

Pile 'em high, sell 'em cheap

Lord Carter's interim report on the procurement of legal aid for criminal defence services has been welcomed with something less than enthusiasm

A joint statement from CLSA, LCCSA, LAPG, the Solicitors' Association of Higher Courts Advocates and the Society of Asian Lawyers noted the absence of any research evidence to support the conclusions reached, and said: "Lord Carter is recommending 'Pile them high, sell them cheap' when it comes to legal aid for the general public."

LAPG director Richard Miller pointed out that the report repeated "to a significant extent" many of the LSC's competitive tendering proposals from a year ago.

In the Daily Telegraph, Joshua Rozenberg, the paper's legal correspondent, cited the report as another reason – as well as the time of year – to be depressed.

The document recommends the introduction of market-based reforms over three years. In phase one, there will be fixed pricing for all criminal legal aid work, including that provided in police stations, magistrates' courts and Crown courts. Phase two will see a managed market that would

"What was needed was to get rid of anomalies, redistribute to some extent, find a balance of high quality work in a sustainable system"

award contracts to "efficient and high quality suppliers" that can take on more cases – these would be either individual solicitors' firms or "consolidations" of firms. In phase three we will have managed priced competition with safeguards to protect standards of quality, coverage in rural areas and diversity.

The report recommends that these proposals should replace the Legal Services Commission's original suggestions for price competition in London.



Lord Carter: "We are asking people to rationalise."

Introducing his report, Lord Carter said that people have the right to representation; nobody is satisfied with the existing system; everyone wants a sustainable system. The way to achieve this is to get enough people in the professions with enough money to keep them there and make law a valuable career. The key is quality, Lord Carter said; under his proposals that issue would remain in the hands of the professional bodies. "I want to avoid any suggestion that this is a threat to quality," Lord Carter said. "In the phase when we allocate work, there will be fixed prices and strict guidelines on discounting. We want to pay for high efficiency and high quality, without destabilising the market."

Choice for the client is critical, Lord Carter said; the proposals would not deny choice, merely restrict it. "I envisage a panel for police station work, where the firm that gets the police station contract will win the rest of the

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A stiff task

Ian Kelcey provides the practitioner's perspective



Whatever I write I cannot get away from the Carter report. This was a review rolled out with the title "A fairer deal for legal aid": judging by the interim report, never has there been such a misnomer. It is quite clear that Lord Carter's terms of reference were fatally flawed. His proposals appear to be applying sticking plaster where major hospitalisation is needed. He makes limited reference to

why the cost of legal aid has risen but pays little more than lip service to the cause.

The recent report from the National Audit Office concerning the reasons for the inefficiencies and other problems in the magistrates' court system tells the true picture; one also has to mention the Sunday Telegraph article of 26 February. Clearly other people are getting the message – why didn't Lord Carter?

Look at the increase in funding received by the prosecution agencies over the past six to seven years: a 48% increase in real terms for police, Crown Prosecution Service and Probation Service; a recent Home Office survey concedes that there has been a 19% increase in defendants "brought to justice". Why then is there surprise that legal aid expenditure has risen by 10% in real terms?

Lord Carter tried to draw comparisons between our system and other systems of justice. Comparisons with European systems are inappropriate and disingenuous, however, because they are based on an inquisitorial rather than our own adversarial system of justice. Comparisons with New Zealand are interesting because there, press and lawyers have been complaining for a long time about miscarriages of justice arising because from the underfunding of legal aid.

"Lord Carter tried to draw comparisons between our system and other systems of justice. Comparisons with European systems are inappropriate and disingenuous, however, because they are based on an inquisitorial rather than our own adversarial system of justice."

ahead

It seems to me that Lord Carter can do nothing about providing a solution until he addresses the real cause of the problem, namely the vast increase in cost drivers – new legislation and changes to procedures. It is a shame that he has not taken the opportunity to address these issues; one could point out cynically that his terms of reference were so narrowly drawn as to ensure he could not provide a critical analysis of government and ministerial policy. It is easier to kick criminal defence lawyers.

There are a number of fundamental flaws within Lord Carter's thinking: first, the issue of peer review and moving the quality standard tests from the LSC back to the Law Society. It's a funny old world – we are almost back to where we began. Initially one may be attracted to the proposal but when you apply a little bit more thought you begin to realise that this is not just a hospital mass but a whole NHS trust coming the way of the Law Society. I say that for the following reasons: who will be responsible for conducting peer review, the Law Society in its representative role or the new regulatory board? If it is the former, then it must be on the basis that we are providing a brand of quality, and where should that brand of quality be other than at basement level, reflecting the remuneration that is paid? Not an attractive scenario. It becomes more interesting, however, if it is an issue for the regulatory board. Why should criminal defence lawyers be the only ones to have their files peer reviewed? Surely if it is a regulatory issue then the same principles will have to apply to all lawyers up and down the country. I do not see that the large city firms are going to be attracted to the idea of



Lord Carter's proposals appear to be applying sticking plaster where major hospitalisation is needed

peer review of their files, and I would not have thought that the regulatory board would be keen to take it on.

You do come to realise how deft a political manoeuvre this is when you ask the following questions:

- Who will pay? Answer, us. Who pays at present? Answer, the LSC.
- If there is a reduction in rates, are standards likely to drop? Answer, yes.
- If standards do drop, who will be left holding the baby when it comes to political fall-out because of poor peer reviews? Answer, The Law Society or the regulatory board.

Let us now turn to the issue of consortia. In principle one can understand the desire to reduce the

number of suppliers, but first you have to identify the geographical area in which the small suppliers operate: are they in large urban areas or in rural areas? I suspect that many are in rural areas, because there is not the volume of crime and because they provide a service to the local community, often at a loss and subsidised by other areas of work.

Are these suppliers going to be interested in entering into consortia with larger firms in urban areas? I think not; they will just give up criminal law. What will then happen? There will be even more access deserts because firms in large cities will not want to travel to rural areas, particularly if they are not being paid for travelling and waiting.

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Regrettably, Lord Carter seems to have taken the approach in his initial report that the units of supply, ie the work that we do on files, can be measured in the same way as producing nuts and bolts. You can do it in the standard way for a standard fee. It's a shame he didn't bother to look at some of the decisions emanating from the Court of Criminal Appeal where so often their Lordships are telling us no one case is the same as any other.

These are just some of the flaws within the report. What I want to ask is this: why has government concentrated so much on the increase in the legal aid budget? The annual headquarters and associated office expenditure of the Department of Constitutional Affairs in 1999/2000 was £360m. By 2004/2005 the estimated expenditure was £598m; an even starker increase is shown under the heading of executive agencies. In 1999 executive agencies cost the department £157m, by 2004/2005 the estimated expenditure was £409m, for 2005/2006 the planned expenditure is £982m. This is strange when we are told that this is a department that is overspent.

The administration costs at the Legal Services Commission have risen from £58m in 1999/2000 to £124m estimated in 2004/2005. Those costs, we have since found out, interestingly, are part of the legal aid budget. We have also discovered that the orders we get for all those defendants who never had a legal aid order, who were privately paying and who were to have their costs paid to them out of central funds actually get the costs out of the legal aid fund where there seems to be an annual expenditure of £50m for this purpose. Why on earth should this come out of the legal aid budget? It is interesting to note that the Court Service costs in 1999 were £163m and by the year 2004/2005 they had risen to an estimated outturn of £408m.

The truth of the matter is that the Carter review has been nothing to do with a fairer deal for legal aid but should more properly be entitled "saving money for the Treasury". Let

me make it plain to all our members that the CLSA is totally opposed to these proposals. We consider they are unworkable, unfair and not in the interests of justice, which must of course mean that they are not in the interests of our clients, which brings me to my next point. Those of you who receive this newsletter will spend many hours defending and standing up in court for the rights of your client. We are dedicated to that and on the whole pretty good about it. Why are we so poor about standing up for our own rights and ultimately the rights of our clients? A diminution in the service

"We need to get the message across that every person who gets behind the wheel of a car and has a fatal accident may potentially be facing up to 10 years in prison"

provided by criminal defence lawyers and their ability to act properly for their clients is ultimately a diminution of the services that those clients receive and a headlong drop into the tunnel of miscarriages of justice. We need to stand together and we need to start to make our point forcefully to politicians, locally and nationally. We need to get our message across to the media. Criminal law is not just about hardened criminals. We need to get the message across that every person who gets behind the wheel of a car and has a fatal accident may

potentially be facing up to 10 years in prison. The public need to understand that it is their rights that are being eroded.

Finally I know there has been concern about the position of the Law Society in relation to the Carter review. The Bar Council of course didn't raise much objection to the initial paper – not really much for them to object to in that, particularly from a short term point of view. If however you take the long term view, I suspect we will all start to use our higher rights.

I would also urge the profession to start thinking outside the box. Instead of having the knee-jerk reaction of briefing counsel, why don't we consider briefing each other with higher rights and keep the money within our branch of the profession. The Law Society's position – and I want to make this plain having discussed the matter with the president Kevin Martin – is that it has not signed up to accepting Lord Carter proposals in whole or in part. The Society does have the position of continuing to try and negotiate and talk to Lord Carter in his ongoing review, but at no stage has the Law Society welcomed Lord Carter's interim report, cautiously or otherwise, and I have no reason to doubt that the Law Society will be standing shoulder to shoulder with us in the forthcoming battle to try to ensure that we do get "a fairer deal for legal aid".

A meeting will shortly be arranged in Chancery Lane for regional representatives of criminal lawyers. This will not be a line in the sand meeting, but is intended to be a meeting of constructive thought processes and ideas dealing with Lord Carter's interim report. It is difficult for us to take the matter much further forward at present as so much of the devil will lie in the detail and the proposed costs have not yet been supplied. I will not wait with bated breath for good news. I suspect we are in for a battle and we have to start preparing for it.

Continued from page 1

work, to achieve continuity of representation all the way through the magistrates' courts."

What was needed was to get rid of anomalies, redistribute to some extent, find a balance of high quality work in a sustainable system, and get away from the "whinge factor in legal aid, which diminishes the profession".

Lord Carter denied that the proposals were a widespread cull of defence solicitors' firms, "We are asking people to rationalise," he said. "Whatever we do, if you look at the demographics, it will be happening anyway."

Asked whether the proposals would have an impact on rural communities, where more legal aid "deserts" would appear as sole practitioners disappeared,

"It does not seem likely that this process would improve or maintain quality."

Lord Carter said it may be necessary to pay higher prices in those areas. "We are committed to representation," he said, "One size does not fit all."

Would the proposals mean an incentive to lawyers to spend as little time as possible on a case? That danger always existed, Lord Carter said, and it would be up to the Bar and the Law Society to deal with.

The Bar Council cautiously welcomed the proposals as an important first step. It warned, however, that the proposed new structure would need to be properly resourced to meet the public interest and maintain quality.

The Law Society's president Kevin Martin said before agreeing the details of any scheme, the society would need to be certain that the full financial implications for the viability and sustainability of the supplier base are satisfactory.

The society's chief executive Janet Paraskeva said: "Any risk to the viability of the overall supplier base could further exacerbate the problem of advice deserts

because most firms undertake a balance of both criminal and civil work."

The Legal Services Commission offered a plaintive voice of welcome for the Carter recommendations, "specifically the way he has built on the LSC's existing direction of travel and the thinking in our preferred supplier proposals".

The joint CLSA/LCCSA et al statement said that price competitive tendering is about giving contracts to the suppliers with the lowest price. In legal aid it is also about creating monopolies. With the lowest prices comes a steep decline in quality. The statement suggested an analogy: reduce the number of MPs to 100, make all current MPs bid to do the job at the lowest price and take the first 100 at the lowest prices and declare parliament full. "It does not seem likely that this process would improve or maintain quality," the statement said.

There is not a single convincing statistic within the 47-page report to show where savings would be made other than a simple price cut, the statement went on; if nothing were done to tackle the external cost drivers, the legal aid budget would continue to rise whatever the procurement arrangements; and if it's not broken, don't fix it – "the present market is sophisticated, stable and works well".

There were sensible reforms that would achieve much, the statement said, for instance to limit the number of duty solicitor schemes which only a solicitor could join. Institutional arrangements to detect and analyse very high cost cases before they entered the criminal justice system should also be possible.

If carried through, the proposed reforms would be a disaster for the profession, but more importantly for those it represented, "the most vulnerable people in our society".

"And this at a time when, as the report acknowledges, the resources given to those on the other side of the adversarial system have increased by 46 per cent in six years".

The threat to criminal justice



Lord Carter

At its meeting on 3 March, the CLSA's national executive committee passed the following resolution:

The Carter proposals are intended to reduce substantially the supply of community based criminal lawyers who have played a pivotal role in the administration of one of the fairest and most respected justice systems in the world today. That change will be brought about by a process that includes, but is not limited to, price competitive tendering. The CLSA takes the view that the inherent risks in these proposals threaten such access to, and quality of, justice. We therefore reject Lord Carter's proposals in their entirety and call upon members to write in sending a clear message to government. That message is "no to Carter".

Members are requested to express their views, should they wish, by writing to:

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Chairman
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DX 2740 Brighton

Call me any time

Sharon Wallach rings the changes

When a football fan tells you to “ring any time”, you need to mentally add the words “after 5 on Saturday”. Ian Kelcey is the new CLSA chair. What I did not realise, however, is that he is a football fan. I found this out when I rang him at the precise moment Bristol City scored at home and all hell was let loose at the other end of the phone.

Ian has been involved with CLSA for a decade. He qualified in 1980 and set up his own practice with Gillian Hall four years later. (Kelcey and Hall is now a four-partner practice, with 10 solicitors in the criminal department.) For the past 15 years, he has specialised in criminal work, as well as being a member of the Children Panel for 10 years. He is a duty solicitor and still attends police stations.

His greatest hope for CLSA is to see it grow. “It has made tremendous strides in the past five years,” he says, pointing out that in terms of numbers, it is the largest representational organisation for criminal practitioners.

“My aim is to ensure that at the end of my chairmanship we have 90 per cent of the firms doing criminal law having at least one member of CLSA. I also want us to communicate as well as we can with the profession, and I want to be accessible to the profession.

“We are all in this together. Only by approaching things with a united and robust front will we stand a chance of halting the loss of solicitors practising in criminal law.

“There is no doubt we have to win over hearts and minds and we have to

convince the government that we are not the bad boys of the criminal justice system. We have to educate the Treasury that justice is a commodity that comes at an expense. We also have to get across the message that a vast amount of wastage in the system is caused because of the desire of each agency in the criminal justice system to protect its own budget. This invariably works at the expense of the legal aid fund.”

Finally, Ian said he wants to see the CLSA forge closer links with the LSC “to give them the opportunity of proving that they do understand our problems and are not our enemy”.

Bristol City drew with Scunthorpe one all on that Saturday, by the way. Oh, and it was a good job I didn’t ring Ian at the home of his other love, Arsenal – they won seven-nil.

Andrew Bishop, the new vice-chair, set up his firm with Kevin Light in 1995. Bishop and Light, based in Brighton and Hove, does 90 per cent criminal defence work, and 10 per cent mental health. Andrew is a duty solicitor, a Crown court advocate and has been a member of CLSA since 1995. His main contribution, he says, is that in 2001 he set up a criminal law solicitors’ email group which caught on, and has now become a CLSA email group. He also runs the association’s website, “with the help of Sue Johnson and the internet provider”.

Andrew says he sees his role as supporting Ian as chairman. “This is an extremely challenging time for criminal

defence lawyers and there is a huge amount of work to be done, in particular in attempting to deal with the issues raised by the Carter review.

“I am beginning to realise just how much hard work the officers of the CLSA put in, especially Rodney and Ian, constantly attending meetings and never failing to push the cause of the CLSA and defence solicitors. So much work goes on that members don’t see and I hope that I can assist them and lighten their burden.”

Andrew is also a Bristol City fan (Editor’s note – is this a prerequisite for CLSA chair or vice chair?), and still plays for a Sunday morning league, albeit “usually the oldest player on the pitch” (he is 40). But he says, “as long as they pick me, I will continue to turn up”.

CLSA committee changes

Chair

Ian Kelcey 0117 927 9604
ikelcey@kelceyandhall.co.uk

Vice-chair

Andrew Bishop 01273 732733
andrew.bishop@bishopandlight.co.uk

New committee members

Victoria Lancaster 01262 602401
victorialancaster@lancaster-solicitors.co.uk

John Goodwin 0113 2440597
john.goodwin@howardcohen.co.uk

Simon Walker 01642 440444
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Progress on PROGRESS

The criminal case management delivery unit of the Office for Criminal Justice Reform reports

In December last year, an event was held at Manchester Minshull Street Crown Court to formally mark the launch of PROGRESS, an IT system that will support the case progression function. The event itself was attended by a cross-section of regular court users and several high profile guests came along to lend their support,

including Lord Justice Thomas and Jane Furniss (acting chief executive of the OCJR). The Attorney General provided a recorded message commending joined-up working between the prosecution, defence and the courts, welcoming the benefits that are gained through this.

Greater Manchester and Essex have been chosen as the two test areas for PROGRESS. Manchester, in particular, was chosen because of its pioneering work in electronic case progression at Minshull Street, a tribute to the vision and dedication of the late resident judge, Barry Woodward. Minshull Street

– which celebrates its tenth anniversary next year – is one of the busiest courts in the country, dealing with 4,000 criminal cases a year. The court’s manager Ian Jordan said: “We are delighted that this area and Essex have been chosen to test this new scheme. It is a testament to Judge Woodward and his vision of the future for criminal justice.”

The PROGRESS system itself is currently in the design stage and user workshops are being held to ensure that the system carries out the appropriate functions and has a user friendly look and feel. Mike Jones, a

Tagging on bail

Chris Marsh describes the availability of electronic monitoring to support a curfew as a condition of bail for defendants whom the courts would otherwise remand in custody

The tagging of adults on bail has been carried out on a limited scale over several years. The caseload had gradually increased – from 47 on 30 April 2004 to 165 on 30 September 2005.

From April 2005, however, NOMS was able to increase the available tagging capacity, as a result of a renegotiation of contracts with the electronic monitoring operators, SERCO and G4S. In September courts were invited by HMCS to make greater use of tagging as an alternative to a remand in custody in appropriate cases.

Although some regions have been quicker than others the use of tagging on bail has increased across England and Wales since September. The caseload reached 492 at the end of December, and 447 by the end of January.

Tagging adds an alarm system to the curfew and ensures that breaches, whether absence or tampering, are identified immediately at the contractors' control centres

to facilitate a quick response by the police.

Curfews limit opportunities for offending, typically but not necessarily during the evening and night, whilst allowing defendants to continue their normal lives and employment at other times. Curfews also provide limits that may help defendants leading chaotic lives to develop more control over their behaviour, possibly reducing the likelihood of a custodial sentence if found guilty.

If the court decides to impose a bail condition of a curfew with tagging, the court advises the contractor of the requirement and the hours of the curfew. The contractor arranges for the application of the ankle tag and the installation of the monitoring unit at the curfew address, after the start of the first curfew period set by the court. Defendants are given a full explanation of how tagging works and the requirements placed on them.

NOMS expects that tagging on bail will be used for borderline remand in

custody cases, including those defendants who may pose little or no risk to the public but who have tested the patience of the court by previous failure to appear and for whom custody would otherwise be the next step.

Solicitors should note that, rarely, there are technical barriers to tagging. Where a telephone landline is not available and a mobile system will not operate, perhaps due to poor signal reception, tagging cannot be used. In some cases a defendant may need to be remanded in custody initially whilst the suitability of the address is established or until a landline can be installed.

Solicitors should also note that tagging is not available as a condition of police bail.

Anyone wanting advice on tagging in their area should in the first instance contact their local court. Alternatively, they could contact Chris Marsh in NOMS HQ on 0207 035 1766 or at chris.marsh6@homeoffice.gsi.gov.uk

partner at Grayson Willis Bennett, said: "I am more than happy to be involved in the development of the system and it is heartening to see defence firms consulted from the outset".

When complete, PROGRESS will be able to provide details of orders and directions, with supporting basic case information, for all criminal cases where a non-guilty plea has been entered. This information will be provided through links with LIBRA for the magistrates' courts and the Xhibit system for the Crown court, with Xhibit being further developed for this purpose. It will also be possible for courts to enter information manually.

In this way, members of staff with case progression responsibilities in the courts and in defence firms will be

able to access PROGRESS through their office systems – via the Government Secure Internet and a secure site on the internet respectively. Staff in the CPS will be able to access the same information and functions provided by PROGRESS through their existing case management system, which like Xhibit is being developed further to enable this.

The system will enable those with case progression responsibilities to have a common view of a case's orders and directions and also their due dates. Moreover, PROGRESS will enable the production of reports, such as all outstanding orders and directions, those outstanding from a certain date or those where compliance dates are imminent. The

system will enable defence firms and the CPS to note their compliance with orders and directions and this information will be automatically relayed to the court. PROGRESS will also give the ability to apply to vary a direction or order of the court electronically and a feature of particular note is that the system will provide an audit trail and would require very little to be printed.

PROGRESS is expected to be tested in the Greater Manchester and Essex areas from the summer, with a view to national rollout from early 2007. The development team are working closely with the IT suppliers to ensure that a full and innovative training package will be available for users reflecting their individual needs.

Gladiators for ju

A bleak picture of the future of legal aid was painted at this year's CLSA conference in November, albeit one tinted with moments of light relief. Christ Baker reports

Opening events at the November event at the Tortworth Court Hotel in Gloucestershire, outgoing chair Helen Cousins admitted it had "not been a good year" for the profession.

Apologising for getting things going on a sour note, Ms Cousins went on to explain that solicitors were getting out of criminal work, citing problems with morale, prosecutors, CDS Direct, and the Law Society. "The Law Society cannot be all things to all people," she said. "The London Criminal Court Solicitors Association and other groups are now fulfilling the main representative role."

The next speaker, CPS policy director Philip Geering, talked of how the service was working to correct the errors of the past, its unpopularity with the police and prosecution and the historic limitations it has had to face. But he did add that the CPS provides job opportunities for lawyers: "The CPS is now the biggest law firm in the country and we are now ready for radical reform."

Then came an entertaining session with Professor Allan Jameson, director of the Forensic Institute in Edinburgh. In a talk peppered with anecdotes, jokes, asides to the audience and slides of Winnie the Pooh, Professor Jameson put forward a strong case for not trusting the word of expert witness. Science must not be unchallengeable in the courts, and it is the job of the defence to dig deeper, he explained.

Professor Jameson was followed by the Lord Chancellor, Lord Falconer. Speaking for the first time at a CLSA conference, Lord Falconer admitted that defence solicitors "at the coal face" are too often taken for granted, and he wanted more of them to become judges.

"There is an assumption – among some solicitors – that being a judge is not just for 'other people' but more specifically for 'other barristers'," Lord Falconer said. "This is wrong ... solicitors are a huge untapped pool of talent for judiciary."



Professor Allan Jameson: anecdotes, jokes and Winnie the Pooh – the case against the expert witness

But he added that legal aid is unlikely to get any extra funding from the Treasury due to a £10 million overspend. "There is not much prospect of any extra money before the next spending review," Lord Falconer explained, adding that the chances of a boost in the next review were also slim. "We will have to work on the basis that there will be no extra money for legal aid over all." Big, high cost cases had pushed expenses up at the expense of other areas of law, he explained.

The next speaker, Steve Coombes, said he was pleased to have the Secretary of State as his "warm up act". The writer of TV programme *Outlaws*, Mr Coombes explained how his experience of trailing duty solicitors to research the programme had changed his views of the profession.

"The more I followed you around, the more I came to realise that you are gladiators for truth and justice," he said. "Simply by doing your job you are doing something very important."

After lunch, Legal Services Commission chair Sir Michael Bichard gave a combative speech in which he announced a cull of up to 450 LSC staff. Echoing Lord Falconer, Sir Michael complained of being

constrained by the Treasury and the mismatch between civil and criminal legal aid, and pledged to work more closely with practitioners. He also pledged to publish a paper on the LSC's future early next year. In a question and answer session, Sir Michael dealt with accusations from delegates that CDS Direct was not working.

London Criminal Court Solicitors Association past president Rob Brown then spoke of the perils of price competitive tendering – "most people know this policy is dangerous and should be abandoned" – and sympathised with the LSC for being "squeezed by the Treasury". Unsure of legal aid's future, Mr Brown predicted a "watershed" shortly after publication of the fundamental legal aid review.

After Mr Brown, there followed a Question Time-style panel where delegates could interrogate LSC head of criminal defence service Derek Hill, its executive director for policy and planning Richard Collins, Ms Cousins, Mr Brown and CLSA director Rodney Warren. Both Mr Hill and Mr Collins also admitted that there was little likelihood of legal aid receiving a funding boost in the near future. They also faced a grilling on PCT, the preferred supplier pilot and CDS Direct.

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There is little hope of legal aid getting any extra funding in the next comprehensive spending review, the Lord Chancellor admitted.

He added that the chances of a boost in the next review were also slim. "We will have to work on the basis that there will be no extra money for legal aid overall." Big, high cost cases had pushed expenses up at the expense of other areas of law, he explained.

Lord Falconer pointed to a £130 million overspend in the legal aid budget, adding that costs had risen from £1.5 billion to £2.1 billion today. Criminal legal aid costs had risen by 37% while civil costs had dropped by nearly a quarter, he said.

"The key is to reduce the expenditure on the very high cost cases so the whole legal aid system can be balanced," Lord Falconer said. "It's not an option to indefinitely squeeze money out civil and family legal aid to fund the rising criminal spend."

LSC chair Birchard explained that he was "squeezed" by the amount of funding the commission received from the Treasury. "Whenever budgets are set the commission will advise the government of the level of resource needed to deliver particular services and you can be sure that we will present the best possible case for the resources we think the system needs," he explained. "But the commission cannot live beyond the resources which are then allocated to us."

Speaking at a panel session later in the day, LSC head of criminal defence service Derek Hill and its executive director of policy and planning Richard Hill said they shared the Secretary of State's fears over funding.



Lord Falconer: "We will have to work on the basis that there will be no extra money for legal aid overall."

"If we are going to preserve the legal aid system we have got to make the system more effective," Mr Hill said. "Unless we can do that there is no prospect of getting more resources in."

Mr Collins said there had to be a future for legal aid. "The justice system has got to change – it's not fit for purpose," he added. "The profession has to change to make it easier for people to get into the system, and the education has got to change so that people do not go into the system with the debts that they have."

Both speakers denied that PCT, CDS Direct and the preferred supplier pilot were damaging the quality of services on offer. CDS Direct project manager John Seroca pointed out that the scheme was only in its third week, a full time quality supervisor had just been appointed and the service would be subject to an independent peer review.

Other speakers included CPS policy director Philip Geering, who spoke of the service's historic problems and how

it was working to address them. Outgoing CLSA chair Helen Cousins – who was replaced by then vice president Ian Kelcey – and LCCSA past

"The key is to reduce the expenditure on the very high cost cases so the whole legal aid system can be balanced"

president Rob Brown both shared their fears for the future of legal aid. "It has not been a good year for us," Ms Cousins lamented.

Closing the conference before the association's AGM, director Rodney Warren announced a new campaign in conjunction with the Home Office, Association of Chief Police Officers and Health and Safety Executive.

"Health and safety in police stations has become an area of concern to us," he explained. "It is clear that many staff are at risk because of a lack of thought." Delegates were provided with forms on the subject to fill in to help generate an evidence base for work that needs to be done to ensure criminal lawyers are safe at work.



The CLSA panel: Richard Collins, Rob Brown, Derek Hill, Rodney Warren and Helen Cousins

A police station update

By Andrew Keogh

PACE codes of practice

New codes of practice issued under the 1984 Police and Criminal Evidence Act took effect on 1 January. The new codes, A to G, apply to all arrests from that time.

The most important change is code G which deals with new arrest powers.

Power of arrest

Sections 24 and 25 of PACE are replaced by a new section 24 and a section 24A, as amended by sections 110 and 111 and schedule 7 of SOCAPA.

The effect of the changes is to replace the concept of seriousness with a test of necessity. All offences now carry the power of arrest. A lawful arrest will require two elements:

a person's involvement or suspected involvement or attempted involvement in the commission of a criminal offence

AND

reasonable grounds for believing that the person's arrest is necessary.

The necessity criteria are set out in detail in paragraphs 2.4 to 2.9 of PACE code G. The criteria are that the arrest is necessary to:

- obtain the name and/ or address of the person and be satisfied with the information provided
- prevent the person in question
 - i) causing physical injury to himself or any other person
 - ii) suffering physical injury
 - iii) causing loss or damage to property
 - iv) committing an offence against public decency; or
 - v) causing an unlawful obstruction of the highway
- protect a child or other vulnerable person from the person in question
- allow the prompt and effective investigation of the offence or of the conduct of the person in question
- prevent any prosecution for the offence from being hindered by the disappearance of the person in question.

When considering the need to arrest, the officer should take the following into account: the situation of the victim, the nature of the offence, the circumstances of the offender and the needs of the investigation.

Arrest must never be used simply because it can be used. The use of the power must be fully justified and officers exercising the power should consider whether the necessary objectives can be met by other, less intrusive means, such as summons, fixed penalty notice, penalty notice for disorder, or by using street bail following arrest rather than taking the person to the police station.

Recording requirements are set out in section 4 of code G.

Trigger powers

Arrest "triggers off" a set of other powers available to the officer in order to investigate the offence. These powers were previously reserved for arrestable and serious arrestable offences.

However, the SOCAPA amendments to PACE provide that the threshold for exercise of these powers is now indictable offences (i. offences triable on indictment or triable either way). List of powers and levels of authority are:

PACE section	PACE 'Trigger Power'	Authorisation required
s4(4)	Road checks	Superintendent
s8(1)(a)	Search warrant	Magistrate
s17(1)(b)	Entry for the purpose of arrest	n/a
s18(1)	Entry and search after arrest	Inspector*
s32(2)(b)	Search premises for evidence after arrest	n/a
s42(1)(b)	Apply for extended detention (to 36hrs)	Superintendent
s43(4)(b)	Warrants for further detention (up to 72hrs)	Magistrate
s44	Extension of warrants for further detention (up to 96hrs)	Magistrate
s56(2)(a); s56(5)(a) s56(5A)(a)	Delay right to have someone informed of arrest	Inspector
s58(6)(a); s58(8)(a) s58(8A)(a)	Delay access to legal advice	Superintendent

* unless s18(5)(b) of PACE applies

Summary offences do not attract these powers, save for those offences listed at section 17(1)(c)(i) and (caa) of PACE, as amended by SOCAPA. This means that a number of summary offences previously listed in schedule 1A of PACE (listed at annex A) will not have access to these trigger powers.

Search warrants

Section 8 of PACE is amended by section 113 and section 114 of SOCAPA.

The effect is to enable application for and issue of a warrant:

- for an indictable offence
- with a lifetime of three months; and
- which allows entry to more than one set of premises (specific-premises warrants); or
- which allows entry to all premises "occupied or controlled by" an

individual and can enable the police to search premises not specified in the original application where further evidence comes to light during the course of the original search (all-premises warrants).

As with existing PACE requirements, applications must state the object of the search and provide sufficient information to satisfy the court that it is necessary to enter and search each premises specified in the warrant. Endorsed warrants must also be returned to the issuing court.

A specific-premises warrant requires the application to list all relevant premises at the time of application.

An all-premises warrant requires that the application must specify as many premises that can be named, identify the person who is in occupation or control of the premises and state why it is necessary to search more premises than can be specified and why it is not practicable to specify all the premises at the time of the application. In considering the application the judge may authorise the search of some or all of the premises named in the warrant.

In the case of all-premises warrants s16(3A) of PACE, as inserted by s113(9)(a) of SOCAP, requires any entry and search of premises not specified by the court on the warrant to be authorised in writing by an officer of at least inspector rank and not involved in the investigation. The authorisation must be provided in advance of the entry to the premises. PACE code B paragraph 6.3B refers.

If an application is sought allowing for multiple entries to a single set of premises or to more than one single set of premises, the number of entries authorised may be unlimited or limited to a maximum. It will be for the officer to satisfy the court on application.

Photographs of suspects other than at a police station

Section 64A of PACE, as amended by s116 of SOCAP, enables a constable (or in certain cases, CSOs and accredited persons) to photograph suspects elsewhere than at a police station when:

- the person has been arrested by a constable for an offence
- the person has been taken into custody by a constable after being arrested for an offence by a person other than a constable
- a person is made subject to a requirement to wait by a CSO
- a person is issued with a fixed penalty notice by a constable, CSO or accredited person

A police officer, CSO or accredited person may use reasonable force to take a photograph elsewhere than at a police station. Where a constable cannot satisfactorily ascertain the individual's name/address, or believes that the details that have been given are false the officer has the option of arresting the individual if necessary to ascertain their identity under the new arrest powers.

PACE code D, note for guidance 5F, stipulates that if a suspect refuses to remove religious garments covering their head and/or face an officer should consider whether it would be appropriate to take the suspect out of public view, where the garment can be removed in private.

Moving images

The definition of a photograph under s 64A(6A) of PACE is amended by s116(5) of SOCAP to include moving images. Therefore the retention provisions in section 64A(4) of PACE will apply to still and moving images of detainees.

Impressions of footwear

Section 61A of PACE, introduced by s118 of SOCAP, brings the taking, retention and sharing of footwear impressions in line with other identification evidence (fingerprints and DNA samples). As with fingerprint and DNA samples the individual must be informed of the reason for taking the impression and that the impression may be the subject of a speculative search and this information must be recorded in the custody record.

The power to take footwear impressions from detainees at a police station is limited to cases where the person has been detained in connection with a recordable offence. The person's written consent should always be sought prior to the taking of the impression, but any footwear impressions, whether taken with or without consent, must be taken overtly with the full knowledge of the suspect.

Stop and search

Sections 1(2)(a) and 1(8B) of PACE are amended by s115 of the SOCAP to enable constables to stop and search individuals suspected of possessing prohibited fireworks. The prohibited possession offences relate to:

- anyone under 18 being in possession of fireworks in a public place
- any member of the public in possession of display grade (or category 4) fireworks.

Comprehensive guidance on the use of stop and search powers, particularly when stopping and searching juveniles, is available on the Home Office website.

Drugs Act 2005

Some parts of this Act came in to force on 1 December 2005, in particular drug testing on arrest for those 18 year or older.

Ketamine

Ketamine became a class C controlled drug as of 1 January 2006. Previously this drug was regulated under the Medicines Act.

Section 1

Section 1 of the Drugs Act 2005 inserts a new section 4A into the Misuse of Drugs Act 1971. It stipulates the circumstances which a court must treat as aggravating factors when considering the seriousness of the offence of supply of a controlled drug, when the offence is committed by a person aged 18 or over. It will be an aggravating factor where the drug dealer uses a person under the age of 18 as a courier to deliver a controlled drug to a third person or a drug related consideration to himself or a third person or where the dealer supplies a controlled drug on or in the vicinity of school premises, during the 'relevant time'.

Section 3

Section 3 of the Drugs Act 2005 amends s55 of the Police and Criminal Evidence Act 1984, which makes provision with regard to intimate searches. The amendments made by section 3 of the Drugs Act 2005 require that the suspect's written consent is obtained prior to a drug offence search and allows a court or jury to draw such inference as appears proper should consent to such a search be refused without good cause. The amendments also require the detainee to be informed that authorisation has been given for a drug offence search and the grounds of that authorisation.

Some drug dealers conceal drugs in their body cavities to avoid detection. Prior to the Drugs Act 2005, PACE allowed for an

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More to think about

Whilst the interim Carter report dominates our thinking there are other issues which we have not lost sight of. But first – Lord Carter



Rodney Warren

“Why are there no firms now in existence with many, many branches across the country in cities and rural areas alike?”

Much of this edition is devoted to the interim report outlining the proposed move to a market approach. I believe there are three steps in the process of considering the ideas put forward and each one of them has a number of associated questions which need to be answered.

The steps are:

- Is the price competitive tendering approach conducive of the provision of a public service as part of what used to be called the welfare state, a provision of a viable, sustainable quality service in every part of the country, from inner city to the most remote rural area?
- Is the proposed system workable in ensuring adequacy of sustainable supply of independent lawyers with provision for proper client choice (much vaunted in the health service at present)?
- When we see the figures (it is unhelpful that they have yet to be disclosed), is there evidence to establish that the business case can be made to support the business models envisaged? Anyway, how can volume be guaranteed with all of the other changes government is bringing in: means testing, abolition of committals and offences taken out of magistrates' court jurisdiction, for example?

This comes down to three shorter questions: Is the philosophy right? Is the design workable? Will the businesses be viable?

The one question which I cannot seem to get anyone to answer is this: why are there no firms now in existence with many, many branches across the country in cities and rural areas alike?

From a theoretical view alone, until that question can be answered I, like most

others, cannot see a magic wand which will increase profitability and encourage those firms to be created. That is especially the case where cuts in rates may be envisaged as part of this process and any efficiency savings made by proposed economies of scale are looked upon as savings for the paymaster and not for the firm which generates them.

Re-accreditation

As if we haven't got enough to think about, there appears to be a move on the part of the Regulation Board, now with some independence from the Law Society to try to move forward with its re-accreditation of members of the criminal litigation accreditation scheme.

The LSC accepts Law Society CLAS membership for qualification of duty solicitor status. It will rest first with the LSC whether it will support this move. If it does it will have to decide whether to continue to contribute to the cost. If not it leaves solicitors to pay for any training and other fees themselves. The LSC will also have to decide how this process fits in with peer review and preferred supplier principles.

Safety in police stations and other custody areas

We are working with the Health and Safety Executive to try to get focus on a huge area of risk to us all, an area to which others appear to be almost blind. We have a lot of work to do to get the message across and have meetings arranged with ACPO and the Home Office.

What will help us most are your personal experiences, examples of being locked in cells or interview rooms. Let us know by contacting sue@clsa.co.uk and heading your email "Safety".

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intimate search of a suspect to be carried out on the satisfaction of certain conditions. Consent was not required under PACE. However, unless it was impracticable to do so, intimate searches were carried out by a registered medical practitioner or registered nurse and, in practice, such searches would not normally be undertaken without the suspect's consent. Consequently some suspects would not consent in order to avoid detection. Section 3 of the Drugs Act 2005 is intended to encourage suspects not to withhold consent without good cause by enabling courts to draw such inferences as appear to them to be proper where consent is withheld without good cause.

Section 5

Section 5 of the Drugs Act 2005 inserts a new s55A into PACE. It enables a police officer to authorise an x-ray or ultrasound scan of a person who is arrested for an offence and who is suspected of swallowing a class A drug which he had in his possession with intent to supply or to export unlawfully.

Section 8

Section 8 of the Drugs Act 2005 amends s152 of the Criminal Justice Act 1988 to make provision for a magistrates' court to commit a person charged with possession of a controlled drug or a drug trafficking offence into police custody for a period of up to 192 hours to increase the likelihood of any swallowed drugs being recovered.