



The Law Society

# **Procuring criminal defence services: is there a better way?**

A Law Society consultation

April 2013



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# Procuring Criminal Defence Services: is there a better way?

## Foreword from the President

**The purpose of this consultation paper is to give Law Society members an opportunity to contribute to shaping the vision and strategy of the Society in relation to future tendering for criminal legal aid services. Whatever route this vision takes, the Society is committed to protecting the interests of its members, and to doing its utmost to ensure that you are able to continue to provide your clients with the essential services they need.**

But we need your help, your ideas and your feedback to be able to do this.

On every occasion so far we have managed to defeat the proposals for 'Price Competitive Tendering' or so called 'Best Value Tendering' that have been presented by successive Governments. The Law Society has made it clear to Government repeatedly that the proposals they presented were unacceptable and would cause untold damage to clients, the supplier base and the integrity of the justice system.

The Society remains deeply concerned that any tendering model based on suppliers competing for legal aid contracts solely on the basis of price may be unsustainable. We have repeated our concerns to the Government. We have, for example, made clear the very real dangers of market collapse if a crude form of price competitive tendering is introduced into a market that is neither ready nor robust enough to cope with it. Many crime firms simply do not have the resources or experience to submit bids that would ensure a sustainable supplier base.

Moreover we do not believe that any form of tender based on price will deliver the level of savings on the scale the Government has indicated it needs to make within the next 1-2 years. It would take a lot longer than that, at the risk of the supplier base collapsing in the meantime.

However the stark reality is that whatever arguments we put forward against competitive tendering, we are told savings will be required. However, wrong we may feel this to be, the fact is that Government is committed to making savings and there will be less money available for criminal legal aid.

This is why we need to seize the initiative and present our own ideas for a future vision of how criminal legal aid could work. Whatever new procurement model emerges from this process, there will be winners and losers. The Law Society is committed to trying to find a solution which will result in the fewest number of losers possible.

In this paper we present a number of ideas; we know some of the suggestions may be controversial, but we are seeking to identify those which will have broad support from the majority of our members. Some of these ideas stem from the results of a short online survey conducted at the end of 2012; the full results of this survey are attached at Annex B.

Our aim is that any solicitor who wishes to do so and who meets appropriate quality standards should be able to continue undertaking criminal defence work; and that solicitors should retain as large a share of the budget as possible. However, this may mean being prepared to change some aspects of the way you work, or the way you run your businesses.

The Law Society could simply adopt an approach of blanket opposition to any change to the system and to any proposals issued by the Government. In my view, this would be short-sighted. I believe we need to engage with the Government so that we can achieve our aims. To do so, we need to hear and understand your views.

**Lucy Scott-Moncrieff**

# 1 Introduction

The Treasury's Autumn Statement in 2012 foreshadowed that the next spending review will require that all Government departments save further significant sums. The MoJ will not be exempt, as George Osborne made clear in his budget statement, which imposed a further £142m of cuts on the Ministry of Justice, which will have to be implemented before the 2015 general election. The MoJ is one of the government departments required by Osborne's budget to reduce its spending by 1% for the next two years. That will mean a reduction of £73m in 2013/14 and £69m in 2014/15, when the overall budget will be £6.8bn<sup>1</sup>.

The Treasury chief secretary has in addition begun the spending review for 2015-16 by demanding that unprotected Whitehall departments show how they would cut 10% from their budgets – nearly £3bn more than the £11.5bn outlined in the budget.<sup>2</sup>

We can therefore expect that Ministers will seek to drop the axe on criminal legal aid, in one way or another. The experience of LASPO shows that the Government has no compunction about making cuts that the profession considers both unconscionable and economically unviable. We are facing an uncertain and unpleasant future.

The MoJ is committed to consulting on an alternative approach to procuring defence services, involving price competitive tendering (PCT). An accelerated timetable has been published, which indicates that the consultation will take place in April 2013, with tenders in autumn 2013, and the first contracts going live in autumn 2014. Even if we avoid PCT, the next most likely outcome would be another significant reduction in rates, which both our members and the independent economic analysis undertaken in 2011 by Andrew Otterburn tell us would be disastrous for the supplier base.

We have strong arguments against PCT, which have been rehearsed repeatedly in response to previous consultations. Based on what we know about the current fragility of the supplier base and the likely approach the Government might try to take to PCT, we believe that the impact of such a move could be equivalent to the problems of the interpreters' contract extrapolated to every case in the criminal justice system.

We also have strong arguments against further cuts to rates. The research undertaken by Andrew Otterburn<sup>3</sup> when the Government launched its Green Paper in November 2010 demonstrates the extent to which the Government is already gambling on a very precarious supplier base. A number of firms, including some of the most respected, and some of the larger firms the Government is relying on, have said that if there are further cuts, they would not expect to survive.

If there are to be further cuts to criminal legal aid, we have already produced a number of ideas as to how these could be achieved. Documents ranging from the Access to Justice Review<sup>4</sup> to our response to the Green Paper<sup>5</sup> to our criminal law

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<sup>1</sup> <http://www.lawgazette.co.uk/news/osborne-imposes-further-142m-cuts-moj>

<sup>2</sup> <http://www.guardian.co.uk/politics/2013/mar/27/whitehall-3bn-extra-spending-cuts>

<sup>3</sup> <http://www.otterburn.co.uk/legalaidreport.pdf>

<sup>4</sup> <http://www.lawsociety.org.uk/representation/documents/access-to-justice-review/>

<sup>5</sup> <http://www.lawsociety.org.uk/representation/policy-discussion/proposals-for-reform-of-legal-aid-law-society-response-and-alternative-saving-measures/>

efficiency document<sup>6</sup> set out numerous good ideas as to how savings could be achieved without damaging the viability of the criminal defence profession further. Unfortunately, the initial indications that we have had from Ministers is to the effect that these proposals are insufficiently certain to deliver savings, too difficult to implement, or will not deliver savings of the magnitude the Treasury is demanding.

Similarly, we have highlighted the significant drop in volumes in the criminal courts, and the reductions in the budget that this drop must have generated. However this, too, it appears, does not satisfy Ministers, who fear that a drop in volumes could be reversed.

It is also clear that there are significant problems with the present system. As we have suggested, there is evidence that a number of firms are struggling to remain viable financially. There are many features of the present system which lead to inefficiencies and cause problems to firms. We need to identify these and seek solutions.

Government perceives that there is an imperative to save money. It also perceives that a tendering exercise is likely to deliver quality and savings. If the Society fails to engage with Government on these matters, then there is a strong danger that Government will act in a way that causes even more damage to the profession than is presently envisaged. We therefore seek views on practical and realistic propositions that we should put to Government.

This paper discusses:

- The problems that exist with the present system
- Reforms that could be made to the system
- The features and problems with Price Competitive Tendering
- The options that the Society wishes to explore.

We welcome practitioners' views on the options outlined here. Please send these to: [crimetendering@lawsociety.org.uk](mailto:crimetendering@lawsociety.org.uk) to arrive no later than **5pm on Friday 10 May 2013.**

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<sup>6</sup> <http://www.lawsociety.org.uk/representation/articles/improving-efficiency-in-the-criminal-justice-system/>

## **2 The problems**

### **2.1 *The “need” for consolidation***

The drop in volumes of criminal prosecutions in the past couple of years, together with a reduction in rates has led to a view that the existing number of firms is unsustainable. The rates for criminal work are such that firms need to have a particular volume of work to maintain a profit and adequate investment in their infrastructure. Our survey of the profession in December 2012 showed that well over half of respondents positively supported a degree of consolidation. “Death by inadequate contract size” is not helpful for firms. It has adverse consequences for firms, for clients and for the system as a whole.

#### *Firms*

Because firms have lower volumes of work than they could handle within existing resources, this means that they have to spread the fixed costs of the work over a smaller number of cases. The marginal profitability of each case is smaller than it need be (or the loss is larger than it need be) if firms had higher volumes.

#### *Clients*

The limited profitability means that clients are at risk of various adverse consequences. At its most benign, the impact of the financial pressures on firms may be that client service is damaged. However, in some circumstances, the overall service offered by the firm may be impaired. Corners may be cut that result in a worse outcome for the client. In extreme cases, this may mean that witnesses are not interviewed who might have provided crucial evidence that exonerated a client and led to an acquittal. There will also be a few firms that resort to unscrupulous methods to poach clients from other firms. There have been occasional reports of individuals at Court claiming to be a representative from the client’s solicitor, and deceiving the client into signing the forms to transfer representation to a different firm.

#### *The system*

Each firm has certain fixed costs it has to incur in order to be part of the legal aid system. If there are more firms in the system than are required, those costs are being replicated more often than they need to be, which is economically inefficient. Moreover, the Legal Services Commission’s administration costs are of course increased if there are higher numbers of firms in the system. These impacts are felt both at the time of any tender, given the number of bidders whose tenders have to be processed, and in their day to day contract management work.

### **2.2 *The allocation of duty solicitor slots***

The purpose of the requirements around duty solicitors was to ensure that any client who called on the services of the system was guaranteed that the lawyer who spoke to them had the right skills and experience to protect their interests. However, in practice, much of the work in the police station, particularly in the bigger cities, is undertaken, entirely competently, by police station representatives. The practice of requiring a link between an individual duty solicitor and a slot on the rota does not do anything positively to safeguard clients’ interests. Clients’ rights do not require that this situation remains in place.

Moreover, duty solicitor slots represent varying degrees of the case mix in different areas and as a source of clients can represent anything between 0% and 100% of the client base for any particular firm. The current system of allocating duty solicitor rota slots pro rata to every duty solicitor who meets certain qualifying criteria has been subject to substantial criticism by some. It means that in those areas where it is important to be on the duty rotas, firms have to secure the services of as many duty solicitors as possible. This often means that firms have to employ far more duty solicitors than they have the work for, which is economically inefficient and adds unnecessary expense to the system in those areas where duty solicitor work is preponderant. This situation is exacerbated by the fact that every time the rotas are up for renewal, duty solicitors can hold firms to ransom.

In the past year or so, this position has been worsened by the fact that former duty solicitors who are no longer in regular practice are maintaining their qualification and selling their slots to firms. Firms that engage in this practice are gaining an unfair advantage over those that don't, as they are gaining slots without having the costs normally associated with having the duty solicitor in the firm to acquire those slots. This does not appear to be a breach of any professional regulation, so the SRA cannot intervene, and the LSC faces a twin problem of lack of clarity in its rule and lack of resources to enforce effectively. This system demonstrates the fact that the link between individuals and slots can be abused and that firms are able to provide adequate duty cover without using individual duty solicitors.

The specific system in London of qualifying by the "neighbouring borough" principle has been subject to further criticism relating to the qualifying criteria, which have resulted in hundreds of duty solicitors qualifying for each rota, and in solicitors or representatives having to travel significant distances, again adding unnecessary cost to the system, to fulfil their obligations notwithstanding that they have chosen to do so in an effort to create volume in terms of caseload.

There has been a further problem of late which is not limited to London, in the perceived inadequate policing of the qualifying requirements, which has led to solicitors being allocated duty slots even though they have no apparent connection with either the firm or the area in which it practises. In some extreme cases, it has been alleged that solicitors on the rota are living abroad, or in one case no longer living at all.

The current system may therefore not be meeting the requirements of firms, or the requirement to protect the interests of clients and deliver best value for the taxpayer.

The obligation on firms to employ duty solicitors whose services are not actually required in order to undertake the available work adds unnecessary cost to the system. The money firms have had to pay out to acquire duty slots has therefore not been available, for example, to invest in IT which could have speeded up the development of electronic working in the criminal justice system; or to invest in expanding the firm by way of mergers, thus reducing the number of firms the LSC has to manage.

In our view, the emphasis on duty work needs to be carefully examined and reformed.

### **2.3 Lack of capital for investment to expand or to purchase IT, or to take on trainees**

We have suggested above that the low rates of remuneration for criminal legal aid has led to a lack of capital to invest. When the options for a firm are to invest in the firm and take a pittance by way of income, or to take a reasonable income by foregoing investment, most firms will choose the latter.

This decision is made much easier by the sword of Damocles that is PCT. The threat is stark: if a firm does not win a contract, it will have to close and the firm will lose any investment it has made. Not only is this a strong discouragement to the partners to reinvest profits, it is also a very effective bar on firms being able to secure investment capital from lending institutions. It is only worth investing if the investment and profit can be recouped from the fees gained during the currency of the contract. If the Government were to impose PCT, without regard to the need to provide adequate investment for the future, this would become a permanent feature in the system.

The low rates for this work and the absence of capital to invest has not only prevented firms from consolidating and expanding, it has actually forced some firms in the opposite direction. It has not been uncommon for multi-department firms to close down their criminal departments, leading the lawyers in those teams to set up in a new small firm. A growing number of lawyers have concluded that the only way to make a viable business in this field paying a reasonable professional income is to strip all overheads to the bone, and work in a micro-firm, consisting of themselves and their laptop. Some 400 firms (25% of the total contract holders) are in fact sole practitioners.

This is not in itself a problem, but these economically rational choices by practitioners have led to the market doing the exact opposite of what the Government wants, because it is increasingly difficult to make a living undertaking this work within a reasonable-sized firm.

#### *Firms*

Because firms have little assurance that they have a long term future, there is little incentive to invest or grow their businesses and they are at risk from an adverse result in the next tender round. This means that:

- They are reluctant to invest in technology for the benefit of clients or the system generally;
- They are reluctant to invest in trainees or in the people which are a crucial part of the business.

Thus, a system that, through cutting rates forces individuals into small, highly efficient enterprises, also makes it impossible to plan for a long-term, high quality criminal defence network.

### **2.4 The need for quality criteria**

Every practitioner believes that they deliver a quality service. Many of them will also point to other practitioners whom they believe do not. This begs two questions. What

do we mean by quality? And what level of quality can reasonably be expected given the rates the Government is prepared to pay? Whatever solution the Government comes up with for 2015, there must be a clear answer to these questions.

In our view, the essential indicators of quality are:

- The knowledge, skills and experience to deal competently with client's case, providing appropriate advice and working properly with others in the system to ensure that the client's case is well prepared and presented;
- The resources to undertake the necessary work on behalf of the client.

There are three separate approaches in play at the moment: measuring individuals, measuring management and measuring work.

### *Measuring individuals*

There are three key schemes that measure individuals, two in place already and one in development. The Criminal Law Accreditation Scheme measures individuals' fitness to be allocated slots on the duty solicitor rotas. The police station accreditation ensures that non-lawyers sent to the police station have sufficient skills and knowledge to protect the client's rights. And in due course, QASA will rate an advocate's fitness to undertake different levels of case.

In addition, the legal aid contract requires that each firm must have a supervisor who has specified experience and expertise.

### *Measuring management*

In order to undertake legal aid work, a firm must hold either the Specialist Quality Mark (SQM) or Lexcel. These management standards are predicated on the not unreasonable argument that if a firm is well-managed, it is more likely that the work will be conducted to a higher standard than if the firm is poorly managed. However, it is recognised that these measures are a proxy, and that it is possible to deliver poor work within a good system.

The effectiveness of the SQM has been compromised in recent years because the LSC has stopped routinely auditing firms against it. With the contracting out of the auditing function, and a new requirement in retendered contracts for firms to have an audit against the SQM standard at their own expense, this is being turned around, but this has not happened for crime contracts yet. This means that there cannot be confidence that current contract holders are universally maintaining the standard, which has implications for the retendering process whatever form it may take.

### *Measuring work*

The most direct measure of quality currently available is peer review. A system whereby other solicitors judge whether a firm is offering sufficient quality gives the greatest guarantee that the profession will keep control of the standards on offer. An analysis of files by other professionals is a very good way of identifying and addressing poor performance.

However, there are criticisms of peer review. First, peer review is based on the content of files. Arguably the most important part of a criminal lawyer's work is what

happens in the police station and in court. Even the best-kept file cannot tell you much about the quality of this “live” work. However, a well-organised file will show what advice has been given, enabling a judgment to be made as to whether that advice was appropriate.

The second issue is the cost. The LSC has significantly reduced its reliance on peer review because it is too expensive. As a result, the Commission rowed back from its previous intention of using peer review comprehensively and systematically, which would have enabled its use as a tool in procurement.

The third issue is the extent to which such a move would drive poor firms out. Evidence from the LSC’s past use of peer reviews is that very few firms achieved a confirmed category 4 or 5 peer review result. Having said that, a number of firms withdrew rather than submitting to a second review, after a poor first review result.

Peer review probably remains the best available direct measure of quality, although the arguments about its limitations are well-founded. Moreover, because it has not been consistently operated to date, it cannot currently be used in a tendering process. There must also be significant doubts about whether the cost of such a system is justifiable in the present climate.

### *Conclusion*

While there is broad acceptance that quality should form part of the procurement process, whatever that may eventually turn out to be, the existing measures are not adequate for the purpose of driving consolidation of the market. CLAS, police station accreditation and supervisor standards, along with Lexcel/SQM are all mandatory threshold provisions. Peer review has been inconsistently applied. QASA is not yet operational. None of these is therefore capable of assisting in making comparative decisions.

### **Questions**

- 1. Have we identified the problems correctly?**
- 2. Do you agree that allocation of duty slots should no longer be based on the number of duty solicitors a firm has, thus ‘breaking the link’ between numbers of duty solicitors and slots?**
- 3. Are there other problems within the control of the MoJ we should be addressing?**

### 3 Reforming the current system

Despite numerous cuts to legal aid rates, and the lack of any increase in fees for over ten years, the Government tells us that the cost of criminal legal aid is still “too high”. This is not an objective assessment but a political viewpoint, which begs the question “compared with what?” and highlights a point we have regularly made about the inefficiency of the justice system as a whole within which defence practitioners have to work. We have long argued that the costs of legal aid are consequential on the system and on the decisions of police and prosecuting authorities, and that there is an urgent need for wholesale reform of the criminal justice system generally.

The Law Society has made numerous proposals that could save costs to the system without the need for reducing fees further; in our responses to the Government’s Green paper; the LASPO Bill, and in our 2011 paper, ‘Improving Efficiency in the Criminal Justice System: a new approach’<sup>7</sup>.

These proposals included:

- The ‘polluter pays’ principle; making inefficient parts of the system pay for the financial cost to other departments;
- Better prosecution preparation of cases;
- Better use of technology / electronic applications (without passing the cost on to the defence);
- Improvements to prison visiting arrangements;
- Use of restrained funds to pay legal aid contributions; following years of lobbying by the Law Society, the Government has recently announced that it will be amending legislation to enable the use of restrained funds to cover the defendant’s contribution to legal aid.
- Review of approach to prosecutions in VHCCs;
- Various proposals to increase court efficiency;
- Controlling travel and other disbursements such as experts fees;
- A single fee for Crown Court work: under this a firm would be paid the whole fee for both the litigation and the advocacy element of the case;
- Abolish the Defence Solicitor Call Centre (DSCC) and replace it with an automated telephony system. The Society commissioned specifications from two independent telecommunications companies, both of which demonstrated that this would save money;
- Reduce costs in high cost cases: Many of our members have expressed concern at the fact that cuts to the criminal legal aid budget seem mainly to affect the lower end of the system, yet there is probably room for some cuts to be made to higher cost cases. QC fees have been cited as a specific example where savings could be made.

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<sup>7</sup> Ibid

## 4 Price competitive tendering

All the feedback we have had from our members, including through our survey, indicates that there is almost unanimous opposition amongst the profession to competitive tendering based on price, subject merely to a quality threshold. The Society believes that such a form of tendering would have an extremely damaging impact on the legal aid supplier base and consequently on the criminal justice system, and is committed to opposing any such proposals.

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.

Amongst other factors, 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. There is also no way of knowing either the size of the whole market nor of guaranteeing the share of that market each firm will get in 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.

When this idea was first made part of the LSC Corporate Plan in about 2001 there were some 4000 firms conducting criminal work. Now there are only some 1600. The market is extremely fragile. Many firms currently operate at marginal profits, and any reduction or loss of fee income could see many firms forced to close down.

Firms that do not win bids and have no option but to close down will leave a reduced number of suppliers, thereby removing any competition for future bid rounds. This is also likely to have a knock-on effect on the provision of civil legal aid services, as many legal aid firms undertake both civil and criminal work. If a firm offering both criminal and civil legal aid services loses its criminal contract, this might make the firm financially unviable, or it may decide that it is not worth the overhead of continuing to meet the administrative requirements of a legal aid contract for the much smaller volume of legal aid work remaining. In either case, the loss of the criminal legal aid contract would have an adverse impact on the availability of civil legal aid services.

This comment (edited for context) from one of the respondents to our survey expresses an extremely important concern about the lack of market readiness for such a form of competitive tender, and the potentially disastrous consequences:

*“a competitive bidding process based on price alone... would lead to bids doomed to fail and a future collapse of the criminal [legal aid market], [as there are too many unsophisticated suppliers who do not understand their cost base].”*

This highlights one of the biggest difficulties the Ministry faces in ensuring that its designs do not cause the demise of the system it seeks to have in place to achieve its duties concerning access to justice. However much it may wish that the profession was more sophisticated and more able to calculate and submit a carefully considered tender, it has to deal with the market as it is, not as it would like it to be.

But even if we succeed in defeating this latest attempt to impose competitive tendering, that might be of cold comfort to the profession if the result is simply a further reduction of rates within the current structure. This would have, potentially, even more disastrous effects.

It also needs to be recognised, however, that if Government is paying for services, it needs to be satisfied that it is obtaining value for money; that the price is not excessive and that the quality of work that it is obtaining is appropriate. Price competitive tendering is a tool that is used frequently in the commercial world to enable purchasers to obtain goods and services at the best value.

Government has however a mixed record of undertaking such exercises. At least two exercises for rail franchises have led to disaster with the tender either called off or the successful bid proving unviable. Closer to home, the recent shambles over the court interpreters contract presents a picture of Government finding grave difficulties at managing the balance between price and quality. There is a real danger that Government's need to secure savings will override the need for quality. That is why the profession has to engage with this debate.

## 5 Features of a procurement system

Even if there is no further cut in fees, the unequivocal message from many of our members is that some structural change is necessary if the criminal defence market is to have a viable future. In this section, we discuss and invite views on some of the possible features of the next procurement system, whatever form it might take. This includes exploring what might be appropriate selection criteria in the event that the Government opts for a selective process. We would stress that the Law Society has not reached a final view on which ideas should be supported and which ones discarded. We want the views of our members before we make that decision. These are options, not proposals.

In setting out these ideas, we have the following aims in mind:

1. Any procurement system should include mechanisms for giving preference to firms which can demonstrate a range of quality features or other measures of public interest such as taking trainees. This could be achieved by setting high threshold criteria, or by a selective process in which the selection criteria give extra credit to firms with such features.
2. The outcome of the process is likely to be a degree of consolidation of the market. The recent civil tender round demonstrates the risks of a system that spreads the work too thinly.
3. Any procurement system must select only economically viable tenders and must reject all unviable ones. Due regard must be had to the risks of overexpansion.
4. We want to ensure that as much of the available money as possible is kept in the hands of the solicitors' profession, and is spread fairly between routine and more complex work.
5. Different regions may have different solutions.

So far as possible, those who wish to continue undertaking this work, and who can demonstrate the relevant level of competence and economic viability, should be able to do so. However, in a situation where there are too many lawyers chasing too little work, this may not be achievable across the board. Whatever change there is in the market should happen in an orderly fashion. Any system that results in significant numbers of bankruptcies would be unacceptable.

### 5.1 Giving preference to quality

The Law Society's survey indicated particular support for the idea of reducing the number of firms by means of an increase in quality standards. The key questions which then arise are what should those quality measures be, and how should they be measured.

#### *Peer Review*

As noted in section 2, the most direct measure of quality currently available is peer review. However, there are legitimate criticisms of peer review, notably the fact that it has, to date, been based on the content of files, when arguably the most important part of a criminal lawyer's work is what happens in the police station and in court. There is also the issue of cost – both of these concerns are set out in detail in section 2.4 above.

If the profession were to propose this as the standard to be used in contracting decisions, it would almost certainly have to be on the basis that the LSC charges firms to be reviewed.

Current estimates are that a peer review costs in the region of £2,500-£3,000. A review would need to be conducted every 3-5 years for the system to be effective. This would therefore equate to a cost in the region of £500-£1000 per year per firm.

Because the LSC has not used peer review consistently for the whole profession, it would not be practical to use it in the forthcoming procurement process, even if it were to be thought a good idea. It would have to be built into the contractual obligations, and could only be used in subsequent tender rounds.

If the profession were to push for peer review, it would open up a separate question: whether there was a need to have the Criminal Law Accreditation Scheme as well as peer review. CLAS was introduced because of concerns about the quality of police station work. However, if the quality is being measured directly through peer review, is there the same need to assess the individuals conducting the work? On the other hand, it might be argued that CLAS gives additional assurance about the quality of "live" work in the police stations and courts that is missing from peer review, and that it should therefore be retained alongside peer review.

If CLAS were to be dropped, then the cost of getting duty solicitors through the scheme would no longer fall on firms. This may partly, or in some cases wholly, offset the cost of peer review.

Consideration would also need to be given to the interaction of both CLAS and any possible return to peer review with QASA.

## Questions

4. **Would you support greater use of peer review as a quality measure?**
5. **If peer review were to become routine once more, what is your view on the appropriate relationship between peer review, CLAS and QASA?**
6. **To what extent could these schemes be used for comparing between firms as opposed to being used as thresholds that all firms must pass?**

## QASA

The Quality Assurance for Scheme for Advocates (QASA) is likely to be operational - in some areas - from September 2013. There are a number of possible provisions that could be included in relation to this scheme. One possibility might be to have a minimum number of advocates meeting the level 2 requirements. However, if the number were higher than one, such a proposal would automatically exclude sole practitioners. It would be difficult to argue that the indirectly discriminatory effect of such a proposal was justified by the public interest in including such a provision. A provision that a firm should have a minimum proportion of fee earning staff with the relevant advocacy qualification would avoid such an impact. However, this might lead

to a similar “overstaffing” issue as that created by the need to employ duty solicitors in order to obtain rota slots.

Another option would be to include a provision that all firms should have at least one level 3 advocate. However, given the circumstances in which a level 3 advocate is required, such an obligation might well be an unreasonable constraint on firms, particularly outside the main urban areas.

The likely economic climate suggests that firms should have maximum flexibility to deliver services in the most appropriate way. That could well include outsourcing all advocacy at level 2 and above to the Bar if that were to be the most cost-effective option. For that reason, it may be inappropriate to insist on an in-house advocacy requirement. QASA only measures advocacy skills and does not measure quality in any other way.

However, if the Government introduces a selective process, it would seem on the face of it odd if a firm with level 3 advocates did not secure some credit for that in comparison with a firm with no such advocates. Care would again need to be taken to avoid any incentive to overstaff. This might be achieved by the simple mechanism of giving the available “credit” in the process to any firm that has one or more level 3 advocate, but not giving additional credit for additional level 3 advocates.

- 7. Do you agree that it would not be appropriate to impose any threshold criteria by reference to QASA?**
- 8. Do you agree that in the event of the Government introducing a selective process, a firm with one or more level 3 advocate should be given credit over a firm that does not?**

### ***Case experience***

The LSC’s supervisor standards are built to a significant degree around case experience. Just because a firm has conducted a case, that does not necessarily mean it has conducted the case well. However, if a firm (or its staff) has not had experience of significant types of case, that does raise a question mark over the firm’s ability to handle them. Given the nature of the contracts, it would be expected that firms would have experience as a minimum of police station work, magistrates’ court cases and Crown Court cases, including in the latter two, experience of full trials. Other experience that might be desirable rather than essential might include handling very high cost cases; handling cases brought by different prosecuting authorities such as the FSA or SFO; handling a range of types of case, such as 1) murder/rape/serious assault, 2) fraud, 3) domestic burglary. Handling cases involving multiple defendants might be another relevant factor.

The criminal contracts also cover prison law and proceeds of crime cases. Some criminal firms will also handle actions against the police. Experience of these types of case might also be desirable

- 9. Do you agree that basic experience of the main categories of work should be a minimum threshold requirement?**

10. **Are there any other types of experience that should be required as part of the threshold?**
11. **In the event of the Government introducing a selective process, would you agree that broader experience is a legitimate factor by which to distinguish between firms?**
12. **What types of experience should lead to a firm gaining additional credit in the event of a selective process?**

### ***Trainees***

An important part of ensuring the medium to long term viability of the profession is that trainees are able to find training contracts. Firms have to be registered with the Law Society to be entitled to provide training contracts. This provides another external assessment of the firm, albeit a limited one. There are many reasons why good quality criminal defence firms may not offer training contracts. Firms that only specialise in crime may be unable to provide the range of experience needed in a training contract. Firms may simply have felt financially unable to take on a trainee. This may well make this a measure that could not reasonably be used as an absolute requirement. However, it could be used as a criterion for comparing organisations if the Government were to introduce a selective process.

Moreover, it may also be possible to reward those who have invested more in the future of the profession, providing them with high quality training and retaining a reasonable proportion of those trainees following qualification. Preferential criteria could also include the provision of opportunities for meaningful work experience that would improve an applicant's chances in gaining a training contract, and supporting employees through the CILEX scheme.

13. **Do you agree that being registered to take trainees should not be a threshold requirement in any forthcoming tender process?**
14. **In the event of the Government introducing a selective process, should a firm that is registered to take trainees be given credit over a firm that is not?**
15. **Should further credit be given to a registered firm based on the number of trainees it has actually taken on, and if so, over what period?**

### ***5.2 Consolidation***

The idea of guaranteeing contracts of a specific minimum size has received a certain amount of support amongst the profession. This would mean consolidation of the market through firms either merging or closing down with their work transferred elsewhere.

In theory, this should result in firms being able to undertake greater volumes of work with the same overheads, as smaller firms either join with them or exit the market. This should improve the financial viability of those left in the market.

This theory is not unchallengeable. If smaller firms sought to meet the minimum threshold by combining with each other, the current larger firms might not see any significant increase in their work volumes; and if the impact on those smaller firms was merely that they had to introduce overheads by way of offices, staff, processes and IT hardware that had previously been unnecessary, the benefits of increased volume for them might be outweighed by the increased costs.

A minimum contract size would clearly have benefits for Government, as it would guarantee that they would be dealing with a smaller number of larger firms, which will generate administrative savings for them.

We are seeking views on whether this option would assist firms in developing their business and maintaining sustainability.

**16. Do you believe that in principle there should be a minimum contract size?**

***Minimum contract size via contract terms***

One mechanism for establishing a minimum contract size would be to introduce a term into the contract that if, in any given period, the firm's take from the legal aid fund did not exceed a certain figure, their contract would be terminated or not renewed. A similar mechanism could be introduced referring to volumes of cases of various types. This would have two effects. It would discourage those who have no realistic prospect of reaching the minimum from seeking a contract; and it would provide an enforcement mechanism after the event for those who failed to meet the minimum. Its major advantage for the profession is that no firm would be forced out of the market immediately. Everyone would have time to make the changes necessary to be able to stay in the market in the medium term, or to plan an orderly exit. The above idea can be progressively implemented with its mechanisms leading to a consolidation of the market.

Consideration would need to be given to what the figure for any minimum should be. From one perspective there is a long "tail" of firms doing relatively small amounts of work, so that a minimum of £100,000 would, perhaps surprisingly, have quite a significant impact on the number of firms in the market. However, a minimum set at this level may have limited effect in increasing the volumes of work conducted within the remaining firms, and might therefore not be particularly effective in achieving the enhanced economic viability that would be the underpinning reason for such a change.

The position in London is, of course, very different from the position in any other part of the country. Consideration would need to be given to the question of whether there should be different minima within and outside London.

It would also be important to distinguish between the size of the firm, and the size of any contract at an individual office. Sometimes the provision of a service in small towns and rural areas requires small contracts in those areas.

If there were to be a minimum contract size, there would need to be an equalities impact assessment to consider the impacts on protected groups.

17. **Would you support a minimum contract size based on this mechanism?**
18. **If a minimum contract size were to be set on this basis, at what level should it be set?**
19. **If a minimum contract size is introduced should there be different levels set in London and outside? Should there be any other variation for rural areas, and if so, what?**
20. **Should any minimum be set at office level or firm level?**

### ***Minimum contract size via volume bids for duty slots***

Another means of establishing a minimum contract size would be by allocating blocks of duty solicitor slots at the price set by the Government. However, as has been pointed out above, duty slots form a varying percentage of work source and in some areas it is as capable of being 1% as it is of being 100%” in others.

For the reasons outlined above, the current system of allocating slots does not appear to be protecting the interests of clients, meeting the requirements of firms, or delivering best value for the taxpayer.

One alternative option, therefore, might be to invite firms to submit bids for blocks of duty slots they were prepared to cover at the administrative price set by the Government. The smallest block size would determine the minimum contract size.

Duty slots allocated to successful firms would not, as now, be based on the number of duty solicitors the firm has, but the firm would be required to demonstrate that they have sufficient staff of sufficient levels of qualification to cover those slots. In this way firms would be able to avoid the current uneconomical need to employ more duty solicitors than they actually have work for.

There would need to be selection criteria, and some firms would not secure duty slots. An open question is whether such firms should still be permitted to undertake own client work, as a way of avoiding the problem of the outcome of the bid process being fatal to some organisations, and as a potential mechanism by which their might be competition for future bids.

21. **Would you support a minimum contract size based on this mechanism?**
22. **If this mechanism were introduced, what should be the smallest number of slots for which a firm could bid?**

### ***Block bids for police station cases***

Rather than bidding for slots, firms could bid for police station cases by set area. The number of cases would include duty and own client cases.

For example, firms would bid for a set number of cases at the price set by Government, with the money paid upfront or on a quarterly basis. If volumes drop 5%

below or increase by 5% there could either be a refund or an additional payment made.

Alternatively, firms could bid for a percentage of duty cases in a defined area excluding own client cases, again at the price set by the Government. Own client cases would be paid at the same nominal rate.

The LSC has figures for duty and own client cases per firm/area, so it should be possible to ascertain whether firms are realistically able to provide the volume of services for which they are bidding.

- 23. Do you think that a tender could work based on 'blocks' of police station cases?**
- 24. If Yes, do you agree with the suggested outline above?**
- 25. What other issues would need to be addressed in such a model?**
- 26. What disadvantages, if any, do you see with such a proposal?**

### ***5.3 Economic viability and controlling consolidation***

Among the greatest risks to the criminal legal aid system are a lack of sufficient working capital, and the competitive threat from unviable bids. This could be mitigated if as part of the tender process, firms were asked to provide a business plan together with confirmation of the availability of the capital required, such as via a provisional offer of funding from a bank.

One of the problems at the time of the last tender was that the LSC had no way of evaluating how realistic bids were from a commercial perspective. If firms were required to provide evidence from a bank that the business plan had their support, that would provide a degree of competent independent evaluation of the economic viability of the bid. This in turn would provide firms with a degree of protection against competition from economically unsustainable bids.

- 27. Would you support a requirement that firms should be asked to provide evidence of the capital available to support their bid and/or approval of the business plan by their bank?**
- 28. What other measures could be used to protect firms from unrealistic "suicide bids" by others?**

There are substantial dangers from too great a consolidation of the market too quickly. First, the disruption caused by the forced exit from the market of a large number of firms would be significant, and would be detrimental to individual lawyers, to firms, to clients and to the Government. Some firms would collapse insolvent, causing immediate problems for clients and potentially leading to a direct loss of public money. Others would withdraw from the market, leaving large numbers of clients seeking alternative representation, which may require the Government to pay for duplication of work. Others still may seek hasty and ill-considered mergers, which lead to potential conflict issues in the short term, and perhaps longer term instability of the new entity.

Secondly, there is a risk to the winners in such a scenario. One of the prime causes of insolvency is over-expansion. If firms seek to expand too much too soon, they may well find that they are unable to secure the working capital necessary to cover a substantial increase in work in progress. This can lead to a cashflow crisis and to a sudden and complete collapse of the business. Within a consolidated market, there would be less flexibility to absorb the impact of such collapses, which would be more severe as the firms concerned would be larger. There could even be a domino effect, as firms that are already expanding are pressured into expanding further and more quickly to absorb the work from a failed firm, causing the same cashflow problems for themselves and leading to their own collapse.

Whatever form consolidation might take, safeguards to ensure that such an outcome did not result are essential. Possible safeguards, which may or may not be relevant depending on the procurement process adopted, might include:

#### ***A maximum bid size / Minimum number of firms***

If there were a maximum bid size, this would serve to ensure a minimum number of suppliers in the market and would provide some protection against overexpansion by any individual firm. However, it would be a relatively crude measure, because of the range of different sized firms in each area. For the larger firms, such a cap might limit expansion to, say, 20%, whereas it might leave smaller firms free to expand by 200%. Logically, the latter is a more risky proposition than the former, and therefore other measures are needed to provide further assurance against overexpansion.

Consideration should be given to the LSC setting a minimum number of firms in any given scheme. The requirement to deal with conflicts of interest means that this would almost certainly be desirable.

- 29. Do you think that there should be a maximum bid size in each bid area?**
- 30. Do you think that there should be a minimum number of firms per bid area?**

#### ***A maximum level of expansion***

Thus it may also be appropriate to ensure there are protections against excessive expansion that are tailored to the individual firm. Procurement rules probably mean that it would not be possible to set an absolute cap on expansion. However, if the Government opts for a selective process, this could be achieved as part of the selection criteria. So, for example, a firm that was seeking to expand by 10-20% might be allocated a higher number of points, while a firm seeking to expand by 100% might score fewer points, and a new entrant might score no points at all on this criterion.

- 31. Do you agree that there should be some sort of 'cap' to guard against excessive expansion?**
- 32. If 'yes', do you think the above proposal to limit expansion by means of the selection system within the tender process would work?**

**33. What other means might be used to ensure some protection against excessive expansion?**

***Capacity caps***

The business plan should also provide details of how the firm intends to staff its bid. The LSC could set capacity caps, so that you would have to show one duty solicitor for every X slots bid for. This, when tied to the requirement for confirmation of the availability of working capital, would help to filter out unrealistic bids.

However, care needs to be taken that we don't with such a measure reintroduce the overstaffing that builds unnecessary cost into the system. A variant on the above could be to say that points would be allocated for each duty solicitor and each accredited rep that a firm employs, and that the firm had to achieve a certain number of points in order to bid for a certain number of slots.

**34. Do you agree that capacity should be measured in the above way, via the allocation of points per duty solicitor / accredited rep?**

**5.4 Retaining the budget for solicitors**

***Full "cradle to grave" service***

Some firms will undertake one part of the process only, for example Crown Court trials, and will not conduct other work. Many practitioners argue that firms that choose to cherry pick the bigger and more lucrative cases are depriving firms providing a full "cradle to grave" service of resources that those services need. If firms were required to conduct all work from the police station, through the Magistrates Court and up to the higher courts as well, the limited resources available would be spread more evenly, and the payments for the larger cases would contribute towards the cost of providing the routine service.

If accepted, then this would tend to suggest that firms operating under a legal aid contract should be obliged as a matter of course to undertake the full range of criminal work, including police station, Magistrates Court and Crown Court.

If this approach is adopted, there is a further question as to whether very high cost cases should be exempted from this requirement. These cases, which are very few, require such significant levels of resource that a large proportion of the supplier base could not reasonably be expected to handle them. However, if these cases are exempted this would leave a significant tranche of money still being diverted away from those providing the routine service. One option might be to say that these cases should be included within the contract, but that if an individual firm gets such a case and feels that they are not capable of handling it, they should be free to pass it to another firm or subcontract it out without being held to be in breach of contract. In other words, a firm could choose not to handle a VHCC, but could not choose to handle only VHCCs.

The counter-argument is that bigger cases require both a degree of skill and a level of resources that only a limited number of firms can currently provide, and that the quality of representation, and the need to avoid trials collapsing due to the

inadequacies of the lawyers, require that these cases are restricted to firms that have proved their capability to undertake such cases.

- 35. Do you believe that firms should be required to undertake all work, rather than being permitted to cherry pick the higher level work and the biggest cases?**
- 36. Do you believe that very high cost cases should be treated differently? If so, how should these cases be handled?**

### ***Work retained in-house***

There is a spectrum of possible structures that firms may adopt. At one extreme is an individual who never conducts any work himself, but merely acts as a broker, farming cases out to freelancers. Such an individual is arguably just skimming money off the legal aid budget without providing the service that the LSC, by its contract, expects. Some firms undertake work themselves, but deliberately take on more than they can handle, and use agents for a significant proportion of the work. Some firms have sufficient coverage to ensure that most of the time, every stage of every case is handled by employees within the firm, and they refuse to take on more work than they can handle in-house.

There is a viewpoint that the service given to a client is likely to be better if the firm keeps most of the work in-house rather than regularly using agents for significant parts of the process. The client will be more likely to be able to speak to the same person on different occasions. There will be better supervision by the firm of the quality of the work, and of the lawyer's continuing education and training.

These arguments can be overstated. For example, in a firm that works by having departments undertaking the different stages of a case, clients may equally lose that continuity of representation. On the other hand, case management systems can ensure that whoever the client speaks to is aware of the relevant details of the case and can deal with the client appropriately. Such case management systems may be absent, or less reliably used, in a firm that frequently uses external agents.

One of the main arguments in favour of the use of external agents is that they can operate with lower overheads and more flexibly, and that in these financially constrained times, it is essential to retain this option. Conversely, money which is paid to freelance agents is diverted away from the organisations that bear the capital and infrastructure costs of the criminal defence system, at a time when those firms can ill afford to forego this money.

There will be occasions when agents have to be used, for example to deal with clashes or to cover for staff absences. However, there is a credible argument that in the interests of clients and the system as a whole, such occasions should be kept to a minimum.

If such a measure were to be introduced, how might it work? One option would be for the contract to include a provision that no more than, say 20% of work of any kind should be conducted by external agents. The LSC could police this by a combination of file audits, and comparisons between the number of fee earning staff a firm has and the volume of work being billed.

A further question is the extent to which advocacy should also be retained in-house. Although the use of in-house advocacy has advanced substantially in the past three years, it is questionable whether it has yet advanced far enough that requirements to retain advocacy in-house would be workable. In any event, the economic imperative to retain this work in-house provides an assurance that the quality benefits of doing so will be secured whenever feasible without the need for artificial constraints. If there were to be such a provision, it could be dealt with separately from agents for police station and litigation work, with different thresholds attached.

37. **Do you believe that the retention of work in-house rather than using agents would tend to assure a higher degree of quality?**
38. **Would the suggested mechanism for such a provision work?**
39. **If a provision requiring work to be retained in-house were to be introduced, what level of work conducted by agents would be necessary to ensure reasonable flexibility to cover staff absences and emergencies?**
40. **If such a measure were to be introduced, should advocacy be included, handled separately or excluded from any such provision?**
41. **Could such a measure be used as a way of selecting between providers rather than as a threshold requirement, by giving preference to those firms retaining more work in-house?**

### ***Competition only for Very High Cost Cases***

There are strong arguments that it is not practical to take more money out of lower crime work without doing serious damage to the whole criminal justice system. Given that a significant proportion of criminal spend goes on the biggest cases, a tender based on these cases only may be more effective for the Government in seeking costs savings, and would avoid the potential damage to the routine work, and the firms that do it, that would be threatened by a more widespread tender process.

One way this might work is suggested below:

1. Cases are notified as they are currently (possibly with revised thresholds to enable the LAA to quantify the likelihood of obtaining the savings agreed).
2. The case would be put out to tender to panel firms and the current firm would also be given the opportunity to apply for panel membership if they can meet the criteria.
3. Each firm would be given the case summary, the client's version of events and the details of disclosure already made. From this the firm should be able to identify how the team dealing with the case should be made up and be able to quote for a number of hours (as this is what all firms have to do now on a VHCC case). There are clearly potential risks with this idea which would need to be mitigated, e.g.

issues of client confidentiality, and the risk of prosecutor getting hold of information.

4. They should also be able to quote an average hourly rate price based on the division of tasks between A, B and C grade fee-earners (again they already have to divide the work up in this way). As the quote is an hourly average and not all providers would have the same team set up, this is where price differentiation is likely to become more acute and savings will be made by innovation.
  5. The client would then be given a selection of three to five firms based on the selection of the LAA case manager on the basis of price and reasonableness and the client would then choose.
  6. There could be provision for the contract to be varied if previously unknown variables occur (as is the case now) but the hourly rate would not change.
  7. Payments could be made quarterly in equal amounts up to the amount agreed under the contract so long as the firm can undertake that their actual time is not dropping below a threshold (in which case the payment would have to be varied). Any breach of undertaking would leave the firm facing sanctions or termination of their panel membership.
  8. This would give the LAA a saving to set against the increased costs of reviewing a number of tender applications, because at the moment their case managers have to keep an ongoing eye on all case costs. Under this regime, they would only need to monitor case costs where a contract is varied and then only to the extent of agreeing the variation.
- 42. Do you believe that VHCC and higher end Crown Court cases would be suitable for a tender process?**
- 43. If Yes, do you think the process outlined above is appropriate for such a tender?**
- 44. If not, what other means of tendering for such cases would you suggest?**

## **6. Alternative sources of income**

With the profession caught between the Government's funding squeeze and the questionable economic viability of the work, it is worth considering whether there are other sources of funding that might be tapped into. We have already convinced the Government of the need to allow the release of frozen assets to pay for the defendant's contribution to legal aid in appropriate cases. However, we would welcome the views of the profession on two other ideas that have been suggested.

### **6.1 Legal aid as a loan**

Views are invited on the idea of legal aid being provided as a loan, to be paid off by installments at the end of the case. These could be collected at the end of the case through the tax and benefit system, rather like student loans, and would be based on a simple assessment of the ability to pay, rather than the current over-complex system.

Clearly some clients would never be able to repay such loans and the cost of collection might well be disproportionate.

- 45. Do you agree that criminal legal aid should be provided as a loan, to be repaid at the end of the case?**
- 46. if 'yes'; on what basis should the assessment of ability to pay be made?**
- 47. Should repayment be required only in the event of a conviction, or in all cases?**

### **6.2 Top-up fees**

It has been suggested that if it were possible to amend the contract rules preventing private funding to be used by those eligible for legal aid, a system of 'top-up fees' could be introduced. This would present an additional income stream for practitioners, and would enable, for example, a client to obtain the main bulk of services under legal aid, but if they wished they could pay privately for additional services, such as:

- The services of a more senior fee-earner;
- More frequent visits whilst in custody to discuss / prepare evidence;
- Solicitor attendance at procedures not covered by the scope of legal aid.

There are clearly some potential concerns with this idea, such as a potential lack of clarity regarding the 'service' covered by legal aid, and what could legitimately be charged for, given that much of the work is now and may in future be covered by fixed fees.

#### **Questions:**

- 48. Do you agree that a system of 'top-up fees' could work?**

49. **If 'yes', do you agree with the above suggestions for additional services that could be paid for privately?**
50. **What other services could be paid for privately in addition to / alongside a legal aid service?**
51. **How could potential abuse of such a system be prevented – e.g. solicitors charging for services which are covered by legal aid?**

**Annex A - List of consultation questions - Attached separately.**

**Annex B - Results of Law Society online survey - Attached separately.**

## **HOW TO RESPOND:**

The closing date for responses to this consultation is **5pm on Friday 10 May 2013**

**Please send responses by e-mail to:**

[crimetendering@lawsociety.org.uk](mailto:crimetendering@lawsociety.org.uk)

**Or by post to:**

Ashmita Shah  
The Law Society  
113 Chancery Lane  
London  
WC2A 1PL

Please send any queries regarding the consultation to the above e-mail address.