

## Introduction

LawWorks welcomes the opportunity to respond to the Government's Green Paper on transforming public procurement. As £290bn of public money is spent on goods and services annually this is an important consultation that will have implications for many areas of public services, and across many different sectors.

Whilst we welcome the emphasis on broader outcomes, we note that while the Green Paper is largely silent on the subject of legal services procurement; most of our comments are directed towards this issue. In particular, our response highlights the contribution of pro bono in the legal services sector; LawWorks believes that pro bono legal services should not be seen as a substitute for an adequately funded system of civil legal aid, however the support of the legal profession acting pro bono makes a vital contribution to access to justice.

As the largest single purchaser of legal services in England and Wales, Government is in a prime position to use its market power to achieve positive social aims at no extra cost, simply through being more strategic in the way it procures services. Our response focuses on how Government might be better able to promote and support pro bono delivery in the private sector through policies on procurement designed to leverage socially responsible outcomes.

## About LawWorks

LawWorks (the Solicitors Pro Bono Group) promotes, supports and facilitates pro bono legal services that extend access to the law for individuals and communities in need and the organisations that support them. We champion pro bono because of the positive contribution and difference it makes for individuals, communities and society. We work (in England and Wales) with the solicitors' profession and with our members, the Law Society, law schools and law students, law centres, advice agencies and others to develop and support pro bono legal services, and to promote access to justice for all.

Our key programmes include:

- **Clinics** - we support a network of around 290 independent pro bono legal advice clinics across England and Wales, providing training, resources and guidance, and professional indemnity insurance. 70,261 people were helped by clinics in 2019, 37,551 clients (53%) received legal advice, and 32,710 were given information or referred to other services.
- **Not-for Profits-programme** - we broker pro bono advice for smaller charities and social enterprises on a broad range of legal matters;
- **Bespoke casework and representation** ('secondary specialisation') - our in-house solicitors triage and supervise cases, including social security tribunal appeals, unpaid wages cases and support for the parents and carers of children with life-limiting conditions (in partnership with the charity Together for Short Lives);
- **Online platforms** – we have been developing websites and digital projects (such as 'Legal Free Answers') to facilitate pro bono legal volunteering and access to free legal advice.

We work collaboratively, for example with our partners in the Litigants in Person Support Strategy (LIPSS). In addition, LawWorks promotes, supports and facilitates pro bono by providing training, knowledge sharing events, pro bono awards, and engaging in policy - working with the regulators, professional bodies and stakeholders to encourage a supportive environment for pro bono within a strong access to justice infrastructure. Whilst LawWorks is a membership organisation, our response to this, and other public consultations, are not submitted on behalf of our members, and nor should they be interpreted as an homogenous reflection of our member's views.

## General comments

The Green Paper looks at options for the codification, consolidation and simplification of existing procurement regulations post-Brexit. The Paper is ambitious in scope, proposing that all current core procurement regulations, covering the public sector, utilities, concessions and defence and security, should be integrated into a single coherent framework and legal regime, supported by a National Procurement Policy Statement, with streamlined processes under the oversight of a new Cabinet Office Unit. It is intended that new processes will work through a single digital platform for supplier registration, promote innovation in tenders and reform redress mechanisms.

Whilst the Government has a clear role in regulating markets, it can also play a role as an active market participant. We welcome reference throughout the Green Paper to using social, economic and environmental criteria in selecting suppliers and awarding contracts and linking these to the new strategic national priorities for public procurement, specifically regarding creating new businesses, improving supplier diversity and tackling climate change. Arguably the Government could go further with this agenda. There are frequent references in the Green Paper to achieving “best social value for money,” but social value is a sometimes a contested concept that lacks definition. The Public Services (Social Value) Act 2012 made a step in the right direction by requiring public authorities to “consider economic, social, and environmental wellbeing” when they commission public spending contracts, but the Act has not been used much in practice and there has been little by way of guidance and enforcement. However, from January 2021 the guidance on evaluating social value recommends central government and non-department public bodies to include a weighting of 10% for social value.<sup>i</sup>

The consultation aims to set a framework, but should also recognise that in public procurement one size cannot fit all; a public services supply chain can benefit from involving SMEs, third sector organisations, and developing processes which put the experiences of diverse service users and beneficiaries at the heart of procurement policy metrics about value for money and transparency. Our interest in the Green Paper is set within a legal services context, including what can be learnt from other jurisdictions and learning from devolved Governments on sector specific issues.

### Questions 1 – 12: Law and procedures

The laws governing the UK’s public procurement regime are largely based on EU rules derived from several EU directives and Treaties. Broadly speaking, these rules aim to open up public procurement to EU-wide competition. The EU has been unequivocal in seeking to achieve social, economic and environmental goals through public procurement, with particular emphasis on stimulating greater social inclusion.<sup>ii</sup> Moving to a new regime, specifically designed for the UK market and priorities, is likely to be a complicated and lengthy exercise, and we hope that well developed EU principles on social and ethical procurement are not lost, and that these underlying concepts can be built on for the UK context.

We welcome the underpinning principles that Government proposes to incorporate into the legislative framework for procurement, namely:

- Public good - procurement should support the delivery of strategic national priorities including economic, social, ethical, environmental and public safety.
- Value for money - procurement should enable the optimal whole-life blend of economy, efficiency and effectiveness that achieves the intended outcome of the business case.
- Transparency - openness that underpins accountability for public money, anticorruption, and the effectiveness of procurements.
- Integrity - good management, prevention of misconduct, and control in order to prevent fraud and corruption.
- Fair treatment of suppliers - decision-making by contracting authorities should be impartial and without conflict of interest.

- Non-discrimination - decision-making by contracting authorities should not be discriminatory.

We note that there are no proposals to incorporate other “stand-alone” legislation into the framework, such as The Public Services (Social Value) Act 2012 and NHS or local government specific legislation. However the Green Paper refers throughout to social value as being as important as commercial value. The Green Paper commits to making “delivering social value including economic, social and environmental outcomes” one of the three key priorities in a National Procurement Policy Statement that contracting authorities should have regard to. Despite this, there is little way of further detail on the Policy Statement, and the proposed outcomes (creating new business/jobs, improved supplier diversity, tackling climate change) do not include a social value strand, or examples of how social value can be ‘added value’ in the procurement process.

We support making social value a more integral consideration in procurement, but it is important to consider and measure social value from the perspective of those affected by an organisation’s work, and informed by evidence of need and impact. There is scope here for Government to have a much wider conversation with stakeholders about the approach to social value, and for social value metrics to be co-designed with organisations who work with public service users. A shared understanding of social value would contribute to evidence-based policy-making as policies, projects and programmes to which public spending is directed are determined by Government using the Green Book’s methodology for constructing a business case, but it can be challenging to demonstrate intended objectives for delivering improved social welfare or wellbeing, let alone how outcomes are being achieved.

As noted in our introduction, the key focus of our response is on legal services procurement, and outcomes which could improve access to justice. There are several existing arrangements for legal services procurement across Government, for example the Government Legal Department (GLD) administers the Attorney General’s Panel Counsel. The Attorney General’s panels of counsel consists of over 400 junior counsel who undertake civil and EU work for all government departments, and the Law Officers have overall responsibility for counsel instructed on behalf of government. Since 2016 the Crown Commercial Service (CCS) have been reshaping the way public bodies procure legal services through panel arrangements. The CCS appoints firms to legal services panels for central government and the Attorney General also provides guidelines for Departments, setting out the issues to be addressed when considering whether to use the Government Legal Service (GLS) or the private sector for particular types of legal work.

The CCS has been aiming to develop a new commercial vehicle and approach to create a UK-wide £650m “legal services marketplace” from which the public sector can procure commercial legal services. This is intended to cover all central government departments and their associated bodies, the devolved administrations, along with the wider public sector, ranging from health and education bodies and local and regional government organisations, to emergency services and third-sector organisations. Finally, the Ministry of Justice also has specific arrangements for the procurement of legal aid suppliers through the Legal Aid Agency – as legal aid already provides a social value to the public, we limit the application of ideas about pro bono in procurement to those services that are commercially secured for the purposes of Government business.

### **Legal services procurement and pro bono**

Consistent with Government intentions in the Green Paper that public procurement should be “leveraged to achieve social and environmental value”, we invite the Government to look at whether a commitment to pro bono and a positive CSR culture should be one of several factors in designating firms (or other organisations in the legal services sector) as preferred suppliers. Whilst we do not support a mandatory approach to pro bono, we believe there are opportunities to build incentives in the procurement process, and two particular models (described below) merit investigation.

## Australia

For law firms to secure legal work from Australian Commonwealth and state/territory government departments, they must first tender or apply to be included on the department's "panel" or "list" of pre-approved law firms. To qualify to be included on the "panel" or "list", these firms must meet certain requirements. The Commonwealth, Victorian, South Australian, New South Wales and Western Australian Governments include pro bono requirements in their tender arrangements for legal services. While the arrangements between jurisdictions differ in various ways, they have been successful in increasing the pro bono contribution made by participating law firms.

### *Background*

The Victorian Government in Australia was the first in 2002 to introduce a tender scheme for the provision of legal services to Government. The scheme aimed to provide a more transparent system for allocating legal work to law firms, achieving lower costs for Government and increased commitment to social policy objectives. Firms on Government legal services panels were subject to a range of performance tests and audits to ensure they adhered to the terms and conditions of their service level agreements, a feature of which was a requirement for the provision of pro bono services. When tendering to provide legal services under the Victorian model, each legal firm commits itself to providing pro bono services as a percentage of the legal fees (excluding tax and disbursements) derived from Government work. Firms undertaking State work are contractually required, as a mandatory commitment, to provide pro bono services of at least 10% of the value of the legal fees, with no maximum commitment. Following the introduction of the Victoria scheme, a review found that the pro bono requirement had raised the profile of pro bono work and encouraged 'cultural change' across the legal profession in Victoria and provided an impetus for firms to develop and formalise their pro bono programmes.<sup>iii</sup>

Subsequent models were refined to further incentivise pro bono participation. This was marked by a move toward an aspirational target, rather than a requirement linked to the value of the contract. For example, in 2008, the Commonwealth Government implemented provisions which introduced 'pro bono conditions' that required Commonwealth agencies, departments and statutory authorities to take into account a firm's pro bono commitment in making their decision as to whether to engage that firm. The condition requires firms to commit to pro bono legal work by either being a signatory to the National Pro Bono Target (currently at 35 hours per lawyer a year – see below), or to nominate a target value of pro bono legal services over a financial year. This applies regardless of whether the firm is ultimately engaged by Government to undertake legal work. The Commonwealth Attorney General has since instructed that the National Target should be the primary means by which providers satisfy their pro bono obligations.

In 2016, the New South Wales Government followed the path of the Commonwealth by including a clause in the 'Panel Deed' that mid-size to large-size law firms must undertake to use their best endeavours to meet the target.

### *The Pro Bono Target in Australia*

The National Pro Bono Target in Australia is a voluntary and aspirational target of at least 35 hours of pro bono legal services per lawyer per year that can be signed by law firms, incorporated legal practices, individual solicitors and individual barristers. Launched in 2007 by the Australian Pro Bono Centre, and supported by a range of legal profession and civil society organisations,<sup>iv</sup> it aimed to raise the profile of the professional responsibility of lawyers to:

- enhance access to justice for people who would not otherwise have access to legal assistance;
- to work for the public good; and
- to highlight the shared nature of that responsibility across the legal profession.

The target amount of 35 hours was chosen in consultation with the legal profession. It reflected what many lawyers were already doing and represented a minimum number of hours of pro bono legal services that all lawyers should aspire to undertake. Within its first year the target had 58 signatories, with 83% reporting they met the requisite hours, and coincided with the introduction of pro bono provisions in the Commonwealth Government tender arrangements in 2008.

Over the years, while the percentage of law firms meeting the target has dropped the number of signatories have increased to 135 and the reported pro bono hours undertaken more than quadrupling from 115,000 hours in 2008 to 473,500 hours in 2019.

The target is overseen by the Australian Pro Bono Centre, first established in 2002 following a report of the National Pro Bono Task Force, set up by the Attorney General of Australia. Signatories to the target endorse a “Statement of Principles”, which pledge to work toward achieving the hours to an agreed standard, and each year signatories are asked to self-report on their pro bono hours. There are no adverse consequences for signatories which do not meet the target, however firms that do not report may get removed from the signatories list. The Australian Pro Bono Centre produces an Annual Performance Report on the target, which is prepared in an anonymised form – neither firms nor lawyers are identified. The Centre provides support to signatories to develop plans to help them both meet and exceed the target. In 2020 the Centre opened the target to in-house legal signatories who will be committing to using their best endeavours to achieve at least 20 hours of pro bono legal services per in-house lawyer per year.

### Ireland

In 2015 the Office of Government Procurement (OGP) consulted on a new procurement regime for the purchase of legal services. The Public Interest Law Alliance (PILA), a national pro bono clearinghouse, submitted an overview of how government procurement might interact with the development of pro bono legal work in Ireland. This proposal was accepted in principle. Clause 6.4 of the resulting Framework Agreement, requires law firms to offer at least 5% of the value of the invoiced legal fees in corporate social responsibility projects or pro bono services. Framework members must, every six months, certify to the OGP, the quantum of pro bono services delivered in Ireland, along with examples.

However, this approach was not PILA’s preferred route as they considered that a pro bono requirement linked to the value of the contract, and incorporating corporate social responsibility, was unlikely to incentivise increased pro bono participation and could prove onerous for the purposes of reporting. PILA’s preference was for an aspirational pro bono target, setting an industry standard against which all firms could benchmark. In 2019, the OGP launched a revised framework agreement for legal services requiring all law firms to commit to working towards 20 hours of pro bono legal services, for every lawyer involved in the delivery of the agreement.

### The UK - England and Wales

In looking at the potential transferability of the Ireland and Australian models, it will be necessary to consider what might work best for the UK, including the way that legal services are procured and regulated.

In keeping with a voluntary (non-mandatory) approach to pro bono, the Law Society of England and Wales have led a number of initiatives such as the Pro Bono Charter, and the professions have also developed the Joint Pro Bono Protocol. LawWorks has worked with the Law Society and others to develop tools and resources to facilitate greater engagement in pro bono, including contributing to the Law Society’s Pro Bono Manual, and our own bespoke

resources including a ‘business case’ template and an in-house pro bono practice guide. Firms have also been stepping up – for example, through the Collaborative Plan for Pro Bono, a profession-led initiative for participating law firms with a strong institutional commitment to pro bono and access to justice. The Plan incorporates an aspirational target of 25 pro bono hours on average per fee-earner in the UK each year. In 2020 participating firms reported 391,834 pro bono hours, averaging 22.5 hours per lawyer.<sup>v</sup>

The Australian aspirational target approach could potentially map well onto a UK context. However, LawWorks supports incentives and incentivising, not mandation or regulatory requirements around undertaking pro bono. In addition, any reporting system should not be so onerous as to disincentivise firms and others from participating. Adoption of an aspirational target might therefore be considered as one of several factors at play in arrangements for legal services procurement at least at central government level. We are not proposing anything prescriptive at this stage, but rather ask that the Government be open to the idea in the next stages of the policy-making process further to this Green Paper. The approach is also in keeping with commercial practice, as diversity, corporate social responsibility, and environmental sustainability are increasingly becoming supply chain factors in business to business tendering and procurement.

### Scotland, Wales and Northern Ireland

The devolved jurisdictions have developed their own approaches to procurement, and they too have been looking at issues of social value. The Scottish Government’s “Framework agreement for the provision of legal services” specifically includes “Pro-bono work for charities and third sector organisations” as an example of proposals that could be included in tenders to meet the Scottish Government’s overall community benefits policy through delivery of the framework agreements.<sup>vi</sup>

The Well-being of Future Generations (Wales) Act 2015 provides an overarching framework for public procurement in Wales. The Commission on Justice in Wales made recommendations about sourcing public sector work in Wales from local firms, including that the Welsh Government should act through its procurement capacity to encourage all lawyers in Wales to collaborate more amongst themselves and with law schools.<sup>vii</sup> LawWorks have had encouraging discussions with the Welsh Government on procurement and pro bono.

### **Legal services procurement and legal aid**

Since Government moved to a contacting model of legal aid supply, procurement of legal aid contracts (both from private firms and third sector organisations) has been a contested area of policy and practice. The regimes for procurement of criminal and civil legal aid differ significantly, but there are some common threads. Since the Carter Review of legal aid procurement in 2006,<sup>viii</sup> there has been a policy push, by Labour, Conservative and Coalition administrations to introduce elements of price competitive tendering into the procurement regime. The approach has repeatedly been shown to be inappropriate in terms of servicing the client base (ie.; vulnerable people, and those in the criminal justice system), and supporting quality and market sustainability for these specialist areas of practice.

The issue of market sustainability is now at the centre of attention in debates over the future of legal aid. After a decade of spending reductions on legal aid and low rates of remuneration for legal aid work, the sustainability of the supplier base – which includes SMEs, the junior bar and third sector advice organisations - has been significantly eroded when it comes to publicly funded work. More recently, the pandemic has had an especially adverse impact on the usual supply and demand cycle, given the on impact the operation of the courts and the challenges for legal aid practitioners in working remotely with vulnerable clients. There has also been an ongoing issue about the level of bureaucracy involved in the administration of legal aid contracts. For civil legal aid, complex rules around scope and eligibility have added to the burdens on suppliers and detracted from the service and outcomes for clients.



We hope that as part of this exercise of rethinking procurement, greater consideration can be given to the need to build long term sustainability and resilience in the legal aid market, recognising the intrinsic social value and commitment to access to justice and the rule of law that the supplier base provides. To support sustainability, it may be appropriate to look at lighter touch procurement and commissioning approaches.

### Questions 13 – 35: Evaluation, regulation and redress

We welcome the proposed shift in Chapter 4 for tender evaluations from being based on most “economically advantageous tender” to simply “most advantageous tender” in order to encourage contracting bodies to place emphasis on non-economic factors. The Green Paper notes that this might include social value as part of the quality assessment in order to give opportunities for small businesses, charities and social enterprises to innovate in public service delivery. However, as we have highlighted earlier in our response, one size cannot fit all for public services or the needs of different groups, and there is scope for the Government to go much further with the social model for procurement. We note that last month the House of Lords Public Services Committee wrote to the Cabinet Office to say “We are concerned that the Green Paper fails to embed the greater emphasis on social value permitted by the commissioning guidance that was introduced last year. The proposals contained in the Green Paper do not recognise that high-quality public services require a commissioning approach that gives a central role to charities, local authorities and service users, and which provides small organisations with the funding that they need to carry out their important work.”<sup>ix</sup>

We do not have sufficient expertise to provide useful answers to the block of questions in Chapters 5 and 6 relating to supplier standards, as many of these questions are quite technical, but consideration of capability, transparency and public trust should be paramount.

Questions 30 – 33 in Chapter 7 of the consultation touches on issues of redress. Whilst most of the issues concerning redress are about commercial contracts involving issues of competition law, decisions made by public bodies in pursuit of their public functions are subject to public law obligations. Given that procurement is often used as a vehicle to drive public services delivery and outcomes, it is inevitable that issues of public law and public interest can be engaged. Through judicial review, contracting bodies may be subject not only to challenges on shortcomings in due process or for acting ultra-vires (“beyond their powers”), but there have also been well-publicised cases involving issues of non-compliance with equality/ discrimination and human rights laws. We would not want any new redress or associated legal costs regime to limit the scope of judicial review, or narrow the pathways to public law redress in this context.

March 2021

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### Endnotes

<sup>i</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/940827/Guide-to-using-the-Social-Value-Model-Edn-1.1-3-Dec-20.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940827/Guide-to-using-the-Social-Value-Model-Edn-1.1-3-Dec-20.pdf)

<sup>ii</sup> European Commission 2010 guidance, *Buying Social: A Guide to Taking account of Social Considerations in Public Procurement*,

<sup>iii</sup> Report on the Review of Legal Services to Government Panel Contract, 2006.

<sup>iv</sup> <http://www.probonocentre.org.au/provide-pro-bono/target/>

<sup>v</sup> <http://probonoplan.uk/what/projects/>

<sup>vi</sup> <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2019/08/legal-services-framework-2019-to-2023/documents/legal-services-framework-buyers-guide-january-2021/legal-services-framework-buyers-guide-january-2021/govscot%3Adocument/Buyer%2527s%2Bguide-%2BLegal%2Bservices%2Bframework%2BJan%2B2021.pdf>

<sup>vii</sup> [https://gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL\\_2.pdf](https://gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL_2.pdf)

<sup>viii</sup> Legal Aid: A market-based approach to reform’, July 2006, Lord Carter of Coles

<sup>ix</sup> <https://committees.parliament.uk/publications/4692/documents/47132/default/>