



House of Commons
Committee of Public Accounts

The procurement of legal aid in England and Wales by the Legal Services Commission

Ninth Report of Session 2009–10

*Report, together with formal minutes, oral and
written evidence*

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The Committee of Public Accounts

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Mr Philip Dunne MP (*Conservative, Ludlow*)

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Powers of the Committee of Public Accounts are set out in House of Commons Standing Orders, principally in SO No 148. These are available on the Internet via www.parliament.uk.

Publication

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at <http://www.parliament.uk/pac>. A list of Reports of the Committee in the present Session is at the back of this volume.

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Contents

Report	<i>Page</i>
Summary	3
Conclusions and recommendations	5
1 The financial management and governance of the Legal Services Commission	7
2 The delivery of criminal legal aid	9
3 The Legal Services Commission's skills and capacity to manage change	11
Formal Minutes	13
Witnesses	14
List of written evidence	14
List of Reports from the Committee of Public Accounts 2009–10	15

Summary

This report covers the Committee's examination of the procurement and administration of legal aid in England and Wales on the basis of two reports by the Comptroller and Auditor General: his report on the qualification of the accounts of the Legal Services Commission for 2008–09¹ and his value for money evaluation of the procurement of criminal legal aid.² We took evidence from witnesses from the Ministry of Justice (the Department) and the Legal Services Commission on the Commission's financial management and governance, on how criminal legal aid is delivered, and on the Commission's skills and capacity to manage change.

The Legal Services Commission—a Non-Departmental Public Body of the Ministry of Justice—spends £2.1 billion a year on buying civil and criminal legal aid, mainly from solicitors and barristers, and a further £125 million on administration. The Commission has successfully arrested the increase in legal aid spending in the last five years, but we found it is an organisation with poor financial management and internal controls and deficient management information. These weaknesses resulted in the Commission having its annual accounts qualified for 2008–09 and an assessment that its procurement and administration of criminal legal aid posed risks to value for money.

The Committee was very concerned that such weaknesses in the Commission's performance had occurred when the Ministry of Justice spends over £2 million a year itself on legal aid policy matters and on overseeing the Commission. We found confusion and uncertainty about the respective roles of the two organisations which had led to duplication of effort on some issues and a lack of clarity about who should be responsible for others.

Because the Commission is the sole buyer of legal aid, it is important that it knows it is paying the right price for this and the effects its policies are having on the sustainability of providers. But it does not know enough about the costs and profitability of firms to know if it has set its fees at an appropriate level. Moreover, there are gaps in the arrangements to assure the quality of criminal legal aid procured which make it harder to assess whether the services delivered represent good value for money.

The Commission considered the introduction of tendering would remove the imperative for it to know the market, because prices would be set by competition. The recently announced abandonment of its plans to introduce its tendering proposals following representations from the legal profession leaves the Commission not able to assess if it is paying a reasonable price for legal aid. In particular, significant expenditure is incurred on the largest cases that take place primarily in the Crown Court and a small number of barristers are earning substantial fees from such cases. Despite playing a more active role in managing these cases, the Commission has not done the analysis to determine if its current

1 C&AG Report, *Accounts: Community Legal Service Fund and Criminal Defence Service Fund Accounts*, HC (2008–09) 731

2 C&AG's Report *The procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission*, HC (2009–10) 29

approach is cost effective.

The Commission has been responsible for implementing significant reforms to legal aid, which were recommended by Lord Carter of Coles in 2006. However, constant changes in staff at senior level—which have been costly and disruptive—and poor planning of the changes has meant that reforms have often been delayed, have not always kept to their timetable and have not been properly evaluated to assess their impact.

Conclusions and recommendations

- 1. There is a lack of clarity in the respective roles of the Ministry of Justice and the Legal Services Commission, leading to uncertainty and duplication.** This relationship is currently subject to an independent review. Irrespective of the outcome, the Department needs in future to perform a sponsor role in which its oversight and interventions are proportionate to the risk of spending and activities in respect of legal aid. This needs to be reflected, as a matter of urgency, in the framework document, policy responsibilities, and performance management regime with which the Department governs the Commission.
- 2. The Commission has failed to get a grip of its financial management and weak internal controls led to its accounts being qualified in 2008–09 because of an estimated £25 million of overpayments to solicitors.** As a priority, the Commission and the Department should ensure that effective financial management becomes a priority at the most senior level, and should put in place measures to respond more rapidly to emerging financial risks. These measures need to be in place as it moves to making more payments electronically.
- 3. The Commission was unable to account for the significant variation in profits from criminal legal aid work reported by solicitors.** Having been requested to abandon its proposals for Best Value Tendering, the Commission should set a timeframe to gather much more coherent information on the costs and profits of firms providing legal aid so that it can set prices which reflect good value for money for the taxpayer while ensuring the sustainability of the service.
- 4. The Committee is concerned that the increasing use of solicitors to conduct work in the Crown Court is threatening the long term future of the junior criminal bar and may be affecting the quality of advocacy being provided in the Crown Court.** The Commission needs to guarantee the quality of the legal aid services it purchases. As a matter of urgency it needs to finalise how it will measure the quality of advocacy in the Crown Court. It also needs to produce a robust plan for how it will deploy peer review more strategically for solicitors.
- 5. Everybody is entitled to free legal aid if they are held by the police, but only about half of people take this up.** The Commission should develop a mechanism for collecting the views of legal aid users on the service provided and properly investigate the reasons why people do not currently take up legal aid. It should also evaluate the wider impact of low take-up of legal advice on the criminal justice system, and the potential financial consequences of improving access to it.
- 6. Although the Department and the Commission launched a separate system for paying for the most expensive Crown Court cases in 2001, eight years later they still do not know whether this system gives value for money.** As they seek to make further savings from the legal aid budget, the Department and Commission should prioritise making savings in these most expensive cases. By July 2010, they should complete an evaluation of past cases to determine at what value it is most efficient to administer cases separately through a contract, and when it would provide better

value for money to handle cases using existing graduated fee schemes. They should then set the threshold for using contracts at the value which optimises value for money.

7. **While the Committee accepts that specialist skills need to be properly remunerated we were concerned to find that some barristers, notably Queens Counsel, can earn up to £1 million a year from publicly funded criminal legal aid cases.** The Commission should consider introducing an earnings cap for all individual solicitors and barristers.
8. **The Commission has struggled to recruit and retain the right skills on its senior team where the high turnover of staff has been disruptive and expensive.** The Commission should define the skills it needs, in particular at a time when it has to make significant administrative savings, and set out how it will maintain its skills at this level.
9. **The Commission lacks a clear strategic direction, reflected in its poor management of the changes to legal aid detailed by Lord Carter.** The Department and the Commission need to adopt a more coherent approach to introducing change. The Department must commit that all future reforms should have a clear timetable, should be fully piloted and evaluated, and that these evaluations are timely and consider the impact of reforms on suppliers, as well as identifying any financial impacts of the change.
10. **The Committee was disappointed, given the serious nature of the issues discussed at this hearing, that the Ministry of Justice was not represented by its Accounting Officer.** Our expectation is that Departmental Accounting Officers will appear in person to account for their spending before the Committee of Public Accounts, and in future the Committee will only consider inviting an alternative witness where a very clear case can be made.

1 The financial management and governance of the Legal Services Commission

1. The Legal Services Commission (the Commission) is a Non-Departmental Public Body sponsored by the Ministry of Justice (the Department). In 2008–09 it spent £2.1 billion on procuring and administering criminal and civil legal aid, 20% of the Department’s annual budget of £10 billion, and spent another £125 million on administration.³ The Commission has successfully controlled the growth in legal aid spending and effectively fixed the budget at 2006 levels.⁴ However, it has weak financial controls and management information to oversee this spending.⁵

2. Despite the scale of legal aid spending and the acknowledged weaknesses in the Commission’s oversight of it, the Committee’s Hearing was not attended by the Department’s Accounting Officer. The Committee reminded the Department of the established protocol that Permanent Secretaries should be responsible for accounting for how their budgets are spent by attending relevant hearings of the Committee of Public Accounts.⁶

3. The rationale for the Commission’s status as a Non-Departmental Public Body of the Ministry of Justice was that this provided a separation between Ministers and decisions about entitlement to legal aid. However, the Department acknowledged that the governance arrangements for delivering legal aid services may no longer be appropriate. The Department had employed 34 people at an annual cost of £2 million overseeing legal aid policy and spending, although this number had reduced following a reorganisation of its sponsorship and policy capability.⁷ In addition, the relationship between the Department and the Commission has been subject to a review by Sir Ian Magee which was ongoing at the time of the Hearing.⁸

4. Although the Department put considerable resources into overseeing legal aid, the division of responsibilities between it and the Commission lacked clarity and this had resulted in unnecessary duplication and complexity.⁹ This lack of clarity had been demonstrated by the Department intervening in the Commission’s everyday activities, such as negotiations with the legal professions around funding arrangements.¹⁰

3 Q 35

4 Q 96

5 Q 1

6 Q 2

7 Q 4

8 Q 52

9 Q 96

10 Qq 98–101

5. The Department admitted that it was completely unacceptable that the Commission's accounts had been qualified for 2008–09. This qualification was because the Commission had made an estimated £25 million of overpayments to solicitors providing both civil and criminal legal aid due to weak financial controls, specifically that the Commission's processes for auditing the payments it made to solicitors were insufficiently robust.¹¹ There was evidence of a failure to prioritise financial management at the most senior level, as the Commission's senior management team did not feature a qualified accountant with responsibility for financial management. The Commission was in the process of recruiting a new Finance Director who would be appointed to its senior management team.¹²

6. Given that the Commission is an organisation which makes a lot of payments, it had been surprisingly slow to address the risks which had resulted in the qualification of its accounts. The Commission had identified in the autumn of 2008 significant risks around matters which included the accuracy of providers' claims, the controls over the means of assessing the eligibility of applicants, and the robustness of its accounting systems. Yet it did not begin to undertake further work on these risks until May 2009.¹³

7. The Commission assured us that it had taken immediate steps to address the issues which had led to the qualification of its accounts. It had increased the size of its internal audit team and had doubled the number of payments that it checked.¹⁴ It was also already introducing specific measures to further improve its financial systems with key milestones to be met by April 2010, overseen by the Department's Finance Director, with further measures to follow. A cornerstone of these changes was the move from a paper-based to an electronic verification system for making payments to solicitors.¹⁵

11 Qq 5 and 53

12 Qq 30–36

13 Qq 40 and 41

14 Q 6

15 Q 44

2 The delivery of criminal legal aid

8. Legal aid solicitors reported a wide disparity in profits made from criminal legal aid. On average, solicitors' firms reported that they made 18.4% profit from criminal legal aid, and 37% of firms made more than 20%. This rate of profit was significantly higher than for many other industries.¹⁶ However, 16% of firms reported that they made no profits at all from legal aid.¹⁷

9. The Commission sets the fees it pays to suppliers without having good knowledge of the costs borne by suppliers, and it was unable to account for the wide disparity in profits derived from legal aid work by solicitors.¹⁸ The Commission argued, however, that it understood the legal aid supplier base and drew information from sources including direct discussions with solicitors and barristers, as well as a newly established central database.¹⁹

10. The Commission also suggested that its ability to understand the supplier base and get value for money from it would be improved by its plans to implement Best Value Tendering for criminal legal aid.²⁰ One week after our hearing, however, the Department announced that it had invited the Commission not to proceed with the planned pilots for Best Value Tendering. The Department said that it had been persuaded by representations made by the Law Society and legal aid firms that the scheme proposed was unlikely to lead to the creation of an efficient legal services market as envisaged by Lord Carter.²¹

11. The Commission took the lead on the assessment of the quality of legal aid provision, and one of its key tools for assessing the quality of solicitors' legal aid work was a system of independent peer review. However, it believed that ultimately quality assessment was the responsibility of the regulators of legal services.²² The Commission planned to move to a risk-based system for peer reviewing the work of legal aid solicitors, which will involve a smaller sample of reviews based on the Commission's analysis of where the risks to quality are highest.²³

12. The Committee was concerned about the impact upon the quality of publicly-funded advocacy of an increased number of solicitors conducting defence work at the Crown Court. They were also concerned about the impact that this increasing use of solicitors in the Crown Court would have upon the long term sustainability of the junior Bar. Although no measure of quality was in existence for publicly-funded defence work at the Crown Court, the Commission informed us that it would be piloting such a scheme in 2010. This

16 Qq 60 and 63

17 C&AG's Report, *The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission*, para 1.13

18 Qq 60 and 63

19 Qq 7 and 8

20 C&AG's Report, *The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission*, para 8

21 Ev 28

22 Qq 10–13

23 Q 127

was planned to apply to legal aid work conducted at the Crown Court both by barristers and by solicitors.²⁴

13. Even though everybody was entitled to free legal aid at police stations, only half of people took up this right. The Commission could not tell the Committee why people chose not to take up this right because they had not collected the views of people held at police stations. One suggestion was that people were put off claiming legal aid by pressure put on them by the police.²⁵ The Commission told us that it would shortly embark upon a survey of 10,000 custody records across England and Wales to understand the reasons behind this low take-up.²⁶ It also acknowledged that increasing the take-up of legal aid at police stations would be a challenge as there was a fixed budget for legal aid.²⁷ It did not collect data itself on the consequences of defendants moving through the criminal justice system without legal representation, but did receive information from HM Courts Service on unrepresented defendants in court.²⁸

14. The largest and most expensive cases at the Crown Court accounted for almost 10% of the criminal legal aid budget. The cost of these cases was driven in part by the high fees paid to a small number of barristers, particularly Queens Counsel, which can result in an individual barrister earning up to £1 million a year from the criminal legal aid fund.²⁹ The high cost was also driven by the considerable amount of time it took these cases to go through the courts.³⁰ To control the cost of these cases, the Commission had introduced a separate contracting arrangement in 2001. This involved managing cases through individual contracts and agreeing with solicitors and advocates in advance the work a case required and that the Commission was willing to pay for.³¹

15. The Commission was unable to demonstrate the value for money of this contracting arrangement for anything other than the most expensive Crown Court cases, and it had not centrally assembled all the data necessary to make this evaluation. The Commission assured the Committee that this situation had been rectified and data was now being brought together. The Commission announced plans to reach a decision on how to fund the most expensive Crown Court cases in future in July 2010. Options that it was considering included abandoning its contracting arrangements in favour of expanded use of graduated fees.³²

24 Q 11

25 Q 127

26 Q 56

27 Q 57

28 Q 102

29 Ev 12

30 Qq 14 and 78–85

31 C&AG's Report, *The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission*, para 3.11

32 Q 85

3 The Legal Services Commission's skills and capacity to manage change

16. The Commission had experienced a number of significant structural changes, which had been intended to make it a more efficient organisation.³³ One result of ongoing change had been the departure of several members of the senior management team in recent years, and the use of several interim members of senior management.³⁴

17. We were concerned at the cost and disruption of these changes in senior management, which had cost the public purse £1.5 million in additional payments including those made for pensions and redundancy.³⁵ Despite plans to implement significant reforms, one departure from the Commission's senior management had been its Director for Transformation, which the Committee suggested was an area of expertise which the Commission clearly needed.³⁶

18. The Department and Commission had followed a programme of reforms to the procurement of legal aid set out in 2006 by Lord Carter, who envisaged a fundamental shift to a market-based system for legal aid suppliers, beginning with measures such as fixed fees for work at police stations. The Department said that implementation of these reforms to date had resulted in savings of more than the £100 million envisaged by Lord Carter.³⁷ However, we found that they had often been poorly planned and that the Commission had often not conducted post-implementation reviews on the effects of the reforms. The Commission accepted the need to build the time for effective reviews into future projects.³⁸

19. The ultimate goal of Lord Carter's reforms was the introduction of a system of Best Value Tendering for criminal legal aid. The Commission believed that introducing competition would resolve the issue of variations in profits and would encourage firms to innovate to reduce their costs.³⁹ The Committee noted the delay that had occurred in implementing Best Value Tendering prior to the Department's decision not to proceed with the scheme.⁴⁰

20. Even before the abandonment of Best Value Tendering, we found that the Commission was likely to need to make further savings in its legal aid budget, but at the time of the hearing did not know where these could come from. Neither the Department nor the

33 Q 27

34 Qq 25–28

35 Ev 17

36 Q 29

37 Qq 65 and 66; C&AG's Report, *The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission*, para 1.9

38 Q 67

39 Qq 63 and 64

40 Ev 28

Commission could confirm whether reduced spending would result in reduced incomes for legal aid firms and barristers.⁴¹

Formal Minutes

Monday 25 January 2010

Members present:

Mr Edward Leigh, in the Chair

Mr Richard Bacon

Angela Browning

Mr Paul Burstow

Rt Hon David Curry

Mr Austin Mitchell

Dr John Pugh

Geraldine Smith

Draft Report (*The procurement of legal aid in England and Wales by the Legal Services Commission*), proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 20 read and agreed to.

Conclusions and recommendations 1 to 10 read and agreed to.

Summary read and agreed to.

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

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

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

[Adjourned till Wednesday 27 January at 3.30 pm

Witnesses

Wednesday 9 December 2009	<i>Page</i>
Ms Carolyn Regan , Chief Executive, Mr Hugh Barrett , Executive Director— Commissioning, Legal Services Commission and Mr Peter Handcock CBE, Director General, Access to Justice	Ev 1

List of written evidence

1	Legal Services Commission	Ev 12
2	The Law Society	Ev 18
3	Legal Aid Practitioners Group (LAPG)	Ev 19
4	Stuart Ranson, Ranson Legal IT Services	Ev 21
5	Michael Robinson, Emmersons Solicitors	Ev 26
6	Ministry of Justice	Ev 28

List of Reports from the Committee of Public Accounts 2009–10

First Report	A second progress update on the administration of the Single Payments Scheme by the Rural Payments Agency	HC 98
Second Report	HM Revenue and Customs: Improving the Processing and Collection of Tax: Income Tax, Corporation Tax, Stamp Duty Land Tax and Tax Credits	HC 97
Third Report	Financial Management in the Foreign and Commonwealth Office	HC 164
Fourth Report	Highways Agency: Contracting for Highways Maintenance	HC 188
Fifth Report	Promoting Participation with the Historic Environment	HC 189
Sixth Report	Train to Gain: Developing the skills of the workforce	HC 248
Seventh Report	Young peoples sexual health: the National Chlamydia Screening Programme	HC 283
Eighth Report	Department for International Development: Aid to Malawi	HC 282
Ninth Report	The procurement of legal aid in England and Wales by the Legal Services Commission	HC 322

Oral evidence

Taken before the Committee of Public Accounts on Wednesday 9 December 2009

Members present:

Mr Edward Leigh, in the Chair

Mr Richard Bacon
Mr David Curry
Nigel Griffiths

Keith Hill
Dr John Pugh
Geraldine Smith

Mr Amyas Morse, Comptroller and Auditor General, **Mr Robert Prideaux**, Director, Parliamentary Relations, and **Mr Paul Keane**, Director, National Audit Office, were in attendance. **Mr Marius Gallaher**, Alternate Treasury Officer of Accounts, HM Treasury, was in attendance.

REPORT BY THE COMPTROLLER AND AUDITOR GENERAL (HC29) THE PROCUREMENT OF CRIMINAL LEGAL AID IN ENGLAND AND WALES BY THE LEGAL SERVICES COMMISSION

Witnesses: Ms **Carolyn Regan**, Chief Executive, **Mr Hugh Barrett**, Executive Director—Commissioning, Legal Services Commission and **Mr Peter Handcock CBE**, Director General, Access to Justice, gave evidence.

Q1 Chairman: Good afternoon. Welcome to the Committee of Public Accounts. This Committee will examine both the Comptroller and Auditor General's Report on the accounts of the Legal Services Commission for 2008-09 and its Value for Money Report on the Procurement of Criminal Legal Aid in England and Wales. We welcome Carolyn Regan who is the Chief Executive and Accounting Officer of the Legal Services Commission and Hugh Barrett who is the Executive Director responsible for commissioning legal aid within the Commission. We also welcome Peter Handcock who is Director General for the Access to Justice Directorate within the Ministry of Justice which sponsors the Commission. I want to focus today on an organisation with very poor management information and weak control over its finances which is still spending £2 billion a year. Mr Handcock, why is the permanent secretary not here?
Mr Handcock: Chairman, I hold the budget for legal aid spending and I also hold the policy responsibility for legal aid so it seemed appropriate that I should give evidence to the Committee.

Q2 Chairman: I have always established the principle that it is the permanent secretary of the accounting officer who comes to this Committee. I am very happy for him to be advised by you and for you to take questions, but this Committee has to relate to permanent secretaries. They may not like coming; they just have to come. All right?
Mr Handcock: Yes.

Q3 Chairman: Mr Hancock you have 34 staff and spend £2 million a year overseeing the Legal Services Commission, yet obviously the Commission—as we

know from reading this Report—suffers from very fundamental weaknesses. Given the resources you put into this, why do you not have a firmer grip?
Mr Handcock: Chairman, the first thing to say is that this study took place while we were in the process of a re-organisation.

Q4 Chairman: Will you please not read your notes. Will you please look me in the eye and talk to me.
Mr Handcock: I am not reading a note, Chairman. We were re-organising our sponsorship and policy capability. We now have significantly fewer people than 34. I believe we do have a grip on legal aid spending and I believe we can demonstrate that. The system is in the middle of a period of radical change. We had had a long period when the budget for legal aid had gone up inexorably year after year. The reforms that we have introduced have frozen the budget at 2006 levels. We have dramatically increased the range of issues on which people receive advice. We have increased the number of cases on which people got help in the civil system by over 200,000 this year. We have reduced spending on criminal legal aid by £17 million. We have maintained the level of help being provided; there is a service in every police station in the country, as there was previously. So I think the track record of the reform programme so far is pretty good in terms of increasing value for money. There is no doubt that this Report shows there are areas in which frankly we have not had our eye on the ball as we might have done so there are things we need to learn from that.

Q5 Chairman: If you have such a firm grip why were the accounts qualified last year because of poor financial controls leading to over payments to solicitors?

 Legal Services Commission and Ministry of Justice

Mr Handcock: From the Ministry's point of view it is completely unacceptable for the Commission's accounts to be qualified and we have made that very clear. The underlying issue is that the audit process that the Commission has in place for payments was not sufficiently robust and there is a difficult balance to strike between, on the one hand, the amount of bureaucracy that is imposed on suppliers in terms of proof they have to produce for payment and, on the other, managing the risk properly. I think it is quite clear that that balance was wrong and we require the Commission urgently to address that as they are.

Q6 Chairman: Ms Regan, your accounts were qualified; what action are you now going to take to ensure that this does not happen again?

Ms Regan: Obviously we find ourselves in a regrettable position with the qualification of accounts and we have put some immediate steps in to address them. For example we have increased the size of our contract compliance team to 16 people and we are doubling the sample levels of cases that we are looking at this year. We are also doing some training for the five and a half thousand providers who are offering legal aid and we are sending out some refresher guidance. We are increasing our checks and we have taken immediate steps to increase our financial controls.

Q7 Chairman: Ms Regan, will you please look at paragraphs eight and nine of the Report which tell us, "The Commission needs to improve its knowledge of the suppliers and users of criminal legal aid". You seem to be putting all your faith on best value tendering, but how will you ever get a grip of the solicitors if you do not understand your market and you do not understand them?

Ms Regan: We do understand the market and we do have all the data. At the time of the NAO Report that was not brought together in one central database which we are now doing. We know from the recent bid rounds that we have done that some schemes are actually 400% over-subscribed so there is significant provision of legal aid practitioners everywhere and we continue to maintain a 24/7 duty rota in all the police stations in England and Wales. We know there is cover; we know there is access. We acknowledge that we can bring some of our data together in a central system.

Q8 Chairman: Do you know in detail the impact that your decisions are having on the legal aid suppliers in the bar and among solicitors? Do you actually go to the firms and to the barristers' chambers to understand the impact that your decisions are having on those barristers' chambers and on the solicitors?

Ms Regan: We understand the impact from a number of angles. We do have those direct discussions with individual solicitors' firms and barristers' chambers across England and Wales. In fact we have a network of contract managers who have individual relationships and have that information. We have also set up quarterly meetings with solicitors, barristers and trainees across the

country where we take a sample of views and we do have on-going discussions with the representative bodies like the Law Society and the Bar Council.

Q9 Chairman: Looking at paragraph 1.19: "Many barristers interviewed by the NAO undertake both criminal defence and prosecution work, and indicated that the former pays more. Barristers we interviewed expressed concern about the long-term sustainability of the Criminal Bar." You are aware of that are you?

Ms Regan: I am aware that those are the views. Again we have no evidence of gaps when we put work out to be tendered for either on the crime side or in terms of additional work on the civil side with, for example, housing problems and debt problems.

Q10 Chairman: You know that the junior criminal bar is having enormous difficulties at the moment because of the increased use of solicitors in crown courts. You must know this.

Ms Regan: I am aware of this, yes.

Q11 Chairman: Is it not a matter of concern to you that as the junior criminal bar finds it more and more difficult to get work we are going to find it more difficult to train people up to become senior barristers and excellent defence lawyers.

Ms Regan: Clearly one of the issues of importance is the future work force both in terms of solicitors and barristers and to that end we make a number of training contracts available for trainee solicitors. We have spent about £10million over the last four years helping young solicitors. There are issues, as you rightly say, in terms of the quality of advocacy and we are due to pilot a scheme in the New Year which looks at assessing the quality of advocacy, be it provided by independent barristers or indeed by solicitor advocates. I could ask Mr Barrett to give you more information on that if you like.

Q12 Chairman: It has been said to me that what is happening is that increasingly reputable firms are leaving criminal defence work and that less reputable firms are increasingly moving into the market, for instance one tactic they pursue if they are dealing, say, with a murder case is that they actually pay the defendant up to £10,000 to acquire that brief. Are you aware of that?

Ms Regan: I am not aware of that at all. I am aware of the allegation by some firms that less reputable firms are taking the work.

Q13 Chairman: Does this not worry you?

Ms Regan: Of course it does and we have therefore put in a whole system of quality checks on the solicitor firms who are doing the work. We have an independent peer review system looking at the quality of legal aid. In our contract with solicitor firms we have standards for supervisors and supervisees. We are using systems to check the quality of processes being adopted by those firms. So I would argue we have a high level of quality checks in place and clearly what we are trying to do is balance, as you rightly say, the access across England

 Legal Services Commission and Ministry of Justice

and Wales and the quality. I think there is a role for the regulators of legal services in assessing quality but at the moment we have taken on that work and we are doing it.

Q14 Chairman: Could we just have a moment to talk about the contracts of very high cost criminal cases which are dealt with in paragraphs 3.11 to 3.17? I have expressed concern about the junior bar; there is also some public concern about the very high earnings of relatively few criminal barristers who rely entirely on criminal legal aid work, who earn salaries of hundreds of thousands of pounds. Are you addressing this?

Ms Regan: On the very high cost cases the Report makes reference to some cases which have not been managed within the existing system and we are working with the other parts of the Criminal Justice System to make sure that we can predict the length of trial. As you know, it is very difficult to do that but when we do manage very high cost cases there is a very tight process of case management which means we do check the level of payments being made to both solicitors and barristers.

Q15 Chairman: Mr Handcock, this is a very complex area and it is absolutely vital that we get quality legal defence work, that people are paid a fair wage and all the rest of it. You are causing the Commission to reduce its staff by almost a third. Given the problems that we know they now have and they are struggling to understand the market place, how will this help them?

Mr Handcock: I do not think the Commission would necessarily accept that it is struggling to understand the market place as Ms Regan explained.

Q16 Chairman: You accept they have all sorts of problems; otherwise you could not be here.

Mr Handcock: I absolutely accept that the balance between risk and control, for example, in managing payments needs to be in a slightly different place. I do not think that is a question of deploying large numbers of additional staff. The solution to that problem actually is to build in the right control checks in the electronic payment process which is about to be rolled out. I do not think the issue is lack of staff; we are driving efficiency as we must do.

Q17 Mr Bacon: Ms Regan, is it correct that you went on a trip to New Zealand?

Ms Regan: It is.

Q18 Mr Bacon: Can you tell me when you went there?

Ms Regan: I went there in March.

Q19 Mr Bacon: How long for?

Ms Regan: For a legal aid international conference which happens every two years. I think I was there about ten days.

Q20 Mr Bacon: Right. The conference lasted for ten days, did it?

Ms Regan: The conference lasted for five days.

Q21 Mr Bacon: What were you doing for the other five days?

Ms Regan: I was actually having a bit of a holiday, having travelled on an economy ticket.

Q22 Mr Bacon: Did you pay for the ticket yourself?

Ms Regan: The Legal Services Commission paid for an economy ticket for me.

Q23 Mr Bacon: You took the time to have a holiday while you were there.

Ms Regan: I did.

Q24 Mr Bacon: Could you send us a note of all the costs involved in your trip to New Zealand including not just the flight but all the accommodation and everything, all the associated costs, travel inside New Zealand and so on? That would be very helpful.

Ms Regan: I would be happy to do that. We have also published that as we publish our expenses quarterly, but I will send you a note as well.¹

Q25 Mr Bacon: Thank you, that would be great. I am looking at the *Annual Report and Accounts* of the Commission and under senior directors there appear to have been a lot of changes recently. There are four people in the executive team at the moment, according to this list—yourself, Hugh Barrett, Phil Lambert and Hazel Parker-Brown—although there are seven further names who seem to have departed quite recently.

Ms Regan: Yes.

Q26 Mr Bacon: Can you explain why there has been this degree of movement?

Ms Regan: Yes, of course.

Q27 Mr Bacon: There has been a lot of acting and a lot of interim as well.

Ms Regan: Yes, that is right. We have been going through a significant change within the LSC focussing on being a more efficient organisation and trying to drive on the reforms that we have described in the earlier questions. As part of that we have reduced the number of executive directors which was five when I came into post to the three that you named, Hugh Barrett, Phil Lambert and Hazel Parker-Brown. We have also reduced our senior management team by some 20% over the year and during some of the interim months we took on two interim directors who are listed in the *Annual Report and Accounts*.

Q28 Mr Bacon: Why did you have interims?

Ms Regan: We had interims because we had to bring in specialist skills, because we did not have people in permanent posts and because we were recruiting to the permanent executive director vacancies.

¹ Ev 12

Legal Services Commission and Ministry of Justice

Q29 Mr Bacon: One of the people who seem to have departed was an executive director for transformation. Is that not the sort of person you would have to help you achieve transformation rather than the person to get rid of?

Ms Regan: What we have actually done is to consolidate that work into the three new directorates and that work is now covered in part by Mr Barrett, who is sitting on my left.

Q30 Mr Bacon: Of these people in the executive team, it is not obvious which one of them is in charge of financial management. Which one is it?

Ms Regan: It is now Hazel Parker-Brown and it was David Godfrey at the time.

Q31 Mr Bacon: Was Mr Godfrey a qualified financial manager? Was he a qualified chartered accountant?

Ms Regan: He was.

Q32 Mr Bacon: Is Hazel Parker-Brown?

Ms Regan: She is not.

Q33 Mr Bacon: She is not?

Ms Regan: No.

Q34 Mr Bacon: So you have replaced somebody who had a financial qualification to do your financial management with someone who does not.

Ms Regan: The finance director is actually the qualified accountant; he is not listed on that list of names.

Q35 Mr Bacon: Why is the finance director not part of the executive team? You are an organisation that spends £2 billion—that is 20% of the whole Ministry of Justice's budget—surely getting this right is sufficiently important that you ought to have somebody on the board as part of the executive team.

Ms Regan: You are absolutely right and the recruitment we are doing at the moment for a permanent finance director post—we have an interim in post at the moment—is someone who will be part of the senior management team and will attend executive team meetings. The board—the actual Commission—is made up of non-executive directors but that new appointment will be part of the management team.

Q36 Mr Bacon: So what is described here as executive team will grow from you plus three to you plus four?

Ms Regan: There will be a finance director at the executive team meetings. We are recruiting now and the final interviews are scheduled for next week.

Q37 Mr Bacon: I have been reading your statement of internal control (which is on page 42 of the Report). What is striking about it is the number of different levels at which you say that you control risk. You do it at the strategic level, you do it at the senior executive level, at director level where all directors are required to sign a personal assurance

statement, through internal audit, at project management level, at business unit level and there is further stuff about the staff and then you go on about how it is embedded in five different ways in the activity of the Commission. Who wrote this statement of internal control?

Ms Regan: The secretariat of the Commission wrote it and it was reviewed by a number of committees.

Q38 Mr Bacon: When was it written?

Ms Regan: It was written during the time when the NAO were doing their audit last year.

Q39 Mr Bacon: Did you have one before?

Ms Regan: We did have one before but clearly we reviewed it in the light of what was coming out of the audit.

Q40 Mr Bacon: This is the new one in light of the NAO investigations and what they found.

Ms Regan: This is the new one published when we published our annual report. We are in the process of reviewing it for this year and putting in more checks so that when people sign off the controls at senior management team level we actually ask for more evidence.

Q41 Mr Bacon: It says also over the page under the heading “Significant internal control issues” that you identified a number of control weaknesses. They include control over the accuracy of providers' claims, the controls over the means of assessment of the eligibility of applicants, and robustness of the accounting systems. When during the year did you identify that you had a problem with the robustness of your accounting systems?

Ms Regan: We identified that from about—I am trying to think of the sequence of events—late last autumn, probably about this time last year and it was an on-going process leading up to additional auditing in about May or June of this year.

Q42 Mr Bacon: I am slightly surprised that you should take so long to find out that you have weaknesses in your accounting systems, given that in many ways you are a payments organisation. It does say—this is you personally because you have signed it—“I will establish, in consultation with the MoJ, a clear timetable for the implementation of the resultant recommendations”. Is that timetable now established?

Ms Regan: We have a timetable and we have a very comprehensive action plan for which I am the responsible owner of that action plan, jointly with Mr Handcock and we report to various committees and groups including to the director of finance in the Ministry of Justice. There is a review meeting scheduled on that to review where we are with the actions on Monday of next week.

Q43 Mr Bacon: Perhaps you could just send us a copy of the timetable for the back of our Report; that would be very helpful.

 Legal Services Commission and Ministry of Justice

Ms Regan: Of course.

Q44 Mr Bacon: Where does it say you should be by when in the timetable? When will all these issues be resolved according to the timetable?

Ms Regan: It is an on-going process. In terms of putting a timetable around the issues that we know about, it is on-going between about last month and the next four to five months. There is clearly on-going work as we move towards electronic working in terms of some of our very labour intensive paper based systems that we have at the moment. The short-term measures are for now, in this financial year, but there will be an on-going programme of work as we move towards electronic working, translating three quarters of a million pieces of paper a year which come into us with legal aid applications into electronic working with instant approvals on line of whether clients are eligible for legal aid.

Q45 Mr Bacon: I will ask you about that in a second, but so far as the short term timetable is concerned are you saying that in this timetable there are specific things that will be done by specific named dates?

Ms Regan: There are, which takes us up to the end of April 2010.

Q46 Mr Bacon: You will send that to us.

Ms Regan: I will do, yes.²

Q47 Mr Bacon: As far as the electronic delivery is concerned, who is your computer contractor?

Ms Regan: It is with capgemini.

Q48 Mr Bacon: How much is the contract worth?

Ms Regan: I think it is about £11.6 million. It is in three phases starting with, as I said, electronic forms in terms of the means test for individual clients.

Q49 Mr Bacon: Who is the senior responsible owner of the project?

Ms Regan: Phil Lambert, who is the other executive director who comes with experience of having introduced these systems both in the private and the public sector.

Q50 Geraldine Smith: Mr Hancock, your title is Director General, Access to Justice, so you will be dealing quite a lot with legal aid.

Mr Hancock: Yes, legal aid is one of my responsibilities.

Q51 Geraldine Smith: Would you say it is the majority or your work?

Mr Hancock: It is a fair proportion of my work, yes.

Q52 Geraldine Smith: Why do you need a separate Commission then? If you have a team of staff and you are dealing with it, why do you need this separate Commission? We have established it is a payment agency, you are basically just paying solicitors and we know that you are not doing that

very well because the Legal Aid Commission does not bother validating claims, you just pay them out on a monthly basis (a bit like the House of Commons Fees Office it sounds like) and there are errors; the Commission does not know if the solicitors are committing fraud or whether it is just administrative errors. What is the purpose of the Commission first of all? What does it add that your team or a larger staff could not do?

Mr Hancock: The history of the Commission is that as a non-departmental public body it separates ministers from decisions about the entitlement to legal aid. I think your question, if I may say so, is a very good one. Whether the current delivery model is the right delivery model is something we are thinking about and we have commissioned a review which is being led by Sir Ian McGee to think about whether the deliver model and governance arrangements are right. There is one thing I should correct. The Commission is not simply a body that makes payments to solicitors, in fact the reform programme is about making a transition from that—which is what it used to be, it certainly was that when the Access to Justice Act was passed—and the transition will see it becoming a commissioning body which is managing contracts with providers rather than simply passing on payments into professions that were entitled to offer the legal aid service as a right. Its function has changed very substantially and will continue to change.

Q53 Geraldine Smith: It is very worrying when you look at what the Commission is doing so far, when they are just making payments. How much did you over-pay last year to solicitors? How much in over-payments were made by the Commission?

Mr Hancock: The total amount of over-payments which were calculated on the basis of an extrapolation from a sample of files was £25 million. Of that though it is worth saying that only £8 million was in relation to criminal legal aid and that represents an error rate on the transaction volume of around 0.6%, so 99.4% accuracy across a huge number of essentially paper transactions. The way in which we believe that this will be improved is by the strengthening of existing system controls and the implementation of an electronic verification system for civil payments and then subsequently for crime. As I have already said, it is absolutely unacceptable that the Commission's accounts were qualified on the basis that its controls were not good enough. In relation to criminal legal aid that level of error would not have led to qualification.

Q54 Geraldine Smith: The National Audit Office did not rely on the Commission's own testing of solicitors' claims; that is true, is it not?

Ms Regan: Yes, and that is why I have said we have doubled the amount of validation and testing that we are doing as a result.

Q55 Geraldine Smith: What do you do now that you did not do before?

² Ev 15

 Legal Services Commission and Ministry of Justice

Ms Regan: We now test 20% of files. Where there are firms that are clearly outliers in terms of large numbers of claims, we go and look at them individually. We are managing the contracts with much more information. The other part of the jigsaw puzzle is moving away from hourly rates—which is how we used to pay solicitors and solicitors firms; we used to pay on hourly rates plus travel and waiting—onto fixed and graduated fees.

Q56 Geraldine Smith: Only half of people in police stations that are being held take up the right to legal representation. Why do you think that is?

Ms Regan: The answer is we do not know totally because we have not asked all those people, but we do know that some people choose not to have a representative for a variety of reasons. However, we are trying to increase the percentage of people who do take up that advice. We also provide, as a safety net, a duty solicitor in every magistrate's court so even if the case goes from the police station into the court there is the opportunity of having legal representation at that stage. We are about to embark on a large survey looking at 10,000 custody records across England and Wales to find out if there is a reason for the low take up, which is increasing; we know it has increased in the last six months.

Q57 Geraldine Smith: If there is only 50% people taking it up and you want to encourage more people to take up legal representation, can you afford it?

Ms Regan: That is one of the challenges of managing within a fixed budget and meeting the needs of an increased number of clients. We know that demand, for example, in things like advice, housing and debt have increased by about 20% over the last year so we are putting in things like more telephone advice and longer telephone hours to increase the number of people we get advice to.

Q58 Geraldine Smith: The chancellor has been talking today about civil servants that earn more than £155,000. Would any of you have to seek approval from the Treasury?

Ms Regan: I would at the moment.

Q59 Geraldine Smith: Can I ask how much you earn, just out of interest?

Ms Regan: You can. It is in the Annual Report; it is £194,000.

Q60 Keith Hill: Over the years the government has made a series of efforts to constrain the rising cost of legal aid, of which I suppose the Carter initiative was the most recent. I have to say that every time these efforts are made I am personally, as a Member of Parliament, inundated with representations from those of my learned friends amongst my constituents—I have a highly educated electorate in Streatham—and they write to me or they lobby me here and I have highly articulate individuals who describe this doomsday scenario which is about to descend upon legal aid. If these attempted cost savings are implemented then all of these firms will be going to the wall et cetera, et cetera. Therefore I

was personally surprised to find in the Value for Money Report that the profit figures for firms outlined in the Report were on average 18.4% with 37% of firms making over 20% on criminal legal aid. Ms Regan, were you also surprised to discover these levels of profitability amongst legal aid firms?

Ms Regan: I was not surprised because we have seen a range of profitability figures from firms before. I believe they exclude the partners' profits from that.

Q61 Keith Hill: Does that mean that if you actually include them the level of profitability would go down?

Ms Regan: I think it would but it is hard to say by how much. That is the question. Perhaps I can ask Mr Barrett to elaborate on that.

Mr Barrett: What the evidence in here shows is that, as you quite rightly point out, we do have a very big disparity in profit levels among solicitors firms. Some are making what appear on the face of it to be very high levels of profit but, as you have seen, quite a significant number are reporting no profits at all. I think that is a symptom of an administratively set rate of fees; you have no incentive for firms to innovate, to give better value for money to the taxpayer by reducing prices and therefore gaining market shares. My analysis of this would be that this is a symptom of administratively set fees.

Q62 Keith Hill: Nevertheless, 18.4% seems pretty significant. Do you have any idea how it compares with rates of profit in other businesses?

Mr Barrett: Let us take a firm that has £200,000 worth of drawings from the legal aid firm at 18% profitability, that would mean the partners' earnings would be about £36,000. That would be an example of what I would not regard as excessive profits. Obviously there will be other examples potentially which might be making much more money, but you cannot compare these figures with those for a limited or publicly limited company.

Q63 Keith Hill: I have done some research on this and I find that these rates of profit are significantly higher—indeed three times higher—than leisure and hotels and five times higher than international airlines; manufacturers of course are in a negative profitability situation; they are 20 times higher than in the retail business, et cetera. Is this the level of profit margin you have built into the current fee rates?

Mr Barrett: The current fee rates are set administratively so they cater for profit levels from zero to over 20%. Our expectation is that as we move to a market based set of prices then profitability will be related to the cost of provision and the cost of capital for those organisations and therefore you would expect to see the taxpayer getting better value for money as a result.

Q64 Keith Hill: You would expect these firms which have a significant legal aid business actually to be displaying lower levels of profitability in the future.

 Legal Services Commission and Ministry of Justice

Mr Barrett: Those that are more efficient and those that are going to grow their businesses, I would expect to be working at lower levels of profitability than the top end of this distribution. Those at the bottom end will face a big challenge because at the moment they would not be able to compete successfully for business and they have a difficult challenge in a competitive marketplace. At the moment it is not a price competitive market.

Q65 Keith Hill: That is of course if the reforms, for example envisaged by Lord Carter, were to be implemented they would find themselves possibly at some risk. Mr Handcock, Lord Carter envisaged you achieving savings from legal aid procurement of £100 million excluding those arising from means testing. Have you achieved this?

Mr Handcock: We have; we will have achieved significantly more than that by the time we get to the end of this programme. The programme we are currently running is the programme that was recommended by Lord Carter, starting with the process of moving to fixed and graduated fees which has put significant downward pressure on costs as a precursor to moving to a full market system.

Q66 Keith Hill: I am sorry to interrupt you on this but my understanding is that the Commission was originally committed to begin the tendering process in October 2008 but has later slipped to a planned nationwide introduction date of 2011, and in July of this year it was delayed until 2013. Are you saying that actually by the end of this process you will have achieved the savings but actually the date by which you expect to achieve the savings has gone back four years

Mr Handcock: It is inevitably the case that the process of moving from an entirely non-competitive, non-market based system to a competitive system is a challenging one and Lord Carter set a timetable that we are, for a variety of reasons, a bit behind. We have to be very careful here to strike a balance between on the one hand preserving an adequate supply base, and on the other moving at sufficient pace to deliver the savings that we need to deliver.

Q67 Keith Hill: I would be interested know from Ms Regan why the post implementation reviews have consistently been delayed.

Ms Regan: We have delayed some post implementation reviews and we need to make sure when we start the project that we actually build in time for the post implementation reviews. Mr Barrett will be in charge of those and we will be doing those as we go along. If I can just say something about the timetable for best value tendering, we actually elongated the timetable in response to 55 consultation meetings we did with solicitors and others. There was a strong view that we should be piloting these initiatives which we are doing and hence the longer timetable than Lord Carter had originally envisaged. The first part of Lord Carter's reforms, the introduction of fixed fees, we have actually kept to the timetable and we have delivered savings from moving away from hourly rates.

Q68 Keith Hill: What savings have you secured so far?

Ms Regan: We have flattened the expenditure on criminal legal aid which was increasing 5% annually going back over the last 15 years, so we are meeting the needs within a flat budget and therefore we have been able to spend more money on housing cases, debt, social welfare and family.

Q69 Keith Hill: Let me turn very briefly to the issue which the Chairman raised of the very high cost criminal cases. It appeared to me, Ms Regan, in your answer you suggested the key variable in cost was the length of the trial. Is that right?

Ms Regan: Yes.

Q70 Keith Hill: Not the high fees of the individual barristers.

Ms Regan: There are a number of issues. One of them is the length of the trial which triggers the payment and one of the issues is the complexity and the pages of evidence. We are trying to balance those things and working very much with the Court Service, the CPS and others to make sure that we can predict more accurately.

Q71 Keith Hill: Am I right in thinking that people involved in these trials are entitled to select extremely expensive, highly qualified QCs?

Ms Regan: We run a panel of people who are eligible to do this work.

Q72 Keith Hill: Which would include high and top-end QCs.

Ms Regan: It would, yes.

Q73 Keith Hill: They are presumably extraordinarily expensive.

Ms Regan: They are expensive but they are all managed within these rates that we set out for these cases.

Q74 Keith Hill: I do not want to interpret that remark, could you explain it to me?

Mr Barrett: At the top end they would be remunerated at about £155 an hour.

Q75 Keith Hill: You make a calculation and is it possible for you to say, "No, you can't have this character"?

Ms Regan: We do quite a lot of negotiation and part of the management of that case is the level of fees and individuals and other costs like disbursement. So we do quite a lot of case management and that is one of the things we are consulting on at the moment. There is a balance between how much you spend on staff managing the cases and how much you set a rate as with BVT and let people get on with it.

Q76 Keith Hill: Do I detect that you would have a kind of presumption against denying a defendant a high cost QC?

 Legal Services Commission and Ministry of Justice

Ms Regan: It depends entirely on the case. Assuming that those people are on the list and eligible to do the high cost cases and are doing the work for the set rate, then we would approve it.

Q77 Keith Hill: For the set rates?

Ms Regan: Yes, for the set rates.

Q78 Keith Hill: Is there a scale of set rates?

Ms Regan: Yes there is a scale of set rates with £155 per hour at the top end.

Q79 Keith Hill: How many hours do these fellows—I suppose they are mainly chaps—put in?

Ms Regan: Hence my point about the length of the case being a big determinant. Some of these cases are very expensive and account for about 10% of the criminal budget.

Q80 Keith Hill: That is quite a lot. Far be it from me to suggest that some criminal does not deserve the most expensive defence, but have you thought about actually, on the whole, having a more moderately priced group of barristers from which people can make their choice rather than highly expensive barristers?

Ms Regan: We are always looking to ensure that there is value for money in what we pay. We recognise that these are complex cases requiring skills and experience and we need to make sure that we price it accordingly. We are currently consulting on what we will pay in the new, very high cost cases which come into being next July.

Q81 Keith Hill: With a view to what?

Ms Regan: With a view to a number of options, either paying on graduated fees or staying with the existing system which includes a high level of case management where we would challenge the fees. Also I go back to my previous answer on having a quality assurance scheme for advocacy which could be linked to the level of payment for these high cost cases.

Q82 Chairman: Ms Regan, if you know what is going on with these very high value criminal cases, why do we read at paragraph 3.17 “The Commission has not assembled sufficient data to alter the assumptions underpinning its calculations for savings from VHCCs”?

Ms Regan: We do have the evidence to demonstrate that we have made savings from some of the VHCCs at the higher level. I do not think again we have had the data in a reasonable shape in one place to look at the totality of very high cost cases.

Q83 Chairman: What this paragraph tells us is that you do not know whether this sort of contract provides value for money.

Ms Regan: We know that this contract provides value for money at the higher end.

Q84 Chairman: Why does it say this then?

Ms Regan: It says in the following paragraph, 3.18, that we have achieved our savings target.

Q85 Chairman: Why does it say, “The Commission has not assembled sufficient data”? Why have you not assembled sufficient data?

Ms Regan: That is a fair point and one which we have rectified in terms of bringing the data together.

Q86 Chairman: Can you please send the Committee a note with the top ten earners from criminal legal aid work and the top ten cases?

Ms Regan: Yes, I can.

Q87 Chairman: I would like the name and the earnings please.

Ms Regan: Yes.³

Q88 Dr Pugh: I apologise for coming late; if I ask a question that has already been answered please tell me if you have already answered it. Can I take it as read that you have demonstrated quite adequately that your organisation is not very good at procuring the product they asked to procure? I think that is fairly evident from the Report and I want to move on to explore some of the explanations for it. Ms Regan, what I wanted to know really in terms of your organisation, first of all what is the size of your top management team?

Ms Regan: Do you mean the executive team?

Q89 Dr Pugh: Yes.

Ms Regan: There are four of us.

Q90 Dr Pugh: How many of them have legal training?

Ms Regan: No-one.

Q91 Dr Pugh: If we go a little further to the second tier, how many in the second tier have legal training?

Ms Regan: I would have to think about that. We have a legal director who is part of the senior management team and we have another row of other post holders who also have legal training.

Q92 Dr Pugh: Do you think it would be helpful if you had more people who had a legal background in the Legal Services Commission?

Ms Regan: No, I do not actually because the issue for us is how we move forward with the reforms and make sure that we are offering value for money with the £2 billion that we currently spend and provide a high quality service to the increasing number of clients.

Q93 Dr Pugh: In terms of high quality service 42% of the solicitors you are using describe you as unhelpful and 28% thought it was unlikely they would use you again in five years’ time. Does that not indicate that something is going wrong with the legal profession?

Ms Regan: It indicates that we are half way through a very challenging reform programme.

Q94 Dr Pugh: It is not as though you are not giving them plenty of money without too much inspection.

³ Ev 12

 Legal Services Commission and Ministry of Justice

Ms Regan: I think there is a view that managing increasing demand within a fixed budget is a difficult balancing act as it is for any public service and although we do not always agree I think the communications and the discussions are actually quite good. Those same firms also went on to say that their relationship with their individual contract manager is actually quite good and they find them very helpful.

Q95 Dr Pugh: What is your relationship like with the Bar Council?

Ms Regan: I think they would probably say the same sorts of the things, they do not always find us helpful although discussions continue.

Q96 Dr Pugh: The briefing I have been lucky enough to receive from the Bar Council contains the following sentence: “The Bar Council agrees with the NAO Report. The division of responsibility between the Legal Services Commission and the Ministry of Justice has resulted in unnecessary duplication and complexity. We would go further and say the division of responsibility has become chaotic. Would you like to comment on that?”

Ms Regan: I have not seen the brief. I would strongly disagree that it is a chaotic relationship. I think we work very well together on a number of things and I could give you a number of examples such as the introduction of means testing in the crown courts which goes live in January of next year. That is just one example.

Mr Handcock: Can I add something to that? It is absolutely no surprise that our relationship—both the Ministry’s and the Commission’s—with the professions is occasionally rocky. We have in effect fixed the legal aid budget at 2006 values. If you look at what counterfactual growth would have indicated, we would be spending something like £2.7 billion now rather than £2.1 billion, so we have taken an enormous amount of potential payments out of the system. That is pushing the professions to modernise and to adopt different models and to change the way they do things. Frankly we understand perfectly well that is tough but the reform of the system and putting in place processes that would bring expenditure under control are absolutely urgent and actually they continue to be urgent. I guess that will mean that the relationship will continue to be quite a tricky one.

Q97 Dr Pugh: Clearly some of the people you are working with are not having their profit margins driven down, judging by the observations that Mr Hill made.

Mr Handcock: It would have been higher still.

Q98 Dr Pugh: In terms of this relationship, one point they make in terms of how you deal with the profession is that sometimes negotiations take place with the Legal Services Commission which the Ministry of Justice then takes an interest in, which can lead to strange variations in procedure. Can I cite you one case? In November 2009, five days before the planned date of a publication of a

consultation paper which was agreed between the Bar Council and the Legal Services Commission, the Ministry of Justice insisted on a scheme which had been previously rejected as unworkable and that that should be included in the options for consultation. That is what the Bar Council tells me; I have no reason to disbelieve them. It would it seem that the Ministry of Justice lunged in—I am looking at Mr Barrett here—to correct consultations that had been taking place between Ms Regan and the Bar Council. Is that correct?

Ms Regan: We have issued a consultation document which has a number of options in it. We have been working with the Bar Council and others for a while and it has been very much a joint piece of work between the Legal Services Commission and the MoJ.

Q99 Dr Pugh: So it is no surprise to you that the Ministry of Justice insisted, five days before the planned date of publication, that an option that had been rejected as unworkable should be included.

Mr Barrett: It has to be remembered that this is £2 billion worth of public spending and as you would expect it is something in which ministers take a very close interest. This particular piece of work on very high cost cases was, as Carolyn has said, a joint piece of work between the Ministry and the LSC and ministers decided—ultimately it is ministers’ responsibilities to make those policy decisions—on what the options are for consultation.

Q100 Dr Pugh: You surely can understand if you are sitting round a table with the Bar Council and you have a set of proposals, you produce a consultation paper and then five days later something else comes out, people are going to feel a little bit put out.

Mr Barrett: It was before the consultation. We maybe should have said in the small print at the bottom of the documents we were discussing with the Bar Council: “Please be aware that this is subject to ministerial agreement and sign off” and I would expect that they have enough experience of dealing with ministers and the Legal Services Commission to understand that that happens, and it happened.

Q101 Dr Pugh: You are expecting the lawyers to read the small print.

Ms Regan: It is a consultation document.

Q102 Dr Pugh: Let us go onto means testing. Means testing has various effects; it sometimes puts solicitors in barristers’ places representing people and sometimes the public in the place of solicitors because they turn down legal aid. Do you keep any records that show the success of these variations? In other words, is there any evidence the public do any worse by representing themselves?

Ms Regan: The Court Service, with whom we work very closely, has data on unrepresented defendants in court. We have discussed the cover in police station but we do also provide a duty solicitor in every court should someone wish to avail themselves of that advice.

Legal Services Commission and Ministry of Justice

Q103 Dr Pugh: You cannot judge the success of having a solicitor represent you rather than a barrister where it is possible.

Mr Barrett: I do not think means testing in any way has altered the balance between the work that solicitor advocates do and that barristers do. You are quite right about the potential for more unrepresented defendants because a defendant who is being asked to pay for it—which he previously may not have been asked to pay for—may choose not to and therefore represent himself.

Q104 Dr Pugh: The chancellor today indicated that there were savings anticipated from the legal aid budget; what is the share from criminal legal aid?

Ms Regan: We were just talking about that outside. I am not sure I have an answer but can I just go back to your quality of representation? As I said before, we are looking to have a scheme which assesses the quality of that advocacy, be it provided by solicitors or barristers, so we will be coming back to that and that is a scheme that everyone has signed up to participate in.

Q105 Dr Pugh: You say you are not sure, but did the chancellor consult with you before.

Ms Regan: He did not consult with me personally.

Q106 Dr Pugh: So you do not know where the savings are coming from.

Ms Regan: No I do not at this point.

Q107 Chairman: You must have some idea. You are running this organisation and this is quite important, is it not? Give us an idea where you are going to look for savings. Are you going to hit the Law Society and Bar Council even harder than you have already or what?

Ms Regan: What we are looking to do is to continue providing high quality legal aid to an increasing number of clients. That means looking at things like how long the telephone service is available for, who is using it and can it extend the range of cases that it deals with. It also means continuing to provide high quality legal advice and representation in criminal cases. That is the balancing act that we have to negotiate.

Q108 Chairman: We have had a tale of woe given to us by the Law Society in their memorandum to us. They say, “Independent evidence now shows that the incomes for both employed solicitors and partners and legal aid firms are frequently at or below medium incomes in the country, far removed from the sort of level a professional should be entitled to expect and could end up in other fields of law. It is clear that a substantial element of the supply base is not economically sustainable.” We know the junior bar is under very severe pressure. The truth is, to make significant cuts along the lines of what the chancellor was talking about this morning you are going to have to cut the incomes of solicitors and the bar at junior level, are you not

Ms Regan: We are looking to move away from administratively set prices so that we do reward those innovative firms who are doing high quality work.

Q109 Chairman: So the answer is yes, you are going to have to cut their incomes.

Ms Regan: The answer is that we want to move away from administratively set prices.

Q110 Chairman: The answer is you are going to have to cut their incomes.

Ms Regan: We are looking for them to set the prices rather than us.

Q111 Chairman: So you are going to cut their income.

Mr Handcock: We are looking to create a competitive market.

Q112 Chairman: So you are going to cut their income.

Mr Handcock: We have to get better value for money.

Q113 Chairman: So you are going to cut their income.

Mr Handcock: We are going to spend less money. What the impact will be will depend on the way they respond to it.

Ms Regan: Some may increase their incomes.

Q114 Mr Curry: When I look at your chart here of the executive team, it brings back shadows of the Rural Payments Agency, people fired with huge compensation, not quite clear what people do. Ms Regan, you said your salary was £194,000; in fact your total remuneration is £213,600 if you add in non-consolidated performance payment. Is that right?

Ms Regan: If you add in the non-consolidated performance payment.

Q115 Mr Curry: Do you earn more than the PM by the way, just out of interest?

Ms Regan: I believe I do.

Q116 Mr Curry: Dear me, you are a marked women in those circumstances. I am terribly foggy as to quite what the executive team is and what the hierarchy is. I see you are earning £200,000; Mr Barrett, who is part time—

Mr Barrett: I am not part time.

Q117 Mr Curry: Why is Mr Barrett £150,000 south of you if he is on the executive team? Mr Lambert is again on the same amount; Ms Hazel Brown is even lower. Can you list the top five jobs by title and by person and what those people earn or what you would expect them to earn?

Ms Regan: I can list the top four and then I will come back to you. In the year that you are referring to the three people apart from myself were only in post for part of the year; they came into post on the first of December hence the figures in the Annual Report.

 Legal Services Commission and Ministry of Justice

Mr Barrett: It is the second column you need to look at, which are the full year equivalents and allowances. This shows that I only earned 46.7 and the full year equivalent is 140.

Ms Regan: So 140, Mr Barrett; Mr Lambert 140; Hazel Parker-Brown, 134.

Q118 Mr Curry: So that is the hierarchy.

Ms Regan: The executive team, yes.

Q119 Mr Curry: You would hope that they will stay for some time because, like the Rural Payment Agency, there has been a bit of heave-hoeing going on.

Ms Regan: Yes, absolutely.

Q120 Mr Curry: Thank you; that helps with that. Mr Handcock, you have told us that you have had to get rid of quite a lot of people and as a consequence your service is much better than it was. How long can this go on for? The logic of what you were saying appears to be that it seems to me that if you get rid of everybody the service will become absolutely wonderful.

Mr Handcock: If I may say so, I made a point of saying that there is not that fixed relationship between the numbers of staff and efficiency. One of the things that drives efficiency is putting in place better systems and it will be the move away from processing large numbers of claims on paper to processing them electronically in a much better controlled way that enables us to operate more efficiently with fewer people.

Q121 Mr Curry: May I suggest before you do that that you have another look at the Rural Payments Agency because we have had a very long story of what happened with processing claims electronically with the Rural Payments Agency. You will save yourself a great deal of grief if you have a look at that.

Mr Handcock: I am grateful for the advice.

Q122 Mr Curry: If you link that with the fact that you are going to have a budget under pressure—there is no doubt about that at all—and one of the ways forward for you is to say that you are going to compulsive competitive tendering. I can remember when I introduced compulsive competitive tendering into local government and this government said it was a wicked idea, we were going to get away from all that and have best value. Compulsive competitive tendering is not like if you are Tesco because you can go back and say you have had a bid from so and so, can you get below it? How will it actually work? The danger is that you look at the headline figure but presumably these firms have got reputations for being good or not good and they have reputations for quality of what they do, so there is a value for money element. How are you going to combine competitive tendering with value for money? Does that mean that there will be occasions when the bid which is not the cheapest might present the better value for money? Take me through that, as it were.

Ms Regan: Let me start and I am sure Mr Barrett will want to come in. The first thing to say is that we set very strict quality standards that anyone wishing to bid for work has to meet, that includes a score of three in the independent peer review, and that includes standards for, for example, the number of people supervised by a qualified lawyer. So we have a number of quality thresholds that people have to meet before they can even bid. The second point is that we are not going to one firm in each locality; we are looking for a minimum of eight which is different from some other best value tendering systems. The third thing is that we are looking to increase the views and feedback from the clients who are getting legal aid.

Q123 Mr Curry: You will then feed that back to the bidders, will you?

Ms Regan: Yes. I think there is an issue about potentially publishing some of those peer review ratings or client feedback.

Q124 Mr Curry: Just like when schools are inspected—schools which have had a consistently good record get a lighter touch—will you have an A list of bidders so they perhaps do not have to provide as much information as others because they have a track record of delivery?

Ms Regan: We will and this will feed into our electronic working with them and the amount of checking and validation that we do. Clearly we need to focus our efforts on checking people who come out less well from the inspection.

Q125 Mr Curry: What would a new entrant have to provide for you? This is their first ever bid; would you mentor them at all, or help them produce the bid? How much is it going to cost people to produce this sort of bid?

Mr Barrett: I could not tell you but it would not be particularly expensive. It is not like bidding for a big IT contract for government.

Q126 Mr Curry: There are a lot of stories there as well.

Mr Barrett: The key thing would be, could they demonstrate they meet the quality standards that we have set so do they have the required levels of accreditation? Do they meet either our SQM or the Law Society's Lexel standards? They would have to demonstrate that they meet the quality standards, that they have a firm financial basis and then they would be treated on a level playing field.

Q127 Mr Curry: Figure nine on page 20 is the response to the question: "What is the most common reason why people do not claim legal aid at police stations? Police may discourage/put pressure on not to take legal aid." A third of all people, according to this list, would say that. Another third would say the length of time it takes. Do you agree with that? Do you think that is the correct analysis? If it is the correct analysis then two thirds of people are either put off by the police or think it is all too complicated.

Legal Services Commission and Ministry of Justice

Mr Barrett: We are doing some independent research on this which we are going to publish very early in the New Year. The Legal Services Research Centre is doing research on this and Ms Regan referred earlier to a big study of custody records which will get a more independent view of what the truth of the matter is.

Mr Bacon: I would ask for two quick notes if I may, first of all from Ms Regan. Can you send us a note about the total cost to public funds of all the executive team members that are referred to in the Annual Report, both the current ones and the ones who either left or who were interim or who were made redundant like Mr Collins, or who were transferred from the Ministry of Justice on secondment for the three financial years 2006–07, 2007–08, 2008–09, with a summary of all costs to the public purse including any pension payments, lump

sum payments, redundancy payments and that kind of thing.⁴ Secondly, Mr Handcock, you mentioned something very interesting in answer to your question from Geraldine Smith about the possibility of changing the business model and whether the architecture you currently have is the correct one. Could you send us a note on that and on the Ministry's thinking on that it would be very interesting.⁵

Chairman: I would like a note on your reply to paragraph 2.24 where you place a lot of emphasis on peer review but you are now moving to risk analysis. I would like to understand from you how it is going to be as effective as what you have done before.⁶ Thank you very much, that concludes our hearing.

⁴ Ev 17

⁵ Ev 13

⁶ Ev 14

1. Supplementary memorandum from Legal Services Commission

Questions 17–24 (Mr Bacon): *All costs of Carolyn Regan's trip to New Zealand, April 2009*

Carolyn Regan travelled to New Zealand to attend the biennial International Legal Aid Group (ILAG) conference from the 1 to 3 April 2009.

Over the course of the three-day conference, Carolyn Regan presented the national report on legal aid for England and Wales, outlining changes since the 2007 conference, a paper on price competition and quality and chaired a session on criminal defence in a global environment.

The breakdown of costs for this trip are as follows:

- Return economy flight (including outbound one night stop-over in Singapore)—£1,366.00;
- Taxi journey from airport to the conference hotel in Wellington—£14.00;
- Registration fee for ILAG conference—£100;
- four nights' accommodation for the ILAG conference—£357.96; and
- Return one night stop-over in Hong Kong—£120.

Total—£1,957.96

Given the distance travelled and the costs incurred, the fare was part-funded by Carolyn Regan, who combined attendance at the conference with a short holiday. The LSC publishes details of all expenses incurred by the Executive Team and Commissioners on its website.

Questions 42–45 (Mr Bacon): *Timetable for LSC's comprehensive action plan reporting into MoJ's FD*

See attached action plan at Appendix A.

Question 86 (Chairman): *The top 10 earners from Very High Cost Criminal Cases and the top 10 cases in 2008–09*

TOP 10 CRIMINAL BARRISTERS 2008–09

The Ministry of Justice (MoJ) publishes information on its website on the top ten earners from criminal and civil legal aid (barristers as well as solicitor firms) on an annual basis. The latest figures available are for the financial year 2007/08:

<http://www.justice.gov.uk/information/docs/highest-paid-legal-aid-2007-08.pdf>

The process of collating and verifying the data for 2008/09 is currently underway. The figures have been collated, and barristers and solicitors have been given the opportunity—as usual—to verify the figures to ensure compliance with the processing of personal data under the Data Protection Act 1998. The highest payments to criminal legal aid barristers in the financial year 2008/09 are listed below. As soon as the verification process is complete (expected to be by the end of February 2010) the names of individual barristers will be provided to the PAC, and also uploaded to the MoJ website.

The proportion of these fees paid through the Legal Service Commission's (LSC) Very High Cost Criminal Cases (VHCC) scheme is specified in brackets.

1. QC—£928,249 (£296,780).

2. Junior—£786,557 (£0)
3. QC—£762,161 (£147,910).
4. Junior—£712,128 (£141,303).
5. QC—£703,609 (£446,497).
6. QC—£628,679 (£20,543).
7. Junior—£623,161 (£17,124).
8. QC—£557,327 (£0).
9. QC—£556,018 (£38,668).
10. QC—£513,902 (£8,082).

The majority of these fees relate to old cases paid after the event on Ex-Post Facto Assessment by the HM Courts Service (HMCS) or on Graduated Fees. The top income from the LSC's VHCC scheme on this list was £446,497.

Definitions:

1. These figures are payments made to the individuals in 2008–09.
2. The payments cover all legal aid cases, whether paid through VHCC scheme, Graduated Fees or the previous Ex-Post Facto payment scheme.

TOP 10 CRIMINAL CASES 2008–09

The highest cost criminal cases, where the costs were paid in 2008–09, are listed below. The Legal Services Commission managed them all under the VHCC scheme, except where specified as old cases where the final bills were determined by the HMCS. The costs quoted represent the total over the life of the case, not just the costs in 2008–09. Numbers in brackets are the LSC case numbers.

1. Terrorism case—£12 million (335).
2. NHS fraud case—£10 million (371).
3. Tax fraud case—£6.3 million HMCS determined old case. (428T20047470).
4. Terrorism case—£5 million (290).
5. Terrorism case—£5 million (141).
6. VAT fraud case—£4.5 million (357).
7. Drug trafficking case—£4 million HMCS determined old case. (444T20037534.)
8. Terrorism case—£3.4 million (414).
9. Horse racing fraud case—£3.1 million (401).
10. HM Customs and Excise fraud case—£3 million (199).
11. Fraud case—£3 million (388).
12. Murder case—£2.9 million (313).

Definitions:

1. VHCC Scheme Cases, managed by LSC's Complex Crime Unit are those where the final contract was recorded as concluded in 2008–09.
2. HMCS determined old cases are Residual Ex Post facto Cases, not managed by the LSC's Complex Crime Unit. The HMCS determined the final bill in 2008–09. These cases pre-date the full operation of the VHCC scheme.

Question 127 (Mr Bacon): *The total cost to the public funds of all Executive Team members referred to in the most recent annual report—including their severance packages and pensions—for the years 2006–07, 2007–08, and 2008–09*

See attached figures at Appendix B.

Question 127 (Mr Bacon): *The changing business model Peter Handcock mentioned*

In October 2009, 10 years after the Act was passed through Parliament, the Justice Secretary invited Sir Ian Magee to conduct a review of legal aid governance and delivery arrangements to consider ways in which the delivery of legal aid services might be improved.

The Justice Secretary asked Sir Ian to report back to him in January 2010, and the review is currently in progress.

The terms of reference for the review are as follows:

To review the existing delivery and governance arrangements of the legal aid system, and make recommendations that:

- explore the separation of the CDS and CLS and options for doing so effectively and efficiently should that be the recommended way forward;
- provide for effective and transparent financial management of both funds and their administration;
- provide for effective ministerial accountability and policy direction in respect of both the CDS and CLS, whilst continuing to ensure that every application to the CLS and CDS funds are decided fairly, within the criteria, at arms length from government;
- identify appropriate delivery models for both the CDS and CLS and their relationship with the Ministry.

The outcome of Sir Ian's review is likely to form the basis of any changes in the corporate architecture of the LSC, or in the governance and delivery arrangements of the CDS and CLS.

The Access to Justice Act 1999 (section 2) always envisaged that the Government may eventually want to separate the Community Legal Service (CLS) and the Criminal Defence Service (CDS) to ensure that CLS resources are not swallowed up by the CDS and that the latter plays its full part in delivering an efficient and effective criminal justice system.

The Ministry of Justice will ensure that any future changes to the delivery of legal aid provide for an effective service that reflects the Government's priorities, with governance and management structures that can maintain effective financial control over the legal aid fund.

Question 127 (Chairman): *for note on peer review and how the risk-based approach to this will affect it*

Peer review is the LSC's principal tool to measure the quality of legal advice delivered under contract. Since 2005, the LSC has completed more than 2,600 peer reviews. Across all categories, more than 95% of providers reviewed so far have received an initial peer review rating of three (out of five, with one being the best) or higher. Whilst this is reassuring and shows that the provider base is operating at an appropriate level of quality, it is clear that continuing with a policy of reviewing all contracts every three years would represent an unjustified burden on providers as well as poor value for money. As part of the tailored approach to quality, peer review will, in future, be used on a risk based and random sampling basis.

The LSC will maintain the requirement for providers to achieve at least peer review category 3 if audited. This category is designed to equate with the obligation (in both the Solicitors Code of Conduct and the LSC Unified Contract Standard Terms) to perform work with reasonable skill, care and diligence. If a second sample of files confirms the provider as Peer Review 4 or lower in a category of law, the LSC terminates its contract in that category.

The LSC's new risk-based approach will deliver an assurance regarding quality at least as good as previously achieved. In the past, the focus of reviews has been on crime; our new proposals will see an increase in civil peer reviews. The LSC has long derived some of its assurance regarding individual competence from accreditation schemes managed by the Law Society and others. Where the LSC requires supervisors and/or caseworkers to hold accreditation, it plans generally to conduct fewer peer reviews than in categories of law where no external assurance about individual competence exists. If other intelligence indicates that there are problems within a particular category, or we consider that risks are increased, we may look to increase the volume of peer reviews in that area (as we have already indicated that we will do in the mental health category).

We will continue to visit the offices of a great many providers in order to undertake various levels of contract compliance work. Where the information gathered in such visits, or other evidence such as complaints, poor claiming practice or low quality applications comes to light, we are likely to trigger further investigation such as a peer review. We are also considering how best to get direct client input, whether from independent surveys and collecting views from the public.

5 January 2010

APPENDIX A
LSC STEWARDSHIP HIGH LEVEL ACTION PLAN

<i>Ref</i>		
1	Design Financial Stewardship criteria and statement to enable all initiatives in the LSC to be assessed against these criteria, enabling the design of satisfactory controls — For all new projects — For all changes to existing systems	31/03/2010 30/06/2010 30/09/2010
2	Design and implement a programme of prioritised, cost effective, tactical business process improvements to strengthen controls against the key financial stewardship principles including eligibility Phase 1—manual process improvements Phase 2—automated changes where appropriate	Phase 1—30/04/2010 Phase 2—30/09/2010
3	Make a detailed assessment of existing legal aid schemes against the Financial Stewardship tests, implementing improvements to controls where identified.	30/09/2010
4	Review existing fee regimes and design and implement simplification options.	30/09/2010
5	Advise all providers of the importance of compliance with contractual frameworks and highlighting actions, including a strengthening of the use of sanctions.	31/12/2009
6	Design and implement a strategic plan of business process and system changes to strengthen controls and improve corporate infrastructure across all fee schemes with business processes that are conducted in a time-efficient and cost-effective fashion.	31/01/2011
7	Evaluate an extension of the systems link with the DWP to check means assessment verification for Civil certificated work (in relation to passported benefits).	31/03/2010
8	New guidance and process issued for independent evidence for validation of pages of prosecution evidence (PPE) fee on litigator fee schemes.	31/01/2010
9	Contract Compliance Audit quality control increased from 10% to 20% of files reviewed.	31/03/2010
10	Contract Compliance Audit team size strengthened to 16 (from 12) in a dedicated team with the aim of creating a centre of excellence.	31/12/2009
11	LSC online system changes introduced to reduce likelihood of mis-claiming in Family and Immigration cases.	30/11/2009
12	Recovery of overpayments to providers focusing on five main areas: — Family Data Validation Looking at incorrect claiming patterns based on Matter Type and Fee code combinations reported by providers between Oct 07–Apr 09 Contract Notice will be issued in January 2010 where response is inadequate — Duplication Data Validation Checking of exact, non-exact and possible duplicated claims reported by providers, 56% completion as at 18/12/09	30/04/2010

<i>Ref</i>		
	<ul style="list-style-type: none"> — Tolerance Data Validation Checking of cases incorrectly reported as being outside tolerance limits which enable providers to receive a higher fixed fee—45% completion as at 18/12/09 — Immigration Data Validation Checking of cases incorrectly credited with hourly rates rather than appropriate Fixed Fee. — Level 1/Level 2 Family 	
13	Improving financial management reporting and timeliness in preparation of monthly Management Accounts—to better support effective decision making within LSC.	31/12/2009
14	Interim Finance Director appointed in October. Permanent Finance Director expected to join by the end of the financial year (Phase 1) New Finance Director to lead programme to improve financial management skills across the Commission (Phase 2)	Phase 1—31/03/2010 Phase 2—30/09/2010
15	Design and implement an improved delegated authority management process for all expenditure in LSC.	31/03/2010
16	Designate process owners/accountable directors (supported by account managers) for each part of the fund and provide an agreed statement of accountability and outcomes.	30/01/2010
17	Engage Ernst & Young to conduct a review highlighting how LSC might strengthen its accounting for debt and work in progress within the constraints of existing systems <ul style="list-style-type: none"> — identify weaknesses and make recommendations — implement prioritised actions 	Phase 1—31/01/2010 Phase 2—31/05/2010
18	Design and implement a structured, robust plan for the management of the production of the Year End Accounts for 2009–10, ensuring that the requirements of the NAO audit plan are met, and that accurate information is provided in a timely and constructive fashion.	11/01/2010
19	Strengthen corporate assurance arrangements, in conjunction with the Ministry of Justice's Internal Audit function.	31/01/2010
20	Increase the profile and strengthen the capacity and capability of the Internal Anti-Fraud Function.	31/03/2010
21	Review and strengthen the contract sanctions process.	31/03/2010
22	Strengthened programme of on-site audits by a dedicated team with enhanced training, to check providers' compliance with contractual requirements and the LSC Specialist Quality Mark.	31/03/2010
23	Development of monthly performance packs to support the accurate and timely identification of over claims.	28/02/2010
24	Review and implement (in conjunction with the Ministry of Justice) recommendations to improve fund forecasting and accounting, arising from the jointly commissioned Ernst & Young review.	30/09/2010
25	Renegotiate Service Level Agreements with HM Courts Service with new performance measures.	30/04/2010
26	Institute 100% checks on Crown Court Means Testing cases in early adopter courts.	31/01/2010

APPENDIX B
EXECUTIVE TEAM REMUNERATION

	<i>Salary & allowances</i>	<i>06/07 Total inc bonuses, BIK and compensation</i>	<i>Employer Contribution to pension account including risk benefit cover</i>	<i>Salary & allowances</i>	<i>07/08 Total inc bonuses, BIK and compensation</i>	<i>Employer Contribution to pension account including risk benefit cover</i>	<i>Salary & allowances</i>	<i>08/09 Total inc bonuses, BIK and compensation</i>	<i>Employer Contribution to pension account including risk benefit cover</i>
	£000	£000	£000	£000	£000	£000	£000	£000	£000
Carolyn Regan (note 4)	91.0	91.0		183.8	200.0	32.8	194.8	213.6	34.2
Richard Collins (note 9)	114.4	129.9	30.0	126.9	148.4	32.8	142.3	404.0	17.1
David Godfrey (note 10)	132.9	153.7	35.0	136.6	160.0	32.8	158.0	261.7	22.8
Mike Jeacock (note 11)	163.5	214.4	43.0	172.5	235.4	32.8	17.1	228.0	2.9
Jonathan Lindley (note 6)	146.1	191.8	38.0	20.5	41.8	2.6			
Brian Harvey	76.4	100.5	219.0						
Clare Dodgson (note 3)	64.3	64.3	304.0						
Helen Riley (note 5)				128.1	160.1	32.8	104.0	130.8	25.7
Hugh Barrett (note 7)							46.7	46.7	11.4
Phil Lambert (note 7)							46.7	46.7	11.4
Hazel Parker-Brown (note 8)							43.7	43.7	11.4
Crispin Passmore (note 12)							43.9	44.2	12.1
Gary Robertson (note 13)							230.7	230.7	
								note 1	

1. The cost is the value of the Veredus contract and not what was paid to Gary Robertson
2. Includes compensation paid to certain individuals for loss of office/redundancy.
3. To 30 June 2006
4. From 25 September 2006
5. From 26 April 2007 to 31 December 2008
6. To 25 April 2007.
7. From 1 December 2008
8. From 3 December 2008
9. To 30 September 2008
10. To 5 December 2008
11. To 30 April 2008
12. From 18 August 2008 to 31 December 2008
13. From 6 May to 19 December 2008

2. Memorandum from the Law Society

The Law Society believes that the recent National Audit Office (NAO) report on *The Procurement of Criminal Legal Aid in England and Wales* has produced a number of useful findings and recommendations, although the Law Society does not necessarily agree with them all. The issues The Society wish to focus on in this briefing concern the profitability of criminal legal aid work and the sustainability of future criminal legal aid provision.

Criminal legal aid is an essential element of a democratic society as it strengthens the principles of equality before the law and, the right to a fair trial as enshrined by Article 6 of the European Convention on Human Rights.

PROFITABILITY OF LEGAL AID PROVIDERS

The NAO report finds that average profitability has fallen from 21.6% to 18.4% over the last three years. Since these are the accounts of partnerships, and not limited companies, profit here is calculated as the amount before partners' drawings or notional salaries, or any return on the capital the partners have invested in their firms. Around one sixth of criminal legal aid solicitors' firms do not make any profit at all—so the partners make no income from this work—while 14% of firms make a profit of between 1 and 5%. Approximately 50% of firms make profits of less than 10%. A sole practitioner with a turnover typically of £150,000 making a 10% profit would thus only earn £15,000, a sum which is not significantly higher than the minimum wage (about £12,600 for a 40 hour week).

It is fair to ask how firms are surviving if they are making zero profit on this work. For some firms, the answer is that they are not surviving. They have been unable to adjust to the significant cuts in legal aid rates in the past couple of years at a time when there is little scope left for making cuts in costs. The lack of earnings from this work is indefinite, and signifies the end of legal aid as a viable work-stream for the business.

The majority of criminal legal aid firms also do other types of work which effectively subsidises criminal legal aid. While this may enable firms to survive in the short term, this cannot be sustainable for any length of time as solicitors firms are businesses who will have no alternative but to gravitate towards more profitable areas of work if they are to survive. If private practice withdraws from criminal legal aid in significant numbers, the only alternative would be to expand the LSC's directly run Public Defender Service network. This currently consists of four offices in England and Wales and the evidence indicates that this method of service delivery is at least 40% more expensive than private practice.¹

Not surprisingly low levels of profitability translate into low levels of earnings for salaried fee earners. A recent survey of pay in the public sector² showed that, at a median salary of £25,000, legal aid lawyers are close to the bottom of the public service pay scale, below nurses and primary school teachers. This offers little incentive for debt-saddled graduates to opt for a career in legal aid work, particularly as the rewards of private practice are considerably higher.

SUSTAINABILITY OF CRIMINAL LEGAL AID

The issue of whether criminal legal aid is sustainable is of course closely linked to the issue of profitability. The survey accompanying the NAO report finds that only 48% of solicitors firms surveyed consider it likely that they will be doing criminal legal aid work in five years time. Of those firms who say they are unlikely to continue, 40% cited lack of profitability as the main reason for not intending to continue with legal aid. Another significant reason for withdrawal is the LSC's intention to introduce Best Value Tendering with 33% of firms stating this to be the main reason why they are unlikely to continue with criminal legal aid. The ageing profile of criminal legal aid solicitors also affects sustainability, with 15% indicating their intention to retire within the next five years. This in itself will produce a net loss due to the decline in young solicitors entering criminal legal aid practice.

CONCLUSION

The criminal legal aid supply base is in an extremely fragile state. Independent evidence now shows that the incomes of both employed solicitors and partners in legal aid firms are frequently at or below median incomes in this country, and far removed from the sort of level a professional should be entitled to expect and could earn in other fields of law. It is clear that a substantial element of the supply base is not economically sustainable. Profitability will be further eroded if further cuts proposed by the MoJ³ to Crown Court advocacy fees and representation at the police station are implemented. This would further threaten the viability of criminal legal aid providers. The ageing profile of criminal legal aid practitioners and the risks posed by Best Value Tendering are also factors which will inevitably lead to a reduction in providers in the short to medium term.

The effect of providers withdrawing or collapsing in the numbers that now appear inevitable will be that clients will be unable to secure the advice and representation they need when faced with the power of the state bringing a prosecution against them. The UK Government could find itself in breach of its obligation

¹ *Evaluation of the Public Defender Service in England and Wales*: Bridges, Cape, Moorhead and Sherr (2007) page 231.

² *The Guardian* 17 November 2009.

³ MoJ: *Legal Aid Funding Reforms*, Consultation Paper CP 18/09, August 2008.

to ensure that everyone has a fair trial. The cases of Colin Stagg and Stefan Kiszko are just two high profile examples of why it is vital that every defendant has the opportunity fully to test the evidence presented by the State, and why the rule of law would be undermined if that right was effectively lost.

There is an urgent need to find a mechanism to calculate the costs of delivering this service, and to ensure that the rates paid for this work are sufficient to cover those costs and provide a reasonable living to the lawyers delivering a vital public service.

7 December 2009

3. Memorandum from Legal Aid Practitioners Group (LAPG) on Community Legal Service Fund and Criminal Defence Service Accounts for the year ended 31 March 2009

LAPG is a membership organisation with over 450 private firms and not-for profit organisations as members. We hope that the attached comments are of assistance to the MPs on the Committee.

LEGAL HELP AND CRIME LOWER (PARAGRAPHS 13–19)

ACCURACY OF PAYMENTS FOR LEGAL HELP AND CRIME LOWER (PARAGRAPHS 31–37)

We note the finding of incorrect claiming. The Payment Annex of the Civil and Family Mediation Specifications of the Unified Contract contains 261 fees of which 130 different fees are used in family cases alone. There are other civil fees for certificated work. There are more fees in crime. For a firm doing a wide range of cases the number of possible fees is immense.

In private practice there will be fee earners of various levels doing this work and probably reporting cases to a book keeper who will input the information. A partner will oversee the work. It is extremely easy to enter the wrong information and we welcome the proposal that LSC online will be redesigned to make it much more difficult to enter the incorrect information.

In Appendix 1 we have set out one family law partner's comments about the complexity of the scheme.

We note paragraph 37 which states that the LSC should review its use of sanctions against suppliers "to ensure that these act as a necessary deterrent to solicitors from claiming inappropriate fees". Our experience is the opposite of that suggested. Our experience is that practitioners are terrified of getting it wrong, of facing recoupments that could put them out of business, of losing contracts with the LSC and of course being disciplined for incorrect claims and facing the possibility of being struck off. Criminal sanctions would be a possibility for fraudulent claims.

We would suggest that there is a core of highly trained people at the LSC who would be available to answer questions from practitioners from 8am–6pm every working day to give guidance and for that advice to be provided on a completely confidential basis so that people can ring up with genuine problems and not be afraid that they will be "picked on" for an audit. We would also suggest an email service along the same lines. Such a helpline could bring about drastic improvements and the team providing it could then run a question and answer page with the most commonly raised issues on.

CROWN COURT PAYMENTS (PARAGRAPHS 20–21)

ACCURACY OF CROWN COURT PAYMENTS (PARAGRAPH 38)

We note that the LSC has a Service Level Agreement with HMCS and HMCS is responsible for validating the claims.

ELIGIBILITY (PARAGRAPHS 22–28)

LEGAL HELP

CRIME LOWER

CIVIL REPRESENTATION (PARAGRAPHS 29–30)

ELIGIBILITY (PARAGRAPH 39–42)

The estimate of legal aid provided to ineligible clients is £6.4 million.

Eligibility issues are a problem—partly, one suspects, because practitioners want to get on with cases. The only solution that would be practical is for practices to ensure that no practitioner sees a client until another member of staff has obtained all the necessary information. If practitioners are not allowed to carry out any legal work until the eligibility check is complete that puts them in difficulty. We believe that practitioners who see clients, particularly if their case is urgent, will look at documents and if some more information needs collecting, they will carry on with the legal work and ask for the further information. The case develops, the information is overlooked and then when the file is audited the information is not there. This can be rectified by training and more stringent systems in offices. But there will be a risk that in thousands of cases people who need advice will not receive it in time.

Paragraph 25 makes it clear that the estimated error of £2.3 million indicates that the Commission MAY have paid this amount to solicitors for advice provided to individuals who were not eligible for legal aid. In fact paragraph 17 states that the auditor found insufficient evidence to support fees or disbursements claimed by solicitors as well as demonstrable errors. In reality some of those clients may have been eligible for free advice.

Many of the people entitled to free advice live chaotic lives and for them to produce information that may seem easy to others who are better educated and have better resources may be extremely difficult. A very useful outcome of this audit report would be to look again at obtaining a balance on this. There needs to be a realistic discussion on what proof of eligibility is sought.

As regards civil eligibility, very little information is provided in the report. We note that the overpayment error is £1.6 million. Some people were found to be ineligible or a wrong calculation was made. Again, we stress the complexity of the system, particularly for vulnerable clients at a stressful time in their lives. The means form for someone who is not on benefits is 20 pages long. The accompanying guide is 10 pages and there is also a 4 page checklist.

Carol Storer
Director LAPG

8 December 2009

APPENDIX 1

EXAMPLE OF THE COMPLEXITY OF CLAIMING FEES

This is a report from one experienced family practitioner.

The problems are as we have said before that the rules and guidance are just so unclear. The codes are complex and it is inevitable that incorrect codes will be used especially as no validations are built into the spreadsheet.

From our own audit I had one contact case where I saw the client, wrote to the Mother, referred to mediation, then applied for legal aid. I claimed the Level 1 and Level 2 fees of £315 in total as I had seen the client twice but my note for the second interview was not very detailed and only referred to completing legal aid forms. That is not sufficient to count for a second interview so I was only able to claim Level 1.

I had another contact case where I only claimed a Level 1 fee on my own accounts system but the code I used, FPL04 generated a level 1 and 2 fee.

This was because Level 1 guidance did not refer to cases where you applied for legal aid but only saw the client once.

The guidance says you should use code FPL01 where:

“This code should be used when only the Level 1 fee is being claimed and no further work at controlled work level is undertaken for the client. This will include change of name applications, cases where the client does not require any further work after initial advice and acting for a respondent in an undefended divorce.”

It does not mention cases where you progress to certificated work and it is very unclear whether that is the correct code. In those cases the client does require work after initial advice and therefore the code does not seem to fit the scenario.

I had put code FPL04 which says: This code should be used where the case involves children issues (with or without issues around divorce and/or domestic abuse) and work is undertaken at Level 1 and Level 2 and the children issues are not settled at Level 2 eg a certificate is applied for to issue proceedings in respect of the children issues or the clients ceases to give instructions” which I appreciate now is not correct but in my case I had only claimed the Level 1 fee but was just not sure how to report it.

I think the guidance should make it clearer FPL01 is for everything where a level 1 fee is payable, regardless of whether one progresses to a certificate or not.

Also the end points are ambiguous and the combinations of codes.

I would put code FB where we had seen the client once so there was a Level 1 fee but had carried out further work, and was told I should use endpoint FA where I was claiming Level 1. There is no indication on the codes guidance, which is already 53 pages long, that you cannot have endpoint FB with Level 1 cases.

The guidance says:

“Please enter the code from the category list provided showing what stage has been reached in the case. This should correspond to the “highest” level of assistance provided to the client.

FA First meeting

FB Further Work”

I would therefore think that the highest level of assistance was further work as I had written letters and referred to mediation and always took FA to mean first meeting but no further action. I therefore was told I had correctly put endpoint FB where it should be FA but the guidance had not made it clear what I should use.

The spreadsheet should tell you that you cannot put in code FB where you are claiming FPL01.

In the past we could claim for the initial two or three hours without proof of means provided the work was reasonable. Now there seems no leeway at all and not only do you require proof it must be no more than one month old in contrast to the previous rules which allowed three or six months.

Many cases that are audited were still opened way before the new guidance came in so probably would have sufficient proof of means to be compliant under the old rules but not these. Files will therefore fail on means whereas in the past they would have been compliant.

Cases can be paid where it was urgent to provide advice but there was no proof of means and the client subsequently fails to provide the proof. However, firms may not be putting enough information on their forms or files to explain so the file will be marked as a fail but may be reinstated when the firm looks at it again and provides an explanation.

When we were asked for our files to audit I went through and explained the circumstances such as those on each file and although we did not have proof for two files it was accepted these were urgent cases and they were not failed.

It was only when we had our audit that I realised how we were not passing their requirements on the various issues such as codes and am correcting this on file reviews and when completing the spreadsheets.

However, many firms still do not know about the second interview rule or proof of means or which code to use and no wonder are failing their audits.

These are just some examples from our cost compliance audit and if a firm like ours, where I am pretty up with the legal aid requirements, is not compliant then it is no wonder so many firms are failing.

I was still category A1 after a couple of appeals but the prospect of paying for audits when we failed basically because of the lack of clarity or guidance is very worrying.

The partner then wrote this update yesterday:

I did my LSC online last week after the new validations were installed and found codes I had used before no longer worked.

For example if I acted for a petitioner in divorce and there were finances issues and we did not issue for finances but there was a consent order I would use FPET FAMK FPL03 FB FE. But we have been told that is not valid for a level 1 and 2 fee so have to use FAPP which is for an applicant where proceedings are issued or FADV advice given. I did not issue ancillary relief proceedings but if I used code FPET it was not a valid outcome.

I also used a wrong code FPL01 instead of FPL10 for a divorce and realised before I uploaded that the fee was wrong and managed to change it before submitting.

As I have said before to have to enter over 40 codes is a nightmare and errors are bound to happen but not for any malicious intent.

4. Memorandum from Stuart Ranson, Ranson Legal IT Services

Could you please receive this notification of concerns expressed about the new BVT proposal for dealing with legal aid in the criminal courts as proposed.

I have been privileged to be a part of the solicitors profession since I qualified in 1972 and have always practised (and still do in the criminal courts).

I retired from dealing with the public direct as Senior Partner of my prior four partner firm some six years ago and have thereafter provided my services (a la barrister) by only taking instructions from other solicitors (ie not dealing with the public direct) and continue to do so as both a general agent for any firm of solicitors to attend any magistrates court and any police station.

In my past I have been engaged as the principal prosecutor for the police for a number of years prior to the Crown Prosecution Service taking over all prosecutions some years ago and have at all times represented clients in Magistrates Courts and Crown Courts (including representation where appropriate) and have been and still am a member of the Children Panel. I have conducted trials and continue to represent many clients on a regular basis in challenging the State case in contested issues and also representations of clients on sentences etc.

I was invited by the Legal Services Commission to be on the West Country panel of the Providers Readiness Group and have attended each meeting to discuss how the LSC should deal with legal aid provision in both offering positive suggestions and also making constructive criticisms.

I feel I am particularly well placed to give a considered opinion as to the current proposals of Best Value Tendering as the proposal arising from the recommendations of the original Carter commission to consider legal aid changes.

This view is because unlike the period of years when over time I gradually became only personally responsible for the more serious cases and was relied upon for my supervisory and quality control skills including designing and promulgating detailed manuals for use across three offices together with being responsible for implementation of technology systems to support the provision of legal aid to my current “hands on” levels of observation the provision of the legal supply by more than one firm due to the release of my prior responsibilities.

I have seen the gradual diminution of the provision of legal aid supplies to all family work until the present time when it can be readily observed that there are “deserts” in various parts of the country and where it is virtually impossible to find legal aid help in family matters due to withdrawal of firms providing such services. The reasons for such withdrawal has been the lack of profitability in doing such work due to the remuneration and excessive paper requirement and controls imposed by the Legal Services Commission (LSC) which at the present time do nothing to maximise “quality” except to drive out of the market place those firms which were skilled in it and were able to provide such “quality”. Those firms continue to exist but have withdrawn from the public provision because it has been proved impossible to subsidise such a service by private clients.

As a member of the Children Panel and being fully aware of the high quality of the solicitors involved in such work and the high standards they have to prove before admission to the panel, I am aware of the very low morale of those still performing such work due to the ever gradual reduction of fee levels now paid. I am further aware as I ask the Committee to be aware of how the CAFCAS system of ensuring protection of children in public proceedings has deteriorated where the number of qualified persons performing such work has reduced to the extent there are really unreasonable and non justifiable delays. Sometimes these delays are as much as nine months before any proper assessment can be made. Currently I am aware of problems of the continuance of the support of such system due to both poor fee level payments and financial restraints imposed on the system.

I regret therefore to conclude that for various reasons primarily the reduction of state support for the proper representation of those poorer members of society means that they are increasingly at a major disadvantage in the legal system and often unable to represent themselves but unable to pay for representation so that their case can be properly argued.

In respect of the criminal justice system there is currently extremely poor morale within the profession and it is my considered view that the core of the high quality persons dealing with such work in the public sector is ageing at an alarming rate and is not being replaced. The reason for this is that those who are in the profession with the greatest experience are finding it is not worth their while to continue with publicly funded cases unless there is appropriate financial rewards. There never has been any true compatibility or comparison with the fee rate of the legal profession for private work and for public work. The rates of fee payment are often one third or less than private paid work. It is inevitable that those who have high qualities if undervalued will gravitate to more rewarding work.

Such fee paying rates only tell half the story however. Any firm of solicitors offering services to members of the public are required to have physical premises and to have a prescribed quality control to be enabled to provide legal advice and assistance to the public at large. This also requires substantial insurance overheads together with clear “overhead” of supervision. These “back office” costs are made high by the LSC and professional requirements and these “overheads” have to be recovered.

To recover the “overhead” of any business requires reliability of future assured clientele to meet the overhead cost of the provision of service together with the cost of provision and some “reward” in the form of profit for the owners is a requirement. In the smaller firms (and there are a large no of small firms who provide representation in the provision of legal advice and assistance to those seeking or needing representation whose costs of overhead have to be strictly controlled and where there is little profit in the work with some form of cross subsidisation from other work: such firms are at grave risk of not being able to continue.

A comparison with the experience of the trial run by LSC of requesting a number of “set ups” to provide services as “Public Defenders” in the accounts showed clearly that the expense of such firms when overheads were included showed that these larger firms although supported by the LSC in their overheads could not compete with the smaller firms and the conclusion was that the expense of such was higher to the state than the current private firms performing such work.

It is argued by many that the current specialist firms although small are the ideal size to keep the expense of the provision of the service low enough to enable it to be continued and larger firms cannot by mere size alone improve either the quality nor the fee rate than presently offered. Such argument is obviously contentious but nonetheless may be correct.

The Carter Commission in an attempt to try and identify the cause of increased public costs of provision of legal aid and assistance in the criminal justice system came up with the concept of “Best Value Tendering”. The pros and cons of that conclusion will be passed over here but the effect has been to produce the present proposed trial in certain areas of a “pilot” of such in a number of areas.

I understand and believe that the overwhelming view of the profession in such a scheme is inappropriate, will not work and will have disastrous consequences to the administration of justice.

At the present time of writing a number of solicitor firms in the designated “pilot” area are indicating a refusal to join in with such a trial. One reason for so doing is that those firms by geography have been discriminated against because they are now asked to involve themselves in an “auction” whereby each firm must “bid” a price “per case” to perform work on a fixed fee basis without any compensation should they not make a successful bid. Some of those firms have been providing excellent quality work for many years but have a fear that an “auction” whereby the good the bad and the ugly are entitled to bid for work and those who are not successful will be barred from performing such work.

The consequences for those firms are horrendous. The theory is that all firms will bid competitively as if they all had a market to bid for which had certainty as some in industry may do.

It seems to me self evident that in the commercial world when there are potentially large bids for work to be undertaken, any commercial firm makes bids which takes account not only their overhead costs but their projected profit but usually in the absolute knowledge that if unsuccessful there is other work in which they have excelled to perform for others if any bid is unsuccessful. More importantly it is highly likely and I believe in the commercial world it has been proved recently in IT contracts, the bids which are successful are such as give very large profits largely because of the restricted market in which they operate. For the legal work in crime however there is indeed a restricted market – those who are not successful will be prohibited from doing the work publicly funded at all.

One of the unintended consequences is that those firms who prove to be unsuccessful in their bids for work under BVT will suddenly and overnight be “hit” by the TUPE regulations which currently will require those firms to compensate all their employees who will lose their employment as a result. This will inevitably lead to bankruptcy of many firms whose principals by their very nature are not able to avoid personal responsibility for any debts their firm may suddenly incur. The LSC have currently stated they (or the state) will not be prepared to take on the costs of such huge claims by the reduced work force.

Quite apart from the particular problems firms may have in provision of publicly funded work for the above reasons different considerations are now raised as to why any firm should undertake a risky personal investment in future work at restricted bid prices which cannot be guaranteed and which will require them as a firm to reassess that risk in the employment of staff etc in the future in the knowledge that at any time in the future all such work with all the above consequences may occur.

With any form of work there must be sufficient profit motive to make such work worthwhile and the risk of undertaking it must be accounted for in the measurement of what profit is appropriate for such a firm.

Some simple calculations in arithmetic show the following.

Currently on arrest and detention at a police station anyone (millionaire or pauper) is entitled to legal advice and assistance in the investigation of the allegations against them by the state.

It is my personal experience that it is common that some 90 minutes will be expended before an attendance at the police station by a suitably trained lawyer actually attends and most sessions take at least 90 minutes and some many more before conclusion: to include the support work of telephonic contact and writing up a report the usual minimum period of attendance of work often in unsocial hours can be at least 4 hours per case. The arithmetic on the small fast turn round cases means that for a fee which is now fixed in most areas an hourly rate of payment for a lawyer representation at the police station is no more than £60 per hour including being mandated to be available for a 24 hour period and to attend during these anti social hours.

These current fees are calculated on a “swings and roundabouts” basis by the LSC on the basis some cases will take less time while others may take more time. What I ask you to consider is that in the more serious cases the fee of between £200 and £250 is the MAXIMUM payable no matter how serious the offence or how long the case takes up to nine hours of work and no matter how many attendances. Only after nine hours is there any possibility for representations be made to ask for a “time spent” basis to be paid when the maximum hourly rate then is fixed at £69 per hour.

Attending police stations therefore (the first step of ensuring quality of arms in our justice system and in my personal experience where the most likely position is found to avoid unfair charging and removal from the criminal justice system of future costs of trialling issues) results in savings to the criminal justice system generally.

Consider if you pass by and are incorrectly identified as being a person committing a criminal act and at the police station no one is telling you the basis of the allegation but an account is sought from you to support the allegation which by astute representation informs you of the true issues and challenges clearly at an early stage the basis of any allegation: without representation a possible charge, investigation and full trial: with representation a close examination of the facts, challenge of them and an account which clearly demonstrates unreliability of the allegations: is that not the worth of the representation and indeed it could be by you next time whoever you are).

The above is to make a demonstration of the fact that those who provide the legal service in the criminal justice system not only perform a useful function but on a case by case basis may well justify the cost by ensuring cases are removed from the system that should not be there. If one extends the benefit of the

representation at the police station there is early involvement in the challenge of false or inaccurate allegation or often the early admission of appropriate misconduct leading to avoidance of cost to the justice system. The cost of such assistance on a case by case basis on the present level of fee payment is not great and much less than many consider.

If a case is taken to the court the current system is the payment of a fixed fee of £160 for any guilty plea unless for exceptional reasons more than five hours approximately is taken on case preparation in which case a slightly higher fee is payable.

Such fee is paid on the assumption of full details and examination of the case by attendance on a client, reading of papers, attendance at court and full representation, if necessary through two or three hearings. Again the average I have found for such cases on an hourly basis is at best £40 per hour by time of case completion.

Solicitors are mandatorily told to take their turn on publicly funded work to attend court on a rota basis to provide assistance to all those facing charges where custody may be possible. Their rate of payment is £52 per hour but they must reserve the whole of their day for such work, and pay their own way to the court in both time of travel and actual travel costs. Sometimes they are asked to read papers, advise, and if necessary assist in the completion of legal aid forms for submission for future hearings, and if necessary fully represent on guilty pleas and in any event to make representations for bail or adjournments for as many attendees who arrive at court without a solicitor. In my area the court is currently proposing a list of 20 such persons to be seen by the solicitor per duty session: an almost impossible task considering that there are often a minimum of 30 pages of statements to read and a client to be attended for explanation. Nonetheless such is the system and I venture to suggest the rate of hourly payment (less the solicitor cost of attendance) is pretty poor (although higher than the apparent average referred to above it is non delegable and is performed by the highest grade of fee earner—fully qualified solicitor—and precludes any other form of work that session if in conflict.

Simple arithmetic drives the equation that in any firm it is likely that any solicitor may be expected to perform direct fee earning hours of no more than six hours per day five days per week by 48 weeks in the year: ie a maximum of 1,440 hours where the HIGHEST hourly rate averages at £45 per hour which is less than £70,000 per annum assuming that such hourly work rates are performed. In fact there are many studies which show that the actual hours reasonably required of a solicitor or clerk at this level is only 1,040 hours (to allow for public holidays, m(p)aternity leave, sickness and other unavoidable absences. Such reduced hourly work produces an annual fee recovery rate from publicly funded work of less than £50,000 It is not difficult to work out the likely profit return from such poor hourly rates. A newly qualified solicitor without much experience after NI is likely to cost any firm at least £28,000 pa leaving less than “£22,000 to cover overhead and support staff. Generally speaking this is likely to leave by my experience little if any profit for the proprietors of the firm!

The point about trying to publicly show what the current rate of payment of lawyers in publicly funded work is to show that very few other businesses would wish to operate at such low profit margins having regard to the risks involved.

Such is the current position where I say that the morale of the profession is the lowest in all my years of experience.

It is the belief by the Carter commission that if a competitive system were put into operation the “market” would fix by competitive bids a “fair” and “competitive rate” for work to be performed.

The BVT has fundamental flaws in this submission of mine:

1. There has never been a system proposed such as this anywhere in the world.
2. It follows that England and Wales are being made a guinea pig of a new system of how publicly funded work should be provided by lawyers to those who are in a state of actual current and potential detention.
3. The system proposed has been drawn from a commercial comparison where the realities of the current profession are nothing like the commercial competitive systems for other publicly funded work.
4. There is no provision to compensate those whose entire future has been to provide such funded work should they not be successful in ensuring economic survival by bidding in a truly competitive and real form.
5. No other competitive bidding system has been tried on an existing large market of funded firms where their very existence is threatened without any recourse due to the particular speciality of the work involved.
6. Those firms which have other sources of work do their work on the basis of private profitability and any thoughts of cross subsidisation of loss making work will be rejected by those in such firms who consider their income streams are being reduced by support of such public funded depts: this is proved by the reduction in those firms which used to cross subsidise and the increased finding of specialised firms doing no other work (because they but not their former partners) have a feeling of vocation for that work.

7. Where a competitive bidding system is proposed which suggests a large reduction in provider numbers the temptation to bid unrealistically low to avoid bankruptcy until alternative measures can be taken is extremely high resulting in a highly likely unrealistic competitive bidding system.
8. Those who are the best and have provided the best quality are not likely to be rewarded by a BVT system and in due course because they are the best their qualities will be lost to the profession affording any such work: example that best shows this is when recently on very high cost cases the fee for publicly funded work was set so low that NO barrister could be persuaded to undertake the work AT ALL leading to non representation and trials vacated and the obvious problem of unfairness of non representation in serious matters.
9. The system is untried and not likely for years to provide any indication of true market price reforms.
10. The actual hourly rate for work in criminal provision by lawyers has not changed for OVER 10 years leading to current levels of payment to be at the very lowest and probably at least 50% lower than historical payments.
11. The “fat” (if ever there was any) has already been squeezed from the system of payment for publicly funded assistance.
12. Volume of future work cannot be guaranteed and unlike other forms of tendering the proposal is asking firms to “bid” for a volume of work which is not guaranteed and which if cases fall means the basis of the price fixing mechanism fails (lower volume the price computed on higher volume will lead to loss).
13. It cannot be right to so price the work as to drive out those firms and individuals who have the skills due to reducing the number of providers by the competitive bid process.
14. It is likely that younger persons entering the profession will not train to perform such work unless there is value in doing so.
15. The age range of current providers is unduly high and the likelihood is that once the higher age groups leave the profession they will not be replaced.
16. By definition if the market place is to be competitive but found not to be sufficiently profitably the most able will find alternative forms of employment.
17. There will be deserts of geographical areas (already starting) where it will be impossible to find appropriate representation for those who cannot afford private payment.
18. The whole justice system will start to add costs to itself by the inadequate preparation of cases and miscarriages of justice will increase.
19. As the state becomes more paternalistic and grants powers to its servants to arrest and detain (witness the ever increasing number of laws in the last few years and increased power of arrest and detention) the ability of its citizens to contest their detention will reduce.
20. The BVT system will reduce the quality of firms providing the expertise which the MOJ actively claim they seek to preserve.

It is my belief that BVT will be the most draconian method of attack on the ability of any member of our society to call upon assistance and representation against the state’s ability to arrest and detain due to the almost certain reduction in provision of assistance.

I ask myself that if I was at the position I once was some 30 years ago would I have set myself to train and train others in the provision of legal assistance to those who are least able to help themselves in either family or criminal work. If I ask myself or if any younger person so starting asked me now I would state that there was no future in publicly funded work as it is now being presented. Why? Because there is high risk if ability to perform such work is suddenly withdrawn having committed investment and cost to doing so and little profit in doing the work until that event arises.

I would ask myself whether I had skills in ability to analyse, empathise, criticise and represent persons with good effect relying on my personal and expert skills as a lawyer and advocate. I would argue I (as others would also argue for themselves) am good at what I do but I would NEVER undertake that sort of work again with the high risks involved. The same skill set could and did make a lot more money on other private work so why should I compromise myself, My future is limited due to my retirement from active practice but a younger person has only his future and must determine in what area to ply those skills.

The above I argue shows that the current fee rate for publicly funded work is probably at the very lowest as matters stand. BVT will actively harm and possibly bankrupt many good solicitor/lawyers. Any current round of BVT will be protectionist and will arrive at an unsustainable market which will implode for the reasons above stated.

If BVT goes ahead I am certain that a large number of firms will exit the market place and will never be replaced.

It may be argued that BVT will achieve in part its purpose in removing the multiplicity of firms offering the services of a publicly funded nature and a reduced provider base may make it easier to administer. Apart from the obvious reduced administration of the current system of overseeing and regulating a smaller provider base I see no advantage of BVT. Even if implemented it means that all firms will make adjustments to ensure they do not suffer bankruptcy if they have to prepare (as currently) for a next bid round in a further two or three years time.

In due course even if BVT is successful and many firms go out of business there is the real problem that a smaller provider basis would lead to the “doctor” syndrome of powerful control of the market by each later demanding a higher price (the competition having been removed). At that later date the problem the government will have is how to deal with a much more powerful provider base. It may be well argued that the current position is already providing a high competitive element in that only those who wish to involve themselves at current fee rates (which I believe are not sustainable at current low rates) seek the type of work at the fee rates currently paid. They HAVE to be efficient at those rates so why think that BVT will reduce those rates even further.

Knowing that at the end of the day the current proposed reforms are all about issues of money saving may I propose, in the same way that MPs propose to deal with their salary rises and other industries deal with how they pay their executives. Why not have an organisation which “sets” the appropriate rate of pay after extensive consultation with the profession and Law Society and based on what are perceived to be appropriate state set rates (as hitherto). At the end of the day if a rate of pay is fixed then firms can decide whether to perform such work.

The advantages are obvious.

If the rate is appropriately set the good firms with good support systems will be able to make appropriate and proper profit levels. Those who cannot do so will fail by their own inability.

Professionals will “gravitate” to the best firms who are efficient and pay appropriately for their expertise.

No firm will be faced with a TUPE close down and forced to discontinue but if they wish to withdraw from the market can do so without catastrophic consequences.

Given the current non increase in fees for over 10 years why does anyone think the cost of BVT and its consequences believe that the state will save any money.

To save the money look elsewhere at the present time for savings because they can be made in reduction of the huge control and overhead and simplify the controls and the other areas of MOJ where wastage is all too clear to see.

Please submit this representation to all members of the committee and invite them to read it all as it is meant to be descriptive of the true position by a “front line soldier” member who used to be a “general” and can see both ends of the argument.

Stuart Ranson

11 December 2009

5. Memorandum from Michael Robinson, Emmersons Solicitors

Level 1 Legal Help attracts a fee of about £90 plus vat. A solicitor undertaking private client work can charge about £160 per hour plus vat in our area. That puts into context the remuneration rate for level 1 work. Add into that an hourly recovery rate of £70 per fee-earner, you can see that any level 1 claim that takes more than 1 hour 30 minutes to process is non-profitable.

Add into that the poorly drafted Unified Contract and Specification (which are a tribute to cut and paste ability as opposed to thinking skills) and the difficult-to-find LSC guidance on obtaining evidence of means and the fact that the LSC, despite the fact that it has been auditing family fixed fees for some time, has not produced more up-to-date, comprehensive guidance then you can see why solicitors might be in a mess.

The requirement for solicitors to obtain documentary evidence before starting giving advice is an incredible concept. Why? In essence it is not practical, causes unnecessary delay and forces solicitors to do a lot of work for free. (“Oh Dear”, I hear you cry. What do you do for free?). “Free” does not pay the bills.

1. The LSC recognises that clients “burn out” if referred too often from one place to another—a reason why CLACs have been established. Asking a client to keep getting documents wastes time, delays advice giving and fails to account for the fact that clients may be anxious for advice yet not be in an emergency situation. Repeated requests for evidence will cause clients to fail to return. Our audit report is evidence of that.

2. The level of administration of the evidence-obtaining process is disproportionate to the remuneration.

3. Those who create these systems tend to be salaried people who don’t seem to fully understand that if a fee-earner does not earn fees then there is no money to pay the fee-earner his/her salary, nor is there money to pay support staff nor to invest in capital expenditure.

4. How is a solicitor supposed to organise his business to ensure that clients bring all the documents required: read a prepared script to each client when they book an appointment? Send a letter confirming the appointment? See the client and send them away with a list of documents to bring to the next appointment (first appointment is enforced *pro bono* work)? What if they don't come back? See the client, give them advice and don't claim unless one has all the relevant documents? More enforced *pro bono*. One can sue a private client but not a client who may be entitled to legal aid.

One wonders how the CLACs and the CLA telephone advice service deal with these issues? Aren't they salaried in any event?

The result of the current Family Fixed Fee Costs Compliance Audit process is forcing solicitors to delay seeing clients until all the relevant documentary evidence is produced.

Below is a comment from a solicitor audited by the LSC.

"We have been operating a zero tolerance approach to documentation since we got the kick back on our initial audit in the summer. The problem is that, unless the client is on a straight forward passported benefit the administration of the scheme at this strict level defeats the object of it from everyone's point of view, especially the client. Certainly, the cost of actually opening a file on this basis is swallowed by the level 1 fee so it really is starting to feel like what is the point?!!"

Lord Bach, Carolyn Regan, the NAO and politicians fail to understand the value of legal advice to people. They are obsessed with bureaucracy, audits, evidence of means, means-testing and value for money—which are all excuses for causing solicitors to do work for nothing.

In case you have not worked it out legal aid spend has risen because more people have become entitled to it. More people have become entitled to it because the Government's systems don't help or support the very poorest and those who are not so poor. These people then have to get legal advice to correct a decision of a government department (eg re education or benefits) or to advise as to debt or immigration etc.

The rise in legal aid spending is not a success of a quasi welfare state but an indication of how failed the systems of governance are in England and Wales. Other countries spend less on legal aid because they don't have to spend as much as is spent in England and Wales.

Until there is a proper discussion with solicitors and a proper review of the justice systems and then a review of how those systems will be funded you will continue to make a mess of legal aid "reform".

They have failed to develop with solicitors reforms of the legal aid system which make sense and allow ready access to quality legal advice for those who need it.

Clients are now being presented with hurdles before getting advice so a solicitor can successfully claim £90 plus vat—which doesn't even bring with it a profit to the firm in any event.

The National Audit Office fails to understand the realities of solicitors in private practice in relation to legal aid and sees nothing wrong with solicitors checking each claim before submitting it. How much non fee earning time do they think that a solicitor can spend checking the work of another solicitor.

The system of fixed fees and all that goes with it is bureaucratic nonsense developed by the ignorant without any concept of the value or worth of the giving of legal advice and without any grasp of the reality that we and our clients try to operate in. Theory from the heart of Government and the Treasury is one thing—trying to get a client from a sink estate in Sunderland to bring her three screaming children to an office on the bus with all relevant documents quite another.

My clients will be made aware of the fact that our requests for evidence of means will be repeated until we are satisfied because the politicians and civil servants who have created the system don't care about them and care more about money.

Michael Robinson
Emmersons Solicitors

7 December 2009

6. Memorandum from the Ministry of Justice

BEST VALUE TENDERING

I am writing to let you know that the plans to tender criminal legal aid work, that both Carolyn Regan and I referred to in evidence to the Public Accounts Committee on 9 December 2009, have changed.

At the end of last year Ministers announced that they had invited the Legal Services Commission not to proceed with the Best Value Tendering pilots planned for Avon and Somerset and Greater Manchester. The bidding processes had been due to start early this month.

The reason for this change was that Ministers were persuaded by the Law Society and a number of criminal legal aid firms that the scheme proposed was unlikely to lead to the efficient, re-structured legal services market envisaged by Lord Carter in his 2006 Review of Legal Aid procurement.

Ministers remain fully committed to developing tendering processes with a more ambitious scope which reduce the overall costs for criminal legal aid and by increasing the opportunities for innovation and efficiency enable suppliers to be profitable and sustainable.

The consideration work already undertaken in preparation for the pilots puts us in a strong position to develop the new proposals. Ministers have therefore asked their officials to work closely with the LSC, the Law Society and individual practitioners to develop in outline improved proposals by the end of March 2010.

Peter Handcock
Director General
Access to Justice

25 January 2010
