

**LONDON CRIMINAL COURTS SOLICITORS' ASSOCIATION**

**RESPONSE TO DCA CONSULTATION  
"LEGAL AID: A Sustainable Future"**

**12 October 2006**

The London Criminal Courts Solicitors' Association (LCCSA) represents the interests of specialist criminal lawyers in the London area. Founded in 1948, it now has over 1000 members including lawyers in private practice, Crown prosecutors, freelance advocates and many honorary members who are circuit and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interest of the members on any matters which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts including those who are in the course of their training.

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**LCCSA RESPONSE TO DCA CONSULTATION:**  
**LEGAL AID: A SUSTAINABLE FUTURE**

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## **FOREWORD**

During the period of consultation, three simple truths have emerged.

The first is that the Carter team focused on the wrong target. What should have been the main preoccupation of the Carter Report was tackling the 1% of cases that use up 50% of the Crown Court legal aid budget. Instead, the bulk of the report focuses on that part of the budget which is under control namely, the money spent on police station and Magistrates' Courts representation.

Secondly, there is no rational cost benefit analysis which justifies proceeding with the fundamental re-organisation of the firms that are the suppliers of legal aid through the staged processes of fixed prices, restricted bidding and eventually Price Competitive Tendering.

Thirdly, proposals to remove large numbers of firms in London are discriminatory. Many of the smaller firms to be eliminated are black minority ethnic owned. London leads the way in being the most cosmopolitan city on the planet and it is one where second and third generation children have been able to qualify as solicitors and set up in business often providing very valuable community services to minority groups. It may be the unintended consequence of the proposals to remove these, young start up businesses, but it is undoubtedly the likely consequence.

The consultation has produced a large body of comment based on a great deal of hard work by practitioners. This has raised as many new questions as answers. It has become obvious that London is a complex and special case with substantially higher costs that arise from it being the capital of a major industrial nation and a leading financial centre with a multinational and shifting population. This means that any movement towards national or average costs would have a particularly severe impact on profit margins and supply. As London accounts for a very large segment of supply, we urge great caution and press the case for more research, careful consultation and for realistic changes which produce real benefits.

There are some simple practical reforms which could produce step-by-step measurable benefits. There is the potential through grandiose schemes to produce unintended and catastrophic effects.

We set out in our introduction our view of the past mismanagement that has damaged supplier moral and eroded relationships between the DCA/LSC and suppliers. Proceeding

with trust, confidence and respect is still possible but requires the government to listen and act proportionately in relation to reform.

## **INTRODUCTION**

A process of modernisation and reform has been underway for the last 20 years. This has coincided with an unparalleled volume of legislation in both civil law and crime, but the latter has been of heroic proportions and the torrent of change has been manifest in evermore complex procedures at all levels of service (cf research by professors Cape and Moorhead).

The number of suppliers engaged in criminal defence work has fallen dramatically and they have also become more specialised and efficient at coping with structural change, franchising and contracting, tendentious processes of audit and a relentless, downward pressure on margins imposed by rate freezes, and cuts.

Carter's timetable introduces price cuts in advance of any planned benefits. Cuts come before volume increases; before consolidation of work into specific contract areas. Hence, only those firms with the resources to withstand the cuts will be able to survive pending artificial restructuring of the market. There is no guarantee that those with the requisite resources will be those that provide the best, most efficient service.

The supplier base in London has been very stable, but nevertheless proposals were put forward to introduce Price Competitive Tendering (PCT) in London. This produced a negative response from all concerned. This unfolded while another piecemeal, unsatisfactory process called the Fundamental Legal Aid Review came to no clear conclusion. As a result, we have had the Carter Review of procurement of all legal aid services nationally.

The iterative process adopted by Carter is limited in methodology and timescale. It was an essentially secret process, limited in reality to a handful of institutional stakeholders and beset by the problem of both coming to an understanding of legal aid and then reaching a conclusion. We understand that it is in the nature of such an inquiry that it should reach conclusions and in particular, deliver a target cut to the legal aid budget. We also understand that there may be some wider economic and societal processes that underpin a drive towards the aggregation of supply in larger units and Best Value / Price Competitive Tendering. That we understand it, does not mean that we think that these are the only conclusions or the right ones.

In this submission, we try to deal with the complexity of the legal aid system in relation to crime and the relationship between topics largely neglected in the Carter Review but which do figure elsewhere in government policy very significantly namely, social inclusion, choice and access. We also deal with the external cost drivers which mean that whatever reforms

are undertaken, they will probably not be able to deliver a “capped budget”, and also issues of risk in fixed price systems.

Criminal legal aid lawyers in London are a committed and resourceful group of people. They have been poorly managed. We hope this paper helps in the understanding of the complex system in which that commitment is displayed everyday and that the outcome of this consultation will be a much more constructive dialogue about the management and funding of legal aid services.

## **THE CONSTITUTIONAL SIGNIFICANCE OF LEGAL AID REFORM**

There are some very obvious things that ought to be said in relation to the importance of legal aid as one of the mechanisms for guaranteeing the rights and obligations that come with citizenship in a modern democracy.

The central feature of democracy is the right of the citizen to freedom, and the recognition that free people are sovereign and exercise their right to freely choose their form of government by voting in a secret ballot. The guarantee of freedom is the rule of law and that to be deprived of freedom engages a process in which the standard and burden of proof is on the prosecution and the presumption of innocence lies with the defendant. In the most serious matters, it also engages the right to jury trial, and the process unfolds in an adversarial setting in which the rights of the defendant are properly and equally represented (equality of arms). We comment below on the potential to erode equality of arms in particular through fixed fees.

It is an assumption in relation to this process that there is an independent legal profession. We also comment below on the potential to erode that independence eventually through very few suppliers operating large contracts through corporate entities.

Many commentators have seen the flood of legislation in the area of law and order as a steady advancement of social control and the erosion of liberty. Others see the process as the rebalancing of the criminal justice system in favour of the law-abiding majority. However it is characterised, it is a process which engages many more defendants in novel legislation and brings into sharp focus the necessity for properly resourced independent lawyers to defend their interests. This ranges from ASBO's to disclosure orders, the seizure of assets, the change to the right to silence, "compulsory" drugs testing, restraint orders, electronic tagging and evidential issues such as the bad character and hearsay provisions, and new prosecution powers like the appeal of bail and sentence and extended detention in the police station prior to charge.

At the same time, there is also much commentary on levels of apathy in relation to the exercise of the right to vote and concerning social exclusion. We make extensive comments on the latter below and stress the point that legal aid is an important "glue". It is societal expenditure which provides access and choice of independent lawyers. Lawyers advise individuals not only of their rights but also of their responsibilities. Proper, choice-led representation assists people engaged in the system to come to the view that it is legitimate. In other words, that the law has been applied fairly.

Putting at risk this system through less choice, less access, and insufficient resource, would erode one of the cornerstones of democracy: that the criminal justice system has legitimacy.

## **THE ECONOMICS OF LEGAL AID**

A common thread runs through all cases, all practices and the budget for legal aid; and it is the equation that links need, capacity, cost and value.

Individual clients often present with a cluster of needs. Criminality will be associated with homelessness, drug and alcohol dependency, the breakdown of family relationships, mental illness and so on.

legal aid practices were traditionally a point of delivery of many services (holistic), and the proposals in community legal services for preferred suppliers operating through CLACS and CLANS reflect that analysis and tradition.

Unfortunately, suppliers have been driven towards mirroring the divorce of the criminal and civil budgets by the LSC, with more firms specialising in fewer legally aided areas.

At a national level, there has been little resource devoted to mapping need. If there were, it would identify the existence of civil deserts, a declining supplier base, and that most suppliers are overwhelmed by demand.

Crime is different because “need” is defined by the prosecution. It is demand led by third parties, such as the police, HMRC, the Serious Fraud Office and even the Probation Service [see section on External Cost Drivers below].

Capacity is an interesting issue. It is a feature of the stable market that there is sufficient capacity to meet need in police stations and Magistrates’ Courts. This is because, ancillary to firms with permanent staffs, there is a more flexible pool of self employed solicitors and accredited police station representatives, as well as a pool of counsel. In a very large demand led system like London, it is vital to have access to that flexibility of resource on a day-to-day basis.

Models of efficiency based on a number of cases per fee earner per year are highly superficial. Managing police station demand is complex because day to day volume and out of hours demand is unpredictable.

In a large firm, 20 police station events a day require a full time manager to take responsibility for “bail to return events” and to find out what is going to happen and to manage staff allocated to the day. Even if this is six or seven individuals, there can be

issues of timing with perhaps four or five cases all happening concurrently. A particular case may be very demanding and take most of a “shift” whilst another may be a short event. It is not at all clear that three or four small firms managing the same set of events will do it any less or more efficiently per event.

The only “saving” may be a capacity to take on another concurrent event (if waiting) at a police station, or a consecutive event in the same place (avoiding travel and waiting), but this is a matter of timing and the complexity of each event.

If police station representatives are placed full time in police stations, it is highly likely that “need” will increase as more clients access available services, and this will actually lead to an increase in volume and cost.

With regard to cost, we would suggest a more sophisticated police station payment system than a single fixed price which produces a downward pressure on quality.

With regard to value, for the client it is the quality of advice and representation. For the firm it is the balance between fees earned and costs incurred. This can be seen in the attached statistical study: *An Economic Analysis of Publicly Funded Criminal Defence Claims Data and The Potential Impact of Lord Carter’s Proposed Reform of Procurement*.

For the LSC, it is the number of quality acts of advice and assistance bought for the price. For the reasons explained above, the purchase of that advice secures the legitimacy of the criminal justice system. If the price is too low, the purchaser (LSC) will fail clients who have not received the quality of advice they need and the legitimacy of the criminal justice system will be eroded.

We refer elsewhere to the mature market and the astute decisions of firms that locate themselves where they believe there is need and then develop their capacity as need grows. That there are many “small” firms reflects a number of factors.

A great deal of “need” is very local. Clients like to be able to access services locally, and word of mouth builds a reputation locally. It is an enormous strength of direct, small providers that they can and usually do provide a highly personal and efficient service. Work could be more localised by some adjustments to Duty Solicitor scheme membership, and we comment elsewhere on social inclusion and the glue that legally aided services provides for the community.

There is an argument that it is the low hourly rates that lead to more small firms. The only way for a senior solicitor (non-partner), to achieve an increase in earnings, is to set up in practice. In the same way, casualisation of the profession represents choices to achieve individual work / life balance and income through self-employment.

Paradoxically, increasing rates would enable firms to pay assistants more, widen partnerships and increase the likelihood of firms growing sustainable capacity.

We also comment on the fundamental failure of the Carter proposals to think through the issue of the economy of scale and geographical reach. London is a hugely complex place, and the simple Carter model does not have any easy fit to any part of London or supply. Artificially reengineering capacity for marginal savings is likely to have unforeseen consequences and presents a deeply unstable environment for business planning. Cuts in price present difficulty for every supplier. Ironically, they make large sophisticated businesses less sustainable than small businesses and increase the tendency to fragmentation.

The LSC obviously purchases capacity. It has its own “need” which is to reduce its administration costs. It seeks to achieve this by having fewer suppliers. The consequence of this logic is that the tail wags the dog. Capacity is reorganised to suit the administrative need of the monopoly supplier rather than the needs of the consumers of supply.

Cost and value are very difficult issues. We highlight below particular London issues which we believe are factors in producing higher costs per case.

There is also a fundamental issue in that it is not clear that there is any budget problem at all.

### **The LSC Annual Report**

The most recent annual report contains income and expenditure accounts which are accompanied by a management commentary. If there were a major budget difficulty, one might expect to find that reflected in the commentary.

Much is made by advocates for major re-engineering of legal aid procurement of the need to “live within the envelope” which is a short hand expression for delivering services within a pre determined budget.

Despite protracted enquiries, it has been extremely difficult to find out what the budget is. The figures that are often quoted, as the cost of legal aid, appeared in the Carter interim report dated 9 February 2006 as follows:-

“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”.

The income and expenditure accounts of the LSC show operating expenditure of £2.489 billion in 2003, £2.238 billion in 2004, £1.862 billion in 2005 and £1.820 billion in 2006.

Indeed, the income and expenditure account for 2006 records a surplus for the year of £451 million and a similar figure in relation to 2005.

On any analysis, it appears that the expenditure trend of the legal aid budget is downwards. This would not surprise us in view of the cuts to expenditure already announced and implemented over the last three years.

The budget is subject to external cost drivers (see below). The DCA has little, if any, control over these.

We are also well aware of vast unmet need in areas like housing, welfare benefits, debt and family breakdown.

The difficulties of access are certainly growing as more firms abandon legal aid services, and there are extremely serious issues to address: the viability of providing comprehensive services within whatever the budget is, and whether value is being purchased.

What is the connection between price and quality? There is little evidence. It is a subject area that demands careful expert research of a large sample of cases, and which has all the difficulty of answering the question of what is being measured. One of the flaws of the Carter process was that it had insufficient resources and time to conduct any meaningful research into the legal aid system as a whole. There is the difficulty of what is called in psychology, the “experimenter effect”. From the point of the view of the purchaser (the LSC) the desirable outcome would be a statement that there is no connection between higher price and higher quality and that the quality of what some suppliers deliver at lower prices, equals what other suppliers deliver at higher prices. From the point of view of the supplier, the desired statement would be that there is a connection between higher price and quality and that

what suppliers who charge higher prices deliver is superior in quality to that delivered by suppliers with lower prices.

There are differences in regional average figures in price per case. Again, there is no clear evidence of why this is the case. Both propositions could be true, but no one knows if they are. There is a real danger that depressing prices does lead to reductions in quality, although what it can cause is an increase in volume. In other words, the suppliers compensate for reduced prices by increasing volume. What this could amount to is simply the purchase of more “junk” by the LSC. In other words, although an annual report might proudly announce a vast increase in acts of assistance delivered, it may be that the money has been spent on poor quality and therefore badly spent.

A proper evaluation of need and capacity for all legal aid services would lead to the conclusion that what is really required is the purchase of more capacity at higher prices if the services purchased are to have real value and the legitimate expectations of those in need are to be properly met.

## **EQUALITY OF ARMS AND EXTERNAL COST DRIVERS IN THE CRIMINAL JUSTICE SYSTEM**

This is a topic deeply neglected in the Carter Report and ignored in the DCA Consultation Paper. It is a matter of the utmost concern.

There has been a massive reallocation of resources in favour of investigation and prosecution of crime. Government boasts of meeting its targets of more cases being brought to justice and record numbers of arrests and prosecutions. The creation of SOCA is a recognition of the increase in serious and organised crime.

There has been an unparalleled flood of legislation. This creates not only new crimes, but evermore complex procedures. See our commentaries on police station, and Magistrates' Court processes.

There is also an unrecognised development in relation to the complexity of crime. As society grows evermore complex, so does criminal activity. As a result, investigations are more resource intensive, and produce much greater volumes of material. Some practical examples illustrate the point. The mobile telephone is a hugely useful piece of evidence in the hands of police. Interrogation of the phone will reveal all of the numbers and identities of the associates of a defendant. Downloaded from the phone are text messages and video clips. Available from phone contractors such as T- Mobile, is the itemised billing. Available as a result of expert report and interpretation, will be the voluminous evidence (known as "cell site") relating to the area in which the phone was used for each call made and received.

The important point is that this evidence was not available before the advent of this new technology. The same is also true of CCTV evidence, and the growth in all manner of forensic detection.

Increased resources for police also mean surveillance, both electronic and physical, which gives rise to very considerable volumes of paper.

This means that a case is now of a very different character in terms of evidence presented and the resources needed to maintain an equality of arms between prosecution and defence.

This is an extremely serious matter and that it is so is a fact recognised in Article 6 of the ECHR. Equality of arms is a fundamental issue within the adversarial system. For justice to

work properly, and for a trial to be perceived by all parties as legitimate, it is fundamental that there should be some equality of resource between prosecution and defence.

We are deeply disturbed by the implication of much of what is said about litigators and advocates fees, that there should be constraint and diminishing of the capacity of defence lawyers. This operates at two levels.

The fundamental objection to fixed fees in the Crown Court is that there are constraints that will prevent work being done which is “reasonable and necessary” (to apply the historical test for work to be carried out on behalf of a party in litigation).

It is important to a defence team that it is sufficiently resourced and those resources include the team. There are different roles for litigator and advocate. Those traditional roles reflect a necessity that a part of the team is closely engaged with a defendant and that another part of the team is expert in the process of trial. These tasks are unlikely to be accomplished by single litigators. The drive towards fixed fees and the merging of litigation and advocacy services in the hands of one person severely constrains and diminishes the capacity of the defence. A proposal that the police (who investigate crime) and the CPS (who act as litigators) should be resourced by a single graduated fee would be regarded as absurd. Yet this is what is proposed for defence litigators in the Crown Court, whose function mirrors that of the police and CPS combined.

An absolute fixed fee may well prevent an equality of arms and we fear that in the not too distant future, there will be a moment when application is made to stay the proceedings on the basis that a defendant cannot be properly represented as there is insufficient resource available within a fixed fee structure. We comment further below on risk in a fixed fee system.

In the longer run, the resources of the prosecution will no doubt increase, the complexity of investigations will grow, the volume of evidence will mount, and the position of defence lawyers will be further undermined and the quality of service that is available in the criminal justice system will diminish. This has very serious consequences for public trust and confidence in the system in general as well as for individual defendants.

Whatever rebalancing of the criminal justice system is to be made, it should not be the case that the rebalance is so unfair to the defendant as to prevent the proper examination of evidence and the proper presentation of the defence.

The criminal defence fund (and therefore the whole of legal aid expenditure), is the “victim” of prosecutorial decision making in criminal matters. The DCA/LSC can only estimate that the volume of very large cases entering the criminal justice system (CJS) in one year is likely to be the same as the last year. We have proposed that there should be an institutional framework which would serve as an early warning system for the DCA/LSC eg, the major agencies, CPS, HMRC and the Serious Fraud Office, could meet and indicate the investigations underway that are likely to evolve into major cases with some estimate of time and cost. This would also be an opportunity for oversight of the cost / benefit of pursuing particular investigations.

We accept there is a public interest in prosecuting very serious and large matters eg, business cartels that fix prices, major frauds and international drug supply. What concerns us is that the agencies themselves do not “forward plan” with regard to cost, and that these prosecutions should not arrive in the CJS as a surprise. These are the cases (the icebergs that sink the titanic budget), that are the most likely to derail any budget and it is on these cases that there needs to be the greatest focus. Carter largely misses the point, devoting a great deal of time and effort to lower end work where costs are under control. There is no penalty to the prosecution in producing vast costs for the legal aid budget, and no incentive to be concerned about the legal aid budget at all.

The secondary problem therefore, is that when these cases enter the CJS, the budget needs to be flexible (ie to have the ability to increase resources), in order to cope. There needs to be recognition that the budget is demand led by external agencies, and there are downstream effects of prosecution decisions which a capped budget cannot “absorb” if the cases that arrive in the CJS are too many and too large. Given what we have stated about complexity, this is likely to be a long term trend.

At the lower end, whilst costs are under control in the investigation and proceedings stages, (police stations and Magistrates’ Courts), there is an issue regarding “take up” in relation to free advice in the police station. There has been a long term trend for more defendants to respond positively to the question “do you want a solicitor?”. This is not surprising. We live in a culture that encourages a positive attitude to “rights”. It is perhaps more surprising that 40% currently do not say “yes”. Carter/DCA are aware of the 40% problem and threaten cuts to eligibility should the percentage of take up rise. This is not reasonable. If eligibility is currently set at proper levels, then to remove defendants from eligibility, who ought to receive advice, is not good social policy. It is also a feature of the system that the number of people arrested fluctuates, but given the amount of new criminal legislation, and the government desire to “Narrow The Justice Gap”, there are other pressures in the system to

increase volume at the lower end. Again, these are third party (government) driven, but are factors for which the suppliers are not responsible. Cutting eligibility as the answer to greater volume is undesirable.

## **AN ANALYSIS OF RISK IN A FIXED FEE SYSTEM**

There are some points to make in relation to fixed fees which are important when considering the proposed radical experiment of introducing fixed and graduated fees across the vast majority of legal aid work including criminal defence.

### **Proportionality**

In the context of fixed fees, proportionality is an important concept and it means the relationship between the amount of work that it is possible to do in any case, and its relationship to the fixed fee.

In small cases and at the lower end of work, it is likely (and this is another, more conceptual, version of the idea which is often expressed as “swings and roundabouts”) that there remains a relatively close relationship between the content of the work done in terms of hours, letters and calls, and the fee. In other words, the amount of divergence that is possible above and below the fixed fee is relatively limited.

This operates for both purchaser and supplier. The purchaser can be satisfied that it is relatively unlikely that the supplier is able to do very little work for the fixed fee. In other words, that there is no significant gap in value between what is done and what is purchased.

The supplier knows that as there is a relatively small gap between what is done and what is purchased, it is possible to operate a business on the basis of small gains and small losses, in the hope that if the fixed fee does represent a past averaging of costs, there will be a relatively small chance of doing more work than the value received. In other words, that there is a small chance of making significant losses.

The judgements of both purchaser and supplier are radically different when larger values are involved.

Larger values are related to complexity.

Thus, initial investigation, which usually involves the definition of a problem and initial advice and some action, is more susceptible to a fixed fee approach. Historically, this took the form of initial limits on legal help (Green Form work) and the evolution into tailored fixed fees and proposals for police station fixed fees could be seen as further examples.

Complexity in the police station is most obviously added by the gravity of charge, but might also relate to other features of the case such as multiple defendants or particular characteristics of the defendant such as youth or vulnerability. It is immediately obvious to practitioners that there is unfairness in attempting to fit case of greater complexity into a rigid single fixed fee scheme.

To cater for complexity, there are potentially two solutions, a higher fixed fee for police station work and/or a threshold for transition from fixed fee to hours paid which might depend on a combination of the above complexity factors and actual hours worked.

### **Magistrates' Courts**

There has been in practice a recognition of the points made regarding the expectations of both purchaser and supplier concerning value and its relationship to the fixed fee through the more complex but well understood system of fees in the Magistrates' Court which have permitted different fees for different types of work and lower and higher fees to reflect the content of work done with an escape mechanism to non standard fees.

We are extremely disturbed by the apparent acceptance of the notion that a single graduated fee could be made to fit all types of case in the Magistrates' Court, and our objections in principle are the same as those in relation to graduated fees in the Crown Court to which we now turn.

### **Crown Court Graduated Litigator's Fees**

There has been a determined attempt by the LSC and subsequently adopted by Carter to try and construct a graduated litigator's fee. Those attempts were not successful. The difficulty lies in the different character of work that the litigator (solicitor) undertakes from that of the advocate and secondly in the problem of the higher values of money involved, ie proportionality for the purchaser and supplier.

Earlier in our response, we explained the change in the nature of prosecution and its reliance on technologically based evidence. In day- to-day practice, evidence is served piece meal over long periods of time. This is caused partly by resource bottle necks, eg, laboratories being overwhelmed with requests and building up long queues, and partly by the nature of information gathering and analysis. There are also tactical considerations for the prosecution about when they divulge evidence as well as simple inefficiency and there is

a complete absence of sanction for the prosecution in relation to the late delivery of evidence.

The task of the litigator (solicitor) is to make sense of this often disordered jumble. No explanation is given of how any part of the evidence relates to any other part and for example in serious Crown Court matters, the prosecution opening note of how they put their case is in most cases delivered only very shortly before the start of the trial.

It is also the case that there is often limited access to a defendant who is in custody. In London this will often be HMP Belmarsh which was built, from the point of view of most practitioners, in one of the least accessible places in London.

The importance of identifying the correct proxies for the work done by the litigator has been neglected. Reliance has been placed upon importing proxies from the advocacy scheme rather than designing a fit for purpose scheme based upon the actualities of a litigator's necessary work.

The skills required of solicitors and specialist trial counsel are very different. It has been a strength of the traditional division of function between solicitors and advocates that these different skills have been applied on behalf of defendants and that defence teams can be constructed which have sufficient resource and skill to enable there to be an equality of arms between the prosecution and defence. Clearly, in practical terms, the resources spent by the police and Crown are usually vastly greater than those spent by the defence, but nevertheless experience, skill and focus and sufficient funding of both litigator and advocate have allowed defence cases to be properly prepared and presented.

The advocate's fee has been the subject of a great deal of amendment and addition to reflect tasks which were not immediately apparent at the time of the original design and which also reflect changes in the criminal justice system. It tends to be the case however that the advocate receives the product of the litigator's work. A lengthy proof of evidence by the defendant may have required many, many visits by a solicitor. A simple count of page numbers does not reflect the complexity and difficulty of the preparation work. The advocacy scheme has been a successful one simply because its proxies are appropriate to the advocacy function and it has been generously funded relative to litigator's fees. We provide detailed statistical analysis in relation to this disparity in our appended paper *An Economic Analysis of Publicly Funded Criminal Defence Claims Data and the Potential Impact of Lord Carter's Proposed Reform of Procurement* (page 30).

The proportionality issue, so far as fixed fees or graduated fees is concerned, is that, from the purchaser's perspective, the gap between the fee paid and work done may be very great. In other words there is overpayment for what is actually done. From the supplier's point of view the gap may also be very great in that the work done was greatly in excess of the fee paid. There is much greater risk for both parties in the arrangement.

From the point of view of principle and equality of arms, there is an enormous danger that the constraint of the defence team will undermine equality of arms and prevent the proper presentation of the defence case.

Whilst a pre-emptive strike has been made against the historical method of payment, ie for work reasonably and necessarily and actually done, we do not see anything wrong in that historically sound principle. There is an experienced cadre of determining officers working nationally. If there are concerns that work is being paid for which was not reasonably necessary or actually done we do not understand why greater effort should not be put into the extension, re-training or further direction of determining officers.

From the points of view of both risk and principle, we oppose the introduction of graduate litigator's fees and believe this is an area which should be carefully re-thought before any precipitate action is taken.

## **SOCIAL INCLUSION**

There are a number of key words that flag up very important government policies. These include social inclusion, choice and access. We have been puzzled and frustrated by the pursuit of policies which do not recognise the importance of these concepts in relation to the provision of the public service which is legal aid. Our frustration arises from the pursuit of policies which operate directly against these government-sponsored concepts and which contradict reforms and initiatives elsewhere in public services which support social inclusion, access and choice at the local level.

### **The Market**

A secondary justification of Carter is that proposed reforms are “market led”. The market is not one single mechanism. Markets are, in real life, always imperfect and contain a number of different features.

The legal aid market has grown over a period of 30-40 years. It is mature and complex. It has been an unusual market in terms of providing a public service because overwhelmingly it has been provided by small entrepreneurial businesses (solicitors’ firms), who have found their way into the market by identifying needs and seeking to provide services to meet them. This has not been a random process. Solicitors who manage businesses have excellent local knowledge, they choose to site their businesses in high streets, often near working class communities where there is poverty and social need and to supply services for which there is a demand. This has been influenced by the shape of procurement. There are services which have always been under funded eg, representation in tribunals. The absence of funding has, of course, meant an absence of provision, whilst inadequate funding also causes shortages of supply. That is not the result of selfish solicitor choice but the consequence of funding arrangements.

We have likened the complexity of this market in which solicitors compete by reputation to the ecology of the rain forest. Committed firms with a long term presence in communities, produce myriad relationships to individuals and their families. Those families may well present with clusters of problems and different problems over long periods of time. Those families are often referred to as socially excluded. By this we understand a process by which individuals and their families become disengaged and alienated from societal values. Dysfunctional families are often cited as the object of intervention and government policy.

What should be understood as a major feature of the current market of legal aid supply is that every pound spent on a legally aided case is not only spent in solving a particular problem but also assists in reconnecting those dysfunctional and alienated families to the societal values of justice and rights. There are millions of examples in any year of how legal aid lawyers empower their clients. When an individual is confronted with a problem which involves rights, disrepair, inability to access benefits, family breakdown and so on, and chooses to go to the lawyer of his choice, he is empowered. If they have an ongoing relationship to that lawyer, they are reconnected to institutional frameworks rather than being disengaged and alienated. In other words, legal aid money creates a social good. There is also a compelling case that early and effective intervention “saves” very large downstream expenditure by preventing chain reactions eg, homelessness, children into care, drug issues, arrest and so on.

### **The Impact of Carter on the Market And Social Inclusion**

The Carter model of the market is very different. The fundamental proposition is of a smaller number of suppliers with semi monopolies in which the concept of “own client” is diminished and in which volume is traded for price. This essentially represents a commoditisation of the work and its depersonalisation.

A smaller number of suppliers inevitably leads to less choice of access and more difficulty of access. Fewer firms mean longer distances. Larger firms organised to deal with volume are highly likely to be less personalised.

We would like to say something about the personalisation of service. In everyday life people seek out personal relationships. It is a part of the fabric of everyone’s life that they have ongoing conversations with people who they recognise. These are two way connections. A local shop keeper recognises regular customers; the customers discuss with the shopkeeper the weather, daily problems and so on. These relationships permeate our lives without us thinking about them. The more settled the community, the more likely they are to thrive. If the postman has been in the job for a length of time, he will know all sorts of information about his round and the people to whom deliveries are made. The same has been true of milkmen, beat police officers and so on. Settled communities with these networks are often the basis for nostalgic TV serials eg, Open All Hours, Heartbeat, Doctor Finlay’s Casebook and so on. The disappearance of these relationships is often lamented, ironically by politicians, as other services are aggregated and depersonalised, the disappearance of the small sub post office, corner shops, general practitioners who do their out of hours visits to

families they know and so on; it becomes ever more difficult to achieve social solidity. This is the part of the process of disengagement and alienation.

Whilst not over estimating their impact, legal aid lawyers do play a major role in social cohesion through their empowering relationships with individuals who value their services. It is important to firms to be seen as family lawyers. Carter proposes short term contracts, the reorganisation and relocation of offices. The Carter market solution is destructive of the network of relationships we have characterised as being like the rain forest. It replaces rich ecology with the impersonal, uniform and unappealing soya bean fields. This may appear important as a short term economic goal but what is lost is unlikely ever to be replaced.

## QUALITY

The Carter Review recommended that the LSC should begin a national roll out of Peer Review assessment from July 2006 in anticipation of best value tendering taking place from April 2009 (Recommendation 3.1).

It is generally accepted that previous mechanisms for assessing quality (namely Transaction Criteria, SQM and file review) have not provided an acceptable route to guaranteeing quality. It is also widely accepted that professional Peer Review is capable of providing an improved method of measuring quality and one which is capable of having wider support among the profession.

Whereas responsibility for monitoring quality has hitherto fallen largely on the LSC, Carter proposes that responsibility for conducting the new system of quality control (Peer Review) be transferred from the LSC to the profession. This would have the practical consequence of making the Law Society responsible for administering Peer Review of solicitors undertaking publicly funded work and at the same time achieve a significant saving in the running costs of the LSC.

We recognise the potential benefits of Peer Review over previously tried quality controls and we acknowledge Carter's opinion that it is preferable that the Law Society, as independent regulator and representer of the profession, should assume responsibility for assessing the quality of work undertaken by solicitors.

The desirability of both Carter's proposals – to introduce Peer Review and to transfer responsibility for quality to the Law Society from the LSC – are self evident.

However these proposals, when taken in conjunction with other recommendations made by the Review, risk the creation of new problems.

First, it is inevitable that tension will arise as a result of quality standards being raised at the same time that prices for legal aid work are lowered. The published research (undertaken by the Carter Review, the Law Society and the LCCSA/CLSA) demonstrates the economic fragility of the supplier base. A reduction in pricing and the simultaneous raising of quality standards is an unrealistic goal. Whichever organisation is responsible for Peer Review, it will have to make allowance for falling prices when setting the quality threshold.

Secondly, we are concerned at the likely consequences of the combined effect of the proposed Carter market reforms and the simultaneous implementation of Peer Review. The proposed market reforms anticipate that approximately 400 suppliers will disappear from the market. The analysis conducted by LECG for the Law Society predicts that the same changes may in fact lead a minimum of 800 firms being required to merge into larger practices. Quite separately, the LSC predicts that a significant number of firms will fail to survive as a result of the new Peer Review quality standard. Therefore the combined effect of Carter and Peer Review may lead to an overall reduction in the supplier base of much greater magnitude than anticipated by Carter alone. This would have very serious implications for access to justice across the country and we therefore urge the LSC to undertake a specific analysis of the likely reduction in supply which will result from the combined effect of the proposed market reforms and simultaneous roll out of Peer Review.

Thirdly, we are concerned as to the consequences of transferring responsibility for Peer Review from the LSC to the Law Society. The Law Society is at present in the process of post-Clementi reorganization, creating clear separation between its representational and regulatory functions. At this time no decision has been made as to whether responsibility for Peer Review would be undertaken by the representational or regulatory arm of the Law Society. As a result, no consideration has been given as to whether a firm's failure to achieve a satisfactory result from Peer Review might lead to professional disciplinary action being taken against the firm *in addition* to the firm being excluded from undertaking publicly funded work. Similarly, at this stage no decision has been taken as to how the cost of Peer Review would be funded if it were undertaken by the Law Society. Lord Carter's Review anticipates that transfer of responsibility to the Law Society would lead to a commensurate saving to the cost of funding the LSC. As yet there is no clarity as to whether the cost of Peer Review would be supported in some other way by government or whether the cost would fall on the Society and thereby be passed on to the wider profession as a whole (through the practising certificate) or by way of some additional demand on firms undertaking publicly funded work. The latter consequence would pose a substantial financial burden on practices already having to bear the strain of reduced prices. We therefore urge the LSC to seek a resolution of these uncertainties before any final decision is reached that the Law Society should take on responsibility for Peer Review.

Finally, we would urge the LSC to ensure that, (in the interests of procurer and supplier), whatever system of quality control is adopted as a result of this consultation, it should be a system which is as transparent, simple to operate and unbureaucratic as possible. Let there be one measure for quality operated by a single organisation with responsibility for quality

control. If the profession is to answer to peer reviewers appointed by the Law Society then there should not be some separate quality check being run in parallel by the LSC.

## **TENDERING**

In the context of Criminal Defence Services, recognition of “Best Value” as a concept is only marginally better than the ‘lowest price bid wins’ considerations that underpinned the previous Competitive Tendering proposals that were put forward from the LSC. It remains the case that Criminal Law Defence services are inherently unsuited to tendering. The LCCSA has previously submitted a paper to the DCA and LSC on this subject and we do not support tendering in any form for the reasons set out below.

In its annual report for 2002/2003 the LSC complained that

“CDS spend is significantly driven by factors outside the Commission’s control...Other criminal justice agencies continue to make significant changes to law and procedure.....the impact of which on the CDS expenditure is not taken into account when proposals are developed and costed”.

If LSC has been unable to work this out, is it right that providers will have to cope with the same cost drivers (over which they will have even less control/input on a fixed budget?).

Any Competitive Tendering exercise in such an area is very different from other procurement exercises elsewhere in that given the fact that there is a monopoly purchaser and that the overwhelming number of suppliers of these services do not supply services to any other purchaser; those that fail in the initial bid round will become extinct. In other words, the consequences of tendering in Criminal Defence services are irreversible.

Whilst Graduated/fixed fees can ignore inputs by placing a value on outputs only; Tendering compels a bidder to value the inputs. The value of necessary inputs has increased as wholesale changes have been made over the last 15 years to the rights of silence, burdens of proof, rules of character evidence, rules of hearsay etc. There is a Criminal Justice Act nearly every year. All of the above are not designed to simplify procedures but in fact to complicate them. As this process has continued apace, the notion that expenditure on criminal defence services should not rise is as tenable as the claim that defence lawyers have brought about the changed scenario. So the cost rises all the time as it is demanded by government in the legislation implemented.

It is not possible to have a system of competitive tendering where the inputs are not in the control of either contracting party. In the context of court based services, the following example should show up how ill conceived the notion of tendering in terms of fixed price per

case can be. The single example we use is in relation to the recent provisions of bad character evidence.

The CJA 2003 brought in new laws in relation to not only the bad character of the defendant but also that of any witness for the prosecution or defence. A new set of complex laws were established setting out a series of “gateways” through which bad character evidence can be adduced. Prior to this the law was quite simple and straight forward and did not impact on the cost of a case.

The new rules were intended to come into force on the 4<sup>th</sup> April 2005. In the consultation period for the previous Tendering Proposals which overlapped with the implementation of CJA 2003, the LSC officials conceded in meetings with practitioner organisations, that in a competitive tendering environment if a new law were to be imposed by statute which caused a rise in costs then an additional payment would be made on top of the previously existing bid per case. At this point a question arises as to how that extra segment of payment would be arrived at. Would there be an independent arbiter of the amount to be set?

Be that as it may whilst it was understood that the new law would come into force on the 4<sup>th</sup> April 2005; the Court of Appeal decided that according to its method of statutory interpretation these new laws in relation to bad character would be effective as of the 15<sup>th</sup> December 2004 which is when they decided the case of Bradley.

So far in this scenario we have a tendering environment being influenced by new statute and also the Court of Appeal bring forward an implementation date. Presumably in a post tendering environment this would lead to another round of negotiations for an extra amount to be added to the bid price previously tendered per case. This of course is necessary due to the fact that the inputs have been changed unilaterally without consultation as a result of judicial decision making.

The passing of the bad character provisions under the CJA 2003 and their “earlier” implementation by the Court of Appeal has added at least one extra hearing (a cost driver of some 25% in the Magistrates’ Court) to the cost of a case as each of these cases where bad character is an issue must have a prior preliminary hearing – pre-trial review in the Magistrates’ Court/Crown Court prior to trial. In the time scale between the 15<sup>th</sup> December 2004 when the rules were brought in by the Court of Appeal and the 15<sup>th</sup> May 2005 different courts had different court procedures for dealing with these issues.

However the Court of Appeal then revisited the issue in the case of Bovell on the 25<sup>th</sup> April 2005 where it basically stated that whilst previous convictions can of course be revisited as allowed under the change of law, a considerably large amount of material would be required before any such applications could be made. In other words in the stroke of a single paragraph of the judgement (paragraph 2) several hours worth of work may have been added to each case where bad character is an issue.

In a post competitive tendering environment therefore, the law firm would once again have to revert back to the LSC and an additional price would have to be agreed in addition to the pre-agreed bid tender price. There would soon be in place a system which was defined more by its exceptions than its original price.

It can therefore be seen that even in the context of CDS lower the following institutions would significantly affect the inputs:

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1. Parliament by passing new laws of substance or procedure.
  2. The Court of Appeal by setting out the depths and breadth of enquiries necessary and the amount of evidence and format of that evidence necessary in order for a case to proceed.
  3. Each Magistrates' Court with it's own idiosyncratic set of pre-trial reviews.
  4. The Professional Regulators set standards that may impact on price tendering. For instance it is presently the case that each solicitor must complete 16 hours of continuing professional development in terms of attending courses per year. It is apparently planned that this number is to be raised dramatically. Any professional entity bidding for cases at a fixed price would have taken this into account as part of their overheads. This particular item in the firm's budget could have it's cost tripled without any means of recovering it through cost of services provided which is in any business the life blood of that business.

It may therefore be seen that in the light of the various institutions that compel what inputs have to be made into a case renders a competitive tendering scheme unworkable. The issue is compounded by the fact that the inputs required by multifarious agencies occur randomly and in a tendering environment would often occur after a bid price has been submitted and agreed.

In addition certain types of cases that feature clients with learning difficulties or mental health problems inevitably require larger inputs than might otherwise be the case. Under Price Competitive Tendering schemes for such services it is these most vulnerable clients who would not be at all well catered for. The extra inputs required here are sought to be ignored by the procurers who may thus be failing in their statutory duty.

## **DIVERSITY**

BME criminal defence firms are one of the few sectors of the legal profession where diversity exists and where skilled solicitors operate, providing quality representation in their communities.

BME communities started to arrive in the United Kingdom in larger numbers since the 1950's. It has taken time for these communities to establish themselves and for second and third generations to educate themselves to levels where they can establish their own firms.

These successful BME lawyers provide role models for their communities. Many of these firms are young and are growing. Carter's proposals, freezing growth and promoting large firms will cause many of them to collapse and will set the cause of diversity back many decades.

These are successful businesses. They are, however, by and large, small firms that have reached glass ceilings coterminous with the communities they serve. They have set up their firms in a highly competitive market place where their competitors are larger and longer established. These BME firms survive by offering a niche and quality service to the communities in which they operate.

It is not wholly correct to conclude that such firms only cater for clients from ethnic minority communities. They offer services to all members of the local community. However, they offer added value for money to the Legal Services Commission due to the linguistic skills offered by minority solicitors (which means a reduced use of interpreters) and by their cultural empathy and understanding of ethnic communities.

The government has made it known that it wishes to promote diversity within the legal profession and the judiciary. Publicly funded criminal defence work is an area where such diversity exists.

The current state of the market means that firms established by minority lawyers have an active control of their own destiny. They also offer training positions and opportunities to minority solicitors who might not find such opportunities within non BME firms.

The current proposals threaten the very existence of these firms and will inevitably lead to the following:

1. Minority solicitors, in positions of responsibility within their own firms will have the following choices.
  - (a) To form inherently unstable consortia
  - (b) To combine with larger firms
  - (c) To give up their firms and act as fee earners in other firms
  - (d) To withdraw from the criminal defence market place.

All of these options will lead to minority solicitors having less of an influence in the justice system. There will be less of a pool from which solicitors can be selected for higher office.

2. Minority firms, due to their linguistic skills and cultural empathy, offer a distinct and important service to members of minority communities. The 20% own client rule out of area, will make it more difficult for such firms to look after members of their communities who request their services. This will be particularly the case in areas where there are not significant minority communities or BME firms and where the only way to obtain the services of such a firm would be to request one outside of that area. It is hard to understand why there is such a restriction in circumstances where, under a fixed fee scheme, the firm would have to make that economic decision.

The destruction of such firms will be a heavy blow to solicitors from minority communities. Often they find difficulties in relation to recruitment or training with non BME firms and they rely on small minority firms to give them the opportunity they need to succeed.

Carter's proposals discuss at length the Legal Services Commission monitoring the effects of the reforms on minority communities and making rules to ensure that firms have diversity policies. If the protection of diversity within the legal community were to purely rely on ensuring large, non BME firms have a diversity policy then this would be a step in the wrong direction. At present no such proposals have been drafted and there is no confidence that, if such regulations were drafted, then they would be strictly enforced. The danger is that firms would pay nothing more than lip service to such regulations.

Carter's report asserts that its current proposals are Race Relations Act compliant and will not adversely affect minority firms or solicitors when matters are looked at on a nationwide basis. This ignores the fact that minority communities and the solicitors that represent them are not spread out evenly throughout the United Kingdom but are concentrated in certain regions. Communities and firms in these areas will be disproportionately affected.

Table 5.17 on page 112 of Carter's report refers to a regional impact in rollout areas by legal aid income and refers to crime firms under £50,000. The table shows the proportion of firms that will need to restructure in each area. A comparison is made between white British and black and minority ethnic firms. The regional figures indicate that BME firms are disproportionately affected. Thus in London 22% of black and ethnic minority firms will need to restructure as opposed to 12% of white British firms. In relation to London North the figure is 22% for black and minority ethnic firms whereas it is 13% for white British firms. In relation to London south the figures are 24% for black and minority ethnic firms compared to 11% for white British firms. In relation to the southern region the figures are 50% for black and minority ethnic firms against 22% for white British firms. In the South West the figures are 100% for black and minority ethnic firms against 34% for local white British firms.

It is clear that the regional effects on minority firms are so great that the reforms cannot be justified and that they clearly impact more upon black and ethnic minority firms rather than white British firms.

In Table 5.18 on page 113 of the report the suggestion is made that 16.3% of black and ethnic minority solicitors (as opposed to firms), will be affected against 19.1% of white British solicitors. However, once again the figures show great disparities between regions. In relation to London South the figures are 15% for black and minority ethnic solicitors as opposed to 5% for local white British solicitors. In Merseyside the figures are 35% for black and ethnic minority solicitors against 27% for local white British solicitors. In the North East the figures are 50% for black and ethnic minority solicitors as opposed to 25% for local white British solicitors. In the South East the figures are 22% for black and ethnic minority solicitors as opposed to 17% for white British solicitors. In the Southern region the figures are 28% of black and ethnic minority solicitors as opposed to 20% for white British solicitors. In Wales the figures are 33% of black and ethnic minority solicitors as opposed to 24% of white British solicitors. In the West Midlands the figures are 15% for black and ethnic minority solicitors as opposed to 10% for white British solicitors.

There will obviously be areas where there are less minority solicitors and firms operating because there are smaller minority communities in those areas. It is therefore untenable to argue that the proposals are acceptable when looked at on a national basis.

The LCCSA is also concerned about the drive to force firms to join together in franchises or consortia. Mergers made under compulsion make for inefficient business entities. Small

firms have different cultures and ways of running their affairs. Under these circumstances forcing them to combine is not feasible.

The philosophy behind the report seems to encourage firms to increase their indebtedness and to persuade banks to lend them more money in order to restructure. Small firms run on very tight margins. This is on the basis of current fees that are paid. The LECG report, published by the Law Society, indicates that this is the case. Encouraging firms to borrow beyond their limits, along with reduced fixed fees, will put a large number of the smaller firms out of business and BME firms will be disproportionately affected. The LECG report indicates that some 800 firms will be affected.

Carter's proposed reforms will not allow small minority firms to expand. This is because they will, in the first wave of reforms, only be allocated work on the basis of historical performance.

The existence of most small minority firms is threatened by the imposition of fixed fees (amounting to price cuts) to be implemented in March 2007. This is because the promised "efficiencies" allowing firms to maintain their fee income by doing more work for the same amount of money have not been implemented. The effect of the initial fixed fees will be to pay firms less money for the same volume of work they are doing.

The current fixed fee levels are not realistic and, at public meetings, large non BME firms and preferred supplier firms (LSC flagships) have stated that the proposed fixed fees would amount to cuts of somewhere between 25% and 40%. These figures threaten the very existence of small minority firms running on tight margins, especially as their caseload will have a disproportionate number of longer cases caused by the need for foreign interpreters.

The LCCSA is also concerned that the restriction on access to VHCC work will also mean that many small minority firms will not be able to conduct the work they presently undertake.

The knock on effect on communities will be drastic. It is widely accepted that black and ethnic minority defendants are disproportionately reflected in the criminal justice system in relation to the total population. Participation in the criminal justice system by other members of the BME community at lawyer and judicial level enhances inclusivity and the legitimacy of the system.

As for the impact on BME lawyers, the work will become less attractive due to lack of a career path, when survival is contingent upon artificial mergers. The Society of Asian

Lawyers own figures suggest that many BME proprietors of criminal law firms are considering withdrawing from criminal defence work altogether if the proposals, as currently drafted, are introduced.

BME firms often, but not exclusively, instruct members of the criminal bar who reflect their client's linguistic and cultural needs. If small practices instructing BME barristers disappear then the criminal practices of those BME barristers are also likely to disappear with them.

## **POLICE STATIONS**

The Police and Criminal Evidence Act 1984 was a crucial intervention by the state in the processes that surround the arrest and detention of its citizens for interrogation and criminal investigation. The previous system of Judge's Rules had been completely ineffective in preventing malpractice, as a result of which there were major miscarriages of justice and public confidence in the criminal justice system was severely undermined. The presence of legal representation in the police station acts as a guardian of fair process, making evidence obtained through interrogation admissible and preventing malpractice.

There have been many subsequent developments, and each tends to increase police power and make the process of detention more complex. Periods of detention have been extended, the definition of arrestable offences has been widened to include all imprisonable offences, the caution has been transformed, and other processes are now engaged as a result of advances in technology including DNA and drug testing.

The police station remains a crucial point of entry into the criminal justice system, at which high quality representation is imperative and often decisive in how a case subsequently evolves.

The funding of police station representation has been a social good and is excellent value for money. The fact that the LSC can now advance a range of fixed prices, the highest of which is approximately £250 net of VAT and disbursements for each police station case, shows how low cost the system is.

Travelling and waiting have traditionally been paid at about a half of attendance rates. This has been a reflection in both the police station and Magistrates' Court of cost systems derived from an earlier age. Most solicitor work was located in the office and travelling and waiting were relatively small portions of time spent. The effect of creating legal presence in the police station, and a higher rate of representation in the Magistrates' Court, has been to front load solicitors with the problem of having to spend so much time travelling and waiting at very low rates of pay.

It is a paradox that the LSC and Carter have regarded travelling and waiting as a "waste" of resources, and in some way the result of inefficiency on the part of solicitors. Cutting the rates paid for travel and waiting is hardly a solution to the problem, but rather adding insult to the injury.

The compensating factor is said to be the prospect of an increase in volume. There are however, two major problems.

The first is that there are limits to how much any individual can do in a given timescale. The additional complexities referred to above mean that it takes, if done properly, a substantial amount of time to “process” an individual case in the police station. Even if there could be some improvement in the number of cases processed per visit to the police station by each individual, it is highly likely to be marginal.

The other problem is the complete confusion about volume and locality. It is said that re-engineering police station areas can produce much larger volumes and contractors could grow into large scale providers. However, the reality is that the volume is still likely to be spread over a number of police stations wide distances apart. There is no single location in which it is economic to place an office. Having several offices beside several police stations is a very poor economy of scale as core administrative costs like reception, telephone and computer systems have to be duplicated at each site. Offices located near to the police station will often not be close to the courts and certainly not to prisons. This is particularly the case in London. This is a confusion which lies at the heart of the Carter proposals.

A further serious problem is delay. Delay is on most occasions caused by police officers and Crown prosecutors. Vast amounts of time are used up while officers make their notes, conduct enquiries, delay between interviews, and then there is further delay whilst the CPS are asked for opinion with regard to charge.

There are also difficulties with the arrival of interpreters, mental health teams and appropriate adults. The delay caused by third parties is highly unlikely to be removed as a result of bureaucratic meetings of local criminal justice boards. We view the idea that this kind of stakeholder co-operational and intervention will be effective at local level with enormous scepticism.

We are therefore opposed to a single fixed fee. It is not sensible to have a single fee because of the wide variety of different situations we encounter in the police station.

If there are to be fixed fees, there is certainly a need for a two tier system. A system mirroring the lower and higher standard fee scheme in the Magistrates' Court would be preferable. The reason for this is that it is more sophisticated and can take account of grave crimes which require experienced police station representation and other factors which make defendants particularly vulnerable such as a youth, mental illness and language difficulty.

We would also welcome a more refined system which takes into account in and out of hours attendance. It is extremely difficult to organise an attendance system that does not contain some compensation for working in the middle of the night, weekends and public holidays.

It is also our view that for grave/complex work, there needs to be a more realistic escape clause than the one proposed by Carter.

An inflexible fixed fee will increase the risk of false confessions/admissions and will act as a pressure to diminish quality of representation.

## **MAGISTRATES' COURTS**

According to the LSC, the Magistrates' Courts budget is under control. The system of standard fees has worked well, is well understood and is integrated into the administrative and technical back offices of firms and the LSC.

Little regard is had for the administrative upheaval of all of the Carter proposals, and the costs that would be imposed on the supplier base by changes in rates and types of claim let alone the costs of "bidding" to do the work.

It is said to be necessary to cut money from the lower end budget. We have commented above on whether or not there is truly a budget problem.

We have already commented on travelling and waiting as contemporary phenomena. The idea of waste of resource is linked in the LSC's mind to travel and waiting.

### **Travel**

In London, unlike elsewhere, it is extremely rare for a police station, a court and prison to be close together. If a firm places its office by any one of those places, it is highly likely to be very far away from the other two. This is as a result of long term failures of strategic planning. For example, in North West London, the Brent Magistrates' Court is serviced by Wembley police station. They are miles apart. When Brent Magistrates' Court was built, a planning process that unfolded in the 1980's, it would have been possible to build a large modern police station next to it. This was not done. Instead very large amounts of money have been spent rebuilding and refurbishing both Kilburn and Wembley police stations. Cases sent to the Crown Court are sent to Harrow Crown Court. This is many miles away from the Magistrates' Court and the police stations. defendants detained in custody, will often go to Wormwood Scrubs prison, but in serious cases, destined to be heard at the Central Criminal Court, are then transferred to Belmarsh in South East London. Given the geography where should a firm have its office? The answers have tended to be in the high streets where people come and shop and which have good transport links, none of which happen to be where the courts, police station, Crown Court or prison are located.

That there should be some cut to travel costs and that they should be rolled up into the standard fee on an average basis is further sought to be justified by the idea of an increased volume in a local court.

This brings us back to the issue of capacity. An individual lawyer has only a finite amount of capacity and changes in procedure have vastly changed the Magistrates' Court as a forum.

The Criminal Justice Act 2003, in particular, imposed a new framework for sentence. Conducted properly, and in accordance with the Act, there should be substantial mitigation on a first hearing to enable the court to decide its preliminary view on the level of sentence and the purposes of sentence which should then be recorded. Whilst some tribunals ignore the complexity of that process, the system for providing legal services should not be designed on the basis that the statutory framework should be ignored.

We have commented above on particular London issues, but it is worth mentioning that the capacity of an individual advocate is also affected by defendants having mental health issues, language problems and other social problems such as homelessness and drug dependency. It is our anecdotal view that these problems are frequently accounted in London Magistrates' Courts.

The economic point is that although it might be more economic to be able to do one or two cases per court session more, there is a limit to capacity and the amount of "gain" is unlikely to be great and may well not compensate for any cut in rates.

### **Delay**

Waiting time is rarely caused by defence advocates. There are numerous reasons why there is delay in the Magistrates' Court. Arranging a Magistrates' Court hearing is complex in that it requires a defendant, a defence lawyer, a suitably qualified prosecutor and court time as well as prisoner transport services for clients in custody, interpreters or foreign language speakers (witnesses and defendants), and appropriate adults for your and vulnerable defendants.

The defence lawyer will only be ready once there has been an opportunity to take proper instructions and as all cases tend to be listed at the same time, it is likely that there will be a queue.

Cases are unpredictable. Lay magistrates are much slower than district judges and faced with difficult problems of sentence or bail, may well take considerable time coming to decisions.

Courts routinely overload their trial lists causing trials to be vacated to other days.

With regard to economies of scale, and capacity, whether or not an advocate can take on more cases in a given session also depends upon timing. It is not possible to be in two court rooms at once, or to do two cases at the same time.

We have great concern that the proposed “rolled up” fees represent real cuts.

We do not see any need to change the Magistrates’ Court payment system. The budget is under control and the system works well.

## **THE CROWN COURT**

### **Crown Court Litigator's Graduated Fee Scheme**

We have previously commented upon our concerns at the proposals for a GFS for Crown Court litigators. The limitation placed on fees by the GFS will limit the volume and quality of work which can be undertaken by those preparing the trial of defendants in the Crown Court. There are direct implications for equality of arms. Limitations placed upon the defence will restrict the quality of information on which juries and judges have to base their decisions on guilt and sentence. As a consequence we are concerned that the quality of decision making would decline thereby leading to miscarriages of justice which in themselves disfigure the reputation of the criminal justice system as well as leading to personal suffering of victims and wrongly convicted defendants as well as an increase in the number of (expensive) appeals.

The GFS for advocates has been in existence for many years and was originally based on a substantial piece of research, the purpose of which was to ensure that the proxies within the system were capable of reflecting the variety and complexity of work involved in criminal advocacy. In designing the litigator's GFS the LSC has substantially relied upon the same proxies which were relied upon to produce the original GFS for advocates. However, because the work of litigators is more varied and very different to the work of advocates the GFS as presently designed is not fit for purpose.

LCCSA and CLSA have together conducted a survey of practitioners to test the workings of the proposed new scheme. The results show a disastrous impact on fee levels, far beyond those anticipated by Carter. The full analysis is appended to this response. For ease of reference we set out below relevant extracts.

## 1. Crown Court Claims

### (a) Data Available

Following the publication of Lord Carter's report, the Legal Services Commission provided us with a number of datasets of Crown Court claims. These included: -

- Data on 7,419 claims made by "preferred suppliers" between 2000 and 2005;
- Data on 272,975 claims made since 2003<sup>1</sup>.

We also conducted an online survey, and draw conclusions from the data gathered during this exercise.

### (b) The Headline Figures

The larger of the two datasets includes details on 263,975 claims totalling £432,824,368.99 (not all of the claims were included because of doubts raised by the Legal Services Commission in relation to their accuracy). If these were to be paid under the litigator's fee envisaged by Lord Carter, the total expenditure would be £390,515,864.87, an overall reduction of £42,308,504.12 (9.77%)<sup>2</sup>. This is broadly in line with the 9.05% reduction in fee income that would be experienced by the preferred suppliers when applying the litigator's fee to the 7,419 dataset.

#### (i) Are Some Types of Claims Affected More Than Others?

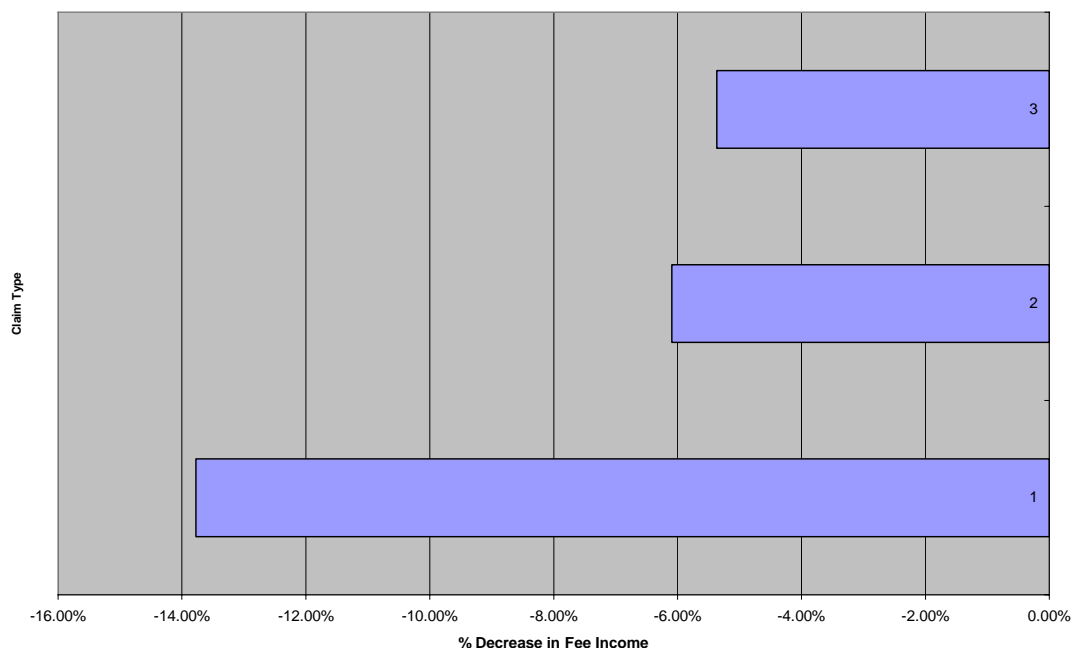
Perhaps unsurprisingly, the claims most affected are those relating to trials, and firms will experience a total reduction of 13.77% in their fee income from this type of work – see Figure 1.

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<sup>1</sup> Our understanding is that this dataset was created by amalgamating counsel's graduated fee claims data, solicitors standard fee claims data and the National Taxation Team's ex-post facto claims data

<sup>2</sup> Lord Carter predicts total savings of 10%

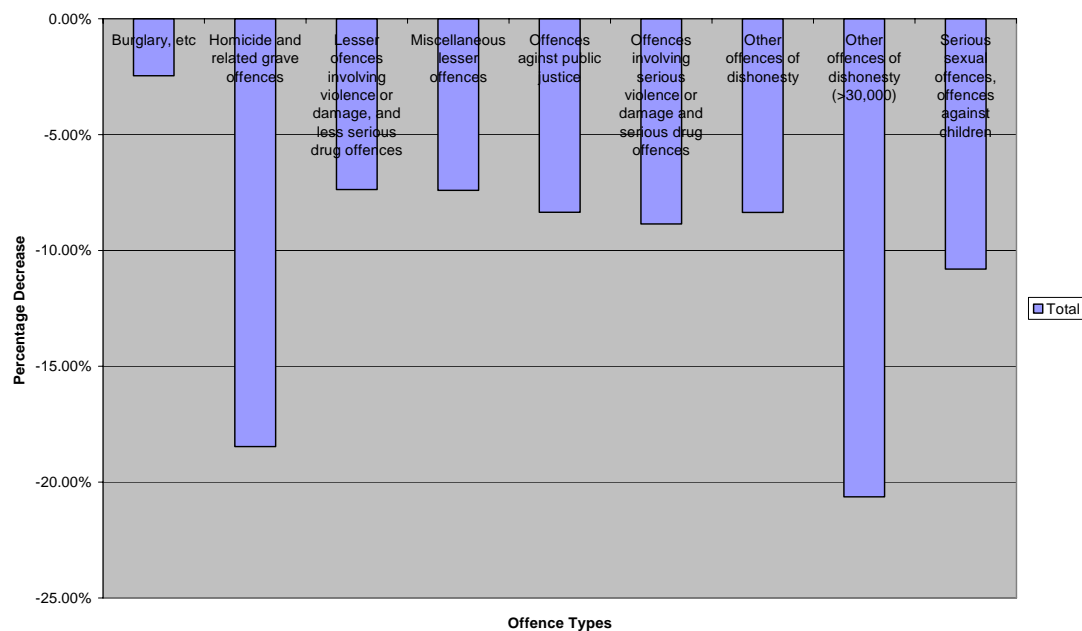
**Figure 1 – Potential % Reduction By Crown Court Claim Type<sup>3</sup>**



(ii) What About The Types Of Offences – Does This Make A Difference?

Our analysis of the large dataset demonstrates that claims in relation to some offences are more affected than others – see Figure 2.

**Figure 2 – Potential % Decrease Of Crown Court Claims Income By Offence Type**

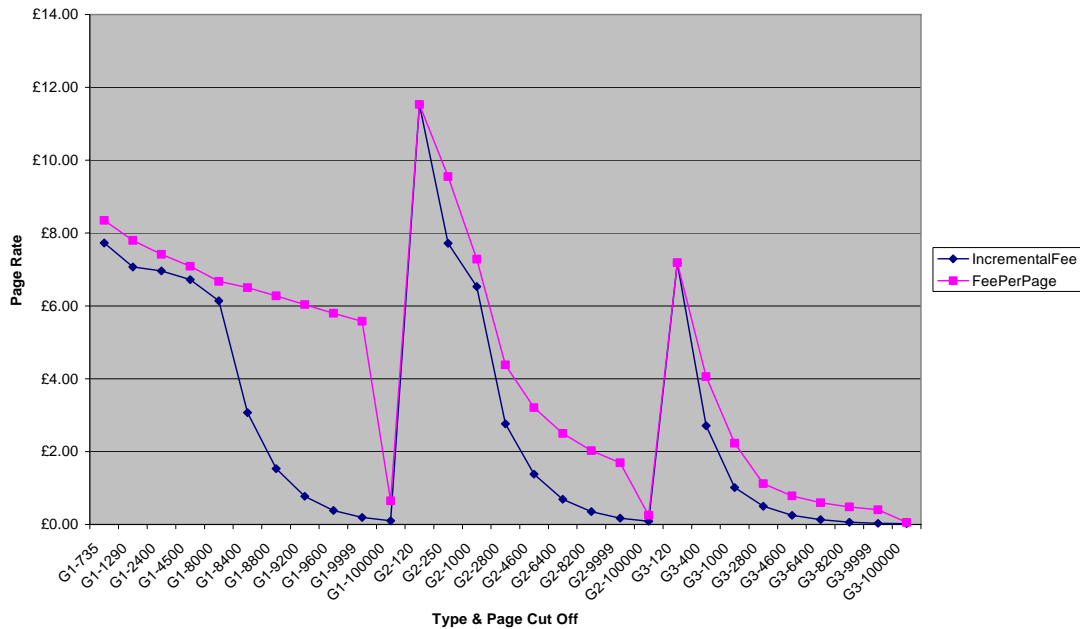


The greatest loss is to claims for defending “other offences of dishonesty” where the alleged value of the fraud/deception/theft is greater than £30,000, a loss of 20.63% in real terms.

<sup>3</sup> The following case type referencing is used throughout this analysis: 1 = Trial, 2 = Cracked Trial, 3 = Guilty Plea

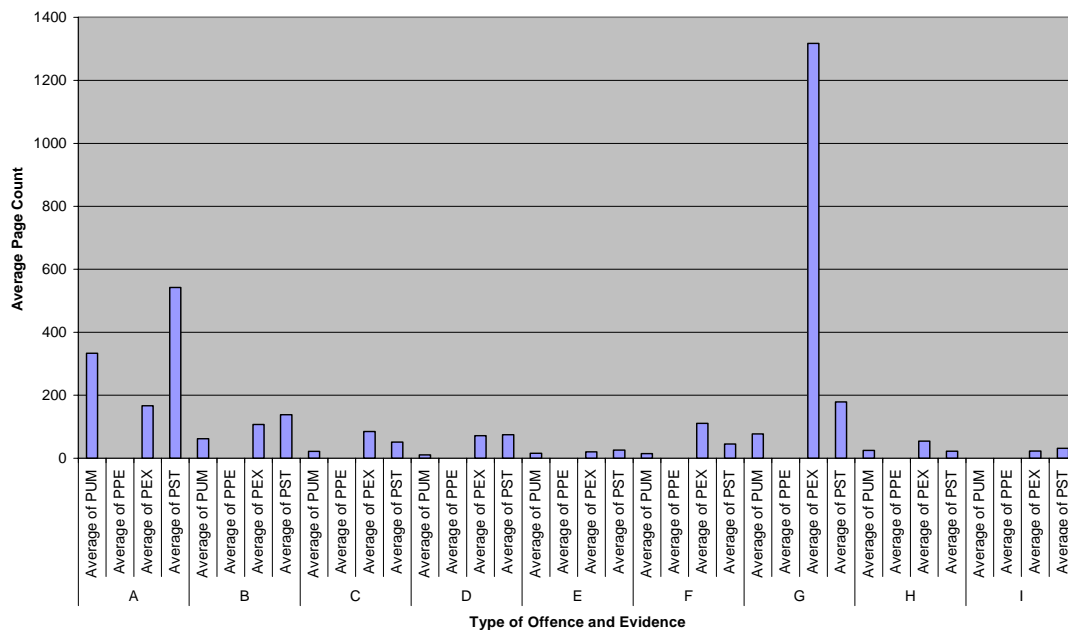
This is most probably explained by the fact that these cases tend to be “paper-heavy” and there is a steep reduction in the incremental fee paid per page of primary evidence over and above 8,400 pages.

**Figure 3 – Litigators Fee Page Rate For "Other Offences Of Dishonesty Where Value > £30,000"**



There is further support for this contention from an examination of the joint online survey (see Figure 4), which clearly shows that average number of pages for “other offences of dishonesty” far exceeds those for other types of offences.

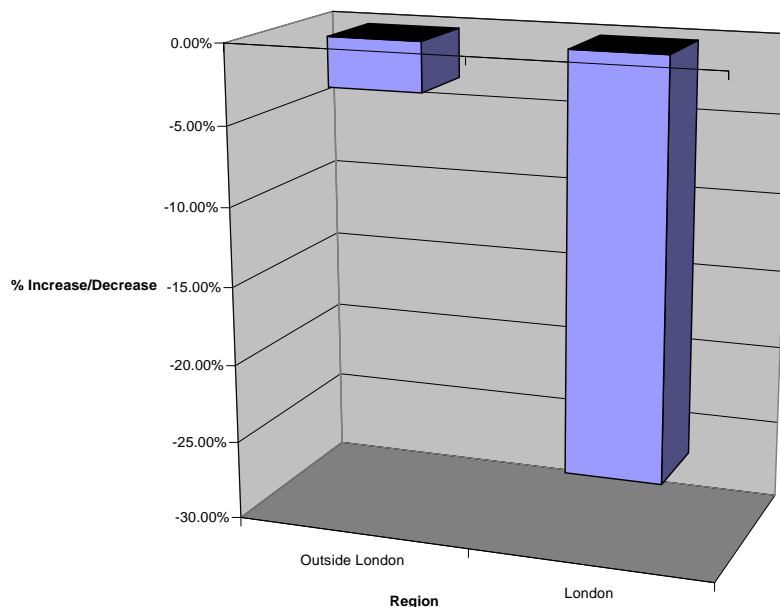
**Figure 4 - Average Pages Of Material For Crown Court Claims By Offence Type<sup>4</sup>**



(iii) Is There A Geographical Discrepancy?

Our analysis reveals that London firms will potentially suffer the largest reduction in their of fee income, losing 26.11% (see Figure 5)

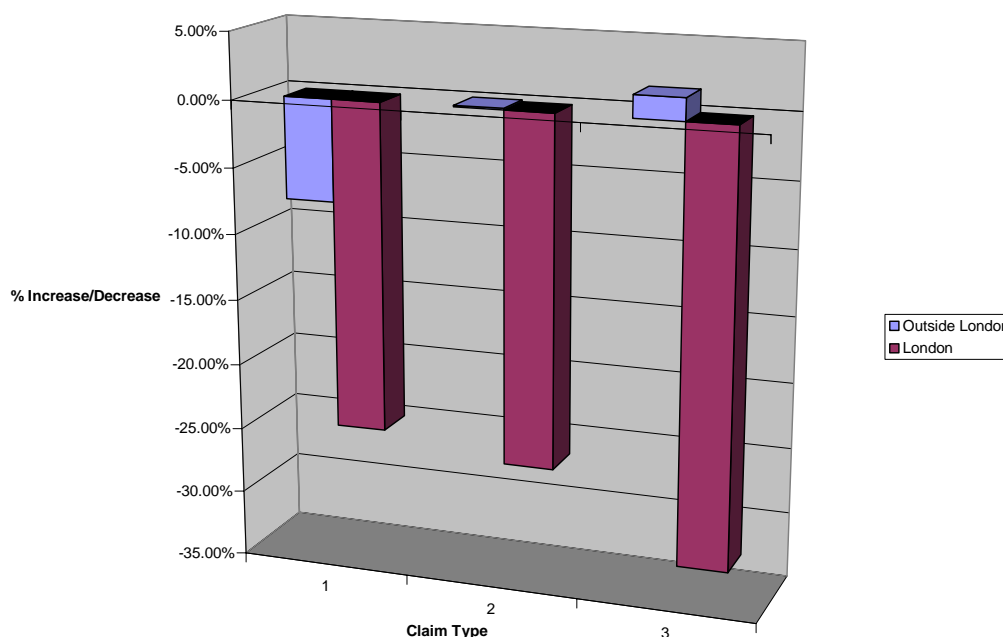
**Figure 5 - Potential % Difference In Crown Court Costs Claimed By Geography**



The claim and offence type is better particularised in Table 1, and the differences in relation to claim types are most dramatic when you analyse them by region (see Figure 6). For guilty pleas, London's potential losses amount to 32.63%.

<sup>4</sup> Types of offence are categorised A-I, with G referring to "Other Offences of Dishonesty where value > £30,000"

**Figure 6 - % Increase/Decrease By Crown Court Claim Type And Region**



**Table 1 –Potential % Differences In Crown Court Fee Income By Offence, Claim Type And Region**

Description	Claim Type	Outside London	London
Burglary, etc	1	3.95%	-13.30%
	2	2.32%	-22.59%
	3	4.97%	-32.30%
Homicide and related grave offences	1	-14.94%	-28.98%
	2	0.52%	-31.79%
	3	8.84%	-34.59%
Lesser offences involving violence or damage, and less serious drug offences	1	-2.40%	-18.20%
	2	-1.06%	-24.58%
	3	2.21%	-34.02%
Miscellaneous lesser offences	1	-8.60%	-16.91%
	2	-3.54%	-19.93%
	3	-0.04%	-27.22%
Offences against public justice	1	-11.14%	-16.47%
	2	-2.63%	-29.24%
	3	-1.64%	-41.52%
Offences involving serious violence or damage and serious drug offences	1	-5.92%	-24.05%
	2	1.49%	-28.58%
	3	1.73%	-32.76%
Other offences of dishonesty	1	-4.88%	-21.08%
	2	0.42%	-20.06%
	3	1.52%	-30.46%
Other offences of dishonesty (>£30,000)	1	-17.21%	-35.59%
	2	1.41%	-23.00%
	3	-0.43%	-24.48%

Description	Claim Type	Outside London	London
Serious sexual offences, offences against children	1	-6.89%	-28.48%
	2	0.32%	-33.24%
	3	-2.58%	-39.23%

(c) What About The Preferred Supplier Data?<sup>5</sup>

Figure 7 reveals the variations that the preferred suppliers would experience under the proposed litigator's fee. In some cases, the results are at complete odds with the larger dataset, and whether they can be regarded as representative must be suspect. Certainly, given that there are only four (out of twenty-one) preferred suppliers based in London, great care must be taken when assessing the impact on firms based in the capital.

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<sup>5</sup> This analysis is drawn from the 7,419 dataset supplied by the Legal Services Commission

**Figure 7 – Potential % Differences For Preferred Suppliers Crown Court Claims, By Offence Types And Region**

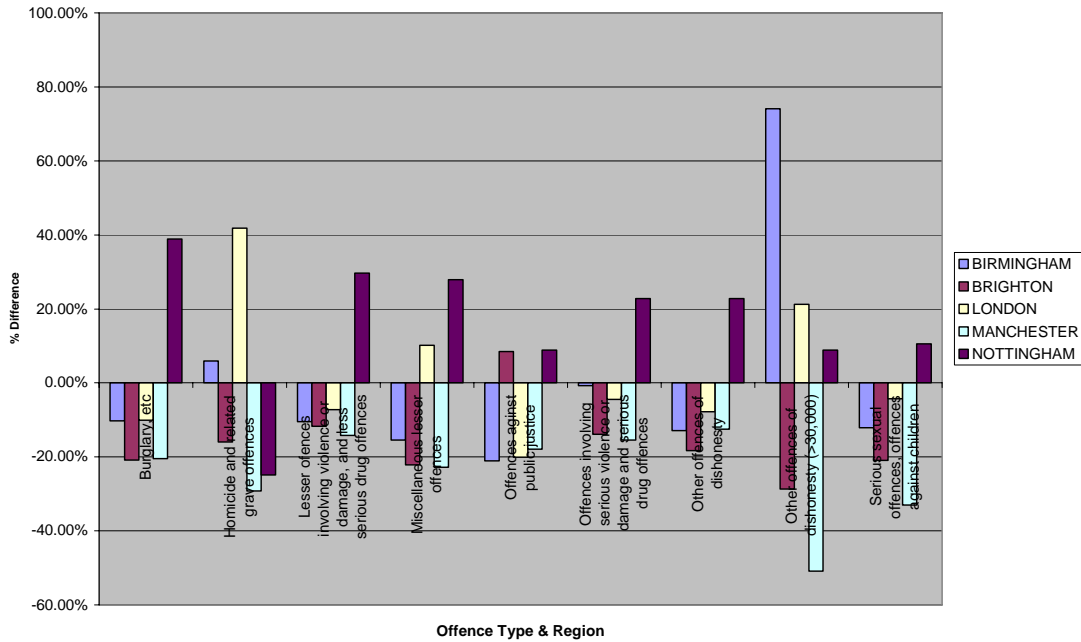


Figure 8 shows the potential affect on the individual firms. What is interesting is the apparent arbitrary effect of these proposals upon the LSC’s flagship firms – no doubt regarded as both quality assured and costs efficient. One firm is set to lose over 46% of its Crown Court fee income and four others over 20%.

**Figure 8 - Potential Effect Of Litigators Fee On Preferred Supplier Firms<sup>6</sup>**

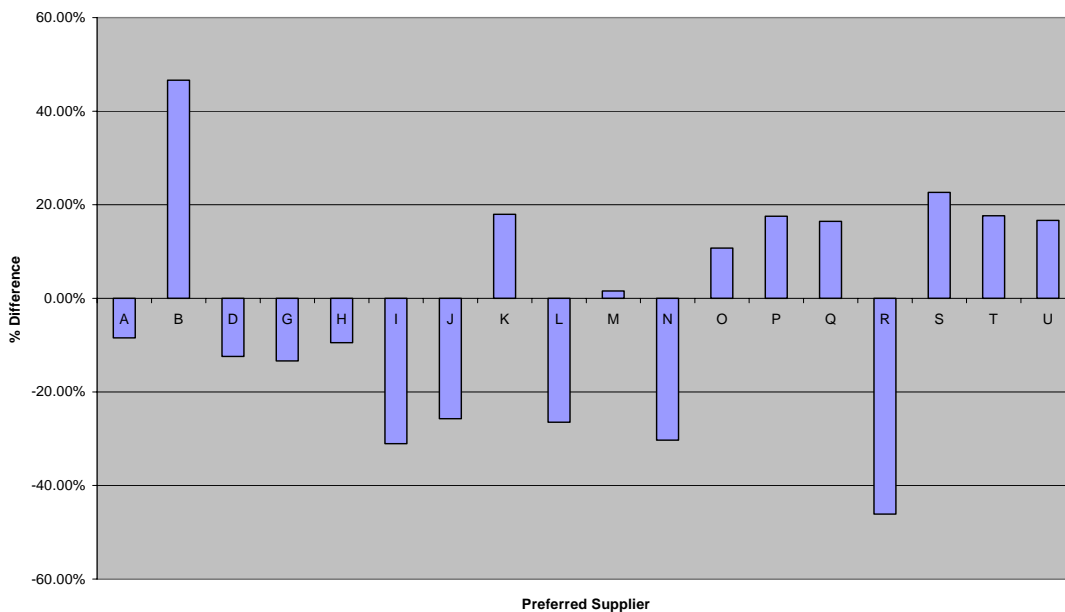


Table 2 also reveals that there are currently no preferred suppliers in the following legal aid areas: Merseyside (Liverpool), Chester, Wales (Cardiff), South West (Bristol), North East

<sup>6</sup> We have excluded preferred suppliers where we have data for less than 100 claims

(Newcastle), Yorkshire & Humberside (Leeds), and Eastern (Cambridge). This is an additional reason for treating the results of any analysis of that dataset with scepticism.

**Table 2 - Preferred Suppliers And Region<sup>7</sup>**

<b>Region</b>	<b>Preferred Supplier</b>
BIRMINGHAM	BACHES
BIRMINGHAM	OWEN NASH & CO
BIRMINGHAM	ROTHERHAM & CO
BIRMINGHAM	TERRY JONES SOLICITORS
BIRMINGHAM	WILLIAMSON & SODEN
BRIGHTON	EDWARD HAYES
BRIGHTON	FRANCIS LOVETT
BRIGHTON	HAMNETT OSBORNE TISSHAW SOLICITORS
BRIGHTON	WANNOP & FOX
LONDON	ASHLEY SMITH & CO
LONDON	FISHER MEREDITH
LONDON	H C L HANNE & CO
LONDON	T V EDWARDS SOLICITORS
MANCHESTER	BURTON COPELAND LLP
MANCHESTER	FORBES SOLICITORS
MANCHESTER	PLATT HALPERN
MANCHESTER	PLUCK ANDREW & CO (INC HIBBERT POWNALL & NEWTON)
NOTTINGHAM	BHATIA BEST SOLICITORS
NOTTINGHAM	CARTWRIGHT KING SOLICITORS
NOTTINGHAM	EMERY JOHNSON
NOTTINGHAM	THE JOHNSON PARTNERSHIP

(d) What Are The Possible Reasons For The Geographical Variations?

The figures above present contradictory findings. The preferred supplier dataset (four London firms out of 21) shows those London firms with a 0.9% gain under the Carter reforms. By contrast, the larger dataset shows a loss for London of 26.11%. The distinction between “London” and “out of London” is a crude one. What, for example, of inner city Manchester or Liverpool or any other large urban area? It is likely that in such areas, as in London, there is a greater proportion of more serious offences. Carter impacts upon these to a greater extent than less serious offences.

Analysis of the larger data set shows that conclusions based solely upon the preferred supplier dataset are unreliable when setting the appropriate fee levels under the proposed litigators’ graduated fee scheme.

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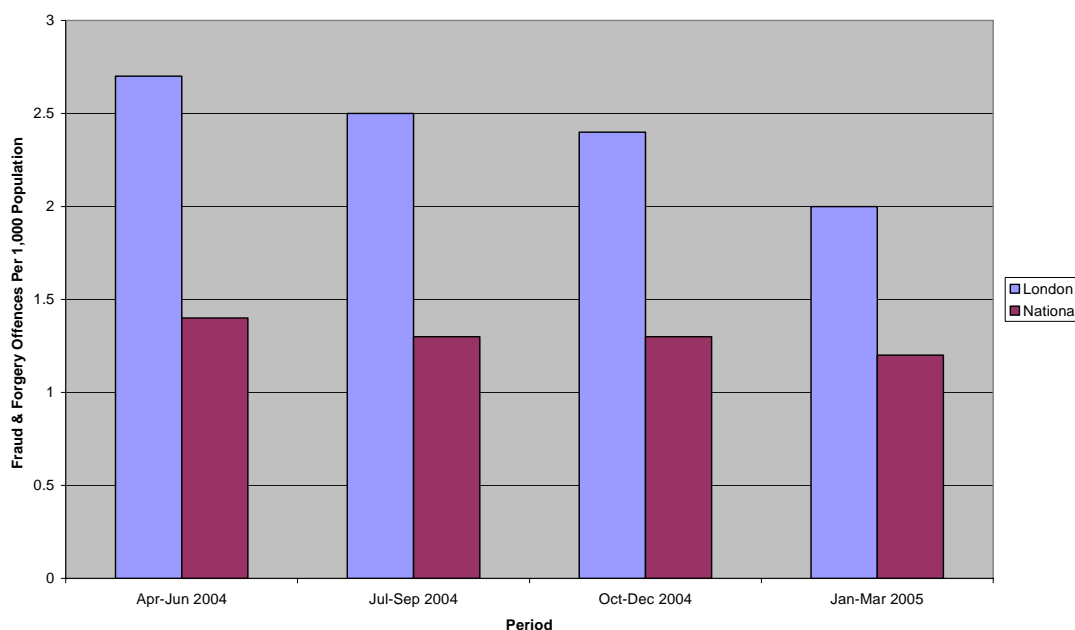
<sup>7</sup> The order of the firms listed in the table bears no relation to the alphabetical identifiers in Figure 7, and it is not possible for the reader to relate one to the other.

**Table 3 - All Crime For London Region Apr 2004 - Mar 2005<sup>8</sup>**

Month	Total number of offences	Offences per 1000 population	Offences per 1000 England/Wales population
Apr-Jun 2004	261193	35.4	27.3
Jul-Sep 2004	257383	34.8	26.3
Oct-Dec 2004	255509	34.6	26.1
Jan-Mar 2005	243553	33.0	25.5

The disproportionate affect on London claims may be partly explained by the higher percentage of fraud in the capital. This is best illustrated by Figure 9.

**Figure 9 - Fraud & Forgery Offences Per 1,000 Populations<sup>9</sup>**



(e) What Other Factors Affect The Costs Of A Case?<sup>10</sup>

The joint survey undertaken by the LCCSA, CLSA, LAPG and the Law Society has allowed us to identify what, if any, other factors over and above trial length and page count affect the costs of a case.

In addition to the factors referred to below, we also attempted to measure the average number of hours of audio and video evidence in relation to each claim, but the data collected

<sup>8</sup> "Crime in England and Wales 2004/2005", Home Office

<sup>9</sup> "Crime in England and Wales 2004/2005", Home Office

<sup>10</sup> For the purposes of this analysis we have ignored costs drivers referred to in the LCCSA's interim response to Lord Carter's Interim Report, as well as Professor Ed Cape and Professor Richard Moorhead's research paper: "Demand Induced Supply?"

is too small a sample to provide meaningful analysis. We believe that further work should be carried out in relation to these possible proxies before any graduated fee scheme is introduced.

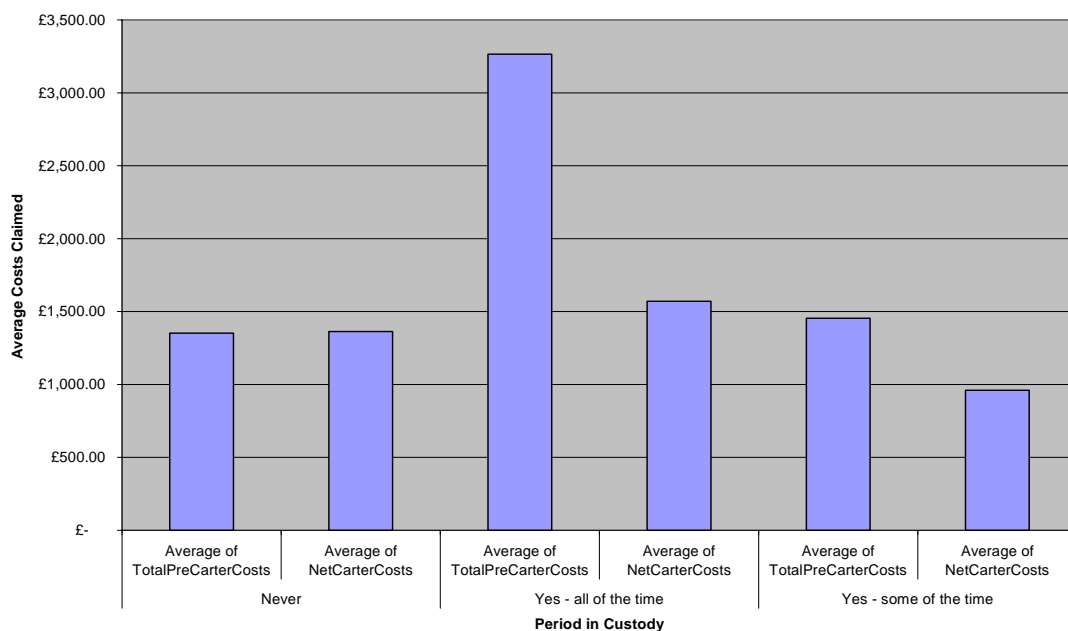
(i) What If The Client Is In Custody?

Our research demonstrates the effect of the defendant being remanded in custody in so far as the total cost of a case is concerned (see

Figure 10). Under the current claiming regime, the average costs for a case where the defendant is in custody is £3,265.03; for those on bail, this figure is reduced to £1,352.10, a difference of just over 58%.

The reasons for this may be obvious, including increased travel and waiting time, as well as “ancillary” court hearings such as bail applications and custody time limits. Also, it is true to say that if a defendant is charged with a more serious offence then (s)he is more likely to be remanded in to custody.

**Figure 10 - Average Crown Court Costs Claimed, By Custody Status**



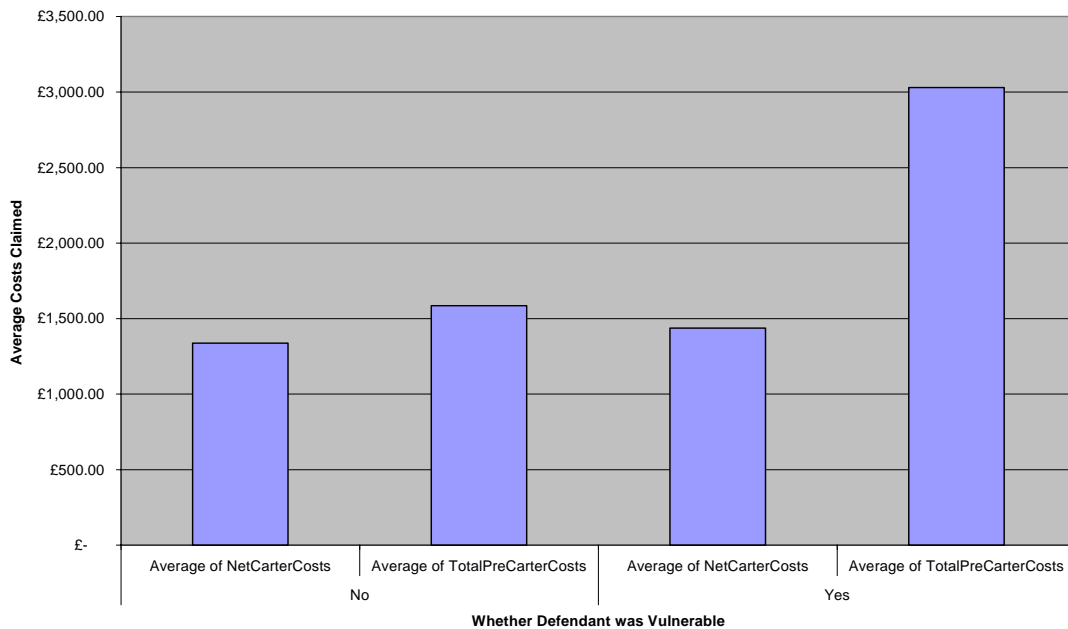
(ii) What If The Client Is “Vulnerable”?

We have tried to avoid “vague” or imprecise proxies, but in the case of “vulnerable” defendants there will always be an element of this. An easy way to measure this type of claim would be to include those where either: -

- the defendant required an appropriate adult under PACE because of his/her “mental disorder”<sup>11</sup>; or
- where the court proceedings included a disposal under the Mental Health Act 1983; or
- where the court proceedings included an enquiry as to whether the defendant was fit to plead.

The online survey reveals that for these types of cases, there is a significant impact on the average costs claimed – see Figure 11.

**Figure 11 - Average Crown Court Costs Claimed, By Defendant's "Vulnerability"**



We have serious concerns that the proposals would significantly disadvantage firms representing mentally disordered offenders – a particularly vulnerable group. These cases are demonstrably more expensive and inherently more difficult. This should be reflected in the fee structure.

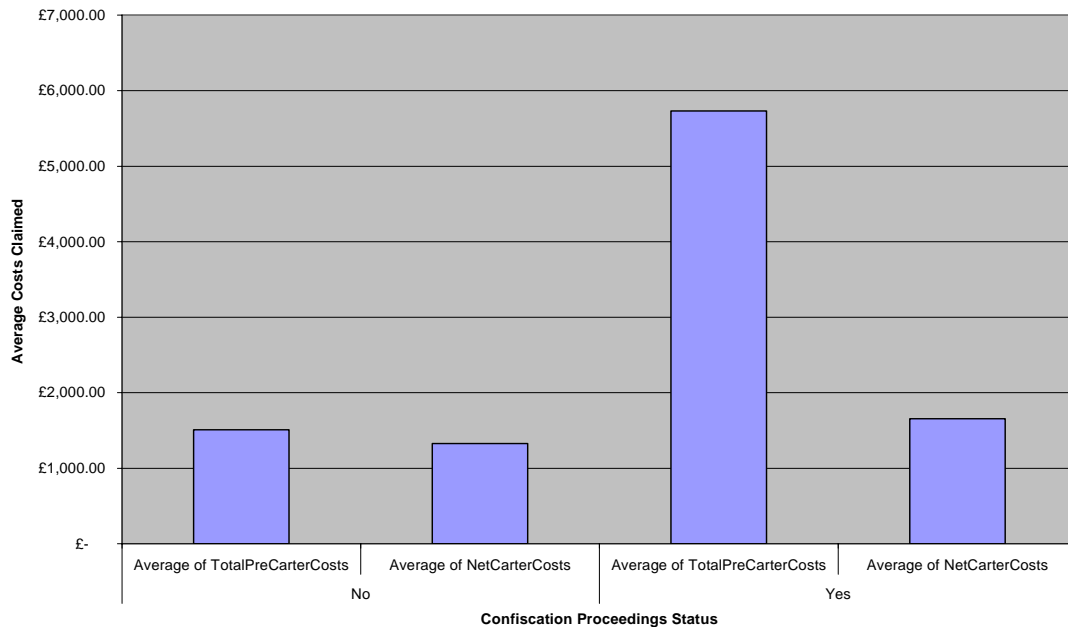
(iii) What If There Have Been Confiscation Proceedings?

The fact that there have been confiscation proceedings also makes a significant difference. Defending these types of cases leads to an average £4,221.063 increase in the claimed costs – reflecting the complexity of the evidence and issues involved in calculating a defendant’s benefit and identifying his/her realisable assets. This is further complicated

<sup>11</sup> Defined as “mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or

when the Crown contend criminal lifestyle, extended benefit or hidden assets, and the work of the defence often involves a forensic analysis of bank accounts, identifying the source of credits and debits and seeking supporting evidence.

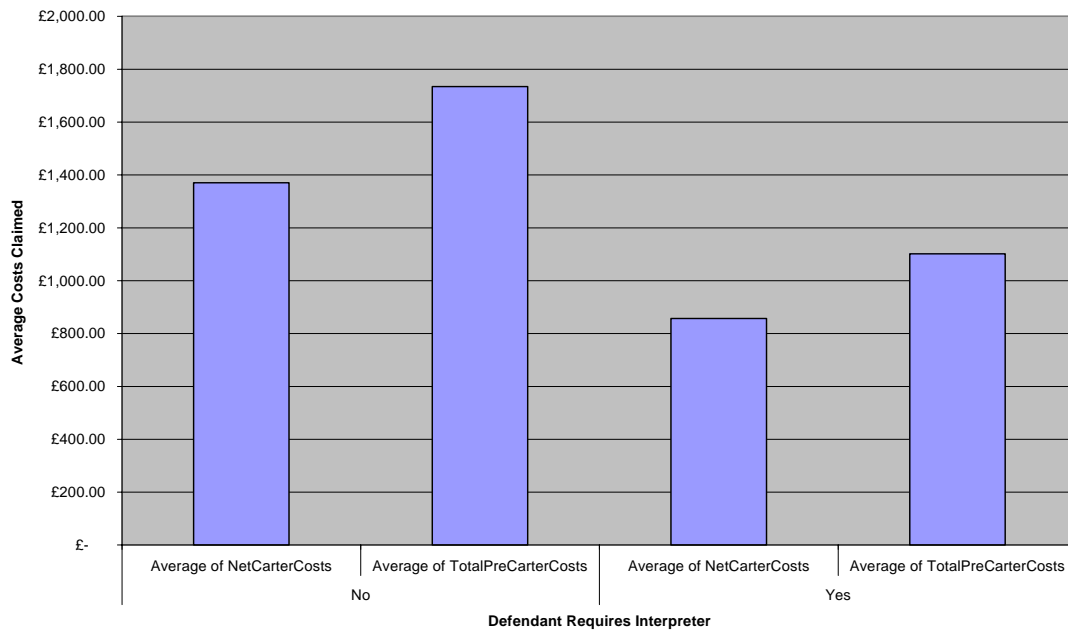
**Figure 12 - Average Crown Court Costs Claimed, Distinguishing Confiscation Proceedings**



(iv) What If An Interpreter Is Required?

The results of the online survey are surprising in terms of the effect the requirement of an interpreter has on the average costs claimed - see Figure 13. One would have thought that this would have made an equally significant difference both in terms of number of hours required to take instructions and on the length of trial as the other factors referred to above, and the relatively low differential may be explained by the small size of the data sample.

**Figure 13 - Average Crown Court Costs Claimed, By Requirement for Interpreter**



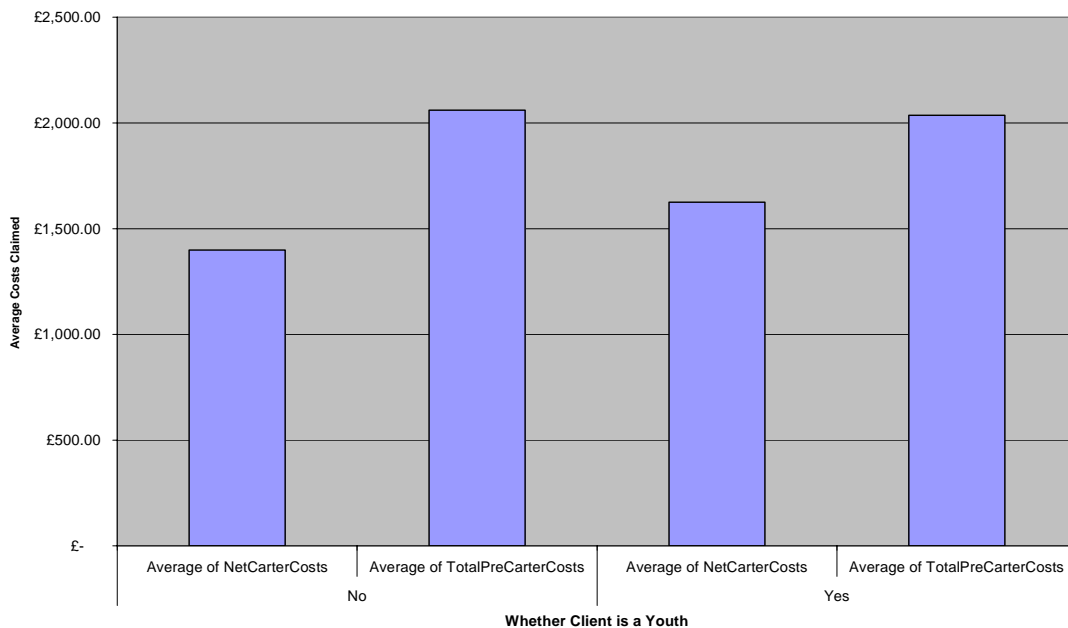
(v) What if the defendant is a Youth?

Our Online Survey shows that there is no significant difference in the average costs claimed when defending adult or youth defendants – see

Figure 14.

**Figure 14 - Average Crown Court Costs Claimed, by Adult or Youth Status**

**Figure 15 - Average Crown Court Costs Claimed, by Adult or Youth Status**



(f) How does the Litigator's Fee compare to the proposed Advocate's Fee?<sup>12</sup>

Approximately a quarter of all criminal legal aid is spent on advocacy services in the Crown Court<sup>13</sup>. There are over 11,000 independent advocates in private practice, with approximately 3,000 providing criminal defence services<sup>14</sup>.

It is possible to use the 272,975 dataset supplied by the Legal Services Commission to compare the proposed Litigator's fee to the proposed Advocate's fee<sup>15</sup>.

Figure 16 highlights the disparity between Queen's Counsels and Leading Advocates' fees compared to Litigators' fees: Queen's Counsel will be paid over 113% more for undertaking exactly the same cases, Leading Counsel 60% more (in other words, the advocate will be paid more for presenting the case in court than the solicitor for preparing it)<sup>16</sup>. Solicitors firms, Led Junior counsel and Junior counsel acting alone will receive approximately the same fee for undertaking these cases.

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<sup>12</sup> Lord Carter predicts total savings on Advocates' Fees of 20%.

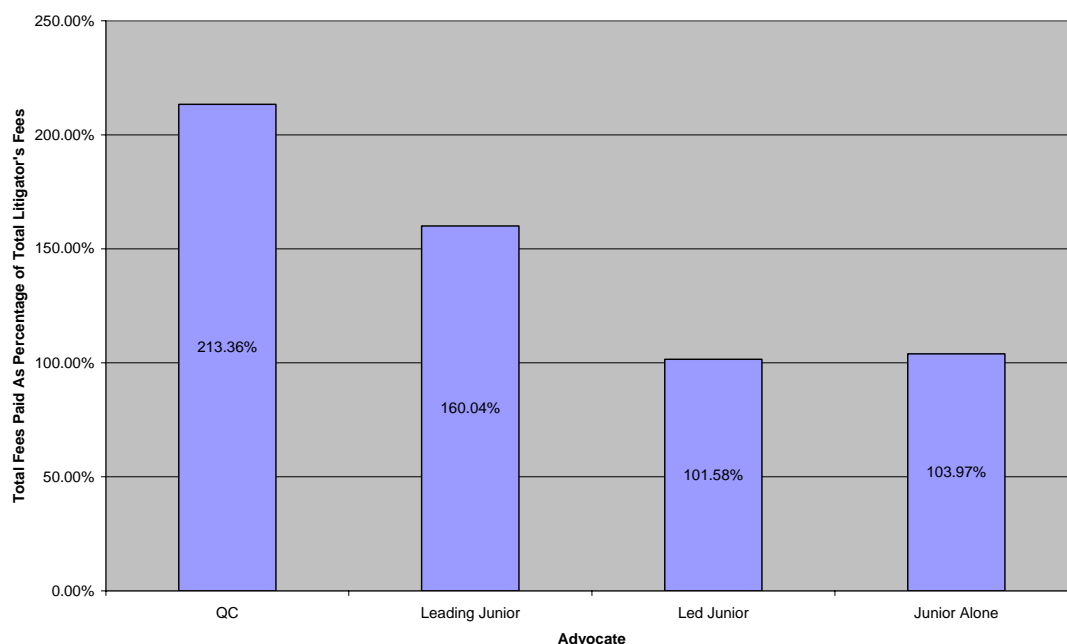
<sup>13</sup> Procurement of Criminal Defence Services, page 14

<sup>14</sup> *ibid*

<sup>15</sup> In fact, the Advocate's Fee would likely be greater than that calculated because we have not included any of the "ancillary payments" (see page 159, Annex 4.5 of Legal Aid - A market-based Approach to Reform), and we have not used the enhanced rates for D+ and G+ offences (the dataset does not allow us to make the distinction).

<sup>16</sup> We note that year on year the costs of advocacy in the Crown Court have exceeded the solicitors costs for preparing the case (for example, Annex 6.2.2 and 6.2.3 of Legal Aid - A market-based Approach to Reform reveals that for the 2005 financial year, solicitors firms were paid £273m, and advocates were paid £362m (a difference of 25%). Lord Carter predicts that although a disparity will remain, his reforms will reduce this to 16%.

**Figure 16 - Total Advocates' Fees, Expressed As A Percentage Of Total Litigators' Fees<sup>17</sup>**



e litigator by using red text.

Table 4 shows the differences between the fees, distinguishing the class of offence and types of cases. We have highlighted entries where an advocate will be paid a lower fee than the litigator by using red text.

**Table 4 - Total Advocates' Fees Expressed As A Percentage Of Litigator's Fee, By Class Of Offence And Type Of Case<sup>18</sup>**

Offence Class	Case Type	Advocate	Fee as % of Litigator's Fee
Burglary, etc	Trial	QC	160.79%
		Leading Junior	120.58%
		Led Junior	80.41%
		Junior Alone	83.42%
	Cracked Trial	QC	269.67%
		Leading Junior	202.25%
		Led Junior	134.83%
		Junior Alone	91.88%

<sup>17</sup> For cracked trials, we have assumed that the case cracked in the final third (see page 157, Annex 4.5 of Legal Aid - A market-based Approach to Reform)

<sup>18</sup> ibid

Offence Class	Case Type	Advocate	Fee as % of Litigator's Fee
	Guilty Plea	QC	311.46%
		Leading Junior	233.60%
		Led Junior	155.73%
		Junior Alone	104.38%
Homicide and related grave offences	Trial	QC	135.13%
		Leading Junior	101.37%
		Led Junior	67.50%
		Junior Alone	79.61%
	Cracked Trial	QC	114.60%
		Leading Junior	85.95%
		Led Junior	57.30%
		Junior Alone	71.94%
	Guilty Plea	QC	113.86%
		Leading Junior	85.39%
		Led Junior	56.93%
		Junior Alone	62.35%
Lesser offences involving violence or damage, and less serious drug offences	Trial	QC	220.95%
		Leading Junior	165.83%
		Led Junior	110.52%
		Junior Alone	110.08%
	Cracked Trial	QC	249.88%
		Leading Junior	187.41%
		Led Junior	101.19%
		Junior Alone	101.32%
	Guilty Plea	QC	257.85%
		Leading Junior	193.39%
		Led Junior	95.70%
		Junior Alone	95.70%
Miscellaneous lesser offences	Trial	QC	263.11%
		Leading Junior	197.47%
		Led Junior	124.16%
		Junior Alone	122.93%
	Cracked Trial	QC	273.18%
		Leading Junior	204.88%
		Led Junior	113.49%
		Junior Alone	113.52%
	Guilty Plea	QC	310.68%
		Leading Junior	233.01%
		Led Junior	122.98%
		Junior Alone	122.98%
Offences against public justice	Trial	QC	188.16%
		Leading Junior	141.20%
		Led Junior	89.85%
		Junior Alone	90.16%
	Cracked Trial	QC	241.33%
		Leading Junior	181.00%
		Led Junior	111.92%
		Junior Alone	111.96%
	Guilty Plea	QC	330.29%
		Leading Junior	247.72%
		Led Junior	151.45%

Offence Class	Case Type	Advocate	Fee as % of Litigator's Fee
Offences involving serious violence or damage and serious drug offences	Trial	Junior Alone	151.45%
		QC	222.60%
		Leading Junior	166.94%
		Led Junior	111.22%
	Cracked Trial	Junior Alone	118.63%
		QC	202.54%
		Leading Junior	151.91%
		Led Junior	101.27%
	Guilty Plea	Junior Alone	116.63%
		QC	235.38%
		Leading Junior	176.54%
		Led Junior	117.69%
Other offences of dishonesty	Trial	Junior Alone	123.45%
		QC	176.97%
		Leading Junior	132.73%
		Led Junior	88.49%
	Cracked Trial	Junior Alone	96.69%
		QC	268.63%
		Leading Junior	201.47%
		Led Junior	134.31%
	Guilty Plea	Junior Alone	98.98%
		QC	288.92%
		Leading Junior	216.69%
		Led Junior	144.46%
Other offences of dishonesty (Value >£30,000)	Trial	Junior Alone	98.59%
		QC	162.04%
		Leading Junior	121.65%
		Led Junior	88.05%
	Cracked Trial	Junior Alone	91.57%
		QC	166.64%
		Leading Junior	124.98%
		Led Junior	83.32%
	Guilty Plea	Junior Alone	114.66%
		QC	192.45%
		Leading Junior	144.34%
		Led Junior	96.22%
Serious sexual offences, offences against children	Trial	Junior Alone	106.16%
		QC	165.06%
		Leading Junior	123.87%
		Led Junior	76.46%
	Cracked Trial	Junior Alone	77.39%
		QC	167.95%
		Leading Junior	125.96%
		Led Junior	83.97%
	Guilty Plea	Junior Alone	100.96%
		QC	207.46%
		Leading Junior	155.60%
		Led Junior	103.38%
		Junior Alone	106.03%

It would appear that Lord Carter accepted that increases were warranted in the case of the fees paid to advocates, and raised their rates by an average of 16% across the board<sup>19</sup>. This appears to have been achieved without any additional spend to the budget for Crown Court advocacy because of the “winding down” of ex post facto taxation, and the anticipated savings achieved through Lord Carter’s proposed reforms to the payment schemes for very high cost cases.

Historically many firms have been able to make a profit from the larger and more complex Crown Court trials. The proposed new scheme has such a significant, negative impact on income from Crown Court work that will be likely to force firms to close. Apart from the negative financial effect, the commission needs to bear in mind that the solicitors who undertake this work tend to do so because of the professional satisfaction associated with doing good quality work in a challenging environment. If the fees are to be so restricted as to require less work to be done as is necessary then a major motivational factor for continuing to practice in this type of work is removed.

Before any GFS scheme can be introduced there needs to be a fundamental re-evaluation of the design of the scheme to ensure that it works fairly. Particular attention needs to be paid to ensure that the larger and more complex cases (which tend to be the more serious ones and those which attract a heavy sentence) do not lead to substantial financial losses. We recommend an examination of the operation of the current taper and considering of inclusion in the fee (either by way of proxy or bolt on) the following factors which are influential in determining the true cost of delivery quality preparation for a Crown Court trial:

- Unused material
- Clients in custody
- Clients who are youths
- Clients with special needs or otherwise vulnerable
- Allowance for litigators attendance at trial
- Instruction of and consideration of expert reports
- Defence witnesses proofed
- Cases involving work outside the jurisdiction (the report is silent on how payment might be made for a case involving work or a trip abroad)
- Client requiring interpreter
- Issuing of third party witness summonses for disclosure (other similar applications might be in relation to letters of request etc)

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<sup>19</sup> The biggest increases apply to the 1-10 day cases

- Third party material not served as part of the prosecution case
- Visiting the locus
- Legal research of novel, complex and developing areas of law
- Video evidence
- Telephone evidence (including cell site analysis)

## **Proposals for Specialist Criminal Contract (non VHCC)**

The Carter Review recommends that the LSC consider whether and how a small number of criminal defence practitioners could continue to provide niche services when the new general criminal contract arrangements are implemented (Recommendation 3.3).

It is our view that if the Carter proposals for the new general criminal contract are accepted then the LSC should make provision for a specialist criminal contract for niche providers of criminal defence work in the Crown Court. Such provision is justified in the interests of professional choice and client choice. There are already a number of niche providers which rely mainly on recommendation by reputation and it is right that they should continue to be able to practice and that clients who wish to instruct them are able to do so. Many of the clients of those providers do not rely upon public funds for the investigation stage of their case but in the event that they are charged with an offence may have insufficient resources to pay privately for the conduct of the trial and (subject to any means testing arrangements which are likely to be made in the Crown Court in the near future) ought to be entitled to the benefit of public funding of that stage of their case. The continuing existence of these firms would not present a managerial or administrative burden for the LSC and nor would they threaten the future market envisaged by the broad sweep of Carter's proposals. Their existence would be of some benefit for the legal aid fund because many of their clients are able and willing to pay privately at least for the early stages of the case and many of those cases are of a complex nature where the early stage would otherwise be burdensome upon the state.

If such firms were not allowed to continue to exist there would be a reduction in the available pool of good quality firms able and willing to join any competition that may exist for membership of the VHCC panel. Any firms which wish to bid for the VHCC panel will necessarily require to be equipped with sufficient human and other resources to demonstrate their ability and capacity to undertake large scale defence work. Any firm that bids for the panel inevitably risks making an unsuccessful bid. In the event of an unsuccessful bid such firms would have no use for the human and other capital in which they have invested. The availability of non-VHCC work for such firms would be essential to enable them to survive and enter later VHCC bid rounds. Without the existence of such a broad pool of firms there would be a significantly less competitive market for VHCC work and an increased risk of VHCC work ending up in the hands of oligopolists.

## **Crown Court – Advocates** (Recommendations 4.11, 4.12, 4.13, 4.14 and 4.16)

### **Recommendation 4.11**

We have stated throughout this response that any new system must take into account the impact of the behaviour of other agencies on defence costs. It would be unfair to penalise the defence for exceeding the budget where any increased expenditure has been caused by other agencies. The quarterly monitoring proposed must take into account the cause of any excess spending.

We have proposed at the beginning of this response an effective means of keeping the system in balance by the imposition of a fixed penalty system for those agencies (including defence advocates) that may cause delay and thereby increase budgetary expenditure. This proposal is expanded upon in the context of Crown Court work under the heading 'Law Society View', below.

### **Recommendation 4.12**

We accept this recommendation.

### **Recommendations 4.13**

Recommendation 4.13 of the Carter report proposes that the Crown Court advocacy payment scheme should make the 'total case fee payment to a single named advocate'. Chapter 4, Paragraph 46 states that the payment should be 'payable to a single trial advocate *as identified at the outset of a case*' (our emphasis).

### ***Current position***

At present all advocates working on the same case for the same defendant render separate bills for whatever part of the case they have undertaken. The Court Service (HMCS) makes payable orders to each separate individual advocate regardless of whether they are a barrister or a Higher Court Solicitor Advocate (HCA). Recently in the case of HCAs, the HMCS has been able to make the order payable to the firm employing the HCA (and presumably this also applies where the barrister is an employee of a firm as opposed to being in a set of chambers).

The professions, the judiciary, the Department for Constitutional Affairs and Legal Services Commission have for some time agreed that case preparation should be 'front loaded' and that the proposed trial advocate should almost always attend and conduct the Plea and Case Management Hearing (PCMH). This is at present not always the case and there are often as a result, a large number of ancillary hearings such as mentions and pre trial reviews (PTRs) in any given case, with each hearing being claimable as a separate fee. As a result it is felt that justice is delayed.

PCMHs are currently paid at £100 per hearing and advocates maintain that this represents inadequate remuneration. There is no incentive for the chosen trial advocate to prepare the case in a thorough way at the PCMH as envisaged by the Criminal Procedure Rules (CPR), since there is no guarantee that this advocate will in fact be able to do the trial, due to other commitments, and it may be passed on to another advocate instead. This has meant that issues such as hearsay notices and bad character applications, as well as listening to tapes of interviews, have often been left to the last moment to be undertaken by the advocate who eventually does undertake the trial. Such advocates are often identified at a much later stage in the case, which does not fit with the aims of speedy trial preparation.

Lack of preparation leads to more mention hearings. Advocates have expressed concern at the low fees paid for mentions/PTRs, which amount to £46.50 per hearing. These can take up not only a lot of court time, but can also mean that an advocate earns just £46.50 for a whole day.

### ***Carter's Proposals***

In order to encourage front-loaded preparation, the Carter report proposes 'enhanced base fees', which incorporate the first two days of trial as well as the majority of ancillary payments (e.g. the first five mentions, the first three conferences). The expectation is that the more thorough an advocate is with preparation, the fewer mentions etc there will be and the more incentive there will be for an individual advocate not to cause cases to be listed for a mention/PTR, since the payment for such will come out of the base fee. The LCCSA has no objections to this recommendation.

The report proposes that the entire case fee should be payable to the first advocate identified to conduct the case. If other advocates have performed tasks in the case then this first advocate should be responsible for paying all of the others.

We would be prepared to accept such a scheme whereby the single payment would be made to

(i) the first instructed advocate

or

(ii) the trial advocate

We believe it would be preferable for the payment to be made to the trial advocate, as in many cases the initial instructed advocate may - at the PCMH stage when the trial date is fixed - find themselves unavailable due to other commitments and there will have to be a change of ownership. The instructed advocate identified at the outset of the case will always have the incentive to front load the preparation in the case and will strive to do the trial themselves. All advocates involved in the case should still be eligible to be paid the same fees regardless of their professional background.

We understand that The Law Society and the Bar are in the process of discussing this issue, in the interest of agreeing a protocol that will ensure the smooth administration of justice.

We have some concerns that since the base fees are fixed and any mention hearings etc will have to be paid out of that fixed fee (along with PCMH, listening to taped interviews and conferencing), there may be cases where there are a large number of mentions etc which are not the fault of the advocate, when the base fee will be inadequate.

This concern can be addressed by the introduction of the 'polluter pays' principle, which we have outlined earlier in this response. We envisage a scheme whereby the party that is to blame for non-compliance with a judicial order and thereby causes a mention hearing to take place should pay a fixed penalty of £100 to the other party. It cannot be justified, for example, that non-compliance on the part of the prosecution which causes a mention to be listed, should result in the defence fees being diminished.

Chapter 4, paragraph 56 of the Carter report states:

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

We note that this is not a specific recommendation in the report.

The above paragraph seems to indicate that wherever a barrister is involved for a defendant and a solicitor-advocate also appears (and may in fact even have been the first instructed advocate) then the fees should always be paid to the barrister. The Society believes that this would unfairly discriminate against solicitor-advocates. We do not believe that this was the intention of the proposal, however, we are concerned by the use of the word 'barrister' in this paragraph when the term 'advocate' is used elsewhere in the report.

Since the Courts and Legal Services Act 1990, Government regulations have made no meaningful reference to barristers in this way. Since the 1990 Act, practitioners with higher rights are all either authorised litigators or authorised advocates. There should therefore be no discrimination between the three branches of the legal professions (two in relation to higher rights) that currently provide advocacy services.

The report seems to be suggesting that where the instructed advocate (i.e. the advocate who is the chosen trial advocate at the outset) is a barrister and they are unable to conduct the trial, the instructed advocate would receive the case fees (as envisaged by Carter) and account to the barrister who does the trial. We have no objections to this proposal.

However, there also seems to be a suggestion that where the instructed advocate is a solicitor advocate (HCA) who is then subsequently unable to do the trial (as in the case of the instructed barrister above) and a barrister conducts the trial; then the case fees should be paid not to the HCA, but to the barrister who undertook the trial. This barrister would then account to the HCA for all the work done by the HCA. We view this as unequal treatment and believe it should be amended. No reasons are advanced by Carter as to why the above approach should apply.

These proposals could cause problems in the following situations:

- (i) *Solicitor Advocates who also work in chambers in the same way as barristers.*

If a HCA based in a chambers was unable to conduct a trial and then returned the case to a barrister, then the barrister would be deemed to be the instructed advocate and be paid the entire case fee. Whereas if a barrister could not do the case and it was undertaken by a HCA instead, the barrister would still get paid the entire case fee. It is not clear why a HCA based in a set of solicitor advocate chambers should be treated less favourably than a barrister based in chambers. The proposals in paragraph 56 appear, on the face of it, to

seek to protect specifically that part of the Bar which is self employed and which operates in a chambers style model.

*(ii) Barristers who are employed by firms within their in house advocacy departments.*

In this case, an in-house instructed barrister, even if s/he returned the case to another barrister elsewhere to conduct the trial, would still be paid the base fee for onward distribution to all other advocates who worked on the case including the trial lawyer; whilst his/her HCA colleague who did the same would not receive the fee, instead the fees in this instance would go to the trial lawyer simply because s/he is a barrister.

An issue which also needs to be considered is that a solicitor receiving fees, some portion of which may be due to a barrister acting in the case, will be able to put the money in their client account. Barrister's chambers do not however have client accounts, so it is unclear where the money will be kept where it is a barrister that receives all of the fees in a case.

#### **Recommendation 4.14**

Recommendation 4.14 emphasises the need for early identification of the trial advocate.

It may be worth considering the inclusion of a requirement in any LSC Regulations that the advocate should make their diary available to the instructing solicitors, to enable greater transparency as to their availability to undertake the trial. The Society believes that this would help to avoid the adverse impact on quality of service and unnecessary duplication of effort related to late returns.

#### **Recommendation 4.16**

The proposal that as soon as possible after 2009, both the advocacy and litigation schemes should be harmonised into a single fee.

One of the key concerns regarding fixed, albeit graduated fees in the Crown Court is that they introduce constraints which will prevent work being done which is reasonable and necessary (to apply the historical test of necessity for work to be carried out on behalf of a party in litigation). It is crucial that the litigators graduated fee scheme is appropriately designed and given an opportunity to bed down. Only at that point will it be feasible to consider harmonisation.

It is essential that the defence team in any case is sufficiently resourced. This recommendation seems to suggest that those litigators with higher rights could both take instructions from the client and represent him/her at court in order to maximise fee income. This is feasible in guilty pleas but less so in other scenarios as it may be difficult for one lawyer to wear a 'litigator hat' in a prison conference at the same time as conducting a trial in the Crown Court.

These traditional roles reflect the reality that a part of the defence team is closely engaged with the defendant and another part of the team is expert in the process of trial. These tasks are unlikely to be accomplished by single individuals in many cases.

### ***Fees***

We note that in contrast to wanting to abolish senior solicitors/ Grade A/ B/C fee earner/solicitors and setting a single litigators grad fee; Carter seeks to not at all address the issue of the different ranks of Advocates. The existence of QCs, in a report purportedly based on market principles, is not addressed. It is arguable that The QC system represents a rigged market.

We note that the fees for advocates envisage that QCs be paid double that of juniors. The LCCSA believes that QCs should be paid the same as Leading Juniors, since the latter often appear against QCs in the same case, dealing with the same facts, yet they get paid a third less than QCs.

## **VERY HIGH COST CASES**

The LCCSA questions the need for a new system for very high cost cases. We have previously referred to the need to control the number of high cost cases, their content and the manner of their prosecution. It is in these areas – and improved trial management generally – that real savings are to be made. The VHCC system was put in place to help the control of defence costs. This has already achieved substantial benefits: all VHCC's are now very closely managed by the VHCCU so as to ensure that defence costs are not incurred unnecessarily. In addition, recent developments have already led to a very substantial reduction in the rates payable for VHCC work. The price of this work has already been squeezed sufficiently and there is unlikely to be any real benefit by reducing prices any further.

We support the proposal for a flexible approach to the entry point for VHCC's, recognizing that some cases with a trial estimate below the threshold could beneficially be made the subject of individual contracts.

We are not in favour of a small and restricted pool of firms being given the exclusive right to undertake VHCC's. Such a small pool would suck out funds from other firms which are hard pressed by the low prices payable for general lower work and general Crown Court work.

All firms should be entitled to undertake VHCC work provided they can demonstrate sufficient quality (by peer review) and sufficient capacity in terms of human and other resources.

The proposed bidding process is unnecessary and over complex. It will place an unreasonable administrative burden on firms and create a climate of uncertainty which leads to a disincentive for firms to invest capital and other resources.

If the Commission insists on a VHCC system dependant upon competitive bidding then it must ensure that bidding rounds are transparent and streamlined. Membership of any panel must be for a reasonable length: it is not acceptable that firms should be expected to make substantial investment if panel membership is reviewed every 12 months.

## **LONDON – Particular Considerations**

A particular series of problems arise in connection with London. London has more police stations (222) Magistrates' Courts (50) and Crown Courts (12) than anywhere else in the country. People use a solicitor local to their home or near a police station where they were previously arrested, or to whom they have been referred - and whom they trust. The sheer size of London means that people are not always arrested near their solicitor's office or brought to a central court house as happens in nearly all other urban centres. As a result of the Carter proposals the concept of 'own-client' work, with all this entails in terms of the build up of trust and competition between solicitors, based on the quality of their work, will be lost. Quality will be lost for the client; job satisfaction diminished for the lawyer.

Carter seeks to address this concern by means of the '20% rule' to allow for own client cases outside the contracted area to be dealt with. As to whether this is sufficient for firms outside London successfully to continue to represent their long- standing clients we leave others to comment. In London, (which is a single entity of seven million people), the 20% figure is for many firms negligible and will in effect mean that solicitors are no longer able to act for their historic clients. A busy practice will typically represent clients right across the London area on a daily basis. Some of these clients will have more than one case in different courts and police stations at any one time. These proposals raise the prospect of these clients being represented by a multitude of lawyers with no one person properly holding an overview of the client's situation.

Firms with an excellent reputation, who receive referrals of work from old clients, the voluntary sector and other solicitors, will not under these proposals be able to act for these clients. Trust built up over years and the personal knowledge crucial to dealing with some of the most vulnerable, disadvantaged or just plain difficult people appearing in the court system will be lost.

Currently firms compete with one another by reputation based on the quality of work and dedication of staff. Under the new proposals, guaranteed volumes of work – and eventually the lowest price per case – will replace that free market competition.

There may also be an issue as to costs in London, both as to the cost of running a practice in London and also the cost of defending cases in London. The concept of 'London weighting' has long been established in the public sector and is understood to be reflected in

rates of pay. We are not aware of any cost analysis being conducted of the actual costs of running businesses in central London and greater London in terms of the prevailing market levels for rent, rates, travel costs and costs of other essential services. Such analysis should inform any debate as to possible differentials between legal aid rates for London for other areas.

As to reasons why London cases may in some areas lead to higher average costs there is, to our knowledge, no research yet conducted on this point other than the statistical study appended herewith. It suggests there are a number of possible factors that could cause costs for cases in London to be higher than the national average:

- Terrorism offences and related investigations – in addition to the obvious cost of prosecutions directly relating to terrorism offences there are also often additional and lesser charges brought against individuals connected with acts of terrorism but not charged with those offences. These charges (e.g. perverting the course of justice) will often involve substantial paperwork relating to the original (terrorist) offence. The cost of the investigations gives an indication of why the cost of the defence response will inevitably be substantial.
- Sophisticated investigations - Operation Trident is one of the best examples of how policing has become ever more sophisticated. The mass of background intelligence available to Trident officers is now increasingly deployed by the prosecution especially since the changes to the hearsay rules.
- Large scale public order incidents – we suspect that London will have a greater number of such incidents than many other areas in the country. Political demonstrations ending in multiple arrests will impact on the average costs for offending that might otherwise be associated with more typical incidents public order incidents occurring in London and nationwide.
- Extradition – the costs of these Magistrates' Court cases vary greatly but it is not uncommon for counsel to be assigned and for considerable costs to be incurred.
- City of London fraud – not only in the Square Mile but often elsewhere, London attracts certain types of attempted fraud not common to other areas. There are complex cases involving (forged) specialist banking documentation, often involving

foreign nationals (European and American) and these cases may often result in for example a 'False Instrument' charge. The appended statistical study clearly shows that London has by far the largest share of dishonesty above £30,000.

- Interpreters – the appended statistical study also sets out the impact on the costs of a case when interpreters are used. London's diversity and the need for use of interpreters is well documented. We understand that 80 separate language interpreters at Wood Green Crown Court alone.

Travel costs – whatever savings may be brought about by consolidation of offices and greater use of technology and whether it is paid for or not, solicitors will always have to travel to see clients in prison, at court and in police stations. The office cannot be positioned at all of these places at once. Travel times in London are long and costs high because travelling around London is necessary, slow and expensive.

## **TRANSITIONAL ARRANGEMENTS**

The Association fails to see how monitoring on its own and transitional support arrangements can for example ensure that BME firms are actually not prejudiced.

We have already stated that the idea that firms should have some form of paper policy in relation to diversity policy does not in itself inspire confidence.

The idea of a diversity advisory group being created is a good one but it must amount to more than lip service and must meet at regular intervals. Permanent staff need to be devoted to it and what it has to say should contribute to any policy decisions. The creation of such a diversity advisory group is not sufficient in itself to ensure continuing diversity within the supplier base.

The emphasis placed on firms to restructure is disturbing. As has been earlier stated criminal defence firms run at minimal profit levels or at losses. Therefore the emphasis on firms borrowing monies to restructure is disturbing. This, together with payment of reduced fixed fees for work, may result in many firms being in a position where they are unable to repay such loans. The emphasis on firms investing in expensive information technology systems is also disturbing for the same reasons.

Page 118 is full of good ideas as to how advice can be offered to firms wishing to restructure. Our primary submission is that the market is a well-functioning one.

The Legal Service Commission has not published details regarding how exactly such advice is to be given or to be implemented. Until such time as this has taken place then none of the planned reforms should be implemented.

Once again on page 120 the report states that “there should be assistance in the form of advice, for those suppliers who are interested in pursuing shared office functions”. Yet there are no concrete proposals as to how such advice is to be given. This is deeply disturbing in circumstances where Carter wishes firms to fundamentally change their structure to remain in business.

The report makes reference to financial support, yet once again gives no indication as to how such financial support is to be provided.

Page 137 is of interest in stating that “assuming that firms currently unable to deliver £150,000 of criminal legal aid work will want to consolidate, grow or merge, currently 1,000 firms doing crime work may wish to seek a grant and assistance to merge or grow”. We note, in passing, the remit of Carter’s reforms seems to be to ensure that no firm doing less than £150,000 of publicly funded criminal defence work in a year should continue to exist. This obviously goes far beyond the £50,000 claimed earlier in the report.