

Legal aid: a sustainable future?

An initial response from the Advice Services Alliance

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1 Introduction

- 1.1 For the NfP sector, the publication of the Carter report and the LSC/DCA paper “Legal Aid: a sustainable future” represents a fundamental challenge to the nature and extent of our involvement in the provision of advice in social welfare law.
- 1.2 For a summary of the changes proposed see our previous briefing “Carter, the future of legal aid and the NfP sector.”¹
- 1.3 The potential impact on the NfP sector is set out by the Draft Impact Assessment which accompanies the “sustainable future” paper:

“ We have modelled the impact of NFP organisations moving to the TFF Replacement Scheme if fees are set on a national basis and our preliminary analysis suggests that if NfPs do not increase the numbers of matters undertaken, 92% will experience significant decreases in their publicly funded income, and the total spend with the sector in the categories of work covered will reduce by 50% (£21 million).”² (our emphasis)

- 1.4 The purpose of this briefing is to set out our initial response to these proposals, insofar as they affect the social welfare law categories of debt, welfare benefits, housing and employment. We are not in a position at this stage to comment on the separate proposals in relation to immigration and asylum and mental health. We will comment on these proposals in our final response to the LSC consultation.
- 1.5 This briefing has been written following discussion with the major advice networks whose members are affected by these proposals: Advice UK, Citizens Advice, the Law Centres Federation and Shelter.
- 1.6 The briefing sets out our “initial” response because it reflects our early thinking, based on the information that we have been able to consider so far. We have received some further information from the LSC, which we need to consider. More importantly, we want to hear from agencies what they think the effects of these proposals would be.
- 1.7 Although this briefing concentrates on the proposal to introduce fixed fees in social welfare law, it also considers two other important issues:
 - the allocation of funding between the regions
 - the question of who should be in charge of quality.
- 1.8 Our initial conclusions are that
 - Any change in payment methods should be deferred to coincide with the introduction of the preferred suppliers scheme and to enable further research to be carried out into the determinants of case costs.
 - The proposed fees are set far too low to deliver the swings and roundabouts necessary to ensure a case mix which meets the needs of all clients.
 - The proposals would create a perverse incentive for all suppliers to cherry pick easy cases and easy clients.
 - Some suppliers may be tempted to cut corners, or do less for clients, leading to a reduction in the quality of services provided.

¹ Available at <http://www.asauk.org.uk/fileLibrary/pdf/Carterbfg.pdf>

² Draft Impact Assessment para 86

- There are alternatives that should be considered. These include: tailored fixed fees; higher fee levels; more categories of fees; graduated fees; more sophisticated escape mechanisms; and special provision for niche organisations.
- There should be a full debate and proper consultation before any changes are made to the allocation of funding between the regions.
- The LSC should remain in charge of the peer review process.

1.9 We would particularly like to hear agencies' views on

- What you would have to do in order to survive under a fixed fee regime
- The problems that fixed fees would cause in particular types of cases
- The viability of the various alternative suggestions set out below.

2 Fixed fees

Introduction

2.1 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.

2.2 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,³ 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.

2.3 The report is particularly clear that fixed fees for legal help must be “consistent with maintaining a good quality supplier base”⁴ and that “quality should continue to be the key test for deciding which suppliers to contract with.”⁵

2.4 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.

2.5 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.

³ Carter report p.84

⁴ Recommendation 4.24

⁵ Carter report p.96

- 2.6 The proposals for fixed fees set out in the “sustainable future” are an extremely 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.

The variation in case lengths

- 2.7 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 by which solicitors are currently paid (which are reflected in the regional fees proposed) and in the average case lengths of NfP organisations.
- 2.8 Our analysis of NfP case lengths ⁶, 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).
- 2.9 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)
 - 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 results for clients is associated with longer case times.
- 2.10 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

- 2.11 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.
- 2.12 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.” ⁷
- 2.13 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

⁶ Available at <http://www.asauk.org.uk/fileLibrary/pdf/cslgthnfpcon.pdf>

⁷ Legal Aid: a sustainable future p.28

whole with more complex cases. There is some evidence of this in the data that we have on NfP average case times.⁸ This would be understandable given the large number of small advice agencies and community groups in London, which may well be dealing with the less complex cases.⁹ Higher case lengths/costs may also reflect the high level of pressure on statutory and other services in London. They may also reflect particular problems arising out of the nature of the “other side” in many disputes.

- 2.14 Amongst NfPs, 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 and second highest in 2 of the 13 categories. In many categories the proposed London fee is dramatically higher than that of the second placed region.
- 2.15 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 hour¹⁰) and the NfP average case times nationally and in London in 2005-06.¹¹

	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

- 2.16 The table shows dramatic differences between the proposed national fees and London fees in all of these categories. It shows significant differences in NfP average case lengths in all of these categories except debt.
- 2.17 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 needed, a topic to which we return below.

⁸ 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 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.

⁹ There may of course be quality issues concerning such advice.

¹⁰ 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.

¹¹ 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”

- 2.18 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.”¹²
- 2.19 The distinction between the “what, who and how” is an important one. However, the distinction is not as simple as this passage suggests.
- 2.20 Both the previous documents 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.
- 2.21 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 has been carried over into the fixed fee proposals.
- 2.22 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.
- 2.23 There are two obvious dangers involved here.
- 2.24 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.
- 2.25 The second danger is that the proposals could affect the quality of supply before the preferred supplier process has established a benchmark.
- 2.26 These problems arise, in our view, because the proposals are likely to have a direct impact on the types of case taken on and the quality of services provided.

Case mix

- 2.27 Where suppliers have average case lengths or costs that are higher than the value of the fixed fee, the incentive will be to reduce their average case lengths or costs. This is likely to involve
- Looking for the easy/short cases for the easy clients and/or
 - Avoiding long, difficult and complex cases and clients.
- 2.28 As Carter says: “If the LSC targets only case volumes, there is a risk that some suppliers may not wish to pursue complex cases.”¹³

¹² Legal Aid: a sustainable future p.21

¹³ Carter report p.85

- 2.29 Where suppliers have average case lengths or costs that are equivalent to or lower than the value of the fixed fee, the incentive will be to maintain their previous case 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.
- 2.30 Our analysis of NfP 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.
- 2.31 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 review will only be able to pick up easy/short cases that are done badly. Whether the LSC will be able to detect this in other ways we do not know. Even if it can, we are not clear what it 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. At the moment we have seen no evidence of this.
- 2.32 The problem can of course be ameliorated by escape mechanisms for exceptional cases. We consider the proposed trigger of four times the fixed fee to be far too high. Wherever it is set, however, there will always be a problem in relation to those cases that are likely to take considerably longer than the average reflected in the fixed fee, while falling short of the requirements of the exceptional category. Unless they are separately catered for, a large proportion of multiple debt cases, for example, are likely to fall within this category.

Quality

- 2.33 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'. This means that they risk foregoing the quality assurance that should be provided by the preferred supplier scheme.
- 2.34 Shorter or simpler cases can of course be done well. They may even be done more quickly by high quality suppliers.
- 2.35 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*.¹⁴ 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.
- 2.36 Where suppliers have case lengths or costs which are higher than the value represented by the fixed fee there is likely to be a direct relationship between fixed 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.

¹⁴ Moorhead et al *Quality and Cost: Final Report of the Contracting of Civil, Non-Family Advice and Assistance Pilot* (2001)

- 2.37 There is of course a further risk that suppliers will limit the amount of work they do on cases that are taken on, which will have a direct impact on the quality of services provided.
- 2.38 In practice, if these proposals are implemented, there is a real risk that the LSC will drive out some good suppliers, while keeping in high volume suppliers who may not be providing quality services, in breach of Carter's recommendations about the importance of quality.

The overall provision of services in social welfare law

- 2.39 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.
- 2.40 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.
- 2.41 The need to meet 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.
- 2.42 The need to meet targets 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.
- 2.43 The need to meet targets is also likely to distort the relationship between specialist agencies and other 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

- 2.44 The implementation of a crude fixed fee system could have serious diversity implications.
- 2.45 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.
- 2.46 This is likely to affect a disproportionate number of clients who have a disability and/or are members of BME communities.
- 2.47 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.
- 2.48 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.”*¹⁵

- 2.49 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.
- 2.50 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 not classified as White British was 64% in debt, 73% in housing, 74% in benefits and 75% in employment.

The amounts proposed are too low

- 2.51 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’”.¹⁶
- 2.52 We understand from the LSC that the fixed fees proposed have been based only on solicitors’ TFF payments.¹⁷ 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.¹⁸ The LSC has provided us with information suggesting that NfP costs per case on a national basis are substantially higher than solicitors’ costs in debt, slightly higher in welfare benefits and slightly lower in housing and employment cases. It would appear therefore that calculations based on solicitors’ **and** NfP costs per case would produce substantially higher figures in debt, and slightly different figures in the other three categories.
- 2.53 We have difficulty at the moment 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.¹⁹
- 2.54 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
 - Welfare benefits in Merseyside and the North West.
- 2.55 The appropriateness of such figures is, however, doubted by the LSC in other contexts.

¹⁵ ‘Sir Michael Bichard on Carter’, *Focus Issue 51* p.4

¹⁶ Legal Aid: a sustainable future p.28

¹⁷ 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

¹⁸ These figures have been calculated from data contained in the August 2006 edition of the LSC’s Civil Contracting Report 2006/07

¹⁹ 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.²⁰

2.56 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

2.57 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.

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

2.59 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.

2.60 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.

2.61 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 in April 2009.

Are there alternatives?

2.62 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 skill and knowledge).

²⁰ Gateshead CLAC specification para 49a; Leicester CLAC specification para 48.1

Tailored fixed fees

- 2.63 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.
- 2.64 If a standard fee system has to be introduced, a workable system could possibly be achieved by a combination of some or all of the following proposals.

Higher fee levels

- 2.65 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

- 2.66 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
 - In employment: adding categories for unfair dismissal and for discrimination.

Graduated fees

- 2.67 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

- 2.68 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.

Exceptional cases

- 2.69 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.

Niche organisations

- 2.70 Consideration needs to be given as to whether separate provision is necessary for certain niche organisations.²¹ 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.

3 Regional allocation of funds

- 3.1 Carter recommends 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.²² 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.²³
- 3.2 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 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%

- 3.3 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%.
- 3.4 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.
- 3.5 According to the second edition of *Causes of Action*:

²¹ See the Carter report discussion on crime at pp.59-60 and public law children at p.66

²² Carter report p.80

²³ Recommendation 4.29

“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 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.”²⁴

- 3.6 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.²⁵
- 3.7 Statistics provided by CLS Direct show that London has consistently produced the highest number of calls per head of population.
- 3.8 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.
- 3.9 We trust that no action will be taken by the LSC to implement any redistribution of the legal help budget along the lines proposed by Lord Carter without full debate and proper consultation.
- 3.10 This is clearly another area in which further research is necessary before any significant change is undertaken.

4 Who should be in charge of quality?

- 4.1 According to Lord Carter, there should be a transfer of all quality assurance for solicitors from the LSC to the Law Society by April 2009.²⁶ “NfP agencies that have legal aid contracts but do not employ a qualified solicitor will need to consider how best they fall under the new quality arrangements, and whether they should develop their own advice standards (based on peer review)”.²⁷
- 4.2 We oppose 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.
- 4.3 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.
- 4.4 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 split the measurement of quality between private practice and the NfP sector makes a mockery of the concept of preferred supplier.
- 4.5 The LSC has taken over five 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

²⁴ Pascoe Pleasence *Causes of Action: Civil Law and Social Justice* second edition p.23

²⁵ Ibid p.23n

²⁶ Recommendation 5.1

²⁷ Carter report p.96

sufficiently independent of the LSC. Arriving at this stage has taken considerable resources and the ongoing operation of the scheme will continue to require substantial 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.

- 4.6 It is not clear what the Law Society's responsibility would be if Lord Carter's proposal was implemented. Currently it 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 departments, regardless of whether the department is made up wholly of solicitors, or of a mix of solicitors and non-solicitor caseworkers or wholly of non-solicitor caseworkers.
- 4.7 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.
- 4.8 Not only will this arrangement make it much more difficult to determine whether a department meets the standard required for preferred supplier, it involves unnecessary duplication, unfairly disadvantages NfP solicitor agencies and is impractical.

5 Further action

- 5.1 This briefing represents only our initial response to these proposals. Advisers will have their own views about the proposals, and how they will affect their individual agencies.
- 5.2 If you have any concerns about these proposals, please contact your advice network.
- 5.3 We would also be very interested to hear from you directly. In addition to contacting your network, please also let us know what you think about these proposals, preferably by emailing us at adam.griffith@asauk.org.uk
- 5.4 We would particularly like to hear agencies' views on
- What you would have to do in order to survive under a fixed fee regime
 - The problems that fixed fees would cause in particular types of cases
 - The viability of the various alternative suggestions set out above.
- 5.5 Agencies are urged also to reply to the "sustainable future" consultation paper as soon as possible and in any event before 12 October 2006, and to forward a copy of their response to their advice network. If you think that fixed fees would have an adverse effect on the service that you provide to clients, or to particular types of clients, you might wish to cover issues such as
- where your clients currently come from
 - client profile information
 - whether you prioritise certain types of cases

- any financial calculations you have done as to the impact on your agency of operating under a fixed fee regime (using the national and regional fees proposed).

6 Supplementary note on Quality and Cost ²⁸

6.1 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.

6.2 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.

6.3 The researchers peer reviewed the work of all four groups and compared the results. They found that:

“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.”²⁹

6.4 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.”³⁰

6.5 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”.

6.6 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.

6.7 The overall conclusion to the report states:

²⁸ Moorhead et al *Quality and Cost: Final Report of the Contracting of Civil, Non-Family Advice and Assistance Pilot* (2001)

²⁹ Ibid p.112

³⁰ Ibid p.133

“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.”³¹

³¹ Ibid p.227