



Contracting for Legal Services in the Health & Social Care Sector

MEMORANDUM

**by the Comptroller and Auditor General
for Northern Ireland**

**to the Public Accounts Committee
of the Northern Ireland Assembly**

4 December 2008

List of Abbreviations

| | |
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| BB & Co | Brangam, Bagnall & Co |
| CPD | Central Procurement Directorate |
| CRU | Compensation Recovery Unit |
| CSA | Central Services Agency |
| DFP | Department of Finance & Personnel |
| DHSS | Department of Health & Social Services |
| DHSSPS | Department of Health, Social Services & Public Safety |
| DLS | Directorate of Legal Services |
| DSO | Departmental Solicitor's Office |
| GPA | Government Procurement Agency |
| GPS | Government Purchasing Service |
| HPSS | Health & Personal Social Services |
| HSC | Health and Social Care |
| HSS | Health & Social Services |
| NIAO | Northern Ireland Audit Office |
| PAC | Public Accounts Committee of the Northern Ireland Assembly |
| PSNI | Police Service of Northern Ireland |
| RPA | Review of Public Administration |
| UCHT | Ulster Community Hospitals Trust |
| VFM | Value for Money |

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Section 1: Introduction

Introduction

1.1 On 4 July 2008, the Northern Ireland Audit Office (NIAO) reported to the Northern Ireland Assembly¹ on the events surrounding the discovery of fraudulent activity, perpetrated on several bodies in the health and social care sector in Northern Ireland (Health Boards and Trusts), by George Brangam, principal partner in the partnership of solicitors operating under the name of Brangam Bagnall & Company (BB & Co). The Report referred to a supplementary investigation that NIAO was undertaking into the initial and subsequent market testing of legal services within the health and social care sector within Northern Ireland. This investigation is now complete and forms the basis of this Memorandum, which will be presented to the Public Accounts Committee of the Northern Ireland Assembly.

Background

1.2.1 The Directorate of Legal Services (DLS), part of the Northern Ireland Central Services Agency (CSA) was the main provider² of legal services to NI health and social care (HSC³) organisations between 1973 and 1994. In line with Government policy at the time⁴ which sought to improve public services, the then Department of Health & Social Services (the Department)⁵ decided in 1994 that this provision should be market tested. The establishment of a select list⁶ of approved legal services providers was identified as the most

¹ Brangam Bagnall & Co Legal Practitioner Fraud Perpetrated against the Health & Personal Social Services NIA 195/07-08.

² DLS was the only provider, apart from the Departmental Solicitor's Office, which provided land and building conveyance services to health bodies. From 1990, it assumed responsibility for defence and medical negligence claims against Trusts.

³ In this Memorandum, the term Health and Social Care (HSC) incorporates Health and Social Services Trusts, Health and Personal Social Services Boards and miscellaneous health agencies.

⁴ Competing for Quality – Buying Better Public Services, 1991 White paper

⁵ DHSS became the Department of Health, Social Services and Public Safety (DHSSPS) in 1999.

⁶ This approach involved asking private sector legal firms and the CSA legal directorate to bid for inclusion on a Select List, which could be accessed by customers as the need arose. Firms could only be included on the List if they were able to demonstrate their competency in respect of various types of cases.

appropriate approach and, following a competition, the Select List was issued to the HSC organisations in April 1996. The organisations were advised that, if they wished to market test their legal services (and this was not compulsory), they should invite tenders from the providers listed on the Select List and apply the same criteria in assessing those tenders as were used in the establishment of the List. Legal services covered by the Select List were wide-ranging, but the majority of work tendered, related to family law, clinical negligence, and employers' and public liability cases. In subsequent years, a number of HSC organisations undertook tendering exercises using the Select List, resulting in services remaining with CSA, or transferring to Brangam Bagnall & Co (BB & Co) or a small number of other legal services providers. HSC organisations choosing not to undertake market testing continued to receive legal services from CSA.

1.2.2 In January 1995, George Brangam, whilst still occupying the post of Director of DLS /Chief Legal Advisor at the CSA, set up the legal partnership of Brangam Bagnall & Co (BB & Co) with Fiona Bagnall (also then a solicitor with DLS⁷). They left the Agency in March 1995. Following the first competitive exercise BB & Co was successful in obtaining a place on the Select List of approved legal services providers. From 1996 until August 2006, following tender action, BB & Co won contracts to provide legal services at 11 (out of 23) HSC Boards and Trusts⁸. Appendix 1 shows the distribution of payments made to legal service providers between 1996-97 and 2007-08. From this, it can be seen that, of the total legal costs during this time of £30.4 m, CSA was paid £19.4 m (64 per cent) and BB & Co was paid £7.0 m (23 per cent). Several other providers accounted for the balance. Appendix 2 provides further detail of the fees paid to different providers by individual HSC bodies over the past six years.

1.2.3 The Department's initial Select List was intended to have a life of three years with the option to extend it for three further twelve month periods to 31 March 2002. Following a review in 2002 of existing arrangements for the

⁷ Fiona Bagnall left the Practice in July 2003.

⁸Causeway Health and Social Services (HSS) Trust, Down Lisburn HSS Trust, Green Park HSS Trust, Homefirst HSS Trust, Mater Infirmorum HSS Trust, Northern HSS Board, North & West Belfast HSS Trust, Royal Group of Hospitals & Dental Hospital HSS Trust, South & East Belfast HSS Trust, Ulster Community Hospitals HSS Trust (formerly Ulster Hospitals HSS Trust and North Down and Ards Community HSS Trust) and United Hospitals HSS Trust.

provision of legal services to HSC organisations, a further procurement exercise was initiated and taken forward by DHSSPS with support from the Department of Finance and Personnel's Central Procurement Directorate (CPD). The Department advised us that this procurement exercise failed to provide the necessary assurances in relation to the value for money offered by individual providers, and it therefore decided in June 2005, on the advice of CPD, not to make an award. In these circumstances, the Department's decision not to make an award appears reasonable, but the failure of the process in 2005 remains of concern, however, particularly given the Department's assurances to the Assembly's Public Accounts Committee on 19 September 2002⁹ that a new legal services contract would be in place by 1 April 2004 to deliver both a quality legal service and value for money.

1.2.4 Following the decision in June 2005 not to make an award, the Department reviewed its policy on the provision of legal services to HSC organisations, and in June 2006 the DHSSPS Board agreed that a further market testing exercise should be carried out for the procurement of legal services. Three months later, BB & Co was closed down by the Law Society and subsequently, cases were transferred to other legal service providers. These included CSA and MSC Daly, a new practice set up by solicitors who had previously worked for BB & Co.

1.2.5 The Department expected to have new arrangements for the provision of legal services in place from 1 April 2009. However, in August 2008, following the publication of the NIAO's report on the George Brangam fraud (see paragraph 1.1), the Minister for Health, Social Services and Public Safety announced his decision that all legal services would, in future, be provided in-house by the Central Services Agency. Any organisations currently using a private legal firm were expected to move their legal work to the Agency under arrangements and timescales to be agreed.

⁹ In September 2002, the NI Assembly Public Accounts Committee heard evidence from the Department in relation to NIAO's Report on Compensation Payments for Clinical Negligence, NIA 112/01.

Overview

1.3.1 Section 2 examines the events leading to market testing of legal services, the selection of approved providers in 1996, the reasons for the failure to make an award in 2005, and recent developments in this area. In Section 3, the Memorandum focuses on the assessment of value for money with Section 4 looking in more detail at issues raised at the Public Accounts Committee in 2002, including concerns about legal services costs. The conclusion at Section 5, gives a summary of the main issues arising and recommendations for the way forward.

Section 2: Market Testing and Provision of Legal Services for the Health and Social Care Sector

Brief History

- 2.1.1 The Central Services Agency (CSA) has provided a centralised legal service for the health and social care (HSC) sector since its creation in 1973. The key areas of law in this sector include family law, clinical negligence, employers' & public liability, employment and administrative law. Until 1990, as medical doctors required personal professional indemnity insurance they were defended by various medical defence organisations, which in turn engaged solicitors. Since 1990, HSC bodies have been responsible for defending cases that involve medical doctors employed by them.
- 2.1.2 Until 1996, the Department required Health Boards to use the services of CSA. While no such direction was issued to the Health Trusts as they had a greater degree of autonomy, in practice they also used the CSA.

Events leading to Market Testing

- 2.2.1 In 1993, in line with Government policy at the time to improve the quality and value for money of public services through the extension of competition in the public sector, consideration was being given by the Department to the feasibility of market testing legal service provision to HSC organisations. CSA was commissioned by the Department to develop proposals. These were submitted in September 1994.
- 2.2.2 At a meeting with senior representatives of HSC organisations in September 1994, George Brangam set out his thoughts on the future provision of legal services to the HSC and presented his proposal to create a private sector company to provide such services. The Department took the view that, as they were exploring the scope for private sector provision of legal services, they must avoid any possible allegations that George Brangam or his colleagues in the Legal Department in the CSA had used their privileged

position to make contacts with potential customers in the public sector or to develop a business plan using information only available to staff in the Agency. Consequently, the Department wrote to George Brangam in October 1994 requesting that no further action be taken by Mr Brangam or his staff pending further discussion when the position on market testing was clearer.

Procurement Exercises for the Provision of Legal Services

(a) Interim arrangements for the handling of cases prior to the establishment of the 1996 Select List

2.3.1 In early December 1994, against the background of George Brangam's proposal to resign from CSA and create a private firm, potentially having a significant impact on the small legal services team within CSA, a representative group of users (senior members of Health Boards and Trusts) met with the Chief Executive of CSA and George Brangam. The purpose was to discuss the interim arrangements to ensure continuity of legal services to HSC organisations pending the completion of the 1995-96 market testing exercise. The following principles were agreed:

- continuity of service and choice of solicitor was important to clients (i.e. Boards and Trusts);
- market testing must proceed in an orderly way, on the basis of fair competition;
- interim arrangements for the provision of legal services had to satisfy the requirements of probity;
- these interim arrangements needed to be managed in accordance with clear rules; and
- George Brangam and his colleagues should have reasonable freedom to take advantage of a business opportunity.

2.3.2 The group proposed that existing cases should be allocated to the named solicitor, subject to the wishes of the relevant HSC organisation. This would have the effect of distributing the existing caseload between CSA and George Brangam's proposed private firm. For new work, it was proposed that an

emergency short list of solicitors would be established to provide additional capacity in the event that CSA concluded they could not manage the workload during the interim period.

- 2.3.3 An internal memo in early December 1994 notes that both the Chief Executive of CSA and George Brangam believed that an early separation of those staff wishing to leave CSA to establish a new Practice and those remaining staff was essential, as relationships within the Legal Department were very strained. Indeed, there had been harassment allegations made against George Brangam and a formal disciplinary enquiry was held within the Agency, which led to some adjustments to managerial responsibilities. In November, George Brangam had submitted an unsigned and undated resignation as Chief Legal Advisor in CSA, along with four other solicitors. These were not accepted by the CSA as they were unsigned. Formal resignations were submitted by George Brangam, Fiona Bagnall and one other solicitor in February 1995 and they subsequently left the Agency in March 1995.
- 2.3.4 In January 1995, the Department rejected the User Group's proposal that relevant existing cases be transferred to solicitors departing CSA for Brangam Bagnall & Co. This was not considered to satisfy public probity. The Minister agreed that Boards and Trusts should distribute any cases which the CSA could no longer manage to private sector firms on the proposed emergency short list, but if any favouritism was shown to one particular company, the relevant Chairman would be held to account.
- 2.3.5 The Head of the Government's Legal Services concurrently advised that Boards and Trusts could not ensure cases were distributed evenly if they were acting independently of one another and there would be an understandable predisposition on the part of the clients to refer cases to a trusted advisor (i.e. George Brangam), particularly if the cases were well advanced. He suggested that, at the very least, arrangements for the allocation of cases to private sector firms needed to be monitored closely to ensure that equity was being achieved. CSA was to oversee the handing out

of all cases that it could not manage internally and report monthly to the Department.

2.3.6 In February 1995, the Department agreed a protocol with the Minister for the handling of all cases in the event of confirmation of departure dates by those staff who had advised of their intention to resign. It noted that the protocol should be helpful in securing a date for the departure of the solicitors who had submitted their undated resignations, and should in turn minimise the risks of claims for constructive dismissal. The agreed protocol was advised to HSC Chief Executives in April 1995.

2.3.7 When George Brangam left CSA in March 1995, an Acting Chief Legal Advisor was appointed. Until the Select List was established, the Acting Chief Legal Advisor (who subsequently replaced Brangam as Director of Legal Services¹⁰) was asked to consider whether all casework previously managed by staff who had now left CSA could continue to be dealt with effectively by the Agency. If not, the cases would be referred to an emergency short list of firms to ensure quality and continuity of service. This emergency short list was compiled by the User Group, based on their assessment of the experience of various firms and included BB & Co. The Department told us that the choice of solicitor from the short list was a matter for each Board or Trust Chief Executive who were reminded of the need for objectivity and even-handedness in the allocation of work. In the event, only 106 cases (0.6 per cent) of the total CSA caseload of nearly 18,000 cases, were transferred to BB & Co, for continuity purposes.

2.3.8 NIAO observations

- George Brangam's involvement in discussions in relation to the transfer of existing cases is surprising given the Department's earlier views regarding potential allegations of abuse of position, though it is acknowledged that the Department later rejected the User Group's proposals (see paragraph 2.3.4).
- Was there a need to establish an emergency short list? The Department advised us that, given the imminent departure of key staff from CSA, the absence of available appropriately trained staff from other public bodies, and

¹⁰ When this Director of Legal Services subsequently left CSA, he undertook work as an employee of BB & Co .

the lead-in time needed to secure appropriate replacement staff, it would have been imprudent for the Agency not to have established some form of contingency arrangements to ensure that it had access to the necessary expertise and capacity to continue to meet the service's requirements. Whilst, in the event, only a very small number of cases transferred under these arrangements, availability of the emergency short list minimised the risk of disruption to services during a period of significant change to the Agency.

- Although there were 14 other firms on the emergency short list, and no guarantee of work was given, one of the incentives for using this list appears to have been to secure a departure date for George Brangam and other solicitors who had submitted undated resignations. In practice, a relatively small number of existing cases were transferred out of CSA (see paragraphs 2.3.6 and 2.3.7).
- While the information recommended by the Head of the Government's Legal Services (paragraph 2.3.5) was collated, NIAO saw no evidence of how the CSA or the Department ensured equity was achieved in the allocation of cases.

(b) First Procurement Exercise (from April 1996)

2.4.1 In November 1994 the Department advised HSC Chief Executives at a meeting (confirmed in writing in early December) of its intention to subject all legal services delivered by the CSA to market testing. Two approaches to market testing were considered – a 'full package' approach or a 'select list' approach - both of which would accommodate the submission of an in-house bid by CSA staff. Both options would also enable a group of staff from within the CSA to bid to provide legal services from a private sector base, though such staff would not be allowed to develop their bid while still in the CSA or contribute to the construction of the in-house bid.

2.4.2 In June 1995, a tendering approach using a select list was proposed by the Department because:

- it would give users a choice of representative;
- it would provide an opportunity to cultivate the market which had been dominated by CSA for some time; and

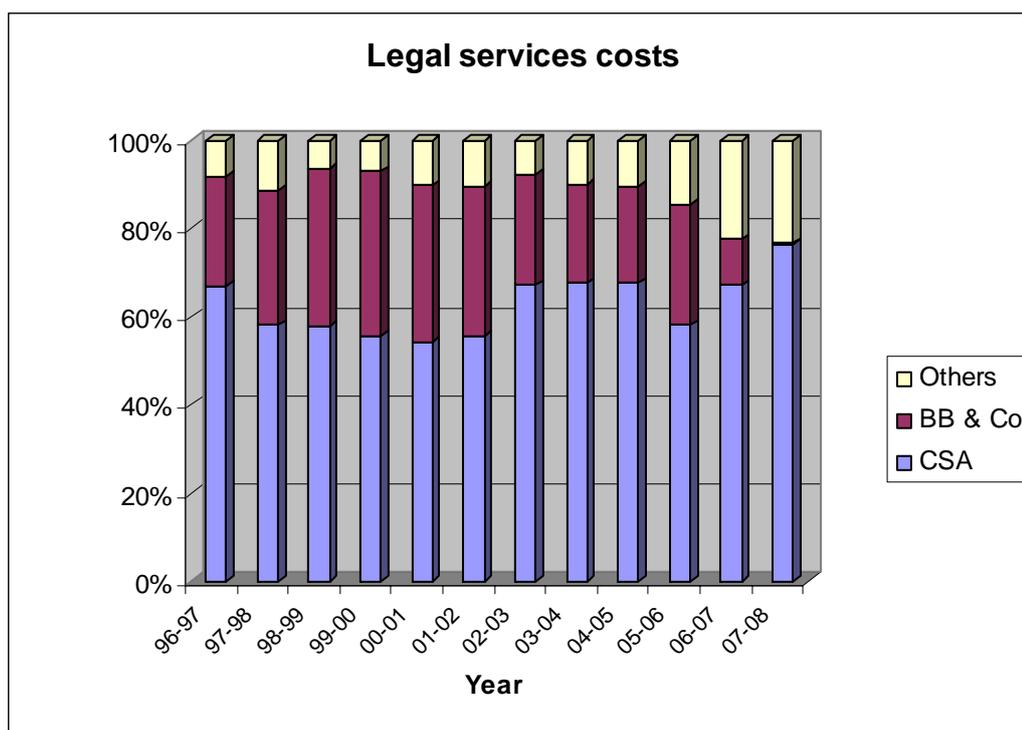
- it would help to address concerns about the ability of the remaining legal services staff in the CSA following the departure of key personnel to the private sector.
- 2.4.3 The risks to pursuing this new approach were also recognised by the Department. The approach was untested, could result in potential fragmentation of the legal service, dilute legal expertise in some specialised areas, and might lead to differing standards of service quality, particularly in the initial use of the list. Furthermore, it was noted that legal services costs from a select list would require careful monitoring to ensure cost effectiveness.
- 2.4.4 In September 1995, a Project Board was appointed, chaired by a practising barrister and then chair of a Health Trust. It was required to oversee the submission and evaluation of tenders from firms for inclusion in a framework for the supply of legal services, with high level advice input from the Government Purchasing Service (GPS).
- 2.4.5 The resulting Select List comprised individual lists for 12 distinct areas of law, with a total of 25 firms on one or more of the Lists. Firms were ranked in order of their assessed performance against the evaluation criteria for each area of law, namely local representation, capacity, experience and standards. When Private Finance Initiative work was removed from the Select List on 31 March 1999, CSA and Brangam Bagnall & Co were the top two ranked legal service providers in nine of the eleven remaining areas of law, as well as being on the Select List for the other two areas¹¹.
- 2.4.6 The recommendations of the Project Board for each of the 12 lists were accepted by the Department and the Select List was established from 1 April 1996. HSC organisations were required to appoint only those firms listed in the Select List. In selecting firms, organisations were required to use the same criteria applied in the establishment of the Select List, though there was flexibility in its application. HSC organisations were given the option of choosing firms from the appropriate list drawn up for each area of law, based

¹¹ European Law and Tax Law, which saw very little work awarded.

on their ranking; tendering their legal services work through secondary competition, involving some of the approved providers on the appropriate list(s); or remaining with CSA.

2.4.7 Figure 1 shows the market share based on legal costs¹² from 1996-97 to 2007-08¹³ (also see paragraph 1.2.2 and details in Appendix 1). At least 88 per cent of fees paid from 1996-97 to 2005-06 were to either CSA or BB & Co, approximately 65 per cent of which related to CSA and 23 per cent to BB & Co. This amount dropped slightly to 78 per cent in 2006-07, following the closure of BB & Co. From 1996-97, BB & Co's market share built up steadily, from 25 per cent in 1996-97, peaking at approximately 35 per cent for the four years from 1998-99 to 2001-02.

Figure 1: Market Share following tendering exercise



Source: DHSSPS

2.4.8 An example of the work allocated to providers in 2001-02¹⁴ is shown in Figure 2. It is clear from this figure that almost all new cases (95 per cent by caseload) were awarded to either CSA or BB & Co. Figures for the years

¹² Legal costs cover legal services fees only. They exclude counsel, expert and settlement costs.

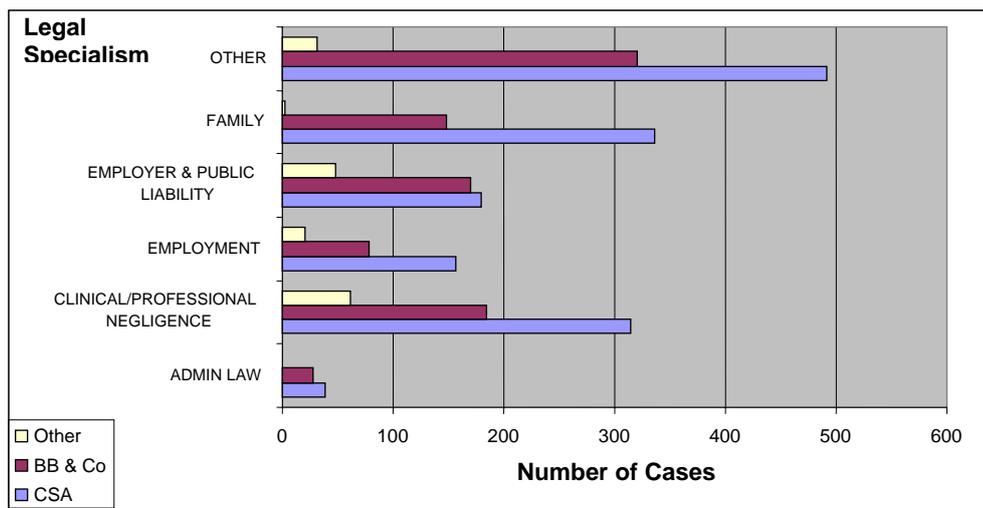
¹³ 2002-03 and 2003-04 figures not available for the Royal Group of Hospitals and Dental Hospital Trust.

¹⁴ 2001-02 was the last year this information was collected. This year would have been a fairly typical year.

1996-97 to 2000-01 show a generally similar pattern.

2.4.9 This procurement exercise resulted in the market being split principally between the two main legal service providers, CSA and BB & Co (see Appendix 1).

Figure 2: Allocation of new cases to legal services providers: 2001-02



Source: DHSSPS¹⁵

(c) Second Procurement Exercise (2002 to 2005)

2.5.1 The Department's initial Select List was intended to have a life of three years from 1 April 1996, with the option to extend it for three twelve-month periods to 31 March 2002. The Select List was extended yearly from 1999-2000 and in March 2001 the Permanent Secretary of the Department agreed to extend it for a final year until 31 March 2002, with a new list of providers to be in place from 2002-03 onwards. In July 2002, the then Minister approved the establishment of a new legal services Project Board to carry out a review to facilitate new arrangements for the provision of legal services by 1 April 2003. The Project Board comprised representatives from the HSC and Department together with legal advisers and advisers from the Department of Finance and

¹⁵ Draft Annual Report on the use and performance of the list of approved providers of legal services covering April 2001 to March 2002.

Personnel's Central Procurement Directorate (CPD). The delay in initiating this process, and the further delays in trying to conclude it, required the 1996 Select List to be extended, initially until 30 September 2002, due to staffing constraints at the Department of Health, Social Services and Public Safety, and then a further seven times until the second market testing exercise failed in early June 2005, as best value for money could not be established.

2.5.2 The Project Board was tasked with two key roles: first, to determine the most appropriate model for the procurement of legal services for the HSC; and second, to oversee the implementation of the preferred model. In July 2003, the Project Board reported 11 recommendations on the way forward, including proceeding with a one stage, direct tender process at local level as the procurement model, with HSC organisations coming together on a consortium basis – for example, on a geographical basis or by area of law – to take forward the tender process. The Project Board also recommended that legal services be procured under three categories: list 1, clinical negligence; list 2, personal social services (including primary care); and list 3, employment law, employers' and public liability law, contract law and administrative law.

2.5.3 The Department of Health, Social Services and Public Safety told us that the recommended model of procurement was consistent with EU legislation and procurement best practice. The Project Board's initial preferred model had been for a select list approach with secondary tendering at local level. However, in screening this model to ensure compliance with European procurement legislation, the Board was advised that a secondary tender exercise was inappropriate and instead, work should be allocated on a mechanistic basis, for example, by rotation of firms. This was not acceptable to the Project Board and to health service bodies who wanted to retain local choice in the selection of firms in which they had confidence, through the development of close working relationships. The direct tender approach was therefore recommended by the Project Board as the most appropriate way forward. The Board's recommendations were accepted by the Department and the aim was to have the new arrangements in place by July 2004.

- 2.5.4 In February 2004, the Department invited HSC Chief Executives to form up to six consortia with overall responsibility for the management of the procurement process being assumed by the Central Procurement Directorate on behalf of HSC organisations (and the Department). However, the target date of July 2004 was not achieved as it took longer than envisaged to establish the consortia and finalise the selection process. A further extension of existing arrangements to March 2005 was granted by the Minister. Another significant factor affecting the rate of progress was in determining what cases would be transferred from existing contractors to new contractors, when this would happen, and what impact the transfer of CSA caseload would have on the CSA staff.
- 2.5.5 In December 2004, legal firms were invited by CPD, by means of a single advertisement on behalf of all HSC organisations, to tender for the provision of legal services. The response to the advertisement was positive, with 10 firms submitting tenders. Firms were required to submit bids on the basis of two separate pricing options: a fixed price for their estimate of expected time input; and a blended hourly rate. The Department advised us that the fixed price (or block contract) arrangements were commonly used within the HSC for a range of services as a means of smoothing peaks and troughs in income and expenditure, and to incentivise service providers to improve efficiency by, in effect, placing a 'cap' on their income in any particular period, other than in exceptional circumstances. NIAO notes, however, that prior to the issuing of invitations by CPD no decision had been made by CPD or the Department as to how the pricing models were to be used in evaluating the tenders received.
- 2.5.6 In May 2005, CPD advised the Department of the difficulties it was experiencing in evaluating the prices offered by tenderers and in assessing value for money from both the fixed price and blended hourly rate pricing models. There was a wide variation in both the number of hours offered and associated prices for a block contract, and the blended rates had not been prepared on a consistent basis with different firms making different assumptions about the input required from each grade of staff.

- 2.5.7 In addition to receiving CPD advice, the Department sought advice from the Departmental Solicitor's Office. The DSO expressed concern about the evaluation of bids against two different pricing options (i.e. block contract and blended hourly rate) as each could give a different result and it had not been determined in advance which preferred option the consortia were to use in assessing bids. DSO recommended the introduction of a mechanism which would result in a single ranking for pricing both options. It noted that problems of capacity could arise if a small firm were to win a number of bids and concern was also expressed that a new calculation (that of standardisation of the block contract option) was being introduced so late in the day. CPD considered the DSO advice during the competition to have been unclear. Later, DSO commented that the introduction of "such a subjective element into the process is clearly highly unsatisfactory and would be unlikely to be defensible, were any legal challenge to be mounted by the challenger."
- 2.5.8 The view of the Department and of CPD is that the process was destined to fail from the outset, when firms were invited to submit two pricing models. In addition, tenderers had criticised the historical data provided to them by Health Boards and Trusts, via DHSSPS, as being insufficient to properly scope the level of services required by the contract. In light of these difficulties, CPD advised the Department that it was unable to conclude the evaluation and ensure that the contract award would deliver best value for money.
- 2.5.9 At the subsequent debriefing with CPD, CSA also expressed its concerns that one of its competitors was getting inside information.
- 2.5.10 Following consultation with the Department, in June 2005, CPD wrote to all firms that had submitted tenders, advising them that no award would be made as best value for money could not be established. On 30 June 2005, the Department advised health bodies that existing tendering arrangements should be extended until 31 March 2006.
- 2.5.11 In October 2005, Chief Executives were advised that any new market testing exercise would now need to await the new structures under the Review of

2.5.12 NIAO observations

- NIAO recognises the need for the Department to be **assured** that this second procurement exercise would have secured value for money. Nonetheless, a considerable amount of time and effort was expended by senior members of staff on this review, both within and outside the Department, including the CSA and firms interested in making a bid for contracts. Bearing this in mind, the number of extensions to the original contract and the resulting failure of this market testing exercise after three years must be criticised and it calls into question the continuing validity and basis of legal service procurement and provision to the health service.
- Where choice is exercised at local level, there is a greater potential for this to threaten propriety, market fairness in the allocation of work, and value for money. This reinforces the need for central monitoring by the Department. (Section 3 discusses this further and Example 1 in Figure 7 illustrates the point.)
- Management information sought from the HSC by tenderers was not sufficiently detailed, nor readily available.
- The evaluation model used to assess prices offered by tenderers on a fair and equitable basis was considered inadequate for the award of a tender (see paragraph 2.5.7).
- NIAO is surprised, given the level of expertise in CPD, their close working relationship with the Department, and the experience of the Project Board, that the procurement process was not sufficiently robust to allow the contracts to be awarded.

(d) Third Procurement Exercise 2006 to 2008

- 2.6.1 Following the decision in June 2005 not to make an award, the Department reviewed its policy on the provision of legal services to HSC organisations. In June 2006, the DHSSPS Board agreed that market testing should be adopted as the way forward and recommended a single tender exercise for the entire HSC. Its view was that this was the best way to secure a legal service which is demonstrably as efficient, competent, responsive and accessible as can be obtained¹⁶.
- 2.6.2 Unsurprisingly, this policy decision was not greeted favourably by CSA, which continued to lobby the Department to have its Directorate of Legal Services declared preferred bidder whereby clients would have the option to seek services elsewhere if DLS services were not delivered to the highest standard within a competitive environment. CSA was also concerned that in any new competition, it would be a simple matter for its main competitor (BB & Co) to undercut a DLS bid as DLS hourly rates were, in the Agency's view, certain to have been leaked to its competitors, and that being a public body, with the need to ensure that its costs are covered, there was more limited opportunity to adjust its pricing.
- 2.6.3 In September 2006, the Department wrote to Trust Chief Executives seeking nominations for a small Departmental working group to put the new arrangements in place, initially with a target date of April 2007. In December 2006, the Department wrote again to Trusts asking that the process be taken forward by the service under the chairmanship of a lead Trust official. A Legal Services Forum was established in September 2007, chaired by the Chief Executive of the South Eastern Trust and comprising representatives from each HSC Trust, a representative of the four Health Boards, a representative of the Regional HSC Board designate, a procurement specialist and a Departmental representative. In November 2007, the Forum proposed that:

¹⁶ Letter from DHSSPS Deputy Secretary to Chief Executives of Boards and New Trusts, 6 Dec. 2006

- Family Law should not be tendered but offered to DLS, the rationale being that as existing skills and expertise already exist within this organisation, a tendering process would not add value; and
- Clinical Negligence and Administrative / Employment Law should be subject to full procurement, with tendering based on an individual organisational basis or using partnership agreements between HSC bodies.

2.6.4 These proposals were accepted by the Department and the aim was to conduct a further competitive tendering exercise during 2008-09, with the new arrangements being in place from April 2009. However, in August 2008 the Minister for Health, Social Services and Public Safety, announced his decision that all legal services required by HSC organisations would, in future, be provided by the Central Services Agency. Any organisations currently using a private legal firm were expected to move their legal work to the Agency under arrangements and timescales to be agreed. The Department advised us that it is now taking forward a process to ensure the timely and effective implementation of the Minister's decision. With effect from 1 September 2008, all new legal cases have been referred to the CSA and plans are in place to ensure a managed hand-over of existing cases in the coming months.

The Closure of Brangam Bagnall & Co

2.7.1 On 1 September 2006, three months after the Departmental Board decision to take forward a further tender exercise, Brangam Bagnall & Co was closed down by the Law Society as a result of suspected fraud¹⁷. On 4 September 2006, Gary Daly and other solicitors who had worked for BB & Co wrote to the Department advising it of their proposal to establish a new Practice to provide service for the clients of the former Practice. They acknowledged that their Practice would not have been assessed or validated in respect of any tendering process but considered that, in the best interests of the Trusts and Boards, there should be continuity of service with respect to ongoing cases.

¹⁷ NIAO Report: Brangam Bagnall & Co: Legal Practitioner Fraud Perpetrated against the Health & Personal Social Services, NIA 195/07-08, 4 July 2008.

In the following 2 weeks, they advised that their records showed there were 107 family case hearings scheduled. Furthermore, a number of clinical negligence cases were fixed for trial.

- 2.7.2 The Department noted in their response that they were currently developing a competitive tendering process with a view to having new arrangements in place for all Trusts from 1 April 2007. Consequently, any arrangements regarding the workload of cases previously dealt with by BB & Co would be short term. Following detailed discussion with the Department's legal and procurement advisors, the Department advised the Chief Executives of those Trusts that had used BB & Co that, whilst the Department was not endorsing MSC Daly, 'there is no impediment in law or procurement practice which would preclude the use of this new firm, should you judge that the use of this firm, to ensure continuity of service, would be in the best interests of your clients'¹⁸.
- 2.7.3 The vast majority of cases handled by BB & Co transferred to the Directorate of Legal Services at the request of the Trusts, with DLS market share increasing from approximately 58 per cent in 2005-06, the year prior to the closure of BB & Co, to 83 per cent in 2007-08, the year after closure. Cases were also transferred to the new Practice MSC Daly Solicitors and to other legal services providers (see Figure 1 and Appendix 1).
- 2.7.4 The original intention for the new competition was for new contracts to be in place from 1 April 2007. However, this was subsequently extended to 1 April 2008 and then to 1 April 2009. In April 2007, the Departmental Solicitor's Office advised the Department that:
- there was a general concern that Select Lists of a long duration could close off the market and limit competition;
 - if challenged, a Court would need to be convinced why a Select List had exceeded the 4 year limit¹⁹ by such a long time;

¹⁸ Letter from DHSSPS Permanent Secretary to Chief Executives of HPSS bodies, 7 September 2006

¹⁹ 2006 Public Contracts regulations which implemented European Directive 2004/18/EC.

- the longer the re-tendering exercise is delayed the greater the risk of such challenge; and
- the transfer of work to MSC Daly should not continue for longer than necessary, given the existence of the 2006 Regulations.

2.7.5 NIAO observations

- The Select List agreed in 1996 was still being used, more than 12 years after its introduction.
- The date for the new arrangements which were to be in place on 1 April 2007, slipped a further 16 months before the Minister's decision to bring all legal services back to the CSA (see paragraph 2.6.4).
- The Department advised that none of the solicitors from MSC Daly who approached the Department has been the subject of any fraud investigation.
- Until the impact of the Minister's recent announcement, MSC Daly solicitors have continued to manage a number of cases for the health sector, despite the fact that they have not been assessed under any tendering process.
- BB & Co, in 1995-96, and MSC Daly, in 2006-08, are the only firms permitted to provide legal services to the health sector without having gone through a tendering process.

Section 3: Was Value for Money Achieved?

- 3.1.1 Government policy in the 1990s was to expand competition for public sector services with the twin objectives of improving quality and value for money (VFM). This policy was detailed in the 1991 White Paper “Competing for Quality” which required all government bodies to market test a wider range of services.
- 3.1.2 Against the background of the White Paper, the Attorney General produced guidance²⁰ in 1991 on the use of the private sector for Government legal work. NIAO note that DHSSPS considered this advice did not apply to CSA legal work as its work was not government work in the strict sense, but acknowledged that its good practice principles applied. The Guidance recommended that departments should be ready to contract out legal work, if necessary expertise does not exist in Government; if resources to do the work without undue delay are not available; and if it is more cost-effective for the work to be done in the private sector. It also set out four relevant criteria for departments and agencies to consider when deciding whether to contract out work (see Figure 3).

Figure 3: Criteria for Contracting Out

- Value for money (the prime consideration), securing services that are cost effective and of the right professional quality
- Experience and expertise required for a job
- Risk that the nature of the work contracted out will tie the department or agency to one supplier
- Risk of a conflict of interest between a department or agency and another client of a private sector firm

VFM Considerations pre First Procurement Exercise

- 3.2.1 In May 1995, following the decision to market test legal services, the Department produced a SWOT²¹ analysis for the proposed select list approach. An extract is highlighted at Figure 4:

²⁰ Guidance by the Attorney General “Use of the Private Sector for Government Legal Work” 1991

²¹ This is a methodology for reviewing strengths, weaknesses, opportunities and threats of a proposed change.

Figure 4: SWOT Analysis

| | |
|--|---|
| Strengths | Opportunities |
| Widens pool of expertise | May stimulate, cultivate NI legal market |
| Provides choice | May run in tandem with CSA to augment and compete with them |
| Allows comparison of service | |
| Weaknesses | Threats |
| Approach is new and untested | Select List may not prove to be VFM |
| VFM cannot be demonstrable | |
| Possibility of favouritism | Cost of CSA staff redundancy may be high |
| May be difficulties in controlling costs | Cost of administering the list may be high |

- 3.2.2 As noted in paragraph 2.4.3, the Department told us that, from the outset, it had recognised risks associated with the select list approach. However, NIAO questions whether these risks were considered in the context of the SWOT analysis and we have not seen any evidence of potential costs of threats being calculated or weaknesses being considered, either as part of the SWOT analysis or at any time thereafter.
- 3.2.3 There were risks with not proceeding with the planned competition. CSA would have retained its monopoly position with no real incentive to improve its legal services. HSC organisations would have no choice but to continue to use CSA, regardless of their satisfaction with the Agency's performance. And there were concerns over the continuing ability of the CSA – certainly in the short to medium term – to provide high quality legal advice to HSC organisations following the resignation of a number of senior CSA solicitors at the beginning of 1995 and some question about the ability of the remaining staff.
- 3.2.4 Against this background, the Department concluded that the balance of advantage lay with pursuing market testing using the select list approach. This way forward was accepted by the then Minister in June 1995.
- 3.2.5 Within a reasonably short time (June 1995) information was to hand to suggest that the private sector service might be expensive compared with the in-house service. Against a DLS salaries and wages budget for 1995-96 of £506k, CSA initially estimated that its usage, on an interim basis, of BB & Co

in 1995-96 – prior to the establishment of the Select List – could result in fees in excess of £500k. The Department advised that it was aware of the Agency's concerns and instructed it to negotiate more acceptable fees with the firm. Actual fees paid in 1995-96 were £211k, which the Department did not consider to be disproportionate to the work involved.

VFM Considerations post the Procurement Exercises

- 3.3.1 For value for money to be assessed, appropriate, timely and accurate management information must be available. Following the decision to adopt a select list approach, the Department required each HSC organisation using the List to report to the Department's List Manager on a quarterly basis giving details of the firms used, the services received and an indication or otherwise of the adequacy of standards of service. Any adverse reports were to be investigated by the List Manager. However, the Department advised that none of these reports identified any material concerns in relation to service standards. No adverse reports were prepared.
- 3.3.2 In May 1996, a Trust Chief Executive wrote to the Department suggesting that the monitoring arrangements were overly bureaucratic and unnecessary. In response, the Department advised that it considered the arrangements to be essential to 'underpin public accountability and openness', and that the information requested was similar to that which the Trust would wish to have itself to provide assurance that resources in this area were being used wisely. Nonetheless, in April 1998, in the light of continuing concerns about the quarterly reporting arrangements and the fact that the Select List appeared to be operating satisfactorily, the Department advised HSC organisations that from 1997-98, monitoring would be on an annual basis.
- 3.3.3 The Department issued annual reports, for each of the years 1996-97 to 2000-01, summarising the usage and performance of firms and the costs of legal services to all HSC bodies, based on the returns received. NIAO has reviewed these returns and notes that they provided mainly quantitative data with very little qualitative information. The annual reports were sometimes issued long after the financial year to which they related, diminishing their

value considerably. For example, the 1996-97 report was not issued until 29 April 1998 and the 1997-98 report was not issued until 5 February 1999.

- 3.3.4 The first report notes that the total cost of legal services for new and existing cases to HSC organisations in 1996-97 was £1.484m compared to £1.293m in 1995-96, a real increase of 12.23 per cent, though it recognised that the format of the information held did not allow like for like comparisons. Although it was not possible to identify the specific causes of the increase in total costs, the report commented that it may be attributable to factors such as the introduction of the Children's Order, changes in employers' liability law, compliance with EC Directives and a general increase in the volume of medical negligence cases. The second report notes that, when adjusted for inflation, the real increase in legal costs for 1997-98 was 16.3 per cent. Again, it was not possible to identify the specific causes of this increase, although the Department noted a 29 per cent increase in referral of new cases. Because of the complex and diverse nature of the service and length of time required to complete a case, this report concluded that 24 months may be too short a period over which to assess VFM though it did highlight significant increases in caseload for Administrative Law, Employer and Public Liability Law, Employment Law and Miscellaneous. Every report specifically noted that value for money was difficult to determine. Consequently, the Department commissioned the Government Purchasing Agency (GPA) to provide an independent review of legal services provision within the HSC.
- 3.3.5 The review ²² raised a number of points, some of which have been set out in Figure 5. These concluded that the select list arrangements had succeeded in improving the timeliness and quality of service and had also met the value for money objective.
- 3.3.6 The fact that this review was commissioned by the Department and the GPA were involved in the market testing process may impinge on its independence although CPD advised us that GPA input to the original select list approach was limited to high level advice with no direct responsibility for the competition for the Select List. The Department's view is that, given GPA's

²² GPA, 'Review of Legal Services Provision for the Health and Social Services Executive', 1999

limited involvement, the time that had elapsed since the Select List was established, and GPA's role as specialist procurement advisers to the Northern Ireland Civil Service, they feel it was entirely appropriate that GPA were asked to undertake the review.

3.3.7 NIAO welcomes the decision to undertake a review, but would query the robustness of the evidence supporting GPA's assessment of VFM being achieved. For example, GPA states that it was not possible for any HSC organisation to give an unqualified assurance that VFM was being achieved due to the lack of effective recording systems in the HSC. Also, the figure of £212k of savings, quantified for block contracts agreed with BB & Co, was provided by BB & Co and was not checked with the relevant HSC organisations. Such information does not appear to be independent and it is surprising that this figure was relied upon, given the significant rise in legal costs following market testing. In response, the Department highlighted that many purchasers were of the view at the time of the GPA review that the block contracts were providing value for money, capping fees at a level well below the hours that would otherwise have been charged.

Figure 5: Government Purchasing Agency Review of Legal Services Procurement

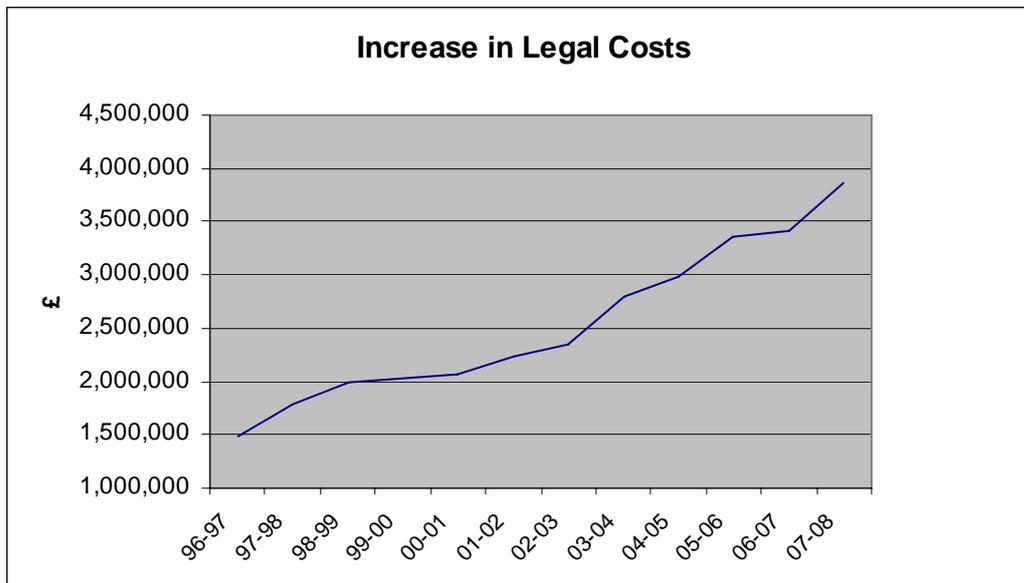
- GPA observations
- Management information necessary to monitor overall value for money was not easily available.
 - The ability of non-legal professionals to select and rank legal services, in a secondary competition was queried. GPA suggested that each body should publish the criteria against which it would appoint providers and offer open debriefing to unsuccessful bidders.
 - Bodies continuing to use CSA solely, needed to ensure VFM was being achieved.
 - Legal service providers noted that some HSC bodies appeared to be very rigorous in their choice, whereas others appeared to ratify a decision made before the tender.
 - Engagement of providers under block contracts was encouraged.
 - CSA and BB & Co had established databases to record management information at the request of purchasers, which GPA noted could assist purchasers more accurately forecast the future demand for services and allow providers to renegotiate contracts reflecting the hours worked.
 - Organisations interviewed felt that the best method to guarantee value for money was to undertake open tendering exercises using the framework. However, they

could not provide unqualified assurances that VFM was being achieved, due to their lack of effective recording systems.

- Full value for money may not be achieved if HSC bodies have not undertaken a full open competition.
- 65 per cent of the bodies (15 of 23) considered quality of advice to have improved and 78 per cent (18 of 23) considered quality of service to have improved.
- The use of other firms on the Select List was limited due to CSA's historical position and BB & Co's skill base.

3.3.8 In February 2001, the Department noted in correspondence that a market had never really developed and legal costs had gone up by 56 per cent since 1996. In their review, GPA attributed increased legal costs to a rise in Family Law cases, following the introduction of the Children's Order, the growth of a litigious society and several cases, e.g. professional negligence, now coming to fruition. Overall legal services expenditure has increased from £1.48m in 1996-97 to £3.86m in 2007-08, an increase before inflation of 161 per cent (86 per cent increase, taking into account Retail Price Index inflation factors) (see Figure 6).

Figure 6: Rise in legal services expenditure



Source: DHSSPS

3.3.9 Since the production of the draft annual report for 2001-02, no further annual monitoring of firms on the Select List has been undertaken by the

Department. The Department advised that, as monitoring from 1996 to 2002 highlighted no significant issues and confirmed on-going compliance and satisfaction with the level of service, it considered the continuation of central monitoring to be of limited value, and since then, it has dealt with any issues on an exception basis as and when they were raised.

3.3.10 As reported in paragraph 2.5.2, in July 2003, the Project Board suggested 11 recommendations on the way forward, including three focussing on monitoring the performance of legal services providers by

- setting performance standards, including specific time scales for the execution of legal action within the litigation process;
- using the DATIX management system, in place in the majority of Trusts; and
- standardising information requirements.

Whilst the second market testing exercise failed because the process was flawed, NIAO fully supports the above recommendations.

Potential opportunities lost

3.4.1 NIAO is not aware of any significant quality concerns in the area of legal services since the establishment of the Select List in April 1996, for either the private sector or CSA, nor have we had sight of any tangible evidence to demonstrate that a more cost effective service has resulted since market testing, though the Department pointed to the GPA conclusions that the new arrangements had improved the timeliness and quality of the service and had also met the value for money objective when used by HSC bodies. Conversely, the examples in Figure 7 highlight cases where opportunities to secure value for money may have been missed.

Figure 7: Value for Money Concerns

Example 1: Concerns raised by CSA

On 18 December 2000, Green Park HSS Trust tendered its legal services (for new work) using the select list and awarded the contract to BB & Co. Representations made by CSA, the existing provider who had been unsuccessful, to the Trust for a formal debriefing were unsuccessful. On 14 May 2001, CSA asked DHSSPS to review the process, criteria and decision adopted by the Trust in awarding this business. On 31 August 2001, the Department wrote to the Trust asking for a response to the matters raised by CSA and for copies of relevant papers. These were sent to the Department on 6 November 2001. On 22 April 2002, the Department asked the Trust for a full response to the matters already raised. Following a further exchange of letters, it became clear that cost was not scored when evaluating the tenders submitted. Copies of the evaluation papers obtained by the Department showed that, despite the assessment scores being very close between CSA and BB & Co, the annual block contract costs were very different, £5,000 versus £14,000 per annum respectively. Following this unduly lengthy investigation, on 21 January 2003, the Department wrote to the Trust strongly criticising it for not evaluating costs as part of the criteria for awarding the contract and thereby failing to adhere to proper procedures. It also criticised the Trust for refusing a formal debriefing to CSA after it had been unsuccessful in its tender. The Department added that the contract with BB & Co should be terminated once the new HSC legal services arrangements become effective on 1 September 2003. Accepting the findings of the Department, the Trust replied that the contract had a clause contained within it which indicated that it may be terminated by either party giving six months notice in writing. This clause was never effected by the Trust as new arrangements for legal services had not been established and the Trust continued to use BB & Co until the firm's closure in 2006. Potentially, excess contract costs of up to £9,000 per annum may therefore have been unnecessarily incurred by the Trust through its continued use of BB & Co. However, the Department has advised that, for the period 2001-02 to 2004-05 (part year), the difference in legal services costs was approximately £3,000 per annum.

Example 2: VFM concerns raised by Ulster Community Hospitals Trust (UCHT)

In April 2002, UCHT contacted the Department advising that they considered the cost of legal services provided by BB & Co for the community side to be expensive and were keen to achieve better VFM. BB & Co provided legal services under a block contract, but tolerance levels were making the contract expensive. Moreover, a quote provided from CSA for these services was more competitive. The Trust was advised by the Government Purchasing Service to continue with the existing contract in anticipation of the new HSC legal services tendering exercise. The Department advised the Trust to negotiate better terms with BB & Co for the existing contract, or carry out a full tender exercise so that a new provider could be appointed. In the light of expected new arrangements, the latter option does not, in NIAO's view, appear to have been feasible. However, the Trust advised that, following a period of negotiation, a reduction in price was agreed with BB & Co and put into effect from 1 April 2004. The Trust continued to use BB & Co until its closure. Whilst prices were reduced from April 2004, a potential opportunity to achieve VFM cost savings was missed for earlier periods.

3.4.2 NIAO supports the conclusions reached by the Department following its investigation in Example 1. It is unacceptable for costs not to be included as evaluation criteria when awarding a contract in the public sector. The requirement that HSC bodies should publish the criteria they use to appoint providers and offer debriefing to unsuccessful tenders was highlighted by GPA in their review in 1999. The Department drew the HSC's attention to the

findings, conclusions and recommendations of this review, but at least one organisation did not act on these points. The Department did strongly criticise the Trust for the failings in its tender evaluation process, though it took 16 months to complete the Green Park investigation, with some of the delay attributable to the Trust. NIAO would urge that future investigations into such matters are completed in a much faster timeframe given the potential for excess costs to be paid unnecessarily, with the consequential potential loss of public funds.

- 3.4.3 In 2006, when setting out the business case for the provision of legal services, the Department noted that, while the first market testing exercise resulted in a limited adjustment in the provision of legal work, it was widely acknowledged that the quality of service had improved since services were market tested. This view appears to have been subjective, on the basis of the experience of users, as the HSC does not appear to have had clear, tangible measures in place to monitor performance under this approach.
- 3.4.4 Figure 8 provides a summary of the Department's views on the options short listed in the business case presented to the Board in June 2006 which resulted in the preferred option of maintaining competition, being approved. While clearly the first option was unsustainable, the evaluation of the second option appears, in our view, to have been cursory. NIAO has not had sight of the rationale supporting the efficiency savings estimated by RPA consultants. However, in light of the general move within the health service towards shared services, this should have merited a more detailed consideration. The Department has advised that options were compared on the basis of the fees for an illustrative number of legal hours. Nevertheless, it is disappointing that the health service continues to have difficulties in collating appropriate management information, 10 years after the original Select List was established.

Figure 8: Short-listed Options – June 2006

| Options | | Comments made in the Business Case |
|--|---------|---|
| 1. Do nothing | | Not recommended – no incentive to improve quality of service |
| 2. Centralise all legal services with DLS under a shared service agreement | For | - simple to establish - lower costs as no profit element - savings of £200k to £400k identified ²³ |
| | Against | - would the quality of services fall? - option would need to be supported by a full analysis of in-house costs and services compared to other providers. Appropriate management information not available at this time |
| 3. Maintain competition | For | - HSC has benefited from competition in terms of quality and access to wider expertise - external suppliers have a proven track record - reduction in economies of scale likely to be balanced by more competitive prices |
| | Against | - conflicts of interest may arise, but unlikely, given past experience |

3.4.5 The Department also sets out in its business case, how it considers legal services tenders would contribute to the achievement of recommendations arising from an earlier NIAO Report on Compensation Payments for Clinical Negligence²⁴ (see also Section 4). However, it was not clear if any performance measure targets or indicators had been built in to any of the options to assess value for money, or whether the additional information that contractors would have been required to submit, was directed towards the area of clinical negligence. In response, the Department accepted that such targets and indicators were clearly necessary for all areas of law, and work in this area was to be taken forward during the implementation of the agreed procurement action.

Conclusion regarding Value for Money

3.5.1 In light of the above findings, we can find no tangible evidence to demonstrate that a more cost effective service has resulted since market testing. The Department has relied on GPA's conclusion that the exercise achieved VFM; however, for the reasons mentioned earlier, we are not fully convinced. Also, although 18 out of the 23 bodies consulted by GPA,

²³ Review of Public Administration consultants (Deloitte) identified potential efficiency savings of between £200k - £400k under shared services.

²⁴ Compensation Payments for Clinical Negligence, NIA 112/01

considered timeliness and quality of service to have improved, we have not found any objective evidence to support this.

3.5.2 The absence of any formal monitoring of legal services since 2001-02, further undermines any basis for demonstrating VFM. This is compounded by difficulties in extracting required management information from health bodies' systems.

3.5.3 It is imperative that any future decisions regarding the provision of legal services must be firmly rooted in achieving VFM. With the decision to bring legal services back to CSA, the above comments need to be considered in the context of continuing best practice.

Section 4: Concerns raised at the Public Accounts Committee in 2002

Background

- 4.1.1 On 5 July 2002, NIAO published its report on Compensation Payments for Clinical Negligence.²⁵ One of the main findings of the report was the need for the Department to ensure it has access to comprehensive information on all outstanding clinical negligence claims, including costs.
- 4.1.2 On 19 September 2002, the Assembly's Public Accounts Committee (PAC) met to consider the report. The cost of defending cases and how costs were controlled to ensure value for money, were discussed, with the Department supplying further information on the issue, after the session. The Committee was unable to publish a report on its findings and conclusions because of the collapse of the Assembly on 14 October 2002.
- 4.1.3 The Department has advised us that it has implemented all of the recommendations in the NIAO report. However, assurances given to PAC in other areas were not all addressed.

Assurances and information provided by the Department

- 4.2.1 The Department assured the Committee that legal costs were reasonable and had regard to value for money in relation to the costs of defending claims, primarily through the establishment of block contracts with legal services providers. It referred to the GPA review in 1999, which had indicated that 20 out of the 23 HSC organisations which responded had such contracts in place for their legal services, including those organisations which had chosen not to tender for legal services. In NIAO's view, block contracts provided scope for savings; however, these opportunities were limited by the fact that health bodies had the option to choose to remain with their existing providers and in many cases, used a mix of legal services providers through which it would be difficult to show that VFM was achieved.

²⁵ Compensation Payments for Clinical Negligence, NIAO, 5 July 2002, NIA 112/01

- 4.2.2 Furthermore, the Department advised that contracts were regularly put out to tender, in order to test the competitiveness of fees. NIAO accepts this for those HSC bodies that used secondary competition but, as mentioned earlier, some chose to remain with CSA and others picked firms off the Select List in order of ranking. In the previous section we concluded that we have found little objective evidence to confirm that VFM was being achieved. This conclusion was also reached in the annual reports prepared by the Department, based on information submitted by the health bodies.
- 4.2.3 The Department also undertook to provide the Committee with various information, some of which centred on the issue of legal costs, including details of expenditure, and the frequency with which legal tenders were renewed. The Department's response noted that new arrangements would be secured to deliver both a quality legal service and value for money by 1 April 2004. The failure to have the necessary arrangements in place four years after the date advised to PAC is of serious concern.
- 4.2.4 The Department provided historical information on the cost of legal services for the period 1996-97 to 2001-02, but did not provide such costs for 1995-96, the year prior to the establishment of the first Select List. NIAO has seen evidence that the 1995-96 costs before market testing were £1.293m, which increased to £1.484m in the first year of the Select List being established (see Figure 6). While these figures may have needed some comment on their limitations for comparability purposes, these costs should have been provided by the Department.
- 4.2.5 NIAO's 2002 report (see paragraph 4.1.1) referred to the Department's guidance, issued in 1998, requiring each Trust to set up and maintain a database with information on all claims for litigation, including information on quantitative and qualitative aspects of all outstanding claims. The Department indicated that it would ensure that detailed information on outstanding claims was held centrally as well as by individual HSC Boards affected. The report also recommended that the HSC should maintain a database of all resolved clinical negligence cases, including settlement costs

and expenses. The Department has told us that all HSC Boards and Trusts have local systems in place for managing clinical negligence claims which are consistent with NIAO recommendations. It also indicated that, since April 2004, Boards and Trusts have also submitted costing and other information to the Department for inclusion on a central clinical negligence database to provide oversight on the progression of clinical negligence claims across the HSC. The Department stated that the adequacy of this dataset has recently been reviewed and a revised dataset agreed with all organisations, which will include a detailed breakdown of costs. This is expected to be issued to the HSC in December 2008.

- 4.2.6 It is unclear to NIAO why such information has not been considered necessary for all legal service areas, and not just clinical negligence cases, until now. The Department has advised that it, along with the HSC, is currently considering a proposal to extend the database to include all other areas of law, with the exception of family law. However, it is surprising that final data requirements are only now being agreed.

Conclusions

- 4.3 The Department issued a comprehensive circular one week before its appearance before PAC in September 2002, in which it indicated that a Claims and Litigation Steering Group would be set up, tasked with, inter alia, "assessing the implications of the NIAO and PAC reports on clinical negligence, ensuring relevant action is taken".²⁶ Whilst some progress has been made by the Department, NIAO is concerned that greater priority does not appear to have been attached to some of the issues that were raised at the PAC hearing, particularly in relation to the re-tendering of legal services, to ensure that there was a quality legal service in place, providing value for money, within the time frame promised.

²⁶ DHSSPS Circular HSS(F) 20/2002, "Clinical Negligence – Prevention of Claims and Claims Handling" 12 Sept 2002.

Section 5: Conclusions and Recommendations

Conclusions

5.1.1 In the course of this Memorandum, we have identified a number of areas where, in NIAO's view, the Department has not been sufficiently proactive in ensuring that legal services, delivered on behalf of the HSC, demonstrably provide value for money. Due to the failure of the second procurement exercise and the lack of progress since then:

- the Department has been exposed for a number of years to potential legal challenge with respect to the significant period over which the current Select List has existed (see Section 2);
- until the impact of the Minister's recent announcement, that all legal work will be transferred back to CSA, has taken effect, the firm of MSC Daly had (since September 2006) provided legal services to six Trusts and one Board, despite the fact that it has never gone through any form of tendering process. The Department told us that legal advice did not rule out this arrangement, it merely highlighted an increasing risk of challenge the longer it continued (see paragraph 2.7.4). NIAO considers this not to be good procurement practice;
- the Department did not meet the timescale indicated to the Assembly's Public Accounts Committee for the re-tendering of legal services (see paragraph 4.3); and
- detailed management information in respect of legal services has not been collated and issued to the health service since 2001-02 (see paragraph 3.3.9).

5.1.2 The only evidence that the market testing approach adopted since 1996 has resulted in the quality of legal services improving or costs reducing, arose from the fact that 78 per cent of the bodies (18 of 23) consulted by GPA in 1999 considered quality to have improved. There has been no further evidence since then to demonstrate such improvement. Nor is there any evidence of costs of legal services reducing.

5.1.3 It is recognised that the health service is still in the midst of the most significant structural reform, arising from the Review of Public Administration, since its inception. However, given the sensitive nature of legal services and the fraudulent activities of George Brangam, who at one stage provided as much as 37 per cent of the share of legal services to the health sector, the delays in establishing new arrangements are disappointing.

Recommendations

5.2.1 The Memorandum has identified a number of areas which should be considered when establishing arrangements for the provision of legal services. Although the third review of legal services provision has now been abandoned, lessons must still be learnt from the history of these unsuccessful exercises over a long number of years, for any future attempt to market test either legal services or indeed any other service procurement.

5.2.2 Due to the complexities of procurement exercises of this type, the Department must ensure that a robust Project Board / User Group is established very early on, to plan the process. It should only include key representatives from the Department and health bodies to ensure the process does not become unwieldy and protracted. It is essential that both legal and procurement specialists are involved from the outset of the process and ideally, should also form part of the User Group.

5.2.3 Appropriate and accurate data must be provided to tenderers to enable them to properly assess the level of service they will be required to provide and submit robust bids.

5.2.4 There needs to be absolute clarity when setting the evaluation criteria to ensure that the costs can be fully and properly evaluated and that the cost:quality ratio is reasonable.

5.2.5 For legal services, there needs to be a clearly established protocol to deal with existing and new legal cases with robust definitions of what constitutes a live case. Employees who may personally benefit from new arrangements

should be excluded from any such discussions which may prove advantageous to them.

- 5.2.6 Value for money needs to be the key driver of the procurement process and should be embedded throughout it, for example when establishing the evaluation model, assessing the tenderers, monitoring the performance of providers and assessing the quality of services.
- 5.2.7 Key performance measures and indicators need to be clearly established at the outset, regularly reviewed, and the outcome reported promptly to the health sector. Any probity issues arising, should be investigated as a matter of urgency and any lessons learned should be disseminated throughout the health sector.
- 5.2.8 Proportionate management information systems are needed to support the monitoring of performance and should be maintained by the HSC, as purchasers, and standardised throughout.
- 5.2.9 Competitive tendering is a useful tool for improving quality of service, providing a benchmark against which performance can be compared and delivering services where the organisation does not have the capacity to do so. Where a decision has been taken to select this option, performance of providers must be continuously reviewed to ensure it is still the best option and VFM is being achieved.

Final Comment

- 5.3.1 The findings and recommendations of this Memorandum are not only restricted to the health sector, but should be considered in the wider public sector context, not only in terms of the provision of legal services, but also in procurement exercises in other areas.

- 5.3.2 For example, a recent Report by the Local Government Auditors²⁷ highlights that the total expenditure on legal services for councils was approximately £2.5 million for the year ending 31 March 2007 and that a large number of councils have left their main legal services provision with the same individual or firm for more than 20 years without exposing the service to competition.
- 5.3.3 It is likely that, with the mergers of health bodies under RPA, there are other such contracts which could be centrally negotiated using both procurement and legal specialists to ensure that best value for money is being achieved.

²⁷ The Exercise by Local Government Auditors of their Functions, NIAO, 12 June 2008

**Payments made to Legal Services Providers
1996-97 to 2007-08**

| Year | CSA £,000 | BB & Co £,000 | Others £,000 | Total £,000 | CSA & BB & Co %age of Total | BB & Co %age of Total |
|---------------|---------------|------------------|-----------------|----------------|--------------------------------------|-----------------------------|
| 1996-97 | 992 | 369 | 123 | 1,484 | 92 | 25 |
| 1997-98 | 1,033 | 542 | 202 | 1,777 | 89 | 31 |
| 1998-99 | 1,158 | 709 | 128 | 1,995 | 94 | 36 |
| 1999-00 | 1,129 | 754 | 144 | 2,027 | 93 | 37 |
| 2000-01 | 1,130 | 738 | 212 | 2,080 | 90 | 35 |
| 2001-02 | 1,250 | 757 | 237 | 2,244 | 89 | 34 |
| 2002-03* | 1,574 | 590 | 183 | 2,347 | 92 | 25 |
| 2003-04* | 1,897 | 624 | 282 | 2,803 | 90 | 22 |
| 2004-05 | 2,016 | 660 | 309 | 2,985 | 90 | 22 |
| 2005-06 | 1,962 | 916 | 491 | 3,369 | 85 | 27 |
| 2006-07 | 2,292 | 361 | 765 | 3,418 | 78 | 11 |
| 2007-08 | 2,954 | 6 - | 903 | 3,863 | 77 | - |
| TOTALS | 19,387 | 7,026 | 3,979 | 30,392 | 88 | 23 |

* 2002-03 and 2003-04 figures not available for Royal Group of Hospitals & Dental Hospital Trust. Payments made by this Trust in subsequent years were:
 2004-05 – CSA £29k - BB & Co £108k - Other £9k
 2005-06 – CSA £24k – BB & Co £95k – Other £8k
 2006-07 - CSA £37k – BB & Co £60k – Other £57k
 2007-08 - RGH Trust merged with other Trusts as part of RPA re-organisation on 1 April 2007.

Minor amendments between Appendix 1 and 2 due to roundings

Source : DHSSPS

Appendix 2

Expenditure on Legal Services – HSC Bodies – From 2002-03 to 2007-08

| HSC Bodies | 2002-03 | | | 2003-04 | | | 2004-05 | | | 2005-06 | | | 2006-07 | | | 2007-08 | | |
|-----------------------------|---------|------|------|---------|------|------|---------|------|------|---------|------|------|---------|------|------|---------|------|------|
| | CSA | BB | Oth |
| | £000 | £000 | £000 | £000 | £000 | £000 | £000 | £000 | £000 | £000 | £000 | £000 | £000 | £000 | £000 | £000 | £000 | £000 |
| Eastern Board | 84 | 5 | 7 | 95 | 1 | 0.2 | 92 | 1 | - | 84 | 0.1 | 1 | 88 | - | 7 | 75 | 6 | 32 |
| Northern Board | 1 | 111 | - | 2 | 71 | - | 2 | 75 | - | 2 | 92 | - | 3 | 17 | 16 | 24 | - | 24 |
| Southern Board | 45 | - | - | 80 | - | - | 49 | - | - | 55 | - | - | 39 | - | - | 31 | - | - |
| Western Board | 70 | - | - | 79 | - | - | 58 | - | - | 47 | - | - | 50 | - | - | 48 | - | - |
| North & West Belfast Trust | - | 120 | - | - | 80 | - | - | 51 | - | - | 94 | - | - | 22 | 44 | | | |
| South & East Belfast Trust | 194 | 164 | 32 | 178 | 200 | 60 | 239 | 162 | 35 | 217 | 374 | 98 | 234 | 49 | 144 | | | |
| Royal Hospitals Trust | *** | *** | *** | *** | *** | *** | 29 | 108 | 9 | 24 | 95 | 8 | 37 | 60 | 57 | | | |
| Belfast City Hospital Trust | 118 | - | - | 122 | - | - | 140 | - | - | 137 | - | - | 146 | - | - | | | |
| Green Park Trust | 19 | 15 | - | 23 | 15 | - | 18 | 16 | - | 11 | 17 | - | 8 | 11 | 12 | | | |
| Mater Infirmorum Trust | 3 | 9 | - | 1 | 11 | - | 1 | 15 | - | 0.3 | 14 | - | 2 | 7 | 9 | | | |
| Belfast Trust | | | | | | | | | | | | | | | | 463 | - | 351 |
| Ulster Com & Hosp Trust | 89 | 18 | - | 65 | 76 | - | 72 | 85 | - | 88 | 100 | - | 212 | 27 | - | | | |
| Down Lisburn Trust | 9 | 49 | 69 | 25 | 84 | 102 | 2 | 62 | 94 | 9 | 61 | 294 | 90 | 147 | 195 | | | |
| South Eastern Trust | | | | | | | | | | | | | | | | 504 | - | 315 |
| Craigavon Area Trust | 1 | - | 55 | 0.1 | - | 109 | 3 | - | 164 | 4 | - | 83 | 3 | - | 266 | | | |
| Craig & Banbridge Trust | 76 | - | - | 79 | - | - | 108 | - | - | 103 | - | - | 94 | - | - | | | |
| Armagh & Dun Trust | 70 | - | - | 180 | - | - | 170 | - | - | 120 | - | 1 | 134 | - | 6 | | | |
| Newry & Mourne Trust | 100 | - | - | 105 | - | 1 | 98 | - | 0.5 | 124 | - | - | 108 | - | 0.1 | | | |
| Southern Trust | | | | | | | | | | | | | | | | 466 | - | 158 |
| Altnagelvin Hosp Trust | 47 | - | - | 94 | - | - | 109 | - | - | 82 | - | - | 112 | - | - | | | |
| Foyle Trust | 159 | - | - | 129 | - | - | 173 | - | - | 158 | - | - | 177 | - | - | | | |
| Sperrin Lakeland Trust | 109 | - | - | 183 | - | - | 210 | - | - | 205 | - | - | 214 | - | - | | | |
| Western Trust | | | | | | | | | | | | | | | | 612 | - | - |
| United Trust | 33 | 18 | - | 50 | 18 | - | 83 | 17 | - | 100 | 11 | - | 111 | 4 | - | | | |
| Causeway Trust | 54 | 39 | - | 52 | 38 | - | 73 | 35 | - | 72 | 39 | - | 73 | 10 | - | | | |

| | | | | | | | | | | | | | | | | | | |
|----------------------------|-------------|------------|------------|-------------|------------|------------|-------------|------------|------------|-------------|------------|------------|-------------|------------|------------|-------------|----------|------------|
| Homefirst Trust | 217 | 42 | - | 244 | 31 | 3 | 196 | 33 | 2 | 210 | 19 | 2 | 272 | 7 | 2 | | | |
| Northern Trust | | | | | | | | | | | | | | | | 644 | - | 2 |
| NI Ambulance Trust | 45 | - | 9 | 57 | 0 | 7 | 48 | - | 4 | 41 | - | 4 | 51 | - | 4 | 49 | - | 3 |
| Central Services Agency | 25 | - | 11 | 46 | - | - | 32 | - | - | 26 | - | - | 19 | - | - | 19 | - | - |
| NI Blood Trans Agency | 2 | - | - | 1 | - | - | 5 | - | - | 2 | - | - | 2 | - | - | 1 | - | - |
| NI Reg Med Phs Agency | 2 | - | - | 2 | - | - | 2 | - | - | 2 | - | - | 2 | - | - | 2 | - | - |
| NI Med & Dent Trg Agency | 1 | - | - | 1 | - | - | 1 | - | - | 2 | - | - | 4 | - | - | 5 | - | - |
| NI Social Care Council | 1 | - | - | 3 | - | - | 2 | - | - | 4 | - | - | 2 | - | 3 | 3 | - | 12 |
| Reg & Quality Imp Agency | | | | | | | | | | 28 | - | - | 5 | - | - | 7 | - | - |
| NI Practice & Educ Council | - | - | - | 0.4 | - | - | 1 | - | - | 5 | - | - | 0.4 | - | - | 1 | - | - |
| Mental Health Commission | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 6 |
| Totals | 1574 | 590 | 183 | 1897 | 625 | 282 | 2016 | 660 | 309 | 1962 | 916 | 491 | 2292 | 361 | 765 | 2954 | 6 | 903 |

*** 2002-03 and 2003-04 figures not available for Royal Group of Hospitals & Dental Hospital Trust.

Figures rounded

Table takes into account RPA re-organisation changes from 1 April 2007

Minor amendments between Appendix 1 and 2 due to roundings

Source: DHSSPS

The Tendering Process – December 2004

Invitations to Tender for the Supply of Legal Services to HSS Boards and Trusts were issued on 22 December 2004.

Period: Three years for 1 April 2005, with options to extend for four further periods of one year.

Tenders were invited for the supply of services to each of six consortia:

- Northern Board Area Consortium
- Southern Board Area Consortium
- Western Board Area Consortium
- Eastern Board Area Consortium
- Acute Trusts Consortium
- Community Trusts Consortium

Three lists of services for tendering purposes:

- List 1: Clinical Negligence: this covers negligence claims lodged against any staff member across the HPSS encompassing the acute (including medical) personal social services and community sectors;
- List 2: Personal Social Services: this includes Family Law, Primary Care Services, Continuing Care and Mental Health; and
- List 3: this includes Employment Law, Employers and Public Liability, Contract Law, and Administrative Law.