

A Fairer Deal for Legal Aid





A Fairer Deal for Legal Aid

Presented to Parliament
by the Secretary of State for Constitutional Affairs and Lord Chancellor
by Command of Her Majesty

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Foreword by Lord Falconer

The legal aid system is one of the proudest legacies of the progressive post-war Labour governments.

Since the Attlee government established legal aid in 1949, millions of people have been given help, advice, support and representation.

Legal aid ensures vulnerable and disadvantaged people are not denied access to justice because of their inability to pay for it. And it ensures that people accused of crime get a proper defence and so a fair hearing. It is one of the cornerstones of a fair and decent society.

Legal aid provides the framework within which citizens can enforce their rights and are held accountable for fulfilling their responsibilities.

These are important principles – just as relevant now as they were in 1949. But since legal aid was introduced, our country and society has changed dramatically. The way publicly funded legal advice and representation has been funded and delivered hasn't always kept pace with these changes.

The overall cost of legal aid has grown considerably in recent years, up from around £1.5bn in 1997 to over £2bn in 2004. But there has been a disproportionate growth, over the same period, in the criminal legal aid spend (up 37%) compared to legal advice and representation in civil and family matters, excluding asylum (down 24%).

There is also a bias towards court-based outcomes and insufficient emphasis on resolving problems swiftly or without recourse to litigation. A small number of very expensive criminal cases absorb too great a share of the budget so that the spread of funding isn't responding effectively to demand.

The current system is in need of reform – this is why we carried out an important analysis of legal aid and why the time is now right to create a fairer deal for legal aid.

The reforms will ensure that, like other mainstream public services, publicly funded legal advice and representation delivers for the public. This means guaranteeing that the taxpayer gets value for money from those who provide services with legal aid money. And it means targeting resources on people who most need it, requiring those who can contribute do so and, critically, ensuring that everyone has access to justice.

This vision, analysis and the reforms that follow will keep the legal aid system at the heart of a fair and decent society. We will continue to drive forward reforms that make criminal trials more focused and effective: better judicial case management and a more systematic approach to the way fraud offences are brought to justice. We will develop the provision of civil and family advice and assistance; a priority being the needs of vulnerable and disadvantaged people. We will make the family justice system more effective, focusing on achieving the best outcomes for the child. We will create a better system for buying legal services, developing a more open and responsive market.

When legal aid was introduced in the post-war period, its aim was to provide access to justice and to contribute to a fair and decent society. These principles remain today. The vision set out here will see these principles applied to the needs and demands of today's modern, progressive society.

The image shows two handwritten signatures in black ink. The top signature is 'Charlie' and the bottom signature is 'Falconer'. Both are written in a cursive, flowing style.

Lord Falconer of Thoroton

Secretary of State for Constitutional Affairs
and Lord Chancellor

The origins of today's legal aid system

An evolving system reacting to change

1.1 The concept of the state providing legal support for defendants and litigants dates back to the early part of the last century. However, a comprehensive, funded system was not in place until the inception of legal aid in 1949. Our justice system now depends, to a significant degree, on legal aid in order to function fairly.

1.2 Since its introduction, legal aid has adapted to meet changing demands. In the last 56 years, society's needs and wants, economic well-being and social concerns – as well as various Governments' priorities – have changed, often significantly. Legal aid has frequently been reformed and refocused to reflect these new priorities and respond to new needs – it has evolved in response to the political, economic and social environment.

1.3 However, as a result of the piecemeal, evolutionary process, legal aid has developed in ways that are not always desirable.

1.4 This chapter:

- outlines the development of legal support in this country and the introduction of legal aid and
- sets out the main reforms to legal aid since its introduction.

The early foundations

1.5 Until the mid-eighteenth century, courts were often devoid of lawyers – prosecutions were usually pursued by well respected citizens with judges effectively acting as defence counsel¹. It was not until a series of reforms, from 1752 to 1826, that lawyers became a more common feature in criminal trials – albeit only on the prosecution's side. Eventually, in 1836, lawyers were granted the right to address the jury on behalf of the defendant, although this privilege was only extended to defendants who could afford to employ defence counsel.

1.6 In 1903, the Poor Prisoner's Defence Act made tentative steps to addressing the imbalance in legal representation, by allowing magistrates to order payment of legal help for the defendant, drawn from local funds. This provision was only activated if the prisoner disclosed their defence early in the case, at the committal stage. In practice, this meant that free legal assistance in criminal trials remained a rare occurrence. The 'early disclosure' restriction was eventually removed in the Poor Prisoners Defence Act 1930, which also introduced the concept of an 'interests of justice' based merits test and widened magistrates discretion for granting legal aid.

1.7 In civil cases, legal help relied largely on the goodwill of lawyers. A 1914 change in the rules of the Supreme Court allowed for litigants of modest means and with a strong case to be assigned a lawyer to investigate their case and report to the High Court or Court of Appeal. The judge then had discretion to assign counsel or a solicitor, drawn from a list of volunteers who were willing to work without remuneration. This scheme continued until 1925 when administrative responsibility transferred from the courts to the Law Society, where it remained until 1988.

The post-war settlement

1.8 The Rushcliffe Committee report in 1945 paved the way for a modern legal aid system. Although the provision of free legal help in criminal cases was fairly modest², the report focused on improving civil legal help in two areas:

- firstly, litigants of sufficiently modest means should be provided with lawyers, drawn from the private sector, to represent them in courts and tribunals
- secondly, the report recommended the creation of a publicly-salaried cadre of lawyers (similar to a Public Defender Scheme) to give early, generally pre-court, advice in civil and criminal cases.

¹ Goriely, T. – *The Development of Criminal Legal Aid in England and Wales*, from Young, R. and Wall, D. (eds.) (1996)– *Access to Criminal Justice: Legal Aid, Lawyers and The Defence of Liberty*, p.27

² Mainly raising awareness of the 1930 Poor Prisoners Defence Act

1.9 The Rushcliffe recommendations were given effect in the Legal Aid and Advice Act 1949. Many of Rushcliffe's proposals were limited (for example, civil help was initially limited to High Court divorce cases, following a sharp upturn in applications from returning servicemen and their spouses) or dropped entirely (for example, the publicly-salaried early advice service). Combined with magistrates' apparent reluctance to grant legal aid, the provision of free legal help remained largely restricted for a number of years.

1.10 However the foundations for the modern system of legal aid provision had been laid, with the civil scheme beginning in 1950 and criminal provisions being progressively introduced between 1952 and 1963.

The growth of legal aid during the latter part of the 20th century

Increasing volume, increasing costs

2.1 The period between 1960 and the present day saw a significant rise in volume and expenditure on legal aid. This upward trend was punctuated by periods of accelerated and dramatic growth.

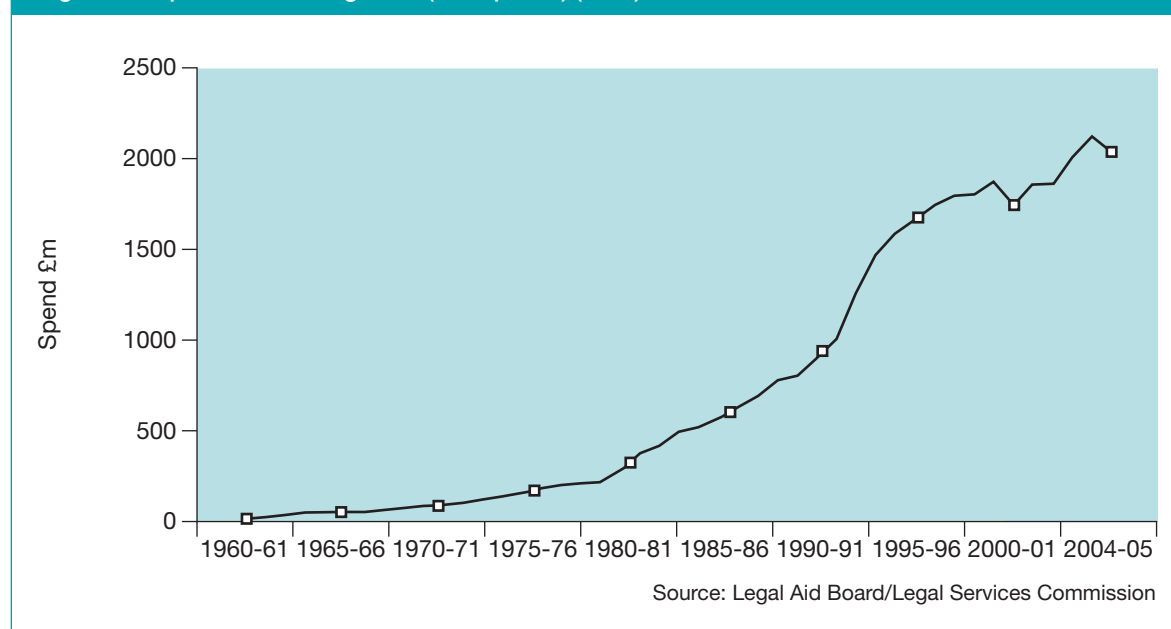
2.2 Although it is difficult to separate out and analyse the reasons underlying this increase, two key factors were pre-eminent in the long-term growth of legal aid:

- in 1960, the Government accepted that the blanket fixed-fee system for legal aid criminal defence work was not fairly remunerating lawyers for the work that they undertook. An inputs-based procurement regime was introduced, which paid hourly rates. At the time, volumes of cases were sufficiently low for the state to be able to accurately police

such a system and ensure that payment reflected only necessary and actual work undertaken by lawyers the funding source for criminal legal aid was changed. Whereas previously local funds (i.e. money from ratepayers) had met costs, the Government decided that legal aid should, in fact, be paid for by taxpayers through a national Legal Aid Fund for magistrates' courts and the Home Office for the higher courts.

2.3 The combined effect of these changes was dramatic. The proportion of defendants receiving legal aid in jury trials rose from 39% in 1962 to 79% in 1966. In magistrates' courts 1.2% of defendants received legal aid in 1964, up from 0.3% in 1955⁴. Whilst this increase is small in absolute terms, it represents a four-fold increase in the proportion of summary defendants receiving legal aid. There is persuasive evidence to suggest that magistrates who had previously been extremely cautious in granting criminal legal aid from local funds, now felt able to grant representation more freely, facilitated by the relative distance of a national source of revenue⁵.

Figure 1: Expenditure on Legal Aid (2005 prices) (cash)³



³ Figures from 1959-60 to 1979-80 do not include criminal higher payments, as these were paid by the Home Office

⁴ Widgery – *Report of the Departmental Committee on Legal Aid in Criminal Proceedings*, para. 32

⁵ Goriely, T. – *The Development of Criminal Legal Aid in England and Wales*, from Young, R. and Wall, D. (eds.) – *Access to Criminal Justice: Legal Aid, Lawyers and The Defence of Liberty*, p. 44

2.4 The 1964 Widgery Report explicitly defined the meaning of the ‘interests of justice’ test with a view to regularising grants for representation in magistrates’ courts. It also recommended that responsibility for legal aid should move from the Home Office to the Lord Chancellor’s Department; a provision eventually given effect in 1980. The ‘Widgery criteria’ are:

- the offence would, if proved, lead to loss of liberty, loss of livelihood or serious damage to the defendant’s reputation
- the case involves a substantial question of law
- the defendant may be unable to understand the proceedings or to state his own case due to inadequate English, mental illness, or mental or physical incapacity
- the nature of the defence involves tracing and interviewing witnesses, or expert cross-examination of witnesses, or
- it is in the interests of someone other than the defendant that the defendant should be represented.

2.5 In historical terms, the report’s publication also marked the start of a period of significant growth in volumes and costs of funding free legal help for magistrates’ court defendants. Costs rose, in real terms (2005 prices), from £6.8m in 1966-67, to £115m in 1982-83⁶, to more than £324m in 2004-05⁷.

2.6 Free legal help was also extended to the police station, following the Police and Criminal Evidence Act (PACE) in 1984. The Act was the Government’s response to the Philips Royal Commission on Criminal Procedure, which was tasked with reviewing the criminal process from the start of investigation to the point of trial following a number of cases of intimidation and assault on suspects at the police station. The Royal Commission, in 1981, estimated that providing free police station advice would cost only around £6m per year. However, the cost of the police station scheme was £85m in 1994, and £172m in 2004-05, in real terms (2005 prices).

2.7 The Law Society had retained responsibility for the administration of civil legal aid since 1925. However, this ended with the Legal Aid Act 1988. The Act sought to resolve the anomalous position of the Law Society as both the paymaster and representative of the profession receiving funds. It created a non-departmental public body – the Legal Aid Board – to inherit the administrative role of the Law Society in legal aid, and codified the relationship between the Board and the Lord Chancellor, and his Department.

2.8 The Legal Aid Board oversaw a continued rise in expenditure. Spending on all forms of civil and family legal aid rose rapidly from £787m in 1992-93, to £939m in 1997-98, (in 2005 prices) a 19% increase in spend in the five year period. Yet in the same period, the number of full civil legal aid cases started each year fell by 31%. The main reason for this was that legal aid was too heavily biased towards expensive, court-based solutions rather than helping to tackle people’s problems before they reached courts.

2.9 Expenditure was almost entirely on lawyers’ services, who, in practice, determined where and how the money was spent. There was also criticism that legal aid was often funding cases of insufficient merit. The statutory framework also meant that the Board was compelled to fund any firm to undertake criminal defence work. The administrative overheads of funding a large number of firms – many of which did only a small amount of criminal legal aid work each year – were placing an unnecessary financial burden on the Board. Although attempts were made through franchising to restrict the number of firms being paid each year, it was clear a system where only contracted suppliers would be able to undertake criminal defence work was needed to drive out this inefficiency and introduce quality controls.

⁶ Home Office – *Criminal Statistics for England and Wales 1984*, p.188.

⁷ Legal Services Commission – *Annual Report 2004-05*.

2.10 The Access to Justice Act 1999 abolished the Legal Aid Board and replaced it with a new non-departmental public body – the Legal Services Commission. The Commission began its work in April 2000, tasked with developing and maintaining the Community Legal Service (for civil legal aid) and the Criminal Defence Service (for criminal legal aid). The Act also provided the legislative vehicle for major changes to the legal aid scheme. It provided for the creation of a General Criminal Contract to ensure that only those solicitors with demonstrable competence in criminal defence cases could be remunerated from legal aid funds.

A growing legal practitioner market

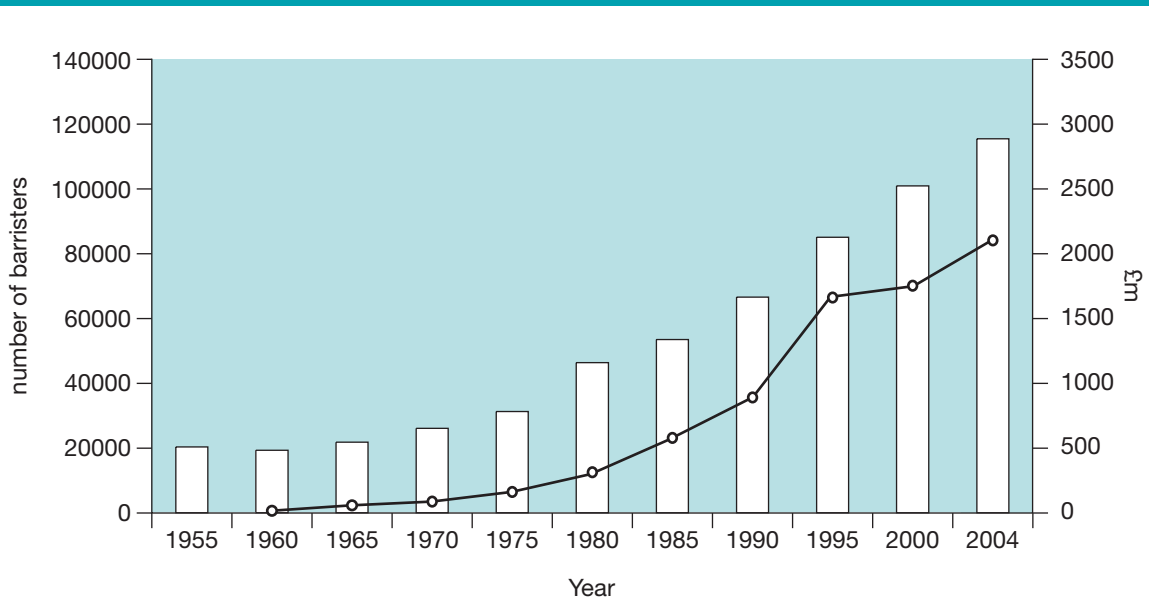
2.11 The rapid growth in legal aid expenditure has been matched by a dramatic increase in the overall number of legal practitioners and the pool able to provide legal aid services. Between 1955 and 2004 the number of solicitors holding a practice certificate has risen from 17,969 to 96,757 – an increase of 438% (see Figure 2). Over the same period the number of independent/self-employed barristers has risen from 2,008 to 11,564 – an increase of 476% (see Figure 3). While there are many factors in addition to legal aid that will affect the size of the legal services market, the rising trend in legal aid spending appears to match the increase in the number of lawyers. It has been suggested, particularly in relation to criminal legal aid, that the number of lawyers is a driver that contributes to increasing legal aid spend⁸.

Figure 2: Number of solicitors holding a Practise Certificate and total legal aid expenditure (2005 prices) (Cash)



⁸ Goriely, T. – *The Development of Criminal Legal Aid in England and Wales*, from Bridges, L. – *The Professionalisation of Criminal Justice*, Legal Action, pp7-9

Figure 3: Number of self-employed/independent barristers and total legal aid expenditure (2005 prices) (Cash)



Source: The General Council of the Bar/Legal Aid Board/Legal Services Commission

Recent trends in spending and case volumes covered by legal aid

2.12 In recent years, total legal aid spending has continued to rise. In 1997-98 it stood at around £1.5bn. It had increased to over £2bn by 2004-05. Some of this increase can be accounted for by inflation, some by increases in volumes of work in certain areas of law but much of this increase can only be accounted for by costs rising significantly above the rate of inflation in the rest of the economy.

2.13 Figure 4 shows the evolution of total legal aid spending in real terms. While legal aid spending fell between 1997-98 and 1999-00, there has been a significant increase in overall legal aid spend of 17% in real terms, in the period since 1999-00.

2.14 This picture does not show the way in which the legal aid scheme has become increasingly focused on providing advice and representation to those facing criminal charges. Figure 5 illustrates the extent to which expenditure on criminal defence services has risen. This is in sharp contrast to the spend on civil legal aid which has decreased in real terms over the same period.

2.15 Within the overall declining spend on civil legal aid in Figure 5 there are two areas of civil legal aid which has shown rapid and

very significant growth – child care and related proceedings and asylum. Asylum legal aid expanded to support the rapidly rising number of people applying for asylum and the importance of having their applications and appeals determined as quickly as possible. Joint working by the DCA, the Legal Services Commission and the Home Office Immigration and Nationality Directorate made sure that asylum legal aid contributed towards speeding up decision making and appeals for asylum seekers. However, costs are now dropping as the Government gains control over the number of people applying for asylum. In addition, arrangements introduced by the Legal Services Commission controlled the amount of work that could be done in these cases and progressively restricted the provision of asylum legal services to those firms providing quality advice and representation. These controls ensure that funding goes to the cases that need it and that cases without merit are not taken forward. As a result of these measures, and the reduction in the number of applications, we have started to see a significant decrease in the amount of resource consumed by asylum legal aid. The significant increase in expenditure on asylum masks what has been happening to other areas of civil legal aid expenditure, therefore the analysis which follows specifically excludes this area of work.

Figure 4: Overall spending on Legal Aid (2005 prices) (cash)

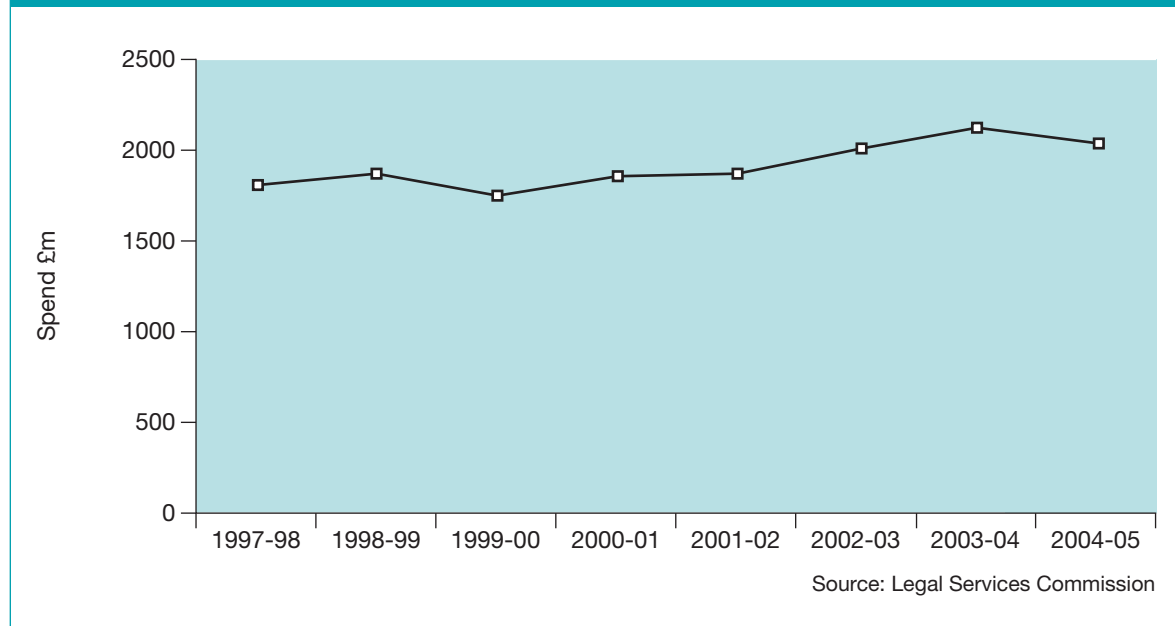
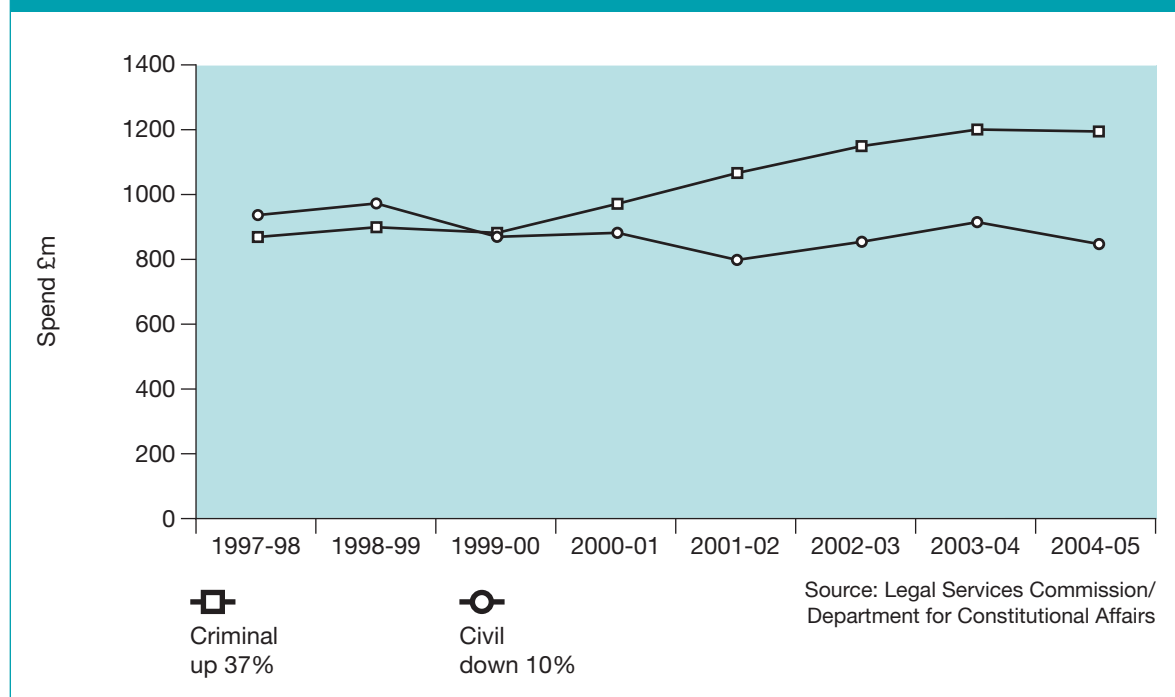


Figure 5: Spending on Criminal and Civil Legal Aid (2005 prices) (cash)



Increasing demands and costs of providing criminal defence

2.16 Splitting the legal aid scheme into criminal and civil services and removing asylum work illustrates the way that legal aid has become increasingly focused on criminal issues – Figure 6 shows spending on civil work (excluding asylum) has fallen by 24% in real terms over the period 1997 to 2004-05, whereas spending on criminal matters has increased by 37% in real terms.

2.17 Like all areas of public expenditure, legal aid has to live within an overall budget and the demands on the scheme must be met from within that budget. The growth in criminal spending has meant we have had to reduce the spending on civil, particularly on legal help, and family legal aid, which is undesirable for society as a whole.

2.18 Over this period there have been significant increases in spending on the Criminal Justice System as a whole – the police, Crown Prosecution Service, probation and the prison service. Since 1998-99 the cost of the CJS has grown by over 46%, in real terms, driven by Government policy to tackle persistent offending and anti-social behaviour, and to increase the number of offenders brought to justice.

2.19 There is no demonstrable link that increased spending on the CJS has directly translated into increased volumes of work, either ‘lower’ criminal matters – (police station advice and representation in magistrates’ courts) – or ‘higher’ criminal matters (where a case is heard in the Crown Court).

2.20 Figure 7 shows that on some measures the number of people receiving criminal lower legal aid has declined, and the number is broadly stable in the Crown Court. This suggests that the significant real increase in criminal legal aid spending is not a result of a greater number of cases, but has other causes.

2.21 However, the decrease in volume of criminal lower work is not clear cut. At least part of the decline is attributable to a change in the way ‘acts of assistance’ (i.e. defendants helped) were recorded with the introduction of general criminal contracts in 2001-02.

2.22 Expenditure in the Crown Court shows a clearer trend. Here spending has increased by 65% with little change in case volumes. Figure 8 shows this effect. It should be borne in mind that this increased spending comes against a background of broadly stable volume of cases in the higher courts.

Figure 6: Legal Aid spending excluding asylum (2005 prices) (cash)

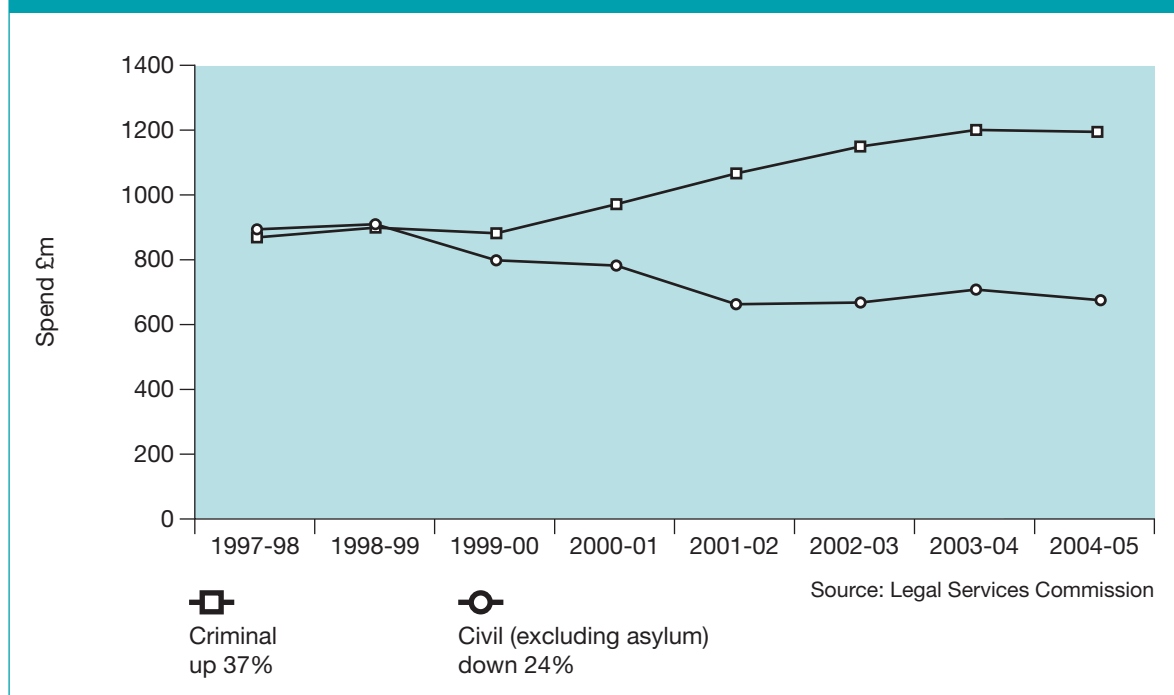


Figure 7: Volume of criminal work covered by Criminal Legal Aid

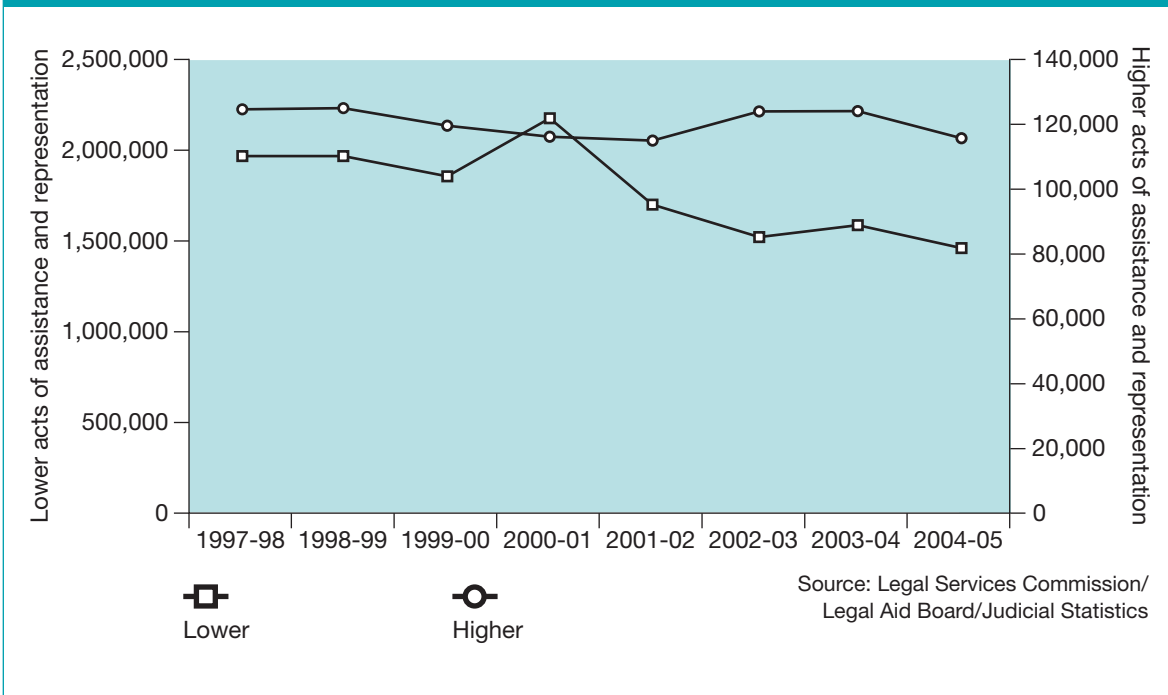
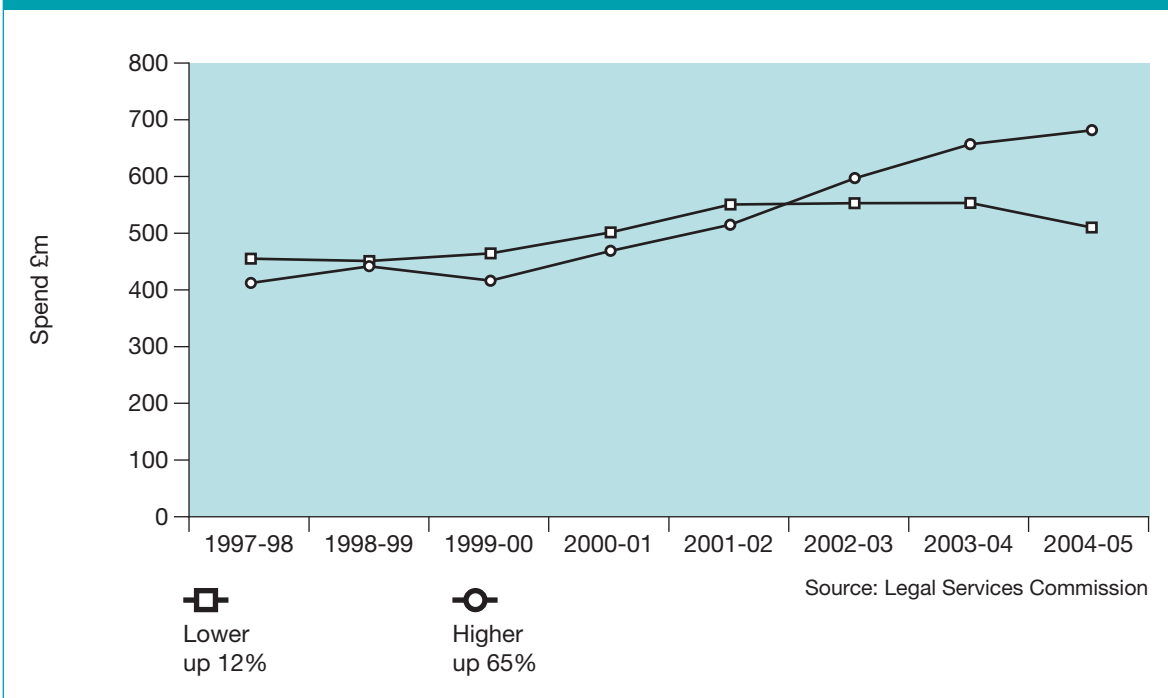


Figure 8: Criminal Legal Aid spending (2005 prices) (cash)



2.23 Figure 9 splits the real terms increase in fees paid to barristers and solicitors for Crown Court work. Payments to solicitors have risen at a higher rate than payments to barristers, which fell slightly last year. However, the aggregate rise in both groups leads us to seek improvements in the way legal aid is procured and used in the courts.

2.24 The rise in spend on solicitors in the Crown Court is in part due to the lack of robust mechanisms to control the amount of work undertaken. Solicitors are paid for inputs (hours worked). This means that volume of work, rather than efficiency, is rewarded financially. As the majority of this work is also paid 'ex post facto' (after the work is completed) the state has limited ability to control the eventual cost. Chapters 4 and 5 set out potential measures to maximise and reward efficiency.

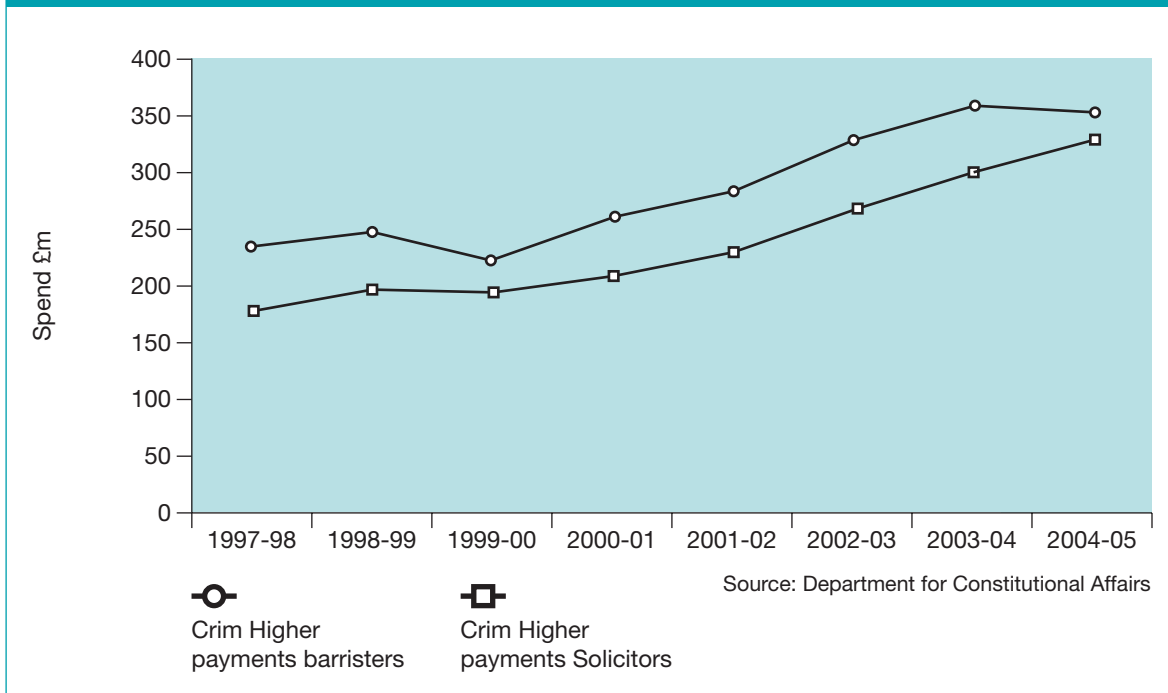
2.25 For the most expensive cases, where the exceptional nature of the work means a standard fee scheme is impracticable, barristers are paid by hourly rates. The Legal Services Commission has brought these fees under a special contracting regime⁹.

2.26 There is still potential for individual barristers to earn large sums from these cases. Figure 10 shows the increase in legal aid earnings for the 'top ten' barristers since 2001-02. The average legal aid earnings for this group in 2004-05 was £724,000 per annum, and one barrister earned in excess of £1.6m from legal aid over the two years 2002-03 and 2003-04.

2.27 Notwithstanding the aggregate increase in expenditure on criminal legal aid to barristers there is some evidence that not all barristers have personally benefited from this increase, and this is most true for junior barristers. This imbalance can largely be explained by the structure of the bar – a market of self-employed practitioners. As so many barristers are competing for work, significant numbers are not fully employed.

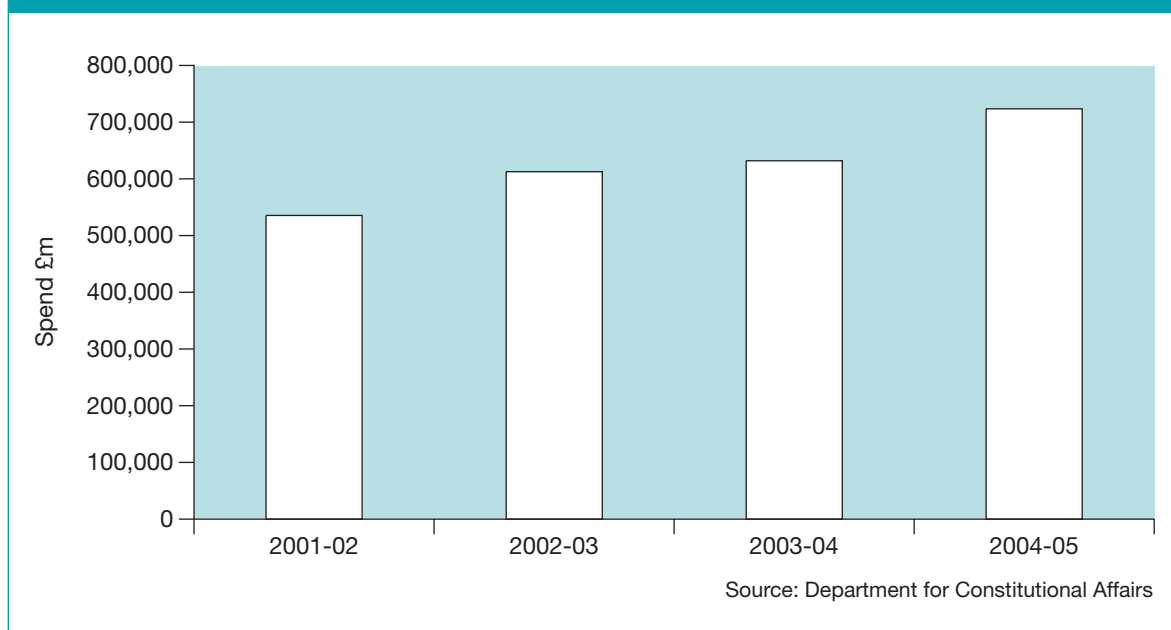
2.28 We need to ensure that the current system of criminal legal aid procurement works effectively; that it secures defence services at a fair price and simplifies the system wherever possible. Chapters 4 and 5 present detailed analysis of these issues and proposals for re-engineering the way in which we could procure legal services from both barristers and solicitors.

Figure 9: Criminal higher legal aid spending (2005 prices) (cash)



⁹ Where a defendant receives legal advice/representation at the police station and the magistrates' courts only one act of assistance is now counted. Previously, police station and magistrates' court legal help were counted separately. This change would result in a lower overall volume of acts of assistance counted.

Figure 10: Average legal aid earnings of top ten barristers (cash)



Diminishing civil legal aid

2.29 Figure 6 showed that in real terms since 1997-98, there has been a reduction in spending on the civil and family justice elements of the legal aid scheme of 24%.

2.30 This reduction has also been reflected in the number of people getting publicly funded legal advice and representation in non-criminal matters. Figure 11 illustrates that there has been a decline of 39% in the number of people being represented and of 45% in the number of people receiving legal help (by which we mean 'traditional' face to face help in a solicitor's office or advice agency). As the drop in the number of people being helped is significantly greater than the drop in spend on civil and family justice, this implies significant growth in the average cost of legal aid cases.

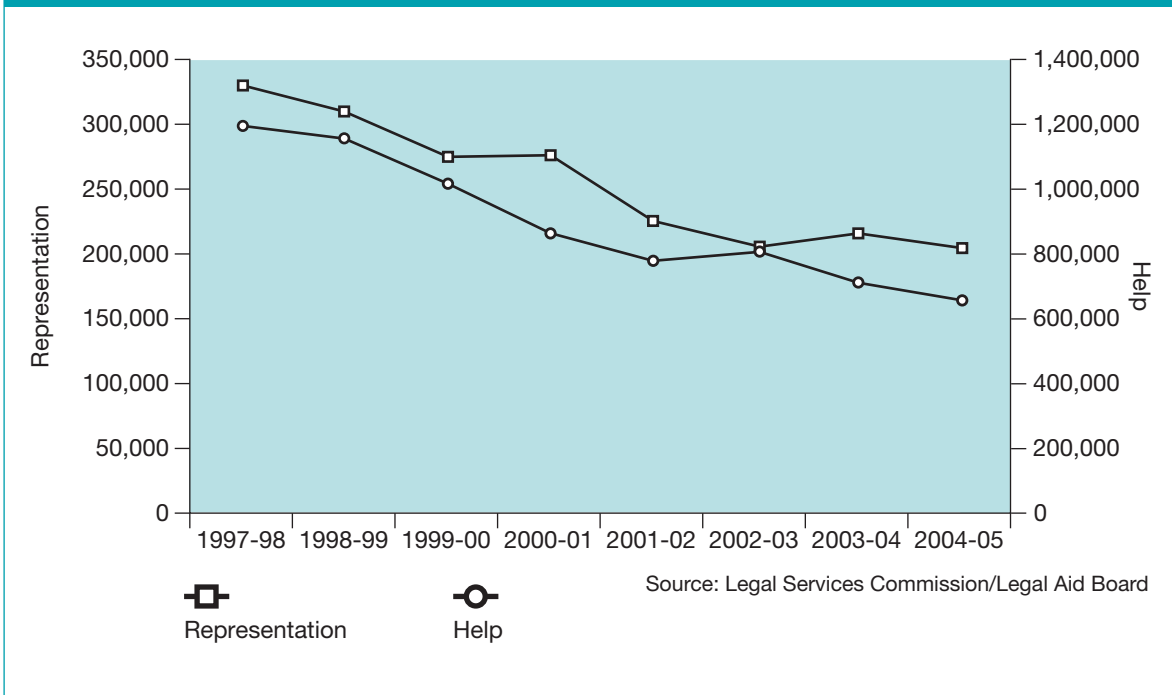
2.31 Part of the reduction in funding is a result of the Access to Justice Act, which allowed for the removal from the scope of legal aid of various categories such as Personal Injury and general contract cases which could alternatively be funded by Conditional Fee Agreements (see Chapter 6 below). The Community Legal Service fund has a controlled budget, but with more flexibility than the previous civil legal aid system to redeploy resources to meet unexpected demand, and adopt different approaches to reflect changing priorities and new opportunities.

2.32 Since 2000-01, there has also been a strong move towards exploring alternative methods of provision where the traditional services of a solicitor's firm may not be the only, or the most appropriate route to advice. In particular, there has been a shift towards 'Not for Profit' (NfP) provision (advice agencies such as Law Centres or Citizens Advice Bureaux) for housing, welfare benefits and debt advice. NfP contracts in these areas have increased by 32%, 25% and 21% respectively since 2000-01. There has also been increasing use of telephone and internet routes to advice, as discussed in Chapter 6.

2.33 These developments have as a major aim tackling the problem that in some parts of the country, face to face provision of aided or voluntary sector legal advice is limited. This problem of 'advice deserts' was referred to in evidence to the Constitutional Affairs Select Committee's inquiry into civil legal aid, which reported in July 2004, and in the paper the LSC provided in response. Chapter 6 describes further measures being taken or envisaged to tackle this problem.

2.34 Within the Community Legal Service, set up under the Access to Justice Act 1999, Community Legal Service Partnerships bring together the funders and providers of advice and assistance services, including 'Not for Profit' provision, within each locality. The LSC is working with these Partnerships to assess the appropriate level of advice provision and to ensure continuing advice to those who need it – see Chapter 6.

Figure 11: Volumes of Civil and Family Publicly funded work



Family legal aid

2.35 Advice and representation on family matters is the most significant element of non-criminal legal aid spending. This covers matters such as child contact and residence cases, as well as child care and related proceedings in instances where the state has intervened to protect a child, for example through care arrangements or adoption.

2.36 Child contact and residence cases: Figure 12 shows that overall spending on child contact and residence cases declined in real terms by 16% between 1999-00 and 2004-05.

2.37 Child care and related proceedings: Figure 13 shows that volumes have increased 37% since 1999-00, while expenditure has increased, in real terms, by 77%. This implies a very significant increase in cost per case. Analysis has indicated a number of cost drivers, including the proliferation of parties and greater use of experts paid from the legal aid fund.

The Fundamental Legal Aid Review

2.38 The Secretary of State for Constitutional Affairs set up the Fundamental Legal Aid Review in May 2004 to analyse the issues set out in this chapter. This report sets out the conclusions from that review.

Figure 12: Spend and volume in Child Contact and Residence Cases (2005 prices) (cash)

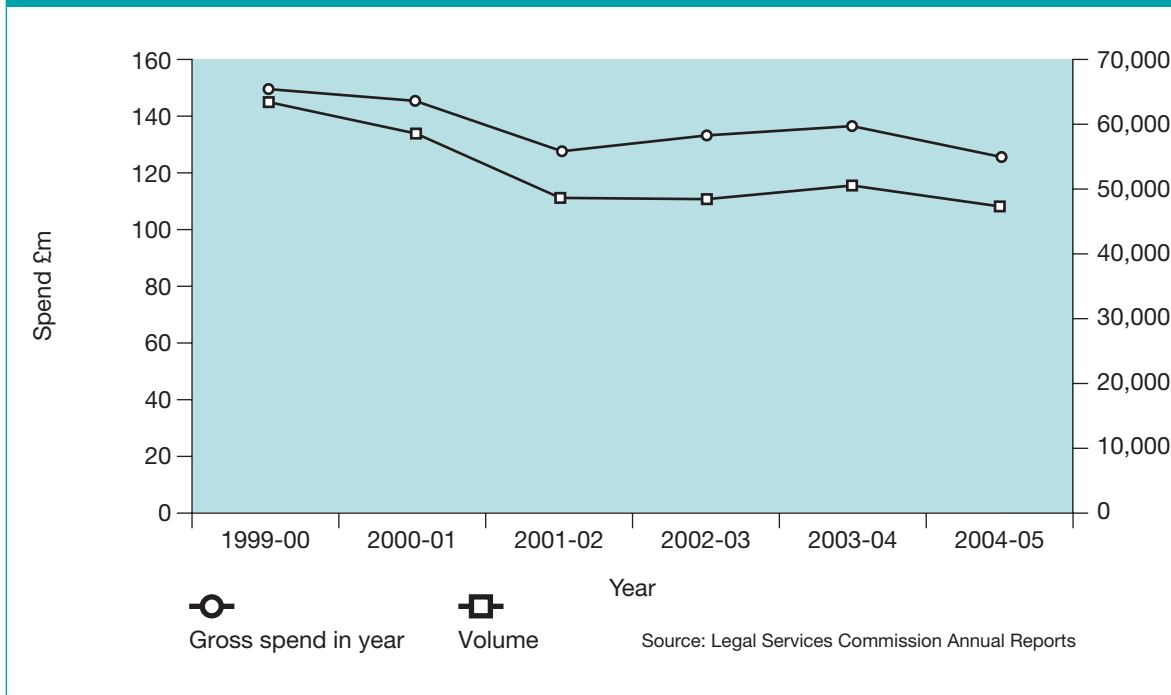
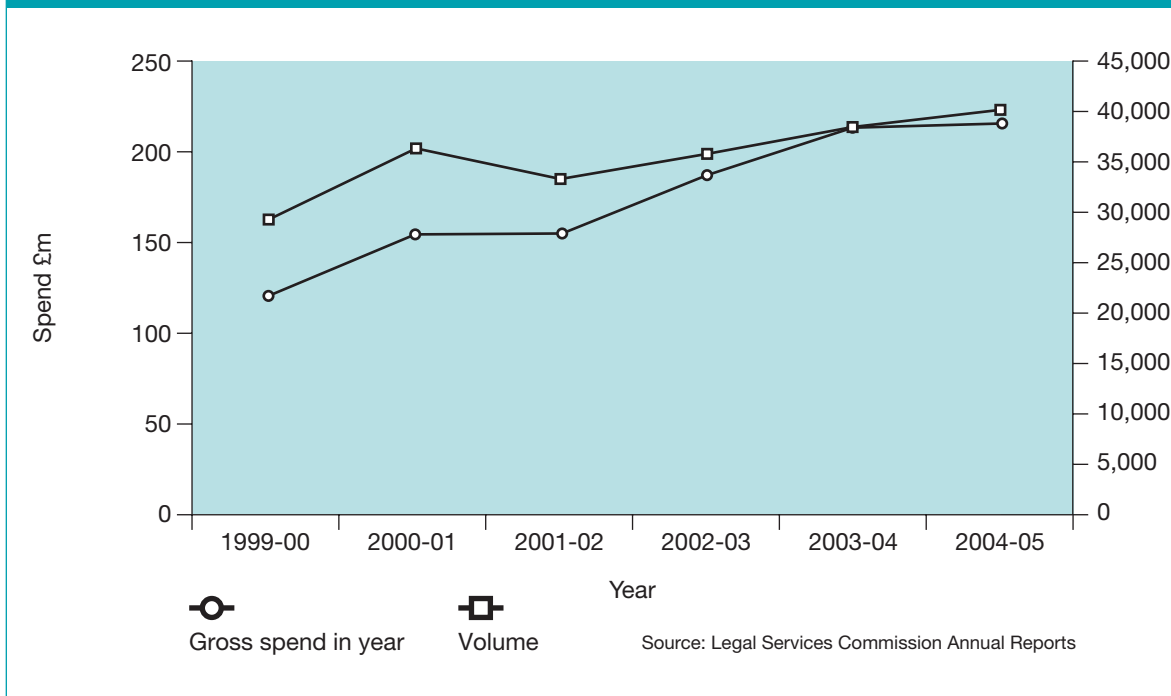


Figure 13: Spend and volume in child care and related proceedings (2005 prices) (cash)



Delivering a fairer deal: the long-term vision for legal aid

3.1 Legal aid serves two, largely distinct, functions. Firstly it provides protection and representation to those accused of a criminal act, underpinning the guarantee of a fair trial. Secondly, it actively contributes to the Government's social welfare agenda – particularly by tackling key problems associated with social exclusion, such as housing and debt.

3.2 The future for legal aid will see it actively supporting the progressive objectives of social welfare reform – fairness, decency and opportunity for all. The legal aid system will be fair and effective, providing access to justice for all who need it. And the suppliers of this publicly funded advice and representation will be operating in an open and competitive market ensuring an efficient service that provides the taxpayer value for money.

3.3 The efficacy of reforms in realising the vision rests, to a large extent, on the continued provision of **quality** legal services. Our commitments to fairness in criminal trials and helping the most vulnerable in society cannot be met by the provision of poor quality services. It is, therefore, vital that we ensure high standards of service provision and place quality at the heart of reforms to the system.

Getting the balance right

3.4 Publicly funded legal services will be better focused on people's priorities – ensuring the effective operation of the justice system and actively promoting equality and opportunity for all. Legal aid will:

- Ensure that defendants in criminal cases continue to get a fair trial
- fund legal and other advice for those who most need help to resolve their problems, such as the socially excluded and the vulnerable – those who can contribute to their legal costs should do so
- contribute to alternative ways of assisting those who can resolve problems without recourse to legal assistance, and supporting the effective development of alternative methods of funding litigation where that is necessary

- promote alternatives to court based approaches to resolving problems wherever that is possible and appropriate.

Supporting a fair and effective system of justice

3.5 Legal aid will:

- protect the rights of the innocent, vulnerable and disadvantaged
- ensure a fair trial for defendants who cannot afford to pay for themselves
- be integrated into the way justice is delivered so that the services provided with legal aid funds are proportionate to the importance, urgency and complexity of the issues concerned and unnecessary additional demands are minimised
- incentivise swifter conclusions to minimise costs across the justice system
- be considered along with all other funding streams when changes are made to our systems of law, and
- be under tighter management control so that demands for legal aid services are proportionate to the need.

Promoting an efficient publicly funded legal services market

3.6 Legal aid will promote a legal services market that delivers independent advice and representation in the most efficient way to meet people's needs. Legal and advice services will be procured in a way that increases efficiency and provides greater value for money. Legal aid will:

- be delivering services from an active and competitive legal services market with a system for remunerating practitioners that is effective, removes unnecessary complexity, and is focused on rewarding innovation
- ensure that all practitioners, from junior barristers to QCs, from police station representatives to experienced solicitors, are fairly remunerated for the work that they have undertaken, and

- support the development of new and more efficient methods of delivery to meet the needs of citizens for legal services that enable swifter resolution of problems at a reasonable cost e.g. internet and telephone advice.

3.7 Our aim is to ensure that we meet the needs of the public who require legal and advice services, the needs of those who provide them, and the taxpayers. That necessitates reform of the demands made of legal aid and reform of the way publicly funded legal services are procured and supplied. Understanding how to reform the procurement and supply of legal services through legal aid will be the key tasks of the independent review conducted by Lord Carter of Coles (see Chapters 4 and 5 and Annex A).

3.8 This approach to reform will place legal aid on a more sustainable footing for the future. It will enable legal aid to operate as a major public service within a budget that is proportionate to the needs and importance of the overall justice system.

Delivering a fairer deal: swifter and more effective criminal justice

Bringing more offenders to justice and improving public confidence

4.1 The Criminal Justice System (CJS) must be fair. It is based on the principle that the guilty must be convicted and the innocent acquitted. This requires:

- good investigation
- accurate charging
- effective prosecutions
- robust case management and
- effective defence services.

4.2 All these are important if we are to have a fair and effective system, where co-operation between all the players really matters. Within this overarching agenda, the Government has set the following goals:

- that more offences should be brought to justice
- that public confidence in the system should rise
- that victims and witnesses should receive a consistently high standard of service

4.3 Much has already been done to help us achieve those goals. Measures have been implemented that are creating a transparent, joined up system that increasingly commands the respect of the public it serves. It is delivering faster and more effective justice for victims and the wider community while safeguarding the rights of defendants. These measures include:

- The Crown Prosecution Service (CPS) placing Duty Prosecutors in police stations throughout England and Wales to make accurate charging decisions
- The Forensic Science Service working to make forensic evidence available much earlier in the life of a case in order to reduce delay

- The Criminal Case Management Framework providing frontline staff and practitioners with best practice guidance to drive out waste and reduce the number of ineffective trials
- The Lord Chief Justice issuing the consolidated criminal practice direction in March 2005, which sets out measures to better manage cases through the criminal justice process, and
- The ‘No Witness, No Justice’ project which is introducing dedicated Witness Care Units, bringing police and the Crown Prosecution Service together for the first time to jointly meet the individual needs of victims and witnesses in criminal court cases. Witness attendance rates are up, meaning fewer trials are postponed on the day.

Protecting people’s rights and supporting the delivery of justice

4.4 Legal aid ensures a fair trial for defendants by providing public funds for legal advice and representation in those criminal cases where defendants cannot afford to pay for it themselves. Legal aid therefore makes a vital contribution to the effective operation of our fair and effective CJS.

4.5 Providing this essential component of a fair and decent society means that criminal legal aid represents more than half of the entire legal aid budget. Because this is one element of a single budget for all publicly funded legal services it is vital that:

- the demands made on legal aid by the CJS are appropriate and proportionate
- it makes the most effective contribution to the overall aims of the CJS
- it is procured in ways which incentivise these objectives and provide the best value for money.

4.6 Legal aid can make an effective contribution to achieving our goals for the CJS. Where defendants plead not guilty, the way in which legal help is provided can help to ensure that the trial is focused on the key issues. Effective legal advice can also help those who intend to plead guilty to do so at the earliest opportunity. Not only is this the most efficient outcome for the CJS and legal aid, but more importantly, it provides the best deal for victims and witnesses, who are spared the ordeal of an unnecessarily protracted trial process. A system that delivers

justice quickly and that is focused on the needs of victims and witnesses whilst safeguarding fairness and the rule of law, will attract higher levels of public confidence.

Action to promote the earlier resolution of criminal cases

4.7 Work is already being taken forward in a number of key areas to enable offences to be brought to justice earlier than at present. Taken together – and supported by new ways of procuring services from practitioners – these concerted actions represent a real step forward by placing the legal aid agenda at the heart of an effective and efficient Criminal Justice System.

4.8 Legal aid complements the work of other criminal justice agencies and other reforms at a number of key stages.

At the police station

4.9 The CPS is rolling out the provision of Duty Prosecutors in police stations throughout England and Wales to make the best possible decisions on charge. Building on this initiative, we are working with the CPS to allow Duty Prosecutors to initiate discussions with defence representatives around the point of charge. Providing legal advice to defendants at this point will further enhance the prosecutor's capacity to charge accurately from the outset. We are ready to work jointly on a pilot to test the impact of the new liaison with the defence on case outcomes, particularly early guilty pleas.

In cases involving forensic evidence

4.10 Close collaboration with the Crown Prosecution Service, the Association of Chief Police Officers (ACPO) and the Forensic Science Service (FSS) has resulted in plans to enable forensic evidence to be made available much earlier in the life of a case, enabling defendants to receive well informed early advice from their lawyers on the strength of their case.

4.11 Currently the first appearance of forensic evidence will often not be until late in the progress of a case. This means that much of the early legal advice to defendants cannot take account of key forensic information that may determine the outcome of the case. However, a 'first match report' of DNA evidence can be produced early in the process. In appropriate cases this provides the prosecution with the opportunity to base a charge on the match

report and agree summary forensic evidence. Managing cases involving DNA in this way reduces delay and assists with early identification of trial issues. We are now investigating with the CPS and FSS whether early reports could also be provided for other evidence, such as finger printing, drugs analysis and firearms analysis. For a defendant who is aware of his or her own guilt, legal advice that there is hard scientific evidence of that fact is likely to be a key determinant in considering an early guilty plea.

For remand prisoners

4.12 For defendants to be able to make an informed decision on whether to plead guilty at an early point in the process, they need to have access to legal advice. This may become a particular issue where the defendant is held on remand. Working with the Prison Service, we will investigate ways to bring together local practitioner groups and prisons to make legal prison visits easier to arrange. We will monitor the take up of prison visits and any effect that this has on case outcomes.

4.13 Remand privileges are currently forfeited by prisoners once they enter a guilty plea. Potentially this is a powerful disincentive to entering an early guilty plea. We are working with the Prison Service to develop a pilot where remand privileges will be retained until the point of sentence by those who enter a guilty plea at the earliest possible moment. The change will only be adopted nationally if it can be shown that the change in availability of remand privileges has a real effect on the number of early guilty pleas.

Maximising the impact of sentence discounts

4.14 One of the most significant factors which influences a defendant's decision to plead guilty at the earliest possible opportunity is the fact that an early guilty plea will result in the maximum sentence discount. However, this incentive is only effective if the defendant knows what the discount will be.

4.15 The recent decision of *R v Goodyear*¹⁰ in the Court of Appeal Criminal Division, makes it clear that if a judge is asked to indicate what sentence he or she would pass if a guilty plea was entered, then, assuming the conditions set out in the *Goodyear* case are met, the indication may be given in open court. We expect early guilty pleas to rise as a result of this decision.

¹⁰ [2005] EWCA Crim 888

4.16 Legal advice to defendants on this possibility and its implications will help them to understand better the importance and likely consequences of requesting an indication of sentence and subsequently making an early guilty plea.

Action to improve the way criminal defence services are procured

4.17 The current system of work allocation can result in a large number of suppliers being paid to attend the same police stations and magistrates' courts. This does not effectively align supply with demand and can lead to considerable travel and waiting costs. Allocating larger 'block' contracts to a smaller number of firms would help to:

- capture the process efficiencies from contracting with fewer firms operating in a given set of police stations and magistrates' courts
- allocate work to suppliers offering the best value for money
- allow firms the freedom to explore innovative ways of delivering services.

4.18 There are a number of block contracting models, which might be appropriate for procuring legal defence services. We are exploring these, in close collaboration with legal practitioners and the Legal Services Commission (LSC). A block contract has the advantage of paying for a specified service to be delivered, rather than hours worked. This creates an incentive for suppliers to work more efficiently to increase their profits.

Price competition

4.19 Price competition would enable the purchaser to direct work to the most efficient suppliers and pay the price necessary to secure a sustainable supply according to local market conditions. The LSC has published a consultation paper on the introduction of price competition in London for police station and magistrates' court work to:

- enhance value for money by buying the right services (via quality controls) at the right price (via competitive tendering)
- reward the most efficient firms with greater market share
- allow firms to innovate and organise their businesses in the most efficient way.

4.20 In the longer term we may wish to extend price competition to Crown Court work. Introducing competition for public legal service provision across the CJS should ensure that the price remains sufficient to maintain the necessary pool of lawyers willing to undertake legal aid work, whilst avoiding over-payment for services.

4.21 Competition within the market will determine the rates to be paid for services rather than relying on government to determine these rates centrally. By holding the competitions on a regional basis for volume work it will be possible to pay the rates necessary to ensure supply. This may give rise to different rates across the country to reflect local market conditions i.e. the geographic spread and volume of work available in each area.

4.22 Paying the market price means moving away from Government fixing the remuneration rates which can distort the way suppliers would most efficiently work. A competitive approach means firms who work more efficiently could be rewarded with an increase in their market share. Greater competition would reward those firms who are more innovative and efficient and thereby promote a sustainable supplier base.

4.23 The following chapter will discuss the potential value of 'lead suppliers' for tackling the disproportionate spend on high cost cases. The proposals will also offer benefits to ordinary criminal cases.

Understanding the wider impacts – managed reform

4.24 The perception of legal aid's contribution to the CJS has perhaps been limited to underpinning the state's guarantee of a fair trial by providing defendants with adequate legal help. This will always continue to be the principal objective of legal aid in criminal cases. But when legal aid reforms are combined with other criminal justice reforms legal aid can also make an active and meaningful contribution to the wider goals of the CJS. Legal aid will continue to have a role at the heart of the CJS, driving forward reforms with partners and supporting the Government's priority objectives.

4.25 Past experiences in local government and other major public services have taught us that a managed move to a more competitive approach for procuring services enhances value for money. However, there is an imperative that applying this approach to the procurement of legal advice and representation in criminal

cases must not undermine the ability of independent lawyers to provide adequate defence services.

4.26 Neither barristers, nor many solicitors firms, currently structure their working practices in a way which would make it easy for them to adopt the role of lead supplier or to competitively tender for certain types of work. Legal aid solicitors tend to be owners or employees of small to medium sized firms whilst barristers are largely self-employed, sharing premises and administrative overheads through the chambers system, but accepting responsibility for generating their own income and workload. Currently, barristers working in the area of criminal legal aid, appear to have particular difficulty in securing enough work to be profitable at the beginning of their careers.

4.27 Both block contracting and price competition are likely to have an impact on the client's choice of lawyer providing criminal defence services. Choice will be an important part of any future scheme:

- where clients can make an informed decision on choice of representative, lawyers seeking an increased market share will have to acquire a good reputation. This helps to drive up quality
- choice of provider in a geographical area means that different defendants in multi-handed cases can receive help from different lawyers. This is particularly important where defendants are implicating or accusing each other to avoid conflicts of interest
- choice also protects the purchaser from the inherent dangers of monopoly supply.

In developing any new procurement models, we will ensure that client choice is preserved accordingly.

4.28 There are also potentially wider implications than simply the provision of defence services. The current national network of independent barristers also provide advocacy services in the more complex cases for the prosecuting authorities. Many of the payment systems used to procure defence services from barristers are also used by these authorities, in particular the CPS. Barristers are also a group from which we draw many of our judges. Given this, it is important that we fully understand the potential impact of changes alongside any planned developments in the procurement of these services by the prosecuting authorities.

4.29 For this reason the Secretary of State for Constitutional Affairs and Lord Chancellor has decided to appoint Lord Carter of Coles to review how new models of procurement could be implemented to deliver enhanced value for money and a sustainable supply for legal aid. Lord Carter will produce a plan by early 2006 describing what action the Government would need to take to enable the legal professions to adapt successfully to new procurement methods. The terms of reference for Lord Carter's review are attached at Annex A.

Delivering a fairer deal: reining in high cost criminal cases and getting a grip on fraud

Delivering high-profile, high-cost justice with public confidence

5.1 Public confidence is understandably damaged when single cases cost millions of pounds and last for months – or even years – at enormous personal cost to victims, witnesses and jurors and sometimes with no effective outcome.

5.2 Resources are finite, and the disproportionate amount spent on these high cost cases inevitably means that there is less available for bringing more offences to justice and for other priority areas for legal aid.

5.3 We must deal with these cases in the most effective and efficient way for the taxpayer, without compromising fairness in our justice system.

Special features of the highest cost criminal cases

5.4 Over 50% of Crown Court legal aid expenditure is consumed by 1% of cases. This disproportionate expenditure is even more marked for the, very few, most expensive cases.

5.5 For understandable reasons – multiple defendants, serious charges, complex issues and the weight of evidence – the cost of providing an effective defence in a minority of cases in the Crown Court can escalate if robust measures are not in place to control it from the start. For instance, in the top 30 cases during 2003-04:

- the average trial length was 67 working days
- the average number of prosecution witnesses was 114
- the average number of defendants was 6; and
- the average legal aid cost was £2.6m per case.

5.6 But those who commit serious crimes must be brought to justice. A wealthy businessman who defrauds shareholders is no less a criminal than an individual claiming jobseekers' allowance whilst working. The interests of justice require that all defendants receive fair and proportionate advice and representation. The Government's concern is to ensure that the costs of providing defence are proportionate to the issues at stake.

Action to gain better control of case management and costs

5.7 The Very High Cost Cases Contracting regime was introduced to bear down on the cost of these very large and complex cases. Under this scheme solicitors and barristers are awarded Individual Case Contracts (ICCs) and undertake work for fixed hourly rates. The amount of work is managed by the LSC.

5.8 The cost of these cases does not just impact on legal aid. We have worked closely with the courts, the judiciary, prosecutors and other CJS agencies to ensure that reforms provide benefits for all, not least victims, witnesses and the public, who rightly demand that we deliver justice efficiently in a timely manner and at a proportionate cost.

5.9 The range of measures proposed here will provide solutions which are tailored to meet the unique requirements of these cases and will help to deliver a more proportionate and effective approach to these cases.

5.10 The following steps – many of which are already being taken forward – aim to provide an end-to-end scheme for dealing with high cost cases. We will also continue to work with our partners in the CJS to institute further improvements, should they be necessary.

Case management

5.11 By their nature these cases raise complex, legal and evidential issues and they are time consuming for all parties. The effectiveness by which they are prepared for trial and managed through the CJS has a major impact on whole system costs. For example, if timetables for pre-trial preparation are not adhered to, or if the parties spend time raising, or responding to, points that are not germane to the relevant issues in the case there may be delay and increased cost.

5.12 In such circumstances, the judiciary has a crucial part to play in ensuring that the parties remain focused on the relevant issues, that there is no undue delay and that costs do not spiral. In order to ensure that judges are fully empowered to manage cases effectively and efficiently through the Criminal Justice System, the Lord Chief Justice issued the Consolidated Criminal Practice Direction and Protocols on 22 March 2005. This establishes the rules and procedures for the management of criminal cases by the judiciary and the parties. In addition, the Protocol provides specific guidance on the management of long and complex cases.

5.13 Prosecutors also have a crucial role to play in ensuring that the costs of these cases do not spiral. The CPS has recently established a high-level Case Management Panel, headed by the Director of Public Prosecutions that will oversee the strategies employed and the key decisions made in the very largest cases. Local Area panels chaired by Chief Crown Prosecutors will also be established to ensure a consistent strategic oversight of all cases likely to last over eight weeks at trial. The Serious Fraud Office (SFO) and Revenue and Customs Prosecutions Office (RCPO) also have strengthened case management arrangements in place.

Review Board

5.14 To ensure that we build on, and continually refine the way that high cost cases are managed, the key players from across the CJS will have a seat on a Very High Cost Case Review Board. After cases have concluded the Board will collectively examine the reasons why the largest cases have taken so long to try, and consumed so much resource and together agree ways that the control and management of these cases can be improved.

Disclosure

5.15 A common feature of high cost cases is the large quantity of material passed from the prosecution to defence lawyers. During the course of an investigation vast quantities of documentary and other material may be collected. Some of this is vital to the prosecution case and is served as evidence, but much of it is not used by them. The prosecution are, however, under a duty to disclose to the defence, subject to public interest immunity, any of this 'unused material', which may reasonably be considered capable of undermining the prosecution case or assisting the case for the accused. This is the 'disclosure test'.

5.16 The problem for prosecutors is that, often, there is so much unused material that it is unmanageable by normal means, and neither they nor investigators have the resources to consider all of it to ensure that only that which needs to be disclosed is disclosed. To avoid unfairness to defendants and possible miscarriages of justice, prosecutors will often err on the side of caution and disclose all the non-sensitive unused material – whether it satisfies the disclosure test or not. This practice is known as 'blanket disclosure'.

5.17 This has a significant impact on driving up legal aid costs because defence lawyers are incentivised to trawl through all the unused material instead of being able to focus only on what undermines the prosecution or assists them. The situation is exacerbated in trials with more than one defendant.

5.18 However, a number of recent events and initiatives should help to address this situation. The House of Lords' decision in *R v H and C* 2004 provided welcome authority at the highest level that the prosecution must apply the disclosure test faithfully and that neutral material or material damaging to the defendant need not be disclosed. Following this decision, the DPP issued a direction to all Crown Prosecutors that the disclosure test must be applied properly in all cases and that blanket disclosure must cease.

5.19 In April 2005, to coincide with the coming into force of part 5 of the Criminal Justice Act 2003, the Attorney General issued revised Guidelines on Disclosure for all prosecutors. In them he emphasised that all parties involved in criminal proceedings should apply the statutory disclosure regime robustly and consistently. In particular, the Guidelines assert that disclosure must not be 'an open ended trawl of unused material.'

5.20 The CPS, ACPO, RCPO and the SFO have worked closely together in the Advanced and Specialist Disclosure Project, which concluded in May 2005. A comprehensive Disclosure Manual has been produced for investigators and prosecutors. Amongst others, specific instructions for the management of large-scale cases and the use of disclosure counsel will guide prosecutors in the effective application of the statutory regime which should result in a reduction in unnecessary defence trawling of material.

5.21 These measures collectively should combine to produce a range of positive benefits in the criminal trial process, both for volume as well as large-scale cases. In particular, they emphasise that the disclosure regime depends upon the proper and consistent application of the disclosure test. Provided the defence and courts play their role as envisaged by the Attorney General's Guidelines, the opportunities for ever increasing legal aid costs attributable to defence lawyers' time spent on unused material will diminish.

5.22 To reduce the unnecessary time spent by the prosecution and defence having to plough through unused material that does not satisfy the disclosure test, we are determined to identify more effective ways of handling substantial quantities of evidential material, both during the course of the investigation, and subsequently in the presentation of that material at trial. This may include routine electronic capture of material in certain types of case. We must also ensure that it is well catalogued and scheduled.

5.23 There are other steps we are considering taking to assist this process:

- the appointment of a prosecution disclosure specialist to look at disclosure issues in large and complex cases
- greater early joint working between police and the CPS in potentially long and complex cases to assist in the management of disclosure
- providing disclosed material electronically, whenever possible.

5.24 This is particularly important in cases where there are a number of defendants, each with their own defence team, where each lawyer can claim legal aid for scrutinising the disclosed unused material. We are working with the various prosecutors on moving forward in this area.

Impact of Serious and Organised Crime Agency (SOCA)

5.25 SOCA will generate a number of cases, some of which will be high cost cases. Specialist prosecutors employed by the CPS and RCPO, working closely with senior trial counsel, will decrease duplication of effort, increase seamless case ownership, and support proactive case management from beginning to end.

More controlled methods of procuring legal services

5.26 It is important that we get value for money in the procurement of legal defence services. If we are to ensure that every pound spent in the CJS is used effectively, we must scrutinise our methods of procurement to promote efficiency and drive out waste, and free up resources for delivering the Government's priorities. The challenge is to buy the right services at the right price, whilst ensuring that there is an adequate supply of suitably qualified lawyers to provide services for those who need them now and in the future. Our aim is to develop a procurement regime that creates the right incentives for the market to organise in a way which meets the needs of the people who require legal advice and representation.

5.27 Much work has already been undertaken to modernise our procurement of criminal legal aid:

- We have largely moved from unconstrained hourly rates and brief fees set by the courts and assessed after the event, to the prescription of hourly rates and the introduction of standard, graduated and fixed fee schemes. It is a priority for the Government to complete this programme.
- We have introduced and are developing and improving quality assurance schemes, which assess the quality of the legal service provided as well as the outcomes achieved for clients. In addition the LSC has piloted arrangements to further enhance the quality and reduce the transaction costs of legal aid for both solicitors and itself as purchaser through its Preferred Supplier Initiative. The lessons learnt in that pilot are currently being evaluated by the Commission with a view to moving its future relationships with suppliers onto a new basis.
- We have implemented special arrangements for the small group of particularly long and complex cases, where contract managers scrutinise the work that lawyers propose to undertake, and only release funds where appropriate.

5.28 Our procurement arrangements should enable us to secure the best prices for quality services. We need to ensure that we encourage a sufficient supply of lawyers to provide the right quality of service and reward them for doing so. Suppliers need to make a profit to remain in business. However, we do not wish to reward suppliers for reducing the cost of what they do at the expense of the quality of service to the client.

5.29 A solicitor and barrister working on the same case in the Crown Court are currently paid separately. However, it is difficult to align these payments to the work actually undertaken because the split of work between the solicitor and barrister varies in each case. Contracting with one lead supplier for all preparatory and advocacy work in a case would:

- reduce duplication of payment which can arise from paying barristers and solicitors separately for the work that they do
- allow solicitors and barristers to structure their work in the most efficient way
- ensure a single point of accountability for the overall conduct of individual cases.

5.30 The lead supplier could be a firm of solicitors or a barrister or a consortium of the two. They would be responsible overall for the running of a case, including subcontracting any litigation or advocacy work that they were not qualified to do. By dealing with a single lead supplier, the transaction costs and bureaucracy of the current system on both lawyers and the purchasers could be reduced. In the longer term it may be possible to contract with non-legal firms as lead suppliers.

5.31 We believe lead supplier should be a more efficient method of procuring services but further work is needed to understand how this would work in practice and what the impact would be on wider objectives and the legal services market. We will work with the professions to ensure that business practices and structures are able to adjust to these new arrangements.

5.32 We are also aware that members of the legal professions, and the representative bodies, have made significant efforts to explore how legal aid could be provided more effectively. The Bar have produced papers and the Law Society have set up working groups to consider relevant issues.

5.33 As outlined in the previous chapter, Lord Carter of Coles has been appointed to review how new models of procurement could be implemented to deliver enhanced value for money and a sustainable supply for legal aid. The procurement methods discussed in this

chapter will be considered as part of Lord Carter's review (see the terms of reference at Annex A).

The particular issues around high-cost fraud cases

5.34 Fraud is not a victimless crime: it is a particularly insidious crime in our society. Quite apart from the many direct victims of fraud – such as those who lost their pensions in the Maxwell case – every consumer and taxpayer is an indirect victim of fraud through the costs and resources needed to tackle it. Fraud also funds other serious criminality. The National Criminal Intelligence Service reports that organised criminals derive as much money from financial crime as from drug trafficking.

5.35 Fraud not only harms our citizens, it also damages our economy through its cost and the loss of business and consumer confidence it generates. It may also be on the increase. The number of reported offences of fraud and forgery rose from 174,742 in 1991 to 317,900 in 2003-04, but we suspect that large amounts of fraud are unreported and uninvestigated. It is certainly becoming more complex in its nature, aided by technological advances.

5.36 In 2000 fraud was estimated to cost around £14bn¹¹ a year – equivalent to about £230 per head of the population, and taking no account of undetected fraud. Over half of all businesses report that they have been defrauded and 49% of people are either victims, or know victims of credit card fraud. In 1998 the Association of British Insurers estimated that 3.7% of insurance premiums were directly attributable to fraud losses. In 2003 it calculated that fraudulent motor and household insurance claims were running at £20m per week.

5.37 It is also expensive for Government with £11.9bn lost in VAT revenue during 2002-03 and benefit fraud estimated to cost £2bn per year. The cost of bringing fraud to justice is also rising. Fraud trials regularly feature among the most expensive cases in our system. In legal aid terms they cost about £95m per year, accounting for 21% of the volume, and 32% of the legal aid cost of all high cost cases referred to above.

¹¹ *Economic cost of fraud*, a report for the Home Office and the Serious Fraud Office published by the National Economic Research Associates, July 2000

Current work to tackle fraud

5.38 Given the impact of fraud on our economy and on our society it is vital that we tackle it effectively and efficiently to reduce the harm done and costs incurred. In 1983 Lord Justice Roskill chaired the Fraud Trials Committee to examine how these cases could be conducted more justly, expeditiously and economically. The Committee reported in 1986 and many of their proposals were accepted by government, and implemented. For example, the Serious Fraud Office was established by the Criminal Justice Act 1987. In addition, a regulatory regime was introduced by the Financial Services Act 1986.

5.39 We are currently simplifying the law on fraud. The multiplicity of possible charges in fraud cases gives scope for legal argument and debate. The Fraud Bill, which is currently before Parliament, will implement the Law Commission proposals to sweep away the deception offences in the Theft Acts and replace them with a general offence of fraud which can be committed in three ways – by false representation, by failure to disclose information or by abuse of position. This will place prosecutors in a better position to capture the true criminality involved in serious and complex frauds and could lead to shorter trials. The Law Commission’s proposals formed the basis of the Government’s consultation paper which was issued in 2004. The responses to the consultation widely welcomed the proposals and added much to the formulation of the Fraud Bill. The Fraud Bill was introduced in the House of Lords on 25 May 2005.

5.40 There have also been a number of initiatives to improve the way we manage these cases. The Consolidated Criminal Practice Direction and Protocols, already referred to, establishes the rules and procedures enabling the length of fraud (and other complex) cases to be controlled within proper bounds, consistent with a fair trial. In addition, and as already indicated, the CPS has established a high-level Case Management Panel to review progress of these cases. Even so, improved case management will not by itself be sufficient to bring the longest serious fraud trials within a reasonable timeframe. The Government therefore proposes to implement Section 43 of the Criminal Justice Act 2003, which will enable such trials to take place without a jury. The Attorney General has made

clear that certain criteria will have to be met before a case can be heard without a jury. Both the trial judge and the Lord Chief Justice will have to agree; and we only anticipate this happening in a relatively small number of fraud cases each year.

Action to get a grip on overall costs in bringing fraud offences to justice

5.41 In view of the seriousness, extent and complexity of modern day fraud we have to be sure that our CJS remains properly resourced, organised and empowered to deal with it effectively and efficiently. The indications are – from a number of high-profile fraud cases – that to meet this challenge and to maintain public confidence in the CJS, we may have to further improve our ways of dealing with fraud.

5.42 For instance, we need to ensure that we have a coherent strategy for preventing, detecting and bringing fraud to justice that meets our current need. We must also ensure that the information we are collecting about fraud is appropriate and enhances our ability to fight it effectively.

5.43 We must also be sure that we are properly organised to combat modern fraud and to reduce its harm. Fraud investigations and prosecutions are by their very nature particularly complex and time consuming, requiring specialist expert skills and placing enormous strains on police and prosecution resources. The SFO, who investigate and prosecute the most difficult and complex cases can only handle a small proportion (7%) of the caseload. Most of the remainder (65%) falls upon the CPS and individual police forces. These police forces have to make tough choices about which cases they are able to investigate, particularly since the number of mainstream fraud investigators has declined from 869 in the mid 1990’s to around 600 today.

5.44 The remaining 28% of offences fall upon a number of disparate authorities. Some have full criminal prosecutorial powers, others a combination of regulatory and criminal powers and yet others possess a mixture of criminal and civil powers; all have different working methods. We have to be sure that, in the current fraud landscape, this distribution of resources does not undermine our ability to combat it by, for example, making it difficult to spot fraud trends and to prioritise investigations across the criminal, regulatory and civil systems.

5.45 Whilst we must not flinch from using the full rigour of our CJS wherever appropriate, we must also ensure that we make proper use of the full range of tools available to us to combat fraud in all its guises. We need particularly to understand the relative impact, in terms of harm reduction, of our different approaches to dealing with fraud.

5.46 As stated in the Labour Party manifesto, the Government is committed to *'overhauling the laws on fraud, and the way fraud trials are conducted to update them for the 21st century and to make them quicker and more effective'*. In carrying this out we will ensure that these issue are addressed comprehensively.

5.47 The Government will shortly be announcing a further programme of work to tackle the way fraud is tackled from end to end, including prevention, detection, investigation, prosecution, and defence. It is recommended that this work should take the form of a review to address the following broad questions:

- The scale of the problem
- The appropriate role for Government
- How resources are used to achieve maximum value for money across the system, without prejudice to the pursuit of criminal prosecutions whenever appropriate.

Delivering a fairer deal: helping vulnerable and disadvantaged people to solve their disputes faster

Legal aid delivering a progressive consensus for social welfare reform

6.1 The promotion of earlier and more effective resolution of disputes is part of the Government's vision of empowering people and communities to achieve a fair and decent society with opportunity and security for all in a changing world. This is because these disputes can have serious social effects, most notably when people experience problems in clusters, which can lead to or exacerbate social exclusion. Unresolved disputes and legal challenges can act as barriers that stop people fulfilling their talent and can limit the opportunities that should be available to every part of society.

6.2 The Government's aims for promoting earlier and more effective resolution of disputes are to:

- reduce the number of legal problems and disputes that people experience in the first place, in particular through our drive to improve the delivery of, and the help provided by, public services
- promote earlier and more cost-effective resolution of disputes by providing information and advice at the earliest stage, before a problem becomes more serious (and costly to resolve) than it need be
- focus publicly funded and other help on those who need it most and
- provide faster, more efficient and affordable services and procedures when court proceedings do become necessary.

6.3 A range of work in these areas has had positive effects on the proportion of people receiving suitable assistance. However still not enough problems are resolved in a timely and proportionate manner. This is particularly relevant to people who are, or are at risk of being, socially excluded.

6.4 Civil legal aid plays a key role in this, particularly in the provision of information and advice to help people to resolve problems through a range of appropriate and proportionate channels, wherever possible avoiding recourse to the formality, stress and expense of litigation. But more can be done to integrate the role of legal aid within the wider network of advice and resolution services.

The social and economic cost of unresolved disputes

6.5 Many people in their day to day lives face problems and disputes that have potential legal solutions. Research has estimated that over 1 million problems go unresolved each year because people don't understand their basic rights or know how to seek help. Problems then tend to escalate and become more difficult and expensive to resolve, which often leads to further problems. Those experiencing these multiple problems are often from disadvantaged groups and so vulnerable to social exclusion. The economic cost of these unresolved problems is believed to be between £2bn to £4bn annually.

6.6 In 2003-04, £675m was spent on civil legal aid (excluding asylum), but the majority was focused on legal representation, much of it on resolving children and family issues. Only £110m, or 16%, was spent on early advice and assistance (legal help) aimed at resolving problems other than those concerning children and the family. Just as our proposals for criminal justice support the early and effective resolution of criminal disputes, our proposals on civil justice aim to help people resolve their problems at an early stage before they escalate into formal legal disputes, so that court action is used only as a last resort. Within civil legal aid, our aim will therefore be to improve the provision of early advice and assistance, prioritising the problems of those at risk of social exclusion.

6.7 We have identified the key barriers to providing earlier and more effective advice and assistance, which include:

- The complexity of the system results in confusion amongst the people who need advice
- Legal and advice services are not provided to mirror the 'clusters' of problems that people face

- Systemic problems are treated on a ‘case-by-case’ basis, which is inefficient
- There are areas of the country where certain types of advice are not readily accessible – some organisations have described these areas as ‘advice deserts’.

6.8 The latter was recognised by the Legal Services Commission in its paper published in response to the Constitutional Affairs Sub-Committee’s Report on Civil Legal Aid. However, it is clear that whilst there have always been places where face-to-face services have been scarce, and whilst there will never be sufficient funding to provide unlimited advice services everywhere, the actual availability of these services is in fact much greater now than it has ever been.

6.9 We believe that key underlying factors are the ad-hoc, fragmented and supplier, rather than client, driven provision of advice as well as remuneration systems that do not incentivise suppliers to fully meet the needs of their clients.

6.10 Work currently underway or planned is aimed particularly at tackling the barriers identified above, recognising that this may need an innovative approach. As one of the key issues is the co-ordination of different sources and types of advice, work needs to be joined up across central and local Government to ensure that the maximum benefit is achieved from the resources available, within the boundaries of the overall legal aid budget.

Recent developments in civil legal aid

6.11 The Access to Justice Act 1999 was a major milestone in the history of legal aid. Its main policy thrust was better focusing and control of civil legal aid spending – increasing the focus on tackling social exclusion and protecting the vulnerable (particularly children and the mentally ill). There is now a controlled budget for civil legal help – initial advice and assistance given to clients in all categories of law.

6.12 On 2 March 2005 the Government announced a package of measures to reform civil and family legal aid. This followed the consultation paper *A new focus for civil legal aid – encouraging early resolution; discouraging unnecessary litigation* which was published by the Legal Services Commission in July 2004. The main theme of the paper was to refocus the civil legal aid scheme to encourage early

resolution in civil dispute cases, including family cases, and the use of alternative dispute resolution (ADR) measures such as negotiation or mediation and away from contested litigation.

6.13 In announcing the way forward, which was implemented from April 2005, the Government confirmed that the revised proposals represented a positive move forward for civil legal aid that could be built on in future years. We emphasised that the New Focus proposals were fully consistent with the Fundamental Legal Aid Review (see Chapter 2) and represented the first phase of a co-ordinated continuing Legal Aid reform programme. The proposals contained in this paper continue this process.

6.14 The principal New Focus proposals include:

- simplifying the eligibility scheme by aligning the disposable income and capital limits for Legal Help and Legal Representation. This involved increasing the financial eligibility threshold for Legal Help, which will enable more people on low incomes to get early advice and assistance and resolve problems early without the need for litigation
- reducing the upper eligibility limit for Legal Representation, although only those applicants who would previously have had to pay high levels of contribution under their legal aid certificates were adversely affected by this change, which was introduced primarily for financial reasons
- restricting the Very High Cost Civil Cases budget to ensure that disproportionately expensive cases do not preclude access to justice for smaller cases
- increasing eligibility for victims of domestic violence seeking protection from the court
- reducing the number of ancillary relief (division of assets on divorce/separation) cases that would be funded by legal aid, recognising that these cases could be funded by the assets themselves – or loans secured against the assets
- providing stricter controls over multiple and repeat applications in family cases
- plans to launch a Family Help pilot, in which remuneration levels will be restructured to incentivise solicitors to work towards reaching early, consensual agreements for their clients whenever they can

- improving the operation of the statutory charge, to encourage early repayment of legal aid costs.

6.15 The Access to Justice Act 1999 removed most personal injury cases from the scope of the legal aid scheme from April 2000. This was based on an assertion that the State ought not to have a routine role in funding legal disputes between private parties which could be funded by other means, primarily through conditional fee agreements (CFAs). This had the effect of removing a large volume of work and allowing an increased focus on areas where alternative sources of funding are less readily or not available. The 'New Focus' consultation confirmed that clinical negligence was not yet an appropriate area for conditional fee agreements. It recognised that the CFA market was an emerging market and reaffirmed the essential role of legal aid in protecting the rights of the most vulnerable and enforcing the responsibilities of those who have a duty of care towards them.

6.16 Similarly the Civil Funding Code in 2000 removed representation in many general contract cases from the scope of legal aid and there has also been a reduction in spend in this area is also likely to be related to the growing availability of alternative forms of funding, such as conditional fee agreements, and a greater array of alternative approaches to resolving consumer disputes. As a result consumer and general contract issues provision is another area of civil legal aid which has declined significantly (a reduction of over 90% in spend since 2000-01).

Improving the quality and accessibility of existing dispute resolution services

6.17 There is a wide range of work currently ongoing across Government to improve the system, including programmes to:

- improve the provision of information, advice and legal assistance as well as access to alternative channels of dispute resolution
- reform the legal services market
- tackle the compensation culture and improve the compensation system; and
- develop more efficient litigation and court processes.

6.18 The Government fully recognises that public services should be provided in a way that places customers first, allowing them to seek effective redress for any real deficiencies that arise. Our White Paper *Transforming Public Services: Complaints, Redress and Tribunals*, published in July 2004, set out how we intend to make mechanisms of redress easier to navigate in the vitally important administrative and employment justice fields. We have embarked on a programme of work across Government to give the public the benefit of better decisions, clearer communication, fast, fair, and easily triggered reviews of administrative decisions; and an independent, accessible, flexible and authoritative dispute resolution system, tailored to the needs of the individual. In line with this, the 'New Focus' changes to legal aid (see above) will encourage the greater use of existing complaints systems in preference to litigation, especially in cases of clinical negligence and actions against the police.

6.19 Furthermore, we are taking opportunities to streamline and simplify basic legal and administrative frameworks. For example, we have asked the Law Commission to look at the best means of resolving housing disputes, in a way that responds to criticisms of the existing system and enables proportionate, timely, affordable and accessible resolution of these disputes.

6.20 As part of the programme of work on tackling the compensation culture and improving the compensation system for valid claims, we are considering reforms to make the system more timely, proportionate and cost effective for valid claims, and more effective at weeding out weak claims. This will include work to reduce legal costs by making processes more proportionate and timely, to find ways of securing earlier admissions of liability and settlement, and to encourage the use of alternative dispute resolution.

6.21 It is important that any advice and assistance regarding compensation claims makes people aware of their rights in a responsible manner, so that false expectations of compensation are not encouraged. This should ensure that we tackle any expectation that compensation is available for every misfortune, even if no one else was to blame, as well as misconceptions that lead to a disproportionate fear of litigation and risk averse behaviour. This is especially important where such fear and behaviour diverts scarce resources from the effective delivery of public services.

6.22 Following the review conducted by Sir David Clementi into the regulatory framework for legal services, we will reform the regulatory framework for legal services to put the consumer first. We want a framework that promotes competition and innovation, and protects the consumer. We will publish a White Paper setting out our proposals in Autumn 2005 with legislation to follow.

6.23 We are developing a strategy to improve the provision of education, information and advice that will help people understand their rights and responsibilities, and empower them to resolve their problems at an early stage. This includes better sign posting of advice to ensure more people know how to get help as well as increasing the level and scope of advice available through help lines, web sites and other channels.

Reaching wider communities through electronic and telephone channels

6.24 The Government believes that the use of telephone and Internet technology will be effective in reaching larger sections of the community efficiently. This is because they provide access to a wider and more expert range of services than any existing 'local' provider, they are more instantly available and they have the great advantage of anonymity. As a result, more people are helped at an early stage in their problem cycle and providers can accurately and rapidly identify problems of a type that might benefit from class actions or other high level intervention. Furthermore these services, which have grown enormously over the past 3-4 years, all retain the capacity to refer people to face-to-face advice if it is eventually required.

6.25 As telephone advice will often be cheaper than face-to-face, as well as ensuring a speedier service for customers, it is also likely to have cost benefits. We will therefore expand our current national telephone advice services as set out below in order to widen access to legal and advice services and achieve greater value for money.

6.26 For example, the use of the Community Legal Service Direct (CLS Direct) telephone advice service and award-winning web site continues to grow. The web site currently averages 58,000 visits each month and over 205,000 calls have been dealt with by the help line from launch on 14 July 2004 to end March

2005. As well as expanding these services to provide advice on a wider range of social welfare issues, we are improving their integration with other public and private advice initiatives.

6.27 DTI and DCA have been working together to expand the provision of free telephone debt advice. We have increased Government funding to National Debtline to support expansion of the service, and are working closely with the free debt advice sector, including CLS Direct, and the credit industry to improve the provision of free debt advice to consumers.

6.28 Consumer Direct is a new national telephone help line and on line service, funded by the DTI, that provides clear and practical consumer advice and information. It is operated in partnership with local authorities across the UK, who work together to manage their contact centres. The service was first launched in July 2004 and national rollout will be complete by early 2006.

6.29 The National Mediation Help Line, which came into operation in December 2004, uses telephony to bring opportunities to settle disputes out of court to a wider group of people. This will reduce pressure on the courts, allowing us to improve the service for those people that need to be there.

Delivering co-ordinated advice and resolution services with legal aid protecting the interests of the most vulnerable and disadvantaged

6.30 We will continue to drive changes aimed at tackling the issues identified by developing the delivery channels that are best suited to each group of the public we want to help and for different stages of the advice cycle. This may be active outreach for the socially excluded, telephone services for some people and Internet services for others.

6.31 For those in vulnerable groups, we will increase the capability of face-to-face advice and representation. With the LSC, we are looking to develop a coherent and sustainable strategy for the funding and delivery of advice supported by legal aid, and other advice services, in key social welfare areas. This includes refocusing the work of local Community Legal Service Partnerships towards service delivery, and setting up separate arrangements for co-ordinating their funding.

6.32 We will also be piloting a small number of legal and advice centres targeted on localities where advice provision is particularly in need of improvement. These pilot Community Legal Advice Centres (CLAC's) will provide jointly-funded, face-to-face legal and advice services in social welfare law delivered under a more client-focused service specification than either existing LSC contracts or many local authority funding agreements. These services could be based in major urban centres, perhaps with satellite offices, in the most deprived communities but where an area of high social deprivation already has a good network of service providers. Full details of these proposals will be in a forthcoming LSC consultation document that will also contain other detailed proposals to improve the delivery of advice and legal services. The proposed centres will help improve the local provision of joined up advice and legal services in the most deprived areas, and deliver a more client focused service that particularly helps those with multiple problems.

6.33 In his Pre-Budget Report, the Chancellor of the Exchequer set out the next steps for tackling financial exclusion and announced the setting up of a Financial Inclusion Fund of £120m over three years. Some of this money will be used to develop the provision of free face-to-face debt advice, particularly in localities with a high incidence of financial exclusion. We will also pilot models of money advice outreach aimed at the hardest to reach community groups.

6.34 We will start to develop the potential of web-based services through the integration of advice content covering employment, debt and relationship breakdown with the DirectGov web site. In addition, we are investigating delivering advice centred video content through television programming, interactive digital TV, broadband-delivered video, and mobile phones. We are also working with DfES, Home Office and others to help ensure young people are better prepared to make the transition to becoming adult citizens equipped to exercise their rights and responsibilities.

6.35 In order to drive changes that are effective, the provision and funding of advice and assistance needs to be better co-ordinated so that the available resources are more effectively deployed to tackle the unmet advice needs of people with social welfare problems. Therefore, with others in central and local government who have an interest in this area, we will examine the advice and assistance systems with a view to developing a co-ordinated, cross-Government strategy that tackles the issues we have identified. In doing so, we will:

- Examine the Government's current arrangements, policies and programmes, aligning and building on them to ensure that they operate in the most co-ordinated and effective manner at both national and local levels
- Develop a better understanding of the economic and social arguments for the Government's provision of civil legal aid and support for other advice services
- Take a joined-up strategic approach to driving improvements in public services by enabling the advice sector and the tribunals system to contribute to potential solutions to problems in public service delivery through feedback on the causes of clients' problems
- Develop recommendations for making the system more accessible, effective and efficient.

6.36 The aim will be to complete this work by 31 January 2006.

Delivering a fairer deal: every child matters

Putting the interest of the child at the heart of the family justice system

7.1 Legal aid plays a crucial role in protecting children when they are most at risk and supporting eligible families when they are going through difficult times. It does so in two main ways:

- Protecting the interests of children whose parents are going through relationship breakdown. Families in this situation may require additional support to enable them to resolve contact and residence issues as quickly and amicably as possible, so as to minimise conflict and support good outcomes for children, preferably without recourse to the courts. In more extreme cases, children whose parents are separating may be at risk of harm, either as a direct result of abuse, or through witnessing violence in the home. For these children, their best interests will be served by identifying them and ensuring that their cases come to court as quickly as possible.

- Protecting children who are at risk of serious abuse or neglect. This may necessitate them being removed from their parents. Or where at all possible, it may result in their parents receiving additional support from local authority social services to help them fulfil their responsibilities as parents more effectively.

7.2 A significant and growing amount of legal aid is being spent in this area every year. It is therefore important to ensure that public funds are targeted in the best way possible, to protect those who are most vulnerable or most at risk of harm; and that alternative methods of resolving family disputes are explored wherever this is possible and appropriate.

7.3 If we are to ensure that the family justice system properly supports the Government's wider objectives, as set out in the Green Paper *Every Child Matters*, we must continue to develop innovative solutions that enable us better to meet the needs of children and families facing difficult circumstances. We must also target resources according to the relative complexity and seriousness of the issues they face.

7.4 Overall spending on child contact and residence cases declined in real terms by 16% between 1999-00 and 2004-05, while spending on care and related proceedings has increased by 77% in real terms over the same period.

Figure 14: Spend and volume in child contact and residence cases (2005 prices) (cash)

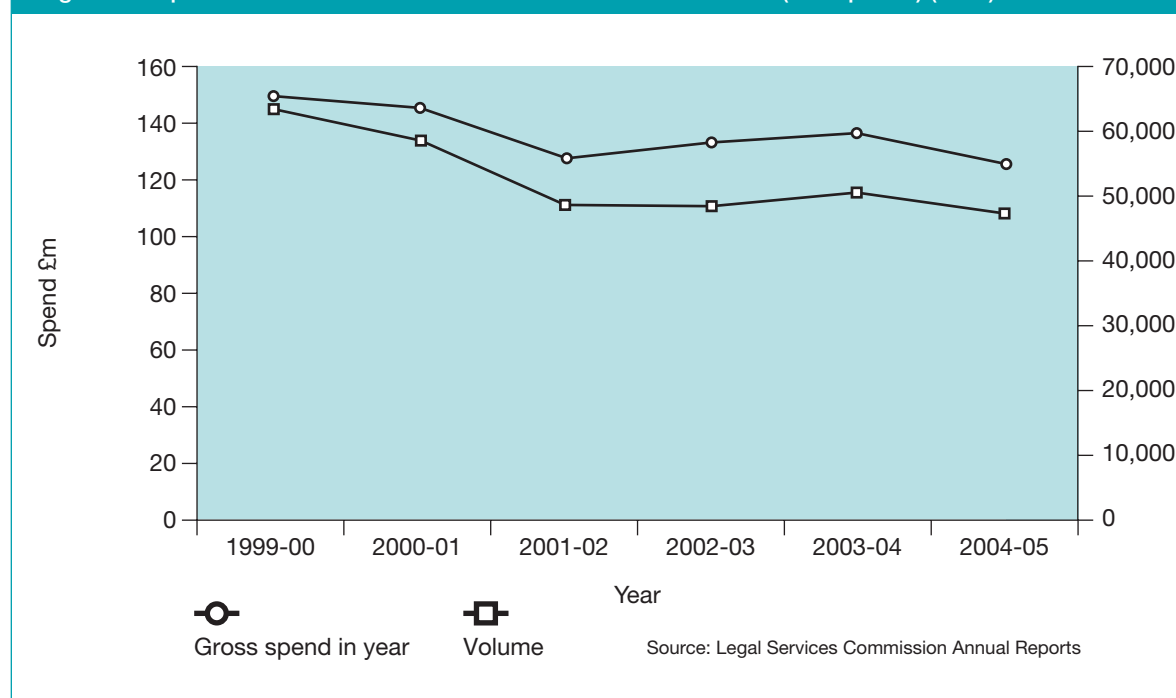
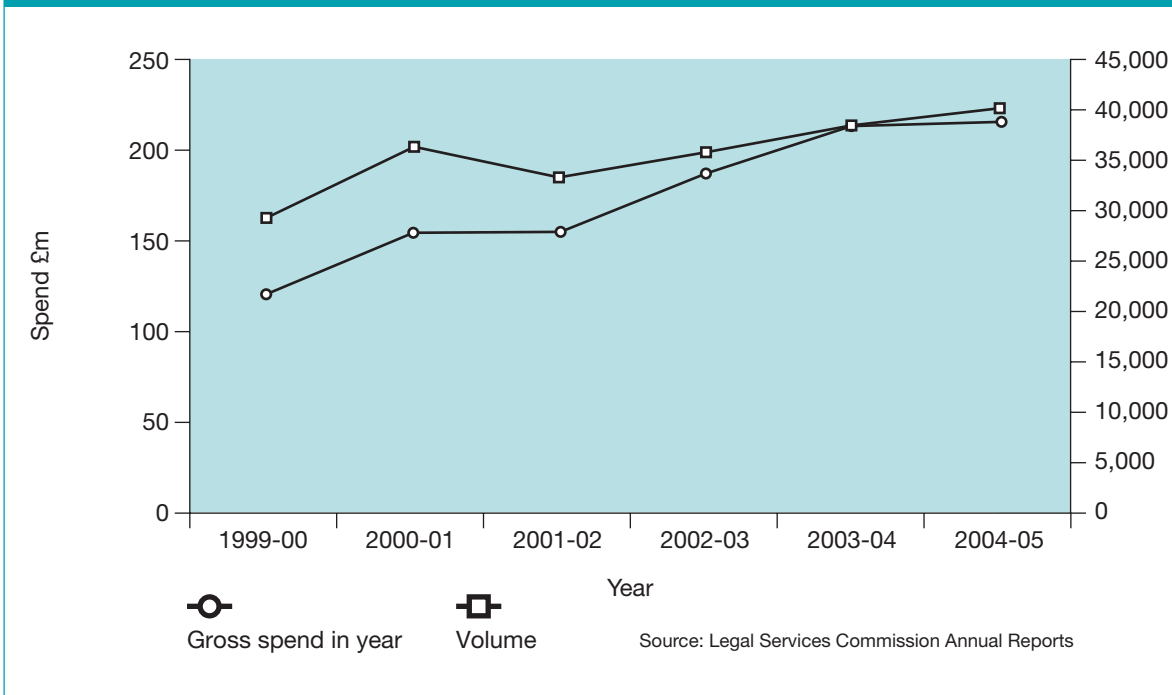


Figure 15: Spend and volume in child care and related proceedings (2005 prices) (cash)



7.5 It is vitally important that we ensure that expenditure on family legal aid is being targeted in the best way possible, to protect those who are most vulnerable or most at risk of harm.

7.6 The Green Paper *Every Child Matters* set out the five outcomes that matter for every child. They are:

- being healthy
- staying safe
- enjoying and achieving
- making a positive contribution
- experiencing economic well being.

7.7 The Government’s focus is on developing innovative solutions that enable us to deliver these five outcomes for all children, whilst also targeting our limited resources at those who are most at risk.

Action to protect children whose parents are going through relationship breakdown

7.8 In January 2005, the Government published its paper *Parental Separation: Children’s Needs and Parents Responsibilities: Next Steps*. The key principle underpinning

the paper is that a child’s welfare is paramount when providing support or intervening to assist separating parents in reaching agreements about the future of their children. This implies that we must focus on spending legal aid funds in a way that delivers the best possible outcomes for the children involved in these cases.

7.9 For the majority of children, their best interests will be served by maintaining a continued and constructive relationship with both parents, assuming that it is safe for them to do so. In these cases, our overall aim is to provide families with readily accessible help, advice and support, which will enable them to reach agreements between themselves, without the need to go to court. Evidence suggests that such agreements are almost always better for families, because they cause children less distress and work better over the long term than arrangements that flow from court based resolutions.

7.10 By investing in improved advice and support to enable the majority of families to agree contact arrangements between themselves, we aim to free up greater amounts of legal aid resources to focus on those cases in which children are at greater risk of harm, either as a direct result of abuse, or through witnessing violence in the home. For these children, their best interests will be served by identifying them and ensuring that their cases come to court as quickly as possible. In so

doing, we can ensure that any contact arrangements that are put in place are safe, both for themselves and their parents.

Action to protect children who are at risk of serious abuse or neglect

7.11 For children who are at risk of serious abuse or neglect, it is vitally important that legal aid makes the most effective contribution possible to safeguarding them from harm.

7.12 Government spending on these types of cases is increasing steadily year on year. As well as the money spent directly on legal aid, additional public money is spent on child care proceedings by local authorities (£110m pa), Children and Family Court Advisory and Support Service Guardians (£30m pa) and the courts (£41m pa). All of this is in the context of an approximate total expenditure of £1.8bn on children in care by local authorities in England and Wales every year.

7.13 The average child protection case lasts for almost a year. This is a year in which the child is left uncertain as to his or her future and is often moved between several temporary care arrangements. Meanwhile, the child's family, social workers and their respective lawyers are often engaged in protracted and complex legal proceedings. Though any court decision regarding the future of a child at risk must be soundly based, it is essential that we eliminate unnecessary delay from child care proceedings in order to achieve better outcomes for the children and families involved in these cases.

7.14 With this in mind, the Government, in partnership with the judiciary, has already carried out an extensive programme of work to identify the drivers of unnecessary delay within care proceedings. As a result of this work, new measures have been introduced, aimed at improving the way that these cases are managed by judges, to ensure that decisions regarding a child's future are made as quickly and efficiently as possible. Most cases should be dealt with in under 40 weeks. These measures are being implemented and rolled out across all agencies in a way that maximises their potential impact in terms of improved case management.

7.15 We remain committed to making further major improvements to the way that cases in this area are handled, including what happens before they enter the family justice system. We are therefore launching a cross-Government, review of the child care proceedings system in England and Wales. The overall aim of this review is to ensure that system resources are used in the most proportionate, efficient, effective and timely way, to deliver the best possible outcomes for children and families, in a way that is consistent with the underlying principles of the Children Act 1989 and the European Convention on Human Rights. In summary, these principles require that where the state intervenes in family life, it does so in a way that:

- causes minimum delay, is focused on the protecting the welfare of the child and is at the minimum level necessary to deliver best outcomes for children and
- respects the rights of children and their parents to private and family life and to proper representation during legal proceedings.

7.16 Specific areas of focus within the review will include:

- identifying innovative practice which enables children to be diverted away from court proceeding and, instead, to be supported in their families where this is possible.
- examining the extent to which the core principles of the Children Act 1989 are best met by the current, over represented approach within the courts, and examining whether these principles could be better met by using a more inquisitorial system
- exploring the possibility of early low-level judicial interventions to encourage parents to resolve problems themselves, thus avoiding the need for full court proceedings wherever possible and appropriate
- examining whether the two stages of the court process in child protection cases (establishing the facts and determining the care plan) could be more formally separated with different attendees, procedures and levels of legal representation at each stage.

7.17 Our intention is that the review should report to Ministers by 31 January 2006. The terms of reference are at Annex B.

Delivering a fairer deal: next steps

Developing the fundamental reforms that will sustain a fair, efficient and effective justice system accessible by all

8.1 The provision of free legal aid for those who need it is a world-class system of which we can be justifiably proud. It is, however, clear from the analysis presented here that this system is under threat; it does not fully support the aims and objectives of the justice system and costs are escalating at a rate that does not deliver value for money. Unless fundamental reforms are made, particularly to the procurement of criminal legal aid, dramatic cuts will have to be made to the civil scheme, with an inevitable cost to our ability to effectively tackle social exclusion.

8.2 Further short-term tinkering of the current system for buying and providing publicly funded legal advice and representation will no longer guarantee that the finite legal aid budget will continue to meet the needs of our society. Only fundamental reform can achieve this. The issue now is how to move forward before further cost pressures on criminal defence services means that funding of advice and representation for vulnerable and disadvantaged people has to be restricted further.

8.3 The Fundamental Legal Aid Review that led to these conclusions was wide ranging and encompassed the views of all the major players. It received assistance and contributions from the legal professions, the judiciary, justice agencies, and representative groups – for which we are extremely grateful. We will build on this collaborative approach in taking forward these conclusions.

8.4 But there is no extra money for legal aid. Quite apart from the overall fiscal position, the analysis of the internal review has demonstrated that the very significant increase in criminal legal aid expenditure is not justified by the greater volume of business.

Measures to control the processes and spend on criminal cases, especially fraud

8.5 We will focus on ensuring that the very high cost criminal cases are properly controlled. They will be the subject of proper judicial case management, proper prosecutorial focus, and their criminal defence will be procured with methods which encourage the cases to end at the time which the judge, after considering the details of the case (before the trial starts) considers to be a reasonable time.

8.6 It is clear from our analysis that we need to deal with fraud better than we do presently. The proposed review of fraud is intended to be an holistic review of how we tackle fraud in the criminal and non-criminal contexts: its scope transcends the interests of legal aid. It will consider what we should be doing to fight fraud effectively and coherently and it will consider issues such as the prevention, detection, investigation, prosecution, trial and defence of fraud cases.

8.7 For the review to be fully effective it will need to canvass the views of all those involved in dealing with fraud in the public and private sectors.

An independent review of how to deliver modern procurement methods

8.8 We fully recognise the high quality of service provided to defendants in criminal cases by the legal profession. Their independence, integrity and commitment to serving their clients' best interests are renowned. Quite rightly, they protect the rights of defendants to a fair trial so that justice is done.

8.9 The interests of justice also include a duty – laid on all those involved in it – to ensure that it is administered efficiently. This duty encompasses a commitment to ensuring that our processes continually serve the needs of our society. Where those needs change, the justice system must respond.

8.10 One critical area where our needs have changed is the way legal services are procured by the Legal Services Commission. It is now necessary to develop different procurement methods. In particular, these will enable the interests of users to be met, more cost effectively and to the same high professional standards.

8.11 We will deliver more cost-efficient contracting arrangements with those that provide legal services from public funds. We will ensure that there remains reasonable client choice. The new arrangements will ensure consistent high standards of representation for defendants combined with incentives for lawyers to adopt cost-effective practices which lead to the conclusion of cases within a reasonable time.

8.12 These methods which might produce those results include:

- *price competition between lawyers* – instead of there being no competitive pressure on lawyers, only those who provide quality and best value bids should be providing publicly funded services
- *bulk contracting* – instead of looking for payment for a individual case contracts, lawyers contract with the Legal Services Commission for the provision of a complete service in a number of cases from police station to disposal in court or otherwise
- *lead supplier* – in the larger cases one lawyer has overall responsibility for ensuring that the case is delivered within the agreed budget.

8.13 We are not in a position to reach any conclusion now on how these methods could best be delivered. Some of these reforms may have far-reaching consequences to the nature and organisation of our legal professions. With that in mind, and because we are committed to sustaining and building upon a high quality and independent legal profession, Lord Carter of Coles will conduct an independent review of how such reforms could be delivered (Annex A).

8.14 Lord Carter's review will need the full support and co-operation of all those involved in the justice system, but particularly the legal profession if we are to continue to have a world-class legal aid system that is sustainable and provides value for money for taxpayers.

Developing a cross-government strategy for providing people with advice and help to resolve their disputes

8.15 The effective targeting of legal aid to promote earlier and more effective resolution of disputes is part of the Government's vision of empowering people and communities to achieve a fair and decent society with opportunity and security for all.

8.16 Despite the wide range of work that has already been completed, still not enough problems are resolved in a timely and proportionate manner, with the most vulnerable being the most adversely affected. As highlighted in chapter 6, in order to provide sustainable, effective and affordable systems that empower people to resolve disputes early and proportionately, we need to examine the system in its entirety, from the point at which disputes arise through to their final resolution, whether in court or otherwise.

8.17 We will therefore be working to develop a coherent cross-government strategy for helping people to resolve their disputes, building on the range of programmes already in train across Government to ensure that they operate in the most co-ordinated and effective manner. The strategy will be ready for 31 January 2006.

A review of child care proceedings

8.18 Legal aid relating to family disputes has been increasingly targeted towards cases where children's interests are at stake. We need to be clear that the resources for doing this are applied in a way that delivers the most effective solution. As indicated in Chapter 7, we will work with the Department for Education and Skills to take forward an end-to-end examination of the processes for considering care applications, with a view to alternatives to court proceedings being available where appropriate. The terms of reference for this work are at Annex B and it will be completed by 31 January 2006.

Annex A

Legal Aid Procurement Review – terms of reference

1. These are the terms of reference for the production of a plan to implement a package of reforms to the way publicly funded legal advice and representation are procured by the state. The review and resulting plan will be produced by Lord Carter in agreement with the Secretary of State and Lord Chancellor and by early 2006.
2. The review will consider the means by which to deliver the Government's vision, set out in *A Fairer Deal for Legal Aid*, for procuring publicly funded legal services, particularly criminal defence services. This will be presented as a plan for delivering a procurement system that achieves maximum value for money and control over spending whilst ensuring quality and the fairness of the justice system.
3. The reforms will also encourage a more open and responsive market, share risks between supplier and purchaser, and improve the way the state engages with lawyers when procuring legal services.
4. To achieve these objectives the plan will set out how to deliver the best way of buying and delivering legal services, in particular criminal defence services for high cost cases, that:
 - a. matches the right advice and representation to the issue at stake
 - b. meets specified quality standards
 - c. incentivises swift conclusions and minimises costs to other parties
 - d. encourages a diverse and competitive market of lawyers and others offering advice and advocacy that helps deliver quality and just outcomes for best value
 - e. avoids frequent and piecemeal direct fees negotiations between the purchaser and individual sectors within the legal services market.
5. The review will take in to account the current programme of moving to fixed or graduated fees (in particular schemes for graduated fees for cracked trial and guilty pleas and for Crown Court litigators) and the proposals for competitive tendering for solicitors in London. This review will also fulfil the commitment that the DCA gave in a letter to the Bar dated 24 June 2004 to review the current criminal graduated fee scheme and the very high cost criminal cases scheme.
6. The review will focus on the options for new procurement arrangements set out in *A Fairer deal for Legal Aid* (block contracting, price competition, and lead supplier) but may also contain other reforms to supplement, modify or replace these options in order to produce an effective overall package.
7. The plan will be grounded in a detailed analysis of the impact of the final reforms. This analysis will include:
 - a. an assessment of how effective each reform and/or combination of reforms will be at achieving the overall objectives, whilst ensuring quality
 - b. the likely efficiency gains and the timescale over which they will be achieved
 - c. the impact of a new procurement regime on the supply of criminal defence services, the wider legal market, the way the professions are structured, the way the CPS operate and the operation of the entire justice system
 - d. the impact on the various agencies e.g. the Legal Services Commission and Her Majesty's Courts Service.
8. From this analysis the plan will give a route map of how to deliver the reform package and how that will achieve the overall objectives. Included in this route map will be the action needed to promote changes to the quality, structure and performance of the market and its constituent professions (in the context of wider legal service reforms). The plan will also include mitigating action to be taken to address any adverse affects on quality and performance that may result from changes.

Annex B

Review of the Family Justice System in the area of child care proceedings – terms of reference

1. These are the terms of reference for the Review of the child care proceedings system in England and Wales.
2. *A Fairer Deal for Legal Aid* puts forward the case for a cross-Government, end-to-end review of the child care proceedings system. This Review will aim to ensure that the system is as effective as possible in delivering the Government's overarching vision for children, as set out in the Green Paper *Every Child Matters*. It states that every child should benefit from:
 - Being healthy
 - Staying safe
 - Enjoying and achieving
 - Making a positive contribution
 - Experiencing economic well being.
3. The Review will be taken forward to improve the cross-Government delivery of the core welfare, minimum intervention and minimum delay principles set out in the Children Act 1989. It will:
 - Examine the extent to which the current system for deciding care cases in the courts ensures all resources (including children's services) are used in the most effective, efficient, proportionate and timely way to deliver the best outcomes for the children and families concerned
 - Explore the variation in routes taken to bring children into care, both in terms of the rate at which this takes place, and the way in which children enter care through the court process or on a voluntary basis. Identify good/innovative practice which enables children to be diverted away from court proceedings and, instead, to be supported in their families where this is possible.
- Examine the extent to which the core principles of the Children Act 1989 are best met by the current, over represented approach within the courts, and examine whether these principles could be better met by using a more inquisitorial system. Options to consider include:
 - Investigating the possibility of early low-level judicial interventions to encourage parents to resolve problems themselves, thus avoiding the need for full court proceedings wherever possible and appropriate; and,
 - Examining whether the two stages of the court process in child protection cases (establishing the facts and determining the care plan) could be more formally separated with different attendees, procedures and levels of legal representation, and precisely where, and in what way, lawyers should be involved.
- Explore examples of best practice from other jurisdictions and assess the extent to which they may be applied in England and Wales.
4. The review will be led jointly by DCA and DfES and will take into account the programmes of work in this area already underway across Government. It will also involve ODPM, HMT, HO, DH, the Welsh Assembly Government, and a comprehensive set of external stakeholders including the judiciary. It will report to Ministers by 31 January 2006.

Notes

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