Bristol Law Society's response to MOJ Consultation Paper

- Transforming Legal Aid

Bristol Law Society was founded in 1770 and is the oldest Law Society in the country. It has over 1500 members throughout Bristol and surrounding regions. Some of those members are criminal practitioners and Bristol Law Society seeks to respond to the Government Consultation Paper on Transporting Legal Aid.

As an introduction the Society takes the view that the proposals currently put forward by the Ministry of Justice for Tendering of Criminal Legal Aid, as set out at Chapter 4 of the Paper are unworkable. The proposed fee cut set forward in the Paper at Chapter 5 are untenable for criminal practitioners and if these proposals are brought in the Society is firmly of the view that the whole fabric of the Criminal Justice System is likely to collapse.

Our key concerns are that:-

- the proposals are not economically viable for either small or large firms;
- there are potential legal obstacles to some of the proposals;
- the timeframe set out in the Paper is unrealistic and unachievable;
- there are a number of other ways that savings could be achieved and the Government should explore these.

In dealing with some of the issues of principle the Society considers that the retention of client choice is an essential element to retaining quality. It will also reduce time and crucially costs spent on cases for the Criminal Justice System as a whole.

We believe that personal choice is likely to ensure that clients are more likely to take the advice of their preferred Advisor; furthermore, to retain the right to choose their own advisor is likely to support their belief and confidence in the legitimacy and integrity of the legal process.

Bristol Law Society is also concerned that the removal of client choice in the way proposed would be unlawful under the terms of LASPO.

Price Competitive Tendering

We do not believe that the market within criminal Legal Aid practitioners is able (for a numner of reasons) to deal with a competitive tender based on price at the present time. If this were to happen market consolidation would need to firstly take place so as to avoid a collapse of the criminal defence system.

Flat Fee Structure

The proposal in Chapter 5 to harmonise the rate across the board in relation to Early Guilty Pleas, Cracked Trials and Contested Trials into a single fee in our view creates an obvious conflict and a real risk of perverse incentives, or the appearance of perverse incentives in the clients mind.

Clients may be put under pressure (or certainly feel under pressure) to plead guilty when this may not be the most appropriate course of action; and when it may well be more appropriate for more detailed instructions to be taken and consideration given to the case. If clients consider and are driven to the view that this is what may have happened (in their case) it will increase the risk of numerous appeals clogging up the appeal system.

The Society is concerned that a number of criminal practitioners within its region are barely economically viable. They are further concerned that these proposals will have a dramatic effect on BME firms causing the closure of many. We are concerned that the quality proposals as set forth in the Consultation Paper pay little regard and give little in the way of consideration to quality. There is reference to peer review as an entry criteria, but how is quality to be measured on an on-going basis?

Peer review is an extremely expensive way of measuring quality and it therefore seems odd that the Government should choose this at a time of austerity when they are seeking to save money. There are existing options which measure the quality of Legal Aid firms; namely Lexcel, Specialist Quality Mark, CLAS, QASA, and client choice. One should not diminish the latter.

Client choice is extremely important. Criminal defence clients are, contrary to the Government's view, quite sophisticated and well able to choose who they think may best represent them or seek recommendations on the same. It is our view that client choice is one of the best drivers of quality. If client choice is removed and firms have the guarantee of a case for the duration of the case, there is no direct incentive upon them to go the 'extra mile' for their client.

On a general note the Society is also concerned as to how an equal distribution of work would be carried out. It is proposed that those within the Society's area would join forces with Avon, Somerset & Gloucestershire. This is a wide geographical area. The bidding would have to start at 17.5% less than current income levels and there would effectively be only 11 firms bidding because there would be a guarantee of a place for the Public Defender System. That in itself is anti-competitive, in that the Public Defender System is guaranteed a slot without having to go through the bidding process.

We are further concerned that a reduction of 17.5%; coupled with having to cover a wider geographical area does not provide any financial incentive to a firm. If your current income out of the Legal Aid fund is less than the percentage being offered under PCT then those firms will be required to undertake more work for less reward in a larger geographical area. It would make no economic sense for any firm to bid. Those firms that have a higher take than what is being offered would have to down size.

We do not consider the timeframe is a viable timeframe, the Paper talks in terms of alternative business structures being formed but allows a period of 3 months for this to take place. It takes at least 6 months for alternative business structures to be approved by the Solicitors Regulation Authority. There is therefore, a disconnect at this point.

We care concerned that the Government's approach in all other areas has been to widen client choice. It therefore seems perverse that the Government should seek to remove client choice in this particular area, particularly where it is in an area where there is a clear conflict. The Government chooses to prosecute through the State, the Government's lawyers prosecute and in effect the Government chooses the defence practitioner who will represent the defender. This has a real risk of bringing the Criminal Justice System into disrepute. When confidence is lost in the Criminal Justice System it will not easily if ever be regained.

In response to the questions raised in the Government's Paper, Bristol Law Society replies as follows:-

Q7 – Do you agree with the proposed scope of criminal Legal Aid services to be completed?

We do not agree for the reasons already given

Q8 – Do you agree that given the need to deliver savings a 17.5% reduction in the rates payable for those classes of work not determined by the price completion is reasonable?

Whilst we accept that there is a need for austerity we do not accept the need for a 17.5% reduction. Criminal defence practitioners have received no rate increase, only reductions in the last 20 years. They cannot in our view financially survive 17.5% reductions and other ways should be looked at to try and save the costs on the Legal Aid budget. The real issue is:- what is the current Legal Aid budget? We do not accept that the budget is £2.1 billion, we suspect the current Legal Aid budget is much lower. It is our view that considerable savings have already been made and further savings will be filtering through in the course of the current year, due to the abolition of committals, the on-set of Early Guilty Pleas and administrative savings that have already been brought in but will not have filtered through in the current round of figures.

Q9 – Do you agree with the proposal under the competition model that 3 years with the possibility of extending the contract term up to 2 further years and a provision for compensation in certain circumstances for early termination is an appropriate length of contract?

We do not agree that 3 year contracts are the right length. We disagree with the principle of price competition in this area, but 3 year terms do not allow sufficient flexibility and scope to adjust its working practices to cope with contracts. The one thing the criminal defence market needs and requires at the present time is stability and with a 3 year term, by the time you have started into the contract, you are quickly looking forward to the closure of the contract in 3 years' time. It also acts as a perverse incentive to young Solicitors joining the criminal defence market. They would know that any firm they joined only had the guarantee of a contract for 3 years and therefore their future may well be considered to be short term. What prospects would those young Solicitors see in a firm that may not have a contract within 3 years' time. It is therefore likely that such short term contracts would have a negative impact upon the ability to attract young Solicitors into the criminal defence market.

Q10 – Do you agree with the proposal under the competition model in relation to the procurement areas?

We do not propose to touch upon the issue of procurement areas bearing in mind that the procurement area for Avon, Somerset & Gloucestershire we have already touched upon in the main body of this response.

We are of the view that the geographical area is far too wide. It would mean practitioners within the Bristol area would have to travel as far as Cheltenham in the north and Taunton in the South. For practitioners in Taunton they would have the prospect of having to travel to Bristol or beyond to Cheltenham. How are the workloads to be guaranteed? It seems to us that it cannot be guaranteed and no model has been put forward at the present time to ensure equality of distribution of work.

Q11 – Do you agree with the proposal under the competition model to join the following CJS areas? Gloucestershire with Avon & Somerset.

We do not agree for the reasons set out above.

Q12 – Do you agree with the proposal under the competition model that London should be divided into three procurement areas?

This does not concern Bristol Law Society; we have no views to put forward on this

Q13 – Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas? Please give reasons.

We are surprised that you should even be asking this question. If work is not to be guaranteed to firms within those regions, how are you going to ensure an equal distribution of work? Equally on the other hand, if you have a client who commits an offence in the region of West Mercia and then another offence within the region of Avon, Somerset & Gloucestershire, which firm are you going to allocate to represent him or her? Will it stay with the firm who is first allocated, in which case you will be bound to allocate to a firm out of region for the second offence. If you are to allocate two separate Solicitors, then you will have duplication of work if the cases are subsequently consolidated in the Crown Court.

Q14 – Do you agree with the proposal under the competition model to vary the number of contracts in each procurement area?

We are only concerned with Avon, Somerset & Gloucestershire. We do not think you have provided sufficient contracts within this area and for the reasons set out previously we consider the proposals to be wholly untenable.

Q15 – Do you agree with the factors that we propose to take into consideration and are there any other factors that should be taken into consideration in determining the appropriate number of contracts in each procurement area under the competition model?

We have already indicated that we consider these proposals to be unreasonable and untenable and therefore not capable of working. In different regions you have different vale contracts. We cannot understand the logicality of that and it does not seem to us that this could in any way be described as a sustainable procurement model.

Q16 – Do you agree with the proposal under the competition model that work should be shared equally between providers in each procurement area?

You have given no basis as to how you would ensure equal distribution of work. If you were to allocate work on date of birth of client that would not provide an equal distribution of work. Some cases require far more work than others. Compare for example a conspiracy to a simple shop lifting. If you were to allocate on the basis of the client's date of birth you would have the same difficulty. If you were to allocate the work on the basis of days on the duty rota, this is notoriously difficult. For example, some days are quiet other days are exceptionally busy. If you were to allocate through a call centre you have the same difficulty. You would be allocating a case, not the weight of the case. There is a world of difference, for example, between allocating a murder or a large scale drugs conspiracy to a simple offence such as a Public Order matter. Some firms could be burdened with preparing for heavy and complex cases, other firms could be given cases that finished in one Hearing. The remuneration level would presumably be the same. The proposals for equal distribution of work do not stand scrutiny.

Q17 – Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset?

No, we disagree very strongly with this. We have already set forth the reasons. It would reduce quality, it would reduce trust in the representative and is likely to increase unnecessary Trials in both the Magistrates and Crown Court because of lack of trust in the representative.

Q18 - None of these Police Station allocation methods would work.They would not guarantee an equal distribution of work because it is not only the allocation of the work; it is the weight of the case that you must have regard to.

Q19 – Do you agree with the proposal under the competition model that for clients who cannot be represented by one of the contracted providers in the procurement area, the client should be allocated the next available nearest provider in a different procurement area?

We disagree. It would mean that an allocated provider in an outside area would therefore be burdened in having to travel to that area when waiting and travel is not to be paid. For example, in Kent there are to be only 5 providers. This does not provide sufficient provision for conflicts of interest that may arise in multi-handed cases. It is difficult to see how one would be attracted to travelling great distances to take on a case out of area where travel is not to be remunerated.

Q20 – Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances?

There are many reasons why clients may wish to change from their existing lawyer. Those reasons are well restricted in the authority of R v Ashgar Khan. It is difficult to see how you can force a client to continue to be represented in situations, for example, of conflict of interest, change of instruction or other professional difficulties of which a representative may encounter. For example, half way through a case a client may complain that he was not given the right advice at the Police Station. This then creates a conflict between him and the firm who are representing him if they represented him at the Police Station. The reasons for change of Solicitor are numerous and in the main carefully monitored by the Court. To try and impose a higher threshold for change, as this Paper seems to do, is quite wrong. It would run into regulatory difficulties with the Solicitors duty to his regulatory authority. Client choice is a vital element of this and if you try to enforce this proposal too rigidly you are likely to end up with a number of defendants who seek to represent themselves. This would then create lengthier Trials, victims being cross-examined by defendants, all of which frustrate the Government's stated aims and objectives.

Q21 – In relation to representation in the Magistrates Court and Police Station we strongly disagree with the proposal to cut rates to 17.5% below the current value. In relation to Crown Court Litigation Fixed Fee, Crown Court Litigation Graduated Fee, the Law Society has already proposed ways of restructuring the Litigation Fee Scheme in order to remunerate cases more fairly and we adopt those proposals.

Q22 – Do you agree with the proposal under the competition model that applicants be required to include the cost of any travel and subsistence under each Fixed Fee and the Graduated Fee when submitting their bill?

We do not agree that on top of a fee cut of over 17.5% suppliers should be expected to absorb an unknown amount for travel and subsistence costs particularly with the widening of the geographical area. These could possibly have been estimated if firms were bidding in the same areas they now service. However, if the areas are to be widened as they are within Avon, Somerset & Gloucestershire, travel distances would be unknown as will other possible disbursements.

The timeframe is insufficient for firms to entirely restructure. The time provided for applicant firms to prepare bids simply does not allow for any of the detailed costings required.

Q23 – Are there any other factors to be taken into consideration in designing the technical criteria for the pre-qualification questionnaire?

We consider it unrealistic to expect firms to have a full quota of staff in place by the time of submitting the PQQ. It is unrealistic to expect firms to be able to guarantee financial investment by the time of submitting the ITT. We suspect that firms will find it very difficult to raise finance on the

basis of a 3 year proposal and in relation to an unknown volume of work. The time table is frankly impossible and we very much doubt that the major Clearing Banks would be attracted to this proposal.

Clearly we except that any PQQ evaluation should take into account experience of staff, experience of the management team in managing a comparable service and experience of having delivered comparable volumes of work.

Q24 – Are there any other factors to be taken into consideration in designing the criteria against which to test the delivery plan submitted by applicants in response to the invitation to tender under the competition model?

Para 4.138 states that as part of the delivery plan, providers would also be required to submit a financial plan showing how they intend to finance any expansion or robustly managed financial implications of running the service. Bristol Law Society would invite the Ministry to give examples of what Banks or other financial lenders would be prepared to invest in a business on the basis outlined in these proposals. Our own enquiries lead us to believe that Banks would not guarantee investment in a business that firstly has no guarantee of a contract at all, and secondly, if they do obtain a contract it would only be for a period of 3 years with no guarantee of an extension or a new contract. The notion that firms will be ready with guaranteed finance at the point of bidding on such an unsure basis is completely unrealistic and untenable.

Q25 – Do you agree with the proposal under the competition model to impose a price cap for each Fixed Fee and Graduated Fee and to ask applicants to bid a price for each Fixed Fee and a discount on the Graduated Fee below the price cap?

We do not agree. The timetable is unworkable. Only 3 months are being allowed between a firm knowing they have a contract and being required to open and begin providing a service.

If a firm is to obtain an ABS licence it will take 6 – 8 months at least. Even firms not seeking to form new business structures would still need to merge and/or take on extra staff in order to provide the service across a whole CJS area. For that reason these proposals are untenable and considerable investment would need to be found, staff and premises taken on and IT put in place. This would not be achievable within a 3 month timeframe. Larger firms would need to shrink in size.

Q26 – Do you agree with the proposals to amend the Advocates Graduated Fee Scheme and to introduce a single harmonised basic fee payable in all cases that attract a basic fee?

We do not agree with this proposal for the reasons set out previously. We think this gives the appearance of perverse incentive. It creates the reality of a perverse incentive. There is a world of difference between preparing a case for what may be a 5 day Trial or even longer for preparing a Plea. The work should be remunerated accordingly not on one simple structural basis as proposed here.

Q27 – Do you agree that the Very High Costs Case Fee should be reduced by 30%?

We disagree with this reduction. High Cost Cases need to be carried out by people with the particular specialism in those cases. They are already poorly remunerated. To seek to reduce them by 30% is untenable and is likely to mean that you will have less qualified people doing the work which means that those cases may take longer and be managed far less efficiently. We therefore doubt that any savings would be achieved.

Q28 – Do you agree that the reduction should be applied to future work under current contracts?

No we do not agree with this reduction in relation to current contracts. We are of the view that firms that have contracted to do this work on a current basis of remuneration should continue to do so. It is wholly unfair to move the goalposts during the currency of a case.

Q29 – Do you agree with the proposals to tighten the current criteria which inform the decision on allowing the use of multiple advocates?

We cannot agree with the proposal to require Litigators to undertake more work for no remuneration. On top of the drastic cuts already being proposed we regret that these proposals are simply unsustainable. If the criteria are to be tightened to restrict the numbers of cases, where more than one Advocate is allowed, this cannot be used as a reason to then insist that a Litigator must attend in such cases to assist Counsel for no additional payment. The Ministry cannot have it both ways. If the case is sufficiently complex and requires more than one Lawyer, then two Advocates should be allowed or the Litigator should be paid for their attendance. If on the other hand the case is sufficiently straightforward that one Advocate can manage the case on their own then they should not require the additional support of an unpaid Litigator.

Paragraph 5.546 of the Consultation Paper states that there is no duty on the State to provide equality of arms in cases where the prosecution has more than one Advocate. This, however, risks serious miscarriages of justice which will be costly to the State later on. If it is found that the defendant was not considered to have had a fair Trial due to having a defence that was not equal to the prosecution. Individuals do not choose to be accused of crimes; if the State is bringing the prosecution it is there duty to ensure that the accused person has equality of arms with the prosecution.

Bristol Law Society

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