



The Government's Response to the
Constitutional Affairs Select Committee's
report on Civil Legal Aid –
adequacy of provision



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Presented to Parliament by the
Secretary of State for Constitutional Affairs and Lord Chancellor
By Command of Her Majesty
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GOVERNMENT RESPONSE TO THE CONSTITUTIONAL AFFAIRS SELECT COMMITTEE'S REPORT ON CIVIL LEGAL AID – ADEQUACY OF PROVISION

Introduction

The Government is grateful to the Constitutional Affairs Select Committee for its report. Since the Access to Justice Act 1999 and the establishment of the Community Legal Service (CLS), both the Department for Constitutional Affairs and the Legal Services Commission have been committed to maintaining fair and proportionate access to justice, whilst also retaining value for money for the public purse. The Committee's report makes a valuable addition to the findings of the Matrix review of the CLS, and the Frontier Economics review of Demand, Supply and Purchasing for legal services, which reported earlier in the year. The Government will continue this important work through the Fundamental Legal Aid Review (FLAR) and the Clementi Review of the regulation of legal services, both ongoing.

The Government regrets the time that has elapsed between the publication of the Committee's original report and this response. As the Committee raised so many important issues, both the Department and the Legal Services Commission requested additional time to consider the recommendations in full.

This response consists of two parts. The first has been provided by the Legal Services Commission, which has operational responsibility for most of the areas covered by the Committee's recommendations. This is followed by the Department's separate response to those recommendations which concern wider government policy. The Government has approved the LSC's response as well as the Department's, and the LSC's response reflects the views of Government as well as the Commission.

Policy perspective

The Community Legal Service (CLS), launched in April 2000 and administered by the Legal Services Commission (LSC), aims to improve access to good quality legal and advice services. Focusing on the social welfare categories of law that most impact on day to day life, including debt, housing, welfare benefits, employment, immigration and family issues, it plays an increasingly important role in helping to deliver social policy initiatives, especially those aimed at combating social exclusion.

The LSC's Legal Services Research Centre produced the National Periodic Survey of Legal Need in 2003, and its findings highlighted the importance of early and accurate advice in preventing escalation of problems. To help widen the availability of advice, the LSC launched CLS Direct in July 2004. This service brings together a national information and advice help line, a legal information website, access to the CLS directory of Quality Marked local providers and the CLS information leaflet line.

The Government is working to ensure legal aid spend is better targeted at protecting the vulnerable, especially children at risk and the socially excluded. The Fundamental Legal Aid Review (FLAR), launched in May 2004 and due to report to Ministers in early 2005, is examining how legal aid can provide services that meet the needs of society, help people improve their lives and prevent social exclusion. It continues to examine how innovative ways of delivering legal services can be developed to ensure best use of tax payers money.

The Department has also recently instigated two surveys on the impact and availability of advice. The first, liaising with Jobcentres and doctors surgeries, will concentrate on the effect that in-depth advice at the earliest stage of problem recognition can have on its resolution. The second is a more global study on the volume of advice provision in England and Wales. Both studies should begin to provide evidence by mid 2005.

PART 1: RESPONSE FROM THE LEGAL SERVICES COMMISSION

Introduction and background

- i. This memorandum contains the response of the Legal Services Commission to the House of Commons Constitutional Affairs Committee's fourth report of the session 2003-04, published on Friday 16 July 2004, on 'Civil Legal Aid: adequacy of provision'
- ii. The Legal Services Commission is an executive non-departmental public body created under the Access to Justice Act 1999 to replace the Legal Aid Board. It is sponsored by the Department of Constitutional Affairs and we work closely with the Department. The Secretary of State for Constitutional Affairs is accountable in Parliament for our activities and performance. Our work is overseen by a board of independent Commissioners.
- iii. As the Committee is aware, the Commission is responsible for the development and administration of two schemes in England and Wales:
 - The **Community Legal Service** which replaced the old civil scheme of legal aid in April 2000, bringing together networks of funders (eg Local Authorities) and suppliers into partnerships to provide the widest possible access to information and advice.
 - The **Criminal Defence Service** which replaced the old system of criminal legal aid from 2nd April 2001, providing criminal law services to people accused of crimes.
- iv. The Committee made a total of 24 recommendations (as set out in the content list on page three) – and of those, 19 will be addressed directly in this response. The Department of Constitutional Affairs is responding to the remaining five.
- v. We welcome the Committee's focus on access to legal aid. It mirrors our own emphasis on understanding needs for legal services and driving forward policy and practical initiatives to meet them. We wholeheartedly agree with the Committee that access to justice is a basic right and that the legal aid system is a vital element of the strategy to prevent members of the public from suffering social exclusion. We thank the Committee for stressing the importance of the Commissions' work..
- vi. We are pleased to see the reliance of the Committee on the Legal Services Research Centre's first survey of justiciable problems published as "Causes of Action: Civil law and Social Justice". The Commission too draws heavily on this research to set its future direction. The second survey is currently in the field and next year should provide further updated information.
- vii. We do not accept that the provision of civil legal aid has deteriorated over the past four years. On the contrary, over that period, there has been significant progress in moving towards a civil legal aid system which provides quality legal help and representation to those most in need of it.

- viii. The introduction of the Quality Mark has improved the quality of the firms and agencies providing specialist help. The organisational standards of those providing civil legal aid have been raised. Indeed the overall standards of suppliers have now risen to a level which allows the Commission to further develop its approach to quality assurance of legal services. This includes the use of peer review as a method of validating the quality of advice and the introduction of a lighter touch audit regime for those we know to be reliable performers. The Commission is proud of the work it has done with legal aid providers to improve the service being offered to clients. We have already accepted that the time is now right to reduce the monitoring requirements which were necessary four years ago and work has begun on identifying preferred suppliers and on piloting tailored fixed fees.
- ix. We are also pleased to have been able to secure the base of higher quality providers and improving their geographical spread, while staying within the budget set by the Government. Not only have we attempted to maintain the local supply of traditional face-to-face advice, we have – as the Committee reports – also encouraged alternative methods of delivering services to those people who are unable or less likely to be visit traditional suppliers; for example, for those who live in rural areas or who are disabled.
- x. It is important to stress, as context for our response, that we have to work within a fixed legal aid budget. This clearly and rightly has an enormous impact on the level of civil legal aid services that we are able to fund at present and on our thinking for future developments. The pressures on the funds available for civil legal aid have given us some extremely difficult decisions to make about competing priorities, many of which have individually compelling cases, but which if taken together would exceed the budget available to us.
- xi. We understand that the DCA and the Treasury may not be able to accept the feasibility of a simple ring-fencing of civil legal aid. We accept that as a question of provision this is primarily a matter for government, but that must not prevent us having discussions about other mechanisms which would provide more certainty about the level of funding available for this civil legal aid. The funding of Immigration legal aid provides a model that could be relevant to other areas of civil law. It may be that the best way of achieving a reliable and predictable level of funding that both we and the Committee wish for is to link legal aid spending to the wider government programmes to which they relate. Above all the Commission is firmly of the view that, whatever the mechanisms, the level of funding for civil legal aid should be sustained. A key step would be to link funding for the Criminal Defence Service explicitly to the budget for Criminal Justice System.

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LEGAL SERVICES COMMISSION RESPONSES TO THE COMMITTEE'S RECOMMENDATIONS

The Committee's recommendations are in italics followed by our response in the numbered paragraphs.

When making its forward planning for matter starts, the Legal Services Commission must take into account the need for solicitors' firms to make similar forward planning. It is entirely unreasonable to expect solicitors' firms to be able to function without making such forward business plans (para 29).

1. The Commission aims to give solicitors and other advice providers as much certainty as possible. Contracts are awarded for three years and at the beginning of each year the new matter starts awarded to a firm reflect the amount of work carried out in the previous year. The Committee has perhaps overlooked the security of three-year contracts which are by no means standard in this field or indeed in others. Uncertainty comes primarily from problems arising in unpredictable ways; the same number of people do not come forward wanting advice in a particular subject category in a geographical area year-on-year. The system needs to be able to deal with fluctuating patterns of demand.

2. The adjustments made to contracts throughout the year, with both solicitors' firms and not-for-profit agencies, are to ensure that the money available for legal aid is used to best effect. If a firm is starting fewer new cases than authorised by the contract, the money that we anticipated we would need to pay for their cases can be spent elsewhere – in areas where the demand for services is higher or a previously unidentified need has emerged. If such an adjustment could not be made, the Commission's fixed budget would end up underspent when there was unsatisfied demand in another area of the country. Given the limited budget, the Commission is not able to give some agencies additional capacity without withdrawing potential and so far unused capacity from others.

3. Since the introduction of contracting in 2000, as a general rule there have always been sufficient case starts available nationally to ensure a reasonable spread across all regions in all priority categories of law. On average, solicitors' firms start no more than 90% of their authorised number of cases. The resulting spare capacity has been evenly spread throughout the country. However, there will always be pockets where, at a particular point in time, demand exceeds supply for various reasons.

4. Last year we refused increases in "matter starts" to firms with very high average costs or who had over-claimed substantially. Also, in a controlled budget environment, choices sometimes have to be made which may restrict access for certain categories of law that are considered not to be as high a priority as other categories.

5. The issues raised by the Committee are not caused by the Commission's unwillingness to allow firms and agencies to plan for the year, but when demand at one firm/agency in one area of law does not materialise in exactly the way in which it was predicted.

Despite the factors raised by the Legal Services Commission, we are satisfied there is ample evidence of unmet demand. When there is no evidence of reduced demand the number of people helped is a key indication of how successful the system is. It is unacceptable that the system is helping fewer people (para 35).

6. Numbers of 'new matters' started have fallen across nearly all categories of civil law – the exceptions being Debt, Community Care and Mental Health. For Family law, the largest volume category, 'new matter starts' fell about 10% from 2002/03 into 2003/04. The falls in other categories vary from 3% in welfare benefits to 32% for Consumer and 34% for Miscellaneous.

NON-IMMIGRATION NEW MATTERS STARTED: CIVIL LEGAL AID CONTRACTS

All Suppliers New Matters Started	01/02	02/03	03/04	03/04 change over 02/03	04/05 YTD 3 months	04/05 Annual Projec- tion	Projected 04/05 change over 02/03
Actions Against the Police	5,341	5,455	4,474	-18%	1,132	4,528	-17%
Community Care	2,117	2,711	3,098	14%	805	3,220	19%
Consumer	9,150	7,327	5,015	-32%	961	3,844	-48%
Debt	48,635	52,802	55,708	6%	13,876	55,504	5%
Education	3,327	3,452	2,984	-14%	731	2,924	-15%
Employment	10,977	11,719	10,522	-10%	2,275	9,100	-22%
Housing	86,307	88,014	81,606	-7%	19,790	79,160	-10%
Family	320,373	339,043	302,764	-11%	69,756	279,024	-18%
Mental Health	26,118	28,637	29,063	1%	7,370	29,480	3%
Miscellaneous	28,359	22,731	14,949	-34%	2,693	10,772	-53%
Public Law	1,429	1,811	1,614	-11%	422	1,688	-7%
Welfare Benefits	78,479	78,992	76,439	-3%	17,844	71,376	-10%
Personal Injury	7,237	5,787	4,827	-17%	886	3,544	-39%
Clinical Negligence	4,892	4,585	4,076	-11%	856	3,424	-25%
Total	632,741	653,066	597,139	-9%	139,397	557,588	-15%

7. In a wider context, the decrease in the number of acts of assistance through the Legal Help scheme has been seen in other legal aid jurisdictions including Scotland. Advice and assistance volumes north of the border have decreased by 5%, 6% and 10% over the last three years. There has also been a general decline in advice work funded from sources other than civil legal aid, for example, the number of problems dealt with by Citizens Advice fell as well.

8. The table above also shows that the trends last year appear to be continuing into the first quarter of the current year. The results of last year's bid round are therefore being revisited with the intention of letting more contracts, increasing allocations or initiating further bids in particular places and categories. We want to ensure that it is not the availability of 'matter starts' to our suppliers which is causing the reduction in matters actually being started for clients and that more matters are started in the second half of this year. There are potential 'matter starts' that we have allocated to suppliers which have not been taken up by clients.

9. The Commission is currently investigating the possible causes of this reduction in cases started. These include:

- a growth in mediation and the non-interventionist approach, for example in family proceedings;
- a reduction in the number or changes in the type or complexity of justiciable problems (the second survey of the Legal Services Research Centre will provide us with this information);
- although there have been no changes in eligibility for legal help over the years concerned, the reduction in eligibility for legal representation may have had the effect of discouraging solicitors/advisers from taking the case on even as legal help;
- other changes in the ways in which suppliers choose to take on cases in response to the Commission's robust management of the budget and average case costs; for example, solicitors may have become more risk averse to having monies taken away at audit or through contract sanctions; and
- a possible reduction in the number of clients changing solicitors/advisers as quality improves.

10. Once we have this information we will be able to formulate the optimal response to increase the number helped by the civil legal aid budget. In the meantime we continue to monitor trends and to work to improve access to civil legal advice, such as:

- Community Legal Service Direct;
- Work to improve sign-posting into the Community Legal Service from other key services, such as JobCentrePlus;
- Projects funded by the Partnership Initiative Budget, such as advice provision within health settings, using video-conferencing and capacity building in the voluntary sector.

Impact on suppliers

The evidence on the difficulties of recruiting solicitors and barristers to legal aid work and retaining them underlines one of the most serious threats to the provision of publicly funded legal advice. The significant trend of young lawyers away from legal aid work puts into question the future of the civil legal aid system (para 49)

11. While we accept that there is a need to ensure that lawyers and advisers enter and remain engaged in legal aid work, the Commission does not believe that the issue has reached the point where the future of the civil legal aid system is 'in question'.

12. Clearly it is crucial that the staffing of legal services is sustainable, and to ensure this remains the case, we have developed a number of initiatives designed to support solicitors' firms, advice agencies and future generations of lawyers:

- a scheme to develop the next generation of legal aid solicitors by providing grant support for training.
- A recent initiative to support the work of the not-for-profit sector by investing in training to develop the skills needed to manage Commission contracts successfully.
- Work with the Law Society, the Young Solicitors' Group, the College of Law and other Legal Practice Course providers to develop new ways of promoting legal aid work as a career of choice.

13. The one area in which we found that the supply of barristers was a problem was in the field of immigration. We therefore began a minimum income guarantee scheme for barristers which in its first year was both cost-effective and successful in maintaining a flow of barristers into this area of practice. In its second year an amended scheme does not include the minimum income aspect and the outcomes of this modified programme is to be compared, so that we continue with the best way method of ensuring barristers enter this field of law.

There is a role that ‘outreach’ programmes can play in adding to the range of services giving advice to the public. The details of their implementation are, however, of crucial importance, They can be an effective complement to other services if they encourage people to take advice who might be reluctant for any reason to consult a solicitor or who do not know how to go about seeing one. ‘Outreach’ programmes can provide good cover for legal advice in a wide range of cases. If proper use is to be made of such facilities, they must not be irregular or infrequent and they must integrate with other legal services to enable proper referral (Para 53).

14. We thank the Committee for acknowledging the role being played by outreach sessions funded by our contracts and are indeed keenly aware of the associated issues raised in this recommendation.

We are in no doubt that the term ‘advice deserts’ reflects the concerns which exist in some geographical areas and in some fields of law that advice is not readily accessible (para 61).

15. As the Committee acknowledged later in its report, we are working hard to identify and address unmet need for legal services. We accept that there are areas of the country where certain types of advice are not readily accessible.

16. In our Supplementary Evidence III provided to the committee on 21st April 2004, we explained that we carried out an analysis of the results of the bidding round. This analysis covers the number of contracts awarded compared to the number before the bidding round, the number of matter starts made available, and, for each region, progress in addressing any gaps in the provision of legal services identified by Regional Legal Services Committees. The last bid round was broadly successful in meeting its aims, which were, in summary:

41. to provide an opportunity for new suppliers to bid for contracts and for existing suppliers to bid to expand into new categories of law. As part of the bidding round, we awarded new Legal Help contracts covering:

- 182 categories of law to suppliers who did not have previously have any contract.
- 123 categories of law to suppliers who previously held contracts which only allowed them to provide civil representation.
- 313 categories of law to suppliers with an existing Legal Help contract in another category.

42. to award contracts to meet the priorities identified by Regional Legal Services Committees. Overall, good progress has been made in this respect, and we set out a summary of the position for each region of England and Wales at paragraphs 48 to 59 of the evidence. Within the next month, we expect to publish the 2004/05 reports from the Regional Legal Services Committees, which will inform our work to develop and fund services.

43. to focus funding on organisations that provide the best quality of service whilst maintaining sufficient access.

44. to ensure that, by April 2004, the solicitors' firms that have performed least well in Contract Compliance Audits have either ceased to participate in the civil legal aid scheme, or do so only on the basis of a temporary contract. This objective has been met.

17. We will seek to use any funds that become available from contracts that have been awarded but not taken up, or which become available during the year, to improve access to priority services outlined in Regional Legal Services Committee reports, as described in paragraph 33 of our principal written evidence dated 03 February 2004.

18. We have created a Community Legal Service Development Fund. A total of £2 million will be made available during 2004/05 to assist in developing services which will address gaps in supply identified in CLSP reports, RLSC Regional Reports and the Commission's Regional Contracting Strategies.

If it is the policy of the Legal Services Commission to deal with fewer firms, this creates a number of problems. For example, if fewer solicitors' firms have contracts the problems of supply in rural areas will be exacerbated, especially in family law disputes which require different solicitors' firms for each of the parties. In time the limited source of legal aid work in fewer firms may result in higher fees being charged since the bargaining position of the Department will be weaker. Fewer contracts with firms would involve the loss of resources which the current body of experience, trained and motivated legal aid practitioners represents. Once these valuable practitioners are lost they will be hard to replace.(para 67)

19. It is not the policy of the Commission to attempt to reduce the number of firms with which it deals. However this may be the consequence of other Commission policies – such as the introduction of quality standards – and of the trend in the wider world for mergers and acquisitions.

20. It is true that there has been a reduction in the number of suppliers since contracts were introduced in 2000. Those solicitors firms who dropped out were mostly doing only very small amounts of publicly funded work or could not meet the quality standards. Since that point reduction in the number of solicitors' contracts has been compensated for to some extent by an increase in not-for-profit contracts. A reduction of suppliers does not necessarily involve a reduction in the number of practitioners; it can mean larger groups working together in bigger firms. We are considering any equalities issues which may arise as a consequence.

21. The Law Society has suggested that "Providing services through fewer outlets is not necessarily undesirable if it enables quality to be enhanced through greater specialism." We believe that the advantages of a smaller number of providers may outweigh the problems raised. A smaller base of suppliers specialising more in legal aid work could lead to a reduction in bureaucracy, for example, in the reduction of the number of audits and the level of paper-based reporting required

At present, it is possible to take advice from a wide range of firms in which there is a good general spread of expertise. Over-specialisation in certain areas of legal aid work may tend to prevent solicitors from providing a holistic approach to the advice given, unless steps are taken to avoid this. Although specialisation can provide a concentration of expertise which allows a better service to be given, firms must be able to offer a "joined-up" service, since many people turn to solicitors with a series of connected problems that require expertise in different legal areas. For example a divorce may result in debt problems, mental health problems, and perhaps housing problems. (para 68)

22. The Commission is extremely keen to ensure a joined-up service able to provide holistic advice. This does not require all specialisms to reside in one person nor even one firm – but advisers with different specialisms working together inside a consortium or drawing on the expertise of others by a variety of methods.

23. Following a pilot, in April 2004 the Commission launched a specialist support service which provides caseworkers – both not-for-profit agencies and solicitors – with experts to consult about their casework. For example, a family law solicitor with a LSC contract can use this service for support on providing advice on the debt, mental health and housing aspects of a divorce case.

There is a serious risk that if legally aided work is associated with very low fees, this may have a serious impact on the quality of people who undertake legally aided cases. The problems that are faced by clients who require legal aid support are often of the most complex variety. Many vulnerable citizens have problems which come in “clusters”. It is vitally important that they have access to justice which can only be guaranteed by competent advisers (para 75).

24. The Legal Services Commission is fully committed to ensuring that citizens do receive high quality legal advice that fulfils their legal needs, and this does indeed require competent advisers. The Commission does monitor remuneration levels to check that these are not adversely affecting our ability to deliver legal services. As we reported to the Committee, together with the Department for Constitutional Affairs, the Commission is in the process of reviewing the purchasing arrangements for legal aid. A report by Frontier Economics, commissioned by the Department, concludes that, at current levels of remuneration, we should be able to secure sufficient supply to meet demand. This finding suggests that there is no case, at this time, for a general increase in remuneration rates – although this does not preclude the possibility of the need for targeted increases in certain categories of law, such as housing, in order to ensure continued supply.

25. Frontier also recommends that the Commission should review the way in which it currently purchases legal services, examining in particular ways of increasing competition and incentives that could be provided to secure good outcomes for clients. We are developing a suite of pilots designed to test the feasibility and viability of the ideas emerging from Frontier’s work.

26. Remuneration increases are not the only means by which we can encourage legal aid practitioners to take up, or continue to provide, good quality publicly funded work. We have been listening to what the profession has been telling us and the Committee, and we are now in the process of improving those requirements of contracting and the Quality Mark which advisers find unnecessarily bureaucratic. In April 2004 a national system of specialist support funded by the Commission was launched. As well as providing local advisors and solicitors with experts to consult about their casework, the Specialist Support service will provide training programmes in each region and in Wales, helping front-line advisors to develop their knowledge and increase their capacity to take on cases. We are also in the preliminary stages of the project to develop National Occupational Standards for advice work.

27. We should explicitly state that it is our view that publicly funded work will never pay at the same rate as private work. This level of payment would simply not be sustainable from the public purse. However we do not think that this will lead to problems securing talented lawyers and advisers into the field of legal aid. There are other motivations which are relevant.

28. Lastly it is erroneous to relate directly remuneration levels and competence. Otherwise this would suggest that, compared with those in say corporate law, only less able lawyers enter social welfare law. From our experience of lawyers and from the quality of the work carried out by the majority of those firms with whom we have a contract, we know this not to be the case. Many gifted lawyers enter and remain in the field of civil law.

Those who receive public money for providing a public service need to maintain proper professional standards. However, the current system of auditing solicitors is arbitrary, inaccurate and bureaucratic. Furthermore, it is not linked to quality of advice given. It is clearly punishing competent and honest solicitors and is operated in such a way which completely fails to attract the support of the profession. This is the most serious criticism of the current system for managing legal aid work that we have found. A solution is urgently needed (para 87).

29. The Commission maintains that at the time when contracting was introduced there was very much a need to ensure that contracts were monitored to ensure both a quality and cost-effective service. The over-riding importance of this was made very clear to us in a number of ways, including very clear recommendations from the Public Accounts Committee.

30. As a result of these auditing processes, the Commission has now brought itself to a position of working with a smaller and quality-assured base of suppliers, for the majority of whom this level of management is no longer appropriate. The Commission has been listening to the concerns of its contractors and is developing a replacement process.

31. We have developed a solution which will address the Committee's concerns. We plan to cease detailed contract compliance auditing for the majority of civil suppliers in most categories of Legal Help from next year.

32. This will be possible as a result of the proposals in our July 2004 consultation paper *A Tailored Fixed Fee Scheme for Civil (Non-Immigration) Controlled Work*. In that paper, we introduce our proposals by saying that:

"The scheme is part of a wider strategy... designed to secure the future of the Controlled Work scheme at a time when we are under financial pressure. It represents an evolutionary step away from the current system of payment based largely on inputs (time spent) towards the approach we are likely to adopt in the future of paying for outputs (defined pieces of work) at prices fixed by standard or graduated fees, and ultimately by managed competition"

33. The formal consultation period on our proposals ends on 1 November 2004, and after that date we will be assessing the responses in detail to help us decide how best to progress the scheme. In the meantime, there is a voluntary version of the scheme, available since the publication of our consultation paper, offering a number of advantages for suppliers, including an additional 2.5% over and above average case fees. In the light of specific concerns with the voluntary scheme, we have already made a number of improvements to the proposals.

34. We propose to introduce the final version of the mandatory scheme on 1 April 2005. The Tailored Fixed Fee scheme will pay firms a fixed fee for their controlled work cases (except Immigration) based on the firm's average cost per case in each category reported in 2003/04. It has a number of benefits for the LSC and for our suppliers, most notably that it will restrict the growth of average case costs and at the same time reduce the need for cost compliance auditing. This 'stepped back' approach will build the trust that is required for firms to increase the capacity to deliver the cases to meet demand. Income will be more stable with the uncertainty of the cost compliance and extrapolation removed. With average costs controlled through the scheme, this also removes the need for the contract sanctions of reducing starts for suppliers whose average costs significantly increase.

35. Our intention is to maintain suppliers' Legal Help costs per case at the same level as their average costs per case during 2003/04. This will create a more certain level of remuneration with no need to recoup monies after the event as currently happens. The new scheme will be used for one to two years before the introduction of a system of fixed fees, graduated fees or a form of block contracting, depending on the outcome of the current review of supply and purchasing arrangements. Suppliers would benefit from a more certain income and their Legal Help claims would not need to be subject to detailed cost assessment. The scheme would effectively prevent further inflation in Legal Help costs.

36. As a result, the focus of our audit processes will change. We anticipate that the introduction of a fixed fee approach will increase the risk that suppliers may limit the amount and quality of work they undertake in order to improve profit levels. To ensure value for money, we will analyse a range of data including case outcomes to assess the quality of suppliers' performance. We will also look at the mix of suppliers' cases to ensure that the same range of cases is being undertaken, and at the same levels of service. Where issues are identified, these will be explored using individual file assessment and/or peer review processes, both of which will provide evaluations of value for money and the quality of advice.

37. In addition the preferred supplier project will focus on identifying our best suppliers by quality and cost. It will work with these suppliers to identify effective methods of capacity building and delivering services where they are most needed. The preferred supplier pilot will conclude in December this year and following evaluation will be offered to all suppliers who satisfy the qualifying criteria. We anticipate by the end the spring of 2006 up to 30% of suppliers will be working at the preferred level. We will be working with those suppliers within the next business year to fulfil our priorities and to build capacity where required.

38. We are also addressing the issue of auditing the quality of the advice given by developing the use of peer review (see below).

39. We are pleased to report changes which will meet the Committee's key concern.

The principle that two successive category "3" marks means automatic loss of contract – "two strikes and you are out" – is unnecessarily draconian. Even if it were based on a recognisably fair system it would be harsh, and the combination of this rule with the arbitrary application of the LSC's rules makes it unacceptable. A similar mark should begin a period of consultation and assistance which would help solicitors, who may be providing a perfectly good service to the community, to improve their management systems. Simply eliminating them from the list of contract holders is wasteful and counter-productive (para 89).

40. This issue will be eliminated with the introduction of the Tailored Fixed Fee scheme (see above). We maintain that it was the right policy to remove contracts from those solicitors who continued to fail to perform at the level that we set and to over-claim from public funds.

Peer review has been accepted by all parties as providing an appropriate means of audit for practitioners. If properly administered it should reduce bureaucracy and provide a much clearer picture of the value of the service provided (para 94).

41. The Commission is heartened that the Committee has endorsed the use of peer review which the Commission has been developing.

42. It is important that peer review is seen as one of a basket of measures for quality assurance. We expect to rely increasingly on a range of techniques, including peer review and mystery shopping, that will measure quality directly. As we do so, we will be able to move away from proxy measures of the quality of services. We will also develop existing work which seeks to assure quality services by reference to the competency of the individuals providing them.

We were impressed with the strong commitment of many of the solicitors and advice sector workers whom we met. The public service which they carry out deserves wider recognition, as they are often the only barrier between a citizen and complete denial of legal rights. A proper system of access to justice for all the community depends entirely on these professionals.(para 95)

43. The Commission wholeheartedly endorses the Committee's conclusion about the commitment of those providing a publicly funded legal service. We hope to work with the profession on the planned three-year strategy for the Community Legal Service with the aim of together increasing both awareness of the CLS and its funding.

We think that the idea of financial support for those newly qualified entrants into the legal profession who will provide publicly funded legal services is a good one. Initiatives of this kind will become a necessity in order to ensure the public service provided by legal aid solicitors is maintained. We commend the work by the Legal Services Commission in developing policy in this area (para 101).

44. We thank the Committee for its acknowledgement of our work in this area, and are continuing to address this issue. See paragraph 12 above for the summary of work being carried out.

Impact on customers

Any system of legal aid must cater for the most vulnerable in society. They are the people whose problems may often come in "clusters". They also include some of the people who are most likely to suffer from "referral fatigue". We believe that the current system of referring people results in many people giving up on legitimate claims. (para 114)

45. The Commission is very much aware that the system of legal aid and indeed the wider CLS needs to cater for the most vulnerable and the socially excluded. We are involved in a range of work to make advice services more accessible to different client groups who might find it difficult to approach traditional legal advice providers. This is highlighted in the Commission's forthcoming report of the Partnership Initiative Budget (PIB). PIB projects adopt a number of different models to service delivery in order to reach people who would not otherwise have received the advice service they need. The report, amongst other things, focuses on the use of primary health care settings for advice projects and on projects targeted at mental health service users. Over the coming year we will be extending this work and adopting this approach to other vulnerable groups who may be missing out on legal advice from traditional providers; young people; Black and minority ethnic groups, and older people. This will involve joint work with key service providers, and also with the Consumer Strategy Unit of the Department for Constitutional Affairs.

46. We are also aware of the clustering of problems and accept there is a tension between lawyers specialising in one area and the need for the co-called 'whole person' approach. We will be considering this issue when developing the CLS Strategic Plan. We are about to begin a pilot for contracts which will fund a range of legal work for people who have presented as needing legal advice regarding mental health legislation.

47. The issue of “referral fatigue” is one which the Community Legal Service was set up to combat four years ago. Community Legal Service Partnerships (CLSPs) were given the role of producing referral protocols, but the results have been variable. Significant improvements have been difficult for the CLSPs to deliver. We accept that this is an area in which the CLS has not produced the improvements which were hoped for.

48. We believe Community Legal Service Direct telephone advice line has an important part to play in improving the system. It provides a service to which other front-line services can signpost. Community Legal Service Direct will develop “hot links” with other providers of telephone advice – Consumer Direct and National Debtline are obvious examples – so that users can be transferred between them without hanging up. Ultimately, we would like to see managed referrals from Community Legal Service Direct, where an appointment is made for the user with a face-to-face service and information about the case is passed to the new adviser.

49. We are also involved in work to improve ‘signposting’ from other agencies outside the CLS. In particular we have been trialling this work with JobCentrePlus in the East of England. JobCentrePlus staff are being trained to identify that a client has a problem – for example debt – which requires independent advice, and refers him/her to Community Legal Service Direct telephone service. This is to be extended to other regions in England and Wales. Over the coming year we aim to adopt this approach with other key ‘problem noticers’ in a number of sectors, for example the health service.

Broadening means of provision

There is considerable scope for employing knowledgeable advisers who are not solicitors to give advice in specific areas. Often such advisers are at least as good as or better than solicitors in providing for the needs of clients in their area of specialism, for example, welfare benefits or debt. Law Centres provide an established example of how such advice can successfully be provided (para 118)

50. Some of the most pressing problems faced by vulnerable members of society, including problems concerning welfare benefits and debt, have not been part of the service traditionally offered by solicitors’ firms. Before the CLS, there was a substantial shortfall in the availability of advice for people with those sorts of problems. We have now adjusted public funding towards the not-for-profit sector, which has greater relevant expertise in these areas.

51. The introduction of the CLS has seen Commission funding for the not-for-profit sector increase from a negligible amount to more than £50 million per year – including about £25 million per year for Citizens’ Advice Bureaux and about £10 million per year for Law Centres. The Commission has also supported a number of new Law Centres through a variety of mechanisms. For example, in our North Western Region, the Commission, working with partners including local authorities and the Law Centres Federation, helped to establish three new Law Centres, in Stockport, Trafford and Bury, during 2002/03. Cases taken by not-for-profit legal aid suppliers generally demonstrate better outcomes for the client – in 2003/04 83% of completed NfP matters had a clearly positive outcome for the client compared with 63% of completed solicitor matters reported.

Non-independent sources of advice can only be a complement to and never a replacement for services provided from solicitors and independent advice agencies. Ideally, they should be independent of the organisations against which the citizen is claiming and they should not be the only avenue of advice (para 121).

52. The Commission is increasingly approaching the provision of information and access to legal services in a holistic way, rather than simply focusing on legally aided advice service. It is by working with others, both in Government and elsewhere, that we believe that we can work most effectively towards social inclusion.

53. The Commission is extremely pleased to be working with such national governmental agencies as JobCentrePlus and the Pension Service in order to :

- improve the standard of information provision;
- prevent problems arising;
- identify when their clients have problems outside that agency's immediate business remit; and
- and ensure appropriate referrals to sources of legal advice.

This work does not replicate that of independent advisers and solicitors, but should complement it by enabling JobCentre Plus and Pension Service clients to get independent legal advice when they need it.

54. In our work with other agencies the Commission is careful to make the distinction between providing information, and receiving independent legal advice. A government agency can provide independent advice – in the same way as a local authority can – where it is not a party to the issue; in other words, as long as there is no conflict of interest. For, example a suitably trained Pension Service member of a joint team can give independent debt advice, but would not be able to advise a customer who had a dispute regarding his entitlement to Pension Credit. This distinction is being taken fully into account in our work on the Quality Mark with the Pension Service; in order to achieve the Quality Mark there will have to be in place procedures which satisfy the requirement that staff are aware of the point at which clients needs to be referred to independent welfare benefits advice.

More research on the viability of a salaried scheme should be undertaken, following assessment of the LSC's Public Defender Scheme. If any salaried scheme is introduced it must be properly funded (para 131)

55. Although the Commission has no current plans to put in place a salaried service for the generality of legal services falling within the CLS, as part of our overall review of legal aid, we are considering whether a salaried service would be a cost-effective way of dealing with pockets of unmet need. We will be learning from the Public Defender Service, established in 2001 with a four year research programme operating alongside it, and the new directly employed immigration and asylum service which will be based in Birmingham and integrated with the PDS.

We support the view that telephone advice could be made more widely available as a cost-effective source of first-stage advice. It is possible that, in urban areas, face-to-face services would need to be expanded to keep pace with the demand generated by referrals from telephone services.

56. We are pleased that the Committee has supported the development of telephone advice services. Since we gave evidence to the committee, we are pleased to report the successful launch of Community Legal Service Direct on 14 July – an integrated web site and telephone advice line: 0845 345 4 345 and www.clsdirect.org.uk. Advice can currently be obtained across England and Wales for welfare benefits, debt and education; and the service will be developed for other areas of law.

57. We also published on 20 August 'Improving Access to Advice in the Community Legal Service; Report on evaluation research for the Methods of Delivery pilots', chapter one of which covers in some detail the telephone advice pilot which led to the setting up of the national service. A copy has been sent to the members of the committee and can be obtained from www.legalservices.gov.uk

58. In September Community Legal Service Direct received over 20,000 telephone calls. About three-quarters of these callers are requesting contact details of face-to-face advisers and the remainder request and receive either information or a telephone advice service from independent quality assured providers. The demand for the advice service is increasing as such a rate month-on-month that we are planning to increase the capacity of the service.

59. Community Legal Service Direct telephone advice service is intended to complement face-to-face legal help and will continue to provide a valuable entry point to face-to-face advice where this is more appropriate for the client. We will be undertaking work to establish the effect of our telephone advice service on face-to-face local services.

New and alternative technologies can complement services provided under the legal aid system, especially when dealing with hard to reach groups. They provide an important way forward for combining an affordable system with quality advice. If their use is to be successful they must integrate with the rest of the system to enable ease of access for clients and transfer of files between advisers. They must also receive adequate funding. Further research is needed on improving electronic means of access to advice, in particular to enable less literate groups to use information technology (para 143).

60. The Commission is currently compiling an evaluation of strands of the Partnership Initiative Budget (PIB) projects, a number of which include the use of web services and video-conferencing, and we will be developing recommendations based on the experience of these PIB projects. In addition, with the help of advice providers, we are already investigating the feasibility of e-services which could be provided, not only through the web accessed via a computer, but also via other methods such as digital television. Consideration is being given to which groups of people may not be able to use these services, and whether these means of accessing information can be adapted to serve their needs.

61. Community Legal Service Direct is an example of the integrated system combining the internet site, a telephone advice and referrals where necessary. Its website www.clsdirect.org.uk has 50-60,000 visitors a month with anything up to 725,00 page impressions, and the number of people using the site continues to increase. It is now ranked as the second best Government website in the country, with 100% accessibility and 0% pages with errors. With the assistance of independent experts, we are continuing to improve the content on the site.

PART 2

Department for Constitutional Affairs response to recommendations

Below is the DCA response to the Committee's recommendations. As the LSC has responsibility for the administration of the CLS fund and publicly funded legal services providers, they have responded, in a separate annex, to the questions which relate to their specific responsibilities.

The Committee's recommendation is reprinted in italics, with the relevant paragraph number.

The Criminal Defence Service budget is demand led. Increases in spending on criminal legal aid reduce the availability of money for civil help and representation. Provision for civil legal aid has been squeezed by the twin pressures of the Government's reluctance to devote more money to legal aid and the growth in criminal legal aid, as well as the cost of asylum cases. Whatever action the Government may take to reduce the financial impact of asylum cases on the legal aid system, it is likely that the growth in criminal legal aid will continue to be a burden. There may be scope for bearing down on the cost of criminal legal aid by better case management and a new criminal procedure code. The Government should ring fence the civil and criminal legal aid budgets so that the funding for civil work is protected (as immigration work is) and considered quite separately from criminal defence funding (para 13).

Civil legal aid is already considered separately from criminal (see below). Its level could be maintained regardless of increases in criminal legal aid expenditure only by exceeding the Government's expenditure plans for legal aid as a whole, which maintain its value in real terms (from the level it has reached with real terms rises over several years).

Both the CDS Budget and CLS Fund are part of the Department's Delegated Expenditure Limit (DEL). The rules governing the management of a DEL provide flexibility, allowing resources to be switched as demand and priorities dictate, and for carrying forward resources from one year to the next. To ring-fence the CDS and CLS would remove that flexibility and severely impair prudent and effective financial management.

The Treasury expects departments to prioritise competing pressures and fund these from within their overall annual limits (DELs), as set in spending reviews. Resources from the very limited, centrally held DEL Reserve are intended only for genuinely unforeseeable contingencies. DCA, like all other departments, is expected to remain within our DEL limits which are strictly enforced.

We recognise that expenditure on criminal legal aid is increasing at a faster rate than civil. This may give rise to fears that people may be denied help from the CLS as a result. Therefore, for reasons of transparency, and to allay fears that civil is being squeezed to pay for criminal, section 5(2) of the Access to Justice Act provides that the Lord Chancellor shall pay to the LSC the amount he determines is appropriate for funding the Community Legal Service, while 5(4) requires the Lord Chancellor to lay before Parliament a copy of every determination of the CLS Fund.

The Fundamental Legal Aid Review (FLAR) is considering the possibility of area specific budgets (as with immigration and asylum). These would allow legal aid expenditure to be seen as part of a wider dispute resolution system and give some measure of budgetary protection.

It is vital for the Government to ensure that part of the cost of calculation of policy initiatives includes an assessment of the impact on the legal aid budget and that there is adequate liaison between the Constitutional Affairs Department and departments such as the Home Office which legislate in relevant areas. This is a key recommendation; we expect the Government to be able to demonstrate that it has significantly improved its system for ensuring that legislative changes proposed by departments are costed to take into account the full impact on the legal aid budget (para 15).

DCA does undertake assessments of the impact of other departments' policy changes on the courts and legal aid etc. Our estimates of future legal aid expenditure include additional expenditure stemming from policy change, in particular new legislation. Such estimates were included in our public expenditure bid, on the basis of which the Chancellor of the Exchequer set our allocation for 2005/06 to 2007/08. We have no reason to believe our estimates of future expenditure are inaccurate given the uncertainties attached to the effect of any future legislation. But we have recently recruited an additional operational researcher with a view to improving this modelling, and our overall forecasts. It is a convention in Government that the Department responsible for instigating change is also responsible for ensuring agreement as to funding the financial implications of their policy falling to other Departments and agencies. There is room for improving co-operation between departments in this area, in particular by improving end to end planning of the Criminal Justice System. Part of this will be improving our advance warning and understanding of other Government Department's intentions.

At present, the legal aid system is increasingly being restricted to those with no means at all. There is a substantial risk that many people of modest means but who are homeowners effectively will fall out of the ambit of legal aid. In many cases this may amount to a serious denial of access to justice (para 105).

It is not possible to extend financial eligibility to legal aid with existing resources. Those in receipt of Income Support or income based Jobseeker's allowance and Guarantee State pension credit, automatically qualify financially for (non-contributory) public funding. Those at the top end of eligibility are offered funding only on the basis that they agree to pay contributions towards their legal costs. Paying contributions places the funded client, as far as possible, in the same position as an unassisted party, for whom taking legal action may involve some sacrifices. It is for the applicant to decide whether the contribution he or she is asked to pay is reasonable in the light of the importance of the proceedings to them.

Public funding is intended to help the least well-off in society with the costs of their legal advice. The Government recognises that those who are above the limits might still not be able to readily afford legal representation, and may feel that the system is unfair, but there are many competing priorities for public funding and a threshold has to be set somewhere. The development of new initiatives like CLS Direct delivers improved access to advice on a range of legal problems. It offers free, high quality information and advice to everyone and help with civil legal cases for those who qualify for legal aid.

The Legal Services Commission published a consultation paper, "A new focus for civil legal aid – encouraging early resolution; discouraging unnecessary litigation" on 22 July 2004. The consultation paper, which was published with the agreement of DCA Ministers, proposes reforms to the funding of civil cases under the Community Legal Service. It includes proposals to align financial eligibility levels for Legal Help and Legal Representation, and to abolish the £100,000 'equity disregard'. Measures would be put in place to ensure that the most vulnerable are protected. The consultation closed on 15 October 2004 and Ministers will announce the way forward in due course.

It is not acceptable that in employment cases employees can be forced to represent themselves in circumstances where private employers are able to employ lawyers to represent them. If proceedings are to be fair, there needs to be equality of arms. Legal aid should not automatically be excluded from such tribunal hearings (para 111).

The Government does not accept that blanket availability of legal aid in employment tribunal cases is necessary. Employment tribunal procedures are designed so that people can prepare and present their own cases, and there is an established tradition of advisers who are not legally trained, whether trades unions, friends, colleagues or other sources of advice. Those bringing cases alleging discrimination may also seek advice, and in some cases receive representation, from the equality commissions (currently the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission which will, in the future, come together under the umbrella of the Commission for Equality and Human Rights).

Funding for general legal advice (falling short of advocacy) is already available under the Legal Help scheme. In addition, the Lord Chancellor has the power, on receipt of a recommendation from the Legal Services Commission, to authorise “exceptional funding” for representation under the Access to Justice Act 1999 s.6(8)(b) in those few cases where representation may be essential for a fair hearing, and where no other sources of help can be found. It is worth noting that, although “exceptional funding” has been available since April 2000, the Legal Services Commission have found it appropriate to recommend very few applications to DCA in employment tribunal cases, and none at all so far in 2004.

Full Representation is available for cases brought in the Employment Appeal Tribunal.

The Department’s views on the appropriate provision of legal aid in tribunals are set out at paragraphs 10.14-10.15 of the White Paper “Transforming Public Services: Complaints, Redress and Tribunals” (Cm 6243) published in July 2004.

Legal Expenses Insurance can be useful as a supplement to the Legal Aid system. It has the advantage of already being available for some areas of law or for specific purposes. If it were to be relied on as an important addition to the general system of civil legal cover it could be part of the usual household insurance contract. This might require an element of compulsion (para 134).

The BTE (Before the Event insurance) market is stable and growing at a steady rate. Coverage of the population is increasing mainly through add on policies to household or motor insurance cover. Policies typically cover consumer, employment, property, tax, data protection, bodily injury, motor prosecutions and uninsured loss in motor and associated products/services includes help lines and counselling. Take up is largely amongst people above legal aid eligibility, partly due to choice and partly because people eligible for legal aid are over represented in the 25% of households who do not have any form of household insurance. The price of BTE is low partly due to low awareness (many forget or don’t appreciate they have the cover) and as such low claim rates.

Europe offers little in the way of direct comparisons because of the different legal systems and market histories. The domestic market is a mix of BTE, after the event insurance, conditional fee agreements (CFA), Legal Aid provision, pro bono and traditional hourly funding. The after the event element promoted by the Access to Justice reforms introduced in 2000 is unique and has become the most obvious direct substitute or complement for legal aid provision. Direct intervention in the BTE market through some element of compulsion could destabilise a currently healthy regime and inhibit future capacity or indeed promote unsustainable growth. At a recent roundtable including legal and insurance representatives on litigation funding issues hosted by David Lammy it was generally felt that there could be severe problems if expansion of BTE coverage was forced too quickly either through over vigorous marketing or some form of compulsion.



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