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The Use of Contracts in England and Wales: a paper by Steve Orchard, CBE

1. From the mid 1990's it became increasingly clear that radical reform of the legal aid scheme was necessary and inevitable. This paper does not set out all the background and reasons. However, the key objectives that we believed the reforms should achieve in the civil scheme were as follows:-

   a) to bring spending under control as far as possible,

   b) to eliminate from the civil certificated scheme that work that could be funded in other ways and use the savings to increase funding in social welfare law,

   c) to have differential tests for the granting of certificated funding in different categories of law which reflected government priorities and importance of the issues to the client,

   d) to reduce the amount spent on high cost certificated cases and use savings to increase funding in social welfare law,

   e) to increase advice sector involvement by funding expansion of those agencies demonstrably expert in social welfare law,

   f) to match supply much more closely to real needs and priorities,

   g) to eliminate work done solely for the purposes of generating income and encourage work likely to be of real benefit to the client; and

   h) to make quality standards mandatory for all suppliers.

   Some of the objectives were relevant to criminal work also, particularly quality standards. We were concerned about the growth in very high cost criminal

cases. These, mainly fraud and drug trafficking offences involving multiple defendants, were accounting for 1% of Crown Court trials by number but nearly 40% of expenditure (now 49%).

Access to Justice Act 1999

2. The Access to Justice Act 1999 replaced the Legal Aid Board with the Legal Services Commission and gave it the statutory duty of creating and maintaining a Community Legal Service and a Criminal Defence Service. A key change so far as we were concerned was the far greater flexibility to fund work other than traditional individual cases. We were also given the power to introduce contracting across the whole spectrum.

Community Legal Service

3. The idea of a community legal service recognised that legal services for the poor were funded by bodies other than LAB through legal aid. Local authorities have traditionally funded, to varying degrees, advice services and many provide directly employed services themselves. Local authorities were the major funders of individual Citizens Advice Bureaux and law centres and often supported smaller independent advice bureaux and community groups. Charities are also significant funders and as the social exclusion agenda developed under the new Labour Government many Government departments were made responsible for programmes and initiatives which impacted upon the poor.

4. In furtherance of our statutory duty to create and maintain the Community Legal Service we decided to focus on three elements. First, the development of franchising into the Community Legal Service Quality Mark and its extension beyond the work that had been funded under legal aid. Secondly, the creation of Community Legal Service partnerships to bring together funders, providers and anyone else with an interest in the delivery of legal services to work on, initially, the mapping of supply across all suppliers against the need for legal services in the community. There was no set formula for a partnership; we were prepared to be flexible and create

partnerships among those who were prepared to work together. This recognised historical and political differences at local levels where some cities were at loggerheads with their surrounding rural areas. Thirdly, the development of a CLS website that would provide information about the availability of legal services locally to individuals or groups who needed that information.

5. At the same time as developing the CLS we wanted to introduce contracting across all the work funded directly by LSC in order to bring about greater control of expenditure and to improve quality standards. This was a major change agenda.

6. Franchising, and as its successor the Specialist Quality Mark, had always been category of law specific. Individual firms would have a franchise in, for example, family or mental health or both. But this did not preclude them from doing other work. So one of the key decisions that had to be made was the extent to which we should make the holding of a Specialist Quality Mark in a category of law a pre-requisite for doing any work in that category. We decided that there were four categories of law where we would introduce "exclusivity" but for different reasons. We had excellent coverage across England and Wales in family law and saw no reason why we should allow any firm without the Specialist Quality Mark in family law to do that work. However, in clinical negligence we were satisfied that the inherent difficulty in many of the cases meant that it should be conducted only by genuine experts and we should move as quickly as possible to eliminate the "dabblers". In fact we reduced the number of firms to just under 300, whereas our records indicated that some 5,000 had done one or more clinical negligence cases under legal aid funding. There were two other areas of law where we believe the complexity of the issues and the vulnerability of the client base dictated the work should be done only by firms holding the Specialist Quality Mark. These were immigration, particularly asylum, and mental health. These four categories remain the only areas of law where holding a Specialist Quality Mark is a pre-requisite for doing the work at all under public funding.

However, other categories of law may join them as we develop the supplier base in the new categories.

7. Another key question we had to address was what sort of contract, or contracts, should cover the civil legal aid scheme. We quickly concluded that a one size fits all approach would not be appropriate. Instead, we combined together the old green form[1] and ABWOR schemes under a single contract and called the new scheme Legal Help. We removed the two hour limit in order to encourage an appropriate amount of work to be done applying a cost/benefit test, to deliver a result for the client. Each contract at this level could cover all the categories of law in which the firm held a Specialist Quality Mark but the contract limited the number of cases that could be started. Case starts had to be reported to the LSC. However, we built flexibility in to every single contract enabling work outside of the categories contracted for, save in the categories of family, mental health, immigration and clinical negligence, to be done under "tolerances". The number of case starts under tolerances was normally limited to 10% of the total case starts in the specialist areas. We consider tolerances essential to enable both an holistic service to be delivered to individual clients and to allow new categories of law to emerge. We also recognised that not every legal problem could be squeezed into the definitions and categories that we had created, not least because in many the volume of problems was relatively low.

8. The approach we adopted for Legal Help had risks. Clearly, encouragement to do sufficient work necessary to get an appropriate result for the client would inevitably lead to an increase in average costs. A fixed budget in this area would mean fewer cases and fewer clients. This was one of the reasons why

[1] The Green Form Scheme allowed advice and assistance, but not representation. The Advice by Way of Representation (ABWOR) scheme was used either for civil proceedings in the magistrates' courts, overwhelmingly family issues related to children or domestic violence or work before Mental Health Review Tribunals.

The Green Form scheme allowed solicitors to do up to the value of two hours work (approx £70 then) on any matter of English law for financially eligible clients without reference to the LAB. Solicitors carried out the means test themselves. The first LAB knew of any matter started was a request for an extension beyond the limit or on presentation of a final bill. LAB controlled certificates for ABWOR so no work could be done in these areas without LAB authority.

we were anxious, see (b) and (d) above, to increase the amount of money available at this level as money was saved on civil certificated work.

9. When it came to contracting for civil certificated work we retained the concept of exclusivity in certain categories of law, explained above, but it was clear that few firms in private practice did sufficient work in any category of law to enable us effectively to limit the number of cases they started. We decided to go for a simple licence approach which at least enabled us to impose quality standards although did not give us an effective control over overall costs as individual cases were still costed at the end of the proceedings.

10. However, the third type of contract did enable us to control directly the cost of individual cases where their cost was very high. For these purposes we defined very high as £25,000. Any case likely to exceed that cost, predominantly but not exclusively clinical negligence and Children Act proceedings, is now subject to an individual case contract based upon a case plan submitted to LSC by the conducting solicitors, and if involved, the barrister. Work is authorised by stage as the case develops and is priced before the event. At the conclusion of each stage work for the previous stage is paid for and the case plan is updated. This has proved remarkably effective in controlling costs in these cases particularly in clinical negligence and other types of case where the "loser pays the winners' costs" rule applies. Here we have introduced the concept of risk sharing on the basis that if the case is won the winner's costs are paid at the market rate which is significantly in excess of the legal aid rate. So if the case is lost the losers get less than they would have been paid even under the old legal aid scheme and far, far less than the market rate. This has acted as an encouragement to weed out cases with poor chances of success. This approach does not apply in family where there is no tradition in the courts of recognising win or lose much less ordering costs to be paid by one side or the other.

11. The Community Legal Service was introduced at the same time as contracting on 1 April 2000. Since then we have covered the whole population of

England and Wales with partnerships and developed the CLS website (Just Ask) and all civil legal aid is now subject to contracts in one form or another. We have taken advantage of the far greater flexibility under the '99 Act to develop services far different from traditional individual cases. The next paragraphs identify some of the more innovative approaches we have adopted and that has been made possible by contracts.

Asylum

12. Asylum is a major political issue in the UK. The number of asylum seekers has increased to 100,000 per year and there is a real political will to get to grips with the issue. A key part of the strategy is to discourage people from seeking asylum in the UK but, if they do, a second part of the overall strategy is to resolve their status as quickly as possible and remove them if asylum is refused. Initial decisions on asylum are taken by relatively junior civil servants employed in the Home Office and there is an absolute right of appeal to an independent judicial authority. There are appeals beyond this, with leave, to the Immigration Appellate Tribunal and in a minority of cases to the Administrative Court by judicial review. Part of the Government's approach is to speed up significantly the rate of decision making on initial applications and the handling of appeals to the adjudicators. The combination of increased numbers of asylum seekers, faster decisions and speedier throughput of appeals has put massive pressure on advisors in immigration law and on the budget. Under our new powers we were able to expand the supplier base through a range of incentives and support the adjudicators in ensuring that appropriate representation was available for appellants before them. We have been publicly commended for our work in this area by the Chief Immigration Adjudicator. However, the overall quality of work in this area remains the biggest problem that the LSC is currently wrestling with.

Support for Advisers

13. We have recognised that not all advisers can be competent in everything, even if they hold Specialist Quality Mark. In order to support frontline advisers we have contracted with a range of specialists in specific categories of law to

provide direct support to frontline advisers. This can be by way of immediate support over the telephone, by providing written advice, by taking over cases, with the agreement of the frontline adviser, and by delivering training courses. After some initial reluctance both private practice and the advice sector is increasingly making use of these facilities.

Telephone Advice

14. The advent of contracting made it very clear where there were gaps in provision to meet needs identified by the partnerships. Where it has not been possible to develop supply on site we have contracted with different types of provider to give advice to clients over the telephone. The service is marketed in closely defined geographical areas and by category of law so as not to take clients away from providers that are under contract with LSC.

Student Sponsorship

15. It is clear that firms of solicitors with a significant amount of publicly funded work have become increasingly reluctant to take on trainee solicitors. When they advertise they almost always seek experienced people who can hit the ground running. Their reluctance can be attributed to two main reasons; first, a lack of capital to invest in training and, secondly, a lack of confidence in the future. To counteract this in 2002 we launched what we hope will be an annual scheme whereby we funded firms by way of grant that were prepared to sponsor students through the legal practice course as a pre-cursor to a training contract and other firms that took on individual students under training contracts. A total of 200 grants have been made and in 2003 and future years we hope to fund students through their LPC and once completed those same students through a training contract. The grants are focused on higher volume legal aid firms.

Criminal Defence Service

16. The CDS was launched on 1 April 2001, one year after the CLS. No firm can do any publicly funded criminal work without a contract with the LSC.

17. The first public defender office was opened in July 2001 and there are now a total of eight offices but with no plans to open more, at least before April 2004. The PDS experiment is important for a number of reasons. First, the experience will give us a much better idea of the cost base involved in running a criminal defence practice. Secondly, research and peer review can make comparisons between the quality of service delivered. Thirdly, it will demonstrate any differences in approach or attitude brought about by working in the public sector for a salary rather than a profit making organisation. Finally, an employed service can step in quickly if gaps begin to appear in private practice provision. In order to address the last point we have been experimenting with branch offices attached to a main public defender centre. For example, a major office was set up in Swansea in South Wales and we have recently opened a sub-office on Pontypridd in the Welsh valleys and we run them as a single organisation.

18. The introduction of contracting was another opportunity to take forward the quality agenda in this area. As explained earlier, we have already combined with the Law Society to introduce accreditation for non-solicitor representatives but this has now been extended to encompass solicitors as well.

19. One of the key challenges has been the very high cost cases which now consume 49% of total spend in the Crown Court. We define high cost for these purposes as a case lasting more than 25 days at trial or costing more than £150,000. Our objective is to bring all of these cases under individual case contracts on similar lines to the civil scheme explained in paragraph 10 above. We will contract every single case that meets the criteria from 1 April 2004. Implementation of this has been delayed because of the need for Treasury approval. Individual case contracts have demonstrated that they significantly reduce the unit cost of cases but do bring forward the payment of cash on account.

CONCLUSIONS

20. I have not included in this paper any examples of the contracts currently in use but they can be made available to anyone interested. The strengths of what we have achieved include significant improvement in the overall quality of the work done under public funding. This has been endorsed by key individuals within the legal profession. The civil scheme is much more closely allied to real need and to priorities. More people are getting a service that genuinely meets their needs and delivers an appropriate result for them. This has been brought about by greater flexibility and innovation in the use of statutory powers. There is much more control over civil expenditure than there has ever been. However, that control is not absolute and this is reflected in some of the weaknesses that we have identified. Average cost growth in civil work is high and unsustainable within a fixed budget. We either bring average cost under control or fewer people will be eligible for help. Some quality issues remain particularly in asylum where there is evidence of over claiming against legal aid and poor quality work done by lawyers. To address this we have started to use peer review in a significant way by employing experienced immigration lawyers to look at costs claims and solicitors' files to see if the work done was of an appropriate legal quality. Unfortunately, in many cases they are identifying over claiming and very poor quality work which has put many clients at risk. This has uncovered weaknesses in our ability to remove contracts which we are resolving but lawyers being lawyers they are fighting every inch of the way and this is proving extremely resource intensive.

21. Some of the key objectives we set ourselves in the late 1990's and which are set out in paragraph 1 have been achieved. There have been some increases in social welfare law funding but almost all on asylum rather than, for example debt, welfare benefits and housing. We now have differential tests for the granting of certificated funding in civil which increasingly reflect Government priorities and the importance of the issues to the client. Advice sector involvement has expanded substantially to the extent that we now pay some

£49M to that sector. Supply is much more closely aligned to real needs and priorities but that task is never finished. Crucially, quality standards are now mandatory for all suppliers whether in private practice or in the advice sector and we have successfully eliminated unnecessary work and focused suppliers on that which will deliver real benefit to the client.

22. Private practice firms are leaving the scheme, for example we have lost 17% of family contractors since contracting was introduced in 2000. However, managerial action using contracting as the tool, for example persuading suppliers to advertise their services away from where their office is based and telephone advice means that no advice deserts currently exist.