



Lord Carter's Review of
Legal Aid Procurement

Legal Aid

A market-based approach to reform

July 2006



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13th July 2006

The Rt Hon Lord Falconer of Thoroton
Secretary of State and Lord Chancellor

Final Report on Legal Aid Procurement

I enclose the final report of my review into the procurement of legal aid. I must put on record that I am very grateful for the immense support and co-operation throughout from the Law Society, the Bar Council, the many practitioners we have seen over the past year, the judiciary, the Legal Services Commission and your department.

I was surprised to discover at the outset that the relationship between the various legal aid stakeholders was often adversarial and sometimes hostile. This has resulted in a fragmented system that has not historically recognised a duty to deliver justice at an acceptable overall public cost. I am pleased to see a growing recognition that a new co-ordinated and collaborative approach is required in which it is no longer acceptable for one part of the system to act in a way that imposes a disproportionate burden on another. This is, however, a broader theme that will require reinforcement by you and the rest of government.

The arrangements I have recommended are the best ones that I think can be achieved, bearing in mind the tough fiscal climate. The biggest challenge that I have faced is the inadequacy of the management information available. The complexity and the opaqueness of the numbers, their components, the inability to forecast change, and the lack of a comprehensive understanding of the whole system, all contributed greatly to the difficulties I have encountered.

I have been impressed by the deep dedication and integrity of the professionals involved in legal aid work, and their real commitment to the principles of legal aid. They should be proud of their hard work on behalf of their clients, and acknowledged rightly as a credit to the legal profession.

However, many in the profession tend to have a natural conservatism towards any move to greater efficiency in the services they deliver. There must be a better understanding of the finite nature of resources, and the need for the taxpayer and government to secure better value for money from the funds it spends.

I am confident the legal profession will understand the benefits of change arising from my recommendations, and how they have been devised with their business interests at heart. The new procurement regime will help government to forecast and control the cost of the legal aid system; it will help the public to receive a better service; and it will also help practitioners to achieve a better financial return for themselves.

I have been encouraged by the willingness of the Law Society and the Bar Council to participate in the iterative process which has led to my report. I recognise that, in this process, they have had to countenance changes that may not be wholly welcomed by their members. Whilst they are not, of course, responsible for the recommendations of my report, it would not have been possible to reach these recommendations without their engagement and I am grateful to them for their responsiveness and their participation in the process.

There is an historic opportunity for all parties to address the inherent risks in the culture and structure of the legal aid delivery arrangements, and match the willingness to do something about it, with the urgency to address it.

Given this urgency, all parties must also make a fresh start, with a new relationship based on openness and co-operation.

Finally, I would like to thank my panel of advisers, Guy Beringer, David Gregson and David Ross, as well as the secretary to the review, Jeremy Marlow, and the rest of my team for all their hard work.

A handwritten signature in black ink, appearing to read 'A. J. Carter', written in a cursive style.

LORD CARTER OF COLES

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Executive Summary

1 Lord Carter's report on the review of legal aid procurement is the conclusion of a year's detailed analysis and extensive consultation. The review has been iterative in its approach, considering a wide range of issues, options and impacts before developing detailed and costed recommendations for a new procurement system for legal aid.

2 DCA, the Legal Services Commission, the Law Society, the Bar Council, the judiciary, other representative groups, individual practitioners and many other stakeholders, have all played a full part in the discussions that have led to these recommendations.

The need for reform

3 Fundamental change must be made in the way legal aid services are procured so that:

- clients have access to good quality legal advice and representation;
- a good quality, efficient supplier base thrives and remains sustainable;
- the taxpayer and government receive value for money; and
- the justice system is more efficient, effective and simple.

4 There have been several attempts in recent years to improve the efficiency of the legal aid system, but these have proved insufficient to halt the increase in legal aid spending, especially on criminal defence services.

5 In England and Wales, we spend more on legal aid per capita than anywhere else in the world. Legal aid expenditure has increased from £1.5 billion in 1997 to over £2 billion today. Legal aid costs each taxpayer nearly £100 per year.

6 Although there have been many well-known anomalous and exceptionally high cost claims on the legal aid budget, the scale of the continued rise in spending is not the result of individual or collective wastefulness. It is the result of systemic weaknesses in the way legal aid services are procured and therefore inefficiencies in the way those services are delivered.

7 The recommended procurement reforms should lead to much better control and forecastability of legal aid spending. They should provide greater efficiency in criminal defence practices and the operation of the justice system, which should ease the pressure on civil and family legal aid.

8 The recommendations should, subject to effective implementation, deliver efficiencies across the legal aid budget of £100 million against spend in 2005–06 without compromising quality and access to services for clients. This control will reduce spending on criminal legal aid by over 20% in real terms over the next four years.

Quality, value, access

9 All reforms are directed towards achieving a market-based outcome. A healthy legal services market should be driven by best value competition based on quality, capacity and price. All three of these factors should lead to the restructuring of the supply market. The option of longer contracts should be available for suppliers, if they are considered to offer a particularly good quality and efficient service.

10 There should be a minimum standard of quality for all legal aid practitioners assured through peer review. The process of reviewing and assessing the quality of individual suppliers should begin immediately and complete by April 2009 at the latest. This process alone will cause some restructuring of the market as suppliers of inadequate quality legal services are forced to improve or withdraw from the market.

11 Combined with the implementation of Sir David Clementi's recommended reforms to deregulate the legal services sector, procurement driven restructuring is likely to see an increase in the average size of firms through growth and mergers, rationalisation and harmonisation of the way separate services are delivered.

12 There should be a wholesale move towards fixed pricing for work. Fixed pricing rewards efficiency and suppliers who can deliver increased volumes of work. However, pricing should be graduated for more complex work so that cases

genuinely requiring more expertise and effort are priced fairly. Exceptionally complex cases should be managed and paid for under individual case contracts with only the most experienced, competitive and competent legal teams providing the service.

13 Reform of the procurement system and restructuring of the legal services market will be challenging for all involved. Part of this can be helped by a managed transition. This should give good quality and efficient suppliers time and support to adapt to the new arrangements in the run up to best value tendering in 2009–10.

14 The managed transition period should be used to sustain and promote a diverse and sustainable supplier base. This should enable clients to be confident in the quality of the service they receive, and still offer a choice of legal representative.

Criminal defence

15 Defence firms should be able to increase their volumes of work through new contracts, working arrangements and boundaries for allocation of duty police station work. Clients would continue to be able to ask for a firm of their choice but there should be limitations of the amount of work a firm can do of this nature to preserve the integrity of the quality and economic benefits of the new working arrangements and boundaries.

16 There should be minimum thresholds of capacity and managed choice for clients. Payments for the police station should be based on fixed fees, which include travel and waiting costs that are currently paid separately. These changes should be implemented in two stages (April 2007 and October 2007).

17 Revisions to the current magistrates' court standard fee scheme should be made to shift more payment in to fees for productive work in the early stages of a case and away from of travel and waiting costs. This should reward more efficient practices and provide appropriate incentives for early preparation and resolution. A new graduated fee scheme for this work should be considered for implementation in April 2008.

18 Revisions should be made to the graduated fee scheme for advocacy in the Crown Court to transfer a greater proportion of the fee in to the early stages of a case, promoting earlier preparation and resolution. There should be a reduction in piecemeal payments for work resulting from inefficiencies in the operation of the justice system. The revisions should be in place by April 2007.

19 A new graduated fee scheme for litigation in the Crown Court should replace the current method of paying case-by-case bills based on the number of hours worked as determined by each and every supplier. The fee should have a base payment varied to reflect different types of offences and have uplifts to that fee to reflect varying complexity and effort required for each case. The new scheme should be in place by April 2007.

20 Revised, tighter control of very high cost criminal cases should be achieved by only allowing (through a best value tendering process) the best qualified, most experienced and most efficient defence teams to undertake this sort of long and complex work. There should be more active and legally experienced management of the individual case contracts by the Legal Services Commission. The improved procurement and management arrangements should be in place by January 2007.

Civil and family

21 Suppliers of civil legal aid should provide a more efficient client-focussed service concentrated around meeting differing local needs through the establishment of community legal advice centres and community legal advice networks, in line with the Legal Services Commission's strategy for the Community Legal Service.

22 New forms of contracting should promote greater links between civil suppliers, and where possible, greater links with family law suppliers, so that the clusters of problems faced by many clients are dealt with more effectively. Best value tendering for the new centres and networks is already underway. (Learning from the first wave should be applied to subsequent waves with the complete roll-out expected from 2009 onwards).

23 Family law, especially child-care proceedings, has been subject to considerable reform, and the recommendations made on family legal aid should support the rationalisation and simplification of these legal processes through encouraging earlier resolution where appropriate, and controlling expenditure.

24 New fixed fee schemes for legal help for areas of law such as housing and debt advice should be in place from April 2007. These will replace the current tailored fixed fee schemes for civil legal help to promote a consistent level of efficiency across all suppliers.

25 A new graduated fee scheme for solicitors in private law family should be in place by April 2007. This scheme should provide a structured framework for replacing tailored fees for legal help and payment at hourly rates for work in court. This should lead to a more efficient structure that provides better outcomes for clients, as well as better control over expenditure.

26 A graduated fee scheme for solicitors in child-care cases should replace the current system of payment at hourly rates in court, as well as encourage earlier work by solicitors before proceedings are initiated. This should be in place from April 2007 to support better outcomes for children and families in child-care proceedings in line with the current judicial case management protocol and changes following the implementation of the child care proceedings review.

Quality assurance

27 It is essential that clients have confidence in their legal service and that the professional quality of that service is assured.

28 The Legal Services Commission should continue to set quality standards, but in line with legal services reform, the responsibility of quality assurance should pass to the legal professions through their relevant professional bodies.

29 In particular, the quality of advocacy services, including their quality of interaction with the courts, should be developed in time for the introduction of new procurement schemes in April 2007.

Profitability

30 The reforms will have an impact on suppliers, especially criminal defence suppliers. In terms of profitability, the proposed new fee structures will allow good quality efficient criminal defence suppliers to make a reasonable return. Moreover, as the volume of work that firms can undertake increases, so too does the return they can earn. While a sole practitioner is likely to earn £36,000 to £55,000, an equity partner in a firm with 40 fee earners could expect to earn between £120,000 and £150,000.

31 It is now recognised that overall expenditure on Crown Court advocacy services will decrease by nearly 20% compared to 2005–06. This is largely driven by the final elements of the ex post facto regime coming within the revised graduated fee. However, changes to the pricing of different elements within the revised advocacy graduated fee scheme have been recommended to address the fact that different elements of the graduated fee scheme have been held flat with no indexation to account for inflation, in some instances for up to 10 years.

32 The impact of the new rates has been assessed against a basket of different Crown Court cases. This assessment shows that the changes to different elements within the revised graduated fee scheme would re-balance the value of these cases by between -3% to +20%.

Diversity and choice

33 It is essential that clients have access to good quality legal advice, and confidence in the service they are given. A diverse and sustainable supplier base is essential for clients of diverse backgrounds to have confidence in their legal services. The Legal Services Commission should use its procurement power through its contracting terms to promote diversity within firms and their use of counsel and referral services, especially where they serve diverse communities.

34 Analysis of available data indicates that the recommendations should not have a negative impact on black and minority ethnic firms and solicitors on a national basis. There may be some disparity of impact at regional level. It is considered, however, that the recommendations are justified by the need to control legal aid spending and to promote efficiency of service in the public interest. It is considered that the recommendations constitute a proportionate means of securing a legitimate aim.

35 Consultation with representative groups and diversity experts have led to a reconsideration of the position in the review's interim report where capacity bidding would be a major feature of market-based reforms and choice would have been tightly controlled. The removal of simple capacity bidding in favour of best value bidding on quality, capacity and price, and the relaxation of client choice limitations should aid the transition for smaller black and minority ethnic owned firms to restructure in time to compete effectively for work.

Integrated justice

36 It is essential that resources are optimised within the justice system, and that wherever possible unnecessary work and duplication is spared. The judiciary have a vital role to play in this respect, as they have a unique role outside the other competing pressures on other players in the adversarial system. They should build on and spread the robust case management practices supported in several recent high profile Court of Appeal judgments.

37 The justice system has many different elements, with different objectives, each of which is funded by the taxpayer. Each of the participants is able to cause a significant cost burden to fall on some of the others but, in many cases, little account appears to be taken of the overall financial burden which results for other parts of the justice system. More collective responsibility for the overall use of resources in the justice system should be encouraged and enforced nationally and locally.

Help for suppliers

38 Delivering radical reform in the shape of a market-based approach will be a significant challenge to firms and practitioners. Help should be available to firms who want to continue in legal aid to enable them to become more efficient and capable of competing for contracts.

39 There should be grant programmes to part fund specific growth and consolidation advice and assistance amongst suppliers and for investment in all legal aid supplier's information technology infrastructure and modernisation. This will offer the Law Society a unique opportunity to provide firms with assistance in restructuring, and mark its renewed representative status following legal services reform.

Cost control

40 The procurement reforms should, if executed properly deliver the long desired cost control in legal aid. Without these new procurement reforms, the same sort of price inflation as seen in the past decade would more than likely be repeated in the future.

41 By 2010, the new procurement system and underlying fee rates should lead to 4% efficiencies (before inflation) from the supplier market over three years from 2006–07. The variations in timing for the new fixed pricing schemes should mean that the efficiencies sought are staged over the period of the transition.

Implementation

42 This challenging programme of changes needs a mix of expert skills and knowledge to execute their effective delivery. The changes, restructuring and overall efficiencies for all sides will require DCA and the Legal Services Commission to assess and where appropriate to continue to improve their capability.

43 The cost of administering legal aid has increased from £58 million in 1997–98 to nearly £100 million today (a rise of 65%). This is 5% of the legal aid budget. The increase in capability and skills will require some short term-investment. But by 2010 the shift to a smaller number of suppliers (and therefore contracts, in some cases, of a longer duration) along with rationalised and more electronic transaction processes should mean that administration costs are reduced by 30% to approximately £70 million.

Transparency

44 An atmosphere of mistrust and suspicion has been allowed to build up between suppliers and the government, and implementation of the reforms would be significantly helped if stakeholder relations were strengthened with the legal profession and other agencies operating in the justice system.

45 A new structure of stakeholder engagements should be put in place. This will be a platform for improved and constructive relationships between DCA, the Legal Services Commission and the key stakeholders that are essential to a sustainable settlement for the long-term.

List of recommendations

Quality

Recommendation 3.1: The Legal Services Commission should begin from July 2006 a national roll-out of peer review assessment for all firms seeking a place in the new market so that the introduction of best value tendering can take place from April 2009 onwards. The Legal Services Commission should adopt four criteria to plan the roll-out of peer review:

- greatest quality impact for clients;
- greatest opportunity to restructure the local market;
- ensure a level playing field for all firms until best value tendering takes place; and
- assess the impact on the justice system.

Value

Recommendation 3.2: The Legal Services Commission should continue to develop the design of a best value tendering process around the framework set out in paragraphs 61 to 64 of the review's final report, with specific arrangements for each local tendering round, so that a national roll-out of best value tendering should begin in April 2009.

Access

Recommendation 3.3: The Legal Services Commission should consider whether and how a small number of criminal defence practitioners could continue to provide niche services when the new General Criminal Contract arrangements are implemented in October 2007. Consideration should be given to how sub-contacting arrangements can be developed for referrals from firms who hold a General Criminal Contract as well as support for growth and consolidation.

Recommendation 3.4: The Legal Services Commission should explore the possibility of firms and not for profit agencies expanding into other categories of civil and family law. Depending on the area and the nature of the service, suppliers should be encouraged to develop services across a wider area of categories of civil and family law than is currently the case.

Recommendation 3.5: It is important that there is not one model for community legal advice centres, and the Legal Services Commission allows centres to develop in a pragmatic and flexible fashion that best suits their potential clients in the area where they are located (including sub-contracting service delivery where necessary).

Recommendation 3.6: It is recommended that the Legal Services Commission should carefully evaluate the impact of the transition in the first wave of community legal advice centres from 2007, so lessons can be learnt for later waves from 2008-09 onwards.

Recommendation 3.7: It is important that the Commission enable community legal advice networks to be developed in a pragmatic and flexible fashion that makes sense locally, as in some areas there could be informal networks that already exist and might be built upon, whereas elsewhere the networks would be a fresh development. But the Legal Services Commission should ensure that all would-be network suppliers are subject to a robust tendering process, and that the network is ultimately based on the needs of clients.

Recommendation 3.8: It is recommended that the Community Legal Service strategy should not simply set the way forward for the Legal Services Commission, but should also provide a good working framework for other funders of legal advice services, including local authorities and other government departments in England and Wales, that allows them to add value to their spending in this area through working together with the Legal Services Commission. This better co-ordination should lead to better overall legal services for local communities, especially the more vulnerable groups.

Criminal defence

Recommendation 4.1: The Legal Services Commission should construct new General Criminal Contract boundary areas as set out in paragraphs 4 to 9 and Annex 4.1, for all of England and Wales by January 2007. This should be based on detailed maps and data covering existing police stations and duty schemes, suppliers, magistrates' courts, and distances between suppliers and police stations. An iterative process to create the new boundaries should be based on:

- developing larger areas for work where appropriate;
- a combination of minimum drive times between suppliers and police stations and grouping of existing duty police station schemes, as well as travel to courts;
- ensure new working areas allow performance standards to continue to be met for client access; and
- provide for possible exceptions for police stations in rural areas.

The new boundary areas should then be published for consultation prior to implementation with associated new working arrangements in October 2007.

Recommendation 4.2: The Legal Services Commission should put in place a series of measures that mitigate market fragmentation and allow firms to begin the process of restructuring. The Legal Services Commission should consider the following measures:

- reduce duty solicitor service requirements for duty solicitor work so that it is in line with own client requirements. This should mean that any duty solicitor, accredited representative, probationary representative (non indictable offences) and solicitor with the police station qualification may undertake all types of work. Duty solicitor slots should be allocated to firms (in proportion to the volume of work they had undertaken between July 2005 and July 2006) rather than named individual solicitors. There should be a moratorium on new duty solicitor slots other than in response to changes in local need. Where new slots are required to meet

demand the Legal Services Commission should notify firms that new slots are available;

- enforce the requirements that 80% of police station work and 50% of magistrates' court work is undertaken in house; and
- the duty solicitor rotas and remove those firms or individuals that have not undertaken duty solicitor work in a 12 month period.

The Legal Services Commission should consult on the above proposals and should introduce them as soon as is practicable, but no later than January 2007.

Recommendation 4.3: The register of potential very high cost criminal cases should be developed further to include early identification of cases. The prosecution authorities should work together to notify the Complex Crime Unit of a potential very high cost case on the questioning or charge of an individual. Changes to the Complex Crime Unit should ensure that the exception to the police station scheme operates effectively. This register should be in place by December 2006.

Recommendation 4.4: The Legal Services Commission should construct new General Criminal Contract working arrangements providing for access to own solicitor within and outside of contract areas and duty solicitor slots by January 2007 as set out in paragraphs 20 to 28 of Chapter 4. The new working arrangements should then be published for consultation prior to the implementation with associated new working arrangements in October 2007.

Recommendation 4.5: The duty solicitor call centre and CDS Direct should be monitored closely by the Legal Services Commission. The monitoring should be on a monthly basis and at a local scheme level, and should look at the volume of cases, and review their effectiveness and quality of service. If this fails to control any increase in volume of work being undertaken in the police station then DCA and the Commission should consider options for restricting defendant eligibility. This should happen alongside the introduction of the new police station fees in October 2007.

Recommendation 4.6: By January 2007, the Legal Services Commission should develop a methodology for allocating work under the new working arrangements, based on a minimum threshold that varies according to area and market conditions as described in paragraphs 29 to 35 allowing for duty slots within boundary areas, a percentage of out of area duty slots and own solicitor work within the boundary area. The Legal Services Commission should consult on the need for a minimum threshold that varies. The new working arrangements (including the need for a lower threshold) should then be published for consultation prior to implementation with associated new working arrangements in October 2007.

Recommendation 4.7: The Legal Services Commission should introduce a new police station procurement scheme, based on fixed fees per case that include travel and waiting, as described in paragraphs 36 to 39 and set out in Annex 4.2. The fees set out in Annex 4.2 should be subject to consultation and should be introduced in April 2007.

Recommendation 4.8: The Legal Services Commission should introduce a revised magistrates' court standard fee scheme including an element of travelling and waiting (as described in paragraphs 40 to 41 and set out in Annex 4.3). The fees in Annex 4.3 should be subject to consultation and should be introduced in April 2007.

Recommendation 4.9: The Legal Services Commission should introduce a new magistrates graduated court fee as described in paragraph 43. The Legal Services Commission should collect data to develop proxies. The Legal Services Commission should also collect data to develop an alternative basis for pricing cases that escape. The graduated fee scheme set should be developed and subject to consultation in June 2007 and should be introduced in April 2008.

Recommendation 4.10: Alongside the introduction of a new graduated fee scheme for magistrates' courts work in April 2008, DCA and the Legal Services Commission should review the issue of assigned counsel in magistrates' courts by April 2007 and should consider the following alternatives:

- counsel to be paid the basic fixed fee with a 10% uplift;
- solicitors to be paid a 50% uplift on the basic fee and thereafter disseminate monies as they believe to be appropriate to assigned counsel; or
- the development of a graduated fee scheme for assigned counsel.

The Legal Services Commission's preferred option should be published in June 2007 to be implemented in 2008 alongside the new graduated fee.

Recommendation 4.11: DCA and the Legal Services Commission should apply the ring fenced and capped budgets for Crown Court advocacy ancillary payments as set out in Annex 4.5. These budgets should be monitored on a quarterly basis. If the budget is exceeded in the financial year the payments will cease to be made as ancillary payments and will be automatically absorbed without further negotiation into the base fee for all following years on a cost neutral basis.

Recommendation 4.12: DCA and the Legal Services Commission should review the effectiveness of the October 2005 changes to the advocacy graduated fee cracks and guiltyies scheme in the Crown Court, and any changes proposed to this scheme, on the timing of cracked cases. This should report in January 2007 and be considered by the stakeholder mechanisms recommended in Chapter 6.

Recommendation 4.13: DCA and the Legal Services Commission should introduce a revised advocacy graduated fee scheme for crown court work (as described in paragraphs 46-55 and the tables in Annex 4.5) that increases base fees, introduces two new offence types, reduces the number of ancillary payments and makes total case fee payment to a single named advocate or two named advocates in two counsel cases. The fees should be subject to consultation and implemented in April 2007.

Recommendation 4.14: The introduction of a revised advocacy graduated fee scheme in the Crown Court in April 2007 will require the early identification of the trial advocate. Clerks and chambers should begin revising their working practices to ensure that advocates will be identified at the commencement of a case from this date.

Recommendation 4.15: The Legal Services Commission should introduce a new graduated fee scheme for litigators in the Crown Court. The Legal Services Commission, during consultation and prior to implementation in April 2007, should ensure that the fees set out in Annex 4.6:

- contain uplifts that appropriately reflect and remunerate differences in costs and complexity;
- are not missing uplifts that might provide greater cost reflectivity; and
- achieve the appropriate balance, in terms of payment, between the base fee and the uplifts described above.

If rebalancing or the creation of additional uplifts is required, this should take place within the proposed level of expenditure recommended for the scheme (see Chapter 6). The fees should be implemented in April 2007.

Recommendation 4.16: DCA and the Legal Services Commission should consider harmonising the separate litigation and advocacy graduated fee schemes in to a single graduated fee for all defence services in the Crown Court, for implementation as soon as possible after 2009, when the market has stabilised and legal services reforms allow for the creation of alternative business structures.

Recommendation 4.17: There should be a new specialist panel of suppliers to conduct very high cost criminal cases. In advance of inviting applications and bids from potential teams the Legal Services Commission should issue by April 2007 an expression of interest document detailing the criteria for membership of the new panel. This should fulfil the requirements (set out in paragraphs 70 to 74 and the detailed wording should be consulted on with the appropriate professional bodies.

Recommendation 4.18: The Legal Services Commission should establish a best value tendered panel for very high cost criminal cases based on the steps sets out in paragraphs 80 to 89. Prior to doing so the issues set out in paragraph 90 should be consulted on with the professional bodies. The invitation to tender should be issued by July 2007 with tenders submitted by September 2007 to allow implementation of the panel by October 2007.

Recommendation 4.19: The Legal Services Commission should require all defence teams and prosecution bodies to notify all cases that would be expected to last 25 days or more at trial and/or the defence teams are estimated to be £100,000 or greater. The Legal Services Commission should contract all cases that would be expected to last 41 days or more. They should have the discretion to contract any case expected to last greater than 25 days and less than 41 days and/or the defence teams are estimated to be £100,000 or greater. This should take effect by April 2007. The Legal Services Commission should consider developing criteria for other 'exceptional' cases that do not meet the 25 days and/or financial criteria.

Recommendation 4.20: The Legal Services Commission should design a pro forma notification document to assist in the early identification of potential very high costs criminal cases by September 2006. Annex 4.7 sets out the key points that this document should cover.

Recommendation 4.21: The existing High Cost Cases Review Board should develop a robust trial estimate procedure for very high cost criminal cases. The procedure would:

- provide an estimate of the trial length which should be scrutinised by the court, the prosecution and the defence;
- provide for a detailed timetable agreed by the prosecution, defence and the court within which the issues in the case can be fairly determined;
- build a process to monitor departures from that timetable and ensure these are justified to the court; and
- develop a mechanism by which the estimate set and any variations to the estimate should be

reflected in the contractual terms for payments and management arrangements for both prosecution and defence teams.

This should be developed by the review board in November 2006 and implemented in January 2007.

Recommendation 4.22: The Legal Services Commission should make improvements to case management by the Complex Crime Unit (outlined in paragraph 96 and detailed in Annex 4.7) by recruiting qualified practitioners, establishing a referral and a post case audit panel and designing a very high cost criminal cases best value team protocol by October 2007.

Recommendation 4.23: The Legal Services Commission should consider the potential to generate a 5% saving on current spending through the combination of competition on rates and tighter management of very high cost criminal cases in the financial year 2008-09.

Civil and family

Recommendation 4.24: The Legal Services Commission should ensure the fixed fees for legal help with which they propose to replace tailored fixed fees in civil categories of law are sustainable within the overall legal aid budget, and consistent with maintaining a good quality supplier base.

Recommendation 4.25: Wherever possible, the Legal Services Commission should ensure that the dynamics, between the fixed fee for civil legal help and the payments for civil court work, act to reward early settlements where it is appropriate. The Legal Services Commission needs to look at this in more detail, and whether this means removing the current differential between legal help and representation rates, and should report with its findings by July 2008.

Recommendation 4.26: Where practicable, the Legal Services Commission requires firms to report success rates in civil certificated cases as one of the performance indicators in the contracts, so the Legal Services Commission is able to monitor if devolved powers for certification are being used properly.

Recommendation 4.27: Following the introduction of the first community legal advice networks in 2006, options for networks should be tested out in different areas by the Legal Services Commission to identify which approach works best in each of a variety of different circumstances.

Recommendation 4.28: Bids by suppliers to work in community legal advice networks should refer to arrangements they have together agreed for co-operation with other bidders, so that it can build on existing informal networks. This could include proposed co-location and active referral arrangements. Bidders should also be asked by the Legal Services Commission for their own proposals on how they would implement or exceed the contractual requirements. This should enable the network to be flexible and take account of local factors. The Legal Services Commission would be free to accept or refuse bids on an individual basis, and determine which arrangements are best for clients.

Recommendation 4.29: The process of moving to indicative budget allocations by the Legal Services Commission for legal help for social welfare law through deprivation data should be managed carefully to minimise any disruption to services. As part of this process, the funding formula should enable the Legal Services Commission to decide in which local areas to expand case starts.

Recommendation 4.30: There should be no major changes in the current civil representation ex post facto remuneration scheme for the time being, but it should be kept under close review by DCA and the Legal Services Commission, together with the profession, and DCA and the Legal Services Commission should produce a report with their findings by July 2008. As part of this, DCA and the Legal Services Commission should consider how the various alternatives, such as a "success fee", set out in Annex 3.1, might impact upon the current scheme.

Recommendation 4.31: The procurement strategy in the category of mental health should be kept under close review by the Legal Services Commission, as it will need to take account of future changes in mental health legislation, and if there is a move towards more clients being cared for at home and not detained. It is important that clients cared for at home are able to have access to legal advice, if it is required, and so supply centred around hospitals may need to be expanded to cover this category of clients (and permit referrals from the community legal advice network).

Recommendation 4.32: The Legal Services Commission should ensure the fee levels they are proposing for private law family are sustainable within the overall legal aid budget, and consistent with maintaining a good quality supplier base.

Recommendation 4.33: The move to the family help procurement scheme from April 2007, should be seen as paving the way to a graduated fee scheme for solicitors in private law family that includes the final hearing stage from autumn 2007.

Recommendation 4.34: The Legal Services Commission should replace the current public law children ex post facto scheme with a graduated fee scheme aligned with the Judicial Case Management Protocol for Care Proceedings. Other public law children work, that is not covered by the graduated fee scheme, should be kept under review by the Legal Services Commission and DCA, and consideration given to expanding the graduated fee scheme if volumes and costs increase in other public law children work.

Recommendation 4.35: The Legal Services Commission should ensure the fee levels they are proposing for the new public law children scheme for solicitors is sustainable within the overall legal aid budget, and consistent with maintaining a good quality supplier base.

Recommendation 4.36: The Legal Services Commission should consider the possibility of tailoring family contract sizes in relation to quality. For instance, a firm with a high peer review score, who might be prepared to be subject to more stringent performance targets, could be offered an extended contract, e.g. up to five years, with a three year break clause to check their progress against targets. Equally, a firm with a low peer review score, but who are prepared to improve to meet more stringent standards, could be offered a shorter length of contract, to enable time to improve with close monitoring from the Legal Services Commission.

Recommendation 4.37: The Legal Services Commission should encourage growth in family provision through best value based bidding on contract sizes and length of contract by 2009, but subject to the need to maintain a variety of good quality, efficient suppliers within the family justice system.

Quality assurance

Recommendation 5.1: The Legal Services Commission, DCA and Law Society should agree an operational process and timetable by September 2006 for transfer of all quality assurance for solicitors by April 2009. The Legal Services Commission will need to be satisfied by the arrangements put in place for quality assurance by the Law Society before effecting a handover of responsibility.

Recommendation 5.2: Peer review should also be assessed before transfer to the Law Society in April 2009 to ensure that a high level of client service is being delivered, resources are being correctly used, and that the needs of the rest of the justice system are being met. Such an assessment should cover both client satisfaction and justice system partners, so that quality assurance includes the quality of firms' effective interaction with the wider justice system. The assessment should be undertaken in partnership by the Law Society, Legal Services Commission, Bar Council and judiciary by April 2009.

Recommendation 5.3: A proportionate system of quality monitoring based on the principles of peer review and a rounded appraisal system should be developed for all advocates working in the criminal, civil and family courts. This system should be developed through a process chaired by a member of the judiciary in partnership with the Bar Council, Law Society, Legal Services Commission and DCA to ensure it covers all advocates with relevant rights of audience in these courts. The new quality monitoring system should be developed in the first instance for publicly funded criminal advocates, then for publicly funded family and civil advocates, and ultimately for all advocates. The scheme for publicly funded criminal advocates should be in place by the time the new graduated fee schemes are implemented in the Crown Court in April 2007. The system should be subject to a full regulatory impact assessment before being implemented.

Diversity and choice

Recommendation 5.4: The Legal Services Commission and DCA should help sustain a diverse supply base for legal aid services by working closely with the legal profession to introduce the following measures:

- monitoring of ethnic data throughout all stages of the transition to the market structure in 2010 and beyond;
- regular monitoring of quality checks to ensure that they have no unintended discriminatory effects; and
- a requirement that all suppliers have in place an equal opportunity policy, including specific measurable characteristics, which is regularly reviewed and which is followed; the policy should include the promotion of diversity in the workforce and the capacity of the firm to work effectively with the diversity of the community in its area.

Recommendation 5.5: The Legal Services Commission should maintain resource to monitor, assess and promote diversity within its suppliers. The Legal Services Commission together with partners, including DCA, should create a wider diversity advisory group to report to the Lord Chancellor and LSC Commissioners on the state of diversity within the suppliers of legal aid services and make recommendations for improvements where necessary. The Legal Services Commission, Law Society and the Commission for Racial Equality should jointly review the number of black and minority ethnic firms, and the number, status and integration of black and minority ethnic practitioners within firms providing legal aid services.

Helping suppliers

Recommendation 5.6: The Legal Services Commission should include the methods and timing of making payments to suppliers as a factor when determining the length of contracts awarded under a best value tendering process.

Recommendation 5.7: The Legal Services Commission should set up a financial advisory group as a regular forum in which DCA, suppliers and bankers can discuss how best to promote the availability of loan and equity finance for the sector.

Recommendation 5.8: There should be established a grant programme through a growth and consolidation fund, lasting from April 2007 to March 2009, totalling no more than £4 million, and administered by the Law Society to provide support for the necessary assistance that firms delivering legal aid will need to enable them to restructure in a way that will allow them to compete for new contracts under the best value tendering process from 2009 onwards.

Recommendation 5.9: There should be established a match-funded grant programme through an information technology modernisation challenge fund lasting from April 2007 to March 2009, totalling no more than £6 million and administered by the Law Society to provide support for all firms providing at least £50,000 of legal services in 2005–06 to invest in information technology improvements to their businesses.

Integrated justice

Recommendation 5.10: The appropriate use of limited resources by all participants in the criminal justice system should be pursued and enforced by the judiciary in their management of all types of cases. Internal judicial training, through the Judicial Studies Board, should be expressly developed to ensure that the comments set out above become standard practice and are rigorously enforced, through for example, the quality assurance schemes. Training developments should build on the existing work of the Judicial Studies Board in the area of judicial case management and would provide a backdrop against which it should help the proposed reforms to become more effective. The relevant judicial training should be in place for all Circuit and High Court judges by April 2007.

Recommendation 5.11: A review of the effectiveness of judicial, prosecution and defence adherence to the principles set out in the disclosure protocol (Disclosure: A Protocol for the Control and Management of Unused Material, 20 February 2006) should be conducted by the existing High Cost Cases Review Board reporting by July 2007.

Recommendation 5.12: DCA and the judiciary should review the criteria and regulations that allow for the appointment of two counsel to ensure that representation orders are only granted for those cases that genuinely require two advocates and in particular what circumstances should permit the instruction of two junior counsel as opposed to a QC and junior counsel. The review should be completed by October 2006 so that guidance can be issued and necessary changes to regulations made before the revised advocacy graduated fee scheme is introduced in April 2007.

Transparency

Recommendation 6.1: The Legal Services Commission should immediately move to set up dynamic management information systems by December 2006 so that they can effectively monitor and share key performance indicators relevant to the successful delivery of new procurement schemes.

Major indicators include the take-up of advice in the police station, proxies for case complexity in the magistrates' courts, differences between estimate of trial length and actual trial length for very high cost criminal cases. In civil and family, it could include the number of cases under legal help budget, or percentage of cases achieving significant benefit for the client or resolved without resort to court.

Recommendation 6.2: Using the new improved monitoring information, the Legal Services Commission should identify significant upward movements in unit cost and bring together all parties (using the mechanisms for stakeholder relations set out in Chapter 6) to secure shared understanding of the position and agreement to an adjustment down in price or other measures to bring unit cost back within the projected totals set out in Chapter 6 and in Annex 6.2.

Recommendation 6.3: DCA and its partners in the justice system should develop systems for ensuring a full understanding of volume pressures. The legal aid impact test is a good approach to ensuring that the volume implications of legislation or other deliberate changes in government policy are understood and quantified. It should be vigorously enforced through the government's collective agreement mechanisms. But it will need to be supplemented by a programme of research to ensure that volume pressures arising from subtler changes across the public services, for example in professional practice or rules of procedure, are better understood.

DCA should also work with the full support of the Cabinet Office and Her Majesty's Treasury to ensure that government collectively takes a balanced view of the costs and benefits of allowing legal aid

volumes to rise. Where a volume increase is unavoidable or the consequence of a change in policy or practice which is desirable for the government as a whole, the government will need to accept that this will increase the total cost of the scheme and ensure additional funding is therefore made available. It will not be sustainable to offset increased costs from increased volumes through simple price cuts in the transition period and following the introduction of best value tendering in 2009-10 this will not be possible anyway.

Recommendation 6.4: Mechanisms for local information sharing and problem solving on legal aid should be established by the Legal Services Commission by April 2007 to promote opportunities for greater efficiency (or managing risks of inefficiency) which arise from practices and relationships in a particular place. For criminal legal aid the basis for such arrangements should be for the Legal Services Commission to be represented on local criminal justice boards supported by local defence practitioner feedback arrangements. Elsewhere, for example, local family justice boards may be used for family legal aid.

Recommendation 6.5: DCA and the Legal Services Commission should establish improved stakeholder engagement arrangements giving the precise format and timing for quarterly meetings of the senior members and officials from the key groups to update one another on dynamic management information and quarterly forecast reviews so that the first quarterly update can take place by January 2007. An annual roundtable chaired by the Lord Chancellor should also be established for the lead figures in the major representative bodies and agencies to report and discuss the major strategic issues affecting legal aid.

1. Purpose of the review

Delivering a fairer deal for legal aid

1 This is the final report of an independent review led by Lord Carter of Coles and commissioned by Lord Falconer of Thoroton, the Lord Chancellor and Secretary of State for Constitutional Affairs.

2 The background for the review was set out in the government's command paper A Fairer Deal For Legal Aid, published by DCA in July 2005. The paper set out the need to improve the way that legal services were procured with legal aid, especially criminal defence services.

3 The paper underlined the importance of procurement changes, and stated that any changes in procurement must have regard to an understanding of the wider impacts on the justice system and the profession. It said reforms would need to ensure access to justice, deliver greater value for money and a sustainable supplier base.

4 The paper suggested a number of new procurement options including the possibility of introducing block contracts, the greater use of price competition, and adopting a lead supplier approach. All of these and other options have been considered during the review.

5 An interim report was published by Lord Carter in February this year. This report¹ set out the principles of a market-based approach to reforming criminal defence services, and provided the platform for the review's final report.

6 This final report is the culmination of 12 months of research, consultation and analysis. The report provides a plan to implement reforms to the way legal advice and representation are procured through legal aid by the state, as required in the Lord Chancellor's terms of reference for the review (see Annex 1.1 for the full terms of reference). A description of how the review was conducted, including a list of those consulted, is summarised in Annex 1.2.

The major issues and challenges

7 Building a new procurement system for legal aid within this remit has involved understanding four significant factors that make up the context and boundaries for the review. They are:

- maintaining access to good quality and efficient justice;
- operating in a complex multi-party justice system, that should provide access to justice for all and especially for the most vulnerable in our society;
- a public service delivered by the private sector that provides value for money, quality and client choice; and
- delivering justice, within fixed and compartmentalised budgets, which supports the aims of the justice system.

8 All of these challenges have an impact on each other and they are often the legacy, of the constitutional arrangements in England and Wales, evolved over generations.

Maintaining access to good quality and efficient justice

9 It is widely recognised that legal aid is an essential component of the justice system in England and Wales, which is one of the most highly regarded justice systems in the world. The effective operation of the legal aid scheme is necessary to ensure equal access to justice for those who may not otherwise be able to exercise their rights.

10 The foundation of the modern legal aid system is the Legal Aid and Advice Act 1949. It was one of the building blocks of the post-war welfare state. Throughout the 1950s there was a phased introduction of separate schemes for the provision of both civil and criminal legal aid. However, only a handful of cases were funded under the Act at that time.

¹ Procurement of Criminal Defence Services – Market-Based Reform, Lord Carter of Coles, February 2006

11 During the course of the 1960s – and almost continually since then – both the number of people receiving help and concomitant expenditure have increased. For example, in the magistrates' courts alone, costs have risen in real terms (2006 prices), from £6.9 million in 1966-67, to £117 million in 1982-83, to more than £334 million in 2005-06.

12 The total cost of the legal aid budget has risen from its negligible actual cost in the early 1960s to £1.5 billion by 1997, to over £2 billion this year.

13 It is clear that far more is spent on criminal defence in England and Wales than in other jurisdictions. An examination of legal aid expenditure is, however, in itself insufficient. For example, the very different demands of inquisitorial systems, such as those that operate in France and Germany, require less advice, assistance and representation in securing just outcomes. The review commissioned the University of Westminster to undertake research into criminal defence services in other jurisdictions. This research, which has been published online², found that legal aid spending per head was far greater than other jurisdictions, and even when the costs of the court systems in other countries were factored in, the spending in England and Wales remains significantly higher than other jurisdictions.

14 Of course, any comparison with other jurisdictions needs to be treated with caution, but the adversarial nature of the justice system in England and Wales appears to be a key contributory factor to the higher cost of justice here. There might be issues around the quality of justice delivered, but it is widely accepted that other jurisdictions would appear to be delivering justice at less cost than in England and Wales. This was confirmed by visits by members of the review to the Netherlands, Germany and the United States, where they spoke to justice system experts, including judiciary, lawyers, and public officials, about their respective systems.

15 Legal aid is used to procure independent advice, assistance and representation provided by the privately operated legal services sector in defined circumstances to ensure the effective resolution of legal issues, including a fair trial.

The way legal aid is used to procure legal services for the eligible client can promote the earlier resolution of cases and help ensure that court proceedings are focussed on the key issues. Efficient and effective operation of the justice system through the use of legal aid also provides a better outcome for families in dispute, vulnerable people in care, victims, witnesses and defendants.

16 This report considers the issues and challenges arising in most kinds of criminal and non-criminal legal aid. The main exception is immigration and asylum cases, which have not been considered in detail as their handling has been the subject of detailed recent review.

Operating in a complex multi-party justice system

17 The system of justice in England and Wales operates in an adversarial forum where each party to a dispute argues out their case in front of an independent court or tribunal. Legal aid is used to fund the services for one or more of these parties. For example the defence of a client in a criminal case, one or all sides in a family dispute, or the representation of a person seeking redress for negligence or for having their rights infringed.

18 Delivering a more efficient legal aid procurement system requires greater predictability. The more that the requirements in individual cases are predictable, certain and standardised, the more that legal aid procurement arrangements can be predictable, certain and standardised – with benefits both to the government, suppliers and customers.

19 Reforms to any part of the justice system should recognise the fit between the provision of legal aid and the demands of the justice system, so that legal aid supports the drive to simplify, speed up and standardise processes, where possible and appropriate. The more that all parties can work together to make the most effective use of resources (police, prosecutors, social services, courts, judiciary, as well as lawyers) the more that the maximum possible productive use is made of all resources.

² <http://www.legalaidprocurementreview.gov.uk>

20 The nature of an adversarial system means that none of the active participants in the justice system has any responsibility to ensure that the overall result is the best possible allocation of public funding for society as a whole. Each participant can say that it has protected the interests entrusted to it and that the fault lies elsewhere. The result is exemplified by legal aid expenditure in very high cost cases. The optimum use of resources within the justice system is set out in more detail in Chapter 5.

A public service delivered by the private sector

21 In contrast to other public services introduced as part of the post-war welfare state, legal aid has never been a public service delivered directly by the public sector. There is some public sector involvement in the delivery of criminal defence services but this is very small and accounts for less than 1% of all criminal defence spending. There are examples in other countries where the public sector directly delivers publicly funded legal advice and representation (e.g. public defender services in the United States). However, there are very few advocates of such an approach in England and Wales. In line with wider government policy on public sector reform, the review has therefore focussed on how best to improve the way the current private market is structured to deliver value for taxpayers' money rather than replacing it with a public sector alternative

22 As in other parts of the public services, where the private sector is directly involved in delivering services, there is a clear expectation by parliament and the taxpayer that this should be done to optimal efficiency and delivered at the right quality. It is critical that quality of service is assured, especially in such a highly skilled and client-centred professional service as the law.

23 In recent years, quality assurance has been the responsibility of the professions and the Legal Services Commission. The Specialist Quality Mark awarded to solicitors firms have specific

requirements to ensure competence. The Legal Services Commission assess performance through audit, bill assessment and contract management review, and will through the use of peer review directly measure, for the first time, the quality of advice. The Bar Council is also responsible for quality in the Bar through its regulatory and disciplinary structure, advocacy training, and traditional monitoring and discipline imposed by chambers and the circuit structure

24 The Legal Services Commission will continue to monitor performance in terms of contract compliance and bill assessment. They should also set minimum acceptable standards but the responsibility for quality assurance in the future should be within the control of the professional regulatory bodies. Further detail can be found in Chapter 5.

25 Choice is also seen as an integral part of the legal system. The right for clients to choose their legal representative is considered to be critical to both the commercial viability of suppliers and the confidence and co-operation of clients in the justice system. The current legal framework provides eligible clients in criminal cases with the right to choose any representative, provided they choose either a member of the public defender service or a privately operated firm that holds a General Criminal Contract from the Legal Services Commission, and the travel times are not excessive. There is a similar scope to choose a representative in civil and family legal aid.

26 At present, suppliers do not compete on price, but firms compete with one another to gain new clients or retain existing ones, and therefore the income generated by clients. Competition tends to be on the basis of reputation. Similarly, barristers compete with one another to demonstrate to those firms, and their clients, that by instructing them they will receive the best advocacy service.

27 Chapter 2 describes in more detail how the current private market of suppliers is structured to deliver legal aid services.

Delivering within a limited budget

28 Access to justice through legal aid is not an unlimited free good. Legal services procured through legal aid are delivered with finite resources which need to be managed within the government's three year spending regime and judged alongside other priority areas, such as health and education. The challenge is to ensure access to justice within available resources, and to make the best possible use of the budget so that it supports the aims of the justice system. However, in recent years, driven by the growth in criminal legal aid, the legal aid budget has grown considerably. This has not been due to increasing volumes of work but increasing average costs. The Lord Chancellor has stated that his priority is to bring the growth of criminal legal aid under greater control in order to ease the resulting pressure on the courts and civil and family legal aid budgets.

29 Financial pressures caused by legal aid do not restrict themselves to DCA. These pressures have an impact across the justice system and have serious implications for the public and all concerned with the delivery of justice. It could mean that fewer cases will be resolved each year and the rate at which they are resolved will be slower.

30 There is a clear relationship between the operation of the wider justice system and the provision of legal aid. Regardless of the point of origin, the interdependent nature of the justice system means that inefficient behaviour in one area will inevitably be felt by all. As such it is vital that work is pursued to improve the fit between legal aid and the wider justice system within which it operates. Headway is already being made in this area, and it is vital that this work is vigorously pursued; from the formulation of strategic policy to behaviours at the frontline of delivery. Although the budgets for prosecutors, police, the courts, prisons and legal aid are separately administered, effective and consistent joint working is vital to enable processes to be streamlined, thus releasing benefits for all.

31 Decisions on the process and design of the justice system, often set out in departmental and judicial guidance, can no longer afford to be taken without regard to the resource implications for all

the interests and stakeholders within the justice system. The relationship between the provision of legal aid and the operation of the justice system – particularly in its formal arena – is potentially a major contributor to getting legal aid funding on a more proportionate and controlled basis. That is why strategic responsibility for the whole of the justice system must be shared collectively at national and local levels.

32 Real progress has been made in the operation and performance of the criminal justice system to achieve collective responsibility, e.g. through the national criminal justice board and the 42 local criminal justice boards. By comparison, much more could still be done to create the same sense of collective responsibility for civil and family justice. In both arenas, if strategic responsibility is to work then the allocation of resources must also be explicitly within the remit of these collective arrangements. This is addressed, with recommendations, in Chapter 6.

Balancing the challenges to create a sustainable procurement system

33 Steps have been taken to improve efficiency in the provision of legal aid in the recent past – many of which were set out in DCA publications, *A Fairer Deal for Legal Aid* and *A New Focus*³ – and some progress has been made in controlling expenditure. However, actual spending ran considerably ahead of forecasts. The exact reason for this overspend is difficult to identify – the system is dynamic, and it has not been possible to identify a single cause through examining the available management information. What is clear though is that this overspend is not the result of simple wastefulness, and that substantial procurement reform has a vital role in putting the provision of legal aid on a sustainable footing.

34 The new procurement schemes for legal aid recommended in this report should enable better control and management of legal aid and so deliver a sustainable financial profile for the future. But this will not be enough in its own right. Continuing reform to improve the efficiency and effectiveness of the way the justice system operates is equally important.

³ *A New Focus for Civil Legal Aid*, Legal Services Commission, October 2005

Criteria and conditions for a successful outcome

Quality, value, access

35 The aim of the review can be summed up as securing value for money without compromising quality and access to legal advice. This means creating a procurement system that pays fair prices for good quality and efficient legal services to all eligible clients.

36 From the outset it has been clear that a reform package would need to balance two criteria for achieving this aim:

- sustainability of good quality, efficient suppliers – the procurement system must promote and sustain an optimal market of suppliers throughout England and Wales; and
- managing within a budgetary envelope – the procurement system must be based on pricing for specified volumes of work that take account of available resources.

Dynamic and transparent data and management focussed on delivery

37 As is common with other areas of public service delivery, the pressures placed upon legal aid have to be managed within an agreed budget. This means it is very important that forecasts are based on fixed pricing and predicted volumes of work. Suppliers need to consider whether they can become more efficient and deliver better value for money for taxpayers.

38 The procurement system recommended in this report provides a way to achieve fixed pricing, set either by the government or the market. But it is conditional on DCA and the Legal Services Commission working closely with other government departments and agencies to ensure they have a clear and shared understanding of forecast volumes of work and the operation of the justice system.

39 In turn, other government departments and agencies must have an understanding of what pressures are being placed on legal aid. DCA should

reach an understanding of shared risk with other departments. Recommendations for how this should be achieved are contained in Chapter 6.

40 And finally, DCA and the Legal Services Commission must transform the way they work, within controlled budgets and with the supplier base, both through individual contracts and relationships with the broader representative and regulatory bodies. Similarly, these representative and regulatory bodies (mainly the Law Society and Bar Council) must also examine their role in a reformed system and how they can better serve the needs of their members and the consumers of their services.

41 It is essential that all organisations rapidly recognise and implement the changes within their organisations to strengthen their capability and capacity for delivering the new procurement schemes and managing an orderly market transition. Recommendations of how this should be achieved are in Chapter 4 and Chapter 5.

Measures of success

42 In order to achieve the review's aim and balance the two factors of sustainability and fixed budgets, the package of procurement and associated reforms recommended in this report have been designed and tested against three questions:

- will each scheme, and the combined effect of the schemes, provide access to quality services with client confidence?
- will each scheme, and the combined effect of the schemes, lead to a structure for the suppliers that is profitable and vibrant?
- will each scheme promote greater efficiency and value for money for the taxpayer and enable more active management of demand for legal aid – both in the steady-state of a reformed system and during the transition?

43 Achieving positive answers to the first two of these questions should produce the sustainability of good quality suppliers that is essential for the long-term future of legal aid.

44 Making sure the schemes are affordable will rely on the dynamic monitoring and management described above and recommended in Chapter 6. Managing expenditure in a world of finite resources is a critical task in any modern, reformed public service, including legal aid.

45 Designing a new procurement system to try and achieve these measures of success has been extremely difficult and has inevitably led to tough choices. The legal aid system is highly complex and deals with extremely sensitive and constitutionally important issues, critical to the rights and freedoms of all citizens. The people who work in it are committed and professional in what they do.

46 But the public rightly demands that these professional services are structured in a way that delivers full effectiveness. Public funds must only be used to procure good quality services at a fair price, otherwise finite budgets come under pressure and tough choices have to be made about access to justice.

47 The new procurement system recommended in this report has been designed to procure only from suppliers who structure themselves to deliver the most efficient good quality services, whilst recognising that those structures will be dependent on local market conditions, and the particular needs and diversity of local communities.

Structure of the report

48 The structure of the report follows the iterative approach taken by the review. It reflects the research used to determine key issues conducted at the start of the review, the development of ideas and solutions to these issues, and the negotiations regarding the proposed reforms as the review completed.

49 Chapter 2 summarises the research and consultation process, examining the details of the current procurement system and identifying the most pressing issues. Chapter 3 outlines the options for finding solutions to these problems and then sets out a strategy for achieving a steady state for the legal aid market, taking into account the variability of the legal market and the need for managed transition to the new procurement framework.

50 Chapter 4 goes into the detail of the new procurement schemes, explaining the design of contracts and tendering processes for both criminal and civil and family legal aid. Chapter 5 examines the impacts to the current supplier base, and recommends methods of managing the transition to the new system.

51 Finally, Chapter 6 looks at the need for a sustainable management of the legal aid budget which better monitors prospective monetary and volume pressures, and continues to find best value for money for both the procurer and the client.

52 The annexes contain finer details omitted from the body of the report, such as the terms of reference, closer analysis and descriptions of the proposals, and the specific proposed fees and rates for the new criminal schemes.

2. The current procurement system, supplier market and wider justice system

Understanding the specific procurement, supply and systems issues

1 A detailed assessment of the need and priorities for reform to the procurement system was undertaken before considering specific reform options. A significant amount of time and effort was spent working with the Legal Services Commission, representative bodies, practitioners, members of the judiciary, as well as expert economists and accountants. The assessment examined:

- the way the current procurement schemes worked;
- existing plans for change;
- the state of the private market supplying legal aid services; and
- the effect the wider justice system was having on legal aid and specific procurement schemes.

2 This chapter outlines the findings of that assessment by first explaining and analysing the current legal aid procurement arrangements and expenditure, and highlighting key issues and areas of concern relevant to the review. The findings are presented separately for criminal legal aid, and then for civil and family legal aid as the schemes and issues are quite distinct.

3 The chapter goes on to consider the current position of the supplier base, and the risks to suppliers under the current legal aid procurement arrangements. The chapter sets out the case for a restructuring of the supplier base to improve its long-term sustainability and the associated risks of doing that.

4 The review commissioned research from a range of bodies to examine the legal aid market from various perspectives. The University of Westminster produced a report for the review that compared the legal aid sector in England and Wales to other jurisdictions. Business consultants from PKF conducted a survey of practitioners involving visits to firms and telephone surveys with firms and

chambers. Otterburn Legal Consulting conducted further analysis of the PKF work and previous research.

5 It is important that the current procurement arrangements and state of the supplier base, and any restructuring, are placed within the context of the overall justice system. The chapter ends with an examination of some of the key issues for legal aid that arise from pressures elsewhere in the justice system.

The current procurement system

The Access to Justice Act and the Legal Services Commission

6 The Access to Justice Act 1999 made major changes to the legal aid scheme. This included the replacement of the Legal Aid Board with the Legal Services Commission in April 2000. The Commission is tasked with developing and maintaining both the Community Legal Service (CLS) for civil, immigration and family legal aid, and the Criminal Defence Service (CDS) for criminal legal aid.

7 The Commission's overarching aims are twofold. The first is to ensure that the CLS allows appropriate access to those services that meet citizens' needs. The second is that the CDS grants access to such advice, assistance and representation as the interests of justice require. To this end, the Commission is required to act as the procurer of legal aid services to ensure the provision of a high quality public service at a fair and efficient price.

The Criminal Defence Service procurement system

8 Since 2001-02, solicitors' firms wishing to carry out publicly funded criminal defence services have been required to obtain a General Criminal Contract from the Legal Services Commission. The General Criminal Contract includes the scope of work provided for by the contract and details the means through which all defence work is funded up to disposal in the magistrates' court.

9 For the vast majority of criminal defence work, firms access work through the police station when clients either choose their own solicitor or request a duty solicitor. Clients currently choose their own solicitor in approximately half of all cases. However, if a client asks for a solicitor, but does not know a named solicitor who can attend, they will be offered a solicitor from the duty solicitor scheme.

10 Under the duty solicitor scheme, solicitors are placed on a duty rota for a police station or a group of stations. When an individual in a police station requests a duty solicitor, a solicitor from the rota is called. Firms can be on multiple rotas, but there is a requirement that firms must be within a certain proximity of the relevant police station.

11 There are a number of different payment schemes depending on the type of work being undertaken, the key features of which are detailed in the following paragraphs.

Police station schemes

12 Police station work includes all work undertaken for a client during the criminal investigation of a matter up until the point at which the client is charged or summonsed for the matter under investigation. This falls into the criminal investigations class of a General Criminal Contract. Advice and assistance in police stations is paid for on an hourly basis, as is travel and waiting. All suppliers are paid the same basic remuneration rates (higher in London). They vary according to whether the solicitor is a duty solicitor or 'own' solicitor, at what hour they are called to the police station, and the seriousness of the offence. The hourly rate therefore ranges from £52 up to £80. There are also separate hourly rates for travel and waiting, which again are subject to some variation, but range from approximately £30 to £70.

13 There are 1,645 police stations in England and Wales and solicitors working in police stations generate around 700,000 claims for legal aid annually. Of these approximately 20% are telephone advice and 80% are for attending and providing advice at the police station.

14 It is not possible to measure the volume of police station cases back beyond 2001-02 on a consistent basis because the way volume was measured has changed. However, the volume of police station advice rose from 616,366 in 2001-02 to 766,305 in 2005-06 – a 24% increase. Actual costs rose from £126.9 million to £171.2 million over the same period – a 35% increase. Travel and waiting increased from £55 million to £90 million between 2001-02 and 2005-06. The average cost of a claim varied considerably across different regions. For example, the average cost was £204 in Newcastle and Leeds, and was £349 in London.

15 In 2005-06 the average total cost of all attendance cases was £89,000 per police station. This figure varied considerably between individual stations, with one attracting total claims of only £36 and another claims totalling £1.8 million. Over 70% of police stations had total attendance costs of less than £50,000, whilst 6% of police stations had total attendance costs of more than £500,000 in a year. Around 26% of the value of all attendance costs were for travel and waiting 20% for travel, 6% for waiting.

16 In 91% of police stations travel and waiting accounted for between 10% and 40% of total attendance costs. Around 6% of police stations had travel and waiting claims of more than 40% of the total cost of attendance.

17 The number of suppliers serving a particular police station varies significantly. For example, the average number of suppliers per police station in Bristol was 31, compared to 85 in London.

18 The current police station scheme is largely structured on the basis of choices made by suppliers as to where they practice and the volume of work they provide. Firms can choose whether to provide duty and/or own solicitor work and, subject to contractual and regulatory rules, may choose which police station schemes they join.

19 As the majority of criminal defence work originates in the police station, firms that wish to maximise their market share of duty work are required to employ a number of duty solicitors and encourage them to join as many schemes as possible. In some areas this has resulted in schemes with many members and high travel costs.

20 The remuneration system is based largely upon inputs and time spent and therefore does not provide the best incentive to be efficient. Examples of potential inefficiencies are:

- uniform hourly rates do not allow the market to vary the price at which individual suppliers would be willing to supply services; and
- uniform hourly rates do not necessarily encourage suppliers to innovate in either the way they develop and deliver services to clients or how they run their business.

21 A procurement scheme based primarily on payment for inputs, such as time spent, letters written and phone calls received, could provide incentives to perform more work on a case than necessary to achieve a desirable outcome.

22 The current system does not allow work to be allocated to those suppliers offering the best value for money. It also does not allow such suppliers to benefit from their efficiency and control of costs by taking on more work at competitive prices. Unrestricted choice of suppliers independent of where they operate can lead to high expenditure on travel and waiting time. There are insufficient incentives for firms to reduce travel and waiting time.

Magistrates' court scheme

23 Magistrates' court work undertaken by solicitors' falls into the criminal proceedings class of work set out in the General Criminal Contract and covers all work undertaken for a client during criminal proceedings in a matter or case from the date of charge or summons.

24 Solicitors are paid for magistrates' court work in three categories according to standard fees. The first two categories separate guilty pleas and uncontested or discontinued proceedings from contested trials and cracked trials disposed of by a guilty plea or discontinued on the day of trial before the opening of the prosecution case. The third category covers work for cases being sent from the magistrates' court to the Crown Court.

25 There are two levels of standard fee, lower and higher. The level of standard fee for each category of work is determined by the amount of work the solicitor carries out for the case. If a solicitor's costs go above the limits set for the higher standard fee then their costs will be paid as assessed on an ex post facto basis.

26 In addition to the standard fee, there are also payments for travelling time, waiting time and disbursements such as translators.

27 The total cash cost of magistrates' work in 2005-06 was £324 million. The average increase in cost per case between 1997-98 and 2004-05 excluding travel and waiting has been 6% in cash terms. Travel and waiting made up approximately £50 million of expenditure in 2005-06. Solicitors working in magistrates' courts generate around 670,300 claims for legal aid each year. Over 90% of the value of these claims was for representation work.

28 Of the representation claims, 80% were paid at the lower standard fee rate, 14% were paid at the higher standard fee rate, and 5% were paid at the ex post facto arrangements. Waiting costs make up a slightly higher proportion of the average claim for lower standard fee cases.

29 This scheme has worked well in containing cost, with relatively little increase in the cost per case in profit cost terms. However, there has been a substantial and disproportionate increase in travel and waiting costs. The system does not incentivise firms to minimise these costs.

30 Of course there are limits to which costs in either travel or waiting can be reduced, but firms have not yet had incentives to organise their businesses to secure economies in these areas. The current fee system, which is a hybrid, with both hourly rate and fixed elements has proved effective. There is evidence that some firms do organise their business to maximise higher fees at the risk of making the running of the magistrates' court less effective than it could be. The cost of running this system is inevitably higher than a pure fixed or graduated fee scheme.

Litigation in the Crown Court

31 Most litigation services performed by solicitors in the Crown Court are currently paid on an ex post facto basis where solicitors carry out work at an hourly rate, and then submit their bill for assessment at the end of the case.

32 Some cases are remunerated by a standard fee scheme that was introduced in 1998. It was to cover cases of one to two days trial and some guilty pleas. However, almost 50% of the eligible cases avail of an escape clause to ex post facto determination. Total spending for 2002-03 was £12.3 million falling to £10.8 million in 2004-05.

33 Court staff attached either to the court or to the National Taxing Teams assess the individual claims and pay such sums as they think reasonable, for work they consider has been reasonably undertaken. Regulations prescribe the hourly rates for the various grades of fee earners used in solicitors' firms, but the assessment of the reasonable number of hours and the number and grade of fee earners used on a case is not subject to any pre-set limit.

34 This system of remuneration has proved to be expensive. From 1997-98 to 2004-05 there had been an increase in real terms of 86% in the Crown Court. The Legal Services Commission have been developing a graduated fee scheme for litigators at the Crown Court since 2005 to allow for greater certainty and control of this area of expenditure.

35 The current ex post facto system pays for work considered to have been actually and reasonably done and can take account of exceptional factors. However, the current system does little to reward efficiency as firms are paid for inputs (hours worked) rather than outputs (throughput of cases). There is, therefore, an incentive to work as many hours as possible on each case. Maximising the hours worked could mean that the criminal justice system as a whole does not operate as efficiently as possible, as there is no incentive for litigators to secure the earliest possible disposal of individual cases or minimise duplication with the work done by advocates. In contrast to a graduated fee regime, the current system provides little certainty for firms in both the timing of payment and the final amount that might be allowed by the determining officer as costs are only assessed after the event.

36 A graduated fee scheme would provide suppliers with a fee for a case that is not connected to the number of hours they work but to the complexity of the case. This would allow those suppliers who are most efficient to benefit financially from their efficiencies.

37 By remunerating litigators through a graduated fee scheme, case fees will be linked to the formula rather than the length of time spent preparing the case. This will offer a financial reward to those practitioners who seek early resolution to cases where appropriate. Currently the efficient practitioner who manages to dispose of a case efficiently in circumstances where this is the right course of action, will receive less in case fees than the inefficient practitioner who does not succeed in addressing case issues efficiently. However, under a graduated fee scheme they would be able to retain those unspent funds from the case fee as additional profit.

38 In addition, given that the additional payments in a graduated fee scheme for pages of prosecution evidence and days at trial are a good proxy for complexity, those cases that are genuine complex cases and require greater input from a practitioner will receive a proportionately higher total case fee.

Advocacy in the Crown Court

39 Since October 2005, all advocacy work (performed by barristers and solicitor-advocates) on new cases committed, sent or transferred to the Crown Court (except very high cost cases – see below) has been paid through a graduated fee scheme. The graduated fee scheme payment is calculated by applying a formula made up of a base fee (that varies with advocate type and offence type), uplifts for length of trial, a daily refresher (that varies with advocate type and offence type), uplifts for number of pages of prosecution evidence and number of prosecution witnesses, and a range of additional payments to cover smaller events (e.g. sentencing hearings) and preparation activities (e.g. viewing video tapes).

40 The advocacy graduated fee scheme was introduced in 1997 to remunerate the advocacy element for all cases that went to trial for 1-10 days. Longer cases and most cases that cracked or had guilty pleas were remunerated separately through the ex post facto scheme. This scheme required advocates to submit a bill at the conclusion of the case, which would then be assessed by the National Taxing Team and paid on an hourly rates basis.

41 Since 1997 the scheme has been progressively extended to capture more cases so that since October 2005 all cases including guilty pleas and cracked trials are covered (except very high cost cases with trials lasting 41 days or over). In that time total cash spending on advocates in all Crown Court cases (including very high cost cases) has increased by 78% from 1997–98 to October 2005. This growth has arisen from cases paid under the old ex post facto arrangements.

42 The graduated fee scheme provides certainty for both the purchaser and suppliers of advocacy services. Fees are fixed by a formula that is clear and understood by all, and payment is made promptly. However, the number of 'bolt-on' fees paid in addition to the basic fee make the system cumbersome, and leads to misconceptions about rates. The fees for additional work are not fees in themselves, rather they represent part of the overall

graduated fee for whole cases. The graduated fee scheme scheme better rewards efficiency and encourage advocates to bring cases to a timely disposal.

Very high cost cases

43 Very high cost cases are managed under contracts by the Complex Crime Unit at the Legal Services Commission. The Complex Crime Unit was established in 2001 in response to the rapidly growing expenditure being incurred in long and complex cases. It is widely recognised that the method of paying the lawyers – ex post facto determination – was unable to exercise any control over the spiralling cost of these cases. It is estimated that almost 50% of defence costs in the Crown Court were being spent on just 1% of the cases and the cost of these cases was increasing by 15% year on year.

44 The primary difference between the Complex Crime Unit scheme and the old ex post facto system is that work is now agreed in advance and there are fixed rates for advocates preparation and court attendance. The unit works to control costs by ensuring that:

- only necessary work is done;
- it is done by the right level of fee earner;
- it is done in a timely manner; and
- unnecessary duplication of work between the defence team is eliminated.

45 Cases are managed through three monthly stage plans and paid on the basis of different hourly rates for team members (solicitors and barristers) with different levels of experience. The rates that are paid depend upon which of four categories of seriousness and complexity the case falls into. Category one cases attract the highest rates and category four cases attract the lowest rates.

46 Initially the unit only contracted a limited number of cases. There were two criteria for whether a case was contracted or not. Firstly, if the case were to go to trial and would be expected to last

at least 25 days it would be considered for contract. Secondly, if the preparation of the case was expected to incur costs of £150,000 or greater it would also be considered. By meeting either one of these criteria the case could be brought under contract.

47 Following discussions between DCA and the Bar Council in August 2004, the criteria to be applied when considering a case for contract changed to cover cases where trial is expected to exceed 40 days.

48 Table 2.1 below details the total number of contracts signed each year, the number of live contracts and the total spend incurred. In 2003-04 the majority of contracts were signed in the second half of the year, and from 2 August 2004 the notification criterion changed to trial estimate over 40 days.

Table 2.1 – Volume of very high cost case contracts and associated expenditure

Year	Contracts signed	Live contacts	Total spend £ million
2002-03	43	43	15
2003-04	558	548	41
2004-05	480	756	96
2005-06	394	773	103

Source: Legal Services Commission

49 According to the Legal Services Commission 2004-05 annual report, the Complex Crime Unit made savings of £46 million on that years spend. The unit employs approximately 42 staff and incurs a total cost of £1.7 million per year to run. It has offices in London, Birmingham, Leeds and Liverpool.

50 The structural strengths of the very high cost cases system are that defence teams are paid only for work that has been agreed in advance as being reasonable for that particular defence client. Claims are supported by attendance notes or detailed work logs, and contract managers will assess proposed work to avoid duplication and encourage delegation across the defence team, and will compare cost proposals on generic issues with other contracts on the same case. However as suppliers are paid on hourly rates, apart from advocacy, for work done within agreed tasks there is no in-built incentive for suppliers to improve efficiency.

51 Although the current system of hourly rates is more structurally effective than ex post facto settlements – as firms are compelled to justify and negotiate for work on an ongoing basis – there is still no systemic incentive for defence teams to innovate and work efficiently. As payment is on an hourly basis (rather than an output measure paying by task), teams can profit through seeking to agree and claim for work which would do little to progress the defence case if judged objectively by their peers. This drives up costs by remunerating defence teams for work that does not help progress the defence’s case.

52 As such, cost control is heavily dependent on the skill and experience of contract managers in negotiating unreasonable costs down. They are supported in this task by training, supervision, best practice guidelines and the contract specification. They also have the discretion to decline unreasonable requests, in which case, defence teams have the right of appeal to a panel of peers. The cost management process presently lacks the ability to compare defence costs on individual contracts across a case to influence future negotiation. This will be addressed by the proposal to recruit experienced lawyers into the Complex Crime Unit.

Court of Appeal and other schemes

53 Fees for legal aid work in the Court of Appeal (Criminal) and the other higher courts (advice and assistance in Courts-Martial Appeal Court, or in appeals from the Court of Appeal to the House of Lords where the appeal is not lodged with the House of Lords) are assessed by the court after the case has concluded using the prescribed hourly rates and the fee regimes that are used in the Crown Court ex post facto scheme.

54 This ex post facto regime shares the disadvantages of the current Crown Court litigation scheme described above. However, the volume of cases here is much smaller and costs are assessed by a small team at the Royal Courts of Justice who are able to assess relative fees much more easily than colleagues assessing Crown Court bills across England and Wales. As the total spend here is such a small proportion of legal aid spend, and as the system appears to be working well, changes have not been considered by the review.

The Community Legal Service procurement schemes

Legal help

55 Civil, family and immigration legal aid suppliers are awarded a General Civil Contract by the Legal Services Commission, which is granted within specific categories of law. The General Civil Contract operates under two mechanisms: controlled work and licensed work.

56 Controlled work covers the provision of general legal advice from contracted solicitors or legal advisers (legal help in civil, family and immigration, and controlled legal representation, which applies only in the areas of immigration and mental health). The Commission sets the number of cases the supplier is authorised to start in a particular year and the number of hours of direct casework time for not for profit agencies.

57 Legal help involves taking instructions and giving initial advice and assistance. Legal help cash costs went from £143 million in 1997-98 (2005 prices) to £182 million in 2005-06, an increase of 27%. This is despite the fact that certain categories of work (including business cases and most personal injury claims) were removed from the scope of legal aid in 2000.

58 Most civil legal help provided by solicitors' firms is remunerated under the tailored fixed fee scheme. The scheme pays fixed amounts per case (matter start) based on firms' average costs per case in the year 2003-04, plus an uplift of 2.5%.

59 The tailored fixed fee scheme varies by firm and category and includes disbursements and counsel's fees. Additional payments can be made for exceptional cases, which cost three times the tailored fixed fee or £2,500 (whichever is the lower) and are out of profile with previous claims. The Legal Services Commission also pays any increase in overall average disbursement costs, and the tailored fixed fee can be adjusted down if the firm's total costs at hourly rates fall below 80% of their total tailored fixed fee payments in any category over any 6 month period. Those firms with less than 10

claims in any category are paid the average tailored fixed fee for that category within the region.

60 There are exceptions to the tailored fixed fee scheme for legal help. Firms doing mental health work can choose whether to include their work in the tailored fixed fee scheme or work at hourly rates. It is also noted the tailored fixed fee scheme does not cover cases of patients subject to Part 3 of the Mental Health Act 1983. Work under the immigration contract continues to be paid at hourly rates.

61 Legal help provided by not for profit organisations is paid for on a funded post model, rather than through tailored fixed fees per case as for solicitors. The model is based on a target of 1,100 hours controlled work per year for each funded post. The payment for each post does not vary by category. It is calculated as follows:

- salary of caseworker – using local authority pay scales;
- running costs – a flat rate of £10,907 (£9,578 outside London); and
- start up costs – £7,330 (£6,548 outside London) for first 1,100 hours and £2,728 (£2,416 outside London) for each additional 1,100 hours are paid when agency first enters into contract.

62 Case disbursements for example, expert reports or interpreters are paid in addition and do not form part of the funding formula.

63 The contracting arrangements for legal help described above have been successful in directing expenditure to priorities and improving quality. However, current remuneration schemes do not sufficiently reward efficient suppliers. The tailored fixed fee scheme (which was only ever intended to be a transitional measure prior to the introduction of standard fees) has been successful in limiting cost increases but maintains price differentials that reward the most expensive firms. The not for profit funding model, since it pays the same regardless of the number of cases started, does not always incentivise effective working. None of the current arrangements encourage the delivery of a seamless service.

64 The improvements in quality have come at the price of reinforcing the tendency for firms and not for profit agencies to concentrate on particular sections of law, so there is now a declining number of family suppliers undertaking social welfare work. Furthermore, the increasing concentration of social welfare law services in not for profit agencies has further fragmented the delivery of civil law advice, despite the real improvements in access to benefits and debt advice that have arisen because of their involvement in civil legal aid. The fragmented delivery of services is a barrier to early resolution of problems and thus could be argued to be a barrier to the efficient interaction between civil and family advice and the rest of the civil and family justice systems. Such fragmentation ensures that clients' needs are not met efficiently.

Licensed work

65 Licensed work covers all other civil and family legal representation except for high cost civil cases. There is no limit on the amount of casework that can be done. Applications for funding must be made in each individual case. Funding is decided based on the client's financial eligibility and the merits of the case. Legal representation in civil categories, under licensed work, is paid for entirely on a case-by-case basis using hourly and item rates.

66 At an assessor's discretion, an enhancement of up to 100% can be claimed on top of the published rates. In the High Court, an enhancement of up to 200% can be claimed. Disbursements and counsel fees are also claimed in addition to the hourly rates. In civil cases, where the case is successful and the opponent pays costs, the solicitor is paid at inter-partes rates rather than legal aid rates.

67 In family work, legal representation is paid for on a hourly basis once court proceedings have been initiated. The rates depend on the type of case, within three categories. The rules that decide which cases fall into each of the three categories are complex. Each category has a slightly different set of rates.

68 Civil and family licensed work cash costs went from £773 million in 1997-98 (2005 prices) to £547 million in 2005-06, a fall of 29%. The reduction can be traced to the removal of scope of certain categories of cases following the Access to Justice Act, though some categories of work, notably child care within family public law, have increased in cost substantially as noted elsewhere.

69 The system of licensed work, particularly the changes in scope, and criteria for granting legal aid set out in the funding code, has kept down overall costs and ensured expenditure is focussed on priority cases that have merit. The funding code has also created an increased emphasis on suitable alternatives being explored before litigation is taken. Payment by hourly rates however, does not reward efficient working, and the differential between controlled and licensed rates can create an incentive to move to litigation.

Family graduated fee scheme

70 Within licensed work, one graduated fee scheme, paying fixed rates in a number of broad categories of work, has applied since 2001 for advocacy by counsel. There are four categories of graduated fee that apply depending on the type of case. The categories are as follows:

- category 1 – family injunctions (domestic violence);
- category 2 – in respect of public law children proceedings;
- category 3 – in respect of private law children proceedings; and
- category 4 – ancillary relief and all other family proceedings (a general category which includes all financial cases).

71 In each category there are five functions (units of work):

- pre-action and written advice work;
- injunctions and enforcement;

- interim hearings – including straightforward directions hearings, substantial case management hearings, financial dispute resolution hearings in court conciliation, and contested hearings over where a child should live, or how much contact a parent should have in the period before the final hearing;
- conferences – other than conferences at court which are included in the base fee for the hearing; and
- final hearings.

72 There is a fixed fee for each function in the different categories with some variation in amount for different types of work. This fee is capable of fixed increases in cases where specific defined elements of complexity exist, provided that those complexity elements are certified by the judge as being of substance and relevance to the hearing. They are known as special issue payments. Special issue payments are only payable if the trial judge countersigns a form saying that they were of substance and relevance to the hearing. The barristers submit their claims for payment to the Legal Services Commission when one of the five functions is completed. Payments are generally received more quickly than they were before the system was introduced.

73 Family graduated fee cash costs went from £40 million in 2002-03 (2005 prices) to £88 million in 2005-06. The scheme has been reviewed since it was designed and the fee levels adjusted accordingly. The revised scheme and rates (as above) was introduced in 2005, and has largely been accepted by the family Bar.

74 In cases in the family proceedings court, where counsel has been instructed, but no certificate nor subsequent justification for counsel has been issued, the fee paid will be limited to the maximum the solicitor would have received had they undertaken all the work themselves. This is to avoid duplication of payment.

High cost civil and family cases

75 The Special Cases Unit was set up by the Legal Services Commission in April 2000 to manage high cost civil and family cases. The Special Cases Unit controls the funding of civil cases where costs will exceed £25,000. The unit manages these cases under individual case contracts, deciding which cases should be funded on merits and what prices should be paid.

76 When the Special Cases Unit was established, around 0.5% of cases were consuming 15% of civil legal aid funding. However, the unit has been successful in gaining greater control over this cohort of cases, and the Legal Services Commission now spends around £60 million per year on an estimated 1,800 high cost civil and family cases. Nearly half of the cases managed by the Special Cases Unit fall under the heading of Public Law Children Act cases. The next largest area is clinical negligence, and other cases covered include multi-party actions, damages actions against other public bodies, and judicial review cases.

77 The cash costs for high cost civil and family cases went from £106 million in 2000-01 (2005 prices) to £56 million in 2005-06, a decrease of 47%. Of this approximately £17 million of the reduction was due to categories of work that are now excluded from funding under the Access to Justice Act, which includes categories such as personal injury and business related cases.

78 The Special Cases Unit controls have improved success rates and reduced net cost to the fund. This has happened in a number of ways, detailed as follows.

79 First, cases are subject to a higher level of scrutiny by legally qualified staff in the Special Cases Unit. Suppliers provide case plans setting out in detail the merits and costs of cases for the case manager to consider along with key expert reports and evidence. The Special Cases Unit obtains independent expert and barrister reports in novel and complex cases to enable more accurate decisions to be made.

80 Second, the incentive payment regime where providers are paid less for unsuccessful cases

incentivise the supplier to select cases effectively. It results in lower costs to the fund in losing cases.

81 Third, the exclusive panel of specialist suppliers in clinical negligence work subject to performance measurement, has achieved better selection of cases by suppliers. This will be built on in the preferred supplier scheme.

Solicitors' firms – their role and an assessment of the current supply market

Criminal defence services

82 Criminal defence solicitors provide a range of advice and representation services, and there is a wide range of structures for firms operating criminal defence services. However, the core structures can typically be described as follows:

- whole system suppliers – offering a full range of defence services in the police stations, magistrates' court and Crown Court;
- volume suppliers – focussing on police, magistrates' and volume Crown Court work;
- niche suppliers – focussing primarily on high value Crown Court work; and

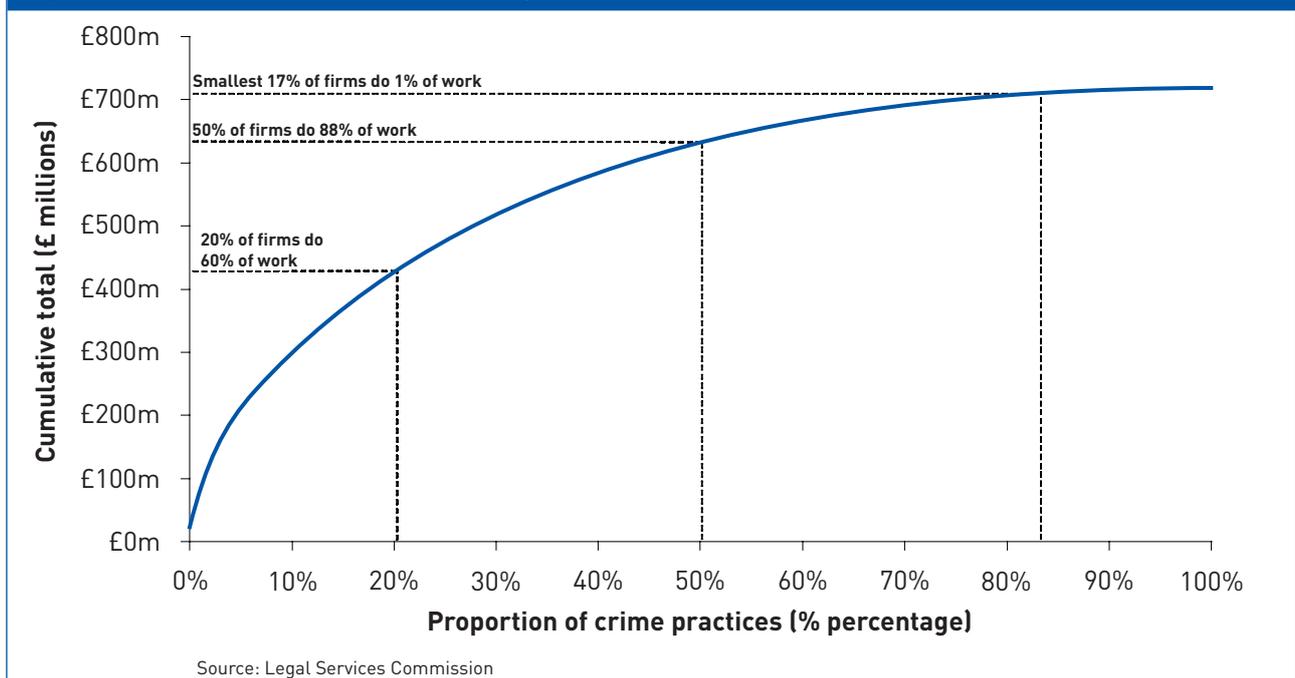
- mixed practice suppliers – carrying out a mix of criminal, civil and/or family work.

83 Firms access criminal defence work in a number of ways including duty solicitor slots in the police station, repeat work from previous clients, and referral work.

84 Figures 2.1 and 2.2 illustrates the distribution of income for criminal defence work across solicitors' firms. Approximately 2,200 firms claimed for criminal defence work in 2004-05. Of these, 720 (33%) received income of less than £100,000 for criminal defence work. 131 firms had turnover in excess of £1 million from criminal defence work. Overall, 88% of criminal defence work was undertaken by 50% of criminal practices

85 Figure 2.3 shows the distribution of crime work for suppliers that do relatively small amounts of legal aid work. There is a group of very small legal practices – over 120 suppliers receive less than £10,000 per year for criminal defence work – but otherwise the distribution of crime work for firms earning less than £100,000 is relatively even. Although these firms have small crime practices, they are not necessarily small firms overall. The 120 firms with less than £10,000 crime work per year

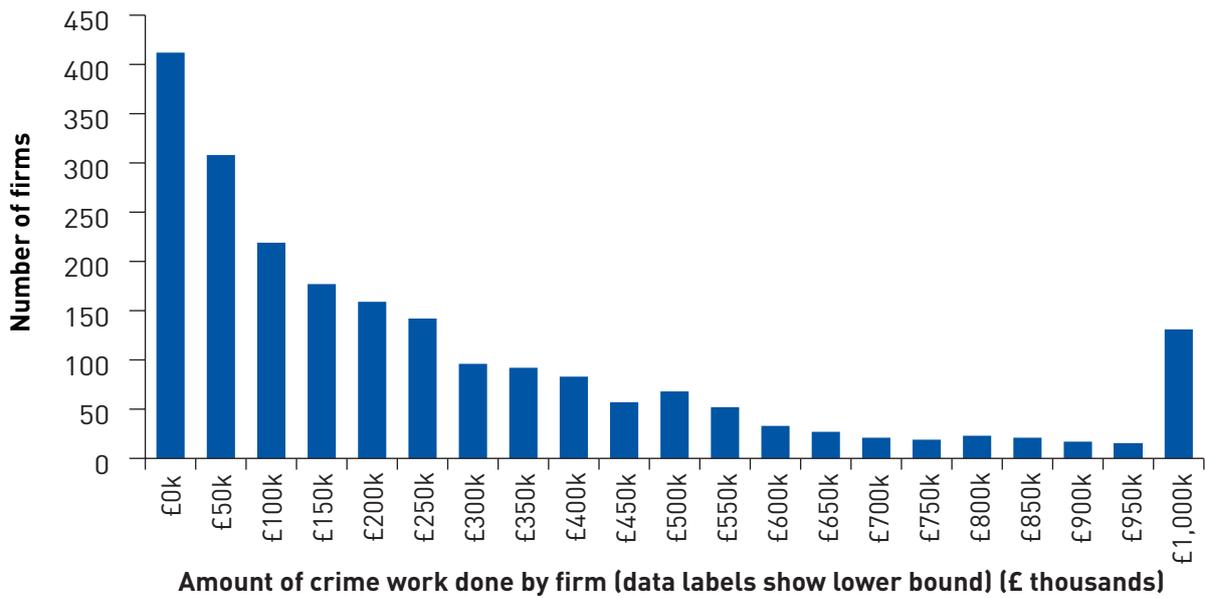
Figure 2.1 – Value of crime work done by legal aid firms



receive just over £500,000 for crime work between them. However, the same firms received a total of £25 million for family and civil work, giving them average total legal aid revenues of almost £200,000 per firm.

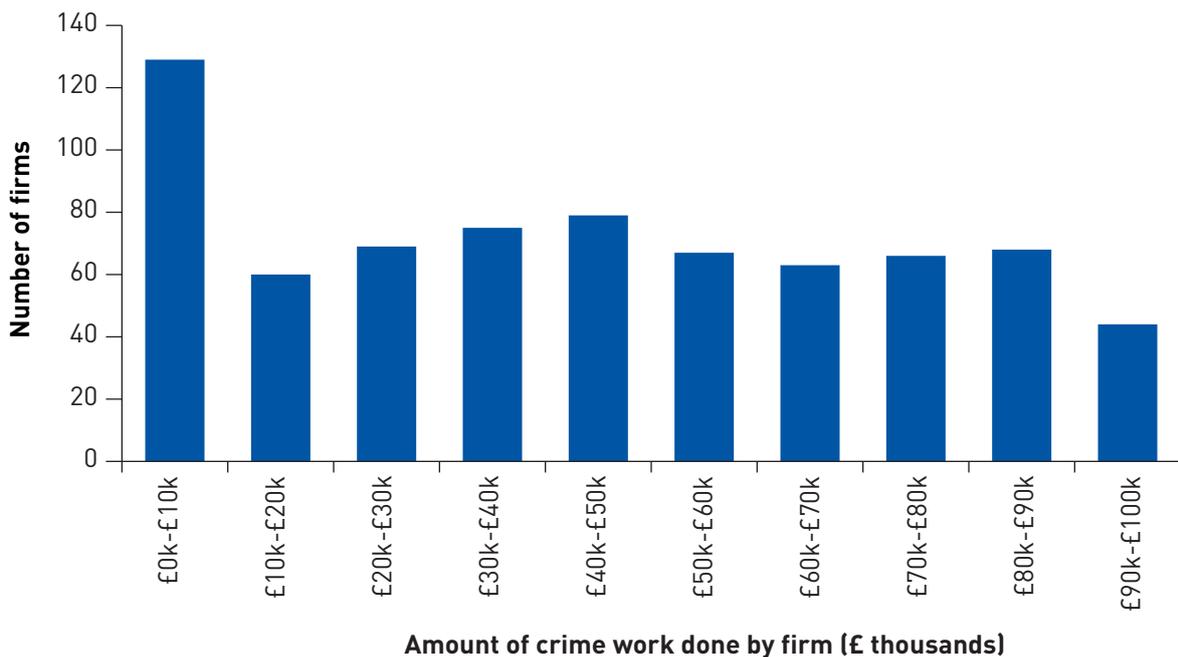
86 Graphs illustrating the distribution of spending by region can be found online⁴. Overall, the distribution of spending is similar in all regions. However, London and Merseyside have a greater than average number of large firms, while the South

Figure 2.2 – Size distribution of suppliers undertaking criminal defence work



Source: Legal Services Commission

Figure 2.3 – Distribution of crime work done by legal aid firms earning less than £100,000



Source: Legal Services Commission

⁴ <http://www.legalaidprocurementreview.gov.uk>

West, South East, Yorkshire and Humberside and Wales have a large number of small firms.

87 In London, firms receiving more than £1 million for crime work accounted for 47% of all crime work, compared with 31% nationally. Consequently, although the number of firms with small amounts for legal aid revenues in London is comparable with the national picture, they receive a lower than average share of total regional revenue.

88 In Merseyside, only 33% of firms received less than £250,000 for their crime work, compared with 59% nationally, and they received just 7% of the legal aid budget (17% nationally). Equally, one in seven firms in Merseyside received more than £1 million for crime work, compared with one in seventeen nationally.

89 Firms receiving more than £1 million account for 12 % of crime work in the South West, 10% in the South East and Yorkshire and Humberside, and 6% in Wales, compared with 31% nationally. In these regions, smaller firms receive a proportionately higher share of revenues.

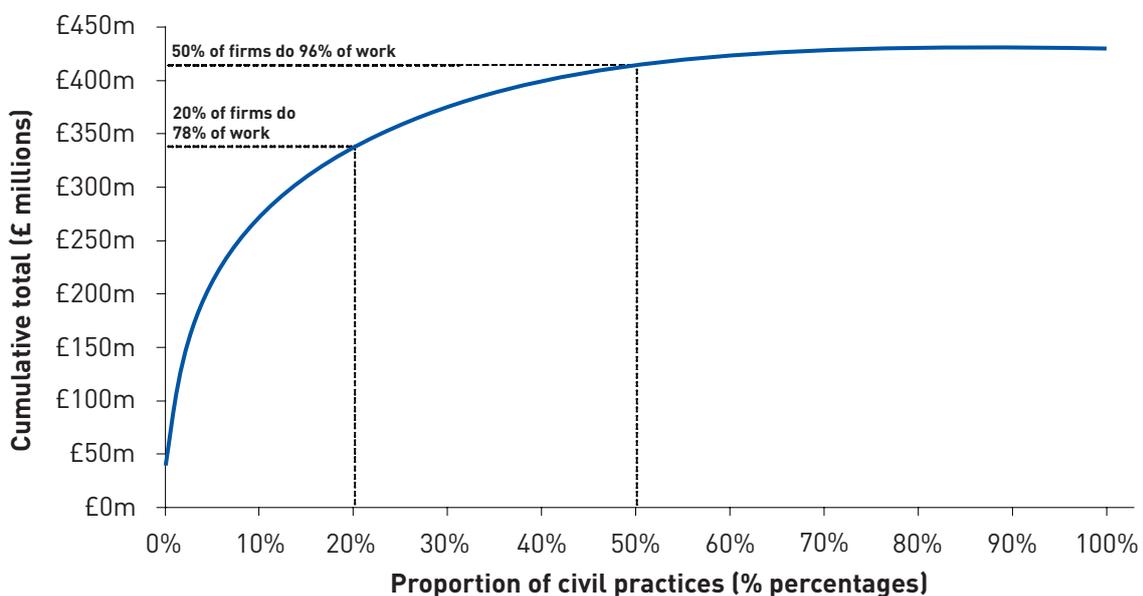
Community Legal Service (civil) – solicitors’ firms

90 There are 12 different categories of civil law funded by the Legal Services Commission. As with crime suppliers, there is a wide range of types of supplier. Many firms providing some advice in this area will have a contract in either crime or family work. However, they are quite likely to provide civil work though a ‘tolerance’ rather than a category specific contract. They may also, particularly those with family contracts, have substantial private client practices. The size of the firm’s private practice may well be larger than the legal aid practice.

91 Just over 3,000 firms and not-for profit organisations (73% of all suppliers undertaking some form of legal aid work) carried out civil, family and immigration legal aid work in 2004-05. Their total revenue for this work was £428 million (26% of all legal aid expenditure).

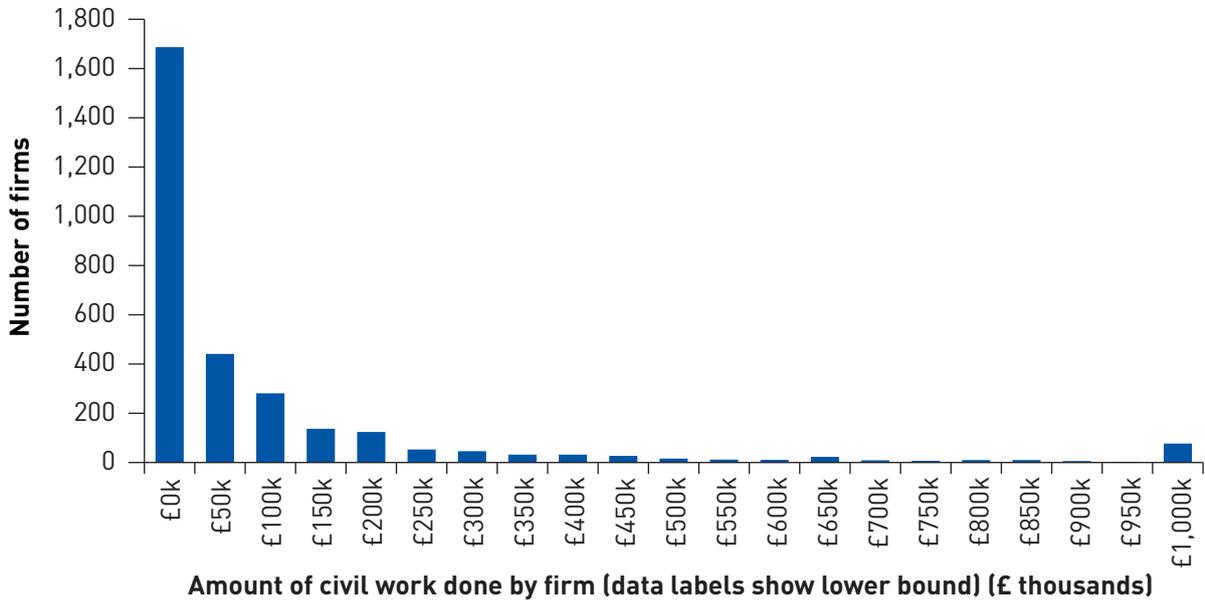
92 Figure 2.4 shows that civil work is slightly more concentrated than criminal defence work. The figure shows that 50% of suppliers carried out 96% of the work. In absolute terms, this means that 1,500 firms between them accounted for just £16 million of civil legal aid spending: claiming on average less than £11,000 each for legal aid work.

Figure 2.4 – Value of civil work done by legal aid firms (including not for profit agencies)



Source: Legal Services Commission

Figure 2.5 – Size distribution of firms and not for profit suppliers providing civil legal aid services

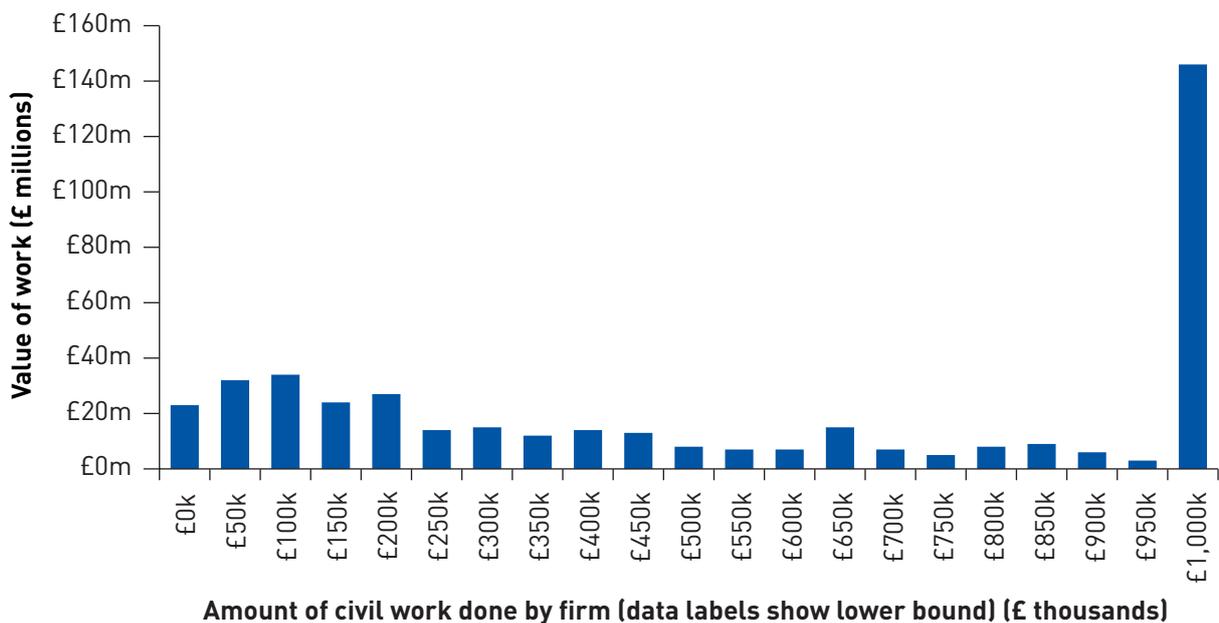


Source: Legal Services Commission

93 Figure 2.5 shows the size distribution of firms. It shows a very large number of firms doing only small amounts of civil work. Almost 1,700 firms, over half the number of firms doing some civil work, received less than £50,000. However, there were also 77 firms which received more than £1 million.

94 Figure 2.6 shows the revenue received by firms for civil work. It shows that over a third of expenditure was received by the 3% of firms which received more than £1 million. By contrast, firms receiving less than £50,000 received just 5% of the total legal aid civil budget.

Figure 2.6 – Revenue profile for firms and not for profit suppliers providing civil legal aid services



Source: Legal Services Commission

95 Graphs illustrating the distribution of spending by each region can be found online⁵. In the North East, firms with small revenues from legal aid work occur more frequently than they do nationally. Firms receiving less than £200,000 accounted for 40% of the total spend compared with 26% nationally. The same is also broadly true in Wales, where these firms account for 47% of the total spend, the South (44%) and the South West (43%).

96 Conversely, firms earning more than £1 million had significant market share in Yorkshire and Humberside, where they received 55% of spend (compared to 34% nationally and 42% in London).

Community Legal Service (family) – solicitors’ firms

97 Family solicitors provide a range of advice and representation services within the Community Legal Service procurement schemes. The majority of work undertaken is licensed rather than legal help and proportionately more so in the field of public law children work. The core structures for firms offering publicly funded family legal services are typically:

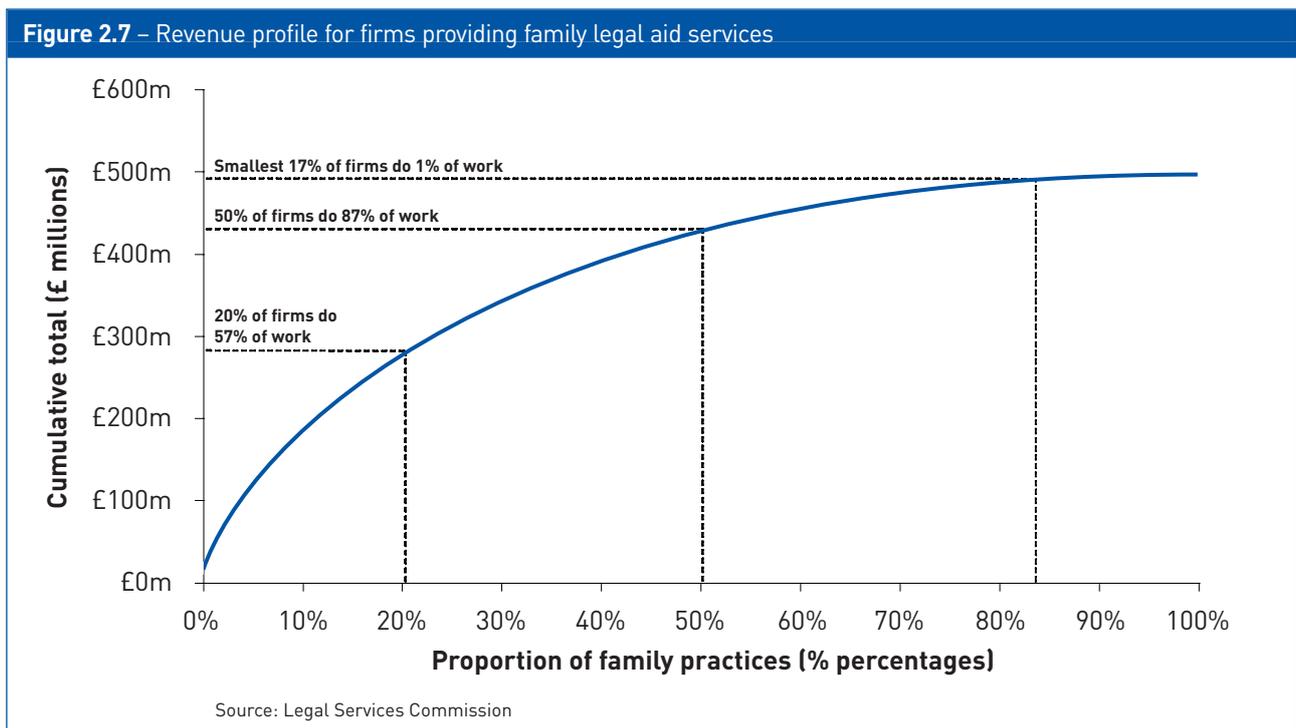
- mixed practices undertaking a mixture of private client and publicly funded work, which may be also be mixed with other categories of law;

- mixed publicly funded practice suppliers – carrying out a mix of family (public law and private law), criminal and/or civil work;
- family only suppliers – undertaking only family – private client, private law, publicly funded private and public law; and
- niche suppliers (including sole practitioners) – focussing primarily on either private law or public law children work.

98 There were approximately 2,500 firms (61% of all suppliers undertaking some form of legal aid work) engaged in family legal aid work in 2004-05. Their total revenue for this work was £494 million (30% of all legal aid expenditure).

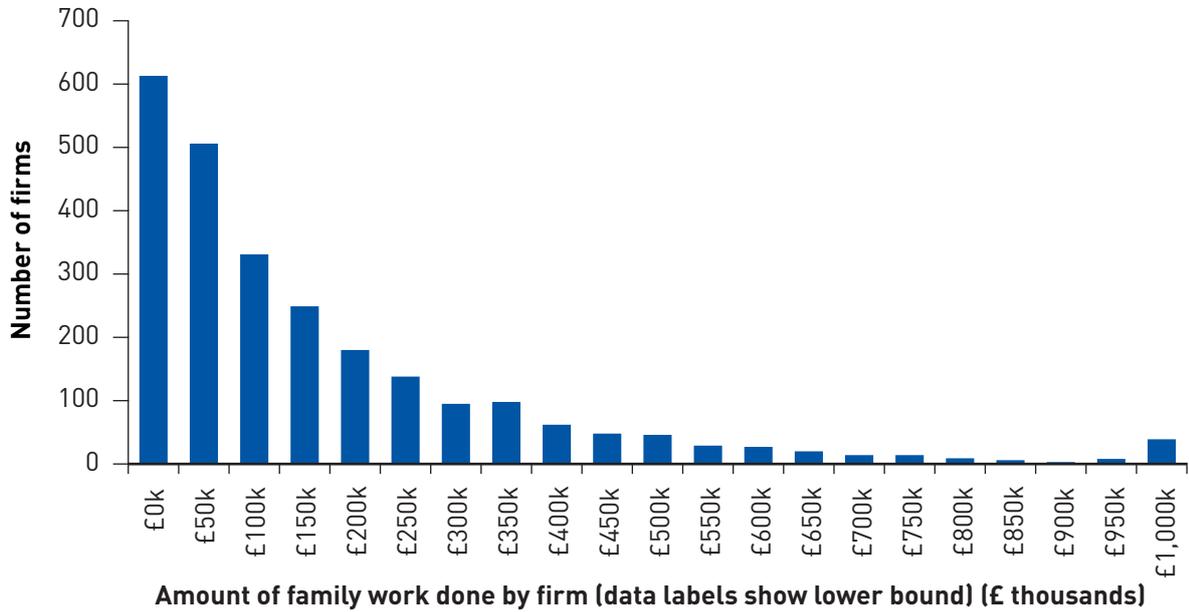
99 As can be seen in Figure 2.7, this work is relatively concentrated. The largest 100 firms carried out approximately 20% of the work. Each of these firms generating at least £600,000 of family legal aid work.

100 Figure 2.8 shows the distribution of family work by firm. It shows that the distribution is still heavily skewed, with many firms receiving small revenues from legal aid work.



⁵ <http://www.legalaidprocurementreview.gov.uk>

Figure 2.8 – Size distribution of firms providing family legal aid services



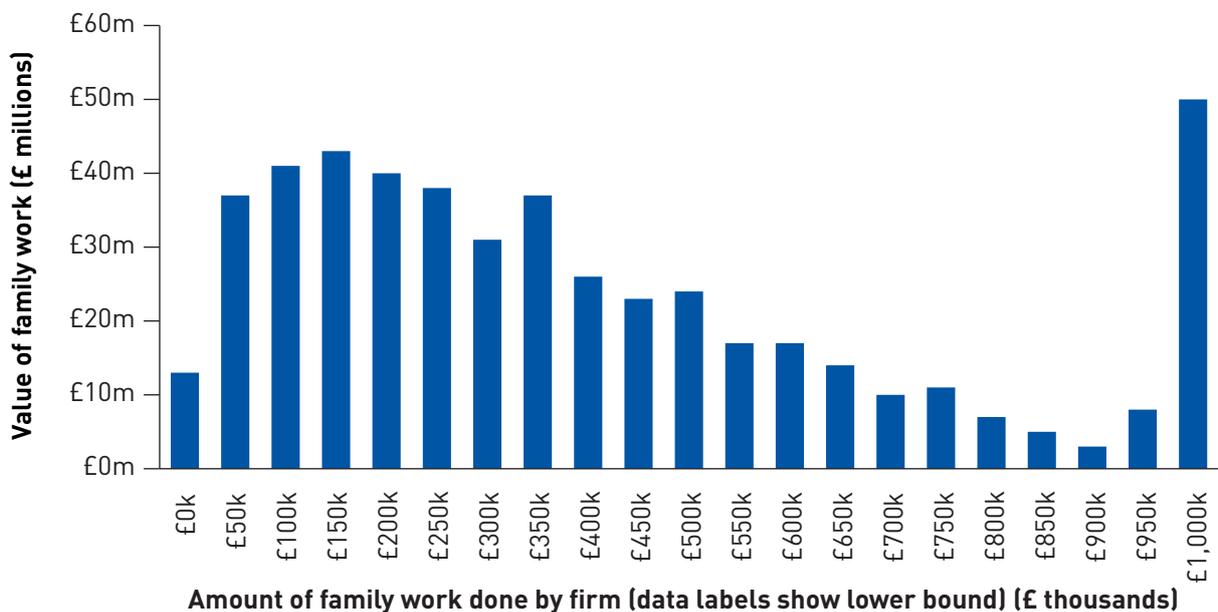
Source: Legal Services Commission

101 Figure 2.9 shows the revenues these firms received for family work. It shows that firms receiving large revenues from legal aid work occur somewhat less frequently for family work than for either crime or civil work. Approximately 25% of family work was done by firms receiving at least £600,000 for their family work. In contrast, around half of all crime and

civil work was done by firms that received at least £600,000 for crime and civil work respectively.

102 The national picture for the distribution of family work between firms is slightly less concentrated than for either crime or civil work, but still shows half of all firms doing over 85% of the work.

Figure 2.9 – Revenue profile for firms providing family legal aid services



Source: Legal Services Commission

103 Graphs illustrating the distribution of spending by each region can be found online⁶. As for other types of work, London firms tend to be larger than those elsewhere in the country. 29% of family work in London is done by firms receiving at least £750,000, compared with 17% nationally. Likewise, only 32% of family work is done by firms receiving less than £300,000 (43% nationally).

104 Some regions have a greater number of firms with small amounts of legal aid revenues compared to the national distribution. In particular, 54% of work is done by firms receiving less than £300,000 for family work in the North East and in Wales and 50% in the East region compared with 43% nationally.

Revenue profiles of firms undertaking a mix of legal aid work

The national picture

105 There are almost 4,100 suppliers of legal aid work. Over 2,500 firms (62%) engaged in more than one type of legal aid work (crime, family and civil) in 2004-05. These mixed firms received total revenues

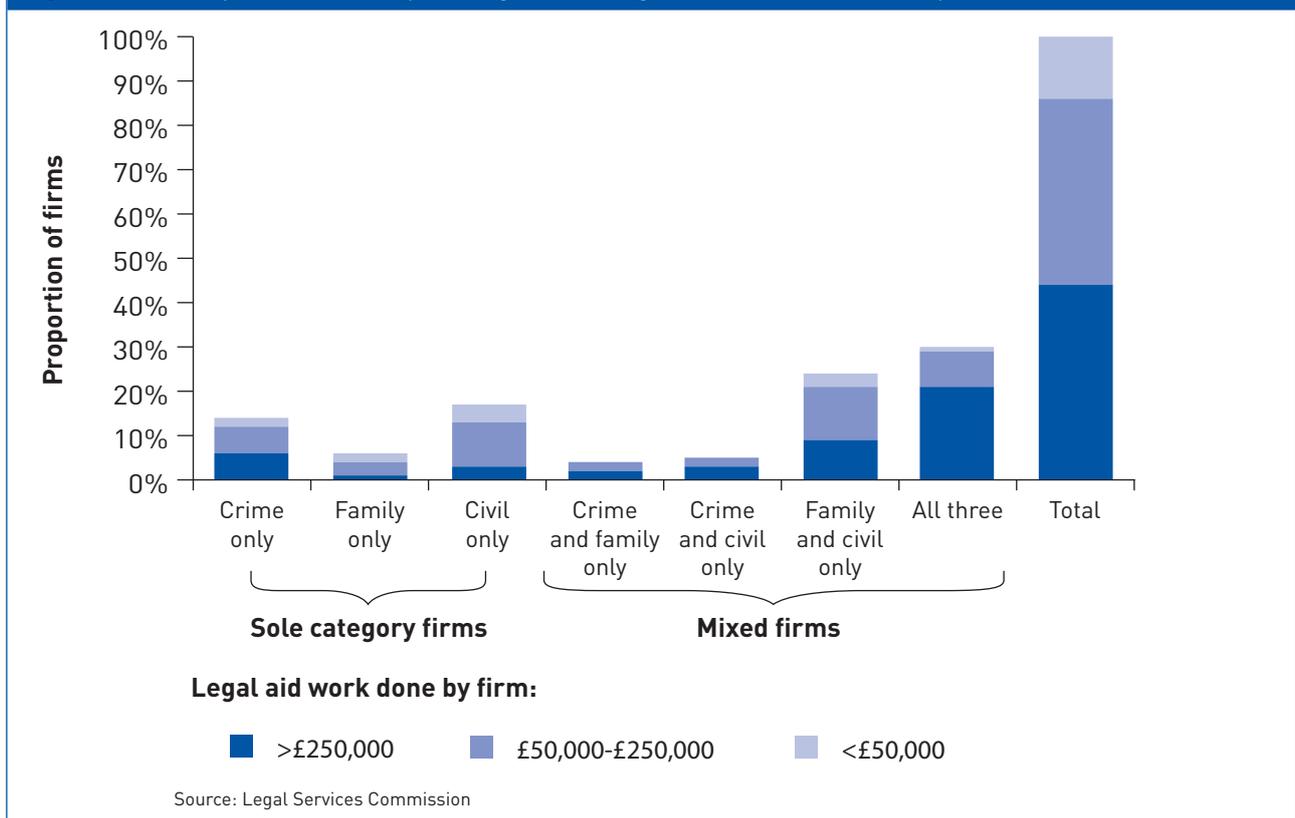
for all types of work of £1,301 million (79% of all legal aid expenditure). The other 1,500 firms who do just one type of work were together responsible for £337 million (21% of all legal aid expenditure).

106 Of the 1,500 firms who do one category of law, most do so in crime or civil work. There are 597 crime firms and 776 civil suppliers. By contrast, just 218 firms do only family work. However, most of the civil only suppliers are not for profit agencies, excluding them, there are only 236 civil only firms. There are 597 crime only firms.

107 Most firms do family and civil work. 961 firms did family and civil work (but no crime) while 1,188 did crime as well. Conversely, only 168 firms did just crime and family work and only 219 firms did just crime and civil work.

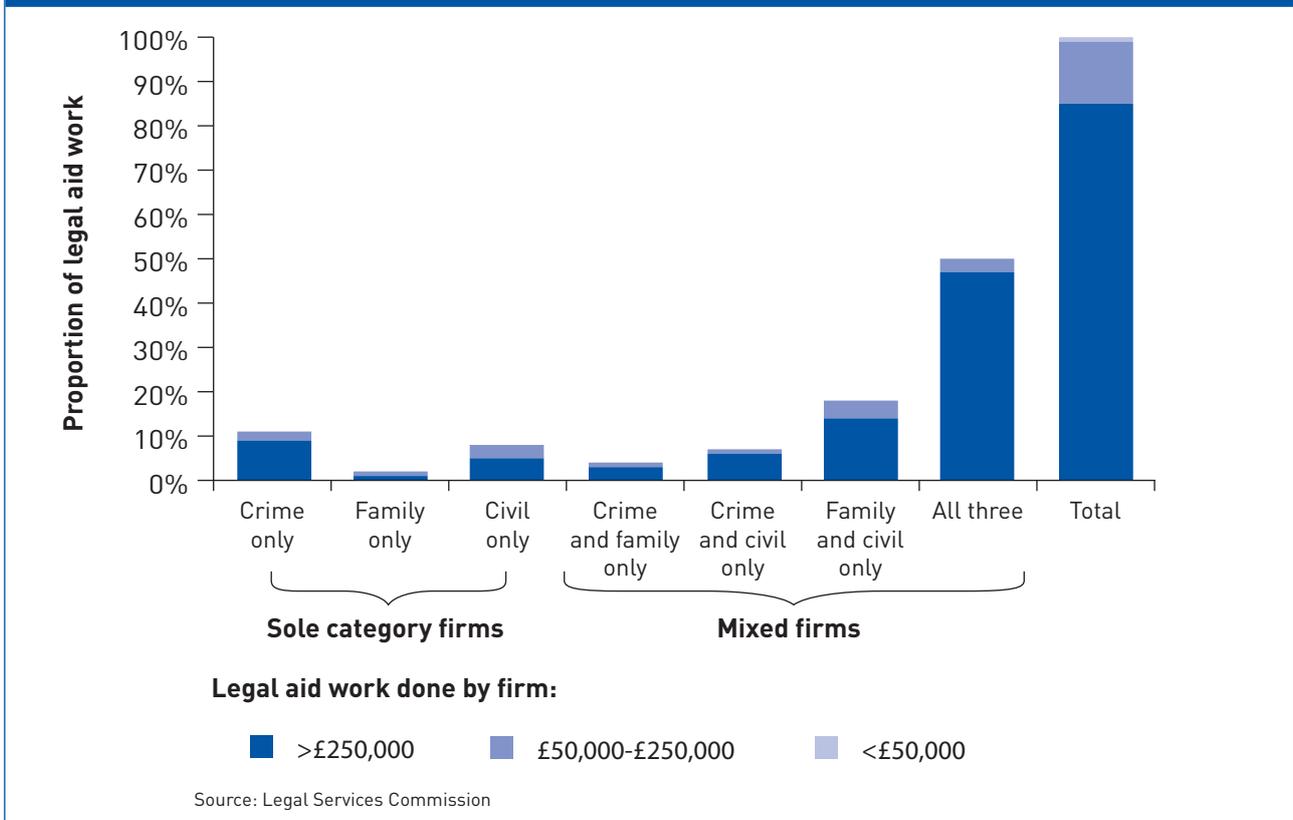
108 Firms who do one category of law tend to be smaller than other firms. Although these firms make up 38% of the supplier base by number, they account for 21% of the legal aid budget. On average, each sole category firm receives £226,000 in legal aid revenues, less than half the £513,000 the average

Figure 2.10 – Proportion of firms providing a mix of legal aid work with revenue profile



⁶ <http://www.legalaidprocurementreview.gov.uk>

Figure 2.11 – Proportion of legal aid work provided by a mix of firms with revenue profiles



mixed firm receives. Family only firms tend to receive particularly small amounts of legal aid revenue, around £129,000 on average. By contrast, firms which do all three types of work received on average £695,000 in legal aid revenues, and accounted for over half the total legal aid budget.

The regional picture

109 The distribution of firms is very similar in each of the regions. In all regions, mixed firms providing crime, civil and family work are the largest single group of suppliers. Similarly, family only suppliers, and firms providing just crime and family work are rare everywhere, whether counted by number of suppliers or by value of work. The number and importance of crime and civil only suppliers varies slightly more across the country.

110 Firms in the North East and Wales are more likely to undertake a mix of all three types of work than elsewhere in the country. In the North East, this

is balanced by an unusually small number of specialist firms, while in Wales it is balanced by very few firms doing crime and civil, but not family work, or family and civil work, but not crime.

111 In Liverpool, the proportion of firms falling in each category is in line with the national average, but a slightly higher proportion of work is done by large mixed firms than elsewhere.

112 In London, more work is done by civil only suppliers, or crime and civil firms than elsewhere in the country. This is reflected in fewer firms doing a mix of all three types of work.

The structure of solicitors’ firms

113 The analysis by PKF shows that legal aid work is currently procured in a piecemeal manner and firms are structured to meet demand on this basis. This and other evidence suggests that the current procurement system does not reward or promote optimal efficient structures for local supplier markets.

114 There is a widely-held recognition of a high level of non-productive time and duplication of effort most of which is a consequence of the way the justice system operates and is outside the control of firms. An increasing burden of administration was also increasing the costs of delivery.

115 Although there is a great variation in the shape of firms and the range of services they offer, they are typically partnerships with a mix of equity to non-equity ratios. There are two main models for firms that undertake crime work:

- a process approach whereby work is passed to individuals most suited to that work based on grade and experience; and
- a more traditional approach where an individual or single team is responsible for a case from beginning to end.

116 The traditional approach does not tailor resources to the task, but is less likely to incur duplication of effort.

117 There is a very large variation in information technology investment, with consequent variations in the efficiencies that firms can achieve. The FreshMinds survey found that spending ranged from £0 to £3.8 million, with the average being £100,000.

The survey also found that around 90% of solicitors use time management software; practice management software was used by around 60%; and IT for case management by about 60%.

118 While 29% of firms in the FreshMinds survey said they continued to undertake crime work so as to provide a full service to clients, nearly 50% of firms thought that the biggest change affecting the market would be closure of criminal departments. Some 22% thought there would be a pooling of resources in the future either through merger or consolidation.

119 The average firm in the FreshMinds survey (242 respondents) had more staff undertaking criminal work compared to family and civil work. Average staffing was as in Table 2.2.

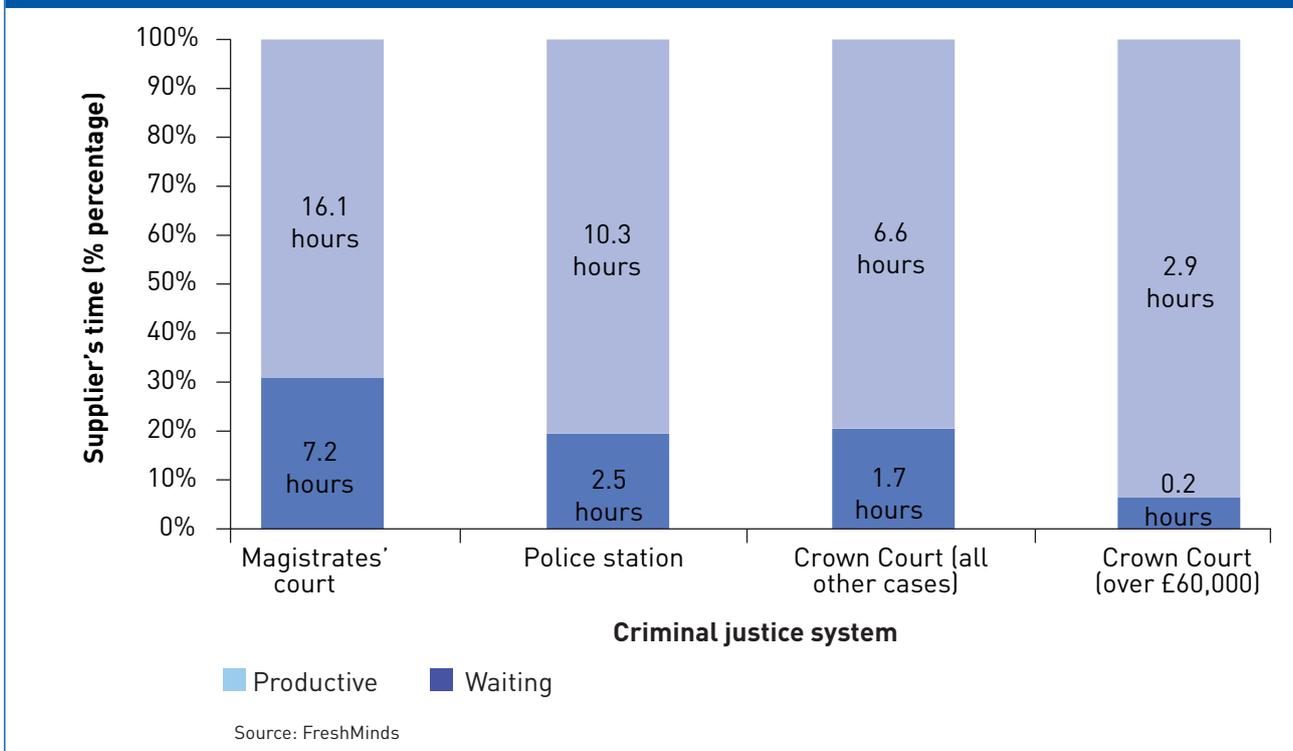
120 In the context of criminal legal aid work, a firm will spend around 50% of its time on magistrates' courts activity, 28% on police station work and the remainder at Crown Court. However, in an average working week about 24% of time could be classified as unproductive 'waiting' time. In Crown Court cases under £60,000 some 20% of time is made up of waiting, but in cases over £60,000 non-productive time accounts for only 7% of time.

Table 2.2 – Average staffing levels for different types of legal aid firms

Type	Crime	Civil	Family	Other	Total
Equity partners	1.5	0.9	0.8	1.3	4
Non-equity partners	1.5	1.2	0.8	1.5	4.9
Qualified fee earners	3	2.1	1.9	2.8	8.6
Non-qualified fee earners	2.5	1.3	0.8	1.4	5.3
Trainees	0.6	0.5	0.3	0.5	1.8
Administrative and other	2.9	1.8	2.4	7	15.1
Total	11.9	7.7	7	14.6	39.7

Source: FreshMinds

Figure 2.12 – Allocation of suppliers time into productive and non-productive elements in different parts of the criminal justice system



The profitability of solicitors' firms – identifying optimal structures

121 A key issue for the review has been identifying the optimal structure for firms in terms of costs, quality, efficiency and profitability. In developing an understanding of this issue, the review has drawn on a wide range of existing evidence, and has commissioned work from both PKF and Otterburn Legal Consulting to examine the issues of firm

behaviour and structure in detail. A summary of the findings of both the newly commissioned and existing research can be found online.⁷

122 This section provides a brief summary of the overall conclusions, before providing a more detailed summary of the Otterburn work, which focused in detail on the relationship between the structure of firms and their costs and profitability. In summary,

⁷ <http://www.legalaidprocurementreview.gov.uk>

the key findings from the evidence examined are as follows:

- there is a need for substantial reform of the procurement system – legal aid firms consistently report that they are at the edge of profitability. Firms also believe that, under the current system, there will be many closures of criminal practices, or consolidation;
- there are many elements of the system that impose costs and inefficiencies. A key one of these is the bureaucracy involved in the current procurement system;
- legal aid firms are amongst the most efficient of legal firms – particularly those that are crime only firms – but there remains scope for further efficiency gains in many firms. For example, management information and information technology – firm investment in these activities could lead to substantial efficiencies. However, they need to be combined with changes on the part of the Legal Services Commission in the way it interacts with firms;
- there are some firms that are able to make reasonable profits per equity partner from carrying out legal aid work. These firms appear to have a number of common features: higher levels of gearing; higher levels of chargeable hours; a relatively low overhead base; and a specialism in criminal legal aid; and
- typically, firms with larger numbers of fee earners tend to be more profitable.

123 Otterburn Legal Consulting was asked to validate and analyse data collected by the market research firm FreshMinds. FreshMinds were commissioned to conduct a large scale survey of legal aid firms in November–December 2005. A key limitation of the FreshMinds data was the small number of large crime firms that chose to take part. Consequently, a second survey was undertaken by Otterburn Legal Consulting of the top 100 crime firms.

124 A key objective of the Otterburn analysis was to consider how different firm structures impacted on costs. Consequently, the analysis examined and

reported costs for different sizes of firm (1-5, 6-12, 13-40 and 40+ fee earners). It is important to note, as mentioned above, that two different surveys were carried out; one by FreshMinds and a second by Otterburn, which focused on the top 100 crime firms.

125 Care must be taken in making direct comparison between the two surveys because the samples, methodology and assumptions used in the two surveys were different, in particular with regard to chargeable hours. The composition of the two samples was also very different – in the first survey, for example, only 20% of the firms with 13-40 firms undertook crime work, whereas in the second survey crime represented 94% of the fees of these firms.

126 Costs are reported on a per hour basis – a standard measure used, for example, by the Law Society in its research. Costs were calculated using both reported chargeable hours and assumed chargeable hours. The latter measure was used to help identify differences in the underlying costs of different types of firm, by allowing like for like cost comparisons across the firms. Specifically, the question this comparison addresses is, for the same level of input per fee earner, which type of firm can achieve the lowest costs.

127 The analysis of the FreshMinds data finds that, when compared on a like for like basis – using assumed hours per fee earner – firms with 13-40 fee earners have the lowest costs per hour. However, when costs per hour are measured on the basis of reported hours, firms with less than five fee earners have the lowest hourly cost – this appears to be driven by the high chargeable hours achieved by these firms. Firms with less than five fee earners report chargeable hours that are substantially higher per fee earner than firms with 6-12, 13-40 and 40+ fee earners. The analysis of costs across the second survey of the top 100 crime firms revealed that the 40+ fee earner firms had lower costs than the 13-40 fee earner firms.

128 The Otterburn work notes that costs per hour are higher in the second survey. However, it cautions that direct comparisons should not be drawn between the two samples, as the methodology and assumptions used in both are different.

129 Finally, the work suggests that firms that only provide criminal legal aid tend to have lower costs than firms that provide a mixed service. This appears to be because crime only suppliers do not require the same level of overhead as other types of firm. This is consistent with the findings from the PKF research.

130 A key finding of the Otterburn work is that many firms are on the edge of profitability. This includes some firms that have high gearing (ratio of equity partners to fee earners), effective systems and strong management.

131 However, the analysis finds that profitability does tend to vary considerably. Key trends that appear to emerge are that:

- profit per equity partner increases with the number of fee earners;
- the FreshMinds data shows that profit per equity partner increases from approximately £43,000 per equity partner for 1-5 fee earner firms to £65,000 for 13-40 fee earner firms and £140,000 for 40+ fee earner firms; and
- analysis of the larger crime firms shows a similar trend – 13-40 fee earner firms had a median profit per partner of £67,000, while 40+ firms had a median profit per partner of £139,000.

132 The analysis also identifies the characteristics of those firms earning 'reasonable profits per equity partner'⁸:

- high levels of gearing, and a small number of equity partners;
- higher levels of unqualified fee earners;
- an expectation of higher chargeable hours;
- a relatively low overhead base; and
- a focus on criminal legal aid work

133 The analysis finds that 1-5 fee earner firms can achieve low costs if they can generate chargeable hours that are considerably higher per fee earner than for firms with greater numbers of fee earners.

It also notes that these firms tend to offer a high level of client service.

134 However, Otterburn's view, based on the qualitative comments in the questionnaires, suggests that it is difficult to see how firms in this category can represent a sustainable long term model:

- they tended to have lower profits per equity partner;
- the average age of practitioners, particularly in crime, is increasing;
- they have greater difficulty recruiting staff at some levels – the work found that – young solicitors are often not attracted due to the long hours expected, poor pay, lack of security and poor public profile;
- they have difficulty developing the team structures that are key to cost effective working – due to recruitment difficulties, and also due to a lack of skill/inclination on the part of the partners;
- the firms find it hard to develop the necessary systems and procedure, or to invest in information technology; and
- the firms can be vulnerable to unexpected blows such as the loss of a key fee earner.

The work found that firms with larger numbers of fee earners and a more highly geared structure, can overcome the issues set out above:

- recruitment of certain levels of staff can be easier. These firms are often well known. They are often regarded as providing good training, and for young solicitors who wish to pursue a career in publicly funded work, can be good to have on their curriculum vitae;
- they have sufficient fee earners to be able to attract and justify the cost of specialist human resources and information technology staff;
- they are more likely to have the necessary resources and management structures to develop effective procedures and systems;

⁸ The measure of profit used in the Otterburn work is profit per equity partner. This measure has been used as it appears to be the industry standard approach to assessing profitability.

- succession is often easier – there is a bigger pool of younger solicitors, and if the firms are profitable they are attractive to these people; and
- they are likely to be able to offer a wider range of services – family, housing, debt, crime, rather than the narrower areas of work that many smaller firms will be able to offer.

The capacity of firms to grow

135 In 2003, the report *A Market Analysis of Legal Aid Services Provided by Solicitors* was produced by Frontier Economics⁹. This was complemented by Otterburn Legal Consulting's *Review of Demand, Supply and Purchasing Arrangements*¹⁰. The Frontier report showed the potential for an excess supply of legal aided services provided by solicitors, and suggested that there was some flexibility within the current market to adapt to changes in the CLS.

136 Out of the firms surveyed as part of the Frontier research (which included criminal, civil and mixed firms), 16% said they would be willing to take on more work at current remuneration rates and that they would have the capacity to do so. A further 24% said that they would be willing to take on more work but would require additional resource (office space/staff) to do so. Frontier also found that there was a significant variation in the cost of delivering legal aid services. Frontier concluded that given the fact that some suppliers would be willing to take on more work, and that variety in costs was great, a procurement system which remunerated suppliers on the basis of prices they revealed would be likely to deliver greater value for money.

137 The Frontier report also considered firms' abilities to undertake activities other than legally aided work. Looking at the distinct economic markets for private and publicly funded areas of work, and between civil categories (including family), Frontier found that switching between private and publicly funded law was considered to be relatively easy by 70% of the responding firms. However, switching between categories of law was less easy, with 49% of firms saying it would be difficult to do so in response to market pressures. Frontier considered that within civil and family, it was likely that there are distinct economic markets for categories of law, such as mental health and public law children.

The not for profit sector – the current supply market

138 The not for profit sector includes a diverse range of agencies (Citizens Advice Bureaux, independent advice centres, and other community based organisations), offering a wide spread of services from general advice to more specialist legal advice by solicitors. There are over 2,000 advice service organisations, which provide a range of services throughout England and Wales¹¹.

139 Recent research by Matrix Research and Consultancy, attempted to estimate the size and nature of the civil and family legal advice sector in England and Wales¹². The research revealed that the advice sector was worth around £5-7 billion, of which nearly two thirds was accounted for by not for profit organisations.

140 Local authorities are probably the largest funders of the not for profit advice sector¹³. However,

⁹ 'A Market Analysis of Legal Aided Services Provided by Solicitors, a report prepared for the Department for Constitutional Affairs and the Legal Services Commission', December 2003, Frontier Economics Ltd., London

¹⁰ 'Review of Demand, Supply and Purchasing Arrangements, Survey Of Legal Firms 2003', Otterburn Legal Consulting, Holmfirth, 2003

¹¹ The Advice Services Alliance, which is the umbrella organisation for independent advice networks in the UK, states in its literature that it represents over 2,000 organisations.

¹² Matrix Research and Consultancy 'Estimating the size and nature of the civil legal advice sector in England and Wales', DCA Research Series4/06, March 2006

¹³ By way of example, from 2001-2004, Citizens Advice Bureaux received 50% of their funding from Local Authorities, compared to just 20% from the Legal Services Commission. Legal Services Commission, *Making Legal Rights A Reality, the Legal Services Commission's Strategy for the Community Legal Service, Volume 2, An Overview of the Community Legal Service*, July 2005, p. 25.

they each have different priorities, funding different types and levels of service, depending on local needs and demands. Since the establishment of the CLS fund, legal aid funding is perceived by the advice sector to have played an important role in increasing the capacity of the not for profit advice sector to provide specialist legal advice to their clients.

141 The number of not for profit contracts with the Legal Services Commission has grown from 360 in 2000 to 454 in 2005-06. In terms of the proportion of work being undertaken by this sector, not for profit agencies are now dominating advice provision in areas such as welfare benefits and debt. Not for profit organisations hold around 60% of contracts in debt and welfare benefits. However, they held less than 5% of contracts in family, actions against the police, clinical negligence, mental health, personal injury and public law. In family law, solicitors hold nearly 100% of the contracts.

142 The dominance of solicitors in some areas, and the not for profit sector in others is partly a result of the legal complexity of the issues typically presented in each area, and partly an historical arrangement, as some categories have traditionally been perceived as the preserve of solicitors. With a larger proportion of work being undertaken by the not for profit sector, and their dominance in some social welfare law categories, it is important that value for money be achieved.

143 Not for profit suppliers have higher average cost than solicitors in some categories of cases but not in others. This may reflect a different mix of cases or different degrees of efficiency at dealing with them. In the categories of debt and welfare benefits, where not for profit agencies hold the majority of contracts, their average cost is over £100 more per case than a solicitors' firm. In debt, not for profit agencies average cost is £332 per case, compared to £199 for solicitors' firms. In welfare benefits, not for profit agencies average cost is £352 per case, compared to £243 for solicitors' firms.

144 There are a number of possible explanations for this difference. Some of it is explained by the cost of 'underperformance' against the 1,100 hours

target. Around £8 million per year is paid out to the not for profit sector for hours that are not performed. If this is taken out of the cost per case calculations then the differences narrow but remain significant in some categories, such as debt. In addition, not for profit agencies have far fewer licensed contracts than solicitors. Taking licensed work as a proxy for complexity (those cases going to court may tend to involve more complex legal issues), the issue of higher case costs becomes more acute.

145 There should be scope for greater efficiency in the way that not for profit organisations deliver legal advice services. The funded post model that applies to not for profit agencies may encourage inefficiency, as by paying for hours worked rather than cases completed it may encourage some caseworkers to spend more time on cases than is strictly necessary. This could mean fewer clients helped, and in an environment where ever more innovative means are being found to help more people access legal advice, it is essential that a good quality service is secured that provides maximum value for money.

Barristers and chambers – their role and an assessment of the current supply market

Distribution and supply of barristers' services

146 Although around 6,500 advocates in England and Wales provided an element of legal aid services in 2005-06, the majority of these advocates specialise in either civil (including family and immigration) or criminal work, and are self-employed referral advocates practising in chambers. Barristers are specialist advocates, and generally spend their time arguing cases in the courts, although they also give specialist advice, for example on the prospects of success of a civil case. In the context of legal aid, therefore, barristers are dependent on solicitors to instruct them – to argue a case in court, or to advise on it.

147 There is great variation in the type of work undertaken by chambers ranging from those who

Table 2.3 – Regional distribution of chambers and tenants

Region	Number of chambers	Total number of tenants
South East	163	12,442
Western Circuit	21	735
Wales & Chester	10	351
Northern	29	1,165
Midlands	18	793
North East	26	749
Total	267	16,235

Source: Bar Council

undertake privately funded work only to those that specialise in either criminal or civil legal aid. Equally there is a broad spectrum of remuneration for barristers undertaking legal aid work, from those who undertake a small number of legal aid cases in a year to those who work full time as legal aid practitioners.

148 Chambers rent will be the most significant overhead for many barristers. Other overheads include Continuing Professional Development course fees, insurance and practice certificate.

149 Work is allocated to barristers in a number of ways. Most commonly the senior clerk in chambers will allocate the majority of cases that have been referred to advocates. On more complex cases solicitors firms may request an individual advocate on the basis of reputation or previous working relationship.

150 There are numerous advocacy fee schemes in civil, family and criminal legal aid which are outlined earlier in this chapter. In 2000-01 barrister's fees for legal aid (both criminal, civil and family) totalled £440 million. By 2004-05 that had risen to £536 million.

151 The table above shows that barristers are heavily concentrated in London, which creates intense competition for work, particularly at the junior Bar and this in turn makes it difficult for some advocates to be fully employed in legal aid work. There are around 11,500 self-employed practising barristers. The difference in the total number of

tenancies may be attributable to some barristers having tenancies in London and provincial chambers.

152 One of the recurring themes that emerged in discussions with barristers was the perceived low income of its junior members. There are three issues that influence this perception or the level of junior barristers income:

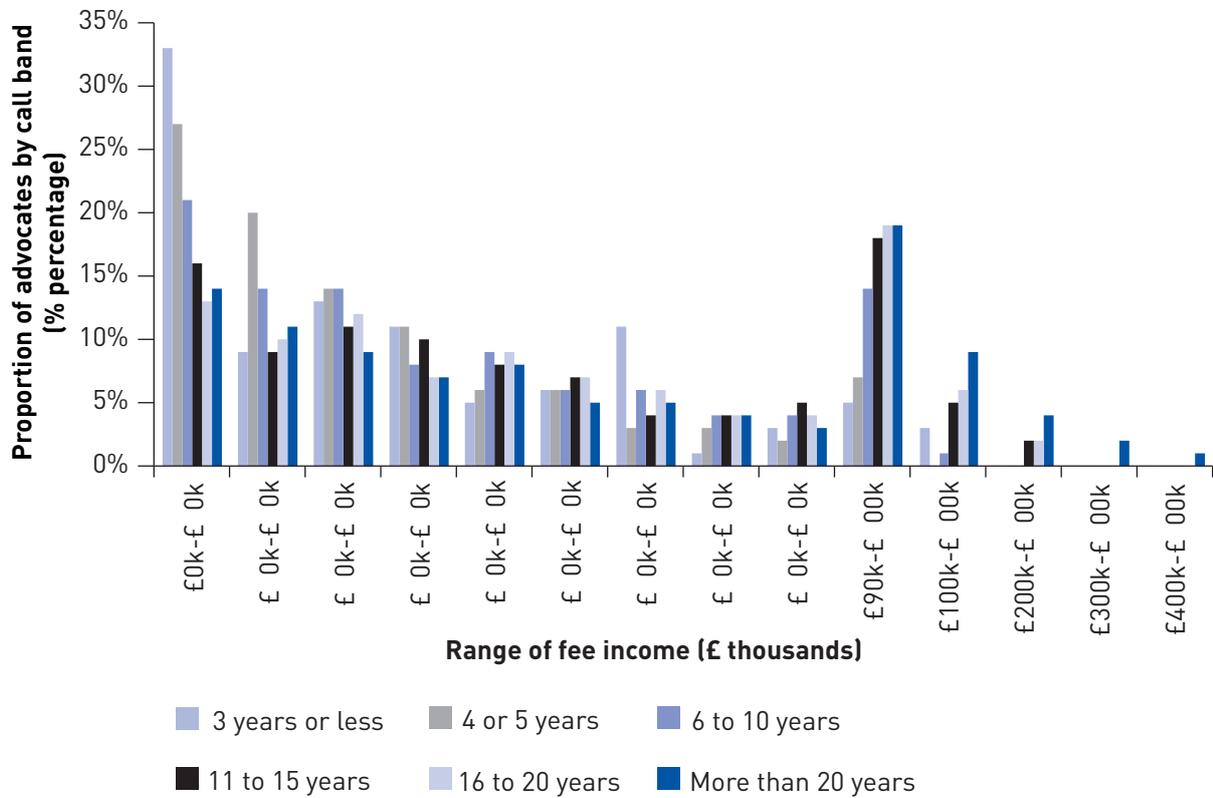
- the supply of barristers;
- the employment of those barristers;
- and the expectations, in terms of income, of those practising.

153 What is in contention is the amount of work that junior barristers are undertaking, and whether there is in fact an oversupply of barristers in certain regions, particularly London.

154 It is essential that the legal aid procurement system pays rates that attract good quality advocates. However, there should be an expectation that those advocates will be fully occupied, so that low incomes are only representative of those struggling to find work and are not reflective of poor remuneration.

155 In a healthy and competitive market there should be a more than adequate supply of advocacy services to meet demand. The available evidence suggests that this is the case in England and Wales generally, and is certainly the case in and around London. The market to supply advocacy services is

Figure 2.13 – Distribution of all advocate graduated fee scheme and ex post facto spending in the Crown Court



Source: Department for Constitutional Affairs

highly competitive and as a result some individual barristers find difficulty in undertaking a full year’s work from legal aid defence work or other sources of work, such as prosecution and private funded defence.

156 Evidence regarding the availability of barristers outside London is contained in Frontier Economics’ second survey of solicitors (carried out for DCA in 2005). The survey suggested that it had become easier (since the first survey in 2004) for solicitors to obtain a barrister if they were located outside London and specialised in family or criminal law.

157 In the survey, 30% of solicitors said that they had on at least one occasion been unable to secure the services of a barrister of appropriate experience and expertise. However, in less than 1% of all cases was there thought to be some detriment arising from difficulties solicitors faced in obtaining barristers to undertake legal aid cases.

Barristers’ incomes from legal aid

158 The figure above shows how it is possible to earn substantial sums in criminal legal aid work. Around 5% of those of 3 years or less of call earned between £90-100,000. While over 30% of advocates of similar experience earned £10,000 or less, that is not indicative of full time employment in legal aid work (for example, those on low legal aid revenues could have earned revenues from prosecution or privately funded work).

159 Unlike solicitors’ firms where there is detailed data about fee income it is difficult to break down total fees because of how chambers are organised, the financial data held by individual barristers and the mix of work (private and public) that each undertakes. What is clear though is that good quality, fully employed advocates, regardless of experience, can make a reasonable income from criminal defence work.

Structure of chambers

160 Despite variation in size, chambers tend to be structured in the same way. In the FreshMinds survey a typical set had eight junior barristers (0-5 years of call), 31 junior barristers (6+ years) and five QCs. The average number of clerks was two with the remainder of staff made up of administrators.

161 Chambers handled an average of 4,203 cases a year, and operated in 88 courts. Although barristers' average 154 cases each per year, the variation of caseload ranged from 3 to 600. The proportion of work undertaken by a barrister, which is legal aid work, varies with experience. Junior barristers (6+ years of call) conducted the most legal aid work (48.8%) and junior barristers 0-5 years call) did the least. This may explain the low incomes amongst the most junior barristers who may not be fully engaged in legal aid work.

162 In the survey junior barristers (6+ years call) generated the most income for chambers in absolute terms; they generate 65.6% of income for chambers reflecting the higher number of staff at this level. That is more than both junior barristers (0-5 years call) and QCs who generate 27% and 7.4% of a chambers' income respectively.

163 The survey found for junior barristers that the greatest income per head is typically gained from civil cases, while the greatest income per head for QCs is gained from criminal defence cases. On an individual basis QCs earn the highest income per head. The mean total income for junior barristers (0-5 years call) is £56,128, which increases to £103,211 for junior barristers (6+ years call) and again to £244,919 for QCs.

164 The mean total expenditure per chambers was £852,073 per annum. Of these costs the most significant element was clerks' remuneration (32.3%). In over a third of chambers, clerks are paid a fixed salary; commission alone was found in only 17.6% of cases sampled. While rent is the second most significant expenditure for chambers, typically accounting for 18.3% of expenditure, it is generally the largest expenditure for barristers (52.4%).

Reform and demands of the wider justice system

Criminal justice

165 Addressing inefficiencies in the procurement regime should be but one goal in tackling inefficiencies more generally within the criminal justice system. While the current input-based remuneration arrangements do not promote efficient working practices, they are not wholly responsible for inefficiencies in the process.

166 There are systemic inefficiencies within the criminal justice system: chief among those is wasted or unproductive time. Moreover, it is often the general public, in the shape of witnesses, or the client who is the victim of this inefficiency. This inefficiency shakes the confidence of the public in the criminal justice system.

167 There can be large elements of non-productive time for practitioners at police stations, at court and when visiting prisoners. It is incumbent upon the various interlocking parts of the criminal justice system – police, defence, prosecution, prison service, court service and judiciary – to acknowledge the essential role of each other in the process and to work in concert even where there are inherent tensions, such as between the prosecution and defence, to deliver an effective service for defendants, victims and the wider public.

168 Defence practitioners can be hampered by poor co-operation with the prosecution or inappropriate decisions on the part of the prosecution. However, the prosecution can also be hampered by the defence, such as through failure or delay in providing a defence statement. This lack of co-operation can lead to delays in the service of papers or late, inappropriate disclosure of unused material, or non-disclosure of undermining and assisting unused material, which in turn can lead to postponements in court, a raft of unnecessary hearings and an inability on the part of the defence solicitor to be able to advise their client properly. That impacts on a defendant's plea and may lead to further wasted time.

169 It is clear that a lack of communication between defence and prosecution can result in increased numbers of ineffective hearings. The National Audit Office estimates that £173 million was spent in 2004-05 on trials and hearings in magistrates' courts that did not go ahead when planned¹⁴. The National Audit Office also calculated that around 28% of all pre-trial hearings in magistrates' courts did not proceed on the scheduled day and that these delays were attributable to, amongst others, the defence (including non-attendance of the defendant), the prosecution, the court and probation service.

170 The defence and prosecution are not responsible for all delays, and it is evident that there can also be deficiencies in the handling of prisoners (for example, timely delivery to court) and within the court listing process. When courts are listing, consideration should be given to the possibility of increased waiting time for all those involved in the justice system or to cases being presented with inadequate preparation.

171 Practitioners are directly responsible for some delays. Cases can be poorly prepared leading to a greater number of hearings; cases may be inappropriately allocated to an inexperienced or poorly briefed counsel; evidence may not be complete or the defence is left with insufficient time to prepare a case; files are mislaid; and occasionally there may be failures in judicial management. At the same time existing information technology may not be used properly or is incompatible with systems held by others within the criminal justice system.

172 However, there have been some improvements within some parts of the system. For example, there is greater involvement of prosecutors via the joint charging programme with the police, which should improve the quality of the case at the point of charge, which in turn will help clarify the sort of advice required by the defence provider. This should encourage appropriate guilty pleas and reduce the number of discontinued cases. There is also improved use in information technology in the court

system: a new computer system, XHIBIT, originally launched in Thames Valley and now rolled out nationally allows the police, prosecutors and witness groups to obtain case details much more quickly than at present.

173 There are also provisions in place that will improve discipline in case preparation, including the protocols for Disclosure (February 2006) and the Control and Management of Heavy Fraud and Complex Criminal Cases (March 2005). While case preparation is critical to improving efficiency within the criminal justice system, there are business efficiencies in terms of practice and the purchase of legal aid services that can drive even greater cost benefits.

Family justice

174 There are pressures within the criminal justice system that lead to increased pressures on legal aid spending, and the same problems surface in terms of legal aid and the family justice system, especially public law children.

175 Public law children covers a range of different matter types. The review has focussed on child-care proceedings (s31 Children Act 1989), as they account for 74% of volume and 86% of the value of claims. In particular, legal aid spending on s31 cases has more than doubled between 1999-2000 and 2004-2005. Spending in this area is projected to continue to rise, and it is expected to rise ahead of increases in care applications unless system changes are introduced.

176 The child-care proceedings system has recently been the subject of a joint review by DCA and DfES. The review found that the current system can suffer from delays and complex proceedings can be difficult for children and the families involved. It made recommendations on how to improve the way the system works, and these are set out in its report Review of the Child Care Proceedings System in England and Wales¹⁵, published in May 2006. The review encouraged early intervention to find resolutions before court, and when cases proceed to court it identified ways to improve the quality of local

¹⁴ National Audit Office report Crown Prosecution Service: Effective use of Magistrates' Court Hearings 15 February 2006

¹⁵ Review of the Child Care Proceedings System in England and Wales, DCA, May 2006

authority applications. It also recommended the involvement of solicitors at an earlier stage to assist this process. The work of the joint DCA and DfES review (which was complimented by the Judicial thematic review of the Judicial Case Management Protocol for care proceedings) is now being implemented and is under the supervision of a Ministerial group.

177 Under the current system, most solicitors only get involved after court proceedings have been initiated by the local authority, as that is the first opportunity for them to be instructed by their clients. The proposed reforms to the Judicial Case Management Protocol and the changes in practice set out in the Child Care Proceedings Review identify this as an area that should change to bring benefits to the overall system. It is suggested that solicitors should become involved earlier and before proceedings are initiated in the courts. This will result in new legal aid costs as the role of pre-proceedings legal advice is increased. However, it should help ensure local authorities carry out their existing statutory duties effectively and prepare cases as thoroughly as possible before court proceedings begin, and where appropriate, enable cases to be resolved without the need to go to court.

178 When cases go to court, the emphasis should be building on the pre-proceedings work, and identifying the key issues earlier so that cases can be resolved as quickly as possible. Family proceedings are being recategorised so as to lead to improved case management which makes best use of the limited resources of the specialist family judiciary. This will involve new allocation and categorisation directions and the need for a gatekeeper role to determine at what level family proceedings should be heard. This should enable proceedings to be heard at the most appropriate tier.

179 Closer, tightly focussed judicial case management, earlier in the process, should lead to a swifter court process, with a consequent positive impact on costs. These proposed reforms, together with improvements to local authority preparation, should achieve significant benefits if implemented effectively. To support this process, DCA and DfES should give consideration to a single shared Public

Service Agreement target for the child care process in time for the spending review in 2007. This should support a shared performance framework, which would provide a basis for closer strategic planning around securing and maintaining the necessary system changes. There should be similar performance arrangements put in place in Wales with the Welsh Assembly Government.

180 Such system changes should mean the system is far more cost effective in achieving desired outcomes, as cases are either better prepared in court or, where appropriate, diverted away from the court. The reforms to the child-care system should lead to improvements for all participants, including legal aid. There also needs to be greater control of legal aid paid to experts in child care cases. It is very important that the Chief Medical Officer's report on expert witnesses is published soon, so that work can be pursued in this area.

181 In addition to problems with child care proceedings, there have also been significant issues around the resolution of disputes in private law family, which in turn have an impact upon legal aid expenditure. The trend towards serial families and the increase in the divorce rate has contributed to the complexity of family structures and greater potential for conflict. This is illustrated by an increase in the number of residence and contact proceedings brought before the court and a consequent increase of 23% in the average case costs of private law cases over the last 6 years.

182 However, it is widely accepted that in private law family disputes, individuals should be diverted away from court based fully litigated outcomes, wherever it is safe and appropriate to do so. Parental Separation: Children's Rights and Parents' Responsibilities and the Next Steps paper published by DfES in January 2005 set out objectives around early dispute resolution in private law contact cases.

183 This saw the introduction of Family Help as a new level of service as a means of contributing to its objectives. It did this with the aim of encouraging early and amicable dispute resolution and reducing incentives to resort to contested court litigation.

184 The Next Steps paper set out plans to implement a range of measures to help separating parents in dispute reach agreement about future parenting arrangements. The intention is to promote these methods as better ways to reach agreement than through contested court hearings.

Civil justice

185 Access to civil justice is one of the key components of a fair and decent society. It enables people to understand their civil rights and obligations, and if appropriate, enforce their rights in disputes. Wherever possible, disputes should be resolved without the need to resort to the courts, but where that is necessary, such disputes should be dealt with as expeditiously and effectively as possible by the courts.

186 Legal aid ensures vulnerable and disadvantaged people are not denied access to civil justice because of their inability to pay. As a result of Government reforms and pressure on legal aid spending, the level of civil legal aid spending has come under pressure. This has meant that legal aid eligibility limits for civil legal aid has tightened over the past two decades. For civil representation, conditional fee agreements have developed as a means of providing access to justice in certain civil areas of law, such as personal injury, for those people who would not qualify for legal aid and would otherwise be unable to pay for litigation. This is discussed further in Annex 3.1.

187 The reforms to the civil justice system introduced by Lord Woolf have helped the system to become more streamlined and efficient, and that has helped ensure cases are better prepared. However, there should be a renewed drive to reduce the need for individuals to resort to the courts, so that cases only proceed when appropriate and proportionate to the dispute in question.

188 It is clear that many of the disputes funded by civil legal aid are not disputes between individuals but disputes between individuals and the state. Funded litigation in these cases is an important means of protecting individual rights, as well as ensuring compensation for maladministration. Therefore, if government wishes to avoid unnecessary legal aid expenditure in court (and expenditure on its own legal teams), it should recognise that the answer to this often rests in its own hands. It should build on existing initiatives, and put greater energy into the following:

- Wider strategic action, involving DCA and across government which deals with the causes of problems (e.g. poor administration) that lead to litigation.
- The use of the legal aid impact test, which requires government departments to consider the effect on legal aid expenditure of changes to policy; and.
- Creating and encouraging the use effective alternatives to litigation, such as complaints procedures.

3. The procurement strategy to 2010

1 A number of options were considered by the review when developing the overall strategy for a reformed procurement system. These options were assessed for their ability to resolve the weaknesses of the current procurement arrangements set out in Chapter 2 and to mitigate the risks associated with the challenges set out in Chapter 1.

2 This chapter begins with a summary and assessment of each option. The chapter goes on to describe the principles behind the review's preferred option of a managed transition to a predominantly market-based system. The remainder of the chapter describes the vision for what the legal aid procurement regime and market should look like once the market has gone through transition and reached steady state in 2010-11.

Summary of alternative options considered

3 Although the review has made the case and developed specific plans for the delivery of a managed market-based transition, the other options considered below should not be ruled out. If the risks to the successful delivery and execution of a managed transition are realised then the government will need to reconsider the merits of the alternative options, especially for criminal defence suppliers.

Option 1 – immediate move to price competition

4 An immediate move to price competition would mean, for example, that contracts for all criminal defence work, excluding very high cost cases in the Crown Court, would be issued following an auction process, with successful suppliers awarded work on the basis of price. Although this approach would be administratively complex to deliver in the short term, it would allow substantial savings to be made quickly as only the most efficient suppliers would remain in the market.

5 There are significant risks associated with purely price-based competition. Some suppliers might set unrealistic prices for their services so as to gain market share and subsequently have to breach their contract and leave the market. This could lead to supply problems.

6 There is also a significant risk associated with quality; with the roll out of peer review taking two to three years, quality assurance mechanisms could not be put in place in time, meaning contracts would need to be awarded on the basis of price and capacity only. There is also the potential for a significant negative impact on the wider justice system as quality is undermined and suppliers left in the legal aid market fail to perform effectively. This could have a particularly negative impact on the running of the courts.

Option 2 – price competition with a restriction on choice

7 Moving to a price competitive market, whilst completely restricting client choice, should increase the scope for any efficiencies to be made quickly as only large and efficient firms would provide services. This could be achieved through a swift restructuring of the system, which simplifies the Legal Services Commission's systems for issuing contracts, and provides greater clarity on the volume of work in each area.

8 In addition to the risks described in option 1 above, this approach has short-term drawbacks. It could result in an administratively complex system and may have a high impact on suppliers within a limited transition period. The limitation on client choice and the removal of a significant proportion of the supply base could jeopardise parts of the justice system. The benefits of continuation, reputation and confidence of representation, e.g. for vulnerable or black and minority ethnic clients, may be lost and some rural areas could lose supply altogether.

Option 3 – progressive administratively set price reductions

9 Administratively set rate cuts could be applied to all defence work with minimal change to current procurement schemes. It would be possible within this option to include some restriction of choice by setting minimum contract sizes and progressively increasing the threshold. This approach would be administratively straightforward. It would also allow some time for a managed transition whereby inefficient suppliers could be excluded and their work taken over by more efficient firms.

10 This administrative option could lead to unmitigated and rapid change for suppliers, posing significant risks to both quality and access if rates are forced too low too quickly as described for option 2. Furthermore, continuous administratively set rate reductions would perpetuate long-term conflict and mistrust between the government and suppliers of legal services.

Option 4 – independently operated public defender service with vouchers

11 The creation of an independent public defender service with vouchers would allow for a few very large, independent regional suppliers to win work. Suppliers would win work through price competitive tendering and would provide duty services in all defence work. A client could choose an alternative non-contracted qualified supplier by using a means-tested legal aid voucher, which they could top up if the supplier's rates were deemed acceptable. These vouchers would be priced according to fixed rates for each type of defence service and would be an administratively easy system to operate, providing for an immediate move to competition and substantial scope for efficiencies.

12 However, the creation of a public defender service along these lines would be a substantial, unmanaged change for suppliers and a fundamental departure from the way the justice system in England and Wales has evolved. It also poses significant risks to both quality and access for similar reasons to those set out in options 1 and 2.

13 In the interim report capacity based bidding was considered as an option. However, this was subsequently discounted because the research suggested that capacity alone is not sufficiently reflective of the relative quality and efficiency of firms. It is also likely that differentiating between firms on the basis of stated capacity would have been difficult to achieve in practice (owing to the difficulty in identifying objective measures of firms potential future capacity) and potentially unfair if firms were excluded from the market solely on that criterion.

Principles of reform

14 As explained in Chapter 1, the aim of the procurement system is to ensure value for money, without compromising quality and access to legal advice. A reformed procurement system should pay fair market prices to sustain a pool of suppliers delivering predictable volumes of good quality and efficient legal services to all eligible clients.

15 To achieve this outcome the review's strategy for procurement has followed a number of key principles across the design of all new procurement schemes. These are to develop pricing and payment systems that:

- optimise the most efficient allocation and provision of good quality work amongst the profitable independent businesses that make up the pool of suppliers;
- distribute payments towards the provision of productive services and away from unproductive costs such as travel and waiting; and
- produce simplicity and transparency in the system reducing the transaction costs of all parties.

The market-based approach

Securing best value – quality, capacity and price

16 The procurement strategy proposed here is based on a move away from a relatively complex administrative set of arrangements towards a more market based approach where work is procured from those suppliers who can provide the best value service to clients.

17 Suppliers across the legal services sector already compete with one another to supply their services to clients. The new procurement system should recognise and harness the long-standing existence of a market economy in legal services by awarding work to suppliers who can meet the demand for work in local areas according to:

- the quality of their service;

- their ability to deliver a sufficient quantity of service; and
- that service being delivered for the most efficient price.

18 This approach of ultimately having work tendered according to these best value criteria is central to delivering the review's overarching aim of securing value for money, without compromising quality and access to legal advice. It is clear that price is not the sole consideration when awarding contracts. The best value model should mean that a quality threshold will be put in place for all suppliers. Only suppliers who meet this threshold will be able to tender for contracts.

19 The assessment of the current procurement arrangements in Chapter 2 highlighted some of their major weaknesses. The assessment also clearly demonstrated that the current arrangements do not fit with the approach to procurement described above.

20 A market-based approach, based on best value tendering, with quality at the forefront, can overcome many of the key challenges to the system. Specifically, best value tendering should help to deliver quality services where the price paid for those services reflect their cost of provision.

21 This means that where good quality services are costly to provide, prices will be higher, and where services are relatively inexpensive to provide, prices will be lower. Overall, however, it means that good quality efficient suppliers should be able to earn a reasonable level of profit.

22 Market-based methods involve suppliers who meet the required quality threshold developing their own means of delivering their product or service in response to external incentives and pressures. Suppliers reveal the correct market price to meet demand by competing with each other to provide services as efficiently as possible.

Wider system benefits

23 The best value tendering approach and the managed phases towards it will also facilitate the

needed restructuring of the supply base as identified in Chapter 2 so that more efficiently structured suppliers will:

- be more likely to be sustainable;
- provide more efficient working structures;
- manage more effective working relationships between the litigation and advocacy element of their service;
- be more profitable, thus ensuring the long term sustainability of the supply base; and
- deliver low transaction costs.

24 The other key advantage of a market-based system is that it should avoid ongoing negotiation between procurers and suppliers. Once an effective market structure is in place to meet the procurer's demands, all the key decisions should be determined by the market rather than by the procurer. This has the advantage of reducing the complexity and bureaucracy of the system, and reducing the uncertainty providers face as they wait for the outcome of negotiations.

25 In the specific context of criminal defence services, it is also important to account for, and wherever possible prevent, inefficiencies elsewhere in the criminal justice system. These inefficiencies can impose substantial costs on suppliers of criminal defence services thus hindering the development of an effective and sustainable market-based procurement system.

26 The cost of meeting these justice system inefficiencies will in future be transferred to the government as the costs will be reflected in market prices. This is a fairer sharing of risk than the current system of administratively set pricing.

27 The clear incentive will be on the government and its partners in the justice system to reduce these costs through the action it is taking to improve the efficiency of the justice system. Otherwise the legal aid budget will not be as effective or as far reaching in helping to achieve wider government objectives for social justice as it could or should be.

One size does not fit all

28 The benefits set out above mean that a move towards a more market-based approach, if delivered successfully, will meet the objectives of the review. However, it is recognised that there are significant risks associated with introducing such a fundamental reform of the system.

29 Critically it is recognised that wholesale and immediate introduction of best value tendering could produce a loss of suppliers such that demand for legal aid services cannot be met. For example, many civil and family suppliers could withdraw from the legal aid market and focus exclusively on privately paying clients. There will be a need to nurture suppliers and help them undertake the transition to new and very different working arrangements.

30 A key element to the design of new procurement schemes and the phasing of their implementation has been to identify what can be done to mitigate the risk of local market failure.

A managed transition

31 In order to minimise the risk of losing suppliers of legal services during the move to a market-based procurement system the review considered a phased approach to deliver a managed transition.

Continuing the move towards fixed and graduated pricing

32 It is widely recognised that the introduction of standard fees for magistrates' court work and graduated fees for Crown Court advocacy have brought benefits to both the procurer and to providers. Continuing this move will help to introduce greater control and certainty over the costs of legal aid procurement.

33 More fixed pricing with appropriate graduations will also provide suppliers with greater certainty over the payments they will receive for the provision of services, provide greater reward to the most efficient suppliers, and reduce substantially the administrative complexity and bureaucracy costs borne both by suppliers and the procurer.

Time and support to adjust to the new arrangements

34 There is a need to provide suppliers with clear signals about the future direction of procurement arrangements. This involves providing suppliers with:

- a clear vision of what they need to do to be in a position to provide services in the future; and
- the time and support to take the necessary steps to remain viable and sustainable under the new arrangements.

Gradual and targeted introduction of best value tendering

35 A detailed assessment of where and when areas are ready for the introduction of best value competition will be needed. This should have a high threshold for the quality of services being provided, as a first step, and require that all competing suppliers meet that threshold.

36 It will also require active economic analysis by the Legal Services Commission to monitor any price element of the competitive process to ensure that high quality efficient suppliers are not undermined by low quality unsustainable suppliers, and to ensure that suppliers do not offer to provide services at unsustainably low prices, thereby putting at risk the entire supply base.

Recognising local and regional differences

37 The review has fully recognised that the pace of change will not be the same for all elements of the system, and that the form that best value tendering will take will also be different. In addition suppliers may need longer to restructure and may need more bespoke arrangements. All of these issues are recognised in the design of the new procurement schemes and in the timing for their implementation.

Minimising unproductive costs

38 A key issue identified by the review is the substantial separate payments currently being made for unproductive costs in relation to lower crime. Specifically, payments for travel and waiting account

for almost 20% of the payments made for police station and magistrates' court work.

39 The review has examined ways in which this unproductive element can be included and more importantly reduced with the move to fixed pricing. The review also recognises that much of the cause of this element has been outside the control of legal aid suppliers.

40 The development of new work areas and working arrangements should ameliorate the current costs of travel and waiting. Recommendations for specific procurement schemes have sought to concentrate more of the work of suppliers in smaller geographical areas, thereby reducing the need for travel.

41 Similarly, by concentrating clusters of work to fewer suppliers, it should also be possible to reduce the time suppliers must spend waiting either in the courts or in police stations. By increasing the volume of work suppliers will cover, less of their time will be spent on unproductive waiting.

A simple more transparent system

42 A simpler more transparent system that reduces transaction costs will provide efficiencies for both suppliers and the procurer. For suppliers, this is focused around two key elements: electronic based transactions and fixed pricing. For the Legal Services Commission, it is based around electronic transactions, and a move to a market with fewer, good quality, sustainable providers.

A quality threshold for all suppliers

43 All suppliers wishing to undertake work should pass a strict quality threshold. The standard for that threshold for solicitors' firms should, in the first instance, be based on a peer review assessment managed by the Legal Services Commission. Firms wishing to provide services will ultimately be required to meet a threshold level of peer review.

Recommendation 3.1: The Legal Services Commission should begin from July 2006 a national roll-out of peer review assessment for all firms seeking a place in the new market so that the introduction of best value tendering can take place from April 2009 onwards. The Legal Services Commission should adopt four criteria to plan the roll-out of peer review:

- greatest quality impact for clients;
- greatest opportunity to restructure the local market;
- ensure a level playing field for all firms until best value tendering takes place; and
- assess the impact on the justice system.

The steady state market for criminal defence services

Revised General Criminal Contracts: new market areas and working arrangements

44 The design and specification for all newly issued General Criminal Contracts should be based on re-defined boundary areas. The new General Criminal Contracts will be the means by which the vast majority of criminal defence cases are supplied. The new boundary areas, where possible should be based on the grouping together of existing police station duty schemes. However, they should change where:

- current duty schemes are too small, for example, one of the schemes in Merseyside had just £38,000 of police station work last year; and/or
- an alternative grouping of police stations would allow for a more economic provision of service, an example of which is grouping police stations that are close together so as to reduce travelling time.

45 Within each boundary area suppliers should compete for a new General Criminal Court, through best value tendering, to provide a given number of cases within that boundary area. Suppliers may compete for work in more than one boundary area but there should be limits on the amount of work a

supplier may bid for in any area or nationally. The Office of Fair Trading should monitor the market in order to guard against the development of cartels.

46 Duty police station slots for the boundary area should be allocated in proportion to the number of cases a supplier successfully bids for. The new General Criminal Court should require the successful bidder to undertake all subsequent magistrates' court work and Crown Court work that may take place after providing advice to a client in the police station. Duty police station slots should be allocated to firms rather than individually named solicitors.

Client choice

47 Eligible clients requiring criminal defence services in a given boundary area should be allowed to choose their defence solicitor in the following ways:

- from those suppliers whose General Criminal Contract permits them a given volume of work in that area (likely to be at least 4 to 6 different suppliers);
- from a supplier with a General Criminal Contract for work outside the boundary area if that supplier agrees to take the case and has not exceeded its permissible 'outside area' volume of cases for the given area; or
- from a supplier holding a specialist contract, as detailed below, if that supplier is eligible to take the case, agrees to take it and has not exceeded its permissible volume of cases for the given area.

48 All requests for advice at the police station should go through the duty solicitor call centre. CDS Direct will also be rolled out subject to a review of the evaluation evidence.

49 There will be a limit on the number of cases that General Criminal Contract holders can take from clients outside boundary areas covered in their General Criminal Contract. This case limit would allow a supplier with a General Criminal Contract to do a small proportion of their contracted volume outside of their boundary area(s). The proportion may be around 20%, but the limit should be set for

firms by the Legal Services Commission according to the specific circumstances of a regional market (e.g. density and diversity of available work and local suppliers). The proportion of cases a supplier could take outside its boundary area(s) would be based on the supplier's contracted volume of cases rather than its delivered volume of cases.

50 The purpose of the 'outside area' limit is to ensure the economic and quality benefits of the new boundaries are preserved. The limits should prevent suppliers from outside an area using short-term aggressive marketing tactics to gain market share at the cost of the general stability and cost efficiency of the local supplier market.

51 By allowing 'outside area' work and client choice in this way suppliers should be able to provide continuity of service to clients who currently have a case in the criminal justice system. Suppliers should also be able to provide a service to existing clients who they have worked for within their boundary area(s) in the past but have come into contact with outside their boundary area(s) as well. Both instances allow the Criminal Defence Service to play its part in the efficient and effective operation of the criminal justice system.

52 Reconciliation of 'outside area' work would take place quarterly, and the risk would be borne entirely by the supplier. If the supplier does more 'outside area' cases than their set limit then they will not get paid for those additional cases either at the police station, magistrates' court or Crown Court.

53 In summary, the new General Criminal Contract with its new boundary areas and working arrangements should ensure that:

- good quality and efficient suppliers can thrive in a healthy and competitive market, for example by limiting any one supplier's share of local markets and the national market;
- new entrants have access to the market, for instance by ensuring rolling-re-tendering and managing size of local contracts; and
- new business structures are not precluded (e.g. all-in-one litigation and advocacy services for all work).

54 New areas and working arrangements should be rolled out in April 2008, with the introduction of best value tendering, where appropriate, from April 2009.

55 The specific details of the new working arrangements, design of new areas and stages of implementation are recommended in Chapter 4.

Fixed pricing

56 In steady state, all elements of publicly funded criminal defence services should be paid through a system of fixed and graduated prices for the main sorts of defence service (police station advice, magistrates' court cases, and the majority of Crown Court cases) with limited escapes for exceptional cases.

57 Specifically, the remuneration schemes will be as follows:

- police station advice – a fixed fee per case, varying by criminal justice system area, with escapes for exceptional cases and a pre-set 'access' uplift for specified police stations with recognised increased costs (e.g. in some rural areas);
- magistrates' court cases – a new graduated fee scheme, with a base payment varying with case type and offence type, and an escape for exceptional cases where appropriate; and
- Crown Court cases – a revised graduated fee scheme for advocacy services (building on current arrangements) and a new graduated fee scheme for litigation services similar in concept to the existing advocacy graduated fee scheme.

58 The Crown Court graduated fee schemes are designed to allow harmonisation of the current schemes to a single graduated fee for all defence services in the Crown Court. The timing of such a move is likely to be best decided as soon as possible after 2009 when suppliers have had time to adapt to both schemes and have new opportunities to structure their services following implementation of wider legal service reforms, and best value tendering is in place.

59 For very high cost cases in the Crown Court, the escape mechanism will be a bespoke managed contracting regime, building on the recent developments of individual case contracts for these long and complex cases. The revised arrangements will require suppliers to compete for access to this specialist and rewarding work and put mechanisms in place to drive more effective team working.

60 Details of the design and implementation of the fee schemes between now and the run-up to best value tendering from April 2009 are recommended in chapter four.

Best value tendering

61 From April 2009 suppliers should compete for General Criminal Contracts through a process of best value tendering. This best value approach encompasses quality, capacity and price. Only suppliers that have demonstrated that they have achieved the appropriate quality standard will be allowed to take part in the best value tendering rounds for police station contracts.

62 While the Legal Services Commission will need to determine the exact nature of the best value tendering process, it is likely to have the following features:

- only firms that pass the appropriate quality threshold will be asked to bid;
- suppliers will bid for volumes of police station cases and associated magistrates' and Crown Court work within each boundary area – firms could be asked either to specify individually the volume they wish to bid for, or cases may be tendered in predetermined lot sizes, for example, blocks of 500 cases;
- if suppliers can specify the volume they wish to bid for, the Legal Services Commission may wish to implement a minimum bid size, based on local market conditions;
- tenders from suppliers will include price bids for police station, magistrates' court and volume Crown Court work. The price element of the tender could be based on discounts off the fixed prices set during phase 1;

- for police station work the introduction of a two part payment structure could be considered whereby firms receive a block payment for a set volume of work, and a fixed fee per case for additional volumes;
- for police station and magistrates' court work firms could bid a discount against the fixed price, with a floor to prevent unrealistic bidding destabilising the market;
- Crown Court firms and advocates could be asked to bid a discount against the relevant graduated fee (either on the basis of the base fee or on the basis of base fee and uplifts), with a floor to prevent unrealistic bidding;
- price bidding could be restricted so that an individual supplier must bid the same discount across the police station, magistrates' court and Crown Court work – e.g. 5%. Alternatively, suppliers could be allowed to vary the discount offered across the three categories of work; and
- the bidding process should ensure that, where practicable, at least four to six suppliers receive contracts in each boundary area in order to ensure that issues of conflict and concerns regarding weak competition are dealt with.

63 The national roll-out of best value tendering rounds should take place in three waves, with each wave having tendering rounds within each region of England and Wales.

64 To assist in deciding upon the areas that should be included in each wave of the best value tendering process the following types of criteria could be considered:

- the size and concentration of the market – larger areas where work is more concentrated may be more suitable for early introduction of best value tendering;
- the extent of restructuring undertaken by the firms. This can be measured by the size and the profitability of the firms;
- the potential number of bidders in the area;
- the number of firms that have attained the necessary quality threshold; and

- the administrative cost to the Legal Services Commission.

Recommendation 3.2: The Legal Services Commission should continue to develop the design of a best value tendering process around the framework set out in paragraphs 61 to 64 of the review's final report, with specific arrangements for each local tendering round, so that a national roll-out of best value tendering should begin in April 2009.

Specialist supplier contracting arrangements

65 The Legal Services Commission should consider whether there should be at least one type of specialist contracting arrangement in addition to the General Criminal Contract. Any specialist contracting arrangement would need to be restricted to a limited number of suppliers and would only be available to those who can meet relevant criteria.

66 One form of specialist contracting arrangement will be a restricted panel of suppliers (likely to be 75 to 150) eligible to take on individual case contracts for long and complex defence work (very high cost cases) defined by the Legal Services Commission as requiring their specialist services. This process for gaining access to this panel and its working arrangements are described in detail in Chapter 4.

67 In addition to the panel of suppliers eligible for individual case contracts for very high cost cases there are a very small number of specialist criminal defence suppliers (likely to be 50 to 200 nationally) who provide valuable niche services to specific groups of clients.

68 However, because of the nature of their services, they may not be structured to provide the suite of services required under the General Criminal Contract. For example, these defence practitioners do not usually provide general advice and assistance in the police station or high volume work in magistrates' court or Crown Court. Instead they tend to gain their work from clients who chose them for their particular skills and reputation, or have cases referred to them by other suppliers.

Recommendation 3.3: The Legal Services Commission should consider whether and how a small number of criminal defence practitioners could continue to provide niche services when the new General Criminal Contract arrangements are implemented in October 2007. Consideration should be given to how sub-contacting arrangements can be developed for referrals from firms who hold a General Criminal Contract as well as support for growth and consolidation.

The steady state market for civil and family services

69 The objectives of the recommended procurement reforms are:

- ensuring clients are provided with a good quality legal service;
- delivering legal services to potential clients which are based around addressing clusters of problems;
- ensuring a sustainable supplier base;
- funding based on outputs;
- risk shared between procurer and suppliers;
- delivering greater efficiency through larger contracts – where appropriate – with incentives for suppliers to grow; and
- developing stronger links between categories of civil and family law, whilst ensuring the maintenance of good quality specialist services.

70 There should be a move towards an efficient market structure that delivers the right quality of service at minimum cost. That will provide a sustainable long-term supplier base where price reflects the most efficient cost of delivering the service.

71 The system should be flexible enough to promote and reward a range of efficient suppliers who can adapt to changes in the type of services required or the volume of work required. It is

important to stress that a ‘one size fits all’ approach will not be appropriate, as there will be a need to take account of the capacity of suppliers and local factors influencing demand for services.

72 By 2011 a steady state should be reached where there are:

- larger, more efficient, good quality suppliers who prosper from increased volumes of work, in which costs are under control;
- smaller suppliers who have maximised their efficiency and provide a good quality service; and
- smaller, mixed practice suppliers in areas of limited demand but where access is an issue.

73 On completion of a series of phased reforms, suppliers will be working under new contracting arrangements to deliver either one or a mixture of social welfare, private law family, public law children, or other civil categories of law (mental health, asylum etc).

74 Wherever possible, depending on volumes of work and the state of local supply, social welfare suppliers should have the opportunity to develop a family law capability. If they are part of a local network, they will have strong links with family suppliers. Similarly, family suppliers should be able to develop a social welfare capacity.

75 Where suppliers deliver services in categories such as mental health, actions against the police, education, discrimination etc, such services are likely to be delivered on a regional basis, but suppliers would have links with local networks and suppliers. It is not envisaged that there should be a sole supplier in any region in any category of law, as potential conflicts of interest need to be avoided.

76 Contracts should be tendered on quality, capacity and price. Contracts in social welfare will cover a local area (top tier local authority) either as sole social welfare supplier or as part of a local network.

77 Contracts in family will again cover a local area (top tier local authority), so family suppliers in that area will be able to engage effectively as part of the

local network and with civil services supplied at a regional level. Payment for civil and family services by solicitors' firms and not for profit agencies will be through fixed pricing wherever there is a sufficient volume of cases.

78 The Legal Services Commission preferred supplier approach should provide a quality basis for the proposals, as well as complementing the direction of travel.

79 There should be further consideration given to the level of access to civil courts where that is appropriate. In recent years, conditional fee agreements, usually underpinned by insurance taken out by clients, has been introduced. This is discussed further in Annex 3.1, where options for variations on a contingent legal aid fund are considered.

80 Moving away from the current system, characterised by tailored fixed fees and payment by hourly rates, towards competition should be carefully managed over a realistic time period to ensure the supplier base is supported and maintained through the transition. In order to address potential concerns over access, the procurement schemes take particular account of rural suppliers, black and minority ethnic suppliers, and providing sufficient suppliers in family law.

81 There should be a gradual transition from the current system towards the steady state. The transition will need to take account of the evaluation and roll-out of the community legal advice centres and community legal advice networks and regional level services, plus post-implementation work following the introduction of family standard fees and new family contracting arrangements.

82 In order to achieve the objectives, and move to steady state, there are a number of key considerations for civil and family legal aid procurement that must be taken into account:

- civil and family legal aid covers a very wide range of law. It would be more accurate to describe it as 'non-criminal' legal aid. Each category has its own body of law, its own specialist suppliers, particular interest groups and problems;

- civil and family suppliers are more likely to be able to have privately paying clients. This is particularly the case with private law family lawyers;
- there is a significant not for profit sector. This is particularly the case in social welfare provision, where not for profit organisations receive significant funding from local authorities and other public and charitable bodies;
- with the exception of some parties in public law children, the provision of civil and family legal advice is subject to means testing. This has increasingly resulted in civil and family legal aid only being available to the poorest members of our society;
- unlike the criminal justice system, there is no equivalent to the police station, which provides an entry point into the civil and family justice systems. Clients can enter and leave the systems at many points and demand is difficult to map; and
- some suppliers have a perception of under-supply in some areas of the country.

83 However, there are also a number of factors in civil and family legal aid which provide building blocks for a new approach to procurement:

- there is a common perception among suppliers and others that the current system is underfunded, and change is needed;
- the Legal Services Commission has clearly sign-posted the move towards standardising fees in the new civil and family contract round in April 2007, building upon the tailored fixed fee scheme and the family help pilot;
- there are a large number of suppliers doing very little legal aid work. Around a third of contracted offices do less than £10,000 legal aid work per year (although some of these offices will be in rural areas where they provide a small scale but valuable service); and

- the allocation of funding for civil and family legal help work – matter starts – provides a tool to encourage growth in efficient suppliers. In particular, there has been an overall growth in the number of matter starts in the past year through the Commission re-focussing funding on direct services. Over 710,000¹⁶ new acts of civil and family advice were started during 2005-06, an additional 20% compared with the previous year. This included an increase by both solicitors and not for profit agencies and across both telephone and face to face advice.

84 A key element of the proposed transition, and the steady state market will be the move away from remuneration based on tailored fixed fees and hourly rates towards a system of standardised fixed and graduated fees.

85 Specifically, in steady state key areas of work will be remunerated as follows:

- legal help – there will be a move towards standardised fixed fees;
- mental health and asylum – there will be a move towards a new graduated fee scheme;
- private law family – there will be a move to a new graduated fee scheme for solicitors; and
- public law children – there will be a move to a new graduated fee scheme for solicitors.

Civil and family contracting

86 The review endorses the Legal Services Commission's move away from payment by hourly rates and the current arrangements for tailored fixed fees towards standard fees, for instance fixed fees and graduated fee schemes depending on the category of law. It is recommended that remuneration for solicitors in family legal services, both public law and private law family, should move to standard fees. Moving to standard fees should provide greater certainty over spending for the Legal Services Commission and promote greater efficiency in the family legal market. Payment should move away from the current position where

remuneration for advice is by tailored fixed fees or at hourly rates paid ex post facto.

87 A move towards standard fees should give greater responsibility to suppliers as they would be required to organise their work within the fixed fee, whilst giving greater certainty over expenditure to the Legal Services Commission. It should mean change for suppliers, as the most efficient organisations are rewarded, for example, through access to greater volumes of work or longer contracts. Over time, civil and family legal aid is likely to be provided by fewer suppliers with larger contracts. However, there ought to be sufficient coverage to ensure appropriate access to quality legal services (including telephone advice), and maintaining a variety of suppliers in family law, social welfare law, and civil categories outside the 'core' social welfare areas of law.

88 The Legal Services Commission should ensure its procurement policies support a sustainable supplier base that has the capacity and capability to deliver a quality, accessible service that meets the needs of clients. The legal services it procures should be able to deal effectively with the kinds of problems presented by clients, and procured in a pragmatic and flexible way, so services are delivered in a way that makes sense to both local suppliers and the communities and locality being served. It is also important that the Legal Services Commission continues to work effectively with other funders of legal services, especially local authorities, so that public money is used to best effect and its impact optimised. This approach should be facilitated by indicative local budgets, which would show how much legal aid is spent from one area to another.

Restructuring civil legal services

89 The move to standard fees complements the CLS strategy¹⁷ published by the Legal Services Commission earlier this year. Under the CLS strategy, future service delivery will be through a mixture of direct face to face services, complemented by an expansion of phone services, such as the CLS Direct telephone helpline. The Legal Services Commission says it will contract with

¹⁶ Source: Legal Services Commission

¹⁷ Making Legal Rights a Reality – the Legal Services Commission's Study for the Community Legal Service, March 2006

suppliers to deliver services on the basis of meeting the legal needs of clients and potential clients.

90 The contracts should require the supplier to deliver a certain number of cases at legal help, subject to payment for the supplier based on the standardised fixed fees for different categories of law, and achieving the performance standards set out in the contract. The payments should be on the same basis as currently, that is fixed fees and standard monthly payments. However, the Legal Services Commission should move, where possible, to output-based block contracts. In any event, over time remuneration arrangements for civil suppliers should become subject to best value tendering wherever appropriate.

91 Categories of law including debt, housing, and benefits will increasingly be seen as part of a single packaged social welfare service, rather than discrete categories of law provided by separate suppliers. The social welfare categories of law should form the core service.

Recommendation 3.4: The Legal Services Commission should explore the possibility of firms and not for profit agencies expanding into other categories of civil and family law. Depending on the area and the nature of the service, suppliers should be encouraged to develop services across a wider area of categories of civil and family law than is currently the case.

92 This move towards firms and agencies developing services across a wider range of law represents a change in the procurement strategy of recent years, but the Legal Services Commission has already signalled its willingness to make such a shift in its CLS strategy. This is supported by evidence¹⁸ about the nature of clusters of problems presented by clients, and underlines the need for civil and family legal aid services that are able to address cluster problems effectively by providing a joined up service for clients.

93 The Legal Services Commission is expanding the CLS Direct telephone helpline and it is an important part of their CLS strategy. The Helpline is already an important part of meeting the need for legal advice, and this should continue to be the case as CLS Direct develops its triage services and expands its capacity. However, it is important to ensure that the growth of CLS Direct continues to be consistent with it delivering a good service, and that the Legal Services Commission manages the difficult balancing act between promoting the growth of public awareness of CLS Direct and its capacity to deliver. Phone services are an important gateway to advice for many people. The telephone service should provide wide and consistent access to basic level advice, as well as more specialist advice where that is possible and appropriate.

Introduction of centres and networks

94 Under the CLS Strategy, the Legal Services Commission is setting up community legal advice centres and community legal advice networks to serve local areas. The centre is a franchise and could be either a solicitors' firm or not for profit agency, depending on the outcome of the tendering process for that local area. The centre franchise-holder would be expected to receive funding from not just the Legal Services Commission but other funders such as the local authority. The centre should provide the whole bundle of social welfare services for that area, as well as provide some services in family law, as part of the overall provision of family supply in the local area. The centres should also expand into other categories of law where feasible.

95 In some cases, the centre could be a consortium that creates a single legal entity to run the centre franchise, subject to Law Society regulations. This could involve a number of private practitioners or private practitioners and the not for profit sector, but this will be subject to the pace of legal services reform and the necessary changes in regulations by the Law Society.

¹⁸ Causes of Action, Legal Services Research Centre, March 2006

Recommendation 3.5: It is important that there is not one model for community legal advice centres, and the Legal Services Commission allows centres to develop in a pragmatic and flexible fashion that best suits their potential clients in the area where they are located (including sub-contracting service delivery where necessary).

96 The centre could operate from a number of locations within the local area and deliver outreach services to particular client groups. For example, a firm providing services in several areas of law may win the tender for the centre but decide to sub-contract the housing work to a specialist housing agency. That secondary agency would need to work to the main body's standards. Alternatively a small black and minority ethnic supplier may act as a sub-contractor in order to reach out to particular client groups that are a priority in any given area. Where work is sub-contracted it would be the responsibility of the centre supplier to ensure the necessary standard.

97 Centres will tend to be based in urban areas, but there could be more than one centre in a defined area depending on the volumes of work and local factors. For example, the volume of work, and issues about access, may make it impracticable to have a single centre in some London boroughs, or Manchester or Birmingham for example, but it would depend on the local area profile.

98 In these areas, a large urban area might be split into two or three centre areas. Equally, a centre might be established that covers, for example, more than one London borough. However, important issues have to be considered when managing the tender process, which is likely to reduce the number of local firms and agencies doing civil legal aid work, as the Commission will need to maintain and develop the service to clients in that area.

Recommendation 3.6: It is recommended that the Legal Services Commission should carefully evaluate the impact of the transition in the first wave of community legal advice centres from 2007, so lessons can be learnt for later waves from 2008-09 onwards.

99 The creation of networks should provide a framework for groups of suppliers that work together to deliver an equivalent range of legal services to that envisaged in a centre. The suppliers that make up the network should not individually be expected to deliver the full range of services but the range should be available collectively through all the network members.

Recommendation 3.7: It is important that the Commission enable community legal advice networks to be developed in a pragmatic and flexible fashion that makes sense locally, as in some areas there could be informal networks that already exist and might be built upon, whereas elsewhere the networks would be a fresh development. But the Legal Services Commission should ensure that all would-be network suppliers are subject to a robust tendering process, and that the network is ultimately based on the needs of clients.

100 The networks should be encouraged to expand their services to cover the full range of legal services in the local area. It is essential that there are links between family suppliers and other civil suppliers through networks. It is also important that, subject to any minimum contract size, networks are able to provide a platform for some smaller firms or agencies, which are unable to provide the full range of services, but provide a good quality service to clients. Networks could also provide entry points for new suppliers

101 The Commission, together with suppliers, should consider how to make the networks real, in the sense of the service given to clients. One option would be to use secure internet 'chat rooms' restricted to network members, in which, in appropriate cases, advice could be given from one member to another on the client's problems or use technology such as web cams or video conferencing to make services provided by one supplier in the network accessible through other network members.

102 This could be particularly helpful for networks covering rural areas of England and Wales, where there may be particular problems expecting a client to travel to see another member of the network. It

has been suggested that such a facility could also enable networks to develop virtual relationships with firms outside their geographical area, and it would add value to the services provided within the Network. It has been suggested that this could be necessary when a distant supplier that deals with a non social welfare category is part of a local network, and it is easier for the client to deal with a single practitioner in relation to a range of problems. As the work should be carried out under a fixed fee, there would be no extra cost to public funds in working in this way as the practitioners could make their own arrangements for dividing the fixed fee.

103 In other civil categories of law, mainly mental health, clinical negligence, education, immigration and actions against the police, it makes sense if such services were procured at a regional level. However, it is essential that there are effective links between suppliers in these categories of law and the centres and networks operating at local area level. It is quite likely there could be an overlap in suppliers in some regions and areas, depending on the range of law covered by the supplier. As some suppliers of regional level services could act as a centre or part of a network, especially if suppliers are encouraged to work in a wider range of categories.

104 All preferred suppliers, whether in centres, networks, with 'stand alone' contracts or with regional contracts, should be able to offer a service that ranges from basic advice to court representation in complex cases. It is proposed to pay for work done under legal help and controlled legal representation by way of standard fixed fees or graduated fees, depending on the category of law, and to continue to pay for licensed work by way of hourly rates and ex post facto assessment.

Suppliers and funders working together

105 Suppliers should work more effectively together to ensure services are integrated in a way that makes sense in terms of client needs. In particular, it is important that the past difficulties with referral are overcome where suppliers have to link to provide an effective service to clients. This should be addressed through service level agreements or other contractual obligations on suppliers.

106 Wherever possible, decision-making on service delivery should be devolved to suppliers, whilst the Commission should take procurement decisions with regard to the local and regional profile, as well as national priorities set out in the funding code and directions from the Lord Chancellor.

107 It is important the Commission continues to work closely with other funders of legal advice services, especially local authorities and the Welsh Assembly Government. For example, such close working is vital to the implementation and timing of the roll-out of centres and networks, as this is subject to a degree of agreement between the Commission and individual local authorities and other key funders. The work of the Interdepartmental Review of Civil Advice has reinforced the need to build better links between funders in central governments departments to ensure the maximum value of out of spending in this area is achieved. The same principle should be applied at local level.

Recommendation 3.8: It is recommended that the Community Legal Service strategy should not simply set the way forward for the Legal Services Commission, but should also provide a good working framework for other funders of legal advice services, including local authorities and other government departments in England and Wales, that allows them to add value to their spending in this area through working together with the Legal Services Commission. This better co-ordination should lead to better overall legal services for local communities, especially the more vulnerable groups.

108 Wherever possible, it has been suggested the Commission should encourage links between centres, networks and pro-bono legal services, with the assistance of Law-Works and others, through promoting strategic partnerships between networks/centres and commercial law firms. This depends on the willingness of those involved, and the voluntary participation by all sides, but interested commercial firms could provide some form of pro-bono assistance to networks or centres. This could

possibly be through help with premises or information technology, or business back-up support to networks/centres.

Niche suppliers – public law children

109 The issue of maintaining a variety of suppliers, including small niche suppliers, is particularly an issue for public law children due to the multi-party nature of many proceedings. There are often several parties to the proceedings who require separate representation – the child or children, parents and other extended family members and the local authority. Many public law specialists are on the Law Society children panel. There are around 1,700 members of the children panel in England and Wales and children in care proceedings must be represented by a children panel member, although this is not currently the case for other parties to the proceedings. A number of these are small suppliers, and there will be a need to ensure such suppliers can be maintained within the system.

110 If small public law children suppliers are to be sustained within the system, there needs to be greater imagination applied, so that a solution is developed that addresses the concerns of all stakeholders in this area. One proposal worth further consideration is the idea of establishing ‘chambers’ practices with public law children practitioners, where they are sole practitioners. The suggestion is that the practices could operate on a similar basis to barristers’ chambers, with practitioners sharing overheads in order to achieve greater efficiencies. The use of ‘chambers’ would allow for the fact that many of these providers are at some distance from one another and a ‘physical’ arrangement would not always be practicable. It could also present an opportunity to bring public law children only practitioners and private law family only practitioners into consortia.

Training contracts and building children panel membership

111 The Legal Services Commission should take a more strategic approach towards the use of funding for training contracts. For example, they could be

used to help efficient family law suppliers to grow their capacity, and within the family category, to encourage public law trainees and increase the number of new public law practitioners and build the size of the Law Society’s children panel. These could be allocated on a regional basis looking at the number of care applications being issued by local authorities.

112 The Legal Services Commission should also work with the profession and representative bodies to help create a clearer career path for solicitors in this area. This should aim to encourage solicitors to move into and remain in public law children. At present, there is a significant qualifying period before a solicitor can gain entry to the children panel. This may deter some solicitors from specialising in this category of law. Proposals could be worked up that create a stepped entry to the Panel- a probationary membership – to encourage lawyers to specialise in this area if there is perceived to be a shortfall in supply.

A new relationship with the Legal Services Commission

113 The Legal Services Commission aims to deliver a more efficient operating structure that will enable it to reduce its operating costs and manage its assets more effectively.

114 The Legal Services Commission’s delivery transformation project will streamline processes, to the benefit of clients, suppliers and the Legal Services Commission itself, while maintaining control over the fund. Both the Legal Services Commission’s administrative spend and the bureaucratic burden on suppliers will be reduced by intervening only when there is a need to and by ensuring responsibility for quality assurance and cost control is in the right place and well defined.

115 There are two key elements to delivering the necessary change:

- implementing preferred supplier to establish the right environment for the supplier-purchaser relationship to thrive; and

- moving away from paper based systems and ensuring that the data collected is accurate and relevant.

116 The preferred supplier scheme is consistent with and will support the transformation process. Those suppliers that become preferred suppliers will be rewarded with greater autonomy, simpler processes and lower transaction costs.

117 The relationship manager will have a key role to play in the preferred supplier process. These managers will be directly responsible for each preferred supplier account and will work with the supplier to identify and to deliver services that meet clients' needs while achieving reduced transaction costs. They will also help suppliers monitor their own systems, processes and outputs to ensure sustained quality and value for money. The pilot for preferred supplier suggested that relationship management worked well in practice.

118 All of the systems and processes will be delivered electronically:

- a client entry system, which will assess the financial eligibility and liability of clients entering the CLS or CDS whether that be at a supplier's office or at a police station;
- a client information database or system will hold the client information required by the Legal Services Commission and suppliers, but will not include detailed case information;
- a suppliers' electronic case management system will record and manage the progression, balancing and outcome of individual cases necessary for case, contract and business management; and

- a supplier management system will interface with the suppliers' electronic case management system so that the Legal Services Commission can monitor quality, cost and outcome profiles across all categories of work against agreed profiles; trends or 'high risk' cases which may take a supplier out of profile and require earlier Legal Services Commission intervention; and payments made to suppliers and the Legal Services Commission future financial liability.

119 Administrative savings will rely on intelligent intervention. Suppliers will be expected to stay within the performance profile agreed with the Legal Services Commission. At the same time the suppliers' electronic case management system and the Legal Services Commission supplier management system enables a process of constant feedback between both parties that will make the review of payments the exception.

Three phases of implementation

120 Table 3.1 shows the major steps for the introduction of the new procurement schemes between July 2006 and 2010-11.

Table 3.1: Phases of implementation		
When	What	Where
Phase 1		
July 2006	Peer review begins	Managed roll-out taking 2.5 to 3 years
August 2006	First community legal advice centres and community legal advice networks established	Nationally
April 2007	Introduce revised standard fees for magistrates' court work	Nationally
	Introduce new fixed fees for police stations	
	Introduce new fees for Crown Court advocacy	
	Introduce new fees for Crown Court litigators	
	New civil contracts. Tailored fixed fees replaced with standardised fixed fees for legal help	
	Introduction of private law family graduated fee scheme for solicitors	
	Introduction of public law children graduated fee scheme for solicitors	

Table 3.1: Phases of implementation (continued)		
When	What	Where
Phase 2		
October 2007	Quality assessed and competitively tendered panels for very high cost cases established	Nationally
	Introduce new boundary areas and working arrangements Introduce new fee regime for magistrates' court work at the same as the new boundary areas and working arrangements	
November 2007	Extension of private law family graduated fee schemes for solicitors to include final hearing	Nationally
Phase 3		
April 2009	Peer review completed for whole country	Nationally
October 2009 January 2010 April 2010	Introduce best value competition for tendering police station contracts and pricing of all criminal justice system work excluding very high cost cases	Three waves in each region with each wave targeting a different local area. Each wave separated by a quarter.
2010-11	Completion of move to community legal advice centres and networks. Complete move to best value tendering for new civil contracts.	Nationally