CO/9207/2010

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 30 September 2010

B e f o r e:

LORD JUSTICE MOSES

MR JUSTICE BEATSON

Between:
LAW SOCIETY OF ENGLAND AND WALES

Claimant

v

(1) LEGAL SERVICES COMMISSION

Defendant

(1) CREIGHTON GROUP
(2) LOCK AND MARLBOROUGH GROUP
(3) NATIONAL YOUTH ADVOCACY SERVICE

Intervenors

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(Official Shorthand Writers to the Court)

Ms Dinah Rose QC and Ms Maya Lester (instructed by Bindmans) appeared on behalf of the **Claimant**
Mr Clive Lewis QC, Mr Paul Nicholls and Mr Michael Lee (instructed by Legal Services Commission) appeared on behalf of the **Defendant**
Mr Nicholas Bowen QC and Mr Ben Chataway (instructed by Creighton and Partners) appeared on behalf of the **1st Intervenor**
Mr Anthony Speaight QC (instructed by Lock and Marlborough) appeared on behalf of the **2nd Intervenor**
Mr Lindsay Johnson (instructed by NYAS) appeared on behalf of the **3rd Intervenor**

J U D G M E N T
(As Approved by the Court)

1. LORD JUSTICE MOSES: This is the judgment of the court. Although ex tempore, it contains substantial contributions from Beatson J.

2. For three years between 2007 and 2010 solicitors have provided publicly funded family law services throughout England and Wales through approximately 2,470 offices. They provided those services pursuant to the Universal Contract (Civil) awarded by the Legal Services Commission ("LSC"). The contract was due to expire on 31 March 2010, but has been extended to 14 November 2010. In order to award new contracts, the LSC conducted a competitive procurement process designed to identify those who are best qualified to provide legal services across the whole range of issues which arise in family law (integrated services) in geographical areas and, where necessary, through access points specified by the LSC.

3. Following a lengthy period of discussion and consultation between 2008 and 2010, on 26 February 2010 the LSC announced the criteria and scoring system by which they would select those best equipped to provide the required services, and they invited solicitors to bid. The period for bids expired eight weeks later on 21 April 2010.

4. The result of this process, announced on 27 July 2010, was to reduce the number of offices providing family law services from 2,470 to 1,300, a reduction of about 46 per cent. No one had expected so dramatic a reduction. The LSC itself had repeated, in the period from 2008 and the announcement of the terms of the tender in 2010, that it expected "the great majority of existing providers to retain a contractual right to provide family law services". At most it had expected a reduction of between 20 to 30 per cent of providers whose publicly funded family services amounted only to a very small proportion of their work.

5. The reduction caused serious and vociferous concern. It was not just a question of numbers. It was not merely a question of dismay that those who had spent their professional lives for little reward providing publicly funded services to the deprived, socially disadvantaged and excluded were no longer to be permitted to do so. The focus of concern was that those who were acknowledged to be highly skilled and experienced professionals were no longer going to be able to deploy those skills in areas where they were most needed. That concern was expressed not merely by those who had failed, but by those who had succeeded, and by those who had come to know, trust and rely upon solicitors practising in a difficult and demanding jurisdiction, namely clients, minority representative organisations and judges.

6. Of course, any competition will throw up losers, will lead to change and cause concern. If that change is the consequence of a fair competitive process designed to lead to improvement in the provision of services by those most qualified to provide them, any complaint about the competition is likely to be unjustified.

7. The competitive process was designed to identify those best able to provide those services which the LSC judged to be necessary in locations where the LSC judged they would be accessible to those who needed them. This application for permission and, if granted, for judicial review by the Law Society is founded on the allegation that the process adopted by the LSC for identification of those who would best be able to achieve its objectives was seriously and unlawfully flawed. The process, it is alleged, was arbitrary, unfair and discriminatory. The manner in which the LSC conducted the

tender process, it is argued, had no rational connection to the aim which the LSC had sought to achieve.

8. Central to this contention is the submission that the LSC ought to have announced in advance the selection system by which it proposed to assess who was best able to provide integrated services. Two categories of criteria were adopted: essential criteria, that is the minimum qualification which had to be reached before a contract would be awarded; and selection criteria, in the event of a need for competition, by which the LSC sought to identify those best qualified in order of merit. The purpose of the criteria is of great importance in this application. It was, as Sarah Kovac Clark, Head of the Community Legal Service of the LSC (states in paragraph 56 of her statement) to identify the very best providers: firms which were good, but not rated as highly as the best would receive little or nothing.

9. The criteria announced in February 2010 revealed that the only way in which the maximum score of 40 under the selection criteria could be achieved was by showing that at the time of the bid at least one caseworker was accredited under two different panel accreditation schemes. There were, of course, a number of different criteria with different marks, but the highest score could only be gained if at least one caseworker, who would provide family services at the office related to the bid, was a member of the Law Society's Children Panel Accreditation Scheme (five marks), and at least one caseworker, who could be the same caseworker, was a member of the Law Society Family Law Accreditation Scheme (having passed the "violence in the home" module), or a Resolution Accredited Specialist in Domestic Abuse. The system of accreditation was designed to assess experience, knowledge and commitment in areas of family law to which the LSC wished to give priority.

10. There was another feature of the process which increased the importance of scoring maximum points and triggered the need of a competition and deployment of the selection criteria. Those who bid in any particular procurement area were required to bid for a number of "New Matter Starts" (that is fixed fee work by way of preliminary advice which does not require specific authorisation). The invitation to tender stated how many New Matter Starts were available for each of the 135 procurement areas. Should the number of New Matter Starts bid for by tenderers exceed the total number available, the LSC would award all these available New Matter Starts to the bidder with the highest score, subject to the bidder's capacity, measured as 200 New Matter Starts per caseworker. The available New Matter Starts would only be allocated pro rata (that is in proportion to the number of New Matter Starts for which a tenderer bid) in the event that two or more bidders tied in top place. This process of "winner takes all" meant that it was necessary to achieve maximum points to safeguard against the possibility that the amount of work would exceed the amount available and thus a competition would take place, and to avoid failure to obtain any contract at all. (A bidder who was awarded no New Matter Starts would not be awarded a contract).

11. Many firms bid for very large numbers of New Matter Starts. There was a powerful incentive to do so. If a number of providers came equal first under the selection criteria, then the New Matter Starts would be allocated pro rata, as we have said, in accordance with the amount for which the provider had bid. Many providers overbid in hopes that on allocation they would be awarded a number of New Matter Starts closest to the number they sought. Thus the numbers of New Matter Starts bid for usually exceeded the number available, and the need to use the selection criteria was triggered.

The LSC was alive to this possibility and put in place the system we have identified of measuring capacity.

12. The criterion of accreditation to both panels frequently proved decisive. The loss of points attributable to accreditation made the difference between obtaining a contract and no contract at all. It is not disputed that a substantial number of firms failed in their bids because they did not, at the time of their bid, have a caseworker accredited to both the specified panels and could not obtain such accreditation in the eight-week period for bidding. It is not disputed that a substantial number of those who failed could have acquired accreditation had they appreciated that success might depend upon it.

13. At the heart of this application lies the complaint that in failing to make clear that such accreditation was necessary if maximum points were to be achieved at a time when a qualified tenderer could have applied for and acquired accreditation, the LSC acted unlawfully and frustrated the very aim it was seeking to achieve. That aim, as we have said, was to identify those who demonstrated they were best equipped in knowledge, commitment and experience to provide family law services. It was, so the Law Society contends, irrational not to give an opportunity to firms to demonstrate those qualities by applying for and acquiring accreditation. Had that opportunity been given, many more firms as well qualified as the winners would have achieved maximum points, or at least a number of points equal to those achieved by the winners, and thus a proportion of New Matter Starts would have been allocated to them, and they would also have won contracts.

14. The LSC contends that it was sufficiently clear from October 2008, when it produced its consultation document, that such dual accreditation, called in this application "panel membership", was necessary to ensure the best chance of success. Thus those who failed have only themselves to blame for failing to appreciate the need. Moreover, once the criteria and scoring were published on 26 February 2010, any challenge based on the lawfulness of those criteria or the timing of the announcement should have been launched promptly and, in any event, within three months. The effect of the delay is particularly serious when new contracts have been awarded, and significant damage and serious costs would be incurred should the process have to begin again.

15. These proceedings were only started on 27 August 2010. The claim should have been issued in February, and not at a time when delay causes severe prejudice to the LSC, to the successful firms and to the public interest.

16. Allied to the Law Society's central complaint is a second ground of challenge that the LSC failed in its statutory and common law duty to acquire such information as was necessary to make an informed decision as to the appropriate process for competitive tender. It should have appreciated that a number of firms who might well be qualified to provide those services, which the LSC wished to see provided, did not have caseworkers who were members of the two relevant panels, and it should have appreciated that the effect of the selection criteria and of the timing of its announcement would be that many existing providers might fail to win any contract at all.

17. The assessments of the impact of the tender proposals which the LSC did carry out under its statutory obligations to eliminate discrimination and promote gender and racial equality were not conducted on the basis of the effect of the selection criteria at

all. They made no reference to the effect of panel membership criteria or of the timing of its announcement. It emerged that at the time of those assessments the LSC had not decided on the criteria or scoring eventually adopted. It only reached a final conclusion on 26 January 2010, one month before the terms of the invitation to tender were announced.

18. The LSC respond that its assessments were conscientious and sufficient. It did not and could not envisage how fierce the competition would be. It could not have even foreseen that it would be necessary to deploy the selection criteria at all.

19. There is a third ground of challenge. The Law Society submits that the result of the competition is that the LSC has failed to secure within the resources made available and the priorities set out that individuals have access to family law services that effectively meet their needs, contrary to its obligation under section 4(1) of the Access to Justice Act 1999. Nor has the LSC promoted improvement in the range and quality it provides, contrary to its duty under section 4(4).

20. The Law Society described the effect of the substantial reduction in the number of providers as the creation of "advice deserts" and asserts that it has caused a lack of accessibility to services for minorities and in rural areas. The LSC has countered with an assurance that the winners would not have succeeded had they not been able to provide services of sufficient quality in those locations where access to such services has been judged necessary. The LSC is reviewing the result. Where an absence of provision has been identified (in Cornwall, Bridgend, Cardiff and the Vale and East Lancashire), revised arrangements will be made. This third issue has led to a substantial exchange of maps and statistics.

21. The Law Society's application is supported by 125 firms of solicitors throughout the country. There are 45 witness statements in support. It is important to appreciate that support comes not just from the losers but from the winners. Mr Rodney Warren, senior partner of Rodney Warren & Co at Eastbourne, who was successful, speaks of the concern at what he describes as dramatically reduced provision in the area of Eastbourne. He points out that the distance between providers is considerable, and there may be travel for as much as one hour each way. He also draws attention to the fact that, in the light of the result of the competition, the LSC has been making enquiries as to how many New Matter Starts successful tenderers would be prepared to relinquish to facilitate a redistribution (see paragraphs 14 to 19).

22. Ms Christina Blacklaws of Blacklaws Davis LLP, who were involved in an interesting exchange as they sought to find an office in which they could work in Camden after they were awarded a contract covering that area, speaks of her extreme concern that one of the intervenors, Creighton & Partners, were not successful. She describes their work as of the highest calibre, and states that their solicitors are uniformly experts in their field. She points out that the firm has attracted aspiring young legal aid lawyers, trained to produce the next generation of care solicitors. She comments that there is a risk of erosion of all experience and expertise, which will leave the most vulnerable in society without proper representation (see paragraphs 5 and 6 of her statement in support of the intervenors).

23. Resolution recorded a survey after the results were announced. The survey was sent to members of Resolution, some 1,355 firms. A substantial number responded, some 44

per cent (that is 597). It is important to note that there was an overall success rate of 54 per cent amongst their members. In response to a question as to whether the results of the award posed a serious threat to access to justice, 476 replied "yes" (that is 90 per cent). That percentage must include a substantial proportion of those who were successful.

24. Large numbers of firms of solicitors have sought to intervene, and a number of those have been supported by many firms. The Creighton Group intervention represents some 80 firms. The part they were permitted to play in these proceedings is dealt with in a judgment of Beatson J before this Divisional Court started to hear these proceedings. Anyone who wants to trace the history of intervention and support will be educated by that judgment.

25. We should emphasise that the Law Society's case does not challenge the criteria adopted by the LSC, nor the decision as to the scores to be attached to those criteria, nor the principle of winner takes all. The Law Society's case seeks to impugn the process adopted by the LSC and the consequences of that process. It is not surprising since the Law Society itself has endorsed the accreditation system, and, in its responses when it was being consulted, wanted to see that system extended even to areas where full provision of integrated services might not prove possible.

26. The criteria and the scoring were matters of judgment by the experts, the LSC and, indeed, the Law Society, who were best equipped to assess how to identify those firms and officers best able to offer the services for which the LSC was responsible. But whilst the court accepts the importance to be attached to the judgment of those expert bodies, questions of the fairness of procedure are distinct. However much the courts should respect the expertise of the LSC in choosing the best way to identify the best firms in consultation with the Law Society, the court, as an impartial observer of a competitive process which the LSC itself accepted to be "a white knuckle ride", is well-equipped to assess the fairness of the procedure and the extent to which it met the objectives the LSC was seeking to achieve.

27. The Creighton Group seeks, by way of intervention, to go further than the Law Society and contends that the criteria and methods of scoring were themselves unlawful. We shall consider later whether it is necessary to resolve that and other issues which it raises separately.

28. To understand the LSC's case that those who propose to tender ought to have appreciated the importance of panel membership, it is necessary to trace the chronology of the lengthy process leading to the announcement of the criteria and scoring on 26 February 2010. By this process the LSC sought to fulfil its statutory obligations. By section 4(1) of the Access to Justice Act 1999, the LSC was established for the purposes of promoting the availability to individuals of legal aid services, and in particular for securing within the resources made available and priorities set that individuals should have access to services that effectively meet their needs.

29. By section 4(4) those exercising functions of the LSC were required to have regard to the desirability of exercising those functions so far as reasonably practicable so as to promote improvements in the range and quality of services provided as part of the community legal service.

30. The key stages of the process designed to achieve that end started with the publication by the LSC in March 2007 of its strategy. The strategy document set out the LSC's aims. It is important because the document provides a yardstick for measuring the extent to which the procedure adopted bore a rational relation to the objectives the LSC set itself.

31. In section 1 of the strategy paper at paragraph 1.4, the LSC identifies the fact that families often experience problems in what they describe as "clusters". It announced that family legal aid providers would be expected to offer the full range of advice services, and able to offer both public law and private law services reflecting the need to meet a cluster of problems, such as document abuse, relationship breakdown, contact/residence and advice on money disputes (see paragraphs 2.9 and 2.10). This was regarded as an improvement to the existing provision. The frequent needs of those who suffered problems in clusters could be met by the provision of integrated services.

32. In October 2008 the LSC issued its consultation document and initial impact assessment. That consultation document repeated the perceived need to redefine the way that the services should be provided so as to meet the types of problem (clustering) experienced by clients who presented with multiple problems that crossed boundaries (see paragraphs 3.4 and 3.6).

33. The consultation document proposed to delivered more integrated services to clients by increasing the proportion of providers offering the full range and breadth of family work. It also described a key objective as ensuring that clients are able to reach an appropriate service either locally or through reasonable travel, and to award contracts only to providers meeting quality thresholds to safeguard the quality of advice. It also sought to manage the bid process in a proportionate way, balancing the need to allow competition with the need to maintain services and a "sustainable provider base" (see paragraph 3.14).

34. The strategy document acknowledged the need to meet the problems suffered by minority groups (see for example at paragraph 3.24). The objective was summarised in a subsequent summary dated 31 October 2008 as follows:

> "Research from the Legal Services Research Centre shows that there is a current need for improved access to early legal advice for both existing clients and those who do not get advice about the problems that they face. The proposals outlined in this consultation document will allow the LSC to secure easier access to face-face advice for people, in accordance with the stated aims..."

35. In a document headed "Summary analysis and evidence", the LSC acknowledged a risk that a move to more integrated services may result in reduced access, but sought to minimise it through the development of procurement plans and applying reduced service requirements in those areas in which it might not prove possible to provide integrated services.

36. We turn to the way the criteria were introduced in the consultation paper. We should emphasise the purpose of the criteria. It is clear, as Sarah Kovac Clark records, that the purpose of the criteria was to select those best equipped to provide the services. In the consultation document, the criteria were introduced by informing those who sought to

tender that there would be criteria which were essential category specific criteria (set out at annex B) and selection criteria (see paragraph 3.31). In relation to family services under the heading "Rationale" at paragraph 4.5, the consultation document gave this assurance:

> "In practice large numbers of family providers either already meet Integrated Services A, or are likely to be in less well supplied areas where we will be seeking Integrated Services B. This means that the overwhelming majority of family providers that follow the bid process and agree the new
>
> requirements can expect to have their contracts renewed." (Our emphasis)

37. In paragraph 4.42 under the heading "Family", the consultation document identifies the way it was proposed to require providers to demonstrate a specialism in one or more priority areas of work: either public law children or domestic abuse or private law children. It said:

> "We intend to measure this through Panel membership, and/or supervisor experience (see Annex B for more detail)."

38. It is worth noting that that paragraph was part of section 4, a section designed to identify changes in existing provision, and that, at that stage, the LSC envisaged a tenderer demonstrating its specialism through the essential, not the selection criteria. This was reinforced in the description of the essential criteria introduced at paragraph 6.10. At 6.10 it was noted that the essential category specific criteria would differ according to types of service the LSC wanted to buy in each category. It said that where significant changes from existing requirements were proposed, the detail would be set out in section 4 -- the section to which I have just referred.

39. The description of the category specific criteria is in annex B. At item 8, in the left-hand column there is set out these words: "Specialism in a priority area of work, ie Public Law, Domestic Abuse or Private Law Children", and then the proposed requirement in the right-hand column:

> "To demonstrate a specialism in Public Law Children, an organisation must have at least one adviser who is a member of the Law Society's Children Panel and/or a supervisor who has a past track record of this work as demonstrated by undertaking ten cases that have finished within the last two years ...
>
> To demonstrate a specialism in Domestic Abuse an organisation must have at least one adviser who is a Law Society Advanced Family Panel Member or a Resolution Accredited Specialist in Domestic Abuse. Alternatively, they must be able to demonstrate experience of delivering an advice service targeted at clients suffering from domestic abuse..."

40. The consultation document emphasised the need for integrated services and the need for provision of a full range of family work, including an employed advocate (see paragraphs 4.54 and 4.55). The idea of procurement areas, namely 134 at that stage based largely around local authority boundaries, was introduced at paragraph 5.52, and

at paragraph 5.6 the LSC proposed a minimum of five contracts. It stated that this was not a maximum and "in many areas, as now, we will be letting more". It repeated that forecast at paragraph 5.8. We draw attention to that expectation because that expectation was not fulfilled. The LSC now suggests that the five minimum in the procurement area is not merely a safety net, as it said in its consultation document, but sufficient to satisfy its obligations to improve those services for which it is responsible.

41. The consultation document dealt with the need for presence at the point at which services were to be provided (see paragraph 5.32). Capacity to undertake the work for which bids were made was specified (in paragraphs 6.34 and 6.35). The maximum number was to be at that stage 150 matters, but because of the fear of overbidding, it was increased subsequently to 200 per full-time equivalent (see paragraphs 6.34 and 6.35).

42. The selection criteria, should a competition take place, are crucial to this case, and the terms in which they were introduced central to resolution of the question whether those who proposed to bid ought to have known how to achieve the maximum marks in the event that selection was required. They were introduced under the heading "Selection criteria". The consultation document reads:

> "6.41. In procurement areas where there are more successful applicants than work available, we will apply selection criteria to further distinguish
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> between bids, this will act as a tiebreaker.
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> 6.42. Selection criteria will vary according to the category of law, information on these will be asked for as part of the tender documentation. We will
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> allocate matter starts to the highest ranking applicant first up to the maximum allocation requested, then the next ranking applicant, and
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> repeat this process until all the matter starts have been allocated. This will also need to take into account the need to ensure full coverage in an
>
> area, and any other relevant factors, for example, a minimum amount of providers per procurement area and our assessment of the applicant's capacity.
>
> 6.43. Selection criteria for each category are set out below. 'Supervisors' means those that would meet the SQM supervisor standard – even if they are not the currently nominated category supervisor."

43. In the left-hand column, under "Proposed selection criteria", reads:

> **"Family**
>
> Integrated service As:
>
> Ratio of Panel members to fee earners in priority areas (public law children, domestic abuse and private law children).

Marking

Preference will be given to applicants with a higher proportion of panel members to fee earners."

44. In the right-hand column under the heading "Rationale":

> "Panel membership provides evidence of a commitment to working with clients in our priority areas of family law."

45. It is worth drawing attention to the paragraph in relation to social welfare law, which emphasised the importance of a ratio. Under that heading, preference was to be given to organisations who could demonstrate a higher supervisor to fee earner ratio because that would ensure the quality of advice delivered by the provider. The fewer caseworkers, it is said, that a supervisor has to supervise, the more time that they will have to devote to their duties and the higher the quality of advice is likely to be. That emphasises that, at that stage, the LSC thought that the best means of assessing quality was to assess, through the accreditation system, the proportion of those demonstrating the necessary expertise to those providing the services. By that means it could assess skill and expertise across the range either of a firm or a provider within a particular office.

46. This application focuses on the passage we have read in relation to integrated service A, and an analysis of whether proposed bidders reading that document should have appreciated the importance of acquiring accreditation in both panels (that is Children and Advanced with Domestic Violence Module). It is not fair to resolve that question until the chronology of the process of consultation is complete.

47. The initial impact assessment of proposals was carried out in October 2008. Its importance is to demonstrate LSC's forecast that a large majority of current providers would meet the proposed criteria, though there would be a loss of those who only did a very small proportion of legal aid work.

48. The summary of the general impact on clients and providers is stated:

> "5.6. Overall, because criteria have been developed with the aim of increasing access to civil legal aid for legal aid clients, we anticipate that proposals will have a positive impact on clients' ability to access the services they need.
>
> 5.7. The analysis that we have been able to undertake found that overall, 83% of existing providers currently meet the proposed criteria. We would emphasise that the proposed criteria are designed to increase access to quality legal services for civil legal aid clients. At present there are a significant number of providers who contribute only a small amount in terms of people helped, e.g., in Family 28% of providers do only 1% of family legal aid work. We are of the view that providers who do very little legal aid work will need to either increase this work to a moderate amount, give up legal aid work or join together in consortia if we are to ensure a sustainable, good quality and client focused services. This is likely to mean fewer and larger contracts."

We draw attention to that expectation that 83 per cent of existing providers currently meet the proposed criteria, and the expected explanation for those who would drop out.

49. At 5.8 the assessment continues:

> "It should also be noted that these impacts are based on analysis of providers who we currently contract with and assumptions around consortia in SWL [social welfare law] categories. We have no way of predicting numbers of new entrants to the market or potential reorganisation of existing providers, for example, through mergers. We anticipate that although there will be some providers who based on their current contracts will not meet the criteria, they will adapt to meet the criteria if they choose to continue to undertake legal aid work. If we are not able to allocate all matter starts, we will hold additional bid rounds." (Our emphasis)

50. We draw attention to the expectation that existing providers would be able to adapt, which carries with it the clear implication that they would be given the opportunity to adapt. The expectation that 83 per cent of current providers would meet the proposed criteria without any further adaptation was repeated at paragraph 5.10. Paragraph 5.13 noted that some existing providers would lose contracts, but again repeated an expectation that existing providers would adapt.

51. At paragraphs 5.32 and 5.33, under the heading "Family", the assessment document repeated its expectation of the numbers who would be able to meet the criteria, and an assumption that providers would be able to expand to meet the proposed minimum bids in each category. It repeated that there could be a fallout of those who undertook only a very small amount of legally aided work, and gave the assurance, subsequently repeated on 18 May 2010 by Ms Kerry Wood, that it was not the intention to reduce the provider base (see paragraph 5.32).

52. That expectation was again repeated under the heading "Affected groups" in 6.15 and 6.16. Again, the document gave assurance:

> "In reality, we anticipate that many providers will be able to adjust their services to enable them to meet the criteria during the bid round..."

53. Thus, the LSC did not state that they expected, and certainly did not intend, any dramatic failure of existing providers to win new contracts. They expected failures to be attributable to a small amount of legal aid work, and expected existing providers to be able to adjust their services. The impact on clients was assessed on that basis, and the paper considers, for example, the expected impact in relation to rural areas: see section 11.

54. The response to the consultation of Resolution is set out in a document dated January 2009, and in particular the response to the question: "Do you think the proposed selection criteria for each category are the best way to differentiate between bids, that the proposal set out in the table in paragraph 6.43 seems sensible?"

55. The Law Society's response to that question states that preference should be given to applicants with a higher "proportion" of panel members to fee earners in both integrated

services A and B: both in areas where there was to be full integration of services provided and where there was to be reduced provision.

56. The LSC's response to the consultation and the final impact assessment was published in June 2009. It had been, it should be noted, expected that the invitation to tender would be published in that month in June 2009. The reasons and nature of the delay is set out by Mr Miller, the Head of Legal Aid at the Law Society in his first statement at paragraphs 45 to 49.

57. The response of both Resolution and the Law Society, and of course others, and the weight to be given to it, depends, of course, on what might reasonably be understood to be that which was proposed. Certainly it appears that a considerable number of consultees did not seem to be clear as to the proposal in relation to the selection criteria. Advice UK asked for further consultation. The Advice Services Alliance regarded it as somewhat ambiguous. Legal Action Practitioners Group wanted to look at the issue again when all contractual information was in place, and the Law Centres Federation did not regard it as clear as to how the LSC would distinguish between competing bids.

58. The response at paragraph 3.4 maintained the LSC's view as to the need to provide integrated services, and at 3.10 acknowledged the need to provide certificated work through authorised litigators. Its response in relation to selection criteria is important. It demonstrates LSC's understanding of what had been proposed, quite apart from indicating to those who read it what was likely to occur in the future.

59. Paragraph 5.20 repeated what it had earlier proposed in relation to selection criteria, namely that New Matter Starts should be allocated to providers following a ranking exercise using selection criteria. Providers would receive New Matter Start allocations in order of ranking up to the point where the available New Matter Starts were used up. The remaining lower ranked applicants would have their bid rejected (see paragraph 5.20).

60. The response then continued as follows:

> "5.21. In consultation we proposed one or two selection criteria per category largely based around supervisor to caseworker ratios or panel membership. 50% of respondents agreed with these measures. Whilst we plan to retain criteria around panel membership, we are reconsidering whether preferring those with a better supervisor to caseworker ratio would be appropriate. A few respondents were concerned that this would favour smaller providers and that it does not take account of the experience of caseworkers. As such we consider it more useful to us as minimum entry criterion rather than drilling down further.
>
> 5.22. To respond to other comments received, we will expand the range of selection criteria we will consider. In the main this will seek to build on
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> the minimum entry criteria to enable us to further decide which providers are able to deliver the best services for clients. This might include considering the access points that an applicant will deliver
>
> advice from to respond to calls for more detailed local criteria recognising

> the greater confidence we have in those with a track record of delivering either LSC services or comparable services, reviewing experience of delivering priority areas, considering whether all levels of advice can be delivered and the extent that integrated services can be provided ...
>
> 5.23. Full detail on the matter start allocation process and our selection criteria, including how it will be scored will be set out in the tender
>
> documentation due to be published prior to the opening of the bid round in September."

In fact, of course, the criteria were not set until January 2010 and not announced until the bid opened.

61. The consultation response was accompanied by a further impact assessment, which drew attention to the importance of certificated work (see 4.10), and announced that clients would have greater access to services (see 4.14). There is further evidence of the absence of awareness of what was to be required. On 26 July 2009, Matthew Howgate, who was working as a consultant assisting legal aid firms, wrote to the Commission seeking clarification of their tender processes, and in particular of the references to track records. Mr Miller, in his third statement, draws attention to a meeting of the Civil Contracts Consultative Group on 28 July 2009, in which further assurances were given that the process was not designed to "knock providers out".

62. The Legal Services Commission published a Q&A document on its website in July, August and November 2009, and again on 17 and 19 April 2010. It is sufficient for us to draw attention to the November document, since the relevant answers remained the same both in earlier and later documents.

63. In answer to question 3.12, "What criteria would the LSC use to distinguish between bids where one organisation bid to deliver all the matter starts available as against several smaller organisations bidding either separately or as consortia?" the Commission drew specific attention to paragraph 5.22 in the response to consultation document, which we have already quoted. It said that the selection criteria would be set out in detail in the tender documentation, but made no further reference to panel membership.

64. Question 4.5 in that document asked how quickly proposed tenderers would know of the selection criteria. It asked, "Why are these not being consulted on when the LSC clearly felt it necessary to consult on criteria in the main consultation?" The response was to say that the consultation exercise, including questions on the selection criteria, had already been undertaken. The final selection criteria would be set out in the information to tender documents. It then continued:

> "In response to comments received, paragraph 5.22 of the Consultation Response gave examples of selection criteria we will consider, including assessing:
>
> ...
>
> · track records of delivering either LSC services or comparable services;

· experience of delivering in priority areas;

and

· whether all levels of advice can be delivered and the extent that integrated services can be provided."

65. At section 5, the LSC dealt with what it called, in the heading, "Quality measures and supervisors". Question 5.2 was:

> "What is the situation for organisations that wish to achieve SQM [Specialist Quality Mark] in time for the new bids, are the LSC going to be able to audit them in time?"

The response was:

> "Providers who do not currently hold the SQM or equivalent quality standard will not be required to hold it at the time of bidding, but will be required to have passed a desktop audit at least six weeks before the contract starts and to have passed a preliminary audit and been awarded the SQM by 1 October 2010."

66. Question 5.11, under the same heading, asked:

> "Thinking specifically about family law:
>
> • At present I am not on any of the panels. I understand one needs to be on a panel. Which one does the LSC prefer, Resolution or the SRA's panels?
>
> • If one wants to do private and or public family law cases, does the supervisor have to be on the family panel or can they be on the children panel?
>
> • There is a 3 month backlog in SRA's papers being marked, and Resolution have informed me that their next exam is in November 2009 and therefore the results will not be know until the bid has been submitted. So do you have to be on a panel before you submit your bid for tender?
>
> • If one wants to do public child law only, I understand you require the supervisor to be on Resolution Child Panel. Is this correct or is the SRA one ok?

67. The answer was:

> "There will not be a requirement for the supervisor to be on a particular panel when delivering private and public family advice or public law children work only. The supervisor requirements set out in the contract for mainstream family work will not differ from those currently contained in the SQM.

> If your proposed supervisor is not a panel member at the time of bidding it will be a condition of any contract award that you must confirm that your supervisor meets the necessary standard (including, in family, panel membership) at least 6 weeks before the contract start date.
>
> The LSC announced on 31 July that the new civil legal aid contracts will now commence in October 2010. This will mean that current contracts will be extended for 6 months. The postponement of the tender will allow legal aid providers more time to decide whether they want to bid for the new contracts and prepare their tenders based on recently published policy. This will include applying for panel membership if required."

68. We comment at this stage that those responses might be confined to supervisors, but there was no hint that if others were required to be on the panels, there would not be time to become accredited by panel membership. On the contrary, it contemplated that supervisors would have the opportunity to become qualified as part of the essential or minimum criteria.

69. By January 2010 the LSC still did not know what the selection criteria were to be, and they had not yet been announced. But there is controversy as to whether the representatives of the Law Society, at a meeting on 15 January 2010, were asked to endorse the selection criteria which it was proposed to adopt.

70. In her statement dated 13 September 2010, Eleanor Druker, an employee of the LSC, states that the purpose of the meeting was to seek the views of the representative bodies on the proposed criteria. Sarah Kovac Clark goes so far as to say that the approach of awarding points for panel membership and experience was endorsed by the Law Society, Resolution and the LAPG (see paragraph 47).

71. This we reject. We can only attribute this unjustifiable assertion to the pressures of urgency in the preparation for this litigation imposed on LSC's officials. The contemporaneous document that has been produced by Mr Miller in his third statement at paragraph 34 (an e-mail in November) shows that what was proposed was an informal workshop-style session to review the terms of the tender documentation (see paragraph 34 of Mr Miller's third statement).

72. Ann Graham, a policy adviser in the legal aid team at the Law Society, describes in her statement how the documents containing the criteria were circulated at the meeting and had to be handed back at the end of the meeting. There was no possibility of consulting those for whom the Law Society was responsible, since neither advance sight of those documents was given, nor could they be taken away. It is difficult in the light of the process described by Ms Graham to see how it could have been called an endorsement.

73. Further, the meeting of 15 January demonstrates what we were told during the course of argument by Mr Lewis QC, frankly, on behalf of the LSC that the final decision as to the criteria had not even been made then. On the contrary, at that meeting there was still a possibility that scoring would allow of experience to count as highly as accreditation by panel membership (see Graham's statement at paragraph 16 (and in relation to domestic abuse experience and accreditation see Druker at paragraph 22).

74. Moreover, as the e-mail of November 2009, quoted by Mr Miller, indicates, apparently a decision had been made not to publish the criteria and scoring in advance of the announcement of the tender. That, it was pointed out by Ms Druker in her e-mail, would give an unfair advantage to those who were consulted who themselves proposed to tender (see Druker at paragraph 18). It is difficult, in the light of those factors, to describe any reaction at that meeting as being "approval on behalf of a representative body".

75. As we have indicated, the invitation to tender terms were announced on 26 February 2010. We should reiterate some of the important features. The selection criteria did not score according to the proportion of panel members to caseworkers. In order to achieve maximum points, it was necessary to belong to both the panels specified. Specialism was to be demonstrated not in the essential criteria as hitherto expected, but within the selection criteria. Whereas time was to be given for supervisors to reach a particular standard in the essential criteria by 14 October, similar time was not to be given under the selection criteria for any caseworker to acquire accreditation.

76. The effect of those criteria, once the bids had closed at the end of the eight-week period, is not in dispute. It was specifically accepted by Mr Lewis QC, on the Monday afternoon of the week of submissions, that substantial numbers of those who failed did so because they had not had a caseworker member on both panels. Examples of the reason for failure can be found in the evidence (see the evidence of Mr Hudson on behalf of Stamps, Ms Bower on behalf of the Children and Families Law Firm, Penelope Scott of Cartridges and Anne-Marie Hutchinson on behalf of Dawson Cornwell). That evidence demonstrates the skill and experience of those firms and the reason why they failed to win a contract due to their absence of accreditation.

77. As late as 14 January 2010, the Chief Executive expressed her view that she did not think that the tender would significantly reduce what she described as the "provider base" and, as we have already indicated, Mr Wood, Head of Central Commissioning, confirmed in May that it had not been the intention of LSC to reduce that provider base.

78. The evidence establishes, and there is no dispute that the reason for failure had not been the one that was expected, namely those who failed had undertaken only a small proportion of family work, but was that tenderers had failed to achieve maximum points or the same number of points as the winner through failure to have membership of both the specified panels.

79. Nor is there any dispute, and the evidence established, that had many of those who failed been given the opportunity to become accredited, they could have done so. Had a number of those who bid scored maximum marks, or had a number of those who bid come top, then New Matter Starts would have been allocated pro rata, as we have said, and all of those who scored top marks would have been awarded contracts.

80. The essential question is whether the LSC gave those who tendered a fair opportunity to demonstrate their knowledge, experience and commitment through accreditation. After all, it was by the external assessment which accreditation afforded that the LSC was able to judge who was best fitted to provide the services it required.

81. There are two related aspects to the failure for which the Law Society contends. First, the process of selection and the proposed criteria which were announced in advance and

on which consultation took place is said to be unclear and misleading. Secondly, by the time it was clear that it was necessary to have one caseworker as a member of both panels at the time of the bid, it was too late to become accredited. A period, so the Law Society submits, should have been set prior to tendering starting, during which those who had not hitherto seen the need to become accredited could do so and thus demonstrate their qualities.

82. We turn to the first question, namely whether the LSC made sufficiently clear what was required to maximise the chance of winning selection. Of course, if a failure to acquire accreditation was attributable to a provider's own failure to understand the prior indications it was given between 2008 to 2010, then the LSC is entitled to say that it did give a proper opportunity to providers to acquire maximum points. Failure to obtain such accreditation would not then be attributable to any failure of process, but only to the provider's unwillingness or inability to absorb the information the LSC had given to them. Mr Lewis QC contends that it was clear that membership of both panels in two priority areas, care proceedings and domestic violence, was needed if a provider was to give itself the best opportunity to acquire maximum points.

83. We are unable to accept that submission. The consultation document in 2008 and the subsequent history of consultation thereafter up to 26 February 2010 shows that the LSC failed to make clear how important it was for a provider to have a caseworker with accreditation on both panels if it was to obtain maximum points and thus be in a position to obtain a pro rata allocation. First, the consultation document in 2008 did not say that it was necessary; it made no reference at all to accreditation on two distinct panels. Mr Lewis suggests that it was obvious from the context that LSC was seeking integrated services with priority given to children and domestic violence. We fail to see how that message emerges from 6.43 of the consultation document at all, let alone clearly.

84. Second, the proposition that it was clear that membership of the two panels would be necessary is contradicted by the second middle column. It referred to a ratio of panel members to caseworkers (or fee earners as they called it). That suggested that a provider with a high number of panel members, even if they were all members of the same panel, in proportion to fee earners would be given preference, not that all that was needed was one caseworker who was a member of two panels.

85. Third, the need to demonstrate specialism at the stage of consultation, as distinct from a ratio, was confined to annex B, the essential criteria. In that respect, either membership or experience was said to establish specialism. As it turned out, contrary to what was said in the consultation document, specialism was to be established by selection criteria, not by the minimum essential criteria.

86. The subsequent responses of the LSC did not clarify, rather they further obscured the means by which a provider could best demonstrate its qualities. In particular, the response at 5.22 in the consultation response document contains no reference to the panel membership to which 5.20 and 5.21 refer. It is important because it demonstrates LSC's understanding that it would retain the criteria "round panel membership" -- a clear reference back to the reference to a ratio or proportion. There was no hint that that was different to that which had been previously announced.

87. Further, paragraph 5.22 spoke of building on the essential criteria for the purposes of determining selection criteria, and refers to the minimum entry criteria, which itself referred to experience and referred to track record. 5.23 envisaged an announcement in September, but the selection criteria were not in fact set until many months later. The questions and answers to which we have already referred, given between July 2009 and April 2010, refer back to 5.22, but made no reference whatever to panel membership.

88. In our judgment, the answers in relation to quality measures and supervisors would unwittingly, we emphasise, but substantially, mislead proposed tenderers as to the need for qualification by accreditation. The documents hitherto had referred to a process of adjustment. Supervisors were to be given time to become accredited through SQMs. There was no hint that proposed tenderers would suffer if their caseworkers were not qualified; no hint that no opportunity would be given to them to qualify.

89. We have already drawn attention to the evidence, cited by Mr Miller in his third statement and elsewhere, of the apparent lack of awareness, as the LSC knew in the summer of 2009, particularly in June and July, of what was required. Nothing in the documentation subsequent to the original consultation document indicated that membership of both panels would be necessary to ensure the maximum marks. On the contrary, those documents repeated the optimism that existing providers would continue to be able to provide the services they had given hitherto and would be given an opportunity to adapt.

90. The LSC submits that there was no legal obligation to announce the terms of a competitive tender in advance. It seems to us unnecessary to decide whether that proposition is correct as a matter of general principle. The LSC did choose to announce in advance what it proposed by way of selection criteria. In October 2008 the only tiebreaker of which it gave advance notice was the ratio of panel members to fee earners in priority areas. It sought to add to that information in response to consultation and its published questions and answers. Having chosen to take that course, it is no answer for the LSC to say it did not have to give any such information. Indeed, its submission that the information it gave made clear the importance of membership of both panels is inconsistent with the submission that it did not have to do so.

91. We turn to the second question, namely whether a fair opportunity was given to acquire accreditation, a question of timing. If the LSC had made it clear how maximum points could be scored, proposed tenderers would have appreciated the need to have one caseworker accredited to both panels. Failure to give an opportunity to acquire accreditation is said to have been a deliberate decision, although that contention does not sit happily with the submission that any one with any sense should have appreciated what was required -- the submission made on Friday afternoon, although it was amended, with Mr Lewis' customary tact, on Monday afternoon.

92. The LSC's evidence as to why a decision was made not to announce criteria in advance in a way which would give providers a fair opportunity to demonstrate, by external assessment, their qualities, emphasises the irrationality of its decision.

93. Miss Sarah Kovac Clark, the Head of Community Legal Services, says at paragraph 49:

> "We decided to assess panel membership on the basis of the position of the applicants at the time of the tender. This was consistent with the

> approach adopted as part of the earlier immigration tender in relation to Level 3 accredited caseworkers. Assessing at a later date would mean that panel membership would be likely to be ineffective as a selection criteria as those who did not have panel membership would apply simply to meet the conditions of the tender, not necessarily as evidence of commitment and experience. Awarding points for applications at the time of the tender would have meant that should caseworkers have been unsuccessful, there would be considerable revisiting of scores and awards late into the process. We did however recognise that some organisations may be in a position whereby they genuinely had caseworkers that met panel membership requirements but had not obtained it and as such, awarded a point for those organisations employing caseworkers that had applied to one of the relevant panels at the time of tendering."

94. We draw attention to the use of the word "applied". We well understand that a caseworker who had applied to join would not demonstrate the same ability to provide services and qualities as one who had received accreditation. But Sarah Kovac Clark's evidence affords no sensible explanation as to why a caseworker should not have been given an opportunity to demonstrate his or her expertise by obtaining accreditation before the time for tender. Her evidence provides no rational basis for denying a caseworker that opportunity. Of course, if a selection competitive process was to work, it would be necessary to be able to decide winners and losers after the time the bids came in, but before the time the work was to be undertaken in October. But that provides no explanation as to why an earlier opportunity before the bids opened could not be given.

95. The evidence of Eileen Druker similarly demonstrates the absence of any rational purpose in the timing of the announcement of the criteria and the scoring. She says:

> "9. However, as Ms Clark explains in her witness statement, it was decided that the criteria relating to the employment of caseworkers who were panel membership would no longer be used as an essential criterion but would instead be used only as a selection criterion. The function of a selection criterion is different from that of an essential criterion. Selection criteria are used to rank bids. Their concern is not to ensure, to the satisfaction of the LSC, that the tenderer will have in place certain necessary systems by the time the contract starts. Instead their role is to enable the LSC to distinguish between bids and place them in order of merit.
>
> 10. The LSC takes the view that the employment of caseworkers who are panel members is an indicator of quality and commitment ... The LSC took the view that in order to enable selection between bids, it was necessary to assess them as at the date of bid. So far as the panel membership criterion is concerned, tenderers who could show at the time of their bid that the employed panel members would be able to show that they had already demonstrated commitment and achieved levels of quality which the LSC regarded as valuable.
>
> 11. It therefore seemed appropriate to give some preference to those who had already obtained this quality standard compared to those who only

> undertook to achieve it in the future. There was a risk that if a long period were given before panel membership needed to be in place, there would be a great rush of applicants to all the panels as the great majority of providers would claim to meet this criterion, making it impossible to distinguish between tenders on this ground." (Our emphasis)

96. It may be that a great majority of providers would have claimed to meet this criterion. That is beside the point. The question was whether a great number of providers could establish their accreditation. If the purpose of the selection criteria was to rank bids in order of merit, as she says, there is no reason that we can understand why a provider should not be given a fair opportunity to acquire the necessary accreditation. Merit is to be assessed by accreditation. The more existing providers able to demonstrate the excellence of their qualities, the greater the chance that the LSC could achieve its objective. Depriving providers of the opportunity not of claiming but achieving accreditation impedes those objectives. It is irrational because it unfairly and arbitrarily reduces the number of those who would otherwise have been awarded maximum points. If those who gain maximum points are, as we are prepared to accept for the purposes of this argument, those who are best able to provide the services needed, there is no reason to reduce their number by failing to explain the importance of accreditation on both the specified panels, and give an opportunity for such accreditation. Such a reduction merely diminishes the pool of those with accredited knowledge, commitment and experience.

97. We repeat, it may well be that it would defeat the purpose of selection and ranking to allow accreditation to be acquired after the time for deciding on the bids, but *non sequitur* that such an opportunity should not have been given before.

98. The LSC's failure to give providers an opportunity to establish accreditation demonstrates that it did not appreciate that many of those who could have become accredited on the specified panels had not seen the need to do so. Evidence shows that after 2006 there was no financial incentive to be a panel member, and that the number of those who were members was declining. The LSC's own strategy paper of 2007 demonstrated a dramatic decline since 2001 in relation to the Children's Panel.

99. In reply, the Law Society produced figures for decline, showing only a significant increase in applications once the invitation to tender was announced in February 2010, by which time it was too late to acquire accreditation in the eight-week period for bids. Certainly numbers continued to decline after 2008, despite what the LSC describes as the clear indication given in 2008 that it was necessary to acquire accreditation.

100. Maureen Miller, the Head of Membership Services of the Law Society, explains the process of accreditation and the reason why applications for accreditation had not, until the invitation to tender, been made by firms undertaking publicly funded work (see paragraph 7). The time to be spent and the expense to be incurred for those with very low profit margins was considerable in the context that there was no perceived need to become accredited.

101. Had the LSC appreciated that experienced providers saw no reason for accreditation, and that the numbers of those accredited were in significant decline, it might have been more guarded in its prediction as to the number of existing providers who would succeed in their bids. It might also have appreciated that it was fair and would advance

its objectives if it made clear the importance of membership of both specified panels so that those who had not hitherto understood the need to do so would have had the opportunity to establish their qualities by accreditation.

102. The one successful tenderer who has given evidence in support of the LSC, Mr Mitchell, suggests that, after the terms of the tender had been announced, a firm without necessary accreditation could have hired a member of staff who did (see his paragraph 31). That was not, as the evidence shows, a practical consideration for those with very low profit margins in the time available. Nor are we satisfied that such an approach gives effect to the LSC's intention to meet its obligations by identifying the best providers. Bearing in mind that maximum points could be acquired if one caseworker who, as it subsequently emerged after the close of tender, needed only to work for three and a half hours in any office in respect of which the bid was made, merely hiring one caseworker with membership of both panels would hardly establish the level of experience, knowledge and commitment the LSC sought. It smacks of a somewhat cynical, although certainly commercial, approach.

103. It seems to us that withholding information as to how a provider might increase its chance of success by acquiring the maximum amount of points inhibits or defeats the very objective the LSC sought to achieve and to be contrary to its statutory obligations. Supervisors were given the opportunity to qualify in order to ensure minimum qualification; why not caseworkers in the tiebreaker?

104. LSC in its tender process was seeking to identify those best equipped to provide the services which were needed. That was the point of judging knowledge, commitment and experience by accreditation to the two specified panels. The application for accreditation shows, in the documents that we have seen, that it was a rigorous process, requiring external assessment of quality. The evidence shows that highly skilled and respected firms could have achieved such accreditation for a caseworker on both panels. It was irrational and contrary to LSC's avowed intentions to keep quiet about criteria according to which firms could demonstrate their expertise in priority services. It was irrational to announce that criteria at such a time when it was too late, by reason of the eight-week period, for bidders to acquire, not merely claim, accreditation on both panels.

105. We conclude that the failures we have identified to make clear what would be required to put a provider in the best position to acquire maximum points was unfair and arbitrary. It led to the absence of any opportunity to acquire an accreditation -- an opportunity which ought in fairness to have been given to achieve the LSC's objectives.

106. The result was the LSC was unable to identify all those who could equally demonstrate their qualities by external assessment. The process arbitrarily distinguished, and unfairly distinguished, those who happened to have one caseworker on both panels or who had happened to have discerned what was necessary in the opaque and misleading information as we have found it to be.

107. The LSC deprived itself of the opportunity to identify the best qualified firms according to external judgment. Had it been able to do so, there would have been a far greater number of those who were equal winners, and an opportunity to allocate the New Matter Starts pro rata and award far more contracts than proved to be the case. The result was that the process adopted could not rationally achieve the aim for which it was

designed, namely the identification of those best qualified to provide the services. The LSC diminished the pool of those who could, by accreditation, have demonstrated their knowledge, commitment and experience. In short, the LSC defeated its own ends.

108. This conclusion removes any need to determine the issue of whether the criteria themselves were irrational, as the Creighton Group contends. It also removes the need to consider whether the terms of the tender, as they were announced in advance, complied with the obligations of transparency and proportionality, or whether those issues are justiciable in public law proceedings. If they are, we would tentatively suggest that it is inevitable that the announcement in the consultation document of what was proposed, or the timing of the actual announcement, was neither proportionate nor transparent. But it is unnecessary to reach any conclusion on those issues.

109. It is also unnecessary to consider in detail the issue allied to the first ground, namely whether the LSC's impact assessment was inadequate. The LSC was under a duty to inform itself of the information relevant to the decision as to what process of tendering would be most likely to identify those best able to provide the services needed: see Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 at 1065B. It was under a similar statutory duty pursuant to section 4(6) of the 1999 Act which required the LSC to plan what could be done towards meeting the need by the performance by the LSC of its functions and facilitate planning by other authorities.

110. There was considerable discussion as to the nature of the duty to assess the impact, both under the 1990 Act and under what we can shortly call "the equality legislation". But it is beyond question that the assessments the LSC did conduct were conducted on the basis that a substantial majority of existing providers would continue to provide relevant services, and the reduction of between 20 to 30 per cent would be due to the small proportion of publicly funded legal aid work those firms undertook. There was no assessment of the effect of the dramatic reduction of anything like 46 per cent. Of course, no one could predict with precision, but LSC, for the reasons we have given, knew or should have known of the decline in membership of accreditation panels, and should have known of the reasons for it. Certainly it could have learnt that there was no great rush to apply in 2008 and 2009 when the numbers continued to decline. The LSC did not consider it, because by that time either it had not decided on the selection criteria or had later decided not to disclose the need for accreditation. It should have appreciated that there was at least a risk that the selection criteria would be deployed, particularly since there was a risk of bids for substantial numbers of New Matter Starts. But this issue is only the consequence of the unlawful process of competition and need not detain us further.

111. We should mention the third issue, before we consider delay: this relates to the consequences of the competition. The Law Society contends that the LSC failed to secure access to the services needed, or to have sufficient regard to the need to promote improvement of their quality. It contends that, far from improvement, those in dire need of the services now have access only to a reduced service, and in certain areas and towns no practical access at all.

112. The LSC accepts that in some areas (Cornwall, Bridgend, Cardiff and the Vale and East Lancashire) the competition has resulted in inadequate provision and is taking steps in its review which it has conducted and continues to conduct to make good those

inadequacies. It points out that there has been improvement and will be improvement in the provision of integrated services, save in those three procurement areas, and that the system has worked to provide improvement in the services which it judges to be necessary to be provided, in particular by specifying a minimum number of firms of five within any procurement area.

113. There has been considerable controversy as to the capacity of the winning firms to undertake the substantial amount of work necessary, which is certified as opposed to being New Matter Starts, and statistics have been exchanged as to whether, in judging capacity by reference to New Matter Starts, the LSC has failed to consider the capacity of the winners to do certified work.

114. We do not propose to resolve those difficult issues, and it is unnecessary to do so in the light of our conclusion, as a freestanding point. But as a related point this at least can be said: in conducting its reviews the LSC is now compelled to advance *ex post facto* justification for what it ought to have foreseen before. In her fourth statement, Kerry Wood, the Head of Central Commissioning, states (at paragraph 15) that the tendering exercise in all but three of the 135 procurement areas would lead to sufficient provision of legal services, including in LSC's priority areas such as domestic abuse and public law children (see paragraph 15). That is a modest claim. If the LSC had appreciated that a significant number of firms would fail to appreciate the need for caseworker accreditation, it would have appreciated that a number of those as well qualified as those who succeeded would be rejected. That after all is the burden of the concern expressed by the President of the Family Division, the leader of the Western Circuit and the minority representative organisations.

115. The work in question requires dedication, skill and experience. The consequence of the unfair and arbitrary process of competition is to diminish the pool of those as skilled and experienced and committed as the winners; those most in need of publicly funded family services have therefore been deprived of access to many of those as well qualified to meet their needs as the winners. It is with that consequence in mind that we must consider the final issue, that of delay.

116. The need for promptness in judicial review is well-known. Good public administration requires finality. This is because public authorities need to have certainty as to the legal validity of their decisions and actions, and third parties need to be able to rely on those decisions and actions. Promptness has been recognised to be particularly important where the interest of other parties is concerned: see for example R v Monopolies and Mergers Commission, ex parte Argyll Group plc [1986] 1 WLR 763 at 782-783; R v Independent Television Commission ex parte TVNI Limited [1996] JR 60; and the authorities cited in *Fordham's Judicial Review Handbook*, Fifth Edition, 26.2.2.

117. In this case the evidence of Kerry Wood in her second statement at (paragraph 57b) is that the LSC has expended significant resources, time and public money on the procurement exercise without believing or having reason to believe that the way the panel membership selection criteria operated would be challenged. She also states (at paragraph 57a) that successful bidders have taken steps and expended resources to be able to start providing the services under the new contract. These have included employing staff and improving their premises, and in some cases acquiring premises.

118. It may, as Ms Rose QC submitted, be the case that since the Law Society informed members of the profession of its intention to challenge the procurement in August 2010 shortly after the successful bidders were notified, that any further steps taken would be tentative in view of the impending challenge. Kerry Wood also refers at paragraph 57c to the detriment to the public who, in the LSC's view, would be deprived of the improved levels of service which are anticipated from the integrated services.

119. We accept that to re-run the exercise will be expensive and time consuming, damaging to those who have won and depriving those lucky enough not to live in the three areas we have identified of more integrated services than had been provided hitherto, even if that provision is to be more thinly spread. We should also note, however, that there is a system in place whereby contracts have been extended, at least at the moment until November of this year.

120. With this background we turn to the two questions we have to address: firstly, has there been delay? Secondly, if there has, should time be extended? The answer to the first question depends when the grounds of challenge arose. It is clear from the material that we have set out that the impact of the panel membership criterion was not foreseen by either party. We consider it significant and important that it was neither intended nor foreseen by the LSC. A the claim based on the impact of the criterion, brought before the LSC started to announce the results, would have been open to the criticism that it was premature and inappropriate. There is an indication of the LSC's attitude in Kerry Wood's letter dated 18 May 2010, responding to concerns raised in late April about the panel membership selection criteria by the chair of Resolution's Legal Aid Committee. She stated that she did not feel it appropriate to discuss the matters raised until the assessment process had "taken its course".

121. We are assisted by the observation of Richards LJ in R(Eisai Ltd) v The National Institute for Health & Clinical Excellence [2008] EWCA Civ 438, although we recognise the difference in the context and the relief sought in that case. The defendant, commonly referred to as NICE, refused to make available to the claimant a fully executable version of the economic model it was using to assess the cost effectiveness of drugs for treatment of Alzheimer's Disease. Proceedings were not instituted after the decision, but only some 18 months later after the outcome of the assessment. At paragraph 70, Richards LJ did not consider the court could have entertained a challenge at the time of the decision. He stated that at that time it was uncertain what the outcome of the appraisal process would be, and that it was more likely that such a challenge would have been considered premature and inappropriate.

122. Here the Law Society has successfully demonstrated the impact of the LSC's failures on the provider base as a whole. Without knowledge of the intensity of the competition in procurement areas, it is difficult to see how, after the selection criteria was announced, the first ground could have been advanced in a realistic way and be supported by evidence. The LSC, which had better knowledge of these matters than the Law Society, did not consider the tender would significantly reduce the provider base (see Carolyn Regan's letter to which we have already referred of 14 January 2010 when she was Chief Executive). The LSC was surprised by the outcome. As we have said, Kerry Wood had repeated the view that it was not the intention of the tender to significantly reduce the provider base. She had not felt it appropriate to discuss matters raised by practitioners' representatives.

123. It is because of the unexpected outcome that the LSC is now conducting the review to which we have referred. The fact that this challenge is to the impact of the timing of the introduction of the panel membership criteria, rather than to the criteria itself, distinguishes this case from Jobsin Co UK Plc (t/a Internet Recruitment Solutions) v Department of Health [2001] EWCA Civ 1241 on which Mr Lewis QC relied. That case involved a situation in which the defendant erroneously considered that a procurement exercise was for a type of contract which did not require the tendering documents to contain the criteria on which it intended to base its decision. In fact, the contract fell into a different category and it was necessary for the documents to contain the criteria. The question was whether a claim by a tenderer who had not been shortlisted was brought within three months from the date when grounds for bringing the proceedings first arose. It was held that those grounds arose when the invitation to tender was public because tenderers were at risk of suffering loss or damage from that date as a result of the defendant's breach of duty.

124. In Jobsin's case the relevant facts were known to both the bidder and the defendant at the time of the tender, but the bidder did not appreciate the legal significance of those facts. In the present case neither the bidders, the Law Society, or indeed the LSC were aware of the impact of the introduction of the criteria on 26 February 2010 when the invitation to tender was published. Jobsin's case also differs from this case because it was a challenge by a disappointed bidder in private law proceedings under the relevant regulations. Taking the facts before us, it has similarities to a challenge by an individual firm employing experienced practitioners who are not panel members and who could not qualify in time. Such a firm would know at the date of the tender that it would obtain fewer points than it would have done had those qualified to become panel members done so. But a challenge of that sort is very different from the Law Society's challenge to the impact of the timing of the introduction of the criterion on the overall outcome of the process. This is a public interest challenge concerned with the impact of this aspect of the procurement exercise on access to justice for those needing advice and representation in family law matters.

125. For the reasons we have given, we incline to the view that a challenge on ground 1, before the results started to be announced, was likely to have been considered to be premature. It is not however necessary for us to decide this point because we consider that, on the assumption that time did run from 26 February when the invitation to tender was published, this is a case in which time should, as a matter of discretion, be exercised. We recognise that the general approach to extending time is strict, particularly in cases where third party interests are affected, and that the great majority of striking examples of long extensions of time concern cases without significant effects on third parties. However, for the following reasons we consider this to be a proper case in which, if it is necessary to extend time, it should be extended.

126. First, we consider that the general importance of the issues constitutes a good reason to extend time. We recognise that such cases are exceptional, but we consider this to be an exceptional case. The failures identified in the process affect not only solicitors, but the wider public. The process led to the consequence that those most in need, the most vulnerable and deprived, have been unlawfully prevented from the opportunity to obtain the services from a much wider pool of well qualified and experienced family lawyers. Those lawyers, had the process been fair, could have been judged as equally well provided to provide those services as the winners.

127. In R v Secretary of State for the Home Department ex parte Ruddock [1987] 1 WLR 1982, Taylor J stated (at page 1485) that, even though the reasons for the delay were not cogent, the general importance of the matter may itself be a reason for resolving the substantive issues. The greater the importance of the issues, the greater the need to resolve them. It seems to us unacceptable to impose on clients an arbitrarily restricted pool on whose help and advice they should be able to draw.

128. Second, we have regard to the strength of the claim. We consider that, in respect of ground 1, it is a strong claim. It is well established that the stronger the case the more willing a court will be to extend time. It is also relevant that, as we have observed, the position of the Law Society is not that of an unsuccessful rival bidder, but of a body representing successful and unsuccessful bidders which has made a challenge on public interest and access to justice grounds.

129. Third, the considerations to which we have referred in considering whether a challenge on these grounds at the time the selection criteria were published would have been premature are relevant at this stage. This challenge is focused on the impact of the panel membership. That impact was not known until the LSC started to announce the contract awards. That is relevant to the question of extending time. The LSC was stating that those with concerns should await the outcome. Those factors justify extending time: see for example R(Young) v Oxford City Council [2002] EWCA Civ 990 at 34, and as a statement of principle, R v Secretary of State for Foreign and Commonwealth Affairs, ex parte the World Development Movement [1995] 1 WLR 386 at 402H.

130. There is prejudice to third parties. Miss Rose had relied on the Resolution survey to which we have referred, and on the fact that only one firm of solicitors supported the LSC's stance, although no doubt as a result of our decision that will change. The National Youth Advocacy Service is also concerned to intervene on the issue of relief. It has been awarded a number of contracts in areas other than family law and we will consider that subsequently.

131. We have thus accepted that there is detriment to good administration. Undoubtedly re-running the exercise will be expensive and time-consuming, and of harm to those who have succeeded. But good administration also demands a fair competitive process to identify those best qualified to provide publicly funded family services. The consequences of LSC's failures was to deprive those most in need of the services of many who could have been judged, by external accreditation, as worthy of joining the band of the most skilled and dedicated lawyers working for little reward. That consequence, in our view, cannot be allowed to persist. It should be corrected.

132. We grant permission to move by way of judicial review. We grant judicial review and allow the Law Society's application. We shall hear submissions about relief.

133. MR LEWIS: My Lord, firstly, I think we are all very grateful to both your Lordships for dealing with such a mass of material and submissions in such short notice and for providing such a comprehensive and thorough judgment. My Lord, in terms of the question of substantive relief, before your Lordships came into court we did consider that the sensible approach might be to invite your Lordships to rise for a little while so we can discuss it amongst ourselves. At least two of us consider that the better course of action would be to allow the parties and the intervenors to digest the judgment and

have either written submissions or an oral hearing on remedies as soon as possible, but it may be your Lordship would like to rise and give us five minutes to discuss and see how we want to proceed.

134. LORD JUSTICE MOSES: We are not going to be able to reconstitute, I am going to be sitting in a different jurisdiction, but I will be here. Beatson J will not be here. If, as I have indicated, I am going to give you leave to appeal, if you want it, there is also the question of what is to happen in the interim, when the appeal can get on and things, which are all relevant. So is the type of relief in those circumstances -- what is going to happen in the interim period is important, but is the type of relief that important?

135. MR LEWIS: In our submission there would be the following stages of relief to consider. The first is whether your Lordships' judgment is limited in effect to the family law services. The related services, the LAYS, which is the hub of this, the family and housing and family which is together (inaudible) and there is child abduction into the Hague Convention, and there is the children only service, all of which was meant to be replacements. So the first question is whether your Lordships' judgment is limited to that alone or whether it necessarily extends to the other areas, such as immigration and so on, and I can address you on that.

136. LORD JUSTICE MOSES: We would be rather amazed if it affected anything else other than the subject to which we specifically referred.

137. MR LEWIS: That may be helpful to us, my Lord, and I will show you the relevant contract document. If that is your Lordship's view, that could be of assistance in the discussion.

138. LORD JUSTICE MOSES: We have not had any evidence about that.

139. MR JUSTICE BEATSON: Your clients will know -- I know because a number of judges were considering other cases concerned with completely different contexts in the time that we were hearing this. So I appreciate anyway that we may not have the full picture.

140. MR LEWIS: But, my Lord, I am quite happy to show you --

141. LORD JUSTICE MOSES: We will rise anyway. How long?

142. MR LEWIS: Shall I give you the menu, if you like, of things?

143. LORD JUSTICE MOSES: Yes.

144. MR LEWIS: One is whether or not it is limited to what I have called the four family related services, which are family law, housing and family, children only services and child abduction, and I can show you the power to amend in the contract because we would have to continue the existing contract, which covers more than one area for family. We would have to amend the contract, continue it for family, but not for, say, immigration or other matters, and if your Lordships are content that we can do that, that would be of great assistance to know that.

145. Then the next question, my Lord, would be the extent of the relief, and the likelihood is that your Lordships would be considering whether the appropriate remedy is to declare

invalid or to quash the decisions provisionally rewarding contracts in the four family related services and that would be the extent of the appropriate remedy.

146. LORD JUSTICE MOSES: I cannot quite see why anybody would need anything more than a declaration.

147. MR LEWIS: A declaration may be sufficient, but it would be limited to the decisions to award those four -- and then thereafter, my Lord, it would of course be entirely a matter for the Legal Services Commission to decide whether to re-tender, to extend the contract or to proceed by some other means. It may be that re-tendering is not appropriate, but if your Lordship gives us five minutes -- if we could have until five past five?

148. LORD JUSTICE MOSES: You better have as long as you need.

149. MR LEWIS: Shall we say until 10 past 5?

150. LORD JUSTICE MOSES: Can I just indicate that I am going to order an expedited transcript. If anybody wants it, they can have my notes.

151. MR LEWIS: Your notes would be extremely interesting, my Lord.

152. LORD JUSTICE MOSES: You will see the bits I have added and you will also see the bits I have crossed out and revised -- the, sort of, Lewis teasing points.

153. MR LEWIS: Perhaps I do not need to see them. If we could get an expedited transcript, that would be helpful. There would be permission to appeal in any event, but the two big issues are the family law and the remedies.

154. LORD JUSTICE MOSES: We will say quarter past 5.

155. MR LEWIS: I am very grateful, my Lord.

(Short Adjournment)

156. MR LEWIS: My Lord, thank you for the time; it has been very productive. We believe we can deal with remedies today and most of it is likely not to be hugely contentious and your Lordship may need to consider some matters. If I can go through it stage by stage. Firstly, there is the question of whether there is limited to what I have called the four family law related contracts, and just for your Lordship's note those are the tender exercises in relation to family law, housing and family law, children only services and child abduction, and sometimes the children only services is described as exclusively children's services -- both descriptions are used. I have asked that there be placed in front of your Lordship the contract, because the aim of this exercise would be to have a situation where the 2007 contract continues in relation to those four areas, but it does not continue in relation to immigration or some of the other matters. Could I just ask your Lordship to go for a moment to the bundle of documents that I have handed up, which are some contract documents and you should have a flag in that document.

157. LORD JUSTICE MOSES: Yes.

158. MR LEWIS: Do you see there, my Lord, "contract number", and this is an example of what an individual provider has. Does your Lordship see it has "family welfare benefits, debt, employment" and so on. So the aim is to get to a situation where we amend this contract so it is only the family bit that continues, not the immigration for example. If your Lordship could kindly go forward two pages in that --

159. MR JUSTICE BEATSON: Where it says "extension of contract"?

160. MR LEWIS: No, I do not see the bit that I wanted. The position at the moment is we believe, and I can show you in the main bundle, the provision for the contract says -- yes, my Lord, if you have got the flag, it is about eight or ten pages in front of the flag, and I am afraid your Lordship is going to have to look for it. On the left-hand side it says "Legal Services Commission unified contract for signature number".

161. MR JUSTICE BEATSON: When you say "pages", do you mean -- they are on two sides, but you are talking about sheets of paper.

162. MR LEWIS: Yes, sheets of paper. Ten sheets of paper in front of the flag.

163. MR JUSTICE BEATSON: "LSC unified contract number 09", et cetera.

164. MR LEWIS: And does your Lordship see paragraph 1, "This contract will start on April 1 2007"?

165. LORD JUSTICE MOSES: Yes.

166. MR LEWIS: It will expire on 31 March. Now, the contract subject matter is what I have just shown you, the list of categories, the list of matter starts. So one way of doing it would be to amend the contract and say this contract will start yesterday; it will expire unless it or part of it is lawfully extended. The alternative would simply be to amend the contract by deleting all the bits other than the family law. There are two ways it can be done and probably more, and the key question for your Lordships if you are going to limit your relief to the four areas, is are your Lordships satisfied that we have the power to amend to that extent, and for that you need the amendment provision. I have page numbers at the bottom right-hand corner. Page 35 at the bottom right-hand corner working from the front, do your Lordships have that?

167. MR JUSTICE BEATSON: Yes, 13 at the top.

168. MR LEWIS: Yes 13, and does your Lordship see, "What if any legislation affects this contract"? The heading is slightly misleading:

> "We may make amendments to this contract as we consider necessary in the circumstances."

And then one is to comply with or take account of UK legislation as a result of any decision of a UK court. As we see it, my Lord, the position is that, as a result of the decision of this court, we cannot replace the family law contract with the new contract and therefore we would have to amend and roll them over, but of course the other tenders have continued and there is no challenge to them yet, and therefore we would assume -- I am not a betting man, my Lord, your Lordship may have inspired all sorts of people up and down the land to get excited. It is necessary as a result of the decision

of this court to amend the contract and provide for the replacement for the non-family law areas, but to continue by whichever way for the future. So the likelihood is, and I make no commitments at all on behalf of the LSC and it needs to be understood that we make no commitments because we have not had time to consider this judgment, the likelihood is that the Legal Service is likely to be of the view that it may be likely to be necessary to amend, and the only question for the court is, if it considers that that is possible as a result of your judgment, then your Lordship will of course limit the relief that you give to the four related contracts, otherwise you have to quash everything for all the contracts, and that is what, for example, the National Youth Advocacy Service, Mr Johnson, wants because they want their community care, their education and so on to be replaced. Everybody accepts that the existing contracts have been continued now until 14 November, so the new contracts would not start until 15 November, and in relation to family law, we would have to decide how we wished to proceed in the light of this judgment.

169. My Lord, the next question then would be the substantive relief. In my submission, the likely appropriate relief is this: it is either a declaration or a quashing order in relation to the decisions provisionally awarding contracts and the decisions saying that the tenders are unsuccessful in relation to the family law, family with housing, children only services and child abduction tenders. My Lord, there has been a suggestion that you should grant a declaration that the tender process is unlawful. In my submission, that is not appropriate for this reason: there are large aspects of the tender process which have not been unlawful. One of the things we may wish to continue with pending any outcome of any appeal is internal appeals and verifications, which is also under the tender process, and a general declaration that the tender process is unlawful is insufficiently focused, and in my submission what your Lordships ought to do in this case is to focus on the decisions awarding the four tender contracts and the decisions saying you are successful and declare those unlawful or quash those.

170. Then, my Lord, it would be entirely a matter for the Legal Services in the first instance to determine what arrangements to make: whether to continue the contracts; whether to re-tender; if to re-tender, how long that will take; what the criteria will be and so forth; or whether or not to use other powers other than re-tendering. There would be a large number of matters that in the first instance must be for the judgment of the body appointed by Parliament for those purposes.

171. So those are the two issues in relation to substantive relief.

172. MR JUSTICE BEATSON: Can I just ask you a question, if you are going on to the third one, about substantive relief? I see what the Law Society sought at page 28 of the claim.

173. MR LEWIS: They have a differently worded relief at the end of the skeleton as well. Can I just find that?

174. MR JUSTICE BEATSON: Yes, please. That is the declaration the LSC has acted unlawfully in the manner in which it has conducted, I assume, procurement of the --

175. MR LEWIS: Yes, and we asked them what relief they wanted. If your Lordships go to their skeleton --

176. LORD JUSTICE MOSES: Why are we looking at this, because we are going to hear to the extent why they object to it.

177. MR JUSTICE BEATSON: Yes, we can hear that, but the question I wanted to ask is that that may be unfocused, but our judgment is dealing with the effect of the failure to announce in advance of the panel membership the way the panel membership will work, and I am not quite sure why relief that is not focused on that, which is what the judgment was about --

178. MR LEWIS: That would be another option; just to give relief which includes a declaration that the failure to give advance notification of the selection criteria governing caseworker panel membership in some such form is unlawful, and that the decision awarding contracts or refusing to award contracts in consequence is unlawful, and that would have the advantage (1) of not stopping notifications and appeals; and (2) not treading into the question of: are you expressing judgments on the other criteria or not. So your Lordships could give a focused declaration, as I would describe it, coupled with the declarations in relation to the decision. What, in my submission, your Lordships ought not to do is just a general declaration that the tender process is unlawful for all the reasons I have given.

179. MR JUSTICE BEATSON: Thank you.

180. MR LEWIS: My Lord, in relation to costs, I anticipate that Ms Lester will be applying for her costs, and we recognise that, in principle, we cannot resist the application of the Law Society. I understand Ms Johnson -- I keep calling Mr Johnson Ms Johnson and I must stop making stereotypical assumptions that barristers are women; they are allowed to be men -- Mr Johnson, for the National Youth Advocacy Service, I understand, accepts that the costs of his intervention is a matter for him. We do not know anything about the people who have intervened on paper.

181. LORD JUSTICE MOSES: Shall we wait to hear what applications are made.

182. MR JUSTICE BEATSON: There is a prima facie rule about this.

183. MR LEWIS: There is a House of Lords judgment that says that, and I put it in front of you, and it is Barker. It is paragraph 32.

184. MR JUSTICE BEATSON: Yes.

185. MR LEWIS: And then there are exceptions. In that case the intervenor became the defendant. But rule 32, "Mr Elvin reminded your Lordship that the usual practice is that the intervenor pays his own costs".

186. LORD JUSTICE MOSES: Have I got a copy?

187. MR LEWIS: I put it on your Lordship's desk. I have another copy if someone could kindly pick it up and hand it to his Lordship.

188. MR JUSTICE BEATSON: I very rarely say anything like this to counsel, but is it necessary for authority on this point?

189. MR LEWIS: My friend is going to apply for his costs and he has a case that says --

190. MR JUSTICE BEATSON: Well, he knows where I am coming from though.

191. MR LEWIS: I am grateful. The last thing is permission to appeal.

192. LORD JUSTICE MOSES: He does not know where I am coming from.

193. MR JUSTICE BEATSON: No, he does not.

194. MR LEWIS: The last thing is permission to appeal. I understand your Lordships are favourably inclined towards granting permission.

195. LORD JUSTICE MOSES: Yes.

196. MR LEWIS: And then the claimants have asked that your Lordship give two directions. Normally it would be 21 days for the appellant's notice from receipt of the transcript. They have suggested seven. We have suggested 14. It is a matter for your Lordship.

197. LORD JUSTICE MOSES: Sorry, for what?

198. MR LEWIS: Appellant's notice.

199. LORD JUSTICE MOSES: Yes.

200. MR LEWIS: And then seven days for the respondent's notice thereafter, if there is to be one. My Lord, in relation to other matters, just so that it is quite clear, obviously in the light of your Lordship's decision contracts in relation to these four areas cannot be entered into, but we see no legal reason why we cannot continue with the verifications and appeals process pending the Court of Appeal judgment, and we just want everyone to know that that is our understanding.

201. So those would be the matters, my Lord, on which we need to make submissions in relation to remedy.

202. LORD JUSTICE MOSES: I mean, I did want to ask this: I do not know how relevant all of this is going to be by the end of the month. I mean, the whole thing could become completely academic. For all we know there will not be any legal aid after October 20.

203. MR LEWIS: I could not possibly speak for the arm of Government known as the Ministry of Justice. My clients are an independent statutory body. I am not privy to what Mr Kenneth Clarke and his ministers --

204. LORD JUSTICE MOSES: I mean, if it is all going to be done again in the light of a 40 per cent cut --

205. MR LEWIS: Your Lordship makes the point why we need to consider very carefully how we proceed in relation to family services because it may be --

206. LORD JUSTICE MOSES: I mention it not just because it is interesting, but because what is of concern is, as you will be appreciating, there are masses of other claims already going on. I do not know how many involve the LSC, but I imagine there are a

large number of those, so it must be an absolute nightmare for your people, quite apart from the expense, and really of course this issue resolved one way or the other, if it is resolved against you, it might stop all of that. If it is resolved in your favour, of course it will not.

207. MR LEWIS: I think the answer is this --

208. LORD JUSTICE MOSES: Or am I being too blunt? But there may be nothing anybody can do about it, but we have been saying when we have heard about them, for goodness sake those ones ought to be put on the back pedal. Whether it is actually right or not, I do not know.

209. MR LEWIS: In my submission, the position is actually this: that the tender exercise in relation to the four contracts I have outlined has not resulted in an exercise that your Lordship has found lawful, and therefore those cannot be awarded. As a result, we are very anxious to make sure there is provision, and the way forward is extending it. Whether by the time we decide how to deal with family law services any grant of Government or Parliament itself has severely contracted or restricted that which can be tendered for in any event is a matter that we cannot predict. But it may be a consequence of events. It is not a matter that your Lordship needs to trouble yourself with.

210. LORD JUSTICE MOSES: I am just thinking about the timing. Anyway, there we are. Thank you very much, indeed.

211. MR LEWIS: Those are the submissions, unless I can assist you on remedies.

212. LORD JUSTICE MOSES: No, thank you. Who wants to go next? Yes, Ms Lester.

213. MS LESTER: My Lords, can I echo first of all on behalf of the Law Society our gratitude for such a swift judgment. Secondly, the Law Society does seek its costs. I do not understand that to be opposed. Thirdly, we have no submissions on the NYAS -- whether it is family contracts only or not point. We leave that to NYAS and the Legal Services Commission. The remedy that we seek is set out at paragraph 74 of our skeleton argument, as Mr Lewis has indicated. May I make a few remarks about what is there at paragraph 34?

214. LORD JUSTICE MOSES: Yes.

215. MR LEWIS: We seek there, as you will see, first of all a declaration that the tender process for family law services was unlawful for the reasons given in the judgment, and can I say that there is no objection on our part to that being more focused to the caseworker selection criterion; secondly, an order quashing the decisions to award and not award contracts, which I understand Mr Lewis not to oppose.

216. LORD JUSTICE MOSES: He says all that is needed is a declaration that they are unlawful. If it is a declaration, those are the consequences.

217. MS LESTER: The effect of A and B is simply that the decisions referred to in B are the decisions that have actually been made on whether contracts are awarded.

218. LORD JUSTICE MOSES: But if the declaration refers to those decisions --

219. MS LESTER: If it follows that the decisions fall away, then there is no need for a quashing order. But one point of clarification, I am told that there are those who did not obtain family contracts and as a direct result lost housing contracts. So we would seek clarification from the Legal Services Commission that the effect of the declaration will be that those who lost family contracts and as a consequence, a direct consequence, other contracts, that those too will fall away. So that is a point of clarification.

220. MR JUSTICE BEATSON: My understanding of what Mr Lewis was submitting was that the contract in relation to those four categories should be extended, so those people who had housing and family, that would be extended. There may be new people who did not get either. I mean, your point only applies to somebody who is a new entrant.

221. MS LESTER: Yes, absolutely, but there are those who are new entrants, as I understand it. I can take instructions as to how many approximately are affected, but I have not asked to seek that clarification that they too will benefit from that remedy.

222. LORD JUSTICE MOSES: If they were new entrants they would not; it would be contrary. They would lose out because it would only be the old contracts that would go on.

223. MR LEWIS: My understanding, my Lord, is that, as a result of the Law Society's claim, those who might have won contracts under family law, housing and family law, children only services and child abduction, who as a result of the claim and judgment would not now have a contract, and it is only those who had contracts until the 2007 --

224. LORD JUSTICE MOSES: Prior, absolutely, yes.

225. MR JUSTICE BEATSON: There is having cakes and eating them, and there is a logical problem, is there not?

226. MS LESTER: Would your Lordships give me a moment? (Pause)

227. I understand that the problem is for people who had existing family and housing, and as a result of losing the contract for family law are no longer able to provide housing services.

228. LORD JUSTICE MOSES: Absolutely. That is okay, that is all right. They will go under the old.

229. MS LESTER: We are happy with that.

230. LORD JUSTICE MOSES: That is what he said.

231. MR LEWIS: That is what I am told.

232. MS LESTER: Finally, on paragraph 74(c) of our skeleton we sought there an order extending the existing contracts for such period as is required until the LSC is able to reconsider and re-run the process in a lawful manner. May I just raise, so that you know what they are, our concerns about this. First of all, there may or may not be an appeal against your Lordship's judgment, and we therefore obviously seek a remedy that will protect the position even if the Legal Services Commission decides not to appeal. Secondly, the Law Society is eager to guard against a further period of

complete uncertainty, both for the providers and clients, and there is no indication at all from the Legal Services Commission about how it proposes to implement your Lordships' judgment, but also no indication at all as to the timescales involved.

233. LORD JUSTICE MOSES: They have only just heard. I mean, what are they supposed to do?

234. MS LESTER: We understand that, my Lords, that they have only just heard, and they have not worked out the process, but they have known an awfully long time the nature of our challenge.

235. MR JUSTICE BEATSON: They have known since 27 August.

236. MS LESTER: I am registering a concern on this side.

237. LORD JUSTICE MOSES: Register away, but I am not sure what we can do about it.

238. MS LESTER: There is a proposal that some kind of notice at least might be given to the Law Society, if the existing contracts are to come to an end, that there is some kind of prior indication in advance from the Legal Services Commission.

239. LORD JUSTICE MOSES: There would have to be.

240. MS LESTER: With that indication, we are grateful.

241. LORD JUSTICE MOSES: I am not intending to indicate anything, I just do not understand -- I mean the effect of your winning is that old contracts go on, new contracts cannot go on until everything is sorted out. They cannot stop making provision altogether because they are under a statutory duty to --

242. MR JUSTICE BEATSON: And they will either extend the contract for the period that Mr Lewis has shown us they can, which is some considerable time, or they will do a re-tendering process. It is not really for us to case manage the after effects of a decision in a judicial review jurisdiction.

243. MS LESTER: I am grateful.

244. LORD JUSTICE MOSES: Thank you very much.

245. MR CHATAWAY: My Lord, I have an application for costs of the Creighton Group. Now, I have here a copy of the practice note issued by the House of Lords in the case of Bolton Metropolitan District Council v Secretary of State for the Environment. Would it help if I pass up a copy of that?

246. You will no doubt be aware of the principles set out there, but the note dealt with a position of the developer who intervened in a successful --

247. LORD JUSTICE MOSES: What are we looking at?

248. MR CHATAWAY: This is Bolton.

249. MR JUSTICE BEATSON: It has only just reached us.

250. MR CHATAWAY: My Lord, that case dealt with the position of a developer who intervened successfully in a planning appeal, but I would submit the principles set out there are of general application to costs of interested parties in judicial review claims.

251. MR JUSTICE BEATSON: It is not a judicial review; it is a planning appeal.

252. MR CHATAWAY: It is not, my Lord, but it has some useful guidance. They are set out on page 3 at paragraph (g). They are fairly briefly stated in four numbered paragraphs there. My Lord, Mr Lewis has referred to Barker v Bromley. That of course deals with intervenors. The Creighton Group are interested parties, so they have a direct interest in these proceedings. I would suggest that these principles are therefore more helpful. The usual rule set out at number 2 --

253. MR JUSTICE BEATSON: Perhaps we should see what the White Book says.

254. LORD JUSTICE MOSES: Sorry what is point number 2?

255. MR CHATAWAY: At point number 2 --

256. LORD JUSTICE MOSES: Point number 2 of what?

257. MR CHATAWAY: In the Bolton guidance. It does state that an unsuccessful party -- in this case the developer, but I would suggest an interested party is not normally entitled to costs -- they may be so if they have either issues which are not covered by counsel for the claimant that are raised in the proceedings, or alternatively they have an interest which requires separate representation. Now, to deal first with the point of the interests of the Creighton Group, the Law Society indicated right at the outset in this case that they were motivated by concerns for access to justice. They were not interested as a representative body for solicitors. The Creighton Group's standing was quite specific and separate from that. They had an interest as the losers in the process.

258. No, it was not clear to what extent the Law Society's concerns might have been allayed in this case by the flexibility, if there had been some flexibility, shown by the Legal Services Commission, and I would suggest that, as a result, it was quite proper for the Creighton Group to seek to be separately represented, and that they fall within that limb of the principles set out in that practice note.

259. As regard the issues they raised, the Creighton Group did not repeat the matters that were dealt with by the claimant. Their submissions did go beyond them. Your Lordships did not find it necessary to reach a decision on those issues, but again I would submit that it was quite proper for them to be brought before the court so that the court was fully aware of the wider challenge to the selection criteria.

260. I just add two further points, which is that there was substantial evidence submitted by the Creighton Group which I hope has assisted the court, and certainly your Lordships' judgment refers to the statement of Christina Blacklaws, for example, and the claimant's made reference to the reasons set out in the Creighton Group evidence as to why providers had not applied for accreditation.

261. Lastly I would emphasise that the Creighton Group are small firms mostly, who are dependent on legal aid, and they have not been well placed financially to bear the costs of the intervention.

262. So for those reasons I would argue it is an exceptional case, that it falls within the Bolton guidance and exception, and it is appropriate for the LSC to make some contribution at least to the Creighton Group's costs.

263. LORD JUSTICE MOSES: Yes, thank you. Who wants to go next?

264. MR JOHNSON: My Lord, I appear on behalf of the National Youth Advocacy Service. It would seem that the concerns we have raised, which were the necessity of ensuring that any order that came out was focused, is actually now almost common ground between the main parties, and I do not think I can assist you any further. I would endorse what Mr Lewis has said.

265. LORD JUSTICE MOSES: And that is what you would like anyway?

266. MR JOHNSON: I would.

267. LORD JUSTICE MOSES: Thank you very much. Mr Speaight?

268. MR SPEAIGHT: I do not think I have any right to ask for anything.

269. LORD JUSTICE MOSES: It is lovely to see you.

270. MR SPEAIGHT: The court's decisions have had a very great impact on those who I do represent.

271. LORD JUSTICE MOSES: Thank you. Yes, Mr Lewis?

272. MR LEWIS: My Lord, in relation to Ms Lester, the first question is the phrasing of the declaration, and the suggestion from my Lord, Beatson J, is that a declaration should be (inaudible) in advance of the two criterion. That would certainly be acceptable if there could be a formal addition, and then a declaration of the quashing order in relation to the decisions to award or not award contracts under the four --

273. So far as the new entrants are concerned, you Lordship has said it is unfortunately having your cake and eating it. The consequence of quashing this tender is that we have succeeded; they no longer have contracts. The new entrants who will have come in have not had that opportunity.

274. LORD JUSTICE MOSES: That was part of your point on delay.

275. MR LEWIS: Exactly, and that is just a consequence.

276. Then in relation to 74C, I would respectfully adopt the observations of my Lord, Beatson LJ, that it is not for this court, with the very greatest of respect, to case manage the outcome of judicial review. What we do, when we do it, how we do it, whether it becomes relevant because of the coalition Government, are matters that are outside the purview of this division.

277. So far as the Creighton intervention is concerned, firstly they applied to intervene. They have been described as interested parties. They are actually intervenors. Secondly, the general principle is that those who intervene do so and pay their own costs. Thirdly, they have not actually had a ruling on their grounds -- the public

procurement, the irrationality. Your Lordships have either indicated that those are unlikely to succeed because they are matters of judgment for us, or they have been left undecided. They have actually started their own judicial review proceedings. So, in our submission, as a matter of general principle, as a matter of this court has not found it necessary to deal with the intervention, and thirdly, my Lord, much of their written submissions and their oral submissions, in my respectful submission, did not assist the court in resolving the issues that were key. The 25-stage document on context of EU law and so on, none of that assisted your Lordship in deciding what was really the core point: was there sufficient notice; what was the impact on access to justice. Finally, they are not within the terms of sub-paragraph (2) of the Bolton judgment. So the normal rule should apply to them as applies to all the other intervenors, who have very realistically not applied for their costs in these proceedings. It seems that the National Youth Advocacy Service and the LSC are speaking with one voice, subject to your Lordship being satisfied that we have the power under paragraph 13 of the contract to amend in the way that I have outlined.

278. So unless I can assist your Lordships further, those would be our submissions. (Pause)

279. LORD JUSTICE MOSES: The first issue is as to the nature of the relief that we propose to give. We are not going to draft it here. We indicate that we do think that the LSC has power to amend the existing contracts, and we shall make a declaration focused upon the reason which underlay our judgment, namely the absence of opportunity and on the consequential decisions to award and not to award in the four family fields identified by Mr Lewis: that is family law, housing and family law, child only or child abduction. We are not going to draft today. Parties must get together and draft something and then we will approve it.

280. So far as costs are concerned, we shall award the Law Society its costs, but we see no reason to depart from the general rule that the intervenors, most of whose submissions merely echoed or amplified what was said on behalf of the Law Society without making any fresh point, and which insofar as they did was not necessary to resolve, should meet their own costs.

281. So far as the appeal is concerned, we have given permission to appeal, as we indicated in advance we would, and you wanted 14 days' notice from the date of receipt of the transcript, and we order the transcript be expedited, seven days thereafter for any respondent's notice. Anything else?

282. MR LEWIS: Just to again record our thanks for the speed of the judgment.

283. LORD JUSTICE MOSES: It has all been most stimulating. I would like to pay tribute to the enormous amount of work that has gone into the preparation in a very short time period. Thank you all very much.