

Annette Cowell
Ministry of Justice
4.38
102 Petty France
London SW1H 9AJ

3 June 2013

Dear Ms Cowell

Transforming Legal Aid: delivering a more credible and efficient system

Please find attached the response of the Bar Standards Board to the above consultation. As a public interest regulator, the BSB response focuses on the greatest risks to the regulatory objectives as set out in the Legal Services Act 2007 that arise from the consultation proposals. The regulatory objectives are fundamental to the effective legal profession and the introduction of Government policy that undermines them has serious repercussions for the criminal justice system and the wider public interest. It is incumbent upon the BSB to set out its concerns where this occurs.

The BSB is particularly concerned to ensure that members of the public have access to competent advocacy and that safeguards are in place to preserve quality of representation within the criminal justice system. In our response we highlight where the consultation proposals conflict with those aims and which present risks to the regulatory objective that cannot reasonably be mitigated.

The introduction of any proposals relating to the funding of legal services gives rise to issues of regulatory concern and I am keen to ensure that my Board is sighted on any developments as they arise. I very much hope therefore that we will be kept informed by the Ministry of Justice of relevant issues during the next phase of policy development and implementation.

Yours sincerely



Baroness Ruth Deech QC (Hon)
Chair, Bar Standards Board



Transforming legal aid: delivering a more credible and efficient system

Response of the Bar Standards Board

Introduction

1. This is the response of the Bar Standards Board (BSB), the independent regulator of the Bar of England and Wales. The response is limited to those issues which the BSB believes are of direct relevance to its role as a legal services regulator. The response focuses therefore on whether the proposals present a risk to the regulatory objectives of the Legal Services Act 2007 (the LSA 2007).
2. The BSB accept that it is for government to set the policy framework and rules of engagement for changes to legal aid entitlement, procurement arrangements, and fees. Further, the BSB recognises and accepts the government's objective, endorsed by parliament, to contribute to economic recovery through savings and efficiencies in public spending, including expenditure on the legal system.
3. The BSB welcomes the opportunity provided by the consultation to comment and challenge the proposals from the perspective of our regulatory remit. It is our duty as a public interest regulator to point to short and longer term risks inherent in the design and planned implementation of the scheme as set out so far.
4. The regulatory objectives are a fundamental pillar within the LSA 2007 and are the basis upon which successful regulation of the legal profession is measured. The BSB has a responsibility under the Act to put in place regulatory policy that promotes these objectives. Our overarching concern with the proposals set out in the Ministry of Justice consultation is that they will undermine these objectives to such an extent that we will not be able to mitigate the risks that arise as a result. Since the LSA 2007 is primary legislation, the BSB considers that the Ministry of Justice should not pursue a policy which is, or risks being inconsistent with it without full Parliamentary debate.
5. The BSB is particularly concerned that the proposals seem to be contrary to the general government policy which emphasises consumer choice and safeguarding the provision of quality in publicly funded services. This aim is at odds with the consultation proposals which remove choice and focus exclusively on price. Whilst it may be legitimate to remove choice in respect of a publicly funded service, and there are examples of this, the necessity for removing choice and the consequences of doing so need to be carefully considered. In these proposals, the removal of choice taken in combination with competition by a radically reduced number of providers on price alone creates a threat to the quality of the services. That in turn creates a risk to the integrity of the criminal justice system.
6. The proposals appear to define the public interest narrowly, by reference to the interests of the taxpayer, and elevate that concern above a broader definition of the public interest, as including the public interest in the proper administration of justice. It is legitimate for elected politicians to decide on and be accountable for the priority they place on these aims. However, it is essential that such decisions are taken after full debate and having properly identified the likely consequences.

7. In this instance it appears far from certain that the proposals are capable of delivering the desired savings and there does not seem to have been sufficient analysis of the accompanying risks. The BSB accepts that austerity measures are a necessary consequence of the financial climate but it is nonetheless essential to scrutinise such proposals for adverse consequences, particularly where these may be unintended.

General comments

8. This section of the BSB response will be structured in line with the regulatory objectives as set out in Part 1 of the LSA 2007. The BSB has considered the Ministry of Justice's proposals with reference to each of those objectives. Our response to the consultation questions that raise issues of regulatory concern is attached at Annex 1.

Protecting and promoting the public interest

9. The public interest in the administration of justice in the criminal courts informs the way in which the Overriding Objective is articulated in the Criminal Procedure Rules. The BSB considers that this is a valuable starting point in any analysis of what the public interest requires in this particular sphere.

The Overriding Objective

- 1) The Overriding Objective... is that criminal cases must be dealt with justly.
- 2) Dealing with a criminal case justly includes:
 - a) Acquitting the innocent and convicting the guilty;
 - b) Dealing with the prosecution and defence fairly;
 - c) Recognising the rights of a defendant, particularly those under Article 6 of the European Convention of Human Rights;
 - d) Respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
 - e) Dealing with the case efficiently and expeditiously;
 - f) Ensuring that appropriate information is available to the court when bail and sentence are considered; and
 - g) Dealing with the case in ways that take into account
 - i. The gravity of the offence alleged,
 - ii. The complexity of what is in issue,
 - iii. The severity of the consequences for the defendant and others affected, and
 - iv. The needs of other cases

10. Any approach to the procurement of legal aid must ensure that the interest of the public is served. As recognised in the Overriding Objective, there is an immediate public interest that individual defendants receive competent representation, which is a key ingredient of a fair trial, as well as a wider public interest that the criminal justice system is effective in convicting the guilty and acquitting the innocent. In the context of legal services provision in the criminal justice market, the BSB would argue that the public interest and the wider regulatory objectives of the LSA require:

- a sustainable and effective criminal justice system;
- access to competent advocates for all parties, whether privately or publicly funded on a basis which includes client choice to ensure good quality, engender trust and to allow consumers to have confidence in the justice system;
- remuneration for any publicly funded work on a basis that attracts sufficient numbers of competent service providers to ensure that sustainability of the publicly

funded service and provides best value and safeguards quality rather than building in perverse incentives

11. The BSB believes that measures that impair or put at risk the quality of the advocacy services provided in the criminal justice system threaten to injure the public interest in a number of ways. Incompetent or inadequate representation at criminal trials is likely:

- To lead to trials being ineffective or taking longer than they should;
- To increase the number of miscarriages of justice (wrongful convictions or acquittals); and therefore lead to a loss of confidence in the administration of justice (both amongst immediate consumers – victims, witnesses, jurors, judges – and the public at large); and
- To lead to an increase in the number of appeals from those challenging those convictions.

12. No allowance has been made, in calculating the cost savings from these proposals for the additional costs that would be likely to be incurred.

13. As a result of the matters identified, some assessment of this is surely essential in evaluating what financial savings will in fact be achieved, quite apart from the question of the broader balance of social benefit and detriment.

14. The BSB seeks assurance from the Ministry of Justice that the public interest will be a central factor in reaching decisions on the final shape of the legal aid fee structure and procurement proposals. The BSB invites the Ministry to share any evidence that it has gathered to support the feasibility and sustainability of the planned cost savings.

Supporting the constitutional principle of the rule of law

15. The application of the rule of law relies on the proper administration of justice. This in turn requires advocacy to be delivered by competent advocates, including in any case where the advocate is publicly funded. Incompetence prejudices not only the party represented by that advocate but the ability of the judge to do justice, since in our adversarial system (in contrast to an inquisitorial system) judges are heavily dependent on the advocates to do their job properly. The BSB's response highlights the risks to the rule of law of implementing unchanged the Ministry of Justice proposals.

Improving access to justice

16. As highlighted by the President of the Supreme Court, Lord Neuberger, access to justice is of fundamental importance to a democratic society. Without it the rule of law is placed in jeopardy. Where it is in the public interest that representation should be paid for by the state, it is deleterious to that objective if there are no (or no sufficient) safeguards on the quality of that representation. The BSB is of the view that insufficient regard has been paid in the consultation to the importance of ensuring the quality of representation. Competitive tendering on price alone carries with it a risk that the quality of the services provided by those representing publicly funded defendants will be impaired and the public interest put at risk. The proposed pre-qualification criteria provide no assurance of competence or quality in the delivery of these specialised legal services.

17. Whilst the Ministry of Justice does not propose to include Crown Court advocacy within the tendering process, the BSB believes that tendering on a price competitive basis is also likely to have an adverse impact on quality of advocacy throughout the criminal justice system. In practical terms, the tendering process will reward those providers who offer the lowest price rather than the best combination of price and quality and the fee structure then incentivises those providers to keep Crown Court advocacy in house, where it will be subject to pressure to maximise contribution to margins, without an incentive to compete on quality.

Protecting and promoting the interests of consumers

18. The consultation proposes removal of client choice in the provider allocated to them at the point of request for advice. The removal of choice is contrary to the approach adopted in the large majority of other public services, where choice is recognised as a key component of the consumer interest. For example, in relation to the medical profession, patient choice is a fundamental element of the NHS constitution. The BSB appreciates that the shift in policy reflects the Ministry of Justice's desire to make the best economic use of available resources within the criminal justice market but is concerned that the combination of a removal of client choice and competition on price alone within a shrinking market will mean that quality of representation is not safeguarded and suffers as a result. Persons charged with criminal offences, and in need of legal aid, are just as much consumers of a public service as patients or benefit recipients, and the principles of choice should apply equally to drive quality and competition.

19. The policy issue as to whether public funding justifies restriction in consumer choice and reconciling this with the need to retain quality within the market is not unique to the legal sector. In social care, for example, the move has been towards setting an individual budget for those individuals who qualify for financial support and allowing for choice of provider on the basis that any costs above the preset limit must be met by the individual. This approach allows competition on quality whilst capping expenditure. Whilst the detail of how such an approach could be achieved within the sphere of criminal legal aid would require careful consideration, it demonstrates that efficiency savings can be made whilst retaining both consumer choice and quality safeguards.

20. In addition to direct removal of choice as to which solicitor represents them, there is a risk that the consumer will in practice have only a limited choice in which advocate represents them. The model proposed by the Ministry of Justice will logically lead to large defence providers who would seek to build in house advocacy capabilities or, perhaps, form commercial relationships with large sets of Chambers limiting practical choice of advocate for the consumer.

21. The benefits of choice lie not only in safeguarding quality, through requiring providers to compete in the quality of their service to consumers, but also in promoting trust as between the consumer and their representative and public confidence in the system as a whole, both of which will be harder to achieve where representation is randomly allocated to providers selected on the basis of price alone. Trust is essential if consumers are to have confidence in the advice they receive, for example, as to plea. A defendant denied their choice of representation (such as a solicitor who is known to them) is likely be less trusting of advice to plead given by someone they perceive as having been randomly allocated to them by the state which is prosecuting them. The ability to exercise choice of representation is salutary and promotes confidence in the system, even if many may in practice not make use of it.

Promoting competition

22. Competition is a critical element of a healthy and effective legal services market, including for legal services paid for with public money. The LSA 2007 places competition at the centre of its drive to ensure quality service provision. The Ministry of Justice's proposals will reduce competition in a number of respects. First, the number of providers tendering for contracts is to be radically reduced. Second, that reduced number of providers is to compete on price alone. Third, the likelihood is that the numbers remaining in independent practice at the criminal bar will reduce as an indirect result of the tendering arrangements, which will incentivise providers to bring advocacy services in house, and as a direct result of fee cuts. Elsewhere in this response, the BSB has set out its concerns about the effect of reducing competition on quality, on consumer choice, and on access to competent representation.

23. It should also be noted that the LSA 2007 places competition at the centre of its drive to ensure quality service provision. The Legal Services Board, as oversight regulator for legal services, has rightly acknowledged competition as a mainstay for the future delivery of regulation.

24. The BSB also has concerns about the sustainability of the long term delivery of litigation services given the proposals by the Ministry of Justice to reduce the number of contracts awarded from 1600 in 2010 to 400. This is justified on the basis of economies of scale and scope. No economic or financial evidence to support this view is provided. The BSB questions the extent to which economies of scale will truly materialise from such significant constriction of the market. For example, is there evidence that the administrative costs associated with criminal litigation will be so dramatically reduced if the volume of the business increases to justify the consequences of the proposals on consumers and the public interest? At present it is merely asserted and in no way evidenced that this will be so and that the benefit of sustainable service delivery at lower costs therefore outweighs the detriment of removing choice (which is said to be necessary to guarantee providers the volumes that will be supposedly bring them economies of scale).

25. This is a high risk strategy in the absence of evidence demonstrating that it is reasonable to expect these economies of scale to be achieved. If the hoped for economies of scale prove to be insufficient, providers who are successful in the initial tendering will necessarily raise their prices in future rounds or move out of the publicly funded sector. By that time, providers who were unsuccessful in the initial round, or who were unable to take part, may have been removed from the market.

26. The consequence of imposing the financial eligibility threshold is likely to be a greatly expanded market for privately funded work. This creates a need to facilitate competition on quality in at least that area, in forms the consumer can recognise and choose between. This will, however, render even more stark the contrast with the basis on which publicly funded representation is to be provided, with the impacts on quality trust and public confidence discussed above.

Encouraging an independent, strong, diverse and effective legal profession

27. This regulatory objective recognises the value of a legal profession which is as diverse as the society it serves. There has been significant progress over the last ten years in the development of a strong and diverse legal profession. Whilst applications for the Bar Professional Training Course (BPTC) and pupillage continue to rise there is, however, much anecdotal evidence that the number of students wishing to practise in publicly funded criminal work is declining, and that many of those who have secured a predominantly criminal law pupillage either are seeking to change the direction of their future practice or leave the profession altogether.

28. With the increase in University fees and the cost of the BPTC it is inevitable that many potential advocates who may have been well suited to practising publicly funded criminal law will not seek to do so given the question over whether they would be able to sustain themselves as practitioners on the fees to be earned. At particular risk are persons from socially diverse backgrounds and those with families to support or other caring responsibilities. The proposals, including as they do further fee cuts, are likely to further reduce the attractiveness, to those joining the Bar, of a practice in publicly funded criminal advocacy. That poses a risk to the long term sustainability of a publicly funded service provided by competent advocates operating at all required levels of skill and experience. Without new entrants, there will not be future experienced practitioners. More immediately, it creates a risk that only those who are financially better off will be able to afford to enter or remain in this area of work and hence a barrier to entry by those who are socially disadvantaged.

29. As a regulator we have a responsibility to ensure that there are no unreasonable barriers to entry to the legal profession, whilst also encouraging diversity. It is not apparent to what extent the equality and diversity impact of the proposals have been considered and the BSB seeks assurance from the Ministry of Justice that a full impact assessment has been carried out, which identifies the issues highlighted above and which puts forward proposals for their mitigation.

Promoting and maintaining adherence to the professional principles

30. The proposed fee taper provides a significant financial incentive for legal advisers to encourage their client to plead guilty, regardless of whether that is in the client's best interests.

This fee structure creates a conflict of interest and a consequent risk that the professional conduct responsibilities placed on advocates will be undermined. Regulators may not be able to mitigate that risk effectively, since it cannot safely be assumed that abuses will necessarily come to light.

31. The decision as to plea should be made by the defendant on the basis of independent and competent advice. Tapering of the fee incentivises advocates, consciously or otherwise, to prefer their own interests and advise, even pressurise, defendants into pleading guilty in circumstances where competent, independent advice would be to plead not guilty. If advocates succumb to that temptation that would then result in miscarriages of justice, which may go undiscovered and uncorrected, and the potential for such miscarriages (or news of actual miscarriages) would reduce the confidence of the public in the proper administration of justice. If the advocates resist temptation and give appropriate advice, trust in that advice will nevertheless be seriously eroded if the client is told (as surely he or she must be) of the adviser's conflict of interest. A client who knows his or her adviser stands to lose financially should he or she plead not guilty is surely less likely to accept that adviser's advice to plead guilty.

32. Either way, fee tapering has a detrimental impact on the integrity and effectiveness of the criminal justice system, due to its (at worst) actual or (at best) perceived adverse effect on an advocate's ability fearlessly to represent their client's best interests, free from external pressures.

Equality and diversity considerations

The Equality Impact Assessment (EIA)

33. THE EIA at Annex K sets out a number of areas where adverse impact is identified. The Ministry seeks to justify each of these impacts using a "legitimate aim" defence. However, the aim must be legitimate in proportion to the impact that will be suffered by relevant groups. It is unclear what consideration has been given to proportionality or on what basis the Ministry has concluded that this part of the legitimate aim defence is made out.

34. Moreover, in each case the Ministry justifies the impact but does not undertake to implement the second part of the first limb of the equality duty which is to "minimise disadvantage" where such disadvantage is identified. It is not enough simply to justify the disadvantage the policy will cause, the Ministry must take active steps to minimise that disadvantage for affected groups. There is no evidence of any plan or intention to do this.

35. The EIA does not appear to rely on an accurate evidence base which is a requirement of an adequate EIA. This needs to be resolved. It should set out the data it intends to gather and how it intends to meet the general duty in the absence of a proper set of data. Many of the protected characteristics are entirely absent from the EIA (religion/belief etc) and yet there is no plan in place for what the government will do about the need to satisfy the general duty in relation to these strands.

36. The EIA is required also to consider (as well as the negatives) the positives of the proposals e.g. it must consider the need to advance equality and foster good relations. It does not do this and focuses only on eliminating discrimination which means it fails to meet the requirements of the general duty.

Efficiency savings

37. Earlier in the response, the BSB expresses concerns about the feasibility of the hoped for economies of scale and about the additional costs that are likely to flow from a failure adequately to safeguard quality in the provision of services. In addition to those points, the BSB has further concerns in relation to the likely impact both on the criminal justice system of an increase in litigants in person. That will impact both on the cost of criminal justice and the effectiveness of the system more generally. A rise in litigants in person is foreseeable as a likely result of individuals preferring to represent themselves rather than risk selection of their representation through the allocated provider system (and, indeed, individuals who do not qualify for legal aid being in practice

unable to afford a lawyer because of other demands on their disposable income). An evidence base must be gathered in order to properly understand what the impact of the proposals will be.

38. Such evidence might include:

- Data from the Courts on the current numbers of litigants in person
- Data showing how much longer cases involving litigants in person take when compared with similar cases undertaken by lawyers.
- Qualitative Data from judges as to current impact of litigants in person on cases before them including impact on timetabling, witnesses, length of cases and outcome.
- Focus group/round table data from the courts service, solicitors and the Bar on the effect of litigants in person conducting their own defences.

39. It is also sensible to assume that litigant in person defended cases will result in more trials, there being no one to provide objective advice on whether to plead, longer trails and more instances of wrongful convictions as a result of unskilled representation. This will need to be taken into consideration when establishing the true cost of the proposals as it is likely to have an impact on the length and number of trials and the number of retrials, appeals against sentence and conviction.

Concluding comments

40. The BSB has restricted its comments on the consultation to those that impact upon the regulatory objectives of the LSA 2007. The response seeks to set out concerns where we believe that the proposals conflict with those objectives. As outlined in the introduction to this response, the regulatory objectives are fundamental to the effective regulation of the legal profession and the introduction of policy that undermines them has grave consequences for the proper administration of justice and the wider public interest.

41. Of particular concern to the BSB are access to competent advocacy and the absence of safeguards to preserve quality of representation within the criminal justice system. Certain elements of the proposals have been highlighted which have significant impact on the ability of these concerns to be met. The BSB is strongly of the view that these concerns need parliamentary debate before any final decisions are taken. Whilst it accepts that it is a matter for the Government to decide on how much it is prepared to allocate to legal aid, it is incumbent upon the Ministry of Justice to ensure that confidence in the criminal justice system is not eroded.

42. The proper administration of criminal justice is fundamental to a civilised society. Access to competent representation where it is required is a critical part of this process. The BSB would urge the Ministry of Justice to evaluate its proposals by reference to the benchmark of the public interest to ensure that irreparable damage to the credibility of the criminal justice system does not occur. At present, the BSB is concerned that the Ministry appears to have equated public interest with taxpayer interest in order to justify its proposals. If the regulatory objectives in the LSA 2007 are not to be undermined, public interest (as taxpayer interest) must be carefully balanced against the public interest in maintaining the proper administration of justice.

Annex 1: Response of the Bar Standards Board

Schedule of Consultation Questions

The responses given to the questions below should be considered with reference to the attached general commentary on the consultation proposals provided by the BSB. In particular, it should be noted that the BSB has confined its response to matters that are specifically relevant to its role as a legal services regulator. The BSB has therefore not commented on a number of questions below which raise policy issues which, although they may be important, do not call for comment from that particular perspective.

Chapter Three: Eligibility Scope and Merits

1) Restricting the scope of legal aid for prison law

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

The BSB has no comments to make on this question

2) Imposing a financial eligibility threshold in the Crown Court

Q2. Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court? Please give reasons.

In principle, the judgment whether to impose a financial eligibility threshold is a question of policy for the Government but it is one which carries with it risks.

The consequence of imposing the financial eligibility threshold is likely to be a) a risk of a gap in access to justice on the part of individuals who do not qualify for legal aid but are unable to afford representation and who therefore are forced to represent themselves; b) a greatly expanded market for privately funded work.

The former risk will arise if the financial threshold proves to have been set at an unrealistic level and/or if there is insufficient flexibility as to allowing legal aid in cases where the anticipated costs exceed £5,000. In that event, the availability of privately funded representation would not plug the gap created by the reduced availability of legal aid and the criminal justice system would be exposed to the additional costs associated with litigants in person that are discussed in our general comments.

For those able to afford privately funded representation, these changes would create a need for regulators to facilitate competition on quality in at least the area of privately funded work, in forms the consumer can recognise and choose between. As noted in our general comments, this will, however, render even more stark the contrast with the basis on which publicly funded representation is to be provided, where consumer choice will be removed and competition for contracts based on price rather than quality.

Q3. Do you agree that the proposed threshold is set an appropriate level? Please give reasons.

This is not an issue upon which the BSB has a view, as it is a matter for economic analysis. We have identified above the regulatory risks that will arise if it is not.

3) Introducing a residence test

- Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

The BSB has no comments to make on this question.

4) Paying for permission work in judicial review cases

- Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.

No. The BSB appreciates that the intention of the proposal is to ensure that legal aid is only used to fund judicial review cases that have merit. However the BSB is concerned that this may have unintended consequences on the likelihood of legal practitioners taking on judicial review cases where, in the absence of objective assessment of the merits of the case, future funding is uncertain. Further, the funding structure would be a barrier to the citizen querying the legality or intra vires of an official decision. Judicial review plays an important role in holding Government to account and this should not be unduly fettered by financial constraints.

The government's proposals that those providing public law services do so unpaid unless and until permission has been granted provides a disincentive to early preparation and early settlement of cases. It creates a potential for perverse financial incentives for the barrister which are contrary to the interests of the client and to the wider public interest and thereby diminishes the rule of law and access to justice.

5) Civil merits test – removing legal aid for borderline cases

- Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having “borderline” prospects of success? Please give reasons.

The BSB has no comments to make on this question.

Chapter Four: Introducing Competition in the Criminal Legal Aid Market

i) Scope of the new contract

- Q7. Do you agree with the proposed scope of criminal legal aid services to be completed? Please give reasons.

The BSB notes that Crown Court advocacy has been excluded from the contract scope but has no specific comments to make on this question.

- Q8. Do you agree that, given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable? Please give reasons

The BSB has no comments to make on this question.

ii) Contract length

- Q9. Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract term by up to two further years and a provision for compensation in certain circumstances for early termination, is an appropriate length of contract? Please give reasons

The BSB has no comments to make on this question.

iii) Geographical areas for the procurement and delivery of services

- Q10. Do you agree with the proposal under the competition model that with the exception of London, Warwickshire/West Mercia and Avon and Somerset/Gloucestershire, procurement areas should be set by the current criminal justice system areas? Please give reasons.

The BSB has no comments to make on this question

- Q11. Do you agree with the proposal under the competition model to join the following criminal justice system areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas? Please give reasons?

The BSB has no comments to make on this question

- Q12. Do you agree with the proposal under the competition model that London should be divided into three procurement areas, aligned with the area boundaries used by the Crown Prosecution Service? Please give reasons.

The BSB has no comments to make on this question

- 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.

The BSB has no comments to make on this question

iv) Number of contracts

- Q14. Do you agree with the proposal under the competition model to vary the number of contracts in each procurement area? Please give reasons.

No.

Competition is a critical element of a healthy and effective legal services market, including for legal services paid for with public money. The LSA 2007 places competition at the centre of its drive to ensure quality service provision. The Ministry of Justice's proposals will reduce competition in a number of respects. First, the number of providers tendering for contracts is to be radically reduced. Second, that reduced number of providers is to compete on price alone. Third, the likelihood is that the numbers remaining in independent practice at the criminal bar will reduce as an indirect result of the tendering arrangements, which will incentivise providers to bring advocacy services in house, and as a direct result of fee cuts.

Elsewhere in this response, the BSB has set out its concerns about the effect of reducing competition on quality, on consumer choice, and on access to competent representation.

The BSB also has concerns about the sustainability of the long term delivery of litigation services given the proposals by the Ministry of Justice to reduce the number of contracts awarded from 1600 in 2010 to 400. This is justified on the basis of economies of scale and scope. No economic or financial evidence to support this view is provided. The BSB questions the extent to which economies of scale will truly materialise from such significant constriction of the market. For example, is there evidence that the administrative costs associated with criminal litigation will be so dramatically reduced if the volume of the business increases to justify the consequences of the proposals on consumers and the public interest? At present it is merely asserted and in no way evidenced that this will be so and that the benefit of sustainable service delivery at lower costs therefore outweighs the detriment of removing choice (which is said to be necessary to guarantee providers the volumes that will be supposedly bring them economies of scale).

This is a high risk strategy in the absence of evidence demonstrating that it is reasonable to expect these economies of scale to be achieved. If the hoped for economies of scale prove to be insufficient, providers who are successful in the initial tendering will necessarily raise their prices in future rounds or move out of the publicly funded sector. By that time, providers who were unsuccessful in the initial round, or who were unable to take part, may have been removed from the market.

- 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? Please give reasons.

See answer to Q14

vi) Contract value

- Q16. Do you agree with the proposal under the competition model that work would be shared equally between providers in each procurement area? Please give reasons.

The BSB has commented in its general comments, and below, on the related issue of the risks posed by removing choice (the driver for which is to ensure equal distribution of work). Beyond those points, the BSB has no comments to make on this question

vii) Client choice

- 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? Please give reasons.

No.

The consultation proposes removal of client choice in the provider allocated to them at the point of request for advice. The removal of choice is contrary to the approach adopted in the large majority of other public services, where choice is recognised as

a key component of the consumer interest. For example, in relation to the medical profession, patient choice is a fundamental element of the NHS constitution. The BSB appreciates that the shift in policy reflects the Ministry of Justice's desire to make the best economic use of available resources within the criminal justice market but is concerned that the combination of a removal of client choice and competition on price alone within a shrinking market will mean that quality of representation is not safeguarded and suffers as a result. Persons charged with criminal offences, and in need of legal aid, are just as much consumers of a public service as patients or benefit recipients, and the principles of choice should apply equally to drive quality and competition.

The policy issue as to whether public funding justifies restriction in consumer choice and reconciling this with the need to retain quality within the market is not unique to the legal sector. In social care, for example, the move has been towards setting an individual budget for those individuals who qualify for financial support and allowing for choice of provider on the basis that any costs above the preset limit must be met by the individual. This approach allows competition on quality whilst capping expenditure. Whilst the detail of how such an approach could be achieved within the sphere of criminal legal aid would require careful consideration, it demonstrates that efficiency savings can be made whilst retaining both consumer choice and quality safeguards.

In addition to direct removal of choice as to which solicitor represents them, there is a risk that the consumer will in practice have only a limited choice in which advocate represents them. The model proposed by the Ministry of Justice will logically lead to large defence providers who would seek to build in house advocacy capabilities or, perhaps, form commercial relationships with large sets of Chambers limiting practical choice of advocate for the consumer.

The benefits of choice lie not only in safeguarding quality, through requiring providers to compete in the quality of their service to consumers, but also in promoting trust as between the consumer and their representative and public confidence in the system as a whole, both of which will be harder to achieve where representation is randomly allocated to providers selected on the basis of price alone. Trust is essential if consumers are to have confidence in the advice they receive, for example, as to plea. A defendant denied their choice of representation (such as a solicitor who is known to them) is likely be less trusting of advice to plead given by someone they perceive as having been randomly allocated to them by the state which is prosecuting them. The ability to exercise choice of representation is salutary and promotes confidence in the system, even if many may in practice not make use of it.

Allied to the removal of consumer choice is the likely increase in litigants in person. The BSB has concerns in relation to the likely impact both on the criminal justice system of this increase, which will impact both on the cost of criminal justice and the effectiveness of the system more generally. A rise in litigants in person is foreseeable as a likely result of individuals preferring to represent themselves rather than risk selection of their representation through the allocated provider system (and, indeed, individuals who do not qualify for legal aid being in practice unable to afford a lawyer because of other demands on their disposable income). An evidence base must be gathered in order to properly understand what the impact of the proposals will be.

Such evidence might include:

- *Data from the Courts on the current numbers of litigants in person*
- *Data showing how much longer cases involving litigants in person take when compared with similar cases undertaken by lawyers.*
- *Qualitative Data from judges as to current impact of litigants in person on cases before them including impact on timetabling, witnesses, length of cases and outcome.*
- *Focus group/round table data from the courts service, solicitors and the Bar on the effect of litigants in person conducting their own defences.*

It is also sensible to assume that litigant in person defended cases will result in more trials, there being no one to provide objective advice on whether to plead, longer trails and more instances of wrongful convictions as a result of unskilled representation. This will need to be taken into consideration when establishing the true cost of the proposals as it is likely to have an impact on the length and number of trials and the number of retrials, appeals against sentence and conviction.

viii) Case allocation

Q18. Which of the following police station case allocation methods should feature in the competition model? Please give reasons.

- Option 1(a) – cases allocated on a case by case basis
- Option 1(b) – cases allocated based on the client's day of month of birth
- Option 1(c) – cases allocated based on the client's surname initial
- Option 2 – cases allocated to the provider on duty
- Other

The BSB has no comments to make on this question.

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 (for a reason agreed by the Legal Aid Agency of the Court), the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.

See concerns raised in respect of client choice in the answer to Q17

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? Please give reasons.

See concerns raised in respect of client choice in the answer to Q17

Remuneration

Q21. Do you agree with the following proposed remuneration mechanism under the competition model? Please give reasons.

- Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and the bid price
- Fixed fee per provider per procurement area based on their bid price for magistrates' court representation
- Fixed fee per provider per procurement area based on their bid price for Crown Court litigation (for cases where the pages of prosecution evidence does not exceed 500?)
- Current graduated fee scheme for Crown Court litigation (for cases where the pages of prosecution evidence exceed 500 only) but at discounted rates as proposed by each provider in the procurement area

The BSB has no comments to make on this question.

- Q22. Do you agree with the proposal under the competition model that applications be required include the cost of any travel and subsistence disbursements under each fixed fee and the graduated fee when submitting the bids? Please give reasons.

The BSB has no comments to make on this question.

ix) Procurement process

- Q23. Are there any other factors to be taken into consideration in designing the technical criteria for the Pre Qualification Questionnaire stage of the tendering process under the competition model? Please give reasons

Yes.

Access to justice is of fundamental importance to a democratic society. Without it the rule of law is placed in jeopardy. Where it is in the public interest that representation should be paid for by the state, it is deleterious to that objective if there are no (or no sufficient) safeguards on the quality of that representation. The BSB is of the view that insufficient regard has been paid in the consultation to the importance of ensuring the quality of representation. Competitive tendering on price alone carries with it a risk that the quality of the services provided by those representing publicly funded defendants will be impaired and the public interest put at risk. The proposed pre-qualification criteria provide no assurance of competence or quality in the delivery of these specialised legal services.

Whilst the Ministry of Justice does not propose to include Crown Court advocacy within the tendering process, the BSB believes that tendering on a price competitive basis is also likely to have an adverse impact on quality of advocacy throughout the criminal justice system. In practical terms, the tendering process will reward those providers who offer the lowest price rather than the best combination of price and quality and the fee structure then incentivises those providers to keep Crown Court advocacy in house, where it will be subject to pressure to maximise contribution to margins, without an incentive to compete on quality.

- 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? Please give reasons.

See answer to Q23

- 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 applications to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons.

The BSB has no comments to make on this question.

Chapter Five: Reforming Fees in Criminal Legal Aid

1) Restructuring the Advocate's Graduated Fee Scheme

- Q26. Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme to:

- introduce a single harmonised basic fee, payable in all cases (other than those that attract a fixed fee), based on the current basic fee for a cracked trial;
- reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and
- taper rates so that a decreased fee would be payable for every additional day of trial?

Please give reasons.

No.

The proposed fee taper provides a significant financial incentive for legal advisers to encourage their client to plead guilty, regardless of whether that is in the client's best interests. This fee structure creates a conflict of interest and a consequent risk that the professional conduct responsibilities placed on advocates will be undermined. Regulators may not be able to mitigate that risk effectively, since it cannot safely be assumed that abuses will necessarily come to light.

The decision as to plea should be made by the defendant on the basis of independent and competent advice. Tapering of the fee incentivises advocates, consciously or otherwise, to prefer their own interests and advise, even pressurise, defendants into pleading guilty in circumstances where competent, independent advice would be to plead not guilty. If advocates succumb to that temptation that would then result in miscarriages of justice, which may go undiscovered and uncorrected, and the potential for such miscarriages (or news of actual miscarriages) would reduce the confidence of the public in the proper administration of justice. If the advocates resist temptation and give appropriate advice, trust in that advice will nevertheless be seriously eroded if the client is told (as surely he or she must be) of the adviser's conflict of interest. A client who knows his or her adviser stands to lose financially should he or she plead not guilty is surely less likely to accept that adviser's advice to plead guilty.

Either way, fee tapering has a detrimental impact on the integrity and effectiveness of the criminal justice system, due to its (at worst) actual or (at best) perceived adverse effect on an advocate's ability fearlessly to represent their client's best interests, free from external pressures.

2) Reducing litigator and advocate fees in Very High Cost Cases (Crime)

Q27. Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%? Please give reasons.

The BSB has no comments to make on this question.

Q28. Do you agree that the reduction should be applied to future work under current contracts as well as future contracts? Please give reasons.

The BSB has no comments to make on this question.

3) Reducing the use of multiple advocates

Q29. Do you agree with the proposals:

- to tighten the current criteria which inform the decision on allowing the use of multiple advocates;
- to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court; and
- to take steps to ensure that they are applied more consistently and robustly in all cases by the Presiding Judges?

Please give reasons.

The BSB has no comments to make on this question.

Chapter Six: Reforming Fees in Civil Legal Aid

1) Reducing the fixed representation fees paid to solicitors in family cases covered by the Care Proceedings Graduated Fee Scheme:

Q30. Do you agree with the proposal that the public family law representation fee should be reduced by 10%? Please give reasons.

The BSB has no comments to make on this question.

2) Harmonising fees paid to self-employed barristers with those paid to other advocates appearing in civil (non-family) proceedings

Q31. Do you agree with the proposal that fees for self-employed barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts. Please give reasons.

The BSB has no comments to make on this question.

3) Removing the uplift in the rate paid for immigration and asylum Upper tribunal cases

- Q32. Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

The BSB has no comments to make on this question

Chapter Seven: Expert Fees in Civil, Family and Criminal Proceedings

- Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

The BSB has no comments to make on this question

Chapter Eight: Equalities Impact

- Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

No.

The EIA at Annex K sets out a number of areas where adverse impact is identified. The Ministry seeks to justify each of these impacts using a "legitimate aim" defence. However, the aim must be legitimate in proportion to the impact that will be suffered by relevant groups. It is unclear what consideration has been given to proportionality or on what basis the Ministry has concluded that this part of the legitimate aim defence is made out.

Moreover, in each case the Ministry justifies the impact but does not undertake to implement the second part of the first limb of the equality duty which is to "minimise disadvantage" where such disadvantage is identified. It is not enough simply to justify the disadvantage the policy will cause, the Ministry must take active steps to minimise that disadvantage for affected groups. There is no evidence of any plan or intention to do this.

The EIA does not appear to rely on an accurate evidence base which is a requirement of an adequate EIA. This needs to be resolved. It should set out the data it intends to gather and how it intends to meet the general duty in the absence of a proper set of data. Many of the protected characteristics are entirely absent from the EIA (religion/belief etc) and yet there is no plan in place for what the government will do about the need to satisfy the general duty in relation to these strands.

The EIA is required also to consider (as well as the negatives) the positives of the proposals e.g. it must consider the need to advance equality and foster good

relations. It does not do this and focuses only on eliminating discrimination which means it fails to meet the requirements of the general duty.

Q35. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

See answer to Q34

Q36. Are there any forms of mitigation in relation to impacts that we have not considered?

See answer to Q34