

**Response of the Young Barristers' Committee of the Bar Council to the Legal Services Commission Consultation Paper "Improving Value for Money for Publicly Funded Criminal Defence Services in London"**

**Introduction**

1. The Young Barristers' Committee welcomes the opportunity to respond to this Consultation Paper, which proposes a radical change to the way in which criminal defence services are financed in London.
2. The Bar wishes to engage constructively and is always willing to consider innovative concepts for the public funding of legal services. In doing so, it is alert to the need to weigh carefully the effect on the provision of legal services and knock-on effects on the criminal justice system, solicitors and the Bar.
3. We question the strategy of embarking upon this Consultation when the Fundamental Review of Legal Aid ("FLAR") is yet to produce its report; we urge the Legal Services Commission (LSC) to postpone consultation until the FLAR report has been published and its conclusions fully analysed, as only then will the whole picture be apparent.

**The Proposal**

4. The criteria in section 4.2 of the Consultation Paper state that the LSC is looking for a bid process that ensures quality, promotes the optimum outcome for the client, provides effective competition, provides coverage across the geographic regions, encourages entry of new firms to the market and sets a sustainable price for legal aid. The proposal does not achieve this and we address this critical point later.
5. Regrettably, we can only identify within this Consultation a desire to reduce remuneration for "outputs" within the publicly funded criminal defence system, inadequate provision relating to quality standards, and a disregard for the interests of the consumer, including client choice. All of this is despite the confirmation in meetings with LSC representatives that the budget for "lower criminal work" is already under control.
6. We are disappointed by the fact that the Paper fails to recognise the importance of the major contribution made by the Bar to representation of defendants in the Magistrates' Courts in London, principally as unassigned counsel<sup>1</sup>. Although not referred to specifically by the Chief Executive in her Foreword to the Consultation, the Bar plays a vital role in the representation of defendants in lower criminal courts in London, and inspires similar confidence to legal aid solicitors in the ability of the system to deliver justice.
7. The Consultation identifies only one area where the LSC anticipates any effect of the proposed scheme on the Bar, namely the replacement of the current system of paying assigned counsel directly with a system allowing solicitors to

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<sup>1</sup> See paragraphs 22-24 below.

make these payments (at paragraph 5.14 on page 30). We return to this at paragraph 21 below.

8. The Consultation fails to address the inherent risk to the supplier base, both solicitor and barrister. The likely effect of the proposal on the Bar will be to squeeze out young barristers from this important area of work and damage the delivery of justice.

### **The Strategy**

9. Since publishing the Paper, the LSC has made it clear that this will not be a pilot but will, in fact, be a permanent scheme for London, which it is envisaged will be rolled out across the country in future years. It is highly regrettable that the Commission has already decided upon such a fundamental change to the declared intention even before it has received the responses to this Consultation.
10. This experiment in introducing price competition into the supply of key public services is a high-risk strategy in which outcomes are wholly uncertain. There is no guarantee of significant economies being made, but there is a serious risk of damage to the supplier base.
11. In a meeting with the Bar, representatives of the LSC have already conceded that the proposed scheme is sailing into wholly uncharted waters and has no precedent, here or abroad, in the legal services market. We suggest that it is highly ill-advised to put in place such a radical scheme without first running a pilot and then thoroughly evaluating the results.
12. If this scheme is implemented and fails, and if the effect on the market is to reduce the number of solicitors' firms undertaking this work to the extent predicted, we foresee irreversible and disastrous consequences for the supply of services to consumers in London.

### **Tendering in the Criminal Justice System**

13. The concept of tendering for work is a well-understood and laudable means of monitoring proposed expenditure when the work required can be sensibly estimated. For example, with a bid or quotation sought from a builder for building work, a builder knows the nature, size, layout, detail and length of the contract for which he is bidding and where, should any changes to those factors occur, the builder will have the opportunity to amend his bid for the work. This is also comparable with a tender to supply supermarkets with a given quantity of clearly defined items, or a cleaning contract for a hospital. In each case the work required can be fairly estimated.
14. However, extending this concept to bidding for contracts in the criminal justice system, as proposed in the Consultation, is pernicious given the sheer number of variables in each case. These include, but are not limited to:
  - the seriousness of the offence charged;

- time differences arising from whether a case remains in the Magistrates’ Court for trial or is committed for trial to the Crown Court;
  - necessity for expert evidence; and
  - the psychiatric background of the client.
15. These variables apply even more plainly to the advocacy elements of a case, rendering the advocacy element of a tender especially hard to quantify in any bid.

### **Likely Effect on Solicitors**

16. Solicitors in London have a large and diverse client base. They cover Magistrates’ Courts in many locations across the whole city. They are rarely able to cover all “own-client” work in every location and the Bar provides a flexible and quality advocacy service through “unassigned” counsel. This permits clients greater choice in litigation services. In turn, solicitors and the courts benefit from the existence and flexibility of a large pool of specialist advocates.
17. The introduction of fixed unit payments will change the position outlined in paragraph 16 above. We understand that this unit price design is intended to inhibit the geographical work spread of solicitors; it will certainly have that effect. There will be a strong tendency for solicitors to maximise profits by retaining the bulk of advocacy in-house and to concentrate their resources on a smaller “catchment area”. It will be increasingly difficult for consumers to obtain the services of their own solicitors if they have appearances in courts which are not local.
18. These problems will only be magnified under a scheme that proposes a bid price that includes all travel and waiting time. There will be therefore no “extra” fee for travel and waiting able to be claimed by the solicitor, a proportion of which at least should be passed to counsel.
19. The economic risk to solicitors of having to ensure sufficient qualified advocates in-house, or to sub-contract at advocacy rates which may exceed the unit price available, may be a significant disincentive for solicitors to engage in the bid process at all. Those solicitors’ firms which are not driven away will doubtless be forced to tender for work at rates which put quality at risk.

### **Unit Price for Litigation not Advocacy**

20. The only sensible way to avoid these difficulties in a tendering scheme is to confine unit price bids to litigation services, and to develop appropriate fixed or graduated fees for the advocacy element of litigation. A fixed-price graduated fee system has already been proved to keep control over unit costs; as Professor Martin Chalkley previously demonstrated to the Government (in his “*Further Note on the Cost per Case under the Criminal Graduated Fee Scheme*” of February 2005), the average cost of a case under the criminal graduated fee scheme fell by 6% between 2002-2004 on a like for like basis.

## **Bar's Role in the Process**

21. As mentioned in paragraph 7 above, the Paper identifies only one area where the LSC anticipates any effect of the proposed scheme on the Bar, namely the replacement of the current system of paying assigned counsel directly with a system allowing solicitors to make these payments (at paragraph 5.14 on page 30). In fact, only a very small proportion of Magistrates' Court work is now designated as fit for "assigned counsel" (which guarantees adequate payment to the Bar for work properly done). LSC statistics demonstrate that in 2003/2004 only 252 cases in the London region provided for assigned counsel out of some 80,000 Magistrates' Court cases.
22. We strongly suspect that the low figure for assigned cases is in great part attributable to the tighter criteria governing the circumstances in which a case may be assigned. We suggest that many more cases in London Magistrates' Courts are deserving (due to their complexity) of being so assigned. Nevertheless, those 252 cases constituted nearly half of the national figure for assigned counsel cases. The fact that London has a disproportionate share of difficult and complex cases makes it an inappropriate venue for the competitive price tendering experiment which is proposed.
23. From its own statistics the LSC is unable to discern the volume of work undertaken by barristers as unassigned counsel. We suggest that the volume is significant. A snapshot by the Bar Council of such cases undertaken by barristers in 10 London-based chambers doing criminal work found that in a two-week period (4<sup>th</sup>-16<sup>th</sup> April 2005) representation was provided in 598 cases in London Magistrates' Courts by just those sets. If we take a modest estimate of there being at least 30 sets in London doing Magistrates' Court work, this 10 set statistic would increase to over 46,000 cases per year (taking into account non-sitting days).
24. The 10 sets were selected as representing a mixture of large and small chambers with a representative spread of barristers of varying ethnicity, with chambers work ranging from defending only to a combination of prosecuting and defending. Three key points can be made from this snapshot statistic:
  - (i) in just one week 10 chambers undertook more unassigned casework than the figure for assigned cases in London for the whole year of 2003/2004.
  - (ii) this supports our contention that the volume of barristers' work is very considerable, if this figure were to be multiplied by all of the chambers practising in London.
  - (iii) the fact that London has much work undertaken by barristers in the Magistrates' Court makes it an inappropriate venue for the competitive price tendering experiment which is proposed.

### **Effect on the Bar**

25. We fear considerable “cherry-picking” of work by solicitors who will be anxious to keep travel time and disbursements to the minimum. Where existing clients are charged in more distant courts it is inevitable that this will discourage the use of in-house advocates. It is those cases which will be sent to the Bar, at rates of payment which are entirely uneconomic.
26. There will be a considerable reduction in the amount of unassigned counsel work available to the Bar. Such work as may be available – the odd case in an outlying court – will be uneconomic for the Bar.
27. Including all advocacy services within the unit price will inevitably make the position for the young Bar intolerable. There will be significant further shrinkage in available work. This will have an effect upon unit price as solicitors are forced to provide all lower court advocacy in-house, even the most complex and/or distant cases.

### **Need for Specialist Advocates**

28. The efficient and satisfactory running of the criminal justice system in London requires the continued existence of a good quality, flexible and specialist pool of junior barristers to supplement the work of solicitors in the lower courts. The Bar not only delivers a specialist and high-quality system of advocacy but also currently delivers that system at an economic price. If an experiment in price competition is to be pursued, notwithstanding our objections, then it is vital to have a scheme which preserves the continued existence of such a pool. Without it, quality standards, coverage and consumer choice are at significant risk, bringing detriment to the consumer if the Bar is squeezed out of Magistrates’ Court work.
29. The criminal law is becoming ever more technical. In an area of law where human rights are increasingly engaged and large legislative changes are routinely effected, we suggest that the LSC ought to be recognising the real value of quality representation and specialist skill provided by the Bar and ensuring that the young Bar is not penalised by fees which are not so much unacceptable as derisory.

### **Summing Up**

30. It can be seen from the preceding paragraphs that the criteria specified in section 4.2 of the Consultation Paper will not be achieved. Taking each criterion individually:
31. Quality. Quality will not be ensured, but is likely to be reduced.
32. The optimum outcome for the client. The optimum outcome for the client is unlikely to be promoted if, as we fear, his choices of solicitor and advocate are limited or even removed completely. This would impact on a client’s access to justice and the quality of representation available to him.

33. Effective competition. We consider it likely that many solicitors' firms will be discouraged from bidding at all, thereby reducing rather than providing effective competition.
34. Coverage across the geographic regions. It is not clear how the system will provide coverage across the geographic regions if solicitors' firms are discouraged from bidding.
35. Encourages entry of new firms to the market. We do not believe that new firms will be encouraged to enter the market when the economic outcome for them is so uncertain.
36. Sets a sustainable price for legal aid. We do not agree. Tendering is not the way to achieve a sustainable price for legal aid. The new system will not be sustainable – quality and availability of representation will deteriorate.

**Effect on the public interest: justice and diversity**

37. These plans will have a knock-on effect in terms of the provision of quality prosecution advocacy as well. As an independent Bar, barristers can both prosecute and defend. If, however, junior barristers are driven away from publicly funded work because the defence rates are so meagre then inevitably the pool of high-quality barristers who undertake prosecution work also decreases. This must have long-term ramifications for the criminal justice system, and for the interests of justice in ensuring that advocates of experience and ability offer representation in the more serious cases. Victims are also entitled to have cases dealt with by experienced advocates.
38. It is in the public interest that the best and brightest from every social and ethnic background are attracted to practise in this key area of publicly funded work. We have serious concerns that squeezing the Bar out of publicly funded work in Magistrates' Courts will have the effect of making it impossible for many young barristers, particularly those from low income families, to sustain themselves during the early years in practice. Fewer new barristers will pursue a career in criminal work and there is a real danger that bright, keen junior barristers will simply leave the profession.
39. This has obvious equality of opportunity implications and is likely to have the effect of rolling back the diversity the Bar has fought so hard to achieve. The Bar Council is a signatory to the recently published "*A Manifesto for Justice*"<sup>2</sup>, which states:

“The legal profession itself needs to focus on its diversity and service to customers. Legal professional recruitment should consolidate its strong track record of attracting high proportions of women and people with an ethnic minority background. Remuneration for young lawyers starting out should be

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<sup>2</sup> April 2005: the 10 signatories were - Advice UK; Citizens Advice; Criminal Law Solicitors' Association; General Council of the Bar; Justice; Law Centres Federation; Law Society; Legal Action Group; Legal Aid Practitioners Group; London Solicitors' Litigation Association.

sufficient to make the law attractive as a career option for people of all backgrounds.”

### **Conclusion**

40. Our opposition to the current proposals is total and our proposal accordingly radical. We urge the Commission not to proceed with implementing this scheme in London, and to review the whole issue of price competition once the FLAR report has been fully and publicly debated.

### **The Bar’s Proposals**

41. We ask the LSC to focus instead on key areas of continuing concern for the Bar in relation to publicly funded work in the Magistrates’ Court, namely:
- a return to payment of all fees directly to the Bar;
  - levels of remuneration; and
  - enforcement of unpaid fees.
42. The financial problems for the young Bar were significantly aggravated by the introduction of standard fees for Magistrates’ Court work in June 1993. The proposal will make things worse. Prior to 1993 a solicitor’s remuneration was not capped and was paid according to time reasonably spent in relation to both preparation and advocacy. Following the introduction of standard fees it was for the solicitor to determine counsel’s fee in unassigned cases and to distribute the money to counsel accordingly. Providing solicitors with “the purse strings” has produced a devastating downward spiral in available fees for the young Bar. Solicitors inevitably seek to maximise their own profits. Often only the more difficult or remote appearances are sent out to the Bar. Remuneration for the appearance – including payments representing travel and waiting by the advocate – are then claimed by the solicitors’ firm and often only a proportion paid to the barrister, if at all.
43. In September 2001, in an attempt to deal with declining and unfair rates of remuneration paid to unassigned counsel in London, a Protocol approved by the London Criminal Courts Solicitors Association, the Criminal Law Solicitors Association, the Criminal Bar Association and the Young Barristers’ Committee of the Bar Council (“the Protocol”) was implemented. This set out best practice standards in relation to the instruction and working methods of counsel in the Magistrates’ Court, and fixed recommended minimum rates of remuneration for various hearings. A copy of the Protocol is at Annex A.
44. Abundant anecdotal evidence demonstrates that many barristers undertaking work in London are nevertheless paid at rates below those set out in the Protocol. There is no evidence that the overall cost of an unassigned case is higher when barristers are instructed. Given past experience, we are convinced that delegating to solicitors the responsibility for making payment can only exacerbate the problems already experienced by the Bar in obtaining payment and at properly remunerated rates. Objective evidence of these concerns is provided by data from surveys of barristers undertaken by the Bar

and by the long-term research of Professor Joanna Shapland and Angela Sorsby, respected independent academics; full details of their reports from 1993, 1997 and 2002 are at Annex B.

### **Levels of Remuneration**

45. The difficulties faced by the junior Bar are not confined to insecurity about reimbursement. Rates of remuneration are a matter of profound concern. Even the Protocol rates (envisaged to be regarded as the recommended *minimum* acceptable rates payable to the Bar) have not kept pace with inflation since 2001, and are comparable with rates paid to the Bar over 20 years ago. The personal financial problems of the junior Bar struggling to repay student loans and the additional costs of professional qualification (together often in excess of £30,000) are well-documented. It is becoming inevitable that low rates of pay will precipitate a similar crisis to that experienced in the nursing and teaching professions.
46. These problems appear to be particularly acute in London where, for the reasons we have outlined, the public and consumer interest in a large pool of flexible and high quality advocates is great. Under current arrangements in which solicitors fix fees in unassigned cases, and are responsible for their payment, the junior Bar is already open to significant risk of exploitation. Currently they may generally, at best, secure the Protocol rates. From these meagre fees they must meet Chambers' expenses, insurance and travel costs. This can have the effect of reducing potential taxable income to less than the minimum wage. The existing effect is to act as a significant brake on the willingness of new entrants to consider publicly funded work. This brings adverse downstream consequences for both availability and diversity. The reduction in quality and client choice which will flow even from current arrangements is already a matter of concern to the Bar. The LSC Paper extends such arrangements to all lower court work and is, accordingly, likely to accelerate this decline in standards of representation, flexibility and consumer choice. There is no evidence of any matching gain for solicitors.

### **Enforcement of counsel's unpaid fees**

47. This issue remains a serious concern for the Bar under any scheme which proposes that solicitors are responsible for the payment of barristers instructed by them. Existing mechanisms for the enforcement of unpaid fees have simply proved inadequate to meet the scale of the problem identified in the research. There is a genuine and legitimate grievance in relation to this and a growing mood of despondency and resignation amongst the young Bar.
48. If the present scheme of the General Criminal Contract is to be retained, we would seek an amendment to include a term permitting barristers to apply to the LSC directly if they are not paid within 30 days of the conclusion of the case or the submission of a fee note. This fee must include the whole fee claimed, including travel and waiting. The mechanisms of conditions in the award of future contracts, and/or the Legal Services Ombudsman, should be applied to enforce compliance with best practice standards for payment.

49. To the extent that we are able to respond to the 33 questions posed in the Paper, we now do so below. The issues raised in the questions are largely confined to the effects upon solicitor providers.

### **Responses to the Questions for Consultation**

**Question 1 – *Should we set a minimum volume of work? If so, how should this be determined?*** No formal response

**Question 2 – *What would be the effects (of a competitive bid round resulting in either more or fewer suppliers) on current contract holders and, in particular, black and minority ethnic (BME) firms?***

We foresee that this scheme will lead to a “cull” of solicitors’ firms which do criminal work; indeed, a potential reduction in numbers is conceded in the Consultation Paper. There is no basis for predicting how extensive such a reduction in the supplier base might be, nor the uneven effect upon firms of differing types or quality. Economies of scale may well inhibit small high-quality firms from bidding at a realistic price for a case for fear of being undercut by larger competitors, who may, nevertheless, offer a lower quality service. Consideration of the impact on niche practices, local community practices and those owned or staffed by BMEs seems to have been something of an afterthought in the development of the Commission’s thinking on this issue.

The Solicitors’ profession will speak for itself and, no doubt, make similar powerful arguments against such risky experimentation with the supply base. They will undoubtedly make the point that a significant downturn in quality and availability cannot be excluded.

Once there is shrinkage in the supply base it may take years to recreate the sector. Advice and representation deserts may emerge in much the same way as changes to the NHS contract for dentists led to significant withdrawal from the market of practitioners. Changes to the provisions for the civil legal aid market have already demonstrated that solicitors will simply move out of a particular market if it is uneconomic, creating such deserts. The Paper does not disguise the fact that blocks of work and duty solicitor schemes will be allocated on the basis of the lowest bid first. To introduce competitive tendering on price in this field is a crude mechanism to cut costs whatever the impact upon quality, choice and sustainability.

We are particularly concerned about the issue of diversity in the supply base. We note with real concern that, compared with all criminal contract holders nationally, a greater proportion of BME suppliers fall into the group of criminal contract holders in London. So BME suppliers will be disproportionately adversely affected by any changes to the current scheme. To eliminate numbers of small BME firms from the market in criminal legal representation will have direct and immediate consequences for the communities which such practices serve, particularly in cosmopolitan London.

BME firms are an important community resource for the disproportionate number of BME clients processed through the criminal justice system. They deliver

- i. cultural empathy;
- ii. unique language skills;
- iii. client confidence;
- iv. perception by the client of a high level of commitment on the part of BME firms.

BME clients are visibly reassured when they enter a solicitor's firm which is culturally mixed. The fact of the perception is relevant to ensuring that changes in policy do not engender social exclusion.

In the "*Review of Demand, Supply and Purchasing Arrangements (Survey of Legal Aid Firms)*" conducted on behalf of the Department for Constitutional Affairs in 2003, no statistics were obtained in respect of BME firms. However, the survey did find that the most profitable firms tend to be larger and specialist (at paragraph 9.2), implying that smaller firms (of which BME firms are a disproportionate number) are already under significant financial pressure. The report focussed mainly on profitability issues and salaries paid to partners. It did not review, for example, the BME makeup of the London and South firms surveyed and referred to at Table 5 (at paragraph 4.4 on page 9 of the Review).

The LSC's proposal to commission a project surveying all BME firms across the country is much welcomed. The views of various BME Bar organisations suggest that a BME firm should be defined as "owned and/or managed by BME partner/s". A different definition could include all firms with at least 20% BME partners, whether salaried or equity.

Even this definition is imperfect since it might exclude, for example, a firm owned and controlled by two white partners, but located in Southall with 40 Asian fee-earners and a significant BME client base.

**Question 3 – How do the following proposals match up against the criteria in section 4.2?**

The criteria in section 4.2 state that the LSC is looking for a bid process that ensures quality, promotes the optimum outcome for the client, provides effective competition, provides coverage across the geographic regions, encourages entry of new firms to the market and sets a sustainable price for legal aid.

Number of suppliers

Measuring these criteria against the proposals for numbers of suppliers, we repeat our observations in the first paragraph of the response to Question 2. The LSC has accepted that the statistics are unclear whether there is over-supply and over-capacity of firms. Further, the Frontier Economics research<sup>3</sup> indicated a small under-supply of barristers in areas of publicly funded work, including crime. There was certainly no

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<sup>3</sup> at page 9 of its report "*A Market Analysis of Legal Aided Services Provided by Barristers*".

evidence of over-supply. There is a significant risk that shrinkage in the supplier base will result in local advice deserts – especially in disadvantaged areas of the city. We can also confidently predict “cherry-picking” by contract holders. Those clients with more complex cases will have to shop around and possibly travel considerable distances to find lawyers willing to take their cases. Such consumers will be driven towards lower quality suppliers who do not have a secure “own-client” base. Those who are arrested in another area of the city from their own may have little choice of representation and be forced to accept a local supplier of whom they know nothing.

### New Suppliers

The Paper suggests that nothing in its proposals rules out other organisations such as barristers’ chambers bidding for contracts in the future. This is misconceived for reasons which we have expressed in great detail to the FLAR. It fails to acknowledge the separate and distinct functions performed by the self-employed Bar who operate as a referral profession of specialist advocates. In addition, the regulatory, organisational and training structures of the Bar all militate against the notion of bidding for shared contracts of work, including police station and court duty advice work. Indeed, in summer 2002, the LSC in its response to the Bar Councils’ consultation about direct access opposed the involvement of the Bar in police station and duty solicitor work, on the grounds that the Bar was not equipped to offer the all round service required.

The practical implications of such an approach would involve a radical transformation of each element and require indistinguishable regulatory, organisational and training structures from solicitors. That would remove the competitive benefits upon which Clementi recommended distinct and separate regulatory regimes for both professions.

Moreover, the need to undertake litigation functions would result in fusion of the professions for all practical purposes. For the reasons set out in greater detail in our FLAR submissions, barristers’ chambers would have to transform themselves into solicitors’ firms, with all of the client care facilities and infrastructure appropriate to undertaking litigation functions. This would generate staff costs and other expenses on a par with those of solicitors, rather than the commercially attractive overheads which currently apply. The long-term impact would be to increase the price for advocacy services provided by the Bar, and to remove – rather than to increase – competition between suppliers.

In any event, even if it wished to, the Bar could not currently compete with solicitors in bidding for contracts. Wholesale regulatory changes would be required to permit barristers to set up partnerships and expand the functions they may perform. The criminal Bar would need to be re-trained in order to become accredited to undertake police station and court advice work. We would have to employ secretaries and make arrangements to hold client funds, expand Chambers to provide for client care, employ staff to undertake investigations and trace and interview witnesses. Since the mechanism of contracting is to acquire clients through police and court duty schemes, which barristers are unable to undertake, we are surprised that the suggestion is canvassed.

It is plain that there is a fundamental misunderstanding of the conclusions reached by Clementi in his Report on regulation. Far from providing the vehicle for fusion of the

professions, and a blurring of the litigation and advocacy functions, Clementi seeks to preserve a variety of legal service providers to encourage competition between them in overlapping areas of provision. Firstly, Clementi recognised that we do not in general deal direct with the public, and that our work is generally on referral from solicitors and others who require those specialist services which we are trained and equipped to provide (see p.105, paragraph F3 of the “*Regulatory Review of Legal Services*”). He makes no recommendation to change this. Secondly, as to partnership, he reaches no final conclusion, suggesting that this should continue to be monitored by the OFT (at p. 132, paragraph F83). Thirdly, and most importantly, he explains that one of the advantages of the B+ model which he recommends is that:

“.....precise uniformity in standards, that a single regulator might lead to, may not always be in the public interest or lead to greater competition. Some degree of choice in the type of provider, and the regulatory rules under which they operate, is to be welcomed, subject to a minimum standard being met.” (at p. 34, paragraph B29(c))

We understand that the OFT takes a similar view of the desirability of diversity and competition between different regulatory regimes within a particular area of service provision. At a recent meeting, support for this approach came also from the Legal Services Ombudsman.

The historic differences between solicitors and the Bar were last authoritatively endorsed by the Benson Royal Commission in the 1970s. Clementi has in effect re-examined that issue. We note that he favours a variety of regulatory regimes, which offer the best prospect of choice and competition in legal service delivery.

#### Bid zones

In creating the bid zones the LSC must be very careful to ensure that the size of each zone does not create barriers for suppliers or present clients with difficulties (such as lengthy travel distances by infrequent public transport) in attending suppliers’ offices for legal assistance.

#### Bid process

In so far as the criteria state that the LSC is looking for a bid process that ensures the optimum outcome for the client and coverage across the geographic regions, we suggest that these criteria do not take into account BME client needs. The results of the proposed survey might usefully inform the LSC’s decision-making process and ensure that any policy implemented does not engender social exclusion.

#### **Question 4 – *What would be the most effective way of achieving these results?***

No formal response. Further, in the absence of the results of the BME survey a response to this question would be premature.

#### **Question 5 – *What shape and size of bid zones would allow firms to price their bids effectively and provide them with enough certainty for the future***

No formal response. Please also see the response to Questions 3 and 4 above.

**Question 6 – *Should an integral part of a quality service require the suppliers to have office space to see clients outside police stations and the Magistrates’ Courts in each bid zone? If so, should the office be recognised by the Law Society as meeting the Society’s practice rules (e.g. “...every office of the practice must have at least one solicitor qualified to supervise, for whom that office is his or her normal place of work”) or should a different standard apply?***

In light of our concerns about lay client access to his solicitor (set out in answer to Question 3 above) we suggest that incorporating the Law Society’s practice rule on this issue should be the minimum requirement. In addition, given the likelihood of a number of different firms receiving contracts within a bid zone, the LSC must ensure that providers’ offices are spread evenly out across the bid zone so that lay clients do not have to travel what can be lengthy distances even across one London borough or CPS/HM Courts Service boundary.

**Question 7 – *Would basing the bids on the duty slots be the best way for allocating access to work as part of the managed competition process?***

No formal response.

**Question 8 – *Would it be reasonable to expect suppliers also to take on any Crown Court work that follows on from their police station and Magistrates’ Court work?***

No formal response.

**Question 9 – *What are your views on the options for Crown Court specialist suppliers/Complex Crime Unit cases and any other suggestions for ensuring that Crown Court specialists can continue to work in the police station and at the Magistrates’ Court, while being subject to the same efficiency incentives and quality standards as suppliers that have gone through the bid process?***

At present there are a number of specialist Crown Court suppliers, e.g., but not only, particularly in serious fraud. Their expertise is vital for the effective and efficient progression of those types of cases which bring with them their own difficulties. It is likely that one reason that those specialist providers do not do routine Magistrates’ Court work (other than to see the big case through to the Crown Court) is the level of remuneration. This proposal will only entrench this. It is critical that the specialist firms are instructed and deal with the case throughout to avoid duplication of work/payment. Any LSC proposal must ensure that specialist providers can continue to provide specialist advice as at present. It must be remembered that, with the forthcoming abolition of committals to the Crown Court, every case is likely to be sent to the Crown Court after only one hearing in the Magistrates’ Court. Therefore the efficiency incentives which will relate to one hearing in the Magistrates’ Court are matters which could easily be resolved.

**Question 10 – *Should Crown Court specialists be required to bid for duty solicitor schemes?***

No, there should be no formal requirement but firms should be able to bid if they wish to.

**Question 11 – *Are special arrangements for specialist suppliers needed, and if so what might those arrangements be?***

The Paper points out that some scheme may be required for those providing services targeted at particular client groups (e.g., for language or cultural reasons, complexity or rarity of the case, quality of specialist service required) and to ensure that classes of work such as Prison Law are adequately covered. Given our priority to ensure choice, quality and specialist skill within any scheme, special arrangements are needed.

Those suppliers with niche practices (for example, appellate work, cases involving the Criminal Cases Review Commission, Youth Court cases, serious fraud cases and extradition work) should be excluded entirely from the proposed scheme. Such casework invariably requires much more concentrated attention and advocacy, and unusual and unanticipated points often arise, with increased associated cost. To subject these cases to the proposed scheme would prove unrealistic or unworkable in practice, with ramifications for the quality of service to a client. Suppliers should of course be subject to the same quality controls as other suppliers subject to the bid process.

As we wholly oppose the scheme proposed in the Paper, we only feel able to support the suggestion that some or all of the identified classes of specialist suppliers be excluded from the competition. These should be allowed as contract holders to continue to provide advice under the current scheme and remuneration structures.

Excluding niche work from the bid process altogether would be preferable to the “exit mechanism” strategy which we are aware that the LSC is also considering now.

Please see also the response to question 2 above. Suggestions must necessarily additionally be informed by the results of the BME survey.

**Question 12 – *What is the most appropriate option for pricing work, bearing in mind the need for any system to be easily understood and, at the same time, to cover adequately the range of complexity in the work involved?***

We note from the meeting between the LSC, the CBA and the Law Society that representatives of the LSC acknowledged that the proposed scheme does not possess the necessary flexibility to cope with a variety of practical issues which are likely to arise. For example, the position of legal aid transfers during the conduct of a case, the great variation in weight and complexity between individual cases within the same unit price, and the impact of legislative and procedural changes during the existence of a contract. None of these profoundly difficult issues is addressed by the scheme.

No pricing mechanism based on outputs and bid prices can account for every eventuality and there is an inherent commercial risk in undertaking work upon such terms. Litigation, especially criminal litigation, is an inherently risky enterprise and – we would argue – simply not susceptible to a “one-price-fits-all ” structure. The most risk laden aspect of an individual case is likely to be the advocacy costs when that case reaches trial. We fear that the risk of bearing this cost within the unit price will

deter any sensible firm from bidding for work in the way proposed. This is a powerful argument for excluding advocacy costs from the litigation output price.

“One-price-fits-all” must have an adverse impact upon quality. The more complex the case, or socially excluded the client, the greater the risk of a corresponding fall in the standards of service available under the contract. Many solicitors firms will feel under commercial pressure to reject clients with, for example, mental health difficulties, who require the extra time, effort and money spent on proper representation and medical reports. Since many defendants present some level of psychiatric difficulty, the LSC will be under considerable pressure to find extra funding for necessary reports or to apply the “exit mechanism”. Even in ordinary cases, clients may suffer from a multiplicity of problems and disadvantages. These may require the solicitor to devote disproportionate amounts of time in taking instructions, attending prison visits, explaining advice. Moreover, there will be significant perverse incentives which may impact on proper advice being provided as to plea, and in seeking adjournments so that a case can be properly presented.

**Question 13 – *Should the new contracts continue the requirement that a duty solicitor must provide initial advice in duty solicitor cases? The Commission is minded to allow bids on the basis that initial ‘duty solicitor’ advice for non-indictable matters could be provided by an accredited representative.***

No formal response.

**Question 14 – *Given the nature of criminal work, should we require a certain percentage of a supplier’s work to be done by fee earners who work exclusively for that supplier? And, if so, what might that percentage be?***

No formal response.

**Question 15 – *Should we require all fee earners to be re-accredited from the Criminal Litigation Accreditation Scheme (CLAS) within a specific period, say 12 months, of the Law Society launching the scheme for London?***

No formal response.

**Question 16 – *Are there any other indicators of quality that we should be considering ?***

The LSC anticipates that 90-95% of firms will pass the threshold currently envisaged. In a meeting, LSC representatives were pressed how the LSC measured the data that indicated the quality of firms in London has gone up. They conceded that, historically, there has been no benchmark of quality and that the LSC is relying on feedback from firms that they have worked very hard. We are not reassured that recent independent peer reviews by specialists in the field are an economic or viable solution. We believe that there is a difference between assessing “adequacy” and “median quality”. Checking that files are adequate through peer review does not, for example, ensure that advice given to the client was appropriate and of real quality.

We believe that a much higher threshold of quality is required, and that the bid criteria must be create genuine balance between quality and price.

**Question 17 – *How could these quality indicators be monitored effectively and at reasonable cost?***

In a meeting with the Bar, representatives of the LSC have indicated that all firms with a current contract will now be subjected to peer review. This is an expensive process. Whilst we support in principle the proper monitoring under franchising scheme to ensure high quality standards, the introduction of an expensive and unnecessary peer review process underlines the false economy of the current approach. We repeat, in light of the acknowledgment that costs for “lower criminal work” are already under control, that the irreversible scheme proposed in this Consultation Paper is wholly unnecessary.

**Question 18 – *Should supervising solicitors be required to have a minimum period of post-qualification experience?***

No formal response

**Question 19 – *Should supervising solicitors be expected to undertake a minimum number of hours of criminal defence work, for example 350 hours per year?***

No formal response

**Question 20 – *Should supervising solicitors be allowed to work as supervisors for only one supplier?***

No formal response

**Question 21 – *Should there be a maximum number of fee earners that a supervising solicitor is allowed to supervise – and, if so, what might that number be?***

No formal response

**Question 22 – *Do our proposed quality assessment processes offer the protection to clients in terms of service quality?***

See answer to Question 16 above.

**Question 23 – *Although peer review is based on files and records from a single office, the Commission wishes the results to be applicable to the firm whose office was reviewed. This should encourage firms to ensure that high professional standards are applied across all their offices. Is this reasonable?***

See answer to Question 16 above.

**Question 24 – *What is the most appropriate option (paying the actual amount bid or using the market clearing rate) and are there any other suggestions as to how the price should be established?***

See answer to Question 12 above.

**Question 25 – *Should expansion-based bids be limited and, if so, should the expansion be limited to, say, 25%, 50% or 100% of current work volumes?***

No formal response.

**Question 26 – *What should be the arrangements for existing suppliers who decide not to participate in this managed competition?***

No formal response. Please also see our response to Question 2 above.

**Question 27 – *Would it be appropriate to pay the suppliers' own tendered rate (for Magistrates' Court work outside the suppliers' bid zones) irrespective of where the court work takes place, or to pay the average rate applicable in the relevant bid zone?***

No formal response.

**Question 28 – *What effect would the proposal have on barristers to replace the current system of paying assigned counsel directly by the LSC with a system allowing solicitors to make these payments?***

Please see our comments under the headings “Effect on the Bar” and “The Bar’s Proposals” in the main body of our Response at pages 5 and 7 above.

**Question 29 – *Do you agree with the preliminary equalities impact assessment on clients?***

Of course we welcome any initiative which endeavours to ensure that a scheme of remuneration for publicly funded criminal defence services does not directly or indirectly discriminate against small and BME firms. We repeat however our observations set out in response to Question 2 above.

**Question 30 - *What additional support measures (if any)for suppliers on Regulatory and Equalities Impact Assessment should the Commission consider establishing?***

No formal response. Please also see our response to Questions 2 and 4 above.

**Question 31 - *Do you agree with the conclusions drawn by the Commission about the ethnicity of CDS clients and CDS supplier base?***

The clients of criminal law firms are disproportionately from BME groups. A proprietor of a moderate sized criminal law firm (whose views were canvassed for the

purpose of preparing this response), estimated that some 35% to 40% of his clients are from ethnic minorities.

It is fair to say that the number of BME suppliers may be disproportionate to the overall number of suppliers. This is because there is limited ability for BME solicitors to progress within larger firms due to perceptions and/or entrenched attitudes. The only way for many BME solicitors to progress is to establish their own client base, often from within their own communities, and by setting up their own firms. This pattern is reflected in the Law Society figures demonstrating that the number of sole practitioner BME firms is disproportionate compared with the percentage of indigenous sole practitioner law firms.

BME firms are the most vulnerable to competitive tendering because most of them are small and do not have the economies of scale which the larger firms can offer.

Please also see our response to Questions 2 and 3 above.

**Question 32 – *What are your views on what elements of the Commission’s current contracting arrangements create barriers for BME firms and why?***

The current contracting arrangements appear, by and large, to be fair. They enable firms to compete and survive in the market place. Firms survive by offering their own unique contribution to that market place. In the case of BME firms this involves appealing to the needs, culture and community of ethnic minorities. It encourages firms to be focused and to specialise in the area of criminal litigation.

The current contracting scheme has encouraged the creation, growth and continuing success of a number of BME firms. Competitive tendering will inevitably undermine this state of affairs.

Please also see our response to Questions 2, 3 and 4 above.

**Question 33 – *Can you identify other barriers to the growth of BME firms that are not within the control of the Commission?***

- a. Perceptions and/or entrenched attitudes of the general public towards BME firms.
- b. Perceptions and entrenched attitudes of society towards BME groups generally.
- c. Recruitment problems. Criminal lawyers are less willing to join small niche firms

Please also see our response to Questions 2 and 4 above.

**Young Barristers’ Committee  
May 2005**

List of Annexes:

- A. Protocol for the Instruction of Counsel, and annex thereto.
- B. The Work of Professor Joanna Shapland and Angela Sorsby, and appendix thereto.

**ANNEX A TO**  
**YOUNG BARRISTERS' COMMITTEE'S RESPONSE**  
**DATED MAY 2005 TO**  
**LSC CONSULTATION PAPER**

**PROTOCOL FOR THE INSTRUCTION OF COUNSEL**

This protocol shall be referred to as the protocol for instructing counsel in cases covered by Legal Services Commission General Criminal Contract. It will be reviewed on or before 31st January 2002 and thereafter on or before 31st December annually.

The object of this protocol is to provide a 'best practice' framework concerning the instruction of counsel to attend Magistrates' Courts on behalf of clients instructed by firms within the Greater London area for work done under the General Criminal Contract.

The London Criminal Courts Solicitors' Association, the Criminal Bar Association and the Young Barristers' Committee of the Bar Council hope that this document will assist in obtaining consistent standards of service and fair levels of remuneration for the young bar.

Counsel shall be the barrister attending a court upon instructions from the solicitor.

**A)** The solicitor agrees as follows:

1. Those instructions shall be given (except in the case of an emergency) in writing sent by e-mail, fax, DX or post.
2. That instructions shall, whenever appropriate, include at least the following:
  - a) Name, address, date of birth and telephone number of the client.
  - b) Copies of charges, TICs, advance information (whether case summary or statements) and exhibits.
  - c) Bail details or reasons for remand into custody, stage of proceedings, object of the hearing in question and bail instructions.
  - d) Unique File Number (UFN) and a copy of the grant of representation order, where available, or instructions to make application for a representation order.
  - e) Proof of evidence of client, including antecedents, previous convictions and comment on prosecution case.
3. That payment shall be made in the month following receipt of counsel's fee note and report of result of hearing.
4. Payment to counsel shall be based on the guidance set out in Annex A, attached hereto. The purpose of Annex A is to recommend a basis for payment of counsel's fees that is fair and reasonable.

5. To pay counsel whether or not a representation order exists unless agreed to the contrary.

**B)** Counsel agrees as follows:

1. On the day of the hearing, or within 24 hours thereof, counsel shall forward a written report on the case to the instructing solicitors.
2. To act as counsel, from the solicitor's approved list of counsel, (save in exceptional circumstances), for the solicitor advising and assisting the client at the relevant hearing.
3. To ensure that the number of cases accepted at any time will not diminish the quality of the service offered to the client of the solicitor.
4. That on the day of the hearing counsel will, by telephone, advise the solicitor of the result of the hearing and any emergency work which is to be carried out.
5. Counsel's chambers will invoice the solicitor collectively, once a month, so that the solicitor may pay the invoice in a single transfer to chambers.
6. If counsel's fees are not paid within 30 days, counsel's clerk will ordinarily require an explanation before a decision is taken to revert to the LSC for payment.

## ANNEX A [to the Protocol]

1. Formal hearings (remands, paper committals, bail applications in the Magistrates' Court), £35 plus 2/3 of the rate payable to the solicitor under the General Criminal Contract in respect of travel and waiting time (in addition to any travelling expenses reasonably incurred by counsel and which are recoverable by the solicitor) plus VAT.
2. Contested hearings (including Section 6(1) committals). Best practice would suggest **either** 2/3 of the rate payable to the solicitor under the General Criminal Contract in respect of travel, waiting, preparation, attendance and advocacy (in addition to any travelling expenses reasonably incurred by counsel which are recoverable by the solicitor) plus VAT; **or** a fixed fee of between £60 and £120 plus 2/3 of the rate payable to the solicitor under the General Criminal Contract in respect of travel and waiting time (in addition to any travelling expenses reasonably incurred by counsel and which are recoverable by the solicitor) plus VAT .

Factors to be taken into account should include the amount of time involved, the difficulty or gravity of the case, and the experience of counsel engaged.

3. Bail appeals to the Crown Court: £45 plus 2/3 of the rate payable to the solicitor under the General Criminal Contract in respect of travel and waiting (in addition to travelling expenses reasonably incurred by counsel which are recoverable by the solicitor) plus VAT.

ANNEX B  
YOUNG BARRISTERS' COMMITTEE'S RESPONSE  
DATED MAY 2005 TO  
LSC CONSULTATION PAPER

THE WORK OF PROFESSOR JOANNA SHAPLAND AND ANGELA SORSBY

In 1993 Professor Joanna Shapland<sup>4</sup> and Angela Sorsby published “*Work and Training at the Junior Bar*”. This was an independent survey, conducted by means of a questionnaire sent to 334 barristers who had been identified from the pass list from the Inns of Court School of Law for 1989/90 and the 1993 Bar Directory. In 1997 Shapland and Sorsby carried out a second independent survey by sending a questionnaire to 522 tenants identified by compiling a list of those under 4 years call in the 1997 Bar Directory. That report was entitled “*The Junior Bar in 1997*”. Following implementation of the Protocol in September 2001, a further survey of pupil barristers and junior tenants was undertaken by the Young Barristers’ Committee. The aim was to establish whether pupils and junior members of the Bar undertaking criminal work were receiving re-imburement from solicitors for the work they did, how quickly, and at what rate. Finally, in 2003 Shapland and Sorsby published “*The Junior Bar in 2002*”, the results of a third independent survey focussing on those called to the Bar in 1998.

The relevant data from these four surveys are summarised in Appendix 1 to this Response. The surveys of Shapland and Sorsby demonstrate a consistent and worrying pattern over 9 years of analysis. They plainly demonstrate that junior barristers throughout the country are finding levels of remuneration in publicly funded work a major problem. Supply side confidence greatly decreased between 1993 and 2002. The numbers of those reporting significant difficulty rose by 16% over this period, with those in London being hit hardest and the problem getting worse – 33% in 1993 as against 49% in 2002. Significantly, in their analysis of their 2002 survey, Shapland and Sorsby commented that:

“...most of our respondents had recovered from their financial difficulties by the time of the survey (3-4 years after pupillage). Some 15% in London and 20% out of London were still finding it difficult or very difficult to manage at that time. However, those primarily involved in publicly funded legal work, especially criminal defence work..., now faced a new set of problems. This was the level of remuneration for appearing at court on pre-trial matters, coupled with delays in receiving fees. The problems of fees in criminal work had begun to be apparent in 1997, but have clearly worsened significantly since then. **We find this quite appalling. Clearly there is a need not to be profligate with legal assistance, but criminal defence work is one of the key areas where human rights are most at risk. Either solicitors are not passing on to those they instruct a reasonable sum for representing their own clients, or the level of fees is derisory, particularly given travel costs.**”  
[Our emphasis added]

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<sup>4</sup> University of Sheffield

## APPENDIX 1

### Surveys on Fees for the junior bar

Over the years a number of surveys have been undertaken, both by the YBC and others. The key results on the issue of fees are set out below.

#### The 1993 survey

In 1993, Joanna Shapland and Angela Sorsby sent out questionnaires to 334 barristers who had been identified by a comparison of the pass list from the Inns of Court School of law for 1989/90 with the 1993 Bar Directory. The questionnaire was followed up by a reminder notice before the results were collated. The survey received 159 responses, a 48% response rate. The analysed results were published in "Work and Training at the Junior Bar". In relation to fees, two questions were of relevance:

- (a) What problems the responding practitioners had encountered with legal aid fees, in terms of the level of remuneration.
- (b) What problems they had encountered with getting fees in.

The responses were as follows:

- (a) What problems the responding practitioners had encountered with legal aid fees, in terms of the level of remuneration.

	Not a problem	A slight problem	A major problem	NA
LONDON	27.8	30.0	33.3	8.9
PROVINCES	38.7	30.6	29.0	1.6
OVERALL	31.6	29.7	32.9	5.8

- (b) What problems they had encountered with getting fees in.

	Not a problem	A slight problem	A major problem	NA
LONDON	20.0	35.6	44.4	0.0
PROVINCES	16.1	41.9	40.3	1.6
OVERALL	18.1	38.1	43.2	0.6

In their analysis of these results, Shapland and Sorsby commented [at p.72]:

“Current financial problems [of junior barristers] were not caused only, or even substantially, by lack of work. One of the main reasons for financial difficulties was the problem in getting fees in. Only 18% of the tenants reported they had experienced no problems in this respect. Forty three percent said that getting fees in was a major problem. One respondent commented that this was the single most pressing problem for junior barristers, adding that it was worse for those at the junior end of the Bar and that only 30% of earnings may actually come in during the first year. Another source of financial difficulty was seen to be the level of remuneration of legal aid work. Around two thirds of the tenants saw this as a problem. It was a major problem for a third of the respondents.”

### **The 1997 survey**

In 1997 Shapland and Sorsby carried out a second survey by the same method. This time the questionnaire was sent to 522 tenants, identified by compiling a list of those under 4 years call in the 1997 Bar Directory. 213 responses were received on this occasion, a response rate of 41%. “The Junior Bar in 1997” addressed the same questions in relation to fees as its 1993 predecessor.

The results were as follows:

- (a) What problems the responding practitioners had encountered with legal aid fees, in terms of the level of remuneration.

	Not a problem	A slight problem	A major problem	NA
LONDON	32.6	34.1	29.5	3.9
PROVINCES	36.4	48.1	15.6	0.0
OVERALL	34.4	39.2	23.9	2.4

- (b) What problems they had encountered with getting fees in.

	Not a problem	A slight problem	A major problem	NA
LONDON	20.8	49.2	30.0	0.0
PROVINCES	23.4	37.7	40.0	0.0
OVERALL	21.9	44.8	33.3	0.0

In their analysis of these results, Shapland and Sorsby commented [at p.103]:

“A major cause of problems, especially in pupillage and the early days of tenancy, are cash flow problems caused by the lag in receiving fees. Pupils and junior tenants may have to wait a long time for their fees because they tend to be working on the early stages of cases. The vast majority of respondents in this survey (78%) had experienced at least some problems in getting fees in ...

The problem of getting fees in does seem to have improved since the 1993 survey. Overall slightly more barristers (22% as compared to 18%) said they had experienced no problems in getting fees in and considerably fewer barristers (33% as compared to 43%) said they had experienced major problems in this regard. The trend was for an improvement in the situation for barristers both in and out of London but the specific pattern of change was slightly different in the two places. ...

A further cause of financial difficulty is the level or remuneration for legal aid work. About two thirds of the respondents saw this as a problem. It had been a major problem for around a quarter of the respondents. The level of remuneration of legal aid fees was more of a problem for barristers in than out of London, possibly due to the greater earlier specialisation of barristers in London (and so the higher reliance of some on legal aid work), possibly due to the higher cost of living for London barristers.

On the whole, the level of remuneration of legal aid work was seen as a less of a problem in this survey than in the 1993 survey. A few more barristers (34% as compared to 32%) said this was not a problem and considerably fewer barristers (24% as compared to 33%) said it was a major problem. The situation has improved for barristers both in and out of London. However, for those barristers who do a lot of legal aid work, the level of remuneration may still be a problem, as is the fear that legal aid will be removed. Some of our respondents voice their fear about cuts in legal aid and the impact that graduated fees would have on the junior bar.”

### **The 2002 YBC survey**

In 2002, the YBC carried out a survey of its own focusing on the effectiveness of the Magistrates’ Courts Fees Protocol which was implemented in September 2001. This was sent to representative junior tenants in criminal chambers, and distributed with Bar News, the CBA newsletter, and through the Pupil Barristers’ Committee. 60 responses were received (excluding one from an employee of the CPS and one from a purely civil practitioner), including 5 responses from sets of chambers rather than from individuals. 81% were from Chambers in London.

The results were as follows:

47 said that their chambers were aware of the Protocol, and 6 said that their chambers were not (78.3% Yes 10% No)

21 said that they were paid £35 + 2/3<sup>rds</sup> travel and waiting for remands, paper committals and bail applications. 37 said that they were not (35% Yes 61.6% No)

19 said that they were paid 2/3<sup>rds</sup> solicitors fee or £60-120 + 2/3<sup>rds</sup> travel and waiting for contested hearings and section 6(1) Committals. 36 said that they were not. (31.6% Yes 60% No)

18 said that they were being paid £45 + 2/3<sup>rds</sup> travel and waiting for Crown Court bail applications. 33 said that they were not (13.3% Yes 55% No)

8 said that they were paid within the month, 52 said that they were not (13.3% Yes 86.6% No)

Comparing these figures with those obtained in the 1993 and 1997 surveys, it could be seen that:

- (a) the figures are at a higher percentage level as in those surveys in relation to the level of remuneration, at a 55-61% level, rather than the 40% level.
- (b) the problem of getting fees in had become considerably worse.

### The 2002 survey

In 2002 Shapland and Sorsby carried out a third survey by sending a questionnaire to all those called to the Bar in 1998, some 1429 people, including those in independent and employed practice, non-practising barristers and overseas members of the Bar. 32% of those in private practice responded to the questionnaire.

The 2002 survey reported that "...one of the key difficulties for barristers in the early years was finance, in the sense of the level of remuneration of publicly funded legal assistance. The extent of the problem has risen since 1997. In 2002, 46% of respondents saw the level of public legally aid fees as a major problem, the majority of whom were in general common law chambers, criminal sets or family/matrimonial chambers. Difficulties in getting fees in were also a significant cause for concern for many, again concentrated in general common law chambers." (at page iv).

The questions posed on remuneration were broadly similar to that of previous years:

- (a) In Chambers, since starting practice on your own, have you experienced problems with the level of remuneration of legal aid fees?

	Not a problem	A slight problem	A major problem
LONDON	19.5%	31.3%	49.2%
PROVINCES	25.5%	34%	40%
OVERALL	21.9%	32.5%	45.6%

- (b) In Chambers, since starting practice on your own, have you experienced problems with getting fees in?

	Not a problem	A slight problem	A major problem
LONDON	28%	36.5%	35.3%
PROVINCES	30%	38%	32%
OVERALL	28.8%	37.1%	34.1%

Analysing these results, Shapland and Sorsby stated (at page 110-111):

“...most of our respondents had recovered from their financial difficulties by the time of the survey (3-4 years after pupillage). Some 15% in London and 20% out of London were still finding it difficult or very difficult to manage at that time. However, those primarily involved in publicly funded legal work, especially criminal defence work..., now faced a new set of problems. This was the level of remuneration for appearing at court on pre-trial matters, coupled with delays in receiving fees. The problems of fees in criminal work had begun to be apparent in 1997, but have clearly worsened significantly since then. We find this quite appalling. Clearly there is a need not to be profligate with legal assistance, but criminal defence work is one of the key areas where human rights are most at risk. Either solicitors are not passing on to those they instruct a reasonable sum for representing their own clients, or the level of fees is derisory, particularly given travel costs.”