



# Prison Law Funding: A Consultation Response

July 2009

*Criminal  
Defence Service*



legal aid – fair access to justice



# **LEGAL SERVICES COMMISSION**

## **PRISON LAW FUNDING: A CONSULTATION RESPONSE**

**15 July 2009**

## Foreword

In this, the 60<sup>th</sup> anniversary year of the *Legal Aid and Advice Act 1949*, we can be proud of the role that legal aid has played in providing advice, support and representation to the millions of people who otherwise would not have been able to secure their rights in the justice system. The Legal Services Commission (LSC) helps the most vulnerable in our society and enables people to protect their rights and deal with their problems.

In the current economic climate it is more important than ever to demonstrate that public funds are being spent in the most effective way, that we focus on achieving value for money across the legal aid scheme and that we ensure that legal aid funding is targeted at those who need it most.

Legal aid spending is now running at over £2 billion a year, with Prison Law costing around £21.6 million in 2008/9. If we do nothing and costs continue to rise at the current rate, we can expect spending on Prison Law to increase to over £44 million by 2011/12, a rise that is not sustainable within a limited legal aid budget.<sup>1</sup>

We understand that factors beyond the control of both Prison Law providers and the LSC, such as changes to the criminal justice system, may have contributed to increasing case costs and the increasing number of Prison Law cases. However, the LSC has to do everything it can to ensure that we have control over the amount that we spend on Prison Law, that we pay for the right cases and that prisoners receive quality advice for their legal problems.

Prison Law is one of the last remaining areas of work undertaken under the crime contract that is not paid for by some form of fixed or standard fee. By introducing a system of fixed and standard fees for Prison Law, we will be promoting efficiency. We will also be giving Prison Law providers greater scope to benefit from efficiency savings and increased financial certainty. The introduction of a supervisor standard for Prison Law will ensure that Prison Law providers meet more demanding quality standards and provide a quality service to Prison Law clients.

I am grateful to all those who responded to the consultation on Prison Law funding and to those who attended our events around the country to discuss the proposals. We have listened with great interest to the views expressed and have reflected them in this consultation response. I am particularly grateful to the Law Society (TLS) and the Association of Prison Lawyers (APL) who engaged constructively with the LSC both during and after the consultation period.

As a result of the consultation process and ongoing engagement with the TLS and APL, we have made some changes to the proposals that we consulted on for implementation in July 2010. We have recalculated and revised the fees, revised the criteria for becoming a Prison Law supervisor and we have also decided to assess the effect of these changes before we consider introducing new matter starts for certain types of Prison Law advice and assistance cases. We will implement a revised sufficient benefit test for Prison Law as we believe that this, coupled with more detail in the CDS Contract 2010 about cases that we expect to fund, will ensure that funding is targeted at

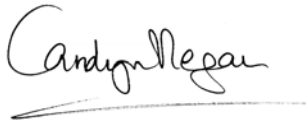
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<sup>1</sup> Prison Law costs for 2008/9 were not available when the *Prison Law Funding: a consultation paper* was published in February 2009. We have revised our forecast figures to reflect the final figure for 2008/9. Forecast figures set out in the consultation paper were £26.1 million for 2008/9 and £45.7 million for 2011/12.

those that need it most. In addition, we will not be making any changes to the way that Prison Law services are delivered (Phase 2 in the consultation paper) at this stage.

Changes to the fees, a revised sufficient benefit test and a supervisor standard for Prison Law will be introduced when the new CDS Contract 2010 begins in July 2010. We intend to undertake a post-implementation review of these changes and report on our findings by the summer of 2011. Following this review we will consider whether it would be suitable to introduce new matter starts for certain types of advice and assistance cases.

We believe that the proposals set out in this response represent the best approach to Prison Law, will ensure the long term sustainability of this important area of work, and achieve our aims of quality and cost control.

A handwritten signature in black ink, reading "Carolyn Regan". The signature is written in a cursive style and is underlined with a single horizontal line.

Carolyn Regan  
**Chief Executive, Legal Services Commission**

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# 1. Executive summary

- 1.1 This is the response to *Prison Law Funding: a consultation paper* published in February 2009. We received a total of 62 formal responses to the consultation and over 100 providers attended five Prison Law consultation events.
- 1.2 The consultation focused on proposals to ensure the provision of a quality service and better control the volume and cost of Prison Law cases. It asked respondents to give their views on a number of proposals which included the introduction of a system of new matter starts for, three options for fees and the introduction of a supervisor standard for Prison Law. The consultation paper also sought initial views on alternative ways of Prison Law services being delivered. Finally, we sought views on a Draft Impact Assessment of the proposed changes.
- 1.3 Following the consultation, the workshops with practitioners and other feedback we received we are seeking to implement the following changes as part of the CDS Contract 2010:
  - a new fee scheme based on fixed and standard fees (which are different to those published in the consultation document)
  - a revised sufficient benefit test coupled with more clarity in the contract about the type of cases that we expect to fund
  - a supervisor standard for Prison Law, based on a portfolio of cases and 350 hours of Prison Law work per year.
- 1.4 We will not introduce a system of new matter starts at the beginning of the CDS Contract 2010. Instead, we will include a clause in the CDS Contract 2010 that allows us to implement new matter starts only if other proposals (such as the revised sufficient benefit test and new supervisor standard) fail to control the number of Prison Law cases in the way that we anticipate.
- 1.5 We will carry out a post-implementation review of the changes that will take effect at the start of the CDS Contract 2010 and report on our findings by the summer of 2011. We will use this review to inform any further decisions about new matter starts for Prison Law.
- 1.6 If, following the findings of the post-implementation review, we decide to introduce a system of new matter starts, we would provide no less than three-months' notice of any changes to providers and would introduce the system by July 2012 at the latest.
- 1.7 We have considered the responses to the consultation and feedback provided at consultation events about the proposals for changing the way Prison Law services are delivered (Phase 2 in the consultation paper). If we decide to make any further changes to Prison Law, informed by the outcome of the post-implementation review, we would carry out a further consultation and consider piloting changes under our statutory powers. We do not envisage that any pilot carried out during the CDS Contract 2010 will affect the scope of the contract.
- 1.8 We will also work with the APL and TLS to develop guidance on Prison Law funding that we will aim to have in place in time for the start of the CDS Contract 2010. This means that Prison Law providers will have a readily accessible point of reference when considering and discussing with Prison Law clients whether cases should be funded.

## 2. Introduction and contact details

2.1 This document is the response to *Prison Law Funding: a consultation paper* which was published by the LSC on 10 February 2009 and subject to a 12-week consultation period that ended on 5 May 2009. It covers:

- the background to the response
- a summary of the responses to the consultation received
- detailed responses to the specific questions raised
- the next steps following this consultation
- the Final Impact Assessment.

2.2 Further copies of this response and the consultation paper can be obtained by contacting the address below:

Policy Team  
Legal Services Commission  
4 Abbey Orchard Street  
London  
SW1P 2BS

Telephone: 020 7783 7201

2.3 This report is also available on the LSC's website: [www.legalservices.gov.uk](http://www.legalservices.gov.uk).

2.4 If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Cate Jolley, LSC Consultation Coordinator, via email at [consultation@legalservices.gov.uk](mailto:consultation@legalservices.gov.uk) or on 020 7783 7200.



### 3. Background

- 3.1 Prison Law funding covers advice and assistance for matters relating to legal issues arising in prison, such as progression through the prison system, advocacy assistance at disciplinary hearings and advocacy assistance at Parole Board hearings. In 2008/9, we funded 42,973 Prison Law cases at a cost of £21.6 million. This was an increase from 33,098 cases in 2007/8 at a cost of £16.3 million.<sup>2</sup>
- 3.2 We recognise that these 2007/8 figures are not consistent with those published in the consultation paper. At the time the document was published, due to issues with the LSC's Supplier Management System, a financially prudent view was taken of the LSC's liabilities in 2007/8. Now final validated figures for 2008/9 have been confirmed, the assumptions made have been found to be overly conservative and for this reason we have revised the outturn and forecast. In any event, growth in Prison Law costs when analysed against either set of figures is broadly consistent (an increase of approximately one third).
- 3.3 The aims of the proposals for Prison Law are to ensure that prisoners receive quality advice for their legal problems, that we have better control over the amount that we spend on Prison Law and that we pay for the right cases at the right point.
- 3.4 A summary of the proposals we consulted on is set out below:

*Phase 1 – quality, volume control and cost control (to be implemented as part of the CDS Contract 2010):*

1. A system of new matter starts in Prison Law
2. A revised sufficient benefit test
3. One of three payment options for Prison Law:
  - Fees Option 1 – hourly rates
  - Fees Option 2 – standard fees and prior authorisation for disbursements
  - Fees Option 3 – fixed fees with a standard fee for Parole Board hearings and prior authorisation for disbursements.
4. The introduction of a Prison Law supervisor standard

*Phase 2 – new methods of delivery (to be piloted as part of the CDS Contract 2010):*

5. Alternative ways of delivering Prison Law services

- 3.5 A summary of the proposals that we consulted on compared with the scheme that we are implementing is set out in the table at Annex B.

<sup>2</sup> The figures for 2007/8 have been revised since we published the *Prison Law Funding: a consultation paper*. The figures for 2007/8 set out in the consultation paper were £19 million for spend and 39,193 volume respectively.

- 3.6 As well as a 12-week written consultation we also held five provider workshops in Leeds, Bristol, Manchester, London and Birmingham to talk to providers about the proposals and gain their views. We met with representative bodies, including the APL, TLS and UNLOCK (the National Association of Reformed Offenders) during and after the consultation period.
- 3.7 In preparing the Final Impact Assessment, we have considered all of the comments that we received and have undertaken more work to restate impacts and clarify impacts further. The Final Impact Assessment is at Annex C.

## 4. Summary of responses

4.1 We received 62 responses to the consultation from, amongst others, individual solicitors, solicitor firms, individual Prison Law clients and representative bodies of providers and prisoners. These included TLS, APL, the Legal Aid Practitioners Group (LAPG), Young Legal Aid Lawyers (YLAL) the Howard League for Penal Reform, the Prisoners' Advice Service (PAS) and UNLOCK (the National Association of Reformed Offenders). A break down of respondents is set out in the table below:

Solicitors, on behalf of their firm	27
Individual legal aid practitioner - solicitor, advisor or mediator (not on behalf of their organisation)	7
National provider representative body	5
Central government	1
Barrister on behalf of chambers	1
Member of the public	1
Regional or local provider representative body	1
Not-for-profit provider	1
Individual barrister	1
None of the above	15
Did not answer	2

4.2 Many of the responses and comments from providers at events had some common general themes. These included:

- Concern that good quality Prison Law providers were being penalised for changes in the criminal justice system that were beyond their control. '[T]he prison population has risen rapidly in the past 5 years...The proportion of prisoners serving indeterminate sentences has increased massively. Prisoners serving indeterminate prison sentences require the greatest input in terms of legal services as they cannot be released without an oral parole hearing at which they have the right to be represented.' (A provider)
- There was also a feeling that the non-specialist providers, who were able to undertake Prison Law work because they held an all classes Unified Contract (Crime) 2008, were having a negative impact on Prison Law quality and costs. 'It is unsurprising that [the current] set up has led to concerns about quality of work and an impact upon the cost of delivering this work.' (APL) 'There are currently too many suppliers dabbling in Prison Law.' (A provider)
- General agreement that the introduction of a supervisor standard, or similar accreditation for Prison Law, would ensure that case volumes and costs would be controlled because quality providers would be unlikely to take on the low value low merit cases that should not fall within the scope of Prison Law funding. 'It is our view that the figures that the Commission has obtained as to the cost of this work are skewed by the fact that there are effectively no quality or supervisor standards at present.' (APL)

- Many providers suggested that costs associated with travel and waiting were often beyond their control and driven by the prisons, who moved clients around frequently. 'Prisoners are very unlikely to spend their entire sentence in one prison and will be moved around the system either as part of sentence planning, for disciplinary reasons or simply as a result of overcrowding...it is both impractical and unnecessarily expensive to implement a system that requires a prisoner to change solicitors each time s/he moves to a new prison' (a provider).

4.3 Detailed responses to the specific questions that we asked in the consultation paper and charts showing a breakdown of how respondents answered each question are set out in Section 5. The percentages shown in the charts may not always add up to 100% due to rounding.

## 5. Responses to questions and the LSC's decision

### Proposal 1: New matter starts scheme for advice and assistance

- 5.1 A new matter starts scheme operates across the civil legal aid scheme. This involves the LSC allocating a set number of cases (or matter starts) at specific points in the year for providers to use to carry out their legal aid casework. Matter starts can be used as an effective measure to cap volumes of certain types of cases. Such a system does not currently exist for any cases carried out under the Unified Contract 2008 (Crime).
- 5.2 The consultation paper sought views on a system that allocated a limited number of matter starts for Prison Law advice and assistance cases. We proposed that matter starts would operate for certain advice and assistance cases only and not cases funded under advocacy assistance at disciplinary hearings or advocacy assistance at Parole Board hearings.

#### Questions we asked about Proposal 1:

##### Question 1

Do you agree with the proposal to introduce matter starts in Prison Law?

##### Question 2

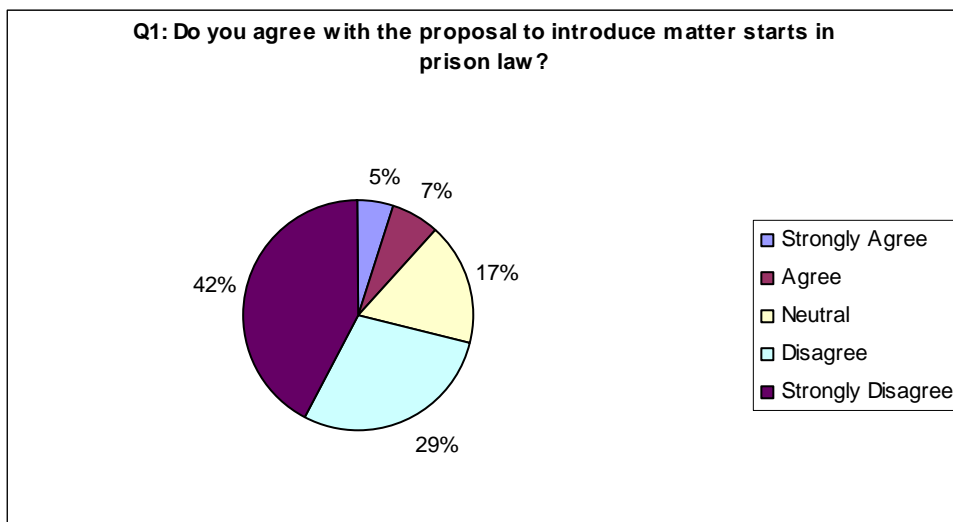
Do you agree with the proposals to set the number of matter starts at the volumes claimed in the 2008/9 financial year?

##### Question 3

Are there any other ways to contain volume increases?

#### Responses to Proposal 1

- 5.3 There were 59 responses to Question 1. Around 70% of respondents indicated that they would be against the introduction of a matter starts system for Prison Law. A breakdown of responses is shown in the chart below:

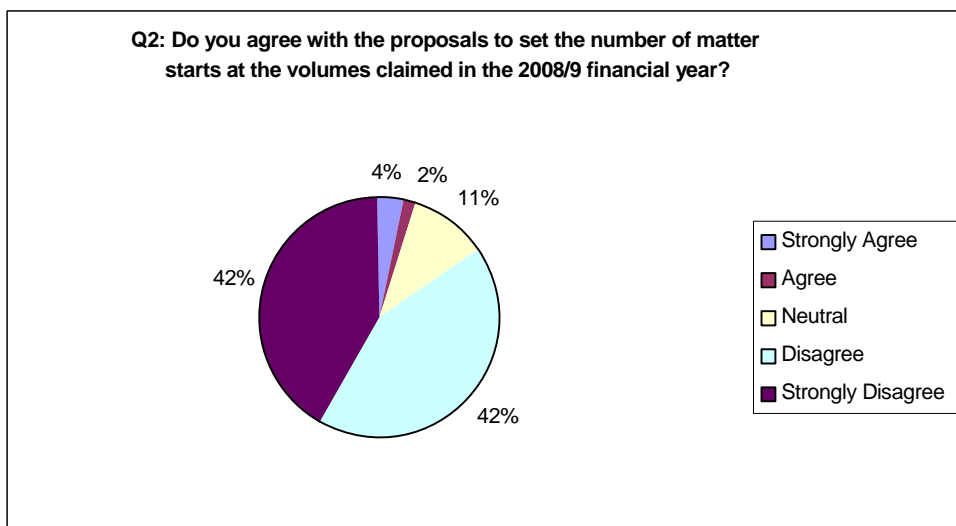


5.4 Consultation responses to the new matter starts proposal included:

- 'Introducing matter starts in Prison Law is probably more difficult than in other areas of law.' (LAPG)
- A system of matter starts, 'will undoubtedly lead to a cherry picking of what matters we are to start.' (A provider)
- '[Matter starts] may also encourage firms who have less work to fill their matter starts with unmeritorious cases.' (A provider)
- 'The introduction of matter starts would create bureaucracy and inflexibility.' (APL)
- '[Matter starts] would clarify the ability of suppliers to provide a reasonable and sustainable quantity of work in order to gain the experience and quality required and allow better supplier management.' (A provider)

5.5 More specifically, TLS thought that, 'In principle it may be appropriate to introduce matters starts for advice and assistance matters which do not involve human rights issues. However, there is a practical problem of determining in advance of obtaining the client's instructions, what the nature of the case is, as many cases involving human rights issues begin as advice and assistance matters.'

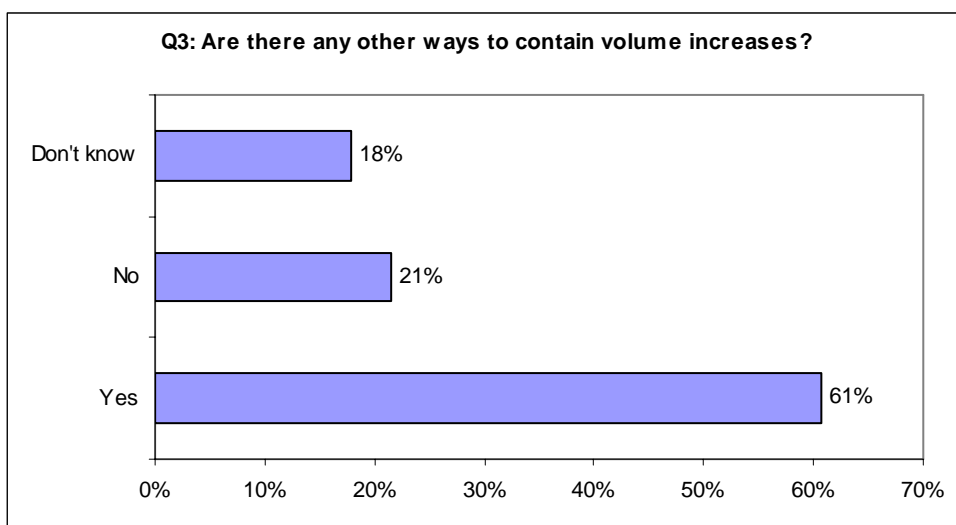
5.6 There were 57 responses to Question 2 with 84% of these disagreeing or strongly disagreeing with the proposal to allocate matter starts to firms based on the number of Prison Law cases that they had claimed for in 2008/9. A breakdown of responses is shown in the chart below:



5.7 Reasons provided for why new matter starts, if introduced, should not be based on 2008/9 figures included:

- A matter starts system is, 'Too formulaic and rigid for those wishing to expand in this area of law.' (A provider)
- Historic information would not reflect the 'increasing prison population' and the 'increase in cases being taken to the European court' would make it 'inevitable that there will be an increase of applications for legal aid.' (The Prison Reform Trust)
- The number of claims a firm made in 2008/9 did not take into account the instances where more than one matter was dealt with on the same file. 'The current system of payment makes it cheaper and more efficient to deal with related matters on one file.' (A provider)

5.8 Of the 56 respondents to Question 3, 61% thought that there were alternatives to new matter starts to control volumes. A breakdown of responses is shown in the chart below:



5.9 Respondents generally suggested that volume could be contained through the other proposals in the paper. 'We believe that volume increases could be

contained by a more careful application of the sufficient benefit test and through the introduction of a supervisor standard' (TLS). PAS concurred with this view stating that, '...these proposals should be tried and tested prior to a re-consideration of matter starts.'

### **LSC response to Proposal 1: New matter starts scheme for advice and assistance**

- 5.10 We will not introduce new matter starts when the CDS Contract 2010 begins in July 2010. We recognise the significant change a system of new matter starts for Prison Law would mean for crime providers. We agree with the respondents who suggested that, 'In relation to preventing unmeritorious or unnecessary cases from increasing volumes, the introduction of the supervisor standard is important.' (A provider) We think that it would be appropriate to assess the impact of our other proposals for Prison Law in the CDS Contract 2010, such as the supervisor standard, before we decide whether to introduce a new matter starts allocation system for certain advice and assistance cases.
- 5.11 However, we will include a clause in the CDS Contract 2010 that means that if the other volume control proposals do not have the desired affect, we will allocate a capped number of new matter starts in relation to certain advice and assistance cases. We recognise that there are factors beyond the control of the LSC and Prison Law providers, such as changes to the criminal justice system that can affect the number of Prison Law cases that may arise. However, the LSC expects to no longer fund low merit, low cost cases under the new arrangements for Prison Law. If we ascertain that, following a post-implementation review of the reforms employing improved Prison Law management information, we are still funding such cases we will introduce a system of new matter starts for certain types of advice and assistance cases to focus funding.
- 5.12 We intend to publish a report of the findings of a post-implementation review by summer 2011. If the findings of the post-implementation review suggest that a matter starts system might be beneficial in controlling the number of Prison Law cases, we would provide no less than three months notice to providers and introduce such a system under the CDS Contract 2010 by July 2012. This also means that if we did have to introduce matter starts system for Prison Law, we would be able to do so based on better management information about Prison Law work from the July 2010 contract.
- 5.13 If introduced, we would expect matter starts to operate for certain advice and assistance cases and not cases funded under disciplinary hearings or Parole Board hearings.
- 5.14 We will consult with TLS on the final wording of the new matter starts clause as part of the CDS Contract 2010 specification consultation in August 2009.

### **Proposal 2: Revise the sufficient benefit test**

- 5.15 The sufficient benefit test is applied to all areas of legal aid to determine whether a case qualifies for legal aid funding. The crime sufficient benefit test is set out in Part B4.1.2(2) of the Unified Contract (Crime) 2008 as follows: 'Advice and



Assistance may only be provided on legal issues concerning English law and where there is sufficient benefit to the Client, having regard to the circumstances of the Matter, including the personal circumstances of the Client, to justify work or further work being carried out.'

- 5.16 In the consultation paper we proposed that the sufficient benefit test in the CDS Contract 2010 should be further defined for Prison Law to include the following wording: 'There should be a realistic prospect of a positive outcome that would be of real benefit to the client.'
- 5.17 Alongside this, we also proposed setting out in more detail in the CDS Contract 2010 the types of cases that we would expect to pass the revised test and asked for views on what these cases should and should not be.
- 5.18 We want to clarify in the contract the cases we would expect to fund, and set out those which ordinarily we would not expect to fund, as we feel that the scope of funding for Prison Law advice and assistance cases is not clearly defined under the current Unified Contract (Crime) 2008. This means that, potentially, there are Prison Law advice and assistance cases being funded that could be resolved in other ways, for example through the prison internal complaints system. The aim of Proposal 2 was to ensure that we funded the right cases at the right point.

#### Questions we asked about Proposal 2:

##### Question 4

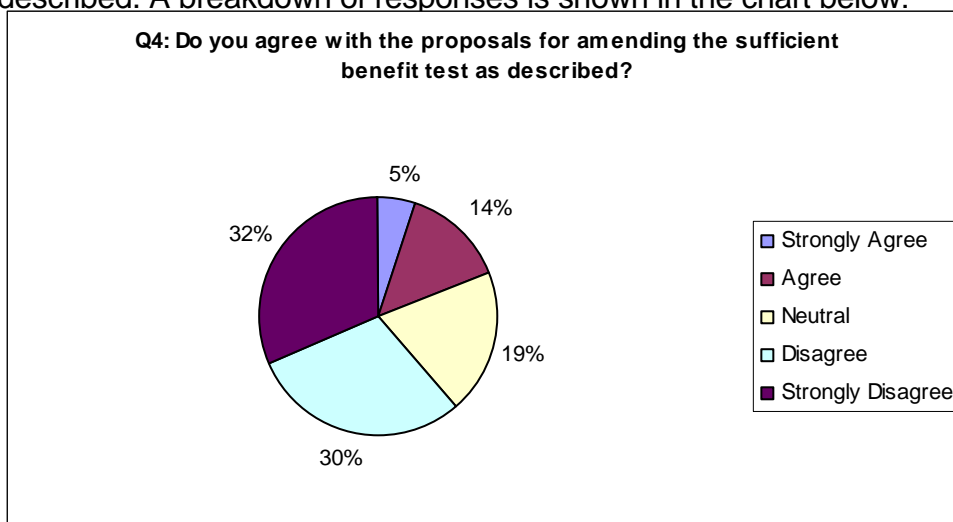
Do you agree with the proposals for amending the sufficient benefit test as described?

##### Question 5

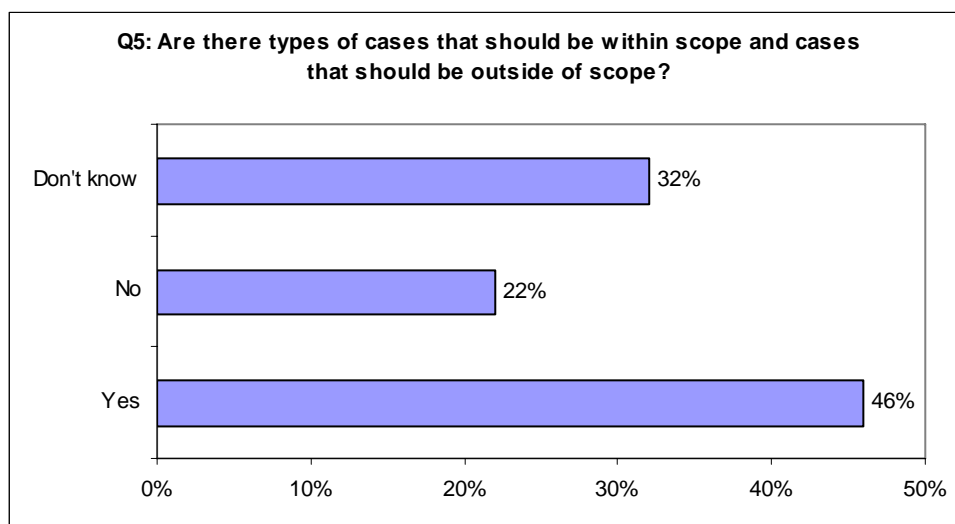
Are there types of cases that should be within scope and cases that should be outside of scope?

#### Responses to Proposal 2

- 5.19 There were 57 responses to Question 4. Of these, 62% either disagreed or strongly disagreed with the proposal to change the sufficient benefit test as described. A breakdown of responses is shown in the chart below:



- 5.20 It was suggested by one provider that the proposed change to the sufficient benefit test would be helpful because it, 'would remove those cases of little merit, allowing funding to be available for those where there is a real opportunity of achieving benefit for the client.' Another provider commented that 'this is an excellent addition to the test as there should, no doubt, be a realistic prospect of a positive outcome otherwise legal representation is pointless.'
- 5.21 However, the APL thought that while the current test 'might be improved with greater clarification' they were 'not convinced that the proposed change is the right way forward.' TLS suggested, 'an alternative approach that leaves the sufficient benefit test as it is but with detailed guidance as to the application of the test.'
- 5.22 Of those who were against the change, it was suggested that the current test worked well. 'The proposed test is aimed at eliminating spurious cases, which the current test, properly applied, already achieves.' (A provider)
- 5.23 In addition, a positive outcome for Prison Law was considered to be difficult to define. 'Prison Law is such a varied area that it would be very difficult to define what is a positive outcome especially with a prisoner serving a lengthy sentence.' (A provider)
- 5.24 Of the 50 respondents to Question 5, the majority (46%) thought that there were some cases that should be in the scope of Prison Law funding and some cases that should be outside of scope and 33% did not. A breakdown of responses is shown in the chart below:



- 5.25 Examples of cases that should be in scope included:
- '[A]ll matters relating to parole, recall hearings, re-categorisation, sentence planning and disciplinary hearings should automatically be within scope...this is not intended to be an exhaustive list. The only matters that should clearly be out of scope are those that do not concern matters of English law.' (TLS)
  - 'i) Any issue regarding the prisoner's containment, for example; categorisation, locality, sanitation and health and safety; ii) Anything that

involves risk to the prisoner; iii) Any cases involving the prisoner's status and entitlements. eg; courses and education; iv) Any cases which involve how the Prison Service manage risk ...; v) Anything regarding race of religious entitlements; vi) Anything regarding alleged breach of the prison rules by prisoners, staff or the service itself; vii) Any alleged breach of prison discipline; viii) Any Human Rights issue; ix) Recovery of property.' (A provider)

- '[O]nly matters which engage a genuine legal or human rights issue should be funded' however, it is 'difficult to be prescriptive about this given the wide range of issues prisoners face.' (PAS)
- 'We would prefer to see items within scope and subject to a sufficient benefit test rather than out of scope completely – this would allow for practitioners to consider these cases and the LSC to exercise discretion when necessary.' (LAPG)

5.26 Comments on cases that should be outside of scope were:

- '[L]argely, cases which would have minimal benefit or impact upon the prisoner.' (A provider)
- '[I]ssues relating to the loss of property...should be outside scope.' (A provider)
- 'Cases where it is reasonable to have followed internal procedures and these have not been followed' although given that not all Prison Law clients might be able to use the internal processes, 'This would have to be a flexible test.' (A provider)

**LSC response to Proposal 2: revise the sufficient benefit test**

5.27 We feel that while Prison Law supervisors correctly applying the sufficient benefit test is likely to have a positive effect on ensuring that we fund the right cases, it is important for both the LSC and providers to have clearer definition about the types of advice and assistance cases that may be funded under the Prison Law part of the CDS Contract 2010.

5.29 We think that the combination of a more specific sufficient benefit test for Prison Law (stressing a realistic prospect of a positive outcome) along with a non-exhaustive list of categories of cases that the LSC would expect to fund set out in the CDS Contract 2010, and of cases which the LSC would not ordinarily expect to fund, will ensure that funding for Prison Law is more focused on the right cases. We know that we will not be able to produce an exhaustive list of cases that we will and will not fund and there will always be exceptions, which would have to be justified.

5.30 We have considered the suggestions for types of cases that should and should not be funded that were provided in consultation responses, at the provider events and by the APL.

- 5.31 Generally, the LSC would expect to fund advice and assistance cases which relate to an individual's progression through the prison system. For example, help with accessing offending behaviour courses, issues arising out of categorisation and advice on recall. We would also expect to fund advice for progress through the prison system for those serving life sentences (as well as other long-term and Indeterminate Sentence for Public Protection prisoners).
- 5.32 The LSC would not ordinarily expect to fund complaints about an individual's treatment, which are more suitable to be resolved through the prison internal complaints mechanism. This would apply unless the individual has mental health problems or learning difficulties such that, even with the help of other prisoners or prison staff, he or she is not able adequately to formulate his or her complaint effectively. In such cases, it may be practically impossible for him or her to use the internal complaints process without some input from a lawyer to help formulate a complaint.
- 5.33 We have also listened to providers' concerns about the lack of clear guidance about Prison Law funding and will work with the APL and TLS to develop guidance on Prison Law funding that we will aim to have in place in time for the start of the CDS Contract 2010. This means that Prison Law providers will have a readily accessible point of reference when considering and discussing with Prison Law clients whether or not their case should be funded.

### **Proposal 3: Addressing costs**

- 5.34 To achieve more control over rising costs, the consultation paper proposed three options for paying for Prison Law:  
Fees Option 1 - retain the current hourly rates system (but better control costs under it)  
Fees Option 2 - introduce standard fees for advice and assistance, disciplinary hearings and Parole Board hearings  
Fees Option 3 - introduce fixed fees for advice and assistance and disciplinary hearings and standard fees for Parole Board hearings.
- 5.35 We also sought views on whether there should be prior authority from the LSC before disbursements are paid.
- 5.36 The standard fee and fixed fee levels in the consultation paper were based on non-London average case costs for claims made in 2007/8.

#### **Fees Option 1 – current hourly rates system**

- 5.37 Prison Law funding currently covers three areas of work: advice and assistance, advocacy assistance at disciplinary hearings and advocacy assistance at Parole Board hearings. Providers are paid at hourly rates and claim for fee-earning work, travel time, waiting time and disbursements. All three areas of work are self-authorized to a limit. The limits by category are:
- advice and assistance (on legal issues arising for prisoners concerning their sentence or treatment in the prison system) - £300
  - advocacy assistance for disciplinary hearings - £1,500
  - advocacy assistance for Parole Board hearings - £1,500.

**Questions we asked about Fees Option 1:**

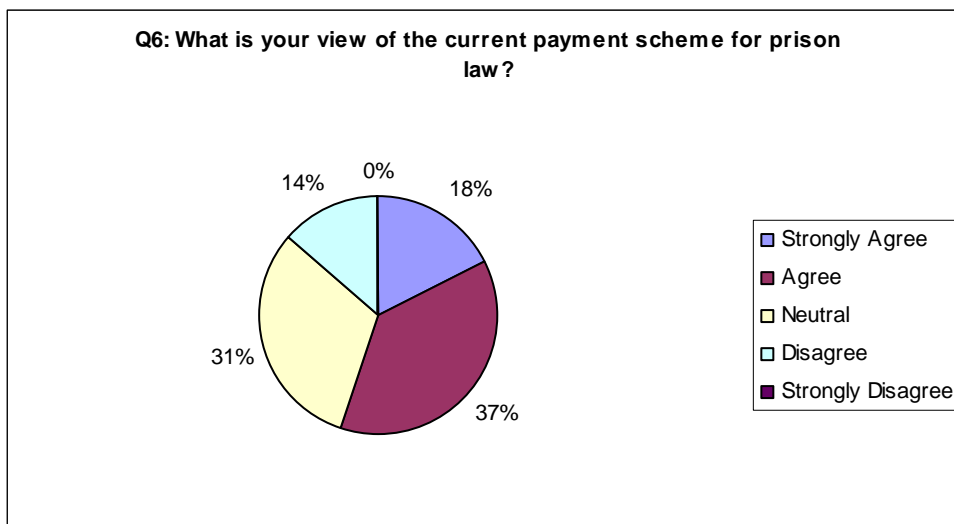
**Question 6**

What is your view of the current payment scheme for Prison Law?

**Question 7**

Could costs be better controlled within an hourly rate payment scheme?

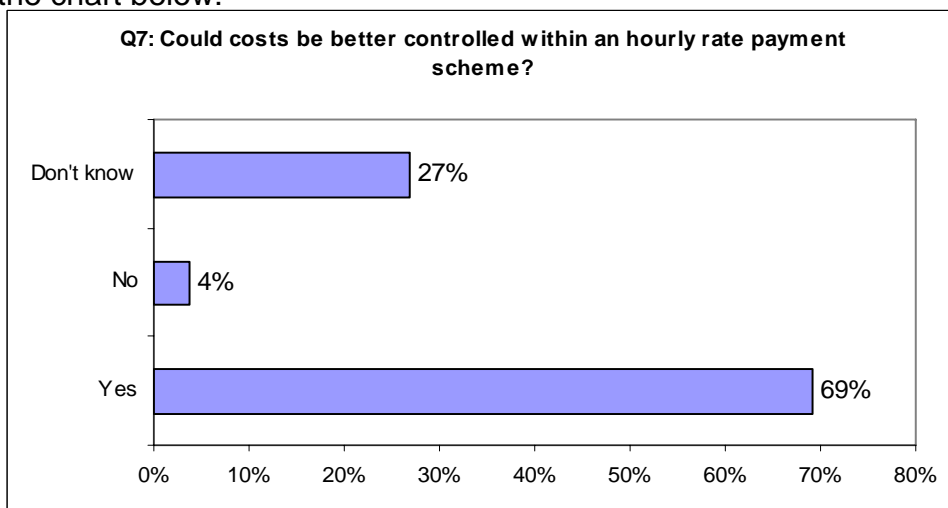
5.38 There were 51 responses to Question 6. A breakdown of responses is shown below:



5.39 The majority of respondents (55%) believed that the current hourly rates system was the fairest way of paying for Prison Law work. 'The current system, if properly enforced, ensures that only work which has actually and reasonably been carried out by practitioners is paid for.' (APL)

5.40 However, the current hourly rates paid for Prison Law work were considered to be too low, with this being the main reason provided by the 14% who said that they disliked the current payment scheme.

5.41 Of the 52 respondents to the question, 62% felt that costs could be better controlled under the current system. A breakdown of responses is shown in the chart below:



- 5.42 The APL summarised the views of several respondents. 'The introduction of a supervisor standard, clarification of the sufficient benefit test, the development of a good practice guide and enforcement of this within costs extension applications should lead to cases being carried out more efficiently by experienced practitioners.'
- 5.43 TLS concurred with this view. 'We believe that the introduction of a supervisor standard should lead to cases being carried out more efficiently by experienced practitioners who will also be able to apply the sufficient benefit test more effectively.'
- 5.44 Other comments on improving cost control under the current system included:
- '[W]hilst travel is inevitable, it may be proportionate to prevent firms from charging travel over and above a specified distance deemed to be reasonable.' (South Yorkshire Prison Lawyers Group)
  - 'Introducing matter starts would limit the exposure of the LSC on costs, supervisor standards would reduce the number of suppliers to the more effective ones, and the increased sufficient benefits test and scope restrictions would all control costs.' (A provider)
  - 'A proper system of prior authority for exceeding initial costs limits and incurring any disbursements (including travel and travel expenses) would provide effective control.' (A provider)
  - '...there could be other limits involving a limited travel allowance and then it would be up to a firm to decide whether or not it travels some considerable distance to see a client, or whether it is able to instruct a local agent to assist.' (A provider)
- 5.45 2% of respondents thought that costs could not be controlled better under the hourly system, with one provider suggesting that, 'the system works as best as can be expected within the hourly rate payment scheme,' and 27% did not know.
- 5.46 Maintaining the present system of paying hourly rates was not an option favoured by the LSC, as it would not give us the same level of control over expenditure as the other options that standardise payments. We also felt that the hourly rates system encourages inefficiency as it pays for inputs rather than outputs.

### **Fees Option 2 and Fees Option 3 - fixed and standard fees**

- 5.47 Elsewhere across criminal and civil legal aid, fixed, standard and graduated fee schemes have been introduced to control costs. We believe that these are an effective way of managing funding for both the LSC and providers as they:
- improve value for money
  - help maintain control of average case costs
  - improve certainty of expenditure for the LSC and certainty of income for providers

- allow providers an increased opportunity to identify innovative and efficient ways of working.

5.48 We consulted on two possible combinations of standard and fixed fees:

1. The first (Fees Option 2 in the consultation paper) involved three standard fees for advice and assistance, two standard fees for disciplinary hearings and two standard fees for Parole Board hearings.
2. The second was a combination of standard and fixed fees (Fees Option 3 in the consultation paper) and consisted of fixed fees for both advice and assistance and disciplinary hearings and two standard fees for Parole Board hearings.

5.49 Both combinations of standard and fixed fees in the consultation paper had the following characteristics:

- prior authority for disbursements
- travel and waiting wrapped up in the fees and not counting towards the amount of time spent on the case in relation to meeting the limits required to be paid the fixed or standard fees
- advocacy payments wrapped up in the fee meaning that counsels' fees would be agreed between the provider and counsel and the work claimed by the solicitor using his contractual hourly rates
- calculated based on non-London claims
- payment for exceptional cases consisting of the higher standard fee plus the costs incurred above the exceptional limit paid at hourly rates.

5.50 Having listened to the concerns raised about the fee levels and structures by providers at the consultation events and by respondents to the consultation, we have worked with the APL and TLS to recalculate the fees and the structure.

5.51 Set out below is a summary of the responses we had to questions 8 - 12, which sought views on fees options two and three. This is followed by a detailed explanation of the fee structure that we propose to implement. We believe that the new fees, set out at Annex A, and the new fee structure address many of the points raised by providers. An analysis of the impact of the revised fees is set out in the Final Impact Assessment at Annex C.

**Questions that we asked about Fees Option 2:**

**Question 8**

Do you agree with the proposal to introduce standard fees in Prison Law?

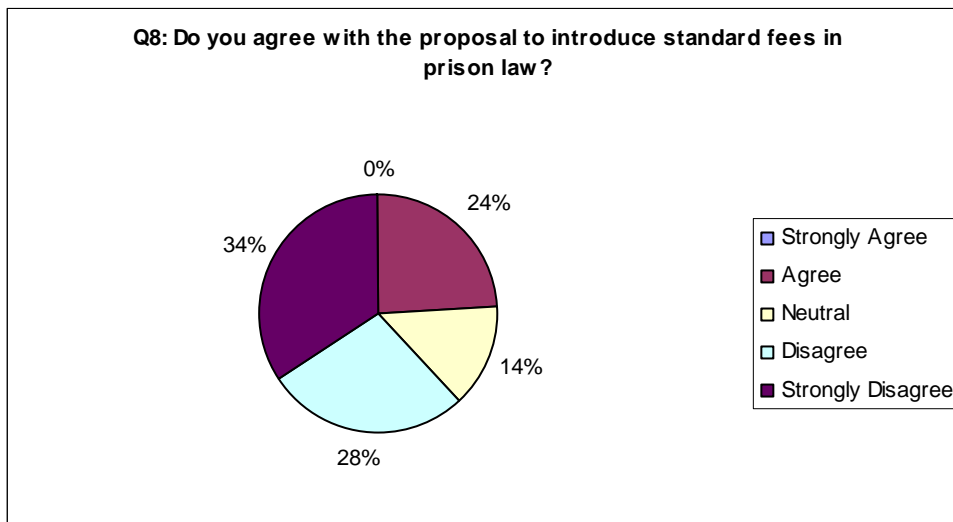
**Question 9**

Do you agree with the levels of payment in the proposed standard fees?

**Question 10**

What is your view of prior authorisation for disbursements?

5.52 There were 58 responses to Question 8. Of these, 62% either disagreed or strongly disagreed. A breakdown of responses is shown in the chart below:



5.53 Reasons for disagreeing with the proposal to introduce standard fees for Prison Law were largely based on the levels of payment proposed for the standard fees. ‘We would not oppose a standard fees scheme that offers a reasonable fee structure. We do not accept the standard fees levels proposed.’ (A provider)

5.54 The Prison Reform Trust agreed. ‘[I]ntroducing standard fees will enable costs to be monitored more effectively, however, we are concerned that travel and waiting times are not to be included.’

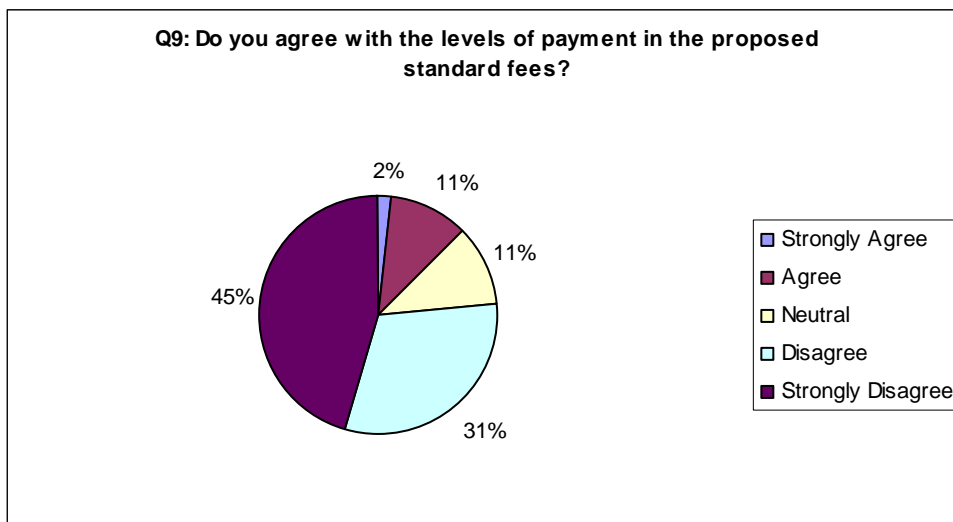
5.55 Other comments about the proposal to introduce standard fees for Prison Law included:

- ‘As a supplier we are used to a graduated fee regime and can operate it. The fee levels would seem reasonable, so long as the overall funding budget for Prison Law is not reduced. We would resist having to submit files for assessment in every case as this would be costly in time and resources.’ (A provider)
- ‘Prison Law is not a "standard" subject - the level of provision and the local connection which applies with criminal law is simply not applicable.’ (A provider)
- ‘We should also state that irrespective the level of the standard fee or fixed fee, it is inappropriate for travel and waiting time to be rolled up into the fee... where the exceptional case threshold is exceeded we can see no justification for not paying the difference between the higher standard fee and the higher limit that triggers the exceptional payment.’ (TLS)
- ‘With clients moving around the Prison establishments this would be wholly unfair as you may agree to represent a client in a local prison to



your office and then the client is moved 180 miles return journey, there is still a duty to conclude the clients matter.’ (A provider)

5.56 There were 55 responses to Question 9. Of these, 76% disagreed or strongly disagreed with the payment levels proposed. A breakdown of responses is shown in the chart below:

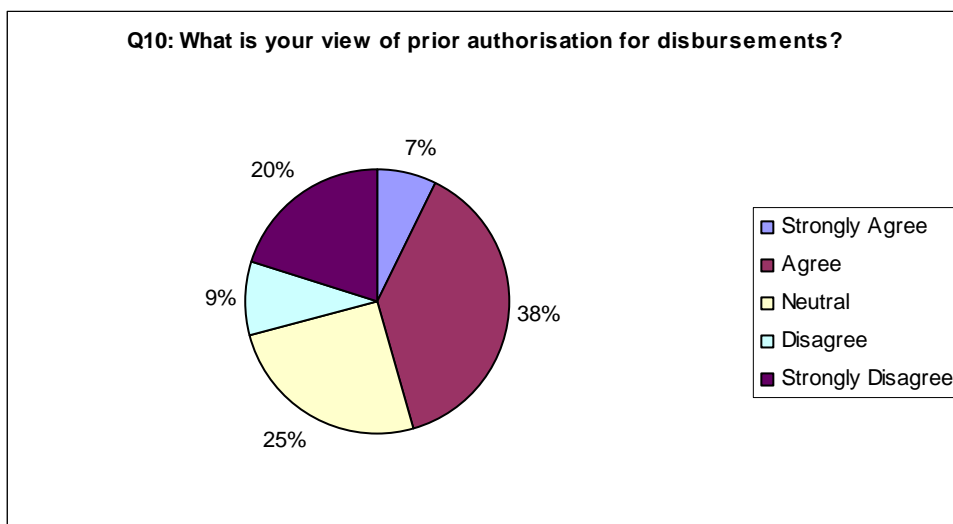


5.57 Respondents and attendees at provider events were particularly concerned about the proposed lower standard fee for advice and assistance of £42.55 (excluding VAT). It was suggested in meetings with the APL and TLS that the fee levels were distorted by the high volume of low value claims occurring in advice and assistance for Prison Law.

5.58 Other comments about the fee levels included:

- ‘The LSC has not taken in to account that the majority of prisons in England and Wales are away from the major cities and that the London prisons now are mainly remand/holding prisons that do not hold long term prisoners and the majority of prisoners once convicted are shipped to prisons outside of London. If the LSC fails to take into account the cost of living or having a practice in London then this will be unfair to London practices.’ (A provider)
- ‘A national fee scheme is welcomed.’ (A provider)
- ‘In particular it looks as if the lower standard fee of £42.55 would be too little for too many cases and the banding could result in too many reductions to make it worthwhile continuing with Prison Law.’ (LAPG)

5.59 There were 55 responses to Question 10. Of these, 70% of respondents were either in favour of or neutral about the introduction of prior authorisation for disbursements. A breakdown of responses is shown in the chart below:



5.60 The APL commented that this was, ‘a good idea if they act to give practitioners some certainty that once approved the fees will be paid without further review.’ TLS agreed, stating that they were, ‘prepared to accept prior authorisation of disbursements provided that applications are processed quickly and that prior authorisation ensures that the disbursement is paid in full on final assessment.’ However, both commented that disbursements should be paid on account.

5.61 Other comments on this proposal included:

- ‘[D]isbursements and in particular experts fees are an area across all areas of practice within legal aid where costs have increased disproportionately and this is an area which the LSC may wish to consider.’ (A provider)
- ‘This arrangement provides certainty for both suppliers and the LSC, so long as the authorisation process was simple and waiting times short.’ (A provider)
- ‘A proper system of file audits and the implementation of the supervisor standard may well address these concerns more economically.’ (A provider)
- ‘[A]nything over £75 should require approval.’ (A provider)

### Questions we asked about Fees Option 3:

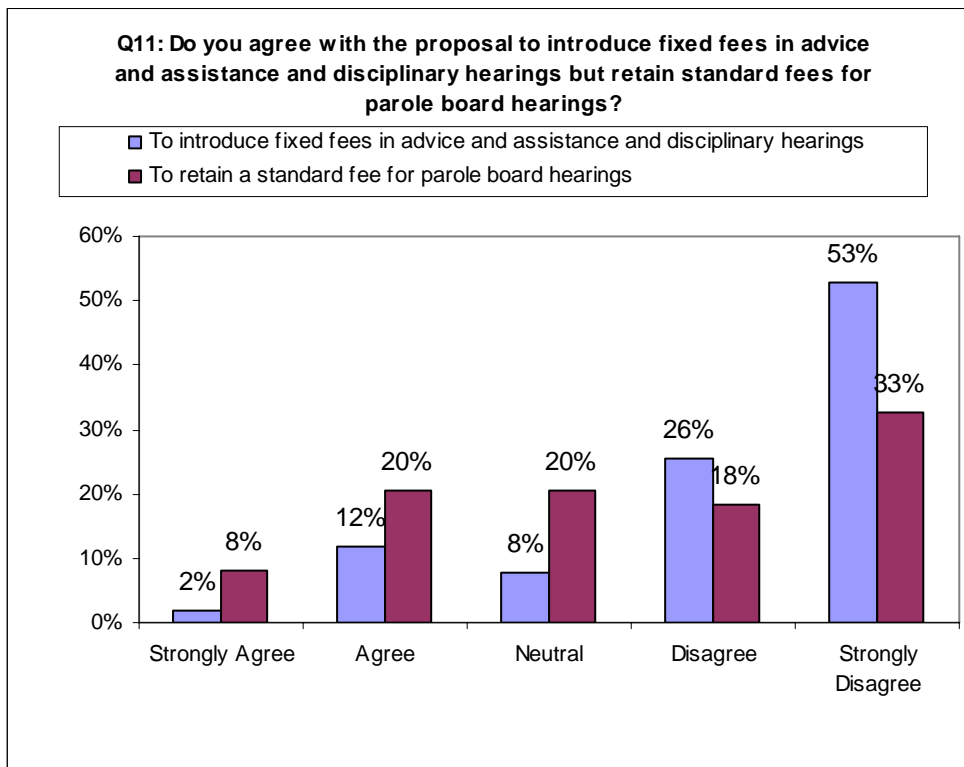
#### Question 11

Do you agree with the proposal to introduce fixed fees in advice and assistance and disciplinary hearings but retain a standard fee for parole hearings?

#### Question 12

Are there any alternative fees to standard or fixed fees that could be introduced that would have the same effect of controlling case cost?

5.62 There were 51 responses to the first part of Question 11 about introducing fixed fees in advice and assistance and disciplinary hearings. Of these, 78% of respondents either disagreed or strongly disagreed to the proposal to introduce fixed fees for advice and assistance and advocacy assistance at disciplinary hearings.



5.60 Of the 49 respondents who answered the second part of Question 11, 51% disagreed or strongly disagreed with combining the fixed fees with standard fees for Parole Board hearings.

5.61 It was thought that Prison Law is too complex for fixed fees with, 'too many variables to readily sit within a fixed fee regime.' (A provider)

5.62 There was also concern about the level of the fixed fees proposed in the consultation paper (£127.66 excluding VAT for advice and assistance and £297.87 excluding VAT for disciplinary hearings). 'Fixed fees at the levels proposed cannot sustain the effective provision of Prison Law advice at this level'. (APL)

5.63 As with the proposed standard fees, particularly for advice and assistance, it was again suggested in meetings with the APL and TLS that the high volume of low value Prison Law claims were distorting the fee levels.

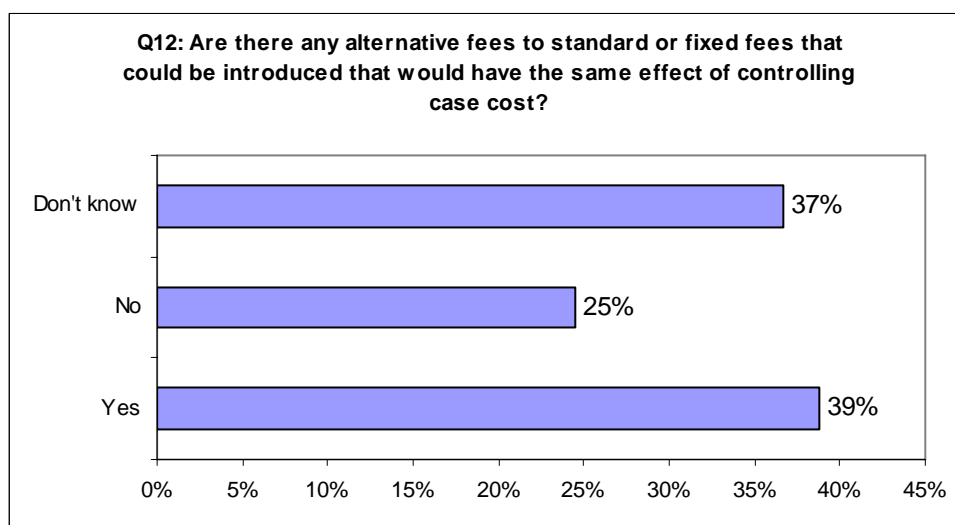
5.64 Other comments about this combination of the fees included:

- 'It will be uneconomic to do the work if too many cases end up slightly below the escape clause. The proposal to pay only the fixed fee plus the hours over the escape fee...would also seriously affect firms' financial viability.' (LAPG)

- ‘The one area of Prison Law that might potentially be amenable to fixed fees is in disciplinary matters before independent adjudicators...Further research is also needed to establish appropriate levels of fees in such cases and also to take account of travel and waiting times.’ (A provider)
- ‘The Society is opposed to the introduction of the proposed fixed fees for advice and assistance and disciplinary hearings. The standard fee scheme at least in principle is preferable as it does provide some mechanism for fees to vary according to the complexity of the case. This element is absent from the fixed fee proposal save for exceptional cases that escape the fixed fee.’ (TLS)
- ‘There would be no objection to this proposal if the fixed fee was set at a realistic level and the escape figure was closer to the fixed fee, say twice the amount.’ (A provider)

5.65 There were 49 responses to Question 12. Of these, 25% did not think there was any alternative to standard or fixed fees that could have the same effect of controlling costs.

5.66 Of those who responded that costs could be better controlled in ways other than a fixed or standard fee scheme, many pointed to better controls of the current hourly rates scheme. A breakdown of responses is shown below:



5.67 There was a belief among respondents that inexperienced practitioners took on cases, such as low-level treatment issues, that a more experienced practitioner would not and that this led to increased case costs and volumes. ‘The early introduction of a supervisor standard and/or accreditation would reduce wastage, as would better supervision of firms by the LSC.’ (South Yorkshire Prison Lawyers Group)

5.68 The APL thought that hourly rates should be maintained but suggested that, ‘The LSC may wish to consider variable standard fees based upon case type under the advice and assistance scheme. An alternative would be to apply the sufficient benefit test effectively under the current CDS extension arrangements as this tends to vary substantially.’ (APL)

- 5.69 Another suggested alternative to fixed and standard fees was that costs could be controlled better under the present system if there was a, 'move away from inexperienced providers toward established firms who have proven over years they can deliver a quality and value of service.' (A provider)

### **LSC response to Proposal 3: Addressing costs**

- 5.70 We carefully considered the feedback that we received about the fees set out in the consultation paper. Following the strong response that the proposed fees were not appropriate we considered several different methodologies for calculating fees. With input from TLS and the APL we have come up with a new set of fees and fee structure which is set out at Annex A. The fees are based on 2008/9 total case costs for non-London providers and therefore include claims for profit costs, travel and waiting.

- 5.71 The APL's view, echoed by many providers at events, was that the quality standards should be introduced first and new fees, modelled on the quality providers, should follow. However, our fees models (shared with the APL) showed that if we based the fees calculations on those providers that we expected to achieve the supervisor standard (those who had claimed 350 hours worth of prison law work in 2008/9) under advice and assistance and disciplinary hearings, this did not make a significant difference to the fees.

- 5.72 The key characteristics of the new fees are:

#### **A: Combination of a fixed fee and standard fees**

- 5.73 We will introduce one fixed fee for advice and assistance, two-tier standard fees for advocacy assistance at disciplinary hearings and two-tier standard fees for advocacy assistance at Parole Board hearings. The most expensive cases will be considered 'exceptional' and be paid wholly at hourly rates (see paragraph 5.87 for more detail about how we will pay for exceptional cases). The historic costs for travel and waiting have been included in the fee calculation.
- 5.74 Fixed fees work best where the actual case costs of the majority of cases are broadly similar and providers are undertaking a broad mix of cases. While no two Prison Law cases will be exactly the same, the relatively narrow spread of average case costs for Prison Law advice and assistance cases is an indicator that it is well suited to a single fixed fee. The fixed fee will work on a swings and roundabouts principle. Some cases will take less time to complete and some more. Over a period of time the work done and the fees paid should balance out.
- 5.75 While the case costs for advocacy assistance at prison disciplinary hearings are similarly contained within a relatively narrow range, the smaller number of these cases means that providers will have a limited ability to balance gains from simpler cases against losses from more complex ones. Therefore we will implement a two-tier standard fee for this work, with cheaper cases attracting a lower standard fee and more expensive cases a higher standard fee. A two-tier fee will also be introduced for advocacy assistance at Parole Board hearings, where there are a relatively low number of cases and case costs are spread more broadly, meaning that a single fixed fee would not be appropriate

for all cases. (See the Final Impact Assessment for more detail on the distribution of Prison Law cases and costs.)

**B: Claims of £50 and under for advice and assistance and claims of £75 and under for disciplinary hearings have been excluded from the fixed fee calculation**

- 5.76 Having listened to providers' concerns, we are aware that some very low cost advice and assistance cases and disciplinary hearing cases are for insubstantial matters, and tend to be carried out by inexperienced practitioners. Therefore, we expect that these cases would not be funded under the new fee scheme given the introduction of the supervisor standard and the revised sufficient benefit test.
- 5.77 Because of this, we have excluded cases with less than £50 profit costs from the calculation of the fixed fee for advice and assistance. This has resulted in the fee being higher than if these cases were included, as they pulled the average cost of advice and assistance cases down. The fixed fee for advice and assistance that we are now implementing is £220.12 (exclusive of VAT) and based on 2008/9 claims (as opposed to the fixed fee of £127.66 (exclusive of VAT) based on 2007/8 claims set out in the consultation paper).
- 5.78 We have also excluded disciplinary hearing cases with profit costs of less than £75 (approximately 11%).

**C: Fees calculated using 2008/9 claims from firms not based in London**

- 5.79 In the consultation paper, we said that we would base the fees on non-London averages, and that we would exclude claims from London based firms when calculating the fees. The claims from London providers on similar case types are significantly higher than those from providers based elsewhere in the country.<sup>3</sup> Of the 43 respondents who provided additional comments to Question 9, 16% (including the APL) raised non-London rates as an issue. We have considered these comments, however, we did not feel that we received any substantive justifications for this disparity and there was nothing to suggest that there is anything in particular about the characteristics or increased complexities of the cases that London based providers undertake.
- 5.80 The slightly higher profit costs paid to London providers under the current hourly rates system can only explain the difference between the higher averages in part (London providers are paid approximately 6% more in profit costs for advice and assistance but overall profit costs per case are on average 53% higher when carried out by London providers). We explain below why we have removed claims from London providers in calculating the fixed and standard fees and why we will not pay an uplifted rate to London providers who undertake the same work as non-London providers in future.
- 5.81 Comments on higher London costs included:

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<sup>3</sup> In 2008/9, advice and assistance cases (including VAT), cost on average £416 if completed by a London based firm and £263 if not. Advocacy assistance at prison disciplinary hearings cost on average £705 if completed by a London firm and £408 if not, and advocacy assistance at Parole Board hearings cost on average £1,777 if completed by a London firm and £1,177 if not. See the Final Impact Assessment for a break down of costs.

- London costs, 'reflect the expertise and ability to conduct cases properly and provide effective legal representation for clients - London firms, which are often larger and employ solicitors who practise in various disciplines are better able to understand the interplay of legislation and therefore better able to gain good outcomes for their clients.' (A provider)
- The LSC had, 'failed to take into account the cost of living in London. London weighting is accepted for all disciplines including the LSC.' (APL)
- 'When the criminal funding proposals were drawn up for fixed fees in the police station there was a meaningful attempt to scrutinise the financial data not only nationwide but for every police station scheme or duty police station area (e.g. in London).' (A provider)
- '[M]ost London prisons are remand or short terms facilities after sentence and that client's will normally be held in such establishments only for a short period of time. Practitioners in London, having built up such relationship, are then forced to travel further than other practitioners who have more local practices.' (PAS)

5.82 Around 94% of prisons and 69% of providers who would meet the supervisor standard based on 2008/9 profit costs are located outside of London. Our figures show that travel costs account for a larger proportion of total case costs of firms based in London than outside of London, with travel costs from London based firms being on average more than twice as high as travel costs claimed by firms based outside of London. In addition, there is a large concentration of Prison Law providers based in London (24% of all firms who claimed in 2008/09) whereas only 6% of all prisons are in London region<sup>4</sup>.

5.83 The police station fees are higher in London because they represent the cost of delivering services at police stations in London. Those prices apply to any provider delivering services in London, irrespective of where they are based. This rationale is not analogous where Prison Law fees are concerned, as the costs per case are not set on a site-specific basis.

5.84 We understand that prisoners move location and that this is beyond the control of the provider. However, we believe that the nature of Prison Law work means that a client should be able to contact a firm which is local to his prison establishment in respect of a prison law matter, rather than contacting the solicitor who represented him during his criminal proceedings or for a separate, earlier matter. A new Prison Law issue is often unrelated to the underlying criminal proceedings and can therefore be conducted by another more local provider. The LSC is in general looking to pay for more local-based advice and we understand that some limited travel may be necessary during a case, therefore we have included the amount claimed for travel (and waiting) by non-London based providers in 2008/9 in the calculations for the fixed and standard fees. In addition, we will pay for travel (up to a capped maximum) and waiting for the more complicated cases that trigger the exceptional case arrangements.

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<sup>4</sup> Out of 142 prison establishments, [www.HMPrisonServices.gov.uk](http://www.HMPrisonServices.gov.uk) lists nine as being based in its London region.

5.85 The supervisor standard for Prison Law will mean that cases do not take longer than necessary due to a lack of expertise and that there will be consistent high-quality advice for Prison Law clients across the country, rather than a high concentration of specialist Prison Law providers in London. This, coupled with better control of legal aid spend on travel by providers is necessary for the LSC to make savings in Prison Law and for the LSC to meet its obligations under s18 of the *Access to Justice Act 1999* to aim to obtain the best possible value for money. Given that we are clearly securing the service outside of London for a particular price we do not see any justification for paying a significantly increased price for the same service because of a provider's location. In any event, if London based providers are completing more complex or serious cases we expect that this will be reflected appropriately in a corresponding number of exceptional cases.

5.86 For these reasons, we do not think it appropriate to include higher London claims in the fees calculations nor pay an uplifted fee to London based providers. For the purposes of calculating and paying exceptional cases, we will also apply the current national rate for profit costs. The Final Impact Assessment sets out the affect of these changes on London firms and any impact in relation to equalities in more detail.

#### **D: Exceptional cases paid for at hourly rates**

5.87 In the consultation paper we proposed that exceptional cases (those cases where costs, recorded using hourly rates, are more expensive than the exceptional limit) would be paid the relevant fee, plus those costs incurred above the exceptional limit at hourly rates.

5.88 During the consultation period we received strong feedback from Prison Law providers that they felt that they would lose out under this system, as they would not be paid for the 'gap' between the higher standard fee and the exceptional limit where they could begin to claim hourly rates from. The APL suggested that it would be preferable for exceptional cases to be aligned to the civil fees model and for providers to be paid the full cost of exceptional cases at current hourly rates and that they would be willing to trade this off against a lower fee for cases that did not trigger the exceptional mechanism. It is important to note that changing the way that exceptional cases are paid does not affect the overall expenditure on Prison Law, rather money that was redistributed from the small number of very expensive cases into the fees is instead paid out for those cases.

5.89 This means that cases that cost more than £660.37 (excluding VAT) for advice and assistance, £1,854.09 (excluding VAT) for disciplinary hearing cases and £4,781.13 (excluding VAT) for Parole Board hearings will be paid at the current national hourly rate.

5.90 Time spent waiting can be counted towards meeting the exceptional limits and providers will be paid for waiting at current hourly rates. Providers will also be paid travel time for exceptional cases at current hourly rates (up to a capped maximum) however time spent travelling may not count towards reaching the exceptional limits. This is in order to preserve the incentive in our original proposal to minimise unproductive expenditure where possible and contain costs within the fee scheme. So when the total profit and waiting costs of a



case exceed the exceptional limit the provider will be paid the profit costs, waiting costs and travel costs (up to a capped maximum).

#### **E: Disbursements**

- 5.91 Disbursements will cover the same range of activities as previously such as mileage and other travel costs actually incurred (but not time spent travelling) and experts' reports. We will monitor the costs of disbursements through management information. Disbursements above £500 would need prior authority from the LSC. This process currently operates informally for Prison Law providers and we propose extending it more formally so that providers have more certainty about whether their disbursement will be paid before making any substantive outlay.

#### **F: Advocacy payments and instructing counsel**

- 5.92 Advocacy payments will be wrapped up in the fee meaning that the counsel's fee should be agreed between the provider and counsel and the work then claimed by the solicitor using his contractual hourly rates. For most cases, counsel's fee will be paid from the lower or higher standard fee. Where the amount claimed by the solicitor makes the case exceptional, the costs will be subject to assessment by the LSC, using the maximum fee principle (that the costs will be assessed as though the provider did the work). This is the same system which applies where counsel is instructed on an unassigned basis under a representation order in the magistrates' court.
- 5.93 If counsel is instructed under advice and assistance, the provider is responsible for agreeing counsel's fee and paying counsel out of the fixed fee. Counsel's fees under advice and assistance do not count as a disbursement unless the case becomes exceptional and may not be taken into account in determining whether a case escapes from that fee.
- 5.94 If counsel is instructed to provide advice under advice and assistance and the case becomes exceptional a provider may, when claiming their fees on the basis of hourly rates, claim payment of counsels' fees as if such fees were a disbursement incurred by the solicitor. However, in that situation the amount claimed in respect of counsels' fees must not exceed the sum which would have been payable by us had the provider spent the same amount of time in providing the advice.

### **Proposal 4: Introduction of a Prison Law supervisor standard**

- 5.95 To ensure the quality of Prison Law providers, we proposed introducing a Prison Law supervisor standard. In the consultation paper we said that in order to obtain the Prison Law supervisor standard, providers would have to do at least 350 hours of Prison Law work every 12 months (with up to a third of this being dedicated to supervision).
- 5.96 We also proposed that the supervisor would need to have been qualified as a solicitor for three years. Currently a supervisor standard exists for firms who manage Prison Law work under a Prison Law only contract. We proposed widening this to all firms wishing to do Prison Law under the CDS Contract 2010.

- 5.97 The supervisor standard is a measure that we use across legal aid schemes to ensure a quality service is provided to legal aid clients. A Prison Law specific supervisor standard would mean that prisoners would receive a good standard of advice and firms would work more efficiently on cases, as they would be more familiar with Prison Law work.

**Questions we asked about Proposal 4:**

**Question 13**

Do you agree with the idea to introduce supervisor standards to Prison Law work and, in particular, the proposed supervisor standard of 350 hours?

**Question 14**

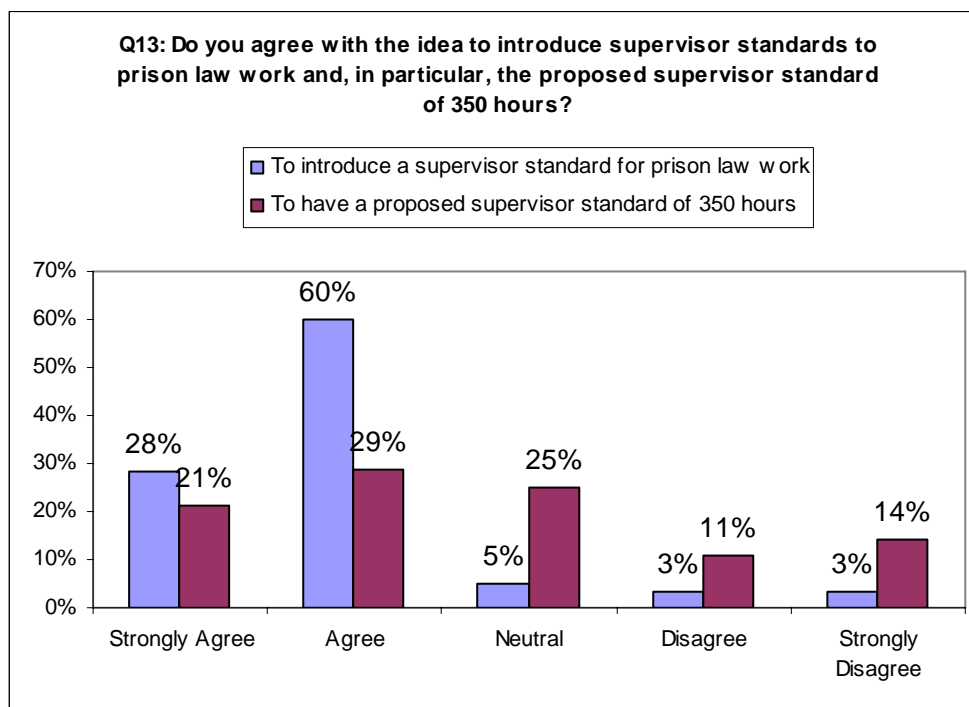
Are there any additional quality standards that could be introduced to maintain quality of provision of Prison Law services to clients?

- 5.98 Of the 60 responses to Question 13, the overwhelming majority of respondents agreed that they would welcome the introduction of a supervisor standard for Prison Law work with 88% of respondents agreeing or strongly agreeing with the idea.

- 5.99 Comments on Proposal 4 included:

- 'This will have the likely effect of restricting prison law work to specialist providers and, could potentially (all other things being equal) have a positive effect on the overall quality of prison law work. It is also possible that limiting work in this manner will mean that cases are dealt with more efficiently and cost-effectively.' (TLS)
- 'This will weed out those firms that do not specialise in this area of law and allow those that do the opportunity to represent prisoners fully.' (A provider)
- '[H]aving lawyers who specialise in Prison Law instead of those who simply dabble in the area once or twice a year would lead to the effective management and preparation of cases.' (A provider)
- 'A regulatory standard for Prison Law work is well overdue.' (APL)
- 'This proposal is endorsed, providing that adequate provision is made for new entrants to the field.' (A provider)

- 5.100 Of the 56 respondents to the question 74% agreed with or were neutral about the proposed standard being 350 hours.



5.101 The APL commented that it was, 'in broad agreement with the proposal to set a supervisor standard at 350 hours but would flag that there is a real possibility that this will result in a shortage of provision of assistance to prisoners.'

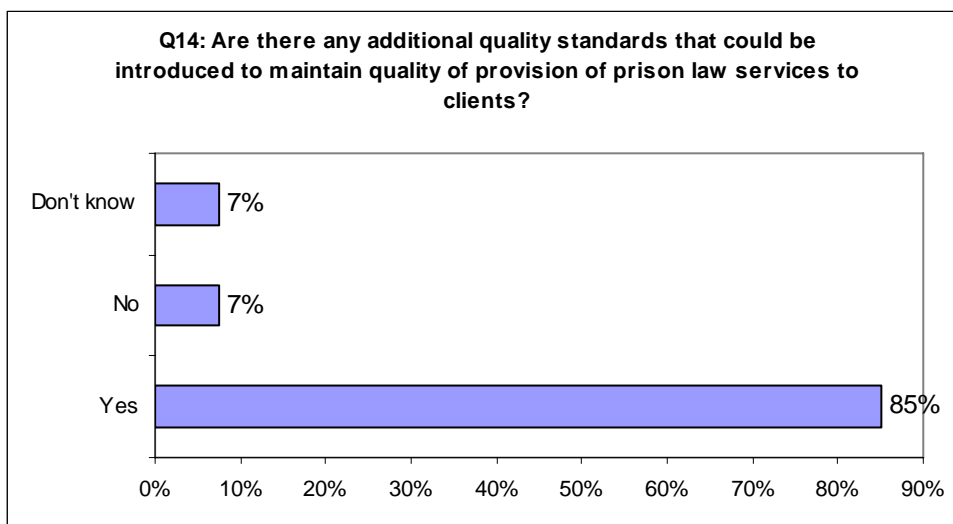
5.102 There was also some concern that hours did not necessarily mean quality. 'Just because you have done 350 hours a year doesn't mean it is done right...350 hours is not a very high amount. Those who work in the area properly can easily do this. Some sort of qualification...or a portfolio like at the police station.' (A provider)

5.103 10% disagreed and 14% strongly disagreed about the figure of 350 hours, with some respondents suggesting that the supervisor standard could be more than 350 hours. 'In order to maintain quality this needs to be increased to at least 875 hours per annum which equates to 17.5 hours per week.' (A provider)

5.104 Concerns were raised about the supervisor having to be a three-years qualified solicitor. 'Very experienced Prison Law caseworkers should not be excluded from the supervisor role.' (A provider)

5.105 Another provider agreed with the proposals to introduce the supervisor standard, 'But without the need for solicitor qualification.' (A provider). It was also pointed out that, 'The LSC have previously allowed a non-qualified person to be regarded as supervisors and...that all those who have attained the supervisor standard should be allowed to continue in this aspect.' (A provider)

5.106 85% of the 54 respondents to Question 14 suggested that there could be additional quality standards brought in for Prison Law. A breakdown is shown in the chart below:



5.107 Suggestions included:

- An accreditation system for Prison Law. 'A better system may be an accreditation scheme which would be mandatory for all those offering Prison Law services (who are not solicitors or members of the Bar).' (South Yorkshire Prison Lawyers Group)
- A requirement for a certain number of Prison Law CPD hours to be obtained each year. 'A lower figure than 350 should be accepted, with the requirement that at least 6 hours CPD in Prison Law work per annum is carried out by the designated supervisor.' (A provider)
- A standard that measured experience and quality of work rather than just hours. 'It is important that the LSC selects a standard which is likely to have the effect of improving knowledge and experience in the sector.' (A provider)

**LSC response to Proposal 4: Introduction of a Prison Law supervisor standard**

5.108 We have listened to the concerns raised by practitioners and, working with the APL and TLS, we have revised the requirements for the supervisor standard.

5.109 The Prison Law supervisor standard will be part of the CDS Contract 2010 and supervisors will be required to adhere to the supervisory requirements of the contract. Key characteristics of the Prison Law supervisor standard will be:

- The supervisor standard has to be held by an individual who can supervise up to six people carrying out Prison Law work within their firm.
- As with other areas of legal aid, supervisors must have 350 hours of case involvement each year, of which no fewer than 235 hours must be personal casework or direct supervision, with no fewer than 115 hours being personal casework. Supervisors will also be able to build up other hours through activities such as file review, delivery of CPD accredited training, or research and publication.

- In their initial application for the supervisor standard, providers will either have to certify that they have to have done 350 hours per year for each of the three years prior to the start of the CDS Contract 2010 on 1 July 2010 or 1050 hours in total over the previous three years.
- Instead of a practising certificate (and in addition to the 350 hours requirement), a supervisor will be required to put together a portfolio of case files covering a range of types of case and complexity that will demonstrate their knowledge and experience. It would mean that a Prison Law supervisor could be a paralegal instead of a solicitor. The list has been developed with the APL and is similar to arrangements for supervisors in other areas of legal aid, for example, Debt.
- Firms who wish to do Prison Law work will need to demonstrate that they already meet the supervisor standard requirements set out above, or will be able to meet them by 1 July 2010, when bidding for a CDS Contract 2010.

5.110 There was some concern about how new entrants to the market would become supervisors. In all other areas of legal aid requiring supervisors, the expectation is that if the supervisor leaves a firm, the firm will have to recruit a new supervisor. A new entrant to Prison Law would be expected to start out by working for an established provider under a Prison Law supervisor until they had the experience to become a supervisor in their own right.

5.111 The case involvement requirement for supervisors in all categories of law is set at 350 hours, which constitutes approximately one third of a full time fee-earners time over the course of twelve months. This volume of case involvement ensures that the supervisor has an appropriate level of expertise in that area of law, whilst leaving capacity for other activities such as specialism in a companion area of law or time sitting as a recorder, lecturer, assessor or tribunal chair.

5.112 We have noted concerns regarding coverage. However, the 15% of firms who would meet the supervisor standard based on 2008/9 claims did 78% of all Prison Law cases so we expect the introduction of the supervisor standard to have a limited affect on coverage. We also believe that the new arrangements will provide those firms who wish to with an opportunity to change their business models and potentially expand. Maps showing prison locations and the location of providers that submitted at least 350 hours worth of Prison Law claims in 2008/9 are set out in the Final Impact Assessment at Annex C.

5.113 We feel that the revised arrangements for the supervisor standard ensure that we have in place a standard that will address concerns about quality by requiring a minimum number of hours to be dedicated to Prison Law as well as a demonstration that practitioners have a wide range of experience. We also believe that requiring a portfolio demonstrating a range of cases addresses concerns raised by Prison Law providers in responses and at provider events that hours did not necessarily mean quality.

5.114 The template for the Prison Law supervisor standard, developed with the APL, will form part of the consultation with TLS on the CDS Contract 2010 contract specification in August and will be included in the Invitation to Tender for the CDS Contract 2010 which will be issued in October 2009.

## Phase 2

### Proposal 5: Examining changes to business delivery

5.115 This proposal set out our early thinking on possible changes to the way in which Prison Law advice is given that could build on the improvements to cost control, volume control and efficiency that are likely to be generated by Phase 1.

5.116 We had intended to develop our ideas further during the course of 2009 with a view to piloting viable ideas in 2010, under the new CDS Contract 2010.

5.117 In the consultation paper we suggested the following options:

- the introduction of a telephone advisory service for Prison Law
- a duty solicitor scheme (perhaps in conjunction with a telephone advisory service)
- increased use of video conferencing facilities in prisons
- examining the suitability of Prison Law for tendering and block contracting.

5.118 A summary of responses to specific questions is set out below followed by the approach that we intend to take for Phase 2 after Question 18.

#### Questions we asked about Proposal 5:

##### Question 15

Do you agree that the introduction of different methods of delivery could improve efficiency and manage costs effectively?

5.119 There were 48 responses to the first part of Question 15. Of these, 72% either agreed or were neutral. 18% disagreed and 8% strongly disagreed.

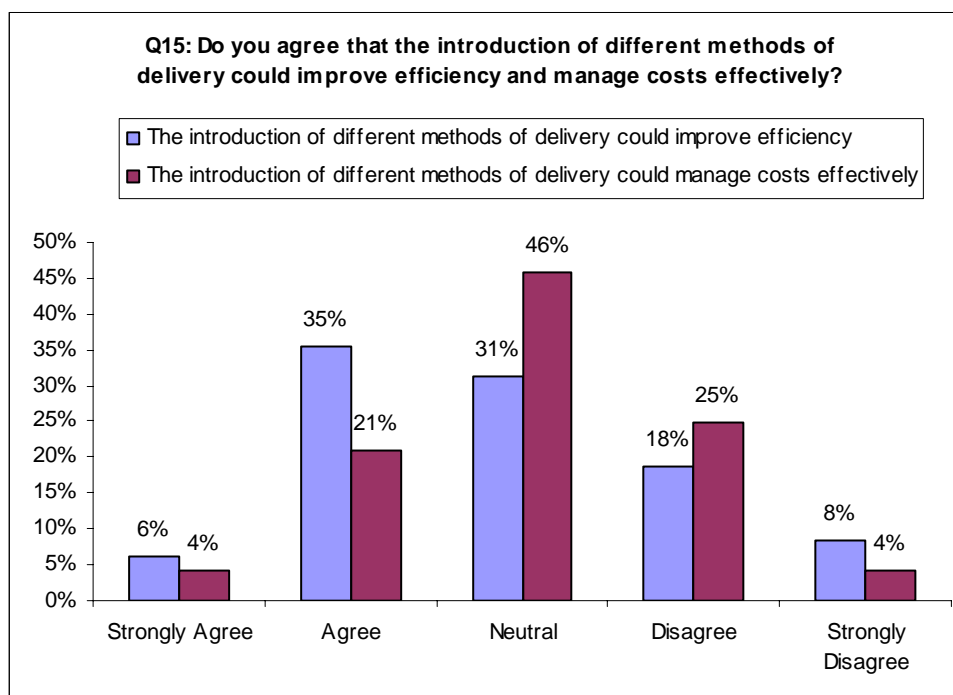
5.120 Comments about Question 15 included:

- 'Some basic Prison Law work is clearly suitable for telephone advice, and would lead to cost efficiency. What should be avoided is moving areas of advice and representation to telephone advice only where the client would be better served by representation in person.' (A provider)
- 'Any alternative methods of service delivery would require careful consultation with NOMS as at the heart of the matter is the manner in which prisoners can obtain and access advice.' (A provider)
- 'Alternative methods of delivery may provide some efficiency, but this would be case specific and dependent on the nature of the request for

advice. Cases usually require some form of disclosure for specific advice to be provided which telephone advice may allow for.’ (APL)

- ‘[D]ifferent methods of delivery could overcome a number of the obstacles that the prison system creates, and by looking at these the level of service provided could be improved.’ (UNLOCK)

5.121 The majority of the 48 respondents to the second part of Question 15 (45%) were neutral about whether or not different methods of delivery could manage costs effectively. 24% agreed or strongly agreed and 29% disagreed or strongly disagreed.



5.122 Views were mixed about whether different methods of delivery could improve efficiency and manage costs. ‘Alternative methods of delivery may provide some efficiency, but this would be case specific and dependent on the nature of the request for advice.’ (APL)

5.123 The importance of efficiencies for legal aid not leading to knock on costs for the National Offender Management Service (NOMS) was also stressed. ‘Different methods of delivery could achieve those goals (Question 15) but work would have to be carried out with the Prison Service to achieve this. Any savings made by the LSC could lead to extra costs for the Prison Service.’ (LAPG)

5.124 Other comments on this question included:

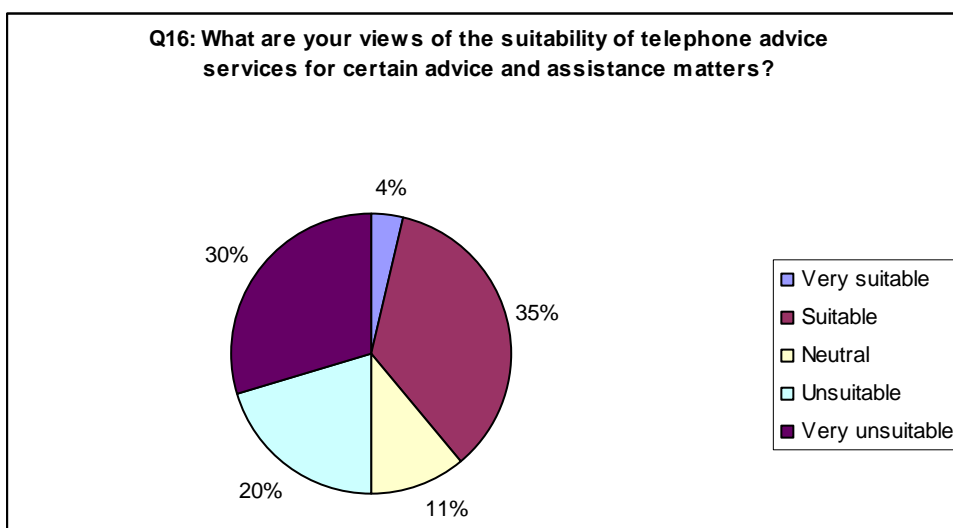
- ‘Yes compulsory video conferencing facilities in all prisons and Prison Law offices to reduce travel and waiting costs.’ (A provider)
- ‘The use of video-conferencing is something that would cut costs whilst not compromising the quality of services offered. It is a good way of ensuring legal visits are maintained whilst saving travel and waiting costs. Mediation is also a method of delivery which can be useful, for example in

discrimination cases. Restorative justice principles may also be of use within adjudications.’ (Prison Reform Trust)

**Question 16**

What are your views of the suitability of telephone advice services for certain advice and assistance matters?

5.125 Views about the suitability of telephone advice services for certain advice and assistance matters were mixed; around 50% of the 54 respondents to the question thought that this would be unsuitable whereas the remainder were in agreement or neutral. The full breakdown is set out in the chart below:



5.126 While there were positive comments about how a telephone advice line may lead to instant and easily accessible legal advice it was stressed that it would be inappropriate in many cases for telephone advice to be a direct replacement for face-to-face advice. ‘We have concerns about the use of telephone advice as an alternative method of delivery. Accessible, confidential, legal advice from professionally qualified lawyers of the client’s choosing is essential. A telephone advice line providing access to quality lawyers on this basis is capable of facilitating enhanced access. However, a telephone helpline should not be substitute for face to face consultation.’ (YLAL)

5.127 LAPG did, ‘not oppose telephone services which complement face to face work but there are certain issues that need to be resolved...They must not be a substitute for appropriate face to face advice and representation.’ A Prison Law client stressed the importance of not limiting client choice, commenting that, ‘This shouldn’t be with just one legal aid provider, but rather the individual should have the choice to whom they contact.’

5.128 Representative bodies such as the APL and TLS felt that before they could comment fully, it would be necessary for the LSC to work up the proposals and costs for telephone advice in more detail. ‘In principle this is something that may be beneficial and suitable but the consultation document is short on detail.’ (APL)

5.129 It was also suggested that the LSC would need to carefully consider the practicalities of introducing such a system to prisons for providing advice and

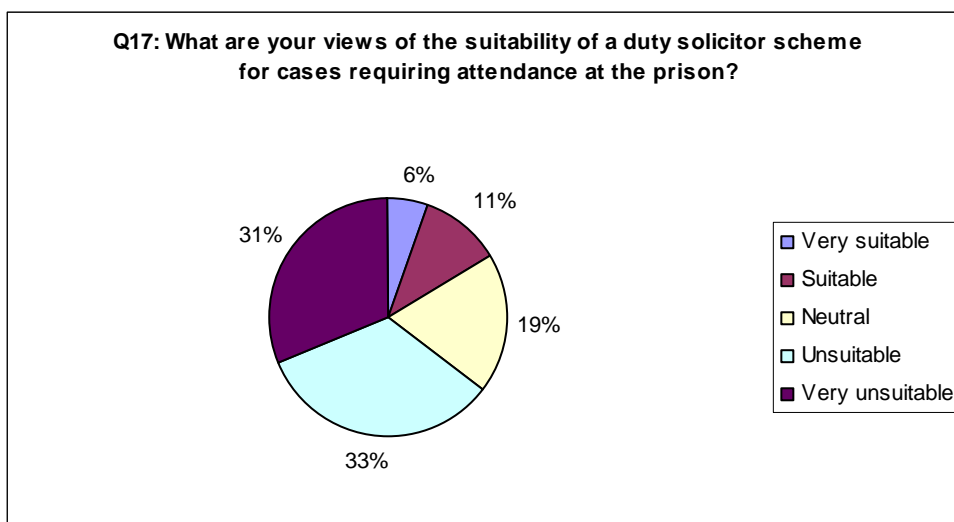


assistance. Current difficulties in the provision of telephone advice included: 'a) Prisoners lack of access to telephones b) The financial cost of prisoners making telephone calls c) The need to have specific numbers approved on the prison PIN system before a prisoner can make a telephone call d) Concerns over privacy and confidentiality e) The fact that call backs cannot be made f) Availability of the fee earner to speak to a client without prior arrangements having been made.' (A provider)

### Question 17

What are your views of the suitability of a duty solicitor scheme for cases requiring attendance at the prison?

5.130 There were 54 responses to Question 17. Although there were some positive responses, largely focused on its suitability for adjudications, 64% of respondents thought that a duty solicitor scheme would be unsuitable or very unsuitable for Prison Law work. A breakdown of responses is shown below.



5.131 As with for telephone advice, some responses stressed the limits that a duty solicitor scheme may impose on client choice and consistency for clients. 'It would take the choice away from the prisoner and that the duty solicitor may be the only way a prisoner is able to get legal advice.' (The Prison Reform Trust)

5.132 Amongst the other views expressed about this idea were:

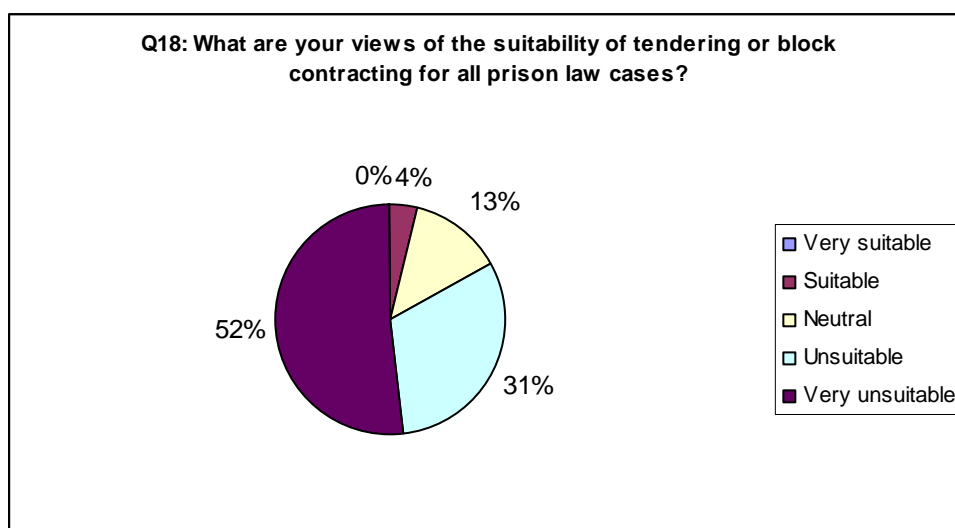
- 'This may be suitable and lead to the specialist supply of Prison Law, but given the distances involved in attending prisons and the few suppliers who might meet the supervisor standard, this may result in gaps in supply, especially in rural areas.' (A provider)
- 'Would need a pilot but many prisoners would have insufficient duty solicitors and it would be hard to ensure that competent practitioners were involved.' (A provider)

- 'The LSC are presumably referring to the possibility of a duty scheme for disciplinary and adjudication offences. Parole Boards are clearly unsuitable for any such scheme.' (PAS)
- 'The LSC should also be aware that the existence of a duty solicitor service could create additional demand which would contradict the LSC's aim to control volume.' (TLS)
- 'Whilst a duty scheme may have some benefit in disciplinary proceedings, other matters requiring specific advice following disclosure would be unlikely to be probative.' (APL)

### Question 18

What are your views of the suitability of tendering or block contracting for all Prison Law cases?

5.133 There were 52 responses to Question 18. Of those, 83% thought that tendering or block contracting was either unsuitable or very unsuitable for Prison Law cases. Only 4% thought it suitable and the remaining 13% were neutral.



5.134 Client choice was again stressed in responses to this question. '[W]hat about client choice if there is block contracting? Would a prisoner have to see the duty solicitor or would he/she be able to see his/her own solicitor where possible?' (LAPG)

5.135 Amongst other things, the APL pointed out that, 'The proposal also fails to consider the difficulties that will arise where there are conflicts of interests between different prisoners in the same establishment... There will therefore need to be provision for at least two firms giving advice at every prison to avoid this problem and this almost immediately undermines the rationale for the block contracting. Furthermore, it makes it impossible for there to be effective tendering once the work has to be divided in this way.'

5.136 Other comments about tendering or block contracting for prison law included:

- 'The diversity of Prison Law and the unpredictable transfer of prisoners are important factors working against the suitability of this means of delivering legal services to prisoners, but it really depends on what is in the contract.' (A provider)
- 'LAPG would stress the need to pilot any changes and evaluate fully.' (LAPG)
- 'Block contracting presents a number of difficulties mainly in relation to client choice particularly where the client wants to instruct their own solicitor. Block contracting would be inefficient where prisoners are moved to different prisons mid-case. There would be duplication as the contracting solicitor at the new prison would have to spend time going through the file in order to take over the case.' (TLS)
- '[I]t is felt entirely unsuitable for long term prisoners, Lifers and general advice such as recall, determinate sentence parole and recategorisation. There 'may' be some merit with regard to the provision of services for adjudications as a regional area on the basis that a geographical area could have a fixed amount of prisons with specific adjudication days spread across the week allowing for procedures to be put in place to allow for block contract adjudication work.' (A provider)

### **LSC response to Proposal 5: Changes to business delivery**

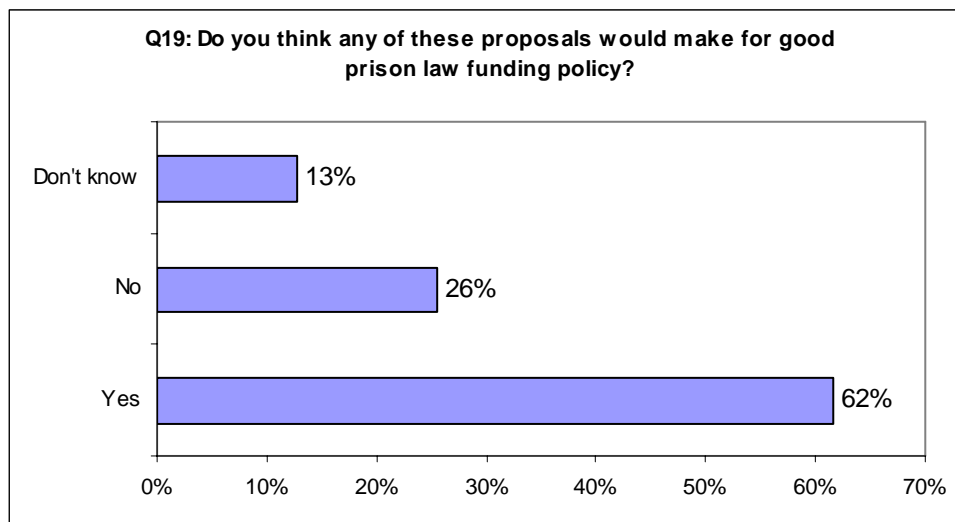
- 5.137 Having considered the concerns about Phase 2 proposals raised by respondents to the consultation and by providers at events, we have decided not to pursue any of these options at this stage. We will assess the impact of the first phase of changes made to Prison Law by carrying out a post-implementation review which we will report on the findings of by summer 2011. This will inform decisions about whether we make any further changes to Prison Law. If we were to make changes, we would seek to develop any proposals with Prison Law providers and Prison Law clients before consulting again. We would consider piloting any new proposals.
- 5.138 We do not envisage that any pilot carried out during the CDS Contract 2010 will affect the scope of the contract.

### **Options**

#### **Question 19**

Do you think any of these proposals would make for good Prison Law funding policy? If so, which option and what changes could be made to improve it?

- 5.139 There were 47 responses to Question 19. Of these, 62% thought that some of the proposals set out in the consultation paper would be suitable for improving Prison Law funding policy.

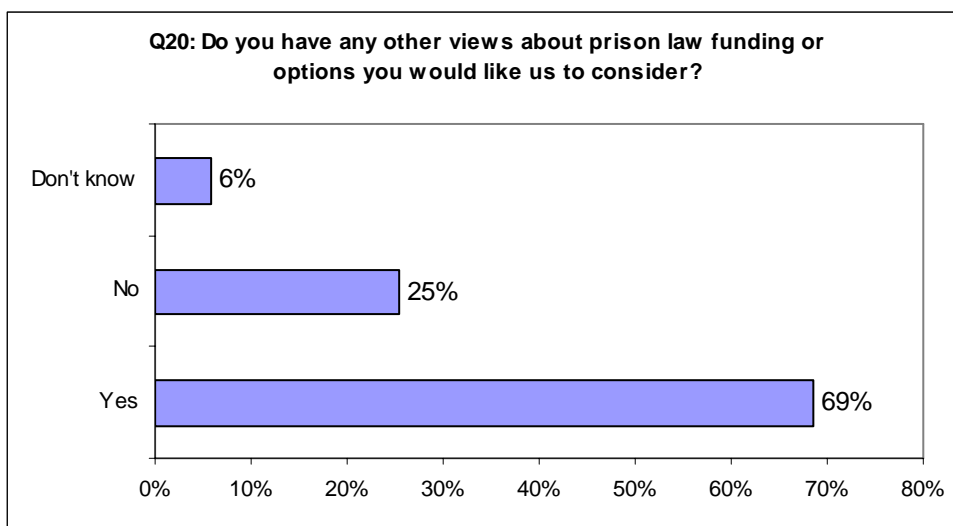


- 5.140 Some of the proposals for Prison Law were seen as being a positive change. 'Matter starts that can be varied along with supervisor standards and standard fees would seem the best model for creating a sustainable Prison Law funding model.' (A provider)
- 5.141 Another provider commented that, 'Control by means of the current sufficient benefit test and supervisor standards will go some way to straightening out the funding problem' however, 'the reality is that government policies contribute directly to the rise in demand for legal services.'
- 5.142 While TLS did, 'not see any obvious way of capping volume as Prison Law issues in the main involve human rights issues.' It did, 'agree in principle with the introduction of a supervisor standard and clearer guidance on the application of the sufficient benefit test.'
- 5.143 LAPG commented that they, 'would not be against proper piloting of the proposals subject to more information being available and proper consultation taking place.'
- 5.144 Other comments included:
- 'National free legal telephone helpline for prison advice and initial matters...The introduction of a supervisor standard of 350 hours...The increased use of video-conferencing...' (Prison Reform Trust)
  - 'We feel that the primary benefits would derive from better quality control and better levels of monitoring.' (South Yorkshire Prison Lawyers Group)
  - 'We welcome investigations into alternative methods of service delivery but for the reasons set out above, we do not think that any of the proposals in the consultation paper are viable or sensible at the present time.' (APL)
  - '[W]e remain of the view that the current system with enhanced quality requirements (and enhanced rates for quality providers) will make good Prison Law funding policy.' (the Howard League)

### Question 20

Do you have any other views about Prison Law funding or options you would like us to consider?

5.145 There were 51 responses to Question 20. Of these, 69% had further suggestions about Prison Law funding.



5.146 Suggestions included:

- 'Given that much of the increased demand stems from Home Office policy we believe that the LSC should be seeking additional funding from the Home Office to cover the costs.' (TLS)
- 'I think that more should be done by the prisons. I have attended countless adjudications where waiting times can be 3 to 4 hours, the case is clearly going to have to be adjourned but there is no way to do it administratively, you have to attend to make the application, where reporting officers don't turn up, prisoners and witnesses have been moved to other prisons etc. If prisons had a designated officer to deal with Prison Law cases much of this waste could be avoided.' (A provider)
- 'We would observe that experts' fees contribute significantly to public expenditure in this area...We would propose a fixed fee for experts and/or a list of approved experts. This would provide certainty and ensure that money is not wasted on experts with inadequate speciality in a given field, particularly risk assessment...' (South Yorkshire Prison Lawyers Group)
- 'Essentially, one of the quickest and easiest cost reducing implementations that could be made would be as suggested to increase the supervisor requirement to 500 hours. This would stop firms dabbling in Prison Law just because they have a unified contract.' (A provider)

- '[I]n order to look comprehensively at the way that Prison Law funding works in practice, consultation with serving prisoners and ex-prisoners must be a priority.' (UNLOCK)
- 'Video conferencing via magistrates' courts can improve matters, but there may need to be a fax facility to sign forms and forward documents. Also not all prisons are on the system and there is more than one system.' (A provider)

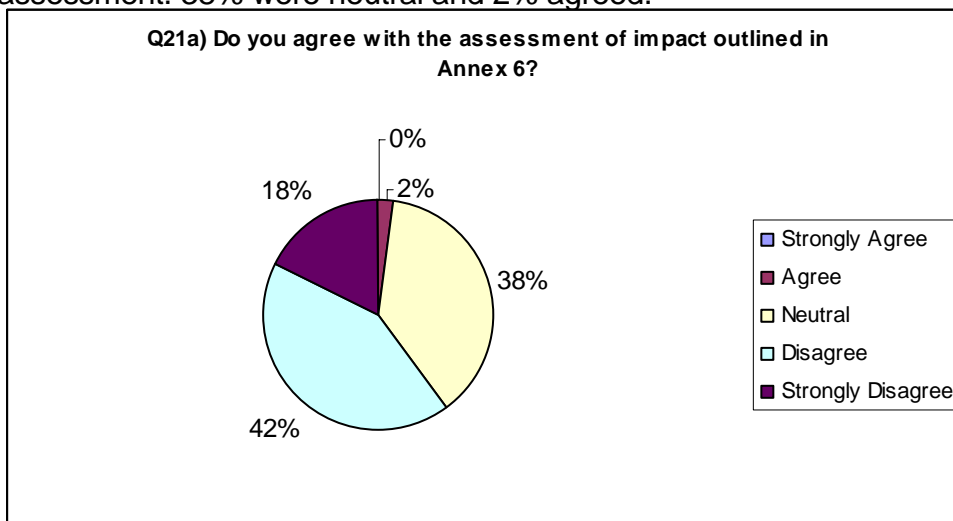
## The Draft Impact Assessment

### Questions we asked about the Draft Impact Assessment:

#### Question 21

Do you agree with the assessment of impact outlined in Annex 6? Do you have any evidence of impact that we have not yet considered?

5.147 There were 45 respondents to the question about the impact assessment set out in the consultation paper. 60% of respondents disagreed with the impact assessment. 38% were neutral and 2% agreed.

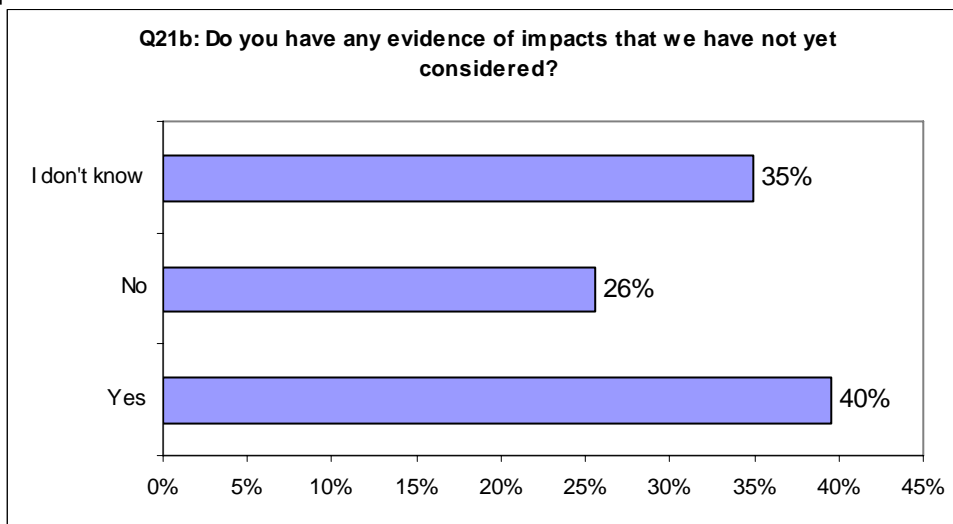


5.148 TLS commented that it had, 'no alternative evidence to question the figures presented in the impact assessment. However whilst assessments of impact in terms of gender, ethnicity, disability etc are useful, the main omission is an assessment of the cumulative impact of matter starts, revised sufficient benefits test, fixed fees and supervisor standard on the overall viability of the Prison Law supply base. In TLS's view such an assessment is essential in order to determine whether the proposals will enable sustainable Prison Law provision to continue for the foreseeable future.'

5.149 A provider stressed that, 'In our opinion quantity and quality follow if properly monitored. It is essential that larger firms are not penalised under the proposals.'

5.150 The APL felt that, 'The LSC has failed to provide the evidence of results and therefore no meaningful comments can be made for competition assessment, small firms impact test, legal aid and rural proofing.'

5.151 APL suggested that it was difficult for them to respond to the question given that the LSC had not provided any of their analysis of the figures in the impact assessment. This data was provided to the APL and TLS during the consultation period.



5.152 There were 43 responses to Question 21b. Around 40% of respondents provided information about impacts that they thought that the LSC had not yet considered. These included:

- '[C]oncerns about the number of providers who will continue to carry out this work if the mixture of increased bureaucracy and decreased pay goes ahead.' (LAPG)
- 'The LSC have identified the problem under consideration is the rapid increase on the expenditure on Prison Law legal aid but have failed to take into account external factors that have caused the increase i.e. IPP sentences, prison population, inexperienced criminal practitioners taking on Prison Law cases etc.' (A provider)
- 'We believe that the focus of the LSC assessment has been to look at how to cut costs. We do not believe that sufficient consideration has been given to understanding why costs have increased in relation to Prison Law.' (A provider)

5.153 We have taken in comments and revised the impact assessment. The Final Impact Assessment is set out at Annex C.

## General comments

### Question 22

Do you have any additional comments on the consultation?

5.154 There were 37 responses to this question. Comments included:

- 'Travel is a vital element of Prison Law work. There should be some recognition of the fact many southern based practitioners are required to travel north to meet their clients on a regular basis.' (A provider)
- 'It needs to be borne in mind at all stages that the prison population is constantly growing and projections are for this to continue. Therefore volumes of work in Prison Law will increase.' (A provider)
- 'The proposals in Phase 1 will go some considerable way to addressing that problem. However, there is an issue regarding the relationship between clients and their solicitors/representatives which you have not satisfactorily addressed.' (A provider)
- 'Legal aid enables access to justice. It is important that prisoners continue to have this access.' (Prison Reform Trust)



## 6. Next steps

- 6.1 We will consult with TLS on the specification for the CDS Contract 2010 which will include Prison Law from 10 August to 18 September 2009.
- 6.2 We will run an open tender for CDS Contract 2010 from 20 October until 27 November 2009. We will consider applications for the supervisor standard as part of this process.
- 6.3 We will aim to carry out Prison Law provider training events during April 2010 to train providers on the new fee scheme before the CDS Contract 2010 (which will include Prison Law) goes live on 1 July 2010.
- 6.4 Given the importance of assessing the affect of the changes to Prison Law funding, we will carry out a post-implementation review of the operation of Prison Law under the CDS Contract 2010 and will report on our findings by summer 2011.
- 6.5 A system of new matter starts would only be introduced for certain advice and assistance cases if the findings of the post-implementation review suggest that other measures, such as the supervisor standard did not have a positive effect on controlling volume. We would provide at least three-months' notice of the introduction of a system of new matter starts and would introduce such a system by July 2012 at the latest.
- 6.6 We will consider whether to implement any changes to the way that Prison Law is delivered following the findings of the post-implementation review. We would then consult on any proposed changes and consider running a pilot.
- 6.7 A high-level timetable for next steps with Prison Law funding is set out below:

Event	Indicative date
Consult with TLS on the specification for the CDS Contract 2010	10 August to 18 September 2009
Open tender for CDS Contract 2010 (including applications for the supervisor standard)	20 October until 27 November 2009
Prison Law provider training events	April 2010
CDS Contract 2010 (including Prison Law) begins	1 July 2010
Findings of post implementation review published	By summer 2011
Latest date that the LSC will (following at least three months notice) introduce a system of new matter starts for Prison Law	July 2012

## 7. The seven consultation criteria

The seven consultation criteria are:

### **Criterion 1: When to consult**

Formal consultations should take place at a stage where there is scope to influence the policy outcome.

### **Criterion 2: Duration of consultation exercises**

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

### **Criterion 3: Clarity of scope and impact**

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

### **Criterion 4: Accessibility of consultation exercises**

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

### **Criterion 5: The burden of consultation**

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

### **Criterion 6: Responsiveness of consultation exercises**

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

### **Criterion 7: Capacity to consult**

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

## Annex A: Revised fees for Prison Law

### Free standing advice and assistance

	Including VAT	Excluding VAT (15%)
Fee	£253	£220.00
Escape limit	£759	£660.00

### Advocacy assistance at prison disciplinary hearings

Lower fee	£257	£223.48
Lower fee limit	£450	£391.30
Higher fee	£711	£618.26
Escape limit	£2,132	£1,853.91

### Advocacy assistance at Parole Board hearings

Lower fee	£551	£479.13
Lower fee limit	£1,177	£1,023.48
Higher fee	£1,833	£1,593.91
Escape limit	£5,498	£4,780.87

## Annex B: Summary of what we consulted on and what we are doing

<b>What we consulted on in the <i>Prison Law Funding: a consultation paper</i></b>	<b>What we are doing following consultation</b>
<p>Proposal 1: Introduce a system of new matter starts in Prison Law based on claims in 2008/9</p>	<ul style="list-style-type: none"> <li>• We will not introduce new matter starts when the CDS Contract 2010 begins in July 2010.</li> <li>• We will look to include a clause in the CDS Contract 2010 that means that if the other volume control proposals do not have the desired effect, we will allocate new matter starts in relation to certain advice and assistance cases.</li> <li>• As part of the 2010 contract specification development we will consult with TLS on the final wording of the new matter starts clause.</li> </ul>
<p>Proposal 2: A revised sufficient benefit test</p>	<ul style="list-style-type: none"> <li>• We will include a more specific sufficient benefit test for Prison Law in the CDS Contract 2010 along with a non-exhaustive list of categories of cases that the LSC would expect to fund and of cases which the LSC would not ordinarily expect to fund.</li> </ul>
<p>Proposal 3: One of three payment options for Prison Law:</p> <ul style="list-style-type: none"> <li>• Fees Option 1: hourly rates</li> <li>• Fees Option 2: standard fees and prior authorisation for disbursements</li> <li>• Fees Option 3: fixed fees with a standard fee for Parole Board hearings and prior authorisation for disbursements.</li> </ul>	<ul style="list-style-type: none"> <li>• A fixed fee for advice and assistance matters featuring an exceptional case mechanism</li> <li>• A two-tier standard fee system for disciplinary hearings featuring an exceptional case mechanism.</li> <li>• A two-tier standard fee system for Parole Board hearings featuring an exceptional case mechanism.</li> </ul>
<p>Proposal 4: A Prison Law supervisor standard of 350 hours with a requirement for solicitors to be three years qualified</p>	<ul style="list-style-type: none"> <li>• A Prison Law supervisor standard of 350 hours over twelve months.</li> <li>• Requirement to demonstrate 350 hours per year for the three years previous to start of the contract.</li> <li>• Instead of a practising certificate (and in addition to the 350 hours requirement), a supervisor will be required to put together a portfolio of case files covering a range of case types and complexity that will demonstrate their knowledge and experience.</li> </ul>
<p>Proposal 5: Alternative ways of delivering Prison Law services</p>	<ul style="list-style-type: none"> <li>• We will consider making any further changes following a post-implementation review of the changes made to Prison Law at the start of the CDS Contract 2010.</li> <li>• If we do want to make any further changes we will carry out a further consultation and possibly run pilots.</li> </ul>

## Summary: Intervention & Options

<b>Department /Agency:</b> Legal Services Commission	<b>Title:</b> Prison Law Funding: a consultation response – Final Impact Assessment	
<b>Stage:</b> Consultation response	<b>Version:</b> 1.0	<b>Date:</b> 15 July 2009
<b>Related Publications:</b> Prison Law Funding: a consultation response		

### Available to view or download at:

<http://www.legalservices.gov.uk> > CDS > Consultations

**Contact for enquiries:** David Szaroleta

**Telephone:** 02077837454

### What is the problem under consideration? Why is government intervention necessary?

Spending on legal aid for Prison Law has risen over the past several years, and more firms are completing increasing numbers of cases with increasing average case costs. This is putting pressure on the budget for Prison Law and on legal aid more widely. We are also concerned that some criminal defence firms may be undertaking this work without the necessary experience which, along with the pressures created by the rising budget, gives rise to concerns about value for money. Government intervention is necessary to raise quality standards and control expenditure.

### What are the policy objectives and the intended effects?

The objectives of the project are to ensure good quality legal advice and representation for clients, a sustainable, effective and efficient supplier base, and value for money for the taxpayer. To do this we will seek to prevent any increase in Prison Law expenditure above the amount spent in 2008/09, ensure that only firms with the necessary experience are undertaking this work, and that only appropriate cases receive funding.

### What policy options have been considered? Please justify any preferred option.

We have considered paying for Prison Law work by hourly rates, leaving the current system of contracting unchanged, and introducing a system of new matter starts which would limit the number of cases that would be funded.

We are implementing fixed fees and standard fees, requiring prior authority for disbursements over £500, introducing a Prison Law specific supervisor standard, strengthening the sufficient benefit test which determines whether a case should be funded, and providing clarity within the contract of the types of cases we expect to fund.

This package of measures represents the best cost/benefit sufficient to achieve the aims of the project without disproportionate disruption to the system.

### When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

There will be a review of the scheme after implementation in July 2010, reporting by summer 2011.

### **LSC Chief Executive/Ministerial Sign-off** For final proposal/implementation stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options***

Signed by the LSC Chief Executive / responsible Minister:



..... Date: 15 July 2009

## Summary: Analysis & Evidence

<b>Policy Option: 1</b>	<b>Description: Do nothing</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' The key monetised cost of not reforming this area is the growth in forecast expenditure. The figure below reflects this impact through to 2012/13.
	<b>One-off</b> (Transition)	<b>Yrs</b>	
	£ 0		
	<b>Average Annual Cost</b> (excluding one-off)		
	£ 20m		
<b>Total Cost (PV)</b>			£ 61m
<b>Other key non-monetised costs</b> by 'main affected groups' n/a			

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' n/a
	<b>One-off</b>	<b>Yrs</b>	
	£ 0		
	<b>Average Annual Benefit</b>		
	£ 0		
<b>Total Benefit (PV)</b>			£
<b>Other key non-monetised benefits</b> by 'main affected groups' n/a			

### Key Assumptions/Sensitivities/Risks

The above figure assumes that the forecast increases in both costs and volumes materialise.

Price Base Year 08/9	Time Period Years 3	<b>Net Benefit Range (NPV)</b> £ n/a	<b>NET BENEFIT (NPV Best estimate)</b> £ n/a
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What is the geographic coverage of the policy/option?		England & Wales		
On what date will the policy be implemented?		n/a		
Which organisation(s) will enforce the policy?		n/a		
What is the total annual cost of enforcement for these organisations?		£ n/a		
Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU requirements?		n/a		
What is the value of the proposed offsetting measure per year?		£ n/a		
What is the value of changes in greenhouse gas emissions?		£ n/a		
Will the proposal have a significant impact on competition?		no		
Annual cost (£-£) per organisation (excluding one-off)		Micro n/a	Small n/a	Medium n/a
Are any of these organisations exempt?		n/a	n/a	n/a

<b>Impact on Admin Burdens Baseline</b> (2005 Prices) n/a				(Increase - Decrease)
Increase of	£	Decrease	£	<b>Net</b> £

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

## Summary: Analysis & Evidence

<b>Policy Option: 2</b>	<b>Description: Fixed and standard fees for Prison Law</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' One off costs represent the project team and IT costs. Average annual costs are the related staff costs to provide assurance under the new scheme.
	<b>One-off</b> (Transition)	<b>Yrs</b>	
	£ 459k		
	<b>Average Annual Cost</b> (excluding one-off)		
	£ 82,320		
<b>Total Cost (PV)</b>			£ 541,320
Other <b>key non-monetised costs</b> by 'main affected groups' n/a			

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' These benefits reflect the savings against forecast from 2010/11 to 2012/13.
	<b>One-off</b>	<b>Yrs</b>	
	£ n/a		
	<b>Average Annual Benefit</b>		
	£ 20m	3	
<b>Total Benefit (PV)</b>			£ £61m
Other <b>key non-monetised benefits</b> by 'main affected groups' n/a			

### Key Assumptions/Sensitivities/Risks

These benefits assume that volumes stay flat over the period. Any significant increase in the prison population would impact on the stated benefits.

Price Base Year 08/9	Time Period Years 3	<b>Net Benefit Range (NPV)</b> £ £61m	<b>NET BENEFIT (NPV Best estimate)</b> £ £61m
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What is the geographic coverage of the policy/option?		England & Wales		
On what date will the policy be implemented?		July 2010		
Which organisation(s) will enforce the policy?		LSC		
What is the total annual cost of enforcement for these organisations?		£ 82,320		
Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU requirements?		n/a		
What is the value of the proposed offsetting measure per year?		£ n/a		
What is the value of changes in greenhouse gas emissions?		£ n/a		
Will the proposal have a significant impact on competition?		No		
Annual cost (£-£) per organisation (excluding one-off)	Micro n/a	Small n/a	Medium n/a	Large n/a
Are any of these organisations exempt?	n/a	n/a	n/a	n/a

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)				(Increase)
Increase of	£ 82,320	Decrease	£ 32,125	<b>Net</b>
				£ 50,195

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

## Summary: Analysis & Evidence

<b>Policy Option: 3</b>	<b>Description: A supervisor standard for Prison Law</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>	Description and scale of <b>key monetised costs</b> by 'main affected groups' n/a
	<b>One-off</b> (Transition) <b>Yrs</b>	
	£ n/a	
	<b>Average Annual Cost</b> (excluding one-off)	
	£ n/a	
<b>Total Cost (PV)</b>		£ n/a
Other <b>key non-monetised costs</b> by 'main affected groups' n/a		

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>	Description and scale of <b>key monetised benefits</b> by 'main affected groups' n/a
	<b>One-off</b> <b>Yrs</b>	
	£ n/a	
	<b>Average Annual Benefit</b>	
	£ n/a	
<b>Total Benefit (PV)</b>		£ n/a
Other <b>key non-monetised benefits</b> by 'main affected groups' This proposal would ensure a baseline quality standard for Prison Law work.		

**Key Assumptions/Sensitivities/Risks**

The main risk under this proposal is that an insufficient number of providers to deliver the service would meet the supervisor standard. However, our analysis shows that this risk is unlikely to materialise.

Price Base Year n/a	Time Period Years n/a	<b>Net Benefit Range (NPV)</b> £ n/a	<b>NET BENEFIT (NPV Best estimate)</b> £ n/a
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What is the geographic coverage of the policy/option?	England & Wales				
On what date will the policy be implemented?	July 2010				
Which organisation(s) will enforce the policy?	LSC				
What is the total annual cost of enforcement for these organisations?	£ n/a				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	n/a				
What is the value of the proposed offsetting measure per year?	£ n/a				
What is the value of changes in greenhouse gas emissions?	£ n/a				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; padding: 2px;">Micro n/a</td> <td style="width: 25%; padding: 2px;">Small n/a</td> <td style="width: 25%; padding: 2px;">Medium n/a</td> <td style="width: 25%; padding: 2px;">Large n/a</td> </tr> </table>	Micro n/a	Small n/a	Medium n/a	Large n/a
Micro n/a	Small n/a	Medium n/a	Large n/a		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; padding: 2px;">n/a</td> <td style="width: 25%; padding: 2px;">n/a</td> <td style="width: 25%; padding: 2px;">n/a</td> <td style="width: 25%; padding: 2px;">n/a</td> </tr> </table>	n/a	n/a	n/a	n/a
n/a	n/a	n/a	n/a		

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)				(Increase - Decrease)
Increase of	£ n/a	Decrease	£ n/a	<b>Net</b>
				£ n/a

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value



## Summary: Analysis & Evidence

<b>Policy Option: 4</b>	<b>Description: A system of new matter starts for Prison Law</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' This proposal would require structural alteration to the Supplier Management System (SMS), the system through which the LSC manages legal aid providers.
	<b>One-off</b> (Transition)	<b>Yrs</b>	
	£ c.150k		
	<b>Average Annual Cost</b> (excluding one-off)		
	£ n/a		
		<b>Total Cost (PV)</b>	£ 150k
Other <b>key non-monetised costs</b> by 'main affected groups' n/a			

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' n/a
	<b>One-off</b>	<b>Yrs</b>	
	£ n/a		
	<b>Average Annual Benefit</b> (excluding one-off)		
	£ n/a		
		<b>Total Benefit (PV)</b>	£ n/a
Other <b>key non-monetised benefits</b> by 'main affected groups' This measure would allow the LSC to control volumes of advice and assistance cases in the event that the volume controls within the CDS Contract 2010 proved to be ineffective.			

**Key Assumptions/Sensitivities/Risks** This proposal assumes that there would be no successful legal challenge to introducing this kind of measure under the CDS Contract 2010.

Price Base Year n/a	Time Period Years n/a	<b>Net Benefit Range (NPV)</b> £ n/a	<b>NET BENEFIT (NPV Best estimate)</b> £ n/a
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What is the geographic coverage of the policy/option?		England & Wales		
On what date will the policy be implemented?		July 2010		
Which organisation(s) will enforce the policy?		LSC		
What is the total annual cost of enforcement for these organisations?		£ n/a		
Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU requirements?		n/a		
What is the value of the proposed offsetting measure per year?		£ n/a		
What is the value of changes in greenhouse gas emissions?		£ n/a		
Will the proposal have a significant impact on competition?		no		
Annual cost (£-£) per organisation (excluding one-off)		Micro n/a	Small n/a	Medium n/a
Are any of these organisations exempt?		no	no	n/a

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)				(Increase - Decrease)
Increase of	£ n/a	Decrease	£ n/a	<b>Net</b> £ n/a

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

## Evidence Base (for summary sheets)

### 1. Introduction

- 1.1. The number of Prison Law cases and the cost of those cases have risen over the past several years, and the number of firms doing the work has also grown. While this is likely to be in part due to rising prisoner numbers and other pressures increasing demand for advice, it nevertheless represents an unsustainable pressure on Prison Law funding.
- 1.2. We are also concerned that we are not getting value for money from many of the firms that have recently begun to complete Prison Law work, and particularly those that undertake very small amounts of Prison Law, as we cannot be sure that we are purchasing appropriate and high quality services in this specialist area of law.
- 1.3. We therefore need to take action to ensure that only high quality firms undertake the work, and to bring case costs under control. If we do not take action now the pressure on Prison Law funding will continue to rise and the future of the service may not be sustainable. To address these issues we recently consulted on a two-phase approach to reform.
- 1.4. The first phase of our proposals included the introduction of a supervisor standard for firms that undertake this work in order to ensure quality services are being delivered, a revised sufficient benefit test to ensure that only worthwhile cases are being funded, as well as new fixed and standard fees for Prison Law and a system of new matter starts for advice and assistance to improve value for money and control over expenditure. The second phase of our proposals was to consider alternative ways that Prison Law services could be provided, and to pilot different methods of delivery.
- 1.5. As a result of the consultation we have now decided to go ahead with our proposals for phase one and more detail can be found in the response to consultation. This impact assessment sets out our final analysis of the potential effects these changes might have. In deciding on the detail of the proposals to be implemented and assessing the impact we have relied on responses to the consultation, which are summarised in the consultation response document, and completed further analysis of the Prison Law data that we hold.
- 1.6. Before making any decisions on phase two we will complete an early post-implementation review of the changes we are making now, which is scheduled to report by summer 2011. We will use the results of the post-implementation review to: update this impact assessment of the phase one proposals in light of the actual changes that occur as a result of this policy, and support any decision on future changes to Prison Law.

### 2. Policy Objectives and Intended Purposes

- 2.1. The objectives of the Prison Law project are to ensure:
  - good quality legal advice and representation for clients
  - a sustainable, effective and efficient provider base
  - value for money for the taxpayer.

- 2.2. To do this we are restricting the ability to complete Prison Law work to those firms that can demonstrate expertise in this specialist area and moving to a system of fixed and standard fees. This will increase certainty of income and payment for providers while controlling increases in costs by seeking to cap expenditure at 2008/9 levels and ensuring value for money.

### **3. Consultation Process**

- 3.1. We undertook a formal written consultation on the Prison Law proposals between February and May 2009, and held five consultation workshops with providers from around the country to discuss the proposals.
- 3.2. As a result of considering the responses to consultation, and of constructive engagement with the Association of Prison Lawyers (APL) and the Law Society (TLS) during and after the consultation period, we have made changes to the proposals that are being implemented. This is in order to mitigate potential adverse impacts and strengthen the policy, making it more likely that the benefits will be realised. Specifically, acting on widespread reservations about the level at which the proposed fees were set, we have re-calculated the fixed and standard fees using the most recent data available for 2008/9 and an improved methodology that reflects concerns expressed by the profession. We are allowing non-solicitors to become Prison Law supervisors, and are taking a more flexible approach to demonstrating competence as a supervisor. Respondents also expressed concern about the introduction of new matter starts in Prison Law. We are not therefore proposing to introduce new matter starts in Prison Law at this time, but reserve the right to do so in future by inserting a clause in the CDS Contract 2010 that will only be activated if these other measures fail to deliver improvements in the quality and value for money of Prison Law work.
- 3.3. Importantly we are also committing to a full and early assessment of the proposals that we are implementing in the new CDS Contract 2010, which will report by summer 2011 and inform an updated impact assessment, as well as any decisions about possible changes under phase two of our Prison Law proposals. Were we to propose any changes to methods of delivery as a result of this they would also be subject to separate consultation and impact assessment.
- 3.4. More detail on the responses to the consultation, and how we have altered our proposals in response to the views expressed, can be found in the response to consultation and the relevant sections of this impact assessment. The CDS Contract 2010, giving effect to the changes announced here, will also be the subject of a technical consultation with TLS in August 2009.

### **4. Options**

- 4.1. We have considered a number of options for changes to Prison Law. These were published in the consultation paper and have been refined as a result of responses received and additional analysis that we have undertaken as a result. These are outlined below and in the response to consultation, and supported by selected data analysis set out in the appendices to this document.

## **Remuneration - fixed and standard fees**

- 4.2. Prison Law is currently remunerated using a system of hourly rates for profit costs (with a higher rate in London), travel costs and waiting costs. We considered leaving this system in place while making changes to the contracting system for Prison Law, however, because of the pressure on the Prison Law budget and the lack of control over expenditure inherent in an hourly rate system, we do not believe that this would meet our objectives of cost control.
- 4.3. We also considered a system of fixed fees and a standard fee system, which we believe would deliver the predictability of expenditure, control of increasing costs and savings needed from the project. However, during consultation we received a large amount of feedback from providers that the level at which the proposed fees were set was not appropriate, and that there were a number of concerns about the underlying data for Prison Law claims and the way that it was used to set the fees. Since the consultation was published more recent Prison Law data for the financial year 2008/9 has also become available.
- 4.4. Because of this we have revisited the fee calculation and modelled new fees for Prison Law, building on the model published for consultation, using the most recent data available, and taking account of the points made by respondents and representative bodies. We have:
- adopted a single fixed fee for advice and assistance and two-tier standard fees for advocacy assistance at disciplinary hearings and Parole Board hearings
  - excluded cases with very low costs that tend to pull the fees down from our calculations
  - changed the way that we pay exceptional cases to reflect the civil fees model so that they attract hourly rates for the full value of the case.
- 4.5. Overall the fees would reduce expenditure by £1.5 million if applied to 2008/9 cases. However, by containing increases in average case costs they save significantly more against our future expenditure projections. Taken along with the introduction of the supervisor standard and strengthened sufficient benefit test, which we believe will tend to restrict increases in volume, we expect the fixed and standard fees will achieve the aim of capping expenditure at 2008/9 levels. Compared with the projection, which represents a 'do nothing option', the fees would therefore save £5 million in 2010/11 (see Appendix 3).
- 4.6. The new fee design has also allowed a more appropriate allocation of funding between different levels of fees, and enabled us to exclude cases from the fee calculation which did not match the general profile of the work. More information on each of the fees is set out in the relevant sections below.

## **General fee issues**

- 4.7. Following the consultation on Prison Law funding a number of general issues emerged about the design and calculation of the fixed and standard fees that we have sought to address through further analysis and changes to the fee proposals.

## London claims

- 4.8. In the consultation paper, we said that we would base the fees on non-London averages, and that we would exclude claims from London based firms when calculating the fees. The claims from London providers on similar case types are significantly higher than those from providers based elsewhere in the country (see Figure 1a below). We have considered comments provided by respondents to the consultation, however, we did not feel that we received any substantive justifications for this disparity and there was nothing to suggest that there is anything in particular about the characteristics or increased complexities of the cases that London based providers undertake.

**Figure 1a: Prison Law cases and cost in and outside London 2008/9 (including VAT)**

	London	Outside London	National
<b>Cases</b>	10,500	32,600	43,100
<b>Profit cost</b>	£4,433,000	£8,995,000	£13,428,000
<b>Travel cost</b>	£1,349,000	£2,026,000	£3,375,000
<b>Waiting cost</b>	£170,000	£313,000	£483,000
<b>Total</b>	£5,962,000	£11,367,000	£17,329,000
<b>Average</b>	£568	£348	£402

- 4.9. The slightly higher profit costs paid to London providers under the current hourly rates system can only explain the difference between the higher averages in part<sup>5</sup> (see Figure 1b). We explain below why we have removed claims from London providers in calculating the fixed and standard fees and why we will not pay an uplifted rate to London providers who undertake the same work as non-London providers in future.

**Figure 1b: Average case costs in and outside London 2008/9 (including VAT)**

	Outside London	London	Difference
Profit costs	£276	£422	53%
Travel costs	£62	£128	106%
Waiting costs	£10	£16	60%

- 4.10. Around 94% of prisons and 69% of providers who would meet the supervisor standard based on 2008/9 profit costs are located outside of London. Our figures show that travel costs account for a larger proportion of total case costs of firms based in London than outside of London (see Figure 1c below), with travel costs from London based firms being on average more than twice as high as travel costs claimed by firms based outside of London (Figure 1b). In addition, there is a large concentration of Prison Law providers based in London (24% of all firms who claimed in 2008/9) whereas only 6% of all prisons are in London region<sup>6</sup>.

<sup>5</sup> The national hourly rate for advice and assistance profit costs is £46.90 while the London rate is £49.70. The advocacy assistance preparation hourly rate is £56.15 outside London and £60 in London. All other hourly rates are the same nationwide.

<sup>6</sup> Out of 142 prison establishments, [www.HMPrisonServices.gov.uk](http://www.HMPrisonServices.gov.uk) lists nine as being based in their London region.

**Figure 1c: Proportion of case costs in and outside London 2008/9**

	Outside London	London
Profit costs	79%	74%
Travel costs	18%	23%
Waiting costs	3%	3%

- 4.11. We understand that prisoners move location and that this is beyond the control of the provider. However, we believe that the nature of Prison Law work means that a client should be able to contact a firm which is local to his prison establishment in respect of a prison law matter, rather than contacting the solicitor who represented him during his criminal proceedings or for a separate, earlier matter. A new Prison Law issue is often unrelated to the underlying criminal proceedings and can therefore be conducted by another more local provider. The LSC is in general looking to pay for more local based advice and avoid unnecessary face-to-face sessions but we understand that some limited travel may be necessary during a case and therefore we have included the amount claimed for travel (and waiting) by non-London based providers in 2008/9 in the calculations for the fixed and standard fees. In addition, we will pay for travel (up to a capped maximum) and waiting for the more complicated cases that trigger the exceptional case arrangements.
- 4.12. The supervisor standard for Prison Law will mean that cases do not take longer than necessary due to a lack of expertise and that there will be consistent high-quality advice for Prison Law clients across the country, rather than a high concentration of specialist Prison Law providers in London. This, coupled with better control of legal aid spend on travel by providers is necessary for the LSC to make savings in Prison Law and for the LSC to meet its obligations under s18 of the *Access to Justice Act 1999* to aim to obtain the best possible value for money. Given that we are clearly securing the service outside of London for a particular price we do not see any justification for paying a significantly increased price for the same service because of a provider's location. In any event, if London based providers are completing more complex or serious cases we expect that this will be reflected appropriately in a corresponding number of exceptional cases.
- 4.13. For these reasons, we do not think it appropriate to include higher London claims in the fees calculations nor pay an uplifted fee to London based providers. For the purposes of calculating and paying exceptional cases, we will also apply the current national rate for profit costs. The affect of these changes on London firms and any impact in relation to equalities is set out in more detail later in this impact assessment under the section on sectors affected.
- 4.14. This will mean that there is a reduction in expenditure of around £1.2 million<sup>7</sup> (or 10%) in London under the new fees when compared with 2008/9 data (see Figure 17, Appendix 2).

<sup>7</sup> These figures also include a small element of saving from exceptional cases in London, see section on exceptional cases below.

### **Payment for exceptional cases**

- 4.15. In the consultation paper we proposed that exceptional cases would be paid the fee and the costs incurred above the exceptional threshold. During consultation we received strong feedback that providers were concerned about the potential losses as a result of the gap. The APL suggested that it would be preferable to be paid the full costs of exceptional cases, and would be willing to trade this off against a lower fee for cases that did not trigger the exceptional mechanism.
- 4.16. We have therefore excluded exceptional cases from the calculation of the fixed and standard fees. As these are by definition the most expensive cases the average cost of those cases covered by the fee, and so the fee itself, is lower as a result. You will be paid for the time you spend travelling for exceptional cases however, this time may not count towards reaching the exceptional limit. So when the total profit and waiting costs exceed the exceptional limit, the provider will be paid the profit costs, waiting costs and travel costs (up to a capped limit).
- 4.17. As mentioned above, exceptional cases in London will only be paid profit costs at the national hourly rate. Overall this has the effect of reducing expenditure on exceptional cases by £570,000 or 17% when compared with the 2008/9 data.
- 4.18. It is necessary to reduce expenditure on exceptional cases in order to contribute to the overall savings necessary from Prison Law, and in order to strengthen the incentives for providers to minimise non-productive expenditure, such as travel, where possible and control case costs within the fixed and standard fee schemes. However, paying for exceptional cases in this way redistributes less money from these cases than originally proposed in the consultation paper, and so reduces the risk to firms and clients in this small number of very expensive cases.

### **Advice and assistance - fixed fee**

- 4.19. The distribution of case costs in advice and assistance cases (see Appendix 1) is well suited to a single fee with an exceptional mechanism, as the majority of cases fall within a relatively narrow range of costs. Firms will therefore be able to manage the risk of more expensive cases against gains on less expensive cases.
- 4.20. In 2008/9 11% of advice and assistance cases were claimed with less than £50 profit costs (see Figure 10, Appendix 1). From responses to the consultation and discussions with providers and representative bodies, it has become clear that these claims are unlikely to represent substantive cases. Instead they may be claims for minor treatment issues, which we would not expect to pass the sufficient benefit test, or for administrative work that might not be correctly claimable under the contract.
- 4.21. By introducing a Prison Law supervisor standard and re-drafting the contractual provisions that govern this work we expect not to fund minor treatment claims or administrative work in the future. We have, therefore, excluded these claims when calculating the advice and assistance fixed fee, which is higher as a result. These cases cost £167,000 in 2008/9 and by excluding them from the scheme this amount has been counted as a saving.

- 4.22. For those cases that remain, and would be funded under the future scheme, the advice and assistance fixed fee saves £470,000 against 2008/9 expenditure when cases are simply re-costed from hourly rates to the fixed fee. This is a result of excluding London cases from the fee calculation.
- 4.23. The total saving of the advice and assistance fixed fee against 2008/9 cases is therefore £645,000. The impact of all of the Prison Law fees on clients and providers is considered further in the sections on affected groups and in the equalities impact assessment sections of this document.

#### **Advocacy assistance at a prison disciplinary hearing - standard fee**

- 4.24. We considered both a fixed and standard fee for prison disciplinary hearings. While the distribution of case costs in this area seems well suited to a single fixed fee (see Appendix 1), there are a relatively low number of these cases compared with, for example, advice and assistance. Firms would, therefore, be limited in the extent that they could balance more expensive cases against those that are less expensive, and the risk to firms would be higher. Because of this we have pursued a two-tier standard fee structure for this work, with a lower and higher fee as well as an exceptional mechanism for the most expensive cases.
- 4.25. We have also excluded 11% cases with profit costs of less than £75. Following discussions with providers we believe that these cases, in common with the very inexpensive advice and assistance cases, are unlikely to represent substantive cases. Therefore, it is not appropriate to include them in the fee calculation, and the fees are higher as a result of them being excluded. These cases cost £58,000 in 2008/9 and by excluding them from the scheme this amount has been counted as a saving.
- 4.26. For those cases that remain, the disciplinary hearing advocacy standard fees save £286,000 against 2008/9 expenditure when cases are simply re-costed from hourly rates to the standard fees. This is a result of excluding London cases from the fee calculation.
- 4.27. The total saving of the advocacy assistance at disciplinary standard fees against 2008/9 cases is therefore £345,000. The impact of all of the Prison Law fees on clients and providers is considered further in the sections on affected groups and in the equalities impact assessment sections of this document.

#### **Advocacy assistance at a Parole Board hearing - standard fee**

- 4.28. Advocacy assistance cases at Parole Board hearings have higher average costs than other Prison Law work, and a wider spread of case costs that means a single fixed fee is not appropriate for this work (see Appendix 1). We have, therefore, pursued a two-tier standard fee with a mechanism for exceptional cases.
- 4.29. The Parole Board hearing advocacy standard fees save £484,000 against 2008/9 expenditure when cases are simply re-costed from hourly rates to the standard fees. This is a result of excluding London cases from the fee calculation. The impact of all of the Prison Law fees on clients and providers is



considered further in the sections on affected groups and in the equalities impact assessment sections of this document.

## **Supervisor standard**

- 4.30. Respondents to the consultation supported the proposal for a supervisor standard to apply to those firms undertaking Prison Law. Respondents also generally supported the proposal that a supervisor should be required to complete 350 hours of Prison Law case involvement every 12-months to maintain the standard. However, some respondents raised concerns over the proposal that a supervisor would have to be a three-year qualified solicitor, as it is common in many firms for much Prison Law work to be completed by experienced non-qualified staff under the supervision of solicitors who do not necessarily complete a great deal of Prison Law work themselves.
- 4.31. In response to these concerns we have decided that instead of a practising certificate and in addition to 350 hours, potential supervisors will be required to demonstrate their recent experience in a range of different areas of Prison Law practice. This reflects other areas of legal aid such as debt. The application for the supervisor standard will form part of the Invitation to Tender process for the CDS Contract 2010. More detail on this process can be found in the response to consultation.
- 4.32. As we do not hold detailed information on the work completed by individual solicitors or other staff carrying out Prison Law at firms, it is not possible to provide a precise estimate of how many people are currently eligible to be supervisors. The situation is also likely to change as firms that wish to provide Prison Law services in the future seek to ensure that they have at least one member of staff who is able to qualify as a supervisor.
- 4.33. However, in order to give an idea of the number of firms currently completing the work that might meet the supervisor standards we have examined claim data for 2008/9 to identify firms that overall claimed the equivalent of 350 hours profit costs at the relevant hourly rate. This shows that a large proportion of firms (85%) are completing less than 350 hours a year, and so would not be able to sustain a supervisor. However, the firms that completed more than 350 hours a year accounted for 86% of the hours billed and 78% of Prison Law cases. We are therefore confident that enough firms will have a member of staff that passes the supervisor standard to continue to provide services to clients, who will as a result benefit from a higher standard of service overall.
- 4.34. More information on our assessment of the impact of the supervisor standard can be found in Appendix 4 and in the sectors affected and compensatory simplification sections of this impact assessment.

## **Sufficient benefit test**

- 4.35. Many respondents to the consultation were sceptical about the benefits of revising the sufficient benefit test, considering that it currently worked in the way intended or that it would be impossible to apply a stronger test justifiably. In addition to revising the sufficient benefit test, the consultation also sought views on whether there were types of cases that should be included or excluded by the test and examples of what these could be.

- 4.36. We consider that there remains merit in strengthening the sufficient benefit test to ensure that only substantial and appropriate cases are funded, but agree that greater clarity would be beneficial to all concerned. Therefore, a non-exhaustive list of categories of cases that the LSC would expect to fund will be set out in the CDS Contract 2010, as well as a list of cases we would not ordinarily expect to fund. This is based on suggestions provided in consultation responses, at the consultation events and in discussion with TLS and the APL. We will also aim to develop additional guidance before the start of the CDS Contract 2010 to aid practitioners in applying the sufficient benefit test. More detail on the revised sufficient benefit test can be found in the response to consultation.
- 4.37. We do not believe that this proposal will have any adverse effect on clients or providers, as it is intended to clarify which cases that should not be funded at present, rather than to re-define the criteria for funding. Revising the sufficient benefit test will, therefore, help to ensure that we are achieving value for money and protect the budget against volume increases. We believe that the measures, outlined above, that we are taking to ensure clarity in applying the test will minimise or eliminate any cost of strengthening the sufficient benefit test.

### **New matter starts**

- 4.38. Respondents to the consultation were generally opposed to the introduction of a system of new matter starts for advice and assistance matters in Prison Law. In particular, respondents raised concerns over whether matter starts could be used to restrict funding in Prison Law, where it is possible that a great many cases involve a potential human rights element.
- 4.39. We have carefully considered the responses to the consultation and agree that the difficulties and costs associated with introducing new matter starts outweigh the benefits at this time, and we will not implement new matter starts at the start of the new CDS Contract 2010. However, we believe it is important that we retain the ability to directly control the number of cases to be funded, in the event that the other changes we are making to Prison Law contracting fail to contain the growth in cases and cost.
- 4.40. Therefore, the new CDS Contract 2010 will contain a clause that would allow new matter starts to be introduced for Prison Law within the life of that contract without the need to terminate and reissue all criminal contracts. However, any decision on whether to activate this clause would only be taken after a review of the scheme, after the start of the new CDS Contract 2010.

### **Phase 2**

- 4.41. As set out in the response to consultation we have decided to postpone any decisions on phase two reforms to Prison Law, including piloting alternative methods of service delivery. We will undertake a post-implementation review of the Phase 1 changes, which is scheduled to report by summer 2011.

## **Summary - the final policy**

4.42. As outlined above, in the new CDS Contract 2010 we will introduce a:

- a fixed fee for advice and assistance cases
- a two-tier standard fee for advocacy assistance at disciplinary hearings
- a two-tier standard fee for advocacy assistance at Parole Board hearings
- a supervisor standard for Prison Law
- a revised sufficient benefit test and guidance
- a new matter start clause, to be used following a post-implementation review of the scheme only if the measures above fail to control rising costs and volumes in Prison Law.

4.43. However, we are not at this time putting forward any further proposals for phase two of the Prison Law reforms as suggested in the consultation paper. Instead we will consider the results of the post-implementation review of the current proposals before deciding whether to further reform Prison Law. More information can be found in the response to consultation published alongside this impact assessment.

## **5. Sectors Affected:**

5.1. We have identified three main sectors that would be affected by our proposals:

- clients and potential clients of Prison Law firms – prisoners
- solicitors' firms that undertake the work
- other criminal justice system agencies, particularly the National Offender Management Service (NOMS).

### **Prisoners**

5.2. Prisoners are vulnerable clients by virtue of being deprived of their liberty, and are also more likely to face other issues such as mental illness and drug abuse. Indeed providers responding to the consultation frequently stressed that the issues that their clients faced made them particularly vulnerable.

5.3. It is particularly important therefore, that where prisoners have a genuine need for legal advice that advice is of good quality and makes a difference to their lives. We believe that requiring firms to employ a supervisor who has been accredited in Prison Law by the LSC will be a real benefit to clients, ensuring that only those with the necessary experience and expertise are able to give advice. Along with the revised sufficient benefit test this will mean that only substantial and worthwhile cases, that can result in real benefit to the client, will be taken on and that when they are, there will be the best possible chance of success.

### **Solicitors' firms**

5.4. Solicitors' firms undertaking Prison Law will be directly affected by the changes to contracting. In 2008/9 just over 900 firms made a claim for this work.

## **Fees**

- 5.5. The way that the fixed and standard fees will affect a firm's income and profit from the scheme depend on their current costs and case volumes and the extent to which they will be able to adapt their working practices to maximise profit in the future. In the past when we have moved to fixed and standard payments for work, such as at the magistrates' courts and in the police station, firms have shown a considerable ability to adapt and work within the fees. Therefore, it is impossible to undertake an analysis before implementation that will accurately predict the effect on individual firms.
- 5.6. However, in order to give an idea about the possible effect of the new fees on firms we have undertaken a counterfactual impact analysis (see Appendix 2). To do this we have re-costed all 2008/9 cases as if they had been paid under the new system of fixed and standard fees. While this cannot provide a reliable estimate of the impact on individual firms it is useful in assessing the scale of the change for current providers.
- 5.7. This analysis shows that overall 49% of firms would have seen an increase in their income and 51% would have seen a decrease, all other things being equal. However, the impact of the fees varies across the country and a large number of those firms that would have seen a decrease in their income are located in London<sup>8</sup>. Outside of London 56% of firms would have seen an increase in income, and 44% a decrease in income. Those firms that would have seen an increase in their income had an average change of £900 or 39% of the value of their Prison Law work, while those that would have seen a decrease in their income saw an average change of -£4,400 or -22% of their income.
- 5.8. We believe that these impacts, notwithstanding the caveats above, are justified by the need to control expenditure and make savings from Prison Law in order to improve value for money. Clearly this implies a reduction in income for some providers however, we believe that the fees are appropriate for the work and will allow efficient providers to deliver quality services in the future.
- 5.9. The impact on providers is considered further in the equalities impact assessment section of this document.

## **Supervisor standard**

- 5.10. As outlined in the section on the supervisor standard above, it is not possible to determine accurately how many individuals would currently qualify as a supervisor. However, we have completed an analysis of how many firms billed more than 350 hours (the supervisor standard level) in 2008/9, which shows that 85% of firms would not reach the standard (see Appendix 4). However, those 15% of firms that would reach the standard accounted for 78% of the Prison Law cases billed in 2008/9, indicating that those providers not reaching the standard complete very small volumes of work.

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<sup>8</sup> This is because of the higher average case costs in London, which have been excluded from the fee calculations.

- 5.11. It is the aim of the supervisor standard proposal that only experienced practitioners undertaking a reasonable volume of cases, in order to guarantee ongoing specialist expertise and quality of advice, are able to undertake Prison Law work. Therefore, it is an acceptable consequence of this policy that a relatively large number of firms doing very small numbers of cases are excluded.
- 5.12. As can be seen from the maps in Appendix 4 (Figure 22a and Figure 22b) those firms that do meet the standard are widely spread across the country and, taken with the fact that they complete the majority of cases, we therefore have confidence that they will be able to meet future client demand for services. Indeed, establishing the supervisor standard may be an opportunity for quality assured providers to take up work previously undertaken by general crime firms and expand their services were any shortfall in supply to emerge in the future.

### **Prisons and other criminal justice system agencies**

- 5.13. We believe that increasing the quality of the services provided to prisoners and strengthening the incentives on providers to deliver their services efficiently will deliver real benefits to clients, as well as offering the potential to provide benefits to prisons in terms of their engagement with legal aid providers.
- 5.14. By strengthening the sufficient benefit test we aim to focus funding on substantive cases, which we believe will support prison administration by encouraging use of internal complaints procedures. Legal advice will be directed toward those cases where it can have the most benefit, including in holding prisons to a proper standard of care for prisoners.

## **6. Compensatory simplification**

- 6.1. We believe that the administrative burden of the proposals will be minimal. Providers will still be required to report case information, and there will be a one-off requirement for supervisors to submit an application. These requirements will be offset by the use of an online system to manage the application process for the CDS Contract 2010. Therefore, we consider that any additional costs will be negligible and outweighed by the benefits of improved quality assurance and value for money from the changes.

## **7. Enforcement and sanctions**

- 7.1. The changes being implemented to Prison Law work will be made through the CDS Contract 2010. Firms will not be eligible to carry out Prison Law work under the CDS Contract 2010 unless they have at least one member of staff who is qualified as a Prison Law supervisor. Under the CDS Contract 2010 all cases will be paid under the new system of fixed and standard fees and the current system of hourly rates will be unavailable for any cases started after the commencement of the new contract.
- 7.2. As with all legal aid work carried out under contract, firms must report case details to the LSC and retain case files for auditing. If any issues over contract compliance are identified the LSC has a range of powers to take action against the firms involved.

## **8. Monitoring and review**

- 8.1. We will monitor the operation of the new Prison Law scheme through case information reported by contracted firms and through ongoing contract management processes. A post-implementation review of the scheme, with a focus on whether the fixed and standard fees have been successful in containing cost increases, will report by summer 2011.

## **9. Contact Details**

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Document available to download at [www.legalservices.gov.uk](http://www.legalservices.gov.uk) > CDS > Consultations

## 10. EQUALITIES IMPACT ASSESSMENT

10.1. The Equalities Impact Assessment (EIA) is a system which considers all of our current and proposed activities and policies to ensure they do not disadvantage disabled people, black and minority ethnic people, men, women, transgender people and people of different ages, religion or belief, or sexuality. It also identifies where our policies and activities can be more effective in promoting equality of opportunity and positive attitudes.

### Methodology

10.2. In order to assess the potential impact of the fixed fees and supervisor standards on providers we have completed an analysis of how the fees might affect providers' income, and the number of firms likely to pass the supervisor standard. While the extent to which we are able to make accurate predictions about the future is necessarily limited (see the sections on sectors affected above and appendices 2 and 4 below) we believe that this provides a useful basis for considering the impacts of the fees.

10.3. The Legal Services Research Centre (LSRC) holds diversity monitoring information on contracted firms, which is collected through an annual survey. They have been able to match this data to the impact assessment that we have carried out, and the results of this analysis are set out below. In order to allow for a more accurate comparison of the average costs of different firms in relation to the fixed and standard fees which will be paid in the future, we have excluded from the analysis cases that we are attempting to take out of scope. Where available, impacts are presented at a national level and for London and West Midlands, where the sample of providers is large enough to allow for meaningful analysis. It is not possible to provide detailed figures for each criminal justice system area on the same basis because of the smaller number of firms in some areas.

### Race Equality

#### LSC Duties

10.4. Public authorities in Britain have a legal duty to promote race equality. This means that they must have due regard to how they will:

- eliminate unlawful racial discrimination
- promote equal opportunities
- promote good relations between people from different groups.

10.5. The LSC is also under a specific duty to conduct race equality impact assessments of its policies in relation to the public duty to promote race equality and within this, to identify whether there is a differential and adverse impact on particular racial groups.

#### National

10.6. As can be seen from Figure 2, below, at a national level firms majority owned and controlled by black, Asian, and minority ethnic (BAME) lawyers have slightly larger Prison Law contracts than firms majority owned and controlled by white British lawyers, with firms with split ownership having the largest contracts.

- 10.7. The average of the percentage changes experienced by all groups of firms is positive, although the change in cash terms is negative indicating that it is affected by firms that experience negative impacts losing more than is gained by those experiencing positive impacts in the analysis.
- 10.8. Firms with split ownership and control have the highest average percentage change, followed by firms with majority white British ownership and control, and then firms with BAME majority ownership and control.
- 10.9. There was no significant difference at a national level between the proportion of firms passing the supervisor standard by ethnicity of majority ownership and control.

**Figure 2: National ethnicity impact analysis**

	Matched firms	% of matched firms	Fee changes			Supervisor Standard	
			2008/9 average	Average change	Average %	Do not qualify	Qualify
White British	456	80%	£18,168	−£527	20%	85%	15%
BAME	82	14%	£23,773	−£4,481	7%	82%	18%
Split	31	5%	£57,629	−£11,697	34%	81%	19%

**Note:** Average % figures are an average of the % change experienced by each firm, and not the average change against the 2008/9 average figures.

### London

- 10.10. In order to examine the difference between impacts at a national level more closely we have undertaken an analysis of firms in London, where 66% of the BAME majority owned and controlled firms matched to the LSRC sample were located. As can be seen from Figure 3, below, the situation in London differs from the national picture with firms with majority BAME ownership and control experiencing a positive average percentage change, compared with a negative average percentage change for firms with majority white British ownership and control – although the difference is relatively small.
- 10.11. Though firms with majority BAME ownership and control were slightly less likely to meet the supervisor standard in London than firms with majority white British ownership and control, the difference was not statistically significant.

**Figure 3: London ethnicity impact analysis**

	Matched firms	% of matched firms	Fee changes			Supervisor Standard	
			2008/9 average	Average change	Average %	Do not qualify	Qualify
White British	53	42%	£16,462	−£2,393	−4%	83%	17%
BAME	54	43%	£30,607	−£6,150	4%	76%	24%
Split	18	14%	£95,074	−£20,587	0%	72%	28%



## West Midlands

10.12. The West Midlands has been selected for further analysis, as it is one of the few areas outside London in which the LSC holds enough provider BAME data to allow for such analysis. However, we were only able to match a small number of firms with majority BAME ownership and control in the West Midlands. This makes it difficult to draw robust conclusions – in particular the finding that 100% of firms with majority BAME ownership and control would not pass the supervisor standard (see Figure 4 below) did not reach statistical significance because of the small sample size

10.13. There were no firms with split ethnicity ownership and control matched in the West Midlands sample.

**Figure 4: West Midlands ethnicity impact analysis**

	Matched firms	% of matched firms	Fee changes			Supervisor Standard	
			2008/9 average	Average change	Average %	Do not qualify	Qualify
White British	27	77%	£17,941	£1,521	40%	85%	15%
BAME	8	23%	£2,886	-£123	-12%	100%	0%

## Disability Equality

### LSC Duties

10.14. The Disability Equality Duty came into force on 4 December 2006. The LSC has published a *Disability Equality Scheme*, which is available at our website [www.legalservices.gov.uk](http://www.legalservices.gov.uk). This sets out the actions that the LSC will be taking to promote disability equality for legal service providers and the clients they serve, and our staff.

10.15. When carrying out our functions, the MoJ and LSC must have due regard to the duties placed upon us by the *Disability Discrimination Act 2005*. These are to:

- promote equality of opportunity between disabled people and other people
- eliminate discrimination that is unlawful under the *Disability Discrimination Act 2005*
- eliminate harassment of disabled people that is related to their disabilities
- promote positive attitudes towards disabled people
- encourage participation by disabled people in public life
- take steps to take account of disabled peoples' disabilities, even where that involves treating disabled people more favourably than other people.

10.16. From 4 December 2006, the LSC are also under a specific duty to conduct disability equality impact assessments of its policies in relation to the public duty to promote disability equality and within this, to identify whether there is a differential and adverse impact on disabled people and other people.

10.17. Because of the small number of firms with a majority of ill/disabled managers it is not possible to complete an impact analysis at this level. Therefore we have

undertaken an analysis of firms that employ at least one ill/disabled manager as against those that do not employ an ill/disabled manager. However, as can be seen from Figure 5 below, the number of firms matched with the LSRC sample remains low and findings must be treated with caution. In particular the low number of observations in London makes it impossible to draw conclusions here, and figures cannot be provided for the West Midlands because there were no matches with the diversity data.

10.18. At a national level, firms with at least one ill/disabled manager were seen to have larger contracts, larger average percentage increases in income, and be slightly less likely to meet the supervisor standard than firms with no ill/disabled managers. However, as stated above the low number of observations means that results are not statistically significant.

**Figure 5: National disability impact analysis**

	Matched firms	% firms matched	Fee changes			Supervisor Standard	
			2008/9 average	Average change	Average %	Do not qualify	Qualify
No ill/disabled manager	555	97%	£20,692	−£1,650	18%	85%	16%
Ill/disabled manager	17	3%	£37,183	−£3,023	36%	77%	24%

**Figure 6: London disability impact analysis**

	Matched firms	% firms matched	Fee changes			Supervisor Standard	
			2008/9 average	Average change	Average %	Do not qualify	Qualify
No ill/disabled manager	124	98%	£34,140	−£6,692	−2%	78%	22%
Ill/disabled manager	2	2%	£2,532	−£270	75%	100%	0%

## Gender Equality

### LSC Duties

10.19. The *Equality Act 2006* places a statutory duty on all public authorities, when carrying out their functions, to have due regard to the need:

- to eliminate unlawful discrimination and harassment
- to promote equality of opportunity between men and women.

10.20. This general duty will come into effect on 6 April 2007. From 6 April 2007, the LSC will also be under a specific duty to conduct gender equality impact assessments of its policies in relation to the public duty to promote gender equality and within this, to identify whether there is a differential and adverse impact on people of different genders.

### National

10.21. As can be seen from Figure 6 below, at a national level differences in contract size, average change in cash terms and average percentage income change,

as well as the proportion of firms meeting the supervisor standard did not vary significantly by gender of majority ownership and control. We do not, therefore, believe that the proposals would have any disproportionate effect on firms by gender of majority ownership and control.

**Figure 7: National gender impact analysis**

	Matched firms	% of matched firms	Fee changes			Supervisor Standard	
			2008/9 average	Average change	Average %	Do not qualify	Qualify
Male	406	71%	£20,331	-£1,420	17%	85%	15%
Female	74	13%	£22,881	-£3,205	12%	87%	14%
Split	89	16%	£23,144	-£1,443	31%	82%	18%

### London

10.22. In London firms with majority female ownership and control had larger Prison Law contracts than firms with majority male ownership and control, and experienced a larger average cash reduction and a negative average percentage income change.

10.23. However, as can be seen from Figure 8 below, the number of firms matched to the LSRC diversity data as having female or split ownership and control in London was small, and there was no statistically significant difference between the proportion of firms meeting the supervisor standard by gender of ownership and control.

**Figure 8: London gender impact analysis**

	Matched firms	% of matched firms	Fee changes			Supervisor Standard	
			2008/9 average	Average change	Average %	Do not qualify	Qualify
Male	78	63%	£27,923	-£5,040	0%	80%	21%
Female	23	19%	£55,687	-£11,143	-8%	83%	17%
Split	23	19%	£29,277	-£6,816	9%	78%	22%

### West Midlands

10.24. In the West Midlands the small number of firms matched with the LSRC diversity data as having split or majority female ownership and control (see Figure 9 below) was too low to draw robust conclusions.

**Figure 9: West Midlands gender impact analysis**

	Matched firms	% of matched firms	Fee changes			Supervisor Standard	
			2008/9 average	Average change	Average %	Do not qualify	Qualify
Male	29	83%	£16,935	£1,358	34%	86%	14%
Female	4	11%	£3,440	-£43	-14%	100%	0%
Split	2	6%	£1,322	£431	34%	100%	0%

## **Overall conclusion**

10.25. Overall, we do not believe that our analysis has identified any concerns about the effect that the proposals will have on equality. Although there is a disparity in impacts at the national level between BAME and white British majority owned and controlled firms, this is accounted for by the concentration of BAME majority owned and controlled firms in London where the impacts of the fixed and standard fees are higher. As we believe that the higher impact on London is justified by the need to improve value for money for prison work generally, and particularly in London where average case costs have been considerably higher in the past, we consider that the impact of the policy is justified by the benefits and proportionate to the issues we are seeking to address.

## **11. OTHER SPECIFIC IMPACT TESTS**

### **Competition assessment**

11.1. We do not believe that the changes we are making to Prison Law contracting will have a significant effect on competition in this sector. While a number of firms currently undertaking small amounts of work are likely to be excluded as the result of the introduction of a supervisor standard for Prison Law, these firms account for a small proportion of the work and undertake a low number of cases. Removing these firms from the market will not, therefore weaken the incentives for competition between Prison Law providers.

### **Small Firms Impact Test**

11.2. While firms undertaking very small amounts of Prison Law work will be excluded from the scheme with the implementation of the supervisor standard, we believe that this is a proportionate approach to safeguarding and improving the quality of legal advice to Prison Law clients. Firms undertaking such small amounts of work will not be able to build up or sustain the expertise necessary to undertake this specialist work, and will not be dependant on such low volumes of cases for their income. In addition, many firms undertaking small amounts of Prison Law work will not be small in total size, as they might undertake small amounts of Prison Law as an adjunct to a large criminal contract.

### **Legal Aid Impact Test**

11.3. The changes to Prison Law contracting are designed to save money from the budget for legal aid for Prison Law (see cover sheets and Appendix 3 for savings figures and cost benefit analysis). They will therefore contribute to ensuring the scheme is sustainable in the future, and that the taxpayer receives value for money.

### **Rural proofing**

11.4. Public authorities also need to take account of rural circumstances and needs (Rural White Paper, 2000). Rural proofing states that policy makers should systematically:

- consider whether their policy is likely to have a different impact in rural areas, because of particular rural circumstances or needs
- make a proper assessment of those impacts, if they are likely to be significant
- adjust the policy, where appropriate, with solutions to meet rural needs and circumstances.

11.5. Where appropriate, the LSC must consider the rural impacts of its policies to identify whether there is a differential and adverse impact on rural areas.

11.6. We have not identified any adverse impacts on rural areas as a result of this policy. Travel to prisons, no matter their location, is part of the service and travel and waiting costs have been included in the fixed and standard fees for Prison Law work. Assessment of the likely impact of introducing the supervisor standard shows that service provision will continue to be spread across the country, with providers located in the proximity of most if not all prisons.

### Specific Impact Tests: Checklist

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	Yes
Disability Equality	Yes	Yes
Gender Equality	Yes	Yes
Human Rights	No	No
Rural Proofing	Yes	No

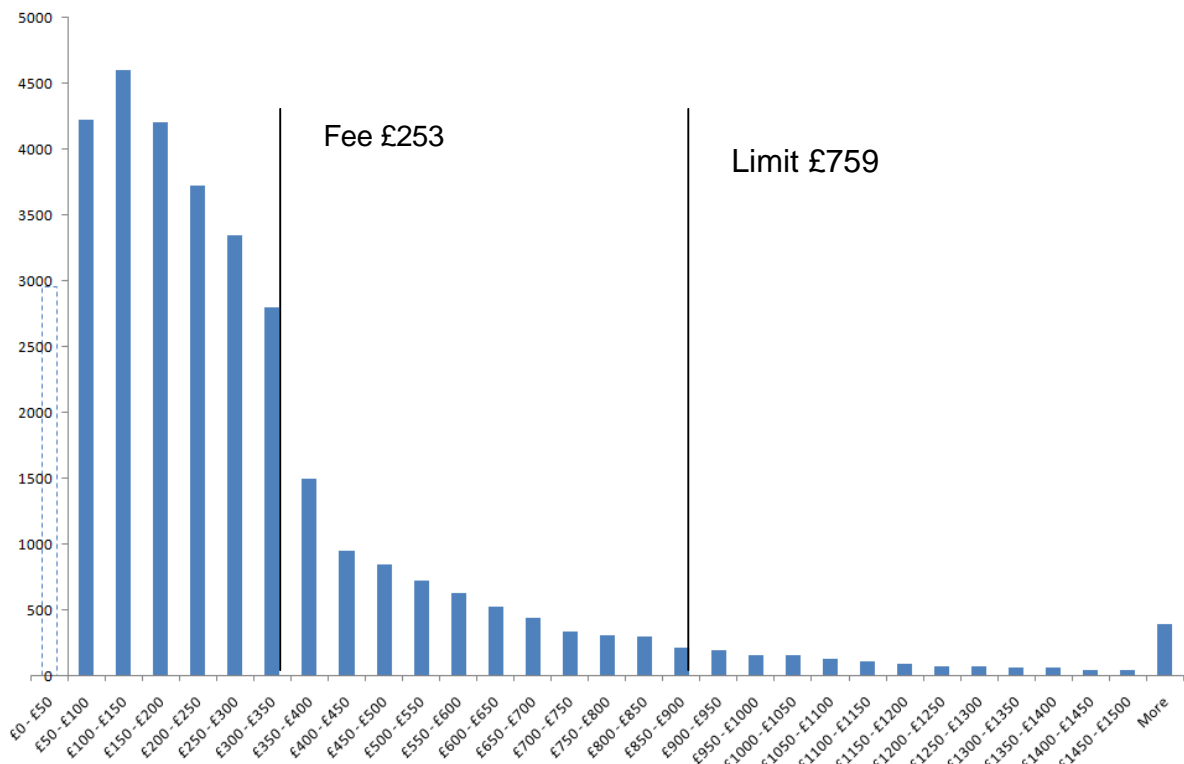
# Appendices

## Appendix 1: Selected data analysis to support the fee calculations

**Note:** All costs and fees in this appendix include profit, travel and waiting costs and VAT at 15%.

### Freestanding advice and assistance

**Figure 10: Freestanding advice and assistance: number of cases by amount claimed 2008/09**



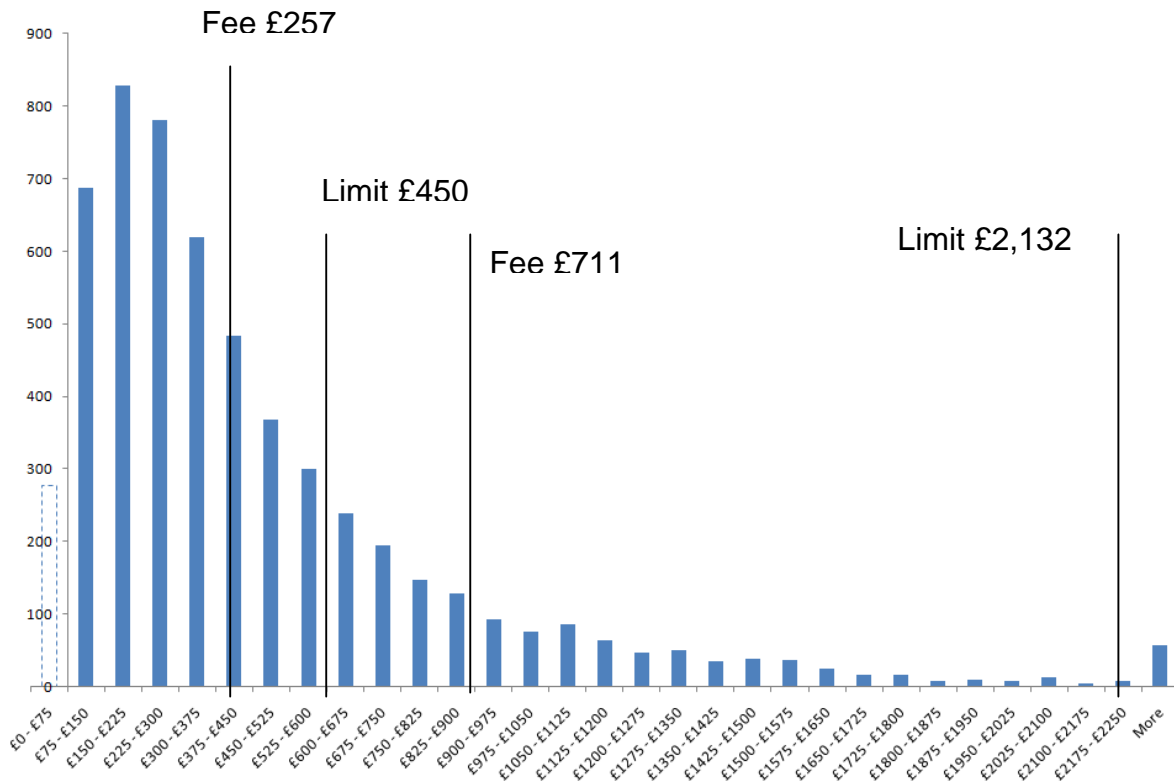
**Note:** Cases with less than £50 of profit costs have been excluded from the fee calculation, to aid interpretation cases with less than £50 of total costs have been shaded out in this chart.

**Figure 11: Distribution of freestanding advice and assistance cases and costs into fee levels**

	Below £50	Fixed fee		Exceptional cases
		Below the fee	Above the fee	
Cases	11%	54%	39%	7%
Cost	2%	25%	47%	28%

## Advocacy assistance at prison disciplinary hearings

**Figure 12: Advocacy assistance at prison disciplinary hearings: number of cases by cost 2008/09**



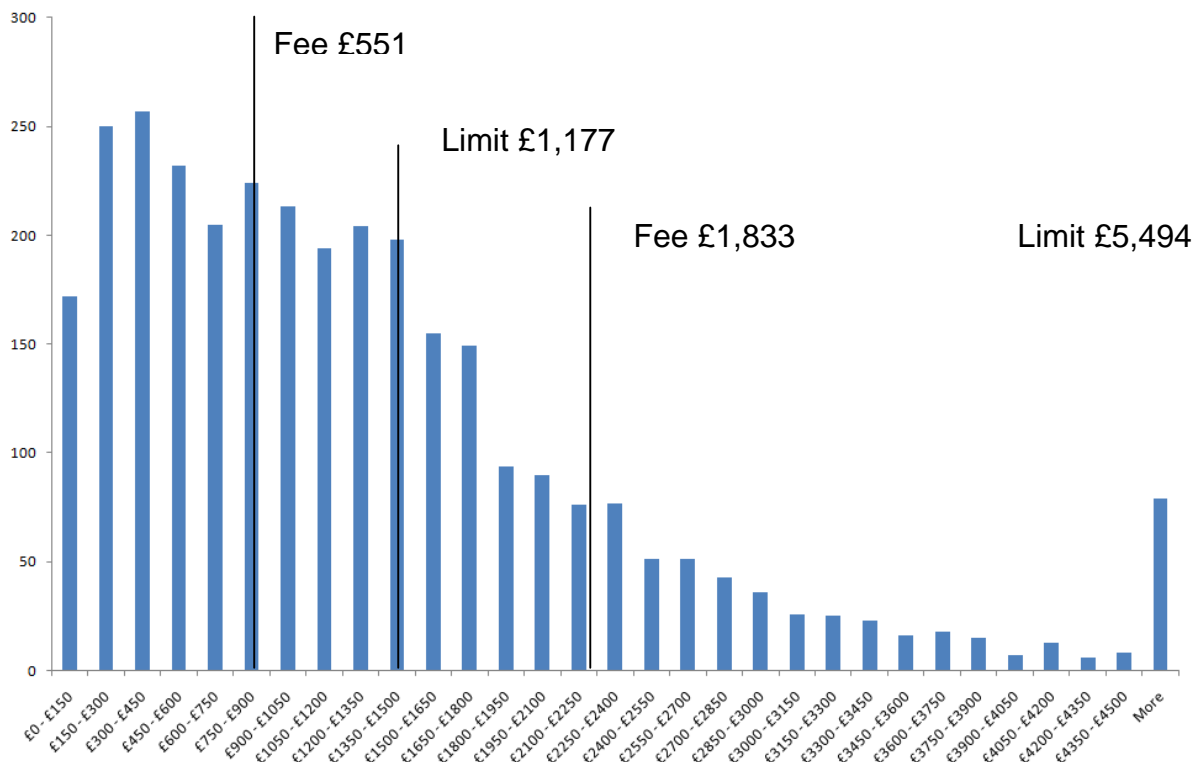
**Note:** Cases with less than £75 profit costs have been excluded from the fee calculation, to aid interpretation, cases with less than £75 of total costs have been shaded out in this chart.

**Figure 13: Distribution of advocacy assistance at prison disciplinary hearings cases and costs into fee levels**

	Below £75	Lower fee		Higher fee		Exceptional cases
		Below the fee	Above the fee	Below the fee	Above the fee	
Cases	11%	30%	30%	19%	19%	1%
Cost	2%	10%	20%	21%	41%	7%

## Advocacy assistance at Parole Board hearings

**Figure 14: Advocacy assistance at Parole Board hearings: number of cases by cost 2008/09**



**Figure 15: Distribution of advocacy assistance at Parole Board hearings cases and costs into fee levels**

	Lower fee		Higher fee		Exceptional cases
	Below the fee	Above the fee	Below the fee	Above the fee	
Cases	26%	28%	23%	22%	1%
Cost	6%	18%	25%	44%	7%



## Appendix 2: Provider income impact assessment

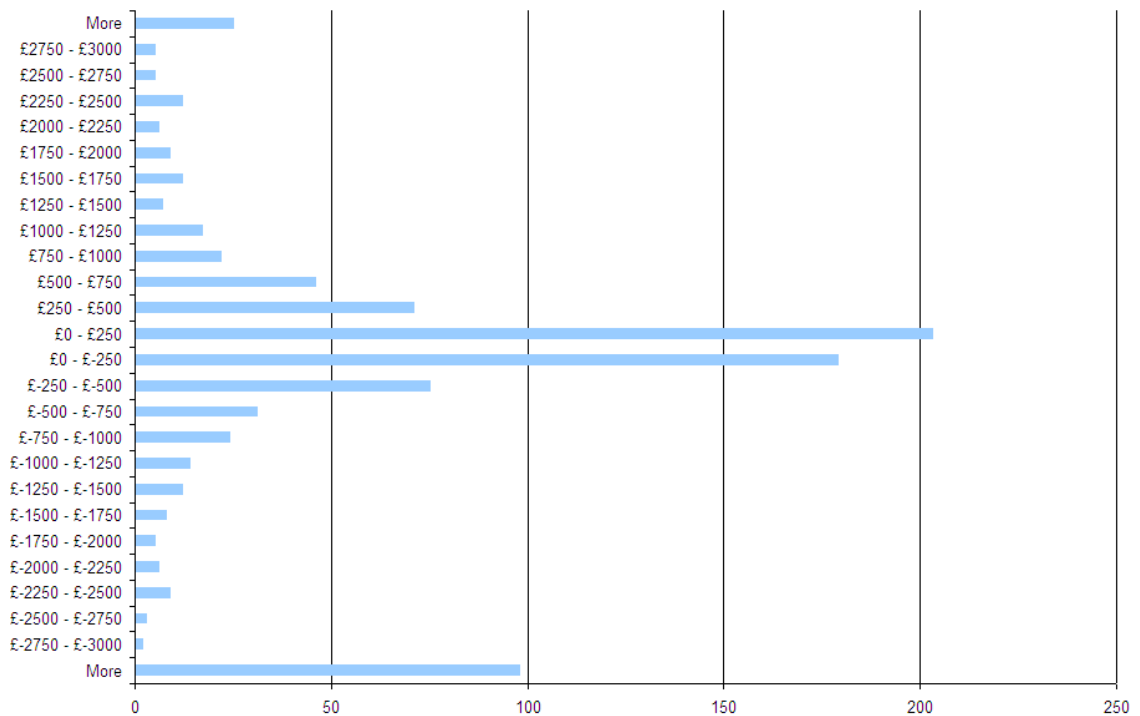
### Methodology

In order to gain a better understanding of how the new Prison Law fees might affect firms differently, we have applied the new fees to the cases claimed by firms in 2008/9. This counterfactual impact assessment therefore assumes no changes to working practices and case costs, which will clearly occur under the new system of fixed and standard fees. Therefore, the figures serve as a guide to the possible impact of the changes, rather than an accurate prediction.

**Figure16: Proportion of firms that would lose and gain from the fees and average cash impact**

	Firms		Change	
	No.	%	Average	%
<b>Gain</b>	441	49%	£900	39%
<b>Lose</b>	466	51%	-£4,400	-22%
<b>Total</b>	907		-£1,800	

**Figure 17: Number of firms by change in income (£)**



**Figure 18: Number and proportion of firms that would lose and gain from the fees by CJS area**

CJS Area	Firms		Spend	
	Gain	Lose	Change	%
Gwent	89%	11%	£5,300	21%
Gloucestershire	80%	20%	£500	13%
Cleveland	77%	23%	-£34,700	-5%
Cambridgeshire	75%	25%	£5,800	6%
Humberside	75%	25%	£8,700	25%
Surrey	75%	25%	£700	5%
Wiltshire	75%	25%	£8,500	13%
South Yorkshire	68%	32%	-£8,600	-2%
Avon and Somerset	67%	33%	£2,400	2%
Durham	67%	33%	£200	1%
South Wales	66%	34%	£600	0%
Staffordshire	62%	38%	-£6,800	-2%
Derbyshire	62%	38%	£1,100	3%
West Midlands	62%	38%	£33,400	6%
Greater Manchester	60%	40%	-£72,500	-4%
Northamptonshire	60%	40%	-£4,400	-4%
Hampshire	59%	41%	-£29,800	-4%
West Yorkshire	59%	41%	£40,400	6%
Nottinghamshire	59%	41%	-£15,200	-2%
Kent	58%	42%	-£3,700	-2%
Cheshire	56%	44%	-£5,500	-12%
Lancashire	56%	44%	-£5,200	-2%
Norfolk	56%	44%	£12,400	18%
Essex	53%	47%	£2,300	7%
Dyfed-Powys	50%	50%	£1,100	36%
Warwickshire	50%	50%	£1,000	12%
Lincolnshire	45%	55%	-£300	-1%
Northumbria	45%	55%	-£41,700	-9%
Hertfordshire	44%	56%	-£6,400	-5%
West Mercia	44%	56%	-£56,900	-13%
Devon and Cornwall	42%	58%	-£96,900	-13%
Leicestershire	42%	58%	-£12,300	-8%
Thames Valley	41%	59%	-£31,000	-10%
Merseyside	41%	59%	-£90,900	-7%
North Wales	40%	60%	£100	1%
Sussex	35%	65%	-£3,200	-3%
Bedfordshire	33%	67%	-£41,600	-14%
North Yorkshire	33%	67%	-£2,900	-5%
Dorset	29%	71%	-£3,700	-10%
London	26%	74%	-£1,210,000	-20%
Cumbria	0%	100%	-£800	-17%
<b>Total</b>	<b>49%</b>	<b>51%</b>	<b>-£1,660,500</b>	<b>-10%</b>

## Appendix 3: Projected cost of fixed and standard fees

**Methodology:** The fixed and standard fees have been applied to projections of future case volumes to assess the possible total cost of the scheme in the future.

Year	08/9	09/10	10/11	11/12	12/13	13/14
<b>Case volumes</b>	43,000	52,000	58,000	65,000	73,000	82,000
<b>Forecast Expenditure</b>	£22m	£29m	£37m	£44m	£51m	£54m
<b>Post-reform expenditure</b>	£22m	£29m	£31m	£22m	£22m	£22m
<b>Saving (£-)</b>	£0m	£0m	£-5m	£-22m	£-29m	£-32m

## Appendix 4: Selected data analysis of the supervisor standard

**Figure 20: Providers qualifying for the supervisor standard by billing 350 hours in 2008/9 by criminal justice system area**

Criminal Justice System Area	Firms	Qualify	Do not qualify	Hours billed	Average by firm
London	214	20%	80%	80,970	378
Greater Manchester	60	23%	77%	23,150	386
West Midlands	52	6%	94%	6,180	119
West Yorkshire	39	15%	85%	10,860	278
Hampshire	32	9%	91%	19,930	623
Merseyside	32	25%	75%	18,680	584
South Wales	32	6%	94%	3,240	101
Northumbria	29	7%	93%	7,970	275
Devon and Cornwall	26	23%	77%	13,520	520
South Yorkshire	25	24%	76%	7,280	291
Sussex	23	4%	96%	1,590	69
Thames Valley	22	18%	82%	4,520	205
Staffordshire	21	24%	76%	5,700	271
Essex	19	0%	100%	520	27
Kent	19	11%	89%	2,510	132
Leicestershire	19	16%	84%	2,170	114
Avon and Somerset	18	6%	94%	1,720	96
Lancashire	18	11%	89%	4,440	247
West Mercia	18	28%	72%	7,270	404
Nottinghamshire	17	35%	65%	12,600	741
Cleveland	13	31%	69%	11,070	852
Derbyshire	13	8%	92%	2,040	157
Humberside	12	0%	100%	540	45
Lincolnshire	11	0%	100%	790	72
Bedfordshire	9	22%	78%	4,880	542
Cheshire	9	11%	89%	710	79
Durham	9	0%	100%	340	38
Gwent	9	0%	100%	430	48
Hertfordshire	9	11%	89%	1,270	141
Norfolk	9	11%	89%	1,150	128
Cambridgeshire	8	25%	75%	1,600	200
Dyfed-Powys	8	0%	100%	40	5
Surrey	8	0%	100%	300	38
Wiltshire	8	13%	88%	860	108
Dorset	7	0%	100%	620	89
North Yorkshire	6	17%	83%	810	135
Gloucestershire	5	0%	100%	60	12
North Wales	5	0%	100%	70	14
Northamptonshire	5	20%	80%	1,670	334
Warwickshire	4	0%	100%	100	25
Cumbria	3	0%	100%	60	20
<b>Total</b>	<b>905</b>	<b>15%</b>	<b>85%</b>	<b>264,270</b>	<b>292</b>

**Figure 21: Providers qualifying for the supervisor standard by billing 350 hours in 2008/9**

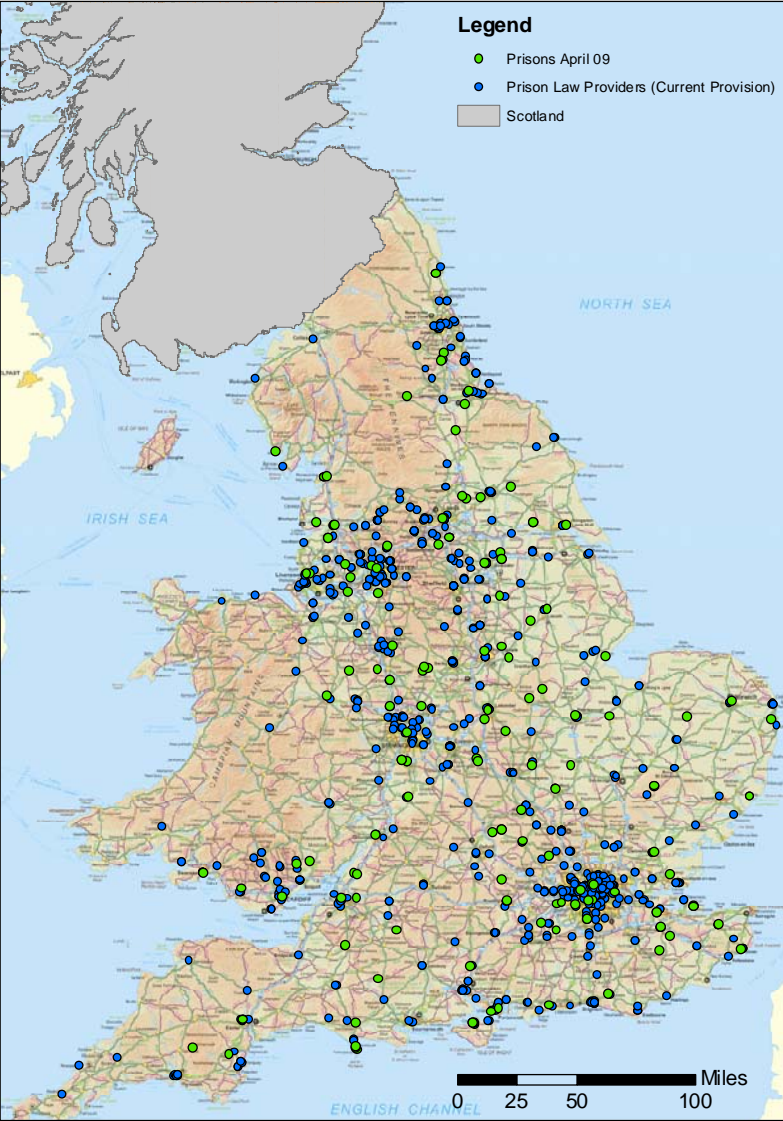
	Firms		Cases	
	No.	%	No.	%
<b>Qualify</b>	137	15%	33,632	78%
<b>Do not qualify</b>	770	85%	9,503	22%
<b>Total</b>	907	-	43,135	-

**Note:** The total firms figures differs from Figure 20 as two firms in the data have not been allocated a criminal justice system area.

**Note on methodology:**

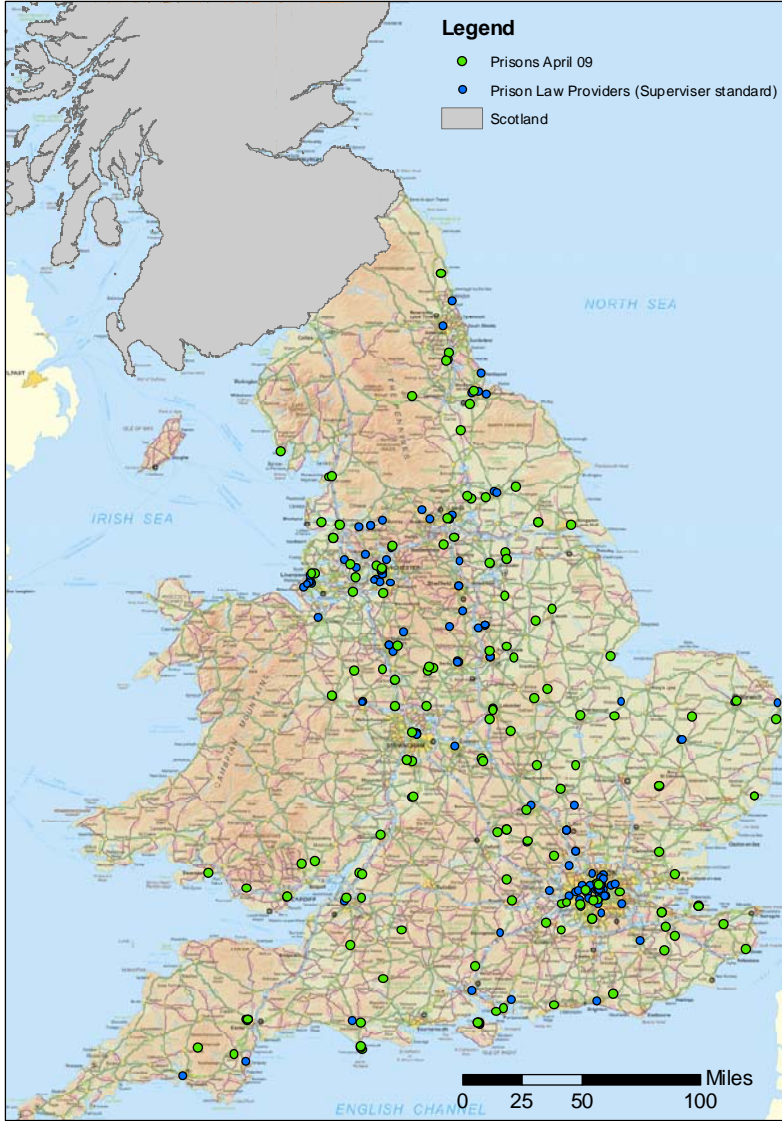
The hourly rates used to calculate the amount of time spend on the case from the profit costs claimed are those that are appropriate for the class of work. The fact that a firm has billed 350 hours of work is not a guarantee that a single fee earner in that firm will qualify as a supervisor, as the work may be spread across several individuals. However, this firm level analysis is intended to give a guide of the potential impact of the policy by describing the current situation.

**Figure 22a: Providers making a claim for Prison Law in 2008/9**



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**Figure 22b: Providers making claims for Prison Law in 2008/9 of 350 hours of profit costs**



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