

# **BEST VALUE TENDERING OF CRIMINAL DEFENCE SERVICES**

**A RESPONSE TO CONSULTATION**

**July 2008**

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## Foreword

I am very grateful to all those, including the representative bodies, who gave their time both in drafting responses to the best value tendering consultation and attending our events around the country.

We have listened with great interest to the views expressed, and have reflected those views in this response. We appreciate the position expressed by those respondents who commented that it is not possible to provide a final view on best value tendering (BVT) until a fully developed model for BVT is available for consideration. This exercise has, however, been extremely useful in bringing to the fore some of the key issues about BVT.

We have carefully considered providers' views alongside the Legal Services Commission's statutory responsibilities to ensure that access to assistance and representation is secured for individuals involved in criminal investigations or proceedings, and to aim to obtain the best possible value for money. These responsibilities mean that the Legal Services Commission (LSC) must have regard to a range of stakeholders in the criminal legal aid system, including clients and taxpayers as well as providers. The LSC must also have regard to UK and EU laws on the procurement of public services. We share providers' desire for a longer-term approach to procurement of their services, one that offers them greater certainty and greater stability with an opportunity to plan their businesses.

This consultation has highlighted the wide range of concerns providers have about the impact competition could have on the criminal legal aid market. Those views from providers are understandable, particularly in the absence of a completed model of BVT that sets out exactly how such a system could work. It remains our view, however, that with careful planning and attention to detail we can create a competitive system that overcomes providers' concerns and ours, and that is sustainable in the long term. Whilst we believe we should continue to follow the blueprint set out by Lord Carter<sup>1</sup> and further explore how competition could work in detail, we recognise the need to allow more time to work with providers and representative bodies on our proposals.

Competition remains our preferred option, although we will make no final decision on moving ahead until you have had further opportunity to consider and comment on the detailed proposals that we intend to present for consultation at the end of this year.

In light of the strength of concern expressed during consultation we have also decided that, rather than a 'phased implementation' approach to competition, that BVT should be piloted in the first instance. The detail and timetable of how such a pilot may work in practice will be included in our second consultation. It is likely that this will need to be piloted in a large enough area or areas to enable us to effectively assess the real impact of competition. However, before we make any final decision on a phased national implementation, we would propose a full assessment of the impact of the pilot to be published within six months to one year of the first BVT contracts being let. The criteria for success of any BVT pilot will also be included in our consultation at the end of this year.

I will explain briefly why a move to competition remains our preferred option.

Administratively set fees are our current system and some respondents favoured maintaining this status quo, commenting that the introduction of fixed and graduated fees had been less problematic than expected. Many respondents felt that the fee rates should be increased and a large proportion, including representative bodies argued the case for an independent panel recommending rates.

An independent panel would have no more information than the LSC on which to base rates. Our statutory obligation to obtain value for money would remain in place and the panel would be

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<sup>1</sup> Lord Carter's Review of Legal Aid Procurement: *Legal Aid: A market-based approach to reform* July 2006

required to operate within this framework. Such a system would require significant administrative complexity, as it is accepted by the majority of providers that rates need to be sensitive to local conditions, which would also need to be factored into an independent panel's assessments of how rates should be set. It must be noted that the continuation of administratively set rates will not afford those firms that can deliver services at the right quality and the most efficient price the opportunity to access optimum volumes of work. Many feel this essential for sustainability. Finally, any independent panel would still be constrained by the fact that the legal aid budget as a whole is limited and would have to take its decisions in light of this fact.

Our view is that the current rates, based on historic billing on a local basis, are proving to be sustainable at the present time. There continues to be full national coverage following the recent re-tender of the criminal contract<sup>2</sup>, and in many areas providers have indicated a desire to expand the volume of work they undertake. The current system does not offer this opportunity. In some areas more providers have been awarded a contract than were previously contracted. Whilst this gives reassurance that criminal legal aid remains attractive and viable for businesses, it further limits the ability of suppliers to access optimum volumes.


We believe that further exploration of a system where rates are set by providers on a competitive basis, rather than administratively set fees, will help to address this continuing trend.

We acknowledge that in some areas there is a case for rates falling and in other areas there is a case for rates rising. Competition that includes an element of price offers the prospect of this happening, based on the local market, at a level which providers themselves have set through the process. This would meet our statutory requirement to secure the best possible value for money, whilst ensuring that the most efficient firms were being paid the correct price for the volume they could deliver, creating a sustainable provider base for the 21<sup>st</sup> century.

We are very aware of the strong and understandable concerns put forward by providers about BVT. We recognise that the design of the BVT model will need to take into account many of these concerns; these are concerns for the LSC also. Section 2 of this response details our current thinking on how the next stage of development will seek to address the issues raised.

It is important to make clear that the LSC can never give a guarantee that all providers will stay in business under competition. At the same time we are committed to ensuring that whatever changes we make are done so in an orderly manner, with the impact properly assessed. We have a duty to ensure that our processes are transparent and reasonable; that firms have sufficient time to prepare for change; that our processes do not unlawfully discriminate; and that there are effective mechanisms to assure quality. We also believe that risks, such as changes in the wider criminal justice system (CJS), should be shared on a proper basis between the LSC and providers.

The aim of any competitive process, therefore, would be to ensure the sustainability of quality services for clients and best value for the taxpayer. We intend now to work up a concrete and detailed scheme for BVT to cover the initial areas, to be published for further consultation towards the end of this year. Our plans will aim as far as possible to meet providers' concerns, and we will engage closely over the coming months with the representative bodies in particular to help us with this. Our final decision on whether to introduce competition will depend on whether the scheme creates an appropriate balance between the need for value for money, the interests of clients and the need for a sustainable service. This will be informed by the further consultation.



Sir Michael Bichard  
Chair of the Legal Services Commission

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<sup>2</sup> Unified Contract (Crime) July 2008

## Executive Summary

This is the response to the LSC's consultation *Best Value Tendering of Criminal Defence Services*, published in December 2007. A total of 202 formal responses were received and over 1,000 providers attended a national programme of BVT consultation events.

The consultation focused on the principle of best value tendering (BVT) and some broad design issues rather than on a detailed model for a possible BVT system; it asked respondents to give their views on a number of issues. These ranged from the question of how government should procure criminal defence services in the future, to policy questions concerning the operation of BVT contracts were that option to be pursued.

### Future method of procurement

Following consultation, the LSC has decided:

- to undertake further work on the design of a pilot for a competitive system and consult on this towards the end of the year, to be published alongside an updated impact assessment
- to maintain the present system of administratively set fees while work is undertaken on designing and, if introduced, assessing an effective competitive process
- to carry out no further work at present on the option of an expanded Public Defender Service (PDS).

These decisions have been made in light of the LSC's statutory duties; its obligations to clients to continue to provide full coverage of a criminal defence service (CDS) and taxpayers and government to ensure that value for money is achieved. To ensure long-term sustainability of the CDS, providers must be able to work within an environment where remuneration reflects the costs of work undertaken locally and efficiently, together with a profit margin. Section 2 contains a full appraisal of the options.

Competition based on price and quality therefore remains the LSC's preferred way forward in light of our statutory responsibilities. A number of respondents to the first consultation suggested that in order to comment fully, they would need to understand more clearly the operation of any tender and firm proposals on the market rules that would govern delivery under any BVT system. The second consultation will give this opportunity.

### Broad design issues for a BVT system

The LSC recognises the concerns raised by providers in response to the first consultation. The LSC believes that to a considerable extent those concerns can be addressed within the design of the system and by taking a pilot approach. Any future system should be based on the principles of revealing the true price of work, transparency and appropriate risk sharing.

Following consultation, the LSC has decided that the design of the model will be based on the following approach:

- a transparent tendering system will be developed for piloting that has been subject to full public consultation and testing before any final decision is taken to implement

- tendering gives providers more than one opportunity to secure work and ensures that we minimise the risk of accepting unsustainably low bids
- any system will continue with an element of client choice; clients will be able to choose from the successful bidders and not directed to a particular individual provider
- Crown Court work will not be tendered as part of the pilot, any proposals for competing for this work will be subject to a full separate consultation if this is deemed a viable option going forward
- Prison Law and Criminal Complaints Review Commission work will be excluded from the model we are developing
- our current assumption is that a Peer Review three rating will be the standard for the initial areas, and that the LSC will continue to examine ways to raise standards of quality as any system develops.

## 1. Introduction

- 1.1. This document is a post-consultation response for the consultation paper, *Best Value Tendering of Criminal Defence Services*. The BVT consultation paper sought views from criminal legal aid providers and other stakeholders regarding a possible system of BVT for criminal legal aid.
- 1.2. This response to consultation and its annexes cover:
  - the background to the consultation paper (Section 2)
  - an analysis of the responses received regarding the options proposed for the future delivery of the CDS and the LSC's decisions in light of the consultation (Questions 1 and 2, Section 3)
  - an analysis of the responses received regarding the options proposed for the fundamental aspects of any future BVT system and the LSC's decisions in light of the consultation (Questions 3 to 13, Section 4)
  - a list of organisations and individuals who responded to the consultation and participated in the regional provider events (Annex 1).
- 1.3 It should be noted that the consultation also included 'Additional topics for consideration' (Questions 14 to 50) in terms of the detail of any BVT scheme. We have recorded the views gathered from this consultation exercise but have not yet made decisions in these areas. These views have been gathered to feed into future detailed work on the model.
- 1.4 A total of 202 responses to the BVT consultation paper were received with 47 responses submitted by providers using the e-consultation facility via the LSC's website. This was the first time a CDS consultation has made use of this e-facility and it is encouraging that nearly a quarter of responses from providers were received via this media. Of the total responses received the majority (124) were received from solicitors replying on behalf of their firms. Responses were also received from barristers, all of the major representative bodies, the Equalities and Human Rights Commission and a member of the judiciary.
- 1.5 To complement the BVT consultation paper and e-consultation, the LSC conducted 58 regional provider events. These events were held between 21 January and 23 February 2008 throughout England and Wales. 1,083 providers attended the events with the average attendance being 19. These events were designed to explore in more detail the issues and themes surrounding the principles of BVT and provide an opportunity for providers to engage directly with the LSC's policy makers and other local providers.
- 1.6 In addition to the written responses the LSC has analysed the feedback from the regional provider events. This feedback has provided an additional layer of information for consideration and has been incorporated into the analysis of responses.
- 1.7 The response rates for each question shows considerable variation, with respondents being less likely to answer the questions posed towards the end of the consultation paper. There are two possible reasons for this decline in response rate. First, the later questions in the paper were concerned with the detail of any proposed scheme and the information contained within the Impact Assessment, and many respondents felt they had insufficient detail to comment effectively at this stage. Second, the large number of questions contained within the paper may have had an influence on the response rates to the later questions.

## 2. Background

- 2.1 On 10 December 2007 the Legal Services Commission (LSC) published the consultation paper, *Best Value Tendering of Criminal Defence Services*. The aim of the BVT consultation paper was to engage with practitioners and interested parties regarding the principle of introducing a system of BVT for criminal defence services and how such a scheme might be constructed.
- 2.2 The possible introduction of a BVT system for the procurement of criminal defence services represents a fundamental change to the way the LSC procures criminal defence services. Therefore, it is important practitioners understand the possible changes, are in a position to calculate the possible impact on their business and to participate effectively in any BVT process.
- 2.3 The BVT consultation paper represented the first part of a possible two-stage process. Its aim was to obtain initial views from providers and other parties in three main areas. First, on the LSC's view that a system of BVT is the best way to reform legal aid and that the initial focus should be on the criminal defence market. Second, on the early policy ideas that form the basis of a future tender process as set out in chapter four of the BVT consultation paper. Third, on the detailed areas of policy development which the LSC, supported by expert consultants in designing a BVT system, should focus upon.
- 2.4 The consultation period closed on 3 March 2008. This report summarises the responses and sets out preliminary recommendations for the second consultation.
- 2.5 The LSC acknowledges that the possible introduction of a BVT system for the procurement of criminal defence services represents a fundamental change to the way the LSC interacts with its providers.
- 2.6 Whilst it is important that practitioners understand the possible changes so that they are in a position to measure the possible impact on their business, it is equally important that both the LSC and the Government understand to what extent our policies, including the possible introduction of competition, will have an impact on all stakeholders including clients, taxpayers, providers of publicly funded services and the CJS.
- 2.7 The LSC appreciates the vital role that impact assessments play in this process, as the preparation and publication will ensure that those with an interest understand and can challenge:
- why the Government is proposing to intervene
  - how and to what extent new policies may impact on them
  - the estimated costs and benefits of proposed and actual measures.
- 2.8 They also give affected parties an opportunity to identify potential unintended consequences. The LSC sees impact assessments as part of a continuous process to help policy makers think through fully and understand the consequences of possible and actual interventions.
- 2.9 We are aware of our wide reaching equality and public law duties. The commitment we have given reflects these duties, notably that a draft impact assessment will be published alongside a consultation paper on the principles and options for BVT and a final impact assessment will be produced alongside the final policy paper before implementation.

- 2.10 This consultation response represents the first part of a two stage process and to date no final decision has been taken as to whether we would introduce BVT. Many respondents to the consultation felt that there is insufficient information to enable them to reach any firm opinion regarding the impact of BVT. As such, following this consultation process the LSC is to produce a second consultation paper with an updated draft impact assessment considering the detail of a fully developed pilot for a BVT system. Subsequently, any final decision to progress would be accompanied by an updated impact assessment for any final scheme, along with the timescales and relevant success criteria for assessing a pilot within its first six to twelve months.
- 2.11 General views were expressed by a small number of respondents with regard to diversity and equality issues, many of which included the caveat of not being able to reach a firm opinion due to lack of detailed information. Some respondents expressed the opinion that small and black and minority ethnic (BME) firms would be necessarily disadvantaged by a system of tendering, and many respondents stressed the need for equal treatment of all firms. All views expressed will feed into the work to produce the second consultation response and impact assessment. It is also likely that ensuring that our proposed tendering system is diversity proofed adequately will form part of the success criteria in assessing any pilot.
- 2.12 The BVT consultation paper and response to consultation focus on price tendering for criminal defence services. The LSC has announced plans to consult separately on BVT in civil legal aid in Spring 2009, ahead of planned trials in a small number of geographical areas in 2010-11.

### 3. The case for BVT – Summary of views expressed and the LSC’s response.

#### Introduction

3.1 Below you will see the questions posed in the consultation paper regarding the principle of BVT, plus a summary of both formal written responses and those received through the regional provider events. We received 173 written responses to these questions.

#### Question 1

Which of the options:

- Option 1 - Continuation of the current system of setting fees administratively
- Option 2 - National roll out of the Public Defender Service
- Option 3 - best value tendering

do you believe is the best way to procure criminal defence services? Please give supporting reasons.

#### Question 2

Is there an option not yet identified by the LSC that should be considered? Please provide full details.

3.2 The breakdown of stated preference was:

- Option 1 - Administratively set fees 23%
- Option 2 - Public Defender Service (“PDS”) 6%
- Option 3 - BVT 5%
- other responses (including other options expressed by respondents) 66%.

3.3 Many respondents expressed their difficulties in assessing the merits or otherwise of any BVT scheme “without knowing the full details of any proposed scheme” (Bar Council). This view was echoed by The Law Society (TLS), the Black Solicitors’ Network (BSN), Criminal Law Solicitors’ Association (CLSA), and Criminal Defence Service Union (CDSU).

3.4 There was limited support for administratively set fees as they currently operate. Many respondents supporting this option did so as they are either the “least bad option” (Advice Services Alliance (ASA)), or “only viable option” (a provider), or that maintaining the current system “would not jeopardise the existing supplier network, but does, through the introduction of fixed fees, incentivise efficiency” (a provider). Many respondents called for a period of stability to allow the recently introduced fixed and graduated fees to bed down.

3.5 On the whole, respondents did not consider the national roll out of PDS to be a “serious option put forward by the government or LSC” (Association of Major Criminal Law Firms (AMCLF)) due to the costs associated, and whilst many saw its usefulness in areas of fragile supply, many echoed the TLS’s concerns that the “PDS cannot be a total solution because of the need for client choice”.

- 3.6 Respondents also expressed a similar lack of appetite for the introduction of BVT. Every representative body that responded to the consultation rejected BVT as an appropriate method for procuring criminal defence services in the future, and cited reasons discussed below and in Section 4 for such objections. The majority of providers echoed the representative bodies' concerns. There was some limited support of BVT from individual providers: "BVT in the duty solicitor market, or to set appropriate local fees for both duty and own client work, holds the key to maintaining a viable market for the future" (a provider).
- 3.7 Many respondents, including several representative bodies such as the Bar Council and London Criminal Courts Solicitors Association (LCCSA), did not accept the stated aim of BVT (ie. a sustainable system of procurement). Instead, they expressed their views that "BVT is a process which is designed only to drive down costs" (a provider), and that the LSC and/or the Government would not allow costs to rise.
- 3.8 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').
- 3.9 Several respondents who were opposed to BVT raised the concern that BVT was not viable given the LSC's inability to guarantee volumes of work under contracts let through BVT. TLS summarised this issue: "as volume is a significant determinant of price, how will providers be able to set a price if volume is unknown?"
- 3.10 Several respondents expressed the view that whilst BVT may work in urban areas, it may be very different for rural areas: "care would need to be taken to consider the different parameters that apply in rural areas, where economies of scale simply do not operate" (a provider).
- 3.11 Many respondents raised the concern that, with pressure exerted on costs, ongoing quality would suffer. In particular the Bar Council made the case that, given the nature of Crown Court cases, any commoditisation would lead to a loss in quality of advocacy. Many respondents did suggest measures to address quality concerns. These are discussed further in Section 4.
- 3.12 The Bar Council and TLS, as well as a number of individual providers, cited the problems arising from the application of tendering for defence services in other jurisdictions, and expressed concerns that there was no evidence that the LSC had considered findings from reports such as the US Department of Justice April 2000 report, *Contracting for Indigent Defense Services*.
- 3.13 Of the other options suggested (Question 2), Independent Defence Lawyers (IDL), AMCLF and Legal Aid Practitioner Group (LAPG) all suggested a scheme whereby administrative rates should be set by an independent body. This option was not explored in the BVT consultation paper. This suggestion was echoed by a number of provider respondents, and included the need for these rates to be set on a locally sensitive basis. Others suggested that the current scheme, with a (as yet unspecified) method to set satisfactory rates of remuneration, would be the preferred option. TLS responded by saying they were currently exploring other options with LECG including evolutionary modifications to the current system, as well as the independent body suggestion and alternative types of contract, but further

details were not provided. Of other options, by far the most popular was administrative rates set by an independent body, as suggested by many of the representative bodies.

## Consideration

3.14 The LSC has considered the options in light of:

- the consultation responses
- the LSC's need to meet statutory responsibilities (as described by the Access to Justice Act 1999, s12.1) to ensure that, as the interests of justice require, access to advice, assistance and representation is secured for individuals involved in criminal investigations or proceedings
- the LSC's need to meet statutory responsibilities to pay the right price for services to ensure a sustainable system and to fulfil our duty to ensure the best possible value for money in funding criminal defence services (Access to Justice Act 1999, s18.3)
- Lord Carter's Review of Legal Aid Procurement, *Legal Aid, A market-based approach to reform*, July 2006 and the joint Commission and Ministry of Justice (MoJ) response, *Legal Aid Reform: the Way Ahead*, November 2006.

## Option 1 – Administratively set fees

3.15 This option effectively represents no change to the current system, as all of the first phase of the Carter reforms have now been implemented, including fixed fees for police station advice and assistance and the expansion of CDS Direct.

3.16 As indicated in a number of consultation responses, there are advantages in continuing with a model of administratively set fees, including the high level of control that the LSC is able to exercise over the budget for criminal legal aid services. The LSC would be able to set prices to remain in budget, subject to any unexpected fluctuations in the volume of cases, whilst providers would have certainty over their payments for police station and magistrates' court work. 23% of respondents were in favour of continuing with a model of administratively set fees. The majority of respondents offering alternatives agreed that administratively set fees are appropriate but there should be a mechanism for increasing the current fees.

3.17 On the evidence of the level of supply, there is no need to raise fees at present. The LSC tendered the July 2008 contract<sup>3</sup> with the new fixed fees for police station work. The number of providers who registered an interest in this contract was sufficient to provide national coverage of all the police station and magistrates' court duty schemes. In over 50 duty solicitor schemes, the number of duty solicitor slots requested by providers was five times in excess of the number that was available, indicating that criminal legal aid work in this area remains both profitable and attractive to providers.

3.18 The disadvantages of administratively set fees stem from the inability to determine whether the rate set by the LSC is one that offers both sustainability for providers and value for money to the LSC. As shown above there are variations in the level of supply in different parts of the country and by setting rates in this way they can become insensitive to local market

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<sup>3</sup> Unified Contract (Crime) July 2008

conditions. In addition, a static fixed fee that is not increased over time will eventually cease to be viable due purely to inflationary pressures. This reality was reflected in many consultation responses.

- 3.19 There is a requirement on the CDS to ensure the right price is paid for services, to guarantee both value for money for the taxpayer and the delivery of a quality service to clients. The variability in the level of fixed fees indicates that different market conditions exist throughout the country. Many consultation responses also noted local variations in practice, often outside of the control of the defence, that impact on costs of service delivery. A complex and burdensome framework would be required to capture this local variability accurately and reflect changes over time. Thus it would be difficult to provide any level of assurance that value for money is being achieved.
- 3.20 Administratively set fees do not provide a mechanism for directing work to those providers that are most efficient and innovative and can therefore offer the keenest prices. Securing access to larger volumes of cases is one way suggested of effectively reducing unit costs. Many providers support this view, and would welcome the opportunity to secure more work. Our current non-competitive tender process does not assist providers to optimise their volume of work; over a third of providers in the recent Unified Contract (Crime) July 2008 tender process indicated they wanted more volume. We saw an actual increase in firms through the tender process, which is likely to further dilute volumes. Mechanisms that we have previously explored, such as a minimum contract size based on previous performance, or future allocations of duty solicitor work based on volume of work previously undertaken may well fall foul of procurement law by discriminating against new providers. There is no identified method available within the current system to effectively, transparently and fairly choose between providers.

## **Option 2 – Expansion of the PDS**

- 3.21 Of the models proposed, expansion of the PDS was considered the most unrealistic by the majority of respondents.
- 3.22 The LSC agrees that it would be a significant undertaking to move provision from a model where services are provided predominately by the private sector, to self-supply by the public sector. Concerns raised with this model include the increased scope for conflict of interests to arise, and the confidence that clients would have in a national system of directly funded defence services where the choice to opt for private practice was no longer available. These concerns echo those revealed in Scotland when the PDS was piloted and client choice was removed during the initial period of the pilot<sup>4</sup>. Concerns were also raised about the ability of a national PDS to provide best value for money. The LSC agrees that there are better ways to meet our statutory obligations for coverage of supply and value for money than a full PDS.

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<sup>4</sup> Goriely et al (2001) *The Public Defender Solicitors' Office in Edinburgh: An Independent Evaluation*, Scottish Executive, Edinburgh

## **Option 3 – BVT for all police station and magistrates’ court work**

3.23 The responses received from providers and representative bodies resulted in BVT being the least favoured option for the way ahead. The main objections raised (as described in 3.6 to 3.11) are discussed below.

### **Insufficient information is available to inform discussion on BVT**

3.24 The LSC acknowledges that this consultation has been limited to discussing BVT at a conceptual level. These discussions have been valuable to the LSC to ensure that key concerns, such as those raised below, can be addressed in the future consultation on the specifics of a system.

### **Lack of support for BVT**

3.25 Given the nature of this consultation, the LSC acknowledges many providers at present do not see BVT as the way forward. Many of the reasons for the lack of support are listed below, and this consultation response addresses these concerns. The LSC agrees that they must be addressed at a detailed level in the next consultation to ensure that the potential advantages of competition can be fully explored. We also believe that should we decide to go ahead our commitment to pilot and then assess our proposed model should help address the concerns of many respoondees.

### **Concern over the stated aim of BVT**

3.26 As discussed above, there are clear indications of over-supply in a number of major urban areas, with many more providers seeking higher allocations of duty solicitor slots than are available. This indicates that competition may well lead to lower prices in these areas.. Conversely, the fact that there are areas with proportionately fewer suppliers (when compared to the volume of work available) may indicate that the prices currently paid for work are too low to remain sustainable in the long term (ie. to attract new providers and solicitors to the area). Competition may lead to an increase in price in these areas.

3.27 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.

### **Concerns over the LSC being the sole purchaser of publicly funded criminal defence services; ongoing sustainability of supply in future BVT rounds; and concerns over ‘suicide bidding’.**

3.28 Providers raised concerns that 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.

- 3.29 The LSC recognises and understands these concerns, and agrees that any BVT scheme that would lead to unrealistically low bidding would be incompatible with future sustainability. The LSC believes that the risks of such bidding can be reduced significantly through mechanisms such as the design of a system that gives more than one opportunity to secure work, delivers a transparent tender system and ensures that clearly unsustainable bids are discounted.
- 3.30 Equally, the LSC would seek to mitigate the risks of lack of supply in the second round of bidding by ensuring that the minimum numbers of contracts let enable future competitiveness, and ensuring that barriers to entry for new entities are minimised as far as possible.
- 3.31 We will explore what support activities will help ensure that providers have the capability of effectively formulating sustainable bids, including identifying tools to support the key elements required for their bid.
- 3.32 We will also explore the relationship between contract length and the need to consider an automatic annual price increase for the duration of the contract to decrease the risk of contracts becoming unsustainable.
- 3.33 We believe that by piloting BVT, we can take account of these issues as part of our assessment of the success of the final scheme in securing sustainable prices. We would discuss with successful bidders their experience of the auction and ensure that their views were fed into any post-auction assessment.

### **Inability to guarantee volume means BVT is impossible**

- 3.34 It is true to say that any contracts let under the current tender mechanism, or in the future under competition, will not guarantee a set volume of work. But it will be possible to provide indicative volumes based on past experience and other factors. However, the lack of guaranteed volumes does not mean that it is impossible to undertake BVT. The Office of Government Commerce (OGC) currently facilitates the price tendering of a number of framework contracts (ie. those that do not guarantee volume) for public sector services. Examples where contracts have been let without volume guarantees include framework agreements for the provision of travel services to the public sector, and HM Revenue and Customs (HMRC) procurement of services for legal costs draftsmen. Whilst these are clearly for different types of services, they do demonstrate that framework contracts can be let through price competition.
- 3.35 Letting contracts in this way does mean that any tender model and future contract would need to take account of the risk of reducing (or increasing) volumes, and address the extent to which that risk is borne by providers, and by the LSC. There is a similar concern about increasing and reducing burdens imposed by the CJS. It will be essential if we are to get the best prices and the greatest acceptance of BVT that there is a clear sharing of risks between providers and the LSC. Broadly, providers should bear those risks which relate to their performance but the LSC should bear risks of substantial change in the CJS.

## **Insufficient competition outside of major urban areas**

- 3.36 In areas where there are relatively few providers, price competition will enable the market to find the right price to guarantee sufficient numbers of practitioners. The LSC will also, as discussed earlier, set minimum numbers of contracts in each area to enable legal conflict to be handled; that will also help maintain a competitive market.

## **Quality**

- 3.37 The LSC is committed to ensuring that legal aid clients receive good quality services, and quality will be a key part of any tender process and ongoing contract management. We will continue to examine ways to raise standards of quality as any system of BVT develops. Specific concerns have been raised about the impact of BVT on Crown Court cases; these cases will however be outside the scope of the initial areas of competition. Currently we are working with representatives of the solicitor and barrister profession as well as the judiciary, with a view to implementing a pilot to assess Quality Assurance for Advocates (QAA) in early 2009.

## **Difficulties experienced in other jurisdictions**

- 3.38 As respondents pointed out, other jurisdictions have used price competitive tendering to secure defence services. The LSC is aware of the nature of the schemes as well as the reports detailing the associated challenges that these jurisdictions have faced. The arrangements in these jurisdictions are different from those in England and Wales, significantly with respect to client choice. The assignment of a defence lawyer to defendants is common where defence services are secured through price and/or value (price and quality) competition. This is particularly true in many states of the US<sup>5</sup>, Canada<sup>6</sup> and Australia<sup>7</sup>. This feature alone removes the incentive for contracted providers to deliver high quality services to secure further market share based on quality and reputation. Allocation of clients, where the provider has no choice in terms of accepting the case, also raises capacity problems – these features are described in the research referred to by the Bar Council and TLS.
- 3.39 The LSC agrees with the majority of respondents, and is committed to continuing with a strong element of client (and provider) choice as a key aspect of any future CDS. Quality will continue to be at the heart of our proposals. Already we are considering the other areas of concerns such as geographical considerations, extraordinary expenses (referred to as exceptional cases by the LSC) and the need for a mixed and diverse provider base raised in other jurisdictions, through this consultation exercise, and in the development of the proposed pilot model.
- 3.40 We would propose to look carefully at the experience of other jurisdictions when deciding what elements should form part of our assessment criteria of any BVT pilot.

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<sup>5</sup> US Department of Justice

<sup>6</sup> Canadian Centre for Justice

<sup>7</sup> Legal Aid Western Australia

## Other options suggested by providers

### Administratively set fees by an independent organisation and/or reflecting regional differences

- 3.41 Many respondents suggested that an independent rate-setting body could provide a better option than BVT. Little detail was offered on the scope of such a body but there appears to be an assumption it would not seek to base rates on the cheapest model of provision and would maintain the existing market structure and non-competitive contract award process.
- 3.42 An independent body would have no greater information on which to base sustainable rates than the LSC, whose statutory obligations to ensure value for money would remain in place. Given the current level of supply in the majority of local markets - as evidenced both in terms of the recent contract round<sup>8</sup> and the expressed desire of many firms for expansion - it is difficult to see how an independent body would base their assumptions on a different basis to those presently followed for rate setting. They would be required to work within the same limited budget for legal aid as a whole that the LSC currently operates.
- 3.43 It is accepted that should all providers wishing to take on a legal aid contract be willing to open their accounts up to scrutiny, allowing a detailed assessment of profitability and sustainable rate setting, this may be a basis on which such a system may work. It is arguable whether many firms would be comfortable with such an approach, however. Such a system could also be even more administratively complex and costly to establish than price competition. Crudely, the process to set rates would have to be repeated 42 times if rates were set for each CJS area, and more if they were set for each police station scheme. This system would be without the benefit of providers making their own individual assessment of the rate they would be willing to work for on a competitive basis and to structure their business to meet this model. The assessments made to set rates would remain subjective and outside the control of providers, unlike the opportunities offered by BVT.
- 3.44 It is the conclusion of the LSC therefore that BVT remains the best option to pursue to ensure a sustainable future for legal aid.

## Decision

- 3.45 The LSC acknowledges the views expressed by a number of respondents who argued that in order to be in a position to contribute fully to the BVT proposals more detail was needed about how a tender model would operate. Furthermore, the LSC acknowledges the concerns expressed by providers and representative organisations regarding the significant challenges and risks associated with the introduction of a novel and unique procurement system for publicly funded legal services. The LSC recognises the concerns that have been raised.
- 3.46 After careful consideration of the points raised above the LSC still firmly believes that of all the options analysed in this section, BVT has the potential to offer the best long term opportunity to secure comprehensive, high quality criminal legal aid services that represent optimum value for money. The LSC recognises however that there are real issues and concerns that need to be addressed in the design and operation of BVT.

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<sup>8</sup> Unified Contract (Crime) July 2008

- 3.47 The LSC will therefore proceed as planned with the second part of the two-stage consultation process outlined in the BVT consultation paper. However, we now propose that a pilot approach would be a more suitable route to take, with an assessment of the success of BVT made within the first six to twelve months of implementation in any pilot area before moving ahead on a phased national basis.
- 3.48 Our second consultation will therefore contain detailed proposals on the operation of a competitive system in up to two pilot areas, and will seek to address in detail the main concerns raised by respondents. As indicated previously the consultation document will be accompanied by a full impact assessment, including a race equality impact assessment. It will also include an initial indication of the success criteria of any pilot and the proposed implementation and assessment timetable.
- 3.49 A final decision whether to proceed with a BVT pilot will only be taken after this full second consultation.
- 3.50 The publication of the second consultation has been moved back from a provisional timetable of summer 2008 until the end of this year. This alteration in the timetable will allow for the issues raised in this consultation to be addressed in collaboration with representative bodies and in sufficient detail before moving forward.
- 3.51 The LSC also accepts that if BVT were to be implemented providers in the pilot areas would need more time to assess the impact of the new fee schemes on their businesses to enable adequate preparations to be made for the proposed introduction of BVT. It is now proposed that there be a longer period between notification of contract award and existing contracts coming to an end to allow providers in the pilot areas who were unsuccessful in winning a contract to manage their exit from the market effectively. This will be explored further in the second consultation.

## 4. Fundamental aspects of BVT – Decisions – Summary of views expressed and the LSC’s response.

### Introduction

4.1 Below you will see the questions posed in the consultation paper regarding ‘Fundamental Aspects of Best Value Tendering’, plus a summary of both formal written responses and those received through the regional provider events, and the LSC’s decisions regarding the fundamental aspects that will become a framework for the second consultation.

### Scope

#### Question 3

Do you agree that police station and magistrates’ court work should be tendered first, with Crown Court work being tendered in later phases?

4.2 76 respondents answered this question. The breakdown of stated preference was:

- yes 42%
- no 21%
- other responses 37%.

4.3 A number of respondents, including TLS, felt that they needed “further detail on the proposed scheme before we can comment further....” But most of those that responded to this question saw it as “acceptable to start in this way” (LAPG).

4.4 The Bar Council’s response said that they “certainly [agree] that for the moment BVT should not embrace Crown Court work....” In their view this is a sensible approach to determine whether BVT will produce any long-term savings before extending what they see as an “administratively cumbersome and costly scheme for Crown Court work”.

4.5 Some individual provider respondents take this further in saying that they “do not believe we will ever be able to successfully tender for Crown Court work.”

4.6 However, dissenting views expressed included the suggestion that it made no sense to split Crown Court work from magistrates’ court and police station work as one led on directly from the other.

4.7 The AMCLF in their response take the view that “the case for BVT has not yet been made. This view is mirrored by IDL who say “there is no justification...in imposing further cuts”. AMCLF do however go on to say that “in the event that BVT goes ahead it should be on a trial basis in a very limited geographical location and assessed fully over the life of the contracts.”

## Decision

- 4.8 The LSC agrees with the view that it would be appropriate to leave Crown Court work outside of the scope of the initial areas of competition. The Litigator Graduated Fee Scheme (LGFS) and the revised Advocate Graduated Fee Scheme (AGFS) were both introduced relatively recently and the interim period will give providers a better opportunity to understand these changes in relation to their cost bases. The LSC intends to consult on a future single fee for non-Very High Cost Case Crown Court work, and that consultation will include an outline of the longer-term vision for the inclusion of Crown Court work in BVT.

## Future restrictions

### Question 4

In the initial areas should Crown Court work be restricted to those who were successful at tender?

- 4.9 A total of 68 responses were received to this question (34%). The breakdown of stated preference was:
- agreed 37%
  - disagreed 40%
  - other responses 24%.
- 4.10 With one exception, the representative bodies were not in support of restricting Crown Court work to those successful at tender. One response stated that the body was “disturbed by the suggestion...This seems to indicate that not only would the Bar be excluded from the dutch auction in phase 1, but it would remain at a permanent disadvantage thereafter if and when tendering was extended to Crown Court work” (Bar Council). Others suggested that the restriction would be “tantamount to tendering for Crown Court work through the back door” (TLS).
- 4.11 The dissenting representative body response focused on the view that “in the event that work can continue to transfer away from such firms who will have made their bid on the basis of their total anticipated fee income (not just that relating to police stations and magistrates’ court) there is a danger that their bids may become unsustainable” (AMCLF).
- 4.12 Responses from providers were more divided, some questioned the need to make Crown Court work exclusive to successful tenderers “why restrict it?” (a provider), “unsuccessful firms will not be taking up Crown Court work” (a provider) and “I know of no firm who moves their Crown Court work to other firms” (a provider).
- 4.13 Others said that “the only firms who should be able to do Crown Court work should be those successful in the tender. If this is not the case then you would have two competing systems of remuneration and pay, which would increase bureaucracy” (a provider).
- 4.14 It was suggested that “once BVT is in all areas then only successful firms should be able to do Crown Court work” (a provider).

- 4.15 Another respondent said “I consider that only those firms who do police station and magistrates’ court work should be allowed to conduct Crown Court work, which is potentially the most lucrative part of the process and which provides the client with continuity and total knowledge of his/her case” (a provider).
- 4.16 There was also a view that “it is difficult to see how any firm, not involved in the tendering process or not successful, would get access to work for Crown Court cases. However, I see no reason to exclude those firms until Crown Court work is included in the tender” (a provider).
- 4.17 “Crown Court work should be restricted to those who are successful in the tender. Those who are successful will provide the bedrock of criminal defence cover. Continuity of service is in everyone’s interest. Furthermore restricting Crown Court work to the successful tenders would allow such firms to bid more competitively” (a provider).

## Decision

- 4.18 We agree that any restriction on access to Crown Court work to those providers winning contracts under any BVT pilot requires careful thinking, including an assessment of the impact on the provider base of such a move. This option will therefore be considered further in our second consultation paper later this year.
- 4.19 In addition, we would like to make clear that any proposals for the tendering of Crown Court work itself, as distinct from access to this work for providers, would be subject to a full separate consultation. Obviously such a system would need to consider a wide range of separate issues, including how both litigators and advocates could compete for this work.

## Other categories

### Question 5

Could other categories of criminal law (eg. prison law work etc.) be incorporated into BVT?

- 4.20 57 respondents answered this question. Of those answering:
- other categories of law could be incorporated into BVT 19%
  - other categories of law could not be incorporated into BVT 56%
  - other comments related to this issue 25%.
- 4.21 Along with the majority of respondents who addressed this question, TLS, the Bar Council and LAPG said that other categories of law should not be included in BVT.
- 4.22 The majority of respondents focused their attention on the suggested area of prison law, with some also generalising their comments to other (un-named) areas of practice. Those respondents that said other categories of law could be included in BVT often expressed the view that if the scheme were to be introduced it should cover all areas of law. Those arguing that Prison Law should not be included in BVT often cited:

- the complexity and specialist nature of the work, eg. “These are specialist areas and we do not think that it is appropriate for them to be subject to BVT”
- the relatively small number of firms doing this work, eg. “There are barely enough people doing things like Prison Law as it is.”

4.23 In addition, the Bar Council also made the point, which was echoed by some respondents, that Prison Law is not a category of criminal law, and is litigated in the civil courts.

4.24 TLS, in their response to the consultation, argued that if any BVT scheme were to cover specialist areas of law then it should be implemented for ‘mainstream’ cases first. The scheme should then be fully evaluated before any expansion in other categories of law.

## Decision

4.25 In light of the respondents’ concerns outlined above, and a desire not to increase the complexity of any scheme proposed for implementation, the LSC agrees with the majority of respondents that Prison Law, or any other categories of law, should not be included in the scheme for police station and magistrates’ court work at this time.

4.26 The LSC will publish a consultation on Prison Law later this year, which will consider changes to the remuneration of this work independently of BVT for criminal lower work.

## Geographical considerations

### Question 6

The number and size of contracts to be awarded could be based on the local market conditions at the time of the tender. Factors that we expect to affect the allocation and number of contracts to be awarded include:

- the size and nature of the area
- volumes of work in the area
- number of existing suppliers
- existing market share between suppliers
- need to avoid conflicts of interest.

What are your views on the geographical approach outlined above?

4.27 62 respondents answered this question. Of those answering:

- 27% agreed that the scheme could be varied based on factors including those identified above
- 16% rejected the principle of BVT
- 10% said that BVT should not be introduced to all areas of the country
- 47% made other comments.

- 4.28 Respondents answering this question frequently commented on the possible restriction of providers' work to particular areas, the size of the areas used as the basis of the tendering process, and the areas identified for the proposed first phase of BVT.
- 4.29 The largest group of respondents answering this question were those that agreed that the proposed BVT scheme could be varied to take account of different local conditions in the supply of criminal defence services. Respondents that said any scheme should be varied to suit local conditions frequently agreed with the factors identified by the LSC. For example, "we agree that any tendering system should take account of any area-specific characteristics".
- 4.30 Those respondents, including TLS, that did not think that BVT would be appropriate for all areas of the country often cited the relatively small number of firms working in rural areas as making them unsuitable for tendering, for example:
- "In large cities BVT makes great commercial sense for the LSC - there is an oversupply that can be clearly cut. Block contracting in rural areas makes much more sense because there is simply no excess supply" (a provider).
- 4.31 Along with many other respondents, BSN commented on the effect of restricting providers' contracts to particular areas on client choice and the viability of small firms that rely on own client work. For example:
- "This will affect own client work. Why should I build up a client following if you stop me from helping them if they're outside my area?"
- 4.32 The Bar Council agreed with the suggested approach of implementing the first phase of BVT in both a rural and an urban area, but argued that Avon and Somerset as one of the proposed phase one bid areas is not representative of rural areas, as it contains the city of Bristol.

## Decision

- 4.33 The LSC agrees that there are local variations that need to be taken into account in the development of any pilot model for BVT. More specific proposals for the way that a pilot BVT scheme could work, developed in light of the responses to the first consultation, will be set out in the second consultation paper. This will identify the specific rules and arrangements that might need to be flexed in response to variations in local market conditions, and consider the applicability of the proposed model to rural areas. It will also consider the need to restrict firms work to areas where they have a contract in light of the concerns raised over client choice and solicitors' ability to serve existing clients.

## Local challenges

### Question 7

Are there any unique challenges to introducing a best value tendering system in your local area?

- 4.34 60 responses were received to this question.

- 4.35 Most of the representative bodies that responded to the consultation are national organisations and therefore commented on the impact of a BVT system nationally.
- 4.36 The LAPG highlighted the “wide variations of structure and practice” across the country and that any future tendering scheme must take account of this. Otherwise, there is a risk that we would introduce a “manifest inequality of reward between firms”. This is a view shared by the AMCLF who suggested that “no two firms have the same case make up.... Consequently, we do not see how the LSC will be able to compare bids from different firms who will be basing their costs on the historic make up of the work they have undertaken.”
- 4.37 TLS consider flexibility in the model to be a reasonable approach but go on to suggest that “in some areas there are too few suppliers to allow for competitive tendering to take place.” A number of individual providers responding to the consultation support this making comments such as: “in my area there is only enough work for four main suppliers, no need for BVT” and “competition in my area is already limited. BVT could drive suppliers out, causing possibility of undersupply and issue re conflict.”
- 4.38 This is of course in contrast to those larger conurbations such as London as IDL point out, arguing that London is a unique case. They offer explanations as to why it is the most expensive place to practice including: “costs of housing, salary, transport, commercial property...”. Both the LCCSA and AMCLF make similar comments in relation to the impact of BVT in London as do many individual practitioner respondents.
- 4.39 The Bar Council considered the effect on the Bar in Greater Manchester as one of the proposed phase one bid areas, submitting that:
- “this threatens the continued existence of the independent referral Bar – particularly when coupled with the loss by the junior Bar in Manchester of an increasing amount of prosecution work as a result of the CPS increasing its target for in-house Crown Court advocacy to at least 25% of the total by value.”
- 4.40 Individual provider respondents identified a number of local characteristics that would need to be considered were BVT to be introduced in their area. These include responses from a provider operating in Gloucestershire who commented on the share of work in their areas with the PDS:
- “The LSC need to seriously consider how the PDS can enter a tendering exercise as the current ideas (just let them have a nebulous proportion with the rest divided between private practice) is fraught with difficulty and at the least is susceptible to challenge as anti-competitive.”
- 4.41 Another provider in their response explained that “currently in Derby City and East Derbyshire there are two police station schemes but one Court scheme. Effectively it is an urban area and a rural area, which is at risk of being lumped together. If the tender area were to cover both it would directly discriminate against firms outside the City who would be bound to bid higher due to higher travelling costs to and from court. This would discriminate against clients in those areas who would then be forced to choose a solicitor many miles away. This is not a unique situation and care needs to be taken to ensure that solicitors are well spread out across an area rather than all located in a given area.”
- 4.42 A provider based in Hull suggests that “the introduction of fixed fees for police station work, and revised fees for magistrates` [court] work has already distinguished between firms seen by the LSC as ‘rural’ and ‘urban’”.

## Decision

- 4.43 The LSC will take account of local factors in development of the proposals for the detail of the proposed scheme. In particular we will be focussing on the factors identified for the pilot areas.

## Phasing

### Question 8

Do you agree that, in the event of best value tendering being implemented, it should be by a phased approach as outlined above? If not, how do you think it should be implemented?

- 4.44 The majority of respondents (63%) agree that a phased approach to the introduction of BVT should be adopted. There is disagreement with the timetable outlined in the consultation paper with the majority of respondents (20%) arguing a full review should be undertaken following the conclusion of phase one. Some respondents (16%) argue that a pilot should be undertaken.
- 4.45 All of the major representative organisations agree with the proposed phased approach including TLS who in their response agree that “phase 1 should include an urban and a rural area. Phase 1 should be treated as a pilot and, phase two should not be implemented until a full evaluation of phase 1 has been completed.”
- 4.46 The essential opportunity to learn lessons between phase one and the start of phase two is a common view expressed by many respondents including the Bar Council calling for an “open-minded review”. IDL state that “the LSC must engage in open consultation as to the results of the first phase pilots.” AMCLF suggest that such an exercise only take place after the full contract term has lapsed.
- 4.47 A number of the representative bodies refer to the phase one of BVT as a pilot. The LAPG argue that “if a tendering scheme is to be introduced it should be a fully defined pilot, and evaluated, not merely phased in.”
- 4.48 This is a view shared by many individual practitioner respondents who whilst agreeing that a phased approach is “the only viable way” they also call for “a pilot for a year or two and progress slowly”.
- 4.49 A number of respondents also commented on the inclusion of urban and/or rural areas in the first phase of BVT. There were conflicting opinions on this with some arguing that “it needs to be properly assessed in a large urban area - sort out London first”. Others submitted that “London should be last as its the largest area and has the most firms” and “the LSC should start with the urban areas and then move onto to the rural areas - this would be a sensible way of the LSC focusing their time and staff on dealing with two different systems in two different types of environment.”

## Decision

4.50 The LSC agrees that any introduction of BVT must be approached carefully allowing lessons to be learnt and improvements to be made to the system along the way. Time must be given for consideration of each stage and engagement with the profession and representative bodies. We are therefore proposing that a pilot approach should be taken, with an assessment of the success of BVT in the pilot areas to be made within the first six to twelve months of implementation before any final decision is taken on a phased national roll-out.

## Quality

### Question 9

Would you include additional measures to the process to help ensure that quality is maintained? If so, what?

### Question 10

Are there any other indicators of quality that we should be considering?

4.51 A large number of respondents (47%) stated that the concept of quality is fundamentally important to the provision of legal services. Respondents also emphasised their views on the impact that tendering could have on quality, the CLSA response for example cited concern raised in the LECG report that:

“Firms will have incentives to cut costs to win contracts and make profits and may do so by reducing quality. Because of the separation, (responsibility for quality assurance with the Law Society and Bar Council [and] value for money with the LSC), a possibility is that they may do so (reduce quality) until quality hits a lower threshold and the quality standard becomes a minimum standard rather than a value for money standard. However, there may be grades of quality defined (as in the peer review system) that can relate value to costs.”

4.52 There was also recognition that “quality indicators are difficult” and that the “present proposals are [a] good starting point” (a provider).

4.53 Respondents generally agreed that BVT should not reduce quality and that firms offering a good service need to be encouraged. All of the major representative organisations supported the view that quality should be maintained throughout the BVT system. The Right Hon Sir Igor Judge, President of the Queen’s Bench Division, also wrote to the LSC to emphasise the importance that should be placed on “encouraging and successfully identifying quality providers”.

4.54 Some respondents suggested that the LSC should play a less active role in terms of assessing quality and that “The Law Society should be handed back the responsibility of monitoring solicitors” (a provider). Similarly, the LAPG said “We believe that the LSC should move away from Quality Control as a matter of policy and rely on existing and developing Quality Assurance. Peer Review has been an interesting development that acknowledges concerns previously expressed by the profession that matters other than the quality of advice were being measured. It has been very valuable. If the LSC truly wishes to move forward in

its relationship with the profession it needs to move away from after the event monitoring and auditing”.

- 4.55 IDL said that “LSC should reconsider its entire approach. A lighter regulatory touch is required. IDL have no objections to Peer Review and SQM and supervision is unobjectionable in principle. Repeated pro forma review of files should be abandoned”.
- 4.56 Overall, 32% of respondents agreed that the current practices of professional training and accreditation, ongoing professional development, Peer Review and the Specialist Quality Mark (SQM) framework help ensure that the service provided to clients is of a requisite standard.
- 4.57 There were also views that “the present quality measures are perfectly adequate even at the category 3 required at the present time” (a provider) and that “Peer review and SQM are sufficient” (a provider). ASA said that “Peer review should be the main way of determining whether providers are doing work of sufficiently high quality”.

### **Other indicators**

- 4.58 18% of respondents identified additional quality indicators, which could be included in the tendering process. 5% suggested that client feedback could be used as a way of monitoring the performance of providers. It was also suggested that the LSC could also require providers to fulfil the requirements set out in ISO 9001 and the Law Society’s Lexcel Standard, a view which was supported by the AMCLF.
- 4.59 ASA said that “we agree that supervision arrangements will be very important under BVT and think that there should be a maximum number of supervisees per supervisor. We think that up to 5 supervisees is feasible assuming that some of those supervisees are more experienced and need less of the supervisor’s attention. However, we feel that the SQM requirements for supervisors are insufficient. We do not believe that length of practice is any guarantee of supervisory skill or of good quality work. We therefore think that supervisors should be tested for legal knowledge before being allowed to supervise”.
- 4.60 AMCLF said that “there are many but until the LSC can demonstrate how they intend to pay for quality it is unlikely that the profession will be enthused with this question. Particularly at a point in time when firms are being starved of cash and therefore unable to invest”.
- 4.61 LAPG said that “the LSC should look at Quality Assurance in the mode of Investors in People. The Specialist Quality Mark has not been revised since it was introduced, unlike its “parents” the ISO 9001, and the Law Society’s Lexcel Standard. If the LSC wishes to adopt the continuous improvement model of Best Value authorities then working with the professional bodies to enhance Quality Standards and Accreditation schemes is the best guarantee of quality”.
- 4.62 Other areas raised as potential quality indicators:
- returning own client figures.
  - advocacy assessment (police station and court).
  - feedback from other criminal justice agencies.
- 4.63 There were however mixed views on each of these areas, both in the written responses to consultation and at the regional provider events. Respondents recognised that any new

measures would need to be examined in more detail before being accepted. There was a suggestion that the LSC “appoint one or more working groups of professionals working with the commission to explore the existing monitoring systems and how they can be improve” (a provider).

## Decision

- 4.64 The LSC’s current assumption is that the quality framework for the initial areas will be based on existing mechanisms, together with a Peer Review three rating, maintaining the SQM and current professional, supervisory, and training requirements, as well as Key Performance Indicators (as shown in the Unified Contract (Crime) July 2008), management information and current audit tools. The LSC is committed to ensuring that legal aid clients receive good quality services and has made clear previously that it will continue to examine ways to raise standards of quality as any system of BVT develops.
- 4.65 However it should be noted that, following the agreement that was reached between TLS, MoJ and the LSC in respect of the Unified Contract Judgement, the LSC is currently engaged in a working group together with TLS and Solicitors Regulatory Authority to determine the optimum quality assurance framework for providers to work within in the future. Early recommendations from this group will be considered during the next consultation. In particular, consideration will be given to the need to re-accredit duty solicitors in a BVT environment to help maintain quality standards.
- 4.66 For the avoidance of doubt, until the quality review group has reported, and any new quality mechanisms are implemented, the LSC will continue to use existing quality assurance mechanisms for existing business and developments of that business.
- 4.67 The LSC is also investigating whether wider feedback has a role to play in terms of a complimentary proxy for quality, including returning own client figures. If appropriate we will make firm proposals in the second consultation.
- 4.68 As was set out in Appendix 4 of the Deed of Settlement reached with TLS our objectives for the overall quality framework and its operation are:
- to assure and, over time, improve the quality of advice and representation provided to clients
  - to ensure it is objective and fair
  - to provide appropriate levels of assurance and value for money for the taxpayer
  - to ensure that the elements within the framework operate in an integrated fashion, without duplication
  - to mesh effectively with other systems (eg. Lexcel)
  - to ensure it is proportionate
  - to ensure it has the confidence of the professions, regulators, representative bodies and the LSC.

## Electronic case management systems

### Question 11

Do you agree that an electronic case management system and secure email is necessary in order to serve the interests of clients and enable efficient dealings with stakeholders across the criminal justice system?

### Question 12

Do you think that providers should be required to demonstrate that they have an electronic case management system prior to participating in BVT?

4.69 68 respondents addressed Question 11. The breakdown of stated preference was:

- yes 34%
- no 50%
- other response 16%.

4.70 64 respondents addressed Question 12. The breakdown of stated preference was:

- yes 23%
- no 61%
- other response 16%.

4.71 Respondents were divided over the desirability of using an electronic case management system (ECMS) and secure e-mail. Some respondents (23%) state that “without doubt such a system could provide a more efficient and, hopefully economic way of working” (provider). However, others suggested that “there is no practical need whatsoever for a CMS” (a provider).

4.72 In terms of representative body responses, the majority were in favour of case management systems in principle, but suggested that “these facilities are desirable but would not go so far as to say that they are necessary” (TLS). One representative body response stated that they did “not accept that an electronic case management system is necessary to serve the interests of clients. It is a matter of professional and business judgement for firms as to what IT they require for which processes” (LAPG). The theme of business judgment was echoed elsewhere, with one respondent stating that “if there are genuine costs advantages then such a system will be generally adopted in the normal commercial way” (IDL).

4.73 Some respondents suggested that the need for such systems are “likely to correlate with the size of the firm. However, there is a greater need for case management systems on larger cases or where the firm runs greater volumes of cases” (AMCLF).

4.74 Respondents opposed to the introduction of a case management system (61%) state that the cost of such systems is prohibitive and there is no evidence of the service to clients being improved, and limited evidence of efficiencies being made. Concern was also expressed regarding the potential requirement of an ECMS prior to the award of contract because “you are then asking us to take on additional expense, without any guarantee that our bid will be successful” (a provider). Some respondents were in favour of the requirement, but believed

that the “deadline should be date of contract award, not tender closing date” (a provider). All representative bodies were against the mandatory requirement.

## Decision:

4.75 The LSC is currently undertaking a survey that covers the uptake of electronic case management systems and secure email systems. It will look closely at these results, as well as the needs of other partners in the CJS to establish whether the use of ECMS and/or secure email should be a contractual requirement. This will be addressed in the second consultation.

## New providers

### Question 13

How should quality of new providers be assured?

4.76 A total of 63 respondents addressed this question.

4.77 In terms of provider responses, there were mixed views on this question. Existing quality standards in the form of “Peer Review, SQM and supervisory requirements (as enhanced) provide for part of the required standards” (a provider); whereas others suggested new ways to assess quality, for example using the “review of individual performance history for any individual moving from an organisation outside the supplier list to an organisation on the supplier list” (a provider). There was a general feeling that all providers should be treated equally, and that “the idea of exempting some firms from PR gives an unfair market advantage” (a provider).

4.78 With regard to representative body responses, some focused on the question of quality itself, indicating that it is “yet to be defined” (AMCLF). Others questioned the suitability of Peer Review as a measure, suggesting that in terms of new entrants “arguably, provisional peer reviews are unduly arbitrary and are no reflection of the quality of the new firm” (TLS). Others felt that “the same Quality Assurance principles can be applied to new firms as to existing providers” (LAPG). This view was echoed elsewhere, with one response stating that “we agree that there should be quality requirements for new providers. Of those listed we think that provisional peer review is the most important”.

## Decision:

4.79 The LSC agrees that there should be equal treatment where providers are competing for contracts, and that all competing providers should be subject to the same requirements. This is easily achieved in relation to the SQM. In terms of Peer Review, it may be necessary to let conditional contracts where no files are available.

4.80 The LSC is committed to ensuring that providers (and in particular partners) who have previously had contracts terminated for reasons of quality or impropriety are not simply able to form new entities to avoid their previous performance being considered in the award of contracts. This will be addressed in the second consultation.

## 5. Next steps

### Introduction

- 5.1 The LSC is appreciative of the time taken by all the individuals and representative organisations that responded to the consultation either in writing or by using the e-consultation facility. This appreciation is also extended to providers who gave up their time to participate in the regional provider events held throughout England and Wales. These events provided an opportunity to explain the thinking behind BVT in more detail and to engage in a constructive and frank exchange of views. It is apparent that all parties with an interest in the provision of criminal legal aid services share a common vision where high quality advice and assistance is provided to those who are most in need. There is a divergence of opinion on how provision should be achieved in the longer term.
- 5.2 A consultation on the overall principle of BVT was important as it provided an opportunity to share early policy ideas and early thinking with regards to the design of the tender process with providers. In order to participate fully in any BVT process providers need to understand the underlying processes. The responses from providers will inform the development process and play an important role in shaping future proposals within the reform programme. A clear timetable showing the next steps for the second consultation is set out below.
- 5.3 The LSC has engaged the services of NERA Economic Consulting to assist with designing a draft technical specification and implementation plan to inform the design of any proposed BVT system. The work being undertaken in conjunction with NERA will be used to prepare the ground for the second consultation. The subsequent consultation will allow all providers the opportunity to comment on the detail of the proposed tender system.
- 5.4 The LSC plans to produce a simulation model of the proposed pilot which will be shared with the representative bodies to enable them to follow a typical tender step by step. The input of the representative bodies will be sought to identify providers in the first areas who can test out the model before we go out to consultation later this year.
- 5.5 No final decision on the implementation of a BVT pilot will be taken until after the results of the second consultation on our proposed model, which will be published later this year, have been properly considered. This consultation paper will be accompanied with an updated impact assessment and timetable. There will be many opportunities for providers to actively participate in the next stage of consultation, and representative bodies will be engaged throughout the process. The LSC plans to undertake more provider events during the second consultation so we can again gather views directly from the profession.

## Revised indicative timetable for BVT

The revised timetable below remains subject to the outcome of the second consultation and if a decision is taken to proceed with BVT.

<b>Event</b>	<b>Indicative date</b>
Publish second consultation, including updated draft impact assessment	December 2008
Provider events	From January 2009
Consultation period ends	March 2009
Publication of responses to consultation and full impact assessment	June 2009
Open tender for pilot areas	Not before July 2009

# Annex 1 – Respondents to the BVT Consultation

This annex lists the representative bodies and individuals who provided written responses to the questions set out in the Consultation Paper.

## Representative bodies:

- Criminal Law Solicitors' Association (CLSA)
- Birmingham Law Society Criminal Law Committee
- The Criminal Bar Association (CBA)
- The Bar Council
- Blackburn Incorporated Law Association
- The Advice Services Alliance (ASA)
- Criminal Defence Solicitors Union (CDSU)
- London Criminal Courts Solicitor Association (LCCSA)
- Institute of Legal Executives
- The Law Society (TLS)
- Independent Defence Lawyers (IDL)
- Black Solicitors Network (BSN)
- Young Legal Aid Lawyers
- Association of Major Criminal Law Firms (AMCLF)
- The Newcastle upon Tyne Law Society
- Blackburn Incorporated Law Association
- Bristol Law Society
- Legal Aid Practitioners Group (LAPG)

## Individual responses

The list below details responses received from individuals and other groups who submitted written responses to the BVT consultation paper and did not wish to remain anonymous. A further 48 written responses were received from individual legal aid providers who were responding personally and not on behalf of their organisations.

A S Law	IBB Solicitors
ABM Solicitors	Jackson & Canter
Andrew Bodnar (Charter Chambers)	James Calderback
Andrew Storch solicitors	John H Smith, Solicitors
Andrews Angel Solicitors	John Latham & Co
Arnison & Company Solicitors Ltd	John Robinson & Co
Atteys	Julian Jefferson
B L B Solicitors	Julian Young & Co.
Ben Hoare Bell - Sunderland	Justice
Berry & Berry	Kelcey & Hall Solicitors & Advocates
Berry Redmond Robbins	Kellys Solicitors (on behalf of nine legal aid providers)
Best Solicitors	Lambert Taylor & Gregory
Bindman & Partners	Lansbury Worthington Solicitors

Birds Solicitors  
Bone and Payne LLP  
Boyce & Co Solicitors  
Brady, Eastwood, Pierce & Stewart  
Brian Koffman & Co Solicitors  
Brooklyn Solicitors  
Brown & Emery Solicitors  
C R Burton & Co, Solicitors  
C Turner Solicitors  
Cartwright King Solicitors  
CCW Solicitors  
CDA  
Chris Nicholls Solicitors  
Christian Khan Solicitors  
Clarion Solicitors  
Clarke Kiernan  
Clarkson Hirst Solicitors  
Clinton Davis Pallis Solicitors  
Cobleys LLP  
Cocks Lloyd Solicitors  
Coodes Solicitors  
Coole & Haddock Solicitors  
David Gray Solicitors  
David Phillips & Partners  
David Watts (a Solicitor Advocate)  
Denleys Solicitors  
Edward Bell Solicitor  
Elliot Mather LLP Solicitors  
Emmersons Solicitors  
Equality and Human Rights Commission  
Evans-Roberts Solicitors  
Everys Solicitors  
Ewing Hickman & Clark  
Fairweather Whillis & Toghill Solicitors  
Fisher Jones Greenwood LLP  
Foley Harrison Solicitors  
Forbes Solicitors  
G V Hale & Co  
Garstangs Solicitors  
Geoffrey Clapp Solicitors  
Goldkorns Solicitors  
Goldstones Solicitors  
Gowmans solicitors  
GWB - Grayson Willis Bennett Solicitors  
Hammon Oakley Solicitors  
Harris Paley Ltd

Larken & Co  
Legal Action Group  
Levenes Solicitors  
Lichfield Reynolds Solicitors  
Lindsay Halewood Dodd Solicitors  
Lionel Blackman Solicitors  
Mackesys Solicitors  
Mark Williams Associates  
McLarty & Co  
McMillan Williams Solicitors  
McMillen Hamilton McCarthy  
Metcalf Copeman & Pettefar Solicitors  
Michael J Fisher & Co Solicitors  
Mike Fanning Solicitors  
Mullenders Solicitors  
Mylles & Co  
Neil Foley & Co  
Nunn Rickard Solicitors  
Olliers Solicitors  
Pattinson & Brewer Solicitors  
Peter Lazarus & Co  
Phillips & Co Solcitors  
Potter Shelley & Co  
R Govier Solicitors  
Riley Hayes & Co Solicitors  
Robin Murray & Co  
Ross Solicitor  
Rothera Dawson Solicitors  
Russell Jones & Walker  
Sabir Selby LLP  
Sarah Buckingham (No.5 Chambers)  
Sharon Taylor Associates Solicitors  
Stephen Weighell & Co Solicitor  
Stephens & Scown Solicitors  
Stephensons  
Stokes Solicitors  
T V Edwards LLP - Solicitors  
Taylor Lewis Solicitors  
TC Smith  
The Right Honourable The President of the Queen's  
Bench Division  
Thompsons Solicitors  
Townshends LLP  
Triggs Read & Dart  
Unite the Union  
Vickers & co

Harrop White, Vallance & Dawson  
Harrow Law Partnership Solicitors  
Hayes - Burcombe & Co  
HCL Hanne & Co  
Hodge Jones & Allen  
Howard & Byrne  
Hywel Davies Solicitors  
Iacopi Palmer Solicitors LLP

W Brook & Co Solicitors  
Wains Solicitors  
Wilson & Co. Solicitors  
Wolff Solicitors Hull  
Woodcocks  
Woollcombe Yonge  
Wragg Mark-Bell Solicitors Ltd