



LEGAL SERVICES COMMISSION

IMPROVING VALUE FOR MONEY FOR PUBLICLY FUNDED CRIMINAL DEFENCE SERVICES IN LONDON

RESPONSE OF THE LEGAL AID PRACTITIONERS GROUP TO
CONSULTATION PAPER

Introduction and summary

- 1.1 This is the response of the Legal Aid Practitioners Group (“LAPG”) to the Legal Services Commission’s Consultation Paper of January 2005, “Improving Value for Money for publicly funded criminal defence services in London”. In preparing this response, we have taken independent legal advice from Herbert Smith on a range of specific legal issues raised by the consultation, including the LSC’s duties under the Access to Justice Act 1999, the application of public procurement rules and the Transfer of Undertakings (Protection of Employment) Regulations (“TUPE”), and this response reflects that advice.
- 1.2 In short, whilst we recognise the LSC’s duty to obtain the best value for money from its funding of the Criminal Defence Service in London, we consider that the consultation paper is substantially misconceived. When the LSC introduced tailored fixed fees, despite taking a significant degree of criticism, we worked with the Commission on its proposals. We could see that the proposal was capable of being developed into a workable scheme, and we accepted that it would achieve some of the LSC’s legitimate aims for control of the budget. We wanted to achieve a scheme that would deliver value for money for clients and taxpayers and would also as far as possible meet the needs of the profession. The result has not been perfect, but as a method of working, it was exemplary.
- 1.3 On this occasion, the LSC chose not to engage with practitioner groups in developing the proposals, and its failure to do so is apparent from the results. We consider that the LSC’s proposals are incapable of being used as the basis for a workable scheme at all, let alone one that would contribute to the attainment of the LSC’s statutory objectives. The consultation paper raises numerous problems, and asks the profession to come up with answers. We consider that many of the questions raised are insoluble within the framework of the LSC’s proposals. Moreover, we have identified many more questions, which the consultation paper does not even recognise.
- 1.4 We therefore consider that the LSC should fundamentally reconsider its proposals. If the LSC were to persist with its present proposals, and to invite tenders, it is, of course, quite possible that firms would bid for contracts on that basis (and it is for individual firms to decide whether to do so). Whilst the LSC might secure contracts from firms willing to try out the scheme, we do not consider that that means that the scheme would be workable. We consider that such a scheme would fall apart. It would entail compromises and conflicts in respect of such important points as to mean that the resulting scheme would tend to meet neither the LSC’s statutory obligations nor its policy objectives. There is a serious risk that such contracts would not provide a sustainable basis for contracted firms to maintain and develop their businesses. We would urge the Commission to withdraw this proposal and return to the series of meetings that started in autumn 2003, but regrettably ended in early 2004, with a view to finding a way forward by consensus that would address the issues.
- 1.5 As a general point, we take issue with the LSC’s assertion that the use of competitive tendering in circumstances such as those facing the LSC is quite usual. Competitive tendering is generally used as a way of introducing a limited degree of competition where there would otherwise be none, such as for one-off capital projects, or for the provision of a monopoly service in a defined area, such as school dinners, rubbish collection or rail franchises. It has never been used in any field comparable to legal services. Competitive tendering is more difficult to implement where, as here, the volume of business available to

any particular contractor is largely uncertain, and where, as here, there is only one possible purchaser of the services, so that failing to get a contract will put an established firm of proven quality out of business overnight. It is not a system that is fit for the purpose of allocating a range of contracts to provide identical and overlapping services where the contractors are in direct competition with each other. Under the current system, firms compete to provide the maximum possible quality within a price set by the Government, in the face of unrestricted competition. Under the proposed scheme, they would compete to provide the minimum quality that will meet the floor the Government has set, while the Government puts out of business the outside competitors that would give them an incentive to provide any higher quality standard.

- 1.6 In the remainder of this paper, we provide some initial comments of a general nature on the key issues raised by the consultation paper, before answering the questions raised specifically for consultation.

General observations

The LSC's proposals

- 2.1 The LSC has apparently concluded, in the light of Frontier Economics' report¹, that the present system of contracting for the provision of criminal defence services is sub-optimal, and it therefore intends to test an alternative method of procurement of criminal lower services in London. The project will operate as follows:
- (i) The LSC will invite bids from suppliers who wish to supply criminal lower services in respect of given "bid zones" in London;
 - (ii) The LSC will conduct an initial review of each potential supplier's suitability, in terms of quality, to provide the relevant services. The review will focus on the past performance of contracted firms;
 - (iii) The LSC will invite all eligible suppliers (i.e. those who pass the quality test) to submit bids to provide services in specific bid zones: the LSC presently envisages that each supplier will be expected to bid to fulfil a specific number of duty slots (at police stations and magistrates courts) and to advise on resulting cases at a specific price per case;
 - (iv) The LSC will award contracts to suppliers who offer the cheapest prices to cover the required volume of work in a given bid zone. Thus, in each bid zone, the LSC would accept bids from suppliers, taking the cheapest first, up to the point at which it has accepted sufficient bids to cover the required volume of work. The LSC has not yet decided whether it should then contract to pay each successful supplier its bid price, or whether all successful suppliers in a given bid zone should be paid the "market clearing price".
- 2.2 The LSC has not yet decided on the precise scope of the services to be covered under the new form of contract (e.g. whether it should cover higher court work, or cases requiring special skills or specialist legal knowledge).

¹ "A market analysis of legal aided services provided by solicitors", December 2003.

- 2.3 The LSC has in mind to award contracts of differing duration, ranging from one to three years, with suppliers offering the lowest prices in their bid zone receiving the longer contract terms.
- 2.4 The LSC makes clear that, in proposing this new method of procuring legal services, it intends to secure better value for money, by addressing deficiencies apparently identified by Frontier Economics in their report, as follows:
- (i) the LSC reads Frontier Economics' report as concluding that there is excess capacity for the provision of criminal legal services in London, and that some suppliers may be willing to undertake more work at lower prices than those presently paid²;
 - (ii) Frontier Economics identified that the costs of providing similar services are likely to differ in different parts of the country, so that it may be inefficient to pay a uniform price to suppliers operating in different regions;
 - (iii) Frontier Economics identified potential inefficiencies which may arise if suppliers are paid for inputs (e.g. letters, meetings with clients), rather than for outputs (e.g. cases completed). Where suppliers are remunerated for inputs, they may, in theory, have little or no incentive to complete cases expeditiously, choosing instead to generate inputs beyond those necessary for the expeditious completion of the case.
- 2.5 The LSC envisages that the procurement system outlined in the Consultation Document will address these issues and thereby secure better value for money from the LSC's funding of these elements of the Criminal Defence Service. The LSC envisages that the implementation of these proposals will ensure that all contracted suppliers meet a basic quality standard, and, subject to that, will give priority to securing the cheapest available services.

LAPG's comments

- 2.6 LAPG's general comments may be summarised as follows.

The LSC misunderstands its duty to secure "value for money" in the funding of criminal legal services

- 2.7 In several places in its Consultation Paper, the LSC emphasises its obligation to secure value for money and points out that, since the Department for Constitutional Affairs provides only a fixed sum to fund both criminal defence services and the Community Legal Service, any extra sums spent on the funding of the criminal defence service must mean that there is less money available for the Community Legal Service³. The obvious inference to be drawn from this statement is that, in deciding how much to spend on the criminal defence service (and, in the context of the present consultation, on the provision of

² See, for example, paragraph 3.16 of the Consultation Paper: "...research suggests the current level of potential supply (measured by fee-earning capacity) in London most clearly exceeds the level of demand."

³ See, for example, paragraph 1.12 of the Consultation Paper: "Managed competition in London is being introduced within the context of a fixed Legal Aid budget, set as part of the Government's Spending Review. Against this background the growth of CDS work is reducing the money available to fund Civil Legal Aid."

criminal lower services in London), the LSC considers that it must take account of the need to leave sufficient residual funding to provide an adequate Community Legal Service.

- 2.8 Such an approach to the issue is clearly wrong in law. Under section 12 of the Access to Justice Act 1999 (as amended), the Commission is obliged to “establish, maintain and develop a service known as the Criminal Defence Service for the purpose of securing that individuals involved in criminal investigations or criminal proceedings have access to *such advice, assistance and representation as the interests of justice require*” (emphasis added). Thus, it is clear that, in deciding what services to purchase, the LSC’s primary duty is to ensure that sufficient services, of a sufficient quality, are available to meet the interests of justice. The LSC may not lawfully decide to procure lesser services, in order to leave sufficient resources available to fund what the Commission considers to be an adequate Community Legal Service. If the LSC has insufficient funds to meet the requirements of section 12, then the proper course of action is for the LSC to request additional funding from the Department for Constitutional Affairs. Under section 18(1) of the 1999 Act, the Department is obliged to “pay to the Commission such sums as are required to meet the costs of any advice, assistance and representation funded by the Commission as part of the Criminal Defence Service”.
- 2.9 The LSC’s duty to secure value for money is framed as follows: “In funding services as part of the Criminal Defence Service, the Commission shall aim to obtain the best possible value for money” (section 18(3) of the 1999 Act). This duty does not entitle the LSC to fund lesser services (e.g. services of lesser quality) than are required to fulfil the section 12 duty. It means only that the LSC should seek to procure at the lowest available cost such services as are required to fulfil the section 12 duty⁴.
- 2.10 In the present context, the relationship between these duties is very significant. There is a real risk that – for the reasons outlined in paragraphs 2.23 to 2.25 below – the implementation of the LSC’s proposals would lead, in the longer term, to a fall off in the volume and quality of services available via the Criminal Defence Service. The LSC will act unlawfully, if it adopts proposals, which are designed, in part, to make available more of its overall funding to provide the Community Legal Service, and thereby jeopardises the quality and volume of services available in the future via the Criminal Defence Service.

The LSC places undue reliance on the Frontier Economics report

- 2.11 The LSC places substantial reliance on the Frontier Economics report. As explained below, the Frontier Economics report is, at most, a preliminary assessment of the issues to which it relates, and Frontier Economics’ general comments on output-based pricing fail to reflect some of the special characteristics of the provision of legal services. LAPG has previously provided the LSC and the DCA with a critique of its concerns about the Frontier Economics Report, which is reproduced at Appendix A to this paper.

⁴ A similar point was made by the House of Commons Constitutional Affairs Committee, in its Report on the Draft Criminal Defence Service Bill (Fifth Report of Session 2003/4). Whilst sympathising with the need to reduce the costs of the Criminal Defence Service, the Committee was unwilling to contemplate that there should be any interference with the scope of services provided to meet the interests of justice test. It emphasised the need to provide adequate services to meet the requirements of Article 6 of the ECHR.

The Frontier Economics report does not provide a firm factual foundation for the LSC's proposals, as it appears to envisage

- 2.12 The LSC proceeds on the basis that the Frontier Economics report establishes that there is excess capacity for the provision of criminal defence services in London, and that price-based competition can therefore be expected to produce financial savings for the LSC. That is not what the Frontier Economics report says. It is far more tentative in its conclusions⁵, and there can be no presumption that the total cost of providing relevant criminal defence services in London would fall⁶, if the LSC's proposals for a new procurement system were to be adopted.⁷

Whilst the Frontier Economics report appears to favour "output-based" pricing, the report does not acknowledge the exceptional difficulties in defining well-specified outputs, in connection with the provision of legal services

⁵ Frontier Economics make clear in their report that they have conducted a study of only limited scope, and that no firm conclusions can be drawn from it as to how the LSC can best structure its procurement arrangements to obtain best value for money. For example, at section 1.1.3, page 11, they state that: *"The scope of this study does not extend to a full consideration of the costs and benefits offered by alternative procurement options. Rather, initial thinking is provided on the relevant issues that should be included in a more formal evaluation of the available options. To the extent that the information collected as part of this study can inform an initial view of the relative strengths and weaknesses, this is discussed."* Frontier Economics are particularly cautious in describing the status of the conclusions drawn from the survey data which they collected via questionnaires to contracted suppliers. At section 4.1, page 66, they state that: *"Given the difficulties identifying and quantifying excess demand, it is clear that the survey offers relatively little information on this issue. At best, it can be said that conditions of excess demand might be more likely to occur in the South to the extent that suppliers located in the South and responding to the survey are less likely to be willing to take on more work than those located elsewhere..."* In section 3 of the report, at page 33, Frontier Economics are again at pains to make clear that their conclusions as set out in that chapter are subject to significant limitations: *"The survey provides the primary data source for these conclusions. As such, it is critical to understand that the conclusions relate to supply in the short term only, and are of direct relevance to those firms responding to the survey. The extent to which they can be applied to the population of firms currently undertaking legal aided work and to those firms whom might do so in the future needs to be carefully considered. In particular, given that firms responding to the survey are those that tend to be more reliant on legal aid income, it might be reasonable to expect the sensitivity of all suppliers to price to be greater."* The report counsels the same caution in respect of its conclusions that there may be excess supply in some parts of the country. In section 3.2.4, at page 45, Frontier Economics state that: *"Caution should be taken in interpreting the responses relating to willingness to undertake more work as excess supply; rather it is an indicator that excess supply might exist. In particular, one would want to know more about the characteristics of those firms willing to undertake more work and the extent to which they have spare capacity."* Critically, Frontier Economics' report discloses, at footnote 34 (page 61) that its regression model performed less well overall for crime firms, suggesting that crime firms are potentially responding in a different way to both prices and the other variables in the regression. This suggests that Frontier Economics' quantitative work provides no reliable data as to the supply and demand of criminal legal aid services.

⁶ Indeed, at page 78 (section 4.4) of their report, Frontier Economics state expressly that: *"in brief, there is no evidence to suggest a need to change the remuneration rates – either to increase or decrease them – in the short term."*

⁷ LAPG accept that there is anecdotal information that suggests there could be excess supply in London, but categorically rejects the idea that controversial new contracting mechanisms should be introduced on the assumption that such is the case without hard evidence to that effect.

- 2.13 The Frontier Economics report recognises that, in aiming to obtain best value for money, it is often more effective for a buyer of services to agree to pay for particular outputs, rather than particular inputs. But, in order for that to be effective as a means of obtaining value for money, it is essential that the outputs should be adequately defined. If the purchaser agrees to pay for a vaguely-defined output, then the supplier will be incentivised to provide a minimal service to meet the defined output⁸; if the purchaser agrees to pay for a generally defined output (e.g. a completed case), and different cases will differ substantially in the work which they entail for the supplier, then suppliers will not be able to submit finely-priced bids, since they will not know whether most of the cases which they handle will be relatively costly to complete, or relatively cheap⁹. It would thus be impossible to calculate an economically rational bid.
- 2.14 However, it appears from a reading of their report that Frontier Economics have seriously under-estimated the difficulty that arises in defining outputs, in general terms and *ex ante*, in connection with the provision of criminal defence services. All lawyers know that every case is different, and that it is practically impossible to predict, at the outset, and in a generally applicable manner, how long it will take, and what will be involved in pursuing a case to its proper conclusion. This is why even the most sophisticated private-sector purchasers of legal services in respect of very substantial matters will often agree to pay their legal advisers according to a variety of factors, including the time spent on the matter, the seniority of the lawyers engaged on the matter, the urgency with which it must be handled and the eventual outcome. It is also why the courts, in assessing costs payable pursuant to costs orders, review the costs incurred by the successful party, and judge whether those costs are appropriate by reference to the facts of the particular case.
- 2.15 Whilst acknowledging that any efficient output-based procurement method would need to involve a proper definition of the relevant “outputs”, Frontier Economics fail to suggest how this should be done, and fail to recognise the potentially insuperable difficulties in doing so.
- 2.16 Similarly, the LSC simply ducks the crucial question as to how a “completed case” is to be defined, saying merely that “Supplier bids will contain two elements: a fixed price per case, *however a case is defined.....*”¹⁰
- 2.17 But even if the LSC could find some way of adequately defining the currently-required outputs in such a way as to allow potential suppliers to submit finely-priced bids for them, that would not be the end of the matter. The difficulties of adequately specifying the outputs which the LSC wishes to purchase are further exacerbated by the fact that new legislation is likely to have the effect, during the contract term, of introducing new substantive criminal offences, and new procedural rules, all of which will serve to add to

⁸ And many commentators suggest that this is the root of the problem as to the quality of school meals provided by independent contractors: the contracts fail to specify adequately the quality of service to be provided, leaving contractors free to minimise the quality of service provided, in order to achieve cost savings.

⁹ This problem is exacerbated if, in future contracting rounds, bidders are expected to bid prices which are inclusive of disbursements, since they will have to factor into their bids additional costs of meeting unforeseeable and unusually high disbursements. See paragraph 4.42 of the Consultation Paper.

¹⁰ Paragraph 4.23 of the Consultation Paper

the difficulty for the LSC of adequately defining the precise scope of the services for which the LSC will wish to contract, and the cost to suppliers of providing them¹¹. One recent example is the provision allowing evidence of bad character to be introduced in trials more widely. This has a major impact on the handling of cases, requiring the defence solicitor to review and consider the relevance of any previous convictions, and sometimes requiring additional pre-trial hearings or extended time at the trial to determine whether such evidence should be admitted. Another topical example is the Effective Trial Management Project, which fundamentally rewrites the procedural rules for criminal cases in both the Magistrates' and Crown Courts. Even during the course of this consultation, the Department of Constitutional Affairs has proposed a completely new scheme under which victims will be represented in hearings,¹² thus substantially extending the length of trials. Although this is limited to serious crimes, it is indicative of the direction of thinking within the DCA, and it is by no means inconceivable that it will be extended to Magistrates' Court cases within the period of the first contracts awarded under this system. The possibility must be factored into bids, unless the DCA is prepared to agree to a moratorium on all changes to procedures in the Magistrates' Court.

- 2.18 It is therefore hardly surprising that the LSC has failed, in its own proposals, to explain how outputs should be defined. Potential suppliers will not be able to bid effectively, and successful bidders will not be properly and efficiently remunerated, if potential suppliers are expected to bid by reference to vaguely-defined outputs such as "completed cases". The situation is exacerbated by the fact that the LSC has not apparently decided on the precise scope of the services to be purchased under the proposed new contracts (e.g. whether they will include higher court work, and how they will extend to cover "own solicitor" services").
- 2.19 Moreover, the interrelationship between the definition of the outputs and the comparison of bids has been completely ignored. If firms are asked to bid a single price for all cases, the cheapest bids will come not (necessarily) from the most efficient firms, but from those who expect to have the highest proportion of the cases requiring the least input. If a firm succeeds on this basis but is then required to take on cases requiring higher inputs, its bid price will prove insufficient to provide the required level of service, and it will fail to provide an adequate service, and/or will ultimately become insolvent.
- 2.20 On the other hand, if firms bid a range of prices for different outputs, the LSC will not be able to compare bids in the way it proposes. Firms will bid higher prices for one type of output and lower prices for others, making direct comparisons impossible. It will be even more difficult to determine a market-clearing rate. Would the LSC have to set a market-clearing rate for each output? If so, this will minimise still further the theoretical savings the Commission could make by entering into this process. Moreover, the prices bid will

¹¹ We would remind the LSC that, in its Report on the Draft Criminal Defence Service Bill, Fifth Report of Session 2003/4, the House of Commons Constitutional Affairs Committee noted, at paragraphs 27 to 35, that a number of external factors altered the nature of the work required to be undertaken by criminal lawyers and the volume of cases falling within the scope of the criminal defence service. Those factors included more demanding targets for the police in terms of arrests and convictions; more offences carrying the risk of a custodial sentence; more complex offences and more complex patterns of criminal behaviour. All of these factors will need to be taken into account in defining the range of outputs for which the LSC wishes to contract, and the likely volume of work for which potential suppliers should be asked to bid.

¹² "Making a Difference: Taking forward our priorities", DCA, page 4

depend on the mix of cases the firm undertakes, and may not hold good if that mix is changed.

- 2.21 Therefore, whichever option the LSC chooses, the outcome is likely to be economically irrational, and unfit to contribute to the attainment of the LSC's statutory objectives.

There are other ways of incentivising suppliers to perform efficiently, under an input-based pricing system.

- 2.22 The LSC's expressed preference for an output-based system of pricing, rather than an input-based system of pricing, is also flawed in other respects. In particular, the LSC appears to have overlooked the evidence available from its own standard fee scheme, as applicable to Magistrates Court work, in evaluating how a more radical output-based system of remuneration would be likely to work in practice. In practice, unless there are significant difficulties in standard fee cases, the most efficient way for a firm to run them is to finish them as quickly as possible. To carry on attending court hearings or undertaking further work between hearings, could take the cost of the case beyond the standard fee. Then, unless there is justification for doing at least a further two hours' work on the case, it will not be possible to claim the higher standard fee. Cases claimed outside the standard fee regime are checked on an individual basis. All other work is subject to checking on audit, with disproportionate penalties for anyone who is thought to have "overclaimed", even where this has made no difference to the standard fee claimed. This system does not create incentives for firms to generate excessive inputs (which the LSC apparently believes to be a key deficiency of its present procurement processes). But it does demonstrate the limitations of any standard output based system of pricing: standard fees are apt only for the most "standard" and predictable cases, and a more bespoke system of pricing is necessary for any case which deviates from the norm.

The proposed new procurement methods may secure short term savings at the expense of long term service provision

- 2.23 There is also a serious risk that the LSC's proposals could force potential suppliers to offer bid prices which are calculated to cover only their variable costs over the likely contract period, but which are insufficient to cover total costs and, in particular, to fund long term investment (e.g. in training trainee solicitors)¹³. This would mean that, whilst the LSC would save money by securing lower prices in the short term, its procurement system would contribute to a shortage of qualified suppliers in the longer term, thereby rendering it more difficult, and more costly, to secure the provision of criminal defence services in the longer term¹⁴. Unless this issue is addressed, it is seriously questionable whether the LSC's proposals can represent a proper fulfilment of the LSC's statutory duties, since the LSC is obliged to ensure that it will be able to secure adequate services to meet its statutory duties in the longer term too.

Stifling investment in training and resources may also adversely affect the quality of supply

¹³ Note the concerns expressed by Frontier Economics as to the need for the LSC to examine further the prospects for long term availability of supply, in the light of the number of solicitors forecast to qualify and practise as legal aid practitioners (page 77 of the Frontier Economics report).

¹⁴ This would be inconsistent with the LSC's announced objective of "[setting] a *sustainable* price for legal aid" (emphasis added), paragraph 4.2 of the Consultation Paper.

- 2.24 The LSC rightly recognises that its obligation to secure “value for money” incorporates a duty to secure services of appropriate quality, as well as an obligation to do so at the lowest attainable cost. The LSC envisages that, in the proposed bid round of contracts, it will judge whether potential suppliers meet a requisite quality threshold, and will then allow potential suppliers who pass the quality test to proceed to put in priced bids.
- 2.25 Whilst this method of selecting eligible bidders will ensure that, in the initial bidding round, suppliers are competent to meet adequate quality standards, the LSC appears to give no thought to whether the prices it is prepared to pay will allow suppliers to institute improvements in quality, and provide incentives to them to do so, so as to keep pace with quality improvements in the legal sector generally. We would make two points:
- (i) There is a serious risk that, if prices are driven down to the level of variable costs, suppliers will have no resources to invest in the assets needed to support quality improvements (e.g. new IT services, new training);
 - (ii) Secondly, if it becomes apparent that, subject to meeting the LSC’s minimum quality threshold, a supplier’s chances of winning a contract will depend entirely on price, then the contracting regime will provide positive disincentives to suppliers to perform to anything higher than the LSC’s minimum acceptable standard of quality.

If the LSC wants to see standards improve over time, it will need to build in incentives (e.g. additional payments) for suppliers who offer a better quality of service than the bare minimum, and it will need to provide sufficient funding to enable suppliers to finance investments in quality improvements (e.g. new IT systems, additional training). The LSC risks failing to fulfil its statutory duties if, in order to secure the cheapest possible services now, it provides no incentives for suppliers to improve the quality of their services in the future, and no funding to allow them to do so¹⁵. In the longer term, the quality of services available to legal aid clients will inevitably fall behind the quality offered in the legal services market at large, and will deny legal aid clients the higher quality of service which they will then be entitled to expect.

The LSC’s proposals are not apt to ensure fairness of pricing as among successful bidders

- 2.26 We are also concerned that the LSC’s proposals as to the fixing of contract prices may be unfair as among successful bidders. The LSC has in mind two different pricing proposals – under the first proposal, each successful bidder would be paid his bid price; under the second proposal, each successful bidder would be paid the market clearing price in his bid zone.
- 2.27 We consider that, in all the circumstances of the case, the former of these options would be unfair. The most efficient suppliers would be paid less for their services. In a competitive market, a more cost-efficient firm has the option either of setting its prices at the market

¹⁵ The LSC’s proposals may be contrasted with the system adopted by, say, Ofgem, the gas and electricity regulator, which sets network price controls at a level calculated to allow the regulated network operators to provide a specific quality of service (in terms of continuity of supply, frequency of interruptions, time taken to fix network faults) and sets targets for improvements to these output measures, which will be taken into account in fixing future price controls, or will trigger additional incentive payments for companies who meet or exceed the targets. Such a regime builds in incentives and funding to allow improvements in quality of output, and makes clear to regulated companies what kinds and levels of improvement they should be seeking to attain.

clearing price, and thereby reaping the rewards of its efficiency in terms of higher unit profits per unit of supply, or of setting its prices lower than less efficient firms, in the expectation that it will thereby secure a larger volume of business. In the context of the Criminal Defence Service, clients who choose to instruct a particular solicitor, or who instruct a solicitor who is the duty solicitor on call when the need arises, are indifferent to the prices charged by different solicitors to the LSC, since they do not pay those prices. It is therefore unfair to require solicitors with lower costs to accept lower prices, in circumstances where they cannot reap the normal commercial rewards of offering lower prices¹⁶. Of course, this argument depends on there being a relationship between the price bid and the efficiency of the firm. For many reasons set out throughout this paper, under the current proposals, such an economically rational bid is impossible.

- 2.28 The unfairness will be exacerbated if lower-cost bidders are expected to commit to three-year contracts (as to which, see paragraph 2.31(iii) below).
- 2.29 One disadvantage of the market clearing rate approach is that the Commission will not achieve as significant savings, possibly to the extent that this whole project is not cost effective. Another is that some firms may bid at lower prices than they require, in order to secure market share, safe in the expectation that other firms will be required who bid higher than them. The system would therefore reward not the most efficient but those who best understand and best exploit the game theory implications of the bidding process. This militates against submitting an economically rational bid even were such a thing possible.

The Consultation Paper proposals are not sufficiently certain to enable potential suppliers to prepare to participate, or to bid, in a competitive tender

- 2.30 The LSC is bound by EC public procurement rules and by general principles of EC law, derived directly from the EC Treaty, in procuring services to form part of the Criminal Defence Service. Whilst the public procurement directives impose only limited additional obligations so far as relates to the procurement of legal services, general principles of EC law require the LSC to act transparently, to adopt fair and transparent procedures, and to apply appropriate objective criteria in selecting suppliers of such services. Principles of domestic administrative law impose similar duties. Moreover, the LSC's statutory duty to secure best value for money in funding the Criminal Defence Service similarly requires in the context of a tendering process that the LSC adopt procedures calculated to allow it to select the most efficient potential providers of services. This obligation will itself generally involve the conduct of transparent tenders, in which the best bidders can come forward with the most efficient offers.

¹⁶ We assume that lower cost suppliers may secure more duty solicitor slots, up to the maximum volume for which they bid. But this will not necessarily lead to a larger overall volume of business, if fewer or smaller cases arise from those "slots" than from other slots, or other sources (e.g. own solicitor services). Thus, there will be no direct linkage between offering lower prices and securing a larger volume of business, such as one would expect to observe in a competitive market. Indeed, in the Consultation Paper, the LSC acknowledges that bidders who bid a lower price will not be guaranteed any particular volume of work. At paragraph 4.25 the LSC states: "Because we cannot guarantee volumes of work to suppliers, these duty slots will simply provide the opportunity for criminal legal aid work. Suppliers will be bidding for access to a source of work. Clients will still be able to choose an own solicitor rather than a duty solicitor".

2.31 We are concerned that several features of the proposals outlined in the Consultation Paper fail to meet the standards required by these obligations:

- (i) Although the LSC explains that it will first review prospective bidders to check that they meet relevant quality standards, it does not explain what quality standard will be applied. It is essential that any quality standard to be applied should be published in advance, should be objectively appropriate, and that the review as to whether particular prospective bidders meet the standard should be conducted in a fair and competent manner;
- (ii) in order for procurement procedures to work fairly and efficiently, it is essential that the buyer should specify with sufficient precision what it is that he wishes to buy. The Frontier Economics report also makes this clear¹⁷. EC public procurement law makes clear that, where a buyer changes (e.g. under the guise of clarification) an essential element of the specification of what he wants to buy or the criteria for selection of contractors, then he should start the procurement procedure again, in order to allow all bidders a fair chance of winning the contest¹⁸. We have already pointed out that the LSC has failed to define the “outputs” by reference to which it wishes potential suppliers to bid. It has also failed to decide which services should be included in the contracts. See paragraph 2.18 above. Its proposals are also incomplete insofar as they contemplate unspecified additional arrangements to ensure the availability of adequate services to certain special client groups (e.g. with special language needs, or requiring advice on special areas of the law¹⁹). Unless these matters are fully resolved before any tendering procedures commence, the proposed award procedures are bound to be unfair, and are likely to lead to an inefficient result (with good quality suppliers failing to secure contracts

¹⁷ See, for example, page 5 of the Frontier Economics report, where it is stated that: “The second key requirement for making changes to procurement along the lines described concerns the services that the DCA and LSC wish to procure. The starting point for introducing competition will be to accurately define these services. ...” At pages 85 to 86 of the report, Frontier Economics explain the issue in more detail: “If the price offered for a completed case were to be £1,000, assuming most firms might take 15 hours to complete the case, any reduction in the hours actually required would mean a higher effective hourly rate and higher profit. Payment for outputs is likely to impose more risk on suppliers. If there were to be a chance that in fact 20 hours would be required for the case, this could mean that firms would be unwilling to take it on at £1,000; the firms could make a loss at this price. Thus, a premium may need to be paid to encourage firms to assume the risk. Increasing the amount of information available to firms about the case will reduce the perceived level of risk, and thus the premium required.” The report goes on to say that the LSC will need to consider: “... what are the outputs (that is, the services) that the DCA and LSC wish to purchase? Should the definition of the output include a reference to the outcome of the case, or the process that should be followed? What information is required to define an appropriate output? How much risk would this transfer to those choosing to supply the service?...”

¹⁸ It is clear that, if the LSC embarks on a procurement exercise without clarifying first what it wants to buy, how bids are to be configured, and how winning bidders will be selected, the procurement exercise is unlikely to comply with these requirements.

¹⁹ At paragraph 4.33 of the Consultation Paper, the LSC says only that: The Commission also recognises that there are a number of suppliers that offer services only to particular client groups and in very specialised areas of law. It may be inappropriate to ask these suppliers to bid for duty slots in order to be able to continue to provide essential services to their clients. We may, therefore, develop specific arrangements to preserve these services. In order to do so, we would need to develop criteria to allow us to recognise such firms and to manage the quality of service provided.”

which they would have won, if the scope of the required services had been specified sufficiently)²⁰;

- (iii) similarly, in order to bid effectively, potential suppliers need to know the duration and scale of contract for which they are bidding: bidders cannot be expected to offer firm prices unless they know for how long they will be required to adhere to such prices. They must know over what period they have to take account of increases in overheads; for what period they are risking changes in the law and procedures impacting on their ability to conduct cases for the price bid; and how soon they will be required to incur the cost of a further bidding process, with, inevitably, the risk that they will at that time incur the costs of closing down their practice if they fail to secure a further contract. According to the LSC's proposals, suppliers would not know until contracts are awarded whether they are to secure one year, two year or three year contracts: see paragraph 4.65 of the Consultation Paper. It would be preferable if all contracts were offered for a fixed period of five years, thereby allowing successful firms a reasonable opportunity to plan for the development of their businesses on the basis of a secure source of revenues. If contracts must be staggered, the minimum period offered should be for three years, and firms should be given the option of offering a different price depending on the length of the contract. Otherwise, once again, bids will not be economically rational.
- (iv) Firms must also know how much work they can expect to secure at such prices. The LSC appears to contemplate that a bidder might offer to perform, say, 200 cases at a given price, but be selected to handle only half that volume, if the bidder is the marginal bidder in his bid zone, and is therefore selected to perform only, say, half of the duty solicitor slots for which he has bid. Since the prices which potential suppliers bid for a single case will reflect their expectations as to the total volume of cases which they expect to handle, it will be inappropriate for the LSC to reserve to itself the possibility of a partial acceptance of a bidder's total offer. Potential suppliers are likely to wish to have the option to make it a condition of their bid that the LSC should accept it in whole, or not at all.
- (v) It will also be necessary for bidders to know the contract terms that they will be expected to accept, if their bids are successful. The LSC should therefore publish the proposed contract terms (including any terms as to the means by which the LSC will ensure continuing adherence to appropriate quality standards) well ahead of seeking bids. The idea that these could be published for consultation with the profession in June with a view to seeking bids in August is completely fanciful.
- (vi) Given the complexity of the procurement procedures that the LSC has in mind, it will be important to allow potential suppliers sufficient time to evaluate the tender opportunity and to put forward an expression of interest. The LSC presently proposes a period of only 4 weeks, which we consider to be insufficient. This will not allow busy practitioners sufficient time to prepare effectively to participate in the bidding process. A period of three months would be more appropriate. Moreover, there should be a moratorium of at least six months between the publication of the final version of any bidding scheme and its implementation, in order to enable firms to make the strategic decisions and begin the structural

²⁰ The Consultation Paper is therefore misleading when it says, on page 31, that: "the Frontier Economics Report concluded that an output-based remuneration structure where fees are determined by a process of managed competition, could lead to better value for money being achieved by the Commission." This was expressed by Frontier Economics to be a possibility, subject to defining the outputs by reference to which suppliers should bid.

changes that they may wish to make in advance of bidding. For example, some firms may wish to arrange a merger before bidding. That will not be possible on the currently proposed timescale.

- (vii) We note that, at paragraph 4.61 of the Consultation Paper, the LSC states that any decision as to the award by the LSC of contracts to any particular bidder will be final and there will be no right of appeal. We consider that this comment is somewhat misleading. The LSC cannot oust the general jurisdiction of the courts to ensure that it adheres to its specific statutory duties and general principles of administrative law in awarding contracts. In circumstances where many suppliers are essentially dependent on obtaining an LSC contract to enable them to continue in business, and where the LSC's decision whether or not to award a contract to a particular supplier will determine whether legally-aided clients may instruct that supplier to assist and represent them, we consider that the courts could be expected to entertain an application by an unsuccessful bidder challenging the LSC's procedures or the substantive criteria for the award of the proposed contracts.

It is not appropriate to rely entirely on price as the criterion for selection of successful bidders

- 2.32 The LSC appears to envisage that, if all bidders have already been confirmed to be competent, then price should be the only criterion for selecting successful bidders. In some cases, this may not be appropriate. In some smaller bid zones, this could result in the award of contracts to so small a number of bidders as to limit unduly the choice of adviser available to legally-aided clients. This could result in problems (and potential infringements of Article 6 of the ECHR) where clients are unable to find an adviser in whom they have confidence, or where multiple clients with conflicting interests are unable to secure advice from separate advisers. It is also apparent that where the outputs for which a price or prices are sought are inadequately defined, the price a firm is able to bid will be more heavily influenced by the mix of cases and clients the firm has than by its "efficiency".²¹

There is a real risk that the LSC's proposals will entail unlawful discrimination against BME firms

- 2.33 In several places in its Consultation Document, the LSC acknowledges that it would expect that only suppliers of a certain minimum size would be likely to bid successfully for the new contracts that it intends to award. The LSC also acknowledges that many BME lawyers practise through smaller undertakings, and might well lose out for this reason (particularly since the initial contract round would probably not allow sufficient time for smaller firms to restructure themselves into larger practices).
- 2.34 Whilst the LSC's proposals are not directly discriminatory against BME firms, there is a real risk that they will be indirectly discriminatory against such firms, by leading, in practice, to the award of contracts to larger, rather than smaller, firms. If the LSC is to defend a practice that operates in this way, it will need to adduce an objective justification. The LSC would, no doubt, argue that its proposals are objectively justified as being calculated to secure best value for money in the funding of the Criminal Defence Service. For the reasons outlined in the previous paragraphs of this note, we find such an argument unconvincing.

²¹ We understand that this conclusion is borne out by more recent, as yet unpublished, research conducted for the LSC by Frontier Economics.

2.35 The risk that the LSC will, by pursuing its present proposals, give rise to discrimination against BME firms provides a particularly pressing reason why the LSC should reconsider its proposals.

2.36 As noted above, the proposals will also have a discriminatory effect against clients with language difficulties. Clients with language difficulties take longer to deal with than those without – the disbursement to pay for the interpreter is not the only additional cost. Therefore firms serving communities with significant numbers of non-English speakers will not be able to submit bids that are as cheap as those from firms serving English-speaking communities, and will therefore be excluded solely because they serve this particular client group. Moreover, once contracts have been awarded, firms will have a strong disincentive to take on clients with language difficulties, and will not be able to offer them as good a service as can be offered to English-speaking clients.

The LSC must have due regard to the effect of its proposals on outgoing contractors

2.37 The LSC makes clear that it expects the implementation of its proposals to lead to some existing providers of criminal defence services being ousted from the market, by failing to win new contracts. It is clear that the LSC envisages, in particular, that some firms who meet the LSC's quality requirements will lose their contracts.

2.38 We accept that current contractors cannot be guaranteed that their contracts will be renewed indefinitely. However, if the LSC adopts a wholly new contracting regime which has the effect of ousting competent firms from the market for the provision of criminal defence services without any adequate transitional protections, many of those firms will face insolvency, and their principals will face personal bankruptcy (with the result that they will be unable to practise as solicitors). If that occurs on any significant scale, then all suppliers (including those who win contracts under any new procurement regime) will take account of that fact in assessing the risks of operating in the legal aid market. They will need to factor into their pricing the risks of later losing their contracts with the LSC. This is bound to add to the prices charged by suppliers to the LSC in the longer term.

2.39 It follows that, if the LSC wishes to ensure that, in the longer term, the cost of securing the provision of criminal defence services is constrained to efficient levels, it must ensure that it manages the transition to a new generation of contracts carefully, and with due regard to the interests of outgoing contractors. In particular, it should ensure that its proposals:

- (i) allow all interested parties a fair opportunity to comment on detailed proposals as to how the new procurement round should be conducted. The present Consultation Document does not set out the proposals in sufficient detail to fulfil this requirement;
- (ii) allow outgoing contractors (i.e. those who apply to bid but whose bids are rejected or who are turned down on quality grounds) a fair opportunity to challenge any decision not to award them a new contract;
- (iii) allow a sufficient run off period under the existing contracts to allow firms to manage their affairs so as to avoid any insolvency;
- (iv) if necessary, provide additional financial support to outgoing contractors to enable them to effect an orderly and solvent winding up of their businesses; and

- (v) where appropriate, allow for new contractors to take on the staff of outgoing contractors (e.g. by structuring arrangements to facilitate the operation of the Transfer of Undertakings (Protection of Employment) Regulations).

If the LSC does not pay due regard to the effect of its decisions on outgoing contractors, it risks acting unlawfully vis-à-vis those contractors, as well as failing to fulfil its duties to secure best value for money, by driving up the prices which contractors will charge in future to participate in the provision of criminal defence services.

The bidding process must have regard to the LSC's own corporate plan

2.40 In its Corporate Plan published in August 2004, the LSC attached great importance to the provision of a holistic service to the clients of defence lawyers.²² The tendering proposal does not even pay lip service to this corporate aim. The effect of the proposal will be to penalise any solicitor who endeavours to provide a superior quality of service, even though this is what the LSC has stated it wishes them to do.

Conclusions

2.41 Accordingly, we urge the LSC to reconsider its present proposals. Before deciding on the adoption of any new model for the procurement of criminal defence services, the LSC should consider further:

- (i) whether there is genuinely an excess supply of relevant legal services in London, and whether price-based competition is genuinely likely to produce lower prices;
- (ii) how best to secure value for money in the short term, without jeopardising suppliers' ability (a) to invest appropriately in the long term improvement of quality of supply, to keep pace with the market at large, and (b) to ensure the long term availability of qualified practitioners equipped to provide criminal defence services;
- (iii) whether it is viable or sensible to divide London into bid zones for the purposes of contracting with firms
- (iv) if the LSC wishes to invite potential suppliers to bid to provide various "outputs", how those outputs should be defined, so as to enable bidders to evaluate with some precision how much they will need to charge to achieve those outputs, and to avoid the need to build in a large additional "risk premium" to guard against the risks of bidding against a poorly-defined output;
- (v) how the LSC can compare bids meaningfully, and without giving undue weight to price, and insufficient weight to quality, client mix, case mix and experience;
- (vi) what are the contract terms (including duration) by reference to which bidders should be invited to bid;
- (vii) how the LSC will, in a price-driven tender process, ensure that there are a sufficient number of successful bidders to provide clients with access to a sufficient choice of legal advisers;
- (viii) how the LSC will protect the interests of outgoing contractors, who fail to secure new contracts under the new procurement system; and

²² At page 25 of the 2004-5 Corporate Plan, the Commission states, "We believe that there is an opportunity to refocus the CDS so that criminal defence solicitors can do more to tackle and reduce offending and re-offending by using their judgment of their clients' situation and character to point them towards sources of advice and help beyond their immediate requirement for legal aid."

- (ix) whether the costs of administering such an output-based pricing system would outweigh the potential benefits. The LSC's present regulatory impact assessment is wholly inadequate to answer this question.
- (x) how to minimise the discriminatory impact of the tendering process

2.42 Given that there are so many important and complex questions to be examined, we suggest that the LSC should withdraw this proposal and arrange a series of round-table meetings with practitioners to discuss the way forward.

2.43 If the LSC insists on proceeding with this misconceived proposal, then it risks embarking on a scheme which will be susceptible to successful legal challenge, as being wholly inappropriate to fulfil the LSC's statutory duties to secure the provision of adequate criminal defence services to meet the interests of justice, on value for money terms, both now and in the longer term.

Where should we go from here?

3.1 For all these reasons, we believe that this paper is wholly misconceived. It should be withdrawn, and we should return to the table to discuss the issues the LSC feels need addressing. This paper and some of the previous consultations highlight a number of issues that warrant further discussion.

3.2 The current consultation notes that some 160 firms in London have contracts for £50,000 or less. On the face of it, this represents an unnecessarily large number of small contracts. One possible response to this would be to introduce a minimum contract value. This would have the advantage for the Commission of reducing its transaction costs. For firms that already do in excess of the minimum value, it would reallocate work from smaller firms, enabling them to do a larger volume, which may be economically beneficial for them.

3.3 However, before considering such a move, the Commission must undertake research into the reasons for firms having such small contracts. Many of them may be mere dabblers who contribute little to the system. However, there are a number of other possible reasons for having a small contract, including:

- The firm serves a particular community or client group that is poorly served by the mainstream of the profession, e.g. immigrant communities, the mentally ill, the deaf etc, and criminal defence services represent one small part of that holistic service
- The firm specialises in Crown Court work, e.g. serious fraud work, and therefore does very little criminal lower work.
- The firm has recently set up, and will take time to grow to a size at which it could handle a larger contract.

3.4 It is also unclear to what extent these figures take account of firms on the outskirts of London who undertake some work within the London region and some outside.

3.5 The LSC may well agree that it would be entirely appropriate that firms that are small for these reasons should continue to be permitted to undertake criminal lower work.

3.6 The LSC recently consulted on possible changes to the rules relating to the use of agency staff. It was decided not to proceed with the changes, on the basis that the issue could be

dealt with in the course of competitive tendering. This issue should be revisited if the tendering proposal is withdrawn.

3.7 In our response to the previous consultation, we identified a number of scenarios in which solicitors might use agents:

- Employed staff, both solicitors and paralegal staff, are technically available but are carrying full case loads (often of considerable complexity and seriousness) which make attendance at the police station in the instant case at the time required impracticable.
- Staff members already have worked in excess of contracted hours and resist further attendances at police station that day or that week because of personal commitments outside work – the work/life balance. There is a tremendous risk of burnout of employed staff without this considerable safety valve. (Since the previous consultation, we have now seen the European Parliament vote to end Britain's opt-out from the working time directive. This will prevent staff who have worked their full quota of hours from attending the police station even if they wished to do so.)
- The firm has reached a point where they need more staff but not a full time member of staff and therefore use agents for courts and police stations until the case load and demand is such that it is in a position to employ another full time staff member.
- The firm needs an additional member of staff or a replacement for one who has left. Most firms now have difficulty recruiting professional staff. With the increased demand for the services of solicitors at police stations as a direct result of government policy, in-house staff cannot meet the need.
- The firm has no physical space in which to site a new staff member and cannot afford larger premises but can handle the work if its working methods are adjusted so that appropriate work is contracted out to competent freelance agents.

3.8 We noted that it appears to be this final use which gives rise to concern among some solicitors and the LSC. Some practitioners take the view that firms operating in this way are abusing the system, taking work away from firms that keep the work in house, and being given money for nothing. On the other hand, those who operate such a system would argue that it is essential in order to manage their staff's workloads properly, and to provide a reasonable quality of life to its duty solicitors. There clearly needs to be a debate as to how it might be possible to curb the less appropriate use of agency staff whilst not inhibiting firms from making proper use of agents when necessary.

3.9 The Commission has previously expressed concerns about growing claims for travel and waiting time, which now, it is said, account for around 30% of claims in London. However, it is important to separate out claims for travelling time and costs from claims for waiting time. Travel claims relate in part to decisions made by firms as to where to site their offices and from how far afield to seek work. There is a legitimate discussion to be had about how travel time and costs should be remunerated, However, we doubt whether a decision not to pay for travel time will result in significant savings being made, as there is no evidence to suggest that firms are presently taking on work at excessive distances from their offices, and spending excessive times in travelling. If that is so, then firms can be expected to carry on working substantially as at present, and will simply have to factor the cost of travel time into their bids. It should be noted that one reason for increased travel costs might be an increase in preliminary hearings caused, inter alia, by the new trial management arrangements and by the bad character provisions.

- 3.10 In contrast, waiting times are not within the control of the solicitor. They are largely caused by inefficiencies in the Court system, the CPS, the prisoner delivery services, the police and probation services. If waiting times are increasing, it is probably because these inefficiencies are increasing. Unless and until a “polluter pays” system is developed whereby the burden of the costs caused by delay falls on the person causing the delay, it is not appropriate to remove payment for waiting time from the legal aid system.
- 3.11 Finally, it has been acknowledged for many years that the duty solicitor scheme in London is overdue for serious reconsideration. This must be on the agenda for any round table meeting.

Answers to specific questions

- 4.1 In the light of these general observations, we now turn to answer the LSC’s specific consultation questions, as follows.

Section 3: Current system

1. ***Should we set a minimum volume of work? If so, how should this be determined?***

As noted above, there may be merit in this proposal, but before doing so, the LSC should establish the reasons for firms having small contracts, and decide whether there may be circumstances in which such a minimum volume would be inappropriate.

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

We believe that smaller firms will be prejudiced in the proposed tendering round, because larger firms will be able to generate economies of scale that are not available to the smaller firms. BME solicitors are disproportionately working within smaller firms, and therefore will be correspondingly more likely to lose their livelihoods. Whilst the LSC may legitimately choose to deal with larger, more efficient firms than with smaller, less efficient firms, when the firms are otherwise comparable, the LSC must make sure that larger firms are able to serve all client sectors, and that it is not wrongly excluding some smaller firms which are appropriately structured, and of an appropriate scale, to serve their own target clients, but cannot replicate the efficiencies achieved by larger firms.

Section 4: the Bid Process

3. ***How (do) the following proposals (on a bid process as a whole) match up against the criteria in section 4.2?***

For the reasons given in part 2 above, we entertain serious doubts as to whether the proposed method of tendering for the supply of criminal defence services can achieve the objectives set out in section 4.2. In particular, we are concerned that:

- (i) the LSC has not explained what quality standards it will apply at the outset, how it will ensure that contracted suppliers maintain the quality of the services which they provide during the contract term, nor how it will ensure that there are sufficient incentives for suppliers to invest in longer term projects calculated to improve the quality of service available to clients in future contract rounds;
- (ii) the LSC has not explained how it will ensure that contracted firms are adequately funded to provide training to trainees, so as to ensure a continuing flow of new lawyers into legal aid practices. The availability of training for new recruits is essential to the availability of sufficient potential suppliers to generate effective competition, and ensure the availability of sufficient providers, in the future;
- (iii) the LSC has not explained on what basis it expects the prices emerging from the proposed tendering procedures to be sustainable in the long term. We doubt that they will be. Bidders are likely to bid by reference to their variable costs, not their total costs (including investment in long term training, recruitment and quality of service improvements);
- (iv) in the longer run, firms who observe the disastrous consequences for contractors who fail to secure contracts under the procurement system now proposed by the LSC, or even worse, who secure contracts but then become insolvent due to Government changes to the criminal justice system, are likely to build in a significant risk premium to their bid prices, to reflect the cost of exiting from the legal aid scheme, if their contracts are not renewed in future bidding rounds and to protect against further Government changes;
- (v) after the first round of contracting, it is very difficult to see how new firms could enter the market. The only firms that will have a track record that can be assessed will be existing suppliers. Breakaways from existing firms will be less likely than now, as there will be little incentive for lawyers to take the risk of setting up if they may be put out of business again either immediately or only three years later. The bidding round will therefore tend to have the effect of stifling competition. The proposal does not give sufficient thought to the question how new providers might emerge in the future – and if they do not, then the existing providers will be placed in a monopoly position which will cost the taxpayer significantly more than the current scheme; and
- (vi) the LSC has not explained how it will define the “outputs” which it wishes to purchase, or the terms on which it wishes to do so, with sufficient particularity to enable bidders to make well-informed bids. Unless bidders can make well-informed bids, there will not be effective competition.

Given the failure to specify outputs (and the impossibility of doing so) and the lack of control the solicitor has over many of the relevant inputs, it is not possible to calculate an economically rational bid. The LSC comments in the consultation paper, “We continue to work with our partners in the Criminal Justice System to make significant improvements to its efficiency.”²³ This is a grossly inadequate response to the problem of other agencies’ inefficiencies increasing the cost to suppliers of providing the services for which contracts are to be awarded.

By way of concrete example, a London practitioner has informed us that Premier Security, which produces prisoners around London, works on the basis that it will get prisoners to court at some time during the day; and they have been known to inform courts that they can’t get prisoners to court at all and to request permission to produce the next day. As

²³ Paragraph 3.10 of the consultation paper

solicitors can no longer take instructions from clients at cell wickets in most of the courts, and as the cell areas usually have no more than four consultation rooms, there is a considerable risk that all solicitors will be waiting for lengthy periods for prisoners to arrive, and to have consultations with them once they do.

Without economically rational bids, the market advantages suggested by Frontier are not realisable. It will be a matter of random chance if firms bid at the appropriate level. Some will bid too high, which will mean that the LSC does not achieve the savings it thinks it will. Some will bid too low, which could lead to their businesses becoming insolvent and to their being completely unable to maintain an acceptable level of quality. Because firms without a contract are to be excluded from the system, there will be no one available to fill the gap when this happens.

4. *What would be the most effective way of achieving these (criteria in section 4.2) results?*

In the light of the comments made in part 2 above, we are of the view that the LSC should withdraw its proposals in favour of a round-table discussion with the relevant practitioner organisations as to how it might practically be possible to address the issues facing the CDS in London.

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

The LSC has indicated that one possible model would be to have 7-15 bid zones. This would give it areas larger than single boroughs or individual duty solicitor schemes. Another possibility would be to have bid zones equivalent to existing boroughs or duty solicitor rotas. Either proposal has a number of insoluble flaws:

- (i) If bid zones are large, and firms are required to take any client from within the bid zone, the LSC will presumably require firms to participate in each duty solicitor scheme within the bid zone. Otherwise within any one zone, the Commission may find it has too many bids for one scheme but not enough for another. It could find that by the time it reaches the “market clearing” rate, all the firms awarded contracts are concentrated in one part of the bid zone a long way from some schemes and some clients.
- (ii) But if the LSC requires firms to participate in all duty schemes within the bid zone, it will be demanding that firms take on work from schemes when they have no historic data and no understanding of the volume or nature of the work those schemes generate. This is yet another factor that would make an economically rational bid impossible. Moreover, the requirement on firms to take duty slots on schemes a long way from their current offices will contribute to clients choosing not to continue with the duty solicitor but instead seeking a firm located more conveniently for them; and it may increase from present levels the amount of travelling time firms have to factor in when calculating their bids.
- (iii) On the other hand, if bid zones are smaller, the LSC faces two major problems. The number of firms bidding in each zone will be much smaller, thus reducing the competitive pressures that the LSC believes will generate savings. And the administrative cost to the Commission of running significantly more bids may outweigh the savings.

- (iv) A further factor that will impact on volume calculations is the reintroduction of a means test through the Criminal Defence Service Bill. This will remove a proportion of the population from eligibility for legally aided services based on their means. The number of clients removed from eligibility will be different in different areas. For some firms, the benefit of securing private client work may lead to them offering a lower bid price. Other firms may see the presence of private work as reducing the attractiveness of a legal aid contract, thus leading them to bid a higher price or not at all, on the basis that they have less reliance on it. Firms specialising in private work only may attract work away from legal aid firms, thus reducing the volume of work they secure below that which they anticipated when calculating the bid. It is impossible at this stage to predict what the actual effect will be, which is another challenge to the calculation of economically rational bids.
- (v) Finally, wherever the bid zone boundaries are drawn, they will inevitably cut straight through the natural catchment area of some firms. This means that some firms, entirely arbitrarily, will be required to submit two or more separate bids just to maintain their existing work, instead of just one, and may find themselves being paid two or more different prices for the same work, dependent solely on where the work originated. This will place a significant additional administrative burden on the firm, which will need to be anticipated and included in the price. This problem will be significantly worse with a higher number of smaller bid zones.

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

This depends on the definition and size of a bid zone, and where the firm has an office in relation to the boundary. To take the extreme example, you could have a bid zone boundary that passes right next to a firm's office. It would not make sense to require them to open a new office next door before they would be permitted to continue to see clients who happen to be on the other side of this arbitrary line. Depending on the size of a bid zone, it may be more difficult for clients to reach an office at the other end of the bid zone than one that is just over the border in the neighbouring bid zone. This highlights once again one of the major difficulties with the concept of bid zones.

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

We are not aware of any evidence or argument as to why allocating contracts based on a proportion of duty slots will give the right capacity of service. In a straw poll at the LAPG/LAG seminar, it appeared that most firms generated a similar proportion of work from duty slots, so it may prove correct. However, this was a small sample, and we would be concerned at the use of this particular variable for this purpose in the absence of hard evidence that it was a legitimate proxy.

During the course of the consultation period, there has been some discussion as to whether firms who have not been awarded contracts should be entitled to continue doing own client work. Although the consultation paper indicates that firms should be entitled to do so only during a transitional period, it has been suggested subsequently that the Commission may consider allowing firms to continue with own client work indefinitely.

In principle, we support the right of clients to continue instructing solicitors whom they know and trust. However, the consultation paper as it currently stands gives no indication as to how the payment rates for such work might be calculated.

Furthermore, careful thought needs to be given to the possible effect of allowing solicitors to continue with own client work. One possible effect may be that some firms will engage in aggressive marketing so that suspects request them by name instead of asking for a duty solicitor. This would be detrimental to firms who are awarded contracts for a share of the duty slots, and who will find that they secure a much lower volume of work than they had expected. This will undermine the rationale for the contracting system, and the assumptions underlying successful firms' contract bids.

In practice, this will be a very difficult problem to manage. Restrictions on advertising are likely to be regarded as anti-competitive, if non-contracted firms are doing no more than advertising for work which they are eligible, within the LSC rules, to perform. It is unlikely that any restriction on advertising would be compatible with competition law in these circumstances.

It should also be borne in mind that this problem could be exacerbated if as a result of the reintroduction of the means test, some firms advertise heavily with a view to securing private instructions.

8. *Would it be reasonable to expect suppliers also to take on any Crown Court work that follows on from their police station and magistrates' court work?*

We would anticipate that the vast majority of firms would wish to conduct relevant Crown Court work. Ability to do Crown Court work as well might be a legitimate consideration in the awarding of contracts were the Commission to decide against awarding them solely on price once the quality floor had been achieved.

9. *What are your views on these options (Crown Court specialist suppliers/Complex Crime Unit cases) and any other suggestions for ensuring that Crown Court specialists can continue to work in the police stations and at the magistrates' court, while being subject to the same efficiency incentives and quality standards as suppliers that have gone through the bid process?*

Our view is that such firms present a clear problem to the LSC's tendering proposal, and we can see no obvious solution. Such firms certainly exist, but it would be very difficult for the Commission to come up with a reliable definition of what constitutes a specialist firm. It would be unfair to tendering firms to allow these firms to remain in the system without

tendering, but it would be undesirable to require them to tender or to drive them from the system.

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

No; neither should any other firm.

11. *Are special arrangements (for specialist firms) needed and, if so, what those arrangements might be?*

Specialist firms are highly desirable, but their existence is likely to be incompatible with the LSC's proposed system of competitive tendering.

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

For the reasons outlined in paragraphs 2.13 to 2.21, we are doubtful whether it is feasible to define specific outputs in advance, to apply for the full contract term, and to expect bidders to bid a fixed price per unit of output. Cases are too varied, and the changes to the law and procedures too unpredictable, for that to be feasible. The concept of a simple system that adequately covers all of the complexity in the work involved is an oxymoron.

An additional problem with fixed costs for police stations arises for the employer. As the Commission is well aware, solicitors and representatives are usually paid an hourly rate for the time that they spend at the station out of hours. This is a key part of the settled employment contracts of many employed criminal defence lawyers. This method of payment cannot change in the short term. The result of this will be reduced remuneration for employed defence solicitors, an even greater reluctance on their part to attend the police station during unsocial hours and friction between the employer and the employee as to whether attendances have been kept to the bare minimum necessary in the circumstances. The incentive will be to abandon the client at the earliest opportunity.

This problem may be exacerbated by forthcoming changes to the Working Time Directive, and in particular the potential loss of the UK opt-out. The employees of criminal defence practices frequently work more than 48 hours per week. If the opt-out is indeed removed, it will have a significant impact on the cost base of firms, which will again serve to invalidate historical data and render the calculation of an economically rational bid highly problematic.

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

LAPG is wholly opposed to this proposal, which would represent a clear reduction in quality. Permitting duty solicitor advice to be given by a non-solicitor, without the initial assessment of the matter by a fully-qualified duty solicitor, is not only directly counter to the quality agenda, it is also probably in breach of section 58 of the Police and Criminal Evidence Act 1984.

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

By contrast, this provision would support the quality agenda. We have some sympathy with the view that such a requirement should be introduced. However, we believe that this is a simplistic approach to a complex issue. Furthermore, it would mean that the LSC would be asking a number of firms significantly to reorganise the way in which they operate. This would invalidate such firms' historical data, thus providing yet another significant obstacle to economically rational bidding.

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

The Accreditation Scheme itself will include a requirement as to the timescale within which lawyers must re-accredit. This timetable will be driven, in part at least, by the resources available to meet the demand for re-accreditation. It may therefore be physically impossible for the Law Society to cope with any shorter timetable the LSC may introduce. We would thus be against the LSC imposing any different requirement from the Law Society.

- 16. *Are there any other indicators of quality that we should be considering?***

In criminal work, real quality is demonstrated primarily in the police station and in Court, rather than in written files. If the LSC is not proposing to peer review this actual work by solicitors, then it is not getting to the heart of the quality issue in criminal defence work.

- 17. *How could these quality indicators be monitored effectively and at reasonable cost?***

There is an obvious tension between monitoring effectively, on the one hand, and monitoring at reasonable cost on the other. For the very same reasons that the LSC considers that it does not have the data or the management tools to undertake a best value bidding process, we do not believe that it has the tools to undertake effective monitoring of quality. Evaluating the performance of the lawyer in the police station and in court would be expensive, but is essential to get to the heart of the question whether a lawyer is competent or not. This cannot be measured from a paper file. One approach may be to have such an evaluation at the end of the process, only to be used in those cases where the paper files are found to be inadequate. If it turns out that they are substandard because the lawyer is spending time giving an excellent standard of police station advice and Court advocacy,

the matter should be dealt with by way of guidance rather than sanctions. If the solicitor is inadequate on his/her feet as well as in writing, then sanctions may be appropriate.

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

In our view, there is merit in requiring that supervising solicitors should have a minimum of three years' post-qualification experience (the period of experience the Law Society requires before a solicitor may set up in practice on their own account).

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

Yes.

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

There is no necessary reason why a supervisor for one organisation could not also be an external supervisor for another, but we would not consider that a supervisor could maintain their own workload, supervise their own department and supervise more than one additional organisation.

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

If there is no such maximum, it opens the way to low grade factory operations with one supervising solicitor "supervising", almost certainly inadequately, a large number of unqualified staff. This has been one of our concerns about CDS Direct. There should be a maximum. We believe it should be a maximum of three staff; but for a solicitor who is supervising externally a second organisation, the limit should be three staff in each organisation.

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

Not by a very long way, and we do not consider that such protection is possible in a competitive tendering scenario. Hospital cleaning and school dinners are two very topical examples of what happens when you try to drive price down through competitive bidding; and it is naïve to think that any assessment or audit processes could stop this from happening. The sort of tools and data that are required are precisely the tools and data that the LSC has conceded that it does not have, in rejecting a best value bidding process.²⁴

²⁴ Consultation paper, paragraph 4.5

There will need to be a whole range of provisions to ensure quality, and to define the standards and requirements expected of firms under the contract, most of which have not even been touched on by the LSC. Yet the Commission intends to consult on and publish the standards in time to issue bid documentation by August 2005. It is not credible that such a major piece of work could be completed in only a couple of months.

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

No. All offices are different and should be treated as such.

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

For the reasons given in paragraphs 2.26 to 2.29 above, we consider on balance that if this scheme does go ahead, contracts should provide for all successful bidders to be paid the same price for equivalent services provided in a single bid zone. However, this has the undesirable and anomalous consequence that a firm doing work originating from a different bid zone, or one with contracts in more than one zone, will find itself charging different prices for the same work based solely on where the client originated. This is irrational, and will cause an extra administrative expense that firms will have to factor into their bids.

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

We consider that bidders should be allowed to submit expansion-based bids, since any other system would preclude suppliers from expanding to any significant extent, other than through mergers. This does of course run the risk that some firms may make unrealistic expansion bids, which they are then unable to fulfil; and the LSC will then not have suppliers “in reserve” to call upon to plug the gap.

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

In our view, this question misses the point. The focus in the consultation is entirely on what the Commission wants to do, and how quickly it thinks it can get its systems in order. We doubt whether the LSC could itself meet its proposed timetable. But, even if it could, the LSC needs also to take account of the business realities facing contracted law firms.

There are two points, not one, at which time is needed. First, once the comprehensive proposals for the contracting regime are finalised, firms need a minimum of six months to consider the proposals and make business decisions on whether or not to bid, where to bid, and whether they wish to seek mergers or undertake recruitment in order to support a bid.

Secondly, after the new contracts have been awarded, there needs to be a period of time for the unsuccessful bidders to extract themselves from existing criminal defence work, and to allow them to implement an orderly winding up of their business, if that is necessary. If redundancies are required, these will necessitate consultation with staff, the issuing of notices and the payment of redundancy packages. This will take three to six months. If a firm wishes to seek a merger, this is likely to involve discussions and negotiations taking nine to twelve months. If the firm decides to change direction, it will probably take at least six to twelve months after the necessary recruitment and/or training to build up a caseload in a different field of law sufficient to replace the lost criminal work. If the practice is to be closed down, the principals will need to dispose of leases of premises and equipment, arrange for the transfer of open files and the storage of closed ones, take out run-off insurance cover, make staff redundant, draw up final accounts and arrange either to pay off overdraft and loan facilities or file for bankruptcy. This is unlikely to be achieved in less than twelve months.

Finally, since it is becoming clear²⁵ that revised TUPE regulations are likely to apply to law firms, it will clearly be critical for the LSC to take account of the implications of TUPE in formulating any proposals for the award of new contracts to firms who would, in effect, succeed to business presently undertaken by existing contractors. The present consultation paper does not address this issue at all.

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

Neither is appropriate. Paying the supplier's own tendered rate may mean the Commission is paying more than if the client saw a solicitor in their home bid zone. Paying the client's bid zone's rate would mean that a firm was being paid different rates for the same job just because of where the client originated. Both results are anomalous.

Moreover, one needs to consider the position of a firm whose catchment area spans more than one bid zone. If it secures a contract in each bid zone, it may well be paid a different figure for equivalent work depending solely on where the client was arrested, (which as noted above creates an additional bureaucratic burden and is anomalous). But in such a case, the firm will be paid no less than the price it bid.

In contrast, if the firm secures a contract in one bid zone only, but works in the second bid zone, the LSC has in mind an arrangement whereby the firm would be paid for work in the second bid zone according to the contract price applicable in the first bid zone. This could result in the firm being paid for work from the second bid zone at a lower price than it was prepared to accept, when it bid for a contract for that bid zone. And the price that the LSC

²⁵ The Law Society Gazette of 26th May 2005 notes in the context of commercial law firms with teams allocated mainly to a single corporate client that Government is thought unlikely to introduce an exemption from TUPE for law firms. There is therefore a realistic possibility that TUPE will impact upon the bidding round.

would pay the firm for work conducted in the second bid zone may well be less than the contract price applicable under contracts for the second bid zone.

Alternatively, the LSC could agree to pay the firm the rate which it actually bid for a contract for the second bid zone, even though that bid was so high in relation to other bidders in the zone that the firm has not secured a contract.

Again, both results are anomalous, and the latter result would be unfair on those firms that did bid low enough to secure a contract in the bid zone.

28. *What effect would this proposal have on barristers?*

We will leave it to the criminal bar to answer this question fully, but we would anticipate that the impact would be severely detrimental.

Section 6: Regulatory and Equalities Impact Assessment

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

No. The LSC is proposing to offer contracts based solely on price once a quality floor has been passed. Clients with language or other communications difficulties take longer to deal with than those without; it is not merely a matter of the cost of an interpreter. Firms who deal with a significant number of clients with such needs will as a matter of course be outbid by firms that do not. Having secured a contract, a firm will be reluctant to take on such clients because they will be uneconomic. These proposals therefore risk having a profound discriminatory effect on grounds of race and disability.

30. *What additional support measures (if any) for suppliers should the Commission consider establishing?*

We have already suggested that the LSC should withdraw its proposals, and that is our clear preference. The issue of support would not arise if the LSC accepts our view.

We agree that some support will be needed for some firms, although without a lot more detail as to how the scheme will operate in practice, it is impossible to say what support would be needed and how widely. This fact is another indication, in our view, that this scheme is not appropriate at the present time.

31. *Do you agree with the conclusions drawn by the Commission about the ethnicity of CDS clients and CDS supplier base? We are also interested in comparing our information with any data sources that you may have.*

We do not have any data sources that would be of assistance to the LSC on this question. However, we do not believe that the LSC's analysis of the impact on BME firms and clients is adequate. For the reasons outlined above, we believe there will be detrimental and

discriminatory effects for both clients and firms that the LSC's analysis has not picked up on.

32. *What are your views on what elements of the Commission's current contracting arrangements create barriers for BME firms and why. When responding please indicate whether you would be prepared to discuss your response in more detail with the Commission.*

This question is best answered directly by representatives of BME firms.

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

This question is best answered directly by representatives of BME firms.

Annex A

LAPG critique of the Frontier Economics Report

LAPG critique of Frontier Economics research report on legal aid

The Department for Constitutional Affairs recently published research by Frontier Economics, which was supposed to be an analysis of the supply of and demand for legal aid.

I, and my committee, saw it for the first time on 27th April. We have serious reservations about it.

We have set out our major concerns in some detail below, but to summarise the main ones, they are as follows:

1. The sample of firms was unrepresentative
2. There is no analysis of the different issues facing suppliers in cities, towns and rural areas, who all face very different economic circumstances.
3. The assumption of excess capacity was based on an expectation that lawyers should work longer hours than permitted by the Working Time Directive.
4. The comparators with private work do not make sense.
5. The analysis of demand assumed a cut in scope and eligibility for civil legal aid: what cuts is the Government proposing to make?
6. No account was taken of the unmet need/demand for legal services, with demand being assumed as what the Government has chosen to supply. Much of what the Government, and in particular the Home Office, is currently doing will cause a greatly increased demand for legal aid. What will be cut to meet this increased demand?

On the supply side, the most important concern relates to the sample of suppliers. Those firms in the sample rely on legal aid on average for 59% of their income. According to LSC estimates, half of the supplier base is less than 25% reliant on legal aid. Frontier acknowledges that the extent of reliance has a significant impact on a firm's response to economic stimuli (e.g. page 36, page 40). Nonetheless, the report's conclusions could be mistakenly read as being applicable across the supplier base as a whole, rather than just to the small, heavily reliant subset of it.

There is no attempt in the report to analyse the different issues facing firms in cities, market towns and rural areas. Any attempt to understand the legal aid supply network is incomplete without such an analysis.

The estimate of excess capacity is based on a supposed "norm" of a firm's fee earners *averaging* 1380 chargeable hours per year. 10% of the sample had averages exceeding 1800 hours. The generally accepted measure of a full-time fee earner's capacity, taking into account training and supervision requirements, unchargeable administration and management time, is 1100 chargeable hours. The norm used is thus almost 25% greater than the standard working week of a full-time employee, which would require solicitors' fee earner employees to work more than 48 hours a week. This is in excess of the limits imposed by the Working Time Directive. It also has a major bearing on quality of life issues, which in turn affects the decision by lawyers whether to accept the significantly lower salaries available for legal aid work. There is no analysis of why the chargeable hours of the sample firms exceed the accepted norm by so much.

The private work comparators (page 56) do not make sense. Personal injury work is case-specific skilled litigation for which relatively high rates are charged to private clients. In terms of the skills required, it would be relatively easy to switch to legal aid work. It is lumped in with residential conveyancing, a process driven routine type of work, which is now commonly performed by

paralegals and charged at relatively low rates. It would be much more difficult to transfer staff from this to most legal aid work due to the significantly different skills required. And we cannot accept that across the supplier base as a whole, family law legal aid contract holders dedicate only 4% of their chargeable hours to private family work. We suspect that this anomalous finding is another consequence of the high relative reliance on legal aid of the sample.

There is no attempt in the report to match the supposed excess capacity to excess demand. It is of no use to a housing client in Northumberland that there may be spare immigration lawyers in London.

Various types of analysis that would have been valuable have not proved possible because the sample, when disaggregated, proved too small for meaningful conclusions to be drawn.

All in all, the relatively small size and unrepresentative nature of the sample make the supply-side conclusions unreliable. The economic theory in the report is clearly set out in easy to understand language, and is a helpful and interesting exposition. The application of that theory to the sample firms provides a useful insight into the likely behaviour of a minority of the supplier base. But Frontier's caveats that less reliant firms (who make up well over half of the supplier base and the vast majority of the network outside the big cities) behave differently must not be forgotten. For this reason, we categorically reject the assertion that the survey responses "provide a good basis for analysis in terms of representativeness in general".

The whole section on demand proved to be a grave disappointment. When this review was announced, we had assumed that the starting point for the analysis of demand would be to consider what unmet demand (and unmet need) presently exists. Since the report was completed, Pascoe Pleasance's work for the LSC has uncovered substantial unmet need. Citizens Advice published a report identifying significantly increased difficulties in seeking to refer clients to solicitors. Evidence has emerged of the number of firms running out of matter starts last year and having to turn clients away.

We had expected that the analysis would then go on to examine the factors that might cause changes to the levels of demand over the coming years. We should have seen consideration of the likely impact on demand for legal aid services of various policy and legislative developments that have been implemented or are ongoing, such as the Effective Trial Management Project, the Mental Health Bill, the Criminal Justice Act, the Domestic Violence Bill, the increases in police numbers in recent years, the Terrorism Acts, ASBOs, the Proceeds of Crime Act, and trends in asylum, to name just a few of the factors that influence demand.

This could then have formed the basis of an intelligent discussion about to what extent and how Government could meet that demand. Consideration could have been given as to what are the highest priority areas, where changes to scope and eligibility might need to be made, and how far changes to the purchasing arrangements could help to meet more of the demand.

We also observe that at page 68, note 39 and page 81, Frontier acknowledges that its estimates of demand are based on an assumption that the Government will cut scope and eligibility for civil legal aid. Do they know something we do not? If not, what justification is there for them making such an assumption?

We consider that the report represents a missed opportunity to get to grips with the issues facing Government and the profession.

When the failure to analyse demand is added to the flaws in the analysis of supply, it is clear that the report does not address the issues of supply and demand facing the Legal Services Commission, and that its conclusions have little application to the real world conditions that we all face.

We are very concerned that this flawed analysis will now be used to justify policy decisions relating to legal aid that will cause significant further damage to the legal aid network in this country.