

# THE PUBLIC DEFENDER SERVICE IN ENGLAND AND WALES

by

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In this paper I wish to provide a general description of the public defender experiment currently taking place in England and Wales and the context in which it is being developed; to set out the lines on which the research evaluation is being conducted; and to raise some questions as to what the role of a public defender should be in a 'mixed' system of delivery of criminal defence services.

## **Background and Establishment of the Public Defender Service (PDS)**

The Public Defender Service (PDS) in England and Wales was launched in May 2001, with the first offices opening during the middle of the General Election campaign of that year. The plan to establish the PDS was first announced in 1998 in the Labour Government's White Paper, *Modernising Justice*, which in turn was the precursor of the Access to Justice Act 1999. The latter made legislative provision for the Legal Services Commission to employ lawyers directly to provide services to the public, in relation to both civil and criminal legal aid (or, to use their up-to-date labels, the Community Legal Service (CLS) and Criminal Defence Service (CDS)). Of course, the Access to Justice Act was significant as the legislation that established the Legal Services Commission (LSC) and authorised the transfer of legal aid in England and Wales from a 'judicare' model, based on the case-by-case funding

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of work done by private practitioners on behalf of eligible persons, to a system of contracts with approved suppliers. The changeover to a contract system, which became operational in April 2001, in fact dominated the work of the LSC in its first year of operation and very much over-shadowed in administrative terms the parallel process of setting up the PDS.<sup>2</sup>

In other words, it would be fair to say that, at least in its timing, the setting up of the PDS was driven more by the political imperatives of the Government<sup>3</sup> rather than as part of a well-planned or long-term strategy to restructure the delivery of criminal defence services in England and Wales. Another factor affecting the timing of the initiative was the setting up of the Scottish public defender office in Edinburgh in 1998 and the research evaluation of this. However, in Scotland there has been no similar shift to contracting criminal legal aid as in England and Wales, so that the Scottish public defender operates as an alternative to a more traditional ‘judicare’ model. Also, the Scottish public defender was set up on the basis that certain clients would be ‘directed’ to use its services.<sup>4</sup> Although this had the advantage in terms of the experiment and the research that the Scottish public defender was able to build a client base relatively quickly, the system of ‘direction’ proved controversial both with clients and other solicitors and was eventually abandoned. It was replaced, however, with the Scottish public defender being given priority in the provision of duty solicitor services in the relevant courts.

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<sup>2</sup> This is acknowledged in the Legal Services Commission’s first annual report on the PDS (*Public Defender Service: Review of the first year of operation 2001/02*, LSC, August 2002), when it is noted that it was working to “a very challenging timetable to establish a wholly new service” and that this “to some extent influenced a number of key decisions which had to be taken in the process of setting up the Service” (para 3.1). In fact the initial Government consultation paper on the PDS (*Criminal Defence Service: Establishing a Salaried Defence Service and Draft Code of Conduct for Salaried Defenders Employed by the Legal Services Commission*) was published in June 2000. A list of potential sites for the initial offices was formulated in September 2000 and recruitment of staff started shortly thereafter. The Government’s official response to the consultation was not published until April 2000 (see note 4 below), just a month before the first PDS offices opened.

<sup>3</sup> One Labour minister in the Lord Chancellor’s Department was prominent in pushing for the setting up of the PDS prior to the 2001 General Election. Ironically, this minister (David Lock) was the only Labour MP to lose his seat in that election, being defeated by an independent candidate campaigning over the closure of a local hospital in the constituency.

<sup>4</sup> The system of ‘direction’ used was to require any person seeking criminal legal aid with a birthday in certain months of the year to use the public defender office rather than another solicitor. The results of the research evaluation of the Scottish public defender were reported in T. Goriely, et al,

The PDO in England and Wales has been set up on very different grounds. First, there has been no similar system of directing or forcing clients to use its services. Indeed, the exact opposite is the case, since the right of clients on criminal legal aid to choose their own legal representative was enshrined in statute under s.15 of the Access to Justice Act 1999. This was a major concession to opposition parties and the legal professions during the passage of the Act. Yet, it also puts the criminal legal aid system in England and Wales in perhaps a unique position in giving legally-aided criminal defendants a legally-guaranteed choice of representative. Of course, that choice is restricted insofar as the client can only choose from among those solicitors' firms that hold contracts with the LSC to provide criminal defence services or the PDS where it operates a local office. There is no doubt that the introduction of contracting of criminal legal aid has led to a significant reduction in the number of solicitors' offices providing criminal legal aid, cutting it by about half across England and Wales as a whole. However, it is estimated that this 50% reduction in outlets resulted in the loss of offices responsible for only about 10% of actual criminal legal aid cases. In other words, it has primarily been those solicitors who did only small amounts of criminal legal aid work who appear to have dropped out of the system due to the introduction of contracting, and there is evidence in some areas that although the number of offices conducting criminal legal aid has been reduced, the number of solicitors operating out of these offices has remained similar to before the introduction of contracting. In other words, contracting appears in most places to have led to a restructuring of criminal defence services into larger units rather than any significant reduction in the overall level of services. It is certainly the case that in most areas of England and Wales, the right of criminal legal aid clients to choose their own solicitor is a real and not just a theoretical one.

If clients in England and Wales are not being formally directed to the PDS, what about more informal means of assisting the new service in recruiting clients? As noted, in Scotland once the system of direction was abandoned, it was replaced by the public defender being given

priority in providing duty solicitor services to the relevant courts. This option would also have been open to the LSC in England and Wales, as it now controls the allocation of ‘slots’ on duty solicitor schemes throughout the country. The system of duty solicitors in England and Wales dates back, at least on a statutory basis, to the 1980s. Under this system, solicitors in private practice take it in turns to act as duty solicitors to provide assistance to otherwise unrepresented defendants and suspects, both in magistrates’ courts and at police stations. Originally, duty ‘slots’ were open to most solicitors, but over the years the requirements for eligibility to act in this capacity have been tightened up. Nevertheless, competition for duty solicitor ‘slots’ among solicitors in private practice remains intense in most areas of the country, with several dozens or even more than a hundred individuals offering themselves to act in this capacity within a local area. Duty solicitors are paid for their services by the LSC, but participation is also seen as a mechanism for solicitors’ to recruit new clients. Indeed, historically duty solicitor schemes have been an important means whereby the ‘market’ for criminal legal aid has been expanded to cover almost all persons facing substantial criminal charges in both the Crown Court and magistrates’ courts.<sup>5</sup>

To have given public defenders priority in the allocation of duty solicitor ‘slots’ would therefore have been a highly controversial step in England and Wales, and following the initial consultation on setting up the PDS, it was decided that they should compete on a “level

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Executive Central Research Unit, 2001.

<sup>5</sup> That historic growth in the volume and scope of criminal legal aid in England and Wales has been traced in McConville, et al, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain*, Oxford: Clarendon Press, 1994, chap. 1 and Appendix.

Indeed, the expansion in criminal legal aid was given a further significant impetus in the late 1990s, just before the introduction of criminal contracting and the PDS. In order to cut delays in the processing of criminal cases, the Government introduced measures to require all those charged with criminal offences, even if subsequently released on bail by the police, to be brought before the magistrates’ court at its next sitting. Previously this requirement only applied to the minority of criminal suspects held in custody by the police after charge. Courts were also empowered to hold various forms of ‘early hearings’ designed to expedite the disposal of cases. To facilitate these changes, a new form of legal aid, universally available to represent any person brought before the courts for such an ‘early hearing’, was introduced. Under this system, any solicitors eligible to serve as duty solicitors in the local court could make themselves available to provide such representation and to be paid by the LSC for this. In its first year of operation, it is estimated that this ‘early cover’ legal aid added no less than £50 million to the costs of criminal legal aid in magistrates’ courts.

playing field” with other criminal defence solicitors at least in this respect.<sup>6</sup> This has meant that PDS offices have had to follow the same rules as other solicitors relating to eligibility of their staff to become duty solicitors and, where they have been set up in areas already well populated by duty solicitors, their ‘turns’ on duty solicitor rota have been infrequent. Indeed, it is a sign of the sensitivity of this issue that in one area where a PDS office has been introduced (Birmingham) it found a way of interpreting the local rules to enable its solicitors to join the duty solicitor schemes in some surrounding towns. This produced protests of unfair competition from other local solicitors, with the result that the LSC has now agreed to new rules that will effectively restrict the PDS to membership of the duty solicitors scheme for its main, local court in Birmingham.

Another feature of the PDS in England and Wales is the decision made that each office should, at the outset, be able to provide from its own staffing resources a comprehensive service to its clients. In a situation where advice to suspects arrested and held for questioning in police stations constitutes a routine element of criminal defence services, this has meant that each office has had to have sufficient staff to be available 24-hours per day and seven days per week. The recruitment for each PDS office in England and Wales started with a staffing model of three solicitors (the office head and two others) and three accredited, non-solicitor police station representatives.<sup>7</sup> This is probably a different basis on which new criminal defence solicitors’ firms might start out. Such firms would be likely to start with two or three fee-earning staff, relying on the local duty solicitor scheme to cover for them when these staff were unavailable, and then only employ further staff when their caseload would

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<sup>6</sup> *Criminal Defence Service: Establishing a Salaried Defence Service – The Government’s Conclusions following Consultations*, Lord Chancellor’s Department, April 2001, p.4. The use of the phrase “on a level playing field” has itself proven controversial. The Legal Services Commission has taken this as referring to equal treatment between the PDS and other defence solicitors in the allocation of duty solicitor ‘slots’ only. Private practitioners have interpreted it more broadly and criticised the Legal Services Commission for providing the PDS with what are alleged to be better salaries, staffing levels and facilities than most criminal defence solicitors argue they can afford.

<sup>7</sup> In the event, not all the offices were able to recruit a full complement of staff. For information on the role of non-solicitor police station representatives in the provision of criminal defence services in England and Wales, see L. Bridges and S. Choongh, *Improving Police Station Legal Advice*, Law Society and Legal Aid Board, 1997.

justify this. One reason for adopting the different model for the PDS was the need, in the absence of other measures to direct or encourage clients to use the new service, to ensure that it could provide a full service to those it did attract and therefore improve its chances of retaining such clients in future.<sup>8</sup> At the same time, it was acknowledged that this staffing model would imply much higher costs for the PDS during its initial start-up phase than could be justified by its workload.<sup>9</sup>

The initial plan was to establish public defender offices in six locations in England and Wales and to allow them to run for a period of at least four years, during which the research evaluation would be carried out.<sup>10</sup> Although the original intention was to consult the research team on the location of the six offices, the shortlist of locations was in fact drawn up before our appointment.<sup>11</sup> The shortlist of 13 locations contained a range of large cities and smaller towns throughout the country where LSC staff considered that there were potential “problems” with the supplier-base of contracted criminal defence solicitors. Such problems might include shortages of criminal defence firms in relation to the local market; the concentration of the market on a small number of such firms; doubts over the quality of local criminal defence services; or other unspecified issues. It is notable that the shortlist of potential locations did not contain any areas within Greater London, even though London probably represents around a quarter of the overall ‘market’ for criminal defence services in England and Wales. Following representations from the research team, subsequent consideration was given to setting up a PDS office in London, but eventually this was rejected on grounds that there was sufficient contracted supply in London; that as criminal defence work in London is spread across a large number of courts, one office would not be able to reflect the market as a whole; and that the office established in Birmingham (the second largest city in the country) would provide a test for the PDS operating in a highly competitive

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<sup>8</sup> *PDO: Review of first year of operation*, op. cit., para. 3.6.

<sup>9</sup> *Ibid.*

<sup>10</sup> This again differed from Scotland, where only one public defender office was opened in Edinburgh and the initial evaluation was carried out over a period of just two years.

<sup>11</sup> *PDS: Review of the first year of operation*, op. cit., para 3.1.

local market.<sup>12</sup> The research team did, on the other hand, endorse the decision to include a number of locations in the public defender experiment in England and Wales, not least because previous research has shown that defence services can vary considerably in cost and quality across different areas.<sup>13</sup>

In moving beyond the shortlist, the actual location of the initial PDS offices in England and Wales was based on the success in the recruitment for office heads. In the event, only four persons of sufficient standing and quality were recruited for offices in Birmingham, Liverpool, Middlesbrough and Swansea. These four areas certainly present different local ‘markets’ for criminal defence services and challenges for the PDS. As indicated, Birmingham represents a large conurbation with a high number of competing defence firms, with well in excess of 100 solicitors on the local duty solicitor rota. Birmingham also proved a difficult area in which to recruit up to the original staffing model, and the office opened with three solicitors but only one trainee solicitor who was also an accredited police station representative. Liverpool is another large city but with a declining population base, again with a considerable number of competing local criminal defence firms. It is also an area long noted for having a distinct local criminal defence culture. Middlesbrough in north-east England is a smaller city, where it appeared that the local ‘market’ for defence services was becoming concentrated in a relatively small number of firms. Finally, Swansea in South Wales is an even smaller city, where again there were a limited number of competing firms, although no specific indications of an overall shortage of supply of criminal defence services. The offices in Liverpool and Middlesbrough started with the full complement of three solicitors and three accredited police station representatives, while the Swansea office had an extra (solicitor) member of staff.

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<sup>12</sup> *ibid*, para. 4.3.

<sup>13</sup> See in particular L. Bridges, et al, *Patterns and Costs under Criminal Contracts and Quality in Criminal Defence Services*, Legal Services Commission, August 2000.

It is worth noting that, as well as being based in only one location, the Scottish public defender service also left out its largest city, Glasgow.

Subsequently, two further PDOs have been opened and will be included in the research evaluation. These are at Cheltenham in Gloucestershire and Pontypridd in South Wales. The Cheltenham office services a set of small cities/towns (Gloucester, Cheltenham and Stroud) with a significant rural hinterland. It also presents a somewhat unique local market situation, in that prior to the PDS being introduced one of the largest criminal defence providers in the area was convicted of defrauding the legal aid system over a number of years and sent to prison. This left one other large and several smaller criminal defence firms operating and creating what was thought to be a degree of under-supply in the area. Pontypridd has been opened as a ‘satellite’ office of the Swansea PDS office,<sup>14</sup> in order to provide more local access for the large number of clients that had been recruited from the town. It has also been staffed with solicitors and accredited representatives from the Swansea PDO (which has recruited replacements) and will be under the overall management of the Swansea office head. Both the Cheltenham and Pontypridd offices have also opened with smaller staffing complements than the original model.

It is worth noting that all the office heads so far recruited to the PDS have come from senior positions in criminal defence solicitors’ firms. Three of the office heads had relatively strong links with the local areas in which the PDS offices would be operating (Liverpool, Swansea and, to a lesser extent, Birmingham) and could therefore rely to a degree on local reputations to recruit clients. The two other office heads were new to their areas, although in all the offices there were other staff with local connections. There is also a professional head of the PDS, a role that has been fulfilled on a part-time basis by a senior partner in a large London criminal defence firm who is also a member of the Legal Services Commission.<sup>15</sup> This person is responsible, along with the office heads, for upholding the professional standards of the PDS in accordance with professional codes, a special *Code of Conduct for Employees of the*

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<sup>14</sup> Similar ‘satellite’ offices are being opened for the Liverpool (Chester) and Middlesbrough (Darlington) PDS offices but will not be included fully in the research evaluation.

<sup>15</sup> This dual role has been subject to some criticism on the grounds that the professional and head of service should be completely independent of the LSC and its management. Interestingly, the

*Legal Services Commission who provide services as part of the Criminal Defence Service*,<sup>16</sup> and through dealing with individual complaints. The special Code of Conduct for PDS staff was another statutory requirement<sup>17</sup> and innovative feature of the PDS in England and Wales. Within the terms of the Code, the professional head of service can issue further advice on professional standards from time to time, and use has already been made of this facility in order to issue guidance on PDS staff advising clients to plead guilty and on seeking adjournments.<sup>18</sup>

In addition to these specific measures to uphold the standards of PDS work, their offices are also subject to the same processes of management and quality audits, using Transaction Criteria and Cost Compliance criteria, as criminal defence firms operating under contracts. The professional head of service also chairs a national PDS Management Committee, which otherwise includes senior LSC managers and the office heads, who are individually responsible for the day-to-day management of their offices. The office heads report to the head of the Criminal Defence Service, whose responsibilities span the provision of criminal defence services both under contracts and through the PDS. Beyond this, the LSC has so far employed only two central administrative staff dedicated to the PDS, but they have been able to draw on other LSC departments such as human resources for recruitment, facilities for the physical setting up of offices, and information systems for computing support. Staff recruitment, for example, has been conducted through standard LSC procedures which are probably more lengthy and costly than those that would be used by many criminal defence solicitors' firms. The initial offices were also set up to a standardised format in shop front, city centre locations. The setting up of computer support for the PDS has also proven a

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potential conflict of having the head of a private criminal defence firm as professional head of service for the PDS has not attracted similar comments.

<sup>16</sup> Legal Services Commission, 2001.

<sup>17</sup> Access to Justice Act, 1999, s.16.

<sup>18</sup> See Public Defender Service review of first year of operation, *op.cit.* Annex 1. Such guidance is perhaps particularly important in view of the research on the Scottish Public Defence Solicitors office which showed that, in comparison with other criminal defence practitioners, it had a higher rate of pleading clients guilty at an early stage of proceedings (see Goriely, *op. cit.*). It is also important in the light of the UK Government's various attempts to encourage higher rates of early guilty pleas in England and Wales (see below).

lengthy and costly process, especially after an initial decision to provide stand alone systems for each office was reversed in favour of networking them into the main LSC system (but with suitable mechanisms to protect confidentiality of casework information).

A dedicated PDS Case Management System (CMS) has been set up and become operational after considerable delays. The PDS offices are also working to a standardised file layout and set of forms to document casework. Interestingly, much of the detailed work in setting up the CMS and designing case documentation has been administered from one of the local offices rather than from the centre. Indeed, at this stage it is difficult to detect any significant central direction over the services or style of operation of the PDS offices. Rather, it is arguable that the PDS in England and Wales has been created in the image of private or contracted criminal defence practice, with each office also reflecting the local criminal defence market and culture in which it operates. Of course, a more national and distinct PDS culture may develop over time. On the other hand, there is also a risk that the very criteria against which the PDS will be evaluated, both in the research and more generally, could reinforce the tendency for it to adopt similar work patterns and standards as its ‘comparators’ among local contracted criminal defence firms.

### **Development of PDS and Research**

How, then, has the PDS and the research on it developed so far? The PDS offices have had varying success in their primary task of building up of client base over their first one or two years of operation. The first annual report<sup>19</sup> showed the following figures for the four offices then in operation:

<b>Office</b>	<b>Opening date</b>	<b>Total matters 2001/2002</b>	<b>Weekly average of new matters</b>
Birmingham	11/07/01	274	7
Liverpool	14/05/01	482	10
Middlesbrough	17/05/01	327	7
Swansea	21/05/01	626	14

More recent figures for 2002-03 show that all the original offices have significantly increased their annual caseloads from the previous year. The Middlesbrough office annual caseload has more than doubled to over 700, while the Birmingham and Liverpool offices have nearly twice as many cases (512 and 781) respectively as in the previous year. The Swansea office, which was the busiest in the first year, showed a somewhat smaller increase in the second year (749), but this is in the context of the 'satellite' office in Pontypridd having opened in September 2002 and having already attracted around 400 cases by the year end. The Cheltenham office opened in April 2002 and had attracted around 700 cases in its first year. The offices also appear to be retaining clients at a reasonable rate, with the percentage of new matters involving previous clients ranging from around 40% for the Swansea, Middlesbrough and Birmingham PDS offices to about 60% for the Liverpool, Cheltenham and Pontypridd offices. Although it is too early to draw general conclusions and there are local factors explaining some of the figures in areas such as Birmingham and Cheltenham (see above), it is interesting to observe that there is an inverse relationship between the size of the city or town in which the PDS office operates and its caseload. Thus, some of the highest initial caseloads have been achieved in the less populated locations such as Cheltenham and Swansea/Pontypridd. This could be a reflection of the difficulties of sustaining contracted criminal defence firms in such areas, in contrast to the larger cities where such firms can expect to operate with large volumes of criminal casework.

The research on the evaluation of the PDS has not yet developed to a stage where it is possible to report findings. Much of the first year was devoted to designing and consulting on our methodology, and this was eventually published by the LSC in August 2001.<sup>20</sup> The research is being carried out in separate phases, with the first examining the work of PDS offices and contracted criminal defence firms in the 'investigation' (police station) stage of cases. Fieldwork for this phase is just coming to a conclusion, and will be followed by further

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<sup>19</sup> *Public Defender Service: review of first year of operation, op. cit.*, para 5.20.

<sup>20</sup> L. Bridges et al, *Methods for Researching and Evaluating the Public Defender Service*, Legal Services Commission, August 2002.

phases looking at magistrates' court cases and finally at Crown Court cases dealt with by both forms of providers.

This phased approach has partly been dictated by the rate of build up of clients by the PDS. Another factor is the limited comparative information available on the services provided under criminal defence contracts by firms of private solicitors. Indeed, while contracting for criminal legal aid was piloted and subject to research evaluation prior to implementation in 2001,<sup>21</sup> the actual form of contracting adopted differs significantly from the pilot. Nor has the research been extended to cover the actual impact of criminal contracting across England and Wales as a whole. We do not have, for example, a ready source of data on the amount of time being spent by contracted criminal defence firms on various aspects of cases (police station, magistrates' court, Crown Court) or the overall cost of cases conducted under criminal contracts. Equally, there is very little information available on the economics of criminal defence firms in terms of such factors as staffing levels and costs and the 'billable hours' targets employed by firms. We are seeking to remedy these deficiencies in the comparative data available on contracted defence services in a variety of ways. One is to draw samples of files at each stage of the research from both the PDS and a comparator group of contracted criminal defence firms in each of the locations where the PDS is being evaluated. Another is to survey a sample of contracted firms for more detailed information about the organisation and cost base of their work on criminal cases.

Obviously, this comparison between the PDS and criminal defence services provided under contracts is central to our research evaluation. The comparison covers not only costs but also differences in the types and processing of cases, case outcomes at the various stages of the criminal defence process, and the quality standards of the two types of services. The latter will be evaluated through 'peer review' and client surveys, although the latter are notoriously difficult to organise with criminal clients. During the first phase of the research 'peer review' has been carried out on the basis of a comparative analysis of case files by one member of the

research team who is himself a recognised expert on police station legal advice.<sup>22</sup> At later stages we intend to employ independent peer reviewers and to extend this part of the evaluation to include court observations as well as file analysis.

In our methodology paper we identified two bases for comparing costs as between the PDS and contracted criminal defence firms. One is the ‘cost to the public purse’ method similar to that used in the research on the Scottish public defender. This method compares the expenditure on the PDS, broken down on the basis of time spent on various aspects of cases, with the amounts paid to other criminal defence firms under contracts for providing the same services. In our consultations, private criminal defence contractors and those representing them have been anxious that the full costs of the PDS, including start up and central administration and support costs, are taken into account in this comparison. However, this raises some tricky theoretical problems about how to treat some initial start up and capital costs, such as the investment in IT support systems that may eventually be spread to additional PDS offices. There is also the issue of how to deal with what was a planned over-provision of staffing and other resources during the initial phases of the PDS and the high costs that this entailed. Are such costs to be ‘written off’ or carried forward as a liability into future years for each PDS office? And what should be the basis of calculating this initial ‘overspend’?

There are similar issues to be raised on the other side of the equation in terms of the costs of providing criminal defence services under contracts. Are such costs equatable solely to the amounts paid by the LSC to contracted firms or should they also include the central cost of managing and administering the system of contracting as a whole, including the awarding of contracts, the processing of payments, and the whole system of quality and cost audits required to support the contract system? As noted earlier, the system of contracts for criminal legal aid was launched in parallel with the setting up of the PDS and considerable resources

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<sup>21</sup> See note 12 above.

were also invested in the new contracting system in terms of administrative support, new computer systems, etc. The research team is just coming to terms with how these start-up and central support costs of contracting can best be built into our analysis.<sup>23</sup>

The second basis of comparison between the PDS and contracted defence firms would be the 'cost to the provider'. This relates to one of the Government and LSC's stated objectives for setting up the PDS, to act as a 'benchmark' for what it is reasonable to pay for similar criminal defence services provided under contracts. As noted, there is little available evidence on the economics of private criminal defence firms on which to base judgments on what it is reasonable to pay them for particular services. Nor, given the nature of the contractual relationship between them, is it likely that these firms would readily reveal such information to the LSC on a routine basis. Whether we, as independent researchers, will be any more successful in obtaining such data from our surveys of contracted criminal defence firms remains to be seen. We have obtained support for this aspect of our work from the various representative bodies of the profession and criminal defence practitioners, but it remains doubtful whether many individual firms will be prepared or, indeed, be able to provide the types of information on their costs that we will require. Yet the issue of 'cost to the provider' may be crucial in determining the sustainability of the system of delivery of the bulk of criminal defence services through contracts with private firms of solicitors. Even if the PDS turns out in the long run to be less expensive than contracted providers, will 'benchmarking' the amounts paid under contracts to this level result in even greater reductions in the number of firms willing to undertake this work? Of course, it remains a moot point what the implications for 'benchmarking' would be should the opposite turn out to be the case, that the PDS is more expensive by comparison with contracted providers.

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<sup>22</sup> Ed Cape, author of *Defending Suspects at Police Stations: The practitioners' guide to advice and representation*, London, Legal Action Group, 1999.

<sup>23</sup> It is not clear that these central costs of administering payments to private criminal defence firms were included in the 'cost to the public purse' comparison in the research on the Scottish public defender.

The importance of all of this has been highlighted by the latest projections on the costs of criminal legal aid. These can be divided between the costs of Criminal Defence Service (CDS) contracts, which include all services in police stations and magistrates' courts (the bulk of which goes to solicitors) and Crown Court legal aid (which includes significant payments to the criminal Bar). The figures going back to before the introduction of contracts are:

	<b>CDS</b>		<b>Crown Court</b>		<b>Total</b>	
	£m	% increase	£m	% increase	£m	% increase
1999/2000	413		370		783	
2000/2001	451	9	422	14	873	11
2001/2002	508	13	474	12	982	12
2002/2003 (estimated)	530	4	570	20	1,100	12

As will be seen from these figures, if one of the key objectives behind the introduction of contracts was to curb the growth in criminal legal aid costs, it is not immediately obvious that it has worked. However, while the rate of increase of CDS costs in the first year of contracting, at 13%, was up on the previous year, it had been reduced to just 4% by the second year of contracting. By contrast, the rate of increase for Crown Court legal aid, which is not yet covered by contracts, has continued to rise to an estimated annual growth of 20% in the latest year.<sup>24</sup> Of course, there are various factors that might be driving up costs of criminal legal aid. It is a major plank of the current Government's criminal justice policies to ensure that more crimes result in someone being 'brought to justice'. This latter term is interpreted very broadly, for example to include those cautioned, additional offences 'taken into account' at the time of sentencing, and even in some circumstances acquittals. However, it is likely that Government pressure would have already resulted in more prosecutions. Indeed, the fact that the large increase in expenditure under CDS contracts in 2001/02 has been followed by a sharp rise in Crown Court cases in 2002/03 is an indication of a possible increase in the volume of prosecutions working its way through the system. Mention has also been made of

the additional costs associated with representation of defendants at early hearings in magistrates' courts. While this was introduced prior to the start of contracting, other changes brought in under contracts may have allowed solicitors to claim additional costs for such representation.<sup>25</sup> Another change introduced under the Access to Justice Act was to remove means testing completely from the granting of legal aid in magistrates' courts.

At the time of writing, we are awaiting proposals on how the Government and LSC intend to respond to the continuing rise in criminal legal aid costs. The fear is that the scope of services provided under criminal legal aid which have gradually expanded over the years in terms of both the proportions of defendants in magistrates' court who are assisted and the availability of police station legal advice, will be reduced as a cost-cutting measure. This in turn may affect the economic viability of criminal defence contractors.<sup>26</sup> The other issue still to be addressed is how Crown Court legal aid will be brought within the ambit of criminal contracting.<sup>27</sup>

### **The Role of the PDS in a Mixed System of Criminal Defence**

This brings me to the final issue I wish to address in this paper. One of the questions posed at the start of our research was what should be the role of a salaried defence lawyer within a mixed system of delivery of criminal defence services. The potential purposes of the PDS identified in its first annual review include

- to provide examples of excellence in the provision of criminal defence services;

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<sup>24</sup> These figures have serious implications for the Community Legal Service (civil legal aid). Expenditure under CDS contracts forms part of an overall LSC budget but it is not cash-limited. The implication is that rises in CDS costs will put pressure on the LSC to reduce civil expenditure.

<sup>25</sup> Prior to contracting, solicitors working to represent defendants at such 'early hearings' in magistrates' courts had to act as 'duty solicitors of choice' and be paid for actual time spent on the case at court. Following the introduction of contracting, it was possible for them to apply and obtain full representation orders for appearing at such hearings and subsequently to claim a standard fee, which usually pays considerably more than the previous hourly rate for duty solicitors.

<sup>26</sup> In fact, the consultation paper, 'Delivering value for money in the Criminal Defence Service' was published on 5 June 2003.

<sup>27</sup> The Government has announced plans for and piloted a system of individual contracts for Very High Cost Criminal Cases (VHCCCs). It is estimated that 1% of cases in the Crown Court account for 49% of Crown Court legal aid. However, what charges are planned for the administration of criminal legal aid in smaller Crown Court cases is still unclear.

- to provide benchmarking information to be used to improve the performance of contracted suppliers;
- to share with private practice suppliers best practice, in terms of forms, systems, etc.;
- to recruit, train and develop high quality criminal defence staff, both to work in the PDS and eventually for other suppliers;
- to provide an additional option for providing criminal defence services in geographical areas where existing provision is low or of poor quality; and
- to raise the level of understanding within government and the LSC of issues facing criminal defence lawyers.<sup>28</sup>

No doubt, some would argue that in light of the current Government's further legislation<sup>29</sup> to restrict the rights of suspects and defendants, through such measures as allowing previous convictions more easily to be introduced in evidence and abolition of the double jeopardy rule, we have some way to go to "raise the level of understanding within government" of the issues facing criminal defendants and their lawyers. Certainly, this legislation has been accompanied with a strong line of anti-defence lawyer rhetoric from successive Home Secretaries.

Apart from this, it is interesting to observe that none of the purposes defined for the PDS is intended to provide it with a specialist role, distinct from that already being performed by private criminal defence lawyers under contracts. Yet, I would argue that in most mixed systems of delivery of criminal defence this is precisely what tends to emerge, with salaried lawyers and state-subsidised private defence lawyers evolving some form of division of labour between them. In some systems this may involve the salaried lawyers predominantly servicing the routine and less serious criminal cases, with those operating under *judicare* or contracts taking on the more serious, longer running and possibly more complex trial cases. In other systems the division of labour may be geographical, with the salaried service focussing on the larger cities but *judicare* or contracts being used to cover the less populated

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<sup>28</sup> Public Defender Service: review of first year of operation, *op. cit.*, para 6.1.

areas. As we have seen, however, the PDS in England and Wales (and also in Scotland) has been created very much in the image of private criminal defence firms and designed to provide parallel services to those currently covered by criminal defence contracts. There is also a sense in which the evaluation criteria that have been developed, with the focus on cost and quality comparisons between the two sectors, will reinforce the tendency of the PDS to adopt similar patterns of service and work practices as their private practice ‘comparators’. It is an interesting question how far the PDS offices, knowing they are being subjected to such comparisons, will feel inhibited in developing various innovative forms of service.

It may be, of course, that a distinct role for the PDS will emerge over time. In particular, this might happen if the terms of contracting are such that this form of criminal defence service in certain areas, whether defined geographically or by reference to types of service, prove to be unsustainable, and the PDS is used to plug the gaps. As we have seen, there is at least some indication that this may be beginning to happen outside the major urban areas. In this respect, it is interesting to observe that one of the first innovations in service to clients that has been associated with the PDS in England and Wales is the plan for the Cheltenham office to offer outreach sessions in more rural areas utilising the offices of Citizens’ Advice Bureaux. But it is also possible to envisage a situation where, because of restrictions placed on private criminal defence firms under contracts, the PDS by default becomes the predominant provider of certain services. For example, the recent consultation paper on cost savings in the CDS suggests restrictions on the work of court duty solicitors, such as requiring them to operate a stricter ‘interest of justice’ test and at the same time preventing them from applying for full representation orders. Also, other solicitors would no longer be paid for representing defendants at their first court appearance unless the court subsequently adjudged such representation as necessary. Taken together, these measures might remove much of the incentive for private criminal defence contractors to serve as duty solicitors and effectively

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<sup>29</sup> Criminal Justice Bill now before Parliament.

hand this service over to the PDS, as in fact occurred in Scotland once client direction had been removed.

As these examples illustrate, the types of division of labour between the PDS and contracted defence lawyers that might emerge, although they may not be the result of Government planning, are nevertheless likely to be indirectly related to other ad hoc measures adopted to control costs under contracts. But this is different from the Government and the LSC having a strategic vision of the distinct role that the PDS might play in a mixed system of delivery. It is interesting to ask why the latter has so far not emerged strongly in the development of the PDS. As noted at the beginning of the paper, the PDS in England and Wales was introduced primarily to meet an artificial deadline set around the 2001 General Election and at a time when most of the effort and focus of the what was to become the LSC was on other matters. But one cannot escape the possibility that the lack of a strategic vision about the potential role of the PDS is also a by-product of the ambiguity at the heart of Government about the value and role of criminal defence services as a whole. Defence services are often seen as a ‘necessary evil’ which governments are obliged to fund as part of upholding the basic procedural fairness of criminal justice systems.<sup>30</sup> Criminal defendants themselves are portrayed very much as the ‘undeserving’ recipients of state-funded services, the cost of which eat into the funding otherwise available for civil legal aid and its more ‘deserving’ recipients. Similarly, criminal defence lawyers are constantly being attacked by Government for their inefficiency and even ‘grasping’ attitude in seeking to maximise their income from legal aid by such measures as increasing their clientele or the services that they provide to them.<sup>31</sup> It does seem to me that until this ambiguity is addressed – perhaps as much by the legal services movement as by governments – we are unlikely to see a strategic vision of the role of the PDS emerge.

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<sup>30</sup> In England and Wales the maintenance of the very wide scope of these services, in particular the inclusion of police station advice and representation, is a corollary to the restrictions introduced on suspects’ rights, in particular limitations on the right to silence under police interrogation.

Yet, there is a sense in which PDS might be seen as having a more central role to play in the further reform of criminal defence services, and not just on the basis of cost comparisons with contracted providers. One area in which consideration has been given to the PDS taking on a specialist role has been in terms of representing youth defendants. It is also possible that the PDS could develop rules which so far have not proven viable in a private practice context. For example, despite efforts in the UK over the past decade to reform 'rights of audience' and to put solicitors on equal footing with barristers in their ability to represent clients in all courts, there have yet to emerge many successful examples of solicitors competing with the Bar in representing criminal defendants in the Crown Court. Could the PDS perhaps pioneer this role, either by encouraging their offices to undertake more of their own Crown Court advocacy rather than farming it out to local barristers, or possibly by creating national or regional based teams of its own consisting of both solicitors and barristers to service local PDS offices in this respect. The development of such functions for the PDS will not arise out of a comparison with contracted services but requires greater strategic planning of the criminal defence service as a whole on the part of both the LSC and the Government.

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<sup>31</sup> Again, there is a contradiction here that Government, having entered into contracts for legal aid, are then critical of lawyers when they act in an economically rational manner to maximise the payments they can receive under those contracts.