



The Law Society

## **‘Transforming legal aid: delivering a more credible and efficient system’ – MoJ consultation paper**

Law society response to chapters 4 and 5:  
‘Introducing competition in the criminal legal aid market’ and  
‘Reforming fees in criminal legal aid’

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## Table of Contents

Executive Summary .....	3
1. Introduction .....	6
2. The timescales .....	10
3. Freedom of choice .....	12
4. Impracticality of the proposals for the market .....	17
5. The Quality of Justice .....	22
6. Equality and Diversity issues .....	24
7. Alternative proposals.....	25
8. Responses to consultation questions (Chapter 4) .....	29
9. 'Reforming Fees in Criminal legal Aid' (Chapter 5).....	42

# **‘Transforming Legal Aid: delivering a more credible and efficient system’ – MoJ consultation paper**

## **Law Society response to chapters 4 and 5: ‘Introducing competition in the criminal legal aid market’ and ‘Reforming fees in criminal legal aid’**

### **Executive Summary**

#### **Introduction**

The proposals for competitive tendering of criminal legal aid set out at chapter 4 of the paper are unworkable. Taken together with the fee cuts in chapter 5 of the paper, they fail to achieve the Government’s stated aim of a restructuring of the market so that the winning bidders would be able to absorb cuts of the magnitude proposed in the timescale provided.

While we recognise that there is scope for some consolidation of the market, this needs to be undertaken in a way which notes the problems of the existing market.

The existing market has had to adapt to a period of 20 years where there has been no increase in fees. It has been unable to invest in efficiencies and the result has been a fragmentation of the market into small and specialist firms who have, nevertheless, managed to serve the market competently and well.

The Government’s proposals are flawed because they:

- Are impractical to achieve in the timescales;
- Improperly restrict client choice;
- Will not work either for existing firms or new entrants; and
- Will diminish the quality of justice.

The short consultation period and the absence of necessary information from Government has made it impossible for us to develop detailed counter-proposals. We hope the Ministry of Justice will work with us to do so.

#### **Timescales**

The Government’s proposals will require a major change in the market by September 2014. This is impractical because:

- The practicalities of establishing offices, staff and IT, together with obtaining finance and regulating approval mean that firms would need to implement business plans **before** the closing date for tenders;
- Lenders will be unwilling to advance money to enable work to begin until a contract has been awarded.
- Firms are unlikely to have the expertise to move quickly in any case.

On these grounds alone, Government needs to look again at the proposals.

#### **Client choice**

The abolition of client choice is wrong because:

- It is an essential driver of quality within the system;
- It will not, in any case, provide certainty of workload because of the other uncertainties within the system;
- It will add cost to the system because solicitors will not be able to offer services to clients who choose them, who they know or where they can add particular value;
- It will diminish trust and confidence between client and solicitor and lead to complaints and people representing themselves;
- It is unlawful under the existing law and, we believe under the European Convention on Human Rights.

## **Impracticality**

The proposals are impractical because:

- The contract sizes are too inflexible and uncertain for firms to be able to make money from them;
- The model will discourage competition and quality;
- The model will encourage “suicide bids” and reduce the market so that it is unable to cope with crises;
- Firms will leave the market meaning that future contract rounds have fewer competitors.

## **The Quality of Justice**

The proposals will reduce the quality of justice

- provided to the defendant because the incentives for firms to do the minimum amount of work on the defendant’s behalf
- for the rest of Society because it will pass costs on elsewhere, increase the likelihood of miscarriages and create inefficiencies.

## **Equality and Diversity**

We believe that the proposals will badly affect:

- clients with a disability or who are members of an ethnic minority and will no longer be able to choose their own solicitor;
- BAME practitioners who tend to practise in smaller firms and may well find themselves in the position of sub-contractors and at a disadvantage compared with larger, more powerful contractors.

The proposals and their effects cannot justify this level of indirect discrimination.

## **Alternative proposals**

The Society has not had the opportunity to develop detailed alternative proposals. However, it believes that any alternative should include the following features:

- Steps to secure consolidation of the market organically over the next two to three years;
- Measures which secure client choice as one of a suite of quality indicators;
- Measures to improve cashflow and to compensate solicitors for the costs caused to them by the inefficiencies of other parts of the criminal justice system;
- Discussion about other means by which the Ministry might achieve the rest of the savings.

We hope to discuss these with Government.

# 1. Introduction

- 1.1 The Law Society believes that the Government's proposals for introducing competition in the criminal legal aid market present unacceptable risks to the administration of the criminal justice system. The abolition of choice of solicitor will remove one of the key drivers for quality and we do not believe that the existing market will be able to adjust to the new provisions without risking serious detriment to quality and availability of services.
- 1.2 In preparing our response, we commissioned research from Andrew Otterburn and Vicky Ling into the finances of legal aid firms, and from Deloitte by way of broader market analysis. These reports vindicate our grave concerns that the approach proposed by the Government is economically unviable. The reports are attached at Annexes A and B, and we have highlighted relevant parts of their analysis throughout.
- 1.3 The Society agrees, for the reasons given below, that change is needed in the procurement of criminal defence services. There is good evidence that the existing market is unlikely to be sustainable in the longer term and that this represents a significant risk for the integrity of the system. That risk will be exacerbated if change to the market is not achieved in a way that enables existing providers to move to a new model without disruption and without risk to the quality of service.
- 1.4 We recognise also that the MoJ budget is not ring-fenced to protect it from cuts and that it is unrealistic to expect that criminal legal aid will be immune from departmental cuts. However, in considering its options it is essential that the MoJ should take account of:
- The practicalities of imposing change on the existing market;
  - The need to maintain a vibrant market in criminal defence services - underpinned by choice; and
  - The need to maintain the quality and integrity of the services offered and of the system as a whole.

Regrettably, the Government's proposals are unlikely to achieve these objectives.

- 1.5 We deal with each in turn.

## The existing market

- 1.6 The criminal defence market has been the subject of significant cuts both in terms of the actual amounts paid and in real terms. The last increase in magistrates' courts fees was in 1993 and there were significant cuts in 1996, 2007 and 2010. In actual terms, the criminal defence budget has declined by 7.5% since 2007<sup>1</sup>. The result of this has been that many firms which previously provided criminal defence work as part of the range of legal services that they offered to the community have found it uneconomic to continue to do so. In response, there has been a trend towards practitioners creating smaller firms serving particular areas or communities using cheap premises and little in the way of support staff. Overheads have been cut to the bone.

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<sup>1</sup> See the Deloitte report at Annex A (hereafter Deloitte) page 23.

- 1.7 There is also a significant dependence on duty slots as a way of obtaining work which has created some perverse incentives – giving individuals who have the slots a high level of bargaining power over firms and, in some cases, the ability to sell slots which they have no intention of filling.
- 1.8 It might be expected that firms faced with declining fees might respond by seeking to obtain more volume. This they have tried to do by growing their duty solicitor work, which has carried too high a price, and which has been compounded by falling prosecution rates, thereby resulting in a net loss of profitability that is a current feature of most firms. With the exception of a few large firms (who service, together, only 7% of the total caseload and who remain very small in terms of the overall legal market), the returns from criminal defence work have not provided the income and margins to invest in the level of IT and overheads that would be needed to create any form of national or bulk service.
- 1.9 The overall funding for criminal legal aid services continues to decline. This is not just as a result of fee cuts. Crime rates are falling, prosecution policy changes and, partly in response to this and, presumably also to cuts within the police and prosecution services, it seems likely that the volume of work available to practitioners will continue to decline. Practitioners are also vulnerable to other changes within the system. The closure of a local court or police station can add significantly to the overheads in terms of travel of a firm serving a particular area. This is not an area of work which is an obvious source of profit for new entrants and major investment will be needed before full advantage can be taken of the opportunities provided by technology to streamline the system.
- 1.10 The Otterburn/Ling report shows that many firms are increasingly living on the margins of profitability. Based on data collected from 119 firms, it demonstrates that the median profit per equity partner has declined from £27,000 in 2009 to £22,449<sup>2</sup>. This figure can be expected to continue to decline as the impact of the fee cuts in 2011 works through the system. The impact on today's figures of reducing fees by a further 17.5% would be that the median firm would suffer a loss of £12,885 per equity partner. As today's figures do not yet reflect the full impact of the previous cuts, the steady state position will be even worse. We doubt whether there is sufficient fat in the system to enable any savings, let alone those of 17.5% to be made, at least in the timescale envisaged by Government.
- 1.11 Government frequently suggests that the criminal legal aid system is expensive compared with other systems. We do not believe this is the case and we believe that the statistics that are produced do not provide an accurate picture and do not measure like with like. Bowles and Perry, conducting research for the Ministry of Justice<sup>3</sup>, noted that when comparing England and Wales with the rest of Europe, account has to be taken of the inquisitorial nature of their justice systems. When you compare the cost of our systems overall, ours is about average, despite the fact that we prosecute significantly more people than most of our European neighbours. It is true that our legal aid system is more expensive than New Zealand's, which is also an adversarial system, but it seems implausible that New Zealand has the level of terrorist and serious fraud cases; and the nature of crime generally is liable to be very different in such a less densely populated country. Moreover, the Court of Appeal in New Zealand has recently ruled that cuts introduced in New Zealand have been implemented unlawfully, so the position remains in flux.

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<sup>2</sup> See the report Annex B (hereafter, Otterburn), Chapter 7.

<sup>3</sup> See <http://217.35.77.12/CB/england/papers/pdfs/2009/comparison-public-fund-legal-services-justice-systems.pdf>

- 1.12 The Society believes that great credit is due to the committed and expert criminal practitioners who currently provide criminal defence services and who maintain a high level of advice and ensure the integrity of the system. They do so by competing vigorously for work and by practising as cheaply as possible. Few would suggest that this is an ideal way of providing such services but, in the light of declining resources, it is hard to see how else these services at this standard could have been achieved. Above all, this is not a market that will find it easy to manage change quickly. It has concentrated generally on providing the service as cheaply as possible in the short term, rather than on managing how it could be done more efficiently in the long term.
- 1.13 Government needs to recognise the reality of the existing market before introducing significant change which the market may not be able to meet.

### **Maintaining a vibrant market**

- 1.14 As we have suggested above, perhaps surprisingly, there remains a highly competitive market for criminal defence services which ensures that everyone needing criminal advice and defence receives it. It is, however, a fragile service because:
- There is limited scope for absorbing further cuts without many individuals deciding that they can no longer make a living;
  - It does not have the infrastructure or management support that is needed to achieve a secure future.
- 1.15 We believe that any sustainable criminal defence service needs to include the following features:
- Incentives for firms to plan for a long-term future;
  - Incentives to enter the market with the expectation of a reasonable return;
  - Incentives to achieve high quality services;
  - A career structure for individual practitioners providing appropriate rewards for expertise;
  - A market of competing firms.
- 1.16 For reasons that we explain below, we do not believe that the Government's proposals will achieve these aims.

### **Maintaining the quality and integrity of the criminal justice system**

- 1.17 The English and Welsh justice system is rightly admired throughout the world for its integrity and the quality of its practitioners. London is the major global legal centre partly because of the quality of our judiciary and the fairness of the process. The integrity of our criminal justice is a part of that and there is a real danger that, if the criminal justice system is perceived to be compromised, then that may affect the international view of the remainder of our system. We do not believe that it is any coincidence that potential competitor jurisdictions, such as Singapore, are investigating to improve their criminal justice systems through such measures as police station advice schemes.
- 1.18 In order to maintain the quality of the system, we believe that the following features need to be in place:



- Incentives to ensure that the right amount of work is done to ensure that individuals have a proper defence;
- Incentives to ensure that there is confidence in the quality and work of practitioners in field by judges, defendants and the public;
- Incentives to ensure that the quality of the work done is at the right level.

1.19 We believe the Government's proposals will have the opposite effect because they:

- Are impractical to achieve in the timescales;
- Improperly restrict client choice;
- Will not work either for existing firms or new entrants; and
- Will diminish the quality of justice.

### **The extent of the cuts**

- 1.20 The Government has indicated that it aims to reduce the cost of criminal legal aid by £220m by 2017. It has made clear its intention that these must come out of savings achieved from fees and that it will reduce rates to achieve that. However, we are concerned that there is very little detail available over the precise savings and, in particular, where the baseline is. The projections for the LAA suggest that they anticipate a reduced spend on criminal legal aid<sup>4</sup>, crime rates are falling<sup>5</sup> and the new approaches towards dealing with crime, together with the cuts to police and prosecution services, suggest that the number of cases will be falling. Therefore expenditure will fall in any case. The MoJ's case is expressed as one of necessity rather than ideology, so it is essential that we can understand the justification for the urgency, radicalism and riskiness of its proposals.
- 1.21 While we can understand that Government will wish to ensure that it gets value for money for legal aid, quality is also an essential part of the service. As we have suggested, it is not clear to us that the market is in a position to provide more efficient services without greater investment. Reducing fees to the minimum will reduce the amount available for investment and to achieve efficiencies. We believe that the Government should take account of the likely fall in demand for criminal legal aid in its assessment of the savings that it needs. We have urged Government to give us greater details of the basis on which its savings are projected so that we can engage with this. None have been forthcoming.
- 1.22 Moreover, the absence of this information from Government has made it difficult for the Society itself to engage properly with the proposals and to provide alternatives which are likely to be feasible or acceptable within the Government's parameters. We are committed to maintaining an efficient, high quality criminal defence system, but the failure of Government to provide information that has been requested, combined with the short timescale for response means that our ideas are less advanced than they would otherwise have been. We hope that Government will continue to engage with us once the consultation period has closed.

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<sup>4</sup> The Legal Aid Agency business plan for 2013-14 anticipates expenditure on criminal legal aid of £941 million. See also Deloitte, page 23.

<sup>5</sup> In April 2013, the Crime Survey for England and Wales disclosed that crime is at its lowest level for 30 years. See also Deloitte, page 20.

## **2. The timescales**

2.1 The Government's proposals envisage that:

- Contracting firms should cover the whole of a particular criminal justice area;
- There will be substantial restructuring of the market through a reduction in the number of firms with contracts;
- That restructuring may be achieved by a mixture of new entrants, external funding, mergers, consortia and sub-contractors.

2.2 This chapter assumes that the overall concept for PCT set out in the consultation paper is, in fact, achievable. We do not believe this is the case, but even if it were, we do not believe that the timescales set out by Government are achievable in the present state of the market.

### **Restructuring the market**

2.3 The Government's timetable is as follows:

- A response to the consultation will be published in 'autumn 2013';
- Firms should submit a PQQ in October-November 2013 by which time firms should have at least initial proposals about the services that they will offer and finance in place;
- The ITT will close in February 2014 by which time firms will need to have their Development Plan ready;
- Contracts will be awarded in June 2014 by which time firms must have formed a legal entity (see paragraph 4.72 of the paper);
- Firms will need to be in a position to deliver services from September 2014.

2.4 This timeframe requires firms to have formed a legal entity and incurred all the cost this entails without any guarantee of even being awarded a contract. The Otterburn report sets out in detail the steps that both new entrants and existing firms would need to take in order to set up viable businesses under the new proposals and these are also discussed by Deloitte<sup>6</sup>. From these reports it is clear that the practical requirements in terms of obtaining finance, accommodation, IT systems and staffing, together with any regulatory approvals will not be manageable in the time frame. The suggestion, indeed, is that the firm would need to begin acting on its business plan even before the ITT period closed.

2.5 Firms undertaking legal aid work generally have little prior experience of tendering for large public contracts. They are therefore likely to need to seek external professional advice and representation from project managers with such experience. Moreover, these requirements will give an advantage to larger organisations which already have procurement advisors and processes already in place. On the face of it, this is contrary to the principles governing a public procurement process, especially those relating to a Part B service which require equal and non-discriminatory treatment of bidders.

### **Information from the banking sector**

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<sup>6</sup> Otterburn, Chapters 5 and 6. And Deloitte, pp 37-14

- 2.6 We have spoken to two of the major high street banks with significant numbers of customers in the legal aid sector, both of which have expressed their concerns regarding the uncertainties inherent in the contract model proposed, and the timescales within which firms would need to secure investment.
- 2.7 A representative from Lloyds bank stated that some lenders may agree ‘in principle’ to allow firms to put themselves forward, with lending to be formalised and drawn down only after the award of a contract. However in this scenario *‘the three months from notification to delivery is a very short and probably unworkable period’*.
- 2.8 The same representative said that they would expect those who remain active in criminal legal aid work to re-engineer their businesses – it will not be possible for them to do this work profitably otherwise. He confirmed however that *‘investment in IT and structures will be costly and many will not have the wherewithal to achieve it from their own resources. Lenders will be concerned that they may be asked to lend against the possibility of a contract rather than the certainty of it, and that any contract awarded would be for only three years. This is an insufficient timescale for the investment in IT and systems to pay back. Some larger firms have already made very considerable investment in systems etc, and now face uncertainty in that they may find themselves with fewer criminal work ‘slots’ under the new proposals’*.
- 2.9 These comments were supported by the other bank that we spoke to. They are also strongly endorsed by the independent findings by Otterburn and Deloitte and apply both to existing and new entrants.<sup>7</sup>
- 2.10 For these reasons alone, Government needs to reconsider its proposals and, if it is to carry them forward, extend the timetable considerably. We recognise that this will mean that Government cannot achieve its savings through cuts in the timetable required. This, therefore, points to the need to look again at the proposals.

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<sup>7</sup> See Otterburn, p 24 and Deloitte p.46.

### 3. Freedom of choice

3.1 The model proposed in the consultation paper relies on the removal of client choice as a trade-off for an increased certainty regarding volume. In our view, there are substantial problems of principle and practice with this proposal. We believe that:

- It will lead to a reduction in quality;
- It will not deliver certainty of work; and
- It will erode trust between client and solicitor and lead to significant knock-on costs;
- It is unlawful under the present law and under the ECHR;

#### Quality

3.2 The MoJ has itself for many years explicitly acknowledged that client choice is one of the best drivers of quality. Most successful firms would acknowledge the importance of providing a quality service to clients as a means of ensuring they return to use the firm's services again and recommend it to others. There are almost no proposals for quality assurance in the paper, yet the Government insists that this is an important factor.

3.3 Client choice is, overall, the most important driver of quality in the system and the Secretary of State is mistaken if he considers that criminal defendants are not sophisticated enough to choose their solicitors. It is a sad fact that many defendants have previous convictions. They may also associate with other offenders who will be adept at identifying and recommending the most effective defence lawyers.

3.4 Freedom of choice also means that firms can develop expertise and reputation in particular areas of work or for particular communities. They undertake the work at the same rates as others but, because they have the reputation, are able to attract the volume. We believe that this adds to the quality of the system<sup>8</sup>.

3.5 Moreover, the proposals stand in direct contradiction to the Government's own policy of increasing choice in the provision of public services. Launching the paper 'Open Public Services 2012'<sup>9</sup>, the Prime Minister said: '*We are putting people in control, giving them the choices and chances that they get in almost every other area of life*'. In the press release accompanying the launch<sup>10</sup>, the Chief Secretary to the Treasury said '*We want everyone to have the choice and the freedom to access the services which are right for them and their families*'.

3.6 It is extraordinary that apparently the only public service to which '*the right to choose the services they want and who to provide them*'<sup>11</sup> does not apply is the choice of the defence lawyer who could make the difference between imprisonment and liberty; between a just conviction and a miscarriage of justice.

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<sup>8</sup> See Deloitte, page 51.

<sup>9</sup> [http://files.openpublicservices.cabinetoffice.gov.uk/HMG\\_OpenPublicServices\\_web.pdf](http://files.openpublicservices.cabinetoffice.gov.uk/HMG_OpenPublicServices_web.pdf)

<sup>10</sup> <https://www.gov.uk/government/news/the-right-to-choose-the-best-public-service-at-the-heart-of-radical-reform-programme>

<sup>11</sup> Ibid

## **Certainty of work**

- 3.7 Government says that abolishing choice is essential to achieve certainty of work. We doubt that this will be achieved. While firms are guaranteed a proportion of criminal work in their area, there is no certainty about how much that will in fact amount to. We have already noted that crime is falling. It may or may not continue to do so. The MoJ continues to close or consolidate Courts, and the police service does likewise with custody centres. Police and Crime Commissioners may change the policy their local police forces adopt towards particular types of crime, or the priorities for the region, thus changing case volumes and case mix. The Government may bring in legislation raising the sentencing power of magistrates or re- classifying offences triable either way as summary only; or there may be new judicial guidelines ensuring work presently in the Crown Court should in future be the subject of the retention of jurisdiction by magistrates<sup>12</sup>.
- 3.8 In short, there are so many things outside the control of bidders, and either outside the control of the Ministry, or that the Ministry cannot commit to retain unchanged, that any suggestion that this proposal delivers certainty of volume is unsustainable.
- 3.9 Moreover, under anything other than a rotational system, we do not see how equal shares can satisfactorily be guaranteed. Normal distribution will arise that means some firms will get more work than they should, and some will get less; and a handful will get significantly more or less. However, a rotational system gives rise to the problem of duplication of representation.

## **Cost, efficiency and trust**

- 3.10 A system that preserves client choice also saves money. Where clients have a solicitor whom they wish to instruct, time and therefore cost to the system are saved at the police station and at court if the solicitor already knows the client's history, and can act for that client in all of their ongoing cases.
- 3.11 If a random system of allocation were used, it would have the result that repeat offenders would be represented by a different solicitor each time they are arrested; with all of the additional time required for each solicitor to take the client's history, with the risk that essential information will be missed. Such repeat/serial offenders often have a history of drug abuse and/or mental health problems, and they can generate large numbers of offences/charges/court appearances. They are often difficult to handle, dislike taking advice even from solicitors they know, and have the potential to seriously clog up the court system with ill-advised trial listings or Crown Court elections when represented by advocates they don't know.
- 3.12 A client may be currently on bail for one matter in one area, and is then arrested half a mile away in a different area, yet they would be required to have two different solicitors for each of those alleged offences. This cannot possibly assist either the defendant or the effective running of the court system, particularly when cases are often transferred from a number of courts to one final court for sentencing. Under the proposed model there would be no one solicitor having overall conduct of these cases, as there is at present. A defendant on bail might also be required to travel to several different firms of solicitors, which for those on low incomes or benefits may not even be practical.

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<sup>12</sup> See also Otterburn, p. 30

- 3.13 In some cases people could end up in prison wrongly (at large cost to the tax-payer) simply because the court was not informed about a vital piece of mitigation. Clients frequently say that they cannot remember details of past offences which appear on their records and which may need explaining before a sentencing Bench. Most solicitors who have previously acted for that client will remember the details and mitigation on an old offence, when it has a bearing on the current matter before the court may well be the difference between a custodial and a non-custodial sentence.
- 3.14 One example of the impact prior knowledge of a client can have on the court process is as follows:
- A solicitor represented a client for a public order offence. His case was adjourned for probation reports. The District Judge indicated her intention to jail him, because the police list of convictions showed that he already had a conviction for a similar offence. His solicitor knew however that this was inaccurate; the client had been acquitted of one element of the previous charge, and convicted of a more minor offence. The solicitor obtained documentary proof from the court that dealt with the old case, and the result was that the client was not sent to prison incorrectly, thus saving considerable costs to the tax-payer.
- 3.15 One firm should, therefore, be allowed to act for a client in all of their 'live' cases. Information on the client's other outstanding cases in relation to dates, offences, and bail conditions is essential in order to make an application for bail in a separate case. Solicitors inform us that the CPS rarely has all of this information accurately, and judges and courts rely on the defence to provide this information, thus ensuring a fair and efficient hearing in which all relevant material is before the court. The most efficient way to ensure this outcome is to retain client choice.
- 3.16 The research paper 'Transforming Legal Aid: Access to Criminal Defence Services' by Vicky Kemp<sup>13</sup> clearly shows that clients are more likely to accept advice from a solicitor they know and trust, than from an unknown adviser. This may include accepting advice they should plead guilty when they have no viable defence. This is echoed in the response of the Legal Services Consumer Panel<sup>14</sup> to the consultation: *'clients may more readily accept unpalatable advice from a lawyer they know and trust. Retaining choice would preserve the resulting time and cost savings to the criminal justice system and spare victims and witnesses the ordeal of appearing in court'*.
- 3.17 Repeat offenders are familiar with the fee structures, and will be aware that with a fixed fee system it is in the solicitor's financial interest to have the case disposed of as quickly as possible. This will result in a significant risk that clients faced with an unknown solicitor whom they do not trust may well ignore correct advice to plead guilty.
- 3.18 Vicky Kemp's paper concludes that *'where the client has 'trust and confidence' in their solicitor, it is likely to encourage them to experience the process as being fair and thus to be more accepting of the legitimacy of the criminal process'*.<sup>15</sup>

<sup>13</sup> [http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/TransformingCrimDefenceServices\\_29092010.pdf](http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/TransformingCrimDefenceServices_29092010.pdf)

<sup>14</sup> [http://www.legalservicesconsumerpanel.org.uk/publications/consultation\\_responses/documents/2013%2005%2016%20MoJ\\_Legalaid\\_choice.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2013%2005%2016%20MoJ_Legalaid_choice.pdf)

<sup>15</sup> [http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/TransformingCrimDefenceServices\\_29092010.pdf](http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/TransformingCrimDefenceServices_29092010.pdf): page 92

- 3.19 Interviews with defendants showed that many are mistrustful of the duty solicitor, and some felt that he/she was working for the police<sup>16</sup>:

*'I need to trust [my solicitor]. You need to know they are not working with the police'*

*'I always use my own solicitor as the duty is as bad as the police. The duty works for the police'.*

- 3.20 The client may be so distrustful of an unknown solicitor that he or she will not disclose important facts such as drug-taking or alcohol addiction, or a history of sexual abuse. All of those matters are crucial to presenting the case as fully as possible. Added to this are those who could be remanded into custody when they should in fact be in hospital by reason of their mental health issues, which may not always be immediately apparent to a solicitor who has only just met them.
- 3.21 But it is not just repeat offenders or the friends and family members of existing clients for whom the ability to choose their own solicitor is important. The Royal National Institute for Deaf People sometimes refers clients to deaf solicitors, as this aids communication and brings in the added dimension that the solicitor understands the social and cultural issues that deaf people face. Clients from minority ethnic backgrounds often prefer to instruct a solicitor from a similar cultural background. This is particularly important where the client does not speak English fluently. Significant costs can be saved if the solicitor is able to communicate in a minority language and a client may well choose the solicitor on that basis. This option will no longer be available if these proposals go ahead.
- 3.22 We believe, in addition, that there is a very real possibility of many more clients representing themselves rather than having an unknown solicitor forced upon them, which will result in additional unnecessary delays to the court process.
- 3.23 Please see in addition our response to question 18, below. The paper appears to think that option 1(c) (allocation by client's surname) would address the issue of continuity of representation. This would not however be a chosen solicitor and does not address the issue of client confidence in the advice given.
- 3.24 Even where there are exceptional circumstances, the paper offers no option for the client to choose a solicitor; they would simply be allocated another solicitor.
- 3.25 We strongly endorse the response of the Legal Services Consumer Panel<sup>17</sup> to the MoJ proposals, which echoes all of the points we have made above: *'Confidence in the legal aid system may be undermined if people accused of a crime are allocated legal representation by an agency of the state which is seeking to convict them. Consumers value choice and our data suggests they exercise choice in the legal aid market..... The benefits of allowing consumers to exercise choice in public services are well-rehearsed. It is a core feature of government policy in areas such as health and social care, education and social housing. The legal aid proposals ran counter to these developments.... Allowing consumers to choose their lawyer would help to safeguard quality as poor providers know they will be punished by the market'.*

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<sup>16</sup> [http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/TransformingCrimDefenceServices\\_29092010.pdf](http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/TransformingCrimDefenceServices_29092010.pdf): Section Three: Examining 'client choice' of a solicitor

<sup>17</sup> [http://www.legalservicesconsumerpanel.org.uk/publications/consultation\\_responses/documents/2013%2005%2016%20MoJ\\_Legalaid\\_choice.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2013%2005%2016%20MoJ_Legalaid_choice.pdf) - Overview.

## Legality

- 3.26 The Law Society has stated its concerns about the legality of the proposal and has sought leading counsel's advice on it. The advice that we have received is clear. The statutory wording of Section 27 of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) speaks for itself:
- (4) *"An individual who qualifies under this Part for representation for the purposes of criminal proceedings by virtue of a determination under section 16 may select any representative or representatives willing to act for the individual, subject to regulations under subsection (6)"*<sup>18</sup>.
- (5) *Where an individual exercises that right, representation by the selected representative or representatives is to be available under this Part for the purposes of the proceedings."*
- 3.27 The Government's proposal is not that an individual may only select from a limited pool of providers. It is that in all cases he will have a representative selected for him.
- 3.28 The Lord Chancellor may not use his regulation making powers to do indirectly what he cannot do directly, namely to remove any right to select a representative in all cases. His discretionary powers cannot be used to thwart or run counter to the object of the Act, which in this respect is to give an individual who is legally aided a right to select a representative. This may be restricted in some cases but not eliminated in all cases. We do not believe that the restrictions set out in sections 27 (6) (a) and (b) affect the principle and we believe a court would support our interpretation.
- 3.29 Clearly, Government could legislate to remove choice. However, even if this were desirable, the removal of client choice is likely to be incompatible with the rights of those charged with a criminal offence under Article 6(3) of the ECHR. Under Article 6.3: "Everyone charged with a criminal offence has the following minimum rights:
- .....
- (c) to defend himself in person *or* through legal assistance of his own choosing **or**, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". (emphasis added)
- 3.30 In the 1984 case of ***Pakelli v Germany***<sup>19</sup>, the ECtHR supported a reading of article 6.3(c) that confers a right to choose one's own representation even when that representation is being funded by the State. We believe this applies here.

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<sup>18</sup> (6) Regulations may provide that in prescribed circumstances-

(a) the right conferred by subsection (4) is not to apply in cases of prescribed descriptions,  
(b) an individual who has been provided with advice or assistance in accordance with section 13 or regulations under section 15 by a person selected by the individual is to be taken to have selected that person under subsection (4),  
(c) the right conferred by subsection (4) is not to include a right to select a representative of a prescribed description,  
(d) that right is to select only a representative located in a prescribed area or of a prescribed description,  
(e) that right is to select not more than a prescribed number of representatives to act at any one time, and  
(f) that right is not to include a right to select a representative in place of a representative previously selected.

<sup>19</sup> (1984) 6 EHRR 1 at [31].



## 4. Impracticality of the proposals for the market

- 4.1 The Government's proposals envisage that firms will be required to bid for a contract representing a fixed proportion of the market in a particular Criminal Justice Area. The number of contracts for each area varies for reasons which are not always clear and the contract sizes vary from £650,000 in Cheshire to £3 million in the Thames Valley, with most in the region of £1 million. Firms will be required to cover the whole CJS area. As discussed above, this will involve a major overhaul of the market and we do not believe that this will be possible within the timescale set by Government.
- 4.2 However, even if the problems of timing could be met, we think that the proposed arrangements will not work for firms because:
- The contract sizes are too inflexible and uncertain for firms to be able to make money from them;
  - The model will discourage competition and quality;
  - The model will encourage "suicide bids" and reduce the market so that it is unable to cope with crises.

### The contract sizes

- 4.3 The response of practitioners to the proposed contract sizes has shown significant concerns. The consensus is that the requirements of the contracts are, generally, too great for most existing firms to manage without significant upscaling – we have already referred to the problems of achieving that in the timescale proposed. However, the larger firms have told us that, in some areas, the contracts proposed are too small for them – they will, in fact, have to scale down their current operations. This does not sit well with an intention to consolidate the market and, in fact, penalises successful firms.
- 4.4 It is also at odds with the policy at the heart of this proposal. The Government's rationale is that in order for firms to be able to absorb a cut of the size it is proposing, firms will need to be able to generate economies of scale. A proposal that requires some firms to downsize fails at a very basic level to deliver the policy the Government has outlined.
- 4.5 These views are endorsed both by Otterburn<sup>20</sup> and Deloitte<sup>21</sup> in examining the proposals from the point of view of new entrants to the market and of existing firms upscaling. It should be borne in mind that this analysis is based on the figures in the consultation paper. As average costs per case have been dropping as a result of the fee cuts previously introduced, the revised figures that the Government has said will go into the final proposal will be even lower, and therefore the financial position will be worse than these findings indicate.
- 4.6 Their findings broadly are:
- Because of the combined effect of the size of the areas to be covered, the value and length of the contracts on offer and the investment that would be required for new entrants and existing providers alike, contracts in many areas would make substantial losses throughout the life of the contract.

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<sup>20</sup> Page 14 et seq

<sup>21</sup> Page 31 et seq

- All firms will be making losses in Year 1, which raises profound questions about the viability of the scheme for anyone, anywhere.
- 4.7 It may well be that firms could mitigate some of these problems by bidding for other areas and obtaining scale that way or by enhanced IT procedures and other efficiencies. However, both of these will lead to problems for firms that are bidding because:
- There will be uncertainty about whether or not they will be successful in other areas where they will already be competing with existing firms;
  - There will be additional costs associated with moving into those areas having no existing office there already, and in investing in the IT needed to create efficiencies.
- 4.8 It must also be remembered that, in fact, the contract size is uncertain and is unlikely to increase. Thus contracts which appear to be viable now may not be in the future and, in any case, the losses made in the first year may be so great that firms are forced to leave the market early.
- 4.9 Some of these problems might be resolved through longer contracts, giving firms greater time to recoup their investment. However, we understand that longer contract periods create their own problems, as demand and the criminal justice environment change and firms find themselves locked in to provide services that it cannot manage on its model.

## **Agents**

- 4.10 A particular problem arises over the attitude to agents. Paragraph 4.74 states that details of all agents to be used during the lifetime of the contract are to be provided by the start date of the contract. It is not possible to predict every single agent that may possibly be used over a period of three years; this would entail factoring into the bid an unknown number of possible appearances by as yet unknown clients in unknown courts in as yet unknown other CJS areas, and then trying to find out the names of all the agents in these as yet unknown areas.
- 4.11 Added to this there is the possibility of new agents setting up in different areas after the start of the contract date; e.g. solicitors who retire, or whose firm fails to win a contract, but who wish to continue to work as agents for other firms. Unless some flexibility is built into this requirement these agents who may provide a useful service will be prevented from working at all by the requirement for them to be named at the time of the tender. However, the principal objection is that there simply will not be any 'fat' in the system to make agency working a worthwhile existence.
- 4.12 A more practical requirement would be for firms to identify the agents they intend to use in their home CJS area every six months so that these can be reviewed by the LAA. This would avoid the abuses that are inherent in a system where those used will inevitably change over the course of the contract. Given the uncertainty however of the other areas in which clients may need to be represented, firms should be free to use any firm with a contract as an out of area agent.

## **Competition and quality**

- 4.13 Government says that it wishes to create a competitive market. These proposals achieve the opposite.

- 4.14 First, the proposals abolish freedom of choice of solicitor. We have dealt with the important aspects of this in the section above. However, this also removes at a stroke a major limb of competition – the ability of consumers to choose the most suitable supplier for them. Firms will have no incentive to market themselves or do anything to gain consumer loyalty. The only incentive to achieve quality will be through compliance with standards. There will be no need for them to concern themselves about trust or reputation.
- 4.15 As an example, the proposed CJS area of South London is to have 18 suppliers. A supplier in Woolwich/ Bexley will need to service police stations and courts in Kingston, Twickenham, Richmond, Croydon, Battersea, Streatham, Brixton and Southwark, amongst others. Certain areas will almost certainly cease to have local cover and it is entirely feasible that a client in Bexley will be required to travel to Kingston to see his solicitor – a journey on public transport that would take a couple of hours if affordable in the first place.
- 4.16 The proposals do not encourage initiative or anything which will enable firms to improve or set themselves apart from their competitors. Assuming that Government will have appropriate mechanisms to ensure quality, there will be no incentives for firms to go beyond the bare minimum required.
- 4.17 This goes contrary to Government's own ideology which is to require competition on quality in the public services. It is deeply ironic that, in respect of a market where there is significant competition, Government's proposals will stifle that<sup>22</sup>.
- 4.18 Secondly, in many areas Government is requiring the minimum number of suppliers to guarantee that the overwhelming bulk of cases can be managed within that area. This will mean that there are no other local suppliers to take over if one of the successful firms fails or to offer any competition to the successful bidders in future rounds. Essentially, the market will be at best stagnant and the only way in which the Government can achieve further competition is by driving down the number of providers still further. It should be salutary that the LSC (as it then was) conducted pilots around PCT in Criminal legal aid in London in 1998 and drew the conclusion that it was creating cartels and abandoned the project as bad value for tax payers funds.
- 4.19 Thirdly, the proposals assume that successful bidders may be part of consortia or offer services through sub-contracting. While consortia or virtual firms may well lead to significant savings and some bids, we believe that there may well be problems with sub-contracting, particularly to firms or individuals which are geographically distant. The contracting firm will need to build in the costs of monitoring the performance of its sub-contractors. It will, however, be quite difficult for Government to monitor how effective those are. Firms are also likely to try to keep the cost of their sub-contractors as low as possible and will be in a position to do so. This may produce significant disadvantages for BAME providers, who may well be in the position of sub-contractors. It may also mean that sub-contractors find that they are unable to maintain the appropriate quality standards and that no-one positively monitors that. Otterburn<sup>23</sup> refers in particular to the issue of supervision and the problems that will be caused for firms having to manage contracts over a wide area.

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<sup>22</sup> See Deloitte, page 53.

<sup>23</sup> Page 25.

## **The PCT process and “suicide” bids**

- 4.20 We believe that any attempt to apply the principles of PCT to today’s criminal defence services market would raise a number of fundamental and probably insurmountable problems.
- 4.21 In many public procurement exercises, there are:
- Relatively few credible tenderers;
  - Firms which have the capacity to survive unsuccessful bids or the scale to bid throughout the country;
  - Firms which have the financial sophistication to make sustainable bids.
- 4.22 This does not apply in the criminal defence market because, as the Deloitte report shows<sup>24</sup>:
- There is, if anything, an over-supply of firms.
  - Many crime firms simply do not have the resources or experience to submit bids that would ensure a sustainable supplier base;
  - Crime firms will rarely be able to survive an unsuccessful bid.
- 4.23 As suggested above, the market for criminal defence services is unpredictable, and susceptible to significant changes within short timeframes. Many of the factors impacting on the cost of undertaking the work are external and beyond the control of practitioners, making it impossible to predict with any certainty the true cost of the work for the purpose of any competitive bid process. This lack of certainty from the outset would create enormous problems for firms even in coping with a bid process itself.
- 4.24 As a result, there are the following risks:
- Firms will make bids which are based on ignorance. This may mean either that good firms are priced out because they have not placed the best bid that they could or that firms gain contracts which are unsustainable;
  - Firms will make “suicide bids” on the basis that, if they do not they will be out of business immediately and in the hope that they may be able to survive a bit longer;
  - Reputable, sophisticated bidders will be aware of this and use game theory to bid which, in turn may lead to unsustainable bids from them.
- 4.25 While Government can obviously undertake a certain amount of due diligence to examine the models that are put forward, we question how successful that will be. Even with large, sophisticated bidders, the franchises for both the West and East Coast mainline rail services went wrong. What is more likely to happen here is a repeat of the fiasco of the interpreters’ contract. It is likely that a number of unsustainable bids will get through the process.
- 4.26 As a result, Government may find itself with a part or full complement of contracts at the beginning of September 2014, or with some dropping out just before the September launch. Within a year, however, it may find that a further number have collapsed and that there is no remaining market available to take up the work.

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<sup>24</sup> See pages 25-28.

- 4.27 PCT for Criminal Legal Aid is an internally economically flawed model that is certain to fail and there will be nothing left to replace it. At the moment, a myriad of suppliers have found ways to survive and form the bedrock of provision that has so far stood the test of the market. To replace this system with one that removes market forces has been likened by some to 'market Stalinism'. The previous government tried a similar exclusive modelling in the civil legal aid area with CLACS and CLANs at the cost of other providers, and even before the LASPO cuts in scope, advice deserts were created in many areas.
- 4.28 In the Society's view, therefore, the economics and practicalities of the proposal doom it to failure because it tries to over-prescribe and regulate the market. Any solution must, in our view, require a more organic development of the market.

## 5. The Quality of Justice

- 5.1 There are two disturbing implications for the quality of justice arising out of the paper:
- The quality of the service provided to the defendant;
  - The knock-on effects for the quality of justice in terms of both the efficiency of the system, but also of the overall outcomes.

### Quality for the defendant

- 5.2 Our comments in respect of client choice and about the perverse incentives provided by the lack of competition inherent in these proposals were made in chapters 3 and 5 of this paper.
- 5.3 In our view, any system will need to ensure that:
- Appropriate advice is provided to the client;
  - The service provided to others in the criminal justice system is efficient and of the right quality in terms of skills and ethics.
- 5.4 While peer review may provide an assessment of quality after the event, it is expensive and, in our answers to the questions on quality we set out some views on how this might be assessed in advance.
- 5.5 These answers, however, need to be qualified by our doubts as to whether, in fact, solicitors will be able to achieve any form of quality at the prices that are proposed in this paper. The Secretary of State suggests that it will be enough for the quality to be adequate. We regard that as pathetically unambitious for a system that is currently the leading criminal justice system in the world. What is worse is that, as suggested above and recognised in the impact assessment, the proposals provide no incentive to provide anything other than the minimum contractual requirements. This was noted by one of the contributors to the Deloitte report who saw it as a disincentive to enter the market<sup>25</sup>.

### Perverse incentives

- 5.6 The criminal justice system relies on defence solicitors to do the work to advise clients properly, gather the necessary evidence and liaise with the other parties in the system to ensure that justice is carried out efficiently. The Deloitte report identifies a number of likely knock-on costs arising out of these proposals<sup>26</sup>.
- 5.7 Firms that obtain a contract may find that they can only provide a service at the new rates by :
- Delegating work to the least qualified individual in the firm;
  - Undertaking the minimum work required to process the case;
  - Using the cheapest in-house advocate.

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<sup>25</sup> Deloitte, page 53.

<sup>26</sup> Deloitte, page 57.

- 5.8 As a result, there is a strong danger that:
- Evidence will be missed or arrive late;
  - Clients may choose to represent themselves;
  - There will be delays and inefficiencies in the system; and
  - there will be more miscarriages of justice.
- 5.9 These dangers are exacerbated by the proposal in chapter 5 to harmonise the basic fees for early guilty pleas, cracked and contested trials into a single basic fee, equivalent to the current basic fee for a cracked trial. We consider that this represents the greatest threat in the paper to the overall quality of justice.
- 5.10 The proposal is based on what appears to be flawed logic. We can understand why the fees for an early guilty plea and a cracked trial could possibly be harmonised – since these are similar sets of outcomes. But both are outside the control of the defence lawyer. In both cases the client decides to plead guilty; the difference is simply one of timing, and this could be seen as an incentive to encourage early guilty pleas, where a guilty plea is the most appropriate course of action.
- 5.11 A distinction should also be made for cases where the case gets to trial but the prosecution offers no evidence. The defence should not be penalised in such cases which are entirely beyond their control, and where a considerable amount of work may have been done in preparing for the trial.
- 5.12 However there is no possible incentive in reducing the lawyer's fee once the trial has already started, where the client has decided to plead not guilty. It is unclear what 'mischief' this seeks to remedy. Paragraph 5.18 refers to the proposals helping to 'encourage the prompt resolution of cases'. This is not however likely to assist in encouraging early resolution of trials where the prosecution case has already begun, other than by creating a dangerous and improper incentive on lawyers to encourage their clients to plead guilty when it may not be the appropriate plea.
- 5.13 Most factors that prolong trials are outside the control of the defence lawyer. The factors most at play are: (i) prisoner non-production; (ii) non-availability of interpreters; (iii) other judicial commitments; (iv) witness unavailability; (v) juror illness or other allowed for commitments such as hospital appointments. Where unnecessary trial length is attributable to a defence lawyer, judges retain powers to direct that part of the advocate's fee be withheld. This is a fairer way and does not penalise the advocate for the actions or inactions of other agencies.
- 5.14 The proposal risks undermining public confidence in the integrity of the system. Repeat clients are generally familiar with the legal aid fee structure, and will be aware that in many cases the lawyer advising them will be paid the same whether they plead guilty or not. This could lead to a suspicion (however unfounded) that advice to plead guilty is being influenced by the fact that the lawyer will receive the same fee for considerably less work. Regardless of whether this is the case or not, this will make the client less likely to accept the advice being offered, so there will be more trials rather than fewer. A great number of appeals will also likely be launched as a consequence, which will have a severe impact on the perception of the quality of our legal system. This problem is likely to be exacerbated if the defendant has had previous unpalatable or unaccepted advice from the same solicitor who was allocated on a compulsory basis, rather than freely chosen.

## **6. Equality and Diversity issues**

- 6.1 We believe that the proposals will have a disproportionate impact on both clients and firms from protected groups in ways that the impact assessment does not fully address. These impacts must be considered in determining whether or not the proposed policy is justified in the face of any disproportionate impact on people with particular protected characteristics.
- 6.2 The effect of the proposals, broadly speaking, will be to replace the current diverse “ecology of provision” with homogenous contracts. There may be firms with different characteristics in consortia set up to deliver those contracts, but as client choice is to be removed, clients will be unable to opt to instruct such firms.
- 6.3 Some small firms owned by ethnic minority solicitors are particularly attractive to clients from the same ethnic background. Those clients will be unable to select such representation in future. There are deaf solicitors to whom deaf clients are referred, because of both the greater ease of communication and the understanding of the social and cultural issues deaf people face. Some gay people would prefer to instruct a gay solicitor, particularly if their sexual orientation was of relevance to the case. Under these proposals, all of these clients will be prevented from choosing to instruct a solicitor who shares the relevant characteristics.
- 6.4 Data shows that black and minority ethnic solicitors practice disproportionately in small firms, and that therefore any proposal that impacts adversely on small firms will have a disproportionate adverse impact on BAME solicitors. It is quite clear that although under these proposals, a small firm may be able to survive as a member of a consortium or as a subcontractor, such firms will be in a weaker position than a firm that holds a contract with the Legal Aid Agency. The proposals will therefore inevitably weaken the position of BAME practitioners within the profession.
- 6.5 The fact that the Government's policy will discriminate indirectly against solicitors and clients with particular protected characteristics does not render it automatically unlawful, but it does place an onus on the Government to justify the policy as a proportionate means of achieving a legitimate aim, and to demonstrate that it has done as much as it reasonably can to mitigate such adverse impacts.
- 6.6 For the reasons outlined in detail above, we do not believe that the proposed policy will achieve the Government's stated aims at all. Therefore we cannot accept that it is a proportionate means of doing so that justifies substantial indirect discrimination.



## 7. Alternative proposals

7.1 The Government's proposals are fatally flawed because:

- The timescale required for implementation is too short;
- The proposed contract sizes are too inflexible and are either too large or too small for existing firms to manage;
- The absence of client choice will diminish quality, is unlawful and wholly undesirable;
- There is a major risk that, even if there are successful bidders for all the contracts, many of them will collapse;
- Changes which damage public confidence in our Criminal Justice system will adversely effect our country's international reputation and will damage London's attractiveness as a major international legal centre.

7.2 We note the Government's position in respect of cuts to fees. We consider that the criminal defence market has suffered such significant cuts in real terms over 20 years that it will be very difficult for the Profession to invest in changes that would be needed to withstand such cuts in the time available or at all. If the Government is to make cuts, however, it is essential that:

7.3 They should be minimised given the financial fragility of the sector;  
The Government should not seek to manage or attempt to manage the market, confining its attention rather to the creation of a structure that will allow innovation and competitive developments to drive quality and value;  
This can best be achieved by flexible contractual arrangements which allow the market participants to adjust themselves to the best way of supplying quality criminal defence services within the fees available.

7.4 In this section of the response the Society sets out its early proposals about how that might best be achieved.

7.5 The Deloitte report<sup>27</sup> identifies the various policy and market levers available to Government in procuring services of this sort. It is striking how few of them are actually used in the proposals.

7.6 It is also striking how far Government appears to be moving towards a state-imposed system rather than allowing the market to develop organically. We believe that there are many alternatives that Government can use to assist the market to develop so that it can provide a sustainable system. One of the key steps is to then leave the market to develop and deliver.

7.7 In our view, the most appropriate way forward is to:

- Abandon the Price Competitive Tendering proposals completely;
- Restore the principle of client choice;
- Reform and simplify the system of Duty Solicitor slots which have had very costly unintended consequences for firms;
- Establish a system of active but simple contract management based on quality and operational efficiency, enhancing over time in accordance with a publicised framework, which will encourage firms to achieve quality and, in return, provide them with a stable future in which they can invest;

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<sup>27</sup> Pages 60-66

- Accept different solutions in different parts of the country subject only to universal quality standards and availability of representation.
  - Work with the profession to develop whole-system reforms to deliver continuing cash efficiencies.
- 7.8 There are many possible options for reforming the system. If changes are not to destabilise the supplier base and risk adversely affecting the proper administration of justice, we consider that quality measures must give proper regard for the experience and expertise of the existing firms and practitioners which have provided such a good service for so long in difficult circumstances.
- 7.9 Quality would be judged in two stages: entry and ongoing. The entry level criteria would be used to judge that the firm was suitable to have a contract in the first place.

### **Entry to the contract**

- 7.10 The following criteria, or some combination of them, could be used in determining whether a firm is suitable to have a contract:
- The number of individuals who have gained accreditation through the Law Society's CLAS scheme and the Police Station Qualification;
  - The amount of expertise in handling criminal cases held by those individuals;
  - The diversity of those employed in the firm, including in management positions;
  - The firm's proposals for employing trainees, which indicates a commitment to the future of the system (although account would need to be taken of the challenges for a specialist crime firm in offering the necessary range of experience for trainees);
  - Particular areas of expertise within the firm that are relevant to identified needs in that local contracting area;
  - The financial sustainability of the firm, including its business plans;
  - Capacity to work digitally to drive administration and procurement efficiencies.
- 7.11 Firms holding a criminal law contract and delivering against the standard would be offered local duty solicitor slots according to an agreed formula based on quality, capacity and experience.

### **During the contract**

- 7.12 During the contract the Agency should monitor:
- Performance in responding to police station calls, including timeliness;
  - The actual involvement of the named individuals in responding to these calls and providing advice;
  - Continued compliance with the quality requirements - these standards to be developed but could include wasted costs orders made against the firm;
  - whether the acquittal rate broadly corresponds to national rates; and cost performance as against mean performance of all contract holders within comparable contracting areas;
  - Changes in the volume of the service provided by the firm.
- 7.13 If this were adopted there would be no need for there to be end dates to the contract. Firms wishing to supply the services could continue, under rolling contracts, to do so for so long as they met the appropriate quality thresholds.

7.14 We believe that these arrangements would mean that:

- Firms could invest, and their bankers could lend, with more confidence for the future;
- The incentives to provide a high quality service will ensure that only solicitors who are serious and committed to the market will stay there;
- The market can adjust organically and there will be proper opportunities for competitive and innovative firms to enter or grow in the market to the advantage of the wider public interest.

7.15 As we have suggested there are a number of possible variations on these options and we hope that we can work with Government to develop them.

7.16 The Law Society and the Ministry of Justice would both have roles to play in providing support, training, and managerial advice and expertise, examples of different models of practice, and introduction to finance to try to ensure that all those with the necessary skills could continue to practice in this field, notwithstanding the continuing financial pressures.

7.17 The Ministry should also underwrite run-off insurance cover for those wishing to close their practices, as this has proved to be a significant obstacle to practitioners who wish to retire or pursue an alternative career direction.

### **Other measures**

We propose the following measures to: help place firms on a sounder financial footing:

#### ***Introduce payments on account***

7.18 Improvements to payments on account are essential. Under the standard and graduated fee schemes, as soon as a case is taken on, there is a minimum fee that is definitely going to be payable to the firm for undertaking work on that case. In our view, there is no reason why that fee should not be payable forthwith upon the commencement of that matter, with the extra sums due billed and accounted for at the end of the case.

7.19 In long-running Crown Court cases, we would also recommend further payments on account during the life of the case.

#### ***Suspend the effect of UITF 40***

7.20 Under UITF 40 firms are taxed on work in progress on cases which, under the Government's legal aid rules, they are not entitled to bill.

7.21 Under this accounting protocol, when a firm is assessed for taxation purposes, its work in progress is included within its taxable income. The reason for this in broad policy terms is to stop a firm from massaging its tax liability by choosing not to bill work until a subsequent tax year.

7.22 However, the impact on legal aid firms is that the Government is taxing them on work in progress that the Government's own rules do not allow them to bill at that time. This is patently unjust, and has a seriously detrimental impact on cashflow.

### ***Simplify the wasted costs order regime***

- 7.23 We have on numerous previous occasions raised with the Legal Services Commission the impact on the legal aid budget of the waste in the system caused by mistakes by prosecutors, courts, prison delivery services and others. With the reductions in income for defence practitioners now being imposed, it is essential that whenever they are caused additional cost by these other parties in the criminal justice system, those costs are reimbursed by the offending party.
- 7.24 The present wasted costs rules are too complex and set the bar much too high. In future, the polluter must be required to pay, consistently. Courts should be given the jurisdiction to make summary orders for wasted costs. This could be on a “tariff” basis so that any time a hearing was caused to be ineffective, there was a set fee that the offending party would pay to all other parties involved.
- 7.25 Given that the fees payable by the LAA are fixed, and there is no additional payment to the solicitor under the legal aid scheme for the extra work carried out, any wasted costs should be payable to the solicitor, and not to the Legal Aid Agency.

### ***Reintroduce inflation adjustments***

- 7.26 If firms are to be satisfied that this is a market in which they can realistically remain in the long term, they need to know that remuneration will be stable in real terms. After twenty years with no increase in rates to allow for inflation, followed by whatever cuts the Government is now proposing to implement, business realism demands that rates are maintained in real terms for the foreseeable future.

## 8. Responses to consultation questions (Chapter 4)

### (i) Scope of the new contract

**Q7. Do you agree with the proposed scope of criminal legal aid services to be competed? Please give reasons.**

While we do not believe there should be competition on price in any area of criminal legal aid, we believe that:

- (a) the requirement that all firms undertake prison law and Appeals/review work is inappropriate;
- (b) there is scope for significantly greater savings from VHCC work and
- (c) there are significant savings that can be made out of the Duty Solicitor Call Centre.

#### ***a) Appeals and reviews / prison law***

It is proposed to include Appeals and Reviews work and Prison Law within the scope of the new contracts. These categories can be currently undertaken under separate contracts, or under the general crime contract if the firm has the relevant supervisory experience and expertise. Separate supervisor standards are required since it is acknowledged that this work requires specific knowledge and expertise which is different from other crime work.

We foresee considerable problems if every firm submitting a bid will have to show that they meet the existing supervisor standards for this work. Many firms with a general crime contract currently do not have the expertise and may not be able to employ someone to fulfil the supervisor experience of 350 hours per annum. There is relatively little volume in these areas of work, and including them in the general crime contract is unlikely to generate significant savings.

Firms must already do initial appeals where they have acted at first instance as this is covered under the representation order. If they have not done this, they are unlikely to be in a good position to do an out of time appeal, as this can raise complex issues.

A distinction needs to be made between standard appeal work; out of time appeals and Criminal Cases Review Commission (CCRC) work. The latter two are highly specialised, often requiring examination of evidence from suspected miscarriages of justice many years after the original verdict. We believe that this work should be undertaken under separate contracts.

Much of the prison law work that will be left in scope if the proposed scope cuts go ahead is to do with risk assessment, and as such is far more like mental health tribunal work. We believe that specialist firms should be able to continue to undertake this work under separate contracts.

There are several areas of work that it is proposed would be excluded from the contract; it would therefore be perfectly possible to exclude prison law and criminal CCRC work from the competitive contract, leaving all firms free to apply for stand alone contracts for this work should they wish to and should they have the appropriate expertise.

## **b) Very High Cost Cases**

Given that a significant proportion of criminal spend goes on the biggest cases, the Society believes that if any savings need to be made, it is the more expensive cases that should be considered first.

The present funding arrangements over-reward VHCC and high page count Crown Court cases and under reward almost everything else (e.g. £386 for a 2 day burglary trial in the Crown Court that might include 4-6 other hearings). This has led to some firms choosing to only do these high value cases. Any firm taking on a contract needs to have access to these higher paying cases to subsidise the routine work. An example of this is one firm that has around five or six high paying cases per year, which enable them to conduct the remaining 2500 cases at break even or even at a loss.

We do not see why VHCCs should not be reduced to the same rates as other work, either by including them into the LGFS and AGFS or keeping them on contracts but at hourly rates equivalent to those underpinning the LGFS.

## **c) Defence Solicitor Call centre and Criminal Defence Direct**

We do not agree with the statement that *'the current means of procuring these services already represents value for money'*.

The Law Society has already presented the LAA with a detailed proposal that could replace both the DSCC and CDS Direct with an automated telephony system. We have provided two fully costed specifications which clearly show that this would cost far less than the current system. We believe this should be taken forward.

**Q8. Do you agree that given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable? Please give reasons.**

As we have suggested, we believe that there is scope for cutting fees for Very High Cost Cases and that the fees for QCs in criminal work are set too high, to the detriment of others in the system. However, we have set out in our response the reasons why the profession is unlikely to be able to cope with a cut of 17.5% and this is confirmed by the Otterburn report<sup>28</sup>. We believe that these problems are likely to apply to the other areas as much as for those affected by the PCT proposals. It is therefore likely to have the same adverse effects on the justice system as in the areas where price competition is proposed.

## **(ii) Contract length**

**Q9. Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract term by up to two further years and a provision for compensation in certain circumstances for early termination is an appropriate length of contract? Please give reasons.**

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<sup>28</sup> See Chapter 8.

As noted above, the proposed model would require firms to invest significantly in order to restructure to deliver services in the way the Ministry requires. A three year contract is inadequate to recover and secure a return on that investment. The Otterburn report indicates that in most regions of the country, a three year contract on the terms proposed is a guaranteed loss-making proposition. This is confirmed by the quotes from lenders in this and in the other reports.

Equally, there are dangers in a lengthy contract period: As we have suggested there are likely to be changes in the criminal justice system and a contract entered into may not be manageable after even three years if there is no certainty of work. Moreover, the length of contract provides a disincentive for investment towards the end of the period and, for many firms, a risk that they will lose everything in the new contract round. This will not lead to a sustainable or stable system for providers.

In our view, there should be an assumption that firms will continue to be able to deliver services provided that the market exists and they can meet the appropriate quality thresholds.

### **(iii) Geographical areas for the procurement and delivery of services**

#### ***Preferred approach***

**Q10. Do you agree with the proposal under the competition model that with the exception of London, Warwickshire/West Mercia and Avon and Somerset/Gloucestershire, procurement areas should be set by the current criminal justice system areas? Please give reasons**

The proposal to tender across whole criminal justice areas was designed to deliver volumes. However, as is shown in both the Otterburn and Deloitte reports, it fails in its aim because it delivers volumes in conjunction with a requirement for firms to cover a wide geographic area, which means the added volumes come associated with significant additional costs. If firms are to absorb significant costs, they need to be able to generate additional volumes within their current local markets and in a way that does not require significant additional infrastructure.

In addition, there are many local problems with the proposals, which firms operating in the areas are better placed to explain within the time available than a national body like the Law Society. We have been provided with some examples of where the proposals impact on specific areas, but we would recommend the MoJ considers the responses from individual firms for more detailed information.

For example, in the North East, Northumbria CJS area is vast, running from Berwick near the Scottish border, Hexham over in the West and down as far as Gateshead, Sunderland, Newcastle and North and South Tyneside. It is very hard to imagine any crime firm being geared up to deal with the whole of that area at the moment; significant expansion would be required, which is almost certainly not possible in the time frame proposed for the reasons outlined elsewhere in this response. Similarly, the vast distances from one side to the other of the Devon and Cornwall CJS area make it impractical for firms to operate to the model proposed, while the Solent causes its own unique problems for Hampshire and the Isle of Wight.

**Q11. Do you agree with the proposal under the competition model to join the following CJS areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas? Please give reasons**

We recommend consideration of responses to questions 11 and 12 from firms based in the areas in question.

***Proposal to merge Avon, Somerset and Gloucester***

Firms in these areas have described this proposal as ‘completely misconceived’. This is, again, supported by the Otterburn research. In particular, we feel that the distances involved will create significant infrastructure costs and difficulties of supervision.

In addition, the potential distances clients would face in having to travel to see their provider in the proposed new area are extensive and it is highly unlikely that providers would be prepared to travel the same distances to see clients for the low fixed fees proposed. A provider in Gloucestershire would be required to make a four hour round trip to represent a client in Yeovil Magistrates Court. With no travel payment included in the proposed fees this is simply not feasible.

A merger or other arrangement with another firm in the relevant area on paper sounds like a potential solution to the problem of the distances to travel, but such a process is riven with logistical difficulties and expense, and as we have explained earlier in this paper, is simply not practical within the timeframe proposed. Add to this the proposed reduction in fees and the requirement to make this investment without any guarantee of securing a contract, and such a solution is quickly reduced to the realms of theory alone.

A firm based in Bridgwater has commented: ‘*Local knowledge is key to the provision of an effective service; I have no knowledge of the local market in Gloucester, and I have limited knowledge of the Bristol market. In the event of PCT progressing beyond the consultation stage I would urge that this issue is revisited. The only model that stands an even chance of working can be the maintenance of three distinct procurement areas (Somerset, Bristol and Gloucester) with a limited number of providers in each.*

**Q12. Do you agree with the proposal under the competition model that London should be divided into three procurement areas be aligned with the area boundaries used by the Crown Prosecution Service? Please give reasons.**

In view of the fact that London is a huge geographical area and offenders/suspects may live in any part of London (and indeed the Home Counties) and work in another, coupled with the fact that the majority of London criminal solicitors have built their practices around providing a full service to their local clients in London, we do not agree with the suggestion that 3 procurement areas be created. These would be totally artificial, and not aligned to police boroughs or Magistrate's Court/Crown Court areas.

Many clients live or work in one area yet can be arrested in an adjoining area. If such clients are on a low income or benefits, it is not feasible to expect them to incur the cost of travel across London to see a solicitor neither of their choice nor near their home. This would achieve nothing. The Crown Prosecution Service areas are based upon administrative convenience; staff needs and the availability of affordable office accommodation near to Courts etc. The CPS office structure could be changed at any time and to have defence CJS



areas mimic an ephemeral recent change is unwise. The basic unit of delivery of defence services in London are on the one hand, boroughs and other the other hand, duty schemes.

The areas currently proposed are too big and the proposed contract values too small. Central & West London comprises 9 court centres and 76 police stations. 38 contracts in Central & West London equates to £690,000 pa per contract. For most firms that will be a substantial reduction in revenue but with an increased number of courts and police stations to cover. This would mean most firms, far from being more efficient would become less efficient.

**Q13. Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas? Please give reasons.**

We do not agree with the proposals in this paper. While it is obvious that those providing services to Government should have contracts, for the reasons we set out in our response, price competitive tendering is inappropriate for this market within the timescales set by Government.

#### **(iv) Number of contracts**

**Q14. Do you agree with the proposal under the competition model to vary the number of contracts in each procurement area? Please give reasons.**

As we have said, we do not believe that fixed numbers of contracts in each area is an appropriate way of managing the services.

However, if this were to go forward, we agree that there must be different numbers of contracts in each area. It should be recognised that reducing the numbers of contracts does not reduce the chances of a collapse of suppliers on the one hand and monopolies and cartels on the other.

#### ***Public Defender Service***

We see no reason why shares of work should be ring-fenced for the PDS. If the PDS offices are truly cost-effective, what is there to prevent them from bidding for a contract on the same basis as everyone else?

The paper states that the PDS provides 'a benchmark for legal aid delivery'. We are unclear what this refers to. We are unaware of any recent benchmarking involving the PDS, and the 2007 evaluation report clearly showed that it was more expensive to provide services using the PDS than private practice. Given the Government's stated aim of saving costs, it is unclear why a service provider that actually costs more to deliver the service would be protected in this way.

**Q15. Do you agree with the factors that we propose to take into consideration and are there any other factors that should be taken into consideration in determining the appropriate number of contracts in each procurement area under the competition model? Please give reasons.**

It is unclear how the Ministry arrived at the proposed number of contracts to be made available in each area, and many appear to bear little connection with the amount of work in

some areas. For example, there seem to be half the number of contracts in South London, yet the total amount of work is of the same magnitude as West and Central (£42m v £37m).

We have asked for the formula that was used to calculate the numbers of contracts per area but have not to date been provided with this. The data used in drafting the consultation paper is at least two years out of date (2010/2011), and given the fact that volume is steadily declining, it is fairly clear that the number of contracts per area would need to be revised using the up to date figures. This also increases the uncertainty of what firms would actually be bidding for; both in terms of size of contract and the number of contracts available.

We cannot see that the paper properly engages with the factors that it claims are to be taken into consideration.

- The section on sustainable procurement appears to be suggesting that new market entrants for subsequent bid rounds will come from fee earners from firms who survive the current round being 'recruited by a potential new entrant' in the next tender round. Where will these 'potential new entrants' come from? Firms that fail the first bid round will simply disappear from the market, and it is hard to see how any new firms are likely to emerge to take part in any subsequent rounds, given all of the massive uncertainty and investment required to bid, without any guarantee of a contract at the end of the process. Any new entrants would be lawyers with salaries under the PCT model of about £20,000-30,000, but would be required from that base to gear up to fund bids of about £1 million plus. As we have pointed out elsewhere, no bank would possibly lend such an amount without security which new anticipated bidders will not have.
- The numbers of contracts proposed in some areas seem unlikely to address the potential for conflicts of interest. In 15 areas only four contracts are proposed, yet the table on page 51 indicates that in 2010/11 there were 1102 police station cases and 47 Crown Court cases nationwide with over 5 defendants (including 204 with 10+ defendants). Figures are not provided for magistrates court cases. It is not clear how many of these cases were in the areas where small numbers of contracts are proposed. It would however seem necessary for firms to consider the numbers of contracts in neighbouring areas, and to factor into their bid an unknown sum for travel to those areas in the event they are required to represent a defendant in a case where there are more defendants than contract holders in that area.
- The 'swings and roundabouts' approach of fixed fees can only work if there is sufficient volume to compensate for the lost income on the larger cases. Given the uncertainties about case mixes and future volumes, even if, which we do not accept, the model offers protection against swings and roundabouts based on historic data, it cannot offer such assurances about the actual work that will be required under these contracts.
- Firms will need to have fee-earners based across an entire CJS area if they are to have any chance of servicing these area-wide contracts. Losing staff in certain areas may have a considerable impact on their ability to service their contract adequately.

#### **(v) Types of provider**

#### **(vi) Contract value**

**Q16. Do you agree with the proposal under the competition model that work would be shared equally between providers in each procurement area? Please give reasons.**

No. The economic analysis provided elsewhere in this response explains the reasons why. Above all, it is a recipe for market stagnation rather than for a vibrant, sustainable market.

The so-called 'equal' shares would not in reality be equal in any event. Every case, whether at the police station, magistrates' court or Crown Court is completely different and requires vastly different input and time spent on it. Some areas by virtue of their location and other features may have a preponderance of a specific type of case – e.g. police stations near ports and airports tend to have more drug-smuggling cases – so one 'share' of the work in any area may not necessarily equate to a 'share' elsewhere in that CJS area, nor in another area.

### **(vii) Client choice**

**Q17. Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.**

As stated above in section 3, we do not agree.

### **(viii) Case allocation**

**Q18. Which of the following police station case allocation methods should feature in the competition model? Please give reasons.**

**Option 1(a) – cases allocated on a case by case basis**

**Option 1(b) – cases allocated based on the client's day of month of birth**

**Option 1(c) – cases allocated based on the client's surname initial**

**Option 2 – cases allocated to the provider on duty**

**Other**

The proposals as they stand could very well cost the Government more than they will save. None of the case allocation models proposed takes account of the effect of the prolific offender on the scheme. The Government recently began targeting the families which they had identified as causing a disproportionate amount of anti-social behaviour and crime. Thus at least one part of the Government realises that crime is not evenly spread across any given area. There are some people who are arrested on an almost daily basis for the same type of offending, usually drug addicts who commit shoplifting offences.

Option 1(a): That offender would end up with several solicitors to whom he had been assigned simply because they were next on the rota. Each solicitor will apply for a Representation Order (or whatever it may then be called). Under the existing scheme the offences would be regarded as a series of offences and would attract a single fee. Under the proposed scheme each individual offence would attract a single fee. Of course, there would be no prospect of the Orders being transferred into the hands of one solicitor as transfer will not be allowed. Thus the cost to the public purse of that offender's activities will be several times the cost which would be incurred if the offender were allowed to nominate his usual solicitor. This will also cause problems as to who represents the defendant when the Court orders a pre-sentence Report.

Options 1 (b) and (c) would avoid the problem of multiple representation, but would not address the issue of client confidence in his/her solicitor, since that solicitor would not have been chosen by the client. It takes considerable time for a solicitor to build up the confidence

of a client, and this will only come at all if the solicitor provides a good quality service. If the client came from a family of prolific offenders, they will, presumably all have the same surname, then that family could distort the relative market shares held by the contract holders. Unfortunately clients do not line up in alphabetical order before committing offences.

Moreover, both these options suffer from the problems of normal distribution. You will not get equal numbers of clients arising for each firm. Instead, you will get a normal distribution of clients. Some firms will get more clients than they should, others will get fewer. Moreover, normal distribution also tells us that there will be a few outliers around the country where some firms get significantly more or significantly fewer clients than they should. While this can be adjusted over time, given the marginal economics of this model, the Government cannot be confident that the firm will not be insolvent before this happens; and given that the MoJ is purportedly offering an exactly equal share of the market, it is likely that the MoJ will face formal challenges in such circumstances.

Option 2 is a variation on Option 1(a) in that allocation would be by random selection. It would still not address the issues of client care, client confidence, saving of time, duplication of representation, increased costs of multiple representation, etc.

Allocation by rota duty slots at least enables a firm to deal with all the work at one police station at any given time. This would allow economies of scale by cutting out travel and waiting for the additional clients detained at that police station during the duty period. Any of the other methods would mean firms only ever getting one person at a time at each police station, thereby increasing average costs per case from those currently.

In our view, all of these proposed methods of allocation are significantly flawed, and cannot achieve what would be required of them if the Government's tendering model were to work.

**Q19. Do you agree with the proposal under the competition model that for clients who cannot be represented by one of the contracted providers in the procurement area (for a reason agreed by the LAA or the Court), the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.**

In the context of the proposed model, this is about the most practical solution. However it would be far preferable to find a model where this would not be a likely scenario. Since travel costs would not be paid for, this is yet another unknown element that firms would need to factor into their bids. To avoid travel costs, agents would need to be used; but by definition, if the agents were available, the case would not need to be offered out of the area.

Under the proposed CJS Area bid zones there are some very concerning implications from the proposals that have yet to be addressed, even in the small CJS areas. In some cases providers would be contractually bound to provide advice over a very wide area, should the proposal for out of areas coverage go ahead, for example:

1. A supplier in Southport could have to provide advice in Anglesey; a 5-6 hour round trip. (Merseyside adjoins North Wales)
2. A supplier in Scarborough could have to provide advice in Blackpool; 6 to 7 hours trip (Lancashire adjoins North Yorkshire)
3. A supplier in Penzance could have to provide advice in Cheltenham; an 8-9 hour round trip (as Devon/Cornwall adjoins the new Avon Somerset Gloucester area).

This is particularly of concern in port areas with a low supplier base where drug conspiracy work has traditionally been spread through own solicitors but now would focus on the area where the arrests are made.

Particularly given the above, it is unlikely that anyone would be able to arrive at a reasonable estimate for an unknown number of clients from neighbouring areas, requiring advice and representation in any number of as yet unknown courts or police stations. Coupled with the other uncertainties in the model, it adds to the difficulty of arriving at a reasonable and sustainable bid.

### **Principle of continuing representation**

**Q20. Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.**

We agree with the suggestion that firms should provide a 'cradle to grave' service, and should in principle be able to represent a client all the way through the case from start to finish. We also do not support clients being able to delay matters by jumping from one solicitor to another. However, a 'cradle to grave' service must also be coupled with client choice. If a client is to remain with the same solicitor all the way through the case, for the reasons outlined above in section 3, this must be the solicitor of their choice.

### **(ix) Remuneration**

**Q21. Do you agree with the following proposed remuneration mechanism under the competition model. Please give reasons.**

- **Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and the bid price**
- **Fixed fee per provider per procurement area based on their bid price for magistrates' court representation**
- **Fixed fee per provider per procurement area based on their bid price for Crown Court litigation (for cases where the pages of prosecution evidence does not exceed 500)**
- **Current graduated fee scheme for Crown Court litigation (for cases where the pages of prosecution evidence exceed 500 only) but at discounted rates as proposed by each provider in the procurement area**

#### **a) Police station attendance block payment**

A block payment for police station attendances is problematic because the volumes can change, potentially significantly, for reasons outside the firms' control, and which may not be foreseeable at the time of bidding.

The police station fee block payment cannot be commented on without greater detail on the trigger for assessing that a retender is required to cope with additional volume, and how that tender might work, as firms may be required to resource considerable additional volume over and above that anticipated before the LAA retender for work.

If, which we oppose, there were to be a block payment, there would also need to be an agreed limit on volumes above which an additional sum would be payable, and how that sum would be calculated.

#### **b) Representation in the magistrate's court**

Over and above the issues of sustainability already advanced, it is impossible to comment on the sustainability of the suggested model without better quality data. Unless the volume of cases going through each court and the balance between guilty, not guilty and committed are known, it is impossible to make an assessment on the reasonableness of the 17.5% cut let alone bid at lower than this.

We disagree strongly with the proposal not to have any sort of escape mechanisms, in both police station and magistrate's court cases.

We have evidence from a costs draftsman of the impact that the exceptional cases can have on the overall spread of fees; This analysis is attached at **Annex C**. If there is no provision to remunerate these cases separately, firms will be at permanent risk of being destabilised financially if they were unlucky enough to have such a case.

There is real concern that the arrangements for court duty have been significantly underestimated. We understand that the current court duty claims have been included in the magistrates court costs, and each session is treated as one claim. However, under the new proposals with court duty not remunerated, any increase in court duty requirements will also not be remunerated. Given that any client who was not represented at the police station could effectively end up as another duty solicitor client at court there could be significant increases in court duty activity (at MoJ roadshow events this was acknowledged as possible).

#### **c) Crown Court litigation fixed fee (cases with less than 500 pages of prosecution evidence)**

#### **d) Crown Court litigation graduated fee (cases with 500 PPE or greater)**

The fee structure for the LGFS is currently badly skewed in favour of the higher page count cases to the detriment of the majority to routine cases, and a cost neutral re-balance would be welcome. This would make the routine work more economically viable and sustainable.

The Law Society has already proposed ways of restructuring the LGFS in order to remunerate cases more fairly. We would be happy to continue that dialogue with the Ministry.

**Q22. Do you agree with the proposal under the competition model that applicants be required to include the cost of any travel and subsistence disbursements under each fixed fee and the graduated fee when submitting their bids? Please give reasons**

We cannot agree that on top of a fee cut of over 17.5%, suppliers will be expected to absorb an unknown amount for travel and subsistence costs. These could possibly have been estimated if firms were bidding in the same areas they now service, however they are being required to submit a bid to service an entire CJS area. Travel distances will be completely unknown, as will other possible disbursements.

In addition, if the issues relating to the identification of agents are not resolved, this causes further difficulties for the proposal to remove travel costs, which may end up being significantly higher than anticipated at the time of the bid.

## **(x) Procurement process**

**Q23. Are there any other factors to be taken into consideration in designing the technical criteria for the Pre Qualification Questionnaire stage of the tendering process under the competition model? Please give reasons.**

The biggest problem with the proposal is the amount of information which it will be important for bidders to provide at the PQQ stage. In the timescale available, and with lending to start restructuring unlikely to be forthcoming without a guarantee of a contract, it is unlikely that sufficient potential bidders will be able to provide the sort of information that would be essential in order to ensure that contracts are awarded nationally to qualified firms with realistic delivery plans.

It is proposed that the PQQ evaluates:

- Experience of staff;
- Experience of the management team in managing a comparable service; and
- Experience of having delivered comparable volumes of work (not necessarily legal services work).

It is highly unlikely within the timeframe proposed, that firms wishing to bid will have the time to put in place all of the staff they would need to service a contract. It is also unclear how there will be sufficient time for all of the above to be evaluated for every firm that submits a bid.

Regarding the first bullet point, given the fees proposed many firms will actually need to make experienced staff redundant once they have a contract because they will not be able to afford them.

**Q24. Are there any other factors to be taken into consideration in designing the criteria against which to test the Delivery Plan submitted by applicants in response to the Invitation to Tender under the competition model? Please give reasons.**

Paragraph 4.138 states: *'As a part of the Delivery Plan, providers would also be required to submit a financial plan showing how they intended to finance any expansion or robustly manage the financial implications of running the service'*.

We have contacted a number of banks who have each told us that they could not guarantee investment in a business that firstly has no guarantee of a contract at all, and secondly even if they do obtain a contract, it will be for only 3 years with no guarantee of an extension or a new contract. The notion that firms will be ready with guaranteed finance at the point of bidding on such an unsure basis is completely unrealistic.

## ***Flexible working***

Consideration must be given in the tender criteria to more flexible models of working. Whilst the model purports to provide something close to certainty in terms of volume, it is not really any more certain than the current system, since specific numbers of cases can never be predicted. It is simply the guarantee of a fixed percentage of an unknown quantity of work. Given the steady fall in volume of cases over the last few years, it would be hard for any firm to successfully predict the likely number of cases they may receive over the whole of their CJS area, in order to even begin to think about what level of expansion or reduction (since some firms would receive a lower volume than at present) may be required in order to submit a meaningful bid.

Some of the proposed areas are vast – e.g. Devon and Cornwall, North Wales – and it is simply not practical for firms to instruct agents on the other side of the county to undertake court hearings and police station attendances. Following a competitive bid round these agents may not even exist any longer.

Moreover, potential bidders would need a guarantee that they will not be constrained in the manner in which they deliver the service by the type of limitations that exist in the current contract. This means being able to deliver the service:

- through the use of both agents and consultants, not necessarily employed by the firm on traditional employment contracts;
- through using 'virtual' offices or temporary premises in order to cover the whole CJS area;
- through employees working from home, or wherever is most convenient to service the police stations and courts in the area;
- through use of technology to advise clients, e.g. video conferencing, Skype.

The difficulty with the virtual model however is that clients will still need to be seen somewhere and realistically this will require a base / office of some sort within each CJS area, or in many cases more than one office since the areas are so large.

Firms who already have one contract should be able to use that office as a 'head office' where most administrative functions etc may be based, and provide services in the other area on a much more 'virtual' basis; i.e. through use of video; freelance agents and consultants, etc. This would avoid the expense of a fully-staffed and equipped office in every area. We think there should be some physical location in each area where the firm has a contract where clients can be seen, but this could take the form of consulting rooms, with information and documentation sent electronically back to the main office.

There must also be flexibility over the use of agents, who should be able to work for more than one contract holder in a CJS area. Contract holders should also be allowed to use other contract holders as agents.

**Q25. Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons**

No. We believe it to be economically unsustainable for the reasons outlined above.



## **(xi) Implementation**

### ***Indicative timetable***

We have stated elsewhere in this response that the timetable is unworkable.

## 9. 'Reforming Fees in Criminal legal Aid' (Chapter 5)

**Q26. Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme to:**  
**introduce a single harmonised basic fee, payable in all cases (other than those that attract a fixed fee), based on the current basic fee for a cracked trial;**

We do not agree with this proposal for the reasons given above in section 5: 'The Quality of Justice'.

- **reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and**
- **taper rates so that a decreased fee will be payable for every additional day of trial?**

We have no comments on these proposals save those given above.

**Q27. Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%? Please give reasons.**

We do not object in principle to a reduction in the fees for VHCC cases.

**Q28. Do you agree that the reduction should be applied to future work under current contracts as well as future contracts? Please give reasons.**

No; we do not agree that this reduction should be applied to current work being undertaken under current contracts. This could amount to amending one of the key terms of the contract – i.e. the remuneration – which brings with it procurement law implications in relation to the requirements for transparency and certainty in a contract. Changes to the rates of existing VHCC contracts could only be made within the powers of variation available under those contracts, however the proposals do not explain whether this power exists nor the mechanism for effecting any such change.

**Q29. Do you agree with the proposals:**  
**- to tighten the current criteria which inform the decision on allowing the use of multiple advocates? Please give reasons.**  
**- to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court;**  
**- to take steps to ensure that they are applied more consistently and robustly in all cases by the Presiding Judges? Please give reasons.**

We cannot agree with the proposal to require litigators to undertake more work for no remuneration. On top of the drastic cuts already being proposed this is simply not sustainable. If the criteria are being tightened to restrict the numbers of cases where more than one advocate is allowed, this cannot be used as a reason to then insist that a litigator

must attend in such cases to assist Counsel for no additional payment. The Ministry cannot have it both ways. If the case is sufficiently complex to require more than one lawyer then two advocates should be allowed; or the litigator should be paid for their attendance. If on the other hand the case is sufficiently straightforward that one advocate can manage the case on their own, then they should not require the additional support of an unpaid litigator.

Paragraph 5.46 states that there is no duty on the State to provide equality of arms in cases where the prosecution has more than one advocate. This may be so, but it is likely that, where the prosecution considers the case is serious enough to require two advocates, then the defence is likely to need them too. Otherwise, serious miscarriages of justice may arise which will be costly to the State later on, if it is found that the defendant was not considered to have had a fair trial due to having a defence that was not equal to the prosecution.