

***IMPROVING VALUE FOR MONEY  
for publicly funded  
criminal defence services in London***

Legal Services Commission Consultation Paper

**RESPONSE OF  
THE LEGAL ACTION GROUP**

May 2005



1. The Legal Action Group (LAG) is a national charity committed to improving access to justice, particularly for the vulnerable and socially excluded. LAG works with lawyers and advisers to improve standards and knowledge of social welfare and criminal law amongst practitioners, by publishing a monthly magazine and legal handbooks and providing training for lawyers and advisers. We also comment and campaign extensively on social welfare and criminal law issues, on administration of justice and on the delivery of publicly funded legal services. LAG does not represent any particular interest group: our primary concern is with quality and access to justice for the users and potential users of legal services.

### **LAG/LAPG conference on price competitive tendering**

2. Our response to the Legal Services Commission's consultation paper *Improving value for money* has, in part, been informed by the comments made during the course of the conference that LAG held jointly with the Legal Aid Practitioners Group on 6 April 2005 in London. The minutes of this event are attached for reference.

### **General observations and summary of response**

3. LAG believes that the Commission's proposals for so-called 'managed competition', which allows the market to determine the price per case, will create an unstable supplier base that is under pressure to drive down costs, and also quality of work. The proposals are misconceived; they are unworkable in practice, and also represent a fundamentally mistaken approach to ensuring an adequate and accessible supply of high quality criminal defence services. The LSC has previously demonstrated its commitment to developing quality, which LAG has welcomed - but price competitive tendering (PCT) will work against the interests of users of the CDS by creating an adverse effect on the quality of criminal defence services and on access to them. PCT will also create unavoidable negative consequences for the Criminal Justice System as a whole.
4. We are surprised that the Commission has put forward proposals, without even piloting them first, and without apparently taking note of available research. PCT will undermine the extensive work it has undertaken over the past few years to try to improve the quality of criminal defence work; it completely contradicts the quality ethos of the preferred supplier pilot, even though the consultation paper suggests that all contract holders will need to commit to work towards achieving the preferred supplier standard. The introduction of PCT will also undermine the rationale for the Public Defender Service pilot, which was designed both to improve the quality of criminal defence services and to provide a baseline for costs within a mixed economy. Set against private practice suppliers contracted under the PCT regime, this rationale for the PDS will no longer exist.

5. The Commission has expressly rejected a ‘best value’ approach to the current proposals. Under best value, public authorities must ‘make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness’.<sup>1</sup> This approach also seems to contradict the Department for Constitutional Affairs (DCA) policy on procurement.<sup>2</sup> This states: ‘The successful tender will be the one which best meets our needs in accordance with the pre-determined evaluation criteria, which in turn will offer us best value for money in terms of whole life costs.’
6. We believe the rejection of best value to be a very shortsighted decision. As we argue below, a bid chosen on the basis of price alone may not be viable for the life of the contract. The LSC would then have to incur further transaction costs in transferring the work to another provider. Work done under a cheap bid might also be carried out in a manner that produces costs for other parts of the criminal justice system, a point to which we return below.
7. Finally, we are concerned that the Commission has apparently failed to recognise the potential long-term impact of PCT on the professional ethic of individual criminal defence solicitors and the firms that employ them. The service ethos of legal aid work, and the requirement to act in the best interests of one’s client, enshrined in the solicitors’ conduct rules, will be overshadowed by the imperative of saving time and costs to make the business financially viable under PCT.
8. We do not propose to respond expressly to the questions in the consultation document. In summary, our concerns are as follows:
  - PCT does not tackle the most important costs drivers in criminal legal aid
  - The LSC is unclear about what quality floor it is seeking, and how this will be assessed.
  - The mechanisms for making initial quality assessments lack clarity, and they may not be sufficiently robust to guarantee that the quality floor is met.
  - Evaluating bids from suppliers, once on the panel, on price alone is likely to have a depressing effect on quality; there are also no adequate proposals for assessing quality during contracts.
  - Peer review is still relatively undeveloped; it is too soon to rely on it as the principal means of assessing the quality of work under PCT.

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<sup>1</sup> Local Government Act 1999 S 3 (1)

<sup>2</sup> See [www.dca.gov.uk/procurement/process.htm](http://www.dca.gov.uk/procurement/process.htm)

- PCT will have a negative impact on access to criminal defence services, and particularly on client choice.
- The effect of PCT will be to throw costs onto other parts of the criminal justice system.

We will now elaborate each of these points in turn.

### **PCT does not tackle the most important costs drivers in criminal legal aid**

9. It is well established that a disproportionate amount of the expenditure on criminal legal aid is taken up by large Crown Court trials. The DCA has worked hard to bring this expenditure under control, and lists this as one of its most significant achievements over the past two years: ‘...we introduced a new regime for how we pay defence barristers in the one per cent of criminal cases that consume nearly half of the Crown Court legal aid budget. These cases now have significantly better cost control with individual contracts in the biggest cases now being agreed before the case proceeds.’<sup>3</sup> Competitive tendering for criminal lower work will not reduce expenditure on Crown Court legal aid, and may even perversely increase the number of Crown Court trials, as we argue below.
10. The costs drivers in criminal defence work which are beyond the remit of both the LSC and criminal defence lawyers were identified in the LSC-funded research, *Demand induced supply*, by Professor Ed Cape and Professor Richard Moorhead.<sup>4</sup> This study started off by looking carefully at the possibility of supplier induced demand and concluded that this is not a satisfactory explanation for the growth in criminal legal aid expenditure. It also found that, since 2001, the rise in average cost per magistrates’ court claim is explained more by increases in waiting and disbursements than by upward trends in profit costs.
11. The study also examined the possible effect of factors in the wider criminal justice system. It found evidence of increasing seriousness of crime – that is, more people charged with offences, more denied bail, and more custodial sentences (leading to a greater likelihood that the ‘interests of justice’ test will be satisfied for applications for representation orders). It concludes that much of the recent and likely future increases in expenditure on legal aid is beyond the control of both criminal defence solicitors and the LSC; for example, an increase in police powers to detain; the forthcoming extension of police powers of arrest to all criminal offences; the time taken to negotiate terms of conditional bail; the growing complexity of police investigations; and the rise in the amount of business handled by the magistrates’ courts.

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<sup>3</sup> *Making a difference: taking forward our priorities*; DCA, May 2005

<sup>4</sup> *Research paper presented to the Socio-Legal Studies Association conference 2005.*

12. We would therefore challenge the Commission's assertion that PCT is necessary 'as part of a wider series of reforms to help control both civil and criminal legal aid expenditure'.<sup>5</sup> In the absence of a clear evidence base, these radical and potentially destructive measures simply cannot be justified. In particular, making such a dramatic change to legal aid for work in magistrates' courts – where there has not been a significant increase in expenditure – seems misjudged, given the threat to quality.

**The LSC is ambivalent about what quality floor it is seeking, and how this will be assessed.**

13. The Commission proposes a risk-based quality assessment to ascertain whether firms wanting to be considered for the bid panel meet the appropriate quality threshold. This assessment would be based on an analysis of case files and case outcomes. The consultation paper acknowledges [para 1.9] that the Commission has a responsibility 'to ensure that the services that it purchases on behalf of clients are of the highest quality within the limits of affordability.' This gives the impression the Commission will be striving to push up standards and that suppliers will be continually encouraged to improve the quality of their work. But elsewhere in the consultation paper, the Commission declares its aim to be much more modest; it is simply setting a quality floor and suppliers providing merely *competent* advice will be admitted to the bid panel.
14. The consultation paper does not make it clear how the initial quality assessment will be carried out. In its press release launching the consultation, the Commission stated: 'The LSC is confident that by assessing outcomes achieved for clients and case files, most firms will be able to demonstrate compliance without the need for peer review.' However, it has apparently now reversed this position, confirming the initial analysis will also be based on peer review as well as case outcomes. It does not inspire confidence that these proposals have been so ambiguously presented.

**The mechanisms for making initial quality assessments lack clarity, and they may not be sufficiently robust to guarantee that the quality floor is met.**

15. We will assume, for the purposes of this response, that it is the Commission's intention to use peer review for the initial risk-based assessment. If our assumption is incorrect and initial analysis is to be based on case outcomes, we would argue strongly that these are of little use in identifying firms about which there may be proper concerns.

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<sup>5</sup> *Legal Aid Reform: London competitive tendering in context*; LSC, January 2005

16. Peer review, if conducted properly, will be time consuming. We do not think that the Commission has addressed the logistical problems of ensuring that there are sufficient peer reviewers, adequately trained, inducted and working consistently to the same standards. In the Commission's own consultation paper on peer review,<sup>6</sup> it is suggested that the initial review, involving 20 case files, should take approximately one day for assessment, with a further half day needed to complete the report. If, say, 400 of the 500 London firms with CDS contracts were to ask to be considered for the bid panel, some 600 days of peer review time would be required to carry out the initial reviews alone. If some of the peer reviewers live in London, there may be conflicts of interest to resolve. We are not convinced that the Commission has at its disposal the time or resources to deliver an initial peer review at this level of detail.
17. On the other hand, a significant reduction in the level of peer review scrutiny could mean that quality concerns would not necessarily be exposed. What is more, they might be insufficiently robust to justify a decision that leads eventually to a firm being put out of business.
18. The LSC consultation paper on peer review states that there will be five ratings: Excellence (1); Competence Plus (2); Threshold Competence (3); Below Competence (4); and Failure in Performance (5). The rating of Threshold Competence indicates that 'although the quality of work that is delivered is proficient, there will be some areas of concern...*which need to be addressed*' (our emphasis). In the same document, the Commission suggests that if a supplier is given a Threshold Competence rating, the peer reviewer will identify potential corrective action and areas of development, which will form the basis of a development plan for the supplier. A rating of Below Competence will result in the issue of a Contract Notice; the supplier would be expected to propose corrective action, and would normally undergo a further peer review within six months to make sure that quality has improved. If this results in a second Below Competence rating, the contract would normally be terminated.
19. It is unclear which of these thresholds the Commission would adopt in deciding whether firms 'pass' or 'fail' the initial review. The consultation paper is vague about the precise quality standard required for a firm to be accepted onto the PCT bid panel, suggesting only that the work should be 'competent' (a term which is not defined) and that if the initial assessment indicates that the supplier is not likely to satisfy this, an independent peer review would be offered. The document does not specify whether the Commission would be seeking performance at Threshold Competence (level (3)), or higher – or indeed lower. If level (3) is implied, it is unclear what mechanisms – if any – would be used to ensure that the necessary corrective action is taken by firms before they are accepted onto the bid panel.

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<sup>6</sup> *Independent Peer Review of Legal Advice and Legal Work*: LSC, April 2005

20. The consultation paper also suggests that analysis of case outcomes would contribute to the first stage of assessment. It has been suggested that the ratio of convictions to acquittals and the level of referrals to the Crown Court might be used as indicators. We question to what extent outcomes such as these would throw light on the quality of work. Without knowing the inputs of individual cases, outcomes have little meaning and no meaningful conclusions can be drawn from them. Differences between firms' case profiles, individual clients' personal histories and the circumstances of their cases, together with the practices of different police stations, courts and local Crown Prosecution Service offices, for example, could all have a significant impact on outcomes. At best, outcomes that are out of line with the average might raise concerns and could suggest that further investigation of quality should take place.

**Evaluating bids from suppliers, once on the panel, on price alone is likely to have a depressing effect on quality; there are also no adequate proposals for assessing quality during contracts.**

21. The Commission acknowledges that, once firms have passed the threshold quality test and have been accepted onto the bid panel, price alone will determine the assessment of bids. In the absence of a best value approach to tendering – which the Commission has rejected as being unmanageable for both itself and for suppliers – there will be no incentive for suppliers to raise or maintain quality standards. LAG fears that firms will be under pressure to submit uneconomic bids in order to secure a contract. Some bidders may treat criminal lower court work as a loss leader to secure the higher paid Crown Court work. Even if they resist this pressure, most are ill equipped to accurately cost their bids within the proposed framework and may under-price their bids in error.

22. The consultation paper contains only vague proposals for reviewing quality on an ongoing basis once contracts have been awarded; reference is made to monitoring performance through 'data analysis, file assessment and peer review where appropriate'. However, this falls far short of a commitment to regular post-contract peer review; in any event, it is unlikely that peer review would take place more than once a year, leaving twelve months for quality to decline unchecked. Given the economic pressures on firms to run cases within their bid price, there are concerns that standards of work could slip immediately after contracts are awarded, even if the pre-bid quality of work had been found to be competent or above competent standard.

23. The importance of regulating quality within competitive tendering is emphasised in the Frontier Economics report, which the consultation paper relies on as the evidence base supporting the move towards so-called 'managed competition'. The report makes the important observation that those receiving legal aid cannot

judge whether they receive a good quality service or not and, in this context, it states:

‘... a competitive approach would need to be exercised with caution. In an unregulated market.... there may be too few incentives in place for firms to provide a quality service. A firm could always outbid another firm by offering a lower price, but it is not clear that this would be a desirable outcome if this involved spending a lesser amount of time on the case or using more junior staff.’<sup>7</sup>

24. The Frontier report goes on to say that incentives to efficiency would not work without maintaining some form of quality regulation, both before and after bids are accepted, as a way of ensuring that competition was ‘managed’. It recommends that pilots be undertaken to test the practical and cost implications of alternative models of competition. We are surprised, to say the least, that the Commission is proceeding with this initiative without testing different approaches through a pilot project. This stands in stark contrast to the more cautious approach of the Legal Aid Board to the development of civil contracting.<sup>8</sup>

25. Thus, the approach adopted by the Commission in relation to PCT gives rise to serious concerns that suppliers whose bids are accepted will be under great pressure to save costs; this pressure is likely to manifest itself in the following ways.

- Devolving work down to the most junior staff (including paralegals) in order to reduce the firm’s overall expenditure on salaries.<sup>9</sup>
- Downward pressure on salaries for individual fee-earners, thus exacerbating problems of recruitment and retention that already exist in small firms.<sup>10</sup>
- Increasing the ratio of supervisors to fee-earners, with a corresponding reduction in regular and effective supervision of fee-earners’ work.
- Avoiding or delaying investment in the firm’s infrastructure – such as IT and library resources – and in staff training.
- Putting staff under pressure to allocate their fee-earning time as ‘efficiently’ as possible in the interests of profitability (for example, in relation to travel and waiting time), probably reducing the likelihood of clients having continuity of representative throughout the case

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<sup>7</sup> *A market analysis of legal aided services provided by solicitors*: Frontier Economics, December 2003, para 5.2.2

<sup>8</sup> See *Quality and cost: final report on the contracting of civil, non-family advice and assistance pilot*; Moorhead, Sherr et al, TSO 2001

<sup>9</sup> Research suggests that there is are high rates of staff turnover (around 50 per cent) among probationary and other non-accredited/non-solicitor staff: see *Quality in criminal defence services*; Bridges, Cape et al, Legal Services Commission, 2000.

<sup>10</sup> See, for example, *Recruitment and retention of solicitors in small firms*: Research study 44, The Law Society; Williams and Goriely.

- Encouraging ‘cherry picking’ of cases, with the result that vulnerable or difficult clients or those with challenging cases would be turned down in favour of less demanding clients.
- Discouraging fee-earners from taking on long cases in the magistrates’ court, where five-day trials are not unknown.
- Putting fee-earners under pressure to limit the amount of work carried out on each case and to avoid incurring expenditure on disbursements
- Forcing fee-earners to carry caseloads that are unrealistically large, creating danger of poor standards of work.
- Putting conscious or unconscious pressure on clients to plead guilty to the charges that they face.
- Encouraging clients to elect for Crown Court trial in either way cases.<sup>11</sup>
- Discouraging fee-earners from making referrals or undertaking holistic work with clients who have complex legal or social needs,<sup>12</sup> which might in turn have helped to address offending behaviour.

26. A number of comparable problems were found to be features of fixed price payments in the civil block contracting pilot, analysed in the *Quality and Cost* report.<sup>13</sup> We are surprised that no reference has been made to this important study, given the relevance of some of its findings to competitive tendering for criminal defence services. The research compared the effect of three different payment models on solicitors’ firms. Group 1 was paid for work carried out on cases, similarly to the old Green Form scheme. Group 2 was paid a fixed sum per annum, but was not under any requirement to take on any particular number of cases. Group 3, on the other hand, were paid a fixed sum per annum for opening a pre-determined number of cases. During the pilot, quality assessment was undertaken through peer review and by using mystery shoppers and client surveys.

27. The research found that Group 3 performed most poorly on quality. Analysis showed that this group was less willing to incur disbursements, less willing to do further work, and gave significantly poorer advice. The study also identified a clear relationship between the amount of time spent on a case and the quality of advice. This finding is corroborated by the Commission’s evaluation of the criminal contracting pilot, which found a broad correlation between the time spent on cases and the quality achieved, as assessed by a ‘transaction criteria’ approach to auditing files.<sup>14</sup>

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<sup>11</sup> The Criminal Defence Bill, currently before parliament, would re-introduce means-testing for legal aid in the magistrates’ court; from the point of view of defendants, this will create an additional incentive to elect Crown Court trial where legal aid is not means-tested.

<sup>12</sup> Contrast with the Legal Services Commission’s assertion that the Criminal Defence Service helps people address the causes of their offending behaviour; and its recognition of the value of holistic work carried out by the Public Defender Service (Legal Services Commission Corporate Plan 2004/05 – 2006/07)

<sup>13</sup> See footnote 8 above.

<sup>14</sup> *Quality in criminal defence services*; Bridges, Cape et al, Legal Services Commission, 2000.

28. The extent to which some of these quality problems have been encountered in the criminal contracting arrangements of other jurisdictions has also not been acknowledged by the Commission. For example, there is ample evidence of the negative impact of excessive workloads on the quality of indigent [ie, impoverished people's] defence work in the USA.<sup>15</sup> This has led to the development of maximum caseload limits, a question that we discuss further below.
29. A concluding observation on the relationship between remuneration and quality: the Legal Services Commission argued in the consultation paper that a remuneration system based primarily on payment for inputs – that is, according to work carried out on a case – could create a perverse incentive to undertake more work than is necessary to achieve a desirable outcome (although it offers no evidence that this is a problem). On the other hand, the Commission appears to be blind to the argument that paying a fixed price per case creates the opposite perverse economic incentive.

**Peer review is still relatively undeveloped; it is too soon to rely on it as the principle means of assessing the quality of work under PCT.**

30. Peer review is still in its infancy. This is illustrated by the fact that the Commission has only just published its first consultation paper on this subject.<sup>16</sup> There are significant challenges in ensuring that different peer reviewers approach their task in the same way, mainly because of the qualitative nature of the evaluation they are required to do. The question of consistency between peer reviewers is recognised as a major issue for all the peer review systems examined in a recent study commissioned by the Advice Services Alliance;<sup>17</sup> it found, for example, that there can sometimes even be quite sharp differences between peer reviewers as to what counts as 'good quality' work. The study emphasised the importance of having standardised review frameworks to help address this problem.
31. The guidance for criminal files in the Commission's own consultation paper on peer review asks the reviewer to consider whether the work was appropriate, timely, effective, efficient and reasonable in the circumstances of the case – all of which are qualitative rather than quantitative judgements which do not lend themselves readily to objective assessment. The document goes on to state that the overall judgement on quality should not necessarily be a mechanical average of the scores on individual files, but should involve reviewers using their 'skill, experience and training to inform the overall rating of the supplier from the trends

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<sup>15</sup> For example, *Keeping defender workloads manageable*; The Spangenberg Group, 2001. This problem is also discussed in *Legal Aid contracting – lessons from North America*; Roger Smith, Legal Action Group, 1998

<sup>16</sup> *Independent Peer Review of Legal Advice and Legal Work*; Legal Services Commission, April 2005

<sup>17</sup> *Peer review in legal and advice services*; John Seargeant, Advice Services Alliance, 2003.

and patterns they see on the individual files.’ We believe that much more needs to be done to ensure consistency of approach in such assessments.

32. Quite apart from difficulties relating to consistency, there are inherent problems in using a purely file-based approach to peer review. First, and most obviously, if suppliers are given prior notice of the files that are to be peer reviewed, they have an opportunity – whether or not they choose to use it – to ‘tidy up’ the paperwork in advance. Another concern is that peer review of files cannot identify verbal interventions by the caseworker unless he/she chooses to record them; for example, persuading clients to plead guilty, or pushing them to elect Crown Court trial in an either way case. Neither can it assess standards of advocacy at trial.
33. In any event, it is not appropriate that the Commission has seen fit to proceed with its proposals for PCT without first finalising its own system of peer review. We note that the consultation on the peer review proposals is not due to end until 25 June 2005; the responses will ‘help shape the detail of the peer review process’ but no timetable is offered for the conclusion of this process or implementation of the final scheme.

**PCT will have a negative impact on access to criminal defence services, and particularly on client choice.**

34. The Commission states that it has placed no limit on the number of suppliers that could be awarded contracts under the new regime. It has concluded that the market should be left to decide this. However, it also expresses a belief that the introduction of PCT will, in reality, lead to fewer suppliers. There is thus a danger that, simply in relation to the number of firms, clients will experience more difficulty accessing a solicitor or may find that their choice of solicitor is restricted. This could create difficulties where, for example, a conflict of interest develops in a case.
35. The bid zone system may – depending on the size of zones – go some way to ensuring that that supply is initially distributed throughout London. However, no mechanism is proposed for distributing suppliers evenly *within* bid zones. This could exacerbate problems of access, especially if zones are very large.<sup>18</sup> It is also unclear whether suppliers would be required to have office facilities in the zone where they submit bids; if not, there will be access difficulties for clients who need to consult a solicitor in the firm’s office; this is often the case with ‘own client’ cases, or cases that are tried in the Crown Court, for example.

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<sup>18</sup> One option mentioned in the consultation paper is the division of London into North, South, East, West and Central zones – each of which would be likely to serve populations of nearly two million people. However, the LSC has since stated that there is likely to be a minimum of seven zones.

36. The nature of the contract regime is likely to create an unstable supplier base leading to poor levels of service and gaps in supply. As has been suggested above, in order to secure a contract, firms may be tempted to put in very low bids that may, at best, only be marginally profitable. The sustainability of the contract would then depend on them recruiting a large number of clients. The Commission will have no control over caseload size, as firms will be able to take on additional 'own clients' at the contract price; fee-earners may end up carrying unmanageably large caseloads. On the other hand, if firms fail to attract enough clients, the low (or non-existent) profit margin will rapidly lead to severe financial difficulties.
37. Other external factors may make contracts difficult to sustain. Firms will be vulnerable to unpredicted changes in their client base, changes in the practices of police stations and courts<sup>19</sup> – and perhaps even the closure of a local magistrates' court. They may also face difficulties in recruitment and retention of staff, especially at a senior level.
38. We have also already noted that, in order to save costs, firms are likely to try avoiding or delaying investment in infrastructure. In particular, firms that are given contracts for only one or two years will find their ability to plan their businesses to be severely constrained and the incentive to invest very limited. The consequences of this could be highly disruptive; for example, a firm might take out a short lease on accommodation, only to find that it can neither renew the lease nor find alternative accommodation within its budget.
39. Thus, there is a danger that, over time and for a variety of reasons, some contracts may become unviable. Unless the Commission is willing to renegotiate contract terms, firms could be forced to abandon criminal work – or might even wind up completely. This might have the effect of creating gaps in supply that the Commission then cannot fill, especially as there is a likelihood that firms excluded from the initial bid round will have gone out of business or, in any event, ceased doing criminal defence work. An alternative scenario is that large firms will take over abandoned contracts, effectively becoming monopoly providers in certain parts of London – and perhaps eventually bidding in cartels to force up contract prices.
40. As a result of having an unstable supplier base, the Commission's future ability to plan criminal defence services will be seriously undermined and thus its ability to ensure that legal need is adequately met. The unstable business environment, especially one with downward pressures on salaries, will also make criminal defence work less attractive to trainees and young lawyers. This negative impact

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<sup>19</sup> For example, Director of Public Prosecutions has stated that, under the pilot scheme that gives the CPS instead of the Police the task of charging suspects, the discontinuance rate for cases has fallen by 69 per cent and the guilty plea rate has risen by 30 per cent: The Times 24.5.05

on recruitment and retention of staff will, we believe, further destabilise criminal defence firms. In this context, it should be noted that the Frontier Economics report observed that in terms of understanding future supply: ‘entry into and exit from legally aided work, and the profession more generally, needs to be considered’ [para 4.3]. The effect of the current success of the CPS in recruiting defence lawyers is a case in point.<sup>20</sup>

41. Diversity within the supplier base, and consequently client choice, is likely to be restricted by the reduction in the number of firms generally expected to result from PCT. Information from the LSRC’s 2003/2004 supplier survey shows that BME firms are disproportionately represented among small firms (defined as those with five or fewer fee earners). The survey also suggests that a disproportionate percentage of London suppliers with criminal contracts are BME firms.
42. Although the Commission has stated that it will not favour any particular size of supplier and believes its proposals to be non-discriminatory, it is widely believed that smaller firms will find it difficult to compete successfully in the PCT bid process, as they will not benefit from economies of scale. It is also probable that firms specialising in certain types of crime or groups of client will have case profiles that differ from the norm, again making it difficult for them to compete in the bid process. So one can reasonably conclude that the profile of suppliers will change as a result of PCT, with the proportion of small, specialised and BME firms considerably reduced. Therefore, as a consequence of PCT, there is likely to be a significant decrease in client choice, to the detriment of users.
43. However, there may be valid reasons why a client wants to instruct a particular type of firm. For example, Black and ethnic minority clients may want to be represented by someone from the same ethnic or cultural background or may prefer to instruct a solicitor with relevant language skills rather than working through an interpreter. Disabled clients may well need a solicitors’ firm with an office that has good disabled access or good transport links. Some clients could strongly benefit from being able to instruct a solicitor with expertise in a niche area of law – for example, in white-collar crime or anti-terrorism cases.
44. Whatever the Commission’s intentions, its proposals would appear to be racially discriminatory in effect and arguably fall foul of the Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000. Among other things, the RR(A)A outlawed discrimination in all public authority functions, with only limited exceptions. It also placed a general duty on public bodies to work towards the elimination of unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups in carrying out their

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<sup>20</sup> The success of the CPS in recruiting defence lawyers has been noted by the Director of Public Prosecutions: see footnote 19.

functions. There is no indication that the Commission has attempted to assess the impact of the PCT system on BME firms. We believe that the lawfulness of the present proposals is questionable.

45. Where firms also have legal aid contracts for work in civil and family law, the loss of a criminal contract – or the failure to obtain a contract through the first round of tendering – could put in jeopardy its ability to continue these other areas of publicly funded work. This is most likely to happen where, for example, areas of social welfare law are being cross-subsidised by a firm's criminal defence work. The loss of contracts in civil law will clearly have an adverse effect on access to justice and will contribute to the existing and well-publicised problem of 'advice deserts'.

**The effect of PCT will be to throw costs onto other parts of the criminal justice system.**

46. As we have already stated, the pressure on firms and individual fee-earners to save costs is likely to manifest itself in a number of ways. Many of these economies of time, expenditure and effort are likely to have a negative impact on the criminal justice system and possibly more widely as well. We would suggest the following examples:

- The reduction in expertise that would follow from devolving work down to the most junior fee-earners – especially if poorly supervised and trained – may lead to cases being less efficiently and competently handled in both the police station and the magistrates' court.
- The probable 'cherry picking' of cases may mean that some of the most vulnerable defendants, and those with complex or unusual cases, are left to represent themselves in the magistrates' court – a development that is likely to cause cases to be adjourned and generally slow down court business.
- The pressures on fee-earners to take on as many cases as possible, possibly spanning a number of magistrates' courts, may lead to them causing hearings to be delayed and/or undermine continuity of representation for individual clients.
- In a bid to take cases out of the PCT payment regime, fee-earners may put pressure on clients to elect for trial in the Crown Court – which is a significantly more expensive mode of trial.
- Fee-earners will be under great pressure to avoid extra work for clients with complex social and legal needs, such as holistic advice or referrals to welfare agencies; in the longer term, this is likely to throw additional costs onto other public services.

47. There are also concerns that the police will adapt to PCT by learning to work the new system to their own advantage. For example, they will become aware that there are strong pressures on criminal defence firms to avoid carrying the financial

burden of waiting and travel time and may, as a result, be tempted to arrange the course of the investigation to deter attendance by defence lawyers. It should be noted that the introduction of CPS lawyers into police stations has already increased the potential for additional waiting time for representatives.

48. In recent years, the LSC has made a commendable effort to impress on the criminal justice agencies how criminal legal aid expenditure is affected both by government policy initiatives and inefficiencies in the criminal justice system.<sup>21</sup> Under PCT, the LSC will be devolving financial risk down to suppliers. There are serious concerns that it will have no further incentive to put pressure on the criminal justice agencies to operate more efficiently – or to reimburse the legal aid budget for any additional costs arising out of changes to policy or practice. Conversely, management of supply through competitive tendering has no mechanisms for adjusting in the face of upward pressures on the work that clients' cases require.<sup>22</sup>

### **A possible alternative approach**

49. For all the reasons we have identified in this response, LAG strongly disagrees with competitive tendering on price as a means of allocating contracts for criminal defence work. We believe that the Commission should strengthen, rather than abandon, its commitment to ensuring and developing the quality of advice and representation. However, we also accept that there is arguably excess supply of criminal defence work in London. The number of different solicitors attending magistrates' courts hearings with very few cases does suggest the likelihood of inefficiencies – especially because of unnecessary travel and waiting time. From the point of view of the Legal Services Commission, there may also be a valid preference for a smaller number of suppliers in order to achieve economies of scale for its own administration.
50. LAG therefore proposes that the Commission adopt a radically different approach to tendering, by assessing bids on the basis of quality using intensified quality requirements. This approach would not only deliver economies of scale; we believe it would also increase job satisfaction for practitioners, help overcome problems of recruitment and retention, and hence build stability within the sector. We do not believe that it is necessary or appropriate to modify the present standard fee system for the magistrates' court – although there may be an argument for making some adjustment to payments for travel and waiting, in order to encourage some rationalisation. It must also be remembered that the relationship between duty and 'own solicitor' work differs between firms and between localities, and that for most firms magistrates' court duty solicitors slots

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<sup>21</sup> See footnote 4.

<sup>22</sup> See footnote 4.

are not a significant part of their work nor a significant method of recruiting clients.

51. We suggest that, as a starting point, the Commission build on the model it has developed for assessing applications for selection for the preferred supplier pilot, launched last year. In summary, the criteria for selection for crime suppliers include:

- Passing peer review assessment of case files, carried out by a team of specialist peer reviewers on files supplied by the contract holder
- Maintaining the Specialist Quality Mark
- Track record as contract holder; eg, no contract or rectification notices or outstanding quality concerns
- Cost compliance record; no more than 10 per cent average reduction rate on the assessment of claims for non-standard fees
- In each office, one supervisor who is a member of at least one Police Station Duty Solicitor Scheme and one supervisor who is a member of at least one Court Duty Solicitor Scheme (this may be the same person)
- In each office, one solicitor who is a member of the Law Society Criminal Law Accreditation Scheme
- Confirmation that designated crime fee earners normally conduct 80 per cent of police station attendances and telephone advice and 80 per cent of instances of advocacy at the magistrates' court
- Financial check – full audited financial accounts for the past three years, together with current annual budget and variance against budget, cash flow forecast, analysis of current working capital and current business plan
- For the past three years, records of hours of work for each employee including non-chargeable time, broken down to show work undertaken under the General Criminal Contract.

52. We would argue that these criteria should form the basis of a 'best value' approach to all criminal contracting, within which quality of advice is given appropriate status. However, we are not convinced that the approach to quality assurance is sufficiently robust within the Preferred Supplier model. In particular, we believe it is important for peer review to be conducted on randomly selected files that are reviewed without the supplier first having any opportunity to check (and amend) the casework records.

53. We would also suggest that the Commission consider additional criteria to check quality. For example, there could be an increase in the length of experience and the casework requirements for supervisors,<sup>23</sup> although this approach is not always

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<sup>23</sup> At present, a supervisor for criminal work must satisfy one of the following: (1) hold accreditation as a duty solicitor for both police station and magistrates' court work; (2) have held a non-conditional practising certificate for three years, and have undertaken 10 police station attendances and 20 magistrates' court appearances in the past 12 months; or (3) have held a non-conditional practising

a reliable indicator of quality. There could also be a strengthening of continuing education requirements for supervisors, to ensure that they update their knowledge and keep abreast of developments in law and practice. Stipulating the maximum number of supervisees for each supervisor should also be considered; in the civil bid round in 2004, one of the evaluation criteria was the ratio of supervisors to non-supervisors. Another approach would be to develop the criminal law accreditation scheme in order to improve quality, perhaps through the type of written competence assessment tests developed by the Office of the Immigration Service Commissioner.<sup>24</sup>

54. Finally, we would suggest that the Commission consider introducing a system of caseload limits into its criminal defence contracting system. This approach has been adopted in parts of the United States, through the work of bodies such as the National Legal Aid and Defender Association and the American Bar Association.<sup>25</sup> Although setting fixed numerical limits has been criticised as being too inflexible, standards of this type are widely seen as a valuable benchmark. Were this approach to be imported here, it would be important to develop clear definitions of different types of criminal case, and adapt to the different features of criminal practice in this country – for example, representation frequently being handled by a number of different fee earners.

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certificate for three years, and undertaken 350 hours of crime casework together with six police station attendances and six magistrates' court appearances in the past 12 months.

<sup>24</sup> Under the OISC scheme, all immigration advisers must undergo an assessment, which contributes to an overall assessment of the organisation. Assessment at Level 1 takes the form of an hour-long multiple choice exercise, primarily taken on-line. Assessments at Levels 2 and 3 consist of scenario questions requiring a narrative answer.

<sup>25</sup> For example, the Washington Defender Association standards for public defence services specifies that a full-time public defence attorney should have an annual caseload not exceeding 150 felonies; or 300 misdemeanours; or 250 juvenile offender cases; or 25 appeals to the appellate court. See [www.defensenet.org/resources/WDAstand.htm](http://www.defensenet.org/resources/WDAstand.htm)