

4. The new procurement schemes

1 This chapter presents the methodology and where possible, the specific design for recommended changes to introduce greater fixed pricing to the major criminal, civil and family legal aid procurement schemes. The design includes recommended fee rates for the criminal legal aid procurement schemes for introduction, following detail consultation, in April 2007 onwards and up to the point when fee rates are determined by best value tendering. The fee rates for civil and family legal aid, as proposed by the Legal Services Commission, are contained in the consultation paper being published separately by DCA and the Commission.

2 The first part of the chapter begins by describing the methodology that the Legal Services Commission should adopt for designing specific new boundaries and working arrangements for the new General Criminal Contracts and the stages of implementation for those areas and arrangements. The chapter then sets out the detailed new pricing structures for police stations; magistrates' courts; and Crown Court work. The final element of the crime proposals is a description of the revised individual case contracting arrangements and controlled access for very high cost cases in the Crown Court.

3 The second part of the chapter outlines the key recommendations for changes to the civil and family procurement schemes and the changes to the pricing regime. This is set out in less detail here than the criminal schemes, as work to develop the new fee schedules was already being undertaken by the Legal Services Commission.

Designing new criminal contracts and procurement schemes

The new General Criminal Contract boundary areas

4 The new General Criminal Contracts will be based on newly defined boundary areas as described in Chapter 3. The method for designing each new boundary area, duty slots and volume of cases available for allocation under contract in each area will involve production of detailed data and maps for England and Wales that:

- plot the boundaries, volume of cases and value of claims generated for all existing police stations and current duty schemes;
- plot the location of suppliers, their volume of cases and the value of their claims;
- plot the location, volume of cases and value of work generated for all magistrates' courts; and
- calculate estimates of the distances between suppliers' offices and police stations.

5 With this information an iterative process of creating the new General Criminal Contract boundaries should be conducted to the following principles:

- **develop larger areas for work where appropriate.** Many of the current duty schemes are small, for instance less than £100,000 in value terms. Consequently, it would be uneconomic for suppliers to concentrate work in these areas while at the same time retaining enough supply to deal with issues of conflict. Moving to larger areas will allow firms to concentrate their work and provide opportunities for good quality efficient firms to grow. At the same time, the areas will be large enough to maintain sufficient numbers of suppliers to deal with issues of conflict;
- **seek a combination of minimum drive times between existing suppliers and police stations and a grouping of existing duty police station schemes, as well as travel to courts.** Where possible the new boundary schemes should be based on grouping up duty solicitor schemes, as this approach will provide firms with familiar areas for work and will capitalise on existing efficient working practices and groupings in the system. However, in some areas, the grouping up of police station schemes may lead to groups of police stations that do not provide for efficiencies in service provision. In these cases, new schemes should be devised based on minimising the drive time between suppliers and police stations in the schemes; and

- **ensure new working areas allow performance standards to continue to be met for client access and convenience.** The current General Criminal Contract sets out performance targets, for example, the time taken between receiving a call and first contact with the client whether in person or on the telephone. The new boundary areas will need to ensure that it is practicable for solicitors to be able to continue to meet these targets.

6 When devising the new, larger boundary areas, there may also be a need for exceptions to be made for police stations in rural areas, and objective criteria developed to identify these areas. The exceptions could mean that certain isolated rural police stations are not grouped into larger boundary areas, but are contracted for separately.

7 The rationale for the exceptions is that it would not be economic to group these police stations into new larger areas, as this would impose a considerable travel burden on firms servicing those police stations. This should also help maintain the civil and family supply base in those areas where mixed delivery represents the best business model.

8 The criteria could be based on a combination of distance from the rural police station to the main police station in relevant schemes, volume of cases in the police station, location of suppliers and distance to relevant police stations or impact on the civil and family supply base in the local area.

9 Annex 4.1 provides an illustration of the way in which new boundary areas can be constructed, the need to take account of dispersed rural areas and the advantages they bring in terms of reducing the cost of service provision for suppliers (through concentrating suppliers' work in smaller geographic areas).

Recommendation 4.1: The Legal Services Commission should construct new General Criminal Contract boundary areas as set out in paragraphs 4 to 9 of Chapter 4 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.

The new General Criminal Contract working arrangements

10 Currently firms are limited in the amount of duty solicitor work that they can access by the number of duty solicitors they employ. This is because even though slots are allocated to firms and not to individuals, the number of slots that any firm receives is in direct proportion to the number of duty solicitors they have on the rota.

11 There are also rules on what type of work individuals can undertake depending on their qualifications. For example, in most situations only a duty solicitor can accept new cases from the duty solicitor call centre or provide initial advice. The combined effect of these requirements is that many

firms have to employ more duty solicitors than actually needed. The cost of employing duty solicitors is also considerably higher than retaining less qualified staff e.g. accredited representatives.

12 In the short term, prior to the introduction of the new boundary areas and working arrangements, there is a risk of market fragmentation as firms attempt to introduce large numbers of additional duty solicitors in order to gain market share. Were this to occur it would be disruptive and costly and act against one of the core principles of the review: to give access to greater levels of volume to good quality and efficient suppliers. It will be important therefore to put in place measures that prevent market fragments.

13 Given that the introduction of the new fee levels will occur in advance of the introduction of the boundary areas and working arrangements it will also be important to put in place measures, that allow firms to begin the process of restructuring as soon as possible.

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.

14 Within each boundary area, the provision of defence services in the police station will be through a block contract based upon a volume of cases. Duty solicitor slots for the boundary area will be allocated in proportion to the number of cases a firm has. Firms should be able to do subsequent magistrates' court and Crown Court work in proportion to their volume allocation. As indicated above, slots should be allocated to firms rather than individual named solicitors, and the allocations should not be governed by the number of duty solicitors employed. However, firms will have to demonstrate their capacity to conduct the work and have satisfactory supervision arrangements in place.

15 This means that if a firm has been allocated 200 cases out of a total of 1,000 in the boundary area, then it will receive 20% of the duty slots. The firm must also have the capacity to do the magistrates' court and Crown Court work associated with its 200 cases.

16 Clients should have the right to choose their representative. However, the choice will be limited to either the duty firm or the other firms contracted to provide advice in that boundary area. There will be one key exception to this restriction: a percentage outside area rule – initial work suggests this number should represent in the region of 20% of allocated work. This would allow a panel firm to undertake the relevant proportion of their contracted volume outside of their panel area.

17 Therefore from a firm's perspective, they will be able to access work in the following ways:

- **own solicitor within a contract area** – if a client asks for a firm, and the firm has a contract in the boundary area, then it can provide advice;
- **duty solicitor** – the firm will have duty slots in proportion to its total allocation of work, and can access work, as today, when a client asks for the duty solicitor; and
- **own solicitor outside the contract area** – if a client asks for a firm, and the firm does not have a contract in the boundary area, then it can still provide advice to that client, as long as it is in that firm's limit of cases outside its contracted area.

18 There should be at least four to six suppliers working in each area to deal with potential conflicts of interest, although the exact number may be subject to local factors.

19 The other key proposed changes to the working arrangements can be summarised as follows:

- **contract scope** – the block contract should encompass both police station duty solicitor work and magistrates' court duty solicitor work. Court duty sessions will be allocated to firms in proportion to the volume of work that they have.
- **very high cost cases** – these cases should not form part of the police station block contract. Advice given by very high cost cases panel members will be remunerated under the very high cost cases scheme. The Complex Crime Unit will be responsible for determining which cases it takes under contract. All cases with a trial estimate of 25 days or greater should be notified to the Complex Crime Unit. However, early identification of some very high cost cases may be possible through identification of the prosecuting body. For example, cases where the Serious Fraud Office or Serious Organised Crime Agency is the prosecutor may require automatic notification of the Complex Crime Unit.

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.

20 In instances where a case has started in a police station, but is later identified as a potential very high cost case, the Complex Crime Unit will determine both whether the case fits the criteria, and whether there is a need to switch from the police station provider to a very high cost case panel member.

21 A pilot for immigration advice for clients detained at the police station started in June 2006. The purpose of this scheme is to ensure that advice is available in relation to non-criminal immigration matters via a 24-hour telephone service. However, the pilot does not change the General Criminal Contract in relation to immigration offences, so immigration practitioners will continue to provide advice and assistance in these matters.

22 Under the rules and provisions of the block contract, advice should only be required and remunerated in relation to the criminal element of the case. Early referral, where possible, of the immigration aspect of the case to an immigration practitioner is recommended. Similarly, consideration has to be given to those persons detained under section 136 of the Mental Health Act who are not suspected of a criminal offence but are held at police stations. This class of detained persons should be referred to mental health practitioners.

23 The relevant supplier should be responsible for representing the client from first advice through to charge or police station disposal, including bailbacks where attendance is required. There are concerns that changes to the operation of the criminal justice

system, such as the rollout of statutory charging, could affect the frequency of bailbacks.

24 Whilst the scheme will not remunerate practitioners separately for necessary attendance at bailbacks, the Legal Services Commission should dynamically monitor the number of bailbacks where attendance is required, and should consider the effect of any substantial increase in numbers when determining fees.

25 All requests for advice – both duty and now own solicitor should be routed through the duty solicitor call centre. This is particularly important during 2007-08 to protect against the potential of a small number of suppliers seeking to drive their volume of cases up in inappropriate matters prior to the boundary arrangements.

26 As previously mentioned in Chapter 3, CDS Direct could be continued in pilot areas and extended to own client work. However the extensions of the pilot in Liverpool and Boston (Lincolnshire) should be discontinued.

27 If the duty solicitor call centre and CDS Direct are expanded in the way suggested this could provide a filter whereby the risk of some firms taking up cases to maximise fee take would be reduced. The new system will also provide management information, which could be used to identify inefficiencies within the wider criminal justice system.

28 No fundamental problems have been identified with the creation of a block contract for this work – the additional features could be included within a revised General Criminal Contract or devised as a separate contract.

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.

Introducing the new General Criminal Contract boundaries and working arrangements in October 2007

29 The new contract areas should be rolled out in October 2007, to ensure that firms have as much time as possible to work under the new arrangements before the introduction of best value competition. The new working arrangements described above should be rolled out in conjunction with the new work areas in October 2007, save for the duty solicitor call centre, which should assume responsibility for own duty work before April 2007.

30 When the new working arrangements and areas are introduced a minimum threshold for all contracts should also be introduced with the possible exception of some rural areas. The threshold should be set at a low level. For example, the volume of police station work that one dedicated professional criminal practitioner could undertake in a year, £50,000 or 200 cases. Exact formulation of the threshold should vary by area and by local market conditions.

31 In addition, when the new areas and working arrangements are introduced, a minimum work requirement relative to the scheme in question should be applied based on historic data in order for a firm to get access to a scheme. For example, to gain access to a new scheme, a firm could have to have delivered a minimum level of between 1 and 5% of work on that scheme in the previous year, (the precise level of the requirement may need to vary by

area, and the Commission will need to draw up detailed rules to determine this), in addition to having delivered £50,000 of work nationally. The exact minimum percentage for work in an area would have to be calculated on an area by area basis, and would vary depending on local supplier market conditions. Firms that meet the threshold for work nationally, but do not meet the minimum work criteria in any individual scheme may not be excluded from the market. Rather, they could be allocated to the scheme in which they had undertaken the largest proportion of the work in the previous year.

32 Independent research commissioned by the Review clearly demonstrates that profitability increases with the volume of work undertaken by the firm. Given the efficiencies required to be delivered in legal aid, it is important therefore to ensure that firms have access to volume in order to improve their profitability sufficiently to remain sustainable under the new procurement regime.

33 Under the new proposals, it is envisaged that firms undertaking larger volumes of work in a more concentrated area will be able to make substantial cost savings by reducing the time spent travelling and waiting in police stations. Firms undertaking small volumes of work would not be able to realise the same level of savings, and moreover, by taking volume away from firms with the capacity to undertake greater volumes of work would also prevent those firms from realising the required levels of savings.

34 Reduction in transaction costs for the Legal Services Commission. The Legal Services Commission currently contracts with over 2,200 suppliers for criminal defence work. The smallest 17% (almost 400) of these firms do less than 1% of the work. They do, however, contribute substantially to the total cost of procuring criminal defence services.

35 When the new working arrangements are rolled out, eligible firms that apply for contracts will be allocated:

- duty slots in the relevant boundary area in proportion to the relative volume of work carried out by the firm in the previous year;
- a percentage out of area allocation based on the total number of cases undertaken in the boundary area in the previous year. For example if the out of area proportion were 20% then if the firm carried out 200 cases in total in the boundary area in the previous year, then its out of area allocation would be 40 cases, and
- the firm will be entitled to undertake own solicitor work for any client within the boundary area.

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 of Chapter 4 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.

The new police station pricing scheme

36 The interim report set out ideas for payment by block contract and very restricted client choice. Following representations from the Law Society and other suppliers, this proposal has been amended. While work will still be allocated through block contracts, considerably more client choice will be allowed (see above) and payment will be made on a fixed fee per case basis.

37 The key elements of the scheme would be:

- a fixed fee that is grouped into seven cost bands;
- the fee to include an element of payment for travel and waiting;
- the fee paid at the same rate for duty work and for own work;
- the fee paid at the same rate regardless of whether work is undertaken in or out of office hours;
- an escape mechanism, based on hours worked for exceptional high end cases – hours spent travelling and waiting do not contribute to hours worked for the purposes of calculating the escape mechanism; and
- hourly payments for cases that escape (excluding travel and waiting) – suppliers must apply separately for payment in cases where there is an escape payment required.

38 The recommended new pricing schedule for the criminal justice system regions, alongside the threshold for escape and the hourly payment for escapes can be found in Annex 4.2.

39 It may be necessary to consider during the consultation process whether fees for London should be further extended – for example, on an inner and outer London basis.

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 of Chapter 4 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.

The new magistrates' court pricing arrangements (stage 1)

40 The interim report proposed an immediate move to a new fixed price scheme. However representations have been made from the Law Society and other suppliers to consider reviewing the timetable for the introduction of the new fixed fee pricing schedule. Consequently, and in recognition of the fact that the recommendations set out by the review are likely to lead to substantial changes in relation to criminal defence procurement, and given the degree of control that standard fees currently provide, the review recommends that:

- the current standard fee is retained, but amended in the short term; and
- a new graduated fee is developed for magistrates' court work in the longer term.

41 The amendments to the current scheme and the principles and proposed price schedule for a new scheme are set out in detail below:

- travel and waiting should no longer be paid for separately on an hourly basis;
- the standard fees should be amended to include an element for travel and waiting;
- ex post facto payments, for cases that escape, should not include travel and waiting; and
- the bulk of additional payment should be within the lower standard fee.

42 Annex 4.3 sets out the recommended price schedules for the amended standard fees.

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 of Chapter 4 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.

New magistrates' court procurement arrangements (stage 2)

43 A new procurement scheme for magistrates' court work based on a graduated fee scheme could have the following elements:

- a base fee that varies with offence type and case type (guilty or trial);
- an uplift for London;
- an escape for a small proportion of exceptional cases, based on a pre-defined number of hours;
- escaped cases would be paid on an hourly basis;
- travel and waiting included in the base fee; and
- disbursements will continue to be paid separately.

44 The escape mechanism set out above is set on the basis of hours worked. However, given that there will be some time before the introduction of the new graduated fee, further work will be required to develop a robust scheme.

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.

Paying for assigned counsel in the magistrates' court

45 At present the Legal Services Commission defines assigned counsel as follows: counsel who may only be instructed where a defendant has been charged with any indictable offence or with particular proceedings under the Extradition Act 1989, and where the court is of the opinion that because of circumstances which make the proceedings unusually grave or difficult, representation by both a solicitor and an advocate would be desirable. Therefore:

- counsel is then paid directly by the Legal Services Commission in accordance with the rates set out in the General Criminal Contract; and
- payment of assigned counsel is paid according to rates set by the Legal Services Commission.

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.

The new Crown Court advocacy procurement scheme

46 A key proposal is to introduce a number of amendments to the current structure of the advocate's graduated fee scheme. The key amendments are:

- enhanced base fees that include payment for the first two days of trial and incorporate the majority of ancillary payments that are currently paid as additional fees;
- uplifts limited to pages of prosecution evidence, numbers of prosecution witness and length of trial – length of trial uplifts only begin to be paid where the length of trial exceeds two days;
- each case fee payable to a single trial advocate as identified at the outset of the case wherein

cases requiring two counsel each counsel would continue to be paid separately; and

- the introduction of two new case categories, D+ and G+, to allow different case fees for those advocates undertaking the most challenging cases in the D and G categories.

47 D+ would cover serious sexual offences. G+ would apply to those offences in class G where the value of the fraud exceeds £100,000. Annex 4.4 provides a full list of the offences that would be included in D+.

48 A small number of ancillary payments will remain. These are set out in Annex 4.5.

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.

49 As is currently the situation, there will be three components to the graduated fee scheme. The first will address remuneration for trials, the second will address cracked cases and the third will cover guilty pleas.

50 For trials there should be different levels of fees depending on the type of advocate involved. The categories of advocate will be:

- Queen's Counsel;
- leading junior;
- led junior; and
- other advocate.

51 Cracked trials should continue to have broadly the same structure as that which was introduced in October 2005. This scheme has three sets of rates depending on the timing of the plea.

52 As with the current scheme guilty pleas should attract the same basic fee and the same evidence uplift payments as trials that crack 'in the first third'. There is no witness uplift for guilty pleas.

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 guilty pleas 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.

53 Annex 4.6 provides the review's recommended new payment schedules for:

- trials;
- cracks;
- guilty pleas; and
- ancillary payments.

54 A small element of payment will remain under ex post facto (for example, some exceptional appeals on conviction and appeals on sentences). This is estimated to be around £11 million. DCA and the Legal Services Commission should monitor this closely and, where practicable, it should be absorbed within the graduated fee scheme.

55 The revised scheme should continue to be paid directly to barristers apart from substitute advocates – see paragraph 57. This may change beyond 2009 – see paragraph 68.

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 to 55 of Chapter 4 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.

56 Where a barrister does the trial the whole graduated fee should be paid to the first barrister instructed. This trial advocate must be identified at the commencement of the case. The graduated case payment will be made directly to that trial advocate. The Bar Council has indicated that it will produce a protocol to assist advocates in this task.

57 If the case has two counsel instructed on it then both the junior and leader will receive their graduated fees separately. However, they will be responsible for the payments to any substitute advocate, if required to attend a particular hearing during the case.

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.

The new Crown Court litigation procurement scheme

58 A key recommendation of the review is to introduce a new graduated fee scheme for Crown Court litigation services. It is recommended that the scheme should have the following elements:

- a base fee that varies according to offence type and that covers the first two days of trial;
- daily trial uplifts that would only begin to be paid where the trial length exceeds two days;
- uplifts on pages of prosecution evidence beyond a specified minimum threshold, depending on class of offence and case type;
- uplifts that are tapered over the course of the case so that payment is front-loaded to reward early preparation and resolution of cases;
- uplifts that vary with the number of defendants being represented; and
- a payment for cracks and guilty pleas that represents a proportion of the trial fee.

59 These uplifts have been identified as appropriate proxies that encompass the size and complexity of a case. For example, the length of trial is impacted upon by the number of prosecution witnesses called at trial, the amount and complexity of the evidence inherent to the case and the amount of relevant unused evidence introduced at trial. All of these elements are represented by the length of trial uplift, and the pages of prosecution evidence uplift. Therefore the payments should not be taken as purely representing the cost to the supplier of reading prosecution evidence or attending at court.

60 However, it is also recognised that there is very large variation in the costs and complexity of Crown Court litigation work. The move from ex post facto payment to a graduated fee scheme represents a substantial change to the procurement arrangements. Consequently, it will be important for the Legal Services Commission, during consultation and prior to implementation to undertake additional analysis to ensure that the indicative 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.

However, 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).

61 The fees for cases which are heard in the Crown Court should include payment for any procedures which have taken place in the magistrates' court.

62 The base fees payable and the relevant uplifts will vary by class of offence from A through to I. Annex 4.6 sets out the offence types covered by each class, the base fees and the allowable uplifts.

63 There are fixed and graduated elements to this scheme. There are fixed fees for:

- appeals against sentence from the magistrates' court;
- appeals against conviction from the magistrates' court;
- contempt cases in the Crown Court that are not linked to a substantive case; and
- committals for sentence.

64 There are graduated fees or fees deriving thereof for the following:

- cases that commence but end before the plea and case management hearing;
- cases that commence but end at the plea and case management hearing;
- cases that crack between the plea and case management hearing and the trial; and
- cases that involve a trial.

65 Additionally, the graduated fee payments are also affected by the following:

- transfers between solicitors;
- retrials; and
- multiple defendants.

66 Annex 4.6 sets out details of how the revised fees are claimed and paid.

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.

Harmonisation of Crown Court procurement schemes

67 As set out in Chapter 3, the Crown Court graduated fee schemes are designed to allow harmonisation of the schemes in to a single graduated fee for all defence services in the Crown Court.

68 The timing of such a move is likely to be as soon as possible after 2009 when suppliers have had time to adapt to both schemes, suppliers have new opportunities to structure their services to provide greater efficiencies following implementation of wider legal service reforms, and with best value tendering in place.

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.

The new working arrangements for very high cost cases

69 In summary, the key changes proposed are:

- the introduction of minimum criteria and quality thresholds for all suppliers wishing to carry out very high cost case work;
- the introduction of a new team based panel for very high cost case work, membership of which should be determined by best value tendering;

- the reorganisation and development of the Complex Crime Unit's contracting capability, and the improvement of the skills base of the unit through the employment of in house lawyers;
- post case audit where requested; and
- revision of the very high cost case contract to reflect these and other changes to strengthen the units ability to control costs. This will be the subject of a separate consultation.

Gaining panel membership – expressions of interest and quality assessment

70 The Complex Crime Unit should issue a detailed expression of interest document to potential bidders. This document should set out information on a number of points of interest to teams seeking to participate in the tendering process.

71 The expression of interest should also set out a number of eligibility requirements in relation to capacity and experience that firms must meet in order to take part in the tendering process. The expression of interest would need to be issued several months in advance of the best value tendering process to allow firms to make any internal restructuring so they are compatible with the minimum requirements set out in the expression of interest.

72 Annex 4.7 contains details on the types of eligibility criteria that suppliers will have to meet.

73 Suppliers who have passed the initial eligibility criteria will be subject to a formal quality assessment of both legal advice and case management skills. Peer review should be the central element of this quality assessment process.

74 Only firms who have been successful in achieving the expression of interest criteria and have achieved a minimum of a level 3 on their peer review will be allowed to proceed to a price bid. This should rise to a level 2 in future rounds.

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 of Chapter 4 and the detailed wording should be consulted on with the appropriate professional bodies.

Best value competition

75 The development of a competitive procurement process requires a clear definition of:

- who will be the participant – the qualification;
- what will be competed for – the product and its price;
- how services will be offered – the capacity; and
- how price will be determined – the format;

76 A team of advocates and solicitors, each led by a QC or Level A solicitor will be able to participate in the procurement process, providing they meet quality criteria set out by the Legal Services Commission. These teams need to be defined in response to the expression of interest publication by the Legal Services Commission.

77 There will typically be a core litigation team that will provide a list of approved advocates that they propose to instruct in the event of taking a very high cost case. The team will nominate a single lead lawyer to act as its representative in any discussions with the Complex Crime Unit about their panel application.

78 The Complex Crime Unit, based on its forecast of total capacity requirements, will qualify a panel of firms who will be eligible to undertake cases taken under contract by the Complex Crime Unit.

79 A simple, dynamic procurement process should be used to determine both the price firms will be paid and the composition of the panel.

80 The Complex Crime Unit should begin by offering a particular base price and invite capacity offers from firms (for instance each firm will be asked to bid the number of cases it would do at that price).

81 A consideration was made for the option of tapering very high cost case hourly rates in the interim report as a method of encouraging efficiency in the market. However analysis of this method has highlighted the difficulties in identifying a mechanism for deciding the start point and the gradient of a taper for very high cost cases. This owes to the complexity and individual nature of such cases. Therefore the decision was taken to omit the principle of tapering for very high cost cases at this point.

82 This base price should be used to determine payment to each team member. For example, for a particular base price the Legal Services Commission could agree to pay:

- base price for a Level A solicitor or QC for a category four contract;
- 87% of the price for a Level B solicitor or leading junior;
- 62% for a Level C solicitor and so on for each of the grades of solicitors, counsel and solicitor advocates/led junior; and
- A fixed uplift on this price can be provided depending on case category (for instance, the current categories one to four in the scheme).

83 If, when the Legal Services Commission offers its starting price, the total capacity bids it receives is in excess of what is required, it should lower the offered base price. It should then re-tender for capacity offers. This process should continue until the capacity offered matches the capacity required. This should constitute the panel of eligible teams.

84 In order to ensure capacity bids are achievable, the Legal Services Commission could decide to limit the rate at which teams can increase their capacity from year-to-year. For example, a team that has never done more than four cases at any one time in the previous three years may not be allowed to bid a capacity of more than six cases in an upcoming procurement process.

85 Capacity should be defined as being that of the instructing litigation team who will agree to supply the required advocate capacity. This would avoid the need to validate the individual capacity requirements of each advocate on each list.

86 Teams who are on the panel should be required to provide capacity they have bid but can exceed this if this meets client choice. Therefore if they have not fulfilled their capacity bid for the period and are chosen by a client they should accept that case. Should, for any reason, they be unable to supply the capacity they have bid, they should be required to find another qualified team willing to undertake the work at the contracted price. If this were to happen regularly it would be deemed to be a breach of contract.

87 This process should result in a single, market-clearing price that will be paid to all suppliers on the qualified panel. This has the important advantage of being fair (all teams are paid the same amount for the same work) and efficient (all teams will have an incentive to offer capacity up to the point where the announced price falls below the base rate they have determined themselves).

88 Teams that are on the panel should not be guaranteed work. Instead, the allocation of work should be determined by client choice from amongst the available panellists.

89 The first panel should remain in existence for 12 months after which a new procurement round will be held in order to create another panel for the next period. This period should be sufficient to minimise procurement costs (on both teams and the Legal Services Commission) while recognising that teams who fail to make it onto the panel should not be locked out of very high cost case work for a very long period of time. Second and subsequent panels may cover longer periods.

90 The auction process recommended above raises a number of further issues for which detailed rules would have to be developed during implementation. These include:

- **capacity forecasting** – the Complex Crime Unit will have to have a very clear indication of capacity required and available capacity at any point in time;

- **long running cases** – rules would have to be developed for cases that run across bidding periods, particularly with respect to how capacity available is accounted for in subsequent bidding periods; and
- **geographic coverage** – rules to incorporate the geographic location of firms and implications for their availability will have to be developed.

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 of Chapter 4. Prior to doing so the issues set out in paragraph 90 of Chapter 4 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.

91 There should be a requirement for all cases that have trial estimates of greater than 25 days and/or the defence teams costs are estimated to be £100,000 or greater to be notified to the Complex Crime Unit for consideration for contract. The unit will contract all cases with a trial estimate of greater than 40 days. However they will have the discretion to contract cases with a trial estimate of 25-40 days and/or the defence teams costs are estimated to be £100,000 or greater. The Complex Crime Unit should make a decision whether those cases would be best suited to the contracting scheme or by payment through a graduated fee. The decision of the unit will be final.

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 costs 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 costs 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.

92 In cases where the Complex Crime Unit takes a case under contract, and where initial work has been carried out by a volume police station provider, the unit should also determine whether it is necessary for the case to be transferred to a very high cost case panel member.

93 The Complex Crime Unit should continue to develop the information flow from the main prosecution authorities about cases they are prosecuting (without breaching any rules of conflict) to identify and use trial length estimates as a basis for early contracting decisions in the absence of reliable estimates from defence teams or the Court. This information, where relevant should also indicate possible plans to sever indictments, which will also be helpful in decision making.

94 Whilst the creation of the panel may be a strong incentive for non-panel firms to delay notification, as happens in some fraud cases now, appropriate sanctions will be sufficient to offset this.

Trial estimates

95 Despite the work being done to improve the management of cases (see Chapter 3), many cases still last longer than their initial estimates. There is a need to maximise resources by making all concerned conduct the trial in such a way that it is kept within the target length.

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.

Improving the case management process

96 In addition to recommending the development of a best value procurement process, the review has also focused on how the Complex Crime Unit's case management process can be improved. In this regard, a number of recommendations have been developed, each of which is summarised below and set out in detail in Annex 4.7.

- **very high cost case best value team protocol** – this will articulate some of the basic approaches to case preparation that the Complex Crime Unit will expect from a very high cost case team. The

review recommends that the Legal Services Commission work with the professions to develop the team protocol. Annex 4.7 sets out the types of questions that this protocol should address.

- **increasing the skill base of the Complex Crime Unit through hiring in house lawyers.**
- **referral panel** – if complex or novel points of law or procedure are raised, the Complex Crime Unit lawyers will have the benefit of access at short notice to a selection of experts known as the referral panel.
- **post case audit** – there will be a post case audit of a small selection of very high cost cases by a specially constituted very high cost case audit panel.

Recommendation 4.22: The Legal Services Commission should make improvements to case management by the Complex Crime Unit (outlined in paragraph 96 of Chapter 4 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.

Setting a budget for very high cost cases

97 Currently there is no budget limit to the amount spent on very high cost cases. The amount spent is the product of each individual contract manager negotiation. Instead there is a system of forecasting future spend based on current run rates and the amount of work agreed but unpaid on individual contracts. The measurement of savings is based on comparison to the system that existed prior to the creation of the Complex Crime Unit, namely the ex post facto system of determination. This shows significant savings having been made by the Unit through the policies implemented for generic types of preparation, the published tariffs and the negotiation success of individual contract managers.

98 This approach still has the following weaknesses:

- It still results in approximately £100 million being spent on a small number of cases

- There are many cases where there is a wide disparity between the amount spent on individual contracts on the same case, which cannot be fully justified solely by the relative position of different defendants.

99 This results partly from the established policy of each contact manager negotiating independent of what is agreed on other contracts on the same case and not being aware of the case management strategy being used by other defence teams.

100 The setting of a budgetary limit lower than the spending currently anticipated on very high cost cases, means the Complex Crime Unit needs to identify ways to spend less money on its cases.

101 However, with the move to a panel of quality assured very high cost case suppliers who would have exclusive rights to manage such cases, there is the opportunity to start to work in partnership with panel members to identify options to reduce the amount spent consistently to the level of the most efficient.

102 The most effective way to achieve the full benefits of this is to set a financial limit for very high cost cases, with the only justification for any subsequent increase being a significant rise in the number of cases.

103 This should, of course, be in addition to the better management of case spending to be achieved by the other measures set out in this report. There is a need to quantify the benefit of these measures and to revise the budget downwards further.

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.

New civil and family procurement arrangements

Payment for civil legal services

104 Remuneration for civil legal services for solicitors' firms and not for profit agencies for controlled work should move to standard fees (for

instance, fixed fees and graduated fees depending on the category of law) wherever possible. Payment should move away from the current position where remuneration is by tailored fixed fees, based on average costs per firm, and hourly rates paid ex post facto. The review endorses the Commission's planned move to payment by standardised fixed fees or graduated fee schemes.

105 The tailored fixed fee scheme pays different suppliers different amounts for essentially the same outputs. There could be valid reasons for this difference, but equally it could be seen as unfair to some suppliers and the differences also raise questions about the value for money that is secured. The replacement for tailored fixed fee should consist of a fixed fee for each category of advice it covers, based on historical case costs and tailored fixed fee payments. A move to standardised fixed fees should be relatively simple to administer and operate. The detail of the new fixed fees arrangements, including the financial limit for exceptional cases, whether disbursements are included, and payment for cases done under tolerance, will all be set out in DCA and the Legal Services Commission's consultation paper.

106 The level of the fixed fees will also be the subject of the consultation paper. The Commission will be presenting two options in its paper: a national fixed fee; and regional fixed fees. It is understood that the options cost the same, but obviously there will be different impacts upon suppliers depending on which option is pursued by the Commission.

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.

107 In the shorter term, the replacement for tailored fixed fees will cover cases at the current legal help stage, with the exception of mental health and immigration cases, which will be paid through a form of graduated fee.

108 In the longer term, the Legal Services Commission should consider the option of fixed fees wrapped up in block contracts based on the supplier meeting output targets and set performance standards. The payments in block contracts would be based on fixed fees per case within a particular category. The output targets should be flexible, as there would be a range of outputs (e.g. cases completed), subject to achieving the basic floor level, with extra payments for achieving over and up to a certain output.

109 In addition to setting a range of output targets, the contracts should require a certain number of hours worked. The fixed fee will be based on notional hours worked, and information on hours worked, as presently, will continue to be required by the Legal Services Commission for monitoring purposes. This is to ensure that firms do not only take on cases with a value, in terms of hours worked, that is below the fixed fee. If the Legal Services Commission targets only case volumes, there is a risk that some suppliers may not wish to pursue complex cases. However, if the target is based solely on hours worked, there is equally a risk that ultimately, a smaller number of cases could ultimately end up being undertaken. The combination of cases and hours should therefore drive better performance in both cases completed and quality of service.

110 The block contracts should contain service level agreements whereby suppliers would be held to rigorous performance standards. For example, the Legal Services Commission might wish to set clear performance expectations around types of clients seen – i.e. black and minority ethnic clients or housing possession cases. As the contract should require information to be provided about types of case and ethnicity of clients. This information should be monitored, and included amongst the performance indicators. Explanation should be required if a centre or firm in a Community Legal Advice Network does not appear to be meeting local need.

111 The contracts should be based on a holistic approach. As they should aim to include legal representation in court, as in the current licensed level, within the contract. However, by including representation within the contract, it should provide solicitors with greater responsibility to proceed with cases – ‘self grant’ – as powers are devolved from the Legal Services Commission, where previously they would have sought a certificate. Such an extension of the current system of devolved powers would place greater responsibility on suppliers, but it should reduce their administrative burden.

112 It is important to ensure potential perverse incentives are not created, through inadvertently encouraging more cases to proceed to court proceedings.

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.

113 The Legal Services Commission will be merging not for profit contracts with solicitor contracts from April 2007, which the review endorses, as there should be a common contractual basis for both sectors. Under the new unified contracts, not for profit agencies should receive funding linked to case targets, on the same basis as solicitor contracts, and they should work under the same level of fixed fees as solicitors.

Tendering civil contracts

114 The best value tendering process for a civil contract should involve potential providers bidding against a set of criteria:

- quality – peer review/preferred supplier;
- capacity – how need will be met, innovation, outreach; and
- price – for example a floor for case volumes to be delivered, with an invitation to say how they could deliver higher volumes.

115 These key elements should be common to all civil contracts, and should set the minimum standards but suppliers should be prepared to offer more.

Tendering for a centre contract (or sub-contract)

116 The Commission should contract with firms, agencies or groups of organisations to run centre franchises in co-operation with the local authority and other funders. The contracts should be of sufficient length, for example, three years to make the service sustainable. Any one individual supplier could succeed in winning tenders for more than one centre (although there should be a limit on how many centre franchises can be held by one individual supplier (e.g. regionally and nationally) to preserve competition). It is recommended that elements of best value competition should be introduced, with quality and service delivery as essential ingredients in the tendering process.

117 Tenders should be invited from firms, agencies or groups of organisations (that propose to merge or carry out some sub-contracting) that can deliver integrated general and specialist legal advice and representation services that meet the needs of the local area. The successful applicant(s) should have a significant track record of providing specialist legal advice and representation services and demonstrate they are able to set up and deliver these services. They should show that the service delivered will be in locations that best meet the local needs of that area, particularly vulnerable groups within that

population, and such group could be identified within the performance standards in the contract, as a group that requires particular consideration. This again reinforces the necessity of applying a pragmatic and flexible approach that is able to take account of local factors for clients and suppliers, and that there is not one prescribed model.

118 The centre franchise holder should put in place an effective referral system, as they should be able to receive referrals from CLS Direct, criminal practitioners, family practitioners, regional suppliers and others. Equally, they would have to have effective referral processes to refer clients to CLS Direct or neighbouring CLS suppliers, criminal practitioners, family practitioners and others.

119 As a means of identifying their key role to the community and other suppliers, the firm or not for profit agency with the centre contract may be required to use some form of centre branding as part of their public image. The firm or agency with the franchise should be able to keep their own separate identity, but it is important the centre is identifiable as one, so the public develops an awareness of where they can seek legal advice and have some understanding of what it entails.

120 The centre should receive payments in advance as part of their contract, and the period covered could be the subject of individual negotiation with the Commission. The payments should be linked to the firm or agency meeting the performance standards set out in the centre contract, and payments adjusted if the standards are not achieved. Equally, the Commission should aim to make bonus payments if the performance standards are exceeded. The firm or agency with the centre contract should also be able to keep (at least part of) any costs awarded in any successful litigation.

Tendering for a network contract

121 There are options for how best the Commission can contract with networks, as it could contract individually with which each member of the network, or have a single contract with a “lead supplier” within the network, who then sub-contracts with the other members.

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.

122 Standard contracts for firms and agencies in networks should be three years in length generally. However, it is recommended that the Commission should also consider tailoring 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 might be offered an extended contract, for example to five years, with a break clause after three years to check their progress against targets. Equally, a firm with a low peer review score, but who is prepared to commit to meeting more stringent standards under the preferred supplier initiative, could be offered a shorter length of contract, to provide time to make the necessary improvements.

123 Similar to centres, payment should be made in advance, based on projected case outputs, with the regularity of payment subject to individual negotiation with the Commission. Payments would be reconciled against actual work completed, although practitioners should also take responsibility for doing this. In order to facilitate payment mechanisms and performance monitoring, there needs to be a more sophisticated and collaborative relationship between the Commission and suppliers, in a way that allows enables risks to be shared and any issues to be identified and resolved swiftly.

124 In terms of developing the network, rather than having to combine together first, suppliers should bid individually to provide part of the network service.

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.

125 Contracts in the non-social welfare categories should be specified as part of the network process, but the funds allocated could reflect the fact that services may often be provided on a wider regional basis, that is, to clients outside of the local authority area.

126 It may be sensible for the network to have a co-ordinator – a post that would have the responsibility of ensuring effective co-operation in the interests of clients. The network co-ordinator should be accountable to the network members and based in the offices of one of the local suppliers. There options as to how these posts could be paid for, as they could be paid for solely by the Legal Services Commission, or a combination of different public funders, or through the cost efficiencies achieved through the bidding process and use of targets. It remains to be established how this position could fit with the new relationship manager function at the Commission, as the Commission needs to ensure there is no duplication and that each is aware of each other's role and can work together closely

127 One of the successful bidders would be given the funding for the post, and with the funding would go the obligation to ensure that the network functioned in the way intended. The Commission should discuss the role of the network co-ordinator

with practitioner groups, so the role can be developed in a way that it adds value to both the Commission and Network members and takes account of local factors. However the Network co-ordinator could have a number of essential functions, for example:

- ensuring management information is accurately recorded and available; or
- ensuring providers across the network are delivering services in line with the contract specification.

128 However, there could also be scope to provide a broader level of business support and expertise to those within the network, providing advice on how to maximise their efficiency and productivity, engage with firms on data management processes or options for establishing referral processes. The network co-ordinator could add value to the network's operation as a whole, as well as to individual businesses within the network whilst improving the provision of management information for the Commission. However, it will be very important to guard against this becoming an extra layer of bureaucracy, and it the post-holder becoming seen as intervening in the affairs of independent firms and agencies, which is why the profession and advice sector should be involved in the further development of this role.

Budget allocation

129 The contracts, including output targets, should be based on indicative budget allocations for local areas. It would need to be a flexible process to allow for changes and sudden shocks to the system, but such a system would ensure allocation took account of levels of deprivation. It would clearly enable comparisons to be drawn between the nature of the local/regional area and the level of spending on legal problems.

130 The allocation of social welfare funding should be based on a formula using data from means tested benefits e.g. income support as a proxy for legal aid eligibility. The overall budget for the region (for instance, by adding together the top tier allocations

for all local authorities in the region) should be managed without variation – for example, a fixed regional budget but variation within it from one top-tier local authority area to another. The Legal Services Commission should manage its budget in consultation with other national, regional and local funders, wherever those funders are willing to manage their budgets in the same way.

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.

Civil legal representation

131 The introduction of tailored fixed fees by the Commission represented a move away from simple hourly rates in controlled work in most categories of civil law. There has also been the introduction of the Family graduated fee scheme for the Bar. However, there has not been a similar move away from payment by hourly rates in civil representation. Both litigators and advocates are still billing for work based on hourly rates and paid ex post facto. Of course, in successful cases, payment in civil categories tends to be at inter-partes private rates due to cost recovery.

132 The net amount spent on civil representation has been in the region of £100 million per annum in recent years, of which around two thirds has been spent on housing and clinical negligence cases, whilst the other third is spent on a dozen or so other categories of law. The overall net level of expenditure is therefore relatively small compared to other areas of legal aid. This, together with the fragmentation between the different categories and the relatively low spend and volumes involved, means it is difficult to produce a standard fee regime for civil representation which would work effectively for all categories.

133 Further consideration should be given to the possibility of separate standard fee regimes for representation in housing and clinical negligence. However, housing covers a wide range of law such as housing disrepair through to repossession, whilst clinical negligence is a particularly complex area that might not lend itself to standard fees without a great deal of further work.

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.

Regional services

134 There should continue to be a number of regional level services provided by suppliers in non-social welfare categories of the law, where the nature of the work means that there is an insufficient case volume within local areas, or work is concentrated in particular locations. A supplier providing such a regional level service should not be confined to taking only clients from one particular region, as the model needs to be flexible enough to allow suppliers to take clients who are referred from elsewhere in the country. There is likely to be more than one supplier in any region for any category of law. This will ensure a degree of choice, and avoid any potential conflicts of interests. All the schemes are covered in more detail in DCA and the Legal Services Commission’s consultation paper, including the levels of fees. The Commission should ensure that the level of remuneration is sustainable within the overall legal aid budget, and consistent with maintaining a quality supplier base.

Mental health

135 The Legal Services Commission is proposing that mental health suppliers move to payment through a graduated fee scheme. This is covered in detail in DCA and the Legal Services Commission’s consultation paper. The proposed graduated fee scheme should take account of the complexity involved in some cases, as well as providing remuneration for representation before the Tribunal. Mental health services would be provided through either centres or suppliers in networks, as well as specialist suppliers operating at a regional level.

136 The Commission proposes that supply should tend to be focussed on detained clients and would be based around hospitals. In order to allow choice of legal representative for clients, work at particular hospitals or groups of hospitals should be divided into units which suppliers can compete for, so that there would be a number of contracts at each hospital.

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).

137 Contracts should include community care provision and any follow up to the client once released. It is also proposed that mental health suppliers should be able to provide advice for their clients in social welfare categories of law. Such advice could be provided through their own legal competence or through links with social welfare law suppliers. This link would work best through participation in networks.

Education/Actions against the police/Clinical negligence/Public law

138 There are relatively small volumes of work in these categories, and they are likely to lend themselves more to suppliers operating at a regional level with links into networks (and if they exist, the local centres) and family suppliers. It would not be practicable to have such suppliers in every local area, but it is proposed that suppliers should be paid by fixed fees for work at the legal help level.

139 With all these services, such as actions against the police, it is important that potential clients are aware of the legal services that are available. This means it is important that good links are made, between networks or centres and suppliers in these services, and referrals made where necessary.

Asylum and immigration

140 This is a complex area of law and it is very difficult to construct a single straightforward remuneration scheme that can deal with all the different processes that exist, not least because virtually all legal aid work, including representation at the Tribunal, is funded as controlled work. DCA and the Commission's consultation paper provides details of a graduated fee scheme that has been devised to apply to around 75% of all asylum clients and to all eligible immigration clients.

141 The Commission is proposing to have a small network of national and possibly regional level services provided by suppliers, and that these are supplemented by smaller local suppliers from both private practice and the not for profit sector. It is anticipated that these suppliers will be based predominantly near induction centres, hearing centres, detention centres and removal centres and in areas of high dispersal but that they will be able to provide services through outreach wherever they are required. Providing services in this way will ensure continuity for clients as they are moved around the country whilst reducing the possibility of them receiving duplicate advice from more than one supplier.

Family contracting

The graduated fee scheme for solicitors – private law family

142 The review endorses the introduction of a graduated fee scheme for solicitors in private law family work. This is proposed in DCA and the Commission's consultation paper, and is consistent with the Legal Services Commission's direction of travel in private law family. The Commission's work in this area has been sign-posted through its current family help pilot, and its move to replace the current tailored fixed fee scheme in the next contracts round in April 2007. It is recognised that the family help pilot involves only a small number of suppliers, but it has still provided valuable insights into how such a scheme works.

143 The new payment scheme should be designed to promote the early settlement of disputes where it is appropriate, with better outcomes for clients and less reliance on litigation. The scheme should therefore address the current potentially perverse incentives to proceed to a legal representation certificate. Where possible, the new scheme should reduce bureaucracy for suppliers and the Commission by simplifying the levels of service and reducing the administrative burden. This should be attractive to practitioners, but in addition to reducing bureaucracy, any scheme should provide incentives to practitioners to take on work and reward efficiency. In addition, of course, it is particularly important that any scheme should provide greater certainty over costs and spending for both suppliers and the Commission.

144 In line with the above objectives, the Commission has developed a graduated fee scheme for family help. This should pave the way for a comprehensive graduated fee scheme for solicitors undertaking private law family. Domestic violence cases that start as emergency applications are not covered by the proposed scheme, but where an emergency application has been made, the rest of the work done under the case should be done under the new scheme.

145 The detail of the graduated fee scheme is subject to consultation by DCA and the Legal Services Commission in their consultation paper, and this includes details of the fee levels.

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.

The graduated fee scheme for solicitors – public law children

146 The Legal Services Commission should move away from payment by hourly rates to a graduated fee scheme for solicitors undertaking section 31 child care proceedings work.

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.

147 The Commission has developed proposals for a new graduated fee scheme for solicitors that covers existing legal help and a new higher level of service to create a staged approach to the fee structure. The scheme is aligned with the judicial case management protocol, and should work under both

the current protocol and once the protocol has been reformed. It is acknowledged that the system is relatively fluid, as for example, a case moving from the High Court to a lower court and possibly back again, and payment should reflect this. The detail of the proposed scheme is in DCA and the Legal Services Commission's consultation paper, including the fee levels.

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.

Tendering for family contracts – private law and public law

148 Tendering for a family contract should involve potential suppliers bidding against a set of criteria. In respect of private law family, it should involve assessing their ability to deliver a contract on the basis of the quality, capacity and price needed against a set budget. The set budget should be a consequence of:

- historical data on demand for advice and representation in private law family, and hence potential case-load;
- standard fees for categories of work, and
- in due course, the share of work which the firm has been successful in gaining.

149 Contracts should be tendered on the basis of local authority top tier levels, although this will need to be validated by the Commission against the location of care centres in order to gain an understanding of volumes of work passing through a particular contract area. This should not mean that the firm must only take clients from within that particular geographical area. However, the area should provide a reasonable, indicative volume of work, and using the local authority area as the framework ought to facilitate links with civil suppliers.

150 Standard contracts should be up to three years in length, but there should be allowance for firms delivering a particularly high quality service, and those that are not yet of the required quality but seeking to make improvements.

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.

151 The allocation of matter starts to contract holders should be decided on the basis of a three-stage process.

(i) Preferred supplier

152 Matter starts should be allocated consistent with the preferred supplier strategy, which in family should be those suppliers who:

- adhere to the Law Society family law protocol applicable in private law cases and the good practice in child care cases;
- demonstrate that they are working with suppliers linked in to other services; and
- fulfil stringent financial checks and the relevant peer review standards.

(ii) Local need

153 Local legal needs should, of course, determine the allocation of matter starts. Whilst this can be difficult to predict accurately, there are a series of proxies which can be used e.g. historical data from firms, population data and local authority data. Such an analysis should provide an indicator of local need and an understanding of the number of matter starts likely to be required in a particular area.

(iii) Minimum and maximum contract sizes

154 Once preferred suppliers have been identified, and local need has been identified as far as possible, the numbers of new matter starts should be allocated to firms on the basis of minimum and maximum contract sizes. These should be set on the basis of the need to retain sufficient numbers of suppliers in a local area (given the multi-party nature of family work), as well as the need to encourage those suppliers who wish to grow to do so wherever possible.

155 The contracts would set targets for outputs of cases to be delivered in return for payment. The output targets should be flexible, as there should be a range of outputs (e.g. cases completed), subject to achieving the basic floor level, with extra payments for achieving over and up to a certain output. The contract should not just set output targets, but require a certain number of hours worked. If only case volumes are targeted, there is a risk that suppliers may not wish to pursue complex cases. However, if a target is based upon hours worked only, there is equally a risk that ultimately smaller volumes of cases are undertaken. The combination of cases and hours should drive better performance in terms of cases completed and quality.

156 The contracts should include service level agreements setting out desired performance standards. Ideally, this should set out desired outcomes. Although it is very difficult to identify a 'good' outcome in this area, the standards should focus on encouraging desirable behaviour in suppliers. For example, there could be indicators relating to forging links with other suppliers through networks, or seeking to ensure only appropriate cases proceed to court proceedings (i.e. the number of applications which result in certificates). The performance standards could also be concerned with the number of settled cases, % resolved at first issue, % cases resolved outside of court, the % through mediation and so on.

157 Payment should be in advance for legal help, with payments reconciled against actual work completed, although responsibility for doing this would rest with practitioners. In order to facilitate

payment mechanisms and performance monitoring, highly skilled relationship managers could be needed in order to manage a more sophisticated and collaborative relationship between the Legal Services Commission and suppliers, in a way which enables risks to be shared and any issues to be identified and resolved swiftly.

158 Over time, the Legal Services Commission should look to introduce more elements of best value competition, as it moves to minimum and maximum size contracts, with quality and service delivery as essential ingredients in the tendering process. The introduction of contestability for different size contracts would need to take into account the requirement to have separate representation for the different parties in family law cases. This means there has to be a minimum number of suppliers in a reasonably sized geographical area and any competition will need to be carefully managed.

159 For example, the potential caseload in the area could be divided into 10 nominal units, and depending on the area, a supplier can bid for up to six units of work and no less than two units. This would vary depending on the nature of the area, as the bidding round would be more competitive in an urban area with a larger number of suppliers, whereas it would need to be more carefully managed in rural areas with few family suppliers. There are a number of options for the geographical basis upon which suppliers can bid. However, to facilitate the creation of stronger links between family law and other civil categories through local networks, it is proposed that the area should be based on top-tier local authority areas.

160 Family contracts for public law children should similarly involve potential suppliers bidding for contracts against a set of criteria relating to quality, access and value for money within a similar size geographical area.

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.

5. Assessing the impacts and managing the transition

1 In line with the aims and criteria given in Chapter 1, there has been constant consideration of the impact of reforms throughout the iterative design of the procurement system. The assessment of impacts has been focused on four areas:

- the clients who receive legal services;
- the firms, solicitors, not-for-profit organisations and barristers who supply legal services;
- the Legal Services Commission and DCA; and
- the wider justice system.

2 This chapter sets out the key positive and negative impacts in each of these areas and includes details of how negative impacts can be mitigated through a carefully managed transition to the new procurement arrangements.

3 The chapter also considers proposals for strengthening quality assurance mechanisms, and sets out the responsibility of the legal profession for ensuring that quality services are delivered by the profession.

4 This chapter focuses particularly on suppliers who undertake criminal legal aid work, as they are likely to be subject to the greatest procurement changes, and therefore experience the largest impact. It also includes an analysis of the impact on black and minority ethnic owned firms. However, recommendations about managing the transition to the new procurement arrangements will also apply to suppliers who focus only on civil and family legal aid work.

Access

Client confidence

5 Clients need to have confidence in their legal representative in order for justice to be fair and effective. Clients may want to choose a specific lawyer or firm for a number of reasons:

- some vulnerable clients and persistent offenders tend to relate better to those solicitors they know, and therefore this may help the process to focus on the key issues; and

- clients may also wish to choose and take up recommendations from friends, family and others, based on the reputation of a specific lawyer or firm.

6 The recommendations in this report should ensure that clients continue to receive quality advice and an efficient service. Clients that wish to retain links with a specific person or firm can do so if that person or firm has a suitable contract. There is also scope within the new scheme for practitioners to continue to provide advice to those clients outside their General Criminal Contract area(s).

7 In certain more complex cases, a client's choice of legal representative may not be equipped to deal with those matters that require specialised knowledge. The very high cost cases and possibly other specialist supplier schemes should provide clients with the best possible representation and ensure that complex or specialist cases of this nature are dealt with by specialist suppliers, thereby ensuring that the best possible service is provided.

Appropriate coverage

8 Access to quality legal services means that an individual is able to receive legal advice that is proportionate and appropriate to their potential or actual problem. Traditionally this would have meant that a solicitor's firm, which did legal aid work, was within a reasonable travelling distance. This still remains true for many people requiring legal advice, although the growing use of telephone helplines and the internet suggests that the public has alternative means of getting advice. It is important that the new procurement arrangements support access to face-to-face legal services and respond to legal needs as much as possible.

Impact on specific clients

9 The procurement reforms have been designed to meet the requirements of clients. It is a fundamental point worth restating that legal aid exists in the interests of the client. Legal aid is there to ensure that vulnerable and disadvantaged people are not denied access to justice because of their inability to pay, and those accused of committing a criminal offence are able to get a proper defence and

a fair trial. The recommended procurement schemes should create a stronger, more sustainable supplier base that ensures the client continues to receive a good quality legal service, and one that is delivered at a fair price to the taxpayer.

10 Under the recommended reforms, clients should be able to get access to quality legal advice and representation, with a reasonable choice of legal representative (this includes black and minority ethnic clients having access to black and minority ethnic lawyers if that is requested – the impact on black and minority ethnic suppliers is discussed later in this chapter). The reforms should also provide clients with even greater confidence in the quality of service they receive owing to the more robust quality assurance mechanisms being put in place such as peer review.

Putting quality first

11 Clients should receive the most appropriate professional advice for achieving just outcomes. The client should have confidence in the quality of the legal advice and assistance they receive which will help contribute to their overall sense of trust in the justice system. This requirement should be at the heart of any legal service procured with legal aid. But it equally applies to any client receiving advice or representation from an accredited legal professional.

12 Any method of procuring legal aid must have the individual who needs assistance at its centre. However, it is very difficult for any client receiving legal advice to know objectively whether the advice is 'good'.

13 When procuring legal services with legal aid, primarily from solicitors, there is a particular responsibility resting with the Legal Services Commission to have confidence that it is procuring good quality services. Quality has been, and should continue to be, the most important factor for the Legal Services Commission when it is awarding a contract for legal aid work to a supplier.

Assuring quality for legal advice, assistance and litigation

14 The Legal Services Commission has used various tools to assess whether suppliers are providing good quality services. The Specialist Quality Mark, the terms of its contracts with suppliers, and the funding code describe the responsibilities of suppliers, but while the Specialist Quality Mark has proxies to measure delivery of competent advice, it does not measure quality directly.

15 The Legal Services Commission has recently consulted on its major new initiative, the preferred supplier scheme, which should transform its relationship with solicitors' firms and not for profit agencies. Key to this initiative is the use of peer review. The assessment process is not confined to quality of service, but addresses other issues such as financial management.

16 Peer review is a quality assessment process that has been generally acknowledged as the most effective and preferred means by which the quality of legal advice and assistance by solicitors can be assessed on behalf of the client.

17 Peer review is an independent assessment undertaken by an experienced practitioner, who takes a random selection of closed files from a solicitor's firm and then produces a report on the quality of advice given by that organisation with a rating from 1 to 5 (1 being the highest). Firms that want to gain access to legal aid work will be expected to achieve a level 3 assessment, and in the longer term level 2 will have to be attained. In criminal legal aid, the threshold should start at level 3 for firms competing for very high cost criminal cases. However, the quality threshold will start at level 2 for police station work as soon as best value competition is introduced.

18 It is important that peer review is fair to all firms. The Managing Diversity Associates' (MDA) report¹⁹ (Research on Ethnic Diversity amongst suppliers of Legal Aid) commended the Legal

¹⁹ Managing Diversity Associates report for Legal Services Commission April 2006: Research on Ethnic Diversity amongst suppliers of Legal Aid services pp36-37

Services Commission for the steps they had taken to equality proof the peer review process, but recommended that the response rate to the diversity questionnaire, which would improve the validity of data, should be improved. MDA reported that black and minority ethnic firms interviewed as part of the research exercise 'supported the proposal for peer review as the best measure of quality'.

19 The Legal Services Commission should continue to demand quality, and set the required quality standards, as quality should continue to be the key test for deciding which suppliers to contract with, as reflected in the approach and specific reforms described in Chapter 3 and Chapter 4.

20 However, the responsibility for monitoring and assuring the quality of professional services should not lie with a procuring body, especially when that body is not the sole procurer. Instead, the Law Society should take responsibility for drawing up competency standards and for monitoring and assuring the quality standards required of solicitors undertaking publicly funded work. Not for profit agencies that have legal aid contracts, but do not employ a qualified solicitor, will need to consider how best they fall under the new quality arrangements, and whether they should develop their own advice standards (based on peer review).

21 One deficiency in the monitoring process is the absence of any consideration of the impact of the quality of advice on the wider justice system as a whole, and in particular on activity at court and compliance with court orders. This needs to be addressed.

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.

Assuring quality for advocacy

22 The Bar Council, like the Law Society, has a number of quality assurance mechanisms in place: a regulatory and disciplinary function; young practitioners' training; continuing professional development requirements; and monitoring and discipline. All these mechanisms are fundamental to maintaining a professional body, but neither they nor the designated qualifications that a barrister holds are an indication of a particular standard of quality.

23 A comprehensive quality assurance process has not been developed for barristers or advocacy skills more generally, and barristers and solicitor-advocates have not been subject to any equivalent to peer review or the Specialist Quality Mark by the Legal Services Commission.

24 The Bar Council has recognised the importance of quality assurance, and is setting up a new Bar Quality Review Board. The Bar Quality Review Board as proposed by the Bar Council would provide a focused element of peer review where other safeguards appear to have failed to deliver a competent and professional advocate. The Bar Council has suggested that the Bar Quality Review Board be regarded as a safety net designed to improve poor advocacy wherever it is found amongst barristers.

25 The Bar Council has demonstrated a clear willingness to enhance its current quality control structures, and its proposals should be welcomed as a very important development for the Bar. The proposals build on its existing structure of de facto quality assurance: training, feedback from clients, responding to complaints, and reports of poor performance.

26 However, as with legal advice, assistance and litigation, there is a client-driven need for the quality assurance of advocacy to be more than a reactive mechanism addressing specific complaints or concerns. This is especially important in the Crown Court (and higher courts) and family courts where advocacy, whether performed by barristers or solicitor-advocates, is a critical component of a client's legal service.

27 A swift move towards a proactive quality assurance process for advocates is required as a precondition of the new advocacy procurement system. Quality assurance should include a robust assessment process against which the required performance can be tested and a rounded system of appraisal (e.g. confidential feedback on performance from other advocates, Her Majesty's Courts Service and judiciary) as suggested above for improvements to peer review for legal advice, assistance and litigation. It could also include information about compliance with court orders. This should ensure that an advocate's ability to provide a general level of client service and effective interaction with the wider justice system is taken into consideration too.

28 Once an assessment system is in place an advocate should only be able to undertake legal aid work if they meet the necessary quality standard. This, together with their professional reputation, should underpin confidence in the ability of the advocate whose service is sought.

29 The Crown Prosecution Service is currently operating a system of preferred sets in London and the South East. But it is moving to a system of grading whereby they intend to secure involvement from the Bar and heads of chambers in accrediting practitioners offering themselves for publicly funded work. This latter model may be a further option to enhance quality for advocacy.

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.

Impact on suppliers: solicitors' firms

30 The Legal Services Commission has begun a process of quality assessment under which all legal aid firms will, by 2009, have undergone a peer review process. This process will involve a review by objective experienced practitioners. Quality should be the lynchpin of any market driven restructuring of the profession, and early results of the peer review process suggest that quality rather than price will be the key determinant of the number of firms that will emerge in the restructured post-transition market.

31 The definition of best value relies on quality, capacity and price. Quality has been deliberately placed first because it will be the first element to be tested (and precedes capacity and price) and because early indications are that it will have a greater impact on the number of firms that will participate than either capacity or price.

32 As described in the previous two chapters, the new procurement system has been designed to promote business structures that should enable legal aid suppliers to reach optimal efficiency for the local market, and hence sustain reasonable profits

to ensure the long-term future of legal aid. An efficient, responsive market driven by quality is also in the best interests of clients who need to be confident that they will receive the best advice regardless of which firm they choose.

33 The new procurement system is designed to provide predictable and more concentrated volumes of work so that costs can be reduced for both suppliers and the government.

34 Some firms have sufficient capacity now to undertake work in this way while other firms will have to adapt. Similarly, those firms that already operate in a way suited to the new procurement system may want to make changes to increase their ability to gain market share (within the anti-cartel limits set by the Legal Services Commission).

35 The transition period when suppliers adapt and change their business models to benefit from these procurement changes has to be managed to ensure that there are sufficient good quality suppliers available to provide a service to all clients in all areas. Arrangements to aid this transition are discussed and recommended towards the end of the chapter.

A possible scenario for impact on current suppliers

36 The changes in procurement, as set out in this report, may mean a number of firms with small publicly funded criminal practices are likely to need to change their current business structures to stay in the criminal legal aid market. The firms could increase their volumes of work by increasing their number of fee earners to gain a larger market share or they could achieve a similar outcome by merging with a similar or larger firm. Alternatively they might choose to leave the criminal legal aid market completely or focus on non-criminal legal aid services. Although the latter is an option it might not be viable for all firms. It is difficult to be precise about the exact impact of the recommended procurement changes, as this will depend on how firms respond to them, but the implications for the legal aid market have been modelled on the scenario that only firms with at least £50,000 worth of total criminal legal aid business continue in criminal legal aid.

37 Under this scenario, two groups of firms are identified:

- firms that are likely to need to adapt their entire legal aid business structures to stay within the criminal legal aid market (specialist crime firms, and other firms where criminal legal aid work is at least 60% of the total legal aid income); and
- firms that are likely to need to adapt part of their legal aid business structures to stay within the criminal legal aid market, but could continue to work with similar or revised structures to provide family or civil legal aid subject to the civil and family changes recommended in this report (firms for which crime work is less than 60% of total legal aid income).

38 Based on these two groups, the potential impact on the supplier base for criminal, family and civil legal aid nationally and by region has been identified. Unfortunately, a comprehensive data set does not exist for the private earnings of firms, and so it has not been possible to model the impact on the legal services market more generally.

39 Almost 2,200 firms do some criminal legal aid work. They make up just over half (53%) of the 4,083 firms that did some legal aid work in 2005. However, since these firms are, on average, larger than firms which do only family and civil work, these firms account for around 72% of total legal aid expenditure.

40 Most firms do some family or civil work alongside their criminal legal aid. Only 573 firms focused exclusively in criminal legal aid in 2005, while 1,599 firms mixed criminal legal aid with family or civil work. Together, these firms were also responsible for 59% of all family work and 40% of civil work.

Table 5.1 – National criminal legal aid supplier base

	Number of firms	Proportion of all legal aid firms	Proportion of all legal aid work	Proportion of all crime work	Proportion of all family work	Proportion of all civil work
Crime only firms	573	14%	10%	23%	n/a	n/a
Crime and family only	161	4%	3%	6%	3%	0%
Crime and civil only	223	5%	7%	14%	n/a	5%
Mixed firms	1,215	30%	51%	57%	56%	35%
Total	2,172	53%	72%	100%	59%	40%

Source: Legal Services Commission

41 Table 5.1 shows key statistics for the current criminal legal aid supplier base. It includes all firms which did any amount of crime work in 2005.

42 The recommendations for changing the current procurement regime will result in extensive restructuring of the legal aid market. The emphasis of the proposals has been upon providing incentives for firms to structure their businesses in such a way that legal aid services can be procured more effectively, and that the service is delivered more efficiently. But the restructuring of firms, whether through consolidation or other means of growing, is about developing efficient practices and not reducing the total number of solicitors in the overall legal aid market.

43 When the new working arrangements are introduced there may be a minimum requirement for a firm to have undertaken £50,000 of criminal legal aid work, based on historic data, in order that a firm have access to further legal aid work (see Chapter 4). Subsequently, when best value tendering is introduced it is likely that those firms with more than £50,000 of criminal legal aid work (and who meet the minimum quality threshold assessed by peer review) will need to increase the amount of defence work in order to compete effectively for new General

Criminal Contracts. The likely size required will differ around the country depending on local market conditions. The Legal Services Commission will provide an indication of likely size requirements when it publishes the new working arrangements and boundary areas in summer 2007.

44 The result of the scenario, which is illustrative only, may overestimate the impact of the supplier base in some areas (e.g. small market towns) given the supplier led restructuring that is designed to occur in advance of best value tendering. The result of this scenario is summarised in the following three tables. Table 5.2 shows the number of firms that may be affected by the recommended procurement system in the scenario outline. Table 5.3 shows the number of firms as a proportion of the total legal aid supplier base (including non-crime firms). Finally, Table 5.4 shows the importance of these firms in the context of the overall legal aid budget.

Table 5.2 – Number of firms affected by procurement changes in scenario <£50,000

	Current supplier base	Number of firms likely to need restructure	Number of firms unlikely to need restructure
Crime only firms	573	85	488
Crime and family only	161	39	122
Crime and civil only	223	53	170
Mixed firms	1,215	235	980
Total	2,172	412	1,760

Source: Legal Services Commission

Table 5.3 – Number of firms affected by procurement proposals, as a proportion of all legal aid firms in scenario <£50,000

	Current supplier base	Percentage of firms likely to need restructure	Percentage of firms unlikely to need restructure
Crime only firms	14%	2.1%	12%
Crime and family only	4%	0.9%	3%
Crime and civil only	5%	1.3%	4%
Mixed firms	30%	5.7%	24%
Total	53%	10%	43%

Source: Legal Services Commission

Table 5.4 – Firms affected by procurement changes, as a proportion of total legal aid budget

	Current supplier base	Percentage of firms likely to need restructure	Percentage of firms unlikely to need restructure
Crime only firms	10.2%	0.1%	10.1%
Crime and family only	3.3%	0.3%	3.0%
Crime and civil only	7.4%	0.4%	7.0%
Mixed firms	51.0%	3.3%	47.7%
Total	71.9%	4.1%	67.8%

Source: Legal Services Commission

45 Therefore under this scenario 10% (by number of firms) of the overall legal aid supplier base (4,083 firms) and 19% (by number of firms) of the criminal legal aid supplier base would need to adapt their business structures. These firms supplied approximately 4% of all solicitor services procured with the overall legal aid budget.

The impact of the new fee structures on good quality and efficient firms

46 This section sets out an analysis of the impact of the proposed recommendations on new fee structures and market restructuring on good quality efficient firms as modelled in discussion with the Law Society, Otterburn Legal Consulting and a range of suppliers. The section provides:

- a comparison of the new fee rates with the existing fee rates;
- an analysis of the new fee rates on a selection of model firms; and
- an assessment of the impact of modest efficiency savings on equity partner earnings.

47 As set out in Chapter 4, it is recommended that work in the police station should be paid according to a system of fixed fees. The fees should cover all work on the case including any time spent on travel and waiting. The fixed fee should cover all cases that

do not go over a threshold number of hours. The most complex cases that exceed the threshold number of hours will be paid the relevant fixed fee and will be paid according to hourly rates for all hours worked over the threshold.

48 Table 5.5 shows the new fixed fee, current average profit costs and the percentage difference between the two for each criminal justice system area. A comparison of current average profit costs per case with the new fixed fees in each criminal justice system area shows that the average criminal justice system area will see an increase in average fees per case of around £45, a percentage increase of 28%. The minimum percentage increase in police station fees for a criminal justice system area is 8%, observed in Nottinghamshire. This criminal justice system area has average profit costs that are currently high. Only five other criminal justice system areas have average profit costs that are higher: London, Hertfordshire, Kent, Surrey and Hampshire. The maximum percentage increase for a criminal justice area is 45%. This percentage increase occurs in London.

Table 5.5 – Comparison of new fixed fees and current profit costs in the police station

Criminal justice system area	Fixed fee	Average profit cost	Difference	Percentage difference
AVON & SOMERSET	£224	£175	£49	28%
BEDFORDSHIRE	£215	£174	£41	23%
CAMBRIDGESHIRE	£181	£148	£33	22%
CHESHIRE	£181	£146	£35	24%
CLEVELAND	£165	£124	£41	33%
CUMBRIA	£181	£143	£39	27%
DERBYSHIRE	£224	£176	£48	27%
DEVON & CORNWALL	£196	£167	£29	18%
DORSET	£165	£135	£30	22%
DURHAM	£196	£144	£52	36%
DYFED-POWYS	£196	£157	£39	25%
ESSEX	£224	£174	£50	29%
GLOUCESTERSHIRE	£196	£155	£41	26%
GREATER MANCHESTER	£215	£167	£47	28%
GWENT	£215	£156	£58	37%
HAMPSHIRE	£224	£183	£40	22%
HERTFORDSHIRE	£243	£191	£52	27%
HUMBERSIDE	£165	£144	£21	14%
KENT	£243	£187	£56	30%
LANCASHIRE	£181	£154	£27	18%
LEICESTERSHIRE	£224	£166	£58	35%
LINCOLNSHIRE	£196	£147	£49	33%
LONDON	£313	£215	£98	45%
MERSEYSIDE	£215	£168	£47	28%
NORFOLK	£215	£161	£53	33%
NORTH WALES	£196	£163	£33	20%
NORTH YORKSHIRE	£196	£147	£48	33%
NORTHAMPTONSHIRE	£181	£141	£40	29%
NORTHUMBRIA	£196	£149	£47	32%
NOTTINGHAMSHIRE	£196	£181	£15	8%
SOUTH WALES	£243	£178	£64	36%
SOUTH YORKSHIRE	£196	£158	£38	24%
STAFFORDSHIRE	£196	£161	£35	22%
SUFFOLK	£215	£166	£49	29%
SURREY	£243	£188	£55	29%
SUSSEX	£224	£170	£54	32%
THAMES VALLEY	£224	£176	£48	27%
WARWICKSHIRE	£215	£156	£59	38%
WEST MERCIA	£215	£167	£48	29%
WEST MIDLANDS	£224	£171	£53	31%
WEST YORKSHIRE	£196	£142	£54	38%
WILTSHIRE	£196	£169	£27	16%

49 In the magistrates’ court, the existing system of lower standard, higher standard and non-standard fees will be retained. However, payments for travel and waiting will no longer be separately reimbursed. The lower and higher standard fees payable for magistrates’ work will increase.

50 Table 5.6 compares the current fees for work in the magistrates’ court with the new fees. Lower standard fee rates will increase by between 23% and 28% and higher standard fee rates will increase by between 13% and 15%. The result is an increase in the lower standard fee rate of £57 for category 1 fees nationally and £85 for category 2 fees. The increase in higher standard fees equates to £71 in category 1 fees and £106 in category 2 fees at the national level.

51 Payments to solicitors in the Crown Court should no longer be paid ex post facto. Payments should be made according to a graduated fee similar to that introduced to pay advocates in the Crown Court. Payments will be graduated according to trial length and the number of pages of prosecution evidence. Since the new system is very different to the current system, it is difficult to compare the payments that would be made under the two. However, Table 5.7 shows payment under the graduated fee scheme for a selection of illustrative cases.

Table 5.6 – Comparison of current and new fees in magistrates’ courts

	Category	Lower standard fee				Higher standard fee			
		Current	New	Increase	Percentage increase	Current	New	Increase	Percentage increase
London	1	£262.32	£334.10	£71.78	27%	£621.87	£718.10	£96.23	15%
London	2	£461.72	£569.40	£107.68	23%	£1,037.11	£1,181.45	£144.34	14%
National	1	£203.80	£260.36	£56.56	28%	£490.21	£560.95	£70.74	14%
National	2	£359.84	£444.68	£84.84	24%	£825.32	£931.43	£106.11	13%

Table 5.7 – Litigation fee payments for example cases

Offence class	Trial length (days)	Pages of prosecution evidence	Number of defendants	Total trial fee (excluding VAT)
Homicide and related grave offences	4	10	1	£6,090
Homicide and related grave offences	4	10	2	£7,308
Homicide and related grave offences	4	100	2	£7,308
Homicide and related grave offences	4	500	2	£10,514
Homicide and related grave offences	10	10	1	£13,325
Homicide and related grave offences	10	10	2	£15,991
Homicide and related grave offences	10	100	2	£15,991
Homicide and related grave offences	10	500	2	£15,991
Burglary, etc	4	10	1	£1,502
Burglary, etc	4	10	2	£1,803
Burglary, etc	4	100	2	£1,974
Burglary, etc	4	500	2	£5,215
Burglary, etc	10	10	1	£2,570
Burglary, etc	10	10	2	£3,084
Burglary, etc	10	100	2	£3,084
Burglary, etc	10	500	2	£5,215

52 Table 5.7 shows that a four day case in the homicide and related grave offences class (class A) would receive a payment of between £6,090 and £10,514 depending on the number of pages of prosecution evidence and the number of defendants. For a four day burglary (class E) case, example payments range between £1,502 and £5,215.

53 The table also shows the fees that would apply for 10 day cases. A 10 day homicide or related grave offence would receive between £13,325 and £15,991. A 10 day burglary would receive between £2,570 and £5,215.

54 This report sets out significant changes to the way in which solicitors practising criminal legal aid will be remunerated. It also sets out a vision for a restructuring of the legal aid supply market. Given the scale of the changes recommended, it has been important to understand the impact of these new remuneration structures on good quality efficient firms.

55 To help understand the likely impact of the new fees and market structures on a good quality firm, the review has engaged in detailed discussions with the Legal Services Commission, a range of suppliers, the Law Society and Otterburn Legal Consulting. These discussions have focused on trying to understand how a good quality firm can structure itself to work efficiently in the new system. Based on these discussions, a number of model firms have been devised. These model firms have been used to test the impact of the new fee structures, to assess the sustainability of the new market and to understand the effects of efficiency improving measures on the part of firms.

56 Table 5.8 shows the projected profit per equity partner for five different model firms. The projected profit per equity partner is based on a range of assumptions about salaries, overhead costs, chargeable hours, mix of work and average case length (for details of the assumptions see Annex 5.1).

57 Table 5.8 shows that profit per equity partner increases substantially as the structure of a firm changes. It shows that a provincial sole practitioner (who is assumed to work 1,600 chargeable hours per year), will earn substantially less than an equity partner in even a small provincial firm (£36,000 vs. £63,000). For substantially larger firms, equity partner profits increase considerably. For example, in a 30 fee earner provincial firm, with a turnover of between £1.6 million and £1.9 million, an equity partner can earn between £110,000 and £140,000.

58 Table 5.9 sets out the assumptions on earnings for other categories of fee earner.

59 The same five model firms have been used to model the effect of modest efficiency savings on profits per equity partner. The efficiency savings that have been modelled take two forms:

- a saving of 5% in terms of the average number of hours per case; and

- a saving of 5% on overheads and non fee-earner costs.

60 Table 5.10 shows the projected profit per equity partner for each of the five different model firms under the assumption that each of the firms make an efficiency saving of 5% in terms of average hours per case.

61 The table shows that profit per equity partner would be around £39,000 for a sole provincial practitioner with a turnover of around £68,000. This is around a £3,300 increase (9%) in profit. For a provincial firm with one equity partner and 11 fee earners, profit per equity partner would be around £96,000, a £16,000 increase (20%). As firm size increases to 47 fee earners, profit per equity partner rises further to £142,000, a £20,000 (16%) increase.

Table 5.8 – Model firms projected profit per equity partner

Number of fee earners	Number of equity partners	Turnover (Provincial)	Profit per equity partner (Provincial)	Turnover (London)	Profit per equity partner (London)
1	1	£64,397	£35,797	£88,852	£55,118
5	1	£299,111	£63,411	£361,137	£89,471
11	1	£643,045	£80,495	£768,296	£121,729
27	2	£1,637,489	£109,005	£1,904,323	£137,162
47	3	£2,878,785	£121,948	£3,337,213	£151,049

Table 5.9 – Earnings assumptions for other categories of fee earners

	Salary of fee earner (Provincial)	Salary of fee earner (London)
Salaried partner (SP)	£76,500	£85,000
Associate (3-10 years call)	£46,350	£51,500
Solicitors (0-3 years call)	£23,940	£26,600
Other qualified fee earner (OQFE)	£26,100	£29,000
Unqualified fee earners (UQFE)	£14,400	£16,000
Trainee (Tr)	£18,360	£20,400
Support staff	£18,810	£20,900

62 Table 5.11 shows the projected profit per equity partner for the second scenario in which firms make a 5% saving on overheads and non-fee earner costs. Under this scenario, profits per equity partner are again higher than before. The increase in profit per equity partner is not as great as when savings of 5% on average hours per case are made for small firms but is larger for bigger firms.

63 Table 5.11 shows the profit per equity partner would be around £37,000 for a provincial sole practitioner. This equates to an increase of £1,000 (3%) relative to no savings. Profits per equity partner increase by £7,000 (11%) for a 5 fee earner provincial firm to £22,000 (18%) for a 47 fee earner provincial firm.

Impact on suppliers – not for profit sector

64 The recommended procurement schemes for civil legal aid, primarily the move to fixed fees for legal help and away from the funded post model enjoyed by not for profit agencies, are likely to have an impact on the not for profit sector. Not for profit suppliers tend to have a higher average cost in categories of law, such as debt and welfare benefits where they have the majority of contracts.

65 The new procurement scheme should require greater efficiency in the way that not for profit suppliers deliver legal services with legal aid. For example, many not for profit suppliers may need to

Table 5.10 – Model firms with an assumed efficiency saving of 5% for average hours per case

Number of fee earners	Number of equity partners	Turnover (Provincial)	Profit per equity partner (Provincial)	Turnover (London)	Profit per equity partner (London)
1	1	£67,786	£39,186	£93,528	£59,795
5	1	£306,794	£71,094	£372,085	£100,418
11	1	£658,894	£96,344	£790,737	£144,170
27	2	£1,671,844	£126,182	£1,952,721	£161,361
47	3	£2,938,727	£141,929	£3,421,283	£179,072

Table 5.11 – Model firms with assumed 5% saving on overheads and non-fee earner costs

Number of fee earners	Number of equity partners	Turnover (Provincial)	Profit per equity partner (Provincial)	Turnover (London)	Profit per equity partner (London)
1	1	£64,397	£37,227	£88,852	£56,805
5	1	£299,111	£70,561	£361,137	£97,904
11	1	£643,045	£96,225	£768,296	£140,282
27	2	£1,637,489	£128,310	£1,904,323	£159,932
47	3	£2,878,785	£144,352	£3,337,213	£177,473

increase the number of clients they help for the funding they receive, so that their productivity compares with private practitioners. This move to encourage greater efficiency should reward those not for profit suppliers who match the efficiency of solicitor firms, as they should make a surplus equivalent to those firms' profits and should be able to use that surplus to support its wider advice work, campaigning, policy work or lobbying. This should enhance the overall role of the not for profit sector and its wider social role.

Impact on suppliers – barristers and chambers

66 The recommended new procurement schemes have a short-term (one to three years) and possibly a long-term (four years or more) impact on the structure or advocacy services provided by the independent Bar. In the short-term there is a measurable impact on income.

67 Three factors are likely to combine over the next four years or more to effect the way advocacy services are structured and delivered. These factors are:

- the implementation of best value tendering for all criminal defence work from 2009 onwards;
- a decision on whether to move to a single graduated fee scheme in the Crown Court; and
- the emergence of a significant number of alternative business structures (where barristers' and solicitors' services are provided through single entities, possibly based on a chambers-type model) assuming the Legal Services Bill is enacted and implemented in its current form over the next few years.

68 These factors could eventually provide an opportunity for businesses offering legal services to provide more efficient litigation and advocacy for certain areas of work. If this market-led development of the legal services sector were to

appear after 2010, the independent referral Bar would continue to be an important and significant means of delivering high quality, experienced and efficient specialist advocacy in many instances.

69 As is set out in Chapter 6, by 2009-10 overall expenditure on Crown Court advocacy services will decrease by nearly 20% compared to 2005-06. The most significant driver of this impact will be the efficiencies derived from the final elements of ex post facto spend coming fully within the revised advocacy graduated fee scheme as set out in Chapter 4.

70 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. This means that while the value of ex post facto cases was increasing above inflation year on year the value of other cases have decreased by between 5-30% in real terms.

71 The impact of the new rates has been assessed against a basket of different Crown Court cases (see Table 5.12). 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%]. Most of the re-balancing has been directed towards the sorts of cases undertaken by more junior advocates as these cases have had their rates held flat longer than others over the past 10 years.

72 The impact of the efficiencies required from the removal of all ex post facto elements and the re-balancing of the revised graduated fee scheme have also been assessed. The assessment is based on sample of actual case and payment records for advocates of different levels of experience who appear to work full time in publicly funded criminal defence work. Using these advocates' caseload for 2005–06, estimated incomes, as shown in Table 5.13, have been calculated using the revised graduated fee scheme. Overheads are assumed at 35% based on a sample study in 2005 of 28 barristers across all years of call. Overheads include chambers rent and

personal work related expenses and do not include any allowance for pension contributions or tax.

73 The table shows that good quality and efficient advocates who are fully employed in publicly funded criminal defence work can expect appropriate remuneration for the work undertaken. For example, a relatively new advocate of up to five years call could expect to earn in around £50,000 under the proposed graduated fee scheme, while an experienced advocate of 10-15 years call could expect to earn over £80,000.

Table 5.12 – Impact of proposals on basket of Crown Court cases

Level of experience (years of call)	Change in payment for typical basket of cases
15+ years (QC)	-3%
15+ years	+5%
10-15 years	+12%
5-10 years	+20%
1-5 years	+18%

Table 5.13 – Potential earnings of sample full time advocates

Level of experience (years of call)	Typical age of advocate	Potential earnings (gross)	Potential earnings (net of overheads)
QC	40+	£196,000	£127,000
15+ years	40+	£125,000	£81,000
10-15 years	35-39	£129,000	£84,000
5-10 years	30-34	£100,000	£65,000
1-5 years	24-29	£76,000	£50,000

74 These earnings only represent defence work in the Crown Court. Full-time advocates (especially as they increase in years of call) are likely to replace or complement their graduated fee scheme work with more very high cost case work and prosecution work for the Crown Prosecution Service (or other prosecuting agencies) as well as any privately funded work.

Impact on suppliers – black and minority ethnic firms

The importance of diversity amongst suppliers

75 The recommendations in this report are intended to create a system within which a diverse choice of quality assured legal representation is procured for clients. This section assesses the impact of the reforms on black and minority ethnic firms and solicitors, and outlines measures designed to ensure the continuation of a diverse supplier base.

76 Some black and minority ethnic practitioners have set up their own firms because that suits the way in which they want to practise, but others have said that barriers within large firms – a ‘glass ceiling’ – hinder their prospects. It is essential that those barriers, or even the perception that such barriers exist, should be removed.

77 All clients should have confidence in the quality of legal advice and assistance provided by lawyers. Changes to the current arrangements for the procurement of legal aid services should recognise the needs of all groups and ensure that there is an appropriate, high quality and diverse supplier base. Diversity is important to the supplier base, but it is equally important that suppliers are able to work effectively with a diverse population in whatever area they might be operating in.

78 Some black and minority ethnic practitioners see their key role as serving the black and minority ethnic communities and say that some black and minority ethnic clients express a preference for lawyers of their own background. There is a clear relationship between ethnicity of clients and black and minority ethnic firms (defined as firms with a majority of black and minority ethnic partners) as shown in the Table 5.14, which shows client ethnicity by ethnicity of majority managerial control. However, black and ethnic minority practitioners serve all communities, and it is important that high quality advice is available to all clients regardless of their background.

79 While there is a demonstrable link between use of black and minority ethnic firms by black and minority ethnic clients, there is also a strong connection between the percentage of black and minority ethnic firms and the make-up of local black and minority ethnic populations across most regions (see Tables 5.15 and 5.16²⁰). This could suggest that the correlation may be as much about location as preference.

The profile of black and minority ethnic suppliers

80 Although there is no single comprehensive database of all black and minority ethnic firms and practitioners in England and Wales, the Law Society and the Legal Services Research Centre hold data from which projections can be made.

²⁰ Population data taken from the Census 2001, Key Statistics for England and Wales, Table KS06, Office for National Statistics 2001. Black and minority ethnic firm and solicitor data taken from 5th Annual Diversity report September 2005 for Legal Services Research Centre. Response rate to Equal Opportunities Monitoring Section was 48.6%; paragraph 1.2.3 of the 5th Annual Report.

Table 5.14 – Client ethnicity by ethnicity at majority managerial control

Client ethnicity	Majority managerial control												
	White British	White Irish	White Other	Mixed White/Black Caribbean	Mixed White/Black African	Mixed White/Asian	Asian/Asian British Indian	Asian/Asian British Pakistani	Asian/Asian British Other	Black/Black British Caribbean	Black/Black British African	Chinese	Other
	N=1154	N=2	N=11	N=1	N=1	N=1	N=37	N=13	N=17	N=5	N=19	N=4	N=1
White British	123635	214	456	.	5	7	1189	713	213	92	368	15	.
White Irish	778	1	7	.	.	.	31	11	33	4	16	2	.
White Other	2453	3	79	.	1	4	479	166	254	15	133	160	2
Mixed White/Black Caribbean	691	3	1	.	.	5	37	19	15	4	28	.	.
Mixed White/Black African	282	.	1	.	.	.	180	6	139	.	154	1	1
Mixed White/Asian	186	.	2	.	.	.	8	2	2	1	1	.	.
Mixed Other	234	2	2	.	1	.	13	4	7	.	7	.	.
Asian/Asian British Indian	1631	.	7	.	.	.	585	34	109	18	22	5	2
Asian/Asian British Pakistani	2807	1	10	.	.	.	323	204	132	15	57	.	18
Asian/Asian British Bangladeshi	815	.	11	.	.	.	102	34	54	4	28	3	.
Asian/Asian British Other	680	2	7	.	.	.	183	1291	414	4	56	103	.
Black/Black British Caribbean	3516	10	13	.	5	3	139	84	253	85	311	18	.
Black/Black British African	7198	13	126	63	6	1	1827	483	2216	67	2014	80	148
Black/Black British Other	1006	6	4	.	.	.	69	29	36	7	33	1	3
Chinese	391	.	12	.	.	1	51	289	57	2	137	73	.

Source: Legal Services Commission Research Centre

Table 5.15 – Black and minority ethnic solicitors and their regional distribution against black and minority ethnic population

Regional breakdown of solicitors	White British		Black and minority ethnic		Total no. solicitors
	Solicitors %	Population %	Solicitors %	Population %	
East	91.2%	91.5%	8.8%	8.5%	1,024
East Midlands	91.7%	91.3%	8.3%	8.7%	1,105
London	56.3%	59.8%	43.7%	40.2%	2,556
Merseyside	91.9%	95.3%	8.1%	4.7%	297
North East	98.4%	96.4%	1.6%	3.6%	616
North West	92.2%	91.4%	7.8%	8.6%	1,645
South East	92.1%	91.3%	7.9%	8.7%	1,443
South West	96.5%	95.4%	3.5%	4.6%	1,451
Wales	96.1%	96.0%	3.9%	4.0%	830
West Midlands	82.5%	86.2%	17.5%	13.8%	1,330
Yorkshire & Humberside	88.8%	91.7%	11.2%	8.3%	1,406
Total	85.0%	87.0%	15.0%	13.0%	13,703

Source: Legal Service Commission Research Centre

81 The first of these tables indicates that black and minority ethnic solicitors, as a percentage of total solicitors from the sample, are proportionately larger than the black and minority ethnic population mapped against the total population of England and Wales (15% to 13%). In terms of firms the black and

minority ethnic populations are nearly matched 11.9% to 13%. London stands out in terms of the size of its black and minority ethnic population (40.2%), and the percentage of black and minority ethnic solicitors is 43.7%.

Table 5.16 – Black and minority ethnic firms and their regional distribution against black and minority ethnic population

Regional breakdown of firms	White British		Black and minority ethnic		Mixed Firm %	Total no. firms
	Firms %	Population %	Firms %	Population %		
East	90.6%	91.5%	3.0%	8.5%	6.4%	202
East Midlands	87.9%	91.3%	7.5%	8.7%	4.6%	173
London	45.5%	59.8%	42.6%	40.2%	11.9%	479
Merseyside	98.3%	95.3%	1.7%	4.7%	0.0%	59
North East	98.1%	96.4%	1.3%	3.6%	0.6%	157
North West	93.1%	91.4%	5.5%	8.6%	1.4%	346
South East	93.4%	91.3%	2.6%	8.7%	4.0%	303
South West	98.5%	95.4%	0.8%	4.6%	0.8%	262
Wales	90.9%	96.0%	7.0%	4.0%	2.1%	187
West Midlands	84.8%	86.2%	12.1%	13.8%	3.1%	257
Yorkshire & Humberside	88.6%	91.7%	7.5%	8.3%	3.9%	254
Total	83.7%	87.0%	11.9%	13.0%	4.5%	2,679

Source: Legal Service Commission Research Centre

Table 5.17 – Regional impact in roll-out areas by legal aid income²¹

Crime firms under £50,000	White British		Black and minority ethnic	
	Local %	National	Local %	National
East	22%	1.6%	25%	0.6%
East Midlands	26%	1.9%	0%	0.0%
London	12%	1.2%	22%	13.6%
London – North	13%	0.8%	22%	10.4%
London – South	11%	0.3%	24%	3.2%
Merseyside	16%	0.4%	0%	0.0%
North East	34%	2.4%	0%	0.0%
North West	24%	3.6%	25%	1.3%
South East	20%	2.6%	25%	0.6%
South Eastern	19%	1.3%	0%	0.0%
Southern	22%	1.4%	50%	0.6%
South West	34%	3.6%	100%	0.6%
Wales	32%	2.4%	33%	1.3%
West Midlands	18%	1.8%	17%	1.9%
Yorkshire & Humberside	26%	2.6%	15%	1.3%
Total		24.1%		21.4%

Source: Legal Service Commission Research Centre

82 The awarding of any legal aid contract should be done on a level playing field. All firms, must meet an adequate quality threshold if the fundamental principles of access to justice are to be upheld.

83 Should a minimum quantity threshold be put in place in any area, then a firm’s capacity to meet the threshold, and therefore its size becomes relevant.

84 Table 5.17 shows the percentage of firms that are likely to have to restructure so that they can compete for a criminal contract under the new procurement regime.

85 The impact in Table 5.17 is modelled on a financial threshold of £50,000 for the minimum contract sum. For each region, there is a national impact figure and a regional impact figure. For example, for firms in the East of England holding criminal contracts of less than £50,000, 22% of white British firms may have to restructure their businesses. In the same region, 25% of black and minority ethnic firms holding criminal contracts might need to restructure because their current contracts are less than £50,000.

²¹ Black and minority ethnic firm and solicitor data provided by Legal Services Research Centre: from 5th Annual Diversity report September 2005 for Legal Services Research Centre. Response rate to Equal Opportunities Monitoring Section was 48.6%; paragraph 1.2.3 of the 5th Annual Report.

Crime solicitors

86 Table 5.18 shows the percentage of solicitors (working in crime) likely to be at risk if their practice does not restructure in a way that will allow them to win a new General Criminal Contract under the recommended procurement system. The basis of the data is the same as Table 5.17.

87 As with the data for the firms, the national picture for solicitors is similar in impact. Again white practitioners are marginally more at risk than black and minority ethnic firms.

88 Looking at what this means in terms of individual solicitors, there are still regional differences. But, significantly, the pattern of impact for firms in London is not the same for solicitors: black and ethnic minority solicitors are less at risk (18% to 26%).

89 However, it should be noted that the precise impact of the arrangements can only be estimated as firms will have two years in which to restructure. Consequently the scenarios described are likely to be an upper bound on potential impacts.

Securing a diverse sector

90 Some black and minority ethnic firms expressed concern about the impact of the proposals outlined in the interim report. Changes made to these proposals address many of the concerns expressed, and have resulted in impact figures that differ considerably from those in the Managing Diversity Associates’ report for the Legal Services Commission for London Competitive tendering.

Table 5.18 – Regional impact in rollout areas by legal aid income

Crime solicitors under £50,000	White British		Black and minority ethnic	
	Local %	National	Local %	National
East	16%	1.0%	15%	0.6%
East Midlands	16%	1.5%	3%	0.1%
London	26%	3.9%	18%	9.9%
London – North	31%	3.8%	18%	8.1%
London – South	5%	0.1%	15%	1.8%
Merseyside	27%	0.7%	36%	0.4%
North East	25%	1.3%	50%	0.1%
North West	17%	2.3%	16%	0.9%
South East	17%	2.0%	22%	1.1%
South Eastern	14%	0.7%	12%	0.2%
Southern	20%	1.3%	28%	0.9%
South West	19%	1.6%	6%	0.1%
Wales	24%	1.7%	33%	0.4%
West Midlands	10%	1.0%	15%	1.8%
Yorkshire & Humberside	19%	2.2%	9%	0.7%
Total		19.1%		16.3%

Source: Legal Service Commission Research Centre

91 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.

92 A number of measures have been recommended to help sustain a diverse supplier base (see Recommendation 5.4). Further, businesses that wish to restructure should be given assistance to do so, as described below, and will have up to two years to achieve efficiencies before the introduction of best value tendering. There will also be a three month period of consultation after the publication of this report in which any outstanding concerns can be raised and addressed.

93 The recommendations in this report differ significantly from those put forward for London competitive tendering by the Legal Services Commission. In particular, it is recognised that an immediate price based competition is not sustainable and that transitional support may be required. Further, it is recognised that while it is important that there are black and minority ethnic firms available to service the needs of local populations, it may be more important for clients that their needs are met through the provision of high quality advice from black and minority ethnic lawyers, regardless of the firms and chambers in which they work.

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.

94 The Legal Services Commission has an important role to play in monitoring and promoting diversity within its suppliers, and most particularly during the transitional period when the market will be restructured. There is a clear need for diversity experts within the Legal Services Commission to advise and report to a wider diversity group that should consider issues across legal aid delivery from the client to the supplier.

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.

Managing the transition

95 As discussed earlier in this chapter, the process of restructuring and transition towards steady state must be managed carefully. The government is under a duty to ensure that there are sufficient good quality suppliers available to provide a service to all clients in all areas. There is also a duty to make sure that specific needs, such as among black and minority ethnic clients and communities are served fairly and adequately.

96 Managing that process of transition should be a shared responsibility – firms that are interested in continuing in legal aid or in entering the market will be expected to demonstrate the necessary quality standards. Through a demonstration of the required competence and quality, efficient firms should be able to grow their business and reduce costs under the recommended new procurement system. Firms that invest in restructuring and growth should be offered support to undertake the necessary transformation.

97 Changes to the procurement system should be phased to allow firms to adapt to the new market conditions and procurement changes. Once firms have shown they have attained both the required standards of quality and capacity, which may vary across regions, they should be able to take part effectively in the best value tendering process from 2009 onwards.

98 In general, the scale and nature of financial support via banks, and the level of complementary professional services available from accountants, tax advisors and consultants, should provide the means for suppliers to adapt to the new procurement arrangements. What may be available to a particular firm will of course depend on individual circumstances.

99 The lending institutions have traditionally been well disposed towards the legal sector. There should be no reason why this should change in light of the recommendations in this report. Moreover, the proposed changes to working arrangements that provide greater guarantees of access to larger volumes of work and which allow firms to grow their business at lower cost should make it easier for firms to access finance. Banks will continue to screen firms with growth aspirations, focusing on sustainability of income, business acumen and appropriate professional support.

100 Investment in information technology systems and the streamlining of processes to enable firms to become more efficient and generate greater profit should be complemented by the Legal Services Commission taking similar action to address overly bureaucratic processes, onerous checking procedures and inadequate information technology capabilities.

Financing restructuring in the legal aid supplier base

101 It is recognised that firms with the quality, scale, infrastructure, capacity and business acumen to respond to the market based reforms should be able to take up the opportunities presented under the new procurement arrangements.

102 Similarly, firms that are already efficiently structured may want to increase their capacity through recruitment or other methods of expansion, while less efficient firms that want to remain in the market might look for opportunities to consolidate, grow or amalgamate in order to allow appropriate restructuring and generate efficiencies.

103 However, some firms may not have the business knowledge to make the necessary changes, and so assistance in the shape of expert advice should be made available to help them make the required transition.

Lending institutions support for legal aid firms

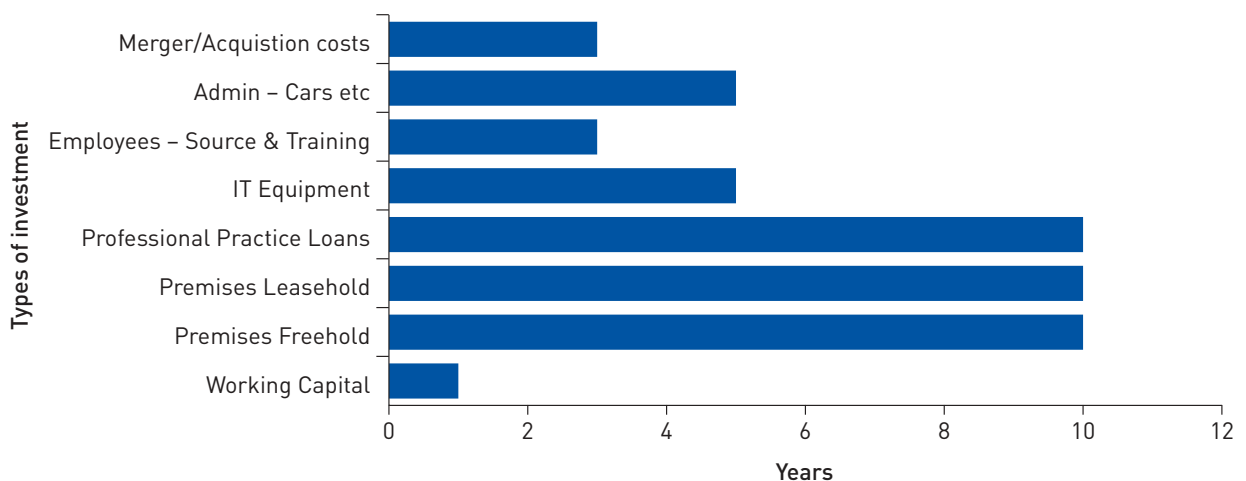
104 The lending institutions have usually viewed the lending and business risks of the larger firms more positively than the smaller practices, as larger firms can often commit specific resources to financial management and tend to be more committed to

modernising their business. Larger firms also tend to benefit from a broader spread of clients and fee earners thus making them less vulnerable and more responsive to changes in the sector specifically, and macro business issues generally.

105 It is not only lending institutions that consider smaller firms and sole practitioners to be a greater risk than larger businesses, but the same is true of those providing professional indemnity insurance. Although there is an assigned risks pool which provides cover for firms that cannot get cover from qualifying insurers or cannot reasonably afford the terms available to them, there are limitations on assigned risks pool. Firms may need to pay a high premium and may be required to attend courses approved by the Law Society. Larger firms are generally in a stronger position to obtain cover as they are more likely to have better claims records and other risk factors may be lower than those for small firms and sole practitioners.

106 Although lenders will examine businesses on a case by case basis, it is likely that they will continue to provide support to the legal aid sector. It is suggested that the procurement changes should be attractive to lenders because they offer better security (standard fee regimes, better cash flow and larger contracts).

Figure 5.2 – Time profile for different types of firm investment



Source: Financial Services Sector

107 Most firms have accounts with one of the three largest high street banks. These banks often have relationship managers dedicated solely to clients within the legal profession. Many relationship managers within these banks are Lexcel accredited and should be in a position to help and advise firms through the transitional period.

108 Lenders are likely to raise the following issues and firms seeking finance to restructure would need to consider each one in advance of seeking appropriate support:

- how sustainable is the top line income stream of the business – is the business viable?
- what are the key risks to sustaining profitability margins?
- has a business plan been completed by an appropriately qualified professional and what funding requirement does it demonstrate?
- is the financial management of the business satisfactory for the task in hand?
- is the client base reasonably well spread – that is, no undue reliance on one client?
- what is the acumen/quality of the key people – how many fee earners are there and what is their track record?
- is the internal structure of the business appropriate to accommodate increased business?
- is the drawings policy of the business appropriate/sustainable?
- what is the level of information technology investment given the scale of the business and growth aspirations?
- what is the investment in people?

Length and terms of contracts

109 Lenders are likely to focus particularly on the sustainability of the top line income stream, the cash flow dynamics of the business, and the robustness of the gross and net profit margins. A key consideration

should therefore be length of the contracts and the terms they contain. These considerations are not only important for lenders, but also for the firms themselves, given that medium and long term business decisions on premises, staff and information technology investment are likely to be taken on the back of the length and volume of business won under contracts from the Legal Services Commission.

110 However, it is not only the length of the contracts that is important, but the manner in which payments are made by the Legal Services Commission. The procurement changes should help in respect of cash flow. This should have significant benefits for practices.

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.

Broader business support for firms in transition

111 Whilst there is likely to be support on the part of lenders willing to take the risk, there are many other business areas which firms should consider and decide upon, whether they are proposing to expand, consolidate or dissolve.

112 Figure 5.2 demonstrates the period of commitment that underpins strategic decisions on key business areas.

113 This shows how important it will be for firms to win and retain contracts when rebidding. For example, if a firm is contractually committed for 15 years under a property lease, the risks associated with having a shorter legal aid contract are clear.

114 Firms should have access to advice and support in considering if and how to bid, understanding the ramifications of not winning a contract and having a plan of action to deal with such a scenario. Such support should include:

- consultancy and professional advice on property issues;
- assistance regarding employee contracts;
- assistance on whether financial assistance/grants might be available;
- tax advice for dissolution or merger;
- information technology advice and support advice/support;
- consultancy support for buying and selling a business;
- personal pension advice on implications of dissolving a business;
- the Legal Services Commission help desk facilities;
- the Legal Services Commission relationship management support; and
- general support to bid or undertake a strategic review and produce a business plan.

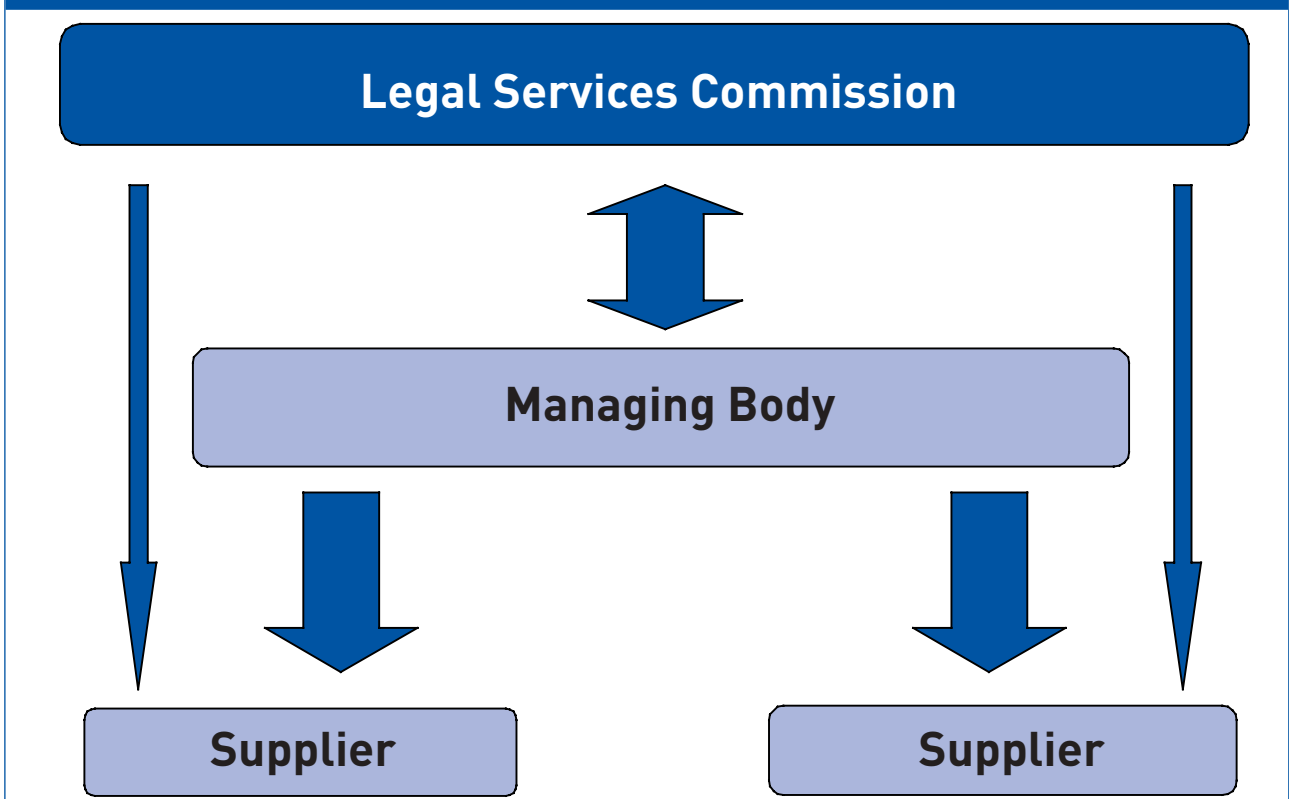
115 There already exist some specialist advice services for small and medium businesses such as 'Business Link' via the regional development agencies. While these can provide advice and assistance in some areas, it may be preferable for a more bespoke programme of support to be established.

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.

Options for suppliers during the transitional period

116 There are a number of models which firms could adopt to increase capacity, such as consolidation, expanding through increased recruitment or sub-contracting. In the short-term consolidation may be the preferred means for small firms to develop.

Figure 5.3 – Possible model for a relationship with the Legal Services Commission



117 For example, firms that wish to consolidate and reduce their overheads could share common services or outsource those services to another supplier. There are two potential models: (i) provision of back office functions including information technology by a larger firm or (ii) use of a third party. The Legal Services Commission will after April 2008 only issue crime contracts to single entities that can be held to account for performance and quality. This will mean either a single firm or a firm which has sub-contracting arrangements with other firms for the delivery of service.

118 It is understood that some firms are actively considering merger as a response to both the interim report and the recent consultation on preferred supplier. Civil and family firms may prefer to operate through networks if they provide civil and family legal aid service. A range of options is available, which should enable small firms to share in the efficiencies currently enjoyed by the larger suppliers, and others are already being actively developed.

Providing shared non-legal functions

119 Discussions with firms have highlighted a number of options open to smaller practices as a result of a sharing of resources. The most regularly identified advantage is access to advanced information technology systems, which would be potentially outside the budget of individual participant firms operating alone.

120 The most advanced current systems are tailored to the relatively limited number of possibilities for progression of criminal proceedings and link directly into time recording systems that flow into billing via the Legal Services Commission website. Users are currently further developing systems that build in automated quality control and produce reports highlighting deficiencies – a form of electronic peer review. A common case management system outside the financial reach of a single firm would be accessible to a number of firms operating together. Indeed, it should be regarded as an essential tool that would enable such firms to gain the efficiencies available to larger suppliers.

121 In addition to information technology, there are other options for consolidating back office functions. For example, secretarial functions could be pooled, or phone calls, messages and correspondence could be taken at a single point and re-routed to individual suppliers when required.

122 Models currently exist within which the entire back office function (including secretarial, administrative services, recruitment, training and even business development) is contracted out to a commercial provider. The degree of control relinquished by participating firms will vary, but can include the fixing of fee earners' salaries, the location of premises and the employment of administrative and management staff directly by the provider. Savings on overheads achieved could be as high as 30%, and partners and fee earners would be able to concentrate solely on fee earning work.

123 Another option is a franchise model. This has similarities to the approach for community legal advice centres. A parent organisation could franchise a number of smaller firms or sole practitioners. The parent organisation has the responsibility of ensuring quality and contractual compliance from the firms it franchises. If it fails to do so the entire contract is at stake. The advantage of the arrangement to both parent organisation and supplier is that this need not be a purely transitional arrangement. A model as shown in Figure 5.3 could continue to operate within a system of either competitive tendering or minimum contract size. There is scope for strategic management by the parent organisation of the ways in which the various firms operate, including acting as a clearinghouse for allocation of work to ensure that all participant firms are operating as efficiently as possible.

124 The main contractual relationship is between the Legal Services Commission and the managing organisation. The Legal Services Commission does however retain some direct contractual control with individual suppliers for exceptional use.

125 The delivery models suppliers choose will affect the willingness of organisations (crucially the Legal Services Commission) to deal with them as a single entity. Suppliers would need to be mindful of this as they develop their services, and in turn the Legal Services Commission will be clear on its requirements and expectations, as should the Law Society when control of quality is transferred to them.

126 As with other areas of growth and restructuring, there should be assistance, in the form of advice, for those suppliers who are interested in pursuing shared office functions.

Helping suppliers to meet the challenge

127 Firms and practitioners will need expert help to achieve the demanding transitional restructuring that many of them will face if they wish to continue supplying publicly funded legal services. That advice may be in relation to gaining knowledge about how to consolidate or grow, how to find a provider of back office services, borrowing and investment, or steps they may need to take in order to improve their efficiency.

128 Regional panels of independent advice providers could be established, particularly in areas where high numbers of smaller firms are seen to be at risk. They could offer a programme of support across a wide range of business issues. This facility would complement the advice that banks would give their clients once the timeframe and implications of the reforms were understood.

129 All criminal legal aid firms that want to restructure to compete for contracts should be given some means of financial support. All other firms delivering legal aid services should also be given financial incentives and advice on how to invest in modern information technology infrastructure provided certain criteria are met in bidding for that assistance. Any financial support available for firms and practitioners should be available to applicants for a period of two years. Any firm that receives a grant and subsequently fails to apply for a legal aid contract will be expected to repay the grant.

Assisting firms to restructure

130 Assistance to suppliers for legal aid services that need and want assistance to restructure could be facilitated by financial support from the government. External help could be provided to suppliers that want to merge or expand their businesses. There are a number of ways in which this help could be provided, however, a small pilot study undertaken by the review found that suppliers currently holding a criminal legal aid contract and wanting help in restructuring could be offered it at three levels. Not only would this staging advice help businesses make planning and investment decisions, but it should also help them, where appropriate, to take the necessary steps to transform themselves into more efficient businesses capable of competing for contracts.

131 Although firms could use the grant to obtain local assistance they might also want to use it through a device that offered firms three levels of advice as outlined below, and possibly facilitated by regional structures of exiting practitioner support groups.

132 The first level of advice would be presentational and delivered by independent specialists who would outline why firms may want to merge or expand; the economic advantages of growth; the steps required to merge or expand; and how to achieve growth. Local presentations would be made to groups of firms, and would be mandatory and part-funded by the firms as a condition of their grant. In effect these sessions will raise awareness amongst interested firms and practitioners about the opportunities and challenges that the new proposals will create. The options and routes open to firms together with the consequences of following each will also be outlined.

133 The second level of advice will be for smaller groups of firms based on information provided by supplier firms. Experts will run workshops for those firms that can demonstrate that they are currently or will be able to deliver the efficient structure required to compete effectively under best value tendering. These workshops will provide practical advice to the individual firms in attendance. This support will detail the nature of advice required (for expanding, merging, diversifying, acquiring, consolidating or dissolving as appropriate).

134 Those firms that appear financially viable for merger or expansion would be offered a third tailored level of service. Expert advisers would work directly with firms: they will brief and assist firms to collate information for merger; consider that information and report to the firms on viability and next steps. All costs beyond that point will be borne by the supplier firm in agreement with the expert adviser.

135 The third level of advice should encompass an initial analysis of accounting information and identification of key issues together with a report giving an assessment of the accounting issues and signposts for the way forward, prior to work being put in train to effect growth or a merger.

136 From the review's pilot study an estimated cost of the individual levels of advice are as follows:

- level 1 – £1,000 per group of 30;
- level 2 – £3,000 per group of six; and
- level 3 – £3,000 per two firms

137 Assuming that firms currently unable to deliver £150,000 of criminal legal aid work will want to consolidate, grow or merge, approximately 1,000 firms with crime work may wish to seek a grant and assistance to merge or grow.

138 The measures outlined above are illustrative of the assistance criminal legal aid practices might want to consider to restructure. However, civil and family practices that also need to restructure to become efficient could use similar assistance though the grant programme.

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.

Other financial support to assist with information technology modernisation

139 Not all firms providing criminal defence services will need to restructure their business or need to seek expert advice for their circumstances. However, there are likely to be a large tranche of firms, providing all types of legal aid services, that will still need to adapt to improve efficiency in the recommended new procurement system, reduce transaction costs with the Legal Services Commission (as envisaged in their preferred supplier approach) and improve their effectiveness when interacting with the wider justice system.

140 Firms that can meet set criteria demonstrating how increased information technology capacity will improve their ability to increase their efficiency to deliver legal aid services, reduce transaction costs and improve their performance within the wider justice system should be eligible to apply for a grant of up to £3,000 from an information technology modernisation challenge fund administered by the Law Society.

141 The fund would provide match-funded grants whereby the firm would need to demonstrate they could find other sources of funding for information technology investment equal to or greater than the value of the grant. The amount available within the fund should be limited to £6 million for a specific period. Such a fund would allow up to 2,000 legal aid firms to bid for the maximum grant.

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.

Impact on DCA and the Legal Services Commission

142 The new procurement regimes, set out in this report, will call for considerable skill, application and flexibility by the Legal Services Commission and DCA in managing delivery of very significant changes within a challenging timetable. While the Legal Services Commission has already embarked on a drive for change through initiatives including its delivery transformation project and preferred supplier, the recommendations in this report should prove more testing, but if they are implemented effectively, there should be significant rewards.

143 Both DCA and the Legal Services Commission should recognise that suppliers are being asked to undertake considerable internal change, and they are likely to require an understanding, sympathetic context if such changes are to result in optimum benefits for the system. The skills required by the Legal Services Commission to help manage that process are very different to the skills required for a relatively straightforward contracting relationship.

144 The Legal Services Commission is already moving in the right direction: the delivery transformation project will help streamline processes to the benefit of clients, suppliers and the Legal Services Commission. In parallel, the preferred supplier process will be undertaken, which will readily assist the transformation process but will also demand a high degree of sound relationship management as the supplier market moves through the transitional period to best value tendering. There is also necessary reform to the civil landscape through the CLS strategy, which should result in better legal services for vulnerable clients.

Completing the detailed design and implementation

145 The report details significant changes to the procurement of legal aid services, particularly for crime. But detailed roll-out and mapping of individual police station areas, particularly in London, should be carefully managed by the Legal Services Commission and the professional bodies to ensure that the supplier base is sufficient to deliver the high quality service that clients deserve and expect.

146 The Legal Services Commission and DCA should have in place a detailed implementation plan and draw on expertise in market change from external experts where suitable in-house expertise is not available. This should help to ensure that the move to a smaller number of more efficient suppliers has no detriment on clients and those firms striving to maintain their business and competitiveness. The Legal Services Commission and DCA should ensure that the changes that will ensue, and what those changes mean, are accurately and sensibly conveyed to all existing suppliers and those who may want to enter the market. There is clearly scope here for the Legal Services Commission and DCA to work much more closely in delivering clear messages to the profession.

Managing the transition and monitoring the supply market

147 Firms that want to remain in the legal aid market, yet need to restructure to improve efficiency so that they can compete for contracts should be given assistance as detailed above in this chapter. Many of these firms may want to grow through merger, but they might be unaware of firms in a similar position in their area. The Legal Services Commission with the Law Society should be able to provide a service to help identify firms who are also interested in growing or restructuring.

148 At the same time, it is incumbent on the Legal Services Commission in managing the transitional process to secure sufficient quality suppliers in each area. It will need processes in place that enable it to monitor what is happening in the market, but it should do so with a light touch.

A more efficient relationship between Legal Services Commission and its restructured suppliers

149 Through the delivery transformation project and preferred supplier scheme the Legal Services Commission should be driving towards a less administratively burdensome system. The changes in the procurement system should lead to a closer relationship between the Commission and suppliers. Some of this can be delivered through the more efficient electronic systems that are being developed, such as the suppliers' electronic management system, and intelligent intervention.

150 The relationship managers, currently being appointed by the Legal Services Commission, have a vital role to play. The relationship managers will be expected to improve the current working relationship with suppliers, through for example helping suppliers to monitor their own systems and processes to meet clients' needs and reduce transaction costs. This should create much more of a partnership approach.

Delivering administrative efficiencies

151 The Legal Services Commission's operating costs in 2005-06 were £94 million. This was a 62% increase on the £58 million operating costs of the

Legal Aid Board in 1997-98. The rationalising processes and information technology changes that the Legal Services Commission are making could realise savings of up to £30 million by 2010 against the 2005-06 spend on administration. Achieving those savings will depend on the feasibility of introducing the necessary information technology regulation changes and the ability of the Legal Services Commission to reduce its costs. It is essential to the success of this programme that the recommended procurement changes are implemented within the timetable, as this should complement and support the changes in administration and audit processes.

Impacts on the wider justice system

The criminal justice system

152 The recommendations in this report should have a positive impact upon the criminal justice system by complementing new initiatives, encouraging early resolution of cases where appropriate, and ensuring an efficient and quality service is given by defence practitioners. The streamlining of payment regimes should enable suppliers to focus energy on delivering a quality service, rather than dealing with burdensome bureaucratic processes, which in turn should improve effectiveness as practitioners can give greater attention to delivering advice and representation.

153 Clients will be able to choose their representative; it is envisaged that by providing clients with sufficient choice at the police station, consistency of representation from police station through to magistrates' courts or the Crown Court should be encouraged. This should have a positive impact upon the criminal justice system.

154 The current remuneration scheme pays less to those practitioners that dispose of a case efficiently and expeditiously as it is an input based system that rewards expenditure and not use of time. The introduction of more fixed pricing schemes will ensure greater financial reward to those practitioners that can deal with cases more efficiently and expeditiously. In turn, efficient working practices ensure that a valued public service is delivered whilst reassuring the public that due weight is being given to progressing cases.

155 The new fixed pricing schemes should give proper consideration to those cases that are complex and require additional work. Sufficient remuneration is provided for those cases that fall within this category thereby ensuring that a quality service is provided. This should complement the careful control and management of those more complex cases to ensure that key issues are resolved and the delivery of justice improved.

156 The procurement reforms should also ensure that very high cost cases are dealt with by practitioners who demonstrate a high level of specialised knowledge and an ability to deal with complex cases. By guaranteeing the knowledge and ability of those delivering advice and representation in these cases, the criminal justice system will benefit from a speedier and more efficient delivery of service by suppliers who will give such cases a priority.

The civil and family justice systems

157 The recommended new procurement schemes for civil and family legal aid should complement the DCA strategy for civil and family justice. As it should have a positive impact on efficiency and encouraging expedition in court where appropriate, and ensuring cases are resolved without the need to proceed to court where that is appropriate and possible.

158 The introduction of standardised fixed fees for legal help for most civil legal aid work should reward efficient suppliers and enable them to play a full part as a centre or as a supplier within a network. This should complement the Legal Services Commission's recent CLS strategy that set out how the Legal Services Commission would be addressing the need for civil legal advice and representation. The roll-out of networks and centres, plus the expansion of CLS Direct, should enable eligible groups to have access to good quality legal advice, which is proportionate and appropriate to legal problems presented by clients. This in turn, should also ensure that legal problems are addressed at an early stage, and cases only proceed to court when this is necessary.

159 The move to graduated fee schemes for solicitors in public law children and private Law family cases should similarly complement DCA strategy for family justice. The graduated fee scheme for solicitors in public law children should support the reforms to child-care proceedings following the recent reviews in this area. It should ensure sufficient coverage is maintained to allow separate representation for all the potential parties in cases, it should support the move to ensure more work is undertaken prior to the initiation of proceedings, and provide a sensible framework for work in court.

Optimum use of all resources within justice system

160 There are significant improvements that can be made to the criminal justice system to remove inefficiencies that can impose substantial costs on suppliers of criminal defence services. These inefficiencies and additional costs combine to hinder the development of an effective and sustainable market based procurement system and place unnecessary burdens on the Legal Services Commission and suppliers of services.

161 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. It could be argued that the one participant that could bring overall accountability is the judiciary because it remains above the adversarial process. In the context of the trial process, the judiciary has already sought to do this in two recent instances. The judgments of Lord Justice Judge in *Rv. Chabaan*²² and *Rv. Jisl*²³ illustrate clearly the proposition that, in a world of limited resources, a disproportionate allocation of resource to one case unfairly deprives another of its proper entitlement. The judgment in *Jisl* states:

“Justice must be done. The defendant is entitled to a fair trial ... It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like ... Resources are limited ... Every day unnecessarily used ... represents ... continuing and increasing tension and worry for another defendant ... in trials which are waiting their turn to be listed ... The objective is not haste and rush, but greater efficiency and better use of limited resources.”

162 This judgment repeated similar sentiments set out in *Chabaan* where Judge, LJ stated “Every trial which takes longer than it reasonably should is wasteful of limited resources”. The recent Court of Appeal decision in the case of *R v K*²⁴ endorsed the approach adopted by a Crown Court judge who invited counsel to make written submissions in order to curtail time spent in oral argument. The Court highlighted in its judgement that the duties and burdens of the Criminal Procedure Rules 2005 provided a framework for all parties, including the judiciary, to ensure effective case management is a reality. This will mean that the judiciary will require sufficient resource and capacity to see this through.

163 It would be tempting, in the light of these judgements, to draw a conclusion which relates solely to judicial case management. Clearly, all cases should be managed on these principles, but the conclusion should be a much wider one. The legal aid fund will always be a limited resource. Any action which wastes a part of this resource has the effect of denying access to justice to unidentified potential applicants. This will not lead to any cause of action on the part of those potential applicants because of the remoteness of the cause and effect but it clearly produces indirect exclusion from justice for those unidentified people who suffer the effect of diminished resources.

164 It should therefore be a prerequisite of any act of any participant in the process that it does not waste limited resources and thus cause such indirect exclusion. In criminal cases, this principle would most obviously discourage prevarication or duplication on the part of the defence but it would also, by way of example, encourage better practice by the prosecution. Action is being taken across the criminal justice system to improve its overall effectiveness and efficiency (as described in Chapter 2) and a good example is the Protocol for the Control and Management of Unused Material issued by Judge LJ in February 2006 . However, such initiatives need constant reviewing to assess their effectiveness and to consider if further incentives or direction are needed.

²² [2003] EWCA Crim 1012

²³ [2004] EWCA Crim 696

²⁴ [2006] 2 EWCA Crim 724

165 Similar considerations also apply to civil and family cases, for example, encouraging better practice in local authorities in housing or child-care cases or encouraging social services to be better prepared for child care proceedings (as recommended in the DCA and DfES Review of the Child Care Proceedings System in England and Wales, May 2006). This would reverse the current position of fragmented non-accountability and provide a universal principle aimed at avoiding direct or indirect exclusion from access to justice.

166 Further legislation should not be required because the principle of efficient use of limited resources has clear judicial endorsement. Proper use of all limited resources (whether those of the defence or the prosecution) is an obligation which should temper the actions of all participants in legally aided matters. The principle should be observed and implemented by participants throughout the justice system.

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.

6: Costing the transition and sharing the risks

1 The report has so far set out the value for money objectives for a new legal aid procurement system, the strategy for achieving market-based reform by 2010 and the specific fixed pricing schemes to achieve it. The previous chapter provided an assessment of the impacts on those who use the justice system or operate in it.

2 This chapter presents the review's best estimate of the costs of the procurement schemes in the transition to best value tendering in 2010, based on the latest full set of volumes and case mix for 2005-06. The chapter also makes recommendations on how spend and performance of the new schemes should be monitored and made transparent so that risks can be shared fairly and openly by all sides.

Costing legal aid expenditure to 2010

Profile of expenditure to 2010-11

3 As described throughout the report, the new fixed pricing procurement schemes and component fees rates are based on a transition to a more efficient and restructured market of suppliers whilst recognising that many of the cost pressures suppliers face are beyond their control.

4 The fee rates set out in Chapter 4 and annexes and the timing of their implementation are designed to ensure the legal services market they are purchased from is the most efficient and sustainable for the long-term. This need to maintain sustainability requires a transition period of two to three years. Annex 6.1 sets out the key milestones and timetable for implementation.

5 The recommended fixed pricing schemes and fee rates would bring the market and system through to a fit state ready for best value tendering beginning in 2009-10. By 2010-11 legal aid expenditure will be procuring legal services through the new schemes but at rates set by the market based on quality, capacity and price.

6 Table 6.1 presents an estimate of expenditure profile during the three years of transition up to 2010-11. The figures are an estimate as they are calculated against the volume and case mix of 2005-06.

Table 6.1 – Expenditure profiles for each of the main areas of legal aid addressed by the review in the transition years up to best value tendering in 2010-11 compared to historic expenditure

£m (RAB)	Cash growth 1997-98 to 2004-05	Outturn 2005-06	Forecast outturn 2006-07	Year 1 of transition 2007-08	Year 2 of transition 2008-09	Year 3 of transition 2009-10
Defence in police stations and magistrates' courts	32%	523	531 (+2%)	508 (-4%)	503 (-1%)	503 (0%)
Defence in the Crown Court*	96%	635	609 (-4%)	586 (-4%)	560 (-4%)	535 (-4%)
Legal help scheme for non-family work and private family scheme	n/a	377	378 (0%)	390 (+3%)	377 (-3%)	377 (0%)
Public law children scheme and legal help scheme for family work	n/a	342	360 (5%)	373 (+4%)	388 (+4%)	405 (+4%)
Sub-total	26%	1,877	1,878 (0%)	1,857 (-1%)	1,828 (-2%)	1,820 (-1%)
All other expenditure (e.g. single asylum fund, administration costs, Court of Appeal, central funds)	n/a	158	191 (+21%)	217 (+14%)	223 (+3%)	219 (-2%)
Total	37%	2,035	2,069 (+2%)	2,075 (0%)	2,055 (-1%)	2,044 (-1%)

*Crown Court figures exclude disbursements which cost £48 million in 2005-06 and forecast to increase to £65 million in 2010-11.

7 Forecasts of changes to 2005-06 volumes and mix of cases procured by each new scheme for the three years of transition will need to be incorporated in to the actual expenditure profile when budgets are eventually set. Some of these volume and case mix forecasts are available and others, especially in later years are being prepared as part of the government's preparations for the forthcoming spending review in 2007.

Implied overall efficiencies

8 Table 6.1 shows the scale and timing of overall efficiencies expected from a reformed procurement system and restructured supplier base. By 2010 the new procurement system and underlying fee rates will demand 4% efficiencies (before inflation) from the supplier market over the three years from 2006-07. The proposed implementation timetable for the procurement system and associated changes can be found in Annex 6.1.

9 Taking account of inflation at 2.7% per annum the overall efficiency demand is closer to 14% efficiencies across the supplier market. Although this level of efficiency would be the same regardless of volume changes (as prices are set on a per case basis) it is important to note that the absolute amount of spend would reduce or decline relative to the changes in volume.

10 The variations in timing in the new fixed pricing schemes mean that efficiencies being sought from the supplier market are staggered over time. This means the 4% overall efficiency demand is sought as 1% in the first year, a further 2% in the second year, and 1% in the final year. This staggering prevents an immediate efficiency demand towards the early years so that efficiencies can be delivered in line with the overall transition. This has been an essential factor in judging the recommended schemes and rates as being sustainable for suppliers' providing services in each area of activity in the transition to best value tendering in 2010.

11 In addition, the sustainability of the level of efficiencies being demanded for each part of the supplier market have been made with reference to the analysis of the structure and profitability of supply base presented in Chapter 2 and the scope for efficiencies through a restructured supplier base as presented in Chapter 5.

12 Similar tables to that above are included in Annex 6.2 showing expenditure profiles broken down for police stations, magistrates' courts, Crown Court litigation, Crown Court advocacy, civil and private family cases and public law children cases.

13 The implementation of new fixed pricing schemes and the time it takes to come through as efficiencies for the overall system varies by each area of spend and within each area of spend. This has a noticeable effect on the profile for spend within each year.

Implied efficiencies for criminal defence supply market

14 The efficiencies being sought from the supplier market delivering services in the police station and magistrates' court have an immediate impact of 4% efficiency demands in the first year of transition which then rapidly taper out to 1% in the second year and flat in the third. This front-loading of efficiencies to earlier years is because pricing changes come through relatively quickly as cases are disposed of and claimed for within weeks or months from their start.

15 The implementation of a new graduated fee scheme and improved control of very high cost cases means that for litigation in the Crown Court the pattern is 8% in year one and then 3% in the following two years. Although the new graduated fee scheme is introduced for all new cases from April 2007 there is a fairly even distribution of efficiency demands for these services as there will be a legacy of cases still coming through and paid for by the old ex post facto or standard fee schemes. By the end of the third year all cases in the system should be procured by the graduated fee scheme.

16 An unusual and complex pattern of expenditure is seen for Crown Court advocacy services. The reduction in spend of 10% in 2006-07 and 6% in each of the final two years is a result of on-going efficiency demands pre-dating the new procurement system recommended in this report. The significant efficiencies are a result of earlier and staged extensions of scope in the graduated fee scheme (see Chapter 2) reaching almost comprehensive coverage in 2005-06 coinciding with some old ex post facto legacy payments running out of the system in the following two years. The scale of these efficiencies would be even larger were there not to be some re-indexation of fee rates within the revised advocacy graduated fee scheme as recommended in Chapter 4.

17 By the end of the transition period the payment system is in balance as all cases (excluding very high costs cases) will be being paid by the graduated fee scheme – revised in structure to improve incentives for efficient operation of the criminal justice system; and with revised rates to take account of varying and inconsistent erosion of rates in parts of the scheme set between 5 and 10 years ago (see Chapter 4 and Chapter 5).

18 Excluding advocacy in the Crown Court the overall effect is that the restructuring of the supplier market for criminal defence services will deliver efficiencies for the taxpayer of 5% in the first year, 3% in the second and then 1% in the third. As described in Chapter 5, those suppliers that restructure to maximise the opportunities that the new procurement system offers will also be able to increase their profitability.

19 After the introduction of best value tendering in 2010 and a possible move to a single graduated fee for all defence services in the Crown Court there should be scope for significant further efficiencies as suppliers will also increase their profitability by restructuring the way they deliver their services.

Implied efficiencies for civil and family supply market

20 Efficiencies being sought from the market supplying civil and family services either hold overall spending flat in all years (e.g. for the moved to fixed fees for legal help schemes) or have a variable impact.

21 The implementation of a graduated fee scheme in the first year for solicitors in family public law cases initially allows a continued increase in prices 6% over that year before reducing price growth the following two years.

22 A similar pattern of growth in the first year occurs for family private law (5%) although for this graduated fee scheme there follows a 5% efficiency demand from the supply market in the second year and then flat in the third.

23 The overall effect is that the supplier market for civil and family services has a net increase in prices of 3% in the first year followed by no increase in the second and an increase of 2% in the third.

Achieving cost control

24 The historical 37% increase in overall expenditure on legal aid between 1997-98 and 2004-05 demonstrates that cost control for legal aid, even when accounting for volumes, has been unmanageable with most of the current and past procurement schemes of the past decade. There have some noticeable exceptions, including graduated fees for advocacy in the Crown Court and the use of individual case contracts for very high cost civil and criminal cases.

25 The forecast overall cap on total expenditure at constant volumes for legal aid shown in Table 6.1 over the next three to four years clearly demonstrates that the new procurement system should deliver almost complete control on any above inflation price increases. This cost control is especially true for those areas which have experienced some of the largest above inflation increases in price per case, mainly owing to the predominance of ex post facto arrangements in these areas over the past five years and more.

26 Without these new procurement controls the same sort of price inflation as seen in the past decade would more than likely be repeated in the future. The current financial pressures on the legal aid budget are clear evidence of this. Using the Legal Services Commission's forecasts of expenditure, it is likely that the new procurement system will deliver savings of around £150 million by 2010-11.

27 However, the effectiveness of the schemes at controlling price inflation up to 2010 and the introduction of best value tendering will not by itself reduce the outstanding pressure on DCA's provision of funding for legal aid in the 18 months of so up to 2008-09 (the first year of the next spending review period).

28 If the pricing of legal aid work were to be used to reduce the remaining pressure on DCA's provision for legal aid, then the scale of efficiencies that would need to be sought from the supplier base would in the order of 10-20% in less than two years (again, on constant volumes and case mix based on 2005-06). This is despite an inflationary increase in provision for the legal aid budget for the years to 2007-08.

29 Efficiencies of 10-20% over such a short time-scale are undeliverable and unsustainable, when considering the tight margins for profitability in the current supply base and the length of time it would take to restructure the market without making strict restrictions on choice, immediate price based competition and risking loss of good quality supply or any supply in some areas.

Maintaining engagement and transparency

Demystifying and monitoring the numbers

30 The most time-consuming and challenging task of this review was to analyse and understand the immense amount of financial and payment data held by the Legal Services Commission and DCA. There were over a dozen separate types of procurement schemes in operation over the past five years and each one had several types of payment arrangements within it, such as graduated fee schemes or standard fee schemes.

31 Some schemes were so opaque in their nature that analysis of them was extremely limited (e.g. ex post facto schemes for litigation in the Crown Court). In other instances the complexity and difficulty was compounded further by the fact that there were or had been numerous schemes in operation just for one area of spend (e.g. advocacy in the Crown Court).

32 It is clear that as well as creating schemes that pay fair fee rates and offer the right incentives for quality and efficiency, it is also important that the new procurement schemes can clearly be shown to fit within an overall procurement strategy (as set out in Chapter 3) and crucially that they are transparent and capable of providing management and performance information simply and quickly.

33 The Legal Services Commission and DCA have recognised the need for more transparency and simpler, more effective management tools (see Chapter 3 and Chapter 5). The schemes presented in this report should help them in this task and it is critical to the delivery of the recommendations in this report that both organisations do not delay in putting in place transparent management information systems before the transition to the new procurement system begins as many of the changes will rely on them.

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.

Dynamic and participative forecasting

34 A substantial legacy of this review has been to build constructive and open engagement of all sides. A major factor facilitating the creation of trust and appreciation has arisen through the complex process of elucidating the clear constituents of any procurement scheme and therefore legal aid expenditure:

- price – for a whole unit of work or its component rates;
- complexity – the make up of a case mix or the individual variables within a graduated fee scheme; and
- volume – the total number of all cases of type of cases.

35 The procurement system recommended in this report has put the vast majority of legal aid work and expenditure in to fixed pricing schemes. Locking this major variable allows for a fundamental shift to a more transparent and dynamic means of forecasting expenditure and understanding the drivers behind variations from a forecast. In a fixed price procurement system the only drivers are complexity and volume.

36 It appears to be agreed by all sides that although complexity of legal proceedings has increased in recent years in most areas this is now stabilising. The main exception is for child care proceedings.

37 The main variable is therefore the case mix element of complexity and overall volumes of cases coming through the various parts of the justice system. Having clear and cross-justice system agreed expectations and forecasts on these two elements is critical if legal aid budgets are to be set to meet the sustainable pricing presented in this report.

38 Clarity on forecast volumes is also essential for the subsequent transparent and accountable management of the legal aid budget by DCA and the Legal Services Commission so that any emerging anomalies in the procurement schemes or unforeseen perverse incentives can be addressed by all stakeholders rapidly.

39 Speed and complicity in addressing unintended consequences will avoid harming a sustainable settlement which in turn could harm the effective operation of the justice system and lead to a reduction in the scope and eligibility criteria for legal aid. The alternative is to revisit the procurement options set out in Chapter 3 that involve tight restrictions on choice and have high risks of lowering quality and reducing access to justice.

Managing pressure on unit costs

40 The new fixed and graduated fee schemes should do much to reduce the risk of upward drift in prices arising from complexity, or to make such an effect more transparent when it occurs – provided the improved monitoring arrangements described above are put into effect rapidly. One of the positive outcomes of this review is that all sides have acknowledged that if total costs for any graduated element of a fixed price scheme rises because of complexity, the pricing of that element will have to be re-considered to bring the total cost back within profile. However, following the move to best value tendering in 2009-10, it will be the market that re-adjusts these prices rather than through administratively set changes to rates.

41 The exception will be the ancillary payments that remain within the advocacy graduated fee scheme in the Crown Court. As set out in Chapter 4, these ancillary payments will be subject to close monitoring. Any deviation from the expected cost profile within year will automatically lead to that ancillary payment being removed in that year with its cost being incorporated in the base element of the graduated fee scheme for the following year.

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.

Sharing the volume risk

42 If all parties accept that the proposals in this review on price and the projected cost of each element of legal aid at agreed volume assumptions are as demanding as can be achieved without unacceptable risk to the supplier market, it follows that any pressures on the budget arising from volumes cannot be offset by a cut in prices. They will need to be managed either by anticipating and preventing significant increases in costs for areas where volumes increase, for example, because of higher police detection rates.

43 As described above, DCA and Legal Services Commission are the unambiguous accountable bodies with responsibility for setting and managing legal aid budgets according to their statutory duties. The procurement system recommended here will help them in this challenging task. But the risk that cross-justice system agreements or understandings of volume vary significantly should not be one that is left entirely to DCA and the Legal Services Commission to manage.

44 Unplanned and unbudgeted volume changes put pressures on the whole legal aid budget. These pressures should be shared across the justice system, especially when they are a result of policy changes that may increase the absolute volume of cases eligible for legal aid or affects the mix of cases so that there is a relative increase in higher cost cases.

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.

On-going transparency and joint problem-solving

45 DCA and the Legal Services Commission have usually engaged with their partners in the justice system or the suppliers of the legal services they procure through a set of bilateral relationships. The history behind the establishment of this review suggests that these relationships are only triggered when problems have become manifest and that they are ineffective at finding solutions to these problems as by the nature of legal aid several parties are usually involved.

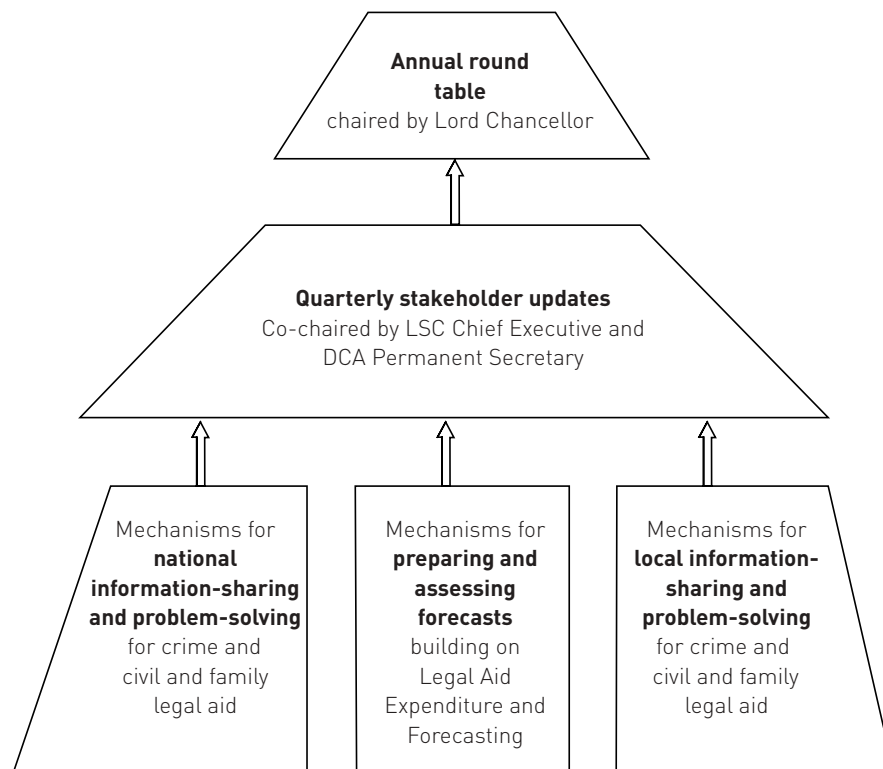
46 More regular and multilateral arrangements for dialogue and problem-solving will have a greater chance of addressing the unintended consequences of change, bring to light opportunities for further improvement and alert others to future volume related or other risks. Arrangements should work at local and national level and there should be a two-way relationship between each level.

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 councils may be used for family legal aid.

47 Figure 6.1 illustrates how national and local stakeholder engagement arrangements should fit together.

48 The lower tier of stakeholder engagement mechanisms would pick up the local arrangements recommend above as well as existing national intra-government and practitioner arrangements such as those managed by the Office for Criminal Justice Reform. In addition to these national and local information-sharing and problem solving arrangements the current internal DCA and Legal Services Commission forecasting committee could be opened up to involve stakeholders from outside government as necessary, such as analysts and officials from the Law Society, practitioners groups, the Bar Council, the Local Government Association, the Association of Chief Police Officers and the Crown Prosecution Service.

Figure 6.1 – Structure of national and local stakeholder engagement



49 A middle tier of stakeholder engagement could be established for senior members and officials from the key stakeholder groups (as above and including the senior judiciary, consumer groups and others) to update one another on legal aid issues such as:

- quarterly management and monitoring information produced as part of the orderly transition to address any unintended consequences likely to harm a sustainable settlement;
- the state of quality and commercial viability of the supplier market both nationally and locally;
- policy changes in the wider justice system effecting legal aid; and
- significant forecast issues based on a presentation of DCA and the Legal Services Commission quarterly forecast.

50 A final top tier of stakeholder engagement could be an annual round table chaired by the Lord Chancellor providing an opportunity for the senior office holders from a limited number of the key stakeholder groups (e.g. President of the Queen's Bench Division, Chair of the Legal Services Commission, Chair of Bar Council, President of the Law Society and Director of Public Prosecutions) to report and discuss the major strategic issues effecting legal aid that have been raised through the quarterly updates.

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.