



The Law Society

Transforming Legal Aid

Law Society alternative to Price Competitive Tendering

The Law Society - 2013

The legal aid reforms must balance competing objectives

Current proposals fail to balance the competing objectives of greater value for money, preserving credibility and quality and ensuring that there remains choice

MoJ Objectives

- Achieving savings of £220 million from legal aid, of which £122 million is intended to come from the proposal for PCT
- Maintaining credibility and quality in the market

Law Society objectives

- Preserve client choice
- Incentive to maintain quality
- Ensuring that incumbent and new providers can achieve sufficient scale to be economically viable
- That there is adequate time and certainty to adjust and avoid disorderly market exit

Current situation - “facts on the ground”

- There is over capacity in the criminal legal aid market
- Reported crime is falling - this is a declining market
- Volumes / nature of work across E & W is uneven
- Despite cost pressures over the last decade, trend has been toward ‘micro’ firms rather than consolidation into larger firms

The relationship between price, quality and choice

The Government has a number of policy levers for legal aid reform around price, quality and choice



- In a competitive market, consumers reward suppliers who offer the best value for money / highest quality service by using their services
- These suppliers then achieve greater market share - but the threat of new entrants and of losing clients through diminished reputation ensures that they do not abuse their market power
- Where there is a risk that price competition may not be effective, or there are public policy reasons for a low price (e.g. universal service), policy-makers can impose a price ceiling
- Similarly, minimum quality and outcome criteria can be set by policy-makers

The Law Society's alternative proposal: A market driven by a Quality and Capacity Framework

Competing objectives are not incompatible: the Society's alternative model would retain choice, provide certainty and facilitate greater market efficiency

Retains choice

- Clients retain the right to choose any willing representative from those with a legal aid contract held with the LAA anywhere in England and Wales
- Choice is actively promoted - clients are provided with information about firms performance, specialism etc
- Choice ensures that the market regulates quality

Provides certainty

- Contracts are reformed so that there is a one-stage bidding process following which providers retain their contract on a rolling basis subject to continually demonstrating fitness
- Contracts are reviewed according to a Quality and Capacity Framework with annually increasing standards negotiated between the LAA and the Law Society

Facilitates efficiency

- The duty solicitor scheme is urgently overhauled to remove inefficiencies and better allocate work to successful providers
- The LAA makes improvements to its payments system
- Wasted costs orders are more widely used to incentivise efficiency
- Barriers to market exit for retirees and poor performers are removed

New contracting regime

Contracts are awarded on a rolling basis and are retained subject to an assessment relative to a increasingly rigorous Quality and Capacity Framework

Summary of the proposed contracting model

- Neither the current model nor that proposed in the consultation paper provide adequate certainty for firms to invest in expansion and digital infrastructure.
- The consequence of short contracts and uncertainty has been an undesirable and inefficient fragmentation of the market into “micro firms”
- Beginning in September 2014 (the end of the present contracts) a new contracting system of rolling contracts is instigated. Contracts would be three years, but would be annually renewed for a further year (e.g. at the end of year one, the contract would be extended for a further year and so on) so that there is always two full years remaining on the contract at any one time.
- Contracts will therefore essentially continue indefinitely subject to two conditions (1) a willingness to fulfil the contract at the LAA set price; and (2) adherence to the conditions of a Quality and Capacity Framework.
- The details of the Quality and Capacity Framework must be published as soon as possible (September 2013), in preparation for an initial tendering stage in the Spring of 2014.
- Contracts will be awarded on the basis of the existing 245 police station procurement areas.
- The criteria of the QCF will be tightened annually to both ensure that the highest quality providers remain in the market and to drive consolidation and expansion. The criteria will be set via negotiation between the LAA and the Law Society.
- The Duty Solicitor Scheme is simultaneously overhauled: the present inefficient system of allocated slots based on the number of duty solicitors in a firm is replaced with a scheme based on the previous year’s volume of work, further rewarding quality, reputation and success.

Using a Quality and Capacity Framework to manage the market

The Society's alternative allows for market change driven by client choice, but also gives the LAA the ability to manage the market via the QCF

How it works

- The Society's proposal is essentially a slightly modified version of the rolling General Medical Service Contracts for GP surgeries - where a contract is automatically renewed on a rolling basis subject to meeting the statutory and mandatory obligations under the contract.
- The mandatory obligations of the legal aid contract would take the form of a Quality and Capacity Framework, which would specify a number of criteria a firm must achieve in order to retain its contract in the next phase of the contract. Core criteria would be annually tightened (though with the potential for regional variation) pushing consolidation.
- Failure to meet the core criteria of the QCF would constitute a breach of contract, leading to its termination. Secondary criteria within the QCF - 'red flag' criteria - would trigger an urgent review, which would include a report setting out the steps the firm has to take in order to retain its contract. Draft criteria for the QCF are set out on p. 8.

Advantages

- Market-based. Client choice and thereby efficiency and quality incentives are created.
- Does not limit volume - allows best to expand, but retains competition by reducing barriers to entry and allowing a variety of firms to compete, subject to meeting the terms of the QCF.
- Removes uncertainty and short-termism by ensuring that a contract is guaranteed subject to adherence to the QCF. Permits long-term investment in capacity and infrastructure.
- Mitigates against the risk of indirect discrimination against BAME firms.
- Provides flexibility to differentiate the QCF criteria to reflect local conditions (e.g. rural areas).
- Reduces bidding costs - removes the need for a three yearly tendering process.

Potential disadvantages

- May introduce new administration costs for the LAA linked to assessing firm performance.
- Failure to meet QCF criteria could be influenced by factors beyond firms' control.

Measuring achievement relative to Quality and Capacity Framework

The GP structure relies on a 'high trust model' with random auditing; a similar model utilising the existing COLP structure could work in the legal aid context

The Quality and Outcomes Framework for GP contracts

- Introduced in 2004 as part of the General Medical Services Contract, the Framework is a voluntary incentive scheme for GP practices in the UK. In reality almost all practices participate
- The Framework contains groups of indicators, against which practices score points according to their level of achievement.
- The criteria to be attained are set by NICE, in negotiation with the BMA as the representative body of the medical profession. The criteria are annually updated to drive specific outcomes.
- Much of the information is gathered quickly and automatically. It is entered by each practice into their clinical records system and extracted by the GP Extraction Service (GPES).
- Where data is not available automatically, it is submitted monthly and signed off by the practice manager. The NHS Commissioning Board can request further evidence of claims, and random auditing may be conducted.

A Quality and Capacity Framework for legal aid contracts

- A QCF in the legal aid context would be similar, but would be compulsory (i.e. failure to comply would lead to contract termination), would contain fewer and less complicated metrics, and would largely involve self reporting backed by audit.
- The precise criteria of the QCF would be set annually (though the initial three years could be set immediately in order to provide market certainty) by the LAA in negotiation with the Law Society (the Law Society adopting a role akin to the BMA).
- A similar 'high trust model' of reporting would apply: the Compliance Officer for Legal Practice (COLP), a regulatory required position in all law firms, would be responsible for submitting the firms results relative to the QCF.
- The LAA would be able to request further information from firms, and could conduct random audits.
- In the case of certain 'red flag' criteria - e.g. an unusual acquittal rate - a peer review would take place.

New contracting regime over time

The minimum criteria for participating in the market - based on the QCF - would change over time, pushing the market towards sustainable consolidation

Stage 1: 2014/15

Quality criteria

- Lexcel / Specialist Quality Mark
- Business plan with supporting evidence from bank and/or accountant
- At least two CLAS accredited staff members
- Must have staff with experience of: (A) police station cases; (B) contested magistrates court trials, including advocacy; (C) Crown Court cases; (D) contested Crown Court trials, excluding advocacy; and (E) youth court cases
- Must have staff whose experience in the past 12 months between them cover the following: (a) murder, manslaughter of wounding; (b) sexual offences; (c) offences of dishonesty; (d) drugs offences; and (e) public order offences
- A ratio of qualified to non-qualified fee earners of at least 1:4
- An SRA compliant diversity policy
- Ability to deal with/refer housing and family case

Outcome / service requirements

- At least two qualified duty solicitors. Firm must undertake all duty work in accordance with allocated slots
 - Must provide comprehensive service covering police station, magistrates court, crown court and immediate appeals, but not prison law or CCRC and out of time appeals for every client taken on, whether via the duty solicitor scheme or otherwise.
 - Must provide a 24-hour duty service, respond to calls within 45 mins and deal fully with 95% of all duty calls
 - Must meet digitisation requirements
 - At least 70% of all police station work and 50% of all casework, Advocacy Assistance or Representation at the magistrates' court must be conducted by a principal, consultant employed in the firm, or other employee engaged permanently with the firm.
- 'Red Flag' KPIs (i.e. triggering a review to understand the causes of the failure to meet the target, prior to any penalty being considered)**
- KPIs should include that the number of not guilty pleas and acquittals is within 15% of the national average; and the existing KPIs relating to costs reductions.

Stage 2: 2015/16

Quality criteria

Unchanged provisions

- Lexcel / SQM
- Staff ratio of 1:4
- SRA compliant diversity policy
- Business plan with supporting evidence from bank
- Ability to deal with/refer housing and family cases
- Staff must have experience of a range of contested trial cases

Tightened provisions

- At least three CLAS accredited individuals
- Staff experience: staff must have experience in the past 12 months of 2 x A-E cases/trials.

New provisions

- Firm must be registered with the SRA to take on trainees or have an arrangement with another firm to provide a criminal law seat for a trainee
- Firm must have staff with experience in the last 12 months of (F) appeals from magistrates court; (G) appeals from Crown Court; and at least one confiscation proceeding

Outcome / service requirements

Unchanged provisions

- Comprehensive service provision for every client whether via the duty scheme or otherwise.
- 24-hour, 45 minute call response and 95% of duty cases
- Must meet digitisation criteria

Tightened provisions

- Must have at least three qualified duty solicitors and must undertake duty solicitor work in accordance with the slots allocated to that firm
- At least 90% of all police station work, and 75% of all casework, Advocacy Assistance or Representation at the magistrates' conducted by an employee

'Red Flag' KPIs (triggering review)

- To include acquittals/not guilty pleas within 15% of national average
- New KPI - the average cost of each magistrates' court case, taking account of the whole class of claims in this category, must not be more than 10% higher than the panel area average

How the contracting process could drive consolidation in the market

The current market is highly fragmented - but certainty of contractual obligations combined with support from the Law Society and LAA would drive consolidation

Core criteria in the QCF drive consolidation

- In addition to establishing a quality threshold for participation in the legal aid market, key among the QCF are criteria - to be amended as appropriate - designed to drive consolidation in the market.
- From Sept. 2014 firms would be required to have at least two CLAS accredited individuals/ and two duty solicitors, rising to three from Sept. 2015. Presently 1177 firms have between 1 and 5 duty solicitors, while only 317 have >5 suggesting that a relatively low minimum number of solicitors could trigger a fair degree of consolidation.
- Furthermore, firms would be required to meet certain service requirements that would encourage broader operations: notably providing a comprehensive service, providing 24/7 police station cover, answering all calls within 45 minutes and adequately dealing with 95% of duty cases.

Transitional support is provided by the Law Society and LAA

- Clearly designating a 'direction of travel' combined with the guarantee of a contract if QCF criteria are met will provide the necessary certainty for investment
- Support should also be provided by the LAA and Law Society in establishing consortia and joint-ventures, as well as firm expansion.

Barriers to market exit are removed

- Barriers to market exit, such as run-off insurance cover, should be removed.

Range of duty solicitors employed	Number of firms
1-5	1177
6-10	210
11-15	51
16-29	23
21-30	18
31-40	11
41-50	1
50+	3

The LAA could alter the QCF criteria to reflect local conditions

A key advantage of the proposed model is the flexibility it grants the LAA to adjust quality, capacity and remuneration criteria to reflect local conditions

Illustrative case study - Dyfed Powys



- Rural areas, such as Dyfed-Powys, face particular problems Under the MOJ's present proposal just four firms would cover this entire area. Long-established firms with existing specialisms and client relationships could be lost to the detriment of the justice system in the area.
- Under the Society's alternative, LAA panel areas could continue to be based on police station duty scheme boundaries - ensuring local coverage.
- As with GP contracts, for example, administrative fees could be set so as to take account of the unavoidable costs of rurality, such as increased travel times.
- Furthermore, to protect local provision and avoid advice deserts, the QCF for subsequent panel reviews could come into effect more gradually to allow more time for current business models to adapt.

Illustrative case study - Greater Manchester



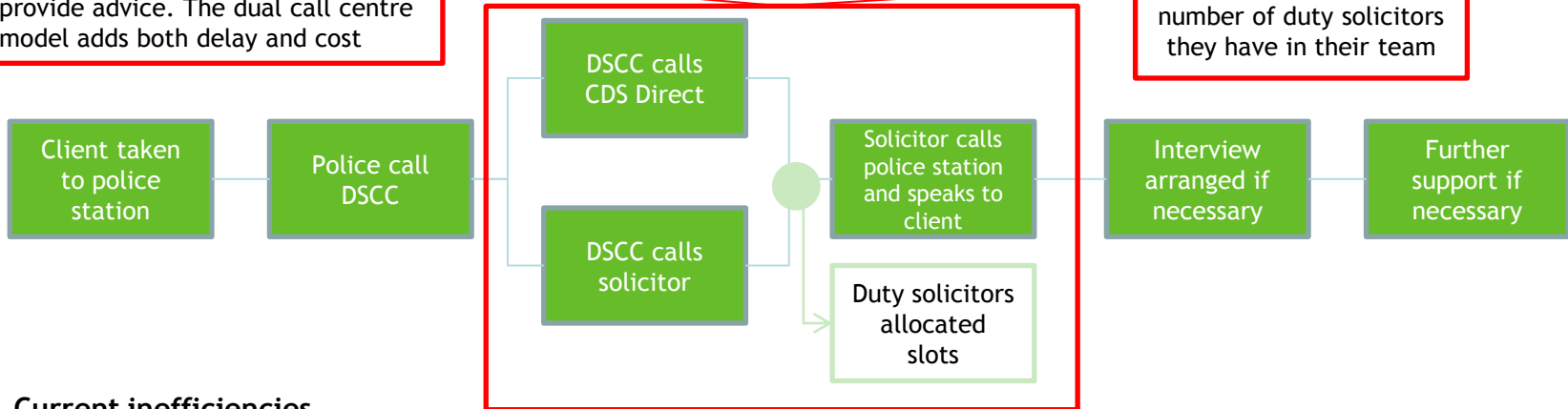
- Urban areas, such as Greater Manchester, have different problems. Under the MoJ scheme the city would be divided into 37 contracts, each with a capped contract value. However, Manchester is home to some of the largest and most successful law firms, with some generating more than £5m of income in their practice. The consequence of the MoJ proposal will be that these firms have to significantly reduce their coverage in the area.
- The Society's proposal would remove this wholly undesirable consequence altogether - successful firms who meet the standards of the QCF could continue to develop and grow.
- An emphasis on client choice, facilitated by the provision of information, would inform clients' choice and reallocate market share towards the higher quality providers, leading to natural consolidation.

The 'as is' situation: the duty solicitor scheme

The present duty solicitor scheme is inefficient and produces perverse outcomes - the Society's alternative is more efficient

At present police call the DCSS, who then decide whether the CDS Direct call centre, or a solicitor can provide advice. The dual call centre model adds both delay and cost

Law firms' access to criminal defence work is often dependent on the number of duty solicitors they have in their team

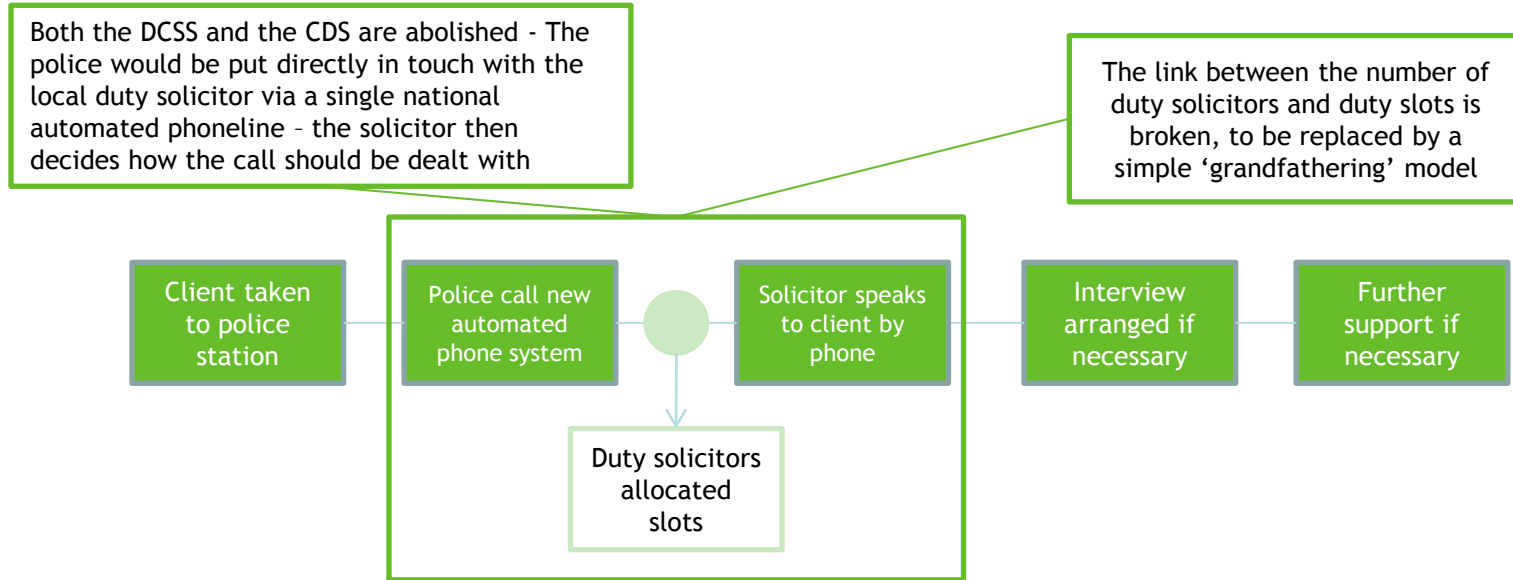


Current inefficiencies

- The police station advice duty solicitor, which often forms the basis of subsequent stages of case work from a client, is currently allocated through a duty solicitor rota system.
- Firms' share of total calls is dependent on the number of duty solicitors they employ. This dependency can create an incentive to employ more duty solicitors in order to gain more slots on the rota, even though the total size of the market is declining.
- Some Law Society members note that the fee income potential of a duty solicitor slot is, in many cases, lower than the cost of hiring a duty solicitor. Others have suggested that some firms have a strategy of employing 'ghosts', whereby they have solicitors on their books in order to gain extra duty solicitor rota slots to gain work and market share, without the solicitors actually engaging in any defence work.
- This may lead to inefficiencies in the current market players' cost base as the number of duty solicitors on payroll, and their average salaries are not reflective of their utilisation and fee earning potential.

The Law Society proposal: the duty solicitor scheme

The DCSS and CDS are abolished, to be replaced by an automated system directing clients to a firm on the panel; panel slots are allocated via a new system



More efficient allocation of clients to duty solicitors

- The Society's proposal removes the need to operate two staffed call centres - the Defence Solicitors Call Centre and the Criminal Defence Service Direct - and instead puts solicitors directly in touch with defendants.
- The police would call a single national number, enter a code for their panel area, and be directed automatically through to the duty solicitor at that time. Several numbers could be provided, and an automatic allocation to the next firm on the panel if no answer is received.
- The solicitor can deliver both the telephone only advice currently provided by the CDS Direct, or choose to visit the police station if an interview is required.
- The Society estimates that this model could save the LAA several million pounds per annum.
- The next page describes a more efficient allocation model for duty solicitors, breaking the link between duty solicitors and duty slots.

The Law Society proposal: the duty solicitor scheme

The current method of allocating firms with duty slots is replaced by a simple 'grandfathering' system

A reformed duty solicitor scheme

- In the Law Society's model choice is not only retained, but is actively encouraged. Greater emphasis is placed by the LAA on defendants to choose their legal aid provider, with information gathered by the QCF exercise provided to defendants.
- However, there will remain a need for a duty solicitor scheme as a last resort in those instances where a defendant is unable or unwilling to choose.
- The present system is inefficient and creates perverse outcomes. It should be replaced with a simpler system of slot allocation.

Duty slot allocation by a firms legal aid workload in the previous year

- Duty solicitor allocation should be made for a year at a time.
- The allocation should be on the basis that each firm is allocated a percentage number of duty slots equivalent to the percentage of crime lower fund spend they received in the preceding 12 months. Note, however, that this figure will need to be adjusted to reflect those 'ghost' duty solicitors purged prior to the allocated round.
- It would reward capacity, in that those who have done more would get more. It would reward quality in that those who have attracted more own client work would see their proportion of slots increase in the following year.
- New firms would still be able to set up, on the basis that they would have an existing client following, and would then be allocated slots at the next round of allocations based on their percentage of lower crime work generated from this own client base. Problem: can the LAA identify the lower spend attributable to cases from a particular police station? If not, how do you avoid firms getting double credit if they serve more than one area?

A freeze and purge to remove 'ghosts' from the duty solicitor system

- A 'ghost' in the duty solicitor scheme is anyone who is not an employee or a freelancer who derives at least 50% of their work from a law firm, but whose duty solicitor slots are allocated to that firm.
- For example, it would include individuals who receive a payment for their duty solicitor slot that is not a salary and is not directly attributable to actual work done for the firm.
- Prior to the first allocation of duty slots in September 2014 there must be a freeze on the practice of hiring ghosts and a process of purging to remove them from the system.

Making transition more manageable

There are two rapid changes that the Government could make that would make transition more manageable

Payments on account

- If firms are to survive on lower payments, improvements to payments on account are essential. Under the standard and graduated fee schemes, as soon as a case is taken on, there is a minimum fee that is definitely going to be payable to the firm for undertaking work on that case.
- There is no reason why that fee should not be payable forthwith upon the commencement of the matter, with the extra sums due billed and accounted for at the end of the case.
- For example, a sending of a case - where a Representation Order is granted - should allow for 50% of a guilty plea to be paid on account. Further down the timeline, where a not guilty plea is entered, then a total of 50% of the fee for a cracked trial (minus that already paid) should be made. Once the trial has begun, then a total of 75% of the total fee payable should be made.
- In long-running Crown Court cases, there should be further payments on account during the life of the case.

Reforming accounting rules to minimise tax liabilities

- The MoJ should urge HMRC to review their approach to taxing law firms undertaking publically funded work. At present, under accounting protocol UITF 40, legal practices are required to pay tax on works in progress
- The impact on legal aid firms is that they are being taxed on work in progress that the LAA's rules do not allow them to bill at that time. This situation is unjust, and has a seriously detrimental impact on cashflow. In recent years many legal aid firms have been forced to take out annual loans to meet their tax liabilities.
- The MoJ should urge HMRC to suspend the application of UITF 40 in relation to law firms undertaking publically funded work.
- Such a measure could take the form of a voluntary 'opt out' whereby firms undertaking legal aid return to a case basis for accounting.

Facilitating market exit for those wishing to leave

To aid consolidation the Government should underwrite the run-off insurance cover, the expense of which currently prohibits market exit

Help with run-off insurance cover for those choosing to exit the market

- There are a number of barriers to market exit, prohibiting the consolidation the market needs. One way to aid consolidation in the market is to reduce sunk costs and legacy liabilities for incumbents.
- The most significant barrier to market exit is the requirement to provide run-off insurance cover for six years following the closure of a firm.
- Run-off costs are typically calculated as between 200 and 300% of the annual premium. As the table below shows, the average premium for predominantly crime firms is £3,933 for a sole practitioner (£14,740 for firms of all sizes).
- Therefore, assuming insurers charge 200%, it would cost £7,866 to run-off a sole practice firm and £29,480 to run-off an average size criminal firm. For many small firms that would like to exit the market, this cover is unaffordable.
- However, if the Government were to offer to underwrite this sum (payouts are fairly low in the legal aid sector) on behalf of those seeking to exit the market, those wishing to retire or change career would be freed up to do so.

PII premiums for firms deriving 50% or more of their gross fee income from crime

	Sole practitioner	2-4 partners	5-10 partners	11-25 partners	All
Mean	£3,933	£22,255	£27,737	£21,741	£14,740
Median	£3,500	£16,960	£27,295	£12,720	£5,770

Incentivising efficiency through wasted cost orders

The wasted costs orders regime should be overhauled so that it punishes poor performance and incentivises positive behaviours

Wasted costs

- Inefficiencies in the criminal justice system caused by mistakes by prosecutors, courts, prisoner transport services and others have a significant impact on the legal aid budget.
- With reductions in income for defence practitioners being proposed it is essential that there is a system in place to discourage negative and incentivise positive behaviours.
- The system should work on the **polluter pays** principle. Where delay or additional cost has been caused by a particular party, that party should pay.
- The present wasted costs rules are too complex and set the bar much too high. In future, courts should be given the jurisdiction to make summary orders for wasted costs.
- This could operate on a “tariff” basis so that any time a hearing was caused to be ineffective there was a set fee - for example £100 - that the offending party would pay to each of the other parties involved.
- In principle, because the additional costs of delay have been borne by the defence solicitor, the wasted costs should be payable direct to the solicitor: not to the LAA.
- There must also be a robust enforcement mechanism for wasted costs orders. The court should have the power to summon the responsible manager to court in the event of a non-payment and to hold them in contempt if payment is not made.
- Avoiding wasted costs orders, and paying promptly, should be a KPI in any contract between the Ministry and any third party service.

Examples of waste

The Law Society undertook a snapshot survey covering a 2 week period in 2011. Key among its findings were three sources of waste caused by 3rd party providers, where wasted costs orders could incentivise better outcomes

Prisoner transport

- Late arrival of prisoners had caused delay to 34.3% of defence solicitors.

Crown Prosecution Service

- Over 50% of solicitors had been delayed because the prosecution had not followed disclosure rules.

Court interpreters

- In Q1 of 2012 there were almost 2,500 complaints against the interpreters service.

Raising money: introducing a Defence Costs Surcharge

The Victims Surcharge, set at £15, raised £10m in 2011. To recoup the costs to the state of providing criminal defence a ‘defence costs surcharge’ should also apply

A Defence Costs Surcharge

- Those convicted in the courts are currently required to pay a “Victims Surcharge”. The Secretary of State has proposed to look for measures that recover more of the costs spend on criminal legal aid from defendants.
- As an initial first step towards that aim, a Defence Costs surcharge should be applied on top of the Victims Surcharge to recoup some of the costs paid by the state to defend those later convicted of an offence.
- As with the Victims Surcharge, a variable rate could be applied via an ancillary order of the court reflecting the severity of the punishment (as a proxy for the legal aid resources expended on the case).
- A lower rate of £5 for a conditional discharge, rising to £20 for a custodial sentence, for example.

	Sentencing data for 2009	Example defence costs surcharge	Money raised
Other (mostly conditional discharge)	119,353	£5	£596,765
Fines	945,494	£10	£9,454,940
Community sentence	195,767	£15	£2,936,505
Custodial sentence	100,190	£20	£2,003,800
Suspended sentence	45,134	£20	£902,680
Total (minus 30 per cent for estimated non-payment)			£11,126,283 pa

The Victims Surcharge

- The Victims Surcharge, introduced in 2007, is an ancillary order imposed by a court. Initially it was set at £15 for all convicted defendants.
- Following changes in 2012 the Surcharge applies at variable rates dependent on the type of sentence received (e.g. £15 for a conditional discharge rising to £120 for a custodial sentence >2 years) Lower rates apply to juveniles.
- The MoJ expects that the new variable rates will raise close c. 50m pa.
- Revenue raised by the Surcharge is used to fund victim services through the Victim and Witness General Fund.

Summary of the Society's alternative approach to legal aid reform

The Society's alternative proposal retains choice, ensures business certainty and incentivises efficiency while granting the LAA flexibility to manage outcomes

Choice retained

- Client choice is not only retained, it is encouraged and facilitated by the information provided via the assessment of firms against the Quality and Capacity Framework.
- Retaining choice not only prevents the negative consequences of its removal - but actively drives quality in a system based on a market model.

Certainty secured

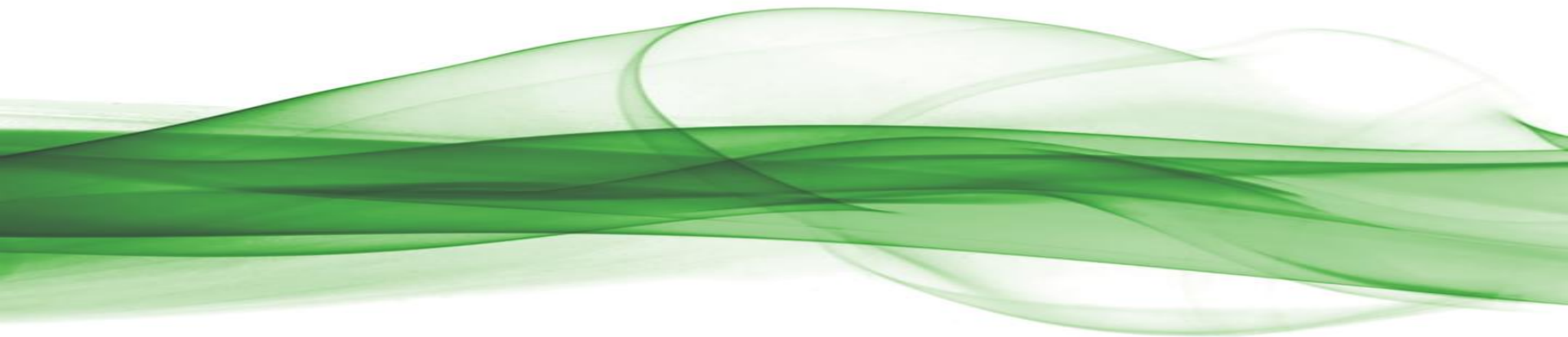
- The Society's proposals for a reformed contracting system - based on a system of rolling contracts in accordance with a Quality and Capacity Framework provide certainty for firms while driving outcomes desired by the LAA.
- Firms are better able to attract investment and make long-term business decisions.

Efficiency incentivised

- The duty solicitor scheme is reformed to remove waste and reduce inefficiency.
- All parties to the CJS are discouraged from negative behaviours via a reformed wasted costs orders regime.
- The Quality and Capacity Framework requires firms to meet particular targets that are desirable in the marketplace.



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