



Report for Bar Council

**A Critique of the Evidence
used by the LSC for its
BVT Proposals**

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1 INTRODUCTION

- 1.1 This report was commissioned from Europe Economics by the General Council of the Bar (the Bar Council) to assist in its assessment of the proposals put forward by the Legal Services Commission (LSC) for “Best Value Tendering for CDS Contracts 2010”.¹² We undertook to:
- (a) review the evidence supporting LSC proposals; and
 - (b) offer some preliminary ideas on how the market for CDS services might evolve, if the LSC proposals were to be implemented.
- 1.2 We take the view that, although the proposed changes will have the most immediate effect on solicitors, barristers will be concerned with the implications for the justice system as a whole; and they will also be concerned by second-round effects as solicitors adjust to the proposed new arrangements. It is also possible that the LSC may make proposals on similar principles for legal aid work in higher courts, so that any precedents set as a result of the present consultation may have further practical implications for the Bar.
- 1.3 Near-final drafts of our assessment have been shown to the Law Society; and we have been shown near-final drafts of the assessment made by the Law Society’s economic advisers.
- 1.4 We begin by setting out our present understanding of the essential economic features of the present system, and of the main proposals.

Current system

Qualifications of suppliers and process of appointment

- 1.5 The LSC is the government body responsible for delivering legal aid, advice and representation to people with problems in England and Wales. It was established under the Access to Justice Act 1999, replacing the Legal Aid Board in April 2000. It delivers services through two schemes: the Community Legal Service (CLS) and the Criminal Defence Service (CDS). The CDS is the scheme that provides legal advice and representation to people being investigated or charged with a criminal offence. This is achieved by managing the duty and own-solicitor schemes for police stations and magistrates’ courts, funding services in the higher courts, and running the Public Defender Service which provides criminal defence services directly to the public.

¹ Europe Economics is an independent technical economics consultancy. For information see www.europe-economics.com

² This Consultation Paper was published in March 2009.



- 1.6 The current “best value tendering” (BVT) proposals relate only to changes in procurement of services for the duty and own-solicitor schemes for police stations and magistrates’ courts.
- 1.7 The existing system for this area of legal aid provision is set out in the Legal Services Commission - Duty Solicitor Arrangements 2008,³ the Unified Contract Standard Terms 2008,⁴ and the Final Unified Contract Crime Specification (July 2008).⁵ The LSC is currently consulting on CDS Contract 2010 terms which would include some significant changes partly (or so it seems) to facilitate the proposed new system of procurement.⁶
- 1.8 The process for procuring duty solicitor work consists of two steps. Firstly, each legal aid provider must acquire a Unified Contract (Crime), which sets out the standard terms for legal aid provision in England and Wales. In order to acquire this contract, the provider must not have received a rating lower than 1, 2 or 3 in each Category of Law as determined by the Independent Peer Review Process. They have, therefore, to have passed a certain threshold of competence.
- 1.9 Subsequently, each criminal defence services (CDS) supplier has to apply for membership of geographically dispersed schemes. The LSC has the responsibility to establish schemes within each Region and identify the Magistrates’ Courts and Police Stations covered by each scheme. Applications for scheme membership are made to the appropriate Regional Office of the LSC.⁷
- 1.10 In total, 1,799 providers (with 2,333 provider offices between them) were awarded a Unified Contract (Crime) beginning on 14 July 2008; this originally lasted 18 months but was extended to 24 months after the activation of the six-month extension clause. This contract will therefore now expire in July 2010.⁸

Scheme types

- 1.11 Scheme types can be one of Police Station only, Busy Court, or Less Busy Court.
- 1.12 Applicants may be permitted to join additional schemes, provided that:
 - (a) for a Police Station (only) Scheme, the applicant can attend the Police Station within 45 minutes of receiving a call;

³ The Duty Solicitor Arrangements 2008, 5 May 2008, Legal Services Commission Criminal Defence Service - http://www.legalservices.gov.uk/docs/criminal_contracting/DutySolicitorArrangements2008_Final.pdf

⁴ The Unified Contract Standard Terms 2008, April 2008, Legal Services Commission - http://www.legalservices.gov.uk/docs/criminal_contracting/StandardTerms_070408.pdf

⁵ Final Unified Contract Crime Specification (July 2008), April 2008, Legal Services Commission - http://www.legalservices.gov.uk/docs/criminal_contracting/Specification_UC_Crime_July08_FinalCleanCopy_110408.pdf
⁶ Annex 2 to BVT Consultation Paper March 2009

⁷ There are a total of 12 Regional LSC Offices, situated in; Newcastle, Bristol, Birmingham, Cardiff, Liverpool, Manchester, Brighton, Nottingham, Cambridge, Reading, Leeds and London.

⁸ LSC Annual Report and Accounts 2007/2008 - http://www.legalservices.gov.uk/docs/about_us_main/LSC_Annual_Report_200708_Final.pdf



- (b) for a Busy Scheme, the CDS Supplier's Office is *Readily Accessible* to the court covered by the Scheme;
 - (c) for a Less Busy Scheme, the CDS Supplier's Office is *Accessible* to the court covered by the Scheme.
- 1.13 Work on Police Station or Magistrates' Court duty solicitor schemes is allocated either by Rota (where there is a list of Duty Solicitors who are allocated to provide Advice and Assistance during a given time slot) or Panel (Duty Solicitors are called upon in consecutive sequence). Some Police Station Duty Solicitor work will be distributed by back-up, when no Rota Duty Solicitor is available. Membership of a scheme initially entitles Duty Solicitors to Back-up work, to be included on the subsequent Rota or Panel.
- 1.14 Duty Solicitors are required to serve on both the Police Station and Magistrates' Court Schemes. The LSC may suspend or remove a Duty Solicitor from membership of a Scheme where that Duty Solicitor has unreasonably failed to attend the Police Station or Magistrates' Court when he or she should have done so.

Basis for allocation of work

- 1.15 Schemes run by Rota consist of a List of Slots, allocated to CDS Suppliers in proportion to the number of Duty Solicitors employed by that CDS Supplier who are members of that Scheme. For those run by Panel, CDS Suppliers are allocated one place on the Panel List for every Duty Solicitor employed.
- 1.16 All CDS Suppliers who have been awarded a Unified Contract (Crime) and whose Duty Solicitors have successfully applied to join a Scheme will have their names entered on the relevant Rota. If, after this step, the Rota is deemed to be adequately staffed, that is to say it has sufficient separate CDS Suppliers to avoid conflicts of interest, and sufficient individual Duty Solicitors to fully staff the Scheme, the Rota for that Scheme will be finalised.
- 1.17 Our understanding is that there is no process by which, in the event that more eligible CDS suppliers wish to join a scheme than the LSC think necessary, the LSC selects on the basis of proximity or any other indicator of expected quality. Suppliers compete on reputation among potential clients, who may request that they are represented by solicitors of their own choice, but the LSC attaches no weight to quality above the minimum requirements when appointing firms to Panels or Rotas, or in requesting particular services from suppliers.
- 1.18 If it is initially found that there are too few Duty Solicitors, those who have expressed an interest on appearing on the Rota more frequently will then have their application considered. If there is still insufficient staffing, or not enough separate CDS Suppliers, the LSC may include those CDS Suppliers who have expressed an interest in expanding into Schemes for which they would not normally qualify. If after this there is still inadequate supply, the LSC may invite applications from CDS Suppliers to join the scheme in question, relaxing travel time requirements.



Fees

Police station work

- 1.19 For Police Station work, an Attendance Fixed Fee (as set by the LSC for each Boundary Area) is payable each time the Duty Solicitor attends a client in the Police Station. This fixed fee includes all work done on the Matter relating to the Police Station Attendance, including time spent advising the Client, travel to and from the Police Station, and waiting time.
- 1.20 Different fixed fees are payable for each CJS scheme. The lowest Police Station Attendance Fixed Fee (exclusive of VAT) is £142.13 for Fleetwood, Lancashire; and the highest out of London is £319.15 for Stansted, Essex. London fixed fees range from £248.51 for Bexley to £340.43 for Heathrow.
- 1.21 The fee schedule is illustrated below (values are given exclusive of VAT):

Table 1.1: Police station schemes examples of fixed fees

Regional office	Minimum scheme fee	Maximum scheme fee	Average scheme fee
1 - Newcastle	£148.09	£202.55	£169.36
2 - Bristol	£159.15	£246.81	£194.51
3 - Birmingham	£168.51	£217.87	£195.53
4 - Cardiff	£146.38	£270.64	£204.13
5 - Liverpool	£148.94	£196.60	£177.17
6 - Manchester	£138.72	£214.47	£179.89
7 - Brighton	£160.00	£297.87	£231.25
8 - Nottingham	£171.06	£226.38	£194.64
9 - Cambridge	£156.60	£319.15	£225.56
10 - Reading	£185.53	£258.72	£223.38
11 - Leeds	£147.23	£225.53	£177.87
12 - London	£248.51	£340.43	£276.44
All outside London	£138.72	£319.15	£119.62
All regions	£138.72	£340.43	£209.66

- 1.22 If for any Matter the total value of Police Station Attendance (if it were claimed at the LSC hourly rates) is above the threshold level of three times the relevant Police Station Attendance Fixed Fee rate, then remuneration will be as for an “Exceptional Case”. Work done beyond this level is compensated at an hourly rate.



- 1.23 Hourly rates claimable for Exceptional Cases (and rates by which it is determined whether or not a case has exceeded the Exceptional Cases threshold value) are shown in Table 1.2 below.⁹

Table 1.2: Hourly rates claimable for exceptional cases

Police station attendance	National (£)	London (£)
Own solicitor	52.00	56.20
Duty solicitor (unsocial hours)	69.05	69.05
Duty solicitor (other hours)	52.00	56.20
Duty solicitor – serious offences (unsocial hours)	80.00	80.00
Duty solicitor – serious offences (other hours)	60.00	65.00
Travelling and waiting		
Own solicitor	28.80	28.80
Duty solicitor (unsocial hours) ¹⁰	69.05	69.05
Duty solicitor (other hours)	52.00	56.20

- 1.24 Costs for the use of professional services (e.g., interpreters) and certain other costs are disbursed separately to the Police Station Attendance Fixed Fee. Multilingual firms that can provide interpreter services in-house do not have an opportunity to charge extra for this.

Magistrates' Court work

- 1.25 Magistrates' Court Duty Solicitor work, providing services as a Duty Solicitor to any defendant who wishes to receive Advocacy Assistance and whose case has passed the Sufficient Benefit Test, is paid at hourly fee rates:

Table 1.3: Magistrates' court duty solicitor hourly rates

	National (£)	London (£)
Standard rate ¹¹	53.85	55.15
Enhanced rate (payable for work done on a day which is not a business day)	67.30	68.90
Travelling time (payable when called out on a day that is not a business day)	26.30	26.30

⁹ Final Unified Contract Crime Specification (July 2008) for Invitation to Tender (080407) -

http://www.legalservices.gov.uk/docs/criminal_contracting/Specification_UC_Crime_July08_FinalCleanCopy_110408.pdf

¹⁰ "Unsocial Hours" means between the hours of 5.30 pm and 9.30 am on any Business Day and any time on a day which is not a business day.

¹¹ For attendance and waiting at a magistrates' court



- 1.26 To represent a client as an Own Solicitor at Magistrates' Court the client must have passed a Financial Eligibility Test and have been granted a Representation Order. Magistrates' Court Own Solicitor work is paid at either a lower standard fee, a higher standard fee or at hourly rates, depending on whether certain thresholds have been exceeded. The fees also differ based on whether the work is in a Designated Area (these cover the major urban areas in England and Wales) or an Undesignated Area, and what category of proceeding is involved. Special fees apply to London.
- 1.27 Further details including the threshold values and categories of proceedings are included in Appendix 1.

Other Rates

- 1.28 Mileage rate: where providers are permitted to claim travel costs under this Specification, the mileage rate is 45p per mile.
- 1.29 Payment for file review: claims may be made for the Special Quality Mark (the Quality Assurance Standard published by the LSC) file reviews carried out on Contract Work files at the rates set out in the table below (exclusive of VAT):

	£
Face to face file review	31.18 per file review
Paper file review	18.71 per file review

Comments

- 1.30 It is clear from these details that the present system of administered prices and contract award has considerable scope to deal with differences between types of work and cost in different parts of England and Wales.
- 1.31 It should also be stressed that many important features of the present system have been introduced only recently. Notably, following the recommendations of the Carter Commission in 2006:
- (a) Many payments are now made on a "fixed fee" basis, of a set amount per case, rather than on the hours recorded and approved by the Taxing Office.
 - (b) Many waiting and travel time payments have been rolled up into the case fees.
 - (c) A system of tapering payments has been introduced for larger cases, in which a higher fee is paid for the first hours spent, and then the hourly fee is reduced, so as to increase the financial incentives on the lawyers concerned to try to bring the case to a conclusion.



- 1.32 In responding to the 2007 consultation on Best Value Tendering (BVT) many of those affected called for a period of stability to allow the recently introduced fixed and graduated fees to bed down.¹²

Justification advanced for LSC proposals

- 1.33 The justification advanced by the LSC in its current Consultation Paper on BVT refers back to previous policy statements, and we begin extracts from these in 2005.

- 1.34 In January that year, the LSC Consultation Paper *Improving Value for Money* stated that:

“... At the same time as ensuring quality, we must also provide a service that is affordable to the public purse now and sustainable into the future...

... the current remuneration scheme ... is too inflexible to reflect the local market conditions facing solicitors...

...In other sectors, competitive tendering is a well-established method of delivering quality public services...”¹³

- 1.35 The 2006 Carter Commission report opened by emphasising how much more the UK spends on legal aid than other countries, and established the objective of reducing expenditure. It acknowledged that such high expenditure may arise partly because of our adversarial system, but also referred to systemic inefficiencies - including the incentive from payment by the hour to spend more time per case than necessary - despite the checks from the Taxing arrangements, and the fact that no one has overall charge of (or responsibility for) the costs incurred in the system as a whole. It also stated a general preference for market-led systems over administered systems, but this is expressed in very vague terms.

- 1.36 The changes to payment per case from payment by the hour introduced since the Carter report, and the changes to payments for travel and waiting time, have addressed some of these criticisms.

- 1.37 The Preface to the December 2007 LSC Consultation Paper *Best Value Tendering* argued that:

“... A market-based system should encourage greater efficiency among providers, should be more efficient to administer and should create a market where practitioners can make a reasonable return on their investments...

... The procurement of professional services, including legal services, through market-based mechanisms is common around the world. The LSC has itself successfully

¹² Page 11
¹³ Foreword



procured legal services in this way for Community Legal Service Direct and Criminal Defence Service Direct...”

1.38 This Consultation Paper also stated that:

“... most fundamentally, the current system provides no mechanism to demonstrate objectively that the Commission is paying sufficient amounts to ensure a sustainable and quality service, but no more than is necessary to ensure best value for the taxpayer.¹⁴

... Quality remains at the heart of our legal aid reforms and it is generally accepted that best value for money is achieved through competition, provided that quality and price are considered together in the final choice of supplier...”¹⁵

1.39 In the October 2008 Consultation Paper “Civil Bid Rounds for 2010 contracts”, the LSC explained that it was seeking to implement minimum new Matter start sizes because:

“... we want to buy:

A level of access that is meaningful and corresponds to our requirements around provider presence in an area – this means the ability to deliver a service that is available regularly to clients.

A service that ensures that providers have sufficient experience of operating within the legal aid environment.

A sufficient volume to ensure delivery of a full breadth of services and to sustain quality.

A service that has the capacity to promote legal aid services, for example, through supporting trainees.

A service that encourages specialists to work alongside each other to respond to clients’ advice needs and promote excellence.

We also want to focus our administrative resource on managing providers’ work and ensuring value. We want to avoid committing considerable resource to managing a large number of small contracts, as this is not cost effective.

We believe this is a reasonable approach as the levels should be able to be met by a full time caseworker and it is a reflection of an organisation’s commitment to legal aid work...”

1.40 A recent Treasury statement on procurement policy states:

¹⁴ Paragraph 2.10

¹⁵ This view was repeated in the response to the consultation, which notes that: There is clearly a risk that overall the cost of pricing set by competition may be higher than the cost of existing administratively set fee rates. Were this to be the case, the LSC and MoJ would review options for addressing this shortfall. Any assessment of a BVT pilot, for example, would look closely at the prices obtained to ensure that future implementation would remain within budget within the wider context of the money available for legal aid as a whole.



“... the Legal Services Commission’s (LSC) report, Best Value Tendering (BVT) for Criminal Defence Services Contracts 2010, proposes models of BVT to drive through efficiency for legally aided work in police stations and magistrates courts which it is anticipated will deliver efficiency savings of 6 per cent. The Ministry of Justice and LSC will work to extend BVT to other areas of legal aid...”¹⁶

- 1.41 The current (March 2009) LSC Consultation Paper highlights the importance of improving efficiency in order to support the Ministry of Justice in its effort to deliver £1 billion of savings up to March 2011. This perspective is slightly different from that of the 2007 consultation in which the belief was expressed that BVT would not cause an overall rise in cost in criminal legal aid, yet if it was found to cause a price rise they would then consider reducing the current scope of Legal Aid as a whole in order to keep within budget.¹⁷
- 1.42 The 2009 Consultation Paper and Impact Assessment (I.A.) refer back to the Carter Commission report and other earlier documents for justification for the main principles being deployed. The I.A. states in general terms that:

“... it is essential that expenditure on legal aid is cost-effective and prioritized to where it is most needed... the current system of hourly rates and administratively set fees is not sustainable and change is needed in order to safeguard the service...”¹⁸

“... The best value tendering proposals are intended to set a sustainable price for crime lower work through competition between providers, allocating work to the most efficient...[allowing] providers to remain viable in the long term. Strengthening the incentives for providers to work efficiently will support the wider criminal justice system in becoming more efficient, effective and less complex...”¹⁹

“... A best value tender would result in providers setting price through competition. Therefore, in contrast to the current system of administratively set rates, the Commission can have confidence that prices will not be too low, or too high, to procure the necessary services...”²⁰

“... providers would face greatly increased incentives to control and cut costs in order to win contracts. Providers would be able to bid for the right amount of work and structure their businesses in the best way for them. We therefore believe that best value tendering would contain any future increases in expenditure and has the potential to achieve savings in areas where there is string [sic] competition and potential for firms to realize efficiency savings. This is essential to ensure the sustainability of the service against a

¹⁶ http://www.hm-treasury.gov.uk/d/vfm_2009update_pu787_230409.pdf

¹⁷ This view was repeated in the response to the consultation, which notes that “There is clearly a risk that overall the cost of pricing set by competition may be higher than the cost of existing administratively set fee rates. Were this to be the case, the LSC and MoJ would review options for addressing this shortfall. Any assessment of a BVT pilot, for example, would look closely at the prices obtained to ensure that future implementation would remain within budget within the wider context of the money available for legal aid as a whole.” Paragraph 3.27

¹⁸ I.A. paragraph 1.3

¹⁹ I.A. paragraph 2.1

²⁰ I.A. paragraph 5.7



background of increased pressure on public spending and would therefore deliver benefits to the LSC, providers and to future clients...²¹

1.43 The I.A. states that its key assumptions are:

“Current administrative rates do not accurately reflect the cost of providing the service and reflect regional variations in cost

The service would become increasingly unsustainable if there were ‘no change’

Providers will be interested in bidding for crime lower work and competition will be effective

Breaking the link between providers’ duty solicitor numbers and entitlement to service police station slots would allow firms to operate more efficiently.²²

1.44 In summary, the justifications suggested for the current BVT proposals are that they would:

- (a) probably (though not certainly) reduce costs to the Exchequer;
- (b) reveal more detailed and relevant information about cost levels, and hence appropriate fees in different areas
- (c) encourage suppliers to become more efficient;
- (d) provide enough money for suppliers to continue to be available.

1.45 We comment later in this paper on the justifications claimed, after briefly outlining the main features of the proposed new system.

Proposed restrictions on entry to the market

1.46 As at present, only firms qualified as competent by peer review or new firms awaiting peer review would be permitted to tender.

1.47 In addition, a number of new restrictions would be imposed, including:

- (a) minimum bid;
- (b) maximum bid;
- (c) ratio of supervisors to solicitors;

²¹ I.A. paragraph 5.8

²² I.A. paragraph 5.17



- (d) aspects of business structure (e.g., whether bids with sub-contractors or in association with others would be permitted).

Proposed tendering system

1.48 Under the proposals, appointment to schemes would be on the basis of price offered for appointment to Police Station work, which would carry with it an entitlement to related work in Magistrates' Courts. The Magistrates' Court work would be remunerated at set fee rates. Thus in deciding what price to bid the bidder could be expected to take into account:

- (a) the price at which the bidder is willing to do the work in the police station;
- (b) any difference between the price at which the bidder would be willing to do the related Magistrates' Court work and the set price for that work;
- (c) the probability attributed to securing different amounts of related Magistrates' Court work.

1.49 A bidder would also take into account

- (a) his estimation of competing bids;
- (b) his estimation of the strategic value of being appointed (by this we mean the value in time periods later than that to which the tender applies, and the value in geographical areas outside that to which the tender applied);
- (c) the consequences of not being successful in the bid.

1.50 Bids would be taken in one of two ways, either a single closed bid, or an "open" bidding arrangement, in which prices would be reduced on-line until no more bidders remained than were required. In either case, contracts would be awarded to those qualified to tender who offered the lowest prices.

Comparison of present and proposed systems

1.51 There is a great deal of further detail in the Consultation Paper, but the following table attempts to summarise the main similarities and differences in the present and proposed systems.

**Table 1.3: Simplified comparison of present and proposed systems**

	Present system	Proposed system
Qualifications required to supply services		
a) Minimum quality standard (peer review of firm)	Yes ²³	Yes
b) Performance requirements for firm	Yes ²⁴	Yes
c) Qualified solicitor	Yes ²⁵	Yes
d) Supervisor ratio	No	Yes
e) Office in proposed area	Sometimes	Yes. Limitations on sub-contracting
Basis for selection		
a) All who apply provided that minimum qualifications are met and scheme is not full	Yes	No
b) Lowest price offered via auction	No	Yes
Work to be performed under contract		
a) Advice to clients at police station	Yes ²⁶	Yes
b) Advising and representing clients in Magistrates' Courts	Yes	Yes
Conditions of contract		
a) Minimum size of bid	No	Yes

²³ "In each Category of Law, your Contract Work must receive either rating 1, 2 or 3 as determined by the Independent Peer Review Process." (The Unified Contract Standard Terms 2008, p37)

²⁴ CRIME PERFORMANCE INDICATORS "Direct Application KPIs are contractual requirements. If you fail to meet these KPIs this is likely to constitute a breach of contract meriting appropriate action under the Contract, including Contract Sanctions where appropriate." (The Unified Contract Standard Terms 2008 Annexes, p109)

KPI 1: Assessment reduction on Claims for Magistrates' Courts Non-Standard Fees and Police Station Advice and Assistance Exceptional Cases - Maximum of 15% reduction on assessment on all your Claims for these Fees in any 3 month period during the Contract Term.

KPI 2: Acceptance of calls from DSCC for Police Station Telephone Advice and Police Station Attendance when you are allocated Supplier on Rota Duty Solicitor Scheme - Minimum of 90% of calls made to you by the DSCC during each of the Quarter Periods accepted and dealt with appropriately (The Unified Contract Standard Terms 2008 Annexes, p109)

²⁵ "An applicant must hold a current practicing certificate" (The Duty Solicitor Arrangements 2008 p8)

²⁶ You may occasionally use a solicitor or legal adviser, working as an agent, to perform Contract Work on your behalf provided that:

- (a) you are responsible for ensuring that their work is properly supervised and complies with this Contract;
- (b) your supervision of them is, in all respects, equal to your supervision of your employed solicitors and legal advisers;
- (c) you are responsible for all payment to them for their work; and
- (d) the use of such an agent does not increase the costs payable by us.

Where Contract Work is payable by a any Fixed Fee, e.g. a Fixed Fee, Graduated Fee or a Standard Fee, any costs related to the use of an agent are within the fixed fee (and may not be claimed separately)." (The Unified Contract Standard Terms 2008, p25)

"You may designate fee-earners not employed by you, especially where they undertake work for you on a regular basis. Where you do so, that fee-earner is subject to the same requirements as all other designated staff and you must comply with the requirements of paragraph 2.7 of the Unified Contract (Crime and Civil) Standard Terms." (The Unified Contract Standard Terms 2008 Annexes, p107)



b) Maximum size of bid	Yes per solicitor, some flexibility if undersupply ²⁷	Yes
c) Own client services only in police station	Yes	No ²⁸
<hr/> Basis for payment <hr/>		
Mixture of fee per case and time spent	Yes	Yes

1.52 This comparison underlines that the main effects of the LSC proposals would be:

- (a) some changes to the limitations on the types of bid that will be considered;
- (b) switching from administered prices to prices set by auction; and
- (c) contracts to be awarded to those offering the lowest prices.

²⁷ Talks about "sufficient individual Duty Solicitors to staff the Scheme fully" i.e. they have decided upon a maximum number of cases that a normal solicitor is capable of covering, with an option to express "an interest in appearing on that Rota more frequently (by considering the maximum number of Slots they are prepared to undertake in a given period)" (The Duty Solicitor Arrangements 2008. p13).

²⁸ 140 firms reported only own client work. I.A. paragraph 5.21



2 EVIDENCE FOR THE PROPOSALS: THEORY

Benefits of effective competition

- 2.1 It would be widely accepted among economists and many others that where a competitive or market-based arrangement can be used it is likely to produce superior outcomes to those resulting from administrative decisions. This is because a competitive market makes better use of better information, and better reflects the preferences of those concerned than is generally possible for a government administrator or planner. It tends to stimulate innovation and product or service differentiation, both of which may be important to buyers and/or consumers.
- 2.2 However, this clearly does not mean that everything is always best settled through a competitive market.²⁹ Nor does it mean that a change to procurement methods of the sort recommended by the LSC would bring about an improvement in the market for legal services.
- 2.3 If it is impractical to define or measure quality of a product or service above a basic minimum, or to establish a clear definition of the output required from services supplied, then a market in which decisions to purchase are based on the price offered, as proposed by the LSC, would affect both the output delivered and the quality. The output would tend to be re-defined so as to be deliverable in a profitable way, and the quality of service adjusted so as to cover the specified requirement but no more.
- 2.4 In order to show that its proposals would improve value for money, the LSC (and the Carter Commission before it) would have to show that these predictable changes in the nature of the service would be either desirable in themselves, or a worthwhile price to pay for the reduced prices paid per case.
- 2.5 We have found nothing in any of the official documentation that establishes this, or even attempts to address the question in a rigorous way. The Carter Commission Report and earlier consultations are couched in very general terms, while the current LSC Consultation Paper takes the issue as settled (saying that “We believe the high level case we made for BVT at the time [of the first consultation] remains compelling”).³⁰

²⁹ Well recognised circumstances in which a market would not be efficient include:

-Natural monopolies or monopsonies, where a single supplier or purchaser has much lower costs than would be possible under a fragmented structure. The LSC is perhaps an example, as the sole purchaser of legal aid services. (This does not mean that it is not possible to have effective competition among suppliers of services purchased by the LSC, just that there are thought to be advantages in having a single decision-taker on the purchasing side.)

-Public goods, in which market transactions would hardly be feasible. Examples include most police work, and the justice system as a whole.

-Circumstances in which either purchasers or sellers do not have access to information that would be essential for an efficient outcome. An example might be a complex procurement requirement, in which the only practical way of proceeding is by appointing a single or main contractor, and proceeding by negotiation.

-Circumstances in which the transactions cost of a market would make it infeasible.

³⁰ BVT Consultation Paper, Foreword, p.1



- 2.6 It may be useful to elaborate the reasons why the high level case on which the LSC relies is not correct.
- 2.7 Under a procurement system of the sort proposed by the LSC, quality standards required would be defined primarily before tenders were considered. All qualifying bids would have to have demonstrated an acceptable minimum standard of competence (e.g., in previous work). The selection of successful tenders from among qualifying bidders would then be on the basis of the prices offered, with contracts awarded to the lowest bids. Under such a system bidders would not be paid more than the market-clearing price because they appeared to offer any higher standard of work; nor once the contract was awarded and work is in progress would there be any financial reward for above-minimum standards of performance.
- 2.8 The incentives for suppliers would therefore be to perform to a standard sufficient to avoid sanctions under the contract, but not to spend any more time and effort than this. In order to achieve this, suppliers could:
- (a) Define the outputs so as to avoid anything not explicitly or clearly required. If, for example, the output required is advice on the legal rights of an accused person, clearly this could be delivered after more or less careful thought and detailed analysis. There would be no financial incentive to consider issues in depth.
 - (b) Deliver the defined outputs with as little cost as possible. If, for example, the requirement is attendance by a qualified solicitor, clearly the less expensive the individual, the better. A more junior person might be cheaper to employ, and the contract would not penalise the supplier for using the least expensive staff possible, despite any reduction in the likely quality of advice provided.
- 2.9 Cost savings resulting from these incentives will include some reductions in waste - which should be welcomed - and some reductions in quality below the optimal level, which should be deplored. Without any rigorous examination of the likely balance of these welcome and unwelcome effects the LSC cannot claim any general theoretical support for its proposals.
- 2.10 A practical illustration of this type of incentive already in operation can be observed since payment per case is already part of the present arrangements. Under the Litigator's Graduated Fee Scheme (LGFS) there is no separate payment for attendance at court, so in a departure from former practice solicitors are understandably less frequently sending representatives to court.
- 2.11 There are many consequences of having no representative at court; a representative may have to arrange the attendance of lay and private witnesses or defendants, he may have to proof witnesses, he may have to obtain information or correspondence from the solicitor's file, collect and send faxes, make phone calls, and so on. Many of these tasks can be done while counsel is in court. Many tasks cannot be done as well by counsel as they are not within his experience or training, or are not professionally allowed (e.g.,



proofing witnesses of fact). If counsel cannot do his job properly because he is distracted by these other tasks, the quality of the trial process is affected.

- 2.12 If there is poor quality advocacy by the defence then there will be more wrongful convictions, more appeals, and more prison costs than there should be.
- 2.13 This illustrates how a (frequently small) cost-saving may produce a significant loss of quality which is often unforeseen, or immeasurable, or both; as well as imposing costs elsewhere in the system.
- 2.14 These effects are being observed before the introduction of the proposed new system of tendering, and result from other changes made following the Carter Commission recommendations. The effect of the proposed BVT procurement system would be to further add to the incentives to reduce costs, including through reducing the standards of service below the optimal levels, for two reasons:
- (a) the nature of the auction would underline to all concerned that the decision would be based only on price; and
 - (b) the process would preclude or at least severely limit the exercise of judgement by the LSC on any dimension other than price.

Best value tendering

- 2.15 The Government's approach to best value in other contexts emphasises that the quality of services matters as well as their cost.³¹ It is indeed a matter of basic economics that consumers derive utility from different characteristics of a product or service, of which the price paid is only one.
- 2.16 The 2007 LSC consultation paper claims that:
- "We have used the term 'best value tendering' to describe our proposals because it reflects the fact that price and quality must both be at the heart of any new system."
- 2.17 However, since the LSC proposed system would take quality into account only as a precondition for the tender, it is in fact designed in such a way that it cannot be expected to deliver best value.
- 2.18 The basic principle of best value tendering is that different aspects of the tender should all be considered, and appropriately weighted, so as to give the best overall value for money. This is not necessarily the cheapest tender, since a slightly cheaper tender might be far

³¹ See for example "Modernising Local Government" Department of the Environment, Transport and the Regions, 1998



worse in quality of output.³² Some recent experiences of awarding contracts for domiciliary care by price auction have underlined this danger.³³

- 2.19 If a tender is to deliver best value and to meet requirements (such as those of EU procurement law) for transparency an invitation to tender would need to be reasonably explicit about the weight to be given to different dimensions of quality and to price, so that it could be demonstrated that the winning tender would offer the best value. An auction or other competitive tender requiring a standard of quality for bidders to enter the market, but then with an outcome determined solely by price, could not be correctly defined as a BVT tender unless there were no value to aspects of quality of the service other than the minimum standard. Where there are dimensions other than price, best value procurement has to take them into account.
- 2.20 An auction by price of a commodity – say, agricultural produce, or minerals – of a defined grade would not be a best value tender, but a price auction of something with a specified quality.
- 2.21 It is clearly not the case that there is no difference between the quality of service supplied by different legal aid law firms. Quality is to some extent safeguarded by the condition that solicitors rated below category 1, 2 or 3 providers would not be eligible to bid. However, the effect of a scheme of the type proposed by the LSC would be that decisions would be made on price, subject only to a minimum required quality of service: the quality of service itself would not be considered in the evaluation, nor in payments made under the contracts.
- 2.22 The LSC proposals cannot therefore be correctly described as “best value tendering”.

Implications for BME clients and lawyers

- 2.23 It would be a mistake for the LSC to assume (as the Carter review appears to have assumed) that the effects of its proposal would be distributed more or less evenly across the justice system. Black and ethnic minority (BME) solicitors have made the point that a race to the bottom in respect of fees would bear disproportionately hard on them because no value is ascribed to the distinctive services they provide. The linguistic skills and cultural awareness that they offer their clients and thus the justice system as a whole are not recognised by the LSC proposals.

³² See for example
http://www.consilium.europa.eu/uedocs/cmsUpload/Template214B_WORKS_CONTRACT_AWARD_COMMITTEE_REPORT.doc

³³ See Appendix 3.



- 2.24 According to the London Criminal Court Solicitors Association (LCCSA), the present system has been successful in attracting a range of suppliers – 40 per cent of criminal defence firms in London are ethnic-minority owned – that reflects the diversity of the community. The LCCSA argues that “The Carter proposals, envisaging large monopoly suppliers, will destroy that ethnic diversity and connection”.³⁴
- 2.25 Firms of BME solicitors tend to be small, relative to broader-based non-ethnic-minority firms, so that substantial numbers of BME solicitors may be excluded from bidding, risking leaving BME clients with lower quality justice and possibly inadequate access.
- 2.26 It might be argued that non-BME firms which find they need the kinds of linguistic and cultural attributes that BME firms provide may be procured by sub-contract to suitable individuals. Even if this is the case, it is hard to see how such a system would be more efficient than having a BME firm take on the case.
- 2.27 Other options for BME offices include merger, growth or exit from the CDS market. However, the 2009 consultation paper precludes the option for firms to form consortia in order to place bids. It claims that the usual arguments in support of consortium arrangements, namely high barriers to entry and different providers offering separate elements of a complementary product, are not relevant in this case. It justifies this analysis on the grounds (a) that it is planned to ensure that barriers to entry are low and (b) that its intention to ensure providers have the ability to take a case from police station to magistrates’ court removes the opportunity for complementary product offerings.
- 2.28 These arguments are not at all persuasive.
- 2.29 The implications of the LSC proposals for BME firms are important for the justice system as a whole, since a significant number of those accused of crime and requiring proper defence are from black and ethnic minorities.

³⁴ <http://www.lccsa.org.uk/index2.asp?ItemID=2663&pcid=3&cid=6&mid=75&incid=53&archive=yes>

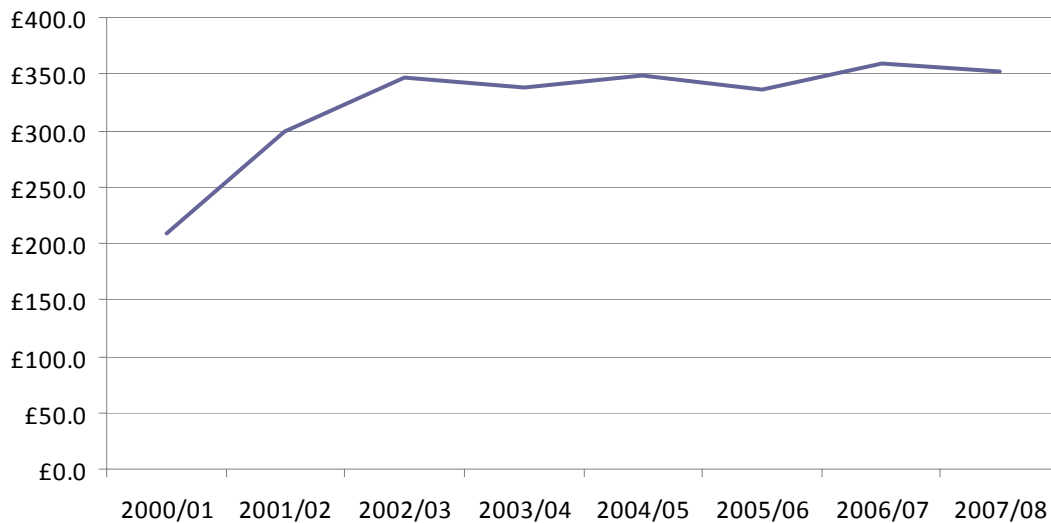


3 EMPIRICAL EVIDENCE

Overall cost to the Exchequer

- 3.1 The Carter Commission's 2006 Review of Legal Aid Procurement observed that the justice system in England and Wales is one of the most highly regarded in the world, and that legal aid is recognised as an essential component of this system. It also noted that our system of legal aid provision cost more per capita than in any other country, with legal aid expenditure having increased from £1.5 billion in 1997 to over £2 billion in 2006. This increase in spending had occurred despite several preceding attempts to improve the efficiency of the legal aid system.
- 3.2 The total spent on legal aid expenditure in 2007/2008 recorded in the LSC's Annual Report and Accounts was £2.023 billion, equivalent to approximately £38 per head of the population.
- 3.3 However, it seems that on the latest information the costs of criminal legal aid per act of assistance provided have not been increasing.

Chart 3.1: Cash payment per act of assistance (2000-2008)

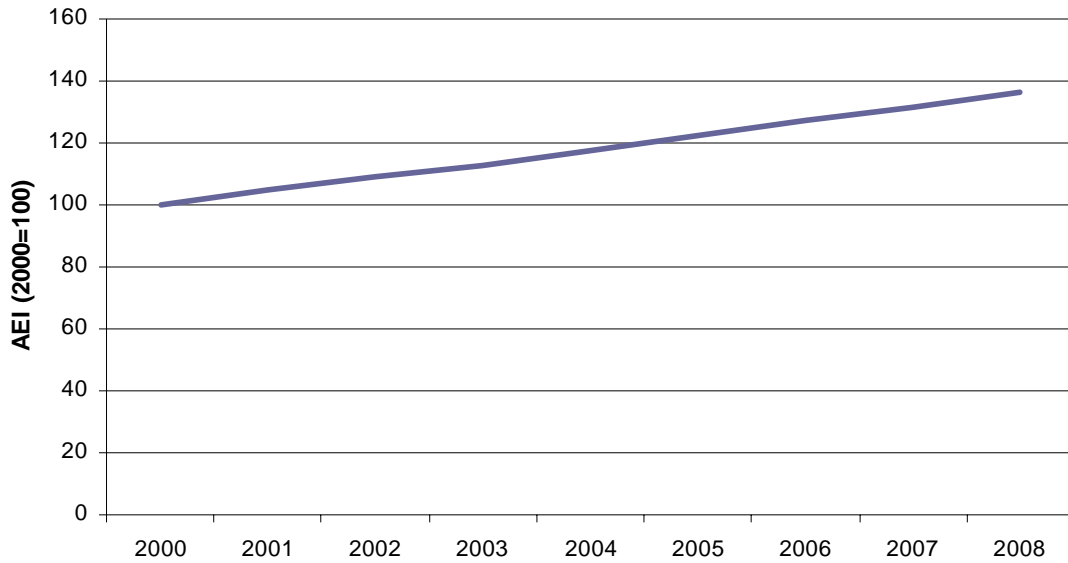


Source: Calculations based on the Ministry of Justice's Judicial and Court Statistics Report 2007 Table 10.4

- 3.4 Total expenditure (as opposed to expenditure per act of assistance) had peaked at £534.2m in 2003/04.
- 3.5 The payment per act of assistance, as can be clearly seen from the chart above, has remained almost constant. There is no obvious indication here of costs running out of control. Indeed, a comparison of changes in the cost per act of assistance with changes in the average earnings index (shown in Chart 3.2 below) shows that the real costs per act of assistance has been falling.



Chart 3.2: UK average earnings index (2000-2008)

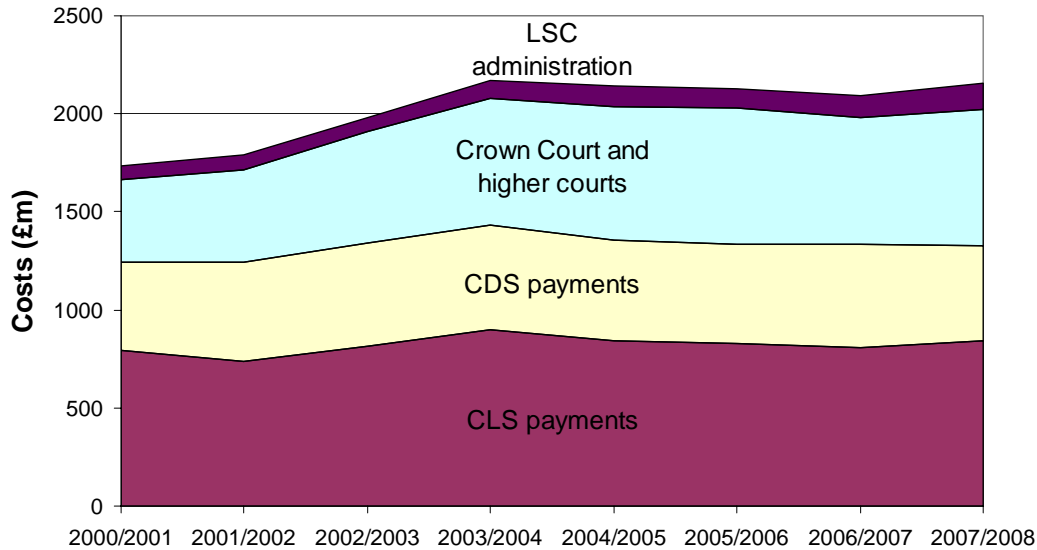


Source: Office for National Statistics [Whole economy (excl. bonuses)]

3.6 A picture of CDS payments in relation to other parts of LSC spending is given below, again confirming that these payments are not increasing in relation to other costs.



Chart 3.3: LSC spending 2000/ 2001 - 2007/ 2008



Source: LSC Annual Reports

Commentary

3.7 A number of factors not connected with the system of procurement have contributed to the costs of legal aid. For example, the LSC has identified strategic political planning aimed at increasing conviction rates as a significant driver of expenditure growth. One example of such planning is in the paper *Cutting Crime, Delivering Justice* which laid out the strategic plan for criminal justice for the period 2004-2008, presented to Parliament in July 2004 by the Secretary of States for the Home Department and for Constitutional Affairs, and the Attorney General. This promised that 150,000 more offences would be brought to justice by 2008, but it did not consider the cost implications for legal aid.

3.8 Recent trends in cost per act of assistance given do not suggest that the proposed new procurement system is needed to control the overall cost.

Systemic weaknesses leading to inefficiency

3.9 Lord Carter's review claimed that the continued rise in spending on legal aid is a result not of individual or collective wastefulness, but of systemic weakness in the way that legal aid services are procured, leading to inefficiencies in the way they are delivered. The review argued that the best incentives to efficiency were lacking because of a remuneration scheme that is based largely upon inputs and time spent.



- 3.10 Subsequent changes to the remuneration scheme have already been made: for example, movement from an hourly rate to fixed fees for Police Station work took place in January 2008³⁵ and travel and waiting time costs were incorporated into Magistrates' Court fixed fees for some urban areas in April 2007.³⁶
- 3.11 The LSC claimed in its 2007 consultation response that administratively set fees have the disadvantage that they do not determine whether the rates set by the LSC are both sustainable for providers and value for money to the taxpayer. However, the number of duty slots requested by providers for each scheme, as well as the levels of inflow and outflow of firms holding legal aid contracts in each area, could have provided good information from which this could be determined. Despite this obvious source of relevant information, the possibility of introducing evolutionary modifications to the current system suggested in the 2007 consultation response was not explored further.
- 3.12 The suggestion that administratively set fees might not provide a mechanism for directing work to the most efficient firms is also repeated in the consultation response, ignoring the fact that reducing administratively set fees while also taking quality into account in awarding tenders would price out the least efficient firms and open up more work for efficient firms.
- 3.13 Finally, the LSC claims that there is no identified method available within the current system which could "effectively, transparently and fairly" choose between providers.

Commentary

- 3.14 The main evidence of systemic weakness considered by the Carter Commission may no longer be relevant, in view of the changes already made to the system.
- 3.15 The suggestion that, because individual suppliers cannot differentiate themselves by price they are not encouraged to innovate, seems misguided. In the first place, any fixed price will provide an incentive to reduce costs since this would lead to improved profitability. This incentive has been reinforced since Carter reported. Secondly, the LSC proposals do not provide any opportunity for firms to offer higher prices and higher quality through innovation or in any other way.
- 3.16 A scoring system based on the weighted values of each firms' quality evaluations and price should satisfy each of these criteria.

³⁵ http://www.legalservices.gov.uk/criminal/police_station_fixed_fees.asp#about

³⁶ http://www.legalservices.gov.uk/criminal/revised_fees_magistrates.asp



Suppliers may not be financially viable in the longer term

- 3.17 The 2005 FreshMinds Legal Aid Review Firms Survey of 242 firms³⁷ reported that legal aid providers were finding it difficult to attract new recruits and to retain fee earners, with 55.5 per cent of those surveyed claiming that salaries for Crime Work were low. Firms cited low profitability for the declining numbers of those qualifying in criminal law. This may well suggest that legal aid payments had been set too low.
- 3.18 The tender by the LSC for the Unified Contract (Crime) July 2008 found that in over 50 duty solicitor schemes (out of 245) the number of slots requested was five times greater than the number available and that over a third of all providers indicated they wanted more volume.³⁸

Commentary

- 3.19 Although there is clearly financial pressure on law firms relying on legal aid work, it does not appear to have reached a stage at which, overall, there are insufficient suppliers. However, this may not be true at a local level; and, in particular, there must be serious doubt about the adequacy of supply of high quality or complex services where payment per case now applies. This is an issue that should be studied in more detail.
- 3.20 There is no evidence that the LSC needs to impose a new structure on suppliers, or on encouraging larger firms in order to increase efficiency and hence long-term viability. PKF's analysis of the firms visited revealed a considerable variation in costs. A similar result was found in 2006 by the Otterburn legal consulting, whose research of the top 100 crime firms in the country showed that whilst some of the larger firms were doing well, others were struggling, so there was a large range of profitability.
- 3.21 PKF suggested more research in this area but it does not appear that this further work was done, even though the weakness of the research in its current form appears to invalidate Carter's view that efficiency savings could be achieved through encouraging the development of a smaller number of larger legal aid firms.
- 3.22 Moreover, key reasons given to PKF by firms for undertaking criminal legal aid activity include "positive cash-flow, small positive gross margin, stability of activity, the interest, reputation and esteem associated with such work and the wish to provide a full service offering". This being so, we would expect to see less profit-maximising behaviour, and therefore lower profit margins, than in other areas. Low profit margins suggest that firms are not taking advantage of the current system to earn abnormal profits, and that the current outcome may already be close to that of a competitive market.

³⁷ <http://www.legalaidprocurementreview.gov.uk/docs/fresh-minds-solicitor-survey.pdf>

³⁸ Response to 2007 Consultation p13-14.



Revealing the correct prices to pay

- 3.23 It is suggested that an advantage of the proposed new system would be to allow the “correct” prices to be paid, since these would be revealed through the bidding process.
- 3.24 However, there are a number of reasons for thinking that the prices offered in auctions as proposed may not reflect the long-run costs of supply, and so would not lead to a sustainable outcome.³⁹
- 3.25 Opinions reported among responses to the 2007 consultation included the following:
- “The majority of representative bodies expressed concerns arising from the near monopsonist nature of the criminal defence market (there are few other options for criminal providers other than publicly funded legal aid work). This in itself would lead to “unsuccessful parties being effectively excluded from the whole market” (BSN), leading to either a “stagnant if not ever decreasing supply base which will decline to a point where the supply base collapses” (TLS). Many respondents also noted that the nature of single purchaser market would also mean that providers would be forced into a position of entering unsustainably low bids (‘suicide bids’).” (p12)
- 3.26 The LSC recognised the concerns put forward by firms in response to the 2007 consultation :
- “... a BVT system for all criminal defence services would invariably lead suppliers with little alternative than to bid at the lowest price possible to ensure that a contract was secured, given the LSC’s role as the only purchaser for the vast majority of CDS work. This ‘all or nothing’ dilemma may lead to unsustainably low bids being received, which would threaten future coverage.”
- 3.27 It proposed that this risk could be reduced significantly by designing a transparent system that allowed more than one opportunity to secure work and discounted any clearly unsustainable bids. But no evidence is put forward that these measures could be expected to produce significant risk reduction, and no details as to how the identification of unsustainable bids might be done in practice. The LSC proposes to take account of these issues by assessing the success of the BVT pilot.
- 3.28 The LSC argues that it would be administratively complex and costly to establish fees through a bottom-up cost-based approach based on collecting information from legal aid firms’ accounts. It points out that the calculation would have to be performed at least 42 times to give a value for each CJS area. However, current police station fixed rates are set at a greater level of detail, with different values for each of the 245 different scheme areas, and there is also a range of payments in different Magistrates’ Courts.

³⁹ We understand that this issue is also likely to be discussed in the Law Society response to the current consultation.



Commentary

- 3.29 The suggestion that the proposed auctions would reveal “correct” prices is a circular argument – a “market process” leads to competitive prices that are therefore based on efficient cost estimates and are sustainable.
- 3.30 It is more likely that a significant number of suppliers would prefer to stay in the market at lower prices (since they might otherwise become unemployed or under-employed), and would then re-specify their work to meet the price set. Cost reductions would be some combination of efficiency gains and reduced service standards. There is no reason to think that the outcome would give better value, or be sustainable.⁴⁰
- 3.31 There are already a wide range of prices paid in different schemes, and evidence easily available to the LSC of which schemes are attracting more or fewer suppliers than required. The most obvious response would be to take this market evidence into account in each successive revision of the local rates paid.

Administrative costs for the LSC

- 3.32 The cost of administering legal aid was reported by the Carter review to have increased from £58 million in 1997-98 to nearly £100 million in 2006. For 2007/2008 this cost has increased to £113.5 million, representing 6 per cent of the year’s legal budget.⁴¹ In order to reduce this administrative cost, the government proposed a shift to a smaller number of suppliers and more electronic processes.
- 3.33 There is no cost benefit analysis of this proposal, so the prospective savings have not been considered in context.

Commentary

- 3.34 Administrative costs for the LSC may well be higher than would be ideal, but this should only be a minor consideration in relation to the implications of the proposals for the system of justice and the market participants.

⁴⁰ See Appendix for notes on recent experience of the NHS reverse e-bidding for palliative and dementia care for the elderly.

⁴¹ Legal Services Commission Annual Report and Accounts 2007/2008 - http://www.legalservices.gov.uk/docs/about_us_main/LSC_Annual_Report_200708_Final.pdf



4 CONCLUSION

4.1 Our conclusions are:

- (a) There is no theoretical economic justification for the LSC proposals. General references to a “market-based system” are not adequate.
- (b) Nor has the LSC provided any empirical evidence that would justify its proposals. Claims that prices resulting would be more sustainable, more accurately reflect local costs, and provide improved incentives have not been justified.
- (c) There is no reason to think that public expenditure on this type of legal aid is increasing too rapidly.
- (d) The LSC proposals are not for a system that can properly be termed “best value tendering”, since they would award contracts solely on the basis of price. The fact that a quality standard must be established in order to be allowed to tender does not change this fundamental nature of the proposals: they are for a system of price auctioning among qualified suppliers, but not for a system in which the tenders accepted would be those likely to deliver best value.
- (e) The results of a system in which payment is substantially per case may already be causing unjustifiable reductions in the quality of service supplied. The predictable result of auctioning contracts in the way proposed by the LSC would be to exacerbate the problems, since suppliers would have increased financial incentives to define the services supplied and the quality of the services to meet minimum standards only.

4.2 Rather than proceed with the present proposals, in our opinion the LSC should :

- (a) Urgently study the practical effects of the changes already made in response to the 2006 Carter Commission review.
- (b) Refine the present system of procurement, so that better prices are offered in areas in which supply appears below the required levels and lower prices where there is excessive supply. The likely quality of service should be taken into account in awarding contracts, as well as the price. No requirements for firm structure or minimum bids size should be imposed.



APPENDIX 1: MAGISTRATES' COURT FEE DETAILS

A1.1 Magistrates' Court Duty Fees depend on the category of proceeding, as follows:



Table A1.1: Magistrates court duty fees

Category 1	Category 2	Category 3
Guilty pleas.	Contested trials.	Committal proceedings including those which are discontinued or withdrawn.
Uncontested proceedings arising out of a breach of an order of a magistrates' court (including proceedings in a magistrates' court relating to a breach of a Crown Court community rehabilitation order, community punishment order or suspended sentence).	Proceedings which were listed and fully prepared for trial in a magistrates' court but are disposed of by a guilty plea on the day of trial before the opening of the prosecution case.	Proceedings transferred under section 4 of the Criminal Justice Act 1987 or section 53 of the Criminal Justice Act 1991.
Proceedings (other than committal proceedings) which are discontinued or withdrawn, or where the prosecution offer no evidence.	Proceedings which were listed and fully prepared for trial in a magistrates' court but are discontinued or withdrawn; or where the prosecution offers no evidence; or which result in a bind over on the day of trial before the opening of the prosecution case.	
Proceedings (other than committal proceedings) relating to summary or either way offences which result in a bind over.	Contested proceedings relating to a breach of an order of a magistrates' court (including proceedings relating to a breach of a Crown Court community rehabilitation order, community punishment order or suspended sentence).	
Proceedings where mixed pleas are entered.	Proceedings arising out of a deferment of sentence (including any subsequent sentence hearing) under section 1 of the Powers of Criminal Courts (Sentencing) Act 2000.	
Proceedings prescribed under Regulation 3 (2) of the Criminal Defence Service (General) (No 2) Regulations 2001 (as amended), except where the case was listed and fully prepared for a contested hearing to decide whether an order should be made.	Proceedings prescribed under Regulation 3 (2) of the Criminal Defence Service (General) (No 2) Regulations 2001 (as amended), where the case was listed and fully prepared for a contested hearing to decide whether an order should be made.	

Source: Final Unified Contract Crime Specification (July 2008) for Invitation to Tender (080407)

A1.2 Fees also depend on whether or not the work takes place or the solicitor's office is in a Designated Area. Designated Areas are the Criminal Justice Areas of: Greater Manchester; London; Merseyside and West Midlands; and the Local Authority Areas of:



Brighton & Hove; Bristol; Cardiff; Derby & Erewash; Kingston-upon-Hull; Leeds & Bradford; Leicester; Nottingham; Portsmouth; Newcastle-upon-Tyne & Sunderland (including Gateshead, North Tyneside and South Tyneside); Sheffield and Southampton.

A1.3 For each area and category two threshold levels are defined. If the cost of the case calculated using the hourly fees set out does not exceed the lower threshold, then the Lower Standard Fee applies. If the cost exceeds the lower threshold but does not exceed the higher threshold, then the Higher Standard Fee applies. If the cost exceeds the higher threshold, then the case is charged by the hour.

A1.4 The hourly fees are as follows:

Table A1.2: Magistrates' court work Own Solicitor hourly rates

	National	London
Preparation ⁴²	49.70	52.55
Advocacy ⁴³	62.35	62.35
Attendance at court where Counsel assigned ⁴⁴	34.00	34.00
Travelling and waiting ⁴⁵	26.30	26.30
Routine letters written and telephone calls	3.90 per item	4.05 per item

Source: Final Unified Contract Crime Specification (July 2008) for Invitation to Tender (080407)

A1.5 Fixed fees and threshold levels for Own Solicitor work representation in a magistrates' court (exclusive of VAT) are shown below (with London figures in square brackets):

Table A1.3: Undesignated area standard fees

	Lower standard fee £	Lower limit £	Higher standard fee £	Higher limit £
Category 1	173.45 [223.25]	298.45 [382.90]	417.20 [529.25]	517.10 [646.85]
Category 2	306.25 [392.95]	512.70 [651.00]	702.40 [882.65]	854.40 [1041.60]
Category 3	276.50 [349.75]	452.20 [548.25]	626.50 [735.30]	789.50 [841.55]

⁴² Preparation includes taking instructions, interviewing witnesses, ascertaining the prosecution case, advising on plea and mode of trial, preparing and perusing documents, dealing with letters and telephone calls which are not routine, preparing for advocacy, instructing Counsel and expert witnesses, conferences, consultations, views and work done in connection with advice on appeal or case stated.

⁴³ Includes applications for bail and other applications to the court.

⁴⁴ Includes conferences with counsel at court.

⁴⁵



Table A1.4: Designated area standard fees

	Lower standard fee £	Lower limit £	Higher standard fee £	Higher limit £
Category 1	221.59 [284.35]	298.45 [382.90]	477.41 [611.15]	517.10 [646.85]
Category 2	378.46 [484.60]	512.70 [651.00]	792.71 [1,005.49]	854.40 [1,041.60]
Category 3	357.87 [406.46]	452.20 [548.25]	734.56 [888.85]	789.50 [888.86]

Source: Final Unified Contract Crime Specification (July 2008) for Invitation to Tender (080407)

A1.6 The items of work included in the Standard Fees set out in the above tables are as follows:

- any preparation within the meaning set out in the Hourly Rates table above including listening to, or viewing, any tape- or video-recording of interviews or evidence;
- routine letters written and routine telephone calls;
- advocacy, including bail applications made in a magistrates' court, the Crown Court or the High Court;
- work done by a fee-earner acting as agent for the Solicitor assigned under the Representation Order; and
- unassigned Counsel's preparation and advocacy.

These are known as the “core costs” and include the costs of any Advocacy Assistance required by this Contract to be claimed under the Order.

A1.7 Payment for travelling and waiting can only be included where the Undesignated Area Standard Fee applies, as the Designated Area Standard Fee includes payment for travel and waiting.



APPENDIX 2: SOME RESEARCH FINDINGS

A2.1 This Appendix notes some of the empirical work available to the LSC in formulating its proposals.

Frontier Economics (December 2003) A Market Analysis of Legal Aided Services Provided by Solicitors - A report prepared for the DCA and LSC

- This was based on returns from 303 firms, 270 of whom provided financial data. The data were reasonably robust and were subject to a high degree of validation.
- The report concluded that lower prices for criminal defence work might be obtained through competitive tendering. It recommended piloting this model.
- This research is now obviously fairly old, especially as in some cases the firms will have based their returns on accounts ending in 2002.

Otterburn Legal Consulting (2003) Review of Demand, Supply and Purchasing Arrangements – Survey of legal Aid Firms - for the Department for Constitutional Affairs

- The Otterburn Legal Consulting Survey used the same data-set and concluded that the most profitable firms tended to be larger and more specialised.
- This research is now also fairly old.

Cape and Moorhead Report to the LSC (July 2005) Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work

- This research was carried out by an analysis of the existing literature and official statistics, rather than surveying suppliers.
- It found evidence to support the view that too many factors that create inefficiencies in firms are beyond their control. This research does not appear to have been taken into account by Lord Carter's team and is not cited in the Carter Report.
- The professors cautioned that their work was completed in a three-month timescale, and there is limited literature in relation to cost drivers generally and criminal legal aid costs drivers in particular.

FreshMinds (December 2005) Legal Aid Review - prepared for PKF

- As part of the research for the review by Lord Carter a large scale telephone survey was undertaken by FreshMinds. A total of 854 firms were approached. Returns from 86 firms looked generally reasonable, although doubts remain regarding the reliability of some of the financial data.



- Managing Diversity Associates (April 2006) Research on Ethnic Diversity amongst suppliers of Legal Aid services – report for Legal Services Commission

Research on Ethnic Diversity amongst suppliers of Legal Aid services – MDA 2006

- This research was undertaken to assist the LSC in carrying out a race equality impact test and support it in carrying out its duty to promote equality. The research relied on statistical data collected by the LSC on suppliers and clients, was supplemented by in-depth interviews with BME firms and LSC staff, and was informed by a stakeholder group. The data appear to be robust.
- The report recommended that the LSC should examine local market conditions and adapt the competitive tendering model accordingly.

Review of the legal professions' delivery of legal aid services – PKF 2006

- PKF based their research on the same data set as FreshMinds, together with in-depth interviews at a number of firms. PKF was confident that its conclusions were valid, although there were concerns about the quality of some of the data. The authors observed that "the metrics were not available to assess 'good', making informed procurement difficult".

Lord Carter's Review of Legal Aid Procurement - Otterburn Legal Consulting 2006

- This analysis used the PKF data set and was undertaken to provide Lord Carter's team with a better understanding of the cost-base of legal aid suppliers. It appears to be based on robust data; but has a narrow focus.

Legal Aid Reforms Proposed by the Carter Report - LECG 2006

- This analysis used LSC statistics on the distribution of criminal defence casework in 2004-5 to model possible impacts of the proposals of Lord Carter's recommendations. It identified a number of significant risks and suggested that the reforms needed to be implemented sensitively. The data were therefore robust; but the analysis limited in scope.



APPENDIX 3: HOME CARE WORKER AGENCY CONTRACTS

Case study: NHS reverse e-bidding for palliative and dementia care for the elderly

- A3.1 On 1 June 2009 *The Times* reported, in a series of articles, the implementation by the NHS of an on-line auction system used to buy end-of-life and dementia care for the elderly. The system was originally developed for councils to buy cheap office furniture, IT and stationery of fixed specification.⁴⁶ Now it has been adopted for homecare (per hour) and for round-the-clock specialist care at residential homes.
- A3.2 The NHS and four local authorities invited companies to participate in reverse e-auctions, where bids are driven down rather than up.
- A3.3 In one such auction for homecare services, Domiciliary Care, a large provider in Scotland, won the contract for a bid to provide care for £9.95 per hour to 78-year old Andrew Wilson of North-East England. The auction was run by South Lanarkshire. *The Times* states:
- “Mr Wilson is hard of hearing, blind in one eye and unable to walk more than a few steps. With no close family, he lives alone and depends on carers. He allowed [BBC] *Panorama* to fit secret cameras in his home for 19 days. The cameras showed Mr Wilson being given a bed bath while his carer was constantly on her mobile phone complaining to the office about her workload. The cameras also recorded that, of his four half-hour visits a day, those at lunch and teatime were often curtailed. His care assessment makes clear that his lunchtime carer should prepare a meal. However, he was routinely fed sandwiches, crisps and toast.”
- A3.4 As a result of this and similar reports, the Scottish Parliament has launched a cross-party investigation with the view to ban reverse e-auctions for purchasing care.⁴⁷
- A3.5 The BBC programme *Panorama*, titled *Britain’s Homecare Scandal* and aired on 9 April 2009),⁴⁸ reported that Walsall, Bedfordshire and Edinburgh local authorities had also adopted reverse e-auctions. The Walsall local authority terminated one company’s contract, the Working Together Specialist Care Agency, after it emerged that the elderly people in their last months of life under its care were not receiving the required pain relief and help with feeding and washing.
- A3.6 Although Walsall stated that price was not the sole consideration, Sue Ryder Care, the specialist charity that held the contract before the auction, commented that “it could not even afford to start bidding at the opening price because it was so low”.

⁴⁶ *The Times* articles used in this case study can be found in http://www.timesonline.co.uk/tol/life_and_style/health/article6401002.ece ,
http://www.timesonline.co.uk/tol/life_and_style/health/article6401122.ece ,
http://www.timesonline.co.uk/tol/life_and_style/health/article6401125.ece#cid=OTC-RSS&attr=797084

⁴⁷ <http://www.scottish.parliament.uk/s3/committees/lgc/inquiries/HomeCareServices/>

⁴⁸ http://news.bbc.co.uk/panorama/hi/front_page/newsid_7990000/7990682.stm



A3.7 A London-based specialist care provider, not named by *The Times*, had similar difficulties. In specialist care auctions, companies were required to reduce prices for round-the-clock specialist care per bed per week by at least £8 each time. Having been approved to take part in a reverse e-auction organised by the London Procurement Programme (LPP), the company made bids of more than £1,000 per week for places in its homes.⁴⁹ When the bidding began, the company was informed that its price was in the bottom five of a shortlist of 20. After a few more bids, lowering its price by £10 each time, the company had not shifted position but was forced to stop as further price cuts would have resulted in deteriorating quality. The CEO tells *The Times*:

“In the end we really pushed it and cut our price by over £100 really just to see what would happen. I think we moved up a few places to 15th. It was a very depressing experience... You are filled with dread about what you are going to have to cut back on to get within the winning price. It is devoid of any human consideration. It's fine if you are supplying stationery, but we are talking about human beings. This is an open invitation to companies to cut standards.”

Commentary

A3.8 The case study illustrates the risks to standards if contracts are awarded solely on the basis of prices offered.

⁴⁹ LPP was established by NHS London to drive collaboration among London's trusts to maximize its purchasing power and enhance patient care through sustainable savings and improved services. Its main objective is to implement procurement savings opportunities. More information can be found on the LPP website: <http://www.lpp.nhs.uk/default.asp>