

LONDON CRIMINAL COURTS SOLICITORS' ASSOCIATION ("LCCSA")

"A FAIRER DEAL FOR LEGAL AID"

SUBMISSIONS TO THE LEGAL AID PROCUREMENT REVIEW BY LORD CARTER OF COLES

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INTRODUCTION

The LCCSA represents the interests of specialist criminal lawyers in the London area. Founded in 1948, it now has more than 1000 members who include lawyers in private practice, Crown prosecutors, freelance advocates and honorary members who are circuit and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of practice and advocacy in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interests of members on any matters that may affect solicitors who practice in the criminal courts and to improve, develop and maintain their education and knowledge.

The LCCSA does not have the resources or research facilities of the Law Society or the Bar Council. Our submissions cannot therefore provide detailed statistical analyses or research. They do however draw on the shared experience of a large number of practitioners working in different spheres of criminal defence practice. Our submissions on a number of topics are made under a number of headings, as set out in the index.

We also wish to set out a few points of principle by way of introduction and background to those submissions.

The Criminal Justice System

The LCCSA represents solicitors drawn from a diverse range of practice: from large multi-office firms to sole practitioners and freelance advocates; from white-collar crime specialists to niche practices specialising in crime and welfare law; from specialist criminal defence firms to generic high street practices. This diversity, which is also of both gender and ethnicity, is a reflection of a mature, complex and stable market. The interests of our members can accordingly be very different. What we have in common is a shared commitment to our clients and the criminal justice system through which we have served our clients, supported as it has been since 1948 by legal aid. We are united in our concern that the changes currently being proposed to the funding of criminal defence practitioners will undermine the quality and choice of services provided to our clients and will prevent many practitioners from performing their jobs properly and in the best interests of their clients. Not only will our clients suffer but so will the quality of the whole of the criminal justice system within which we operate the adversarial system, will be undermined since the other agencies within that system, for example the police, the Crown Prosecution Service and other prosecuting agencies will increasingly not be held to account. The criminal justice system in this country has a high reputation. A vital part of that reputation is based upon the fact that, on a comparatively modest budget, those suspected of or charged with criminal offences are entitled to representation of their choice by solicitors and counsel who, subject to their duties to the court, act solely in the interests of their clients. England and Wales have developed a criminal justice system of which we can, overall, be rightly proud. We therefore remain, even if a little naively, surprised that, while the government heralds and repeats its aims to provide, for example, a National Health Service we can be proud of, seeking to establish per capita funding at the highest European level, it shows a contrasting attitude to Legal Aid funding. Legal Aid represents only 0.42% of total government managed expenditure. If the rule of law is to have substance, and if legal process is to command the confidence of consumers and the public at large, changes to procurement must not diminish access or quality.

Defence lawyers are professionally responsible for protecting the interests of their clients. Whilst this involves actively defending their clients' legitimate interests, the work of defence lawyers is to a great extent reactive: a response to actions and decisions which have been made by others, for example the police, prosecuting agencies and the courts. For this

reason there are inevitable limitations to the capacity for defence lawyers to control, never mind reduce, the cost of publicly funded legal services. The research by professors Cape and Moorhead has confirmed earlier findings that the principal cost drivers are beyond the control of the defence. They found no evidence that costs are supplier driven. Whilst the LCCSA supports proposals aimed at making the criminal justice system more efficient and cost effective and is committed to a process intended to achieve this objective, we recognise the need for a holistic approach if any reforms are to be effective. Improved case management, timely disclosure of evidence and other material, reductions in waiting time at police stations, prisons and courts are some of the issues that will have to be addressed if cost savings are to be achieved. It is therefore essential that any review of legal aid procurement secures the support of all stakeholders so as to eliminate unnecessary expenditure from the legal aid fund.

Ex post facto taxation of solicitors' costs

As those reading these submissions will be aware, our existing funding regimes are based largely upon time spent by solicitors in conducting their clients' cases ("inputs"). The time that is spent is then scrutinised ex post facto, item by item, by experienced taxing officers or LSC auditors/contract managers. The purpose of the ex post facto taxation is to ensure that the lawyer is remunerated only for work that it was reasonable and necessary to undertake in connection with the case. We remain fundamentally committed to those principles as the best method for regimes in terms of ensuring quality of service appropriate to the case and fair remuneration to the solicitors' firm for work properly done at appropriate hourly rates. As we outline in our paper on the Magistrates' Courts, any suspicion that, under such schemes, solicitors may overclaim for time spent, or undertake work or behave dishonestly, is not borne out by research. The audit process, combined with the proposed peer review system (which we support) should weed out those solicitors who under perform or take too long to perform tasks. To conclude otherwise is to suggest that taxing officers and LSC auditors have been failing in their task to assess the reasonableness of time spent. There is no evidence to support that conclusion. It is far more likely that the increase in time spent (which is apparent in the Crown Court sector) is as a result of either changes to financial reporting (claims for *all* work done in connection with indictable only cases having been moved from the Magistrates to the Crown Court claim) or solicitors doing more, but necessary, work as a result of the various external costs drivers which are outside their control. As Cape and Moorhead point out, there is a lack of meaningful academic research into these cost drivers. We are accordingly hugely concerned that a system of payment that, overall, works well and in the interests of clients, to reward fairly solicitors who do a good job and spend appropriate time on their clients' cases, is likely to be changed wholesale when there is no objective reason to do so.

Indeed, it appears to us that the motivation which led to the establishment of Lord Carter's review is the suggestion that spending of criminal legal aid is out of control, with costs, particularly in the Crown Court, increasing against a background in which there has been a decrease in the numbers of cases coming before the courts. (See for example the Lord Chancellor's speech to the CLSA conference on 19 November 2005 and Lord Carter's speech to the Parliamentary Barristers' Committee). We do not support this contention. In the first place we query the statistics upon which it is based. How are the numbers of cases measured? If it is based upon the LSC's "Acts of Assistance" figures, they are flawed. For example section 51 hearings are now defined as one act of assistance whereas they were previously defined as two acts of assistance. We address this in our paper at section 2. It does not moreover tally with the figures most recently produced by the Criminal Justice Board which show that in the year ended June 2005 1,194,216 offences were brought to justice against 1,002,204 in March 2002, a rise of almost 20%.

Moreover, as we explain in the respective papers, the costs of representing clients in the police station and Magistrates Courts are under control and within budget. We also set out in our paper at section 2 how external cost drivers (such as technological change,

prosecutorial decision making, legislative change, procedural change and public policy factors) impact upon criminal legal aid spending. We also set out some suggestions as to how they might be controlled and tackled in the future.

Other methods of remuneration

For all the reasons outlined above we are fundamentally committed to solicitors being paid for the work they properly do on behalf of their clients. As an Association, and as stated above, we are also committed to encouragement and maintenance of highest standards by solicitors and as such are content that our work should be subject to the kind of close scrutiny provided by the existing provision for assessment of claims for costs payable from public funds.

However, we also understand that the government, through the DCA, may be seeking a method of remuneration of criminal defence lawyers that appears to offer a greater degree of budgetary certainty. In our papers we have accordingly sought to provide constructive comment and ideas upon various alternative methods of remuneration, for example standard and graduated fee systems. Those comments are however subject to a general caveat. Introduction of any major change to the existing fee structure will inevitably have a number of hidden costs and costs drivers, both to solicitors and those who manage the remuneration schemes. See also our paper on the Magistrates' Court system (section 4). The greatest potential cost and danger is that if any new scheme were to lead to a reduction in quality of representation that would increase the risk of miscarriages of justice, with a consequent loss of confidence in the system, not only by the parties involved in it but by the wider public. Experience has shown that seeking to correct miscarriages of justice through the appellate system is hugely expensive.

It is therefore essential that any system of remuneration does not attempt to apply a "one size fits all" approach. The inevitable consequence would be a loss of quality. That is why we, together with all the other bodies consulted by the LSC, implacably oppose LSC proposals to introduce price competitive tendering ("PCT"). We do not intend to rehearse here the detail of our reasoning. It is contained in our response submitted to the LSC and in the responses submitted by, amongst many others, for example the Law Society, SAHCA and LAPG. Our objections to PCT are also summarised in the paper at section 8.

Thus, if quality is to be maintained, which is the vital cornerstone of our criminal justice system, any system of remuneration, for example a standard or graduated fee system, must incorporate appropriate "escape" clauses, or sufficient proxies to allow for proper funding of exceptionally demanding cases, with provision for regular (ie annual) review of the system of remuneration, the applicable proxies/escape clauses and the rates of pay.

We would also emphasise that any system of remuneration which standardises rates of pay between experienced, qualified staff and more junior staff may operate to reduce quality not only in the short term but, perhaps more dangerously, in the longer term. In the existing Magistrates' Court system, a firm will be paid the same for case preparation whether an unqualified clerk or an experienced solicitor conducts it. The firm accordingly has no incentive to employ the experienced solicitor on the task. If such a scheme is extended into, for example, police stations and the Crown Court, firms will train, employ and develop fewer and fewer qualified staff and the existing ratio between qualified and non-qualified staff will change radically. This, combined with the fact that it is increasingly difficult to attract able lawyers into the publicly funded criminal defence sector, which has already led to an increase in the average age of the criminal defence solicitor, would, potentially, lead us to a position where, once the existing population of qualified lawyers have retired, there are insufficient coming into the sector for the service as we know it now to be maintained. This (especially when combined with an examination of the statistics showing how many legal aid solicitors are leaving the sector – see section 7) is a real rather than merely theoretical risk. Such concerns were acknowledged by the LSC when the rates payable to duty solicitors (as

opposed to their accredited representatives) on attending for the most serious offences at the police station were increased specifically to encourage the attendance of experienced practitioners on cases demanding their expertise.

Finally, and as we have said in a number of previous responses to government consultations, we are opposed in principle to any requirement for specialist accreditation of solicitors beyond that already in place. Such schemes are costly, administratively onerous and place an unnecessary burden upon a section of the profession that is already amongst the most regulated in the country. Quality of work conducted by solicitors and their staff is capable of being assessed and monitored sufficiently by existing mechanisms, including peer review.

Further information

We are happy to meet with Lord Carter's review team to provide further information or to deal with any questions arising from this response. Any enquiries should be addressed to:

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MODERNISING THE CRIMINAL JUSTICE SYSTEM

Controlling cost drivers and formulating an institutional framework to prevent “scapegoating” of the Legal Aid fund as the cause of the overspend.

The London Criminal Courts Solicitors Association (LCCSA) has played a leading role in seeking to establish the truth regarding the cost drivers of legal aid funding. It is important to begin every discussion about issues of budget “over-spend” and procurement of supply with a rehearsal of this truth because it is principally the factors outside the control of the suppliers (legal aid lawyers) and of the budget holders (LSC & DCA) that lead to budget difficulties. Any modernisation of the criminal justice system must have this clearly in view. To put it bluntly, modernising without addressing these issues would be a bureaucratic folly.

The cost drivers can be itemised as follows.

1. Technological Change as a Cost Driver

Technological change has allowed investigators and prosecutors a vastly increased scope of investigation and is allied to the allocation of more prosecution resources. Investigations produce much more complex material to which a defendant has to react and upon which he may be challenged. Technology also underpins much societal change. This in turn produces more complex offending e.g. fraud within vast public contracts or within computerised banking systems – stealing a loaf of bread still occurs but theft of identity, the manipulation of VAT, the stripping of company assets to defraud creditors and so on are increasingly common. As technology and society change ever faster so do the criminal opportunities and thus the costs of investigation, prosecution and *therefore of defence*.

2. Prosecution Resources as a Cost Driver

It is an obvious truth, but one worth repeating, that the greater the resources devoted to prosecution (which the LCCSA has supported in a number of its responses to government consultations) the greater the impact on criminal defence costs. The irony is that ministers responsible for legal aid consider their budget without any knowledge of the cases that separate budget holders are going to introduce into the criminal justice system. They therefore have no understanding of how those cases will impact on the criminal defence budget. We cannot repeat too often that the legal aid criminal defence budget is the consequence and victim of prosecutorial decision-making.

The particularly acute effect which this paper seeks to address is what we might be called the “Titanic” cases. These are the cases that have a particularly significant impact on the criminal defence legal aid budget, albeit that they are relatively small in number. This is clear when we consider that of the 183,000 Crown Court cases in 2003 and 189,000 in 2004 respectively, approximately 1% of them (about 2000) were responsible for approximately 50% of Crown Court costs in each year.

The investigation and prosecution of these cases can be compared to the launch of the giant unsinkable ship that appears on the horizon and sails serenely on without any cost benefit analysis being undertaken before it does so, not only of the cost of the voyage against the benefit of undertaking it but of whether the ship should have been built and launched at all.

The Crown Prosecution Service, the Serious Fraud Office, Her Majesty’s Revenue and Customs, the Department of Trade and Industry and serious crime divisions of the police have no responsibility or accountability for the voyages taken by the ships they launch into the criminal justice system, nor for the defence costs that follow from the decisions they take.

This is particularly frustrating since criminal defence lawyers are excluded altogether from the process and are left to watch from the shore as the ships sail past. A better analogy may be to compare the criminal defence lawyers (and their clients) with those in steerage class, since when the ships founder it is they who pay the highest price.

It is the great irony of the recent and proposed cuts to the lower end of criminal legal aid work that the lower end budget is not in fact the cause of any problems in the criminal defence legal aid budget; it is tinkered with and cut in an attempt to deal with the problems caused by the "Titanic" high cost cases.

We outline below, under the sub-heading "Very High Cost Cases", some proposals to reduce the burden these cases represent on the criminal legal aid budget.

3. Legislation

We have also pointed to the ever-rising tide of legislation as a significant cost driver of the criminal defence budget. It is notable that the distinguished editors of the Criminal Law Review bemoan the endless production of ill-considered policy and complex legislation. Similarly, in January 2005, Lord Justice Rose, (R v Bradley, Court of Appeal) said "It is more than a decade since the late Lord Taylor of Gosforth CJ called for a reduction in the torrent of legislation affecting criminal justice. Regrettably, that call has gone unheeded by successive governments. Indeed, the quantity... has increased and its quality has, if anything, diminished."¹ While there has been belated recognition of the down stream effects of legislation through a DCA agreement to ensure a legal aid impact test, we do not see in that agreement any commitment to additional funding for criminal defence work. We would urge the Review to recommend that legal aid impact assessments are carried out rigorously and transparently so that the legal aid fund is demonstrably compensated for new cost drivers emanating from other departments.

4. Public Policy

The policy of government 'bring more offenders to justice is another example of a decision which causes downstream costs in the criminal justice system. More arrests mean more police station work and more prosecutions, which lead to increased costs.²

The current consultation on giving victims' families a voice in murder cases is another example. Is the cost of the lawyers who will inevitably represent the families to be met out of legal aid funding? Or are only those families wealthy enough to pay privately representation to be given a "voice"?

The proposal in the recent draft anti-terrorist legislation to detain suspects for three months is a further example. Would the legal aid fund have had the responsibility for funding the lawyers who would have had to visit their clients on a regular basis for three months? Or

¹ See also Professor Ed Cape and Professor Richard Moorhead: "Demand Induced Supply?". Changes introduced during 2004 as a result of the Criminal Justice Act 2003 may have the effect of increasing the number of requests for advice. For example, the power to detain without charge those arrested in respect of arrestable offences was increased from 24 to 36 hours, and powers to fingerprint suspects and to take non-intimate samples were also increased.

² See also the Serious Organised Crime and Police Act 2005 which includes the extension of arrest to *any offence* and Professor Ed Cape and Professor Richard Moorhead: "Demand Induced Supply?". The proportion of suspects requesting legal advice appears to have been increasing since suspects were first given a statutory right to legal advice by PACE. In 1987 25% of suspects requested legal advice, rising to 32% in 1991, and to 40% by 1995, and there have been reports that by the turn of the century the figure had increased to 50%, although a minority of requests do not result in legal advice being secured. This would indicate an increase of approximately 100,000 in the number of suspects receiving legal advice annually between 1993 and 2000. Also note finding that by the end of the decade 34% more people were being charged than at its start.

does the government expect lawyers to do this work (and all the other additional work caused by factors out of their control) for no extra payment? As it is, with Parliament extending the period to 28 days (from the current 14), the defence costs in such cases have potentially been doubled at a stroke for the police station stage of that type of work.

The criminal justice boards (CJB's) established around the country give a further example of disjointed policy thinking. The CJB's establish targets for increasing detection and successful prosecution of crime. The Sussex CJB document "Narrowing the Justice Gap Delivery Plan 2004/2005" targets to "increase the number of offences brought to justice in Sussex by 11% as compared with our baseline performance in 2001/2002". Our understanding is that no provision has been made to increase the spending of the Criminal Defence Service budget by a similar amount.

5. Procedural changes

The government has shown its intent to rewrite the rules that apply to criminal law trials. This has led for example to the proliferation of applications in relation to hearsay and bad character, creating the need for an extra tier of hearings. Sentencing procedures grow ever more complex, causing longer hearings. See for example the comments of Rose LJ (R v. Lang [2005] EWCA Crim 286): "The fact that, in many cases, the sentencers were unsuccessful in finding their way through the provisions of this Act, which we have already described as labyrinthine, is a criticism not of them but of those who produced these astonishingly complex provisions". It is clear that these procedural changes are likely to add to costs, particularly since they unfold in the venue with the greatest costs: the Crown Court. The introduction of transfer by section 51 from the Magistrates Court to the Crown Court has similarly acted as a "push" on costs from the Magistrates Court to the Crown Court. The proposed abolition of committal proceedings will act as a further similar push.

6. The Courts as Cost Drivers

The courts are an independent arm of the State. They are not required to have any consideration of a cost benefit analysis. They are prone to reacting to new legislation or new points of law by making rulings that directly impact on costs in a substantial way. For example, R v Bovell (2005 EWCA), where the Court of Appeal in a single paragraph of a judgement dealing with bad character, greatly increased the amount of work a defence team must undertake in order to be able to make a bad character application.

Very High Cost Cases

As stated above we have argued for some time the need for reform of the structure underlying what become the "Titanic" or very high costs cases. Our proposed reforms are in two parts, both of which would reduce significantly the heavy burden these cases place on the criminal legal aid budget. The first part of the proposal is to create an "early warning system" so that budget holders have some idea of what is going to unfold on a 1, 2 and 3 year time scale. The second part of the proposal is that a cost benefit analysis should be conducted at the outset and during major investigations and prosecutions.

(i) An "Early Warning System"

It would be relatively straightforward to establish an institutional framework whereby representatives of the police, Crown Prosecution Service, Serious Fraud Office and Her Majesty's Revenue and Customs and the Department of Trade and Industry responsible for major investigations and prosecutions meet regularly to discuss and share information about forthcoming investigations. While there would of necessity be a degree of secrecy surrounding these discussions, their outcome could be

provided to budget holders to allow proper planning and budgeting with the benefit of an awareness of what is in the pipeline.

(ii) Cost Benefit Analysis

There ought to be consideration of responses other than criminal prosecution to conduct that is usually prosecuted under the very high cost case regime. Here are some ideas.

(a) Increased Regulation

Extend the regulatory regime, adopting, with appropriate adaptations, the regime used by the Financial Services Authority whereby they have the choice of prosecuting *or* reaching a settlement/making public announcement through its tribunal, which settlement includes the power to impose substantial administrative fines, removal of authorisation to conduct business and other penalties on individuals and corporations. This would not only allow greater flexibility of procedures/outcomes, which is perhaps better suited to the actions under investigation, but would also allow the costs of those subject to investigation to be met by the corporates, the individuals personally, their employers, their representative bodies or through insurance policies. The saving on the criminal legal aid budget would we suggest be significant.

(b) Consideration of Other Steps/Outcomes

An increase in the regulation of corporate and other activities might usefully lead to other actions being taken that will reduce the occurrence of criminal activity, thereby saving costs. In the United States the Department of Justice's idea of "deferred prosecution" is now being used (see for example the article in *The Lawyer* dated 3 October 2005). Where wrongdoing has taken place in a company / firm it can be made subject for a specified period to an "overseer" who will ensure it does not re-offend. Installation of the overseer can take place alongside indictment of individuals if considered appropriate. A lawyer quoted in *The Lawyer* article says "the government's trying to get some middle ground where they're punishing a corporation and putting in monitors and yet not destroying innocent stockholders and innocent employees".

(c) Civil Remedies

Greater consideration should be given to dealing with these matters through the civil law. For example, companies involved could be sued, contractual sanctions imposed and significant financial settlements negotiated.

(d) More Focused Prosecutions and Closer Judicial Control

There is clearly always going to be some conduct whereby the most appropriate outcome of any investigation must be to prosecute corporations and/or individuals. In those cases, however, a cost benefit analysis should still be undertaken and kept under continual review. That analysis must concentrate on identifying and prosecuting the truly culpable, avoiding multiple-defendant and multi-phased trials which almost inevitably involve "small" defendants being tried on "peripheral" issues. Those prosecuting such trials should be required to narrow the issues under examination in order to obtain swifter verdicts through more effective prosecutions.

We support proposals for better judicial case management, particularly of long trials.

PRE CHARGE: ALTERNATIVE FUNDING ARRANGEMENTS FOR ADVISING AT THE POLICE STATION

Introduction

In this paper we consider the alternative methods of funding legal advice and assistance at the police station and draw attention to the advantages and disadvantages of each.

We should emphasise that the Association does not accept that an increase in spending is necessarily symptomatic of a problem that needs to be fixed. Rather, we believe that although criminal legal aid spending has risen, there is no evidence that suggests that this relates to pre-charge advice and assistance.³ The LSC accepts that the budget for “lower work” is under control.

Alternative Allocation of Duty Solicitor Work

1. Restricting the eligibility of duty solicitors to join a particular scheme
 - (a) By setting a maximum number of schemes that can be joined
 - (i) The Association believes that this would:
 - a. result in restricting the size of firms and firms losing economies of scale;
 - b. lead to larger firms fragmenting and operating from a number of smaller offices;
 - c. conversely, some members support a reduction in the number of schemes on the basis that membership of fewer schemes would increase the frequency of rota slot provision on that scheme. This in turn would increase the number of cases each firm would have at a particular Magistrates’ Court and would be likely to lead to potential savings in travel and waiting costs.
 - (ii) The Association believes that multiple scheme membership acts against (b)(i) above, and believes that the government’s concerns can be addressed by imposing maximum travel time claims and / or setting
 - (b) By geographical criteria
 - (i) The current system is based on the belief that all police stations within a borough charge to one central/small number of courts. This:
 - a. minimises travel (certainly during office hours);
 - b. gives a greater proportion of work to local firms and concentrates them in to a local court.
 - (ii) The Association believes that multiple scheme membership acts against (b)(i) above, and believes that the government’s concerns can be addressed by imposing maximum travel time claims and / or setting

³ Professor Ed Cape and Professor Richard Moorhead: “Demand Induced Supply?”. The statistics on the number of police station claims may mask an increase because of the provisions in the General Criminal Contract requiring a single claim for all work undertaken for a client in a matter or case within a class of work (the ‘rolling up’ provisions). There has been a substantial increase in average cost per claim, but this will in part be a result of the ‘rolling up’ provisions.

more restrictive geographical criteria. Some suggest that travel costs be bundled in to attendance rates. This will:

- a. make it less attractive for firms to travel longer distances;
- b. effectively allow the market to set its own balance. However, such a course would be likely to favour larger or multi-site firms disproportionately over smaller firms.

Alternative Public-Funding Arrangements

There are a number of models that can be used to fund legally-aided police station advice and assistance.

(a) Time Spent Basis

- (i) The Association understands that the government's perception is that firms incur unreasonable travel and waiting times. The government believes that lawyers attend police stations when not absolutely necessary. This is not accepted.
- (ii) The Association is keen to point out that lawyers have no control over waiting time. In fact, there is anecdotal evidence investigating authorities positively extend this period. This is an adversarial system, and the profession's concern is that if investigation authorities know lawyers are not paid for waiting, they will almost certainly make sure they wait even longer. Waiting times in London have risen considerably in the last twelve months due to the CPS Direct initiative and the gatekeeper initiative of the Metropolitan police.
- (iii) We are concerned that a temptation may be to remove the differential between own client and duty solicitor rates; we believe that if current rates are replaced with an average the LSC will choose the national average (which favours own clients) as opposed to the London average (where there is proportionally more duty solicitor work). We believe that this will result in money being diverted out of London to other regions. If the rates were to be merged, the average outcome should be the London average.

(b) Extending the use of the Public Defender system

- (i) This pilot scheme has been the subject of numerous papers and comparisons, and we pause simply to comment that the Public Defender Service has proved too expensive and is poor value for money when compared with private practice and more expensive than arrangements involving private practice.

(c) Remunerate according to a fixed/standard/graduated fee or average case costs

- (i) We believe that for any standard fee scheme to work fairly, the government and profession will need to agree upon a banding system. There will have to be an escape route for those cases (eg terrorism and those featuring warrants for further detention), which go beyond the scope of any fixed fee. It may be possible to link this concept to the PACE clock and category of offence.

- (ii) The Association also believes that it would be essential to build in safeguards to this model. The scheme should for example:
 - a. retain a minimum requirement for firms to attend on clients who are vulnerable etc, or where there is an interview, complaint about police, or identification procedure;
 - b. retain incentives such as a percentage uplift according to the grade of fee earner attending and linked to the category of case.

Separate Considerations

The Association is keen to impress upon the government other considerations that we believe are part and parcel of a fair deal. These include :

1. London weighting;
2. index linking/review.

Avoidable Expense

We believe that costs savings can be effective if the following are implemented:

- (a) effective liaison on bail to returns via email and the appointment of a dedicated officer at each police station;
- (b) ensuring the police work to realistic time frames for interviews;
- (c) allowing for early negotiation in relation to charging and pleas, providing for access to the prosecutor at the police station;
- (d) creating incentives for firms to assist diverting suspects/offenders from the criminal justice system via:
 - (i) alcohol and drug rehabilitation schemes;
 - (ii) assisting with accommodation needs.

Quality Control

Whatever payment model is agreed, it will be essential to ensure that agreed minimum standards of advice and assistance are maintained, regardless of the source of funding. We support a system of peer review and believe that this offers a fair system of monitoring quality of service and value for money.

REMUNERATION FOR MAGISTRATES' COURT WORK

Introduction

This paper suggests that the current regime for remuneration of Magistrates' Court cases ought not to be significantly altered, it being noted that:

- The budget for Magistrates' Court proceedings is under control. The only anticipated increases will arise from an increase in the quantity of work being dealt with by the Magistrates' Court or as a result of procedural changes that impact upon the length and complexity of proceedings.
- Unlike police station and Crown Court work, the funding of Magistrates' Court cases is already subject to a fixed fee system;
- Magistrates' Court work is thought to be the least profitable tier of criminal defence work. Some larger firms have statistics that confirm the same. Any measures taken that act to reduce the profitability of this work still further will inevitably lead to a reduction in the quality of service that firms of all sizes and structures are able to provide.

The Current Standard Fee System

Magistrates' Court work is currently remunerated under a system with three levels of payment: subject to the amount of work conducted on any particular case the claim will fall within one or other category as either a lower standard fee, a higher standard fee and for those cases involving the largest input a 'non standard fee' reflecting the time actually spent on the file. Costs for travel, waiting and disbursements must be added to all of these.

Allowance is also made within the standard fee system for different categories of case with the levels at which lower, higher and non-standard fees are triggered varying accordingly. For example, a guilty plea will be treated differently from a trial or committal proceedings.

The vast majority of cases are claimed as lower standard fees (some 80%), with 14/15% (or 1 in 7) claimed as higher standard fees and only 4% claimed as non-standard fees⁴. When the scheme was introduced there was apparently an expectation (or fear) that solicitors would somehow ensure that an unrealistically high proportion of their cases would come to be dealt with as higher or non standard fees. This has not been borne out by the research.

Moreover, contrary to the idea that it is somehow in the interests of the solicitor to seek adjournments and string out cases, for the generality of cases the most profitable outcome for the solicitors' practice would involve the speediest disposal of the case. It is only the solicitors' professionalism and commitment to the client that would ensure that where necessary additional time to read papers or seek reports is requested.

Benefits of the Current System

The current system:

- reflects the complexity of the case and the demands made of the solicitor dealing;
- provides flexibility in allowing rates to be set that reflect different kinds of case disposal;
- requires no changes to adapt to now frequent legislative and procedural changes;

⁴ Cape and Moorhead p48

- is (or should be) administratively cheap to monitor and audit given the small proportion of cases requiring assessment;
- as an overall expense has produced a system that is now said to be 'under control';
- is understood (and effectively accepted) by all;
- allows for cases that are unusually demanding and costly to be dealt with without any adverse knock on effect on other cases and clients.

Problems Under the Current System

This paper does not advocate a wholesale change to the current standard fee system. The source of most criticism of the current system relates to the unprofitable nature of the work.

- The problem with current fee structure is not so much the structure itself as the level of payment.
- There is no system for price indexing such rates as are set.
- There is no incentive to those firms who use a higher proportion of qualified solicitors to undertake case preparation – no differential exists as between rates paid to qualified and non-qualified staff providing financial encouragement to down grade the level of fee earner preparing Magistrates' Court cases.

Possible Efficiency Changes Within the Current System

Efficiency improvements would be to the benefit of all concerned, not least defence solicitors. Waiting time is notoriously lowly paid and anything that cuts waiting time (or the need for unnecessary adjournments) will be welcomed by practitioners.

(a) Travel and waiting

Costs for travel and waiting have long been of concern to the LSC/DCA. The following should be noted

- There is no incentive to wait at court: waiting rates at court are so low as to be uneconomic. Time would better be spent on preparation of Crown Court or Magistrates' Court work in the office or at a police station.
- Solicitors are the last group responsible for waiting at court. Lengthy delays at court are caused by any/all of the following:
 - lack of a CPS file;
 - lack of a court file;
 - busy court lists;
 - awaiting the delivery of prisoners from court and police stations. (The impact of competitive tendering on the delivery of prisoners to courts ought to be noted);
 - evidence from the nationwide 'Waste Week' should be considered.

- Travel issues in London are not simple. Clients may be arrested anywhere across the city. Again, due to the low rates paid for travel it is not in solicitors' interests to travel lengthy distances. A firm in north London does not relish the prospect of a fee earner spending half a day out of the office travelling to say Wimbledon Magistrates' Court for one client. The travel costs make the use of the fee earner's time notionally unprofitable. However there are times when it is right, even essential, that the fee earner attends due to their knowledge of the case or relationship with the client.
- The SQM already sets targets for travel times to court (and police stations) to ensure that firms travel times are not excessive. Travel times for unassigned counsel and free-lance solicitors are in any event limited to a 45 minute maximum per journey.
- Reducing the number of duty schemes that any firm may be eligible for would impact on the number of clients that firm has at different courts. It would be likely to increase the number of cases firms had at particular courts reducing overall travel and waiting times. It is fair to say however that there is no consensus on whether such a route should be followed, with some firms/solicitors believing that a totally free market should operate with no restriction on membership of area based duty schemes.
- Firms could be encouraged to identify particular days of the week when they are already due to appear at a particular court and seek to have remand hearings adjourned to that day.

(b) Factors causing delay at court and to proceedings

The Magistrates' Court is a complex place of business with many actors. In some ways it is very efficient, managing to bring before the tribunal a continuous flow of work. There must, because of the necessity for all actors (lawyers, defendant, court, probation) to be ready, be some waiting time and "inefficiency" because there are many cases being pushed through a single funnel of "readiness" to be heard.

Anyone attending Magistrates' Court will note some avoidable and obvious reasons for waste and delay within the system. Some of these difficulties – almost always beyond the control of the defence solicitor - will be highlighted with evidence from the 'Waste Week' exercise. The points that follow are not exhaustive.

- Licensing and all other non-criminal matters should NOT be listed together with general criminal remand lists.
- Unrepresented defendants – attractive though it may appear to defence solicitors we see no reason why unrepresented defendants ought to be penalised by having their cases called after those who are represented.
- Late prisoner delivery from police stations and prisons continues to be great cause of delay.
- Additional hearings for 'bad character' applications.
- The need to obtain historical evidence in ASBO cases.

Increased Caseload for Advocates at Court?

The suggestion that advocates at court ought to deal with larger number of cases has been mooted for many years by representatives of the CDS/LSC. There are obvious cost benefits

to solicitors and the commission in avoiding a situation where multiple defendants are represented by advocates each with only one file. It may not be correct that having fewer solicitors at court representing more clients will necessarily produce savings. This is particularly true since the implementation of new sentencing procedures which are much more time consuming, eg the Criminal Justice Act 2003.

(a) Cost benefit advantages of representing fewer clients at court

A solicitor representing few clients at court:

- Has the opportunity to deal thoroughly with those clients that day. This increases the likelihood of an early disposal of the case. A guilty plea is more likely to result where a client has the opportunity to properly consider the Advance Information at court with their advocate. Has any recent research been undertaken to determine what causes cases to conclude early or the potential harm that can be done when solicitors are overloaded with clients? (see Standing Accused, McConville & Others 1994)
- Has the opportunity to investigate matters that arise at court and that may be relevant to bail applications or sentence hearings or the non-attendance of defendants.
- Inevitably has the opportunity to provide a better overall service to the client, often eliciting vital information as the relationship of trust is built. This in turn produces better and clearer information for the court and is therefore of assistance to the entire system.
- The solicitor also has the opportunity to deal with any number of problems that arise in the daily court system assisting the smooth running of the court. Examples would include:
 - acting as a liaison between CPS court advocate and CPS room at court to obtain missing files (a regular feature of life for defence solicitors not wishing to remain at court unnecessarily);
 - liaising with police liaison officers at court especially with regard to 'overnight' custody cases, list of antecedents and the like;
 - liaising with the court office;
 - this work is generally accounted for (and effectively hidden) in waiting time. Solicitors carry out these additional functions both to assist their client and the court and to reduce the unprofitable time that would otherwise be spent 'waiting'.

(b) Cost benefit disadvantages of having an increasing number of clients at court

The over-burdened solicitor at court.

- Causes delay to the system.
- Is unable to deal with all matters effectively and may have a greater need to request adjournments.
- Delays co-defendants who are ready for their case to be called on.

- Effectively works as a busy court duty solicitor in circumstances where their clients have the right to expect greater levels of attention.
- The sometimes over-burdened CPS lawyer at court provides a good example of what should not be replicated by the defence. CPS lawyers often do not know the detail of their case papers and are unable to make a decision on the file as to any representations made by the defence as to an alternative charge or the possibility of a caution or discontinuance. Adjournments are then sought to consider these defence representations.

Costs of Radical Change to the Current Fee Structure

Another reason to question the wisdom of significantly altering the current fee structure is the cost of implementing that change. The costs of the current specific proposal for the introduction of PCT are potentially vast and will have been dealt with in some detail within the extraordinary large response to the consultation on those proposals. Any change to the system will result in additional costs.

- Costs of new software and systems to defence lawyers and LSC.
- Costs of training associated personnel with same and in understanding new systems;
- If any new proposal does not have the support of the profession it will contribute to an increasingly demoralised industry, leading to de-motivated staff working inefficiently. There will be a loss of experienced lawyers from the system with inexperienced and non-qualified staff taking on a greater proportion of case preparation and a lack of talented lawyers coming in to the system (see Law Society research).
- If any system resulted in any decrease in time spent on case preparation there will inevitably a decrease in quality of representation. There would be an increase in the number of miscarriages of justice. Cost to individuals, costs of re-trials, costs of civil claims, cost in terms of confidence in the system itself – not easily recovered.
- Cost of the transition process; cost of the transfers of legal aid that will result from closure of more firms.
- Any reduction in standards of defence will result in reduced standards in CPS/police. Defence lawyers hold prosecution agencies to account. Poor or shoddy defence work will inevitably encourage lax policing and prosecution.
- Financial incentive not to make representations to CPS to discontinue as such efforts are time consuming and often fail.
- Cost of repair if it all went wrong: will a risk analysis be conducted in respect of proposed changes?

Additional Points

If changes are proposed there must be transparency in respect of the calculations involved. For example, if there were an attempt to include 'travel' costs within the standard fee for the case, the basis on which this is calculated must be made apparent, with detailed statistical analysis provided. If the system is reformed in such a way as to make Magistrates' Court work appear even less profitable than it is now it is debatable whether there will be lawyers willing to conduct this work in the future. The pressure for firms to select 'profitable' work and avoid the non-profitable areas will increase.

Waiting time cannot be treated as part of any fixed fee as it is beyond the control of the solicitor, who has no incentive to spend unproductive time at court.

The loss of committal cases from the system (in future all Crown Court cases will be sent directly to the Crown Court following the 'plea before venue hearing) will reduce the number of cases at the Magistrates' Court and the costs to the Magistrates' Court budget. Some, though not all, of these costs will be shifted to the Crown Court budget.

Consideration ought to be given to the significant impact that finding a few further million in savings from the Magistrates' Court budget will have on the thousands of defendants, witnesses, friends and families connected to this tier of the criminal justice system. Concerns as to diminishing quality are real. In contrast, the savings that can be achieved by targeting VHCC cases and ensuring that only those cases genuinely in the public interest are prosecuted may impact on comparatively few individuals.

Any changes to the system need to incorporate mechanisms to increase fees, at least in line with inflation.

REMUNERATION FOR CROWN COURT WORK

Alternative Methods of Public Funding

Remove different funding arrangements for counsel and solicitor

The Association believes that by revising the claiming regimes so that in effect there is one case and one bill, any unnecessary duplication of work will be removed.

However, this would require a radical change in the delivery of legal services and we are concerned that such a scheme may result in the shifting of administrative costs from the government to supplier.

Time spent basis

This is the current payment scheme and has much to commend it. We refer to the comments made in the introduction to these submissions. Lawyers claim for work honestly and reasonably undertaken in order to progress their client's case. The work is assessed by experienced taxing officers who, as members of the Association will confirm, carefully scrutinise all files and disallow any unnecessary or duplicated work.

Extended use of the public defender system

The public defender service has proved very expensive and the Association believes that in its current form does not reflect good value for money.

In addition, our understanding is that empirical research in other Commonwealth countries has exposed considerable weaknesses in a public defender system, and further and more detailed analysis is required, beyond the scope of this response.

Standard fees

There is a successful scheme in operation in the Magistrates' Court in terms of offering budgetary control and containing in-built disincentives against unnecessary work and at the same time being elastic enough in allowing exceptional cases to be identified and subject to taxation by the LSC. A single LSC unit at Liverpool is able to bring a uniform approach to taxation of such cases (CDS 7s) which irons out regional variations yet at the same time allows a light touch/inexpensive appeal system at a local level so that the peculiarities of any particular region are taken into account.

The above scenario shows how a vast amount of cases are efficiently processed if a payment system is still to retain a "human" element in terms of a small cadre of assessors bringing a proportionate benefit to the administration of justice.

Graduated fees

It may however be the case that the Carter Review wishes to move away from a system such as that which is tried and tested in the lower courts, in which case the only viable system can be that of a litigators version of a graduated fee (a version of which it is understood has been under development at the DCA/LSC for some considerable time).

The graduated fee scheme has the benefit, by the usage of "proxies", of giving certainty of value to classes of cases chosen by reference to the type of offence in terms of gravity/seriousness/average paper count. The latter characteristics are already written into the Advocates' Graduated Fee Scheme. To extend it to litigators' work will necessitate the taking into account amongst other matters, of:

- (a) taking instructions from defendant/witnesses;
- (b) mental health aspects;
- (c) language issues;
- (d) drafting briefs/notes to advocates;
- (e) an allowance for routine letters and telephone calls on a system similar to that used by the CCU;
- (f) unused material;
- (g) allowances for cases where defendants are remanded in custody, especially at high security establishments;
- (h) The impact of custody which loads the process with travel time.

The above areas need to have objective “proxies” that correlate to the time spent on such activities, whether it be linked to page counts or class of offences or an aggregate of such factors.

Disbursements, particularly experts’ fees, may have to fall outside the proxy system.

Any such scheme must avoid the pitfall that has befallen the current scheme, which is frozen in a legal landscape that existed in 1996 and has proved not to be sufficiently flexible to adapt to the very different way criminal law is now practiced in the Crown Court. For example the law relating to bad character has not only changed by virtue of the Criminal Justice Act 2003 but the input of time by lawyers has been significantly affected by successive judgements from the Court of Appeal in the cases of *Bradley, Bovell and Weir*. In the case of *Bovell* the Court of Appeal, in a single paragraph (para 2), has created many hours of work for litigators and advocates alike in all cases where bad character is an issue.

We therefore submit that there should be created a Standing Committee / Independent Review Commission composed of the following representatives:

- (a) DCA/LSC;
- (b) higher judiciary;
- (c) solicitors;
- (d) advocates.

The above committee could monitor and assist in calibrating the graduated fee from time to time as required by changing practices/legislation. This will at least have the effect of interacting with the judiciary and in time that branch of the justice system will come to appreciate the cost of justice. This suggestion is little more than an extension of the current arrangement in CDS lower work with the CCCG (Criminal Contracting Consultative Group (with the exception that judiciary are not involved)).

A yearly review of fees in line with inflation (“index linking”) can also be undertaken by the Standing Committee/ Independent Review Commission.

The Association is concerned that a simple page count will not work for the smaller cases.

We also believe that there would need to be a model based on something more than just “higher” and “lower” bands.⁵

The advantages of any standard fee or graduated scheme would include:

- (a) certainty for firms and the LSC;
- (b) simplicity and costs savings in terms of less auditing/accounting/costing;
- (c) encouraging firms to find economies that then benefit them.

There are also disadvantages, and we believe that the way lawyers are paid inevitably affects behaviour.

Quality issues

- (a) Maximising profits will involve doing the least work possible on a case. Peer review auditing may address this to some extent. However the Association believes that costs audit will also address the worry of firms doing more work than necessary on cases. At its worst there could be a significant risk to justice in a large number of cases if costs are squeezed so that firms simply cannot afford to do a proper job on the fixed fees on offer.
- (b) “Good practice” framework for peer review of criminal cases, perhaps based on a refined transaction criteria.
- (c) Providing an “opt out” for unusual cases, possibly diverting such cases to the VHCC funding scheme.
- (d) Cherry picking. Practitioners instinctively know those cases that are going to be hard work, perhaps because there is a demanding and/or mentally ill client, the allegation involves a domestic harassment charge, witnesses have convictions, there are a large number of defence witnesses, there is an interpreter, etc. It is not unrealistic to envisage circumstances where a potential client recounts the circumstances of his or her case, a firm makes a quick calculation and concludes that this is a “loser” financially and declines to take on the matter.

Mixture of models

The Association believes that it may be possible to introduce a scheme based on a number of models.

For example, all non-VHCC Crown Court cases could start off within a basic pricing mechanism with, say, two bands dependent on page count and advocacy time.

If a case moves off the agreed scale it would then fall to be dealt with under a graduated fee scheme, which would involve a more sophisticated model with a larger number of differentials, including volume of evidence (we believe this should be something quite different from a simple page count, including hours of video tapes, audio tapes, unused material, etc.), advocacy time, mental health issues, interpreter, etc. and a different rate dependent on whether the case was a guilty plea, trial or cracked trial.

If the case moves past the upper limits of the graduated fee scheme, it would automatically enter the VHCC regime.

⁵ See the Northern Ireland model, discussed in the Law Society’s paper “High Volume Crown Court Advice and Representation”

Other Considerations

The Association is very keen to impress upon the government the importance of London weighting and linking payments to the rate of inflation.

Avoidable Expense

The Association believes that to ensure a fairer deal for legal aid, responsibility must be taken by all areas of the criminal justice system. We believe there to be inefficiencies and avoidable wastage, and list below areas worthy of special mention.

Inefficient listing of cases

There is a common perception that cases are listed for the benefit of the court, and take no account of, in particular, the defence requirements: -

- (a) we believe there to be a lack of consistency in the listing practices of courts;
- (b) we believe the current warned-list system leads to:
 - (i) a disincentive for advocates;
 - (ii) disruption for witnesses;
 - (iii) problematic diary planning;
 - (iv) returns of briefs at the last minute.

The Association advocates the early fixing of all cases and a more widespread utilisation of pre-trial reviews and certificates of readiness. This would lead to better prepared cases, fewer cracked or ineffective trials, more sensible advice and decisions on plea.

Better management of cases

The Association advocates a greater use of the existing power of the court to make Recovery of Defence Costs Orders.

We believe that a greater use by the courts of wasted costs and third party costs orders may well lead to greater efficiencies. For too long these have been seen as weapons to keep the defence in check, but an even-handed approach of "polluter pays" could well benefit the system.

Greater use of IT

The Association commends electronic discovery (through CD-ROMs, DVDs or downloading from secure servers) to the profession.

- (a) There are many advantages. It will:
 - (i) cut down on copying costs;
 - (ii) reduce the need to collate paper discovery;
 - (ii) reduce the costs of storage;

- (iv) reduce the delay between the material being received by the defence, categorised, bound in folders and distributed;
 - (v) allow for time savings with core material identified through Optical Character Recognition (“OCR”) searching.
- (b) However, before any scheme can be properly implemented there must be agreement on format and standardisation within the profession.

Costs savings will arise if the presentation of certain types of evidence complies with agreed standards of electronic format. Notable examples relate to:

- (a) telephone evidence; and
- (b) banking evidence.

Other costs savings can be achieved through:

- (a) booking prison visits via email;
- (b) the wider use of video conferencing (although the Association stresses that this will not be suitable for all clients/matters);
- (c) listing cases electronically, taking in to account: -
 - (i) witnesses’ date to avoid;
 - (ii) lawyers’ dates to avoid;
 - (iii) court availability.

Pre-trial reviews and other case management hearings could also be dealt with electronically.

REMUNERATION IN VERY HIGH COST CASES

EXECUTIVE SUMMARY

In our Introduction

1. We suggest alternatives to the current ways in which procurement for VHCC cases is carried out and controlled by the state, whereby a “lead supplier” is responsible for contracting with the state for the conduct of VHCC cases. Such a system would mirror the historical relationship of solicitors instructing counsel on a private basis and the civil system of structuring VHCC cases. Such a proposal would also improve the way the state engages with lawyers by focusing its interaction on one individual which should improve accountability and at the same time significantly reduce the administrative costs to the state of operating the system.
2. We also suggest simplification of the system so that identification of a VHCC case is dependent upon whether it is prosecuted by a specialist prosecuting team such as the SFO, RCPO, DTI, CPS special casework directorate etc. As this is unlikely to capture a significant number of cases which otherwise would normally come within the VHCC category in terms of costs, a further criteria of cases with a trial estimate of 25 days or more would be appropriate.
3. We also suggest simplification of the categories and criteria of hourly rates for VHCC cases based on complexity. We make no specific proposals for rates or differentials stating that costings would have to be conducted and negotiated with the professions. The rates would have to be set at such a level to encourage solicitors and counsel to remain in the market and to recognise that some VHCC non fraud cases are more complex than some fraud VHCC cases. Alternatively in paragraph 4 (e) we suggest a much simplified method of payment based upon a system of graduated fees using price per unit of prosecution evidence, including unused material, audio or visual tapes or electronic files and depending on the nature of prosecution evidence.
4. We further suggest that solicitors, solicitor advocates and the independent bar who conduct VHCC work be required to produce annual figures for all chargeable work carried out by each fee earner or advocate.

With regard to paragraph 3 of the terms of reference

5. We develop the arguments for a lead supplier, thus saving on administration.
6. The Association recommends the adoption of the three proposals put forward in our letter to Derek Hill of 19th August 2005 (see appendix 2). In summary these were:
 - re-introducing the 25 day limit for such cases;
 - encouraging the market in private criminal work by re-introducing means testing for legal representation in VHCC cases;
 - freeing up restrained assets for use in criminal defence VHCC cases;
 - providing for greater accountability and responsibility for those who really affect costs drivers on the legal aid budget;
 - Opening up the market to more private work which would reduce the burden on the public purse and reduce the cost of administering the system;

- encourage the principle that the polluter pays.

With regard to paragraph 4 (a) of the terms of reference

7. We believe that an examination of the work carried out by supervisors and junior counsel and the payment structures for both may produce some savings by avoiding duplication. It should be noted however that the resources of the prosecution are much greater than the defence and defence teams comparatively small. It is often necessary for a large amount of material to be read by solicitors, junior counsel and leading counsel. In order to attempt to avoid late changes in leading counsel we also suggest that a copy of counsel's diary should be provided to the lead supplier and the CCU when counsel is first instructed.

With regard to paragraph 4 (b) of the terms of reference

8. We consider that criminal defence practice for solicitors (particularly in relation to VHCC fraud and non fraud work) is already subject to extensive quality assurance criteria and assessment. We are opposed as an Association to further unnecessary accreditation in criminal defence solicitor practice. We set out some of the difficulties in assessing quality in relation to advice and judgment and the often competing interests of criminal justice system, the state and the defendant. The Association is not opposed per se to further discussions in relation to meeting further specified quality standards.
9. To consider whether work done is of a proper quality as a legal service. We raise the possibility of peer reviews.
10. We suggest that any "lead supplier" should fulfill the criteria of the specialist fraud panel. The Association recommends that quality standards matching those of the specialist fraud panel be adopted for advocates who deal with VHCC cases.

With regard to paragraph 4 (c) of the terms of reference

11. Defence remuneration should not be a factor to incentivise the swift conclusion of trials.
12. Greater emphasis should be placed on the early presentation of clearly defined prosecution cases.
13. Trial management, particularly of the prosecution case in the early stages of proceedings, is critical in controlling costs.
14. Where prosecutions are conducted in a way that increases costs unnecessarily, costs penalties should be imposed.
15. Greater use of plea bargaining and immunity notices is likely to further control costs.
16. Consideration could be given to providing an incentive to keeping the numbers in the defence team down to what is necessary given the demands of the case and the timescales involved.
17. We have considered suggestions that one firm should be instructed to consider unused material and then distribute their findings to each defence team. We point out that there are inherent difficulties in such a system. If the prosecution approached their responsibilities of disclosure appropriately and consistently this would not be such a problem. Consideration may be given to an independent legal team

considering the prosecution's compliance with their duties of disclosure as a means of streamlining disclosure.

With regard to paragraph 4 (d) of the terms of reference

18. The Association acknowledges that the government's intention is to proceed with the development of legal and/or multi disciplinary organisations. This has the possibility of encouraging diversity and competition and will certainly provide a different model to the existing relationships between solicitors and barristers. Whether it is successful in delivering more just outcomes for best value is at present uncertain. It has the potential of avoiding duplication, cost, preserving quality and just outcomes. On the other hand it also has the potential for increasing cost and allowing commercial financial pressures to prevail over just outcomes. A pre-requisite for such a system would be compliance with the same regulation by each constituent professional body and the quality assurance standards of the specialist fraud panel. We also set out some safeguards which we believe would need to be adopted. The Association has suggested encouraging the private market in this area and we are opposed to competitive tendering. See also our response in relation to paragraph 5. It is critical that the independence of the legal profession, which is fundamental to the interests of consumers, is preserved.

With regard to paragraph 4 (e) of the terms of reference

19. Adopting a "lead supplier" approach would avoid piecemeal negotiations between the state and the lawyers. It should significantly reduce the administrative costs for the state.
20. The Association puts forward a possible example of a model for negotiation of funding which is a much more simplified version of the current system. It is based on a formula which provides for a minutes per page calculation of the prosecution case with differing rates for whether the material is statements, exhibits, unused or other material. Such a system recognises the role of the lead supplier as effectively a budget holder. In order to avoid piecemeal negotiations the minutes per page rates should either rise in line with increases in the retail price index or be subject to binding recommendations from an independent review body.
21. In so far as auditing the work carried out by the lawyers, the current system carried out by the CCU could be continued. If the proposals contained in our introduction and/or our response to paragraph 4 (e) are adopted this should simplify the auditing process. As an alternative, a system of peer review could be adopted with the consequential savings on administration for the state (although funding would have to be found for paying peer reviewers).

With regard to paragraph 5 of the terms of reference

22. The Association is opposed to competitive tendering in this as well as in other areas. We consider it to be an unwarranted restriction on the freedom of choice of our clients in their choice of legal representative. A dissatisfied client who has legal representatives imposed on him by the state, who perceives the decision to change representation to be based on price, is more likely to sack his lawyers and litigate cases to appeal. This would inevitably increase delay, trial time and costs. We believe that in the eyes of defendants, lawyers and the public it would be perceived as likely to produce fewer just outcomes.
23. In other examples of tendering it is generally the end user (the client) who invites the tender and has the choice of service provider.

24. The administrative burdens of tendering, on both the state and the firms, would be considerable and wasteful in terms of resources. We say the pressures on the state as the funding body to consider price as the paramount criteria would mean that quality and choice would inevitably suffer.
25. We set out six areas of concern which surround competitive tendering.
- (a) Which firms would be invited to tender? We have assumed a model which selects those invited to tender from a similar body to the specialist fraud panel. We have queried the efficacy of all firms on, the panel being invited to tender. We also assume tenders will be put out on a case by case basis. The Review team may consider a reduction in the size of the specialist fraud panel. However this may cause problems with regard to conflict of interest and may mean quotes would be less competitive. On the other hand a large panel could lead to quality assurance concerns and be administratively cumbersome and expensive for all involved.
 - (b) How would the CCU identify a VHCC case which it wished to put out to tender? Our experience of the contracting system leads us to conclude that solicitors and counsel who will not be eligible to tender will seek to avoid the tendering process. Any criteria for identifying a tendering case will have to be simple and clearly defined.
 - (c) At what stage would it be reasonable for firms to be invited to tender? We conclude this must be after service of the prosecution evidence. Confirmation of instructions from the client would also be necessary. This will cause in our view insurmountable problems with regard to issues of confidentiality and potential conflicts of interest. At this stage, relatively late on in the process, this will cause considerable duplication of work between the old and new solicitors, irrespective of the add on costs of other unsuccessful firms.
 - (d) What criteria would the CCU use to consider such tenders? At the tender stage we do not see any other possibility than price being the main criteria. Other more nebulous criteria would open the CCU to challenge by way of judicial review.
 - (e) Would such a process save costs? We seriously doubt that this will be the case. We put forward the possibility of a dissatisfied client, being forced to change from his solicitor of choice to one based on a lowest bid, not cooperating with the new solicitor and challenging the process. We believe such a system will increase costs and is likely to cause substantial delay which will run contrary to the Lord Chief Justice's protocol on serious fraud.
 - (f) How would quality be monitored and preserved in a tendering process? We envisage that there will need to be monitoring on a basis similar to that undertaken at present by the CCU and question the outcome should quality standards not be maintained.
26. We firmly believe that competitive tendering would discourage a "diverse and competitive market of lawyers and others offering advice and advocacy that helps deliver quality and just outcomes for best value". It would unreasonably restrict freedom of choice for our clients.
27. If cases are awarded to firms based on the lowest bid price firms with more experienced staff and higher overheads will be less successful in the legal aid market and will either withdraw from it or be forced out. There is a risk that the experience of those senior lawyers will be lost to this market.

INTRODUCTION

Defence costs in VHCC cases are targeted as an example of “fat cat” lawyers milking the system at the expense of civil legal aid, the government’s prudent fiscal spending plans and ultimately the tax payer. On the other hand defence lawyers highlight the fact that there has been no increase in hourly rates since 1993 and indeed reductions in hourly rates with the introduction of the contracting system and the unilateral changes made in October 2005 as a means of arguing that increases in budgets are a result of more work being done and that the real costs drivers in the criminal justice system lie elsewhere. These relate for example to new legislation and prosecution decisions (see Cape and Moorhead report). In order to understand better proposals for reform we considered it appropriate to analyse the development of the system and how payment is currently structured before applying this to our proposals and the terms of reference. From their investigations thus far the Review team will already be familiar with much of what we say. However, as the Review team does not include a criminal legal aid defence practitioner we consider it appropriate to provide a historical perspective before considering any proposals. This is at Appendix 3. No two cases are the same. However, for the purpose of illustration, we set out at Appendix 4 an abbreviated summary of the roles that may be undertaken by different members of the defence team in a “hypothetical” VHCC case. Specific proposals for change are difficult to make as the terms of reference are very wide ranging.

We hope to receive some feedback from the Review team as to those areas they wish us to consider so we have focus and are not addressing points which are unlikely to form part of the Review team’s considerations.

Representation of defendants in VHCC fraud cases developed on the basis of increasing emphasis on specialisation. For solicitors this started with introduction of franchises in the mid 1990’s, then contracting for general crime in 2001. Recognition of the impact of the cost of VHCC cases, in particular fraud cases, resulted in the setting up of the serious fraud panel, now the specialist fraud panel in 2000. This was an important step as it extended the concept of restrictions on a defendant’s freedom of choice with regard to instructing solicitors. The justification then adopted was that, because this is such a specialised area, specific quality assurance requirements merited this restriction and at the same time ensured value for money. Both of these schemes restricted publicly funded work to firms who met organisational and quality standards, achieved a high level of expertise in this field and a certain share of the market. One of the requirements of admission to the specialist fraud panel is flexibility in adapting resources to take on the demands of a substantial fraud case.

Business models for solicitors’ practices include partnerships, limited liability partnerships and limited companies. The model and standards have also involved investment in sophisticated time recording and accounting packages, business and marketing plans, training, staff and buildings, all at a time when remuneration rates have either remained static or reduced and the only way of increasing profit and turnover is to be more efficient, profitably increase in size and/or work longer hours. Some firms which were initially involved in discussions about the serious fraud panel have developed their practices so that other more remunerative private work is more readily available. Lower rates, even in VHCC fraud rates, have resulted in those firms and some more senior, experienced solicitors avoiding this area of work as well as lower end police station and Magistrates’ Court work. In effect solicitors have been “free” to choose their business model and place in the market. There has been no compulsion with regard to range of work within the legal aid system, either within crime or between crime and civil.

Barristers have not had to pass specific quality assurance standards to receive publicly funded criminal or VHCC fraud work from solicitors (although some have voluntarily obtained various quality assurance marks such as the Bar Mark or the LSC Quality Bar Mark). Barristers have relied more upon individual reputation, performance and solicitors accepting

them on to their list of approved fraud counsel to develop their VHCC fraud and non fraud practices. Barristers' chambers have increasingly specialised in specific areas of work, with certain sets developing substantial numbers of tenants, some specialising in criminal work and some in fraud work. Some investment by counsel through their chambers in IT systems, marketing and improved infrastructure has been carried out but on nothing like the same scale as that required by firms of solicitors on the specialist fraud panel. Leading counsel, apart from perhaps those at the very top of their profession, are largely willing to continue to undertake fraud and non fraud legal aid cases (please see Appendix 3 on methods of payment). However solicitors have perceived an increasing reluctance amongst leading counsel to undertake "contracted" VHCC cases. This was demonstrated by the agreement made between the Bar and the DCA in August 2004, without consultation with solicitors, to increase the VHCC requirements from a trial estimate of 25 days to more than 40 days.

Solicitors have formed good working relationships with their contract managers, the major scope for tension being categorisation and the extent to which experienced and more expensive fee earners can undertake work on the cases. Much time can be spent (and some would say wasted) in negotiating these issues. We take the view that this system, which was set up to control costs in VHCC cases in advance of fees being incurred, has worked well for the LSC and, in the main, for solicitors and their clients. The losers may well be leading counsel but we take the view that this may be because they do not come from a time-recording culture. Abandoning the current VHCC contracting system could be seen as "throwing the baby out with the bath water" after significant investment and training on all sides and as being hugely wasteful. Simplifying the system and reducing the administrative burdens on the CCU should be encouraged. In our submissions we discuss simplifying the payment process. Alternatively, in relation to paragraph 4 (e), we set out a model which, we argue, could significantly reduce the administrative burden on the CCU and lawyers.

We perceive a lack of transparency on figures in this area. We trust that figures made available to the Review team will be made clear in their report. We believe that an analysis of the figures will show that the contracting system has been more effective at controlling costs and in enhancing quality than previous systems for remunerating VHCC fraud and non fraud cases. We doubt whether any proposals involving competitive tendering would result in cost-savings. Even if they did they would be problematic given the scope for increased costs in remedying error and miscarriages of justice. The arguments against competitive tendering in relation to deterioration of quality and restriction of freedom of choice of defendants appear to us to be insurmountable.

The recent reduction in hourly rates for more experienced solicitors and barristers is likely to increase pressure on them to avoid these areas of work.

If the current system is to be preserved we suggest that these reductions be reversed. Consideration of the system would be incomplete without looking at existing methods of payment for both solicitors and barristers (see Appendix 3).

There should be higher rates of pay than are now allowed for experienced solicitors dealing with complex and grave cases. These may be fraud or other VHCC cases.

Elsewhere in these submissions we have queried the alleged overspend on the criminal budget. We note the following points:

- The civil legal aid budget should be ring fenced from the criminal.
- We agree with the report (commissioned by the LSC) by Cape and Moorhead which concluded that the real cost drivers are beyond the control of criminal legal aid defence practitioners and request that the Review team recognises this and reflects this in its recommendations.

- We advocate the cost-saving steps put forward to Mr. Hill (some of which are already in hand) in our failed attempt to persuade the DCA to postpone the reduction in rates until the outcome of this review (Appendix 2). Such steps would in our view *“Encourage a diverse and competitive market of lawyers and others offering advice and advocacy that helps deliver quality and just outcomes for best value”*. The abolition of means testing for legal aid in 2000 effectively eradicated the private market for VHCC fraud cases and significantly increased legal aid expenditure.
- We believe the current system for contracting VHCC fraud and serious criminal cases is effective in preserving quality and in controlling and predicting costs but that it should be simplified.
- We recommend that the criteria for identifying VHCC cases be simplified. We suggest that suitable cases brought by a specialist prosecuting team such as the SFO, HMRC, DTI, FSA or CPS special casework directorate fall automatically under the VHCC regime. As this is unlikely to capture a significant number of cases which otherwise would normally come within the VHCC category in terms of costs a further criteria, of those cases with a trial estimate of over 25 days may be appropriate.
- We recommend simplification of the number of categories / differing hourly rates based on complexity and high cost rather than on whether the case can be characterised as a “fraud”. The exact rates and differentials between them would need to be carefully costed and negotiated and reflect that some VHCC non fraud cases are as complex and significant in their implications as some fraud VHCC cases. We also put forward for consideration in our response to paragraph 4 (e) an alternative method of payment based upon the number of pages in the prosecution case. This would greatly simplify the contract process.
- To augment and simplify the already vigorous assessment process and to address criticisms of solicitors exaggerating time spent, we suggest a check on the total hours spent by solicitors and their staff who conduct VHCC cases by solicitors being required to submit their total annual chargeable time recording figures. Significant further benefits could be obtained if similar arrangements were in place for solicitor advocates and counsel.
- We recommend that the reduction in hourly rates imposed in October 2005 be reversed and that hourly rates be linked to increases in the rise of the retail price index each year.

The Association would hesitate to interfere with methods of payment to the independent bar. However there are an increasing number of solicitor advocates in our Association and with the prospect of legal or multi disciplinary practices the Association considers it appropriate to express a view on methods of payment of counsel or solicitor advocates. The Association believes that the graduated fee system and the (now abandoned) red corner brief system produce anomalies and inconsistencies which can provide insufficient rewards for barristers on the one hand, produce excessive rewards on the other, do not encourage early preparation and realistic advice on pleas and do not encourage quality, just outcomes or best value. If the contracting system is to be preserved the Association would recommend that hourly rates should be the basis upon which counsel or solicitor advocates are paid. However if the proposals for lead suppliers were enacted the responsibility for ensuring that counsel carried out work they were contracted to do would fall on solicitors.

With regard to proposals for a lead supplier who would have control of the contract the Association accepts that one supplier to the CCU would simplify the system and reduce CCU administration. At the same time it would increase the administration for the lead supplier. The Association is unaware of the precise proposals put forward by the Bar for leading counsel to fulfil this role. The Association would be sceptical as to whether most

leading counsel would have the administrative skills to act as such or be able to spend sufficient time out of court to administer properly a contract. The practicalities of how this could operate and work with lead counsel are difficult to envisage unless they were also to take on representation at police stations and case preparation and in reality change the business structure of their organisations. If a two stage process, of solicitors at the outset and lead counsel later, were adopted this would increase the administrative burden on all parties particularly if there were a change of leading counsel.

Insofar as the term lead advocate is used we do not regard the description of that role as being any more than the setting out of responsibilities within a team. The team however is one that supports the fundamental solicitor/client relationship and decisions within the litigation process must always be a reflection of the client's instructions.

We take the view that the best way of dealing with all of these issues is for advocates and litigators to work as a team to deliver the case for the best value for money.

TERMS OF REFERENCE PARAGRAPH 3

“The reforms will also encourage a more open and responsive market, share risks between supplier and purchaser, and improve the way that the state engages with lawyers when procuring legal services.”

There are a number of issues which arise in this paragraph. In the interests of clarity we have sought to distinguish them. There are three distinct issues: the market, sharing of risks and the engagement of lawyers.

A More Open and Responsive Market

Before considering how such an objective can be achieved it is necessary to examine the current position. The Review is focusing on the procurement of criminal defence services. We suggest that is too narrow a focus. Consideration must be given to the criminal justice system as a whole if real efficiencies are to be made.

Criminal defence services are required by those investigated or charged with criminal offences. Parliament determines the framework in which this process takes place and the state determines how the investigation and prosecution proceeds. State agencies determine who is charged and with what offences. This determines the level and extent of representation and advice required by the individual and authorised by the state. Another state agency, the Court Service, and the judiciary determine the pace at which the case proceeds. Those requiring legal services either instruct a lawyer on a private basis (personally or by way of insurance), apply for state funding or represent themselves. Individuals who are granted a representation order may only instruct providers of legal services with a criminal franchise granted by the Legal Services Commission. The rate at which the provider of criminal defence services is remunerated is determined by the state.

It is apparent from this brief synopsis that the state controls all aspects of the criminal justice system and the procurement of criminal defence services by individuals under a representation order. No criticism of this system is intended by this observation. Indeed it is crucial to the rule of law within an adversarial common law system that this should be so. However, it does demonstrate that an examination of the procurement of criminal defence services with a view to reducing costs and increasing efficiency will not succeed unless full consideration is given to *all* the agencies within the criminal justice system and their interaction. Examples of this include but are not limited to:

- (i) adequate funding and staffing of the Crown Prosecution Service;
- (ii) the assignment of dedicated judges to complex cases at a much earlier stage in proceedings with sufficient time to read the prosecution evidence and an ability to influence the drafting of the indictment, the extent of prosecution evidence called and the imposition of time limits upon the service of such evidence;
- (iii) greater transparency by the prosecution in respect of evidence held by means of full and early disclosure to the judge;
- (iv) greater transparency in sentencing.

A more open ‘market’

The Association questions whether it is actually useful to examine the criminal justice system in the context of free market economics and to describe it using a neo-conservative lexicon. It could be stated that the Crown Prosecution Service determines demand, that supply is controlled by the Legal Services Commission and that the price is set by the Department for Constitutional Affairs. Is this helpful other than to demonstrate that criminal defence services

only form a part of this 'market' or system as described above? The Association notes that the government's aim is the reduction of spending on legal defence services. The Association's view is that the drivers for the increase in costs lie primarily with the state, legislation in respect of substantive criminal offences and criminal procedure and means testing. Providers of criminal defence services play a reactive role in relation to such developments.

The state controls the 'market' for legal services under a representation order. Consumer Affairs Minister Bridget Prentice stated in respect of government proposals to reform the regulation of the legal profession generally that the aim is to make hiring a lawyer 'as easy as buying a tin of beans.' A truly open market would allow any individual or corporation to enter. To make the market more open, all that is required is to remove the barriers to entry. In relation to fraud cases this could be the removal of the general franchise criteria and the serious fraud panel. This would enable any qualified lawyer of any level of experience to undertake such work. If large corporations such as accountancy firms, supermarkets or insurance companies are to enter the market then it is open to the state to lower the barriers to entry to allow them to do so. However, the Association's position is that this would result in a reduction of quality. It would potentially result in inefficiencies in the criminal justice system in terms of advice, representation and drafting. It would also potentially result in miscarriages of justice and the consequent financial and reputational costs to the system. Overall a fully open market would result in a lack of confidence in the system and an increase in arguments brought under Article 6 of the Human Rights Act 1998.

It is axiomatic to civilised society that it should contain a truly independent legal profession. This is what consumers need before choice, access and price. The unintended consequence of a free market could well be the loss of that independence.

Furthermore, it appears that a contradictory approach has been taken to achieve this desired aim. The Legal Services Commission and the Criminal Defence Service have focused in the last five years on quality and the introduction of franchising and criminal contracts. This has had the effect of reducing the numbers of firms providing criminal defence services. The freezing of the rates of remuneration has also led many firms to cease to provide criminal defence services. The introduction of competitive tendering in London would reduce this number further.

We commented on the market in our paper on lower end work (Section 4). It is in fact highly developed, mature and stable and the result of a severe process of franchising and contracting. The unintended consequences of the low rate of pay has been a divorce between private client and legally aided client firms (see also our paper on social cohesion at Section 9).

A more responsive market

Those left providing criminal defence services have adapted speedily to the introduction of the criminal contract and the franchise criteria and, in relation to VHCC, the introduction of individual case contracts and agreed stages of preparatory work. The Association questions whether a more open market would actually be more responsive. An examination of the procurement of legal defence services demonstrates that the providers of criminal defence services have no option but to be as responsive as the state determines and demands. The Association respectfully suggests that the shrouding of issues in free market shibboleths is unhelpful in identifying the real issues in respect of the future of the criminal justice system.

Risk-sharing

It is good practice in litigation generally to warn a claimant of the risks of any proposed litigation – those risks normally being the financial cost attendant upon unsuccessful litigation. The defendant in civil proceedings may also be warned of the financial costs of

contesting a case without merit. Both sides are able to negotiate. If the concept of risk in law is examined it is apparent that it must involve voluntary action whether that is intentionally, negligently or recklessly. In criminal litigation the defendant is not a voluntary party to the proceedings. The representative must act in accordance with his client's instructions, subject to a professional code of conduct and ethics. The Association's position is that the introduction of a financial penalty upon the provider of criminal defence services would not serve the interests of justice and is likely to be counterproductive. At present if the defendant is state funded he has the certainty of losing credit for an early guilty plea and an RDCO at the conclusion of the proceedings and the judge has power to make wasted costs orders where appropriate.

The following are some examples of risk that have been considered by the Association.

Conditional fee arrangement

If representatives were penalised for unsuccessful contested trials this would, on the face of it, result in costs savings. However, in practice it is more likely that it would result in more defendants acting in person with attendant inefficiencies.

Statutory charge

If the defendant had the prospect of the state taking a charge upon his assets which would be larger the greater the costs of the case this might produce earlier guilty pleas. The issue would again arise as to the costs of the administration and enforcement of such a charge. Potential loss of liberty is likely to be more influential on a defendant than charges on assets but see also our proposals for diversion.

Time limits

The Criminal Procedure Rules and the Protocol issued by the Lord Chief Justice on 22 March 2005 have introduced time limits for fraud and complex criminal cases. These deal specifically with legal argument and place strict control on the format and length of such argument. There have been controls upon the time of solicitors and counsel since the introduction of the Complex Crime Unit.

What must be borne in mind is that the charges faced by the defendant and the evidence put before the court are determined in large measure by the prosecution. The introduction of additional evidence which lengthens proceedings should not be something which results in the penalising of the defence representative.

The Association's position is that the term "risk" is inappropriate and unhelpful. Cost savings will be better made by looking at the criminal justice system as a whole and the more efficient interaction of prosecution, defence and the court.

The way in which the state engages with lawyers

The reduction of administration required in the engagement of lawyers by the state is to be desired. The reduction of the number of individuals and firms with whom the state has to engage is one means of reducing such administration. A means of achieving this is by way of a lead supplier who would liaise with the state and the other parties. Conflicts of interest, which occur in almost every complex criminal case, prevent the provider of legal services acting for all parties. It is fundamental that this is borne in mind in determining any change to the means of engagement to prevent the introduction of a system which is less efficient because of delays arising out of internal conflict.

In theory the lead supplier would be in a position to prevent duplication of work by assigning tasks and sharing certain information such as chronologies and defence expert evidence but this could be achieved more simply by small changes within the existing system

Who should be the lead supplier?

(i) *Counsel*

It has been suggested that counsel could undertake this role. The Association's concern is that this would prove unworkable. The nature of counsel's court based work prevents them from undertaking and overseeing the considerable administrative burden of managing the daily tasks involved in a complex criminal case. The Bar does not have the technological and financial infrastructure required. For example how would the payment of disbursements be dealt with? The state would have to pay disbursements to experts directly or through individual solicitors firms which would entirely defeat the object. Individual barristers do not have experience of employing the variety of staff necessary to operate the preparation elements of a VHCC contract. Whilst they employ clerks and have increasingly sophisticated arrangements for employing individuals within the clerks' office, they are nevertheless essentially self-employed. Each barrister who had individual responsibility for a contract would have to ensure compliance with a raft of legislation with regard to the employment of staff under a contract. Contracts of employment and the ensuing rights such contracts establish would have to be considered for each member of the team. If it were envisaged that junior barristers would be instructed to carry out tasks such as viewing unused material this could have significant costs implications. If it were proposed that non admitted barristers or clerks would be employed how would they be regulated? Barristers' clerks are not regulated by the Bar Council or the Law Society. Solicitors are responsible to their professional body for the actions of their clerks and there is power for the Law Society to make an order under Section 43 of the Solicitors Act prohibiting any firm of solicitors from employing an errant clerk. How would barristers collate the time and attendance notes of such clerks and deal with the monitoring of the time spent according to the task list to ensure that time spent was not exceeding amounts allowed? How effective would they be at collating all of the information in the form of attendance notes so that a meaningful file could be presented to the CCU for assessment of the whole team at the end of a stage? We would suggest that the administrative burdens on individual counsel would not only prove unworkable but an inappropriate application of the skills of leading counsel which are essentially those of an advocate.

We take the view that much of the debate concerning the desirability or otherwise of having a lead advocate has been unproductive. Our view of the future is essentially based upon teams of litigators and advocates bringing together their particular skills to achieve best value for money.

(ii) *The provider of legal representation to the lead defendant*

This is a possibility but there must be concerns about the practicability of this in light of obvious conflicts with co-defendants and issues of confidentiality. For example, how could the representative of one defendant persuade the lead supplier to authorise expenditure on an expert's report which is likely to undermine the lead defendant's case?

(iii) *Alternative business structures*

Organisations which provided both preparatory work and the trial advocate (and possibly expert advice) could improve the way in which the state engages with the supplier in that it would remove the need for the state to liaise with both solicitor and

counsel. It would reduce duplication between senior solicitor and junior counsel. Concerns as to allowing commercial interests to impact adversely on independence and just outcomes would have to be addressed.

TERMS OF REFERENCE PARAGRAPH 4 (a)

“To achieve those objectives the plan will set out how to deliver the best way of buying and delivering legal services, in particular criminal defence services for high cost cases, that:

(a) matches the right advice and representation to the issue at stake;”

We set out some of the tasks and roles of a solicitor involved in the preparation of a hypothetical VHCC case in Appendix 4.

From this it can be seen that the tasks of each of the participants in the defence of a VHCC case are extensive. The CCU in its approval of task lists and case plans already seeks to avoid duplication wherever possible.

In VHCC fraud cases the prosecution will invariably have a specialist team representing them. Usually the solicitors will be specialist in-house lawyers from the SFO, Revenue and Customs Prosecution Office, DTI or CPS special casework directorate. They will invariably have a panel of approved counsel they exclusively instruct for their cases and this will include leading and junior counsel, sometimes more than one junior.

With regard to representation post charge there should be equality of arms and parity of the level of representation between the prosecution and defence. However, the Association recognises that there is some duplication of work between solicitors and junior counsel and between junior counsel and leading counsel. The CCU attempt to avoid this duplication wherever possible in agreeing task lists. However the Association believes that a greater fusion of the roles of junior counsel and the solicitor supervisor in the case could reduce duplication and should be explored further. One of the difficulties has been the extent to which the payment structure for solicitor supervisors is punitive in attending at court.

If lead suppliers and legal disciplinary or multi disciplinary partnerships are introduced these could produce savings. The larger the team the greater the scope for duplication and waste. Financial incentives for solicitors and counsel in the form of increased rates if the numbers in the team are kept down could be considered but also weighed against the need for equality of arms and the provision of an appropriately sized team to do substantial amounts of work. Incentives or disincentives for ensuring continuity within the team could also be considered. A break in the continuity of the team will lead to duplication and, if lead counsel is unavailable, a major cause of dissatisfaction and poor service to the client.

When counsel is appointed the Association believes that a copy of counsel’s diary should be produced to solicitors and the CCU to ensure availability and the court service and judiciary should be more accommodating to the availability of counsel when fixtures are broken and adjournment dates being considered.

The finalisation of protocols for litigators and advocates could assist in delineating responsibilities, preserving quality and counteracting commercial consideration above client interests.

TERMS OF REFERENCE PARAGRAPH 4(b)

“ To achieve these objectives the plan will set out how to deliver the best way of buying and delivering legal services, in particular criminal defence services for high cost cases, that:

*...
(b) meets specified quality standards;”*

Introduction

In order to analyse paragraph 4(b) of Lord Carter’s terms of reference one must start with the ‘objectives’. In summary these are:-

- maximum value for money (para. 2)
- control over spending (para. 2)
- ensuring quality and fairness of the justice system (para. 2)
- more open and responsive market (para. 3)
- sharing of risks between supplier and purchaser (para. 3)
- Improving the way the state engages with lawyers when procuring legal services (para. 3).

The ensuing analysis assumes that these are proper and agreed objectives.

Specified Quality Standards – para. 4(b)

Can the setting of quality standards assist in achieving the government’s objectives?

For a quality standard to be set, it must be measurable against an objective mean. For the provision of a product, rather than a service, this is a relatively easy exercise. The food must be of certain freshness; the retail price must be below a set maximum; the size must be within agreed parameters; etc.

However, the exercise is less straightforward for the provision of a service. At the conceptual level we can define quality standards as stipulations of measurable properties or characteristics which the service must provide as a minimum. But what does this mean in practice?

If elements of the service that is being provided are capable of being defined in objective terms then appropriate quality standards can be set. Thus, for example, quality standards can be set for the provision of both products **and services** within the motor trade under five clear headings:-

1. **Quality** (in the specific sense):

Providing products or services that consistently meet the specification that has been agreed with the customer.

2. **Cost:**

Consistently supplying the product or service to the cost agreed with the customer.

3. **Delivery:**

Consistently supplying the product or service to the customer at the agreed location and time.

4. **Design and Development:**

Designing and developing the specification of the product or service so that it meets the customer's needs ...

5. **Management:**

Putting in place the people, other resources and business processes necessary to achieve the above .⁶

These criteria are easily defined and understood for the provision of a service, such as the maintenance of or repair to a motor vehicle, that is both capable of agreed definition between the customer and service provider and measurable against objective standards.

Can the same principles be applied to the provision of solicitors' criminal defence legal services, particularly those in high cost cases? How will we decide upon measurable properties or characteristics that the service must provide as a minimum? What will be the agreed criteria and can there be objective standards?

Certain common aspects to the service provided by any solicitor, including criminal defence solicitors, are clearly capable of calibration for the application of quality standards. These include: internal management structures and procedures; financial systems; personnel and office administration; and case/client management in the sense of efficient practices for the maintenance of files, timely response to enquiries, good communication with the client etc. It is these aspects that are at the heart of existing quality standard regimes such as those governed by the Lexcel Practice Management Standards, Investors in People, ISO 9000, Chartermark and the Legal Services Commission's Specialist Quality Mark - SQM

However, such pre-existing quality standards are generic in nature and primarily focused on good management practices. However there are other aspects to the service provided by a solicitor. Most critically, they do not provide for specific criteria against which the actual job done can be measured. Arguably, it is this above all else that is of greatest import to the client.

Putting it simply, whereas one can expect all good quality solicitors to run efficient and well-managed practices, can it then be said that each individual advisor within that organisation provides quality advice and exercises appropriate judgement?

It is easy to see how quality standards could be set, against which the end result may be judged, where there is a single relationship (between the solicitor and client), and a unified, agreed common purpose (the cost effective provision of the required legal work), such as applies in conveyancing or probate work. But the relationships in publicly funded criminal defence work are more complex with varying and, at times, contradictory purposes. The solicitor must answer not only to his or her lay client but also to the public funder. The lay client pleading not guilty will be primarily, if not exclusively, interested in securing an acquittal whereas the public funder will be anxious to ensure that the lawyer's services are provided in an efficient and cost effective manner. Indeed, the public funder's ultimate objectives will be for the provision of a cost effective defence service that plays its part in a criminal justice system that convicts and appropriately sentences the guilty and speedily

⁶ Quality Standards of the Society of Motor Manufacturers and Traders Limited (SMMT)

acquits the innocent, objectives that may not necessarily accord with those of the individual client.

Conclusions

It is right and proper that all lawyers, including criminal defence solicitors providing publicly funded legal advice and representation, provide a service that satisfies certain minimum criteria as laid down in industry agreed code(s) of quality standards.

Various codes already exist that govern good practice management standards within the profession. The enforcement of such codes will assist in some of the government's objectives; notably the needs to maximise value for money and to control public spending.

However, such codes do not in themselves specifically provide for good quality legal services and therefore do not directly assist in meeting all of the government's objectives; particularly that of ensuring quality and fairness of the justice system. This is a key objective which is seen by many, including this Association, as being the single most important.

We would point out that, with the introduction of criminal franchising, specialist quality assurance marks, specialist fraud panel accreditation and VHCC contracting there has been an increasing emphasis on quality assurance standards in this field and regulation of the way in which legal services are provided. The Association is opposed to further "accreditation" in the criminal law field. Further hurdles which add nothing to the existing strict management criteria would not only be wasteful of resources but also unlikely to enhance quality. The Association is willing to discuss with the LSC the setting down of agreed 'specified quality standards' that would assist in ensuring that the work done by VHCC criminal defence solicitors in receipt of public funding is not only well managed but also of a proper quality as a legal service. The establishment of a peer review system may be the way forward.

TERMS OF REFERENCE PARAGRAH 4 (c)

“To achieve these objectives the plan will set out how to deliver the best way of buying and delivering legal services, in particular criminal defence services for high cost cases, that:

....(c) incentivises swift conclusions and minimises costs to other parties;”

For the reasons set out below, the Association strongly opposes any proposal to offer an increased payment to defence solicitors in the event that they were able to conclude proceedings expeditiously. The Association believes however that other steps can be taken that, where appropriate, would increase the likelihood of high cost cases being concluded more quickly and at less expense than is often currently the position.

Defence Issues

The Association believes that most defence solicitors with expertise of representing clients in high cost cases act diligently to bring proceedings to a conclusion as quickly as is possible. Their reputation is enhanced, which may in turn lead to their being instructed in new cases, when clients who plead guilty obtain the best possible sentence, and those who plead not guilty are acquitted. Sentences will be more favourable to a defendant the earlier a plea is entered. Equally, an experienced solicitor will always seek to secure the dismissal of proceedings without subjecting a client to the stress of a jury trial if that is in any way possible. Thus there is an in-built incentive for defence solicitors to conclude cases, whether or not they are contested, as quickly as is possible.

To the extent that there may be concerns that cases can on occasion be prolonged to secure economic benefit, the Association makes clear that it does not in any way condone the conduct of proceedings in a manner other than is necessary for the proper representation of the client. Should there have been instances where this has not occurred the Association would expect such conduct to be curtailed by the government's intended peer review system. It is also believed that any problem in this respect will be further eased by the Legal Services Commission continuing to require firms who seek the award of high cost contracts to demonstrate that they have sufficient experience of conducting such cases.

The Association firmly believes that any system whereby an early disposal of proceedings is linked to remuneration could itself be open to abuse and more fundamentally would not be conducive to the proper administration of justice. Any system where lawyers might be financially incentivised to secure an early disposal of cases would be of grave concern to the Association. Lord Carter is accordingly urged not to recommend any measure that would seek in any way to link remuneration to the speed with which a case can be concluded.

Defence solicitors will nevertheless be more able to give robust advice, that may precipitate trials concluding swiftly, if they receive a definitive and properly considered prosecution case at the earliest practicable moment. Early resolutions may also be aided by a system whereby, following discussions with the prosecutor and the court, a defendant can be advised with greater certainty as to the sentence, including any confiscation order that he is likely to receive. At the present time prosecutors routinely do not fully consider their case until a late stage in the proceedings, and no prescribed means currently exists by which a defendant can ascertain his likely punishment. The Association nevertheless considers that the approach adopted by the Court in R v Goodyear was constructive and believes that a formalised system to enable sentence to be discussed would be likely to assist further in controlling costs. Similarly, the positive use of the immunity notice provisions contained in the Serious Organised Crime and Police Act should be a further means by which unduly lengthy proceedings can be avoided.

Prosecution Issues

Although this is an aspect that is dealt with in further detail elsewhere in this response, the Association again emphasises that defence issues cannot be looked at in isolation when considering the length and cost of high cost cases.

The Association broadly supports the aim of controlling high cost cases and accordingly believes that the Lord Chief Justice's protocol for the management of fraud and other complex trials issued in March 2005 should be the starting point for any consideration of how legal services should be bought and delivered for these cases. In the Association's view active and consistent trial case management is likely to have a significant impact on the length and cost of complex cases. The Association accordingly notes that the protocol calls for far greater scrutiny and management of high cost cases at all stages of the proceedings, from initial investigation through to trial. The Association similarly believes that Lord Carter should look at all stages of the process if a means is to be found that incentivises the swift conclusion of these cases that is both in the interests of justice and fair to all relevant stakeholders.

Lord Carter is asked to pay close regard to the fact that the scale of any proceedings, and the pace at which they are progressed, are controlled almost entirely by the prosecution. Both are factors which impact significantly on the time taken to conclude proceedings and thus the eventual cost of those proceedings, both to the prosecution and other relevant parties.

In the Association's view high cost criminal proceedings are too frequently increased both in terms of length and cost because cases are over-charged and presented in a way that over-complicates the critical issues. A standard prosecution tactic is to charge a conspiracy to defraud. Whilst this enables the prosecution to cut its cloth as the evidence emerges, by hedging its bets in this way, the prosecution ensures that cases last longer than might otherwise be the case. It is not possible for lawyers instructed by a defendant to advise meaningfully on the evidence, and the appropriate plea in the light of that evidence, until such time as all the evidence has been served and/or disclosed to the defence. Equally, until such time as the prosecution has properly determined the strength of its case, which as stated often does not happen until some considerable time after charges have been preferred, a prosecutor is often unwilling to accept a plea from a defendant. In those circumstances responsibility for proceedings being prolonged, and the increased costs that result, will lie entirely with the prosecution.

Similarly, whilst some agencies, notably the Serious Fraud Office, have a positive record in ensuring that evidence is served and unused material is disclosed in a timely manner, other agencies too often fail in this regard. The problems associated with a number of high profile failed prosecutions brought by the Revenue and Customs Prosecutions Office of Her Majesty's Revenue and Customs (formerly H M Customs & Excise) are well documented and need not be rehearsed further in this response. It is nevertheless appropriate to note that an experienced defence solicitor will often be able to determine at an early stage that proceedings may have been conducted in an unlawful manner such as to render them liable to be stayed as an abuse of process. In those circumstances a defence solicitor cannot readily advise a client on the appropriateness or otherwise of a plea. If a defence solicitor advises a client to enter an early plea without having properly investigated issues of potential abuse and those issues subsequently come to light, the solicitor would face the possibility of a negligence action being brought by the client.

However, where a prosecutor, whether deliberately or otherwise, does not disclose information to either prove or disprove that an abuse has occurred, it is again not the fault of the defence that proceedings are extended whilst that material is obtained, often only as a result of a court order.

Lord Carter's terms of reference identify an objective of minimising costs to other parties. Where a prosecution falls below normal standards, the financial impact of such failing is felt most obviously by the Court Service and the Legal Services Commission who are required to fund trials that are longer than otherwise would be necessary. At present, there is no direct financial penalty that the prosecution bears when it brings inadequate or wasteful prosecutions. In civil proceedings if a party does not conduct proceedings responsibly, it is penalised in costs and, if the default is serious enough, by the imposition of a wasted costs order.

If the prosecution were to be at risk of such a penalty then there would be a clear incentive to ensure that proceedings are conducted efficiently and proportionately. Equally, if proceedings are not conducted in that manner, then the Court Service and Legal Services Commission will be reimbursed for the additional expenditure it has to pay, which in turn will ease the financial pressures on both organisations.

The Association has considered the suggestion that one lawyer or legal team be instructed to consider the prosecution unused material and each defence statement and determine the relevant material which should be disclosed to each defence team. Apart from placing such a lawyer in a very difficult, if not impossible, position the prospect of persuading a client that an impartial lawyer was looking at his and others' defence statements and the unused material and deciding what should and should not be disclosed was a fair process would be a difficult one. In cases involving cut-throat defences, issues of client confidentiality would be a serious difficulty. We understand the Serious Fraud Association is suggesting that an independent lawyer be appointed to look at disclosure issues from the prosecution side of the fence. With organisations such as HM Customs, which have a poor track record on disclosure, we believe such a scheme would be desirable but doubt whether it would be effective from a defence perspective.

Finally, the Association anticipates that Lord Carter will be aware of the review currently being conducted by Mr Stephen Wooler, Her Majesty's Inspector of Prisons, in the wake of the collapsed Jubilee Line Extension trial. The Association believes that aspects under examination by that review may be of relevance to the issues canvassed in this response. As such the Association believes that Mr Wooler's review should be considered by Lord Carter to ensure that any recommendations made in that review are properly reflected in the plan he proposes.

Summary

1. Defence remuneration should not be a factor to incentivise the swift conclusion of trials.
2. Greater emphasis should be placed on the early presentation of clearly defined prosecution cases.
3. Trial management, particularly of the prosecution case in the early stages of proceedings, is critical in controlling costs.
4. Where prosecutions are conducted in a way that increases costs unnecessarily, costs penalties should be imposed.
5. Greater use of plea bargaining and immunity notices is likely to further control costs.

TERMS OF REFERENCE PARAGRAPH 4 (d)

““To achieve these objectives the plan will set out how to deliver the best way of buying and delivering legal services, in particular criminal defence services for high cost cases, that:

- (d) *encourages a diverse and competitive market of lawyers and others offering advice and advocacy that helps deliver quality and just outcomes for best value”;***

Introduction

Delivering quality and just outcomes for best value in the criminal justice system inevitably entails more than merely adjusting the way the state funds the provision of criminal defence legal services, or even how such provision is structured. A full analysis would involve an examination of the sphere in which criminal defence lawyers operate and what they are working with i.e. the criminal law. Reference to this has been made earlier in our paper, in particular in relation to paragraphs 3 and 4 (b), but because of the reference to “*just outcomes for best value*” a further brief examination is required here.

The plethora of criminal justice legislation which has been introduced over the past 20 years has resulted in constant change and not surprisingly extensive litigation in interpreting and applying each new law which is passed. Whether that legislation itself has contributed to maximising just outcomes for best value is open to debate. For example, the effective abolition of the right to silence by the introduction of inferences from silence in 1994 has resulted in huge expenditure to the state by way of increased police station costs, more complex cases and significant amounts of court time dealing with this issue. In an adversarial system in which there is a presumption of innocence has this change delivered more just outcomes for best value? Will bad character provisions and allowing hearsay evidence help to achieve these objectives? Have the figures for convicting the guilty and acquitting the innocent been improved as a result of such changes?

Some would argue that a first step to delivering just outcomes for best value would be to reduce and simplify the amount of criminal justice legislation and avoid constant tinkering for political ends which inevitably only means more work for lawyers. The cost of training alone to keep up to date in this field is considerable and must be greater than in any other area of law. While encouraging the legislature to accept that acts have consequences is probably beyond these terms of reference (wide ranging as they are) this is a point which should not be ignored.

We also refer to the proposals contained in our letter of 19th August to Derek Hill and taking steps to encourage the private market in VHCC defence work. Those charged with fraud who can pay should pay. The tax payer would look askance at a system which provides significant amounts of their money to a person who has substantial assets and can pay for his defence were it not subject to restraint whereas those who have few assets are not entitled to civil legal aid. Prosecutors who make erroneous decisions should be held accountable and not be in a position to restrict the availability or quality of legal aid by their decisions.

Is the “current market of lawyers and others offering advice and advocacy” in VHCC defence cases “diverse and competitive”?

There are currently no “others” offering advice and advocacy in this market. Legislation is likely to allow multi disciplinary practices to offer legal services. The VHCC defence market is dominated by publicly funded cases. The abolition of means testing and restrictions on the use of restrained funds has significantly eroded the scope for private work. Some private work is still available such as in the cases of Wickes and Dylan Creaven. Funding for such

cases can be a mix of insurance or private. Representation by solicitors in these non publicly funded cases is not restricted to solicitors firms on the specialist fraud panel and commercial city firms with commercial hourly rates are sometimes instructed. Defendants may move from private funding to legal aid when the private funding runs out. Counsel at the top of their profession will be instructed on such cases. On acquittal significant funds are claimed out of central funds for the non legally aided element of the case. We as an Association are unclear whether these form part of the criminal defence legal aid budget. It would have to be said however that this share of market is very small (although perhaps not insubstantial in terms of the cost to the public purse on acquittal) and the vast majority of VHCC cases are legally aided. If the payments from central funds are allocated against the criminal legal aid budget we question whether this is a correct apportionment.

The market for solicitors for publicly funded work is restricted to those on the specialist fraud panel and in this sense is not diverse. The size of the panel has grown from an initial 40 at its inception in 2000 to around 200 at the present time. The CCU are embarking on a review process to ascertain whether those on the panel still fulfil the quality and experience criteria to remain on it and it is envisaged this review will result in a reduction of the number of firms on the panel. There are diversities within the firms who are on the panel. These include size, geographical coverage, the extent to which they offer other legal services, hourly expense rates for private work, whether their teams include in house solicitor advocates or barristers, their marketing efforts for VHCC fraud and non fraud work, their organisational structure and no doubt the profitability of the practices. The lack of diversity in this field is attributable to the restrictions imposed by the specialist fraud panel. There appears to have been a consensus that, for reasons of specialisation, experience, quality assurance and value for money the restrictions on diversity were justified. We understand that this consensus is generally that the specialist fraud panel is an improvement to what went before.

There is no diversity in relation to hourly rates charged for VHCC publicly funded work. We would say that if there were, quality, just outcomes and even best value would be seriously compromised. We maintain that the establishment of the specialist fraud panel has improved quality and delivered just outcomes for better value than the earlier more diverse market. VHCC non fraud cases are not restricted to firms on the specialist fraud panel but are restricted to firms who have contracts with the CDS and have passed their Specialist Quality Assurance Mark.

However there is certainly considerable competition for work within the firms on the panel given that the volume and value in one case can be considerable. Because of the panel, the historical difference between solicitors and barristers and the structure of the independent bar solicitors as a profession have not, up to now, faced competition from other professions for this area of work.

Historically solicitors have always been instructed by the client and solicitors have, with the agreement of the client, instructed counsel and negotiated fees. Primarily this is still the way it works in private and civil VHCC cases. In VHCC civil cases counsel's fees are prescribed, as are solicitors. In civil VHCC cases the solicitors and counsel share the risk of pursuing a substantial damages claim by way of a reduction in rates once the costs exceed £25,000. As civil cases are dependent on a costs benefit ratio and the aim will generally be to achieve damages which make the case economic the considerations and issues are very different from a criminal case where the defendant's guilt and liberty are primarily in issue. Solicitors will nevertheless negotiate the number of hours and the scope of the work with the civil VHCC Unit on behalf of counsel. Whilst the system of solicitors instructing barristers has its advantages (not least ensuring that an expert advocate conducts the case in court) it can result in duplication of work and costs. Although solicitors and barristers work closely together as a team, the levels of communication between the two are constrained as they work in separate businesses.

The independent bar still fulfils the majority of advocacy services in the VHCC field. Although more firms of solicitors are employing in house advocates, either solicitors with higher court rights or employed barristers, the extent to which they carry out lead advocacy work in this field is at present very limited. Freelance solicitor advocates are more common in the Magistrates' Court. The advocacy market in the Crown Court is not diverse in the sense that it is predominantly carried out by the independent bar. However it is generally recognised that there is an over supply of junior barristers in the London area although not perhaps in other areas of the country. In reality however solicitors on the specialist fraud panel should only instruct barristers who are on their approved list of fraud counsel. Solicitors generally instruct counsel they know and can work with as part of a team. Solicitors' reputations are affected by the performance of the barristers they instruct. Barristers are not constrained, as are solicitors, by having to be on a specialist fraud panel to carry VHCC fraud work. Their pay in contracted cases is uniform by way of prescribed hourly rates and refreshers for court attendances. Competition for work in this field between junior barristers is fierce. It is less so with leading counsel, some leading counsel now being reluctant to embark on contract cases, probably for financial reasons. The independent bar do not face significant competition for advocacy services from others in this field such as solicitor advocates or firms of solicitors offering advocacy services. We believe the independent bar can deliver quality and just outcomes for good value although we are disappointed that the some of the leading bar appear reluctant to engage with and embrace the contracting system and we believe this impacts adversely on whether they are able to provide best value in the VHCC field.

Given that we have identified that there is limited diversity and competition should these be encouraged and would change deliver "quality and just outcomes for best value"?

We believe that limiting diversity by the establishment of the specialist fraud panel delivered better quality and more just outcomes for better value with regard to solicitors' work. We assume the CCU and the CDS would agree with us. The Association believes that its members have been more than willing to accept diversity and change in the past. The adage "if it ain't broke don't fix it" has some merit. Whilst this is something we would advocate in relation to the retention of the existing contracting system for VHCC cases the Association is unclear at this stage whether the opening up of the market to "others" to carry out the functions currently carried out by solicitors will be likely to encourage diversity and competition delivering quality and just outcomes for best value. As this seems inevitable the Association suggests that all organisations which undertake such work should be subject to the same regulation by their professional body and to the criminal contracting or specialist fraud panel requirements.

However we are firmly of the view that to attempt to encourage diversity and competition by competitive tendering on a case by case basis would not only be hugely burdensome for all involved in the tendering process but would inevitably impact adversely on quality, just outcomes and, last but not least, freedom of choice for our clients. We query the extent to which savings would really be made.

If it is envisaged that tendering would be on a case-by-case basis we query how this could possibly work. Presumably someone at the CCU would at some stage have to compile a tender document. There would inevitably be a delay in getting sufficient information to enable those firms who were to tender to be able to do so. It would assume that the prosecution were ready for trial at the point that the defendant was first arrested. This would clearly be impossible. Often in such cases a client will already have identified the solicitor or lawyer he wishes to instruct and that solicitor will carry out vital and substantial work at the investigation stage. The pre charge work can last for months if not years. Extensive costs can be built up during this period which would be before a tender document could be started. Assuming the original solicitor was not the successful bidder this would mean a significant duplication of work. The CCU would be faced with the task of identifying who should be

invited to bid, putting forward a tender document and a significant task in identifying the best bid. To ensure that this decision retained the confidence of the professions, their clients and the general public and was not open to subsequent challenge in the courts the procedures involved would have to be seen to be scrupulously fair. To what extent would quality issues be taken into account when looking at the bids? Would they be judged on numbers of hours and price or just price? How able is a contract manager to assess realistically the time which needs to be spent on a case if the prosecution has not provided sufficient information? Other than on price, how does it foster competition if the end user, the client, has no say in the choice of solicitor? The client would be thoroughly dissatisfied that he could not have the solicitor of his choice for financial reasons. We suggest that a privately paying client, whose liberty was at stake, would hesitate before embarking on such a process. When a tender document was ready, the firms who wished to tender (presumably those on a panel) would then have to look at the case to attempt to ascertain the hours that would need to be spent on the case, or the resources they would have to provide. There could be a significant under estimate. In such large cases as these the consequences of getting it wrong could be bankruptcy leaving creditors unpaid and rendering all the work done wasted and requiring a further bid round to ensure representation. If the successful bid were an overestimate then the CDS would be paying more than the job was worth and best value would certainly not be achieved.

The biggest issue however would be quality assurance. Other than going through a similar type of audit process as is carried out at present how could the contract manager be satisfied that the lawyers had carried out what they said they would? If the contract manager was not so satisfied what would the sanctions be? Such a system would inevitably encourage cutting corners. How does this encourage quality and best value? How would such a system save on administrative costs? We suggest they would be vastly increased.

Our experience of insurance panel work, where firms are accepted on to a panel of approved solicitors and the work then distributed by the insurer amongst the panel firms, is that in larger cases the work is still dealt with on an estimate of hours to be undertaken, the hourly rates pertaining to all on the panel being broadly in line.

A system based loosely on the current contracting system, with a simplified hourly rates structure to avoid wrangles about categories, with the size of the contract possibly being based on the documentation to be considered, (as suggested in our response to 4 (a)) would, we say, best preserve quality and encourage just outcomes for best value.

The Association puts forward proposals for encouraging diversity and competition in VHCC fraud and other non fraud VHCC cases as follows:

- encourage more privately funded work and inter party costs orders against the prosecution;
- have one person (a lead supplier) negotiate with the CCU on the terms of the contract for all;
- simplify the payment structure for solicitors and barristers, with more emphasis on fewer differing hourly rates if hourly rates are to be retained (our preferred choice). If these proposals do not find favour we suggest a graduated fee arrangement for litigators in VHCC cases as in paragraph 4 (e). Under paragraph 5 we do not agree that competitive tendering for these types of cases is either workable or efficient in terms of saving costs. We have grave concerns as to the impact on client choice and quality. Last but not least such a process will inevitably involve considerable delay which will run contrary to the Lord Chief Justice's serious fraud protocol;

- agreement of a protocol between those involved with the preparation of such cases and those involved with the advocacy would provide a template for best practice and would facilitate a better understanding of roles within the process.

TERMS OF REFERENCE PARAGRAPH 4 (e)

“To achieve these objectives the plan will set out how to deliver the best way of buying and delivering legal services, in particular criminal defence services for high cost cases, that:

- (e) avoids frequent and piecemeal direct fees negotiations between the purchaser and individual sectors within the legal services market.”***

The current system has been built on a system of direct consultation, with contract managers attending solicitors' offices to negotiate directly on the work to be authorised on each part of the case plan. Auditors then attend to verify whether the work has been completed before authorising the stage payment.

Separate negotiations are held with the barristers in the case in relation to the work that they are expected to undertake.

The number of cases that are able to be dealt with by each case manager is dictated by the distance to and frequency of attendance at the solicitors' office and the number of variations to the authorised work that have to be considered between formal reviews.

The LSC have often referred to their role as being akin to that of a privately paying client who wants to ensure that they are getting value for money. If we were to take that analogy further issues relating to the work done by counsel and the costs incurred would not be negotiated by the privately paying client, but would be agreed by the solicitor. There is a strong case for making solicitors take responsibility for determining the work of counsel in high cost cases and agreeing their costs with them. This alone would save the LSC contract managers a significant amount of time as they would only have one set of contract negotiations instead of two or three. It is also likely to offer overall savings as the solicitors would be in a better position than the case manager to consider the needs of the case and the time necessary to undertake that work. A protocol of how work should be divided between solicitors and barristers has been put forward. If adopted this should provide a template to ensure that the work done by each party is relevant to their role.

The LSC should also consider to what extent one-to-one meetings are necessary in this process. Many firms now have sophisticated I.T. systems that could allow the LSC on-line access to specific cases for audit purposes and most case plans could be discussed over the telephone, particularly where the case manager and solicitor have previously worked together and already have a level of mutual understanding. Visits could still be undertaken if considered necessary but not as an automatic part of the process. On-line auditing and telephone conferences could save considerable travelling time and offers much greater flexibility to the Commission in performing its functions.

The alternative is to take a more radical line and establish agreed rates for work, based on a matrix of variables that eliminates the need for auditing. One possible scenario would be to base such a system on the volume of papers in a case. It is inevitable that there would have to be an acceptance that there would be winners and losers if such a fundamental change was contemplated.

As an example, if the volume of paperwork in a case were used as the key criteria determining cost it would be possible to agree the costs of a case as a matter progresses. The crux of the issue would be agreeing a suitable time allowance for each unit of work e.g. pages served or minutes of video/ tape. In this scenario, the costs of a case could be automatically calculated with the 'block A criteria' used to enhance hourly rates dependant on the number of factors that are applicable to the case. The rate payable might be in bands determined e.g. by whether the case is a guilty plea, not guilty plea or a cracked trial. The matrix could in theory have as many variables as was thought necessary.

If such a system were implemented it would minimise the areas where negotiations with the Commission were necessary and would allow for a shift in auditing emphasis away from the work completed (costs being pre-determined) to quality assessment against criteria that would have to be determined. Control of VHCC costs would then move to the prosecution, to encourage them to narrow the issues that are to be the subject of prosecution and ensure that only relevant documents are served.

As indicated above, the key element in this proposal would be to get the correct time bands for the number of pages served. However, this may be possible by doing an analysis of what those costs have been in historical cases, showing the averages and range.

Arguments could be put forward that this system might introduce perverse incentives with unscrupulous firms cutting corners. This is what the auditing process should be designed to guard against. Alternatively, such a system might be argued to give those firms which are the most efficient the highest margins. In any event the arguments are no different from what they would be for any other standard fee structure.

Such a system would have the added advantage of allowing a page rate to be identified that includes counsels' costs. If this were done the perceived problem of duplication of work would be minimised.

A simplified method of calculation is shown overleaf:

	Total Units	Multiple	Hourly Rate	Not Guilty Plea	Guilty Plea (x 0.5)	Cracked Trial (x 0.75)
Statements (pages)	700	16	£ 110.00	£ 20,533.33	£ 10,266.67	£ 15,400.00
Exhibits (pages)	16000	2	£ 90.00	£ 48,000.00	£ 24,000.00	£ 36,000.00
Interviews (minutes)	960	2	£ 90.00	£ 2,880.00	£ 1,440.00	£ 2,160.00
Videos (minutes)	6000	2	£ 90.00	£ 18,000.00	£ 9,000.00	£ 13,500.00
Unused Material (pages)	16000	1	£ 90.00	£ 24,000.00	£ 12,000.00	£ 18,000.00
Total				£ 113,413.33	£ 56,706.67	£ 85,060.00

Uplift to these figures should then be applied according to whether the defendant's case:

- is likely to give rise to national publicity and widespread public concern;
- requires highly specialized knowledge;
- involves a significant international dimension;
- requires legal, accountancy and investigative skills to be brought together.

The figures are illustrative and are not meant to represent a realistic minute rate or multiple for whether the matter is a guilty plea, not guilty plea or a cracked trial. Considerable research would be needed to identify appropriate rates in this situation.

The above simply recognises that case costs are primarily driven by the volume of evidence served. Clearly such a system would not be popular with the Bar if their fees were incorporated into an overall minute rate and there would be clear argument as to what work they should undertake as opposed to solicitors. Hence such a system would make the adoption of a protocol of great importance.

LORD CARTER TERMS OF REFERENCE PARAGRAPH 5

“The review will take in to account the current programme of moving to fixed or graduated fees (in particular schemes for graduated fees for cracked trial and guilty pleas and for Crown Court litigators) and the proposals for competitive tendering for solicitors in London.”

Introduction

The Association has made submissions on the pre-charge stage, Magistrates’ Court and Crown Court work elsewhere in this document. This section is confined to VHCC cases. For the reasons already outlined we would prefer to see the existing system of payment by hourly rates continue but greatly simplified. We recognise the political imperatives in relation to VHCC cases. In view of this we have put forward an argument for graduated fees for this type of work.

We have considered at length the possibility of competitive tendering for VHCC cases and cannot see that it would preserve quality and choice. We also have grave doubts as to whether it would produce a saving in costs.

An analysis of how competitive tendering could work in practice throws up what we perceive to be insurmountable problems. We have posed a number of fundamental questions in relation to tendering on a case by case basis and been unable to come up with satisfactory solutions.

1. Which firms would be invited to tender?

- (a) It would seem reasonable to restrict the firms to those who satisfy the Serious Fraud Panel criteria (with possible extensions for firms of barristers and multi disciplinary practices). To have open season could result in hundreds or thousands of bids for each case with no guarantee of quality of previous experience in dealing with such cases. It would also add cost to each firm which bids, whilst at the same time resulting in a huge administrative burden on the CCU in fairly considering those bids.
- (b) The current size of the panel is over 200. If all firms on the panel were invited to tender for each case the administrative burdens for all would be considerable. In our view attempts to restrict the tender within the panel would be unworkable.

2. How would the CCU identify a VHCC case which it wished to put out to tender?

- (a) The current system of trial estimate is open to manipulation. The move of trial estimate from 25 to 40 days is a good example of how lawyers have sought to get round what they perceive to be unpopular VHCC contracting arrangements by providing time estimates which came in just below the threshold. The adoption of our recommendations with regard to matching a VHCC case against a prosecution specialist legal team would provide more certainty. However there are many non fraud and some fraud cases which are dealt with by non specialist prosecution teams and, in costs terms, end up as significant VHCC cases. Experience of the current contracting system shows the reality is likely to be that defendants and their legal teams who are confronted with a change in representation being forced on them will attempt to take advantage of any grey areas within the definition of VHCC cases to avoid the tendering process.

3. At what stage would it be reasonable for firms to be invited to tender?

- (a) It would clearly be impossible for firms to tender accurately until the scope of the prosecution evidence by service of their statements and exhibits had been ascertained. The first set of prosecution evidence is normally served before or shortly after the first plea and directions hearing. However it can be drip fed right up to and during trial. A change of defence legal teams at this stage to embark on a possibly lengthy tendering process will inevitably produce significant delay and duplication of costs. Both would run contrary to the Lord Chief Justice's serious fraud protocol of April 2005. It would also be reasonable to have some detail about the client's instructions in relation to the evidence to ascertain the scope of the tender. How would these be obtained when there is no formal solicitor client relationship and how could client confidentiality be preserved?
- (b) Our list of some of the tasks carried out by solicitors and counsel in a hypothetical VHCC case in Appendix 4 shows that significant amounts of work would need to be carried out before the tender process was completed and the successful firm commenced work on the case. This would produce a considerable duplication in costs.

4. What criteria would the CCU use to consider such tenders?

- (a) Although it would be desirable to build in quality criteria, for the reasons set out in our response to paragraph 4 (b), we consider this would be extremely difficult. Not only is there the competing quality criteria between the interests of the state and the client but there is also real difficulty in assessing in advance the quality criteria from the point of view of the state and also considering how these would be monitored. Building in quality criteria to a tender process is likely to require some degree of subjective discretion. In our view such procedures would be dangerous and leave the CCU open to Judicial review from unsuccessful firms, particularly those formerly instructed by the defendant. Ultimately price is likely to be the principal consideration in the tendering process.

5. Would such a process save costs?

We believe the answer to this is that this is unlikely, for the following reasons.

- (a) Many firms which carry out a significant amount of fraud VHCC cases are based in cities— many in London - with the overheads, in particular with regard to salaries, commensurate with such locations. Fraud /VHCC work may not be the only work undertaken by such practices and moving to an area with cheaper overheads may not be a realistic possibility for many firms on the panel. Such firms will analyse the likely return on such a bid and would look at the rates they can obtain in other areas of their practice. These may be two to three times higher than the current fraud rates. Even ordinary private rates for non commercial work are significantly higher (on average double) than the current fraud rates. As such many firms would be likely to tender at rates at least the same if not greater than those which prevailed pre October 2005, with an uplift to take account of time spent in the tendering process. It is envisaged that if a firm were to tender for in excess of say just 50 cases annually a senior employee/supervisor may need to be employed full time to accommodate such work. If the system resulted in an increase in costs the Treasury would no doubt insist on widening the scope of those prepared to tender and this would of necessity risk a reduction in quality.

- (b) If price were the main factor how would the work undertaken by the initial firm be factored in to the tendering process? They would already have undertaken a significant amount of work so may be in a position whereby they could quote a lower price for the job. It could be argued by others in the tendering process that this would give them an unfair advantage.
- (c) If a new firm were appointed there would be significant duplication of work, given the stage at which tendering would be carried out, with teams of lawyers going over the same ground. There would also be significant delay which in itself would cause extra cost irrespective of which firm was successful in the bid.
- (d) We believe the realities would be that a defendant forced to instruct a new legal team and who was aware that the overriding consideration was lowest price would inevitably be suspicious as to the quality of representation he could receive. His cooperation with that legal team may be problematic. If he applied to change his legal team the prospects of success may be greater when the argument was based on the fact that he was quite happy with his former solicitors and had to accept a change to a firm which was the cheapest. If he was unsuccessful in that application he may consider whether he should represent himself and, if he did, this would cause serious problems for the court and undoubtedly increase costs and delay for the state. We cite the McDonalds libel trial as an example of how a litigant in person can lengthen a hearing and we predict that if PCT is introduced for VHCC cases such trials may become a more common feature in the criminal justice system.

6. How would quality be monitored and preserved in a tendering process?

- (a) We have assumed that a similar model to the one proposed for competitive tendering in the Magistrates' Court will be adopted i.e. quality assurance for those entitled to bid and bids then based on the lowest price, with the only difference that there would be an individual bid on a case by case basis. Solicitors/legal teams who have been successful based on bids at the lowest price will always be open to pressures of cutting corners and reducing quality, particularly if they have been overoptimistic in their cost/time estimate. For this reason it will be important to ensure that quality checks are carried out during the lifetime of the case.
- (b) Specific quality criteria measures will have to be set out and the legal teams judged against those criteria. This would have similarities to the current contracting system and in reality the administrative burden on the state would be greater than at present bearing in mind the time which would have to be spent on the tendering process at the start. It would be possible for peer reviewers to carry out these checks, but, if they were done at differing stages in the life of a case, this process would be expensive. What would be the outcome if the peer reviewer or contract manager took the view the legal team was not performing? Would this bring the contract to an end and a new tendering process embarked upon? This would result in more delay and cost. We repeat all of the concerns as to quality and the viability of firms which put in unrealistically low bids which we have voiced in relation to the PCT proposals for Magistrates' Court work. If the model is thought not to be appropriate for Magistrates' Court work, why is it thought appropriate for VHCC work?

We believe the choice and quality arguments against PCT are insurmountable. In practice we say that such a system would be unworkable.

APPENDIX 1

LEGAL AID PROCUREMENT REVIEW – TERMS OF REFERENCE

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

- (c) *the impact of a new procurement regime on the supply of criminal defence services, the wider legal market, the way the professions are structured, the way the CPS operate and the operation of the entire justice system;*
- (d) *the impact on the various agencies e.g. the Legal Services Commission and Her Majesty's Courts Service.*

From this analysis the plan will give a route map of how to deliver the reform package and how that will achieve the overall objectives. Included in this route map will be the action needed to promote changes to the quality, structure and performance of the market and its constituent professions (in the context of wider legal service reforms). The plan will also include mitigating action to be taken to address any adverse affects on quality and performance that may result from changes.

APPENDIX 3

METHODS OF PAYMENT FOR SOLICITORS AND BARRISTERS

Methods of payment for solicitors

The basis of payment for solicitors in this area of work, indeed in most areas of litigation, has historically been on hourly rates for work carried out, the rate often calculated according to the seniority of the fee earner. Historically a solicitor's costs were taxed after the event "ex post facto" on the basis of justifiable work reasonably undertaken. This could result in reductions, delay and uncertainty for the solicitors. Throughout all areas of litigation, particularly complex litigation, this remains the most common and accepted method of payment in both private and publicly funded cases. We are unaware of any situations or scenarios whereby funding for such substantial cases is dealt with on a tendering fixed fee basis where the client is not the funding provider. We take the view that funding for VHCC fraud cases or complex serious crime cases on such a basis is fraught with difficulties.

As a result of payment being based on hourly rates solicitors in this and other areas have become much more skilled at recording their time and invested in complex time recording systems to justify the work which has been carried out. This is the basis on which civil cases are paid in very high costs cases, albeit that if the claimant wins the opponent pays often at private rates. Conditional fee agreements are more common in civil cases where one individual or legal entity commences proceedings against another. These are nevertheless still dealt with on the basis of hourly rates. However in criminal cases where the state commences proceedings, usually against an individual, there are good public interest reasons why conditional fee agreements are inappropriate.

In the 1980's complex fraud work was recognised by taxing masters and costs judges as akin to commercial work, meriting similar hourly rates to those charged by city firms conducting high profile commercial civil fraud litigation. The Backhouse method of calculating solicitors' hourly rates was based upon an "A" figure (largely to reflect overheads) and a "B" calculation to reflect the profit element – generally starting at 50% and increasing with the complexity of the case. Issues such as the whether the case was prosecuted by a specialist team i.e. the SFO or HM Customs & Excise, volume of paperwork, the complexity of the indictment, the number of witnesses, the importance of the case to the client, an international element and the involvement of forensic accountants were all seen as complicating factors which merited an increase in the percentage uplift.

In the early 1990's a cap was placed on the hourly rates for solicitors by virtue of legal aid regulations. For Crown Court work the hourly rate varied from £55.75 per hour for a solicitor of 10 years experience, £45.25 for a solicitor to £34 for a clerk. An enhancement for "exceptional" cases of up to 100% was allowed in "general crime" cases. In serious fraud cases an enhancement of 200% was allowed, following the principles in CRIMLA 74 and recognising the link between complex fraud and commercial civil litigation. Generally speaking, however, hourly rates for fraud work after the enactment of the legal aid regulations were less than under the former system. Since 1993 Crown Court rates for solicitors have not increased. The introduction of the Specialist Fraud Panel Arrangements in 2000 allowed for rates according to categories. Category 1 rates became slightly more than the old rates 200% enhanced rates but category 2 and 3 became lower and considerably lower respectively. The selling point made by the LSC to solicitors to embrace this system and invest in the new system was the certainty of the contracting system (as opposed to the ex post facto system) and improvements in cash flow.

In both ex post facto and contracting cases an audit or assessment of the work undertaken is carried out by either the National Taxing Team or the CCU.

Since 2000 the criteria for category 1 and 2 VHCC fraud cases have been made considerably more difficult to achieve (apart from in terrorist cases) making a category 1 case in areas other than terrorist cases almost impossible to achieve. Of course there has also been the unilateral cut in rates without proper consultation in October 2005 and without reference to this review which has removed the distinction between the old ex post facto 200% enhancement in fraud cases and reduced rates for Category A fee earners in contract cases. For over a decade in this field solicitors have encountered not just stagnant hourly rates but reductions in hourly rates. This has meant that the analogy with commercial civil firms has disappeared, with hourly rates of the criminal serious fraud legal aid solicitor being possibly up to a quarter or less of their civil private commercial counterparts. With the reduction in hourly rates in contract cases imposed in October 2005 and the abolition of 200% enhancement there is also now little difference in rates for fraud and general crime enhanced rate cases. This is at a time when we are told that cross border fraud is becoming ever more complex and so complex that juries are incapable of understanding the issues involved and when solicitors have invested heavily to achieve membership of the specialist fraud panel. The Association also recognises however that some non fraud VHCC cases are more complex and serious in their implications for defendants, victims and the public at large than some fraud VHCC cases.

Method of payments for barristers

The Association greatly values the independent criminal bar and the standards of advocacy it has established and maintained. We would wish to preserve our good relationship with the independent bar and foster and promote the maintenance of standards and independence which are its strengths. However we believe that the system of payment for barristers is anomalous and that it requires simplification and improvement in terms of accountability for time spent in order to produce just outcomes for best value.

Barristers have traditionally been paid a brief fee to cover all the preparation and the first day of a trial or hearing and daily refreshers. In private cases barristers fees are negotiated on behalf of the client by the solicitor. Private clients have found that the method of payment has moved from brief fees to hourly rates since this is more transparent and accountable with respect to work done. The privately paying client has more control and the arrangement is more flexible. Unlike the present VHCC criminal system it is worthy of note that (direct access apart) it is the solicitor who negotiates counsel's fees on behalf of the client and with the client's approval. Once counsel is instructed and a brief fee agreed the full brief fee remains payable even if the case settles or the case involves significantly less preparation than at first envisaged. Barristers have traditionally incurred lower overheads than solicitors and hourly rates for barristers have been recognised by taxing masters and costs judges as generally being lower than solicitors for this reason. The concept of a brief fee was preserved in the system of payment under red corner briefs, although the red corner brief fee system has now been abolished and there are few remaining cases where red corner briefs are available to counsel. However we believe their impact on increases in the size of the criminal legal aid budget should not be underestimated.

Legal aid payments to barristers conducting criminal and VHCC cases fall largely in to two categories:

- graduated fees
- contracted payments.

Graduated fees are paid on a variety of criteria such as number of pages of witness statements, criteria of case and no specific hourly rate is applied. There is little if any financial incentive for counsel to spend time preparing the case and no incentive for them to meet the client in conference. It is not unheard of for busy counsel in some areas of the country to be listed as dealing with two or more trials to start on the same morning in the

expectation that at least one will crack. This system does not encourage early preparation or early appreciation of the evidence/ issues in the case and hence early pleas of guilty. Payments to barristers can be arbitrary, with some legitimately being able to claim payments running to in excess of four figures for a day in court where a case cracks and others where only £46 for a day in which a mention is heard. The public and we find it difficult to understand how such a huge divergence of fees is appropriate. Even on a “swings and roundabouts” basis there can be little dispute that the system of payment does not adequately reward the conscientious counsel who attends conferences with clients and prepares the case thoroughly in advance.

Contracted payments

As with solicitors the work to be done is agreed in advance and paid on a set hourly rate and a stage basis. This is the least popular method of payment, more so amongst leading counsel than junior counsel. Work logs are produced for audit at the end of a stage but again these are not usually as detailed as the time records and attendance notes of solicitors.

APPENDIX 4

ROLES CARRIED OUT BY SOLICITORS AND COUNSEL IN “HYPOTHETICAL” VHCC CASES

Solicitor

1. Receipt of initial instructions from client sometimes as a result of a raid and/or dawn arrest. Arrangements for 24 hour cover for such eventualities.
2. Alternatively instructed following such a raid/arrest and during a lengthy investigation stage which, in some SFO cases, can take years to get to the stage of charge.
3. Negotiating disclosure if possible from investigating authorities.
4. Assessment of that evidence (often substantial documentation).
5. Assessment of likelihood of charge.
6. Advice to client on strength of evidence and inferences from silence.
7. Assessment of client's ability to respond to questioning.
8. Consideration and if necessary preparation of written statement under caution.
9. Attendance and representation on interview under caution or possible Section 2 interview.
10. Liaison with family if client in custody and possibly with solicitors of co-defendants.
11. Preparation for bail application in Magistrates' Court, contact with and advice to sureties or other conditions of bail for client. If case transferred on first occasion and client in custody diarising and arranging for attendance at preliminary hearing in 8 days at Crown Court.
12. Consideration of restraint order application.
13. Assessment of legal aid position, completing legal aid application criminal and restraint proceedings.
14. Conducting bail application in Magistrates' Court.
15. Preparation of statement in response to restraint application.
16. Identify and instruct junior counsel to advise and attend on restraint application.
17. Press prosecution for timetable for disclosure of their case summary and their evidence.
18. Liaison with CCU re contract case.
19. If sufficient information preparation of case plan and task list.
20. Negotiation with CCU re contract specification and task list.

21. If client in custody arranging and attending on regular visits to prison for instructions. If client not in custody communication often several times per day to provide instructions and give advice.
22. Conference with client and junior counsel. Identify leading counsel and instruct junior counsel to advise re leading counsel.
23. Once certificate for leading counsel obtained instruct leading counsel with material to hand.
24. Seek extension of time for service of notice of application to dismiss if prosecution evidence not served.
25. Obtain evidence from prosecution and consider whether dismissal application merited. Instruct counsel to advise re dismissal application if appropriate after taking initial instructions.
26. Scan prosecution evidence in readable format.
27. Peruse prosecution evidence.
28. Consider defence statement and extent to which disclosure issues likely to be relevant to case.
29. Draft or instruct counsel to draft defence statement.
30. Summarise prosecution evidence in schedule format.
31. Commence taking instructions on prosecution evidence (likely to be very lengthy process involving numerous attendances, if necessary in prison). Exercise if carried out properly will assist in setting out for client strength or otherwise of prosecution case and prepare for cross-examination.
32. Proof client.
33. Brief counsel if not already done so.
34. Identify and proof factual defence witnesses.
35. Consider whether forensic evidence necessary and instruct counsel to advise on evidence.
36. If forensic accountant necessary identify 2 or 3 from list of approved experts and liaise re fees. Detailed instructions to each necessary in order that they can tender to CCU.
37. Liaise with contract manager re forensic accountant.
38. Attend on case management hearings with counsel or solicitor advocate.
39. Consider notices of further evidence.
40. Negotiate next stage of task list and prepare files for audit of first stage.
41. Consider schedule of unused material served by prosecution and arrange for management of examination of unused material.

42. Attend for first visit to location where unused material stored to ascertain scope of task.
43. Grade A fee earner who has perused the prosecution evidence to prepare a briefing note to other less senior but qualified staff re matters to look out for in unused and instruct the those examining the unused.
44. Team examines unused material.
45. Sifting of unused material, ideally electronically with adobe acrobat search and comment facilities.
46. Deliver to counsel sifted unused material with instructions to advise in relation to any possible abuse argument.
47. Attend on numerous conferences with client and counsel re preparation for hearing.
48. Attending on hearing – generally supervisor will attend on first day of hearing and important days i.e. if likely client will be considering changing plea, otherwise Grade C fee earner will attend.
49. If high profile case preparation of presentation of case to media.
50. Advice on appeal to client.
51. Representation on confiscation proceedings – preparing statement from client, consideration of instructing forensic accountants, attend conferences with counsel, client and accountant, obtain any other evidence i.e. no hidden assets, attend on hearing (NB this phase can be very extensive as period of imprisonment in default can equate to same as substantive sentence and runs consecutively to substantive sentence).
52. Representation on enforcement of confiscation order in Magistrates Court and possibly certificate of inadequacy in High Court.
53. Correspondence, e-mails, telephone calls on numerous parties throughout the process.

Junior Counsel

1. Possible liaison with solicitors re tactics at interview.
2. Possible bail application as in 14above.
3. Attend on restraint order as application, as in 16 above.
4. Consideration of instructions/paperwork re leading counsel.
5. Drafting advice re leading counsel.
6. Drafting task list for CCU and negotiating contract.
7. Conference with client and solicitors (see 22 above).
8. Further conference with leading counsel, client and solicitors.
9. Consider prosecution evidence likely to be served piecemeal throughout preparation.

10. Consider and draft as appropriate notice of application to dismiss.
11. Summarise/schedule evidence in so far as not already carried out by solicitors.
12. Consider client's proof and comments on prosecution evidence when available.
13. Draft defence statement.
14. Consider admissions.
15. Draft responses to admissions and defence admissions if appropriate.
16. Attend conference with leading counsel.
17. Attend on case management hearings.
18. Consider and schedule as appropriate solicitors sifted unused material.
19. Consider abuse argument and liaise with leading counsel.
20. Ideally leading counsel should research and draft skeleton abuse argument but may be drafted by junior counsel.
21. Attend on abuse hearing.
22. Preparation for trial – various conferences with client to address strengths of prosecution case and weaknesses of defence case and final advice as to plea.
23. Preparation of cross examination of prosecution witnesses, consideration of defence evidence.
24. Attend trial, assist leading counsel with presentation of case.
25. Assist leading counsel with closing speech.
26. Advise re appeal if necessary.
27. Draft grounds of appeal if appropriate.
28. Perfect grounds of appeal and attend on appeal if leading counsel not available.
29. Representation on confiscation.
30. Telephone calls and e-mails with solicitors throughout the process, possibly also prosecuting and co-defending counsel.

Leading Counsel

1. Consider instructions.
2. Attend conference with lay client, junior counsel and solicitors.
3. Consider prosecution evidence.
4. Advise re evidence in writing.

5. Draft task list (task often delegated to junior counsel).
6. Agree task list with CCU.
7. Attend as appropriate case management hearings.
8. Consider instructions including client's proof, comments on prosecution evidence and any further defence evidence.
9. Approve/amend defence statement.
10. Consider and approve/amend responses to admissions.
11. Consider sifted disclosure of unused material.
12. Consider and draft if appropriate abuse skeleton with assistance from junior counsel.
13. Prepare for and attend on abuse argument.
14. Prepare for trial – conferences with client and final advice as to plea.
15. Prepare cross-examination of prosecution witnesses.
16. Attend trial – all the preparation involved in trial including continued instructions from client, liaison with prosecuting and co-defending counsel, often consideration of late service of evidence or unused material, consideration of voir dices, evidential issues (admissibility, bad character, hearsay etc,) additional factual evidence from the defence, submission of no case to answer and preparation of final speech. Mitigation.
17. Advice on appeal and grounds of appeal if appropriate.
18. Representation on appeal.
19. Advice and representation on confiscation.
20. Telephone calls and possibly e-mails with defence team (not usually client) and prosecuting and co-defending counsel throughout period.