

Legal Aid: a sustainable future

The Advice Services Alliance's response to the
Legal Services Commission and Department for
Constitutional Affairs consultation paper



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1 About The Advice Services Alliance

- 1.1 The Advice Services Alliance (ASA) was established in 1980, and is the umbrella organisation for independent advice networks in the U.K. Our aims are to:
- Champion the development of high quality information, advice and legal services;
 - Ensure that people are not denied access to such services on account of lack of means, discrimination or other disadvantage;
 - Encourage co-operation between organisations providing such services;
 - Provide a forum for the discussion of issues of common interest or concern to advice organisations.
- 1.2 Full membership of ASA is open to national networks of independent advice services in the U.K. Current full members are:
- Advice UK (formerly Federation of Information and Advice Centres)
 - Age Concern England
 - Citizens Advice (National Association of Citizens Advice Bureaux)
 - DIAL UK (the disability information and advice service)
 - Law Centres Federation
 - Scottish Association of Law Centres
 - Shelter
 - Shelter Cymru
 - Youth Access
- 1.3 Our members represent over 2,000 organisations that provide a range of advice, legal and other services to members of the public. Most of these organisations offer services within a local area, but some of them are regional or national. They are largely funded through public sector grants and contracts, and charitable fundraising. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as 'social welfare law'). There are currently 452 Not for Profit contracts with the LSC.
- 1.4 This response has been drafted following consultation with our full members. However, it may not reflect our members' views in their entirety and we are aware that some members will submit their own response.
- 1.5 ASA has already published an initial response to these proposals. We have incorporated parts of our initial response in this paper, where appropriate.
- 1.6 We only comment on those proposals that directly affect the provision of social welfare law services by NfP agencies.

2 Summary

Quality

- 2.1 ASA supports the introduction of a strict quality threshold for all legal aid suppliers and is in favour of the use of peer review as the monitoring tool. The peer review process should be monitored regularly to ensure that standards are being upheld and that resources are being well used. We are concerned that the LSC intends to rely too heavily on cheaper and less reliable methods of monitoring quality, namely quality profiling and file assessment.
- 2.2 The LSC should acknowledge now that it will not be able to keep to its April 2009 deadline for implementing the Preferred Supplier scheme. Not only would this take the pressure off the LSC to achieve an unrealistic target, but it also would allow borderline suppliers more time to achieve the required quality standard.
- 2.3 We are opposed to Lord Carter's proposal that responsibility for peer review of solicitors should pass to the Law Society and that the NfP sector should develop its own quality scheme.

Managing change

- 2.4 Further research is urgently needed in order to ensure that specific needs, such as among black and minority ethnic clients and communities, are served fairly and adequately in any new scheme. There must be a full race impact assessment before any changes are implemented.
- 2.5 Financial assistance needs to be available to NfP organisations in the same way as for solicitors firms.
- 2.6 Any change in payment methods should be deferred until all preferred suppliers have been selected. This will allow for further research to be carried out into the determinants of case costs.

Fixed fees

- 2.7 The introduction of fixed fees, as proposed by the LSC, is likely to be seriously detrimental to the provision of advice and assistance in social welfare law, given
 - The variation in case costs/lengths that exists within these areas
 - The fact that the proposed implementation is out of sync with the proposed implementation of the preferred supplier proposals
 - The fact that the LSC does not seem to know what types of cases it wishes to "buy"
 - The likely effects on the cases that suppliers will take on
 - The likely effect on quality
 - The likely effect on the overall provision of services to clients in social welfare law.
- 2.8 Further research and analysis needs to be carried out into the types of cases undertaken in social welfare law; the types of clients helped; the case mix of different providers and the factors that are linked to different case lengths. This should be a joint exercise between the LSC and representative bodies for the two sectors.

- 2.9 Alternative proposals should be considered, including: an extension of tailored fixed fees; higher fee levels; more categories of fees; graduated fees; more sophisticated escape mechanisms; and special provision for niche organisations.
- 2.10 Moving to payment in arrears would cause considerable difficulties for NfP organisations and would be in breach of government policy as expressed in the Compact. We are therefore opposed to it.

Regional allocation of funding

- 2.11 There should be further research, full debate and proper consultation before any changes are made to the allocation of funding for social welfare law between the regions.

3 Supporting Measures

5.1 Quality (Recommendations 3.1, 5.1, 5.2 and 5.3)

Do you have any comments on Lord Carter's proposals in Chapter 3 paragraph 43 and Chapter 5 paragraphs 11 to 29 for implementing a quality threshold for those who would like to undertake publicly funded work? Are there any impacts in particular that should be taken into account? If so please give reasons.

Recommendation 3.1

- 3.1 ASA supports the introduction of a strict quality threshold for all legal aid suppliers and is in favour of the use of peer review as the monitoring tool.
- 3.2 As we said in our Preferred Supplier consultation response, ASA has always been in favour of the use of peer review to assess quality of advice and has strongly supported the development of the LSC's scheme. We believe that the use of experienced advisers to assess legal work is the only way to ensure that advice is good quality. We were therefore pleased when the LSC announced the requirement that preferred suppliers would have to achieve a peer review rating of 1 or 2 to be included in the scheme. We regarded this as an acknowledgement by the LSC that peer review is the only tool they can rely on to assess quality.
- 3.3 However, so far peer review has been done on a relatively small scale compared to what is now proposed. The LSC must take care to ensure that the quality of the scheme is not compromised by the need to carry out a high volume of peer reviews in a short space of time. We are also concerned that the LSC intends to rely too heavily on cheaper and less reliable methods of monitoring quality, namely quality profiling and file assessment. As we said in our Preferred Supplier consultation response, we are concerned to see the reliance on file assessment to test quality in non-major areas of law.
- 3.4 The NfP sector has experience of the file assessment process as the LSC has been using it (minus the quality of advice part of it) to audit NfP contract holders over the last year. Our members have raised a number of concerns about the process: there has been a lack of consistency between auditors particularly in relation to issues of contract interpretation; some auditors have taken a non-constructive, nitpicking approach and have poor communication skills; and some auditors have made judgements about the quality of work and the amount of time claimed for it when they are not qualified and have not been authorised to do so.
- 3.5 Given the LSC's aim to move to a better relationship with its suppliers and to develop more constructive relationships, the experience of our members is worrying.

- 3.6 Our members have not had experience of the quality of advice part of file assessment, as the LSC has not been using it in its audits of NfP agencies. We understand that it consists of a list of questions that an auditor with no legal experience can use to assess the quality of work on a file. We also understand that the results of file assessment have been tested against the results of peer review.
- 3.7 We have not seen the questions, nor evidence of their success when tested against peer review and we are sceptical about their value. This is partly based on our view that peer review is the only way to assess quality of advice and partly on our experience of the LSC's transaction criteria. These were described in very similar terms to the File Assessment questions, but failed to do the job, caused considerable upset amongst practitioners and were dropped from the SQM audit.
- 3.8 We accept that peer review is expensive. However, if the preferred supplier badge is to mean anything significant in relation to quality, we believe that an organisation must score a 1 or 2 at peer review in all its areas of law. Otherwise, there is a risk that suppliers doing work of unacceptable quality will be allowed into the scheme. This will become even more of a possibility when the file assessment quality questions are published. In order to ensure they will pass their file assessments, suppliers are likely to use them as checklists. This will guarantee that the questions are answered but not that the quality is good.
- 3.9 In relation to Quality Profiles, we think it is a good idea for the LSC to collect information that allows it to monitor supplier performance remotely and to use that information to prioritise the use of its peer review resource. However, the success of this method depends on the information the LSC collects being accurate. We hope that this can be achieved without there being any significant administrative or technological changes to how matters are reported.
- 3.10 The success of quality profiles also depends on their accuracy as an indicator of good quality and poor quality work and their sensitivity to different ways of working, different client groups and niche work. There will be no reduced transaction costs for the LSC or suppliers if quality profiles trigger concerns about organisations doing anything but the most straightforward work. We have not had any recent information about the development of quality profiles and are therefore unable to comment on whether we think they are likely to be useful or accurate.
- 3.11 Recommendation 3.1 states that the national rollout of peer review assessment should start in July 2006. This date has already passed and we understand that peer review for Preferred Supplier will not start until a second consultation has taken place. Given this delay so early in the process, and the very tight timetable the LSC set itself for achieving full Preferred Supplier rollout, it is our view that the LSC should acknowledge now that it will not be able to keep to its April 2009 deadline.
- 3.12 Not only would this take the pressure off the LSC to achieve an unrealistic target, it would allow borderline suppliers more time to achieve the required quality standard.
- 3.13 As we said in our Preferred Supplier consultation response: we understand that about 42% of NfP suppliers that have been peer reviewed achieved a score of 1 or 2 and that about 43% achieved threshold competence. We note that there has been some concession in the quality criteria in that those scoring a three will be given preferred supplier designate status and given until 2009 to get their score up to 1 and 2. We support the aspiration of the LSC to contract with only those who achieve a peer review score of 1 or 2 but agree that imposing this straight away would reduce the supplier base drastically meaning that many people in need of advice would be denied access to it.

- 3.14 Indeed, if all agencies currently achieving 1,2 and 3 at peer review gain full preferred supplier status by 2009, this will still mean a 15% reduction in NfP supply. Whilst we are confident that a number of agencies will be able to improve to meet the quality criteria, many will not and this will mean that a significant number of potential clients will be denied access to advice.
- 3.15 We are particularly concerned about the impact of this in rural areas where there may be only one agency serving a large geographical area. If these agencies do not meet the required peer review standard straight away, and there is no time or help given to allow these agencies to improve, the only legal aid provision for the area could be wiped out. Given the numbers of people currently seeking but failing to obtain legal advice for their problems, this should be of particular concern to the LSC.
- 3.16 We therefore feel that whilst the LSC should not step back from its commitment to contract only with suppliers that achieve 1 and 2 at peer review, they should not limit themselves by stating they will achieve it by 2009.
- 3.17 This will allow the LSC to reassess the situation in say two years' time to determine what further work needs to be done by the LSC and suppliers to ensure there is sufficient access to high quality advice. Having done this, they will be able to set out a reasonable work plan and timetable to achieve this. Setting a deadline now of 2009 will only mean that quality and/or access will be compromised.

Recommendation 5.1

- 3.18 We are opposed to Lord Carter's proposal that responsibility for peer review of solicitors should pass to the Law Society and that the NfP sector should develop its own quality scheme.
- 3.19 Given the upcoming changes to the Law Society following the Clementi Review, we do not think that this is the best time for them to be taking on responsibility for such a resource intensive and complex project. We feel that the quality of the peer review scheme will only be maintained if it stays with the LSC at least for the foreseeable future.
- 3.20 The preferred supplier scheme requires that suppliers of legal aid achieve a set quality standard assessed by peer review. It is essential that all suppliers are assessed against the same standard, which is overseen and moderated by a single body. To divide the measurement of quality between private practice and the NfP sector makes a mockery of the concept of preferred supplier.
- 3.21 The LSC has taken over 5 years to develop its system of peer review. Following consultation on the scheme last year, it has reached a stage where it is confident that it is fair and reliable. It is widely supported by suppliers and is seen as sufficiently independent of the LSC. Arriving at this stage has taken considerable resources and the ongoing operation of the scheme will continue to require huge financial input from the LSC. Such resources are not available to the NfP sector and given that the LSC scheme exists it seems a waste of resources to withdraw it from NfP agencies.
- 3.22 It is not clear what the LSC's responsibility would be if Lord Carter's proposal was implemented. Currently the Law Society regulates private practice firms and individual solicitors. Therefore, whilst it does not regulate NfP agencies that employ solicitors, it does regulate the individual solicitors who work in those agencies. When the LSC conducts peer review, it does not review individuals but whole departments,

regardless of whether the department is made up entirely of solicitors, or of a mix of solicitors and non-solicitor caseworkers or wholly of non-solicitor caseworkers.

- 3.23 If the Law Society's responsibility for peer review were to follow the pattern of its current regulatory arrangements, it would mean that it was responsible for peer reviewing solicitors working in NfP agencies but none of their non-solicitor colleagues, even if they were working in the same department and on the same files. Under Lord Carter's proposed scheme those non-solicitor colleagues would be peer reviewed separately by an NfP sector body.
- 3.24 Such an arrangement involves unnecessary duplication, unfairly disadvantages NfP solicitor agencies and is impractical.
- 3.25 We would comment also that, in making this proposal, Lord Carter does not seem to have considered the issue of who will peer review the alternative business structures envisaged in the Legal Services Bill.

Recommendation 5.2

- 3.26 We agree that the peer review process should be monitored regularly to ensure that standards are being upheld and that resources are being well used.
- 3.27 We feel that this is particularly important given the changes to methods of payment that are proposed. We are concerned that fixed fees are likely to make it harder for providers to deliver work of high quality and that standards overall may fall, including the standards required to achieve a 1 or 2 at peer review.
- 3.28 Peer reviewers have to be practising and will therefore be operating under the same fixed fees as everybody else. They will also be reviewing work carried out under fixed fees. In our opinion it is inevitable that their idea of what constitutes good quality work will be influenced by the context in which that work is carried out and that their judgements about what is good advice will be affected by the restrictions that advisers are operating under.
- 3.29 Therefore if fixed fees are introduced, it will be essential to ensure that standards remain consistent and that they do not change in order to hide any detrimental impact of fixed fees on quality.
- 3.30 Lord Carter also recommends that peer review should include the monitoring of client satisfaction and of the interaction with the wider justice system.
- 3.31 The SQM already includes a requirement for suppliers to monitor client satisfaction. We do not feel there is any need to change that requirement.
- 3.32 We are not sure what Lord Carter means by "justice system partners". We think he may mean the Court Service and even regular opponents such as local authorities, registered social landlords, the Home Office, the Benefits Agency, the police and the Crown Prosecution Service. Since these bodies are often "the other side", as far as legal aid practitioners are concerned, we do not think it is appropriate to ask for their views on practitioners' performance.

Recommendation 5.3

- 3.33 Given the importance of advocacy, particularly in family and criminal work, we agree that it should be subject to peer review. However, the existing peer review process has taken over five years to develop and any new scheme would have to go through all the same stages of research, criteria development, consistency checking,

recruitment, training and consultation. We therefore think that the proposal to have a scheme for criminal advocates ready by April 2007 is unachievable.

5.2 Transitional Arrangements (Recommendations 5.4, 5.5, 5.6, 5.7, 5.8 and 5.9)

Do you have any comments on the transitional arrangements proposed by Lord Carter in Chapter 5 paragraphs 90 to 141 of the final report? Are there any impacts in particular that should be taken into account? If so please give reasons.

Securing a diverse sector

- 3.34 We understand the concerns raised by black and minority ethnic firms in relation to Lord Carter’s proposals.
- 3.35 Lord Carter refers to the “duty to make sure that specific needs, such as among black and minority ethnic clients and communities are served fairly and adequately”,¹ but gives no indication as to what this duty might involve apart from
 - Monitoring of ethnic data
 - Monitoring of quality checks
 - Requiring suppliers to have an equal opportunity policy, which includes the promotion of diversity in the workforce and the capacity of firms to work effectively with the diversity of the community in its area²
- 3.36 As far as we are aware, no research has been carried out to assess whether such measures will be sufficient to meet the specific needs of BME clients and communities. Further research is urgently needed on this issue. We refer to our further discussion of diversity in relation to fixed fees below. A full race impact assessment must be carried out before any changes are implemented.
- 3.37 The problem would seem to be particularly acute in London. Our analysis of NfP cases in 2004-05 revealed that the proportion of clients who were classified as other than White British in London was dramatically higher than in the rest of England and Wales. The differences can be summarised as follows:

	London	London	London	London
	Housing	Employment	Debt	Benefits
White British	27%	25%	36%	26%
	Out of London	Out of London	Out of London	Out of London
	Housing	Employment	Debt	Benefits
White British	83%	82%	90%	80%

- 3.38 A further problem concerns the recommendation by Lord Carter that the allocation of social welfare law funding should be based on a formula using data from means tested benefits e.g. income support as a proxy for legal aid eligibility.³ We refer to our further discussion of this issue below. What is clear however is that such a change would have an indirect discriminatory impact given the high proportion of members of

¹ Carter report para 95 p.115

² Ibid recommendation 5.4

³ Carter report p.80; see also recommendation 4.29

BME communities in London, ⁴ and the higher proportion of BME users of legal aid services.

Managing the transition

- 3.39 Lord Carter's discussion of transitional arrangements is concerned solely with the position of solicitors firms, as businesses, their need to expand, reduce costs and invest in restructuring and growth. The report considers the ability of firms to obtain financial and other support and invest in IT systems, including advanced IT systems which would potentially be outside the budget of individual firms operating alone. Lord Carter's recommendations for grants, including match-funded grants for IT services, from a fund to be administered by the Law Society⁵ have generally been taken as applying only to solicitors firms.
- 3.40 No consideration whatsoever is given to the needs of Not for Profit organisations. It would clearly be unreasonable and discriminatory for such assistance to be provided only to one sector of the legal aid market.
- 3.41 NfP organizations are unlikely to have access to the loan facilities available to solicitors' firms, and their needs may therefore be even greater than those of solicitors firms.
- 3.42 The particular concern of NfP organisations with these proposals concerns the IT requirements. We refer to our comments below in relation to question 11.5 of this consultation. NfP organisations are likely to require assistance in upgrading their IT systems to meet the LSC's requirements. It may be that the amounts required will exceed the amounts suggested by Lord Carter. Until the LSC's requirements have been finalised however, we cannot be more specific on this point.

5.3 Wider Justice System Efficiency (Recommendations 5.10, 5.11 and 5.12)

Do you have any comments on the arrangements to encourage optimal use of all resources within the justice system proposed by Lord Carter in Chapter 5 paragraphs 160 to 166 of the final report? Are there any impacts in particular that should be taken into account? If so please give reasons.

- 3.43 These arrangements appear only to relate to the criminal justice system and we therefore have no comments thereon. However, there may be scope for efficiencies within the civil courts and tribunals that could lead to significant savings in the civil legal aid budget.

5.4 DCA/LSC – External Engagement (Recommendations 6.1, 6.2, 6.3, 6.4 and 6.5)

What are your views on Lord Carter's proposals in Chapter 6 on information management and sharing? Do you have any comments on the proposals regarding stakeholder relations and cross - justice system working arrangements?

- 3.44 We have no particular comments on these proposals.
- 3.45 We do however particularly support recommendation 6.3 of Lord Carter's report, with its emphasis on
- The need to develop systems for ensuring a full understanding of volume pressures

⁴ According to the 2001 Census: 59.8% of the London population is White: British; 71.2% is White; 28.8% are from minority ethnic groups. See *Focus on London 2003*, table 2.12.

⁵ Recommendations 5.8 and 5.9

- The importance of the legal aid impact test
- The need for research to ensure that volume pressures are better understood
- The need for government to take a balanced view of the costs and benefits of allowing legal aid volumes to rise.

4 Replacement For Tailored Fixed Fees (Section 6)

Introduction

- 4.1 We consider that any significant changes to the “procurement” of legally aided services in social welfare law should be deferred, so as to coincide with the implementation of the preferred supplier proposals.
- 4.2 Although the Carter report endorses a move to “standard fees (for instance fixed fees and graduated fees depending on the category of law)” wherever possible,⁶ the report acknowledges
- the complexity of the legal aid market
 - the relationship between suppliers’ structures and local market conditions and the particular needs and diversity of local communities
 - the significance of case mix
 - the need for flexibility
 - the danger of emphasising quantity
 - the importance of quality.
- 4.3 The report is particularly clear that fixed fees for legal help must be “consistent with maintaining a good quality supplier base”⁷ and that “quality should continue to be the key test for deciding which suppliers to contract with.”⁸
- 4.4 Given the huge variations in case costs between different types of cases within each category of law, and the huge variation in average case costs between different suppliers, there needs to be considerably more research, analysis and consultation before any significant changes are made to the “procurement” of legally aided services in social welfare law.
- 4.5 There is no urgency as far as spending on social welfare law is concerned. It represents a small proportion of the total legal aid budget, and one in which costs are firmly under control, by virtue of the tailored fixed fee system for solicitors and the capped nature of NfP contracts. The number of acts of assistance has already increased significantly, according to the LSC. Action is already being taken by the LSC in relation to underperformance by some NfP suppliers.
- 4.6 The proposals for fixed fees set out in the “sustainable future” are, in our opinion, a crude attempt to implement the overall approach outlined in the Carter report and are incompatible with
- the emphasis on social welfare law in the CLS strategy
 - the emphasis on a client-centred CLS
 - the emphasis on quality in the preferred supplier proposals.

⁶ Carter report p.84

⁷ Recommendation 4.24

⁸ Carter report p.96

The variation in case lengths

- 4.7 There is huge variation in the type and extent of work done by providers in social welfare law. Within each category of law there are wide differences in the tailored fixed fees which solicitors are currently paid (which are reflected in the regional fees proposed) and in the average case lengths of NfP organisations.
- 4.8 Our analysis of case lengths,⁹ based on data collected by the LSC, suggests that most of the differences are due to variations in
- The types of cases
 - The types of clients
 - The extent of work done on cases
 - The location of suppliers (for reasons that are not clear).
- 4.9 In particular, our analysis shows that
- Certain types of cases take longer than others (e.g. multiple debt cases in debt, appeals in welfare benefits, unfair dismissal and discrimination cases in employment)¹⁰
 - Cases for certain types of clients take longer (with particular reference to clients' ethnicity and, sometimes, disability status)
 - There is a correlation between the time spent on a case and the stage at which the case is concluded (as between 'first meeting', 'further work', 'putting case for client' and 'representation at court/tribunal')
 - The achievement of particular positive results for clients is associated with longer case times.
- 4.10 It is important to note that our analysis was limited to factors that are covered within the SPAN recording system. It could not cover other factors, such as the identity and behaviour of the "other side" involved in a case, and the effect that this has on case lengths.

Geography

- 4.11 The regional differences cause a particular problem as far as any standard fee system is concerned. The problem is particularly acute in relation to London.
- 4.12 The LSC say that they "would accept that the cost of running a legal aid firm in London is higher than in many parts of the country but these do not appear to justify or explain the much higher average prices in London."¹¹
- 4.13 We do not understand why average case lengths/costs are so much higher in London. We do not accept that suppliers in London are more "inefficient", as seems to be implied by the LSC/DCA paper. It may be that providers in London deal on the whole with more complex cases. There is some evidence of this in the data that we have on NfP average case times.¹² This would be understandable given the large

⁹ We conducted a detailed analysis of NfP case lengths in 2004-05, which is available at <http://www.asauk.org.uk/fileLibrary/pdf/cslgthnfpcon.pdf>. We have also conducted a preliminary analysis of NfPs and solicitors' case lengths/costs in 2005-06, based on data received from the LSC. We hope to publish a full report of this analysis in the near future.

¹⁰ We believe that similar patterns exist within other categories of law, such as special educational needs cases within education, for example.

¹¹ *Legal Aid: a sustainable future* p.28

¹² In 2004-05, in employment, NfPs in London reported a higher proportion of cases ending in representation and a higher proportion of discrimination cases. In welfare benefits, London NfPs

number of small advice agencies and community groups in London, which may well be dealing with the less complex cases. Higher case lengths/costs may also reflect the high level of pressure on statutory and other services and the housing market in London. They may also reflect particular problems arising out of the nature and behaviour of the “other side” in many disputes.

- 4.14 Amongst NfPs, in both 2004-05 and 2005-06, London agencies had the highest average case times in benefits, housing and employment (although only the 5th highest in debt). For solicitors, the proposed regional fees show that costs in London are the highest in 11 categories (including debt, employment, housing, homelessness and benefits) and second highest in the remaining two of the 13 categories. Many of the proposed regional fees for London are dramatically higher than those proposed for the other regions.
- 4.15 The table below sets out the proposed national and London fees in the main categories of social welfare law, the equivalent of these fees in terms of hours per case (assuming an average cost of £50 per hour ¹³) and the NfP average case times nationally and in London in 2005-06. ¹⁴

	Debt	Employment	Housing	Homeless	Welfare benefits
Proposed national fee	£127	£229	£163	£188	£143
Equivalent in hours	2.5	4.6	3.3	3.8	2.9
Nfp average 2005-06	5.2	7.2	3.9	3.9	4.6
Proposed London fee	£189	£453	£206	£237	£223
Equivalent in hours	3.8	9.1	4.1	4.7	4.7
Nfp London average 2005-06	5.7	8.8	5.4	5.4	6.1

- 4.16 The table shows dramatic differences between the proposed national fees and London fees in all of these categories. It also shows significant differences in NfP average case lengths in all of these categories except debt.
- 4.17 There may well be good reasons why average case lengths/costs are so much higher in London. We have suggested a few possibilities. This is one of a number of issues that need to be clarified before any significant change in “procurement” methods is implemented. More research is clearly needed, a topic to which we return below.

report a significantly higher proportion of benefit challenge/appeal cases. In both categories there were higher than average proportions of cases reported as ending at the first meeting with the client and significantly fewer than average cases ending at the “further work” stage.

¹³ For comparison purposes we have assumed an average cost of £50 per hour. It may be that the actual average in London is closer to £60.

¹⁴ The LSC/DCA paper proposes separate rates for “housing” and “homeless” cases. The NfP average case length figures for housing do not distinguish between these two categories.

The “what, who and how”

- 4.18 The “sustainable future” paper suggests that the CLS Strategy and Preferred Supplier proposals set out “**what** services we intend to buy” and “**who** we will buy these services from”, while the paper itself sets out “**how** we will pay for those services.”¹⁵
- 4.19 The distinction between the “what, who and how” is an important one. However, the distinction is not as simple as this passage suggests.
- 4.20 Both of the previous proposals deal with the issue of “who” the LSC would like to contract with. The Preferred Supplier proposals, in particular, state that the LSC wishes to contract with suppliers whose quality has been demonstrated by peer review scores of 1 or 2.
- 4.21 As far as the “what” is concerned, the CLS strategy emphasises the importance of delivering services in social welfare law, and in particular the “core” subjects of community care, debt, employment, housing and welfare benefits. It does not however say what types of cases within those categories are seen as priorities. There is a wide range of types of cases within each category, which helps to explain why there is such diversity in the average case lengths of different suppliers. The only indication of priorities that has been provided has been the higher payment rates introduced for certain possession and homelessness cases, which have been carried over into the fixed fee proposals.
- 4.22 The problem with the present proposals is that the LSC is trying to change “how” services are paid for, when it has not established “who” the preferred suppliers will be, or “what” it is that it wishes to buy.
- 4.23 There are two obvious dangers involved here.
- 4.24 The first danger is that fixed fees could influence the services provided by suppliers, before the LSC has decided what it really wants to buy and who it wants to buy services from. Although it may be possible to retrieve this situation later, the LSC may by then have lost some of the suppliers best able to meet the LSC’s priorities.
- 4.25 The second danger is that the proposals could affect the quality of services before the preferred supplier process has established a benchmark for all suppliers to meet.
- 4.26 These problems arise, in our view, because the proposals are likely to have a direct impact on the types of cases taken on and the quality of services provided.

Case mix

- 4.27 Where suppliers have average case lengths/costs that are higher than the value of the fixed fee, the incentive will be to reduce their average case lengths/costs. This is likely to involve
- Looking for the easy/short cases and the easy clients and/or
 - Avoiding long, difficult and complex cases and clients.
- 4.28 As Lord Carter says: “If the LSC targets only case volumes, there is a risk that some suppliers may not wish to pursue complex cases.”¹⁶
- 4.29 Where suppliers have average case lengths/costs that are equivalent to or lower than the value of the fixed fee, the incentive will be to maintain their previous case

¹⁵ *Legal Aid: a sustainable future* p.21

¹⁶ Carter report p.85

mix, and possibly to look for more shorter cases in order to increase the profitability of the work done. There will be no incentive to widen their case mix to take on a significant number of cases that exceed the value of the fixed fee.

- 4.30 Our analysis of case lengths shows that there are clear differences in case lengths or costs between different types of cases within each category. These are not accidental. In employment, for example, discrimination cases take much longer than other types of cases. In welfare benefits, benefit appeals take significantly longer than other types of cases. Once fixed fees are introduced, these differences become much more important to suppliers.
- 4.31 It has been suggested that the LSC will be able to detect organisations that are doing more easy/short cases either by peer review or by other monitoring procedures. We do not see how peer review will be able to detect this since this is an issue to do with case mix, not quality. Peer reviewers in fact tend to discard short cases on the basis that they are hard to review fairly. Even if they do look at them, peer reviewers will only be able to pick up easy/short cases that are done badly.
- 4.32 The LSC has stated that they will monitor case mix and outcomes to ensure that suppliers continue to provide an appropriate service.¹⁷ We do not believe that the LSC's present reporting systems are capable of doing this. It is possible for suppliers to get a run of easy/short cases legitimately.¹⁸ Even if the LSC is able to detect an inappropriate number of easy/short cases, we are not clear what the LSC can do about it, apart from imposing requirements about case mix. This however assumes that the LSC has decided what its priorities are within each category of law, and that it knows what the need is in the geographical area concerned. At the moment we have seen no evidence of this.
- 4.33 As far as longer or more complex cases are concerned, the problem can be ameliorated by escape mechanisms for exceptional cases, but only if the threshold for such cases is set at a reasonable level, which does not deter suppliers from taking on such cases.

Quality

- 4.34 Although the CLS Strategy and the Preferred Supplier proposals set out whom the LSC would like to contract with in the future, the LSC is actually proposing to change the "how" before they change the "who". In doing this, they risk foregoing the quality assurance that should be provided by the preferred supplier scheme.
- 4.35 Shorter or simpler cases can of course be done well. They may even be done more quickly by high quality suppliers.
- 4.36 There is however a potential conflict between fixed fees and quality. This was demonstrated by the research carried out for the LSC and reported as *Quality and Cost*.¹⁹ The research found that solicitors funded to provide a fixed number of matter starts for a fixed fee performed worse than others in the three areas of quality (as measured by peer review), client satisfaction and outcomes. We set out as an appendix to this paper a summary of the relevant findings of this research.
- 4.37 Where suppliers have case lengths/costs which are higher than the value represented by the fixed fee there is likely to be a direct relationship between fixed

¹⁷ Provider Q&A: *Legal Aid: a sustainable future* Civil and Family Legal Aid p.2

¹⁸ If a local employer is in financial difficulties, for example, a supplier may have an influx of clients with claims for unpaid wages, unpaid holiday pay, notice pay or redundancy payments

¹⁹ Moorhead et al *Quality and Cost: Final Report of the Contracting of Civil, Non-Family Advice and Assistance Pilot* (2001)

fees and quality. Caseworkers will be under pressure to handle the longer cases more quickly. This is likely to involve cutting corners, which is likely to be to the detriment of the client.

- 4.38 It seems to us inevitable that economic pressures will cause standards to fluctuate a great deal. In some cases work might be done well up to a certain point and then stopped. Other cases might be taken to their conclusion but skimmed over. There is likely to be a general trend towards routinising cases, with the result that individual cases do not receive the attention that their particular characteristics really deserve.
- 4.39 Furthermore, if these proposals are implemented, there is a real risk that the LSC will drive out some good suppliers, who feel unable to deliver quality services within the fixed fees proposed, while keeping in high volume suppliers who may not be providing quality services. This would of course run counter to Lord Carter's recommendations about the importance of quality.

The overall provision of services in social welfare law

- 4.40 The need for suppliers to meet targets is likely to have significant effects on the ways in which social welfare law cases are dealt with both within and outside organisations that have contracts with the LSC.
- 4.41 Where suppliers have higher than average case costs they may be forced to do a significant number of short cases in order to meet their targets. This is likely to distort any rational division of roles as between different types of service. Specialist agencies, for example, may have to take on work that has previously been carried out by community groups and other generalist advice agencies in the area. The balance between face-to-face and telephone advice services (including CLS Direct) could also be affected. Some cases that could be dealt with over the telephone are likely to be directed towards face-to-face advice in order to help meet the targets of face-to-face providers.
- 4.42 The need to meet case targets is also likely to threaten co-operation between face-to-face suppliers, referral patterns and referrals themselves, as providers hold on to short cases and try to refer longer or more complex cases.
- 4.43 The present proposals are likely to be particularly damaging in situations where local suppliers have developed networks, in liaison with their other funders, to ensure that a range of services is provided by the network as a whole, that other funding (such as local authority funding) can be used to cover the lower level work, and that specialist resources are reserved for the most difficult and complex cases. A good example of this is to be found in Hammersmith and Fulham. We refer to the Joint response from the CLSP advice agencies in the London Borough of Hammersmith and Fulham, which sets out how damaging these proposals are to the way in which they provide their services.
- 4.44 The need to meet case targets also threatens the rational use of specialists within agencies that provide both generalist and specialist services. Specialists are likely to spend more time on shorter or simple cases in order to achieve their case targets.
- 4.45 The need to meet case targets is also likely to distort the relationship between specialist agencies and other advice agencies and community organisations. Many cases which would presently be referred to specialist organisations may be rejected, and have to be dealt with by non-specialist agencies and community groups which do not have the necessary expertise.

Diversity

- 4.46 The implementation of a crude fixed fee system could have serious diversity implications.
- 4.47 As we have already suggested, further research is urgently needed in order to ensure that specific needs, such as among black and minority ethnic clients and communities, are served fairly and adequately in any new scheme. There must be a full race impact assessment before any changes are implemented. This needs to be conducted openly and in consultation with major stakeholders, giving them a chance to consider and comment on the research, findings and analysis considered.
- 4.48 We have noted already that the need for suppliers to meet their targets may lead them to seek to avoid long, difficult and complex cases and clients.
- 4.49 This is likely to affect a disproportionate number of clients who have a disability and/or are members of BME communities. It may also affect cases where an interpreter is needed, as this can double the length of interviews with clients, witnesses, and others involved in a case.
- 4.50 The *Causes of Action* research found that ethnicity was particularly influential in predicting problems relating to discrimination, immigration, and unsafe or unsatisfactory rented housing.²⁰ Discrimination cases take much longer than other types of employment cases, as we discuss below. The same is likely to be true for non-employment discrimination cases. Problems with unsafe or unsatisfactory rented housing are also likely to be more time consuming than other housing cases.²¹
- 4.51 Sir Michael Bichard has recently stated
- "I do want to stress the importance of ensuring that our contracting and procurement schemes enable clients of diverse backgrounds to have confidence in their legal services. We will look carefully at how we can encourage a diverse and sustainable supplier base to achieve this."*²²
- 4.52 We agree entirely with Sir Michael about the importance of this issue. The question however is whether it can be achieved within a fixed fee system. The problem with fixed fees is that they are most suitable for large organisations with a large and mixed intake of cases and clients. That description does not match many organisations, and especially NfP organisations, which have a high proportion of clients of diverse backgrounds.
- 4.53 The problem would seem to be particularly acute in London, as we have explained above.
- 4.54 The importance of this issue is demonstrated by the preliminary findings of our analysis of NfP case lengths and solicitors' case costs in 2005-06.
- 4.55 In relation to disability, NfP clients who were recorded as disabled took slightly longer on average in welfare benefits and debt, and significantly longer in housing cases. For solicitors, the differences were less marked. In employment, in both sectors, clients who were recorded as disabled took very much longer than average.²³

²⁰ *Causes of Action*, second edition p.37

²¹ Cases classed as 'disrepair' were the longest type of housing cases in our analysis of NfP case lengths in 2004-05.

²² 'Sir Michael Bichard on Carter', *Focus Issue 51* p.4

²³ For NfPs the figures were 589 minutes as compared to an average of 430 minutes. For solicitors the figures were £470 as compared to £325.

4.56 As far as ethnicity is concerned, the table below sets out the differences in average case times (NfPs) and case costs (solicitors) between clients described as ‘White British’ (referred to as ‘white’ in the table) and clients in all the other categories (referred to as ‘BME’ in the table).

Sector	Category	Averages			Variance	
		BME	White	Overall	BME	White
NfP	Debt	322	312	314	+8	-2
	Benefits	298	262	274	+25	-11
	Employment	466	407	430	+36	-24
	Housing	268	219	234	+34	-15
Solicitors	Debt	£171	£147	£152	+19	-6
	Benefits	£225	£151	£180	+45	-28
	Employment	£451	£268	£325	+126	-57
	Housing	£228	£175	£200	+28	-25

4.57 As far as ethnicity is concerned, the LSC has claimed that the issue is more to do with suppliers than with the ethnicity of clients, in that BME clients tend to use suppliers that have longer case times for all their clients – both White British and BME. We cannot comment on this claim since we have not seen the analysis on which it is based.

4.58 Given the findings of our analysis, however, we do not believe that this is likely to be either a simple or a complete answer to the problem. To the extent that it is true, we still need to investigate why this is so

- To what extent is it due to the nature of the cases taken by these suppliers?
- Why are BME clients attracted to these firms? Is it because of their location? Is it because they have already adopted the practices recommended by Lord Carter?²⁴ Is it because they have a good reputation? Is it because they are higher quality firms, and achieve better results for their clients?

4.59 The report commissioned by the Law Society from LECG comments as follows:

“The key issue is client access, rather than BME representation amongst suppliers, which may be neutral to the changes. This is an unknown area. For example, it is not tested whether BME clients seek BME solicitors or whether other factors are more likely to affect their access to legal aid, such as local and regional differences in supply. More information is needed.”²⁵

4.60 It is vital that we understand why cases for BME clients take longer. There will be some direct links, such as the fact that discrimination cases take very much longer than other cases. In general however the link is more likely to be indirect, suggesting that ethnicity is a proxy for other things, such as being new to the country, not understanding UK institutions, bureaucracies or procedures, and language difficulties.²⁶

4.61 There are other diversity issues that also need to be considered, notably around age.

4.62 As far as older people are concerned, Age Concern has raised some concerns about the changes proposed. They comment that:

²⁴ See above p.7

²⁵ LECG *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary* p.9

²⁶ See the analysis of these issues by Hazel Genn and others in *Tribunals for diverse users*

- Older clients often need a great deal of reassurance about asserting their rights or using the justice system, and show reluctance to engage in the benefits system. Many local Age Concern information and advice services observe that older people really do not like 'making a fuss' and that they often need help and support even in taking complaints through complaints procedures.
 - If larger law firms start to dominate at the expense of NfP agencies under the proposed changes, this could well deter a number of clients from accessing legal advice as they prefer the more comfortable, less threatening or "official" surroundings of a NfP organisation. This can often be the case with older people who may be extremely reluctant to go to a solicitors' office.
- 4.63 As far as younger people are concerned, Youth Access has pointed out that there is a discrepancy between the times taken by mainstream suppliers and the times taken by suppliers who provide a service that is dedicated to the needs of young people.²⁷ They agree that further research about the relationship between client types, case types and case times is needed.

Provision to rural areas

- 4.64 In their response to this consultation, Shelter have highlighted the problems of providing services in rural areas that would result from the implementation of a fixed fee system that does not take account of the additional cost of providing services in such areas, and in particular does not cover the additional time involved in providing outreach services.

“Rural services will be affected in two ways: firstly by the likelihood that they will make it uneconomic for many suppliers to deliver services, resulting in complete loss of service in some areas; and secondly because the methods of delivery required in those rural areas are prohibitively expensive under the proposed fee rates.

The economies of scale for provision by larger firms that underpins the fixed fee proposals will not work in rural areas. In many areas where Shelter operates, no other NfP agencies exist locally to take on legal advice work, whilst many local solicitors have stated emphatically they will not move back into areas of work long since abandoned. If Shelter’s services then disappear there will be no appropriate housing advice in a number of rural areas. This gap cannot be filled by CLS Direct. The most vulnerable will continue to need a face-to-face casework service as they cannot easily access internet services and do not have the skills to act on telephone advice.

The fee levels proposed do not accommodate the real costs of providing outreach to some of the most dispersed communities, which is a significant part of the work Shelter currently does under LSC funding. Time and expense involved in travelling to deliver in rural areas, facilities required in the locality to enable access to services, and the time taken to conduct a proportion of casework at a distance, should be appropriately reflected in any fees set.”²⁸

- 4.65 The problems are not, of course, restricted to rural areas. Suppliers generally will find it more difficult to conduct outreach sessions or provide home visits to see clients under a fixed fee regime.

²⁷ For a recent discussion of these issues see Jon Robins ‘Uncertain futures’, *Independent Lawyer*, September 2006 p.16

²⁸ Shelter response p.26

The amounts proposed are too low

- 4.66 The paper says that the fees proposed “have been based on claims and TFF [tailored fixed fee] payments in 2005/06 but exclude claims that we would consider ‘exceptional’”.²⁹
- 4.67 We understand from the LSC that the fixed fees proposed have been based only on solicitors’ TFF payments.³⁰ We can see no logic for excluding NfP claims from the calculations. In 2005-06 NfPs were responsible for
- 77% of new debt cases
 - 72% of new welfare benefit cases
 - 49% of new employment cases and
 - 40% of new housing cases.³¹
- 4.68 The most recent figures provided to us by the LSC suggest that NfP costs per case are higher than solicitors’ costs in all these categories, and noticeably so in debt. It would appear therefore that calculations based on solicitors **and** NfP costs per case would produce substantially higher figures in debt and slightly higher figures in the other categories. It cannot be claimed that the fixed fees proposed are cost neutral when they are based only on the lower costs of providers in one sector, and especially when that sector handles less than 30% of the cases, as is the case in debt and welfare benefits.
- 4.69 There is a particular issue concerning debt cases, where NfP agencies not only do the vast majority of cases but also have significantly higher case costs. It is well established that NfP agencies and solicitors firms do different types of debt cases and handle them in different ways.³² Our analysis of case lengths/costs in 2005-06 confirms this. In both sectors, cases reported as ‘multiple debt’ cases take significantly longer than average. Multiple debt cases however represent 59% of all NfP debt cases but only 19% of solicitors’ cases.³³ In these circumstances therefore it is clearly inequitable to propose fixed fees based only on solicitors’ case costs.
- 4.70 We have difficulty in reconciling the proposed national fees with other figures quoted recently. To take debt and benefits as an example, the “sustainable future” paper proposes a national fee of £127 for debt and £143 for benefits, whereas the Carter report cites figures for average costs
- in debt of £332 for NfPs and £199 for solicitors
 - in benefits of £352 for NfPs and £243 for solicitors.³⁴
- 4.71 Some of the proposed regional fees are less than £100, representing two hours work at the most. These include debt, housing and welfare benefits in the South East.
- 4.72 The appropriateness of such figures is, however, doubted by the LSC in other contexts.

²⁹ *Legal Aid: a sustainable future* p.28

³⁰ We understand that the calculations include cases done under tolerance as well as under contract. It is not clear however whether this would have any significant impact on the resulting figures. See Moorhead et al *Quality and Access* p.34

³¹ The figures for new cases have been calculated from data contained in the August 2006 edition of the LSC’s Civil Contracting Report 2006/07

³² See in particular Moorhead et al, *Quality and Cost* and *Quality and Access*

³³ Part of the reason for this is likely to be the fact that the guidance on when multiple debts can be treated as separate matters is significantly tighter for NfPs than for solicitors.

³⁴ Carter report p.45

- In NfP SOOPER, average case times of less than two hours in debt or benefits are regarded as a risk factor
- The CLAC specifications treat average case lengths of less than two hours as an indication that the centre may not be undertaking a reasonable mix of types and size of cases, which may in turn lead to specific targets on case mix being imposed.³⁵

4.73 This recognition of the danger of low average case times suggests that the LSC (or at least part of it) recognises that

- Short cases are likely to be simpler and/or to achieve less for clients
- Longer cases are likely to be more complex and more deserving of funding
- Chasing high numbers of cases impacts on the breadth of service provided
- Certain types of cases should not be prioritised at the expense of certain other types of cases.

The need for further research and consultation

4.74 In our view it is essential that further research and analysis be carried out into

- the types of cases undertaken in social welfare law under legal help by solicitors' firms and NfP agencies
- the types of clients helped
- the outcomes achieved
- the case mix of different providers
- the links between legal help and certificated work
- the factors that are linked to different case lengths
- the services provided by suppliers with high case times/costs where a large proportion of the work is provided to clients from BME communities.

4.75 This should be a joint exercise between the LSC and representative bodies for the two sectors.

4.76 It is likely that this research will need to go beyond the data presently collected by the LSC which does not appear to be capable of catching the nuances of individual cases that are reflected in their case lengths or costs.

4.77 This should be linked to a proper discussion about the types of cases that should be a priority within the CLS, and the case mix which the LSC should be seeking to purchase from its providers.

4.78 It should be possible to devise a procurement system that is fit for purpose by the time that the preferred supplier initiative comes into full effect.

Are there alternatives?

4.79 If there must be change before then, what is needed is a transitional system which

- causes as little disruption as possible
- encourages quality suppliers to stay working in legal aid
- relates payments to case mix, complexity and the work actually done for clients (and therefore rewards effort, skill and knowledge).

³⁵ Gateshead CLAC specification para 49a; Leicester CLAC specification para 48.1

Tailored fixed fees

- 4.80 The simplest solution would be to introduce an equivalent of tailored fixed fees for NfP agencies, as currently exists for those agencies that have taken on additional work under the PSA6 expansion package.
- 4.81 If a standard fee system has to be introduced, however, a workable system could possibly be achieved by a combination of some or all of the following proposals.

Higher fee levels

- 4.82 There must be an increase in many of the fee levels to reflect the amount of work required to deal with a reasonable mix of cases. As far as suppliers are concerned, the Law Society has emphasised that such schemes can only work if they are sufficiently flexible to reflect the realities of practice and if basic fees are set at a viable level. As far as clients are concerned, we have noted already that several of the regional fees proposed are far too low to allow a reasonable case mix.

More sophisticated categories

- 4.83 There could be more categories or sub-categories. For example
- In debt: distinguishing between cases involving single and multiple debts
 - In benefits: adding categories for tribunal appeals and appeals to the Social Security Commissioners (SSC)
 - In employment: adding categories for unfair dismissal and for discrimination.
- 4.84 The case for distinguishing these sub categories is demonstrated by the preliminary findings of our analysis of NfPs' and solicitors' case lengths/costs in 2005-06.
- 4.85 The table below sets out, in relation to each of the sub categories of law referred to above
- the average case length for NfP agencies, recorded in minutes
 - the variation from the average of all NfP cases in that category overall, recorded in minutes
 - the average profit costs for solicitors, recorded in pounds
 - the variation from the average of all solicitors' cases in that category overall, recorded in pounds

Category	Subcategory	NfPs		Solicitors	
		Average length of cases in the subcategory (mins)	Variation from the mean for all cases in the category (mins)	Average cost of cases in the subcategory (£)	Variation from the mean for all cases in the category (£)
Debt	Multiple debts	343	+29	£191	+£38
Welfare benefits	Appeals	402	+129	£265	+£85
	Appeals to SSC	453	+179	£349	+£170
Employment	Unfair dismissal	485	+55	£358	+£34
	Discrimination	711	+280	£554	+£229

Graduated fees

- 4.86 A system of graduated fees could be introduced. The proposals in relation to other categories of law in the Carter report and the “sustainable future” paper involve forms of graduated fees. One possibility would be to introduce graduated fees reflecting the extent of work done on cases, as suggested by the stages at which cases complete. The following table gives the average time in minutes of cases completed at different stages in NfP cases completed in 2004-05.

Code	Description	Benefits	Debt	Housing	Employment
A	First meeting	93	120	80	88
B	Further work	201	265	161	255
C	Putting case for client	334	348	301	526
D	Representation at court/tribunal	538	448	331	1064

- 4.87 A very similar picture emerges from our analysis of case lengths/costs for both NfPs and solicitors in 2005-06.
- 4.88 These figures suggest that there are significant differences in average case times, across all four categories, depending on the stage at which cases complete. It may be possible to construct a graduated fee system on this basis. This would be similar to the approach proposed in relation to mental health work, which distinguishes between initial advice, negotiation and preparation, and representation.

Exceptional cases

- 4.89 Whatever system is devised, provision will need to be made for exceptional cases. The nature and extent of this provision will depend on the nature of the system that it is designed to supplement. Escape mechanisms do not need to be the same for all types of cases. There could be special provisions for priority cases such as multiple debt cases, welfare benefit appeals, or discrimination cases. In any event, the exceptional cases threshold needs to be set at a lower level than that presently proposed. The only logical threshold, in our view, is to set the threshold at twice the fee otherwise payable. If a system is devised which takes account of the different times spent for different types of cases and the amount of work done, there will be far fewer cases that need to be considered on an exceptional basis.

Niche organisations

- 4.90 Consideration needs to be given as to whether separate provision is necessary for certain niche organisations.³⁶ There are suppliers who only do complex cases, such as benefit appeals, on a referral basis. If they cannot be accommodated through other measures, it may be necessary to consider alternative arrangements.
- 4.91 We would of course be happy to discuss these issues further once the consultation period has ended.

Our response to the specific questions

6.1 *Do you consider that any other types or categories of work should be excluded from the scheme? If so please explain why.*

³⁶ See the Carter report discussion on crime at pp.59-60 and public law children at p.66

- 4.92 We consider that, at the very least, the social welfare law categories of community care, debt, education, employment, housing and homelessness, public law and welfare benefits should be excluded from any fixed fee scheme unless and until a proper scheme has been developed that meets the concerns set out above.

6.2 *Which of the 2 options set out for the replacement of the TFF scheme do you prefer and why?*

- 4.93 Neither of the options proposed is acceptable in their present form. Any proper scheme will need to take account of the regional differences in case lengths and costs that do exist, and in particular the differences between case lengths/costs in London as compared to the rest of England and Wales.

6.3 *Do you agree with the proposals for payment of tolerance work? If not please explain why.*

- 4.94 We do not agree with these proposals. Notwithstanding the legitimate concerns about the quality of tolerance work,³⁷ it does play a crucial role in providing access where contracted suppliers do not exist, and particularly in rural areas. There are also some important types of work, such as discrimination in relation to goods and services, which can only be done as tolerance work. Particular issues would also seem to arise if the proposal to separate NASS work from asylum work is implemented, if suppliers have to carry out this work under tolerance.

6.4 *Do you agree that the scheme should apply to work done by NfP providers? Do you agree that there should be a transitional scheme and what are your views on our initial proposal?*

- 4.95 When a proper scheme has been developed we have no objection to it applying also to work done by NfP providers. A transitional scheme will clearly be necessary. The principles behind the initial proposal appear to be reasonable. It would be reasonable to pay NfP agencies the same amounts as before, subject to targets as to the numbers of cases started that reflect the work that agencies are already undertaking, provided that payment continues to be in advance, as at present. Any move to payment in arrears however would cause major problems for NfPs, and would be contrary to the government's approach to funding the voluntary sector, as expressed in the Compact and elsewhere. These issues have been highlighted in the responses from some of our network members, notably Citizens Advice and Shelter and we refer to their responses on this subject.

5 Immigration & Asylum (Section 8)

- 5.1 We have seen a draft of the response to this consultation by the Immigration Lawyers Practitioners Association (ILPA). We are fundamentally in agreement with everything they say and do not propose therefore to reiterate the relevant arguments here.

6 Mental Health (Section 9)

- 6.1 There are very few NfP organisations doing mental health work and we are not in a position to comment on these proposals based on their experience.

³⁷ See Richard Moorhead et al *Quality and Access: Specialist and tolerance work under civil contracts*

- 6.2 We have seen the evidence submitted to the Constitutional Affairs Committee by the Mental Health Lawyers Association and others. This evidence suggests most strongly that the proposals in this area require a radical rethink.

7 Common Issues (Section 10)

10.1 Do you agree with the proposals for varying the fees? If not please explain why.

- 7.1 We welcome the suggestion that the fees will be reviewed at the end of each schedule year. It should however be stated explicitly that this will not entitle the LSC to reduce any fees save in the circumstances covered by paragraphs 10.3 and 10.4 of the consultation paper.

10.2 Do you agree with the proposed arrangements for payment of exceptional cases? If not how else might we manage these cases?

- 7.2 We do not agree with the proposal that cases will only be treated as exceptional if the value exceeds four times the value of the fixed fee. The appropriate level will depend on the overall nature of the scheme, as we have suggested above. In principle however, a case should be treated as exceptional if its value is more than twice the appropriate fee. Any other proposal is likely to deter suppliers from taking on cases that they expect to take significantly longer than the time allowed by the fixed fee, save where they can be very confident that the case will take so long as to cross the exceptionality threshold.

10.3 Do you agree with the arrangements for payment of disbursements? If not please explain why.

- 7.3 We agree with the principle that disbursements should be treated separately. We do not agree with the proposed exception for interpretation and translation costs in asylum cases. This is in clear conflict with the proposition that it is in the best interest of clients for disbursements to be treated separately. We do not agree with the implication that payment for disbursements should be made in arrears. This would be likely to cause significant cash flow problems for Nfp agencies. We propose that the present Nfp arrangements for a disbursement 'float' should continue (and should be applied to both sectors).

10.4 Do you agree with the proposed arrangements for the application of the statutory charge? If not please explain why.

- 7.4 We welcome the proposal that the charge should not apply to any recovery or preservation of property at the Legal Help level.

10.5 Do you agree with the proposals for payment of VAT? If not please explain why.

- 7.5 We appreciate that the problem is not of the LSC's making, but the proposals will make the system much more complicated for the Nfp sector to manage. They seem to imply that agencies will have to check the immigration status of every client, with VAT becoming an individual client issue. This is another element of the scheme that may need to be tackled by the transitional arrangements.

10.6 Do you agree with the proposal to remove payments for file review in order to fund more civil matter starts? If not please explain why.

- 7.6 We do not agree with this proposal. File review is an essential element of quality control. It needs to be done properly, and suppliers need to be encouraged to do it properly. The suggestion that the money saved could be used to fund more civil

matter starts makes clear that the present costs of doing so have not been factored into the fixed fees proposals, that they are not cost neutral and that this proposal therefore represents a cut in payment to suppliers.

10.7 Do you agree with the proposed amendments to the Funding Code set out at Annex C?

- 7.7 We have no comments on the amendments proposed since they appear to relate only to family work.

8 Proposed Unified Contract (Section 11)

11.1 Do you agree with our proposal that eventually all our providers, including NfP organisations, will be covered by the same contract terms? If not why not?

- 8.1 We do not object to this proposal in principle, subject however to the concerns expressed below concerning the proposal for a minimum income requirement and the proposal to end licence only contracts.

11.2 Do you agree that there should be a minimum income requirement, if not why not? Do you agree with our proposal to introduce a minimum income requirement of (a) £25,000 or (b) £50,000? What do you think that the minimum income requirement should be and why? And if you do agree which of the proposed options for the period over which the limit would be calculated do you prefer and why or do you have an alternative proposal?

- 8.2 In principle we can see the advantages of having a minimum income requirement. However, there may be good reasons why suppliers doing only small amounts of legal aid work should remain within the scheme. This could be, for example, for access reasons (where there are no or an insufficient number of suppliers in a particular geographical area) or because the suppliers are specialist or niche organisations with expertise in particular categories of law. Such suppliers might include small specialist organisations, or large national organisations that have a legal department that undertakes strategic casework. We would not want such organisations to be excluded.
- 8.3 In their draft response, Newcastle Law Centre highlight the contribution made by the Northumbria University Student Law Clinic, which has very small contracts with the LSC, but has an excellent reputation and fulfils a vital role in training future legal aid lawyers. This is clearly a good example of the types of services that should be enabled to continue.
- 8.4 We are not clear what work would “count” if a minimum income requirement were to be adopted. The consultation paper refers to “all legal aid payments made . . . in the relevant period.” We assume that this includes disbursements and VAT. It should in our view also be made clear that it includes cases in which costs are received from the other side, where no claim is made on the fund.
- 8.5 We would propose therefore that there should be a presumption that suppliers will be required to meet a minimum income requirement, but that there should be a provision allowing other suppliers to do legal aid work on an exceptional basis.
- 8.6 We think that the proposed minimum income requirement should be £25,000.
- 8.7 We think that the amount should be calculated prospectively.

11.3 Do you agree with our proposals for the future of the SQM? If not why not?

- 8.8 We agree that the SQM should no longer be a contract document.
- 8.9 We accept that the provisions relating to client care and supervision are good practice and should be kept as contractual requirements. However, we feel that the Unified Contract should not require suppliers to comply with other elements of the SQM.
- 8.10 When the LSC first developed the preferred supplier scheme, one of its aims was to reduce the bureaucracy required of suppliers and allow them more freedom to manage their organisations in the manner that best suited them. The proposal, which ASA supported, was that where suppliers could demonstrate through peer review that their work was of good quality there would be no need to prescribe the way in which organisations ran themselves.
- 8.11 In accordance with that proposal, we believe that the rollout of the Preferred Supplier scheme and the standard use of peer review to monitor quality make it unnecessary to keep the proxy indicators of quality contained in the SQM as audited contractual requirements.
- 8.12 We also see no need to introduce alternative quality requirements. The LSC should be satisfied with suppliers receiving good scores at peer review.
- 8.13 We are disappointed that, as they stand, the proposals would mean no reduction in bureaucracy and little increased freedom for suppliers.

11.4 Do you agree with our proposals to introduce new provision on the length of the Unified Contract and powers to terminate the contract in order to introduce Lord Carter's reforms or CLACs and CLANs? What contract length would you like to see and do you agree with the proposals on termination?

- 8.14 We agree with the proposal for three-year contracts with an option for renewal.
- 8.15 We do not agree with the proposal for termination on three months notice. This makes it impossible for suppliers to plan or organise their affairs. The minimum requirement should be six months notice and a prior direction from the Lord Chancellor as at present. The LSC does not need to be able to give three months notice in order to facilitate the introduction of a CLAC or CLAN, given the lead in time that will be required before any such organisation comes into being.

11.5 Do you agree with our proposals on self-monitoring, approved personnel, an open book relationship and technology? Do you think that they will improve the working relationship between the LSC and its providers? If not why not?

Self-monitoring

- 8.16 We agree that suppliers should keep track of their own performance against the contract and think that most suppliers do this anyway. However, we question the value of reporting the results of self-monitoring to the LSC.
- 8.17 We agree with the LSC that it needs to take a lighter touch approach to auditing but we do not see the value of this if it means that suppliers have to comply with more demanding reporting requirements.

Approved personnel

- 8.18 We accept the proposal for the LSC to keep a list of excluded individuals. However, the LSC should ensure that the system it introduces does not slow down the recruitment process for suppliers and that newly recruited workers are not kept waiting before they can undertake contract work.

Open book relationship

- 8.19 NfP agencies publish their accounts annually, giving full details of their financial position. We are not clear what further information is being requested. The “Sustainable Future” document says that the new contract will require the disclosure of all financial information relating to LSC funded work. However, we understand that the new proposals for Preferred Supplier will require less financial disclosure than was proposed in the original consultation. This is partly because the majority of Preferred Supplier consultation respondents felt that the proposed financial assessment was intrusive and unnecessary and partly because the LSC believes that once suppliers come to know and trust their relationship managers they will share financial information voluntarily.
- 8.20 We believe that a requirement to disclose all financial information is unduly onerous and does not reflect the new trusting relationship that the LSC claims it wants with suppliers.
- 8.21 Furthermore, if fixed fees are introduced, we do not see how financial disclosure will help the LSC “to demonstrate that it is meeting its statutory obligation to obtain best value for money” unless it is to be used to justify further cuts.

Technology

- 8.22 As we stated in our Preferred Supplier consultation response, we can see the value, in terms of speed and efficiency, of electronic reporting of contract data. We approve of the idea that reporting between suppliers and the LSC should happen automatically. However, we are concerned that, so far, the LSC has little clarity as to how this will happen.
- 8.23 Furthermore, whilst the LSC acknowledges that many suppliers are far from having the technological capability to conduct all their work with the LSC through e-business, and the sector does not have the resources to develop it, it is offering no funds to help suppliers develop in this area and no suggestions as to where such resources might be found.
- 8.24 The LSC hopes to reduce its own transaction costs through the development of e-business. Without support to help the NfP sector to develop in this area, the LSC could justifiably be accused of reducing its own administration costs by passing on the expense to those whose resources would be best used to enhance the advice service they provide to clients.
- 8.25 The feasibility and cost of moving to e-business will therefore have to be thoroughly investigated before it is taken forward, so as to avoid a situation where good suppliers are lost from the scheme simply because of their inability to pay for the necessary hardware, software and training.
- 8.26 We had hoped that we would be able to develop our comments on this by now. However, the LSC has still not provided a clear specification for the case management systems it wants to introduce nor has it come up with any suggestions as to where the money for the NfP sector will come from. The Draft Impact Assessment suggests that new IT systems are no longer expensive and that most will be compatible with the LSC’s requirements. We do not see how such conclusions can be reached when the LSC’s requirements are yet to be specified.

11.6 Do you agree with our proposal that all contracts will include a number of new matter starts thereby bringing to an end licensed only contracts? If not why not and are there circumstances where licensed only contracts should continue?

8.27 We refer to our answer to question 11.2. Some of the organisations referred to there may do, or may be more suitable for, licensed work only. There should therefore be an exceptional provision that allows them to hold license only contracts.

11.7 Do you agree with our proposals to publish information about contracts? If not why not?

8.28 We are unclear about what exactly is being proposed here. We would be happy to discuss this further once the LSC has clarified its position.

11.8 Do you agree with our proposals on quality assurance and client service particularly the use of peer review and mystery shopping? If not why not?

8.29 Subject to our earlier comments about the SQM, we are happy with the proposals on quality assurance and client service.

11.9 Do you agree with our proposals that under the contract all providers will be paid on the same basis? If not why not?

8.30 We refer to our comments above on the issue of payment in advance as compared to payment in arrears.

11.10 Do you agree with the removal of level 1 work for NfP organisations? If not why not?

8.31 Level 1 work has proved to be an effective way of providing one-off advice, either in person or by telephone, without spending a disproportionate amount of time on completing a controlled work form, obtaining evidence of means, and complying with detailed requirements in relation to opening a case, providing a detailed client care letter etc.

8.32 We believe that this flexibility and efficiency should be retained within any new system.

8.33 Advisers should be able to claim payment for short cases, whether the advice is provided in person, by telephone or by other means, subject to completion of a proxy means test, such as that presently used in relation to CLS Direct.

11.11 Do you agree with our proposals to change the way that contract sanctions are imposed and our proposed changes to the CRB?

8.34 We do not agree with the proposed changes to the CRB. It is not in accordance with the principles of natural justice to allow decisions previously taken by a Board to be taken by one member of LSC staff. This proposal takes away further protection from providers and is unnecessary. The current system should remain in place.

11.12 Do you agree with our proposal for amending contracts and allowing the LSC to introduce contract amendments at times other than April and October?

8.35 It is difficult for suppliers to cope with frequent changes to the contract. The restriction to changes in April and October has proved beneficial.

8.36 We cannot remember any circumstances when the present limitations caused problems and delays in introducing changes that would benefit clients. We are happy to reconsider our position if the LSC can provide us with examples of this. A further alternative may be an agreed protocol for introducing changes, following consultation with the Law Society and ourselves, to enable changes to be made outside the April and October "windows", which would otherwise remain in place.

11.13 Are there any other points that you either agree or disagree with that have not been specifically addressed in these questions? Please give your reasons for either agreeing or not agreeing?

The regional allocation of funds

- 8.37 In his report, Lord Carter suggests that the allocation of social welfare law funding should be based on a formula using data from means tested benefits e.g. income support as a proxy for legal aid eligibility.³⁸ He recommends that the process of moving to indicative budget allocations for social welfare law through deprivation data should be managed carefully to minimise any disruption to services.³⁹
- 8.38 The issue is not new. The LSC has for some time had a General Eligibility model (GEM) which seeks to estimate the proportion of eligible clients in each region by using statistics for the numbers of claimants of certain means tested benefits in each region. The implications of reallocating funds to the regions on this basis, on 2003-04 figures provided by the LSC, are set out in an appendix to ASA's report *Regional Planning and its Limitations* as follows:

Region	Non immigration spend 2003-04 In £	% of non immigration spend 2003-04	% calculated according to the GEM
South East	13,146,779	8.35%	10.05%
London	34,482,651	21.89%	16.69%
East	12,108,823	7.69%	7.66%
North West	16,515,485	10.48%	11.50%
W. Midlands	14,132,073	8.97%	11.38%
Yorks & Humber	13,684,134	8.69%	10.56%
South West	12,885,981	8.18%	7.41%
E. Midlands	12,829,090	8.14%	7.43%
Wales	9,995,453	6.35%	6.55%
North East	9,428,142	5.99%	6.44%
Merseyside	8,313,642	5.28%	4.33%
Total	157,522,253	100%	100%

- 8.39 If the non-immigration legal help budget were to be reallocated on a GEM basis, there would be significant winners and losers. The greatest change would affect London. On these 2003-04 figures, London would receive approx £26.3m on a GEM basis, as compared to an actual figure of approx £34.5m. This represents a drop of over £8m or approximately 24%.
- 8.40 It is a matter of great concern that a change of this nature should be proposed by Lord Carter without consultation and that no reference to it is contained in the "sustainable future" paper. The change proposed seems to assume that eligibility is a proxy for need and that the relationship between eligibility and need is constant across England and Wales. These assumptions are highly dubious.
- 8.41 According to the second edition of *Causes of Action*:

"In both 2001 and 2004, respondents in Wales reported significantly fewer problems than their counterparts in England, mirroring the differences reported between Scotland and England . . . in both 2001 and 2004 there were differences in the

³⁸ Carter report p.80

³⁹ Recommendation 4.29

*incidence rate of problems between the different regions of England with the highest rates in London. Outside of London, though, there was no discernable pattern.”*⁴⁰

- 8.42 In 2001 47% of respondents in London reported one or more problems, as compared to 36% overall in England and Wales. In 2004 the incidence rate in London was 40%, as compared to 33% overall.⁴¹
- 8.43 Statistics provided by CLS Direct show that London has consistently produced the highest number of requests for telephone advice per head of population.
- 8.44 These findings suggest that London’s share of the non-immigration legal help budget is in fact broadly in line with the incidence rate of problems in the capital.
- 8.45 It is also clear that such a change would have an indirect discriminatory impact given the high proportion of members of BME communities in London.⁴²
- 8.46 It is our view that no action should be taken by the LSC to implement any redistribution of the legal help budget along the lines proposed by Lord Carter without further research, full debate and proper consultation.

Notifying negligence

- 8.47 It is suggested that the Unified Contract “will require providers to notify a client if they consider they may have been negligent.” We are concerned that this requirement, if taken literally, may conflict with the requirements of a supplier’s professional indemnity insurance. We would recommend that this requirement be replaced with one that matches the Solicitors Practice Rule 29.09:

“If a client makes a claim against a solicitor or notifies an intention to do so, or if the solicitor discovers an act or omission which would justify such a claim, the solicitor is under a duty to inform the client that independent advice should be sought.”

9 Supplementary note on Quality and Cost⁴³

- 9.1 The research used four experimental groups. The first three groups were solicitors and the fourth group was made up of NfP agencies. Group 1 were paid a piece rate for hours worked, Group 2 were paid a certain amount of money and were told to do as much advice and assistance work as possible with that amount, Group 3 were given a fixed amount of money and were asked to do a certain number of cases, Group 4 were paid for a certain number of hours irrespective of the number of cases.
- 9.2 The amount of money provided bore a strong relationship to the amounts earned in previous years by those firms. The number of cases for the third group bore a strong relationship to the number of cases dealt with by those firms in previous years.
- 9.3 The researchers peer reviewed the work of all four groups and compared the results. They found that:

⁴⁰ Pascoe Pleasence *Causes of Action: Civil Law and Social Justice* second edition p.23

⁴¹ *Ibid* p.23n

⁴² According to the 2001 Census: 59.8% of the London population is White: British; 71.2% is White; 28.8% are from minority ethnic groups. See *Focus on London 2003*, table 2.12.

⁴³ Moorhead et al *Quality and Cost: Final Report of the Contracting of Civil, Non-Family Advice and Assistance Pilot* (2001)

*“Group 3 was significantly poorer at giving advice at the right time than Group 1 (about 10% of cases were poorer). They were also less likely to incur disbursements where disbursements were actually appropriate than Groups 1 and 2. Group 3’s failure to carry out other work was felt to be inappropriate in a greater proportion of cases than Group 2. This may provide an indication of how the constraints of contracting work against Group 3; discouraging disbursements and the carrying out of appropriate work.”*⁴⁴

9.4 As part of the research, clients were asked about their levels of satisfaction:

“Group 3 clients were significantly more likely to report that their case was taking too long (51% compared with 34% in Group 1 and 39% in Group 2).

*Group 2 received higher overall ratings of satisfaction than Group 3. Group 2 clients rated their contractees as excellent in 51% of cases compared with 36% of cases in Group 3. Group 3 received ratings of very good in 32% of cases compared with 26% cases in Group 2. However, cases rated as excellent or very good showed Group 2 as receiving positive assessments in 77% of cases compared with 69% of cases in Group 3.”*⁴⁵

9.5 The study also compared case endpoints. Group 3 had the largest percentage of matters that ended with the outcome unknown to the adviser (39% compared with 32% for Group 1 and 30% for Group 2). Group 2’s clients were said to be better able to plan and/or manage their affairs as a result of legal intervention most frequently (26%), Group 3’s client’s least often (16%). The report concludes:

“Group 3 performed more poorly on nearly all outcome indicators than the other two solicitor groups”.

9.6 Therefore, in the three areas of peer review, client satisfaction and endpoints, the experimental group funded to provide a fixed number of matter starts for a fixed fee performed worst.

9.7 The overall conclusion to the report states:

*“Contracting as structured through Group 3 in the solicitors sector has had a negative effect on quality when compared with the control (Group 1) and the group most similar to NFPs (Group 2). Part of the explanation for this is the combination of volume requirements with fixed prices for blocks of work.”*⁴⁶

⁴⁴ Ibid p.112

⁴⁵ Ibid p.133

⁴⁶ Ibid p.227