



Lord Carter's Review of
Legal Aid Procurement

**Procurement of
Criminal Defence Services**
Market-based reform

February 2006



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Preface

This report gives the initial findings and proposals of Lord Carter's review of legal aid procurement (see terms of reference at Annex A). The findings and proposals focus on the procurement of criminal defence services in England and Wales.

The report gives an analysis of the issues and problems with the current system of procuring criminal defence services and sets out the principles and approach for a new market based procurement scheme.

The report does not give a projected financial analysis of the proposed procurement schemes and therefore the proposals are subject to change depending on the outcome of this financial analysis.

The financial analysis and complete proposals will be presented in Lord Carter's final report in Spring 2006. The final report will also present Lord Carter's findings and proposals for the procurement of civil and family legal aid.

In addition to the advice and support of the relevant professional bodies, Lord Carter is being supported in the Review by three senior figures from the commercial and legal worlds, Guy Beringer, David Gregson and David Ross. Biographies are available at Annex B.

Secretary of State and Lord Chancellor

9th February 2006

Review of Legal Aid Procurement

I enclose my interim report describing the principles and approach for a new procurement system for criminal legal aid. The proposals are aimed at delivering a steady-state market through an orderly transition of three phases:

1. Fixed pricing for defence services where it doesn't already exist and re-balancing inequalities in current fixed pricing schemes;
2. Promoting a managed market by guaranteeing access to volume for those preferred suppliers with sufficient capacity and quality, and providing support services to aid transition; and
3. Introducing managed competition where a healthy market has developed based on quality, volume and price so that the most efficient, good quality suppliers can grow and thrive.

I am extremely grateful for all the support and advice that I have received from all those involved in the delivery of publicly funded criminal defence services. I am especially grateful to the Law Society, Bar Council, the Legal Services Commission, and the many practitioners the team have met. Their close engagement throughout the past seven months, as well as the help I have had from your own department and others in the judiciary and government, has been very encouraging.

We all have a challenging time ahead of us as we move to the next stage of the Review. The complete final package of reforms has to be costed and I don't underestimate the amount of effort and difficulty for all concerned. Although the proposals for a market based outcome will eventually lead to a fair and more efficient system, it is only when I have completed all aspects of the review that I will be able to make my final recommendations as to how it should be delivered.

I expect to be able to make my final report, including the financial analysis and recommendations on civil and family legal aid, in spring 2006.

Yours sincerely,



Lord Carter of Coles

Executive summary

The urgent need for whole-system reform

- The legal aid system in England and Wales helps ensure disadvantaged and vulnerable people have access to justice. It is one of the most respected systems in the world but also one of the most expensive. However, some parts of the system, especially civil legal aid, are under great pressure to deliver on the original objective.
- The cost of legal aid has risen from £1.5 billion in 1997 to £2.1 billion today, an increase of 10% in real terms. Public spending in this area cannot be without limits. The growth of criminal legal aid (over half of the legal aid budget) is putting pressure on vital services for vulnerable people, provided through civil and family legal aid.
- All those involved in delivering criminal defence services have expressed general dissatisfaction about current procurement arrangements. The procurement system and many aspects of the wider criminal justice system are seen as complex, bureaucratic and inflexible.
- Many of the current inefficiencies are outside the control of solicitors and barristers who provide defence services. Whole system reform is needed to deliver a system that is fair to all parties.

The current procurement system

- Many payments are still made on the basis of hours worked, providing little incentive to work efficiently. This accounts for about 75% of criminal defence expenditure.
- A large amount of money is spent on unproductive time. Travel and waiting in police stations and magistrates' courts amounted to £90m in 2004/05. Part of this unproductive time is a result of inherent inefficiencies in the wider criminal justice system.
- There are over approximately 2500 suppliers of criminal defence services. The sheer number of suppliers in many urban areas makes it difficult for them to obtain sufficient volumes of work to structure themselves in the most efficient way.
- Administration costs for the Legal Services Commission and suppliers are high. Suppliers,

especially solicitors' firms, complain about the bureaucratic costs they incur through the large amount of auditable information they must record as part of their duties. Approximately 1.5 million claims for payment are made every year.

Promoting a market-based solution

- A sustainable procurement system must provide the best possible quality defence service, reward the most efficient suppliers, provide clients with appropriate choice, develop a sustainable supplier base and bring greater predictability to cost.
- To be sustainable in the long term the supply of independent quality legal services must come from an efficient market structure that provides the right quality of service at minimum cost. Such a market structure will mean the price paid for criminal defence reflects the costs of delivering that service.
- The system should also be dynamic, so that it is flexible enough to promote and reward efficient suppliers who can adapt to changes in the type of services required or the volume of services required.
- Rather than dealing with individual problems and anomalies of the schemes as they stand today, whole-system market-based reform is needed that is in step with wider changes to the criminal justice system. A one size fits all approach will not be appropriate. The market approach should work in most parts of the country, but may need adapting and closer managing in others such as sparsely populated rural areas and areas with large black and minority ethnic communities
- By 2009 a steady-state should be reached with a smaller number of larger, more efficient, good quality suppliers who profit from increased volumes of work, which are delivered at a lower cost. The new system will attract high calibre lawyers to undertake criminal law.

The steady-state market

- The proposals for criminal legal aid procurement are designed to provide an integrated system for delivering criminal defence services from the police station through to disposal in the Crown Court.

- On completion of a series of phased reforms suppliers will be working under new contracting arrangements to deliver police station and associated magistrates' court and Crown Court work as a joined up service. In addition to large individual suppliers, groups of suppliers could be working in partnership as single contractors or through other means of gaining access to the new market.
- The final phase of reforms will see contracts being tendered on quality (overseen by the professional regulating bodies), capacity and price. Contracts will cover a group of police stations and their associated magistrates' courts and Crown Court cases. Contracts will be competed on a 1-2 year basis, depending on the stability of the new market.
- The Legal Services Commission's preferred supplier approach will provide a quality basis for all the proposals as well as reinforcing the direction of travel of these proposals.
- Payment for the provision of defence services in the police station will be by a block grant for the duration of the contract. Magistrates' court cases will be paid a fixed fee per case determined as part of the competition to award contracts.
- Contracts for police station work will also require the contractor to provide defence services for the majority of Crown Court cases that come through their police station(s). Litigation and advocacy services in the Crown Court will be paid through a single graduated fee scheme determined as part of the competition to award police station contracts.
- Defence services in very high cost cases will be paid for under individual case contracts with single defence teams working to strict cost and case management rules. These defence teams will have to gain access to a specialist panel of suppliers. Teams will be required to pass an enhanced quality test demonstrating both expertise and experience to undertake this work. They will also need to have sufficient capacity to undertake cases at a competitive market rate. New auditing arrangements will ensure poor performing defence teams are penalised.

Managing an orderly transition

- These proposals represent a significant departure from the current system. Any move towards competition will need to be carefully managed over a realistic time period, to ensure that the supplier base is supported and maintained throughout the transition. Therefore the proposals given in this report should replace the Legal Services Commission's original proposals for price competition in London.
- Phase 1 of the reforms will be a move to fixed pricing and associated preparations for the new market conditions. Preferred supplier will be introduced. Prices will be fixed where they are not already across police station, magistrates' court and Crown Court work. Support will be provided to help suppliers either restructure their business or consolidate. This will enable smaller firms to participate in the new procurement scheme by increasing their joint capacity, allowing them to benefit from the efficiency savings and increase profits. This will be particularly important in respect of black and minority ethnic firms, to ensure that suppliers continue to reflect the diversity of the communities they serve. The first round of police station contracts will be tendered on quality and capacity. Price competition for very high cost cases will be introduced.
- Phase 2 of the reforms will be to facilitate further the creation of a sustainable market by rewarding efficiency. There may be re-tendering for police station contracts to reward suppliers that have increased capacity through efficiency gains.
- Phase 3 of the reforms will be a move to managed competition. By this stage, fewer, larger, more efficient firms will be established delivering contracts to supply good quality defence services across the police, magistrates' courts and Crown Courts. Price competition will be introduced for police station contracts and the associated magistrates' and Crown Court work.
- These proposals represent a significant departure from the current system. Any move towards competition will need to be carefully managed, to ensure that the supplier base is supported and maintained throughout the transition. This may include measures to help rural suppliers and encourage ethnic diversity of suppliers to reflect the diversity of their clients' communities.

1. The urgent need for whole-system reform

A public service worth investing in

1. Legal aid exists to ensure that everyone has access to justice through the provision of legal advice and representation. It is an essential part of any fair and decent society – the principle of ensuring equality under the law. However, at a time when all the major public services are under review (e.g. education, health and welfare), it is timely to consider how this principle is working in practice.

2. Today's legal aid system has its origins in the welfare system developed following World War II. In its early years, the legal aid system cost the taxpayer less than £1 million per year (at 2005 prices). By 2005 the scheme had expanded and provided 2.3 million acts of assistance, costing £2.1 billion.

3. Legal aid in England and Wales is well regarded internationally and is seen as one of the most comprehensive systems available anywhere. Legal aid operates within a complex, adversarial legal system that has evolved over centuries to deliver one of the fairest and most respected justice systems in the world today.

4. The public's perception of the legal aid system may not always be a generous one. However, it would soon become a matter of public concern if people were denied access to justice because of their inability to pay for legal advice, including criminal defence services. The planned reintroduction of means testing for publicly funded criminal defences services is an important way to bolster people's confidence in the legal aid system as well as providing greater financial control. It must therefore be implemented as soon as possible, including in the Crown Court. There should be a more consistent approach to the recovery of costs in the Crown Court through the greater use of Recovery of Defence Cost Orders.

5. This hallmark of our civilised and progressive society comes at a significant cost. England and Wales has the highest per capita spend on legal aid in the world: currently more than £30 per head. This

expense is significantly greater than other European countries (e.g. less than £5 per capita in France and Germany). Some of this difference is accounted for in the different types of inquisitorial justice systems that have developed across Europe compared to the adversarial, common law approach of England and Wales. However, even countries with comparable legal systems spend significantly less than England and Wales (e.g. New Zealand spends approximately £10 per capita).

Increasing costs within a finite budget

6. In an environment of limited resources and competing priorities decisions have to be taken about where best to focus public spending. Legal aid is no exception to this rule. It makes the same demands for sustainable funding in return for on-going efficiency as do the NHS, schools, the police, councils and others in the public sector.

7. Total legal aid spending has risen substantially: from £1.5 billion in 1997 to the current spend of £2.1 billion, a 10% rise in real terms. This increase in legal aid expenditure must be considered against spending on the justice system as a whole. There has also been significant investment and reform in recent years, to tackle persistent offending and anti-social behaviour, and to increase the number of offenders brought to justice¹.

8. Since 1998/99 the cost of the criminal justice system has grown by over 46% (in real terms, including the police, Crown Prosecution Service, probation and the prison service). The resulting increased capacity of the criminal justice system to tackle and reduce crime has led to increases in volumes of criminal defence work. However, there is no demonstrable link that the overall increase in activity is proportionate across the criminal justice system as efforts to tackle and reduce crime do not always involve the full legal process.

9. Notwithstanding the considerable effort and efficiencies made by suppliers, the Legal Services Commission and others in the justice system, legal aid will overspend by approximately £100 million in

¹ The Home Office White Paper Criminal Justice: the Way Ahead, published in February 2001, promised 'the biggest injection of new resources for the CJS in twenty years, an extra £1.4 billion in 2001-02 rising to £2.7 billion in 2003-04'.

2007-08. This overspend is the product of a number of factors, including increased complexity of the law² and certain structural weaknesses in the criminal legal aid schemes.

Fundamental reform for long-term sustainability

10. The increases and continuing pressures on the legal aid budget are not proportionately spread across the various elements of the system. Since 1997, criminal legal aid has increased by 37% while civil legal aid has decreased by 13% (in real terms), owing to changes in scope and eligibility. This has impacted unfavourably on those members of society in need of legal assistance for civil matters, and has placed great pressure on suppliers of legal advice and representation to do more with less.

11. Rising spend on criminal legal aid must be of concern to taxpayers. Moreover, notwithstanding the increase in aggregate spend, the legal profession is vocal about inadequate payment for some areas of criminal defence work.

12. The proposals for a new criminal legal aid procurement scheme set out in this report will lead to fundamental structural changes for both suppliers and the Legal Services Commission. Many of these changes build on the reforms already being considered by the Legal Services Commission to drive and reward efficiencies in the legal system.

13. Once fundamental restructuring has taken place and a reformed steady-state has been achieved any further efficiency savings available to both suppliers and the Legal Services Commission can only be expected to be in line with other areas of reformed, modern public service delivery.

14. There will be transitional costs to suppliers and the Legal Services Commission in the period before the steady-state is achieved. There will be capacity building costs to enable suppliers to grow their businesses, become more efficient and compete in the restructured market place. The Legal Services Commission will also incur up-front costs to design and implement the new contracting arrangements.

15. Once a steady-state has been achieved (likely to be approximately 2 years for most parts of England and Wales, depending on how fast the market adapts), there will be limited scope for absorbing future pressures to the legal aid budget. These pressures may come from more offences being brought to justice that are eligible for legal aid funding (e.g. a growth in terror or fraud trials) or further changes to the law that increase the complexity of the criminal legal process.

16. If the legal aid budget is not sustained to cope with future pressures then these pressures can only be alleviated by reducing the number of people eligible for free legal advice and representation. This will inevitably harm some of the most vulnerable members of society: those engaged in civil and family legal actions in which they stand to lose their children or their home. Appropriate mechanisms should be put in place to manage future changes in the volume of cases. Such mechanisms would prevent the need to reduce eligibility or make cuts to fee rates in order to fund increasing defence costs associated with increasing volumes of criminal cases.

What we've been told

17. There is a high level of dissatisfaction with current arrangements from all involved in the delivery of criminal defence services: the legal professions, the judiciary and the government (in the form of the Legal Service Commission, the DCA and HM Treasury).

18. The widespread dissatisfaction with the current procurement system is compounded by a lack of confidence and trust between suppliers and government. Suppliers also complain that there is an absence of a long-term clear direction of travel that makes planning uncertain and investment too risky. A consequence of this mistrust is a lack of credibility within the legal professions for those involved in forecasting demand and expenditure. All sides recognise that there is no simple solution, as already reflected in DCA's A Fairer Deal for Legal Aid³.

² Cape, Professor E. & Moorhead Professor R. (2005), "Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work".

³ The Fundamental Legal Aid Review's conclusions are set out in A Fairer Deal for Legal Aid, DCA July 2005.

19. Many find the current procurement system to be complex, bureaucratic and slow to react. There are at least ten different methods of claiming payment for criminal legal aid work at present. This complexity leads to anomalies and striking differences in remuneration. Last year many experienced lawyers working solely in criminal defence earned £25,000 whereas the ten highest paid barristers each earned in excess of £600,000.

20. There is a consensus that there must be no compromise on the quality of advice and representation provided by lawyers being funded with legal aid. There is also a shared recognition that in order for criminal legal aid to remain available to all those who need it the choice of lawyers available to defendants cannot be unlimited. Choice is already limited as suppliers must have a General Criminal Contract with the Legal Services Commission.

21. All agree that there are considerable opportunities to reform processes both within and outside the control of suppliers. The DCA and the Legal Services Commission has worked to make the payment system fairer for suppliers over many years.

22. Changes to payment schemes, however, have been directed at dealing with specific problems and have tended not to address the whole system. This reactive approach to reform has meant that some suppliers have adapted their practice to areas of work that have not been reformed in order to maintain or increase their income.

23. The proposals set out in this paper are designed to address the whole system and thus prevent the sort of tensions and perverse incentives that have occurred in the past. The full effect and any unintended consequences will only be seen as the proposals are implemented, and it will be the responsibility of suppliers to work in partnership with the Legal Services Commission to recognise any unintended consequences and address them as soon as possible if the new system is to achieve a steady-state.

Giving clear direction

24. The analysis and proposals set out in this report are made after extensive discussion with the

legal professions, the judiciary and other stakeholders and should be capable of full implementation by 2009. The development of these proposals has been with reference to a series of principles that are intended to give a clear indication of the direction of travel.

Appropriate choice and professionally assured quality

25. The ability for clients to have some choice over the supplier of their criminal defence service is a fundamental part of the system, avoiding costly conflicts that could damage justice and the public's confidence in justice. However, this choice has to be limited to those suppliers who are able to demonstrate, through their quality and efficiency, that they can meet appropriate levels of service.

26. All sides agree that quality of legal advice and representation in criminal defence work should be the responsibility of the professional regulators – guaranteeing high standards of legal service regardless of who is paying for it. In the case of publicly funded criminal defence services, the Legal Services Commission will have a monitoring role to make sure that quality standards are appropriate and are being maintained.

Incentives and rewards for the committed and efficient

27. Procurement schemes must incentivise suppliers to deliver high quality services more efficiently by paying for work to be performed early on in the process. These incentives must reward suppliers for thorough preparation to achieve early outcomes. Some areas of the current system implicitly encourage suppliers to prolong the life of a case thus incurring extra expense. In addition, the procurement schemes must avoid any incentive to pay for duplicated effort or for non-productive costs, such as unnecessary travel and waiting time that is within the control of suppliers.

28. The new system of incentives in the schemes proposed in this report is designed to encourage early resolution without discouraging full and proper examination of cases.

29. The procurement schemes will encourage consolidation where appropriate in order to increase efficiency and ensure that quality suppliers can make sufficient profit to ensure a sustainable supplier base. The ultimate aim of many of the procurement schemes has been that increased volumes of work should be given to the most efficient and good quality suppliers in return for lower prices, the benefits of which can be shared between suppliers and the government.

30. Restructuring of the supplier base will be inevitable and the nature and scale of the required change should become apparent very early on in the implementation of the new procurement scheme with a transitional period of approximately 2 years, depending on how fast the market adapts.

31. The ultimate measure of success for the new procurement system will be when it is genuinely sustainable: providing long-term predictability for the government (and therefore taxpayers) and the businesses and their staff that supply criminal defence services.

32. Efficient and good quality suppliers of publicly funded criminal defence services will be able to make a fair income. Innovative and dynamic businesses will thrive and high calibre individuals will be attracted to enter this important public service.

33. The next two sections of this report offer a detailed analysis of the current procurement system (Section 2) and an explanation of the approach that underlies the proposed new procurement system (Section 3). The final two sections set out the detailed proposals for reforming each part of the procurement system (Section 4) and give an overview of a possible implementation timetable (Section 5).

2. The current procurement system

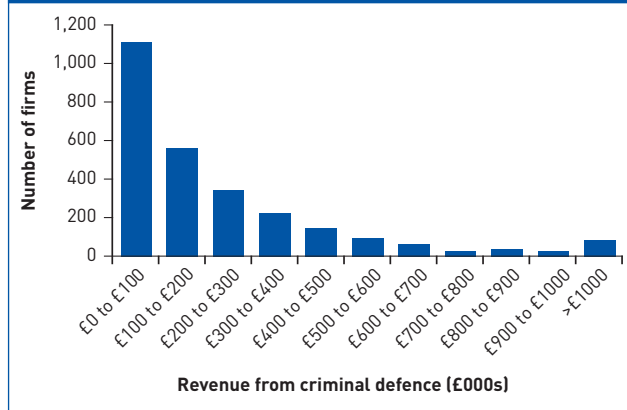
34. A thorough analysis of the legal aid procurement system was conducted as part of the DCA's Fundamental Legal Aid Review⁴. That review set out a series of options for how procurement of criminal defence services could be reformed in the future, leading to the commissioning of this Review. In addition, the Legal Services Commission are already developing a series of reforms such as a strategy for working with preferred suppliers, and the introduction of fixed fees for litigation services in the Crown Court.

35. The analysis and approach presented here takes into account (and in places comments or builds on) the output, underlying research and continued planning associated with this current work.

The structure and income of criminal defence suppliers

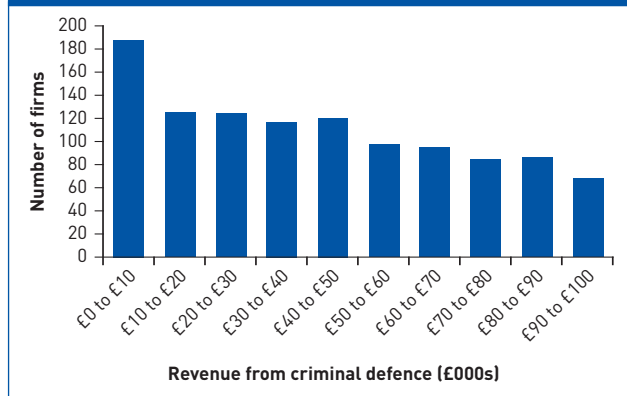
36. The supply base for criminal defence services is fragmented, and is characterised by a large number of relatively small suppliers. The figure below illustrates the distribution of revenue for criminal defence work across solicitors' firms. This shows that approximately 2500 firms claimed for criminal defence work in 2004-05. Of these, more than 1,100 (40%) received revenue of less than £100,000 for criminal defence work. Only just over 80 firms (3%) had turnover in excess of £1 million from criminal defence work.

Fig 1: Distribution of revenue from criminal defence work (data sourced from Legal Services Commission)



37. There is a relatively even distribution of criminal defence revenue among suppliers earning less than £100,000 from criminal defence work (see figure below). Approximately 600 firms (approximately 25% of all firms) claimed less than £50,000 for criminal defence work in 2004-05.

Fig 2: Distribution of revenue from criminal defence work, for those firms claiming less than £100,000 (data sourced from Legal Services Commission)



38. Approximately a quarter of all criminal legal aid is spent on advocacy services in the Crown Court. There are over 11,000 independent advocates in private practice, with approximately 3,000 providing criminal defence services.

⁴ The Fundamental Legal Aid Review's conclusions are set out in A Fairer Deal for Legal Aid, DCA July 2005.

39. Each year approximately 100-150 barristers enter the profession engaging in criminal defence work. The 3,000 advocates who provide publicly-funded criminal defence services as part of their work are distributed over approximately 240 chambers, approximately 60 of which are located in London. Whilst there is no equivalent turnover figure available for advocates, the distribution of incomes range from less than £10,000 to in a few circumstances over £1,000,000 for publicly funded criminal defence service work undertaken as part of a barrister's work load in a full year. This does not include any income for prosecution work, privately funded criminal defence work, or any non-criminal defence work (publicly or privately funded).

40. There has been considerable debate over the appropriate level of remuneration for criminal defence work. The Access to Justice Act states that the provisions made for legal aid work must be adequate to secure the supply of services from competent individuals.⁵ The substantial recent increases in criminal defence expenditure do not appear to have been matched by a proportionate increase in the volume of cases, suggesting that more is paid today per case, than has been so in the past. However, a significant factor may be the increasing complexity of processes in dealing with cases.

41. A number of studies have been commissioned by the DCA and the Legal Services Commission in recent years examining whether there has been evidence of under supply of either solicitors or barristers for publicly funded work. The studies have shown that there is no significant evidence of under supply.

42. For example, in one study⁶ it was found that 16% of the solicitor firms surveyed stated that they would be willing to take on more work at current remuneration rates. In a separate study⁷ it was found that solicitors did not often have difficulty in securing appropriate advocacy services. However, studies by the Law Society indicate that there is an aging profile of the current supplier base and a limited number of newly qualified solicitors entering this area of the profession.

The current criminal defence procurement system

43. Since 2001-02, solicitors' firms wishing to carry out publicly funded criminal defence services are required to obtain a General Criminal Contract (GCC) from the Legal Services Commission. For the vast majority of criminal defence work, firms access work through the police station by clients choosing their own solicitor or requesting a duty solicitor. Clients currently choose their own solicitor in approximately half of all cases.

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

45. For barristers, work allocation is the same as for privately funded work, whereby a solicitor will instruct a barrister to act in a particular case.

⁵ Access to Justice Act 1999

25 (3) When making any remuneration order the Lord Chancellor shall have regard to –

(a) the need to secure the provision of services of the description to which the order relates by a sufficient number of competent persons and bodies,
(b) the cost to public funds, and
(c) the need to secure value for money.

⁶ Frontier Economics (December 2003), A Market Analysis of Legally Aided Services provided by solicitors.

⁷ Frontier Economics (May 2005), Second survey of solicitors on their use of Barristers.

46. There are a number of different payment schemes depending on the type of work being undertaken, the key features of which are summarised below.

Police stations

47. Advice and assistance in police stations is paid for on an hourly basis, as is travel and waiting. For duty solicitors, travel and waiting is paid at the same hourly rate as advice and assistance. For solicitors chosen by their clients, travel and waiting is paid at approximately half that paid for advice and assistance. All solicitors are paid a fixed fee for advice provided over the telephone.

Magistrates' court

48. Magistrates' court work is currently paid on a semi-fixed fee basis. Payment varies by category of case (trial, guilty or committal), and there are three fee levels which depend on the number of hours worked: the lower standard fee; the higher standard fee; and a non-standard fee, an escape into ex post facto (where work is billed for by a supplier after the case is completed). Additionally, travel and waiting is paid on an hourly basis.

The majority of Crown Court cases

49. Most litigation services (performed by solicitors) in the Crown Court are currently paid on an ex post facto basis⁸ where solicitors carry out work at an hourly rate, and then submit their bill for assessment at the end of the case. Advocacy services (performed by barristers and solicitor-advocates) are paid according to a graduated fee made up of a base fee (that varies with advocate type and offence type), uplifts for length of trial, a daily refresher (that varies with advocate type and offence type), for number of pages of prosecution evidence and number of prosecution witnesses, and a range of small payments to cover smaller events (e.g. sentencing hearings).

Very high cost cases in the Crown Court

50. A small proportion of cases (less than 1% of the 80,000 cases completed in the Crown Court in a year) are currently managed by individual case contracting arrangements through the Legal Service Commission's complex crime unit. Cases are managed through three monthly stage plans and

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

Issues raised regarding the current system

51. A common procurement issue for all parts of the legal aid system, and featured in other areas of public service delivery is ensuring the right quantity and quality of service is provided. This first issue occurs when the services being provided are free at the point of use because consumers are likely to be indifferent to or unaware of the cost of the service they use. As such the service may well be consumed whether needed or not.

52. The second issue in relation to the procurement of legal aid services is the quality of the service. Legal aid services are typically consumed infrequently and are relatively complicated. It is hard for consumers to judge the quality of a lawyer's service, before and even after consumption. Nor is it easy for the procurer to judge whether the service received was what was actually needed.

53. Historically, the Legal Services Commission has responded to issues of quantity and quality by introducing regulation into its procurement system: for example, by limiting the number of hours that could be charged for certain kinds of work or by setting qualification requirements. The Legal Services Commission has introduced franchising and the Specialist Quality Mark, and has developed proposals for a preferred supplier approach.

54. Likewise, the current procurement system has evolved over time by responding to a mix of factors including policy changes (e.g. Human Rights Act 1998), changes to other parts of criminal justice process (e.g. allowing the admission of hearsay and bad character as evidence in criminal trials), fragmented negotiations with suppliers and reactions to problems.

⁸ Standard Fees in the Crown Court apply to solicitors undertaking cases that last less than 2 days. In 2004/05 this amounted to £10.8 million.

55. Inevitably, with a system that evolves over time, complexities and issues will arise that are not desirable. In this context it is difficult for the DCA and the Legal Services Commission to keep pace with external changes although they continuously seek to implement a system that rewards efficiency and provides incentives for firms to grow, such as their approach to working through preferred suppliers.

56. Past changes have been focused on individual parts of the system without necessarily taking into account the impact on the system as a whole. This has led to a system that is both disjointed and relatively complex. Over the past few months stakeholders have drawn our attention to a number of key issues with the current system that are outlined below.

Paying for inefficiency in the design of the procurement system

57. As described previously, the main means for solicitors’ firms to gain work is by holding a General Criminal Contract with the Legal Services Commission to take cases from their inception in the police station (either by being a client’s own solicitor or being allocated through the duty solicitor scheme).

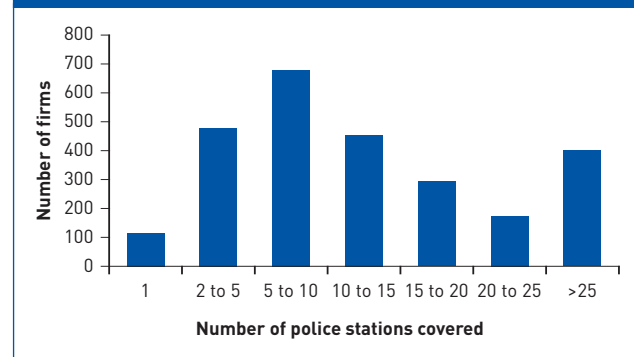
58. A large number of suppliers have suggested that too many firms have been granted a General Criminal Contract so that it is difficult to gain sufficient volumes of work to enable them to structure their business in the most efficient way. In 2004-05 there were approximately 2500 suppliers serving 365 police station duty schemes, covering 1645 police stations, handling 714,000 acts of assistance.

59. In 2005, there were 27 police stations in North Yorkshire that were engaged with some form of publicly funded criminal defence work. The total cost of this work was approximately £1.1 million. The work involved approximately 200 different firms of solicitors, with an average claim per firm of approximately £6,000. Given that the largest firm supplied approximately £140,000 of work (12% of the total), the amount supplied by most firms in a year is likely to be substantially less than £6,000.

60. We are aware from what solicitors and their staff have told us that there is a specific problem in London because of the way that the duty solicitor arrangements are constructed. There are around 175 police stations in London, with a combined value of work of £38 million. In 2004-05, there were approximately 750 suppliers, each with an average claim value of around £50,000 per annum. The largest supplier had a claim value of only £800,000, approximately 2% of the market size.

61. In addition, firms are each providing services to large numbers of police stations. Around 900 firms (approximately a third of all firms supplying criminal defence services) currently work across more than 15 different police stations (see figure below). It is unlikely that firms (as they are currently structured) can be achieving optimal efficiency when they distribute their work in this way.

Fig 3: Number of police stations covered by individual firms (data sourced from Legal Services Commission)



62. A larger volume of work in a more concentrated geographical area would allow firms greater opportunity to reduce their costs. The DCA and Legal Services Commission are also concerned by this problem as it has a substantial impact on total costs of work, given that travel and waiting are paid on a per hour basis.

Paying for inefficiency in the criminal justice system

63. Payment is currently made for travel and waiting in the police station and magistrates’ court on an hourly basis. For the police station scheme, this constituted 26% (£38 million) of costs in 2004-05, while in the magistrates’ courts, it made up

19% of costs (£49 million) in the same period. In total, therefore, payment for travel and waiting amounted to almost £90 million.

64. Payment on an hourly basis for travel and waiting may provide part of the reason for the large number of firms providing services at multiple police stations. Suppliers are generally required to be within a certain proximity of the relevant police station and magistrates' court, yet travel accounts for 20% of total expenditure for police station defence services. There is no incentive in the current payment arrangements for firms (and their staff working out of hours) to make appropriate location decisions.

65. Waiting in police stations makes up a further 6% of costs for these services. Part of this waiting is undoubtedly outside of suppliers' control and it is important that the police and prosecutors make proper consideration of this when delivering their duties to the criminal justice system.

66. However, waiting costs may be exacerbated by the large number of firms offering services at multiple police stations. For example, a police station with ten clients could either be served by a single supplier, or by ten different suppliers. It is highly likely that the single supplier could arrange provision (assuming no conflicts) in a way that led to less waiting time than in the case where there are ten different suppliers.

67. Any new arrangements to minimise unnecessary travel and waiting would have to avoid creating a problem for other parts of the criminal justice system. Under the current system a solicitor may be kept waiting because the police are not ready to interview a suspect. The system would not be well served by creating a scheme where the police could not proceed with an interview because the only available solicitor was tied up in another interview.

68. Travel costs account for 9% of total expenditure for criminal defence services in magistrates' courts. Waiting costs make up a further 10% of total expenditure for criminal defence services in magistrates' courts. Again, as with police stations,

part of the cause for this waiting is undoubtedly outside suppliers' control and it is important that prosecutors and the courts make proper consideration of this when delivering their duties to the criminal justice system. However, as explained above for the police station, the large number of firms offering services at multiple magistrates' courts exacerbates waiting costs.

Paying for inefficiency by suppliers

69. Payments are still made according to the number of hours worked in a number of areas, including police station work, magistrates' courts work (where the standard payment received depends on the hours worked), solicitors' services in the majority of Crown Court cases and all services in very high cost Crown Court cases.

70. Where output based pricing has been in place for some time (barristers payments for short cases in the Crown Court) spending has been tightly controlled. However, having a mix of variable input and controlled output pricing systems within an area of work inevitably leads to suppliers adapting their mix of work (where they can) to maintain, or increase, their incomes.

71. Payment for inputs (i.e. hours worked) does not provide incentives for suppliers to be efficient. Under an input based payment scheme the efficient supplier receives no reward for completing a piece of work in a shorter time than the inefficient. In a set period of time, the efficient firm would deal with more cases than the inefficient firm, but would receive the same level of payment.

72. Consequently such schemes may not offer firms the incentives required to conclude cases efficiently where appropriate – the longer a firm spends on a case the more it will receive. This is less of an issue for busy firms, which have a relatively high volume of work. But, for firms that have relatively few cases, the incentive to extend the number of hours spent on a case is likely to be stronger.

73. It is important to note that any procurement system that seeks to reward efficiency (e.g. by front-loading fees to encourage early preparation) must have in place strict safeguards to ensure efficiency is not gained through compromising quality. There must be effective systems in place to quickly monitor and react to suppliers who do not give appropriate examination of the case or who neglect their professional duties. This would be a particular risk for more vulnerable clients.

74. Both the Legal Services Commission and the legal professions have acknowledged they all must take responsibility for ensuring quality assurance systems are in place and are developing proposals to deliver this, building on the substantial work of the Legal Services Commission in the area of peer review.

Paying for bureaucracy

75. The complexity of the current system means that administration costs for the Legal Services Commission and suppliers are likely to be relatively high. Suppliers, especially solicitors' firms, complain about the bureaucratic costs they incur through the large amount of auditable information they must record as part of their duties under the General Criminal Contract. Approximately 1.5 million claims are made per year.

76. The Legal Services Commission recognise that they can significantly reduce the amount of bureaucracy they impose on suppliers and therefore reduce their own running costs. The need to streamline the payment and auditing arrangements is an essential component of the Legal Services Commission's approach to working with preferred suppliers.

3. Promoting and developing a phased market-based solution

Striving for quality and efficiency

77. Any new procurement system should lead to a sustainable publicly funded criminal defence service provided by independently employed suppliers. The specific objectives that have been used to develop the approach and proposals given in this report are that procurement must:

- provide the best possible quality defence services for those eligible to receive them;
- reward the most efficient suppliers;
- provide clients with choice where appropriate;
- develop a sustainable and diverse supplier base; and
- bring greater predictability to cost.

78. To be sustainable in the long term the supply of independent quality legal services must come from an efficient market structure, that must provide the appropriate quality of service at minimum cost. Such a market structure will mean the prices paid for each part of the criminal defence service reflect the costs of delivering that part of the service while allowing good and efficient suppliers to operate profitably.

79. As the appraisal of the current Public Defence Service model being piloted by the Legal Services Commission has yet to be published, it has been difficult to establish whether a defence service provided directly by the public sector can meet these objectives. However, initial indications are that although the model adopted delivers quality defence services it does not achieve the efficiencies expected from independent suppliers.

80. In most circumstances a publicly owned and controlled defence service should be able to compete on the same terms as others. It is also questionable as to whether the provision of a criminal defence service fits well within the general remit of the Legal Services Commission. However,

there is a potential for a public defence service in areas where the independent market cannot provide sufficient coverage for an efficient cost.

81. An additional requirement for a procurement system in a complex and changing environment, such as the criminal defence market, is that the system should be dynamic. It needs to be flexible enough to promote and reward efficient suppliers who can adapt to changes in the type of services required or the volume of services required.

82. Rather than dealing with individual problems and anomalies of the schemes as they stand today, the approach adopted in these proposals has been to put in place a whole-system market structure that delivers the above objectives in step with wider changes across the criminal justice system.

Administrative and market-based methods of procurement

83. Administrative procurement methods involve procurers playing a central role in specifying and enforcing how suppliers deliver their products or services. The procurer is involved in defining precisely the quality and volume of the product or services to be purchased, who will supply it, and at what price. When this system works well it can be very effective, giving great control and certainty.

84. Effective administrative methods require the procurer to have very detailed information on which to base decisions. This is easiest to achieve where there are only a few, homogenous suppliers, and where costs are easy to identify and define. It is immediately apparent that many aspects of criminal defence services do not easily fit in to these criteria.

85. For example, it is impossible to know both the actual costs of all potential suppliers involved in criminal defence and the key drivers of their costs (and cost differences). It is therefore very difficult to ensure that services are purchased from the best quality and most efficient suppliers and what the appropriate price should be.

86. Market-based methods involve each supplier developing their own means of delivering their product or service in response to external incentives and pressures. Suppliers reveal the correct market price to meet demand by competing with each other to provide services as efficiently as possible while remaining viable for the long-term.

87. The other key advantage of a market based system is that it avoids ongoing negotiation between procurers with suppliers. Once an effective market structure is in place to meet the procurer's demands all the key decisions are determined by the market rather than by the procurer.

88. Effective markets require structures that create incentives for suppliers to compete (by awarding them a larger share of the market) and to be efficient (by allowing them to make a reasonable return) without compromising quality. A sufficiently large number of suppliers is also necessary to compete over a limited supply of work and there needs to be transparency as to the results of competition.

89. In the specific context of criminal defence services, it is also important to account for, and wherever possible prevent, inefficiencies elsewhere in the criminal justice system. These inefficiencies can impose substantial costs on suppliers of criminal defence services thus hindering the development of an effective and sustainable market based procurement system. The ultimate result is increased pressures on the entire legal aid budget.

90. Administrative and market-based methods are not mutually exclusive, especially when procuring professional, regulated services such as criminal defence services. Quality will always need to be regulated, monitored and enforced – a task primarily for the professional regulators but requiring the participation of the procurer, in this instance the Legal Services Commission. Moreover, both methods are critical to the phased delivery of a sustainable system that will not be amenable to a one size fits all approach.

The steady-state market

91. The key elements of an effective market outcome should be achieved in most places by 2009.

This steady-state situation is described below.

Police station, magistrates' courts and the majority of Crown Court cases

92. Fewer, larger, more efficient suppliers will be working under new contracting arrangements to deliver police station and associated magistrates' court and Crown Court work as a joined up service with provision for specialist and niche market suppliers where appropriate. In addition to large individual suppliers, groups of suppliers will be working in partnership as single contractors. Support will be provided to help suppliers consolidate or form consortia. This will be particularly important in respect of black and minority ethnic firms, in order to ensure that suppliers continue to reflect the diversity of the communities they serve.

93. Contracts will be tendered on quality (by 2009 the Law Society will assess quality against peer review standards), capacity and price to cover a group of police stations and their associated magistrates' courts and Crown Court cases. The preferred supplier approach will enable those quality standards to be put in place. Contracts will be competed on a 1-2 year basis, depending on how far the market has developed in a given area.

94. Payment for the provision of defence services in the **police station** will be through a block grant for the duration of the contract or a fixed fee where, exceptionally, the market cannot support a block contract.

95. Defence services for **magistrates' court** cases will be paid a fixed fee per case with some exceptions for very complex or specialised cases. The fee paid will be at the market-clearing rate determined as part of the competition to award contracts.

96. A supplier (or consortia) with contracts for police station work will also be required to take through the majority of cases that require defence services in the Crown Court (except very high cost and complex cases – see below). Suppliers will hold approved lists of advocates they will refer work to.

97. Litigation and advocacy services in the **Crown Court** will be paid through a single graduated fee scheme. The fee will be at the market-clearing rate determined as part of the competition to award police station contracts. Price competition within this fee will be reflected proportionately between litigation and advocacy services – the latter will be paid directly by the Legal Services Commission.

98. Local Criminal Justice Boards will be playing an enhanced role in monitoring efficiency across the system by including criminal defence service expenditure performance and expenditure as part of their remit.

Very high cost cases in the Crown Court

99. Specialist teams of defence lawyers and support staff will bid (on quality, capacity and price) to become members of a single national panel for this specialist and highly skilled area of work. Teams will be required to pass an enhanced quality test demonstrating both expertise and experience to undertake this work.

100. A composite hourly rate for all team members will be calculated to form the price element of each team's bid and a market-clearing rate will be applied to determine membership.

101. Cases with a trial estimate of 30 days or more (or financial equivalent) will be notified to the Complex Crime Unit for consideration. Initially, only in exceptional circumstances will cases of less than 40 days be taken under contract. There will need to be further analysis of cases less than 40 days to determine which ones in future will benefit from regularly being brought under an individual case contract.

102. The panel will be re-tendered every 1-2 years and there will be strict quality and performance auditing arrangements in place with sanctions to remove poor performing teams from the panel.

Phased delivery of a sustainable market

103. A sustainable market for criminal defence services is achievable. This will not be a one size fits all approach to restructuring. The time it will take to

achieve (and therefore the rate of change for suppliers as well as the wider criminal justice system) will depend on the precise structures that are put in place, and the way suppliers react to them. Given the delicate nature of a professional services market, we are not proposing that this be an immediate transition.

104. The transition needs to be carefully managed through distinct phases of implementation, with informed decisions being made before moving to the next phase. Consequently, the proposed reforms follow a staged approach following three phases as set out below:

Phase 1 – fixed pricing and preparing the market

105. Firms will have restructured in anticipation of a market environment where larger capacity and more efficient suppliers will have a competitive advantage. Police station contract boundaries will be defined and the first round of capacity based bids (where capacity will be judged according to minimum historic turnover from the past General Criminal Contract) invited and awarded for police station, magistrates' court and the majority of Crown Court work. Price will not form part of the competition during this phase. The police station element of the work will be paid as a block grant for a fixed proportion of all police station defence services in that contract area. Magistrates' court defence services will be paid on a fixed fee per case basis.

106. In the majority of Crown Court cases litigation and advocacy services will be paid for separately by new graduated fee schemes. Only specialist, competitive defence teams will be conducting very high cost cases with strict cost and case management procedures in place along with audit, penalty and professional disciplinary arrangements.

Phase 2 – managing the market by rewarding efficiency

107. The majority of police station contracts will have been awarded and some of the initial contracts will begin to be re-tendered to reward suppliers who have increased capacity through efficiency gains and consolidation and have gained preferred supplier status.

Phase 3 – managed price competition

108. Fewer, larger, more efficient, good quality suppliers established so that the next round of re-tendering for police station contracts can include price for all associated defence services as a criterion.

109. A single graduated fee scheme will be introduced for the majority of Crown Court work with price competition for elements of the graduated fee and reductions distributed pro-rata between litigation and advocacy services and within a limited range. Specialist defence teams will be re-tendering to take on very high cost cases.

Managing the transition

110. The DCA and Legal Services Commission will need to give clear and consistent messages to suppliers, informing them of what the phases are and what the steady-state sustainable system will look like on completion.

111. This is particularly important given that various parts of criminal defence services have been subject to substantial reform over the last decade. In addition, the suppliers need clarity and certainty over the relationship between the proposals made in this report and the proposals already under consideration by the DCA and Legal Services Commission.

112. Many of the changes already implemented by the Legal Services Commission have laid the ground for the approach and specific proposals given later in this report. For example, the graduated fee scheme for advocates in the Crown Court and the standard fee scheme for defence services in magistrates' courts provide good foundations for the first phase of reform. The approach to working with preferred suppliers also fits well with a managed approach to rewarding more efficient suppliers.

113. However, there are other proposals that are not consistent with a managed move to a sustainable market-based procurement system. Although many elements of the Legal Services Commission's proposals for price competition in London⁹ (and subsequent revisions) are similar to the steady-state market as envisaged in this report, the timescale and managed criteria for delivering the market are different.

114. The approach presented in this report has far greater controls in place to manage the risks to suppliers and the continuity of delivery for criminal defence services in London, especially to the black and minority ethnic community. As such the approach put forward in this report (subject to the financial analysis) should replace the original proposals for price competition in London.

115. There will be up-front implementation costs for all sides during the transition to a steady-state. These costs will be factored into the financial analysis as part of the delivery of an orderly market transition.

116. In addition, there will need to be capacity building support for suppliers during the transition to fewer and larger contractors. The process of developing this support and the best means of offering it should be led and managed by the professional bodies (Law Society and Bar Council) working together with the Legal Services Commission, existing support agencies and networks and the financial services sector. Capacity building funds should be made available during the transitional period to aid supplier restructuring.

⁹ Legal Services Commission, (2005), Improving Value for Money for Publicly Funded Criminal Defence Services in London – Consultation Paper.

4. The new schemes and transitional arrangements

117. This section sets out the integrated proposals for criminal legal aid procurement and how they link together. It provides an explanation of why these specific proposals have been chosen and the arrangements and structures that need to be put in place to deliver them, especially during phase 1, to give a strong foundation for subsequent phases. As outlined in the preface, the proposals are subject to change depending on the outcome of a financial analysis during the next stage of the Review.

118. In summary the proposals will see:

- all work in police stations paid for by fixed price contracts that will also require contractors to provide defence services in subsequent magistrates' court cases and the majority of Crown Court cases;
- defence services in magistrates' courts paid for by a set of fixed fees per case;
- defence services in the majority of Crown Court cases paid for initially by two sets of graduated fees per case (one for litigation services and one for advocacy services) moving to a single graduated fee scheme; and
- defence services in very high cost cases paid for under individual case contracts with single defence teams working to strict cost and case management rules.

Police station contracts – providing a whole service throughout the criminal justice process

119. In 2004-05 the total value of police station work was just over £172 million. Police station work was claimed under approximately 2,600 contracts, involving the provision of advice and assistance in 1,645 police stations. Under the current arrangements advice and assistance in police stations is paid on an hourly basis. Travel and waiting is also paid on an hourly basis and accounts for 26% of current police station expenditure.

120. Duty solicitors' work in the police station accounted for 44% of claims in terms of volume, while work from clients requesting their own solicitor made up 56%. Duty solicitor work accounts

for a greater proportion of the costs of travel and waiting.

121. As discussed earlier, the current arrangements do not provide incentives for firms to be efficient, particularly in London where the structure of the duty solicitor rota can mean that a firm based in the south of one borough could attend a police station in the north of a neighbouring borough. Outside London there is a greater need for travel.

122. Given that the police station is effectively the first point of contact for most defendants entering the criminal justice system it is vital that the procurement system for defence services in the police station incentivises efficient, cost minimising behaviour. In particular any new procurement scheme must:

- promote restructuring of suppliers to deliver fewer, larger, more efficient contractors;
- reward efficiency by allowing suppliers to reduce the costs of delivering services (including unproductive time);
- allow appropriate choice for clients with good quality advice from the outset;
- ensure integration and continuity of service across the rest of the criminal justice system; and
- put in place a structure that allows the development of future price competition.

Paying for all services in the police station

123. The majority of police station work will be effectively delivered through fixed price contracts for a group of police stations. The contract will provide a block payment to deliver a set of services according to strict quality and performance criteria (see below). Suppliers or consortia of suppliers would then tender for these block contracts. Where suppliers form consortia, they will need to establish an effective legal entity with whom the Legal Services Commission can contract. That entity must have effective control over its constituent parts in order to ensure that, for example, quality and performance standards are met.

124. Fixed fees for individual cases will be available to pay for work in special circumstances and during transitional arrangements, for example current suppliers who do not win a contract but who have clients with cases still in the system. However, a move to fixed fees for **all** work undertaken in the police station carries a risk that it would encourage an undesirable increase in work volumes. It is estimated that only 40% of individuals currently attending police stations seek legal advice and assistance¹⁰. Consequently, the primary objective will be to establish the block grant contract system wherever the market conditions are right.

Criteria for awarding contracts

125. The criteria for awarding contracts in phase 1 will not be determined on the basis of price. Contracts will be awarded to suppliers whose tenders satisfy the following criteria:

- an appropriate **quality standard** as being developed as part of the Legal Service Commission's preferred supplier approach and measured by peer review (managed initially by the Legal Service Commission until transition to the Law Society);
- must be able to demonstrate sufficient **future capacity** to satisfy both police station cover and the subsequent volume of magistrates' cases and the majority of Crown Court cases for each contract; and
- where necessary, must be able to demonstrate evidence of the ability to supply capacity by reference to **historic turnover and performance** or equivalent proxies

Providing the contractual services

126. Each of the contracted suppliers would share the responsibility for being the principal supplier of defence services for their group of police stations. The share of responsibility would be allocated according to rotating blocks of time – most likely on a rolling rota basis.

127. During a given period the principal supplier of defence services would also be responsible for ensuring adequate supply of services from other contracted suppliers in conflicted cases and where a client requests an alternative supplier. The Legal Services Commission will also have a role in ensuring clients in such cases have access to a defence service.

128. The precise operation of the contract and the appropriate block of time for which each supplier will be nominated as principal supplier (e.g. 24 hour period, 8 hour period, 12 hour period) would need to be determined for each contract area during the implementation period and would be based on the allocation that allowed firms to most efficiently deliver the service.

129. Suppliers could shift their responsibilities and risks to other suppliers in their contract areas. However, as each supplier will take a turn to act as principal supplier for specified time periods within the contract, they will all face the same incentives and risks. As well, if a group of suppliers in a contract area did this on a repeated and systematic basis it should easily be detected through appropriate performance management information and the Legal Services Commission could then consider removing the supplier or reporting them to their professional regulator.

130. A police station supplier in one contract area will be allowed to tender for other police station contract areas. Over time, as firms increase in size, the coverage of contract areas would be increased so reducing their number. Contract areas would still be split into a number of units to ensure choice, handling of conflict cases and continued competition.

131. Successful suppliers who win contracts will be responsible for the following services:

- the provision of all advice and assistance (with exceptions, e.g. very high cost, complex or specialised areas of criminal law) according to performance standards specified in the contract;

¹⁰ Various Home Office research papers from 1992-98 estimate that 20-40% of those entitled, take up police station advice. (Changing the Code: Police detention under the revised PACE codes of practice; Entry into the Criminal Justice System: A survey of police arrest and outcomes, and the Right to Silence: The Impact of the Criminal Justice and Public Order Act 1994)

- the provision of suitable alternative arrangements in cases where a conflict of interest is likely to arise or where specialist services are required;
- the provision of duty solicitor services in the associated magistrates' court or courts; and
- the provision of associated advice and representation where the relevant police station case proceeds to the magistrates' court or Crown Court (this will be paid for separately as described below).

132. Once the new contracts are in place only suppliers with a contract for a given police station area will be able to take on new publicly funded cases in that area. Contracts would operate on a rolling rota basis so that there was a fair balance in the availability of the type of work available to each supplier. The same principle would apply to the operation of the duty solicitor scheme in the associated magistrates' court(s).

133. The national despatch system and, subject to a successful evaluation of the pilot, CDS Direct (centrally provided telephone advice) should be retained as they have the potential to generate efficiencies through economies of scale. However, suppliers may be given a choice as to whether they use them if they can prove they can deliver more cost efficient alternatives.

134. There are number of niche suppliers that are specialists in particular types of criminal law in the Crown Court, such as very high cost and complex cases. These suppliers are unlikely to be able to win a wide coverage of police station contracts. There will be a panel of specialist suppliers able to provide defence services for very high cost cases (see below)

to which police station contract holders will be expected to refer cases as appropriate. There are also areas of law requiring specialist suppliers in a number of Crown Court cases that fall outside of the individual case contracting arrangements described below. There will need to be arrangements that ensure these specialist suppliers are maintained and can continue to provide publicly funded defence services in these cases.

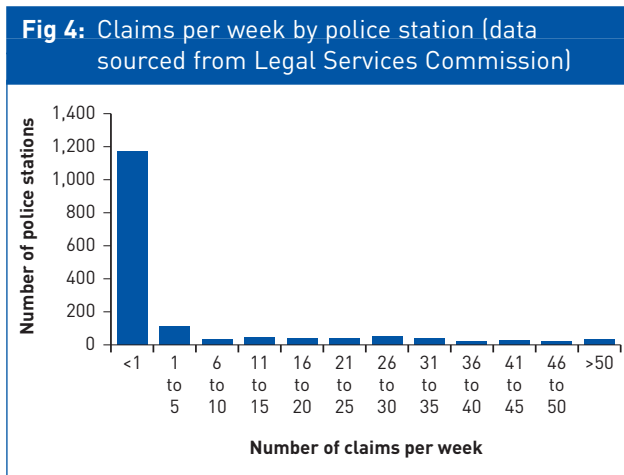
135. In addition, where a client chooses to pay privately for advice at the police station and in the magistrates' court but who later moves through to the Crown Court, their supplier should be able to be paid for from public funds according to the new graduated fee scheme (see below) and subject to passing the new means test.

Contract size and areas

136. There are four factors to balance when determining the appropriate contract size:

- grouping police stations to ensure complete coverage;
- offering contracts that stretch suppliers to some extent in terms of capacity, but that are not so large that the suppliers would be unable to develop the capacity to meet them;
- offering contract units that offer suppliers greater volume in a more concentrated area – thereby reducing the cost to suppliers of providing the service; and
- administrative burden to suppliers and the Legal Services Commission.

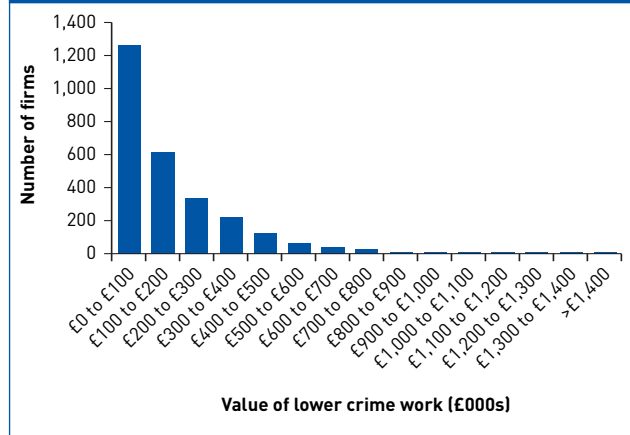
137. Currently 1,174 police stations in England and Wales (70%) have less than one claim per week (low volume), 149 police stations (9%) have 1-10 claims per week (medium volume) and 322 police stations (20%) have more than 10 claims per week (high volume). This is illustrated below.



138. It is therefore necessary to group police stations together in order to provide viable contract sizes, and to ensure that all stations will receive adequate coverage. The current basic unit in the criminal justice system are the 42 criminal justice areas (equivalent to current police constabulary boundaries).

139. Using criminal justice areas as the base unit for contracts would be impractical as it would give contracts ranging in size from £39 million (London) to £700,000 (Wiltshire). The figure below shows the current capacity of suppliers to deliver defence services in police stations and magistrates’ courts. Only 80 firms have a turnover of more than £700,000 for this work.

Fig 5: Value of lower crime work by supplier (data sourced from Legal Services Commission)



140. Contracts should be grouped together so that access to profitable business in a high volume police station or several medium volume police stations must be off-set by providing less profitable defence services in a linked number of surrounding low volume police stations. The precise division of police stations into contract areas will need to be determined during the implementation phase. These police station contract areas would:

- ensure complete coverage;
- give suppliers incentives to increase their capacity without being so large that suppliers would be unable to develop the capacity to meet them (although police station contract areas will be split into smaller work units to ensure coverage – see below); and
- give suppliers greater volumes of work in more concentrated areas (i.e. a supplier can achieve the same or higher volume of work as under the existing scheme, but will be able to do so while serving fewer police stations) thereby allowing firms to reduce the cost of delivering the service.

141. A clustering approach to defining contract size will work best in urban and suburban environments. In sparsely populated rural areas the approach may work but there may be a need for sub-contracting arrangements to be put in place, the used of fixed fees per case (as described above) or more direct

involvement of the Legal Services Commission in the provision of defence services.

Split contracts to reflect local market conditions and provide client choice

142. The clustering approach outlined above would lead to approximately 450 contract areas for police station work, ranging in average size from between £100,000 and £750,000. In most areas of England and Wales this will still lead to contracts that will be too large for any individual firm to handle exclusively which would mean that contracts are split into smaller units. The precise split will depend upon the size (in value or geographic terms) of the proposed contract area and the capacity of firms in the area to deliver the police station service as well as the associated magistrates' court and Crown Court services.

143. In areas where there are suppliers with large capacity this could be as few as 6 units. In areas where there is limited capacity amongst individual suppliers, there may be 10 or more units. This would also help ensure there are sufficient suppliers to deal with instances where there a large number of defendants who are in conflict with one another. The splitting of contract units for clusters of police stations will provide an appropriate degree of choice for clients.

Duration of contracts

144. There are four factors that need to be balanced when the Legal Services Commission decide the duration of each contract:

- **minimising the administrative burden** – the shorter the contract, the greater the frequency of contract letting and consequently the greater the administrative burden;
- **giving certainty for suppliers** – suppliers must be given incentives to invest in developing their business in a way that delivers an efficient service and the shorter the contract the less certainty firms will have over future revenues and consequently the less incentive they have to invest;

- **keeping pace with the speed of restructuring** – firms need to be rewarded for growing and consolidating so if firms know that contracts will be re-let for larger areas relatively frequently they will have greater incentives to grow to ensure that they have capacity required to bid for those contracts; and
- **encouraging continued competition** – over time there needs to be a steady supply of firms available to bid for contracts and the longer the contract period the longer firms will be 'locked out' of police station work and consequently the greater is the potential risk to future competition.¹¹

145. It is difficult to say with certainty at this stage what the appropriate contract length should be for a given area. Decisions will need to be tailored to the specific market conditions of each contract area but it is likely that the first round of contracts should last for between 1 and 2 years.

146. Additionally, to help encourage restructuring and ensure competition contracts should be introduced on a rolling basis to ensure that new opportunities for firms become available on a regular basis.

Deciding the price of contracts

147. During phases 1 and 2 (when there is no price competition) the value of each contract will be determined by aggregating historical expenditure for each of the police stations in the contract area. The contract will include a sum for previous travel and waiting costs. Consideration will also be made to any changes in the volume and case mix that may be forecast for the police stations within each contract area.

148. As discussed elsewhere in this report, there will be exceptional instances of payment by a fixed fee for individual cases within a contract area. Defence services that are provided under the contract for associated magistrates' court and Crown Court cases will be paid for separately according to the schemes described later in this section.

¹¹ In practice, given the number of firms we would not expect this to be a significant risk unless contracts were for very long periods. Moreover, barriers to entry are relatively low – existing individuals can form new entities at relatively low cost.

149. During phase 3 the value of the contract will be made up of three components as price competition is introduced for all aspects of work under the contract. Competition will be based on discounts of the various fixed prices introduced during phase 1. Tenders will include price bids for:

- the block payment of provision of all services in the police station (with exceptions already outlined) with a lower limit to prevent unrealistic bids destabilising the market;
- rates for the magistrates court fixed fee with a lower limit to prevent unrealistic bids destabilising the market; and
- rates for the litigation graduated fee and the advocacy graduated fee (which eventually become a single graduated fee) with a lower limit to prevent unrealistic bids destabilising the market.

150. Price bidding could either be restricted so that an individual supplier must bid the same discount relative to the original fixed price (e.g. 5%) across the three categories of police station, magistrates' court and Crown Court work. Alternatively suppliers could be allowed to vary the discount offered for each of the three categories (for example, bidding to do police station work for 5% less than the fixed prices, but magistrates' court and Crown Court work for 8% less than the graduated fee prices).

151. Further work during the financial analysis of these proposals will be performed to establish the best means of aggregating the bid prices and combining these with a supplier's capacity element of a tender so that the most efficient suppliers are guaranteed success in the tendering process.

Managing the transition

152. The police station procurement system is uniquely placed in terms of its potential downstream impact on the operation of the criminal justice system as a whole. It is essential that the implementation of these proposals, for procuring police station advice and assistance, are carefully

managed to ensure that they do not adversely impact upon the capacity of suppliers to deliver this service or have a discriminatory effect on specific areas or communities.

153. These proposals represent a significant move away from the system as it currently stands and it is essential that such a change is carefully managed to ensure that an appropriate quality of advice in the police station is maintained, and that suitable mechanisms for allocating work throughout other parts of the system are in place.

154. The multi-supplier General Criminal Contracts of the past few years will be terminated on a rolling basis across England and Wales as the new fixed price, whole service contracts are tendered and phased in. It will be important that existing holders of the General Criminal Contract use the time between now and the phased implementation of the new contracting arrangements to take up the support and advice that will be on offer from the Law Society, Legal Services Commission and others to develop and re-structure their businesses where necessary to meet the demands of the new system, where greater efficiency is rewarded by greater volumes of work.

155. As described earlier, this support will involve the DCA and Legal Services Commission working openly and in partnership with suppliers to inform them about the long-term direction of legal aid procurement, in line with the preferred supplier approach. It will also involve direct support for smaller firms, including black and minority ethnic firms.

156. It is also recognised that the capacity of the market to adapt to change of this kind may vary from region to region. A high volume urban area with an abundance of suppliers may find it easier to adapt to the new scheme than, for instance, a number of disparate suppliers in a sparse rural area. This will need to be taken into account as the scheme is rolled out. Areas with market conditions which are ready to begin working under the new procurement

regime should be the first to undergo the transition while those areas with markets that need more time to adapt should undergo the transition in the later stages, with targeted support.

157. Those areas with advanced market conditions should also be ready to undergo re-tendering of contracts during phase 2 of implementation. This will allow those suppliers who have increased their capacity through improved performance and efficiency to gain greater market share.

158. Once suppliers in a number of areas have adapted to the new arrangements and there is a healthy market, phase 3 can be implemented with the introduction of price competition as part of the tendering process in those parts of the country where market conditions are appropriate. However, in some areas, the market may not have developed sufficiently for managed competition to be appropriate. By this phase, suppliers will have a reasonable understanding of the costs of delivering the service under the new arrangements and rigorous quality monitoring and regulation will be in place. Consortia may have established themselves to compete in a price-contested market. Price competition will allow the market to set the right price for the delivery of the service and there will be no loss of quality owing to the implementation of the preferred supplier approach.

159. Further details on the likely support mechanisms and consortia start-up help along with further details on the likely breakdown of contract areas and prices, and the timing and regional phasing for the transition will be set out in the final report of the Review in Spring 2006. The final report will also consider how a changed market for criminal defence service suppliers would affect the market for the provision of civil and family legal services procured with legal aid.

Paying for magistrates' court work

Current magistrates' court arrangements

160. In 2004-05 there were approximately 550,000 representation order claims for magistrates' court work, the cost of which was in the region of £270

million. Magistrates' court work is currently paid on a semi-fixed ('standard') fee basis. Payment varies by category of case (trial, guilty or committal), and there are two fee levels which depend on the number of hours worked and escape level where cases are paid ex post facto. Travel and waiting costs are paid on an hourly basis in addition to the standard fee.

161. The vast majority of cases (80% by volume) are paid at the lower standard fee rate. However, while the majority in volume terms are paid on a lower standard fee, in value terms the high standard fees and ex post facto escape payments are much more significant. A regional breakdown of payments in terms of total costs, travel and waiting shows that travel makes up between 6% (Merseyside) and 14% (London) of total cost, while waiting makes up between 8% (Leeds and the Southwest) and 13% of total cost. On average travel and waiting account for 17% of total costs.

Shifting the incentives to reward the efficient

162. The standard fee scheme has brought predictability and transparency in pricing for both suppliers and the Legal Services Commission. However there remain weaknesses in the current system in that it can provide incentives for suppliers to undertake unnecessary work and it pays on an hourly basis for travel and waiting.

163. Once a supplier crosses a threshold level of hours it moves either from a lower standard fee to a higher standard fee, or from a higher standard fee to an ex post facto payment. This means that the marginal hour or two around each threshold is financially significant for the supplier.

164. A supplier could currently work 10 hours on a case and receive a lower standard fee payment of £500. If they were then to work just one extra hour they would cross the fee threshold and receive a higher standard fee payment of £750 making the marginal hour effectively worth 50% more (£250). Any system that puts in place large jumps in payment, and leaves the basis of determining payment in the hands of the supplier can penalise the more efficient.

165. Payment for travel and waiting in the magistrates' court is partly a function of the inherent inefficiencies in the system of multi-party adversarial justice in England and Wales. Significant expenditure on travel and waiting in the magistrates' court is also a consequence of the current police station arrangements as described earlier. Approximately 9% of total expenditure (approximately £24 million) goes on travel costs.

166. Waiting makes up a further 10% of costs. A large proportion of these costs are a result of the adversarial system and inefficiencies on behalf of prosecutors, courts and others. However, waiting costs are worsened by the large number of suppliers offering services at many different magistrates' courts.

Proposed changes to the Magistrates' court pricing arrangements

167. Firstly, it is worth noting that under the new contracting arrangements described above there will be fewer suppliers responsible for more cases in the same magistrates' court on a particular day allowing more efficient deployment of defence services. This concentration of services over smaller areas is also likely to have benefit for the other parties involved in a magistrates' court case as there is less likelihood of a defence solicitor being late or missing the defendant's hearing.

168. In order to address the concerns associated with the standard fee arrangements it is proposed that the current split of standard fees are condensed into single fixed fees that vary for different types of work and that they include a sum for assumed travel and waiting costs.

169. As already discussed, there are unavoidable drivers of cost differences across cases resulting from other parts of the criminal justice system. Therefore the fixed fees will require some graduation to take account of these pressures and a limited number of uplifts for exceptional circumstances. Fixed fees for a given case might be calculated on the basis of:

- **case type** – there will be two categories of fee, one for trials and one for guilty pleas;

- **offence type** – there will be different categories of fees for different offence types (to be developed as part of the financial analysis for the final report of the Review); and
- **region** – fees could vary according to multiple regions or by incorporating a London and South East weighting.

170. These changes to the payment regime will remove the incentive to carry out additional work in order to access a higher fee rate. The changes will also provide an incentive for suppliers to make location decisions to minimise travel costs and there will be an incentive to increase the volume of work undertaken to minimise the impact of waiting times in court.

171. Further work during the financial analysis of these proposals will be performed to establish what proxies could be used for uplifts in the small set of complex cases that are tried in the magistrates' court or with those cases where assigned counsel is instructed. The proposed pricing for the different elements of the fee, including the classification of offence types and the degree of regional differentials, will also be part of the overall financial analysis and will be presented within the Review's final report in Spring 2006.

Managing the transition

172. As described earlier, phase 2 will see some re-tendering of contracts to reward suppliers who have grown or consolidated to provide more capacity. Part of this capacity will include the delivery of the associated magistrates' courts defence services.

173. Also described earlier, price competition will become part of the criteria for winning police station contracts during phase 3 of the market transition. This competition will include the pricing of associated magistrates' courts defence services.

174. The magistrates' court fixed fee described above for phase 1 will become the upper end of a limited range within which bids will be considered. The lower limit will be set to avoid unrealistic bids causing instability in the market. Suppliers tendering for police station contracts will be required to submit

their proposed rates as part of their tender. These rates will be used as part of a bigger calculation (including bid rates for the actual police station service fee as well as rates for the majority of Crown Court cases) to determine the pricing element of the tendering criteria described earlier.

Use of advocates

175. In those cases where counsel is assigned under a legal aid order the counsel’s fee will not form part of the fixed fee regime. Instead, advocates and litigators will be paid on a graduated fee basis similar to that being proposed for the majority of Crown Court cases, along with the transition to a single graduated fee scheme in due course. For all other magistrates’ court cases (the vast majority) solicitors can instruct in-house advocates or independent advocates if they chose. The fee arrangements will, as now, be agreed between the two parties and solicitors will continue to pay barristers directly.

Paying for the majority of Crown Court work

Harmonising payment regimes for litigation and advocacy services

176. The main concern identified with the current regime is the major discrepancy between payment methods for the two different types of services offered in the Crown Court: litigation performed by solicitors and advocacy performed by barristers and solicitor-advocates.

177. The discrepancy comes from the ex post facto payment for litigation services. As described earlier, this method of payment gives solicitors poor incentives to carry out work efficiently. The system is unable to reward efficient suppliers as total payment is dependant on total amount of time worked on the case. It also offers little certainty for the Legal Services Commission. The figure below shows that solicitor payments for Crown Court work have increased by over 40% in real terms since 2002.

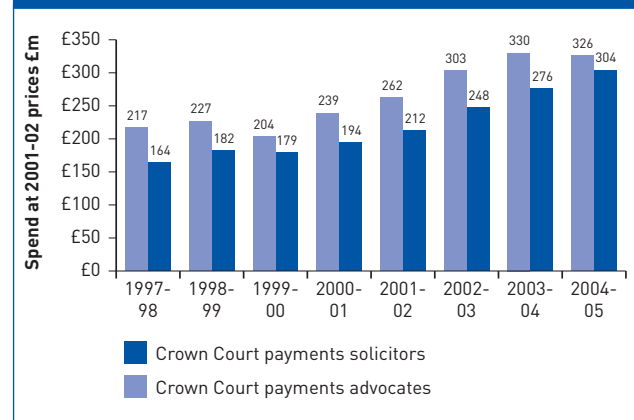
Several factors could also account for part of this rise, including costs shifted from inefficiencies in other parts of the system along with greater procedural complexities.

178. The Legal Services Commission have recognised this concern, and have been developing a fixed fee for litigation services and the proposals given below build on this approach.

179. The graduated fee scheme for advocates, first introduced nearly ten years ago, has worked very well, both in terms of providing incentives for efficient behaviour and in bringing costs under control.

180. However, there remain a small number of anomalies that could be addressed with a revised graduated fee scheme. Daily uplifts are unvarying over the life of a case and may give suppliers incentives to prolong work. There are also a large number of Crown Court cases that last only for a day or two and the current system may be overly complex in remunerating these, and again may provide incentives for advocates to prolong the length of a case. There are also a large number of ancillary payments that add complexity and administrative burden to the current system.

Fig 6: Cash spend on solicitors and advocates (all Crown Court work) in 2001-02 prices (data sourced from Legal Services Commission)



A new graduated fee scheme for litigation services

181. The Legal Services Commission's proposed litigator fee scheme will bring litigation payments more in line with the graduated fee scheme for advocates. The proposals below introduce some amendments that would bring the scheme even further in line with the reformed graduated fee scheme for advocacy described later in this section:

- a base fee varying according to offence type;
- daily trial uplifts that would only begin to be paid where the trial length exceeds two or three days;
- uplifts should be based on trial length and pages of prosecution evidence;
- uplifts should be tapered over the course of the case so that payment is front-loaded to reward early preparation and resolution of cases; and
- for cracks and guiltyies, a graduated percentage of the fee should be paid.

182. The proposed pricing for the different elements of the graduated fee will be part of the overall financial analysis and will be presented within the Review's final report later in 2006.

A revised graduated fee scheme for advocacy services

183. As already discussed, the current graduated fee scheme for advocates has worked well to stabilise costs, and consequently, we are not proposing substantial changes to the design of the scheme. However, there are a few elements of the scheme design that should be amended in phase 1 to bring greater simplicity and harmonisation with the graduated fee for litigation. These amendments are:

- the base fee should incorporate the majority of the ancillary payments that are currently made, and a single advocate should take responsibility for all payment of the advocacy element of the case;
- uplifts should only begin to be paid where the trial length exceeds two or three days – the base fee could be increased to cover this;

- uplifts should be tapered over the course of the case so that the fee is front-loaded; and
- the case fee will be payable to the advocate instructed and he/she will be responsible for the arrangement and payment of any substitute advocate for a particular hearing.

184. Tapering rates could unduly penalise suppliers involved in genuinely long cases, rather than cases where they have undertaken unnecessary work. Further work is required to identify a mechanism for deciding the start point and gradient of tapers but one method might be to vary the taper by offence type.

185. There have been numerous and long-standing complaints from advocates that because the graduated fee scheme allows easy price control the scheme has been unreasonably capped to find savings to fund failures in other areas of criminal defence procurement.

186. Nevertheless, net payments on advocacy services over the past 8 years have continued to rise above inflation and have been disproportionately greater than increases in volume or proxies for legal complexity. However, the impact on particular segments of the advocacy profession (such as junior advocates) may have been disproportionate and redistribution within payment schemes may be appropriate, subject to the financial analysis in the next stage of the Review.

187. A proper understanding of the causes and impacts is difficult owing to the frequent changes to the whole payment regime for advocacy services over the past few years and the resulting changes in behaviour this could have caused. Consequently the pricing for the different elements of the graduated fee will be part of the overall financial analysis in the coming weeks will seek to ensure that past imbalances are corrected in line with the Review's overall objectives for procurement given in this report. The pricing proposals and financial analysis will form part of the Review's final report later in 2006.

Managing the transition to competition

188. The Legal Services Commission is currently planning to introduce the litigator fixed fee later in 2006. Changes to the advocacy graduated fee scheme could also be implemented by this date. Efficient suppliers will quickly begin to experience the benefits of the new fees.

189. In the third phase of implementation of the new procurement schemes there would be a move towards competition for Crown Court payments. Price competition would take place as suppliers offered discounts against the two graduated fee prices (litigation and advocacy).

190. Suppliers bidding for police station contracts (and therefore access to the associated share of the Crown Court market) will be required to tender a list of advocates they would use for Crown Court work and the discounts (within a limited range) the advocate would give against the advocacy graduated fee. The discounted price bid for the advocacy graduated fee will not be allowed to be greater than the discounted price bid for the litigation graduated fee price and the advocacy element will be paid directly to the advocate by the Legal Services Commission.

191. In the final phase a decision will also be taken as to whether to combine both graduated fee schemes into a single whole case graduated fee. This merging of fees could be for all cases or for certain types of cases only. Either way, the single whole case graduated fee will be subject to price competition.

Very high cost cases in the Crown Court

Defining a very high cost case

192. A small proportion of cases (less than 1%) are currently defined as very high cost criminal cases and are paid for and managed (by the Complex Crime Unit in the Legal Services Commission) differently to other Crown Court cases. Nearly all who have observed or had experience with these cases agree that they require close and strict cost and case management arrangements and that the current arrangements can be improved.

193. There is no easy way to determine the exact boundary between a 'normal' Crown Court case and a 'very high cost' case. Furthermore, there is no single indicator that acts as a good predictor of costs.

194. It is well known that 50% of expenditure in the Crown Court goes on just 1% of the cases. However, this 1% accounts for over 700 cases, the majority of which cost in the region of £100,000 to £200,000 each (including litigation and advocacy services). Putting in individual case contracts for this number of cases would be impractical. Moreover, the proposed changes to the litigation and advocacy graduated fee schemes should help address any inefficiencies in these cases.

195. Individual case contracts should instead be reserved for the most unpredictable, complex and resource intensive cases. The Complex Crime Unit's current contracting regime for these cases is automatically initiated when a case is predicted to have a trial lasting more than 40 days. This remains a reasonable indication of when a case is likely to be worthy of an individual case contract.

Improving the current case contracting arrangements

196. A solicitor currently acting under a representation order must notify the Complex Crime Unit as soon as it appears that the case will be, or is likely to be a Very High Cost Case (VHCC) in that it is likely to last 41 days or longer. Factors that are likely to indicate that a case is likely to become a VHCC may include:

- the case raises complex issues of law, fact or procedure;
- detailed consideration of extensive documentary evidence is necessary;
- the defendant is charged with a large number of offences;
- there are many defendants;
- the case is investigated or prosecuted by the DTI, CPS Special Casework Section, HM Revenue and Customs; or
- the case is a terrorism case.

197. Once cases have been included within the VHCC regime, the Complex Crime Unit assigns each VHCC case to one of four categories. VHCC cases are currently paid on the basis of hourly rates for team members with different levels of experience. The rates that are paid depend upon which category the case falls into.

198. Once the Complex Crime Unit has taken up a case, it is managed under an individual case contract with an allocated contract manager. The solicitors must provide the Complex Crime Unit contract manager with regular three monthly stage plans, which set out the work that needs to be undertaken over the following three month period.

199. The VHCC contracting regime is widely regarded as having brought an element of cost control to this part of the system. These bills used to be assessed by Crown Court taxing officers on an ex-post facto basis, which allowed work to be conducted without a fixed hourly rate.

200. The establishment of the Complex Crime Unit in 2001 introduced stage payments for the work and greater control of the work. The Legal Services Commission estimate that in the financial year 2004-05 the Complex Crime Unit delivered savings of £46 million on contracted cases¹³. However, there are two key problems with the current arrangements:

- payment is made on the basis of hourly rates, teams have incentives to carry out unnecessary work – or to duplicate work – in order to drive up case payments; and
- stakeholders are reporting a perception that the current contracting negotiations may not be led by people with sufficient experience to accurately gauge the required level of work.

201. The proposals below seek to build on the success of the current VHCC contracting scheme, strengthen the degree of cost control and support wider changes to improve the management of these cases. The four elements to the proposals are to:

- widen the number of cases covered by the VHCC regime where appropriate while balancing against any increase to the administrative costs of the Complex Crime Unit;
- introduce quality and price competition to provide VHCC services;
- introduce incentives for good quality early preparation and resolution of cases (such as tapering of the rates paid over the life of a case); and
- reward professional case management and disciplines and implement tough penalties for criminal defence teams found to be abusing the system.

Widening the scope of the scheme

202. The Complex Crime Unit should in future be allowed greater flexibility in its ability to bring cases under individual contract. The Complex Crime Unit should in future have a system in place for monitoring the cost risks of all cases with an anticipated trial length of at least 30 days or financial equivalent.

203. This change is not a lowering of the threshold to take under contract all cases lasting more than 30 days. Instead it gives the Complex Crime Unit the freedom to consider whether it wishes to bring the case within its remit where the case is likely to incur significant cost that could otherwise be controlled with an individual case contract.

¹³ LSC Annual Report (2004-05).

Introducing quality and price competition: the VHCC panel

204. In order to create a market of high quality and efficient suppliers able to conduct VHCC (and other specialist) cases a panel of approved suppliers would need to be created. As a first step litigation and advocacy services will be expected to operate together in a team environment. To gain access to the panel the defence teams will have to tender:

- a team protocol setting out how they would approach the major issues that present themselves on VHCC and specialist cases;
- a list of advocates it would call upon to carry out work;
- the volume of VHCC cases they can handle (or available hours) over a defined period; and
- the rates for each category of fee earner, solicitor and advocate (categories to be retained from current VHCC system) within guide prices specified by the Complex Crime Unit.

205. Team protocols would describe the efficient approach to the division of responsibilities and resources including allocation of team leaders at appropriate stages and methods for dealing with unused material. Protocols would have to meet a set of minimum acceptable standards agreed between the professional regulators, the Complex Crime Unit and the judiciary.

206. In order for advocates to be acceptable on a team's list they would have demonstrable experience and expertise in conducting VHCC and specialist cases, possibly with some form of validation from the professional regulating body. Advocates can be on any number of teams' lists. The bid rates for advocates on a list would only vary according to limited categories of experience rather than for individual advocates.

207. The Complex Crime Unit will estimate the number of cases that will come through for the duration of the panel. It is not yet clear whether

teams should tender the number of hours they can provide, or the number of cases they can undertake. The latter may be difficult for teams to predict given that there is considerable variability in the length of these cases.

208. Teams' bids will be ranked from the lowest price to the highest. Starting with the lowest priced bid, teams will be invited to join the panel up to the point where the cumulative bid volume (i.e. number of cases) equals the anticipated requirements for the period (with some buffer to account for unanticipated increases in requirements). The rates paid for work are those bid by the highest priced bidder accepted onto the panel (the market clearing rate). Unsuccessful teams will be eligible to bid in to the panel when it is next reconstituted.

209. Clients will be able to choose their defence team from the VHCC panel. If the client does not exercise a choice then the case will be allocated to teams in proportion to their bid volume. Teams will be required to take cases up to the point where they fulfil their tendered volume – if they do not have the capacity to deliver a particular case then the team will be responsible for arranging for another panel member to take up the case.

Early identification of very high cost (and other specialist cases) and provision of police station advice

210. Many of these cases are recognisable before the point of charge. Consequently, if a client requires it, they should be able to get police station advice and assistance from a specialist supplier competent to deal with the case rather than using the contractor providing police station service at that time.

211. The reason for this is that these cases tend to be more complicated even at police station stage, often requiring representation at a number of interviews. Consequently, for continuity, it is important that the individual can receive appropriate representation at an earlier point in proceedings.

212. VHCC defence teams will therefore be permitted to take on work from the police station through to the Crown Court. The police station work will be paid for under the individual case contract but it will be the professional responsibility of the principal police station supplier to work with the Legal Services Commission to ensure that a specialist VHCC defence team is called upon at the earliest opportunity.

Size and duration of the VHCC panel

213. An analysis of the historic data for very high costs cases under contract by the Complex Crime Unit in 2004-05 suggests that there will be adequate numbers of teams bidding to get on the panel. In that year 417 firms undertook VHCC work with the top 20 suppliers providing 35% of the work and the top 100 suppliers providing 75% of the work.

214. Nevertheless the design of the auction process to award panel membership will need to ensure that even with a large number of bidders there is effective competition and measures are in place to avoid the creation of cartels.

215. The factors to consider when determining how long panel membership should be valid for are:

- administrative simplicity – the less time a panel operates the more often the re-bidding process takes place;
- incentives for teams to bid low – the more time the panel operates the greater the cost to a supplier who missed out on entry so that the longer the term of the panel, the greater incentive there will be for teams to bid low; and
- preserving competition – conversely, the more time the panel operates the greater the risk that there will be no potential suppliers to compete for panel access in the future.

216. It is not yet clear what the appropriate length for the panel should be. Further work will be required during the implementation of the new VHCC arrangements to determine the appropriate duration of the panel.

Pricing individual cases

217. The two main approaches for pricing the individual cases are to pay a team's bid rates or pay the market clearing price – the prices submitted by the last team that won access to the panel.

218. Teams need to know, in advance, the way in which they are going to be rewarded for their services in order to make sensible bids. Whether or not they are rewarded according to the market clearing price or according to their bid will affect the bids they will be prepared to make.

219. Paying teams at the market clearing price gives them the incentive to bid rates on to the panel at the cost of their operation. If a team bids above this level then the team risks not being a member of the panel. A bid below this level means the team cannot cover its costs, will become unviable at some stage and risk losing access to all future VHCC work. All teams accepted on to the panel (bar the last team) will make more than their cost if the market clearing price is paid. They therefore anticipate making a profit by bidding in their marginal cost.

220. If teams were to be paid according to the rate they bid on to the panel they would not anticipate making a profit by bidding their marginal cost. This means that in deciding upon their bid they must trade off the amount they could make if they were accepted on to the panel (pushing their bid rate up) with the likelihood of not being accepted (pushing their bid rate down). Teams could easily make mistakes in this trade off, leading to a situation in which the most efficient teams are not accepted on to the panel.

221. In terms of rewarding and encouraging efficiency, market clearing is preferable as the more a team can lower its costs, the greater will be the profit it can make in the short run and so the more sustainable the market in the long-term.

Finding incentives for early preparation and resolution

222. Teams will continue to be paid on an hourly basis, so clearly there remains an incentive to work as many hours as possible on a case. However, this does not provide incentives to be efficient – indeed it punishes efficiency, as an individual that concludes cases quickly and efficiently will receive less than an individual that does not.

223. It has been difficult to conceive of an alternative output based or formulaic approach to paying for VHCC cases owing to their inherent complexity and variability, often subject to significant changing demands through the development in the prosecution's case. However a way of correcting this feature of the current VHCC payment scheme is to taper the rates that teams receive over the course of the case so that their component rates per hour will diminish over the lifetime of a case.

224. The result is that the more efficient the practitioner, the more they receive per hour. This would remove the incentive to undertake unnecessary work on a case, as it is more profitable to complete three cases than to work a large number of hours on an individual case.

225. A key issue is the point at which rates are tapered and how steeply they are tapered. The concern is that tapering rates will unduly penalise teams that are involved in genuinely long cases, rather than cases where they have undertaken unnecessary work. Further work is required to identify a mechanism for deciding the start point and gradient of tapers but one method might be to vary the taper by offence type.

Strengthening cost and case management in the Complex Crime Unit and in the judiciary

226. A key factor to the successful delivery of these changes to the VHCC contracting regime will be a fully resourced and skilled Complex Crime Unit. The managers and staff in the Complex Crime Unit have been recognised as bringing cost control to these cases. However, there are improvements that will be necessary to deliver the new scheme successfully.

227. The Complex Crime Unit will need to be restructured to ensure it is better equipped with people who are legally qualified and who have direct professional experience of very high cost and complex cases. The new structure and improved professional capacity will allow contract management teams to make more informed and resolute key strategic case funding decisions as well as leading negotiations with defence teams during difficult and complex points of procedure.

228. A new case management protocol for Complex Crime Unit contract managers will cover a new approach to cost negotiation that will strive for early agreement on the majority of the case cost. Defence teams will be required to submit a single programme of work and there will be staged meetings at which the Complex Crime Unit will audit the work undertaken and issue payments.

229. Wherever possible defence teams will be expected to provide a reasonable forecast of the total case cost. The staged approach will also be used as an opportunity to update the Complex Crime Unit on new additional work required on the case and negotiate appropriate funding.

230. Although defence team members will be paid for their hours on a case there will be a maximum number of hours that can be claimed for in any given day. All members of a defence team will be required to keep accurate time records of all their work (publicly and privately funded) that will be available for audit by the Complex Crime Unit at short notice. Defence team membership for an individual case will also have to be agreed with the case manager to prevent teams from expanding the number of individuals working on the case, and reducing each members' input.

231. Another key factor in the success of the new scheme will be the extent to which the judiciary are seen to be adopting a strong case management approach. There have been recent examples of judicial decisions that have had a significant impact on the costs of a case.

232. Demonstration of improved judicial case management would include the adherence by the professions, with judicial control, to the case management practice direction issued by the Lord Chief Justice on 4th April 2005, the fraud protocol issued by the Lord Chief Justice on 22nd March 2005 and the forthcoming unused material protocol. Judicial deployment to these cases and their management of them should be monitored by more senior colleagues to ensure that the protocols are followed accordingly.

233. The judiciary should also be seen to make full use of Recovery of Defence Cost Orders where appropriate. Cost of legal representation could then be re-credited to the legal aid fund.

Auditing and sanctions

234. A small selection of cases will be chosen for re-examination by a special constituted VHCC audit panel. This will be an ad hoc panel and is different from the current VHCC review board that looks at past cases for the purposes of improving the management of future cases.

235. The VHCC audit panel will include members of the Complex Crime Unit, members of the professional regulating bodies and members of the judiciary. An audit will review the extent to which the work billed for was necessary to provide an appropriate quality of service and will judge whether teams performed according to the judicial and professional protocols as well as their individual team bids.

236. If the audit panel reached the view that unnecessary work was claimed for or that the conduct of a case was below the standards expected of a VHCC panel member then the team would be subject to penalties, barring from all future VHCC work and referral to the relevant professional regulating body for disciplinary proceedings.

5. An illustrative timetable for phased implementation

237. The timetable given below will be the subject of careful further analysis with all stakeholders in the period up to the Review's final report. The sequence below is therefore only illustrative, showing how procurement by the Legal Services Commission of the different elements of criminal legal aid might move through the three phases of reform set out in the previous sections.

<p>April to June 2006</p>	<ul style="list-style-type: none"> • Police contract areas defined, priced, performance specifications decided and phasing of roll out established by Legal Services Commission • Consultation on new litigation graduated fee and revised advocacy graduated fee for the majority of Crown Court cases • Restructuring of Complex Crime Unit • Support and consortia start-up services for small and black and minority ethnic firms developed and start to be offered in partnership with Law Society and Legal Services Commission
<p>July to September 2006</p>	<ul style="list-style-type: none"> • Consultation, market preparation (with support and consortia start-up services in place) and IT development for roll-out of new fixed price police station contacts • Consultation on new magistrates' court fixed fee scheme • New litigation graduated fee and revised advocacy graduated fee for the majority of Crown Court cases finalised and delivery arrangements put in place including updating IT systems • Restructuring of Complex Crime Unit complete and invitations to tender for new VHCC panel issued • Launch of preferred supplied approach
<p>October to December 2006</p>	<ul style="list-style-type: none"> • Distribution, pricing and individual specifications decided for first wave of new fixed price police station contracts (with targeted support and consortia start-up services) • New magistrates' court fixed fee scheme finalised and delivery arrangements put in place including updating IT systems • New litigation graduated fee and revised advocacy graduated fee for the majority of Crown Court cases takes effect • New VHCC panel in place with new cases being taken under the new VHCC contracting regime
<p>January to March 2007</p>	<ul style="list-style-type: none"> • Invitation to tender issued for first wave of new police station fixed price contracts and peer reviews completed
<p>April to June 2007</p>	<ul style="list-style-type: none"> • First wave of new police station fixed price contracts awarded • Invitation to tender issued for second wave of new police station fixed price contracts and peer reviews completed • New magistrates' court fixed fee scheme implemented in areas where first wave of new police station contracts in place

<p>July to September 2007</p>	<ul style="list-style-type: none"> • Second wave of new police station fixed price contracts awarded • Invitation to tender issued for third wave of new police station fixed price contracts and peer reviews completed • New magistrates' court fixed fee scheme implemented in areas where second wave of new police station contracts in place • Some cases coming through new VHCC contracting regime likely to be completing and subject to new auditing arrangements with appropriate sanctions being taken
<p>October to December 2007</p>	<ul style="list-style-type: none"> • Third wave of new police station fixed price contracts awarded • Invitation to tender issued for possible fourth wave of new police station fixed price contracts and peer reviews completed • New magistrates' court fixed fee scheme implemented in areas where third wave of new police station contracts in place • More cases coming through new VHCC contracting regime likely to be completing and subject to new auditing arrangements with appropriate sanctions being taken
<p>January to March 2008</p>	<ul style="list-style-type: none"> • Fourth and final wave of new police station fixed price contracts awarded • Possible re-tendering of first and second wave of police station fixed price contracts subject to market conditions • New magistrates' court fixed fee scheme implemented in areas where third wave of new police station contracts in place • Peer review and quality assurance responsibilities for all criminal defence work transferred to professional regulating bodies • More cases coming through new VHCC contracting regime likely to be completing and subject to new auditing arrangements with appropriate sanctions being taken
<p>April to June 2008</p>	<ul style="list-style-type: none"> • Award of second run contracts where re-tendering has taken place for first and second wave of police station fixed price contracts • Consultation on price competition mechanisms for future awarding of police station contracts (including price competition for associated magistrates' court and Crown Court cases) • Possible re-tendering of VHCC panel • More cases coming through new VHCC contracting regime likely to be completing and subject to new auditing arrangements with appropriate sanctions being taken
<p>July to September 2008</p>	<ul style="list-style-type: none"> • Re-tendered VHCC panel in place with new cases being taken under at new bid rates along with continued auditing and sanctions

<p>October to December 2008</p>	<ul style="list-style-type: none"> • Invitation to tender issued for first wave of price competed police station contracts (including price competition for associated magistrates' court and Crown Court cases) • First wave of price competed police station contracts (including price competition for associated magistrates' court and Crown Court cases) awarded and cases being paid at new market set rates
<p>January to March 2009</p>	<ul style="list-style-type: none"> • Invitation to tender issued for second wave of price competed police station contracts (including price competition for associated magistrates' court and Crown Court cases) • Second wave of price competed police station contracts (including price competition for associated magistrates' court and Crown Court cases) awarded and cases being paid at new market set rates
<p>April to June 2009</p>	<ul style="list-style-type: none"> • Invitation to tender issued for third and final wave of price competed police station contracts including price competition for associated magistrates' court and Crown Court cases • Third and final wave of price competed police station contracts (including price competition for associated magistrates' court and Crown Court cases) awarded and cases being paid at new market set rates
<p>July to September 2009</p>	<ul style="list-style-type: none"> • All criminal defence work being paid at market set rates, with some exceptions for areas where market conditions have not developed

Annex A Terms of reference

1. These are the terms of reference for the production of a plan to implement a package of reforms to the way publicly funded legal advice and representation are procured by the state. The review and resulting plan will be produced by Lord Carter in agreement with the Secretary of State and Lord Chancellor and by early 2006.
2. The review will consider the means by which to deliver the Government's vision, set out in A Fairer Deal for Legal Aid, for procuring publicly funded legal services, particularly criminal defence services. This will be presented as a plan for delivering a procurement system that achieves maximum value for money and control over spending whilst ensuring quality and the fairness of the justice system.
3. The reforms will also encourage a more open and responsive market, share risks between supplier and purchaser, and improve the way the state engages with lawyers when procuring legal services.
4. To achieve these objectives the plan will set out how to deliver the best way of buying and delivering legal services, in particular criminal defence services for high cost cases, that:
 - (a) matches the right advice and representation to the issue at stake
 - (b) meets specified quality standards
 - (c) incentives swift conclusions and minimises costs to other parties
 - (d) encourages a diverse and competitive market of lawyers and others offering advice and advocacy that helps deliver quality and just outcomes for best value
 - (e) avoids frequent and piecemeal direct fees negotiations between the purchaser and individual sectors within the legal services market.
5. The review will take in to account the current programme of moving to fixed or graduated fees (in particular schemes for graduated fees for cracked trial and guilty pleas and for Crown Court litigators) and the proposals for competitive tendering for solicitors in London. This review will also fulfil the commitment that the DCA gave in a letter to the Bar dated 24 June 2004 to review the current criminal graduated fee scheme and the very high cost criminal cases scheme.
6. The review will focus on the options for new procurement arrangements set out in A Fairer Deal for Legal Aid (block contracting, price competition, and lead supplier) but may also contain other reforms to supplement, modify or replace these options in order to produce an effective overall package.
7. The plan will be grounded in a detailed analysis of the impact of the final reforms. This analysis will include:
 - (a) an assessment of how effective each reform and/or combination of reforms will be at achieving the overall objectives, whilst ensuring quality
 - (b) the likely efficiency gains and the timescale over which they will be achieved
 - (c) the impact of a new procurement regime on the supply of criminal defence services, the wider legal market, the way the professions are structured, the way the CPS operate and the operation of the entire justice system
 - (d) the impact on the various agencies e.g. the Legal Services Commission and Her Majesty's Courts Service.
8. From this analysis the plan will give a route map of how to deliver the reform package and how that will achieve the overall objectives. Included in this route map will be the action needed to promote changes to the quality, structure and performance of the market and its constituent professions (in the context of wider legal service reforms). The plan will also include mitigating action to be taken to address any adverse affects on quality and performance that may result from changes.

Annex B Biographies of Review team

Lord Carter of Coles: Lord Carter was appointed Chair of Sport England in November 2002. He is also a member of the Home Office General Board and HM Treasury's Productivity Panel. He has chaired a number of Government reviews including Commonwealth Games 2002, the English National Stadium (Wembley), National Athletics, Payroll Services, Criminal Records Bureau and most recently Offender Management. He is also a board member of London 2012 Ltd. He became a Life Peer in May 2004. Lord Carter was educated at Brentwood School and Durham University. He is married with two grown up daughters.

Guy Beringer: Guy has been a partner of Allen & Overy since 1985 and was elected Senior Partner in 1999 and again in 2004. Allen & Overy is an international legal practice comprising approximately 4800 staff.

David Gregson: David is Chairman of Phoenix Equity Partners, which he co-founded in 1991. Phoenix is now one of the leading mid-market private equity businesses in the UK. David has also been a director of 15 public and private companies to date, and has been involved in the supporting of nearly 100 private companies in the UK across most sectors of the economy. David is Chairman of the Jane Goodall Institute, the leading UK conservation and education charity. He has an MBA from Manchester Business School/New York University and a degree in Natural Sciences from Cambridge University.

David Ross: David studied Law at Nottingham University and subsequently qualified as a Chartered Accountant. He is chairman of the National Express Group, deputy chairman of the Carphone Warehouse Group PLC, non-executive director of the Big Yellow Group PLC and Trinity Mirror PLC, and a member of the Home Office Audit Committee.

