



The Law Society

Campaigner Briefing

Responding to the Government's proposals for reforming
criminal Legal Aid and lobbying your MP

April 2013



1. Overview

On 9 April 2013, the Ministry of Justice published the consultation paper *Transforming Legal Aid: Delivering a More Credible and Efficient System*. Under pressure to make spending reductions of 28% in order to meet deficit reduction targets the document proposes measures aimed at reducing criminal legal aid spending by £220million per annum – c. 20% of the current spend.

To achieve these savings the consultation proposes some changes in scope (prison law cases are removed and it is made harder to obtain legal aid for judicial reviews), cuts advocacy fees for public law family cases and introduces a new financial eligibility threshold above which a defendant would not receive legal aid in the Crown Court. However, the primary mechanism for achieving savings is a fresh proposal for price competitive tendering.

The Government's reasoning for this is made clear: *'it is our view that competition is the best way to promote value for money, innovation and efficiency'* thereby ensuring *'long term sustainability'* in the legal aid market.

The Society's assessment of the proposals – based on interviews with members and our knowledge of the whole market – is that as currently drafted they will fail to achieve these aims, especially so in the short timeframe envisaged by the Ministry.

The briefing has been prepared to assist you in responding to the consultation and in lobbying your local MP directly to raise awareness of the defects in the Government's present proposals. It has seven further sections:

1. [Background to the consultation: harsh realities](#)
2. [Summary of the consultation proposals](#)
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2. Background to the consultation: harsh realities

Cutting the deficit

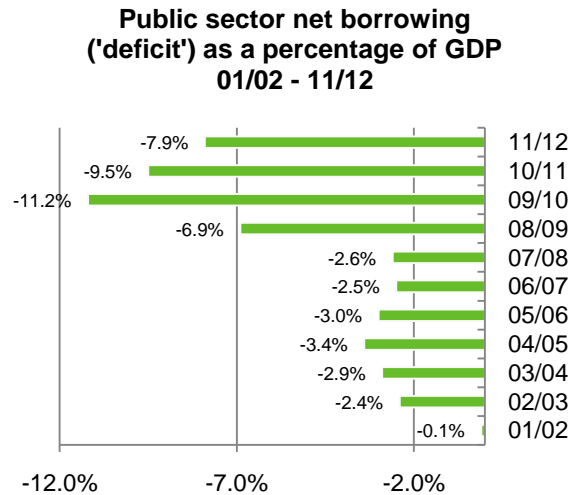
As the IMF has written of UK public spending: 'loose fiscal policy before the financial crisis, damage to potential GDP as a result of the crisis, and fiscal stimulus deployed to ameliorate the crisis have taken a serious toll on the UK's fiscal position.' The result was that public spending was exceeding receipts by 11.2% of GDP in 2009/10 - the highest deficit in the UK's history.

The Coalition Government has repeatedly restated that its primary objective is deficit reduction:

'We recognise that deficit reduction, and continuing to ensure economic recovery, is the most urgent issue facing Britain' (Coalition Agreement, 2010).

‘The events of the last two and a half years in the Eurozone, where several countries have been forced to accept emergency bail-out loans and budget policies imposed by others to avoid bankruptcy, serve as a constant reminder of what can happen when countries lose control of their public finances. We will not let that happen to Britain’(Coalition Mid-Term Review, 2012).

- In 2009/10 – immediately prior to the Coalition coming to power – the Government was spending £158.9 billion more than it received in receipts: the largest deficit in UK history and the fourth highest in the world.
- In 2011/12 the UK national debt had reached £1.1 trillion, or 71.8% of GDP, the highest level since 1976 when the UK was forced to apply to the IMF for a bailout.
- The latest Budget expects that servicing debt interest will cost the UK £51bn in 2013/14 – more than five times the Ministry of Justice budget.



Reductions in departmental spending

In order to meet its overall deficit reduction target the Treasury undertook a Comprehensive Spending Review (CSR) in 2010, which was subsequently updated at the 2011 and 2012 Autumn Statements, and the 2013 Budget.

Under the terms of the CSR 2010 the Ministry of Justice committed to reducing overall spending by 23% on 2010/11 levels by 2014/15. However, subsequent announcements of further departmental spending reductions have increased this by 5% - meaning the MoJ must make total reductions in spending of 28% or almost £2.5bn by 2014/15.

The department only expects to make savings of c. £1bn from administrative re-organisation, the closure of inefficient court buildings and so on. The remaining £1bn will largely be found from the legal aid and probation service budgets via a combination of spending cuts (i.e. fee reductions) and competitive tendering.

As the National Audit Office wrote of the department at the end of 2012: *‘The Department remains under severe pressure to reduce costs. The scale required means that the Ministry needs to look beyond immediate short-term savings and think more radically about how to take costs out of the business and how to sustain this longer term’*.

3. The consultation proposals

The proposals are contained in the consultation document *Transforming Legal Aid: Delivering a More Credible and Efficient System*, which will be subject to an eight-week consultation. The MoJ propose to formally respond and publish any necessary secondary legislation in the autumn of 2013 in preparation for beginning the tendering process before the end of the year. The proposals for price competitive tendering are contained within chapter 4 (pp. 37-72).

Scope of the contract

- Most crime work will be subject to the tendering process (criminal investigations – i.e. police station attendance; criminal proceedings – i.e. representation in the magistrates' court; and non-VHCC litigation in the Crown Court.) At this stage, Crown Court advocacy and VHCCs are not covered.

Contract length

- Contracts will be for three years, with the option to extend for a further two years.

Geographical areas

- The Government's preference is to use the existing Criminal Justice System (CJS) areas, with the exceptions of London, Warwickshire and Gloucestershire. Warwickshire will merge with West Mercia; Gloucestershire will merge with Avon and Somerset; and London will be split into three procurement areas aligned with the area boundaries used by the CPS.

Exclusivity

- Work will be exclusive to those who have been awarded contracts within an applicable CJS area. I.e. successful providers will not be able to accept work from outside their CJS area unless the case moves across a boundary (e.g. the client transferred from a court in a different area).
- Clients will have no choice of representative. Defendants will be allocated a provider by the Legal Aid Agency (LAA). A defendant will be expected to remain with the same provider throughout their case. Therefore, the concept of 'own client' work is abolished unless the defendant is paying privately.

Number of contracts

- The proposal is to reduce the total number of contracts from c. 1600 at present to just 400. Pages 52-53 provide an illustration of the expected number of contracts per CJS area based on 2010/11 claim data.

Types of provider

- Individual organisations may apply, so long as they are appropriately regulated (e.g. a partnership or an ABS). Joint ventures will be allowed.
- It is proposed that a provider will be permitted to use agents, but that details of agents would need to be included in the contract. Providers would take responsibility for the quality of the work undertaken by agents.

Contract value

- Applicants will only be able to bid for an 'equal share' of their CJS area. For example, in the West Midlands there may be 20 contracts available, so a successful bidder would be awarded a contract to deliver a twentieth of the available work in the West Midlands.

- There would be no minimum guaranteed volume of work, just a guarantee that the contractor would receive a specific fraction of the available work in the relevant area.

Case allocation

- Cases will be allocated at the investigations (police station) stage in either one of two ways:
 - Case-by-case allocation – either on a strict case-by-case basis, or by some more orderly means, e.g. by date of birth or surname initial.
 - Allocation by way of duty-slots – i.e. retain the current system of allocating time slots to each provider for which they would have to provide sufficient coverage.

Remuneration

- Providers will be paid for four work stages: (1) police station attendance; (2) representation in the Magistrates' Court; (3) Crown Court (up to 500 pages of prosecution evidence); (4) Crown Court (over 500 pages of prosecution evidence).
- Providers will submit a bid price for the first three stages, and submit a proposed percentage reduction on the fourth stage (min of 17.5%).
- All bids must be at least 17.5% below the current procurement area average claim. Because different providers will be paid according to their bids, providers will be paid differently for doing the same types of work.
- The price bid will be multiplied by the share of the total work available in the procurement area in order to work out the provider's block payment for police station each year. This will generally be unaffected by changes in volume, but additional payments may be made if there is a significant increase in requests for advice in the procurement area.
- The Ministry of Justice will provide bidders with information on average claims.

Procurement process and timetable

- There will be three stages to the bidding process:
 - A pre-qualification questionnaire (PQQ) – similar to the existing procurement arrangement exercises. A series of questions would assess whether the bidder meets the core criteria. Successful bidders will move to stage two. There will be an element of selection at this stage.
 - Invitation to tender (ITT) (Part 1) – A 'Quality and Capacity Assessment' consisting of a Delivery Plan, designed to evaluate the quality of the tender and capacity of applicants to deliver the specific service in the procurement area.
 - Invitation to tender (Part 2) – After bids that fail to meet the necessary quality criteria are removed the intention is that the LAA will allocate the remaining bids on the basis of price until it has a sufficient number of suppliers for each area.

- The indicative timetable (subject to consultation responses) is as follows:
 - 4 June 2013: Close of consultation
 - Autumn 2013: Government response to consultation
 - October 2013 – November 2013: PQQ Stage
 - February 2014 – March 2014: ITT stages
 - June 2014: Awarding of contracts
 - September 2014: Service commences

4. Responding to the public consultation

The deadline for responding to the consultation is **4 June 2013**. All providers of legally aided services and other interested parties are entitled to respond.

There are two ways to respond: (1) either online via the [consultation portal](#) - scroll to 'online survey'); or (2) by emailing a written response to legalaidreformmoj@justice.gsi.gov.uk.

Drafting your response

- If making a written submission remember to include your name, email address and the name and address of your organisation in your covering email.
- Send your response as an attachment in Word or Rich Text format (not PDF).
- Use numbered paragraphs and, if making citations, use footnotes or endnotes.
- You do not have to answer every question. Feel free to answer only those questions that are of most importance to you and your organisation.
- You can include a 'general comments' or introductory remarks section.

Comments on specific questions and suggested response

General remarks

Many will – because of perceived fundamental problems with competitive tendering for legal aid – oppose the proposals entirely. If you do so, the general remarks section is the correct place to state those concerns. Give reasons.

The consultation does not include a question as to whether the proposed timetable is feasible. This is unfortunate, because the view of the Society and of many firms is that it is unlikely to be practically possible to restructure the market in sufficient time even if the rest of the scheme were deliverable.

Use the general remarks section to explain your concerns with the proposed timetable. You may wish to mention:

- Difficulties with obtaining finance for investment/expansion/merger.

- Difficulties with recruiting and training sufficient staff.
- Difficulties associated with becoming an ABS.
- Difficulties associated with expanding geographical reach through new offices or new partnerships, whether via agency arrangements, business expansion or formal mergers.
- Difficulties in commissioning and installing new or updated software.

Question 8: 17.5% reduction in fees for non-competitively tendered work.

The only argument that will carry any weight with the MoJ in relation to fee cuts is that it will be financially impossible for a sufficient proportion of the supplier base to bear these cuts. Moreover, the Ministry will need to see any arguments to this effect backed up by hard evidence.

Question 9: Contract length

The plan to retain the current three year contract period (with the possibility of up to two years extension). The Government intends to retain six month no fault early termination clause, but intends to revise it to include a provision for compensation in certain circumstances. Given that there are likely to be few circumstances in which it would be acceptable not to compensate, you may wish to state what – if any – circumstances you would consider it reasonable.

The proposed three year contract fails to take into account the substantial additional investment that will be required – particularly in the initial tendering round – to cover expansion costs across the entire CJS area, provide additional resource to cover the (possible) increase in volume of work, and to upgrade IT. A longer contract period, which allows firms to recoup their investment costs over a longer period, may be more appropriate.

In describing the problems with the current contract length from the perspective of your firm you may wish to mention the following:

- Describe the types of investment that your firm would need to make to cover the proposed geographical area and deal with the proposed volume of work, including funding the increased work in progress where relevant.
- Describe your experiences of obtaining funding for investment and the likelihood, in your view, of obtaining investment funding over the proposed contract period.

Questions 10 – 11: Proposed geographical areas

The proposal to contract with firms across an entire CJS area, with the expectation that the bidder provides a service across that entire area will mean that a major restructuring of the present market is required. For most firms, expanding to cover a whole CJS area will require significant investment and time.

The proposed merger of some areas will raise particular problems – with firms being required to cover all police stations across a very wide geographical area. The Society will be responding based on our knowledge of the distribution of the entire market, but you may wish to highlight your local experience.

You may wish to mention:

- The feasibility of providing a single service across your proposed CJS area and any particular local problems that you envisage.
- Any local issues relating, for example, to transport links or to the way the criminal justice system is organised, which might make allocation via CJS boundaries inappropriate.

Questions 14 and 15: number of contracts

The proposed number of contracts envisages a substantial restructuring in the current market, which will entail substantial cost. Bear in mind that the number of contracts may be significantly fewer than the number of firms that continue undertaking defence work if smaller firms were to bid in a consortium or to set up sub-contracting arrangements with other firms.

Question 16: contract value

The proposed “equal share” model is very restrictive, and will impose some particular difficulties for a number of bidders. This restrictive approach will require the largest firms to contract (or at least restrict expansion) while imposing very high market entry costs on small providers potentially restricting competition.

- From your own perspective explain the restrictions of the “equal share” model.

Questions 17 - 20: allocation of cases(client choice) / requirement to stay with same provider

The proposal for the LAA to allocate a defendant to a particular provider, and then to oblige that defendant to remain with that single provider throughout the entirety of their case raises particular concerns.

From a legal perspective, the proposal may contravene s. 27 of the Legal Aid, Sentencing and Punishment of Offenders Act, about which that Act’s Explanatory Memorandum states: ‘in relation to representation for criminal proceedings, subsections (4) and (5) [of section 27] provide that an individual may select a legal representative of their own choice and that choice will be respected’.

- Explain how important an ongoing solicitor/client relationship is to your work, with particular reference to improved efficiency.
- You may wish to explain this from the perspective of efficiency for the provider (you don’t have to spend time taking a history from a client you know) and in terms of the impact on the justice system (a client may accept advice from a trusted lawyer to speak in interview, or to plead guilty, which might be rejected if it comes from an unknown source).
- Explain the importance in terms of quality of defence services and general faith in the criminal justice system that defendants are able to choose their own representation.

Questions 21 and 22: remuneration

As noted above, the only argument that will carry any weight with the Ministry in relation to fee cuts is that it will be financially impossible for a sufficient proportion of the supplier base to bear

these cuts. Moreover, the Ministry will need to see any arguments to this effect backed up by hard evidence. You need to demonstrate how much it will cost to deliver what the Ministry is demanding, and how that compares with the remuneration on offer. You may also wish to comment on your regulatory obligations under Principle 8, relating to sound financial management of your firm, and what implications that might have when you come to decide whether or not to submit a bid.

Questions 23 – 25: tendering process

You may wish to comment on the mechanics of the tender proposal. It is structured similarly to recent civil tenders. You may want to indicate whether you believe there is a risk of “suicide bids”, and if so how they could be guarded against, and whether it is likely to be possible for you to be in a position to bid by the time proposed for the process in this paper.

If any firm were going to bid on this basis [i.e. along the lines of the tendering process currently set in the consultation], the managers must satisfy themselves that they could submit a bid without breaching regulatory Principle 8 on sound financial and risk management. A firm’s COLP and COFA, obligated to report material failures to comply or if the firm is in serious financial difficulty, may well want to look closely at the likely financial impact on the firm to see if any such reporting requirements might be triggered. Clearly, if a firm felt it could not submit a bid without breaching this Principle, it would be contrary to your professional and regulatory obligations to do so.

5. Contacting your MP

You can find out who your local MP is as well as their contact details by entering your postcode into <http://findyourmp.parliament.uk/>

Consider the following:

- For the greatest impact you should send your letter **via email** as well in the post.
- Follow up your letter a few days later by making a **telephone call** to your MPs constituency office asking to schedule an urgent meeting.
- Remember to include a request in your letter for your MP to ask a question of the Lord Chancellor at the next Justice Question Time in the House of Commons.

You may be concerned at including commercially sensitive information in your letter. However, it should be noted that letters between constituents and MPs are not subject to freedom of information requests, since MPs do not constitute “public bodies”. Subsequent letters between MPs and ministers may be subject to FOI requests, but it is unlikely that your MP will include any such information and, in any case, you can request that they do not at your meeting.

6. Meeting your MP

The suggested letter includes a request to meet with your local MP in order to discuss in detail your concerns. Once you have arranged an appointment to meet with your MP, you should prepare a short list of the issues you wish to raise. The aim of the meeting will be to demonstrate to the MP the problems with the proposals from the perspective of your firm and on the provision of quality local legal advice as well as explaining that alternative savings exist.

Some MPs, such as those with Ministerial responsibilities, may be busier than others, and therefore may only be able to dedicate no more than 10-15 minutes to hearing your concerns. This is particularly likely to be the case if you meet your local MP at one of their constituency surgeries. If you are able to arrange a meeting at your firm's offices you may potentially have longer with your MP, perhaps 30 minutes to an hour. Most MPs will be more than happy to meet with local constituents and local businesses.

The following points should be considered before any meeting with a local MP:

- **Don't presume knowledge** – MPs deal with several dozen issues every day, and may therefore have very little, if any, knowledge of the extent of the reforms.
- **Highlight your local concerns** – Explain your concerns regarding inappropriateness of the proposed geographical areas, the impact of the fee restrictions on quality and investment, and the resultant effect on the provision of quality legal services locally.
- **Urge them to write to the Lord Chancellor and the Legal Aid Minister, Lord McNally** – setting out the concerns you have raised.
- **Suggest a follow up action between yourself and the MP** – this could include the MP forwarding any response from the Minister; each of you agreeing to update each other on any future developments; and also perhaps meeting again.

7. Keeping the Law Society informed

Your work is essential to moving forward the Law Society's lobbying to persuade the Government to change its plans. It would therefore be helpful if you could provide a brief report of your meeting, and the proposed follow up actions, to the Law Society's Government and Parliamentary Affairs Unit who are co-ordinating the profession's lobbying of MPs and ministers.

Please contact the Government and Parliamentary Affairs Unit at parliamentary@lawsociety.org.uk.

8. Suggested letter

<<Name>> MP
House of Commons
London
SW1A 0AA

<<Date>>

Dear <<Mr/Ms/Sir etc Surname>>,

MoJ proposals for price competitive tendering for criminal legal aid

As a criminal defence solicitor in <<your town>> I am writing to inform you about my very serious concerns with the Government's present proposals for introducing price competitive tendering for criminal legal aid. As currently presented, the proposals are unlikely to achieve the Government's stated savings and may come at the price of chaos in the criminal justice system.

The proposals, contained in the ongoing Ministry of Justice consultation *Transforming Legal Aid*, put forward a system that will reduce the number of suppliers from a current total of c. 1600 to just 400 in a matter of months, with just <<state how many firms are proposed to cover your CJS area>> covering <<your CJS area>>.

In addition the Government, despite naming the proposals 'competitive' tendering, propose to restrict bids to at least 17.5% below current rates – suggesting little faith in the market. If a competitive market is to function properly bids should be allowed to vary to appropriately reflect local conditions, providing an incentive to the Government to, for example, improve inefficient courts and reduce the complexity of criminal law.

There is a very real risk that the combination of having to undertake radical restructuring while simultaneously being subjected to the uncertainties of a competitive tendering process and a compulsory reduction in fees of 17.5% will result in firms being unable to fulfill their contractual obligations leading to advice deserts or a serious diminution in quality.

I would appreciate an urgent meeting with you in order to discuss the likely impact of the proposals on the provision of quality legal services in <<your town>>.

However, in the meantime I would be grateful if you could raise my concerns – which are shared by the Law Society – with the Secretary of State for Justice at the next Justice Question Time. In particular, could you ask the Secretary of State what steps he intends to take to mitigate the negative consequences of the proposals on the quality of defence provision.

I would be happy to host a meeting at our offices in <<your town>>, or to meet with you at one of your constituency surgeries.

Yours sincerely,

<<your name>>
<<your position>>
<<your contact details>>