

THE LEGAL WALES FOUNDATION

RESPONSE TO CHAPTER 4 (“INTRODUCING COMPETITION IN THE CRIMINAL LEGAL AID MARKET”) OF THE MINISTRY OF JUSTICE CONSULTATION DOCUMENT - “TRANSFORMING LEGAL AID: DELIVERING A MORE CREDIBLE AND EFFICIENT SYSTEM”

4 June 2013

1. SUMMARY

1.1 The Board of the Legal Wales Foundation (the Board) believes that certain features of the proposals set out in Chapter 4 of the Consultation Document, namely:

- i) removal of a defendant’s ability to choose his or her legal representative, and
- ii) an 80% reduction in the number of providers of criminal legal aid services in Wales,

would, if implemented, be extremely damaging not only to the rights of individual defendants, but to the efficient and effective administration of criminal justice in Wales and the interests of the Welsh public. A particular concern is the detrimental impact of the proposals on those who wish to access legally-aided criminal law services through the medium of the Welsh language.

1.2 Accordingly, the Board calls upon the Lord Chancellor to reconsider these proposals.

2 THE LEGAL WALES FOUNDATION

2.1 The Legal Wales Foundation, whose governing body is the Board, is a body whose purposes include providing a forum for discussion and the formulation of views and proposals for action on issues affecting the administration of justice, the teaching and researching of law and the provision of legal services in relation to Wales.

2.2 Membership of the Board includes representatives of:

- The judiciary;

- The Counsel General to the Welsh Government;
- The Bar;
- The Law Society;
- Individual Chambers and Solicitors' firms;
- The Crown Prosecution Service;
- HM Courts and Tribunals Service Wales;
- The National Assembly for Wales Legal Service;
- The Welsh Government Legal Service;
- Lawyers in Local Government in Wales.

2.3 This Response draws on the experience and expertise of the members of the Board in the fields in which they operate. It does not necessarily represent the views of the different organisations and interests whom they represent. Some of those organisations are understood to be submitting their own responses to the consultation and this response should not be seen as qualifying those responses.

2.4 In the case of the Counsel General and the Welsh Government Legal Service, they have, in order to avoid any confusion between the contents of this response and that which the Welsh Government is proposing to submit, specifically requested it to be recorded that they have, for that reason, refrained from contributing to this response.

2.5 The Board is strictly non-political and many of its members are themselves public servants. The views set out in this response should not be interpreted as calling into question the Lord Chancellor's prerogative to formulate and implement his policy nor as amounting to a criticism of his policy.

2.5 The members of the Board feel that it is their duty, however, to draw attention to what they believe, based on their lengthy experience of, and involvement with, the criminal justice system in Wales, would be the undesirable consequences in relation to Wales of implementing the proposals, as currently formulated.

3 GENERAL OBSERVATIONS

- 3.1 At the heart of the current consultation lies the proposal to remove from defendants any ability to exercise choice as to which legal aid provider to instruct. Rather than introducing competition into the criminal legal aid market, the proposal would, in fact, have the opposite effect, removing the current arrangements, under which providers who wish to maximise their share of legal aid work have to attract that work through offering the highest possible quality of service to the client and substituting a distorted form of price competition.
- 3.2 The ability of defendants to exercise choice when instructing representatives is desirable not only in order to ensure that there is competition in relation to the quality of service. It also reflects the wider principle that legal representatives should be primarily concerned with the interests of their clients and should be seen as independent of the State.
- 3.3 Parliament regarded the principle of choice of representative as sufficiently important to make it a statutory requirement. Section 27(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, provides that (other than in particular circumstances):
- “(4) An individual who qualifies under this Part for representation for the purposes of criminal proceedings by virtue of a determination under section 16 may select any representative or representatives willing to act for the individual, subject to regulations under subsection (6)”.
- 3.4 In the case of Wales, there is an added reason why choice of representative is of crucial importance, in that it facilitates the ability of a defendant, by choosing a representative who possesses the necessary linguistic skills, to interact with the criminal justice system through the medium of the Welsh language.

3.5 We find it surprising that the consultation document contains no reference to the impact of the proposals on the Welsh language, despite the commitment of the Ministry of Justice, in its Welsh Language Scheme that:

“As we consider and develop new policies, or review existing policies in the usual course of policy business, we will...assess the linguistic consequences of policies affecting services provided to the people in Wales.”

3.6 We will draw attention, when considering specific features of the proposals, to the way in which their “linguistic consequences” would be substantial and would conflict with the Ministry of Justice’s further commitments to “promote and facilitate the use of Welsh wherever possible” and to “implement the principle of equality (between English and Welsh) at every opportunity, so far as is both appropriate in the circumstances and reasonably practicable.”

3.7 Even if the proposals did not expressly set out to remove from defendants their ability, when they qualify for legal aid, to choose their own legal representatives, the proposed reduction in the number of providers able to offer criminal law services on legal aid would have a similar effect. Currently, over a 100 solicitors offer such services in Wales. It is proposed to reduce this to 21 overall (9 in South Wales and 4 each in Gwent, Dyfed-Powys and North Wales). Given the very low population density of much of Wales this reduction would, in itself, mean that even if they were free to choose, defendants would, in practice, be fortunate to have more than one provider able to offer a service. Indeed, in many cases they may find it very difficult, for purely geographical reasons, to identify anyone able to represent them effectively at all.

4. DETAILED RESPONSE

4.1 The Board's assessment is that these proposals will be damaging to the interests of individual defendants, the administration of justice and the public interest in general.

4.2 Their most damaging feature is the removal of any element of choice on the part of defendants. There are a number of reasons why the ability to match the needs of a particular defendant to those of a particular provider is of crucial importance:

- A prosecution for a criminal offence is a proceeding between the State and an individual which may lead to the individual losing his or her liberty or being deprived of his or her property. The right of a defendant to be represented by an independent lawyer is enshrined in Article 6 of the European Convention. Where an individual is unable to pay for representation some restriction of the choice of lawyer is inevitable, although Parliament has recently stressed (section 27(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) that the default position should, even in such cases, be one of freedom of choice;
- The inevitable result of removing from an individual defendant any say in the selection of his or her representative would be the undermining of the trust between client and lawyer which is essential to effective representation;
- Representing a defendant in a particular case is rarely a transaction that takes place in isolation. All too often, defendants have a history of offending and the fact that a particular provider has represented him or her on previous occasions is likely to be of real practical benefit in ensuring that a defendant is advised realistically by a lawyer in whose advice he or she has acquired confidence through past dealings;
- Similarly, the circumstances which bring a defendant before the courts, and which the courts must take into account when dealing with that defendant, often extend to issues to do with employment,

housing, entitlement to benefits and family matters. A locally-based solicitor, who may have acted for a defendant, or other members of the defendant's family, in other contexts, is likely to have access to relevant and valuable information about the defendant which is of importance in advising the defendant and the court;

- The courts of England and Wales proceed on an adversarial basis. They rely on the parties to the dispute bringing before the court the evidence on which the court makes its decision. For the system to work well – justly in terms of outcomes and efficiently in terms of resources – both prosecution and defendant must be represented effectively. An effective defence representative is one whom the defendant trusts and who has a good knowledge of the defendant and his or her circumstances. A representative who is selected for a defendant by rota is far less likely to be effective than one to whom the defendant has chosen to turn;
- Continuity of representation by an effective defence representative is of huge benefit, given the adversarial nature of criminal proceedings, not only to the defendant but also to the prosecution and to the court. For either to have to deal with a representative who does not have the ability to represent the interests of the client effectively and confidently would be likely to increase the administrative burden, and hence the cost, that falls upon them;
- The undermining of trust between defendant and legal representative will inevitably result in more unrepresented defendants, with all the disruption, delay and cost that this entails.

4.3 The consequence of destroying the traditional relationship, based on choice and confidence, between defendant and representative, would therefore extend beyond the interests of the individual defendant. We believe that it would manifest itself in a less just, less effective, and ultimately more costly criminal justice system, which would be highly damaging to the public interest.

- 4.4 Although the consultation paper suggests that locally-based medium sized solicitors may be able to organise themselves into networks and “partnerships” in order to bid for the volume of work generated by the proposed new contracts, the very limited time allowed for that to happen (pre-qualification is proposed to take place in October – November 2013) means that in most cases this will not be achievable. Contracts will be awarded to large providers, almost inevitably based outside the Area (and indeed outside Wales). The income of large numbers of small to medium solicitors’ firms, who also offer legal services over a number of other fields will be seriously, and often fatally, reduced. Throughout the greater part of Wales it will become impossible to obtain access, locally, to obtain advice and representation on the whole range of legal issues – not just those to do with criminal prosecutions.
- 4.5 Whilst the consolidation of legal provision, through the expansion of individual firms and the creation of networks and “partnerships” may have benefits in terms of the quality of service provided, there is no reason to believe that such changes will not take place naturally, given enough time, under present arrangements, but without the risk which the current proposals entail of destroying the fabric of legal services in Wales, without providing any effective alternative.
- 4.6 Whilst, in Greater London or other large conurbations in England, access to the allocated provider may be relatively easy, the geography of Wales means that, virtually throughout the country, defendants would be allocated providers whom they will find almost impossible to access, bearing particularly in mind the limited means of almost all criminal defendants and the poorly-developed public transport network.
- 4.7 If, for example, a defendant from Machynlleth were arrested and taken to Aberystwyth for interview and charge, and then allocated a solicitor based in Llanelli (the largest urban centre in the Dyfed-Powys Area) the relevant each way travel times (leaving aside the question of whether

the defendant could afford to make the journey at all) by car and by public transport, (according to the AA route-planner and the Traveline Cymru website) would be, respectively, 2 hours and 27 minutes and 3 hours 59 minutes.

- 4.8 Wales is a bilingual country. Almost 20% of the population speaks Welsh. This is recognised by the Ministry of Justice's own Welsh Language Scheme, which declares the Ministry's commitment to the principle of treating the English and Welsh languages on a basis of equality. Witnesses (including defendants) have an unqualified right to give evidence through the medium of the Welsh language. Criminal cases, particularly in those areas where a substantial proportion of the population speaks Welsh, can also include evidence which directly involves the Welsh language, for example in relation to words spoken in that language. In addition, a defendant whose first language is Welsh will often feel more comfortable discussing the case and his or her affairs generally, in Welsh, with a Welsh-speaking lawyer.
- 4.9 The ability of providers of legal services to do so bilingually, in the ways set out above, is currently facilitated by provision which is locally-based, so that lawyers reflect the linguistic pattern of the communities in which they work. Defendants can also choose to be represented by a provider able to provide a bilingual service. The current proposals involve a totally different pattern of provision, which will inevitably mean a move to a very small number of providers who will almost certainly be based outside the locality, often outside the relevant Area and increasingly even outside Wales and between whom the client will be unable to exercise any degree of choice.
- 4.10 Had the consultation document been accompanied by an assessment of the impact of the proposals on those who speak Welsh (as it should have done had the Ministry of Justice acted in accordance with its own Welsh Language Scheme) we have no doubt that it would have concluded that the impact in question would be seriously detrimental. We stress that what is of importance is that those who wish to make

use of the Welsh language when interacting with the criminal justice system should be able to do so as easily as those who choose to use English. What is at stake is equal access to justice. We find it incomprehensible that such far-reaching proposals should simply ignore the issue of the Welsh language altogether.

5. RESPONSES TO SPECIFIC QUESTIONS

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

We believe that the objections, both in principle and in practice, to the proposed model are so great that it should be reconsidered in its entirety. Our full reasons are set out above.

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.

We do not feel it appropriate, given the nature of our organisation, to respond specifically to this question. The level of remuneration for legally aided work is a matter on which it is for those whose role is to represent practitioners as such. Our sole comment is to make the obvious point that remuneration must be set at a level that attracts and retains good quality providers of criminal law legal services.

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.

Given our fundamental opposition to the proposed model we do not propose to respond specifically to this question. Whatever the length of the contract term, our assessment is that the model will cause permanent irreparable damage to the current market in legally-aided

criminal law services, which is currently one based on genuine competition in relation to quality.

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.

Given the low population density of almost all parts of Wales, but in particular the North Wales and Dyfed-Powys areas, the basing of the proposed model on criminal justice system areas is a major aggravating feature of its negative effect on the fabric of legal service provision in Wales. We recall that Lord Carter's review proposed contracting on the basis of much smaller areas which would be fixed on the basis of careful analysis of the practical needs of the criminal justice system. If the proposals proceed in any form then the resulting damage, although unacceptable in any form, would be lessened if a similar approach were adopted.

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.

We do not wish to respond to 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.

We do not wish to respond to 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.

No. This feature of the proposals is integral to the removal of any element of choice in relation to legal representation, which, as already stated, we regard as highly damaging.

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. A proposal which, for example, limits the number of providers for the whole of the Dyfed-Powys area – geographically approximately one-half of Wales, to four, is, in our judgment, wrong in principle as well as unworkable in practice.

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.

We believe that the model should be reconsidered in its entirety. Any provider who is able to meet the necessary quality standards and who is prepared to provide the service for the rates prescribed should be able to compete (on the basis of quality) for that work. In other words we call for the retention of the current model in preference to the current proposals.

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.

This is an inevitable feature of the proposed model – a model about whose damaging effects we have already expressed our view.

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.

We regard the elimination of client choice as being a highly damaging feature of the proposals. Our full reasons are set out above (in particular paragraphs 4.2 and 4.3).

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

If a system for allocating individual cases between providers is required (and we repeat our views in relation to the model generally) then option 1(b) would be least damaging in that it would at least deliver some continuity in the representation of a particular individual in relation to different cases.

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 or the Court), the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.

We do not wish to respond to this question other than to observe that the problems which we have identified in relation to physical difficulties in accessing the allocated legal representative (see paragraph 4.6) would be exacerbated in the case of a representative from outside the area.

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.

No. We repeat our comments about the importance of choice and the retention of as much competition on grounds of quality as possible.

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*

We do not wish to respond to this question.

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

We do not wish to respond to this question.

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.

Any provider wishing to tender for work in Wales must be able to demonstrate the ability to provide a fully bilingual service in English and Welsh.

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.

Any tender submitted in relation to work in Wales must demonstrate the ability to provide a fully bilingual service in English and Welsh.

Q25. Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons.

We do not wish to respond to this question.