

Using market mechanisms to deliver value for money in Criminal Legal Aid

Introduction

The legal aid bill in England and Wales costs the taxpayer around €2.5bn (£2.1bn) each year. Significant changes have been made to civil legal aid through the implementation of the Legal Aid Sentencing and Punishment of Offenders Act 2012, but legal aid expenditure is still anticipated to total about €2bn (£1.7bn) by 2015/16 unless further action is taken.

Action comes in the form of a set of proposals, mainly focused on criminal legal aid services, laid out in the UK Government's consultation paper, *Transforming legal aid: delivering a more credible and efficient system*¹. The consultation paper was published on 9 April 2013 and the consultation period closes on 4 June 2013.

One of the proposals, and the subject of this paper, is the introduction of competitive tendering in criminal legal aid contracts in England and Wales.

Background

Criminal legal aid accounts for more than half of legal aid expenditure at around €1.3bn (£1.1bn) per annum in 2011/12 delivered by over 1,600 firms of solicitors and over 4,000 advocates. The Legal Aid Agency² (LAA) administers the funding schemes for criminal legal aid through a combination of contracts and statutory instruments. Historically, the rates of pay for criminal legal aid services have been set administratively via a series of hourly rates, fixed fees and graduated fees.

The current initiative to consult on and implement a model of competition for criminal legal aid is preceded by a number of attempts to implement price competition for criminal legal aid work. In 2006 Lord Carter's Review of Legal Aid Procurement was published. It recommended a move away from administratively set rates for legal aid work in favour of 'best value tendering', which would mean the selection of legal aid providers based on their ability to deliver a sufficient quantity and quality of work at the most efficient price.

The review made a compelling case for moving to a market-based approach to legal aid procurement. It highlighted the need for market restructuring, and for increasing the average size of providers through growth, mergers and rationalisation. It recommended that this should be accompanied by moving towards a system of fixed pricing where possible while retaining graduated pricing for more complex work.

Her Majesty's Government takes the view that the same conclusions presented by Lord Carter still apply. It is believed that a competitive tendering approach is the way forward for criminal legal aid. This would allow providers to offer their services at a price that reflects the costs of delivery in their local area and represents a fair market price for the work carried out.

¹ <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>

² An executive agency of the Ministry of Justice, established on 1 April 2013, replacing the Legal Services Commission. The body responsible for commissioning and administering civil, family and criminal legal aid services in England and Wales.

Proposal

The proposed model of competition set out in the consultation paper rests on the premise that savings can be made to criminal legal aid expenditure through giving those wishing to deliver such services greater certainty of volume (economies of scale). The model is also seen as allowing control of the case (economies of scope) and in so doing delivering those services at a reduced price. A summary of the key elements of the proposed model is included at Annex A.

Savings objective

Price competition in criminal legal aid is one of a number of proposals seeking to reduce expenditure of the whole legal aid system.

In order to ensure the competition delivers a saving to the legal aid fund, it is proposed to apply a price cap under which applicants will be invited to submit price bids. It is proposed to set the price cap at 17.5% below the rates paid in 2012/13 for each area of work in each procurement area.

Economies of scale

Whilst there are currently some criminal legal aid providers who deliver a large amount of legal aid work; the vast majority of providers have very little work in comparison. The concentration of work (i.e. the amount of work delivered by each firm as a proportion of the total work in their area) ranges from 0.06% to 18%. There is currently simply too little work for too many firms.

The proposed competitive tendering model would result in consolidation of the market, making it easier to access greater volumes of work. Providers would have increased opportunities to scale up to achieve economies of scale and provide a more efficient service. The proposed model would give firms the confidence to invest in the restructuring required in the knowledge they would be in receipt of larger and more certain returns.

In order to give providers the opportunities to exploit economies of scale, the following is proposed:

- Contract length – new contracts would be for a three year term, with the option of extending the contract term by up to two further years. It is felt a three year contract with the possibility of extension strikes the right balance between flexibility for both Government as purchaser and applicants with regard to frequency of tendering opportunities; and the certainty and ability for applicants to plan ahead and make longer term investments in the business.
- Geographical areas – with the exception of London and some areas with low case volumes, procurement areas should be set by the current Criminal Justice System (CJS) areas. There are 42 CJS areas in England and Wales, aligned to police force areas. For London, it is proposed to break the area into three procurement areas aligned with the area boundaries used by the Crown Prosecution Service (CPS). The current CPS structure in London is designed to focus resources on specific magistrates' and Crown

Court work. There would be similar benefits for defence practitioners in adopting the same approach.

- Number of contracts – having reviewed data on both volume and value of work, the Government considers that a ‘one size fits all’ approach (that is, adopting the same number of contracts in each proposed procurement area) would not be practicable. Therefore, it is proposed that we should offer between approximately four and 38 contracts depending on the volume of work in each area. The total number of contracts is likely to be in the region of 400.
- Contract value – applicants would submit a tender for an equal share of the volume of police station attendance work allocated in the given procurement area over the life of the contract. Applicants would have access to the subsequent criminal proceedings in the magistrates’ court, and where applicable, the Crown Court. By way of example, if there were to be ten contracts in Northumbria, applicants bidding in that procurement area would be applying for one tenth of the work allocated at the police station, and if there were four contracts in Suffolk, they would be applying for a quarter of the work allocated at the police station.

Economies of scope

At present, clients have almost unlimited opportunities to transfer to a different provider at any stage throughout the life of a case. Whereas economies of scale would drive structural, efficiency and overhead cost savings from access to larger volumes of work, economies of scope would be generated by requiring providers to deliver the full range of litigation services, as well as advocacy in the magistrates’ courts, to the client from police station to the completion of the case. This would give providers the benefit of greater certainty of work, enabling them to resource their contract in the most efficient way. It would also remove the duplication of cost involved in the transfer of clients to and from providers, and the costs associated with each new provider taking instructions at every stage of the case.

In order to give providers the opportunities to exploit economies of scope, the following is proposed:

- Scope of contract – The Government’s preferred approach is to introduce competition first for the full range of litigation and magistrates’ court representation. Consideration was given to whether to include Crown Court advocacy in the competitive tender as well. Subject to the outcome of the consultation, Her Majesty’s Government does not believe that it is appropriate to do so. Crown Court advocacy services are delivered predominantly by self-employed barristers from within a chambers structure, and whilst some chambers may be in a position to contract as a legal entity, these will probably be too few in number for nationwide tendering. This would likely affect the long-term sustainability of the Bar as an independent referral profession.
- Client choice – The proposed model of competition relies on providers having exclusive access to a greater share of work in a procurement area and retention of the client’s instructions from the start of the case to the end, enabling them to exploit economies of scale and scope and in turn offer their services at a lower price than is currently the case. An approach that removed client choice entirely would, on that basis, deliver the

greatest level of certainty. Under the proposed model of competition, a client would generally have no choice in the provider allocated to them at the point of request for advice, and would be required to stay with that provider for the duration of the case. However, it is recognised that in some instances there might be particular circumstances (for example, a professional conflict of interest existed) where the allocated provider might not be in a position to offer effective representation.

Simplification and greater flexibility

It is acknowledged that in order to give successful providers the best possible opportunity to deliver criminal legal aid work at lower cost, the systems and processes for operating the scheme need to be as simple as possible with the lowest acceptable level of bureaucracy.

Giving providers the opportunity to be more flexible in the way they structure their business and in doing so deliver the service, whether that is through joint ventures, use of agents or ABS, is also essential if a more efficient and cost effective criminal legal aid system is to be established.

The competition model is designed to simplify the criminal legal aid system in the following way:

- Types of provider – Under the proposed model, applicants could be individual organisations (such as a partnership or a Legal Disciplinary Practice), a joint venture or an ABS. Applicants could choose to deliver the service themselves and/or through the use of agents. The model would not preclude any new entrant to the market, in whatever form that took, provided they were appropriately regulated. Providers would be permitted to use agents, but they would need to provide, as part of their tender, details of the agents with whom they had a relationship or intended to have a relationship by the start date of the contract. Providers would need to take responsibility for the quality of the work carried out by their agents.
- Remuneration – As far as reasonably and economically practicable, model has been designed that is based on fixed fees. In general, each provider would be remunerated for each stage of a case (police station, magistrates' court and most of work in the Crown Court) by way of separate and unique fee based on their bid price.

Procurement process

Subject to the outcome of the consultation, the LAA currently intends to run the following competitive procurement process to procure new crime contracts.

The procurement process would consist of the following two stages:

(1) Pre-Qualification Questionnaire (PQQ):

The evaluation of an applicant's suitability to contract with a public body and its experience and capability of delivering services of similar type or volume (not specifically legal aid services). Applicants would be shortlisted to progress to the next stage based on the evaluation of responses to the PQQ.

These PQQ criteria would evaluate an applicant's experience and capability of delivering services of similar type or volume. Applicants would be scored against a number of criteria. Those under consideration include:

- Experience of staff;
- Experience of the management team in managing a comparable service; and
- Experience of having delivered comparable volumes of work (not necessarily legal services work).

(2) Invitation to Tender (ITT):

This would be divided into two parts. Part one of this ITT stage would consist 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. Those applicants shortlisted on the basis of this quality and capacity assessment would then go on to have their price bid evaluated. Those applicants tendering the lowest price bid would be awarded a contract.

In providing a Delivery Plan, it is proposed that applicants would be required to set out how they intended to deliver the service against defined areas such as recruitment, premises and other aspects of mobilisation.

As a part of the Delivery Plan, providers would also be required to submit a financial plan showing how they intended to finance any expansion or robustly manage the financial implications of running the service.

The price bid element of the ITT would require applicants to submit a price at which they would deliver each area of work covered.

It is proposed that competition would commence in all procurement areas in autumn 2013, with contracts awarded in summer 2014 and service commencing in autumn 2014. This means the LAA would run a separate competition for services in 42 procurement areas.

Conclusion

Her Majesty's Government has decided in principle to introduce competitive tendering for criminal legal aid services is now seeking views on a proposed model. It is recognised that this would require a major structural change in the market, but it is the Government's view that competition is the best way to promote value for money, innovation and efficiency.

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Annex A - Key elements of proposed competitive tendering model

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| (i) Scope | Investigations, Proceedings, Appeals and Reviews, Prison Law, Associated Civil Work, Crown Court (non VHCC) litigation and higher court representation | |
| (ii) Contract length | Three year contract term with the option for the Government of extending the contract term by up to two further years | |
| (iii) Geographical areas for the procurement and delivery of services | Criminal Justice System (CJS) Areas (subject to two proposed mergers of areas) with an exception for London, to be further subdivided into three procurement areas | |
| (iv) Number of contracts | Applicants allowed to apply to deliver services in more than one procurement area but only one share in each area. The number of contracts to vary by procurement area. Illustrative contract numbers based on 2010/11 LAA data suggests a range between 4 and 38 in each procurement area with the total number of contracts around 400. | |
| (v) Types of provider | Providers could be individual organisations (such as a partnership or a Legal Disciplinary Practice), a joint venture or an ABS. New entrants may apply provided they form a legal entity and are appropriately regulated by the contract start date (indicative timetable proposes June 2014). | |
| (vi) Contract value | Successful applicants in a procurement area to be awarded an equal share of access to cases in the procurement area | |
| (vii) Client Choice | Clients would generally have no choice in the provider allocated to them at the point of requesting advice, and would be required to stay with that provider for the duration of the case, subject to exceptional circumstances in which clients might be permitted to change their allocated provider (either at the point of requesting advice or during a case) | |
| (viii) Case allocation | Cases to be allocated equally. Options for method of allocation: <ul style="list-style-type: none"> • Case by case • Duty slots | |
| (ix) Remuneration | Police station work | Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and the provider's bid price |
| | Magistrates' court work | Fixed fee per provider per procurement area based on the provider's bid price |
| | Crown Court cases with less than 500 pages of prosecution evidence (PPE) | Introduce fixed fee per provider per procurement area based on the provider's bid price |
| | Crown Court (non-VHCC) cases with more than 500 PPE | Maintain current graduated fee scheme but rates set per provider per procurement area based on the provider's bid discount against the current rates under the Litigators' Graduated Fee Scheme |

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| (x) Procurement process | Two stage application process: <ul style="list-style-type: none"> • Pre Qualification Questionnaire – evaluating an applicant’s suitability to contract with a public body and its experience and capability of delivering the services • Invitation to Tender – Split into two parts – the first evaluating the provider’s quality and capacity to deliver the specific service in the procurement area and the second evaluating the bid price. |
| (xi) Contract Award / Implementation | Competitive tendering process to start in all procurement areas in autumn 2013. Contracts would be awarded in summer 2014 with the service commencing in autumn 2014 |