

Methods for Researching and Evaluating the Public Defender Service

A Consultation Document

by

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February 2002

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and should be received no later than **22 March 2002**. Responses will be treated in confidence and we will not identify respondents to the LSC or anyone else.

1. INTRODUCTION

1.1 This paper has been produced by the team of independent researchers commissioned by the Legal Services Commission (LSC) to monitor and evaluate the Public Defender Service (PDS) in England and Wales. It seeks views on how best the new service can be evaluated, and in particular how effective comparisons can be drawn between the work of salaried public defenders and LSC contracted criminal defence practitioners. The paper begins by briefly describing the objectives of the public defender pilot, the work that has already been undertaken in establishing the pilot public defender offices, and a general outline of the research. It then sets out a number of options and issues relating to the methods to be employed in this research, on which we are seeking views.

1.2 It is not usual for researchers to consult in this way on the methods they intend to use in their work. Normally such matters are left to the researchers, as the supposed technical experts, to be agreed with the organisations funding their work. We want to consult for a number of reasons. First, there is very little consensus within the research literature on how such services should be evaluated. Secondly, the public defender pilot has raised amongst some, within the legal professions and more widely, a number of sensitivities and indeed suspicions, and there is a risk that these will spill over onto the research unless some attempt is made at the outset to consult on the evaluative methods being employed. Thirdly, the Government and Legal Services Commission have agreed that the public defender pilot, and the research on it, should be allowed to run for a considerable period of time before any final decisions on its future are made. We are conscious of the level of resources this will require, and this makes it all the more important that the final outcome of the research is not compromised by disputes over the methodology employed.

1.3 As noted above, a key aspect of the evaluation of the PDS will be a comparison between its services and those provided by private criminal defence solicitors operating under contracts. There are a number of complex questions as to how this comparison can best be carried out. We also recognise that, despite considerable research on criminal defence services over recent years, there is still much that we simply do not know about the working of private practitioners operating in this field. This lack of knowledge is perhaps most acute in respect of the economics of private criminal defence firms and financial aspects of their decision-making in relation to such matters as capital costs, deployment and utilisation of staff, and the opening of new offices. We are also acutely conscious of the fact that the conditions under which criminal defence solicitors in particular operate have recently been subjected to a major change, with the introduction in April 2001 of a national system for contracting for criminal legal aid services. We have not been commissioned to carry out a full-scale evaluation of the impact of criminal contracting, yet comparisons between public defenders and firms operating under contracts will require sensitivity to the new conditions and pressures under which these firms are now working.

1.4 The Government and Legal Services Commission have stated consistently that it is not their intention to see a public defender service entirely replace private firms or even to displace them as the main providers of criminal defence services in this country. Rather, both are committed to the maintenance of a 'mixed' system of provision combining the best features of salaried and contracted services. Nevertheless, private practitioners are bound to regard the PDS with a degree of suspicion, if nothing else as a source of increased competition in those localities where it has been established. We very much hope that these suspicions will not adversely affect the conduct of our research. Certainly, we have found in

the past a high degree of openness amongst criminal defence practitioners to the work of independent researchers and hope that similar levels of co-operation will be achieved in this new study.

1.5 Part of our purpose behind consulting on our methods is therefore to ensure that the research causes a minimum of inconvenience to the private criminal defence practitioners with whom we are seeking to compare the work of public defenders. The Legal Services Commission's general criminal contract contains important provisions requiring contractors to co-operate with research. In some instances we are suggesting ways in which these requirements might be varied both to expedite our research and to minimise the inconvenience caused to practitioners. But we also genuinely hope that private practitioners will want to assist in our evaluation of the PDS in other ways, precisely because they recognise the importance of sound comparative data to such an evaluation and, by implication, to the development of their own working relations with the Legal Services Commission and the Government.

1.6 As independent researchers we are fully committed to adopting methods that will be seen to be robust, transparent and reliable. Responses to this consultation paper should be addressed to Professor Lee Bridges, Legal Research Institute, School of Law, University of Warwick, Coventry CV4 7AL (Lee.Bridges@warwick.ac.uk) or to Professor Avrom Sherr, Institute of Advance Legal Studies, Charles Clore House, 17 Russell Square, London WC1B 5DR (Avrom.Sherr@sas.ac.uk), and should be received no later than 22 March 2002. Responses will be treated in confidence and we will not identify respondents to the LSC or anyone else. The research team will also be holding a series of consultative meetings for criminal defence practitioners and other interested parties in the areas where the Public Defender Offices are located. Following consultation, the final approach will be settled by the research team and the Legal Services Commission, and the LSC will publish a paper on this.

2. CONTEXT OF THE RESEARCH

2.1 Publicly-funded criminal defence services in England and Wales have traditionally been provided under a 'judicare' model, through solicitors and barristers in private practice remunerated on a case-by-case basis. This has been true even of 'duty solicitor' services which, since their inception, have been administered through a national network of local schemes consisting of private solicitors taking it in turns to provide duty coverage for magistrates' court and police stations. Since the mid-1990s, it has been the policy of successive Governments to overhaul the 'judicare' system, primarily by aiming to provide criminal defence services through private firms of solicitors operating under contracts. Such contracts were introduced nationally on 2 April 2001, with the result that only solicitors' firms holding contracts (and therefore meeting minimum quality standards laid down by the LSC) are now able to undertake publicly-funded criminal defence work. It is not intended that any single firm will have an exclusive, or monopoly, right to such services in any given geographical area. The first contracts cover police stations and magistrates' courts (plus some specialist services for prisoners' rights, Criminal Cases Review Commission cases, and High Court criminal work). It is intended that contracts will be extended to all Crown Court criminal legal aid, subject to the Government's response to Lord Auld's recommendations for the criminal courts.

2.2 The Government also began a public defender service (PDS) in May 2001, to work alongside contracted defence lawyers in a mixed system of delivery. Six Public Defender Offices (PDOs) are being opened in the first phase of the four-year pilot. The first four opened in Swansea, Middlesbrough, Birmingham and Liverpool during 2001. Another PDO in Cheltenham is due to open in April 2002, followed by a sixth shortly thereafter. They will be evaluated over the four-year period by this research. Some key features of the new service include:

- The salaried service consists of individuals, both lawyers and others, employed directly by the LSC but within a separate structure devoted exclusively to the delivery of criminal defence services to members of the public. Alternative models, such as the LSC making grants to other bodies to develop salaried defence services, have not been included at the initial stage.
- There is a legal head and quality manager responsible for each public defender office (PDO).
- Overall responsibility for the service within the LSC lies with the Head of the Criminal Defence Service and a Public Defender Service Management Committee. The latter is chaired by the PDS's professional head of service (currently a highly experienced private criminal defence practitioner serving as a member of the Legal Services Commission on a part-time basis) who oversees the professional development and delivery of public defender services.
- Each PDO has been set up to provide from the outset a comprehensive service, extending from advice in police stations through to representation of clients in magistrates' courts, the Crown Court, and on appeals. The latter involves them in providing direct advocacy services including higher courts advocacy where appropriate, as well as instructing specialist barrister and solicitor advocates. There is also the potential to develop, within the context of a comprehensive service, specialist expertise in some areas (such as youth

court work).

- Under the terms of the Access to Justice Act 1999, clients cannot be required to use the public defender service (as occurred initially under a system of ‘direction’ in the Scottish pilot public defender scheme). Public defenders have been given ‘slots’ on police station and court duty solicitor schemes in their areas in order to assist them in building up a client base. Although it would have been open to the LSC to give PDOs priority in such allocations, it was decided that they should only be assigned duty solicitor slots on a par with private practice firms. There will therefore be a ‘lead-in’ time before the public defender offices establish a sufficient client base to make meaningful comparisons with the services of private practice firms operating under contracts.
- Public defender offices are required, at a minimum, to meet the same quality standards as laid down for private practice defence firms operating under contracts. An important objective of the PDS is to assist in the development of improved quality standards and assurance mechanisms for the Criminal Defence Service as a whole.¹
- Public defenders are subject to a special Code of Conduct which the LSC has been required to adopt under the Access to Justice Act 1999.² This includes provisions intended to guarantee the integrity and independence of those employed within the service and to avoid their being required to undertake excessive caseloads.

¹ The Criminal Defence Service (CDS) is currently one of two arms of the Legal Services Commission (LSC) and consists of private firms with criminal defence contracts and the PDS.

² *Code of Conduct for Employees of the Legal Services Commission who provide services as part of the Criminal Defence Service*, London, LSC, 2001.

3. OBJECTIVE OF THE RESEARCH

3.1 A team of independent researchers has been commissioned by the Legal Services Commission to carry out an evaluation of the pilot public defender service in England and Wales. The team consists of Professor Lee Bridges of the Legal Research Institute at the University of Warwick; Professor Avrom Sherr of the Institute of Advanced Legal Studies in London; Professor Ed Cape of the University of the West of England in Bristol, and Mr. Richard Moorhead of Cardiff University. All have had considerable experience of conducting research on legal aid and/or criminal defence services, both for the Legal Services Commission and for the legal professional bodies and charitable foundations. Three members of the research team are qualified as solicitors.

3.2 The aims of the research can be summarised as:

- A full analysis of **cost effectiveness**, compared with contracted provision, for different work types. Changes over time, percentage utilisation of office capacity, and additional costs of the development process will be considered.
- A full analysis of **quality** in absolute terms and relative to contracted provision.
- A comparative analysis of **patterns of case conduct**.
- Information on **how PDOs attract clients, why clients choose the public defender and client satisfaction and retention**.
- Qualitative and quantitative information on the vital requirement of **independence of thought and behaviour**, including information on actual advice, case outcomes, the operation of the Code of Conduct, attitudes and experience of PDS staff to their work, and the perception of PDOs amongst clients and others within the criminal defence system.
- An examination of the **effectiveness, efficiency and accountability of management structures** for the service.
- Information on the PDO's **impact on local patterns of supply**.
- **Recommendations on future models** for PDOs of appropriate quality, cost and independence both during the course of the pilot and, beyond this, an assessment of the future potential of the PDS and the balance between it and the private sector in different types of area.

3.3 These specific objectives will aid a general evaluation of whether a system of delivering criminal defence services based on a mixture of salaried and contracted services would perform better than one based solely on contracted private practice providers and how any benefits may be maximised. Predicted benefits of a mixed approach include improved quality; better value for money; a closer alignment of objectives between the Criminal Defence Service (CDS), as purchaser of services, and providers; availability of more comprehensive management information on service provision; pressure on private practice to improve quality and control costs; and flexibility in ensuring access to services. Criticisms made of salaried services in other jurisdictions (particularly where they have a monopoly of

service provision) include a perceived lack of independence; system pressure by the funding body; lack of independence of mind among individual salaried defence staff; interference with the conduct of individual cases; lack of choice of representation for clients; underfunding and potential case overload; poorer quality; higher rates of guilty pleas, worse outcomes and lower client satisfaction; and restrictions on physical access to services.

4. DETAILS OF THE RESEARCH AND PROPOSED METHODS

A. Phasing of research

4.1 The research team has proposed to the Legal Services Commission that the evaluation of the public defender service should be carried out in phases, so as to provide for regular reporting of results during the course of the four-year pilot. As part of this phasing, it is planned to use the initial stages of the research to pilot and consult on the methods to be employed in the research. This will also allow a period for the PDOs to begin working and, crucially, to build up a client base and caseload, before detailed monitoring and analysis of their work begins. The first PDOs opened in Liverpool, Middlesbrough and Swansea in May 2001, followed by Birmingham in July 2001. Another office in Cheltenham is planned to be opened in April 2002 and the sixth PDO is due to open shortly thereafter. During their initial phase of operation, the PDOs will be maintaining detailed records of their work in accordance with the requirements of the researchers, and the computerised PDS Case Management System (CMS) will be installed and implemented by Spring 2002.

4.2 The plan is to focus the initial phase of analysis on the work of the PDOs in providing pre-charge legal advice and assistance, including police station work. This parallels the work that is covered under the 'Investigation' stage of criminal defence contracts with private practitioners. It is anticipated that PDOs are likely to build up a clientele and to complete cases covering pre-charge advice and assistance more quickly than in other aspects of criminal casework. The aim will be to analyse data on such cases from April 2002 onwards.

4.3 A second phase of data collection will relate to the work of PDOs in relation to all aspects of preparation for and representation of defendants in magistrates' courts. This parallels the work that is covered under the 'Proceedings' stage of criminal defence contracts as currently structured (i.e. excluding Crown Court work). Data on the magistrates' court phase will be collected beginning in April 2003 (although it may include work undertaken before that date).

4.4 A third phase of the research will relate to the work of the PDOs in relation to Crown Court cases. Such work is not presently covered by criminal contracts with private criminal defence practitioners, as legal aid for Crown Court cases is still administered separately by the Lord Chancellor's Department. However, it is intended to transfer Crown Court legal aid to the Legal Services Commission and include it in contracts by April 2003. Although it would be possible to monitor the work of PDOs in respect of Crown Court cases separately from this, comparable data on Crown Court cases dealt with by contracted firms is likely to become more accessible once this work is included in criminal contracts. It is therefore proposed to begin data collection in respect of Crown Court cases sometime after April 2003 (although again this may include work undertaken before this date) and to submit a report by September 2004.

4.5 Other aspects of the research, such as client surveys and peer review, will be carried out in similar phases, i.e. to cover the pre-charge, magistrates' court and Crown Court stages separately. However, in a parallel with this phased approach, there will be a number of more general elements of the research on which monitoring and evaluation will be continuous and on-going throughout the period of the pilot. In particular, we will keep under regular review the costs of the PDS; the overall caseload of PDOs in terms of broad case types and sources and types of client; staffing levels; and complaints about services and the operation of the

Code of Conduct.

4.6 A final phase of the research will be to bring all the above work together in order to provide an overall evaluation of the work of the PDS, in order that Ministers and the LSC can make decisions about its future. In particular, we will want to highlight issues which may span the pre-charge, magistrates' court and Crown Court stages of criminal casework.

Question 1

Is the phased approach to the research outlined above, allowing for a period during which the PDOs will be able to build up a sufficient clientele to provide an adequate basis for data collection and analysis, and for the submission of interim reports, both practicable and acceptable? What disadvantages might there be to such a phased approach, and how might these be overcome?

B. Research Questions

4.7 The research team has identified a number of research questions, relating to the overall objectives of the research, that will need to be addressed in the course of the evaluation.

4.7.1 Client recruitment and retention

How successful will PDOs be in recruiting and retaining clients? Not only will this have a bearing on the cost effectiveness of the PDS, especially in its early stages, but client retention (both during a particular case and for future cases) may be taken as evidence of client satisfaction with the quality and independence of the services provided.

4.7.2 Cost and cost effectiveness

This is one of the most important, but also most complex and difficult issues to be addressed in the research. It will involve a comparison of relative costs between the PDS with that of private practitioners delivering criminal defence services under contracts with the LSC.

The research team has identified two broad approaches to the assessment of costs. These are:

(a) *cost to the public purse*

The Government, through the CDS, is the ultimate funder of most criminal defence services, and it is therefore important for it to know the relative costs of providing such services under contracts with private practitioners or through salaried staff employed in PDOs. In this context, the cost of private practitioners is the price that the CDS pays for their services under contracts, rather than the costs to private practitioners in providing these services or the level of profit they derive from doing so. Assessing the costs of PDOs is likely to prove more complex, and we discuss a number of approaches to doing this below.

(b) *cost to the provider*

The Government has indicated that one of its objectives in establishing the PDS is to

provide a basis for “benchmarking” the prices it pays to private practitioners under criminal defence contracts. This involves more than determining whether the price paid under contracts is more or less than the costs of the PDOs. For example, it could be that the PDOs will prove to be more expensive for certain types of case because they spend more time on them but provide a better quality or more effective service. This might suggest that private practice should be encouraged to follow suit, perhaps by providing incentives through higher prices offered under contracts for these cases. On the other hand, PDOs might prove to be cheaper, and it will then be important to consider whether they are providing a better, similar or poorer quality of service.

In this respect, the ‘cost to the provider’ of PDO services will be the actual amounts paid by the LSC for the new service. However, the costs of service provision to private practitioners will be more difficult to determine. Very little objective information is available on the cost base of private criminal defence services, and this is likely to vary widely from one area of the country to another and even between individual firms. Private practitioners may be reluctant to reveal information on the cost of offices, equipment, salaries, etc., or on the amounts of non-chargeable work that they undertake, nor have the researchers been commissioned to carry out a detailed evaluation of the economics of private criminal defence firms operating under contracts.

4.7.3 Types of case and patterns of case conduct

Costs of services cannot be analysed in isolation or separately from information on the types of clients and cases being dealt with, the ways these are handled by the service provider, and their outcomes. There may be significant differences in the types of clients and cases the PDOs attract when compared with private criminal defence contractors in their areas. Equally, even when dealing with similar types of case, the PDOs may, as the result of a lack of commercial pressure or other factors, handle them differently, for example, spending more time on cases at an earlier stage than would be possible in private firms due to funding restrictions. The recently completed evaluation of the Scottish Public Defence Solicitors’ Office (PDSO) also showed significant differences in the pattern of case conduct and outcomes when compared with private criminal defence practitioners, with the PDSO having a somewhat higher guilty plea rate and also completing cases at an earlier stage in the court process, and private practitioners achieving a somewhat higher rate of acquittals.³ Other research from Canada suggests that public defenders have similar rates of conviction to private practice but achieve better sentence outcomes for their clients.⁴ A closely related factor will be the relative incidence of ‘cracked trials’ as between PDOs and private practice. The research will investigate all of the above issues.

4.7.4 Quality of service

One of the main criticisms made of public defenders in other jurisdictions is that they provide poorer quality services than private practitioners. PDOs in England and Wales are being required to meet the same quality standards as are required of private practitioners under

³ T. Goriely, et. al., *The Public Defence Solicitors’ Office in Edinburgh: An Independent Evaluation*, Edinburgh, Scottish Executive Central Research Unit, 2001.

⁴ P. L. Brantingham, *The Buranby, British Columbia Experimental Public Defender Project: An Evaluation*, Ottawa, Department of Justice, 1981.

contracts and will be subject to the same forms of audits by the CDS. The government has also indicated that it will look to the PDS as a base for developing additional quality standards for criminal defence work. It will therefore be important to subject the PDOs to a rigorous assessment of the quality of their casework, and we propose to do this by adopting a number of methods (peer review, analysis of case outcomes, client satisfaction surveys, and interview with criminal justice practitioners) which can be ‘triangulated’ (compared) against each other to ensure robust and meaningful conclusions on quality.

4.7.5 Independence

A particularly important aspect of quality is the extent to which PDOs operate independently and without undue pressure from the Legal Services Commission or the Government. Although such risks may be considered particularly acute in a situation where the CDS is the direct employer and overall funder of the service, they can also affect private practitioners through the operation of criminal defence contracts, commercial pressures and similar factors. Independence can be evaluated by examining the actual advice given to clients of both PDOs and private practitioners in specific cases, and their outcomes. In this respect, the research team has identified the process of advising on guilty pleas as one of particular significance. We will also wish to examine how independence may be affected by the overall management structures developed for the PDS and the relationship between PDS staff and the professional head of services, especially in the handling of complaints.

4.7.6 Caseloads and caseload standards

One mechanism developed in other jurisdictions to protect quality of salaried defence services has been caseload standards, and we would hope to use this research to advise the CDS on the need for caseload standards and, if applicable, the most appropriate standards to be adopted in this regard. The research should allow comprehensive information to be collected on the amount of time spent by different levels of PDS staff on specific types of case and with particular outcomes. However, care will need to be exercised in interpreting these data and in applying any findings arising from them to private practice. In particular, previous research has shown that case handling in private practice firms may be divided between various members of staff and that those staff may not be devoted exclusively to criminal work. These factors will need to be taken into account in deciding whether caseload standards, if appropriate, should be set for individual staff or for offices/firms as a whole.

4.7.7 Impact on pattern of supply

As noted previously, the PDS is intended by the Government to form part of a continuing system of ‘mixed delivery’ of criminal defence services. We will be interested in examining what impact PDOs may have on patterns of provision of criminal defence services in different local settings. How much of the local market for such service are the PDOs likely to capture and how will this affect the number and viability of alternative private practice providers? Is there any evidence of specialisation of PDOs in particular types of criminal defence work? Is there any evidence that PDOs have had an impact on the quality of criminal defence services within the locality?

4.7.8 Effectiveness and accountability of PDS management structures

The PDS is operating, perhaps much more than is commonplace with private criminal defence practice, with a centralised management and support system, although with autonomy

for individual PDO heads in matters relating to the conduct of cases. Does such a management structure introduce ‘economies of scale’ or, alternatively, inefficiencies? Can some services, such as training, be delivered more effectively through central provision or by each PDO operating on its own, and how does the cost of such training compare with private practice? Are there alternative management structures that would better serve the PDS in the longer term? Is there a need for a full-time professional head of service for the PDS?

4.7.9 Accessibility of service

It is important to assess how accessible PDOs are to different client groups within their areas, whether on physical, cultural or social grounds. Specific data will be collected to enable such monitoring to take place, but there may be an issue of how comparative data on private practice can be made available to the research.

Question 2

Are the research issues and questions described above the right ones? Are there additional questions that need to be addressed in the research?

Question 3

Are the two broad approaches to assessing comparative costs – cost to the public purse and costs to the provider – the most appropriate ones to follow in this research? Are there other approaches that should be considered?

Question 4

Should the research seek to look at the cost to private practice providers of criminal defence services, in addition to simply looking at the cost to the CDS of paying for those services under contracts? If so, in what ways can the research gain access to comparative information on costs from private practitioners, in particular relating to such non-case specific items as costs of offices, salaries, equipment, training, and non-chargeable work?

Question 5

Are additional quality standards appropriate for public defender services, in particular in order to protect their independence, and is there such a need for private practice firms? How can comparative data on quality standards and independence best be gained from private practitioners?

Question 6

Is there a need for caseload standards for the PDS? Would caseload standards developed on the basis of the PDOs likely to be appropriate to private practice? In what ways can the research better contribute toward the development of such common caseload standards?

Question 7

What comparative data on accessibility of services, client loyalty and retention may be available from private practice?

C. Research data sources

4.8 We have identified a number of potential sources of data on which to base an evaluation of the PDS and comparative analysis with private practice solicitors operating under criminal contracts. Some of these are existing data sets developed for the purposes of monitoring criminal contracts and/or the work of the PDOs, but most will involve the research team collecting information directly from case files, interviews, peer reviews, etc.

4.9 SPOCC (Statistical Package on Criminal Contracting)

4.9.1 SPOCC is the information system established by the CDS to monitor the work performed and costs under criminal contracts with private firms of solicitors. It basically records information off the forms on which contracted firms report the work which they have performed. One of the features of contracting is that suppliers are now required to report more limited information on work they have performed than was the case with the previous system of claiming cost on a case-by-case basis. Although PDOs are directly funded by the LSC, they are being required to complete the contract work report forms (in particular the CDS6) in order to provide a basis for comparison of their casework with private practice, and the resulting data are also being entered into SPOCC.

4.9.2 SPOCC records data in relation to cases, as defined by the rules for assigning Unique File Numbers (UFNs), in relation to two stages of casework: the *Investigation stage* and the *Proceedings stage*. We intend to use cases as defined by UFNs as a basic unit of analysis in our use of SPOCC data and in drawing case samples from private practice. We also propose to adopt the distinction between the Investigation and Proceedings stages, as this fits in well with our planned phasing of the research (see above). However, we have identified cases with multiple defendants as ones that do not fit in precisely with the system of assigning UFNs, and we will need to consider whether special steps should be taken to analyse and sample such cases separately from others. Further consideration may also need to be given to the methods for sampling Crown Court cases, which are not currently covered by criminal contracts and SPOCC.

4.9.3 The data available from SPOCC cover the following:

- Supplier reference (including PDOs)

- Unique File Number (UFN)

- Type of claim classified by various claim codes

- Outcome in terms of furthest point in Investigation or Proceedings to which case progressed (not actual outcome of proceedings)

- Offence classified according to broad categories (12) of offences

- Profit costs

- Disbursements

- Cost of travel time

- Cost of waiting time

- Date work on case at Investigation/Proceedings stage completed

- Number of suspects/defendants

- Police station/court attended

- Number of police station/court attendances

- Whether any work on case was conducted on a duty solicitor basis

Whether any work on case related to Youth Court.

4.9.4 As well as being able to use these data to profile the work done by PDOs and specific private practice providers, it can also be analysed on a national, regional and local basis in order to compare the work of the PDS as a whole, or particular PDOs, with that of contracted providers as a group.

4.9.5 We have identified three main purposes for which we would use SPOCC data:

- It will provide the main source of information on the “cost to the public purse” of work done under criminal contracts. It will also give an indication of the costs to which PDOs would have been entitled if operating under the rules of contracting, which can then be compared with the actual cost incurred by the CDS in running the PDOs.
- It will provide overview data to compare PDO and private practice cases in terms of broad types of offences covered, types of work undertaken, outcomes and overall patterns of casework. As indicated above, it will be possible to draw such comparisons on a national, regional or local basis, although the latter is likely to provide the most meaningful findings on how PDO work patterns may vary from those of contracted suppliers.
- It will provide a basis for sampling case files from the PDOs and from private practice firms in the same localities for more detailed analysis. We discuss further below how we would intend to carry out such sampling.

Question 8

Are the plans to use data from SPOCC, as set out above, realistic? In particular, is SPOCC likely to provide a reasonable basis for sampling criminal cases from PDOs and private practice firms for more detailed analysis?

4.10 PDS Case Management System (CMS) and Cost Data

4.10.1 A new computerised case management system is currently being designed for the PDS in consultation with the researchers. As well as ensuring that data directly comparable to that being collected from private practice firms working under criminal contracts is recorded and transferred to SPOCC (see above), the CMS will provide much more detailed information than is available through SPOCC on the types of client being served by PDOs, the types of case they are handling, how these cases are being processed, and on specific case outcomes. It will also enable the researchers to obtain detailed information on the amounts of time and other items of work done on cases by different types of PDS staff and therefore to cost their services more precisely than will be possible through SPOCC data alone.

4.10.2 In this latter respect, the LSC is maintaining records on all costs being expended on the PDS, including those incurred centrally at various stages in setting up and running the PDOs. In particular, the costs of central services (e.g. for management, budgeting, recruitment and training of staff) will be fully taken into account, as will the time of LSC staff in supporting the PDS and local PDOs. Of course, how such cost information will be analysed and evaluated raises a number of complex issues which we address further in section

D below.

4.11 Information from PDO and private practice case files

4.11.1 The research team does not consider that data from SPOCC and the PDS case management system will be sufficient to meet all the objectives of the research and that it will therefore be necessary to extract data directly from a sample of case files drawn both from the PDOs and from private practice firms in the same localities. In particular, SPOCC will not provide information on the amount of time spent by contracted firms on cases, nor very much detail on the nature of the clients being served and the processes and outcomes of cases. All of these are likely to be vital to any realistic comparisons with PDOs. Detailed file analysis will be used for the following purposes:

- To understand more fully the characteristics of clients and cases being handled by the respective services (inputs).
- To reach a better understanding of similarities and differences in patterns of case conduct between the respective services (processes).
- To examine case outcomes across the respective services in greater depth than will be possible through the limited data recorded on SPOCC (outcomes).

4.11.2 The use of case files for the above purposes raises a number of issues which need to be considered. First, what basis of sampling should be used to select files from the PDOs and from private practice? Secondly, how can the files from private practice be accessed for the purposes of the research so as to cause a minimum of inconvenience to all concerned? Thirdly, what use would be made of the information drawn from these files, both in terms of analysis and in drawing further samples for the purposes of client surveys and peer reviews.

Basis of sampling

4.11.3 There are two general approaches that might be adopted to analysing differences between PDOs and private practice firms in their criminal caseloads and handling of cases. The first would be to select a random sample of cases from each sector and then to use standard statistical techniques (e.g. multiple regression analysis) in order to take account of variations in client and case types between them and to isolate and measure remaining differences in the nature and quality of services provided, case outcomes, and costs. Such an approach normally demands very large samples of cases and amounts of data to be collected.

4.11.4 A second approach would be to seek to draw from private practice a sample of cases which is similar in key respects to those handled by PDOs. If it were feasible to achieve exactly 'matching' samples in terms of client and case types (inputs), it would eliminate much of the need for large scale data collection as outlined above. Rather, more selective data on key variables to do with case handling, outcomes and costs could be drawn from smaller samples of cases. However, for reasons discussed below, it is not realistic to seek to obtain exactly 'matching' samples of cases from both PDOs and private practice firms.

4.11.5 Our preferred sampling method would seek to combine these two approaches. We would first profile the cases being handled by the PDOs, in particular using SPOCC data on types of offence and claim and police stations/magistrates' courts attended. We would then plan to draw, from all cases reported by private practitioners in the same localities, a

‘structured’ samples of cases displaying a similar profile in terms of offence and claim types and police stations/magistrates’ court attended. However, this would not be a ‘matching sample’, as there are likely to remain significant differences between the PDO and private practice cases in terms of the types of clients served and cases dealt with, and data on these would need to be collected and subjected to statistical analysis in order to isolate and measure ‘real’ differences between the two sectors in respect of their case handling, outcomes and costs.

4.11.6 As noted earlier, the research would be carried out in a number of phases, and we would intend to draw case samples from PDOs and private practice at each of these stages. A number of factors are likely to influence the size of the samples, but our initial estimate is that we would require in the region of 300 files from PDOs (i.e. 50/60 files from each of five or six PDOs), and a similar number of files drawn from private practice, at each of the pre-charge, magistrates’ court and Crown Court stages of the research.

4.11.7 It is important to emphasise that the private practice files to be sampled would be drawn from a number of firms within each of the local areas served by PDOs. The research team has concluded that, given the important influence local police and court practices can have on the conduct of criminal defence work, detailed comparisons between the PDO and private practice cases are best carried out on a local basis, rather than through regional or national samples. Equally, it is not considered appropriate to concentrate on particular firms as comparators for the PDOs. Rather, the aim will be to draw samples from across the full range of private practice firms in each of the areas so as to reflect the work they undertake on behalf of clients within the same police stations/magistrates’ courts as are routinely served by the PDOs.

Access to files

4.11.8 One advantage of the above approach to sampling is that it should limit the number of files from any one firm of solicitors that we would wish to examine. We have given a good deal of thought to the most convenient means of obtaining access to files for the purposes of the research. Under their contracts with the LSC, solicitors are under an obligation to cooperate with researchers acting on behalf of the LSC and in particular to permit such researchers to have access to their premises in order to review client files.⁵ However, we recognise that attempting to visit and make use of the premises of a number of solicitors’ firms within each of the localities served by a PDO, and at each of the three phases of the research, could prove both time-consuming and highly inconvenient to busy practitioners. Of course, it is recognised that there may be circumstances in which this would be the only practicable means of gaining access to the files.

4.11.9 An alternative would be to utilise the arrangements under which firms send case files to the Regional Offices of the Legal Services Commission for the purposes of carrying out audits under the criminal contract. Letters would be sent in advance to the firms indicating, by way of Unique File Numbers, the case files that would be required and asking for them to be posted in the normal way to the local LSC office. The researchers would then access the files at the LSC office, extract the necessary data, and the complete files would be returned to the firms by the LSC. While the contract does not oblige firms to send files purely for

⁵ *Criminal Defence Service General Criminal Contract*, Contract Standard Terms, Clause 3.10.

research purposes, we would hope that most firms would see the advantage in these arrangements and agree to cooperate with them.

Use of data from files

4.11.10 The researchers would be bound by requirements, as set out in the contract,⁶ to maintain the confidentiality of information gained from client files. In particular, the names of clients and of the solicitors' firms involved would not be revealed to the LSC or any other body or in any report or publication arising from the research. Similarly, all data collected from the files would only be used in a way that fully protects the identities of both clients and their legal representatives. This will primarily be in the form of statistical analyses.

4.11.11 At the same time, we would hope to survey the views of at least some of the clients as part of our work on client satisfaction (see below). The criminal contract provides that firms must permit the LSC to carry out surveys of clients and provide such information as may be required for these purposes. Great care would be exercised not to disclose details of cases during the course of interviews with clients.

4.11.12 Some files sampled for the research would also be subject to peer review (see below). Such reviews would be carried out by suitably qualified persons with specialist knowledge of criminal defence work, drawn from outside the localities where the research is based. They would also be managed independently from the LSC and be conducted, wherever possible, at the same time as other data collection from files.

Question 9

Is the basis for sampling private practice files, based on a similar profile of cases in terms of claim and offence types and of police stations/magistrates' courts attended, as covered by the PDOs, a reasonable one? What alternative basis of samplings might be used?

Question 10

Is the proposal to draw the sample of case files, for comparisons with the work of PDOs, from a range of private firms within the same localities, rather than from specific comparator firms or on a national or regional basis, acceptable? Are the number of files involved (a total of 50 in each locality during each phase of the research) feasible?

Question 11

Would firms within the localities covered by PDOs find acceptable the arrangement described above for sending case files to local LSC offices for consultation by the researchers?

Question 12

Does the use of case files to identify contact details for the purpose of conducting client surveys raise any difficulties? Do the proposals for peer review of the same files raise any problems?

⁶ Clause 13.

4.12 Surveys of clients and others

4.12.1 Although there are particular problems associated with surveying attitudes of criminal clients, it is important that some form of client assessment is included in the research, in particular to test out perceptions of independence and quality of public defenders as compared to private criminal defence practitioners. We would acknowledge that client satisfaction may not be the best indicator of the technical quality of criminal defence work, but it is also the case that a technically excellent service, if it is not perceived as such by clients, is unlikely to attract and retain them and therefore to succeed. We would also want to use client surveys to gain insights into other factors that may be significant in the future development of criminal defence services as a whole, such as how clients choose their lawyers, problems of access they may encounter in using such services, and their views on the use of non-solicitor staff.

4.12.2 A particular problem with client surveys is the low levels of response they tend to receive. We would hope to improve response rates by conducting interviews wherever possible by telephone as soon as possible after the completion of cases. As noted above, we would plan to use the same sample of cases described above for detailed analysis of files in order to identify clients, both of the PDOs and private practice firms, for interview. Contact details, including telephone numbers where available, would be taken from the files. We would write to potential interviewees first, explaining the purposes of our research and of our proposed interviews with them, before contacting them directly by telephone. We would hope that where clients contact their solicitors about this, the solicitors would encourage co-operation with the research. Where telephone interviews prove impossible to arrange, we would send out postal questionnaires instead. We would also consider conducting some face-to-face interviews with clients, either as an alternative to the other methods or in order to explore in greater depth client's views.

4.12.3 As noted above, client views are unlikely to provide the only, let alone the best, means of evaluating quality of criminal defence services. We would intend to use peer review as the primary means of evaluating quality (see below), but also see a role for surveys of other criminal justice professionals in this aspect of the research. We will wish to explore using local court staff, Crown Prosecution Service staff, probation officers and the police as potential sources of information and views on differences between PDOs and private practice firms in their relations with these agencies. We also believe that the staff of the PDOs and of private practice firms in the same localities may provide useful insights into the relative merits and impacts of the two types of service. In particular, it will be interesting to present practitioners in both types of service with findings emerging from the research on differences between them in case handling and outcomes, and to ask them to comment on the reasons behind these differences.

Question 13

Are the plans outlined above, to conduct surveys of clients of both the PDOs and private practice firms in the same localities, realistic and acceptable? In what ways might response rates from clients be improved?

Question 14

Are there other groups within the criminal justice system, other than those mentioned above, whose views on the relative merits and differences between PDOs and private practice criminal defence services should be surveyed as part of the research?

4.13 Peer review

4.13.1 It is generally accepted among the legal professions that the best means of evaluating the quality of their services is through a process of ‘peer review’ conducted by persons with significant expertise in the relevant field. Limited forms of peer review have been employed in previous research on aspects of criminal defence services, in particular police station legal advice,⁷ and it has also been successfully used in a recent evaluation of civil advice services.⁸

There are three issues in particular which need to be considered in terms of our proposed use of peer review. First, how are the criteria for judging the quality of criminal defence work to be defined? Secondly, how can consistency between peer reviewers be assured? Thirdly, on what basis of evidence are peer reviews to be conducted?

4.13.2 Fortunately, there has been a great deal of progress over recent years in developing recognised quality criteria and performance standards for many aspects of criminal defence work. Detailed standards for police station advice work were specified as part of the development by the Law Society and the Legal Aid Board of the accreditation scheme for non-solicitor police station representatives. A similar process has recently taken place in respect of magistrates’ court representation as part of the extension of national accreditation to court duty solicitors. These standards are in addition to the Transaction Criteria laid down by the Legal Services Commission for the assessment of work done under criminal contracts. All of these agreed standards would need to be taken into account in formulating the criteria against which peer reviews would be conducted as part of this research. However, there may be gaps in this respect, particularly as relates to agreed standards for the conduct of Crown Court cases.

4.13.3 The aim would be to recruit a group of experienced criminal defence practitioners to act as peer reviewers. These would mostly be senior solicitors, although experienced non-solicitor police station representatives and clerks might also be employed in respect of particular aspects of criminal defence work, such as police station advice or case preparation. The process of recruitment and training of peer reviewers would be undertaken by the research team independent of the LSC. We would also ensure that no peer reviewer would be deployed to undertake review of cases in any locality where s/he had recently practised. Consistency between reviewers would be further assured by statistical monitoring and subjecting at least a sample of cases reviewed to assessment by more than one reviewer.

4.13.4 In previous research making use of peer review, the case file has tended to be used as the main basis of evidence on which assessments of quality have been made. As indicated above, we would intend to use the same samples of case files, drawn from the PDOs and

⁷ In particular, see L. Bridges and S. Choongh, *Improving Police Station Legal Advice*, Law Society and Legal Aid Board, 1997, where the results of direct observations of the practices of police station legal advisers were subjected to review and analysis by a qualified barrister who was part of the research team.

⁸ See R. Moorhead, et. al., *Quality and Cost: Final Report on the Contracting of Civil Non-Family Advice and Assistance Pilot*, Norwich: Stationery Office, 2001.

private practice firms in the same areas for other research purposes, as a source of cases for peer review, with the aim of carrying out the peer review at the same time as, but separately from, other elements of file analysis. However, we are aware that many elements of criminal defence work may not be fully reflected in case files, and as noted, observation has been used in previous research as a basis for assessing the quality of police station advice work. There may be an equally strong case for including an element of direct observation of advocacy in court within the research. We would be anxious to explore with the PDOs and other local practitioners, as well as with relevant police forces and courts, how the research might be extended to include such observations of criminal defence practice in police stations and at court.

Question 15

Are the proposals outlined above for ‘peer review’ of both PDO and private practice files practicable and acceptable?

Question 16

What additional sources might be used in developing quality criteria and performance standards for the assessment of criminal defence work particularly in relation to Crown Court work?

Question 17

How might the research be extended to include an element of direct observation of the quality of police station advice and advocacy in court?

Question 18

Are there additional data sources that might be useful in evaluating the quality of work conducted by PDOs and by private criminal defence contractors?

D. Analysis and Reporting

4.14 As indicated earlier, the phasing of the research will enable the researchers' annual reports on the progress of the research to be published by the LSC. In this sense, the PDS will be subject to a ‘rolling evaluation’, and this should enable the evaluation at each successive stage to be informed by comments on earlier results of the research. We will seek at each stage to ‘triangulate’ or cross-check data from all the above sources in order to produce results that will be seen as reliable and objective.

4.15 We envisage that our findings on comparative costs between the PDS and private practice firms operating under criminal defence contracts may prove most controversial and subject to the greatest debate. This is partly because the issue of costs is a very sensitive one for all concerned. However, it is also highly complex. Our general approach will be to calculate costs of the PDOs on the basis of averaging out all expenditure on the service against a unit of service, which we are likely to define in terms of the amount of time spent by solicitor and other fee earning staff on cases. We will exclude from this calculation any costs or time spent by PDS staff on additional tasks specifically related to the research. There are

two particularly difficult questions of analysis and interpretation which will need to be addressed. First, how should the start-up costs of the PDS be dealt with in any analysis of comparative costs between salaried and contracted criminal defence services? Secondly, how can we account for the possible under-utilisation of the PDO services in their initial stages of operation?

4.16 Our preliminary view is that we should aim to provide a comparison of the costs of PDO and contracted services on a 'going concern' basis. This would include both the revenue and capital costs of providing services.⁹ Certainly, the price paid to private criminal defence firms under contracts is intended to include an element to cover capital costs as well as profit. Unfortunately, there is little information available relating specifically to the capital costs of private criminal defence firms and how these are accounted for, and this is likely to vary significantly between individual firms. There are in addition a number of start-up costs that will have been incurred in establishing the PDOs in the first instance which may be distinguishable from on-going capital costs. The research team is clear that all such costs of the PDS need to be accounted for and reported on in an open and transparent manner. However, it is likely to be necessary to carry out a series of costs comparisons, each involving a different approach to accounting for start-up costs, so that these can be subject to wider discussion.

4.17 The second issue relates to how the potential under-utilisation of the PDOs in their initial stages of operation should be dealt with. This arises in particular from a policy decision initially taken by the Government and the LSC, in setting up the first few pilot PDOs, that they should be able to offer from the outset a fully comprehensive, 24-hour service from within their own staff resources, without having to rely on local duty solicitor services to provide cover for them on a routine basis. Although we have very little information on how private practice firms go about setting up new offices, anecdotal evidence would suggest that they often adopt a different strategy, limiting services initially to only a few fee earners and taking on additional staff only when there is sufficient work available to justify this. The implications of this are that some PDOs may experience under-utilisation of their staff resources until they have built up a sufficient client base, and this could result in average costs per unit of service being artificially high, either because of the overall costs having to be averaged out over relatively few cases or the PDOs spending more time on cases that they would expect to do when operating a full capacity. One possible approach to this problem would be to adjust the PDOs' unit of costs on the basis of an assumed number of hours per annum of 'billable' time spent on cases per caseworker when operating a full capacity and calculating the costs of actual cases on this basis, either writing off 'unused time' or carrying it forward to later periods. In this respect, information on the casework targets or the numbers of hours of 'billable time' expected of caseworkers in private criminal defence firms would be helpful to the researchers.

⁹ A legal interest group responding to the Government's original consultation on establishing the PDS pilot, has suggested that the following should be included in any such analysis: IT and IT developments, including software; human resources; training; LSC support in administration (e.g. payroll); notional interest on set-up costs; indemnity and other insurance; cleaning; subscriptions; practising certificates; maternity cover; and the value to the PDS of receipt of non-capped funding.

Question 19

What approaches should be adopted to taking account of the start-up costs of the PDOs? What comparative information can be made available on the start-up and other capital costs of private criminal defence firms?

Question 20

How should any under-utilisation of PDO services during their initial stages of operation be accounted for? What information is available on (a) strategies of private criminal defence firms in the staffing of new offices and (b) the targets set for 'billable hours' for casework staff in such firms?