

The LONDON ADVOCATE

Updating the London Criminal Courts Solicitors' Association

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EDITORIAL

Welcome to a special edition of the Advocate – dedicated to the single topic of best value tendering (BVT).

I am sure that members will appreciate just how important the issue of BVT is and how its implementation would have a massive and catastrophic effect on the future of those who practise Criminal law. I therefore make no apologies for this one-subject edition.

The government has told us, “There is no more money in the pot”. We all know that, for whatever reasons, this is true and we accept it. But this does not mean that the government, together with the Legal Services Commission, should embark on a project that will see the wholesale destruction of a large number of specialised practices and the end of the road for the careers of the hard-working and dedicated practitioners who work within them.

Cynics among us may well say there is a hidden

agenda. Let's face it: lawyers who represent those accused of crime are not liked by politicians, the general public and the press. Whenever an opportunity comes along, all three are more than happy to take a swipe at us. The only exception to this is, of course, when they need our services. Then we see how quickly we become their new best friends; those who were regarded as scheming, greedy fat-cats are transformed, at a stroke, into the plucky champions of justice, trial-by-jury and the rule of law.

Cabinet minister Harriet Harman QC said, after the elections for local councils and the European parliament, that the government must start to listen. Well, Harriet, Jack, Gordon, now's your opportunity. Listen to those in the know, those who work at the coal-face and put a stop to this dangerous and damaging idea now.

I await developments with trepidation and a degree of cynicism.

– *Malcolm Duxbury,
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NOTICES

■ COMMITTEE MEETINGS

These take place on Monday evenings. The dates are:

- 13 July
- 14 September
- 12 October
- 7 December.

All meetings take place at 6.30pm at the offices of Kingsley Napley.

All members are welcome to attend.

■ EUROPEAN CONFERENCE

This will be held in Berlin, from 2-4 October.

■ CONCERT

The Witness Service in London will hold a 20th anniversary fundraising concert on Thursday 22 October at 7.30pm. The venue is St John's Smith Square SW1P 3HA.

The concert will be introduced by Lord Chief Justice of England and Wales, Lord Judge, and will feature the Rivlin Piano Trio performing works, including some by Handel, Haydn, Mendelssohn and Elgar. Joy Mammen will perform opera highlights, including some by Bizet, Delibes, Mozart and Verdi.

Tickets, costing £50, £35 or £20 are available from Claire Williamson on 07944 465 334 or CCWS.Southwark@vslondon.org.

All proceeds will go to the Witness Service, London.

■ AGM

The Association's annual general meeting will take place on 9 November.

This year, there is a new venue: Browns Courtrooms, at 82-84 St Martin's Lane, WC2.

NEWS

Best value tendering

The LCCSA has been in the vanguard of a massive campaign in response to the Legal Services Commission's publication of a consultation paper on best value tendering for CDS contracts 2010.

Put briefly, the LSC proposes that solicitors' firms should be invited to enter a bidding process for the

award of legal aid contracts for work in police stations and magistrates' courts.

The Association's executive director, Greg Powell, has drafted a response to the consultation document on behalf of the LCCSA. (A lengthy article by Greg Powell on the subject appears at page 5 below.)

In addition, members have been encouraged to send in their own responses. Unprecedented numbers of London solicitors have voiced their individual concerns to government.

Best value tendering training event

On 12 May, the LCCSA held a training evening on the subject of best value tendering. Over 150 members attended. Greg Powell explained, in full detail, exactly what has been proposed by the Legal Services Commission.

It is to Greg's infinite credit that his audience found that his talk not only made a complicated subject comprehensible, but that it was also highly amusing. Nevertheless, those attending found the evening to be somewhat depressing.

60 years of legal aid: one-day conference

On 15 May, the CLSA, LCCSA and the Legal Aid Practitioners' Group held a one-day conference to mark 60 years of legal aid.

As the future of legal aid has now been brought into question, this event was, in fact, a forum on the effects of best value tendering.

CLSA chair, Joy Merriam, opened the proceedings by giving a rather stark speech on the mechanics of closing a firm. She was followed by Lord Bach of Lutterworth, the parliamentary undersecretary of state for justice. Lord Bach attempted to placate the audience, talking of the aims of legal aid and thanking those present for their work in the field. However, he also said that there was no further money available and that the proportion of money for Criminal legal aid in the overall budget was unsustainable.

Sir Bill Callaghan, chair of the Legal Services Commission, argued that competitive tendering was the best proposal for a suitable future. There was then a very lively question and answer session between the audience and these two gentlemen.



Des Hudson, chief executive of the Law Society, gave a speech in which he described the best value tendering project as reckless. He said that the pilot scheme would be a dead duck, as few, if any, solicitors would take part.

There was a further question and answer session in which Lord Bach and Sir Bill Callaghan appeared to become somewhat concerned at the behaviour of the audience, in particular when they were unable to answer questions.

After lunch, LCCSA president, Raymond Shaw, chaired a discussion on possible alternatives to best value tendering. Paul Marsh, president of the Law Society, addressed the meeting, expressing the Society's opposition to BVT. A panel then answered questions.

The final session was a discussion on how to deal with the tendering process, should it arrive. It was suggested that, if best value tendering is introduced, some 85% of firms will close down.

The Association's campaign

Spear-headed by Paul Harris, the Association has run a lively campaign in opposition to the LSC proposals. Flyers and posters have been distributed in courts and to interested parties across the capital.

The message is clear. The introduction of best value tendering will mean:

- a greater risk of miscarriages of justice;
- the quality of representation will suffer;
- client choice will be significantly reduced;
- the closure of many firms;
- an administrative nightmare.

The response from members has been heartfelt and widespread. The Association thanks everyone involved.

The campaign against BVT is continuing after the close of the LSC consultation process, with new posters and flyers distributed, and a concerted effort to enlist the support of all London's MPs.

Any member who would like to become more involved should contact Paul Harris: Paulh@efbw.co.uk

The petition

As part of the campaign, LCCSA president, Ray Shaw, submitted a petition to the No 10 website. It was worded as follows:

"We, the undersigned, petition the Prime Minister to scrap the move towards best value tendering (BVT) for publicly funded criminal defence services.

The Legal Services Commission's consultation paper detailing its proposals for the auction of contracts at lowest prices (so-called best value tendering) will drive many firms out of business; the quality of service provided by the survivors will decline further and the legitimacy of the criminal justice system will be undermined.

It has been a great strength of the legal aid system that clients have had highly valued relationships with solicitors' firms. They are often 'socially excluded', powerless and in very troubled circumstances. Defence solicitors' engagement with them in resolving problems and achieving best outcomes has both a high personal value but also a positive social value in delivering 'rights' and 'justice'."

By the end of June, this petition had attracted 5,903 signatures.

Legal aid all-parliamentary group

On 2 June, a meeting was held in the House of Commons to launch the all-party group on legal aid.

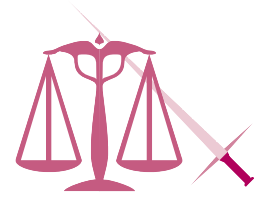
The event was organised by the Legal Aid Practitioners' Group and Young Legal Aid Lawyers. It was chaired by Karen Buck MP.

The group's aim is:

- to promote parliamentary and public understanding of the importance of the role of publicly funded legal services as a pillar of the welfare state and in reducing inequalities in society; and
- to scrutinise and influence any proposals for the reform of legal aid provision to ensure that access to justice for all members of society is preserved and improved.

The meeting was held in a packed committee room 10, where late arrivals were squashed inches away from the speakers, Michael Mansfield QC, Louise Christian (chair of Liberty), Roy Morgan (of LAPG), Henry Bellingham (a shadow minister for justice) and the legal aid minister Lord Bach.

The establishment of the committee was welcomed by the panel and from the floor as an opportunity to open up dialogue between the profession and members of parliament.



BEST VALUE TENDERING – THE ASSOCIATION’S VIEW

The Association's executive officer argues the case against.

A complex and sophisticated legal aid services market

Sixty years of legal aid funding has underpinned the evolution of a complex and sophisticated market in the provision of legal aid services.

On any view a considerable success, this richly diverse market provides national coverage and high levels of service arising from competition by reputation. It is the product of thousands of individual entrepreneurial decisions. Solicitors, risking their own capital and using local knowledge, have met demand by choosing settings which balance accessibility for clients with access to police stations and courts.

Whilst many firms concentrate on providing services to local communities, many also have specialities, serving geographically dispersed client groups, such as travellers or Greenpeace activists, or have reputations for particular kinds of work – as varied as motoring law, RSPCA prosecutions or terrorist cases. Clients are guided by recommendation or by market research, visiting reputational directories and websites.

This market has worked with administered prices set at very low rates. The Carter review proposed the idea of tendering in a market with fewer and larger firms who would benefit from economies of scale available through a reduction in the supplier base.

The culmination of a price-cutting process

The present proposals – best value tendering – can be seen as the culmination of a process of price cutting, coming after a decade of price freeze, reforms which cut magistrates' court payments by rolling up allowances for travel and waiting into the standard fee structure, cuts to the value of very high cost cases and the introduction of a mechanistic mathematical formula to determine the values of cases in the Crown Court. They contain nothing of the Carter model in terms of creating economies of scale and indeed contain proposals specifically to limit growth by restricting the bidding for duty solicitor slots to one eighth of any scheme or CJS

area. It is not reasonable to bring forward best value tendering when the market is still reeling from so many cuts – whose effect has not been evaluated.

Best value tendering, with its minimum and maximum bid proposals, attempts to straightjacket every firm into a specific paradigm of localised work without any regard for the diversity of current provision – which is a major public good because the current structure meets a very diverse client need. The homogenisation of provision which is proposed will, at a stroke, eliminate an enormous amount of expertise, simply for the sake of a bureaucratic plan.

It is not reasonable to bring forward best value tendering when the market is still reeling from so many cuts

Sustainability

Every consultation document and policy pronouncement is framed in terms of sustainability. Nowhere is this term defined but it is often accompanied by expressions like, "We must live within our means" and "There is no more money". There is often reference to the unparalleled rise of the legal aid budget.

But there is no problem with the Criminal legal aid budget. The lower spend on crime, police investigation and magistrates' court representation is utterly predictable; it depends entirely on volume and fluctuates within easily definable parameters.

With the advent of graduated litigator fees in the Crown Court and the complete absence of information from the Legal Services Commission, no one actually knows what has happened with Crown Court spend. It is driven by volume and by prosecution behaviour; it is now entirely out of the control of the supplier base as it depends completely on a mathematical formula applied to each case.

What is not sustainable? In the Legal Services Commission strategic plan, it does not appear that there is any pressure of rising costs in relation to the Criminal legal aid portion of the budget or any overall problem with the budget.



The peculiarities of practising in London

The Legal Services Commission has frequently claimed that there are too many suppliers, saying that there is “oversupply” in London and that too many small firms lead to strains on the Legal Services Commission administrative budget.

There has never been any analysis of supply in London. The claim of “oversupply” may arise from the peculiarities of London's duty solicitor scheme, under which individual solicitors apply for any police station scheme in the borough in which their office is located or any adjoining borough. There has been no upper limit on a number of 24-hour schemes to which a solicitor can apply. This means that it is common for a solicitor to belong to as many as seven or eight schemes, so that many schemes appear to be oversubscribed. But membership of multiple schemes is a compensatory factor for limited numbers of duties in any specific time period.

London is a difficult place to work because it is a huge conurbation and the courts, especially after a series of closures of courts and police stations with the development of fewer charging centres, are widely spread. As a result, the hinterlands of London firms tend to be large. Overheads in London are widely recognised to be higher than anywhere else in the country. (The casual abolition of a weighting in respect of London rates within the best value tendering proposals is a gratuitous further cut.)

As the capital city, London has firms with niche specialities to a larger degree than elsewhere. In this complex legal ecology, it is particularly inappropriate to try an experiment of best value tendering.

The idea that Criminal spend has inhibited social welfare law spend is a myth

Moving the goalposts

Policy incoherence has been a hallmark of the management of the legal aid fund by the Ministry of Justice and Legal Services Commission.

As there is no direct pressure of rising spend on the Criminal legal aid budget and it would appear that the number of suppliers and Legal Services Commission administrative costs are not an issue, the goalposts have now been moved. The Legal Services Commission strategic plan refers to “rebalancing” the spend between crime and civil. No figures are given and no plan is articulated – nor is it directly said that best value tendering will enable this rebalancing.

It is now claimed that it is a policy imperative to rebalance Criminal legal aid expenditure and social welfare law expenditure. This appears to ignore the fact that a major and necessary portion of the rise in legal aid spend was the introduction of face-to-face advice in the police station via the Police and Criminal Evidence Act 1984. Widespread police corruption, the planting of evidence and false confessions propelled the reform of the investigation procedure so as to ensure legal conduct and the integrity of the information gathered for trial. A crucial element of this reform was the right to legal advice and representation. If best value tendering is not successful in cutting costs, then a reduction in scope by the removal of face-to-face advice is apparently contemplated. This would be outrageous and unacceptable and open the door to the revival of widespread police malpractice.

The idea that Criminal spend has inhibited social welfare law spend is a myth.

Extremely low rates of pay in relation to social welfare law cases inhibit suppliers from establishing social welfare law services. Recent Legal Services Commission policy has meant that firms are encouraged to do a greater volume of smaller value – “junk” – cases and to move away from large-scale benefit advice. This has enabled the Legal Services Commission to say, at the end of each year, that more acts of assistance have been provided than in the previous year.

It appears that cuts in Criminal legal aid budget are to be used to further fund this intentional institutional delusion; it will be said that, in the recession, “more people will be helped”.

A fragmenting system

A decade of Ministry of Justice/Legal Services Commission policy has underpinned a series of separations or divorces. At one time, many firms who did private commercial work also provided legal aid services. As a result of complex bureaucracy and decreasing rates of pay, these firms have given up on legal aid work. Similarly, many firms providing multiple social welfare law services have dropped one service or another. And firms have been encouraged to open crime-only practices.

This fragmentation has been driven by the two separate contracting systems for crime and civil work and by bureaucratisation in every area. At one time, claiming payment was relatively straightforward. Now, in every area of work, there is a different, complex and ever-changing payment structure. Claims for work on immigration, housing, family, welfare benefits, mental health, (and, soon, prison law) have become separate oases of complexity and



bureaucracy. Government consultation papers are littered with claims about reducing bureaucracy and simplifying procedures. In reality, what happens is the opposite.

The public good

What surprises us, in the context of “no more money”, is the political failure of the Ministry of Justice/Legal Services Commission to explain the public good which is legal aid expenditure.

At the heart of government policy has been an attempt to tackle social exclusion. Other commentators have referred to the broken society. But this government has drawn ever more people within the ambit of “crime”, has funded an expansion of the prison population and introduced draconian sentences so that, within the prison population, there is a rapidly enlarged sub-population of people serving life sentences. Police forces have been driven towards targets, the range of penalties has been extended and much more fingerprint and DNA records have been gathered. This has criminalised ever greater numbers.

The socially excluded are often the objects of that criminalisation. This overlapping population also seeks housing, welfare benefits, immigration, mental health and family law advice. It is a policy failure to have presided over the unstitching of those services. In particular, separating away Criminal legal aid provision has not helped these people.

Nevertheless, many millions of people, who have been assisted through legal aid and by Criminal law lawyers, have been directly connected to their rights. For every pound spent on an individual problem, a pound is also spent on the wider societal idea of justice. Legal aid spend could be seen as an essential glue, reconnecting the socially excluded to civil society and the idea of rights and justice. For this to be possible, we need a rich diversity of firms who are encouraged by policy and economic leverage to provide the services that communities need.

Cost drivers

In their paper "Demand induced Supply? Identifying Cost Drivers in Criminal Defence Work" (July 2005), Professors Cape and Moorhead presented research which found no evidence that costs were driven by suppliers. They found that costs are driven by volume.

In complex crime, the ever-better funded police and prosecuting authorities take advantage of technological developments to produce greater masses of evidence, in particular, telephone evidence and, in complex fraud, vast quantities of electronic and paper evidence. When the state engages with its citizens through criminal prosecution, resources for

the defence must give those citizens equality of arms. But reform of defence spend has the capacity for degrading that equality and diminishing the capacity of defendants and their lawyers to react to the deployment of the prosecution's resources against them.

The combination of lower prices and higher risk means an inevitable decline in quality

Fixed-fee structures inevitably affect the quality of work

Fixed fees have been introduced in the police station and there is a graduated litigator fee structure for the Crown Court. These fee structures contain risk both for the purchaser and supplier.

For small cases and police station work, the risk of fixed fees can be managed more or less successfully. A certain minimum service is provided at the police station by attendance and the risk of poor value to the taxpayer and purchaser is relatively small.

But there is danger in a new working arrangement whereby it seems acceptable for the police to control the entry of the solicitor into the process. The police indicate when they are ready for interview and precipitate the journey of the solicitor to the police station. The solicitor becomes complicit in that arrangement because of the fixed fee and a desire not to spend too much time in the police station. Police officers allow time to pass before announcing to the arrested person that they are ready but it will take a long time for the solicitor to arrive. That person having already been detained, perhaps for several hours, is induced to take the option of being interviewed without a solicitor because it will be quicker. This type of malpractice is now widespread.

At the higher level of Crown Court fees, risks are much greater. It is in the bizarre nature of those fees that suppliers carry huge risks if they spend a great deal of time preparing a case for trial and then trial does not take place for reasons such as discontinuance, basis of plea, or plea to lesser charges. The collapse of the fee in these circumstances acts a huge deterrent to suppliers to do all the work necessary for trial.

Similarly the extremely low levels of payment for litigators in respect of work which is disposed of early in the Crown Court system means that those smaller cases are now being dealt with for substantially less fees than was the case prior to the new system.



The combination of lower prices and higher risk means an inevitable decline in quality. Not all solicitors will allow their quality to fall and the conscientious may continue, as long as they can, to do the work that needs to be done. But, across the piece, fixed-fee structures inevitably cause falls in quality.

Best value tendering, leading to lower prices and threatened for Crown Court cases in due course, will only exacerbate a trend.

As for assessing quality of work, the consultation paper clearly establishes the lowest possible level: category three on a peer review. Indeed, it appears that peer review is to be abandoned altogether as it represents a costly administrative burden for the assessor. It is to be replaced by revamped key performance indicators. In reality, poor quality of work is likely to go undetected.

There is absolutely no need to couple publicly funded own-client representation with best value tendering contract areas

Own clients

The consultation paper puts forward contradictory propositions about the solicitor-client relationship.

It is proposed that publicly funded own-client work should be limited to schemes where a best value tendering contract is held – an entirely unnecessary and gratuitous attempt to break solicitor/own-client relationships.

Elsewhere, the paper recognises the value of continuity of representation and of the solicitor's knowledge of his or her long-term clients. Indeed, the market force of competing by reputation is explicitly commended. Although firms would be limited to a maximum of one eighth of the duty solicitor slots, there would be no maximum in relation to the amount of own-client work in the area where the best value tendering contract was held.

But there is absolutely no need to couple publicly funded own-client representation with best value tendering contract areas. To do so would break linkage, degrade firms' business models and lead to lower levels of client satisfaction.

Where a client is involved in multiple cases across best value tendering scheme areas, this policy would lead to chaos and would be of no assistance whatsoever to that other important stakeholder, the court. It is common for cases to be collected together in one court for the purpose of sentence and for one

solicitor, who has control of the entire process, to possess a clear understanding of what is going on which often eludes both the court and the CPS.

Managerial resources

Put simply, firms do not have the managerial resources to act in the way that is contemplated by the best value tendering consultation document.

Firms are very diverse, but usually very small in business terms; their managerial capacity is usually overstretched; they spend a high proportion of their time actually delivering legal services. (That money delivers face-to-face services is one of the effective outcomes of legal aid expenditure.) Firms generally do not have sophisticated financial modelling, internal accountancy staff or statisticians who can write or operate sophisticated bidding programmes.

Under the current proposals, a firm in London, wishing to maintain a presence within the 32 best value tendering scheme areas – and therefore to be able to do publicly funded work for own-clients – would have to manage 32 simultaneous auctions over a series of bid rounds, moving volumes, changing prices, making exit bids and hoping to achieve an outcome which makes some business sense.

Frankly, firms do not have this capacity. They are likely to bid in volume and to remain in the bidding to whatever price is finally determined. Then they will adapt their business model according to the price outcome. This is the opposite of the model contemplated by the best value tendering consultation, which envisages firms modelling their business at certain prices. In reality, the price outcome will be the tail that wags the dog of the entire business. The likely consequence may well be eventual bankruptcy.

The Crown Court litigator fee system has rendered the management of businesses a lottery. Previously, fee earners would be paid for the hours they worked, subject to an audit process. It was possible to keep track of this. Now, a huge amount of work can go unpaid, as payment is dependent on what happens in the case.

This means that law firms can only survive if, from time to time, they are lucky enough to do a high value case – one with a reasonably lengthy trial, lots of paper and a grave charge. Whether such a case comes along is a matter of pure chance. For their very survival, firms become like Jack's mother, hoping that a golden egg will suddenly fall from the sky.

Businesses have become impossible to manage. The cost, in people and time, of having to deal with a best value tendering process, is simply untenable.

*– Greg Powell
Powell Spencer & Partners*



BEST VALUE TENDERING – THE CONSERVATIVES' VIEW

The writer is a shadow minister for Justice

On 2 June, over 100 solicitors and barristers turned up at the House of Commons for the inaugural meeting of the all-party legal aid group. This amazing turnout was almost entirely due to their anger and dismay over the LSC's recently published second consultation on BVT, and the MoJ's proposals for sharp reductions in the family advocacy scheme.

This anger and outrage is also borne out in virtually all the regular visits that I make around the country to different law firms and courts. Large numbers of family law barristers and criminal practitioners now fear for their very future, and I have never known morale at such a low level.

The spend

Has spending on criminal legal aid been getting out of control? Although it has increased by 29.8% since 1997, it is worth remembering that spending on legal aid has actually fallen from 0.499% of total public expenditure in 1997/8 to 0.389% in 2006/7 – a reduction of 22%! Over the same period, expenditure on the Crown Prosecution Service has actually risen by 91%, and the figures for the Serious Fraud Office are 123.7%!

What are the current cost drivers of the criminal legal aid budget? Of course, with only 1% of all cases taking up 49% of the budget, it is obvious to me that maximum focus must be placed on the VHCCs, but what about the rest of the landscape?

Many criminal law firms report a significant reduction in their workloads, and one local magistrates' court reported a 33% reduction in charges arising from the police. This is hardly surprising with the reintroduction of means-testing which has seen a 22% fall in the number of representation orders being granted. Furthermore, the police are now disposing of more cases than ever without bringing matters to court, through fixed penalty notices and cautioning – and this trend is set to increase with the greater use of targets for conditional cautions.

With their latest BVT proposals, the LSC are targeting the very part of criminal legal aid that is not actually putting any pressures on the budget. This seems to us to be completely perverse.

Going out of business

As a centre right political party that believes in a free market, we have regularly championed both compulsory competitive tendering and BVT. Although they have worked particularly well in local government, the criminal defence profession could not be further removed from what goes on in our town halls! There is a single buyer, namely the LSC, and many sellers. A buyer can control this monopsonistic market (as economists call it) by setting prices and volumes of work. By introducing fixed fees, the LSC has set prices, and will now attempt to control the volume of work by specifying the amount of work for which firms should tender. Controlling volumes of criminal work is obviously problematic because they are determined by factors largely beyond the control of the LSC and firms.

As Rodney Warren, Director of the Criminal Law Solicitors' Association pointed out: "Firms will bid for work at the price the LSC sets because they are desperate for work. The LSC is selling something it does not have at a price it says it cannot afford!" If the LSC gets it wrong, then the bids simply go to the lowest bidder, and, not only does the LSC get a service that the chosen firm cannot deliver, but the competition simply goes out of business.

When it comes to local government or the health service, unsuccessful suppliers in a bidding process have a good chance of staying in business, because, if they lose one contract, there is always another one around the corner. Little wonder that so many criminal legal aid practitioners are fearing for their very future.

Realistic cost of BVT

The introduction of BVT also represents a huge challenge to the LSC itself. Running any tendering system is not without its costs and between 5%-10% of the total cost of a public service can be absorbed by the procurement process. As Steve Hynes has pointed out in his brilliant recent publication, *The Justice Gap*, "the LSC plans to do this at a time when it is seeking to reduce its own administrative costs and could risk organisational meltdown in the process".

Will BVT actually save a significant amount of money? The LSC have made no effort at all to quantify any future savings. Why has there not been a proper in-depth study of how BVT has operated in places like the United States? For example, in San Diego, BVT has actually led to a significant increase in criminal defence



service costs. Numerous reports show that, if smaller firms are squeezed out of legal aid, not only will they be gone for good, but soon larger suppliers will build up monopolies and push up prices.

Opposition approach

So, it is not surprising that both the shadow secretary of state, Dominic Grieve QC, MP, and I have always had serious reservations about Carter's application of BVT to legal aid. This is why our first plea to the government is to look again at what is happening in police stations and magistrates' courts and ask the question whether BVT is needed at all.

Far from adopting this cautious and practical approach, we understand that the LSC are now planning merely an evaluation of the actual tendering process – rather than a full evaluation of the impact on the market after a period of operation. This was, of course, what was originally promised by Sir Michael Richard, former chairman of the LSC. What he said was, “before we make any further decision on a phased national implementation, we would propose a full assessment of the impact of the pilot”.

As an Opposition, we are appalled that the LSC appear to be reneging on their original assurance. Given all the confusion that this is bound to cause, and also given the proximity of the next General Election, surely the secretary of state should now put the whole process on hold. This would enable an incoming government to not only assess all options, but to move forward with proposals that commanded the support of practitioners

up and down the country.

The Conservatives are currently urgently looking at a number of interesting and imaginative ways of trying to bring new money into the legal aid budget from sources outside the MoJ. Not only are we very keen on the Bar's plans for a contingency legal aid fund, we also feel that Robin Murray's New Deal for Legal Aid merits careful consideration. We also believe that a significant extension of before-the-event insurance cover could greatly improve access to justice. We also want to look at the polluter pays concept, which could bring in a significant amount of money from other government departments. Finally, we want to examine the French scheme which relies on topping up the legal aid budget with small percentage levies on the interest earned from client accounts.

Of course, I entirely accept that none of these ideas represents some magic solution to the legal aid crisis. However, when taken together, they could well bring in more money at a time when we are most unlikely to receive any more assistance from the Treasury.

In conclusion, surely access to justice must be an absolutely key priority for any incoming government? We should be incredibly concerned about the lasting damage being done to legal aid practitioners. Furthermore, we should also look at radical ways of increasing the current £2bn plus that is spent on legal aid, whilst appreciating that, in the current period of financial austerity, further funding from the Treasury will not be possible.

– Henry Bellingham MP

BEST VALUE TENDERING – THE LIBERAL DEMOCRATS' VIEW

The writer is Lib Dem shadow minister for Justice

The Ministry of Justice's second consultation on this subject is an unwelcome return to the disasters of the Carter report.

The government claims that best value tendering is necessary to contain the cost of legal aid. Clearly, now is not the time to make extravagant promises about higher public spending. But that does not mean that we should lose sight of the purposes of legal aid. First, legal aid allows people to vindicate their rights – particularly those who would not be able to do so otherwise. What would be the point of the courts if they did not vindicate these rights in practice? Secondly, legal aid promotes equality, by ensuring that people are not put

at a serious disadvantage in the courts by reason of their lack of resources. Criminal defendants are perhaps the most unpopular group of people, and the civilisation of a society can be measured by the extent to which it safeguards their right to a fair trial. For these reasons, the details of best value tendering are not some technical irrelevance; they are potentially fundamental to the workings of justice in this country.

The MoJ model

The model that the Ministry of Justice proposes to pilot involves providers bidding for a volume of slots in police stations and magistrates' courts. The bidding will occur online and respond to administratively set prices. In effect, this amounts to an average fixed-fee system



with a bit of competition. This has a number of dangerous implications.

First, it will force providers to undercut each other's prices while lowering quality and taking on undue risk. Readers will know only too well that the cost borne by the provider for each particular case can vary drastically. Nuances in complexity and the individual needs of the client can send the costs rapidly skywards. Under the model proposed by the government, firms will be forced to take the risk that these varying costs will average out.

This risk, combined with the competitive bidding process, is likely to drive many local providers out of business. Simultaneously, those firms that do win contracts will be forced to lower the quality of the representation they can offer. The proposed model suggests numerous forms of quality control but we have not seen how such quality assurance will fare under the pressure of the bidding process. On 1 June, The Times reported how best value tendering, for the care for palliative and dementia care patients leaving hospital, has led to an appalling decline in quality of care, despite a supposedly thorough system of quality assurance. Legal aid might easily take a similar turn.

A second problem is cherry-picking. Economically rational providers will take on only those cases that they can deal with within the set price and let others go. The authorities say that they will deal with that with the contract, but how will they know when there is cherry-picking? If they threaten to take contracts

away, they will have to give them to another firm, or the threat will be empty. If, as we suspect, an effect of the system will be to wipe out vast swathes of other providers, there may be no alternatives.

The final problem is that this model of best value tendering undermines choice. A fundamental question for people who are represented is, "Can I trust this lawyer?" What happens if someone has been represented by a lawyer previously, had a bad experience, and wants to go to a different lawyer, or if they want to change lawyers between the police station and the court?

Rational plan

The trouble with the government's approach is that they began with the solution they wanted, without analysing the underlying problem at hand. Instead, the reasons behind the rapid increase in legal aid expenditure need to be analysed. For example, what lies behind the marked increase in expenditure on criminal appeals or expert witnesses? Only when we have answered these questions can any rational plan be developed to contain costs. In the mean time, the fixed fee system should go. In its place, the solution with the widest support seems to be the idea of graduated fees.

The government needs to be tendering the best value for justice, not justifying best value tendering.

– David Howarth MP

TRAINING SCHEDULE 2009

Date	Title
16 July	A refresher course and practical guide to defending sexual cases
10 September	A practical guide to appealing criminal cases
17 September	Your First Days in the Magistrates' Court
24 September	A guide to POCA, cash seizures
29 September	Youth Court Law & Practice Part I
6 October	Youth Court Law & Practice Part II
15 October	Criminal Law Update I
22 October	Criminal Law Update II
29 October	Costs Update



MAN OF STRAW

Camberwell Green Council Tax Court 15 January 2010

DJ: Yes, Mr Straw, I understand that you declare yourself completely innocent of the charge*, but you can't have jury trial on it any more – your own legislation, remember? The trial will take place now, got to keep the figures up, it's four hours after charge already. Are you represented?

What? ...Sorry, you can't have Victor Lissack, they are a niche practice defending parking tickets now. Let's see who's interested. *[Picks up gavel]*

What am I bid for a summary trial, four prosecution witnesses and a lot of paperwork? Last till 7.00 I suppose? Any takers? Starting at £200?

Let's try Geoff Wordsworth at Mackeseys. *[The in-court screen lights up with a view of a somewhat pink Geoff, drenched in bling at his poolside in Florida.]*

Interested, Geoff? £200?

GW: Only if he's pleading. That money won't empty the Bentley's ashtrays.

JS: But I am not guilty!

DJ: Look, do you want representation or don't you? Geoff's a great advocate, he can keep an eye on that barbecue at the same time; he's been doing it for years.

We have got £200. Anyone do it for less? We have a standing offer from Tuckers; their trainee will do it for £150 or £175 for someone literate. Can't get the legal aid top earner for less!

Wait, we've got Venters!

[Screen cut to Venters' receptionist, a phone clamped to each ear, typing with her nose.]

Opportunity here, Jack: she got bail for a blagger last week; got potential!

£140? That's more like it!

Do I hear £100? £100? We can usually get someone from GT Stewart for that price...

[Cut to "Mansfield" – a scruffy tom-cat, face down in a bowl of Whiskas.]

No, I can see he's preparing a carousel fraud...

What about Bruce Reid? Semi-retired in the Himalayas now, of course. We'll try anyway.

[Cut to Bruce with his hand inside a yak, snowy peaks in the background.]

BR: Can't get this calf out. Poor thing's been in labour

for hours. I'll be another 30 minutes and then I am patched into the youth court for a quick plea. Start it without me; I can do the second half for £100, forget the papers... Jack Straw? Love to...

[Bruce's eyes gleam.]

DJ: Looks like it's Bruce.



Going once...

[Straw's face is now ashen.]

Twice...

[Straw close to vomiting.]

No, the office cat at GT Stewart is back!

[Cut to "Mansfield", who looks at the screen with a cross between a meow and a burp.]

He's finished! He'll do it for another bowl of "meaty chunks in gravy". Can't get better than that!

JS: Stop! I give up! I'll defend myself. I'll do it for nothing!

DJ: Can't do that; you are not a registered supplier. Oh, if you must! Just sign this 74-page bidding document. What do you mean, "Read it"? No time for that. Call the first witness!

*Jack Straw, the Justice Secretary, only paid half the amount of council tax that he claimed back on his parliamentary allowances over four years. In his letter to the House of Commons' fees' office, he said: "Accountancy does not seem to be my strongest point."

– Bruce Reid

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