number of cases, be it in criminal, civil or family legal aid, which they would have to see through from start to final resolution. For criminal defence work this would mean that suppliers bid for a bulk of police station cases which they would then have to take through the magistrates' court or the Crown Court where necessary.¹⁵⁷ Competitive tendering for civil and family work is envisaged to commence in October 2008 (criminal) and April 2009 (civil).

138. The objective of this move towards competition is the determination of the 'true costs' for publicly funded legal advice or representation. With regard to administratively set fees per case, the LSC commented that "no amount of research will mean that we would arrive at the 'right' price for legal aid"¹⁵⁸ and that "it is our view that appropriate regional prices will be best set by competition".¹⁵⁹

139. We accept that, in principle, where locally or regionally the conditions for a proper competitive market exist, rates for publicly funded legal advice and representation are best set by providers bidding for contracts on the basis of quality, capacity and price. However, moving legal aid procurement to a market-based system poses a number of difficult problems.

The legal aid market – how will market rules apply?

The existence of an appropriate market

140. One of our prime concerns is the lack of proper market conditions in certain regions and areas of legal aid work, most notably social welfare law. Competitive tendering might not be suitable for all categories of publicly funded legal services across the country where market conditions do not exist because of the small number of local or regional suppliers. The LECG study commissioned by the Law Society warned that in some areas there might not be a sufficient number of suppliers to compete effectively for contracts and that the number and size of firms per area might also be affected by the need to meet other

156 Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p 86

157 *Ibid.*, p 58

158 Ev 296

159 LSC, *Family and Family Mediation Fee Schemes*, consultation paper, March 2007, para 2.13

objectives (such as the prevention of conflicts of interest).¹⁶⁰ Richard Jenner, Director of the Advice Services Alliance (ASA) told us:

“It is worth saying, particularly when we are talking about social welfare law, that we are not convinced that there is a huge market out there. In practice, in most towns there may be three, four or five suppliers doing some social welfare law. Very often that work has been divided up between them on the basis of custom, practice and possibly by agreement. There may be a firm doing housing cases; the local CAB will be doing the bulk of the debt and benefit cases; a law centre may be doing employment; and one or two may be providing across more than one subject. That does not really look to me like a market ripe for competition. I do not believe, under the changes in regulation, that in social welfare law you are going to have a lot of new types of supplier coming in and wanting to compete for that kind of work.”¹⁶¹

The concerns were echoed by Andrew Holroyd, Vice-President of the Law Society, when he described the situation of legal aid providers in Salisbury:

“[...] we heard that the number of firms there has reduced from eight to three. One firm has 70 per cent of the market. The number of duty solicitors has also reduced from 15 to nine. Those are the kinds of situations that we are seeing replicated all around the country, and quite frankly for a market-based system to operate there has to be a supplier base and I think some of the questions we have heard indicate just what difficulty there is.”¹⁶²

141. There is no ‘one size fits all’ solution to legal aid procurement. The LSC will have to ensure that where it intends to procure publicly funded legal services by means of competitive tendering, suitable market conditions exist in order to make the market-based approach to legal aid succeed. Only where there is a sufficiently large number of suppliers can competitive tendering work and conflicts of interest in criminal defence or family cases be avoided. In some areas of the country this will be difficult. Competitive tendering is therefore unlikely to be a model which is uniformly suitable throughout England and Wales.

The Government’s acceptance of increasing prices

142. One premise of a market-based approach to legal aid procurement is the acceptance of increasing prices per case where the market, through competitive tendering, so demands. Lord Carter acknowledged as much when we asked him about this:

“[...] I do believe that what will happen is that the Legal Services Commission will have to pay more per case in the areas where there are legal aid deserts which reflects the higher costs in those desert areas to get people to go in and practise in them. So I

160 LECG, *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary*, September 2006, para1.5 (p 9), www.lawsociety.org.uk

161 Q 185

162 Q 81

do not believe there will be a map of deserts because I believe they will be removed.”¹⁶³

143. However, there is considerable concern over the willingness of the Government to accept a potential regional increase in price resulting from competitive tendering. Andrew Holroyd, speaking on behalf of the Law Society, informed us that “my members do not really believe that when the Government says there is a fixed budget there is actually a willingness to pay any increased prices that come through a market-based system”.¹⁶⁴ There are some indications that these fears should not be dismissed out of hand. Lord Carter himself suggested in his report that, for criminal defence work, the price elements of a tender could be based on discounts off the fixed fee schemes,¹⁶⁵ thus giving quite a clear direction of travel for competitive tendering. Similarly, the Lord Chancellor’s comment that an increase in price for legal aid work would lead to cuts elsewhere in the system does not instil much confidence in the Government’s prospective acceptance of higher case rates where the market would demand them:

“We will be extremely vigilant to avoid the possibility of cartels forming and manipulating prices upwards. If best value tendering were nevertheless to lead to overall significant increases, we would have to pay these rates. That would inevitably give rise to offsetting cuts elsewhere, but we should stress that this is extremely unlikely.”¹⁶⁶

In areas of currently unmet need of legal aid provision (such as parts of Wales or the North East of England) we consider it necessary that prices for publicly funded legal services should go up in order to attract the necessary number of legal aid practitioners to practice in those areas.

144. It is absolutely fundamental to Lord Carter’s proposals for best value tendering that the market sets the price. It is crucial to the correct pricing of legal aid work and the sustainability of the system. The Lord Chancellor and the LSC indicated a strong belief that competitive tendering would not lead to an increase in fee levels. Where that is not the case there will be one or both of two responses:

- **The market price will be treated as a cartel price and dealt with accordingly; and**
- **The market price will be accepted but cuts made elsewhere in legal services to offset the increase in the budget.**

The first response betrays a lack of confidence in the LSC’s ability to set up a system of tendering that is genuinely competitive. The second shows that a market-system that delivers any increases in price might not be sustainable. Either way, neither the LSC nor the DCA appear to have confidence in the central premise upon which the reforms are based.

163 Q 10

164 Q 82

165 Lord Carter’s Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, pp 58-59

166 Ev 294

What will happen after the first bid round?

145. Perhaps the greatest problem facing a system of competitive tendering, is the development of the supplier base and the legal aid market after the first and subsequent bid rounds.

'Winner's curse' and market stability

146. Where legal aid providers in a fiercely competitive and potentially over-supplied market (such as the one for criminal defence work in London and other major cities) bid for contracts, there is a risk that, knowingly or inadvertently, bids might be set at unsustainably low levels for the three year life of the tendered contract. When we asked Professor Frank Stephen to comment on Lord Carter's reform proposals, he highlighted this risk:

“To the extent that there is competitive bidding for contracts bid prices are likely to be pushed down. The literature on auctions and competitive bidding has identified a phenomenon known as the winner's curse i.e. the party winning an auction is likely to have overbid. This applies even to very sophisticated bidders (cf. bidding for UK 3rd generation mobile spectrum). The implication is that firms bidding for legal aid contracts are likely to bid low. This will exacerbate the problem of covering their costs. Thus the consequence is likely to be a reduced level of service for clients.”¹⁶⁷

147. Lord Carter acknowledged this risk in his report when he suggested that the LSC could set “a floor to prevent unrealistic bidding destabilising the market”.¹⁶⁸ Vera Baird QC MP said that: “it is clear in the Carter report that there will be alertness to any suggestion of loss-leader-type bidding to undercut others so that a firm can come in, take over a good deal and do a lot of damage to a local market. The auction will have to be reasonably sophisticated and it is our intention that it should be.”¹⁶⁹ It is not clear what is meant by a ‘sophisticated auction, but one way to avoid loss leader bidding is, as Lord Carter suggested, to have a floor in the market.

148. Legal aid firms that miscalculate their bids and cannot fulfil the contracts may be forced to leave the local legal aid market, with unpredictable consequences for clients and local access, to publicly funded legal services. The same is true of providers who cannot deliver the legal services at the required quality level as a result of an unsustainably low bid. The potential consequence of this situation was pointed out to us by Richard Miller:

“So you may have a bidding round and only allow firms that are of a suitable quality to bid but what happens in the next two to three years is not affected by peer review at all, all that happens is three years later you measure the quality again and if it is dropped what do you do because in the bidding round you have excluded all the other firms, they will not be there to come back into the system, so if quality has

167 Ev 289

168 Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p 59

169 HC Deb, 11 January 2007, col 161WH

dropped there is no-one there to replace them to bring the quality back up to the necessary standard.”¹⁷⁰

The consequence of supplier failure between bid rounds is also likely to be exacerbated where contracts are held by a relatively small number of large suppliers as those suppliers are necessarily more difficult to replace than smaller ones in case of failure of the large provider as a result of “winner’s curse”. There may, therefore, be merit in the suggestion made by the MDA of the introduction of a maximum contract value limit designed to prevent the largest firms bidding successfully for all or most of the available duty slots and civil contracts and thus eliminating smaller firms from the competition.¹⁷¹

Competition and market entry in subsequent bid rounds

149. Another potentially significant risk inherent in the concept of competitive tendering for legal aid contracts is the retention of a sufficiently large and economically stable supplier base between the bid rounds to ensure proper competition, not only in the first bid round but also subsequent ones. The LECG study on the Carter proposals warned:

“A problem is that the proposals may create larger firms with local market power, with some market power to raise prices, or resist further falls, to ensure above-normal profits. Market power concentrated in the hands of a few may arise because a firm that has failed to achieve a contract in the first round may find it hard to bid next time – it will have lost its fee earners and will need to compete with firms that have been working in the market since the last round. Although there may be competition initially it may gradually fall away. The proposals believe that a small number of suppliers, four to six, may be sufficient to ensure competitive conditions. This may be true initially but it may not be capable of being sustained over time.”¹⁷²

150. Andrew Holroyd, Vice-President of the Law Society, confirmed these concerns when we asked him about competition in consecutive bid rounds for criminal legal aid contracts: “You might get a bidding round the first time, but where do the bidders come in succeeding rounds in a very specialist service which is, quite frankly, quite difficult to provide?”.¹⁷³ Where the LSC envisages tender contracts for the provision of social welfare law advice and representation through Community Legal Advice Centres (CLACs) as local monopoly providers, the same risk to effective competition applies to subsequent bid rounds for the running of a CLAC: local civil legal aid suppliers, especially NfP providers, who have failed in their initial bid for a CLAC contract may have left the legal aid market and would not be around to participate in future bid rounds.¹⁷⁴

170 Q 237

171 MDA, *Research on Ethnic Diversity amongst suppliers of Legal Aid services*, April 2006, p 72, www.legalaidprocurementreview.gov.uk. This study on ethnic diversity among legal aid suppliers was made with regard to the aborted LSC plans for a London Competitive Criminal Tendering Scheme

172 LECG, *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary*, September 2006, p 47, www.lawsociety.org.uk

173 Q 81

174 Q 198 [Richard Jenner]

151. When we asked Lord Carter about the maintenance of effective competition beyond the first bid round, he recognised that this was going to be “very difficult”:

“I think people will leave. I think the traditional thing which seems to have happened, how the market has evolved, is that people have broken away and started up and formed new firms to actually do that, you know, somebody leaves a big firm and has some clients and goes away. I would hope to strike a balance between over-fragmentation (which is what has happened in the past, endless fragmentation and lots of small suppliers) to something where, if people saw that there are weak suppliers in an area, people did break away, or alternatively people came in from other areas, which is probably more likely.”¹⁷⁵

“My strong sense is that this is a very vibrant supplier base. People are used to building up enterprises, legal firms taking risks, and I have actually been very impressed with the capacity of some of the people I have met to do that.”¹⁷⁶

152. This was echoed by the LSC’s Chairman, Sir Michael Bichard:

“How do we ensure that there is a healthy market place left? I think we can do that, and we must do it, by the way in which we design the tender process, but I also think that you will find some sub-contractors, because we are allowing sub-contracting in the first round, bidding themselves in the second round, you will find firms bidding from outside of a particular area and you may well find new providers coming into the market place, but that is a real challenge which we have to meet.”¹⁷⁷

153. Alison Hannah, Director of the Legal Action Group, cast doubt over Lord Carter’s and Sir Michael’s optimistic approach to effective competition in the second and subsequent bid rounds:

“It is almost impossible to imagine who would be in for a second round, particularly because of the preferred supplier scheme, which is going to be one of the key factors. In order to become a preferred supplier, you have to have a contract; you have to have your key performance indicators measured in accordance with the contract; you have to have this new file assessment value for money to make sure that you have been administering the legal aid scheme properly in terms of devolved powers and legal aid eligibility for clients; you have to have your peer review. If you get through all those, then you may become a preferred supplier, but how can that work in a second round? Where would there be a new entrant that could possibly supply that number of preconditions? It is very difficult to see how it would work, not least because peer review is going to be organisation-wide. You could not see a situation where maybe a department would split because the peer review would be for the organisation, not for the department. I think it is really hard.”¹⁷⁸

175 Q 36

176 Q 41

177 Q 374

178 Q 184

The problems relating to effective market entry for new suppliers which Alison Hannah raised are likely to be exacerbated where, as currently proposed by the LSC, potentially high minimum contract thresholds will be introduced for criminal legal aid work in major conurbations. The LSC intends to mitigate these, by “reserving a proportion of the market for lower value contracts in each round of best value tendering to enable new providers to enter into the market”.¹⁷⁹

154. Designing an effective and workable model for competitive tendering of legal aid contracts will be the LSC’s prime task. It is a formidable one. Ensuring market stability, an adequate opportunity of market entry for new or external providers and a necessary degree of competition between legal aid providers beyond the first round of competitive tendering will be crucial in the design of the tendering process.

The tendering process – a guarantee for quality?

155. Lord Carter and the LSC envisage a bidding process against the criteria of quality, capacity and price.¹⁸⁰ Not much is known about the LSC’s current thinking about the design of the tendering process. Sir Michael Bichard told us that the LSC was only now about to start discussing the design of the tendering process.¹⁸¹

156. In February 2007, however, the LSC published proposals for the tendering process for criminal defence solicitors wishing to become members of the panel of providers who may take on legal aid work in Very High Cost Crime Cases (VHCCs).¹⁸² Panel membership would be determined by competitive tendering on the basis of ‘essential criteria’ and a weighting of ‘desirable criteria’. For the actual tendering process, the LSC proposes to issue ‘a range of bid prices (probably three)’.¹⁸³ Interested firms would have to enter price-capacity bids on the basis of these bid prices. Solicitors would have to prove relevant VHCC experience and have achieved a peer review rating of at least 3 (‘Threshold competence’) in the first round, and 2 (‘Competence Plus’) or 1 (‘Excellence’) in future rounds. Those firms which have passed this ‘Essential Criteria’ test, will be assessed on the basis of their price bid and their fulfilment of ‘Desirable Criteria’ (e.g. degree of VHCC experience and potential for growth).

157. The LSC does not intend to distinguish between firms which have achieved different levels of acceptable peer review rating – it will thus be immaterial to the LSC’s decision on the price capacity bid whether a bidder has achieved the top rating 1 (‘Excellence’) or (just) level 3 (‘Threshold competence’). It was explained to us:

“We have not included any preference in the assessment process for PR [peer review] ratings above the essential level of PR3 (‘Threshold Competence or Better’). There are differing views about the case for including such a preference in the desirable criteria. Using PR2 and PR1 as desirable criteria would emphasise further the

¹⁷⁹ LSC, *Police Station Reforms: Boundaries, Fixed Fees and New Working Arrangements*, consultation paper, February 2007, paras 6.9; 6.10

¹⁸⁰ Lord Carter’s Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, pp 53-54

¹⁸¹ Q 393

¹⁸² LSC, *Best Value Panel for Very High Cost Cases*, consultation paper, February 2007

¹⁸³ *Ibid.*, para 3.2.1

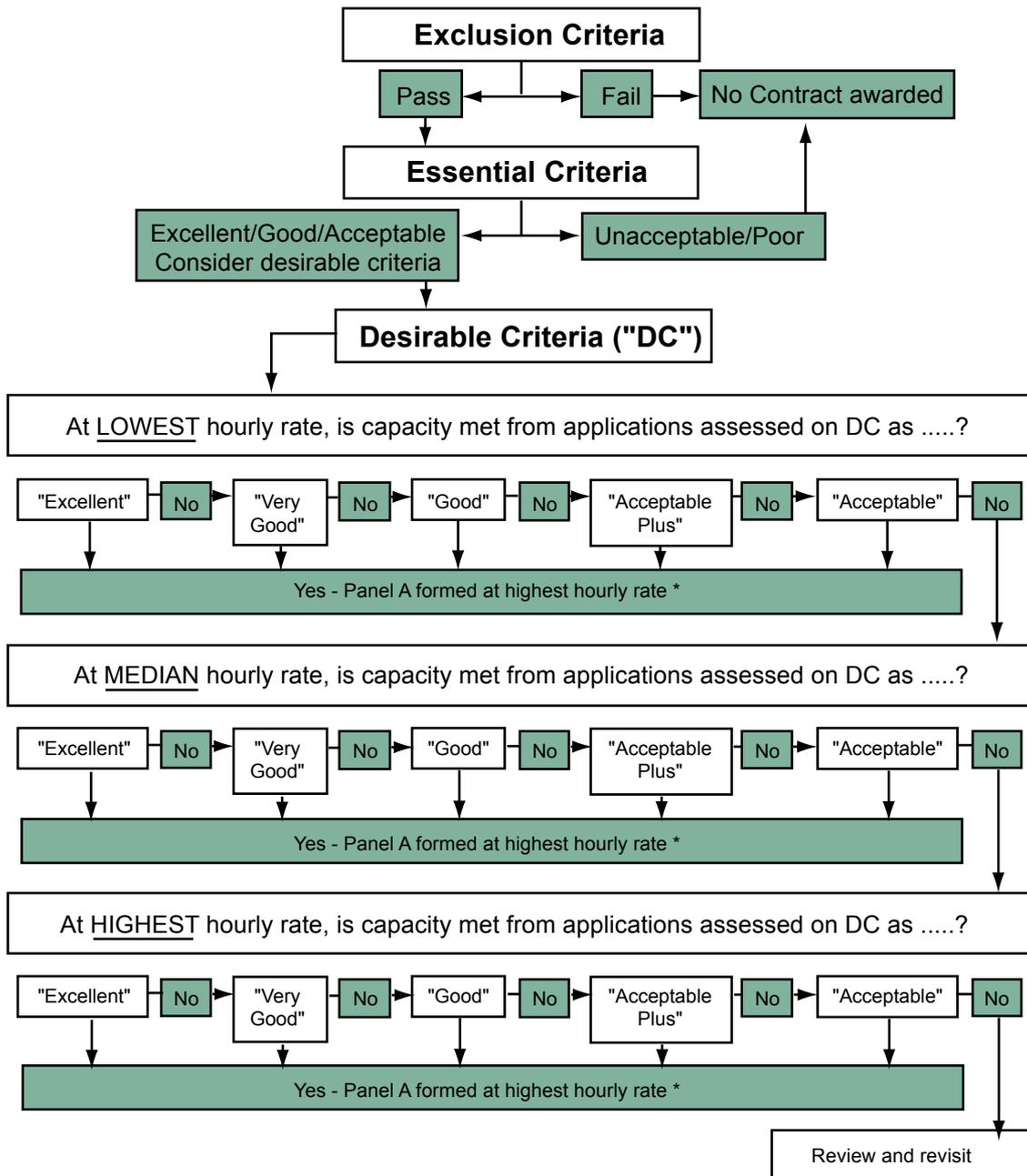
importance of quality in delivering best value. However, there will be disadvantages and risks in doing so, particularly to a small section of the supplier base.”¹⁸⁴

The auction process is best explained in the flow chart published by the LSC:¹⁸⁵

SELECTION PROCESS FLOW CHART

Panel applications will be assessed on three levels.

Only those applications that pass the exclusion criteria (Stage 3) will be considered on essential criteria (Stage 4). Only those applications that are assessed as excellent, good or acceptable on essential criteria will be considered on desirable criteria (Stage 5).



184 LSC, *Best Value Panel for Very High Cost Cases*, consultation paper, February 2007, para 6.1.4

185 LSC, *Best Value Panel for Very High Cost Cases, Annex E*, February 2007

Source: *Legal Services Commission*

158. The LSC proposals for the VHCC panel selection process leave little doubt that the primary criterion for selection will be price, rather capacity or quality: all acceptable bids by provider peer reviewed at levels 1 to 3 at the lowest hourly rate will be considered first, even where the bidder only rates 'acceptable' for the fulfilment of the 'desirable criteria'. Where firms rate 'excellent' with regard to the fulfilment of these criteria but have entered bids for higher hourly rates, they would only be considered if there was still panel capacity left after the firms bidding at the lowest hourly rate have been accepted. No distinction will be made between providers which have been rated 1, 2 or 3 at peer review. Excellence will therefore not be rewarded. The LSC justifies not weighting the peer review levels in the competition rounds by the lack of a proper VHCC peer review mechanism at present.¹⁸⁶

159. We share witnesses' misgivings about the design of the VHCC auction process and do not think that this process is justifiable.¹⁸⁷ When we confronted the Chairman of the LSC with our doubts, he assured us that the eventual competitive tendering process for general legal aid work would have to be "a combination of quality and price and value".¹⁸⁸

"[...] I do not think you should take that as a model for what is going to happen with other criminal and civil in 2008 and 2009. That is something which we want to discuss further with the profession, as I said earlier. That is a debate which we have not yet even started."¹⁸⁹

160. Quality of publicly funded legal services is crucial for the effective provision of access to justice and the guarantee of fair trials. It has to be the primary criterion in any bidding process deserving the name 'Best Value Tendering'. In particular, a premium has to be attached to the bids of those providers which have achieved top rating at peer review. We are therefore disappointed with the LSC's proposals for the tendering process for entry to the panel of legal aid suppliers for Very High Cost Crime Cases. Despite the Government's assurances to the contrary, we believe that this model does not bode well for the general introduction of competitive tendering across all areas of legal aid. Quality must be assured when the procurement of publicly funded legal services moves to competitive tendering.

The fee structure and adequate sharing of economic risk

161. One of the advantages of the move from administratively set fees per case to a determination of case rates by the market, the Government claims, is a more equitable sharing of economic risk between the state and legal aid suppliers. Rates set as a result of competitive tendering would reflect the actual costs to the provider of inefficiencies in the justice system or an increase in procedural complexity by new policy or legislation. This would create economic incentives for the Government to make necessary improvements to the system in order to achieve cost benefits at the next bid round. The LSC told us that:

¹⁸⁶ LSC, *Best Value Panel for Very High Cost Cases - Regulatory Impact Assessment*, February 2007, para 7.2.2

¹⁸⁷ Ev 105 [LAPG]

¹⁸⁸ Q 392 [Sir Michael Richard]

¹⁸⁹ Q 393

“For providers, best value tendering will also solve some of the issues which most concern them, enabling them to factor the costs of local conditions (e.g. waiting at court or the police station) and national policies (e.g. new legislation) into their bids.”¹⁹⁰

In his evidence to us, Lord Carter confirmed this view:

“I think one of the things we will see as a result of moving to a market-based system is that where practitioners find the court system particularly irksome and badly organised I would hope to see prices rise in those court areas and draw attention to those facts and let people actually in the court service thereby do something about it.”¹⁹¹

162. We fear that this might be an over-optimistic view of the operation of the market forces in competitive tendering for legal aid contracts. We see the risk that legislative changes or policy decisions leading to increased complexity in proceedings, in the short term, might have to be borne exclusively by legal aid suppliers and might only be transferred to the Government in the next tendering round. A bid round could be up to three years away and take place long after the increase in complexity and thus average case length has led to an effective pay cut to the practitioner. Brian Craig, Chairman of the Association of Major Criminal Law Firms warned us:

“Although I am aware that Lord Carter is saying the market will sort that out, because they will bid at a higher rate for those courts where there is undue waiting, and things of that nature, the reality is that there will be a lot of concern as to whether or not firms will be successful in their bids and there will inevitably be pressure to bid low, and it may well be that these levels become unsustainable. They may even be sustainable at that point in time but something happens in the criminal justice system to which change in the volumes, changes in the amount of travel, waiting, whatever it might be, pushes a firm over the brink and makes them unprofitable.”¹⁹²

163. When we put these fears to Sir Michael Bichard, he said:

“I understand the point that you are making that new legislation or new circumstances may make it more expensive to deliver, but I do not think that is an unusual situation in any tender. The world does not stand still; you have always got to reflect in the price that you bid the circumstances that you think might change. You have got to build in a contingency. If you and I seek a builder to convert our house, they are going to take note of how old the house is and they are going to have to make some allowance for contingencies. I do not think we are asking them to do anything that you would not expect a normal commercial firm to do.”¹⁹³

190 Ev 294

191 Q 13

192 Q 279

193 Q 378

164. Significant changes between bid rounds in external cost factors for legal aid work beyond the control of legal aid suppliers may lead to considerable reductions in income by suppliers where they had won block contracts requiring them to do a set number cases per annum. This risk of an inequitable allocation of economic risk between the Government and suppliers could be limited by an adequate fee structure which would allow suppliers to share effectively the risk of changes in external drivers of case complexity and case length.

165. Block contracts with a fixed notional fee per case set by the market without uplifts or escape thresholds into hourly rate remuneration for very complex cases may provide suppliers with adequate financial returns where there is only very little spread in case costs and case complexity. It would therefore work best for large volume providers dealing with run of the mill cases. However, providers dealing with smaller case volumes and cases with a large spread in complexity, such as those providers doing child care proceedings, may find it extremely difficult to remain economically viable under block contracts without any graduation or at least a residual escape threshold set at the right level. It is therefore crucial that when remuneration levels will be set by the market under competitive tendering there will be a fee structure which would allow a sufficient degree of banding or graduation. Certainly escape thresholds will have to be put in place.

166. While the Government maintains that competitive tendering for legal aid contracts will lead to a fairer sharing of financial risk between providers and the LSC, we are concerned that it will be the legal aid providers who will carry the lion's share of the financial risk of inefficiencies in the justice system or significant legislative or policy changes leading to an increase in the workload per case. Even competitive tendering may not lead in all cases to an adequate allocation of financial risks through the pressure on legal aid providers to outbid one another. We are particularly anxious that an eventual tendering model for block contracts should provide for means to deal with exceptional cases sensitively and adequately.

The need for piloting competitive tendering

167. Competitive tendering for legal aid contracts is a radical innovation. Little comprehensive research appears to have been done into the likely effects which the move to legal aid procurement by competitive tendering will have on the supplier base and, more importantly, on clients and access to justice generally. We note that the LSC had intended to introduce competitive tendering for police station work in London in 2006 under the London Criminal Competitive Tendering Scheme.¹⁹⁴ When the LSC published its plans for this tendering scheme, it announced that, "lessons learnt from piloting these processes in London will inform the introduction of managed competition into other areas as appropriate".¹⁹⁵ However, in the light of the Lord Carter's review the LSC abandoned these plans.

168. The lack of research on which to base the plans was one of the most criticised aspects of the Government's plans to adopt a market-based approach to the procurement of legal aid through competitive tendering. In his oral evidence to us, Professor Ed Cape warned

¹⁹⁴ LSC, *Improving value for money for publicly funded criminal defence services in London*, January 2005

¹⁹⁵ *Ibid.*, p 4

that it was “crazy to proceed without a proper piloting of something which has such potential for destruction of the legal aid profession”.¹⁹⁶ He considered that “it is justified to use very strong language in relation to this and it seems to me that what Carter proposals constitute is a revolution in legal aid and not to pilot them verges on the reckless. In fact, it is reckless”.¹⁹⁷

169. Professor Cape compared the current reform with the phase prior to the introduction of contracting in legal aid in 2001:

“When the Legal Aid Board as was, the predecessor to the Legal Services Commission, was planning to introduce contracting which was then introduced in 2001, they piloted contracting in a number of areas around the country for a period of two or three years and they employed researchers, of which I was one, first of all to advise them on how the pilot contract should be structured and secondly then to research the implementation of contracting in those pilot areas. As a result of the work that we did, we were able to make recommendations, when contracting was rolled out nationally, about how it should be structured. Most of our ideas were taken on board by the Legal Aid Board at that time and I have to say that contracting at the time was regarded as the biggest change to legal aid that had taken place since the inception of criminal legal aid, but actually its introduction was relatively smooth in 2001. I am not trying to seek credit for that, but I am trying to say that there was a good model of how you make large-scale changes like this.”

He concluded:

“To implement Carter’s proposals without that kind of piloting is reckless because, apart from anything else, the changes that it makes will be irreversible. If it results in large-scale damage to the legal aid profession, there is no coming back from that other than over a lengthy period of time. You would have lost all of your older legal aid lawyers who will get out [...]”¹⁹⁸

170. Since it was predominantly the significant and continuing rise in criminal legal aid expenditure which had motivated the radical reforms in order to ease the pressure on the civil and family legal aid budget, most witnesses we asked agreed that competitive tendering should be piloted in the area of publicly funded criminal defence work. Alison Hannah told us:

“I think it would be a great deal of help if it was started with crime and the effects of that were monitored, not least because of course the major expenditure of the legal aid budget is on crime. If they are looking to make savings, then it is obvious that the first place to look would be on the high spending crime sections particularly. I think most people accept that there is quite a lot of difference between criminal practice and social welfare law. The social welfare law costs are relatively quite small

196 Q 121

197 Q 120

198 *Ibid.*

compared to both crime and family. In terms of more bangs for your bucks, it would certainly make sense to start with crime.”¹⁹⁹

171. Sir Anthony Clarke, the Master of the Rolls, agreed with this judgement when he informed us of the suggestion by the Civil Justice Council that a comprehensive move to competitive tendering be deferred for three years in order to run pilots for criminal legal aid tendering.²⁰⁰ When we asked Lord Justice Thomas, the former Senior Presiding Judge, he considered that as a lot more time had been devoted to the reform of criminal legal aid, plans for a reform of this area of legal aid work were much readier for implementation than civil or family legal aid.²⁰¹

172. The criminal legal aid suppliers themselves and the Government were opposed to the idea of letting “crime go first” in a regionally limited pilot scheme. Rodney Warren, Director of the Criminal Law Solicitors’ Association, considered piloting criminal legal aid competitive tendering to pose an extraordinary risk to the effective operation of the criminal justice system; “to leap ahead with criminal law without being certain of the consequences, I think, is taking a very great risk indeed”.²⁰²

173. When we put to the Lord Chancellor Professor Cape’s assessment of the Government’s plans not to pilot competitive tendering, he denied the DCA/LSC were acting recklessly. While he confirmed that the roll-out of competitive tendering from October 2008 would be regionally phased,²⁰³ he told us that:

“It is not possible, I think, to divide the country in such a way that some parts are piloted and some are not. We do not think it would be wise either. So, yes, we have thought about it, and we have thought about it again in the light of the evidence of Professor Cape [...]. We have thought about it. We do not think it is right.”²⁰⁴

On the basis that the LSC, until early 2006, intended to pilot competitive tendering in London under the London Criminal Competitive Tendering Scheme, we find it difficult to understand the Government’s sudden change of heart as to the possibility of geographically limited piloting of competitive tendering for legal aid contracts.

174. In the absence of any substantial research into the impact of competitive tendering for legal aid contracts on the legal aid market and the availability and quality of publicly funded legal services, and bearing in mind the current fragility of the legal aid supplier base, it is imperative that the risks inherent in such a radical reform be minimised and the effects analysed on a limited geographical basis. Not to do so would be reckless.

175. Since criminal defence work currently remains the major driver in overall legal aid expenditure, piloting competitive tendering in the area of criminal legal aid would be

199 Q 182

200 Q 131

201 Q 159

202 Q 268

203 See also Q 39 [Carolyn Regan].

204 Q 349

justified. Few reforms are without risks. Selecting a limited geographical area with adequate supply (such as London) for a pilot scheme and careful monitoring would help to mitigate the risk of irretrievably damaging the local legal aid market. Great care in the design and monitoring of the piloting process would have to be taken in order to limit unintended spill-over effects of criminal legal aid tendering on mixed providers offering civil or family legal aid services. However, such a pilot will not test the viability of the model in areas of limited supply that will enable assessment of other features of the scheme. Even if the London pilot worked well, further thought would have to be given to areas of limited supply.

5 A move to fewer and larger suppliers

Lord Carter's plan: fewer and larger legal aid providers

176. Central to Lord Carter's and the DCA/LSC's procurement reform plans is the plan to reduce the number of legal aid providers the LSC deals with in order to limit administration and transaction costs. Through a consequential reduction in the number of LSC staff from 1,600 to 1,000, it is estimated that that the LSC could save 30% of its current £100 million administration budget.²⁰⁵ Generally, the DCA/LSC believe that an increase in the size of legal aid providers would allow these providers to "release efficiencies"²⁰⁶ and better absorb reductions in remuneration rates based on planned cuts in LSC expenditure for travel and waiting times of criminal legal aid practitioners in urban areas.

177. Where the LSC decides to introduce minimum contract sizes for the award of a contract, a decrease in the number of legal aid firms the LSC deals with will be the automatic and intended consequence. The Lord Chancellor, told us:

"You will certainly reduce the number of firms, you will probably reduce the number of fee earners, though probably by not nearly as much as you reduce the number of firms, but you end up with a procurement system which drives efficiency, costs less and has a more efficiently organised provider market. That is [Lords Carter's] thesis, that is what he spent over a year looking at, and we accept his premise."²⁰⁷

178. According to Andrew Otterburn's first study of criminal legal aid firms for the LSC of June 2006, the most profitable and thus long-term sustainable legal aid firms are those with a large number of fee earners and high gearing, i.e. a high ratio of non-qualified fee earners, such as paralegals or 'accredited representatives' for police station work to qualified ones (solicitors).²⁰⁸ Yet, Mr Otterburn made a point of stressing that "some large firms with good gearing, effective systems and strong management are struggling to run their crime departments at a profit",²⁰⁹ and that the reasons for that were difficult to explain. Therefore we question whether, by itself, growth in the size of legal aid providers will deliver sustainability.

The impact of moving to larger providers

179. In the course of our inquiry we received evidence on a number of issues pertaining to the Government's intention to move to fewer, larger legal aid providers.

205 Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p 7; Ev 300

206 Q 323 [Sir Michael Bichard]

207 Q 342

208 Otterburn Legal Consulting, *2005 and 2006 Surveys of Crime Firms*, June 2006, pp 33/34, www.legalaidprocurementreview.gov.uk

209 *Ibid.*, p 34

Gearing in legal aid firms and the impact on quality

180. The ‘Carter model’ of highly efficient and profitable legal aid firms is based on a large number of fee earners and high gearing (as discussed in paragraph 177 above), i.e. a high ratio of unqualified fee earners to solicitors. We question whether there is so great a correlation between large size and quality, and we are concerned that the LSC's desire to reduce its own administration and transaction costs is playing too significant a role in consideration of this issue.

181. In the area of civil and family legal aid, the Government’s thinking behind the deliberate move to larger providers is that “fewer but larger providers can actually increase access by offering more categories of law and by increasing access points through flexible services such as outreach – both of which become more sustainable with larger contract size”.²¹⁰ Larger firms may indeed be better equipped to deal with cluster problems in an efficient and comprehensive way. However, during this inquiry we received repeated warnings that firms’ growth in size and breadth of categories of advice they offer must not occur at the expense of the depth and quality of the legal advice provided.²¹¹ The Law Society told us in its written submission that:

“The Carter model envisages a high ratio of fee earners to partners. Suppliers will be under pressure to delegate work to the least qualified fee earners to reduce costs. There is a real risk that quality will suffer if less qualified staff take on work that is beyond their level of experience.”²¹²

182. Only where firms operate an adequate and robust system of supervision can what Richard Jenner called a “dumbing down” be prevented.²¹³ Adequately supervising unqualified staff is in itself a time-consuming task. A legal aid solicitor commented that:

“On two separate occasions, our LSC contract manager has advised us to consider appointing unqualified staff to undertake basic casework so as to drive down our average costs. We are unconvinced about the usefulness of unqualified staff to provide advice without intensive supervision. Too often, we have picked up the pieces of cases after such advice by other suppliers.”²¹⁴

183. The most profitable and efficient legal aid providers are not necessarily always the ones providing clients with advice and representation at the highest quality. We note with interest the fact that the LSC initially tried to present evidence of a link between efficiency and quality of legal aid providers on their peer review programme, a position they did not persist with. The LSC has a substantial peer review programme and the absence of a robust link between quality and efficiency is telling. Similarly, we would have expected the LSC to produce evidence of a link between the size of a firm and the quality of its work to support its reform proposals if such evidence were available. It has not.

210 Ev 293

211 E.g. Ev 136 ff [Access to Justice Alliance]; Ev 97 [Simon Hutchence]

212 Ev 159

213 Q 175

214 Ev 243 [Pierce Glynn]

Adequate provision in rural areas and smaller towns

184. The LSC's intention to deal with fewer and larger firms has also been criticised for failing to take adequate account of the situation of clients in areas outside the major conurbations. In their written evidence to us, the Legal Aid Practitioners Group (LAPG) warned:

“The economic model suggested by Lord Carter is not achievable outside the biggest cities. His proposals depend on firms building up volumes of work that are not available in rural areas and market towns. Any payment structure therefore has to ensure that good quality criminal defence services can be provided by viable businesses outside the cities as well. The Carter Report tells us nothing about how this might be achieved”.²¹⁵

Andrew Otterburn voiced a similar caution in his study for the LSC on the impact of the Carter proposals:

“Difficulty may also be encountered in rural areas, as it is likely that economies of scale may never be realisable in areas with small, scattered populations and lower volumes. Schemes are likely to need to operate differently in rural areas from concentrated urban areas.”²¹⁶

These concerns not only apply to criminal legal aid providers, but also to civil and family legal aid lawyers, particularly those offering advice and representation in social welfare law. The Access to Justice Alliance predicted that the implementation of the new fee schemes and the envisaged move to competitive tendering aimed at reducing the number of providers the LSC deals with, may pose a risk to geographic coverage:

“[t]he introduction of fixed or graduated fees, the unified contract for not for profit organisations, and competitive tendering are all likely to cause a drop in the number of providers. This will increase the risk that advice deserts will grow rather than diminish, with the consequent impact on clients. People may need to travel further, wait longer for appointments, or lose a choice of representative.”²¹⁷

185. We were warned of difficulties in dealing with criminal cases involving multiple defendants where the issue of conflicts of interest in conducting an effective defence might arise.²¹⁸ Similarly, some family law cases, such as multi-party child care proceedings or contact proceedings, may require different firms of solicitors acting for each of the parties to the case to prevent conflicts of interest. The LSC recognised some of these risks²¹⁹ but it remains unclear how it will deal adequately with them if the number of legal aid providers continues to fall.

215 Ev 102

216 Otterburn Legal Consulting, *The impact on the supplier base of reductions in criminal fees from April 2007*, November 2006, para 5.18 (p 36), www.dca.gov.uk

217 Ev 138

218 Q 84 [Andrew Holroyd]

219 LSC, *Police Station Reforms: Boundaries, Fixed Fees and New Working Arrangements*, February 2007, para 4.9

186. Outreach programmes, referred to by Carolyn Regan in her oral evidence to us,²²⁰ and telephone advice and referral services, especially through an improved CLS Direct and the modified CDS Direct, can alleviate the problem of insufficient local or regional legal aid coverage in rural areas and market towns as a consequence of a move to fewer, larger providers. But such programmes cannot replace adequate geographical spread of legal aid providers' offices. We repeat the comments in the Constitutional Affairs Committee Report of the last Parliament *Civil Legal Aid: adequacy of provision* on the potential that outreach programmes might have in securing adequate legal aid coverage in smaller towns and rural areas, especially in social welfare law that "the details of their implementation is of crucial importance;" and that for them to have a chance of working, "they must not be irregular or infrequent and they must integrate properly with other legal services to enable proper referral".²²¹

187. Restructuring and growing in size might be a solution for criminal legal aid firms in London and other major cities to improve their efficiency and provide services in a more localised way, thus reducing the time spent travelling to advise and represent clients in police stations and magistrates' courts. However, the move to fewer, larger suppliers is a solution confined to geographical areas and categories of the law where there is clear over-supply. The welcome desire to reduce the LSC's administration and transaction costs through a reduction in the number of firms it has to deal with must be balanced against the risk to the availability and quality of publicly funded legal advice and representation associated with a reduction in the number of legal aid suppliers.

220 Q 313

221 Fourth Report of Session 2003-04, *Civil Legal Aid: adequacy of provision*, HC 391-I, para 53

6 Sustaining high quality and expert advice

188. Achieving and maintaining high standards of quality in the provision of publicly funded legal advice and representation lies at the heart of the idea of value for taxpayers' money. We have therefore given much weight in our inquiry to the issue of adequate quality control of legal aid work and to the conditions and incentives allowing quality to be maintained and developed.

Peer review and the new quality assurance mechanism

189. Given the economic incentives provided by competitive tendering to cut costs, an independent and rigorous system of quality assurance for publicly funded legal advice and representation is vital. Lord Justice Thomas put it succinctly when he gave oral evidence to us: "Certainly you have to have a system which monitors quality control. If you are to have a system of price competition, as we all know in our daily lives where we buy something on price, you must have regard to quality."²²²

The LSC proposals

190. The LSC published its final proposals for a quality assurance mechanism for solicitors' legal aid work in December 2006.²²³ Under these proposals developed by the LSC in collaboration with Professor Avrom Sherr of the Institute of Advanced Legal Studies in London, quality assessment will be a process consisting of three steps:

- a provider must achieve a 'green' rating in the measuring of 'key performance indicators' against specifications set out in the Unified Contract between the supplier and the LSC;
- a 'file assessment value for money' will be carried out by LSC senior caseworkers on the basis of a questionnaire which has been specifically developed for use by caseworkers and does not require specialist legal knowledge; and
- only where this file assessment has resulted in a 'green' rating (the most positive one) will there follow a proper review by a peer solicitor. This review will be based on a number of randomly selected sample files. It is thus exclusively paper-based.²²⁴

191. In civil legal aid work, the full peer review would be limited to those contract categories (such as debt or housing) which exceeded £50,000 in value. Categories that did not exceed this value will only be file assessed by a caseworker but not properly by peer reviewed ('file assessment (quality)'). If a supplier does not hold a single contract category of a value exceeding £50,000, a supplier's largest category would be peer reviewed. Peer review and the processes leading to it would be organisation-wide rather than based on suppliers' different offices, where these exist.

222 Q 173

223 LSC, *The Preferred Supplier Scheme – Questions and answers for providers*, December 2006, p 7

224 *Ibid.*, p 4

192. Peer review, which is intended to take place in three-yearly intervals per supplier, will lead to the rating of a supplier on a scale of 1 to 5, with 1 being the best ('Excellence'). The LSC envisaged that for the first round of competitive tendering for criminal legal aid contracts suppliers would be allowed to bid who have attained levels 1, 2 ('Competence Plus') and 3 ('Threshold Competence'). In subsequent bid rounds, only providers with a peer review rating of 1 or 2 would be permitted to bid for contracts. For the first bidding rounds for civil and family legal aid contracts envisaged to start in April 2009, the group of bidders will be limited to level 1 and 2 rated suppliers straight away.²²⁵

Comments on peer review

193. Most of the evidence we received generally welcomed the introduction of peer review and the Preferred Supplier status. However, Professor Cape cautioned that there had been no research on the effectiveness of peer review and that no one knew whether it was robust enough a mechanism for dealing with the problems associated with the current reform proposals.²²⁶ Richard Jenner strongly supported peer review "as probably the best available measure of the quality of legal work".²²⁷ In this assessment he was supported by Richard Charlton, himself an experienced peer reviewer, who, while conceding that it was not a perfect system, approved of peer review as the best of available alternatives.²²⁸

194. Nonetheless, as another peer reviewer, Helen Cousins, pointed out peer review had to mean what it said: review of a provider's case work by a proper peer, i.e. a reviewer with sufficient experience in the case work he or she was reviewing. She criticised the current LSC practice of reviewing criminal defence solicitors intending to participate in the first bid round for entry to the VHCC panel by solicitors without their own experience of dealing with VHCC. Reviewers other than those with proper experience in VHCC work would not be able adequately to judge the quality of the actual work done by a VHCC provider.²²⁹

195. Another general point of criticism was the fact that only contract categories with a value of more than £50,000 would be peer reviewed, unless all categories of a provider were below this threshold. Contract categories below this value would only be subjected to a potentially less rigorous 'file assessment (quality)'. This was criticised by Richard Jenner:

"It is also worth pointing out that organisations with small contracts may, in the end, only be peer reviewed in one of their subject areas, so there is no guarantee that everyone who will eventually become a preferred supplier will have achieved the peer review. Our concern, therefore, is that you might get some organisation that you really would not want to contract with getting through."²³⁰

225 *Ibid.*, p 7

226 Q 117

227 Q 186

228 Q 229

229 Q 289

230 Q 186

196. Peer review is, in principle, a promising quality control mechanism. Where a quality assurance mechanism is based on quality control through peer review, this review has to be carried out by experienced legal aid practitioners with their own experience of the work they are reviewing. This peer review should cover all contract categories which a supplier provides.

Quality assessment on the basis of a file

197. Most of the concerns raised by our witnesses were about the adequacy of peer review as a purely file-based system of quality control. We wanted to know whether a basically paper-based control system would work or whether more than just a file-based assessment of a provider's legal aid work was needed. We asked Richard Miller whether more was needed and he replied:

“I think you do, particularly in criminal law. On the civil side I think the file does tell you a lot more because it is very much more paper-based. Criminal work very much more depends on the actual performance of the lawyer in the police station and in the court and I think the current systems do not adequately measure that. That is one concern that I do have, that if firms are being excluded from criminal law on the basis of the system as it currently stands measuring only the paper file [does not] necessarily [exclude] the right firms. Firms could be keeping paper files absolutely fine and doing a poor job in the advocacy and the police station work or, vice versa, they could be doing excellent advocacy but just not maintaining the files as well as they should. In either event you could find that the peer review is targeting the wrong firms on the criminal side.”²³¹

198. Professor Cape and Lord Justice Thomas shared the view that the quality of defence work in the police station or advocacy in court could not be measured adequately solely on a file basis.²³² In a similar vein, Richard Jenner sought to emphasise that the peer review, while probably able to identify suppliers cutting corners because of the pressure of fixed fees, would not notice cherry picking of easier cases by a provider who turned away clients with complex matters.²³³ Simon Hutchence summed the criticism up:

“It is at best naïve, and at worst dishonest, to suggest that a system of paper file peer review will provide an effective system of monitoring and quality assurance any more than it could assure the quality of open-heart surgery. It can do nothing more than assure a minimal level of competence and recording.”²³⁴

The LSC saw things markedly differently when it commented in a consultation paper published in February 2007:

“We do not accept the LAPG's assertion that the fact that Peer Review does not directly test the advocacy skills of crime suppliers means that it is not fit for purpose as a quality standard. It is entirely legitimate to assess the quality of documents in a

231 Q 239

232 Q 129 and 136

233 Q 186

234 Ev 96

crime case, and to take action if the standard of these documents is not acceptable. In any event, we do not accept that the documents are not an accurate reflection of the quality of work provided on the file in general. The peer reviewers are highly experienced practitioners who are, in our view, capable of forming an accurate view from the file and the outcome achieved for the client whether the advocacy in a particular case has been of a satisfactory or unsatisfactory standard.”²³⁵

199. We do not share the LSC’s view. **Where the pressure on legal aid providers to provide cut-price legal advice and reduce the quality of their publicly funded work will be greater than ever through the introduction of fixed fees and competitive tendering, peer review will be the best but a limited means of identifying below standard providers. It will not be able to measure the quality of advocacy by legal aid providers in the courts or certain aspects of the provision of defence services in the police station.**

Permanence of quality standards

200. Another concern about peer review which recurred throughout our inquiry related to the issue of permanence of quality standards. Where peer review only takes place in three-yearly intervals, it may not be possible to ensure that the quality of a supplier’s publicly funded legal services, once rated level 1 or 2, would not deteriorate in the interval (e.g. as a result of an initial miscalculation of case prices of a provider’s competitive tendering bid). The envisaged quality assurance mechanism might thus prove to be too slow in picking up a sudden deterioration in the quality of a provider’s legal aid work and in preventing eventual harm to clients.

201. On the basis of her own experience as a peer reviewer for criminal legal aid work, Helen Cousins warned us that:

“[...] part of the concern is that peer review looks at what has happened in the past, it does not have any benefit in ensuring it happens in the future. Of course you can see a pattern. You can decide that a firm who is well set up and well supervised is likely to continue to be so, but in the bigger firms particularly the turnover of staff is so great, as it is bound to be, that you can have one rogue member of staff which will affect a whole load of files at a peer review and, two years later when there are peer reviews, that member of staff has gone anyway and the firm is still being assessed on that person’s work all that time ago.”

However, she concluded that, while being “an inadequate tool” it was “probably the best that there is”.²³⁶

202. When we asked Alison Hannah, Director of LAG, about the potential of peer review as a robust quality control mechanism, she alerted us to another medium to long-term risk inherent in any peer review system but potentially exacerbated by the economic pressure of fee reductions under the new schemes or market-set rates:

²³⁵ LSC, *Amendments to the General Criminal Contract Standard Terms*, Outcome of consultation, February 2007, pp 3/4

²³⁶ Q 288

“Will there effectively be grade inflation? If the peer reviewers, who are themselves working under the same pressures, are going to think ‘It is not as good as it was two years ago but, on the other hand, what do you expect for the fees that are available?’ effectively will you end up with people purportedly being at the same level but actually not providing as good quality. That is a bit of a concern as to whether, over time, it is going to be able to maintain its level.”²³⁷

Richard Charlton agreed and concluded that the peer review system should be “watched very carefully in terms of not allowing standards to slip”.²³⁸

203. Peer review as currently designed is a tool to measure quality. The possibility of sudden dips in quality in the three-year period between peer reviews is of concern to us. We doubt whether a simple ‘light-touch’ measuring of a provider’s ‘key performance indicators’ against contract specifications will add much protection against a sudden loss of quality, particularly if the peer reviewers are influenced in their expectations by the cost pressures placed on providers.

204. It is crucial that the standards for peer review levels should not be subject to slow erosion over time under the economic pressures faced by the legal aid supplier base and the peer reviewers as providers themselves.

Recognition of expertise

205. While the Government rightly emphasises the absolute importance of a quality legal aid supplier base in providing effective access to justice and value for taxpayers’ money, the Government does not seem to pursue a coherent policy when it comes to ensuring that publicly funded legal services are provided at high quality. We identified two areas in which the DCA/LSC were adopting a course which, we believe, risks a lowering of quality in certain fields of legal aid work: child care proceedings and police station work.

Child care proceedings

206. The first relates to the abolition of the 15% uplift on case fees for solicitors doing child care proceedings who are members of the Law Society’s Children Panel. Membership of this panel requires a significant amount of formal training and practical experience and panel members are expected to abide by high standards of professionalism and quality set by the panel. When the DCA/LSC published their initial family fee scheme proposals in July 2006, they intended to abolish the uplift entirely, as “the development of peer review as a direct measure of quality means that we can significantly reduce our reliance on proxies, such as panel membership to ensure and measure quality.”²³⁹ In November 2006, DCA/LSC explained that “the current arrangements have not led to an increase in panel membership [...]. Any uplift arrangements would also increase the complexity and cost of managing these payments for both providers and the LSC”.²⁴⁰ These initial plans attracted

237 Q 186

238 Q 229

239 DCA/LSC, *Legal Aid: a sustainable future*, July 2006, para 7.61 (p 42)

240 DCA/LSC, *Legal Aid Reform: the Way Ahead*, Cm 6993, November 2006, para 36 (p 31)

sharp criticism; Professor Masson and the Chairman of Resolution's Legal Aid Committee, David Emmerson, argued for a retention of the uplift when they gave oral evidence to us.²⁴¹ Sir Mark Potter, President of the Family Division, confirmed that the planned abolition would be "absolutely regrettable" and that "one of the ways in which quality has been maintained is by the provision of that uplift for these expert solicitors and [...] it is by their expertise that matters are dealt with in a more conciliatory fashion and earlier settlements are reached".²⁴²

207. Following the re-consultation on the family fee schemes in Winter 2006-07, the LSC announced in March 2007 that the 15% panel uplift would be retained under the new Care Proceedings Graduated Fee Scheme, but that it would be limited to those cases that reached the escape threshold of twice the value of the fixed fee for court case preparation or three times the fixed fee value for initial advice and negotiation. It will be subject to further review in the future. Despite this concession, the LSC reiterated that "peer review will remain the route to ensure the quality of services provided. More experienced staff will have their expertise rewarded as they will gain under standard fees by dealing with cases more efficiently and achieving better outcomes for clients".²⁴³

208. Commenting on the these changes, Professor Masson wrote to us:

"Although the uplift for panel membership is retained where cases are paid at an hourly rate, it is clear that the LSC does not support the notion of the child care panel as providing an indication that the solicitor has particular expertise in this area. This has major implications for the continuation of the panel, which remains an important indicator for other professionals (especially where they are referring parents or relatives) that the solicitor has the necessary knowledge and skills. Should child care work cease to be a specialist area of practice, the consequences for vulnerable families, the courts and local authorities are likely to be negative with cases taking longer, more disputes and less satisfactory resolution. [...] The LSC notes that it has absorbed the uplift into the standard rates it has set. Effectively this means that those without expertise who do this work will get the same benefit as those with it."²⁴⁴

Police station work

209. Similar criticism was levelled at Lord Carter's proposals for new working arrangements for police station defence work which have been adopted by the DCA/LSC. Under these proposals, the provision of initial advice and assistance by telephone or in person under the Duty Scheme to suspects held in a police station, which currently is restricted to duty solicitors, would be de-monopolised so that solicitors without a duty solicitor qualification or accredited representatives could provide initial advice.²⁴⁵ While both accredited representatives and solicitors with the necessary police station qualification

241 Q 125 and Q 222

242 Q 152

243 LSC, *Legal Aid Reform: Family and Family Mediation Fee Schemes*, consultation paper, March 2007, paras 2.9-2.11

244 Ev 317

245 LSC, *Market Stability Measures – Final response to the Public Consultation*, February 2007, para 3.20

will generally have to be regarded as sufficiently qualified for this task, the standard for duty solicitor accreditation is a higher one. Simon Hutchence criticised this approach to the maintenance of high quality standards of criminal defence work when he wrote in his submission to us that, “the only way of assuring quality is to pay for quality. Qualification as a solicitor, qualification as a duty solicitor with experience both at the police station and in advocacy at court. The current system of allocation, accreditation and supervision is the best assurance of quality”.²⁴⁶

210. While the current fee scheme proposals encourage quick dealing with cases, they do not provide sufficient economic encouragement to aspire to a high quality standard in legal aid work. Peer review might provide a quality floor but might also lead to clustering around a median quality point. Economic incentives should be created, rather than abolished, to make high quality work pay better and thus make it more attractive.

246 Ev 96 [Simon Hutchence]

7 The impact of the reforms on BME firms and clients

211. A major area of concern in our inquiry into the implementation of the Carter review was the impact of the reform proposals on black and minority ethnic (BME) legal aid providers and any implications for the provision of publicly funded legal services of members of BME communities.

BME providers

212. It is not in dispute that some of the current procurement reform proposals would affect BME-controlled legal aid providers more significantly than other providers. In particular the introduction of minimum contract thresholds for criminal legal aid contracts (which may at some point be extended to civil contracts under the Unified Contract) would affect BME-controlled providers in London, Birmingham, Leicester and Bradford disproportionately as they are over-represented among small legal aid providers in these cities.²⁴⁷

213. Research by MDA in Spring 2006, commissioned by the LSC in the context of the London Criminal Competitive Tendering scheme, calculated the potential impact of different minimum contract sizes on criminal legal aid providers in London in general and on BME-controlled providers especially.²⁴⁸ The study concluded that any proposal to change the way in which the LSC awards contracts for criminal legal aid work in London would not only have a disproportionate impact on BME-owned or controlled firms, but also on the employment prospects of BME solicitors who are far more likely to be practising in BME-owned firms than their white colleagues.²⁴⁹ The LSC calculated that a £50,000 minimum contract threshold would currently exclude 37.5% of BME-controlled providers, but only 18.9% of providers with white British majority managerial control.²⁵⁰

214. Even without the setting of minimum contract values for legal aid contracts, the introduction of competitive tendering for contracts in October 2008/April 2009 is expected to have a similar impact on BME suppliers in the major cities as it is expected that larger suppliers would bid successfully for contracts in these areas.²⁵¹

215. Lord Carter shared the concern expressed by numerous practitioners about the impact of his criminal legal aid procurement proposals on BME firms:

“This is something which has concerned me very greatly. It is a very difficult issue. About 11 per cent, I believe, of firms are owned by BME groups, so it is an issue

247 MDA, *Research on Ethnic Diversity amongst suppliers of Legal Aid services*, April 2006, p 69, www.legalaidprocurementreview.gov.uk

248 *Ibid.*, pp 50-51

249 *Ibid.*, p 4

250 LSC, *Police Station Reforms: Boundaries, Fixed Fees and New Working Arrangements – Draft Regulatory Impact Assessment*, February 2007, para 9.2.9

251 MDA, *Research on Ethnic Diversity amongst suppliers of Legal Aid services*, April 2006, p 4, www.legalaidprocurementreview.gov.uk; also: Q 99 [Geoffrey Vos QC]

there. They do tend to be smaller and therefore any reforms which lead to consolidation may affect them disproportionately, I suppose, to the whole. There is a key issue, therefore, as to how BME groups get representation in a sense of the type that they wish. We took advice. We could find no affirmative steps to recommend in this because we had to come up with something which was across the whole system.”²⁵²

BME clients

216. It is generally accepted that BME clients seek legal help or representation predominantly from BME solicitors. The DCA/LSC noted that “there appears to be a strong relationship between ethnicity of managerial control and client ethnicity: 30.1% of civil BME clients were assisted by BME majority managed providers. 93.3% of civil white British clients were assisted by white British managed providers.”²⁵³ The link between client ethnicity and that of minority ethnic majority managerial control of legal aid suppliers still appears to be largely unexplored; the LECG study of the Carter proposals noted that “it has not been tested whether BME clients seek out BME solicitors as such or whether access is likely to be determined by other variables such as the service conditions in the area”.²⁵⁴

217. Irrespective of the explanation of the link between client and provider ethnicity, our witnesses emphasised the benefits inherent in the provision of publicly funded legal advice to BME clients by providers of the same ethnic background. The Family Justice Council explained these benefits in its response to the initial DCA/LSC consultation on the civil legal aid proposals in July 2006 and warned of the consequences of a loss of BME suppliers:

“The consequences of the anticipated mass exodus of BME practitioners from this field are important - and not just simply as to the issue of right to choice of representation. There may well be an increase in costs because the advantages of BME practitioners representing BME clients are often “hidden” and not empirically quantified. [...] Close cultural affinity with the lay client means confidence is established very early on. This often means advice is more readily accepted and at an earlier stage. This then avoids the need for (often lengthy) contested hearings. BME solicitors regularly conduct appointments with clients, whether in person or on the telephone, without recourse to an interpreter. This is more efficient and represents a significant saving in terms of costs.”²⁵⁵

The importance of a shared language and the effect on the acceptance of legal advice was confirmed by other witnesses we heard²⁵⁶ and in the MDA study of April 2006.²⁵⁷

252 Q 30

253 DCA/LSC, *Regulatory Impact Assessment: Legal Aid Reform: the Way Ahead*, January 2007, para 7.2.3 (p 34)

254 LECG, *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary*, September 2006, p 43, www.lawsociety.org.uk

255 *Response of the Family Justice Council to the DCA/LSC consultation Legal Aid: a sustainable future*, p 6

256 E.g. Q 251 [Lynton Orrett]

257 MDA, *Research on Ethnic Diversity amongst suppliers of Legal Aid services*, April 2006, p 60, www.legalaidprocurementreview.gov.uk

218. Marcia Williams of the Carter Diversity Group echoed this when she told us that “the presence of those kinds of firms in the legal marketplace adds a particular value in terms of community cohesion as well”.²⁵⁸ Sailesh Mehta, a barrister, summed up the concerns of many legal aid practitioners:

“One of the difficulties that we have with Lord Carter’s proposals is that the starting point is that these small firms are uneconomic and therefore bad for business. We do not accept that, we say that these firms are, in fact, very good value for money and add a level of assistance to the community which cannot be put into monetary terms.”²⁵⁹

219. With regard to BME practitioners joining non BME-controlled providers, the Carter Diversity Group cautioned in its written submission:

“[...] BME clients are identifying with the BME firm as represented by its cultural makeup and identity and it is a choice that cannot necessarily offered by an individual BME solicitor practising in a non-BME firm. This link of cultural affinity underpins confidence in the criminal justice system for many from the BME communities.”²⁶⁰

Similarly, the MDA study warned that “without further data it is not clear whether the possibility of BME solicitors relocating to larger diversified firms might provide BME clients with an equivalent choice to that which they currently have with small specialised firms. Flexibility may be needed to review how BME and other clients and areas with specific demands have effective choice of representation, either prior to the introduction of the new system in specific areas or as experience is gained with the system”.²⁶¹

A comprehensive race impact assessment

220. Several witnesses voiced their concern over the lack of a comprehensive race impact assessment of the Carter reforms “as a package” rather than for each individual reform component (such as the police station or Very High Cost Cases reforms). Only research into the effect of the reforms taken together would allow the LSC/DCA to assess the full impact of the intertwined reforms in BME clients and suppliers.²⁶²

“It is crucial to have a race equality impact assessment and, having been promised one, I do not see the point of undertaking it piecemeal because we are told that these are all connected reforms. So if you put into place one reform you have already altered the landscape.”²⁶³

258 Q 248

259 Q 251

260 Ev 240; see also Ev 138 [Access to Justice Alliance]

261 LECG, *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary*, September 2006, p 43, www.lawsociety.org.uk

262 Q 261 [Marcia Williams]

263 Q 243 [Oba Nsugbe QC]; see also Q 263 [Marcia Williams]

221. The potential impact of the current reform proposals, especially in the area of criminal legal aid, are difficult to assess because of the lack of reliable data on the ethnic background of legal aid clients. The LSC acknowledged that there had been a shortfall in data on BME criminal clients and that it was requiring providers to submit client ethnicity data from December 2006. They assured us that “we will use that data to improve our understanding of BME issues” and that “we are confident of being able to conduct adequate race impact assessments and complying with our statutory obligations in this respect”.²⁶⁴

222. BME suppliers provide an essential link between BME communities and the legal world. They can contribute significantly to community cohesion and access to justice for BME clients. The current reforms proposals may have a disproportionate impact on BME clients who form the client base of most BME-controlled legal aid providers. This may limit access to justice for members of ethnic minorities.

223. It is imperative that reforms potentially affecting BME clients disproportionately should be robustly assessed on the basis of comprehensive and reliable statistical information. The LSC’s data sets, especially for criminal legal aid, have been acknowledged to be incomplete, so a full impact assessment of the criminal legal aid reforms on BME clients cannot yet be undertaken. We appreciate the LSC’s efforts in collecting the relevant client data and hope that they will contribute to a comprehensive and robust impact assessment of the criminal legal aid proposals.

A breach of the Race Relations Act?

224. We were warned that Lord Carter’s initial reform proposals and the current, modified proposals, might be breaching race equality legislation, notably the Race Relations Act 1976.²⁶⁵ Sections 19B and 71 of the 1976 Act, as amended by subsequent equality legislation, not only prohibit direct and indirect discrimination on grounds of ethnic background, but also place a legal duty on public authorities to promote race equality, which includes the promotion of equal opportunities.

225. The planned minimum contract sizes for criminal legal aid work were particularly considered to amount to unlawful indirect discrimination of BME-controlled legal aid suppliers on account of their disproportionate impact on them compared to white British-controlled providers. Lord Carter, however, in his report and when he gave oral evidence to us, was convinced that his recommendations “are justified by the need to control legal aid spending and to promote efficiency of service in the public interest. It is considered that the recommendations constitute a proportionate means of securing a legitimate aim”.²⁶⁶

226. This view of a proportionate justification of the uneven impact of the proposals on BME-controlled and providers under white British majority managerial control was not shared by the Bar Council, which, in its written submission to us, argued that neither the need to control legal aid spending nor the promotion of efficiency of legal aid services met

264 Ev 299

265 Ev 115 [Bar Council]; Ev 242 [Carter Diversity Group]; Ev 134 [Society of Asian Lawyers]

266 Carter report, p 114; see also Q 31

the test for justification in specific areas where minority firms may be particularly affected.²⁶⁷ The LSC disagreed with this judgement when it informed us of the approach it would be taking when considering the introduction of minimum contract sizes for criminal legal aid:

“Whether a particular policy is justified depends on the aim of the policy being legitimate and on whether the means used to achieve it are proportionate. Lord Carter’s terms of reference clearly set out a legitimate aim. Relevant factors in considering proportionality are the size of the impact and the strength of the public policy gains. Following our consultation on this issue we will take a view on whether such a threshold is justifiable against these criteria.”²⁶⁸

227. We found the conclusions MDA reached in its study on ethnic diversity of the legal aid supplier base in the context of the (now abandoned) proposals for a London Criminal Competitive Tendering scheme of great relevance and would urge the Government to take them into account:

“There is a need to calculate more carefully and explicitly the predicted cost savings of the proposals, with more detail provided about how they may improve value for money. [...] Reconsider the rationale for introducing a minimum value threshold, and be more transparent about the reasons for doing so. Ensure that there is evidence to support the proposition that the minimum value bar will improve value for money.”²⁶⁹

228. The introduction into the standard terms of the new Unified Contract for legal aid providers of a duty to have a written Equality and Diversity Policy on 1 April 2007, as recommended by Lord Carter,²⁷⁰ may contribute to combating race discrimination in firms undertaking legal aid work. However, as Marcia Williams informed us in her oral evidence, this was already a requirement under professional conduct rules. She concluded that:

“[...] those recommendations are fairly safe, they are not particularly ambitious, and that actually what we need is a commitment to these kinds of firms being present in the market place. Maybe some more radical suggestions might be considering the scope for either not insisting on a minimum threshold of contracts in particular areas, or for particular types of firms, or, as I say, looking at the criteria for best value, what that might mean and what that might represent in practice, to enable these firms to survive.”²⁷¹

229. We are concerned that some of the reform proposals may contravene the prohibition of indirect racial discrimination under the Race Relations Act 1976 as

267 Ev 115, 116 [Bar Council]

268 Ev 299

269 MDA, *Research on Ethnic Diversity amongst suppliers of Legal Aid services*, April 2006, p 6, www.legalaidprocurementreview.gov.uk

270 Lord Carter’s Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, recommendation 5.4 (p 109)

271 Q 265

subsequently amended. Some of the reform proposals, notably the introduction of minimum contract sizes, leave us in doubt as to whether they are a necessary and proportionate means to achieve the intended objective, which is the legal test.

8 The relationship between the LSC and suppliers

230. A central theme in Lord Carter's report is the need for improvement of the relationship between the various legal aid stakeholders, which Lord Carter was surprised to find was "often adversarial and sometimes hostile".²⁷² He noted that "an atmosphere of mistrust and suspicion has been allowed to build up between suppliers and the government, and implementation of the reforms would be significantly helped if stakeholder relations were strengthened".²⁷³ Radical and lasting reform to the legal aid system can only be made to work by suppliers and the LSC working together. This is of particular importance in a period of transition as the current one, in which, as Andrew Otterburn said in his study on the expected impact of the Carter proposals, confidence building between the LSC and suppliers was essential and could best be achieved on the part of the Government by being flexible.²⁷⁴

231. Some of the harshest criticism the reform plans attracted was aimed at the speed with which the Government is driving the agenda for reform of Legal Aid and the difficulty to engage in the reform process on account of its speed and complexity. Reform has followed reform and providers told us that they found it almost impossible to keep up with the constant changes in the legal aid system over the last years.²⁷⁵

232. When we asked Carolyn Regan, Chief Executive of the LSC, about the pace of legal aid reforms, she recognised that:

"It is a lot of change, but having said, that there has been quite a lot of change for the last few years in terms of some of the things that we have already mentioned and the introduction of tailored fixed fee schemes for certain parts of legal aid, so I think it is a continuation of this. It is undoubtedly an acceleration of the pace but, as I said, with discussions and consultation along the way about elements of the total package."²⁷⁶

233. Yet, to many of those involved in legal aid work, the fact that the LSC is consulting on its various fee scheme proposals and other elements of the reform comes only as slight consolation. Richard Miller voiced his concern about the flurry of different new plans, consultations and re-consultations by the LSC in an LAPG press release on 4 March 2007:

"Today I have downloaded nineteen pdf files from the Legal Services Commission website, including annexes and regulatory impact assessments. This is on top of consultations published earlier this month on police station boundaries and the very high cost criminal case panel, not to mention the negotiations on the new unified

272 Lord Carter's Review of Legal Aid Procurement, *Legal Aid: A market-based approach to reform*, p iii

273 *Ibid.*, p 7

274 Otterburn Legal Consulting, *The impact on the supplier base of reductions in criminal fees from April 2007*, November 2006, p 2

275 E.g. Q 85 [Des Hudson]; Ev 99 [Everett & Co]

276 Q 75

contract. I am paid full time to keep on top of the LSC's initiatives, and I can barely cope with this blizzard of publications. How on earth can any practitioner who is trying to conduct a substantial caseload to a high standard be expected to do so? The sheer volume, speed and extent of the changes is liable to destroy the legal aid system even if the substance doesn't.²⁷⁷

When we asked the LSC about the number of most recent, current and imminent consultations in connection with the Carter reforms, we were told that there were 11 consultations on the present criminal legal aid reform proposals, seven on civil legal aid and one cross-cutting consultation.²⁷⁸ This speed and the almost overwhelming amount of detail in the LSC's various proposals have clearly hampered providers in their efforts to understand the new system. Any business planning has been near to impossible.

234. The introduction of the new Unified Contract for legal aid providers on 1 April 2007 brought the already difficult situation to a head: while suppliers and their representative organisations, led by the Law Society, criticised what they described as a one-sided, inequitable contract and announced plans to challenge it by way of judicial review in the Administrative Court,²⁷⁹ the LSC insisted on the fairness of the provisions and their prospective application by it. Suppliers threatened mass refusal to sign the contract, the LSC retorted by informing them that failure to sign the contract by 2 April 2007 would mean that suppliers without a new contract would not be allowed to start new legal aid cases.²⁸⁰ Contracts signed after the 2 April would not be received by the LSC. Following this stand-off, Bindman & Partners, in an open letter to the LSC, wrote that "...the relationship between the [Legal Services] Commission and those it needs to deliver legal services to the public (and in turn to secure access to justice) has never been worse".²⁸¹

235. Another, even more critical example of the lack of trust between the Government and suppliers was the failure by the DCA/LSC to publish the crucial study by Andrew Otterburn on the impact of Lord Carter's initial reform proposals, which the LSC had commissioned and received in November 2006.²⁸² This study, as can be seen throughout our report, was critical of the short transitional period between the introduction of the fee schemes and the roll-out of competitive tendering and of the lack of adequate evidence to come to a reliable assessment of the risks associated with the Lord Carter's fixed fee proposals. It warned that changes to the timetable of the reforms should be made. While Lord Carter and the DCA had published a previous study by Andrew Otterburn of June 2006 on the criminal legal aid supplier base, this equally pertinent research remained unpublished. It was only on the initiative of suppliers' representative groups that we were alerted to the study's existence. It was eventually published in late February 2007 after we raised this issue with the Lord Chancellor.

277 LAPG, Press Release, 4 March 2007, www.lapg.co.uk; Q 95 (Des Hudson)

278 Ev 301

279 Law Society, *Statement on timetable for judicial review*, 27 March 2007, www.lawsociety.org.uk

280 Information on the LSC web site, 30 March 2007, www.legalservices.gov.uk

281 Letter to Mike Jeacock, LSC, 30 March 2007, www.bindmans.com

282 Otterburn Legal Consulting, *The impact on the supplier base of reductions in criminal fees from April 2007*, November 2006

236. While we accept the apology by the Lord Chancellor for what looked like an attempt by his Department and the LSC to suppress an important piece of research relating to the speed of the current reforms, we remain profoundly troubled by the handling of the Otterburn issue on the part of the LSC.²⁸³ It suggests an inability on the part of the LSC to address fairly and openly a critical aspect of the reforms: the ability of the supplier-base to survive the reform proposals.

237. There has been a catastrophic deterioration in the relationship between suppliers, their representative organisations, and the LSC. Unless the relationship improves, we do not see how implementation of these reforms can be successful. We urge all involved in legal aid reform to re-engage in a more constructive dialogue.

9 Conclusion

238. The current proposed reforms to the Legal Aid system are radical and ambitious. They represent one of the most significant changes to the Legal Aid system in its history. We support the general aims of the reforms – there is a pressing need to limit the significant rise in expenditure on Legal Aid.

239. The reform package is being implemented at too fast a speed. There has been no time for proper business planning by practitioners or even for them to understand the raft of proposals, counterproposals and consultations which have been emanating from the Legal Services Commission. Although it clear that there is an urgent problem with Legal Aid expenditure, it is no solution to try to introduce changes in an atmosphere of panic.

240. A major part of the proposals involves the introduction of transitional arrangements which are over complex and too rigid. We think that the Government should reconsider whether they are necessary. We doubt whether the risk to the supplier base which they pose justifies their introduction. We would prefer to see competitive tendering — insofar as that is a solution to the problem — implemented directly, once there has been adequate piloting.

241. We are extremely concerned that the Department is trying to engage in such a far reaching change to the structure of Legal Aid on the basis of little or no evidence about which cost drivers have caused the problem or how its plans for a solution are likely to affect both suppliers and clients. We fear that if the reforms go ahead there is a serious risk to access to justice among the most vulnerable in society. It is clear that the Government has been unwise in attempting to reform the entire system rather than in concentrating on those areas which cause the problem: Crown Court and public law children cases.

10 Recommendations

Legal aid and access to justice

1. We welcome the opportunity which the current procurement and remuneration reform proposals offer to address shortcomings and inefficiencies in the current system. Any money saved under the proposals might fund further acts of assistance and increase the number of citizens receiving legal advice. However, we must sound a note of caution. Access to justice and “value for money” for publicly funded legal work, which are major considerations behind the current reform proposals, are not only about the quantity of legally aided acts, but equally about the quality, nature and adequate geographic spread of those acts of assistance. (Paragraph 11)
2. Legal aid is a public service under significant financial pressure. However, only a properly resourced supplier base will be able to continue to provide the quality legal advice and representation to which legally aided clients are entitled. The impact upon access to justice will be the litmus test for these reforms. Providing effective access to justice is a basic tenet of the rule of law and a core characteristic of the welfare state. The reform proposals must not be allowed to cause irreversible damage to the legal aid system. (Paragraph 14)

Increases in the legal aid budget

3. While there is no room for complacency about the cost of legal aid even where expenditure in certain categories has peaked or is declining, reforms should first tackle those areas of legal aid where expenditure is continuing to rise unsustainably, especially where these reforms are radical in their nature, untested and associated with an unpredictable risk to the stability of the legal aid market. A risk-oriented, staged approach to procurement reform is required, where the expected benefits to the legal aid system are carefully balanced against the risks in each separate area of provision. (Paragraph 30)

Identifying the major cost drivers

4. The major cost drivers in the criminal legal budget and in the budget for child care proceedings are not fully understood. We believe that radical reforms of the criminal and civil legal aid system, intended to put legal aid on a more sustainable footing, can only be planned on the basis of a fuller understanding of the actual reasons for the increase in expenditure in the areas of concern. Necessary qualitative and quantitative research into the cost drivers in criminal legal aid and child care proceedings needs to be carried out as a matter of urgency. (Paragraph 38)

The fragility of the legal aid supplier base

5. Where the legal aid supplier base is generally economically fragile and in continuing, significant decline, reforms to legal aid remuneration and procurement must not lead to a further acceleration of this decline and reduction of the profitability of legal aid work. (Paragraph 51)

Fixed fees and the quality of legal aid

6. We have no objection in principle to a system of graduated fees provided that system adequately captures the amount of work a legal aid supplier has to undertake to provide high quality advice and representation. For most kinds of legal aid work, such a system will require appropriate graduation. (Paragraph 70)

Protecting vulnerable clients

7. Fee schemes which only provide for relatively flat fixed fees with very little graduation provide economic disincentives to taking on more complex cases. This is likely to disadvantage already vulnerable clients. Only appropriately graduated fee schemes which allow adequate remuneration for more complex cases and those where attendance by, or communication with, a client is unusually difficult would encourage providers to devote the time needed to deal with such cases. This might go some way to help prevent cherry picking of cases to the detriment of vulnerable clients. (Paragraph 76)

Risk to specialist providers

8. It is of crucial importance that any fixed or graduated fee system allows specialist and niche suppliers to obtain a reasonable return for their work in order to guarantee the provision of high quality advice for complex cases and thus to ensure access to justice for those requiring specialist advice and representation. There is a major risk that specialist providers will be lost to the Legal Aid system. (Paragraph 82)

Regional differentiations in fees

9. Given the considerable geographical spread in the costs of running a legal aid firm, where fixed or graduated fees are set administratively, we recommend that they should, wherever possible, reflect these variations. Only then will comparable work in effect be remunerated on a true like for like basis. (Paragraph 85)

The inclusion of travel and waiting time costs in the fee schemes

10. Generally, we can see merit in limiting travel costs in geographical areas and for categories of legal aid work where there is ample local supply of legal advice, such as for criminal defence work in most areas of London. It should be incumbent on local legal aid providers to ensure that unnecessary travel costs are not incurred. Factoring in appropriate elements of travel costs in major conurbations to graduated fee schemes is a justifiable step to achieve control over unreasonable travel costs, but care will have to be taken that this does not lead to unsustainably low fee levels. (Paragraph 90)
11. Established police station practice, such as bail-backs, is likely to have contributed to the increase of police station travel costs over the last few years. Therefore, a proper graduation of the police station case fee that took account of the number of attendances, or a time-related banding as in the Magistrates' Courts Standard Fee

Scheme, would provide an adequate sharing of economic risk of rises in defence practitioners' travel cost between the supplier and the Government. (Paragraph 91)

12. The inclusion of travel costs in the civil and family fees may affect vulnerable clients disproportionately by providing an economic disincentive to providers to take on their cases for fear of incurring travel costs beyond the element provided for in the fixed or graduated fee. This would be exacerbated in rural areas and small towns where provision by civil and family legal aid providers will be more uneven. We therefore disagree with the Government's plans to include them in the fixed fees. (Paragraph 93)
13. Both Lord Carter and the Lord Chancellor, Lord Falconer of Thoroton, recognised that there was a variety of reasons for waiting costs of legal aid suppliers and that much of those causes were outside the effective control of legal aid suppliers. While legal aid suppliers should generally be encouraged to make best use of waiting time, there are compelling considerations against the inclusion by the DCA/LSC of waiting costs in the fixed and graduated fee schemes. There is agreement that this cost factor is largely not in the control of the legal aid provider; it would therefore be manifestly unjust to make the provider bear the economic risk of increases in waiting time beyond what is included in the case fee as remuneration for average waiting time. Rather, there should be an economic incentive for the Government to improve police station procedure, court listing practice and case preparation by the CPS or local authorities in order to reduce waiting costs to the legal aid budget. (Paragraph 94)

Not-for-Profit organisations – a special case?

14. Not-for-Profit suppliers of legal advice play a crucial and invaluable role in the provision of social welfare advice and assistance to some of the most disadvantaged clients. Yet, where advice centres and comparable other NfP institutions undertake similar work for similar clients to that of legal aid solicitors, the current difference in the level of remuneration is not sustainable in principle. However, care will have to be taken that the transitional arrangements put in place for the adaptation of NfP providers to new remuneration arrangements will allow these organisations to adjust appropriately to the new funding schemes, as the impact of the transition to fixed or graduated fee schemes is likely to be a significantly more difficult process for a large number of NfP providers than for solicitors with an experience of working under the current Tailored Fixed Fee Scheme. (Paragraph 101)

Detailed impact of the new fee schemes

15. As the regional financial impact figures for the Tailored Fixed Fee Replacement Scheme, the family fee schemes and the police station and magistrates' courts fee schemes indicate, their proposed implementation in October 2007 will have considerable negative financial consequences for a significant number of legal aid suppliers, especially in major urban areas. (Paragraph 122)
16. We agree that remuneration solely on the basis of time spent on a case is a disincentive to dealing with cases efficiently. Continuing the journey away from

remuneration of publicly funded legal services on the basis of hourly rates towards remuneration on a per case basis, whether the price is set administratively or through competitive tendering, is therefore the right course of action. (Paragraph 123)

17. However, fairness in remuneration demands that the rate for dealing with a legal aid case, be it in the field of criminal law, civil or family law, should ideally be based on objective criteria that adequately capture the complexity of cases and allow a more accurate determination of the likely work which a provider has to invest in a case in order to deal with it appropriately. (Paragraph 124)

Lack of adequate data

18. Where the LSC embarks upon the creation of a comprehensive system of fixed and graduated fee schemes intended to provide a sustainable basis for the future of the legal aid market, fair to both the suppliers and the tax payer, it can only do so meaningfully on the basis of adequate knowledge of the reasons for variations in case costs between firms, areas of the country and within each category of legal aid. This knowledge presupposes collection of the right data and of statistical research. It appears that the LSC has inadequate information on which to base its proposed fixed and graduated fee schemes. (Paragraph 127)
19. Equally, there is very little reliable statistical information about the economic situation of the legal aid supplier base on which valid predictions of the impact of changes to remuneration or procurement arrangements could be based. The Government does not have all the information required to assess the true impact on legal aid suppliers of the reform proposals, especially of the new fee schemes on the legal aid market. It cannot know if, and how, legal aid suppliers in different regions and categories of the law will be able to absorb the planned rate cuts, especially in London and other urban areas, if it does not have sufficient detailed information about the economic situation of legal aid suppliers by region and contract category. Furthermore, the evidence it does have points to significant problems in forcing radical change on the profession (Paragraph 128)
20. We appreciate that, as Sir Michael Bichard, the Chairman of the LSC, pointed out to us, it is extremely difficult to draw conclusions about how the firms are going to respond to a very different set of circumstances. In the light of this uncertainty and the general lack of data, the DCA/LSC's intention of a nationwide imposition of fixed fees followed rapidly by competitive tendering across the entire legal aid system is a breathtaking risk. It puts a great deal of faith in economic argument in the teeth of LSC-commissioned evidence which casts doubt on the capacity of supplier to respond. This risk might be justified where the whole system is in utter crisis but large parts of the system (especially non-family civil legal aid) are stable in cost terms. We recommend a reconsideration of the plans and the adoption of a much more measured, risk-based strategy for reform. (Paragraph 129)

Risks in the transitional period

21. The short term introduction of transitional fixed and graduated fee schemes at breakneck speed will not allow providers to make best use of what should be a

transitional period in which firms can carry out carefully planned business restructuring, where potential for efficiency gains in restructuring exists at all. Quality legal aid suppliers might be forced out of the legal aid market on grounds of the income reduction expected in the transitional period before they even have a chance to compete on the basis not just of price but also on quality in the best value tendering process. (Paragraph 133)

22. We strongly recommend that the Government reconsider the timing and comprehensiveness of the reforms. The problem areas of the legal aid budget (Crown Court defence work and child care proceedings) should be addressed swiftly, but we fail to see the need for potentially short-sighted transitional arrangements for legal aid remuneration in anticipation of the roll out of competitive tendering from October 2008, where there are already mechanisms for controlling unit costs or where the costs of cases appears to be under control. We can see merit in time in moving beyond tailored fixed fees for instance. But the desire to impose inflexible national fixed fees against a shaky evidence base is unwise in the extreme. It is more so given the proposed move to competitive tendering. The LSC's time would be far more wisely devoted to designing an appropriate system of competitive tendering, than it is to designing and implementing a suite of reforms which are fraught with difficulties and which are, in any event, only likely to be in place for a short period of time. (Paragraph 134)
23. Given the current fragility of the legal aid supplier base and the time suppliers will need to restructure their businesses where necessary, the introduction of ill-thought out new fee schemes, which are predicted to result in significant reductions in income for a considerable number of suppliers for little more than one to three years' time prior to competitive tendering, poses a great risk for suppliers and clients alike. The introduction of these fee schemes for the short transitional period should therefore be halted. (Paragraph 135)

The existence of an appropriate market

24. There is no "one size fits all" solution to legal aid procurement. The LSC will have to ensure that where it intends to procure publicly funded legal services by means of competitive tendering, suitable market conditions exist in order to make the market-based approach to legal aid succeed. Only where there is a sufficiently large number of suppliers can competitive tendering work and conflicts of interest in criminal defence or family cases be avoided. In some areas of the country this will be difficult. Competitive tendering is therefore unlikely to be a model which is uniformly suitable throughout England and Wales. (Paragraph 141)

The Government's acceptance of increasing prices

25. It is absolutely fundamental to Lord Carter's proposals for best value tendering that the market sets the price. It is crucial to the correct pricing of legal aid work and the sustainability of the system. The Lord Chancellor and the LSC indicated a strong belief that competitive tendering would not lead to an increase in fee levels. Where that is not the case there will be one or both of two responses:

- The market price will be treated as a cartel price and dealt with accordingly; and
- The market price will be accepted but cuts made elsewhere in legal services to offset the increase in the budget.

The first response betrays a lack of confidence in the LSC's ability to set up a system of tendering that is genuinely competitive. The second shows that a market-system that delivers any increases in price might not be sustainable. Either way, neither the LSC nor the DCA appear to have confidence in the central premise upon which the reforms are based. (Paragraph 144)

Competition and market entry in subsequent bid rounds

26. Designing an effective and workable model for competitive tendering of legal aid contracts will be the LSC's prime task. It is a formidable one. Ensuring market stability, an adequate opportunity of market entry for new or external providers and a necessary degree of competition between legal aid providers beyond the first round of competitive tendering will be crucial in the design of the tendering process. (Paragraph 154)

The tendering process – a guarantee for quality

27. Quality of publicly funded legal services is crucial for the effective provision of access to justice and the guarantee of fair trials. It has to be the primary criterion in any bidding process deserving the name "Best Value Tendering". In particular, a premium has to be attached to the bids of those providers which have achieved top rating at peer review. We are therefore disappointed with the LSC's proposals for the tendering process for entry to the panel of legal aid suppliers for Very High Cost Crime Cases. Despite the Government's assurances to the contrary, we believe that this model does not bode well for the general introduction of competitive tendering across all areas of legal aid. Quality must be assured when the procurement of publicly funded legal services moves to competitive tendering. (Paragraph 160)

The fee structure and adequate sharing of economic risk

28. While the Government maintains that competitive tendering for legal aid contracts will lead to a fairer sharing of financial risk between providers and the LSC, we are concerned that it will be the legal aid providers who will carry the lion's share of the financial risk of inefficiencies in the justice system or significant legislative or policy changes leading to an increase in the workload per case. Even competitive tendering may not lead in all cases to an adequate allocation of financial risks through the pressure on legal aid providers to outbid one another. We are particularly anxious that an eventual tendering model for block contracts should provide for means to deal with exceptional cases sensitively and adequately. (Paragraph 166)

The need for piloting competitive tendering

29. In the absence of any substantial research into the impact of competitive tendering for legal aid contracts on the legal aid market and the availability and quality of

publicly funded legal services, and bearing in mind the current fragility of the legal aid supplier base, it is imperative that the risks inherent in such a radical reform be minimised and the effects analysed on a limited geographical basis. Not to do so would be reckless. (Paragraph 174)

30. Since criminal defence work currently remains the major driver in overall legal aid expenditure, piloting competitive tendering in the area of criminal legal aid would be justified. Few reforms are without risks. Selecting a limited geographical area with adequate supply (such as London) for a pilot scheme and careful monitoring would help to mitigate the risk of irretrievably damaging the local legal aid market. Great care in the design and monitoring of the piloting process would have to be taken in order to limit unintended spill-over effects of criminal legal aid tendering on mixed providers offering civil or family legal aid services. However, such a pilot will not test the viability of the model in areas of limited supply that will enable assessment of other features of the scheme. Even if the London pilot worked well, further thought would have to be given to areas of limited supply. (Paragraph 175)

A move to fewer and larger suppliers

31. The most profitable and efficient legal aid providers are not necessarily always the ones providing clients with advice and representation at the highest quality. We note with interest the fact that the LSC initially tried to present evidence of a link between efficiency and quality of legal aid providers on their peer review programme, a position they did not persist with. The LSC has a substantial peer review programme and the absence of a robust link between quality and efficiency is telling. Similarly, we would have expected the LSC to produce evidence of a link between the size of a firm and the quality of its work to support its reform proposals if such evidence were available. It has not. (Paragraph 183)
32. Restructuring and growing in size might be a solution for criminal legal aid firms in London and other major cities to improve their efficiency and provide services in a more localised way, thus reducing the time spent travelling to advice and represent clients in police stations and magistrates' courts. However, the move to fewer, larger suppliers is a solution confined to geographical areas and categories of the law where there is clear over-supply. The welcome desire to reduce the LSC's administration and transaction costs through a reduction in the number of firms it has to deal with must be balanced against the risk to the availability and quality of publicly funded legal advice and representation associated with a reduction in the number of legal aid suppliers. (Paragraph 187)

Peer review and the new quality assurance mechanism

33. Peer review is, in principle, a promising quality control mechanism. Where a quality assurance mechanism is based on quality control through peer review, this review has to be carried out by experienced legal aid practitioners with their own experience of the work they are reviewing. This peer review should cover all contract categories which a supplier provides. (Paragraph 196)

34. Where the pressure on legal aid providers to provide cut-price legal advice and reduce the quality of their publicly funded work will be greater than ever through the introduction of fixed fees and competitive tendering, peer review will be the best but a limited means of identifying below standard providers. It will not be able to measure the quality of advocacy by legal aid providers in the courts or certain aspects of the provision of defence services in the police station. (Paragraph 199)
35. Peer review as currently designed is a tool to measure quality. The possibility of sudden dips in quality in the three-year period between peer reviews is of concern to us. We doubt whether a simple “light-touch” measuring of a provider’s “key performance indicators” against contract specifications will add much protection against a sudden loss of quality, particularly if the peer reviewers are influenced in their expectations by the cost pressures placed on providers . (Paragraph 203)
36. It is crucial that the standards for peer review levels should not be subject to slow erosion over time under the economic pressures faced by the legal aid supplier base and the peer reviewers as providers themselves. (Paragraph 204)

Recognition of expertise

37. While the current fee scheme proposals encourage quick dealing with cases, they do not provide sufficient economic encouragement to aspire to a high quality standard in legal aid work. Peer review might provide a quality floor but might also lead to clustering around a median quality point. Economic incentives should be created, rather than abolished, to make high quality work pay better and thus make it more attractive. (Paragraph 210)

The impact of the reforms on BME firms and clients

38. BME suppliers provide an essential link between BME communities and the legal world. They can contribute significantly to community cohesion and access to justice for BME clients. The current reforms proposals may have a disproportionate impact on BME clients who form the client base of most BME-controlled legal aid providers. This may limit access to justice for members of ethnic minorities. (Paragraph 222)
39. It is imperative that reforms potentially affecting BME clients disproportionately should be robustly assessed on the basis of comprehensive and reliable statistical information. The LSC’s data sets, especially for criminal legal aid, have been acknowledged to be incomplete, so a full impact assessment of the criminal legal aid reforms on BME clients cannot yet be undertaken. We appreciate the LSC’s efforts in collecting the relevant client data and hope that they will contribute to a comprehensive and robust impact assessment of the criminal legal aid proposals. (Paragraph 223)
40. We are concerned that some of the reform proposals may contravene the prohibition of indirect racial discrimination under the Race Relations Act 1976 as subsequently amended. Some of the reform proposals, notably the introduction of minimum contract sizes, leave us in doubt as to whether they are a necessary and proportionate means to achieve the intended objective, which is the legal test. (Paragraph 229)

The relationship between the LSC and suppliers

41. There has been a catastrophic deterioration in the relationship between suppliers, their representative organisations, and the LSC. Unless the relationship improves, we do not see how implementation of these reforms can be successful. We urge all involved in legal aid reform to re-engage in a more constructive dialogue. (Paragraph 237)

Formal minutes

Wednesday 18 April 2007

Members present:

Mr Alan Beith, in the Chair

David Howarth

Dr Alan Whitehead

Siân James

Jeremy Wright

Bob Neill

Draft Report [Implementation of the Carter Review of Legal Aid], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 241 read and agreed to.

Summary read and agreed to.

Conclusions and recommendations read and agreed to.

Resolved, That the Report be the Third Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No 134 (Select Committees (Reports)) be applied to the Report.

Several papers were ordered to be appended to the Minutes of Evidence

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House

[Adjourned till Tuesday 24 April at 4.00pm]

Witnesses

Wednesday 17 January

Lord Carter of Coles, Member of the House of Lords, **Carolyn Regan**, Chief Executive, and **Richard Collins**, Executive Director of Policy and Planning, Legal Services Commission Ev 1

Des Hudson, Chief Executive, **Andrew Holroyd**, Vice-President, The Law Society, **Geoffrey Vos QC**, Chairman and **Tim Dutton QC**, Vice-Chairman, The Bar Council Ev 11

Tuesday 23 January

Professor Ed Cape and **Professor Judith Masson** of the University of West England, Bristol Ev 18

Rt Hon Sir Anthony Clarke, Master of the Rolls, **Rt Hon Sir Mark Potter**, President of the Family Division and **Rt Hon Lord Justice Thomas**, former Senior Presiding Judge Ev 25

Tuesday 30 January

Alison Hannah, Director, Legal Action Group, **Richard Jenner**, Director, and **Adam Griffith**, Policy Officer (Legal Services), Advice Services Alliance Ev 33

David Emmerson OBE, Chair of the Legal Aid Committee, Resolution, **Richard Charlton**, Chair, Mental Health Lawyers Association, **David Jockelson**, Miles and Partners, and **Roy Morgan**, Morgans Solicitors Ev 41

February 6 February

Richard Miller, Director, Legal Aid Practitioners' Group, **Oba Nsugbe QC**, Chairman, **Lynton Orrett**, **Marcia Williams** and **Sailesh Mehta**, Carter Diversity Group Ev 51

Rodney Warren, Director, Criminal Law Solicitors' Association (CLSA); **Brian Craig**, Chairman, Association of Major Criminal Law Firms; **Helen Cousins**, Partner, Cousins & Tyrer; and **Joanna Stevens**, Specialist National Criminal Law Team, Thompsons Solicitors Ev 57

Tuesday 20 February

Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, **Sir Michael Bichard KCB**, Chair, Legal Services Commission **Ms Carolyn Regan**, Chief Executive, Legal Services Commission Ev 65

List of written evidence

1	Coodes Solicitors	Ev 77
2	Gordon Hotson	Ev 78
3	Resolution	Ev 81
4	Advice Services Alliance	Ev 85
5	Thompsons Solicitors	Ev 90
6	Lambeth Housing Lawyers	Ev 94
7	Simon Hutchence	Ev 94
8	Everett & Co.	Ev 98
9	David Jockelson of Miles and Partners	Ev 99
10	Legal Aid Practitioners Group (LAPG)	Ev 101
11	Further evidence from the Legal Aid Practitioners Group	Ev 104
12	The Children's Legal Practice Ltd	Ev 105
13	Mackintosh Duncan Solicitors	Ev 105
14	Legal Action Group	Ev 109
15	The Bar Council	Ev 113
16	Housing Law Practitioners Association (HLPAs)	Ev 121
17	Further evidence from the Housing Law Practitioners Association (HLPAs)	Ev 124
18	Greater Manchester Law Practitioners	Ev 128
19	The Society of Asian Lawyers (SAL)	Ev 131
20	WhatleyRecordon	Ev 134
21	Liverpool Law Society	Ev 135
22	Access to Justice Alliance	Ev 136
23	HCL Hanne & Co	Ev 139
24	Law Centres Federation (LCF)	Ev 147
25	Ole Hanson & Partners	Ev 153
26	Michael Strain of Martin and Strain	Ev 154
27	The Law Society	Ev 155
28	Child Poverty Action Group (CPAG)	Ev 160
29	Ian Kelcey of Kelcey and Hall	Ev 165
30	Young Legal Aid Lawyers	Ev 167
31	Bristol Law Society	Ev 173
32	Fisher Meredith	Ev 175
33	Education Law Practitioners' Group	Ev 178
34	Jamie Ritchie (Brent Community Law Centre)	Ev 182
35	Association of Major Criminal Law Firms	Ev 183
36	Supplementary evidence from the Association of Major Criminal Law Firms	Ev 184
37	Simon Tierney	Ev 186
38	John Smith	Ev 192
39	Sansbury Campbell Solicitors	Ev 193
40	Immigration Law Practitioners Association (ILPA)	Ev 200
41	Alderson Dodds	Ev 205
42	Mental Health Lawyers Association	Ev 207

43	Further evidence from the Mental Health Lawyers Association	Ev 211
44	Birmingham Law Society	Ev 214
45	Child Concern	Ev 216
46	Police Station Defence Service	Ev 218
47	NAGALRO (The Professional Association for Family Court Advisers and Independent Social Work Practitioners and Consultants)	Ev 218
48	The London Criminal Courts Solicitors' Association	Ev 221
49	Further evidence from the London Criminal Courts Solicitors' Association	Ev 227
50	T. V. Edwards	Ev 229
51	The Institute of Legal Executives (ILEX)	Ev 230
52	Howard League for Penal Reform	Ev 234
53	Standing Committee For Youth Justice	Ev 236
54	The Carter Diversity Group	Ev 239
55	Pierce Glynn Solicitors	Ev 242
56	Further evidence from Pierce Glynn Solicitors	Ev 243
57	Citizens Advice Bureau	Ev 247
58	Criminal Law Solicitors' Association (CLSA)	Ev 254
59	Further evidence from the Criminal Law Solicitors' Association (CLSA)	Ev 257
60	Vera Baird QC MP, Parliamentary Under-Secretary of State, DCA	Ev 259
61	Further evidence from Lord Falconer of Thoroton Secretary of State and Lord Chancellor, DCA	Ev 260
62	Further evidence from Lord Falconer of Thoroton Secretary of State and Lord Chancellor, DCA	Ev 261
63	Further evidence from Lord Falconer of Thoroton Secretary of State and Lord Chancellor, DCA	Ev 320
64	Newcastle Law Centre	Ev 261
65	Garden Court Chambers	Ev 262
66	Linda Filby	Ev 264
67	Andrew Siddal of Varley Hadley Siddall	Ev 265
68	Julia Bainbridge of Saunders Solicitors	Ev 268
69	Van Baaren & Wright	Ev 269
70	Association of Lawyers for Children	Ev 271
71	The President of the Family Division	Ev 283
72	The Rt Hon Lord Justice Thomas	Ev 285
73	The Master of the Rolls	Ev 287
74	Professor Frank H Stephen, University of Manchester	Ev 288
75	Supplementary evidence from the Legal Services Commission	Ev 290
76	Further supplementary evidence from the Legal Services Commission	Ev 291
77	Further supplementary evidence from the Legal Services Commission	Ev 321
78	Supplementary evidence from Professor Judith Masson	Ev 317
79	Nelson Guest and Partners	Ev 319
80	Helen Cousins on behalf of a criminal defence solicitor	Ev 319

List of unprinted evidence

Additional papers have been received from the following and have been reported to the House but to save printing costs they have not been printed and copies have been placed in the House of Commons library where they may be inspected by members. Other copies are in the Record Office, House of Lords and are available to the public for inspection. Requests for inspection should be addressed to the Record Office, House of Lords, London SW1. (Tel 020 7219 3074) hours of inspection are from 9:30am to 5:00pm on Mondays to Fridays.

A.J.A. Legal Services
AccessLaw LLP Solicitors
Aina Khan Partnership
Amphlett Lissimore's
Anglia Crime Team
Anthony Gold Solicitors
Anthony Gold Solicitors (Debra Mo)
Anthony Morris Solicitors
Arnison & Co. Solicitors
Ask & Prosper
Association of Law Costs Draftsmen
Atkins Hope Solicitors
Austin & Carnley Solicitors
Christopher Baldwin
Bedford Family Law
Beevers Solicitors
Louise Bell
Ben Hoare Bell LLP
William Bennett
Bhatia Best (Bennett)
Bhatia Best (Best)
Bhatia Best (Bhatia)
Bhatia Best (Colbert)
Bhatia Best (Coleman)
Bhatia Best (Desai)
Bhatia Best (Hallmark)
Bhatia Best (Hayes)
Bhatia Best (Hunt)
Bhatia Best (Jarvis)
Bhatia Best (Jeays)
Bhatia Best (Johnson)
Bhatia Best (Lea)
Bhatia Best (Mandair)
Bhatia Best (McGarva)
Bhatia Best (O'Sullivan)
Bhatia Best (Posner)

Bhatia Best (Ramsell)
Bhatia Best (Vervoorts)
Bhavna Chudasama, Duty Solicitor
Joanne Billingham
Bindman & Partners
Bindman & Partners - not provided as Law Journal clippings
Birnberg Peirce & Partners
Bishop & Light
Blacklaws Davis LLP
Boothroyds Solicitors
Alan Bower
Brand Mellon Solicitors
Brewer Harding & Rowe
Breydons Solicitors
James Buckley
Burke Niazi
Burnetts Solicitors
Caine Ward
Camden Citizens Advice Bureau Service
Campbell Chambers Solicitors
CarterBells
Caseys Solicitors
Will Chandler
Child Law Partnership
Children and Families Law Firm
Christmas & Sheehan
Churchers Solicitors
Coffin Mew & Clover Solicitors
Cole's Solicitors
Colette Moore
Coole & Haddock
Coole & Haddock (Fowler)
Crisp & Co.
Stephanie Dale
Dawbarns Pearson
Douglas and Partners Solicitors (Fanson)
Douglas and Partners Solicitors (Rose)
Douglas and Partners Solicitors (Van Wely)
Thomas Dunton
Fiona Dunkley
Dunning & Co
Eastleys Solicitors
Edwards Vaziraney
Emmersons Solicitors
Eve Wee Solicitors

Ewings & Co. Solicitors
Farrell Matthews & Weir
Fisher Jones Greenwood LLP
Fletcher's Solicitors (Manuel)
Fletcher's Solicitors (Wesley)
Foley Harrison Solicitors
Francis Lovett Solicitors
Frank Brazell & Partners
Frank Brazell & Partners (Hoggarth)
Frank Brazell & Partners (Jones)
Fulchers Solicitors
G V Hale & Co Solicitors
David Gittins
Glaisyers Solicitors
Gray's Inn Square
Green & Co
Gregsons Solicitors
Gross & Co. Solicitors
GT Stewart
Hammett Osborne Tisshaw
Hamnett Osborne Tisshaw Solicitors
Harris Temperley
Hatch Brenner Solicitors
Hooper & Wollen
Hornby & Levy
Howells-solicitors (Simpson)
Howells-solicitors (Wright)
Huw Langley Solicitors
Ian Henery & Co.
Independent Defence Lawyers (Bhatoa)
Independent Defence Lawyers (Julian)
Joan Ferguson & Co.
John Boyle & Co. Solicitors
John Robinson & Co
Shirley Kelly
Kemps Solicitors (Clarke)
Kemp's Solicitors (Man)
Kemp's Solicitors (Sullivan)
Kerseys
Lawrence Davies & Co (Davies)
Lawrence Davies & Co (Holland)
Helen Lees
Levenes (Lynn)
Levenes (Nicolls)
Jeary Lewis

Trevor Line
Lock & Marlborough
Magistrate's Association
Marchants
Marchants Solicitors
Mark Hindley
John Marsden
Maureen Obi-ezekpazu
McMillan Williams
McMillen Hamilton McCarthy
Metcalfe Copeman & Pettefar
Michael A Jeary
Michael Wooldridge
Middlesex Law Society
Miles and Partners
Miles and Partners (Walsh)
Monica Lentin & Co
Claire Moran
Moss Beachley Mullem & Coleman
Mowbray Woodwards (Carrick)
Mowbray Woodwards (Heard)
Mr Carter
Murrays Partnership Solicitors
Newcastle Law Centre
Nigel Ley
Norton Peskett Solicitors
O'Keeffe Solicitors
Otten Penna
Parlby Calder (Butler)
Parlby Calder (Calder-Hayward)
Parlby Calder (Matranga)
Parlby Calder (Parlby)
Parlby Calder (Peters)
Parlby Calder (Spear)
Pat Monro
Payton's Solicitors
Peter Bonner & Co
Peter Soar
Philcox Gray & Co
Porter Dodson Solicitors
Powell Forster Solicitors
Powell Spencer & Partners
Powell Spencer & Partners (Echedolu)
Powell Spencer & Partners (Tait)
Professor Jane Fortin

Pye-Smith, Arthur & Cobb
R McVeighty
Rachel Gowans
Katy Rensten
Reynolds, Porter, Chamberlain
Richard Howell
Robert Blackford & Co
Robin ap Cynan
A M Robinson
Russell-Cooke Solicitors (Carwardine)
Russell-Cooke Solicitors (Little)
Saints Solicitors
Sanders Witherspoon Solicitors
Saunders Goodin Riddleston
Saunders Solicitors (Pankhania)
Scott-Moncrieff, Harbour & Sinclair
Sheltons Solicitors
Solicitor Sole Practitioners Group
Steel & Shamash (Bowker)
Steel & Shamash (Kaufman)
Stephen Burdon
Stephen Burdon
Stephens & Scown
Stone King
The Johnson Partnership
The London Criminal Courts Solicitors' Association (LCCSA)
Helen Tobin
Chris Toms
Tozers
Claire Turney
Varley Hadley Siddall (Haines)
Venters Solicitors
Vickers Solicitors
Walker Lahive
Andrew Watts-Jones
White & Sherwin
White Ryland Solicitors
Roger Wilson
Wilson & Co.
Wiseman Lee
Woolcombe Yonge
Young Legal Aid Lawyers

Reports from the Constitutional Affairs Committee

Session 2006-07

First Report	Party Funding	HC 163
First Special Report	Party Funding – Oral evidence from the Lord Chancellor on the role of the Attorney General	HC 222

Session 2005-06

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