

# **The Law Society's Response to the Legal Services Commission's Paper on 'Improving Value for Money for Publicly Funded Criminal Defence Services in London'**



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**The Law Society**

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# LEGAL SERVICES COMMISSION CONSULTATION PAPER: 'IMPROVING VALUE FOR MONEY FOR PUBLICLY FUNDED CRIMINAL DEFENCE SERVICES IN LONDON'

## Law Society Response

### Executive Summary

#### Quality Concerns

1. The Law Society believes that the clients' interests must be put first in relation to the quality of service they are likely to receive following any competitive tendering process. The consultation paper however makes it clear that the main criteria to be used in awarding contracts will be price, with a suggestion that those who submit the lowest bids would be awarded the longest contracts. The Society has concerns that pressure on firms to retain their contracts is likely to result in bids being submitted which are too low to enable the more complex cases or difficult clients to be dealt with adequately. By obliging firms to submit the lowest possible bid for their average case costs, the Commission risks undermining the improvements in quality that have resulted since contracting was introduced.

#### Access to Justice; Equality and Diversity Issues

2. The push towards driving down costs may have particular implications for clients who need more complex support or who are not an "average" case. Many of the clients who use criminal defence services in London are from poor and excluded communities. Many have a range of social problems; and may have language or mental health issues. In a competitive bid round based on price, it would be these clients who would suffer. Firms may find it economically unviable to take on clients whose cases take longer due to their particular difficulties, or because of the need to engage an interpreter or other assistance where the client has a disability. Whilst the consultation paper acknowledges the need to preserve firms that offer a 'specialist' or 'niche' service, this fails to recognise the huge number of clients with difficulties, whose solicitors do not consider themselves to be offering a 'niche' service. The Society believes that it is unacceptable for the most vulnerable clients to be put at risk in this manner simply in order to save costs.
3. The proposals would also place an undue pressure on firms to finish cases as quickly as possible, which would not serve the interests of justice.
4. The LSC consultation paper indicates that black and minority ethnic (BME) firms are over-represented amongst suppliers with criminal contracts. The paper also acknowledges that small firms and sole practitioners may suffer as a result of the proposals, amongst which there is a high proportion of BME firms. Home Office statistics show an apparent bias against those of a BME background in the Criminal Justice System (CJS); black people are three times more likely to be arrested than white people; BMEs account for 24% of the male prison population and about 31% of the female population.

5. Access may be reduced for particular groups such as Black and Minority Ethnic groups and disabled groups for a number of reasons, including the reduction of the diversity of the supplier base; because firms may find it difficult to adequately prepare time-consuming cases, or because BME firms are unsuccessful in the bid round. If many of the small 'niche' and specialist suppliers are lost from the system, it will be extremely difficult to replace their specialist knowledge and skills, and the clients they serve, who may be disabled, or from specific ethnic communities, will suffer. As a result there is likely to be a loss of confidence in the entire system by these clients.

### **Financial Issues; Impact of New Legislation**

6. In the past 10 – 15 years there has been a significant number of regulatory law and statutes introduced into the criminal justice system, creating a huge number of new offences, and impacting on the manner in which the defence case is prepared. It is unthinkable that this amount of change will not impact on expenditure on criminal defence services. The government must start to take into account the impact of new legislation on all areas of the criminal justice system, and to factor any additional expenses into its budget.
7. Until the new provisions have been in place for a certain amount of time, it is impossible to predict precisely what effect these changes will have on the amount of time that will be required to prepare the defence case, and thus average case costs. Significant concerns arise from the proposal that firms submit bids based on average case costs when they have very little idea how much these costs are likely to be in the next few years. One obvious danger is that the bids submitted will be too low, and that firms will be unable to carry out all the work required in a case, with the resulting impact on the quality of service to the client. Another likely consequence of contracts that do not reflect the true cost of the work that will be required as a result of these new initiatives, is that firms will be forced to undertake a large proportion of work for nothing, and may go out of business, or find it financially unviable to continue with a legal aid contract.
8. The Society does not therefore consider it appropriate or advisable to propose the introduction of a competitive bid round for Criminal Defence Service contracts whilst there is so much uncertainty regarding the extent of the work that will be required to run a defence case in future.

### **Sustainability of the Profession**

9. The difficulties of attracting young solicitors into legal aid work, and the ageing population of legal aid solicitors – particularly in criminal defence work – has been well documented. Once the pool of suppliers has been reduced by a competitive bid round, it will be extremely difficult to attract these suppliers back into the market. This has potentially drastic consequences for supply, in the event that firms who have been awarded contracts subsequently drop out of the market due to having submitted an unsustainably low bid.

## **Bid Process - Contracts**

10. The proposal that contracts may be awarded for variable lengths, between one and three years, is of particular concern. Many businesses in London hold leases on their premises of five years or more, and have staff employed on long-term contracts. It is not clear how any reasonable business planning with regards to staff, premises, IT support and general infrastructure can be possible with a contract of only one or two years.
11. An additional concern arises from the proposal that those who submit the lowest bids will be offered longer contracts. Thus a contract award of only one year is effectively a signal to the firm to submit a lower bid at the end of that year, or risk losing their contract. Firms in this position who may have submitted a realistic bid will be forced to submit an unrealistically low bid simply in order to retain their contract, and the quality of service to the client is likely to suffer as a result.

## Introduction

12. This paper sets out the Law Society's response to the Legal Services Commission's (LSC) consultation paper: 'Improving Value for Money for Publicly Funded Criminal Defence Services in London.'

## Background

13. The Law Society's legal aid strategy document 'Protecting Rights and Tackling Social Exclusion', published in January 2004 was the last time the issue of price competitive tendering (PCT) in publicly funded legal services was considered. Prior to this, the Society had been opposed to its introduction, on the basis that it would inevitably lead to a degradation of quality of service to the consumer.
14. The strategy considered the recent changes to the way legal aid is delivered; including the move to a cash-limited budget, with services being delivered exclusively through a system of contracts with quality assured suppliers. At the same time, there had been a shift in emphasis toward looking more closely at the quality of advice to clients and the LSC was working in partnership with the Society to help identify and assess competent and specialist advisers.
15. The way that contracting has been managed has drastically reduced the number of suppliers willing to provide legal aid services and that trend continues. In this context, in 2004, the Society had looked afresh at the scope for price competitive tendering and considered that it might present both advantages and disadvantages, but that it would need to be limited to a carefully controlled pilot.
16. The publication of the Legal Services Commission's consultation document "Improving value for money for publicly funded criminal defence services in London" makes it clear that a primary objective of the current proposals is to reduce the spend on criminal lower legal aid. At the same time the Legal Services Commission has made it clear that spending on that part of the criminal budget is 'under control'.<sup>1</sup>
17. In addition to the potential for a reduction in the quality of service to clients, a further potential consequence of the introduction of price competitive tendering is likely to be the loss of the public service ethos that attracts people to legal aid work. This could mean that the difficulties in attracting solicitors to this type of practice and retaining them – which have been documented at length<sup>2</sup> - would intensify.

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<sup>1</sup> Legal Services Commission; 21 March 2005.

<sup>2</sup> The Law Society's 'Survey of Career Choices in Law' – January 2004 – showed that only eight percent of trainee solicitors who responded to the survey indicated that they were likely to pursue a career in legal aid work, with the rest citing size of student debt; salary & promotion prospects among the key reasons for not choosing a career in legal aid work.

18. The Law Society has a major role in protecting the interests of those who use solicitors' services, in terms of the availability of advice and representation and in terms of the quality of that advice and representation. It is clear to the Law Society that the consultation document is proposing a scheme which will inevitably reduce access to justice and the quality of advice and representation available to legally aided clients. On that basis the Law Society's Council passed a motion at its meeting in February 2005 opposing the proposals "on behalf of the public, solicitors and the proper administration of justice"<sup>3</sup>.
19. The Society believes firmly in the principle that free legal advice for those who need it but are unable to afford to pay, is one of the hallmarks of a free and democratic society. Awareness of and ability to enforce legal rights are essential in the battle against social exclusion.
20. In reflection of this principle, the Law Society's Council passed a further motion on 12 May 2005 stating that firms should not bid for contracts unless or until such time as, in the opinion of the Council of the Law Society, a scheme is proposed which does not risk reduced access to justice or the quality of advice and representation available to legally aided clients.

## Quality Concerns

21. We note the Commission's intention to build a 'stronger, higher quality legal aid system, with the client at its heart'<sup>4</sup>. We wholeheartedly support that position. However, we do not believe that this can be achieved by the system of competitive tendering proposed in the current consultation document.
22. The foreword to the consultation paper states that competitive tendering is a 'well established method of delivering quality public services'. It would be helpful if the Legal Services Commission could cite some examples of such delivery in any sector, and the system of competitive tendering used. In other areas of the criminal justice system, such as prisoner escort to court from prisons and police stations, the experience of competitive tendering has been disastrous. The reducing of cost to unrealistic levels in order to maximise profits has resulted in the continued late arrival of prisoners at court, often up to two or three hours late, thereby increasing the waiting time and therefore the cost to the Criminal Justice System as a whole. The lack of sufficient staff often prevents prisoners being physically brought into court rooms when required because of security issues.
23. It should also be noted that other organisations that competitively tender do not work exclusively in the area for which they are tendering, but are able to subsidise any tender work with other, better remunerated work. Many criminal practitioners on the other hand, are being asked to competitively tender for all of the work that they do, with all of the attendant risks that would entail.
24. The government has acknowledged that compulsory competitive tendering has had destructive effects on the quality of services in the NHS. The then Health Secretary Alan Milburn told the Labour Party conference in 2000 that compulsory competitive tendering had been 'a failure', with adverse effects on quality and staff.

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<sup>3</sup> Law Society Council Resolution 24 February 2005

<sup>4</sup> Clare Dodgson; Foreword to consultation paper

25. For publicly funded criminal defence work, the buyer is not the person with an interest in the service; indeed the state has, if anything, opposing interests to those of the defendant. We cannot see who, in this scenario, is protecting the defendant's wider rights, given the likely effect on any contracted firm of solicitors which might complain.
26. In paragraph 3.11 the document refers to the price being "determined by the market", and in paragraph 4.21 there is mention of allowing the market to "determine the pattern of supply". In reality, whether under the proposed new arrangements, or under the existing arrangements, the market is dominated by a single purchaser and the benefits which are supposed to flow from the working of the market will in fact be invalidated by the market-fixing decisions of the monopolist.
27. One danger is that, whatever the document's commitment to quality, the actual result (especially noting the comment in 3.16 about the overall aim of controlling the legal aid budget) could be the acceptance of bids from firms that are prepared to cut price to the detriment of quality, which would be contrary to the proper interests of clients, and contrary to the proper public interest in the administration of justice.
28. Furthermore, the document states at 4.11 that the LSC has formed the view that quality and efficiency are not "wholly the domain of larger firms". However even this wording seems to confirm the view expressed at 3.18 that "maintaining service standards is difficult for suppliers who only do a small volume of work". Does the LSC have any evidence that actually demonstrates this assertion? The LSC may be confusing a small volume of work with a small number of cases. We would also remind the LSC of their statements at 3.17 about high quality suppliers, niche providers and firms providing services targeted at particular client groups. The risk is that, in order to promote cheapness and administrative convenience, the quality services provided by small, specialist firms may be lost altogether if these proposals go ahead.

### **LSC Quality Assessment**

29. The Law Society is disappointed with the lack of detail about how the LSC will assess quality. The LSC needs to set out in detail the quality criteria to be applied to the work they want to buy and then to decide how this can be measured. Without such detail, it is very difficult to provide specific comments on the proposals.
30. We are disappointed that the suggested approach seems to be that quality considerations will be taken at a threshold level. There would not appear to be any incentive for firms to offer a high quality service or cater to the special needs of particular client groups. Indeed, there appears to be an incentive to provide work of a just 'good enough' quality, in order to keep the price down.
31. The Law Society would be interested to see any evidence that shows that firms doing high volumes of criminal work offer a higher quality of service, and that solicitors undertaking a certain number of hours of criminal case work themselves, are better supervisors of that work.
32. We are aware that the Office of Government Commerce (OGC) provides help and advice to government departments wishing to appoint suppliers, and we would recommend that the LSC contact staff there to discover more about more complex structures of procurement.

33. One of the key issues which the OGC suggests should be taken into consideration when awarding contracts, is the sustainability of the supplier. In these circumstances, that could equate to awarding a contract to the lowest bidder, who after a number of months finds that they have to pull out of LSC work altogether as the bid price was unrealistic, or carried out the work but to a standard below the quality threshold. How will the LSC proactively monitor whether this is taking place and where will this leave those suppliers who bid a realistic price but were not awarded a contract and therefore closed down? Will they have a case for maladministration against the Commission?
34. Will the tender process include an evaluation by the firm of its ability to provide and sustain a quality service at the prices offered? If so will this include attention to, for example, staff recruitment, retention and development and financial management? Will the firms have to provide their own risk assessment? How will the LSC ensure that firms are not turning away more complex cases?

### **Case Outcomes**

35. We note that the initial stage of bidding involves firms being assessed on 'quality of advice' and 'outcomes achieved for the client' (Paragraph 2.8; page 10 of the consultation paper). We have concerns about these proposals as research has in the past indicated that the reliability of outcome based assessments in the legal sector can, at best, be very mixed and is certainly not appropriate for some areas of law where it is not clear what a positive outcome would be. Numerous factors would need to be considered such as the weight of evidence, previous convictions, the instructions of the client and the extent to which they have co-operated, and the client's perception of whether or not their solicitor has provided a good service. The LSC should clarify how they propose to take these factors into account. If a fair, transparent and accurate assessment of case outcomes is to be obtained, it is likely that substantial resources will need to be employed.
36. It is assumed that the quality assessments of firms will be conducted on an ongoing basis, should the proposed bid process go ahead. If this is the case there is a danger that some practitioners may start now to avoid difficult cases, and only opt for those in which the outcome is assured. This adverse selection is not conducive to proper, early, full preparation, and clients with more difficult cases will suffer. As we have documented later in this response, this will have a particularly negative impact on the most vulnerable clients.

### **Peer Review**

37. The Commission has announced its intention to conduct a peer review exercise on all holders of a General Criminal Contract in London. Clarification is sought as to whether the LSC now intends to peer review all firms as the first stage of the quality assessment for the bid process, or whether, as stated in the consultation document, it will only be used where a firm fails the initial quality assessment.

38. The Society has been generally supportive of peer review as a more reliable method of quality assurance than the audits used by the LSC, subject to the Society being satisfied as to guarantees of confidentiality and impartiality. Any stance taken on peer review in this context is subject to the Society's response to the current consultation on peer review. We are concerned that the detail as to how peer review might work in the context of price competitive tendering has been inadequately dealt with in this consultation paper and we would like to see detailed proposals before making any judgement. As peer review has the potential to put firms out of business, the Society seeks assurances that it will be conducted in a fair and transparent manner, with a robust appeal process.
39. For smaller firms, the administrative cost involved in providing files and information to the LSC and then preparing submissions in response to the result of the review is always higher than for a larger firm that can absorb the costs more easily. Some small firms and sole practitioners may go out of business as a result of being unable to afford a second peer review. Many of these small firms are the 'niche providers' or those that serve particular client groups, referred to in paragraph 3.17 of the consultation paper. A reduction in the number of these firms would not only mean a reduction in the number of firms available, but would also impact on the vulnerable clients that these firms serve.
40. Peer review is unlikely to be frequent enough to adequately protect clients; some additional safeguards would be needed in an environment where firms would have been forced to place cost cutting above the provision of a quality service to the client. As we have stated elsewhere in this response, it is the clients that will suffer in a system driven by price, and any checks on the quality of work done in such a system would need to be particularly robust in order to minimise the effect of cost-cutting on clients. An assessment should be carried out to calculate the cost of the necessary monitoring, which may be much greater than under the current system.

## **Quality of Service to the Client**

### ***Existing Suppliers***

41. The consultation paper fails to acknowledge that within all of the London Boroughs there already exist established CDS contracted firms who have obtained the quality mark required by the Commission and already provide a quality service. Many of these firms contain very experienced criminal defence solicitors who have served their local communities in London often for twenty or thirty years undertaking publicly funded criminal defence work in areas of high crime with difficult and demanding clients.
42. The Commission has already reduced the number of CDS suppliers in London as a result of contracting. Competitive tendering may have the effect of removing many more of these solicitors and their firms.
43. If the present body of specialist criminal defence solicitors and their firms are lost it will not be possible to reinstate them at a later date, and the loss will be to the clients. These practices are generally well established with offices in the heart of the communities known and accessible to the local client base. Many of these firms are ethnic minority firms committed to serving people from their own communities, and already provide very good value for money in London despite the cost of office overheads and poor public transport links in the city.

44. If competitive tendering were to be introduced, and proved as we believe, to be unworkable and unsuccessful in London, the task of trying to resurrect the old firms and bringing back those experienced criminal solicitors into the Criminal Justice System would be impossible to achieve.

### ***Potential Effects of PCT on Clients***

45. The reason that users of criminal legal services may not, as the paper states, always be best placed to assess quality, is because they are often vulnerable, disadvantaged persons who may have problems of mental health, drug and alcohol addiction, debt and housing issues. Their lives are often chaotic. They need legal advice, assistance and representation at a time when they are in crisis and in need.
46. The Society believes that the clients' interests must be put first in relation to the quality of service they are likely to receive following any competitive tendering process. A metropolis such as London contains many pockets of communities in such need, often with additional language problems. Clients must be able to continue to access high quality legal advice.
47. The LSC acknowledges<sup>5</sup> that many firms are 'niche providers', offering services to particular client groups, and states that the Commission 'does not want to lose such firms'. In addition, there are many small firms in London who would not consider themselves niche practices, yet a high proportion of their clients have particular social, mental and language difficulties. All of these factors make attendance on clients more time-consuming, and therefore less economical if the firm has been forced to submit an unrealistically low bid simply in order to retain their contract and to stay in business. It is precisely these clients who will suffer if the proposals go ahead.
48. The Commission has acknowledged<sup>6</sup> that 'it is likely that there will be a reduction in the number of suppliers'. We are concerned that it is firms that provide niche services to particular client groups, or indeed any firm whose clients include a high proportion of specific ethnic groups; or those with mental health problems or other disabilities, that will find it hardest to compete on price, since attendances on clients with such difficulties will inevitably take longer than more straightforward cases.
49. The Commission has indicated that they are considering an 'exit mechanism', whereby unusually expensive cases may be taken out of the contract process and paid the actual case costs. However, it has been suggested that for cases to fall within this category, the costs would need to be around three times the agreed case cost. The Society is concerned that there may be a number of cases that do not fall within this category, but whose costs would be considerably higher than the firm's 'average', due to the client's particular difficulties.
50. The Society is therefore keen to understand how the LSC proposes to ensure that the service provided to these extremely vulnerable clients will be maintained following a competitive bid round, given that any firm whose bid is successful may well need to have bid a lower price per case than will allow them to provide an adequate service to such clients.

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<sup>5</sup> paragraph 3.17 of the consultation paper

<sup>6</sup> paragraph 3.18 of the consultation paper

51. ***The case studies attached at Appendix A are real cases that were dealt with by a small London firm. These are typical examples of everyday cases in which the client has particular problems, and where delays have been caused by external agencies. These case studies demonstrate the enormous complexity of a high proportion of the cases that are dealt with by many small London firms, and the unquantifiable value that is added to the efficient running of the case by it being dealt with by a local solicitor who already has substantial knowledge of the client. It is precisely these clients, and the solicitors who act for them that are likely to suffer in any bid round in which contracts are awarded to those who submit the lowest bids.***
52. In its Risk Assessment the Commission acknowledges that inviting suppliers to compete on price will encourage suppliers to submit unrealistically low bids to win work, which, in turn may lead to a downward pressure on quality. This risk is properly recognised. The Law Society believes that it is inevitable that suppliers will be encouraged to submit unrealistically low bids to win work. The downward pressure on quality will inevitably affect the clients and access to justice. Bids which are lower than the present standard fees in particular, will result in a reduction in the time spent advising and preparing a client's case as margins of profitability will be reduced. Again the client will suffer, and in particular those clients whose cases take the longest to prepare.
53. It should be noted that the consequences of a poorly funded and thus poor quality, criminal defence service, extend beyond the criminal justice system itself. People accused of criminal offences are often already in difficulties in other areas of their lives, and if the criminal charges are dealt with inefficiently, this is likely to increase the chances of family breakdown, developing mental health problems, school exclusion, truancy, unemployment, etc. All of these issues have very considerable costs for other agencies of the state.
54. The Commission states that a key objective of introducing managed competition is to increase, not reduce, the quality of criminal work. The Law Society cannot see how under the present proposals this objective is to be reached. If legal aid monies need to be saved in London, there are other initiatives that could be explored with the aim of saving money from the criminal defence budget, but no initiative should be at the expense of quality.

### **Access to Justice Issues**

55. Many of the Society's concerns with regard to access to justice issues are outlined below in the section on Equality and Diversity, and in the preceding sections on quality.
56. The proposed scheme is police station and court based. However, both police stations and courts are becoming centralised. This means that any firm wishing to offer criminal representation that is not near to a relevant centre will be unable to offer as competitive a price as a firm based nearer to the court or police station, and it is likely that some legal practices will be forced to drop defence work. Over time, the upshot of requiring everything to be done at the lowest price will mean the principled and competent solicitor will move away from quotation fixed work, i.e. legal aid. This will have a direct impact on clients.

## **Advice to Clients on Plea**

57. The need to keep costs within a narrow budget will create an unacceptable tension for practitioners between the need to give proper advice to clients on the appropriate plea, and the financial implications of doing so. This will present pressures that should not form any part of a criminal justice system. This could also lead to an increase in costs to the system, as incorrect advice on plea could result in miscarriages of justice, which will have a knock-on effect on the public purse.

## **Travel and Waiting time**

58. The LSC proposes at paragraph 4.41 of the paper that the 'bid price' will include 'all travel and waiting time'. This presents a real difficulty since not only do solicitors not cause the waiting or delays at court, but these are impossible to predict and therefore factor into any bid. Delays are almost always caused by the prisoner escort services failure to produce prisoners on time from either prisons or police stations, or the Crown Prosecution Service not having papers. Evidence of this is provided in the case studies at Appendix A.
59. This proposal appears to suggest that solicitors deliberately create longer waiting periods. On the contrary; solicitors do not want to spend hours waiting at court, as they run busy practises and would much rather be doing productive work on other cases. Whilst it is theoretically possible to carry out some other work whilst waiting at court, this is not generally practical due to the lack of private, quiet facilities, and the confidentiality issues that arise if one works on client files in a public place. The waiting and travel rate does not make a profit for experienced senior solicitors, but is in fact loss making.
60. One of the causes of the perceived problem with travel and waiting time is that the current arrangements allow solicitors from outside an area to be members of a local duty scheme. This has resulted in solicitors from the local area having to travel further to join other schemes. One solution to this may be to consider limiting the membership of Duty Solicitor schemes to the solicitors' own borough and the next one only. Solicitors' firms looking for work would not then need to be on multiple schemes across London, which would greatly reduce the travel and waiting time.

## **Bid Process**

61. We note the details of the bidding process in the consultation paper. We cannot see however that any of the proposed options overcome the problem that buying on price will inevitably lead to a compromise in standards. If the first option, in paragraph 4.56, is taken, then defendants will receive a fixed price deal under which it will be impossible for any solicitor to offer a more thorough service to any individual, even if it is needed. If the market clearing approach, in paragraph 4.58, is adopted, we cannot see that the lower price bidders will upgrade their service to match the higher bid price; they are likely instead to simply take the higher profit. We are not persuaded that the proposals for monitoring quality would prevent this from happening.

62. A number of proposals for pricing of work are set out on page 22 of the consultation paper. If, as suggested in most of these options, the work is divided into police station and magistrates' court work, it will clearly be more profitable for firms to concentrate on the police station work, since this normally takes less time. As we have pointed out elsewhere in this response, there will also be pressure on firms to make the magistrates' court cases as short as possible in order to stay within the average case cost awarded. This is likely to impact negatively on the quality of service offered to clients.
63. The Society is also concerned at the proposal, in paragraph 4.25, that in order to provide own client work, solicitors would be required to bid for a duty slot. There are a large number of reasons why a solicitor may not wish to be on a duty rota, such as childcare and disability issues. This should not however prevent them from attending their own clients at the police station on request, and it could potentially raise a number of discrimination issues.

### **Bid Zones**

64. The proposal to allow firms located outside London to enter the competition is ill considered. We have serious concerns that this could lead to significant difficulties for clients and have an adverse impact on access to justice and on the efficient administration of the justice system.
65. Many boroughs of London contain densely populated areas of clients of limited means and education. Such areas of poverty often have high levels of drug abuse and crime. Evidence from local solicitors shows that clients living in these areas of London rarely travel outside of their immediate geographical area of residence. Many clients will simply not have the resources or means to travel to solicitors' offices of any distance; some have never even travelled on the underground railway in London. The Law Society is informed by solicitors practising in these areas that many of these clients simply do not attend conferences with Counsel when the conference is held outside their own area, since they are not capable of finding their way to Counsel's chambers, and it is not uncommon for barristers to have to travel to see the client.
66. The result of this proposal may be that instructions will not be taken and cases will not be able to be properly prepared. This will reduce quality and increase costs in the Criminal Justice System with cases not being ready.

## Law Society Practice Rules

67. The proposals as drafted present a number of difficulties with regard to the Law Society's Practice Rules, which represent best practice. It should be noted that many of the requirements of the Rules are reflected in the Legal Services Commission's transaction criteria, against which firms have been audited for several years. Given that firms will be required to submit the lowest bids possible in order to win a contract, the Society cannot see how it will be possible for these best practice standards to be maintained. Attempting to carry out all of the work required on a client's case in the shortest possible time, and for the lowest cost, is quite clearly incompatible with best practice, and it is the clients who will suffer when these standards are cut. The Legal Services Commission has itself acknowledged that firms cannot be obliged to carry out work that is not paid for, and has amended the wording of its manuals accordingly to reflect this principle. If the Commission is to continue to require firms to carry out everything required in the transaction criteria, then this work will need to be remunerated properly.
68. In paragraph 4.21 the document asks whether each office which a bidder would need to have available for seeing clients should be recognised by the Law Society as meeting the Society's practice rules. The following considerations are relevant:
- The practice rule referred to is rule 13(3) of the Solicitors' Practice Rules 1990.
  - Whether an office has to meet the standards of rule 13(3) is not a matter for the LSC - it is a matter for the Law Society to assess; all "offices" have to comply with the rule, although not all office space necessarily constitutes an "office".
  - Perhaps what the Commission is meaning to ask is whether the office (or office space) which needs to be available would have to be an "office" - and would thus have to meet the standards of rule 13(3)) - or whether it might be a mere consulting room not constituting an "office" for the purpose of the rule.
  - In any case, once the new Code of Conduct comes into effect (which is a matter entirely in the hands of the Government) the Solicitors' Practice Rules 1990 will be repealed, along with the requirements of rule 13(3).

## Supervision

69. The Society is unclear as to the references to "supervising solicitors" at paragraph 4.44.
70. "Supervision", in the Society's view, is something that is inherently carried on within an organisation (whether a firm in private practice, a law centre or the PDS), and not something that can be done as an external activity. We do not therefore understand the question that asks whether supervising solicitors should be allowed to work as supervisors for only one supplier. Clearly a supervisor can only supervise the work of the supplier out of an organisation of which the supervisor is part.

71. For example, the provision in section 22 of the Solicitors Act 1974 that the drawing of an instrument relating to any legal proceeding is an activity reserved to solicitors and certain other professions, and can only be done by a person not so qualified if it is done at the direction and under the supervision of a person who is so qualified *who is an employer or fellow employee*.
72. It may be possible for solicitors to supervise (in the Law Society's sense of the word) fee earners who do not work exclusively for the firm. This is an issue which has arisen in other areas of work (e.g. immigration work) where outdoor clerks might work part-time for a variety of firms. Each solicitor's firm must provide appropriate supervision in respect of the work undertaken on its own behalf.
73. If by "supervision", the LSC is referring to some kind of monitoring, rather than true supervision, this would be unlikely to meet the requirements of the Law Society for supervision.

## **Constitutional Issues**

### **The Legal Issues**

74. The government has a legal duty to conduct impact assessments under the Race Relations Act and the Disability Discrimination Act. These impact assessments have not been carried out, and the Society does not believe it is therefore appropriate to consult on these proposals until full assessments have been conducted. We have pointed out elsewhere in this response the possibility of the proposals having an adverse impact on ethnic minority clients and communities, resulting from a loss of specialist services, or of fewer firms that are able to provide an adequate service to clients who may need interpreters etc. The Society has concerns that this may constitute indirect discrimination, as defined in anti-discrimination legislation.
75. For all the reasons outlined in the previous sections on quality, a price competitive bid round will in our view inevitably result in a drop in the number of suppliers, and in a reduction in the quality of services provided by those remaining suppliers. The Society has serious concerns with regard to the impact on the rights of clients under Article 6 (b) of the Human Rights Act, which establishes the right of a client 'to have adequate time and facilities for the preparation of his defence'. It is questionable whether firms which survive a bid round based on contracts being awarded to the lowest bidder would be able to provide such 'adequate time', in particular when language, mental health or other difficulties require more time to be spent obtaining instructions.

## Sustainability of the Profession

76. The Legal Services Commission has stated that one of the aims in setting up the Public Defender Service (PDS) was to enable the Commission to see how much it costs to provide Criminal Defence Services. According to the figures in the PDS annual report however, it appears that the PDS average cost per case is more than private practice. It should also be noted that the case costs for the PDS do not cover the cost of pensions; cost of training; insurance; maintaining an overdraft; practising certificate fees; HR support; IT support; management support (at a local office level). From this comparison it is clear that firms in private practice are providing excellent value for money, and it is very hard to see how these firms could be expected to provide this service for less than they do at present.
77. The PDS Annual Report 2003/2004, under 'Innovation and Future Plans' describes a number of crime prevention initiatives currently being undertaken by the PDS, such the pilot Criminal Justice Intervention Programme and the Community Justice Centre. A number of training initiatives are also described. The cost of this work will presumably be absorbed as an overhead of the PDS, solicitors in private practice could not be expected to do this or to factor it into any competitive bid.
78. The legal aid market is a closed market. It is not an open free market. The entry hurdles to the profession are formidable and expensive. Once a person joins the profession, converting that membership to personal professional profit is equally difficult and risky.
79. There are huge regulatory and financial implications involved in setting up a firm. There is no real chance of finding funding from banks without a track record of production of fee income. That record can only be achieved at the expense of the junior solicitor's employer today, who will be their competitor tomorrow.
80. Many solicitors operating small firms are concerned that having trained and qualified their junior grade qualified staff, they then move to another firm to compete against their own client list. The proposals will exacerbate the existing reduction in training contracts being offered; it will mean that new entrants to the profession have a harder job in finding training posts; and it will increase the age demographic of the workers in this sector. When the older, experienced solicitors are gone, their knowledge base and expertise will be gone with them. In the proposed climate it is unlikely that there will be trainees or junior trained staff ready to take their place.
81. The age and demographic profile of criminal practitioners has been well documented. The most recent Law Society age profile study of CLAS membership<sup>7</sup> showed that over 45% of duty solicitors are aged between 45 and 74, with 30% aged between 50 and 74. Many practitioners represented in this age group who do not win contracts in a competitive bid round are likely to simply retire. Once the pool of suppliers has been reduced in this way, it will be extremely difficult to attract these suppliers back into the market. This has potentially drastic consequences for supply, in the event that firms who have been awarded contracts subsequently drop out of the market due to having submitted an unsustainably low bid.

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<sup>7</sup> CLAS Membership Age Profile; Law Society; April 2005

82. Furthermore, if a bid round leaves only a few large firms dominating the market, there will be even less incentive for young lawyers to enter criminal defence work, given the significantly lowered opportunities for promotion or of achieving partner level in such firms.
83. If there is a significant reduction in the number of lawyers willing to undertake publicly funded work, it may be difficult to support an ailing system by flying in lawyers from other jurisdictions (as has been possible for example with dentists and doctors). Lawyers from other commonwealth countries are able to practice in the UK after passing the Qualified Lawyers Transfer Test (QLTT). However, it is unlikely that many would be attracted to do so, given the generally higher salaries that experienced criminal lawyers can command, especially in those countries where the profession is not split, since they undertake much of the work done by barristers in the UK. Rather than being obliged to resort to such solutions, it is surely preferable not to risk creating the problem in the first place.
84. We have concerns about how new suppliers will be able to enter the market if bids are to be assessed through a review of criminal files and case outcomes. We are also concerned that the procedures for rejecting a new supplier (para. 4.15) are not clear and transparent.

### ***Crown Court Work***

85. Much quality and specialist work is undertaken by firms who concentrate on Crown Court work. Due to the fact that most of their cases are indictable only Section 51 Crime and Disorder Act 1998, the magistrates' court hearings will be billed as part of the Crown Court claim for costs. These firms will therefore have a lower volume of magistrates' court case claims. However, it would be short sighted to lose their experience and therefore quality from the Criminal Defence Service.
86. Whilst the Crown Court and magistrates' court remain separate and contracting has not yet been extended to the related Crown Court work, any substantial changes to contracting in the lower courts will remain premature, complex and difficult to implement efficiently.

### **Independence of the Profession**

87. There is an overwhelming need to maintain public confidence in the rule of law, and for the public to be assured that a robust and independent criminal defence system operates in this country. Recent years have seen an increasing level of control of people's lives by government through vast amounts of new legislation, and the attendant restrictions on liberty and human rights. There has been a consequent shift in the balance of power from the defence to the prosecution. There is therefore now an even more pressing need for the public to be reassured of the independence of defence representation. For this reason, it would be unhelpful to reduce the funding of criminal defence services even further below the level of the prosecution and investigatory services.

88. If the main objective of the proposals is to reduce costs, there is a real risk of a loss of control over the manner in which government departments prosecute cases. One example is that of challenges to prosecutions by the Serious Fraud Office, which are only possible through public funding. If costs to criminal defence services are cut, there will be an increased risk of miscarriages of justice. Many cases will need to be revisited, resulting in increased costs to the criminal justice system, and increased distress for the victims of crime.

## Equality and Diversity

### Equality and Diversity Implications for the Profession

89. The LSC consultation paper indicates that black and minority ethnic (BME) firms are over-represented amongst suppliers with criminal contracts. The initial assessment by the LSC is that the proposals are unlikely to have negative impact on these firms but that they will keep this under review. It is the Society's understanding however that the Commission does not have accurate figures upon which to base any impact assessment, nor is there an agreed definition of what constitutes a 'BME firm'. The figures on page 40 of the consultation document give a definition of 'owned or controlled', but this does not take into account firms that may be owned or controlled by white partners, which employ largely BME staff and whose clients are from BME communities. It is the Society's view that there are considerable risks that the proposals will have a negative impact on BME firms and their clients, however it is essential that thorough research is undertaken, and a clear definition agreed as to what a BME firm is before the proposals contained within the paper can be properly considered.
90. It is accepted by the LSC that a potential outcome of price competitive tendering is a reduction in the supplier base. It is likely that price competitive tendering would disproportionately affect small firms, as they would not be able to afford to 'predatory price' when bidding – i.e. submit very low bids as a loss leader, in order to win a contract and gain on the more profitable work. According to the LSC's current figures, 45.9% of London criminal suppliers are BME owned<sup>8</sup>. There is a predominance of small and sole practitioner firms amongst these suppliers (the Law Society Annual Statistics 2003 showed the ethnic profile of sole practitioners to be 12.5% which is significantly higher than the profession wide average of 8%). This is due to a number of reasons including the barriers many BME solicitors face in getting employment in larger firms and many therefore end up setting up as sole practitioners.
91. Price competitive tendering may place larger organisations (and this applies to legal and non-legal services) at an advantage because they are able to benefit from economies of scale and robust infrastructures which allow them to cope better with the process and bureaucracy requirements. Smaller firms may find it more difficult to compete on these grounds alone. If this is the case, then BME firms will be disproportionately adversely affected by competitive tendering. This is likely to lead to a reduction in the diversity of the supplier base with the consequent impact on the choice, access and quality of services to all clients and in particular, vulnerable clients.

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<sup>8</sup> Page 40 of the consultation paper

92. There is also evidence to suggest that disabled solicitors are also disproportionately represented amongst small firms. Any measures which particularly threaten small firms will therefore have a disproportionate impact on disabled solicitors as well as BME solicitors.
93. The proposals could potentially impact upon issues such as long hours, work/life balance, children and other caring responsibilities. If firms are forced to bid low in order to get a contract, then it is likely that either cases will not be prepared adequately, or solicitors will have to do at least some unremunerated work. The result of this is that solicitors will have to do more work in order to make any profit. This will have a disproportionate effect upon women solicitors, who are more likely to have family responsibilities, which make working long hours difficult or impossible. It will also negate the work which has been started to attempt to address the culture of long hours within the profession.
94. The paper also indicates that the LSC wants to encourage new entrants into this supplier market. The demographic trends indicate that more BME solicitors will be entering the profession in the future. It is likely that an increasing number of new entrants into publicly funded legal services will be from BME groups. If the current pattern of BME firms being over-represented in small/sole practices continues, and PCT is likely to have negative impact on small firms being able to or wanting to enter this market, then the long term impact of this will again be a reduction in suppliers, and especially in the number of BME firms in this field.
95. The Society's data (minority ethnic fact sheet) shows that, on average, BME solicitors tend to spend a higher proportion of their fee earning time on crime (as well as personal bankruptcy and welfare benefits). Approximately 50% of small BME firms hold a criminal contract in London. The Society has serious concerns about the impact of the potential reduction of suppliers have on the employment opportunities for BME solicitors, and the impact this will also have on the service to BME clients (see below).
96. More specifically, if PCT goes ahead, particular attention needs to be paid to how contracts will be packaged. The LSC must aim to attain a position where all suppliers are able to take account of equality and diversity issues and the different needs of clients.

### **Equality and Diversity Implications for Clients**

97. The Society welcomes the recognition in paragraphs 4.33 – 4.36 of the consultation paper of the need to ensure that the services provided by specialist suppliers are retained in the system, since these suppliers very often deal with the most vulnerable clients. However, it is hard to see how many of these suppliers can be preserved within the system envisaged by the proposals. Even if some of these specialist suppliers were to win contracts following a competitive bid round, it is unlikely that they would be able to maintain their current levels of service to their clients, if the key criterion to be employed by the Commission in awarding contracts is price.
98. The Society agrees with the LSC's stated aim of improving the quality of services to users of public legal funds. However, if the net result of trying to do this is reduce access to legal aid for clients (many who are vulnerable or face financial, social and educational exclusion), then the purpose of widening access to justice for these groups will not be achieved – and the quality of the services will be immaterial to those client groups who cannot access them.

99. Access may be reduced for particular groups (such as Black and Minority Ethnic groups; disabled groups and women clients) for a number of reasons, including the reduction of the diversity of the supplier base and therefore a lack of publicly funded provision as a direct and indirect result of the PCT process. If many of the small 'niche' and specialist suppliers are lost from the system, it will be extremely difficult to replace their specialist knowledge and skills, and the clients they serve, who may be disabled, or from specific ethnic communities, will suffer.
100. Many women who find themselves within the criminal justice system have experienced family breakdown, domestic violence etc. Many will have built up a relationship with family lawyers, who know the client and understand the issues they are facing. These clients will want the solicitors they know and trust, to represent them in criminal proceedings. They may be reluctant to disclose a history of violence and abuse to a solicitor they have never met before, and therefore their defence, or mitigation, will never be put fully before the Court. Firms which practice primarily in family law, but who offer criminal defence as a relatively small part of their practice are unlikely to be able to bid successfully against the firms which have large criminal practices. The loss of these solicitors to the criminal justice system will have a detrimental effect upon women clients.
101. The supplier base is likely to be reduced directly as a result of the CPT process itself and indirectly as many providers feel that it is simply not cost effective to provide a publicly funded service. This could lead to "deserts" where clients simply do not have access to services because suppliers do not want to enter the market.
102. The push towards driving down costs may have particular implications for clients who need more complex support or who are not an "average" case. It is almost inevitable that when firms bid for contracts, they will seek to put in competitive bids which are more likely to be accepted by the LSC, since the consultation paper makes it clear that contracts will be awarded to those who bid the lowest. The temptation may thus be to put bids in based on the more straightforward cases, or those which have a predictable and certain outcome. Firms may find it difficult to sustain profitability if they take on a number of cases where the profit margins are reduced significantly or disappear completely because, for example, a client requires more time because of communication or language problems; mental health difficulties or because documents need translating etc.
103. There is a risk that clients requiring an interpreter will find it harder to access a solicitor able to take on their case, for the reasons outlined above. Even where a solicitor does take on the case, the pressure to reduce costs is likely to mean that an interpreter may not be instructed, and a family member is used instead for taking instructions, or the court interpreter is used for hearings. This could have implications in terms of the impartial and accurate recording of the client's instructions and statements, and could be in breach of Law Society rules and procedures. The proposal for an 'exit mechanism' for unusually costly cases would not cover such cases which may be more expensive than the average, but which do not qualify as 'unusually' costly.
104. Home Office<sup>9</sup> statistics show an apparent bias against those of a BME background in the Criminal Justice System (CJS). Black people are three times more likely to be arrested than white people. BMEs account for 24% of the male prison population and about 31% of the female population. The overall percentage of the national population made up of BME groups is 8.7%.

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<sup>9</sup> "Statistics on Race in the Criminal Justice System – 2004" p.viii

105. NACRO suggests that race and ethnicity cannot be eliminated as a factor which impacts on the decisions which are made by magistrates<sup>10</sup>
106. The composition of the Magistracy in 2003/4 revealed that of 26,199 lay magistrates, 1,754 are of BME origin. Of 278 District Judges, 19 are of BME origin.
107. The disproportionately large number of BMEs clients appearing before the magistrates' courts are therefore being dealt with by a predominantly non BME magistracy. The perception of bias and the sense of alienation which such BME defendants/clients must feel in the face of these statistics is real and overwhelming. BME solicitors and those advising BME clients are daily confronted with attitudes that leave them in no doubt that the ethnicity of detained persons at the police station and as defendants at court, provide an additional hurdle that they have to surmount.
108. In the face of those attitudes, when a BME advisor is instructed, the BME user of criminal legal aid services is often provided with some comfort and assurance when they know that the legal advisor is someone who understands that extra tier of pressure brought on by their ethnicity.
109. Clients with a BME background, or with a disability will find it harder to access justice as a consequence of firms being unwilling to take on more difficult or time-consuming cases, or because BME firms are unsuccessful in the bid round. As a result there is likely to be a loss of confidence in the entire system by these clients.

### **Monitoring the Impact on Clients**

110. The consultation paper makes some comment on the fact the LSC will monitor the impact of the proposals on suppliers but says very little about monitoring the impact on diverse client groups and more widely, on access to justice. This is essential if the LSC is to support its view, as set out on pages 39 and 41 of the Impact Assessment, that these proposals are unlikely to have a negative impact on BME and other vulnerable clients. The Society would be interested to know what proposals the LSC has to monitor the potential impact of these proposals on clients, in particular, BME clients, and those with mental health or language issues.
111. Clients from disadvantaged groups (for example, from BME groups; or lesbian/gay clients) have every reason to be suspicious of the "establishment". For them to have any degree of confidence in the fairness of the criminal justice system, they must have confidence in their own solicitor. If the small firms who serve these client groups are put out of business, clients will have no real choice of solicitor, and may feel that their case has not been properly put, because they are likely to feel that their solicitor does not understand their situation.
112. The LSC has a duty under Section 71 of the Race Relations Act 2000, not only to seek the views of BME firms in the consultation process, but, separately, to conduct an impact assessment in compliance with their duty to promote equal access to justice for BME consumers, and non-discrimination against BME suppliers in the procurement of legal services. The LSC appears to accept that they will be in breach of this duty, since they do not currently hold accurate figures for BME firms or clients, or even an accurate definition as to what is meant by a BME firm.

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<sup>10</sup> "Barriers to Equality", NACRO 2004 p.9

## Crime Prevention

113. This issue of crime prevention - which is one of utmost public importance - has been overlooked in the LSC's thinking about how to reduce their budget. Young black men are disproportionately represented in the crime statistics on the wrong side of the law. According to the Black Solicitors' Network (BSN), many young black men who have passed through the criminal justice system are often left with such a deep sense of anger at their treatment, that rather than be deterred or rehabilitated after their sentence, they are more likely to become hardened to authority and callous to the impact of their actions on the society which they feel marginalized by and alienated from. If competitive tendering results in a reduction in the number of BME suppliers, the positive side effect of providing role models to such clients would have been removed.

## Financial Issues

### Frontier Economics Report

114. The Frontier Economics report bases its findings on 303 responses to a survey of all legal aid suppliers; this represents just 10% of all contracted firms (both civil and criminal). The LSC's conclusion that there is 'over-supply' of criminal firms in London is based on 16% of that 10% responding 'Yes' to a question which asked whether they would be prepared to take on more work at current rates. Aside from the fact that there could be a number of different reasons for this small group of practitioners responding in this way - other than spare capacity - this can hardly be considered a sufficient sample on which to base proposals for such enormous change in the criminal legal aid system.
115. The report also notes that the firms in the sample stated that on average they relied on legal aid for 59% of their income, yet the LSC has estimated that half of the supplier base is less than 25% reliant on legal aid work. The report acknowledges that this may have produced an unrepresentative response: "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 legally aided work..... needs to be carefully considered"<sup>11</sup>
116. Page 40 of the paper states: "Firms for whom income from publicly funded work constitutes a greater proportion of their total fee income are also more likely to be willing to take on more work". Given the small number of firms that responded to the survey, and their unrepresentative nature, the Society believes that to infer from the report findings that there is over-supply of criminal firms in London is a flawed conclusion.

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<sup>11</sup> Frontier Economics: A market analysis of legally aided services provided by solicitors, December 2003; page 33

117. The report also suggested that pilots should be undertaken to test the practical and cost implications, and the effectiveness of alternative options for the supply of legal aid services, a number of which are proposed in the paper. : “An appropriate evidence base for any significant change to policy would be provided by a sequence of pilots”.<sup>12</sup> The LSC has however chosen to ignore this recommendation in the report and proposes to introduce Price Competitive Tendering with no preceding pilot period.

### **Impact of New Legislation on Case Costs**

118. In the past 10 – 15 years there has been a flood of regulatory law and statutes introduced into the criminal justice system, creating a significant number of new offences, and impacting on the manner in which the defence case is prepared. Rights to silence have been changed; burdens of proof and changed rules of character evidence have complicated many trials. Despite the large number of bills in last year’s legislative programme, this legislative year has already produced another 6 bills; the impact of these on the defence budget is not yet known. The government must start to take into account the impact of new legislation on all areas of the criminal justice system, and to factor any additional expenses into its budget.

119. In addition to the impact on costs to the system generally, one key effect of the new legislation is that until these provisions have been in place for a certain amount of time, it is impossible to predict precisely what effect these changes will have on the amount of time that will be required to prepare the defence case, and thus average case costs. Despite this, practitioners are being required to submit ‘blind bids’, based on current average case costs, which are likely to be quite different over the next few years as the impacts of new legislation starts to be felt.

120. A large number of changes have been brought into force by the Criminal Justice Act 2004 (CJA), all of which could have costs implications. The Criminal Procedure Rules (CPR), and the Early Trial Management Fee (ETMF) have also just come into play, and all three will significantly affect the costs in a case. The hearsay and bad character provisions are bound to increase the time which will be spent on a matter in almost every case, yet with little experience of these provisions, how can a practitioner be expected to submit a realistic bid? The hearsay provisions make hearsay evidence automatically admissible, unless the Court finds an exception. In some cases, arguments will have to be prepared to persuade the court to find one of the exceptions, and whilst each case will be different, it is impossible to predict how long will need to be spent on such arguments.

121. The bad character provisions cover both the defendant, and any prosecution witness. Bad character includes both previous convictions, and other reprehensible behaviour. If one of seven gateways is passed, then bad character evidence must be admitted. The prosecution are using the bad character provisions from the commencement of the matter in the police station, and in almost every single case. In the police station, the consequence is that more time is spent advising the client, as there is further disclosure to consider, and often a further interview.

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<sup>12</sup> Frontier Economics: A market analysis of legally aided services provided by solicitors, December 2003; page 98

122. When the matter reaches court, the CPR set out a procedure by which the issue is considered, either in a separate hearing, or a longer plea and directions hearing (PDH). To avoid the admission of the bad character evidence requires a legal argument, which can only be embarked upon after considerable investigation, which is individual to each defendant. The defence's ability to cite bad character evidence of the prosecution witnesses also requires a substantial amount of investigation and research. It should be noted that the prosecution will have whatever resources it requires to establish the bad character of the defendant, yet the defence will have limited resources to do the same for prosecution witnesses.
123. Defence solicitors cannot control the number of applications which the prosecution will make under the new provisions, and all of which will require a considered response. These will normally be dealt with at a separate hearing prior to the trial. The case progression direction envisages more than one case management hearing, and there will be more time spent on dealing with court and prosecution case progression officers.
124. The above provisions have been in place for insufficient time for anyone to predict with any accuracy how they will impact on average case costs. What is clear is that they affect a large number of clients, yet each client will be affected in a different way, and the length of time required to be spent as a result of these provisions will be quite different in each case.
125. Significant concerns arise from the proposal that firms submit bids based on average case costs when they have very little idea how much these costs are likely to be in the next few years. One obvious danger is that the bids submitted will be too low, and that firms will be unable to carry out all the work required in a case, with the resulting impact on the quality of service to the client. Another likely consequence of contracts based on average costs that do not reflect the true cost of the work that will be required as a result of these new initiatives, is that firms will be forced to undertake a large proportion of work for nothing, and may go out of business, or find it financially unviable to continue with a legal aid contract. We do not therefore consider it appropriate or advisable to propose the introduction of a competitive bid round for Criminal Defence Service contracts whilst there is so much uncertainty regarding the extent of the work that will be required to run a defence case in future.

## **CDS Bill**

126. The consultation paper proposes that firms bid on an average cost per case, and for a specified number of cases. This does not take into account the potential impact of the CDS Bill on average case costs. The re-introduction of the means test is likely to mean that the number of representation orders granted will be significantly reduced. This will introduce a high degree of uncertainty as to the future average case cost, and will make it extremely difficult for firms to estimate what this average cost might be. For this and other reasons outlined below under the heading 'Impact of New Legislation on Case Costs', we believe that it would not be prudent to introduce such a system until the full impact of the CDS Bill and other new legislation has been properly assessed.

## Average Case Costs: Impact of other Agencies

127. Every criminal case requires certain fundamental pieces of work to be undertaken. Not every case or type of case needs every item of work to be done. Some cases or case types need more than the 'average' amount of work to be done.
128. The LSC will however, expect solicitors to calculate an 'average' case cost, despite the unknown factors outlined in the sections above and without knowing the way that their competitor firms do their work, pay their staff, or run similar cases. Under the proposals, having identified how much a case costs to run, firms will not only decide by how much they are prepared to cut their costs, but also by how much their likely competitors are likely to be willing to cut their costs. The Society is unclear how, on this basis, any level of quality is to be preserved, or how firms will be able to submit realistic bids.
129. A fundamental concept is being ignored by the Commission in its rush to change the way that publicly funded legal services are provided. Unlike many other areas of enterprise, there are numerous unquantifiable items of work that affect the work of solicitors working on cases in their clients' best interests.
130. As we have pointed out above in relation to new legislation, there are numerous external impacts on the work of a criminal defence lawyer, none of which can be predicted or often quantified, for example:
- The police;
  - The ability of the state to criminalise or decriminalise behaviour (The laws relating to sexual offences and cannabis are two examples of recent change);
  - The ability of the state to change the manner in which processes apply to cases from one year to another. Narey and legal aid are two recent examples;
  - The reaction of the courts to charges presented to them;
  - The reaction of defendants to the charges. The level of cracked trials and 'no shows' by defendants remain two of the constants in the criminal justice system;
  - How witnesses deal with their participation in the criminal justice system;
  - The implementation of new contracts in the public sector;
  - The raft of new rules coming from national and regional government, which require more work in preparing the defence case.
131. The Society believes it is essential that detailed costings are undertaken into the impact of the implementation of the many new laws introduced under the current administration. Other agencies will have savings or bear increased costs from the implementation of these proposals. No such costings appear in the paper, but it is vital that these are understood.
132. The services provided by the police and prosecution are publicly funded, yet no moves have been made to limit their funding in the same way that criminal defence services are being restricted. It is essential that the cost of the criminal justice system is examined in its entirety if the government is serious about obtaining 'value for money'.

## Waste in Other Areas of the Criminal Justice System

133. It is important that the LSC and the government understands the spending on criminal legal aid in the context of the Criminal Justice System generally, and that unnecessary expense is addressed in other areas, rather than simply cutting the very area which will impact on vulnerable clients. The LSC has itself acknowledged that waste in other areas of the system needs to be addressed, and the Society understands that the Commission is currently working with the Criminal Law Practitioners Association to conduct research into this.
134. There are numerous examples of areas where costs could be saved in the Criminal Justice System; these are examined in detail in Appendices 2-5:
- Appendix 2: Use of privatised detention and security providers
  - Appendix 3: Agencies spending unnecessarily in order to protect next years budget
  - Appendix 4: Centralised custody suites
  - Appendix 5: The PECS system

## Contracts

135. In any competitive tendering process, solicitors would only be able to submit bids for work based on their knowledge of the present financial position of the LSC and their best guess as to the future.
136. Contracts cannot be future proofed. The profession has seen an enormous amount of change in the last fifteen years. From the transfer of the legal aid administration from the Law Society to the Legal Aid Board to the Legal Services Commission; including fixed fees, the first round of contracting and the second round of contracting, the legal landscape is nothing like it was less than a decade ago. Solicitors who have experienced all that change will find it very difficult to have any confidence that the landscape will remain the same for any length of time in the future – particularly with the experience of the one-sided changes that have come about under contracting.
137. The proposal<sup>13</sup> that contracts may be awarded for variable lengths, between one and three years, is of particular concern. Most businesses in London hold leases on their premises of five years or more, and have staff employed on long-term contracts. It is not clear how any reasonable business planning with regards to staff, premises, IT support and general infrastructure can be possible with a contract of only one or two years.
138. An additional concern arises from the proposal that those who submit the lowest bids will be offered longer contracts. Thus a contract award of only one year is effectively a signal to the firm to submit a lower bid at the end of that year, or risk losing their contract. Firms in this position who may have submitted a realistic bid will be forced to submit an unrealistically low bid simply in order to retain their contract, and the quality of service to the client is likely to suffer as a result.

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<sup>13</sup> Consultation paper, page 27

## **Prison Law Work**

139. In paragraph 4.35 of the consultation paper the Commission seeks views as to whether Prison Law and other classes of work should be included in any bid round. Many criminal firms which hold CDS contracts also conduct prison law work, in particular adjudication hearings, which often relate to existing clients for whom they have acted in the original proceedings. In such cases it would not appear to make sense to separate the prison law work from the rest of the criminal defence work carried out by the firm.
140. One area of work done by prison lawyers relates to oral hearings before the Parole Board. These hearings are held to consider whether it is safe for the prisoner to be released on licence. The hearings are inquisitorial rather than adversarial, there are no rules of evidence, and the involvement of independent experts is often crucial. The consequences for the individual concerned are also very significant – people who do not succeed in obtaining their discharge are likely to spend at least a further two years in prison.
141. Clients may also be represented in these hearings by the criminal lawyer who represented them in the original proceedings. However, some firms hold a prison law only contract, and tend to specialise mainly in these type of hearings. It may not be appropriate to include such firms within any bid round, given that they do not do any other type of criminal defence work.
142. It is important to ensure continuity of representation in these types of cases, whether this is by the criminal lawyer who represented the client in the criminal proceedings, or whether it is a firm with a prison law only contract. Long-term prisoners are often moved around the country, without regard for any legal proceedings in which they may be involved. This would have considerable financial implications in a fixed fee system, both for practitioners and for the LSC. If a firm has been awarded a set fee for a Parole Board hearing, it would presumably be on the basis that the client would not be moved to the other side of the country a fortnight before the hearing. If the firm continued to represent the client, the case would quickly become unprofitable, and once this had happened a few times firms might decide that they couldn't afford to do the work anymore. An alternative would be to allow the firm to hand the case to another firm in that part of the country. This would mean the LSC paying two fixed fees for the one case, which would increase costs to the public purse.

## **Consultation Paper Questions**

143. We have not directly addressed the questions in the consultation paper, although many of the questions have been answered in the main body of our response. We do not consider it appropriate to respond to the questions which request input as to how the competitive bid round might work, given our strong opposition to these proposals.

## Conclusion

144. The modern legal aid system in England and Wales dates from the Legal Aid Act 1948, which was part of the Attlee Government's commitment to state support for people in need. Since then, however, successive governments have allowed that commitment to be undermined, primarily through under-funding. The Society believes firmly in the principle that free legal advice for those who need it but are unable to afford to pay, is one of the hallmarks of a free and democratic society.
145. Since its establishment in April 2000, the LSC has sought to meet its objective of securing value for money through the introduction of exclusive contracts with suppliers for both civil and criminal work, within a cash-limited budget. The Society acknowledges the need to maintain control of the legal aid budget, however, any increase in the cost of criminal defence services cannot be addressed without taking into account the cost of the whole criminal justice system. The current government has introduced a vast range of new legislation and new initiatives into the criminal justice system; the full impact of these on the cost of defence services has not yet been assessed. Increased public money has been put into the police and prosecution services, which has also served to impact on defence costs.
146. Any attempt to obtain true 'value for money' from the system must not only look at the cost of the criminal justice system as a whole, but must put the interests of the client first. The proposals contained in this consultation paper fail to address some of the key causes of increased defence costs, and instead propose that defence solicitors engage in a bidding contest, with contracts being awarded to the lowest bidder.
147. It is clear to the Law Society that the consultation document is proposing a scheme which will inevitably reduce access to justice and the quality of advice and representation available to legally aided clients. On that basis the Law Society therefore opposes the proposals on behalf of the public, solicitors and the proper administration of justice.

**The Law Society**  
**May 2005**

## Client Case Studies

### Case 1

D is a man in his early thirties. He has a long history of mental health problems and long-term drug misuse. He regularly commits offences of violence, theft and robbery to support his addiction and often commits offences of criminal damage. He suffers from drug induced psychosis and schizophrenia. He appears in custody at the local Magistrates Court, violent, volatile and vulnerable. He bangs on the cell door and shouts.

His regular established Solicitor who has represented him for nearly 20 years attends court. The client is reassured to see his Solicitor whom he trusts and who knows his past history. He is quickly calmed and becomes less of a security concern to those in control of custody. He has been arrested on warrant. The Crown Prosecution Service has no papers. A couple of hours later their papers are faxed to them. They are incomplete. The list of previous convictions is not up to date. The Defendant is persuaded by the Defence Solicitor to admit a less serious offence, which is acceptable to the Prosecution.

The court is considering ordering a Pre-Sentence Report from the Probation Service. The Defence Solicitor knows that the Defendant has and still remains unsuitable for any community penalty as Probation have advised on previous occasions. The Defence Solicitor advises the court that this is the case. The Defence Solicitor produces medical reports from another recent case regarding the Defendants' psychiatric condition. He lends the Crown Prosecution Service his case papers so that they can give the facts of the case to the court. The Defence Solicitor advises the court of the Defendant's most recent convictions and their disposal sentences, which do not appear on the Prosecution's list of convictions. The Defence Solicitor, having the benefit of having acted for the client in his previous cases is able to advise the court as to the date of the offences showing that this case pre dates cases more recently dealt with. The case is disposed of without the need for any adjournment because the Defence Solicitor was able to provide all the information required by the court to properly deal with the Defendant.

### Case 2

N is a young Asian woman. She was the victim of serious sexual violence as a child carried out by a member of her family. She was the subject of domestic violence in an arranged marriage made by her family. She ran away from home and was befriended by men who introduced her to hard drugs and prostitution. She has children who do not live with her. She has a long-standing Heroin and Crack Cocaine habit.

She is arrested and charged on a new theft matter and is taken in custody to an East London Magistrates Court. She contacts her established Solicitor in North London. He knows her very difficult background. She has told him all about her harrowing past in detail during the course of previous cases when she was represented by the same Solicitor. She finds it difficult to talk about her past, but does not have to re-open and repeat it all again to another Solicitor. The established Solicitor has travelled from North to East London to represent her because he knows all about her. She is not produced by the escort company from the police station until late in the morning. Hours of waiting time are incurred by the Solicitor because of the inefficiencies of the escort company.

At court she is still withdrawing from drugs. She wants to apply for bail, but her Solicitor knows that at the present time she is of no fixed abode. Pimps have attended the court to observe what happens to her. Her established Solicitor with whom she has a long-standing professional relationship based on trust persuades her not to apply for bail as she needs to remain in custody for her own safety and welfare. No bail application is made and no court time is wasted.

She pleads guilty and comes before the court three weeks later when an expedited Pre-Sentence Report has been prepared by the Probation Service. The report recommends a further adjournment for a Drug Treatment and Testing Order assessment. At the second hearing the same Solicitor is in attendance. The Solicitor has managed to contact the woman's family whom he knows from previous cases. They will provide her with accommodation. The Solicitor is able to deal with the previous failing to appear at court matter with information from his personal knowledge and explain those circumstances. The Solicitor is known to the court and respected and therefore what he gives the court in information is accepted as accurate and not misleading. A successful bail application is now made. The client is now drug free. She keeps her appointment with the Drug Treatment and Testing Order agency. She returns to court on bail for sentence. On that date the court is given papers regarding another outstanding case, which has come from another court. The East London court does not receive the full court papers from the other court. The Prosecution have no papers regarding the other case. The Probation Service can find no record of the other case.

The Solicitor has his file from the other case with him. He is the only one in the proceedings with knowledge of all the matters. He assists the court with papers and details of charges. He lends his papers to the prosecutor to avoid an adjournment. He assists the Probation Service with dates and a list of names, which are being used by the client. There are again hours of delay because only the Solicitor has all the information, but his assistance and personal knowledge of the client and cases prevents further adjournment. A Drug Treatment and Testing Order is made on all matters hopefully dealing with the underlying root cause of the offending.

### **Case 3**

R is a young man who has spent much of his life in and out of psychiatric hospitals. At court he was represented by the Duty Solicitor in relation to a summary only offence. The Defendant insists upon pleading not guilty. Legal Aid is applied for by the Duty Solicitor who knows nothing about him. Legal Aid is refused. He appears a week later in the same case for a trial date to be fixed. He does not know what is happening and does not know why he is not represented. By chance he sees his established Solicitor who is usually at the court in any event. The established Solicitor re-applies for Legal Aid in open court explaining the Defendant's psychiatric history. Legal Aid is granted to his own established Solicitor. Instructions are taken at court. The client is advised that he has no defence in law to the charge, but much mitigation.

The 'local' established Solicitor obtains from his office files containing recent psychiatric reports prepared for a recent case on this Defendant. A change of plea occurs. A guilty plea is entered. The Solicitor knows all about the client and uses the recent psychiatric reports, which avoids the need for an adjournment for a Pre-Sentence Report from the Probation Service or an up to date psychiatric report. A non-custodial non-community penalty is imposed. An unnecessary trial and adjournment for sentencing has been avoided due to the local established Solicitor having all the relevant information and knowledge of the client.

### Use of Privatised Detention and Security Providers

One of the functions of solicitors advising and representing arrested detainees in the police station has traditionally been to ensure that correct procedure is followed in the police station. It is normally the solicitor who takes calls from concerned relatives and offers their services to a confused or indecisive detainee who may have declined legal advice to start with.

It is the solicitor who then continues to check that action is being taken in the detained person's case. The Police and Criminal Evidence Act provides maximum hours for detention and requires that investigations are conducted expeditiously. Custody sergeants are required to listen to and heed the concerns of the solicitor if s/he makes a complaint that nothing is being done to progress the case.

A combination of events has meant that the above does not happen as much as it used to, with a consequent increase in costs to the Criminal Justice System as a result.

The privatisation of custody staff in police stations means that low grade staff are used in place of police officers as were previously employed. These staff rarely recognise the requirements contained in PACE. They often appear either not understand the concept of expedition or do not care about it.

This is now combined with the unwillingness of solicitors to intervene in over-long detentions, which means that detainees are held for much longer per case than was formerly the position. The reason for this is that due to cuts implemented in 2004, solicitors are now not paid per call, but only one fee no matter how many calls are made, and thus many are deciding not to make the calls.

In practice this means that in many cases duty solicitors will no longer take calls from concerned relatives, no longer check with the medical practitioner about the detainee's mental health, and no longer chivy the custody sergeant about what progress is being made. Detainees are detained for much longer as a consequence.

Longer detentions means that more staff have to be employed to guard and feed them. The individual cells remain occupied for longer. The detention centres remain full when they could be empty. More detainees have to be moved around the county as desperate officers seek cell blocks with room in them. This frequently means that the suspect is in the wrong place when required to be produced for a court hearing.

It cannot be disputed that the shortest possible time of detention is desirable, not only because of the cost to the CJS generally, but also because the damages on any consequent writ for false arrest and wrongful imprisonment would be measured in the number of hours spent in the cells.

The government has thus saved a few thousand pounds by not paying for solicitors' calls; those calls are not made; the detention is overlong; more staff are needed, and more costs are incurred.

## **Agencies Spending Unnecessarily in Order to Protect Next Year's Budget**

Many government agencies and departments waste large sums of money on unnecessary expenditure towards the end of the financial year. Part of this problem arises from economic uncertainty about the likelihood of government maintaining its current spending plans for any given period of time. Should a particular institution be persuaded that it has surplus cash this period and it could donate some of its budget to a neighbouring agency this year, it is unlikely to have any confidence that in a later period, when it needs the cash, the corresponding loan will be available from its beneficent this year.

The rules themselves will often provide that the cash spent by one agency can only be spent on its own targets and functions, and can't be spread around even in the interests of the common good.

Agencies carrying out unnecessary repairs in the period from January to the end of March each year is a good example. The budget is measured and tested in early April annually. If the budget from last year is not all spent in the 12-month period, it may be cut the following year. To preserve it for the next accounting period, it is often considered necessary to spend it this.

Some examples of this spending in order to protect next years' budget are:

- a) Renewal of furniture
- b) Painting done when none is needed.
- c) Installation of security systems where no security is needed. When a court was told that the areas under the new CCTV were areas where there was no danger, whereas other areas could make the courts safer or more efficient, it replied that the capital budget was spent and a new bid would have to be made for those areas or innovations.

### Centralised Custody Suites

The introduction of centralised custody suites impacts on the smooth running of the system, and has a knock-on effect of creating additional costs. The following illustrates some of these impacts, which should be taken into account before attempts are made to make savings simply from cutting the defence costs:

- Investigators have to travel from their bases to the custody centre.
- No one in investigation knows anything about the detention function or its demands.
- No one in custody recognises the needs and obligations of the investigation function and operation.
- The prisoner is far from the crime scene. It may be important for the crime scene to be re-re-examined in the light of what the suspect says about it in interview.
- Suspects may be far from their home. This can put the suspect at a psychological disadvantage since they may be worried about something as trivial as getting home afterwards. It means that the family cannot so easily provide food and clothing for them. The evidence that can help their case may be near their home.
- Suspects may be far from their solicitor. They may well know a solicitor whom they trust. S/he may be based near to their home town and may have to travel some distance to offer advice and representation.
- The investigators are based in the old CID offices, usually in the city's traditional police station. They have to travel to the custody suite to conduct interviews with the suspect. They may leave evidence behind – perhaps because they don't register the import of it until the interview is under way.

**Prison Escort and Custody Services (PECS)**

Prisoners are now produced to courts according to a timetable and method that best aids the suppliers of the service, not the 'customer'. Prisoners are routinely delayed in getting to court (this includes the distant journeys that many undertake when coming to court; and the delays in getting from the court cells to the dock). The net result is that costs are incurred at the most expensive point in the system – i.e. during the trial – for the sake of a service which should be among the cheapest elements of the whole procedure; simply transporting clients from one place to another.



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