



Northern Ireland  
Assembly

## Research and Library Service Briefing Note

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# Information Briefing on Legal Aid funding

## 1. Introduction

This paper will examine legal aid funding issues that have been highlighted from three sources – *National Audit Office Report: The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission*; *House of Commons Committee of Public Accounts: The procurement of legal aid in England and Wales by the Legal Services Commission* and *Dominic Grieve QC MP Lecture to Northern Ireland Bar: What Price Justice?* The paper will summarise the main aspects, under individual headings, that have been raised. Detailed information extracted from these three sources is included in appendices to this paper.

## 2. The role of the Legal Services Commission

The Legal Services Commission (LSC), which runs the legal aid scheme in England and Wales, works in partnership with solicitors and not-for-profit organisations to provide information, advice and legal representation to people in need.

All three sources of information raised issues relating to the effectiveness of the LSC in managing legal aid funding. Over the three reports, it was documented that the LSC:

- lacks information on cost structures and profit margins of different solicitors' firms to set fees at an appropriate level;
- is unable to account for significant variation in profits by solicitors carrying out criminal legal aid work – on average solicitors' firms reported an 18.4% profit; 37% made more than 20% profit and 16% reported no profits at all from legal aid;
- has poor financial management and weak internal controls leading to an estimated overpayment to solicitors of £25million in 2008-09 accounts;<sup>1</sup>
- holds incomplete and inaccurate information centrally about suppliers which prevents it from being an intelligent Commissioner;
- holds little information about legal aid users and their perceptions of the service;
- has struggled to recruit and retain the right skills on its senior team and high staff turnover has been disruptive and expensive; and
- has failed to pilot or fully evaluate significant reforms to how it procures criminal legal aid some of which have not met their original timetable.

### **3. Relationship between the LSC and Ministry of Justice**

Outlined briefly below are a number of issues that have been raised regarding the relationship between the LSC and the Ministry of Justice (MoJ):

- Their division of policy responsibilities is confusing and poses a risk of duplication on some issues, a lack of coverage on others and creates uncertainty;
- This is demonstrated by the fact that the MoJ spends £2 million annually on legal aid policy work whilst the LSC spends £125 million on administration; and
- A review should be undertaken as to the number of staff involved in making legal aid policy in both organisations with the possibility of reducing these numbers.

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<sup>1</sup> The most recent published accounts for the Northern Ireland Legal Services Commission (NILSC) are for 2005/06. The report raised some key issues that led to that year's Grant Account being qualified: Disagreement with the NILSC's accounting policy for provisions as not compliant with accounting standards, irregular payments of around £177,000 for legal advice for a civil case, relating to the Omagh bombing and limitation in scope arising from a lack of sufficient evidence to support the regular nature of legal aid grant expenditure.

Northern Ireland Legal Services Commission – Annual Report and Financial Statements for the year ended 31 March 2006  
[http://www.nilsc.org.uk/uploads/publications/documents/ARAC2005\\_06.pdf](http://www.nilsc.org.uk/uploads/publications/documents/ARAC2005_06.pdf)

## 4. Policy changes by the LSC

This section of the paper considers the impact of a number of policy changes which have been introduced by the LSC. In general, however, it has been noted that issues such as effectiveness, satisfaction levels and cost savings, have been difficult to evaluate due to a lack of information.

### 4.1 Fixed fees for legal advice at the police station

These were introduced in January 2008 in order to control legal aid costs for representing clients at police stations by replacing hourly rates and travel and waiting allowances. The LSC identified the opportunity for savings through greater efficiency in a number of urban areas whilst modifying a small number of duty solicitor schemes, mainly in rural areas. The LSC believe the new schemes will now reflect the way in which police carry out work on the ground<sup>2</sup>. The change was designed to save £8 million a year. In spite of not being piloted due to lack of time, the new arrangements appear to have saved £7.5 million in 2008-09.

### 4.2 Means testing applicants' incomes

A means test applicable to applicants earning between £12,475 and £22,325 was introduced, with those exceeding the upper threshold being exempt unless they can prove hardship. Applicants on prescribed benefits are passported through the tests but still must pass an interest of justice test.

- In 2008-09 – 562,000 people passed the means test and Interest of Justice test equating to 93% of those who applied for criminal legal aid; and
- Magistrates have suggested that this has led to an increase in the number of defendants representing themselves – LSC has yet to evaluate this.

### 4.3 Advocates Graduated Fee Scheme (AGFS)

The AGFS was originally introduced in 1997 with amendments made in 2007 following the Carter Review<sup>3</sup>. The AGFS increased base fees, reduced the number of bolt-on payments and introduced a new payment principle which meant that the AGFS payment should be made to a single named advocate (or two named advocates in a two counsel case)<sup>4</sup>. In 2007 fees were increased between 11% and 15%, the first increase in 10 years; LSC forecast that this would increase advocacy costs by £11 million to £20 million a year.

<sup>2</sup> Final fixed scheme for police station work

[http://www.legalservices.gov.uk/press/Final\\_police\\_station\\_fees\\_Oct07.pdf](http://www.legalservices.gov.uk/press/Final_police_station_fees_Oct07.pdf)

<sup>3</sup> Lord Carter's Review of Legal Aid Procurement 'Legal Aid – A market-based approach to reform' 2006

<http://www.legalaidprocurementreview.gov.uk/docs/carter-review-p1.pdf>

<sup>4</sup> Legal Services Commission

[http://www.legalservices.gov.uk/criminal/advocates\\_graduated\\_fee.asp](http://www.legalservices.gov.uk/criminal/advocates_graduated_fee.asp)

#### 4.4 Litigators' Graduated Fee Scheme (LGFS)

The LGFS was introduced in January 2008 for work to prepare Crown Court cases with remuneration to be based on: alleged offence; whether case goes to full trial; number of defendants; and pages of prosecution evidence. The LGFS aims to encourage litigators to speed up cases whilst maintaining quality of representation for longer and more serious cases. Furthermore LGFS aims to simplify the process of claiming a bill and speed up payment<sup>5</sup>. In relation to the LGFS it was observed that:

- Elements are broadly in line with those that CPS used to pay its litigators;
- LSC estimated that this saved £15 million in 2008-09 down from an early forecast of £28 million; and
- Post Implementation Review has started although until complete LSC cannot establish if expected savings have been achieved.

#### 4.5 Higher Court Advocates

Higher Court Advocates are solicitors who have been given rights of audience to appear at the Crown Court. These rights were created under the Courts and Legal Services Act 1990<sup>6</sup> and rights were strengthened by the Access to Justice Act 1999<sup>7</sup>. Solicitor Advocates must undertake an advocacy course to be eligible. Impacts noted included:

- Number of criminal law Higher Court Advocates in England and Wales increased from 1,160 in 2004 to 2,582 in 2009;
- 45% of solicitors' firms use Higher Court Advocates with 33% indicating their use has increased in the last five years; and
- Barristers suggested that firms experiencing a decline in their incomes from criminal legal aid are employing in-house solicitor advocates, because this enables them to use the same solicitor to access income from both graduated litigators' and advocates fees for the same case.

#### 4.6 Very High Cost Criminal Cases

The chart below outlines what constitutes a Very High Cost Criminal Case.

<sup>5</sup> Legal Services Commission

[http://www.legalservices.gov.uk/criminal/litigator\\_graduated\\_fee\\_scheme.asp](http://www.legalservices.gov.uk/criminal/litigator_graduated_fee_scheme.asp)

<sup>6</sup> The Courts and Legal Services Act 1990

<http://www.legislation.gov.uk/ukpga/1990/41/contents>

<sup>7</sup> Access to Justice Act 1999

<http://www.legislation.gov.uk/ukpga/1999/22/contents>

**A Very High Cost Criminal Case (VHCC)**

A case where the trial is likely to last:

- more than 40 days
- between 25 and 40 days and meets the criteria below.

Trials that last between 25 and 40 days are classified as VHCC if they are:

- terrorism prosecutions or
- Serious Fraud Office prosecutions.

or have two of the following:

- at least 10,000 pages of prosecution evidence
- at least 10,000 pages of unused or third party material
- more than five defendants

the case is a fraud or serious drug case where the value exceeds £1 million.

Introduced in 2001 the LSC set a target to save 30% of the cost of Very High Cost Criminal Cases (VHCCs) from a baseline of 2003-04. Amongst the reports it was observed that:

- The limited evidence available suggests the LSC has achieved this for largest cases but not the lower value cases
- In 2008-09 the LSC let 432 contracts at a cost of £112 million – this amounts to almost 10% of the criminal legal aid budget;
- These cases are managed through individual contracts with the LSC agreeing with solicitors and advocates in advance the work a case requires and that LSC will pay;
- In July 2007 the LSC attempted to create a panel of solicitors and advocates and sign an overall contract with each member of the panel, but by March 2008 only 130 barristers including 2 QCs had signed up;
- Negotiations with the bar began in summer 2008 on a scheme to replace the panel arrangements;
- In November 2008 the LSC announced a 5% increase in fees paid under VHCCs and an extension was agreed to current VHCC contracts until July 2010; and
- LSC is currently considering how to fund VHCCs in future – options under consideration include abandoning contracting arrangements in favour of expanded use of graduated fees.

## 5. Other issues relating to legal aid

The following are a number of other issues relating to legal aid funding which have been noted in at least one of the three reports examined:

- Only around half of people detained at police stations take up their right to free legal representation;
- Potential impact of increasing use of solicitors in the Crown Court on the long-term sustainability of the junior bar;
- As the costs of legal aid have increased eligibility has been squeezed – in 1979, 80% of people would have had some or all of their costs met; now it is fewer than half, and fewer than a quarter qualify for full assistance; and
- Leading criminal lawyers have suggested that convicted defendants on legal aid should be required to pay a fixed fee towards their cost of representation - £200 has been suggested.

## 6. Proposals for alterations to legal aid funding

This part of the paper briefly outlines two mechanisms identified from the three reports which deal with legal aid funding in other jurisdictions. Both Germany and France were identified as having reduced legal aid costs significantly. In Germany costs are limited to the final value of the claim – this means greater certainty for clients, lawyers and insurers, and it reduces incentives to string out litigation.

In France a scheme operates, CARPA, whereby all clients monies held by solicitors go directly into one bank account underwritten by the government. A better interest rate is achieved due to pooled monies – the client can thus get exactly the rate of interest that they would receive from a local client account but the differential interest is used to fund the French equivalent of legal aid. This brings in approx £300 million annually.

September 2010

## Appendix 1:

### The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission – A National Audit Office Report

#### **1. Key findings**

<p>The Government's policy is to rebalance legal aid spending towards civil legal aid. In response, the Commission has worked to control the amount of expenditure incurred on criminal legal aid, and this has fallen in real terms by 12 per cent over the past five years.</p>
<p>Under the overall policy direction of the Ministry of Justice, the Commission has primarily controlled criminal legal aid expenditure by implementing a series of significant reforms to the remuneration and eligibility of criminal legal aid.</p>
<p>The Commission is undergoing a major internal transformation to produce further cash savings, which also aim to make it a more effective commissioner of legal aid. The Commission is tasked with securing £193 million in annual net cashable savings over the 2007 Comprehensive Spending Review period, and plans to reduce staffing by a third by 2013.</p>
<p>The Commission should do more to understand the market for criminal legal aid to help it make fully informed decisions. In particular, it lacks a firm grasp of the cost structures and profit margins of different types of legal aid firms and how these vary geographically.</p>
<p>The Government has stated its intention to move towards a system of Best Value Tendering for the procurement of criminal legal aid, under which the market price would be determined by competition between suppliers.</p>
<p>There are tensions in the relationship between the Commission and the legal professions that have on occasion threatened the delivery of legal aid. Attempts by the Commission to change its contracting arrangements in the most complex Crown Court cases in 2007 resulted in many barristers declining to sign up to new contracts when the Commission proposed reduced hourly rates, while the consultation on Best Value Tendering provoked widespread opposition among solicitors. Two-fifths of respondents to our solicitors' survey perceived the Commission as "unhelpful" for reasons including a lack of understanding of the legal system.</p>
<p>Only around half of people detained at the police station take up their right to free legal representation.</p>
<p>The data that the Commission uses to make payments for criminal legal aid services is inaccurate and incomplete.</p>

The Commission controls expenditure on the most costly Crown Court cases with individual contracts and contract managers for each case, but it lacks the data necessary to ascertain the maximum savings possible from the use of these contracts. In 2008-09, the Commission spent £112 million on Very High Cost Criminal Cases. These have a separate arrangement under which cases longer than 40 days in court or with more than 10,000 pages of evidence are managed by individual contract managers who agree to the work which a defence team undertakes. However, in 2008-09, firms did not notify the Commission of £30 million worth of cases that should have qualified for individual contracts. The Commission introduced Very High Cost Criminal Cases in 2001. The Commission set itself a target to save 30 per cent of the cost of these cases from a baseline of 2003-04. The limited evidence available suggests it has achieved this target for the largest cases, but not for the lower value cases.

## **2. Recommendations**

The current division of policy responsibilities between the Ministry and the Commission is confusing and poses a risk of duplication on some issues and a lack of coverage of others.

Despite recent reductions, the Ministry still spends approximately £2 million annually on legal aid policy work, which is in addition to the Commission's own administration budget. The Ministry should review the level of staff involved in making legal aid policy in both organisations and look for opportunities to reduce this number.

The Commission does not currently hold enough information centrally about its suppliers to be an intelligent commissioner.

The Commission also holds little information on the users of legal aid and their perceptions of the services offered. The Commission should consider further research on the reasons for the low level of take up in police stations and the consequences of suspects moving through the criminal justice system without representation.

The Commission has been faced with implementing significant reforms to how it procures criminal legal aid. For a variety of reasons some reforms have not been piloted, some have not met their original timetable, and some have not to date been fully evaluated. Starting with Best Value Tendering, and using Office of Government Commerce guidance, the Commission should pilot all major changes, evaluate the pilots, and provide a set timetable for their introduction including fixed dates for post-implementation reviews.

The Commission receives over a million claims for payment on criminal legal aid annually. The quality of data supporting those claims is poor and there are weaknesses in the Commission's financial controls over the accuracy of payments.

The Commission has faced a number of difficulties in managing its Very High Cost Criminal



Cases (VHCC), including not always being notified of cases that are in practice a VHCC. The Commission should work to better identify VHCCs and undertake further analysis of the costs of these cases to determine whether the thresholds for VHCCs should be changed, or whether it would provide better value for money to integrate some or all of them into the graduated fee schemes.

The Commission considers that the lead role in assuring the quality of work undertaken by suppliers should sit with their regulators and representative bodies. In the absence of such universal quality measures provided by the professions, the Commission should ensure peer review remains the principle tool for assessing quality. It should also obtain user feedback forms from firms and ensure that the preferred method of measuring the quality of advocacy in the Crown Court is introduced in an expeditious way.

### **3. The Criminal legal aid landscape**

In January 2008, the Commission introduced fixed fees for legal advice at the police station, replacing hourly rates and travel and waiting allowances. England and Wales are divided into 245 areas, with fixed fees for each, ranging from £138.72 for police stations in Blackpool to £340.43 for attending a police station at Heathrow airport, which accounts for the complexities of dealing with airport cases. The introduction of fixed fees was not piloted due to a lack of time, and was designed to save £8 million a year. By May 2009, the Commission was to have completed a Post Implementation Review but this was delayed for at least three months because of other work. We have confirmed that the new arrangements saved £7.5 million in 2008-09.

An initial means test assesses applicants' incomes, adjusted according to the number of their dependents. Defendants claiming prescribed means tested benefits are 'pass-ported' through the test but remain subject to an Interest of Justice test. A full means test is conducted if the applicant's adjusted income is between £12,475 and £22,325. Applicants whose adjusted income exceeds £22,325 are refused funding unless they can prove hardship. Capital is not taken into consideration. In 2008-09, 562,000 people passed the means test and the Interest of Justice test – 93 per cent of those who applied for criminal legal aid. For 2008-09, the Commission calculated that the means test achieved a gross saving of £51.8 million at a cost of £20.3 million; a net saving of £31.5 million. We found that this saving was calculated on the basis of 2006-07 fees, however, which were higher than those in place in 2008-09. Consultation with magistrates suggests that reintroducing the means test has resulted in an increased number of defendants representing themselves in magistrates' courts. The Commission has yet to evaluate if this has occurred.

In April 2007, the Commission introduced revised standard fees for legal aid at the magistrates' court in 16 urban areas. Separate travel and waiting payments were abolished, perceived as an incentive to firms to act inefficiently. Outside the 16 areas, firms are still

remunerated under pre-existing arrangements. The revised fees were designed to save £8 million a year but were introduced without piloting. A Post Implementation Review scheduled for completion by May 2009 was delayed by at least three months because of other work. The Commission was unable to supply sufficient evidence to fully support whether it has made the planned savings as a result of these fees.

#### **4. Advocates Graduated Fee Scheme**

An Advocates Graduated Fee Scheme has been in place since 1997. The Carter report recommended this scheme be revised to include enhanced payments for the first two days of a trial, and also to incorporate payments until then not covered by graduated fees. These amendments were introduced in 2007. Under the new arrangements, fees were increased by between 11 and 15 per cent, the first increase to advocates' payments in 10 years. As a result, the Commission forecast the cost it paid for advocacy would increase by £11 to £20 million a year. Barristers told us that while the advocates graduated fee scheme did not compare favourably with what they earn from private work, they viewed it positively as they considered it stable, remunerated them at a fair rate, and was sufficiently flexible to take account of many of the events in a trial likely to increase their workload.

#### **5. Litigators' Graduated Fee Scheme**

On 14 January 2008, the Commission introduced a litigators' graduated fee scheme for work to prepare Crown Court cases. Remuneration is based primarily on the nature of the alleged offence, whether the defendant pleads guilty or goes to a full trial, trial length, pages of prosecution evidence, and number of defendants. Many of the elements of this scheme were replicated from the long-standing Advocates Graduated Fee Scheme, and are broadly in line with that used by the Crown Prosecution Service to pay its litigators.

The Commission's estimate is that the litigators' fee produced a saving of £15 million in 2008-09, a reduction from an earlier forecast of £28 million, but this level of saving is expected to rise significantly in future. The Commission has recently begun a post implementation review. Until that is complete, it cannot establish if the savings expected have been generated.

A concern raised by barristers was that the introduction of the scheme could mean it could become uneconomic for some solicitors to attend court to provide litigation support. In June 2009, the Bar Council responded to a Ministry of Justice consultation on the Criminal Defence Service (Funding) Amendment Order 2009, stating that litigators were regularly not attending Crown Court hearings.

## **6. Higher Court Advocates**

During interviews, barristers raised concerns about the increasing use of Higher Court Advocates. The Courts and Legal Services Act of 1990 allows solicitors to act as advocates at the Crown Court, a right strengthened by the 1999 Access to Justice Act. Barristers maintain that solicitor advocates do not acquire the same level of advocacy experience as a barrister by their typical career path in a set of Chambers, and that this affects the quality of defence they supply. According to Law Society figures, the number of criminal law Higher Court Advocates in England and Wales was 1,160 in 2004, and had risen to 2,582 in September 2009. Forty-five per cent of solicitors' firms we surveyed said they use Higher Court Advocates, and 33 per cent of firms reported their use had increased over the past five years. In consultation with the NAO, barristers suggested that firms experiencing a decline in their incomes from criminal legal aid are employing in-house solicitor advocates, because this enables them to use the same solicitor to access income from both graduated litigators' and advocates fees for the same case. Solicitor advocates must pass through an accreditation scheme before they are able to appear in the Crown Court. The aim of this is to achieve an equivalent level of skills as those of barristers. The Law Society is initiating a training package aimed at developing the skills of solicitor advocates.

## **7. Very High Cost Criminal Cases**

The Commission manages the most complex Crown Court cases through a separate process termed Very High Cost Criminal Cases (VHCCs), introduced in 2001. These differ from other Crown Court cases in that they are not remunerated using graduated fees. Instead, the Commission's Complex Crime Unit manages each case through an individual contract, agreeing with solicitors and advocates in advance the work a case requires and the Commission is willing to pay for. It is at this stage that the Commission makes most savings by disallowing proposed work. This process occurs every three months, and solicitors and advocates subsequently submit evidence to support work undertaken. In 2008-09, the Commission let 432 VHCC contracts, and spent £112 million on such cases.

### **A Very High Cost Criminal Case (VHCC)**

A case where the trial is likely to last:

- more than 40 days
- between 25 and 40 days and meets the criteria below.

Trials that last between 25 and 40 days are classified as VHCC if they are:

- terrorism prosecutions or
- Serious Fraud Office prosecutions.

or have two of the following:

- at least 10,000 pages of prosecution evidence
- at least 10,000 pages of unused or third party material
- more than five defendants
- the case is a fraud or serious drug case where the value exceeds £1 million.

## **8. Revising the arrangements for VHCCs**

Until January 2008, the Commission signed separate contracts for each VHCC with the law firm providing the litigation and the advocates providing the defence. In July 2007, the Commission attempted to create a panel of solicitors and advocates and sign an overall contract with each member of this panel.

By March 2008, a large number of solicitors had signed up to this contract but only 130 barristers had done so including only two Queens' Counsel, the most senior barristers. Approximately 70 Higher Court Advocates also joined the panel. This did not provide the advocates needed to provide legal aid in VHCC cases in England and Wales. The Bar Council contended that the remuneration offered to barristers compared unfavourably with other types of defence work, and that the contractual terms were unacceptable.

Negotiations with the Bar on a scheme to replace the panel arrangements began in summer 2008. In the interim one high profile criminal trial was declassified as a VHCC and paid using graduated fees so it was not delayed. For other cases non-panel advocates could be used. In November 2008, a five per cent increase in fees paid under VHCCs to barristers and solicitor advocates was introduced by the Commission.

In 2009 the Commission initiated a further consultation with the Bar over options to replace the compromise arrangements, and it extended the current VHCC contracts to July 2010. The Commission is currently considering its options for alternative schemes. The Bar Council is also producing its own proposals for the remuneration of complex cases, and submitted its draft scheme to the Commission in September 2009. The Commission is due to undertake a further consultation with the Bar Council in November 2009.

## **9. Evaluating the Value for Money of VHCCs**

The aim of introducing VHCCs was to save 30 per cent of costs incurred on such cases against the baseline year of 2003-04. In 2007, the NAO evaluated the Commission's progress and expressed concern at the risk affecting the assumptions underpinning the

savings calculation, such as the proportion of cases going to trial and the proportion of complex to simple cases. The Commission has not assembled sufficient data to alter the assumptions underpinning its calculations for savings from VHCCs.

The Ministry and the Commission have both undertaken research on the cost of VHCCs and how much trials paid as VHCCs would have cost if the defence teams had been remunerated using the graduated fee schemes. The limited evidence available suggests that for the largest Crown Court cases the Commission has achieved its target of spending an average of 30 per cent less on such cases and that these cases cost less under VHCC arrangements. For the smaller, lower value cases evidence suggests that cases are costing more than in 2003-04 and that the Commission would be paying less using the graduated fee schemes. Additionally, there are some omissions in the data the Commission collects from the Courts Service for VHCCs, such as what constitutes a full day in court. The Commission only started to routinely collect the data necessary to make robust cost comparisons between VHCCs and graduated fees in 2009. As a result, the Commission does not expect to make any change to the definition of a VHCC for the 2010 contracting round.

## Appendix 2

### House of Commons Public Accounts Committee – The procurement of legal aid in England and Wales by the Legal Services Commission

#### **1. Summary**

The Legal Services Commission – a Non-Departmental Public Body of the Ministry of Justice – spends £2.1 billion a year on buying civil and criminal legal aid, mainly from solicitors and barristers, and a further £125 million on administration. The Commission has successfully arrested the increase in legal aid spending in the last five years, but we found it is an organisation with poor financial management and internal controls and deficient management information.

The Committee was very concerned that such weaknesses in the Commission's performance had occurred when the Ministry of Justice spends over £2 million a year itself on legal aid policy matters and on overseeing the Commission. We found confusion and uncertainty about the respective roles of the two organisations which had led to duplication of effort on some issues and a lack of clarity about who should be responsible for others.

Because the Commission is the sole buyer of legal aid, it is important that it knows it is paying the right price for this and the effects its policies are having on the sustainability of providers. But it does not know enough about costs and profitability of firms to know if it has set fees at an appropriate level. Moreover, there are gaps in the arrangements to assure the quality of criminal legal aid procured which make it harder to assess whether the services

delivered represent good value for money.

The Commission considered the introduction of tendering would remove the imperative for it to know the market, because prices would be set by competition. The recently announced abandonment of its plans to introduce its tendering proposals following representations from the legal profession leaves the Commission not able to assess if it is paying a reasonable price for legal aid. In particular, significant expenditure is incurred on the largest cases that take place primarily in the Crown Court and a small number of barristers are earning substantial fees from such cases. Despite playing a more active role in managing these cases, the Commission has not done the analysis to determine if its current approach is cost effective.

## **2. Conclusions and Recommendations**

There is a lack of clarity in the respective roles of the Ministry of Justice and the Legal Services Commission, leading to uncertainty and duplication.

The Commission has failed to get a grip of its financial management and weak internal controls led to its accounts being qualified in 2008-09 because of an estimated £25 million of overpayments to solicitors.

The Commission was unable to account for the significant variation in profits from criminal legal aid work reported by solicitors.

The Committee is concerned that the increasing use of solicitors to conduct work in the Crown Court is threatening the long term future of the junior criminal bar and may be affecting the quality of advocacy being provided in the Crown Court.

Everybody is entitled to free legal aid if they are held by the police, but only about half of people take this up.

Although the Department and the Commission launched a separate system for paying the most expensive Crown Court cases in 2001, eight years later they still do not know whether this system gives value for money.

While the Committee accepts that specialist skills need to be properly remunerated we were concerned to find that some barristers, notably Queens Counsel, can earn up to £1 million a year from publicly funded criminal legal aid cases.

The Commission has struggled to recruit and retain the right skills on its senior team where the high turnover of staff has been disruptive and expensive.

The Commission lacks a clear strategic direction, reflected in its poor management of charges

to legal aid detailed by Lord Carter.

The Committee was disappointed, given the serious nature of the issues discussed at this hearing, that the Ministry of Justice was not represented by its Accounting officer.

### **3. The delivery of criminal legal aid**

Legal aid solicitors reported a wide disparity in profits made from criminal legal aid. On average, solicitors' firms reported that they made 18.4% profit from criminal legal aid, and 37% of firms made more than 20%. However, 16% of firms reported that they made no profits at all from legal aid.

The Commission sets the fees it pays to suppliers without having good knowledge of the costs borne by suppliers, and it was unable to account for the wide disparity in profits derived from legal aid work by solicitors.

The Committee was concerned about the impact upon the quality of publicly-funded advocacy of an increased number of solicitors conducting defence work at the Crown Court. They were also concerned about the impact that this increasing use of solicitors in the Crown Court would have upon the long term sustainability of the junior bar.

The largest and most expensive cases at the Crown Court accounted for almost 10% of the criminal legal aid budget. The cost of these cases was driven in part by the high fees paid to a small number of barristers, particularly Queens Counsel, which can result in an individual barrister earning up to £1 million a year from the criminal legal aid fund. The high cost was also driven by the considerable amount of time it took these cases to go through the courts. To control the cost of these cases, the Commission had introduced a separate contracting arrangement in 2001. This involved managing cases through individual contracts and agreeing with solicitors and advocates in advance the work a case required and that the Commission was prepared to pay for it.

The Commission was unable to demonstrate the value for money of this contracting arrangement for anything other than most expensive Crown Court cases, and it had not centrally assembled the data necessary to make this evaluation. The Commission assured the Committee that this situation had been rectified and data was now being brought together. The Commission announced plans to reach a decision on how to fund the most expensive Crown Court cases in future in July 2010. Options that it was considering included abandoning its contracting arrangements in favour of expanded use of graduated fees.

## Appendix 3

### Dominic Grieve QC MP Lecture to Northern Ireland Bar – What Price Justice? 4<sup>th</sup> February 2010

Since 1999, the cost of Legal Aid in Northern Ireland has increased by 130 per cent – from £34.5 million in 1999 to £80 million in 2009.

And as the Bill has risen, eligibility has been squeezed. In 1979, 80 per cent of people would have had some or all of their costs met; now it is fewer than half, and fewer than a quarter qualify for full assistance.

The result is that some perfectly deserving cases are being starved of funding because the litigant does not meet the strict eligibility criteria for assistance – an example, for instance, would be the pensioner who has bought his own council house, seen it rise in value, but has only a modest income and no means of realising equity in what is, after all, his home and then finds himself facing a boundary dispute with a predatory neighbour.

In contrast, just down the road and also in my constituency, a traveller who has deliberately breached planning regulations to develop Green Belt land to create a permanent site for travellers caravans, receives tens of thousands of pounds of Legal Aid to argue for the right to remain there permanently.

Such examples matter, because as Legal Aid moves from being a near-universal service to a safety-net for a minority selected by the State for reasons of social policy, as more is spent for the benefit of fewer people, the system comes to depend for its continuation on the willingness of those who will be unable ever to benefit from the scheme.

Legal Aid is the largest item of expenditure by the Ministry of Justice after prisons and probation. It cannot be immune to the need for savings.

Legal Aid spending per head in England and Wales, with Northern Ireland only a little behind, is twice as high as in the Netherlands; four times higher than Canada and New Zealand; five times higher than in Ireland and Sweden; and around ten times higher than in France and Germany.

I don't think anyone has the definitive answer as to why legal aid spending in the UK has become so high. It isn't simply down to the adversarial nature of our justice system – look at Canada and New Zealand. A key factor must be the level of crime: the Ministry of Justice's own research suggests that in the UK, the criminal legal aid budget suffers from a double pressure of high crime, especially violent crime, leading to a relatively high number of cases coming before the courts, and a very high proportion of those cases involving the granting of Legal Aid.



We have recently had Lord Jackson's report on Civil Litigations costs, which while not strictly speaking looking at Northern Ireland, deserves serious consideration, as I suspect its principles, if adopted will percolate here as well. It speaks to a much more general issue about the extent to which high costs of litigation are acting as a barrier to access to justice for all parties concerned in litigation.

I detect, following the publication of the report, a growing consensus in favour of limits on costs, and in particular on the success-fees that can be claimed by the winner's lawyers – although the government has only so far moved on the media-friendly issue of libel law.

I think we may well need to go further in barring costs that are manifestly excessive when compared to the sum at stake: for instance, in Germany costs are limited to the final value of the claim. This means greater certainty for clients, lawyers and insurers, and it reduces the incentives to string out litigation. It also sustains a higher number of litigations than we have here.

Limiting or scrapping success fees would have the advantage of making proposals for a contingent legal aid fund (CLAFs) – and for that matter a number of competing CLAFs – viable. This is unlikely to be feasible if success fees are left in place, as it is inevitable that no-win no-fee lawyers would cherry-pick the best cases.

The Jackson report also suggests we should look closely at the ancillary fees being charges by various third parties to litigation – fees charged by claims management firms, exorbitant payments to expert witnesses, firms that charge for professional reports – medical reports, surveys, engineers' assessments – far in excess of the fees paid to the professional who produce them. Ordinary competitive pressures to keep costs down may not work where there is a 50-50 chance of those fees being met by the opponent.

Expanding the use of legal expenses cover, already available to many people through their home insurance policies, which is a relatively inexpensive way of pooling risk and cover.

Possibility of implementing a CARPA (Cassis des Regiments Pecuniaire des Avocats) as exists in France. There all client monies held by solicitors go directly into one bank account, which is in turn underwritten by the government. Because the buying power of the pooled client monies, a better rate of interest is achieved. The client can thus get exactly the rate of interest that he would receive from a local client account but the differential interest is used to help fund the French equivalent of legal aid. In France this brings in approximately £300 million annually.

It has also been suggested by a number of leading criminal solicitors that convicted Defendants on legal aid should be required to pay a fixed fee towards their cost of representation – a figure of £200 has been suggested. While there would clearly be problems

in recovering this sum in some cases, there is no reason in principle not to do it.

Finally, on the subject of legal aid, I think there are serious questions to be asked of the Legal Services Commission (LSC) itself. When Legal Aid was set up, it was administered through each nation's Law Society. It didn't require a Quango with thirteen offices and an administration budget of £125 million in England and Wales. This week's report by the Public Accounts Committee makes clear that the LSC is not fit for purpose. And in Northern Ireland, with fewer opportunities for economies of scale, the problem is even greater: out of a budget of around £80 million this year, almost £9 million will be spent administering the scheme.

## 1 Heading

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