LEGAL AID

LSC 'Improving value for money' plans: a critique

The long-awaited consultation paper from the Legal Services Commission (LSC) entitled *Improving value for money for publicly funded criminal defence services in London*, on competitive tendering, has already met with a storm of disapproval from criminal lawyers. **Jane Hickman**, partner at Hickman & Rose solicitors, in London, predicts that lawyers' opposition is likely to grow as the full extent of the proposals' impact sinks in.[1] The closing date for consultation responses is 29 April 2005.

Improving value for money (unlike many LSC documents) shows every sign of careful drafting, both in its language and in a number of pre-emptive comments clearly designed to forestall any litigation. The paper also spins itself as a contribution to the debate on both justice and value for money.

The paper proposes a scheme of startling simplicity. Criminal firms that meet a set standard in peer review of their files would be eligible to compete on price for a share of magistrates' court and police station duty solicitor rotas. Those firms that bid at the lowest price would win all they bid for. When all slots have been allocated on price, the firms that bid unsuccessfully would no longer do duty work. The LSC's *Annual report 2003/2004* gives a national, average price per lower court case of £504. The illustrative example in *Improving value for money* works on a figure of £300, which is only 60 per cent of the current national average price. The savings to the public purse are potentially massive. The paper makes no attempt to predict the effect on the market, save in bland assurances that the new scheme will assure quality and bring about value for money.

Criminal lawyers cannot complain of lack of notice; it is a scheme envisaged in the 1998 white paper, *Modernising Justice. The government's plans for reforming legal services and the courts*.[2] The real shock lies in the LSC's approach to quality. It had been widely anticipated that the LSC would evaluate bids on quality as well as price, as announced in November 2003 by LSC member, solicitor Anthony Edwards. However, the LSC now says that it lacks the tools to make sufficiently robust judgments on quality. It wants to move away from management audits and proceed (after the first round of blood-letting) with the 'preferred supplier' relationship. Criminal lawyers need wrestle no more with job descriptions, appraisals and non-discrimination policies; all that matters is price.

The reasons for the LSC's volte face have not been publicly disclosed. It would be instructive to know how and why market economists have won the battle with legal aid policy experts. One imagines that the risk of litigation from disgruntled criminal firms grew ever more apparent. Fifteen years of research on proxies for quality and different auditing styles were, therefore, abandoned save for peer review, lately trialed on a small number of firms. The LSC's final decision was to reduce the size of the market on price and worry about quality later.

Overcapacity in the market

Improving value for money draws heavily on the 2004 report commissioned by the Department for Constitutional Affairs from Frontier Economics.[3] This research found that 44 per cent of firms in London were willing to take on more work. This, the researchers said, was evidence of overcapacity in the legal aid market. Such research was hardly necessary; only a hardy few deny the oversupply of criminal solicitors in London.

The main saving that the consultation paper envisages is travel and waiting time. It does not mention the potential savings from reform of the duty solicitor scheme. At the moment, slots on each scheme are divided equally between accredited duty solicitors. In London, as the number of duty solicitors has grown, the slots have been shortened and redivided many times (for example, the Highbury scheme, in north London, had 30 duty solicitors in 1991 and has 292 in 2005). Solicitors are now on duty only a few times each year, and never for a full day. On the Highbury scheme, there are, on average, only 14.8 notifiable charges per year for each duty solicitor. Each solicitor may be on five to eight schemes, but it is hardly a crushing caseload. In London, overcapacity has led to cut-throat competition for clients and significant market distortion. Firms depend on new clients from duty schemes (as old clients give up crime or go to jail). To increase their share of work, London firms compete for duty solicitors who, consequently, command a significant salary premium over their civil colleagues. There is insufficient work for all these duty solicitors, and nothing left over to delegate to lower paid staff.

The duty solicitor scheme, the great engine of growth, will now be reformed. In the process, many law firms will close and a great number of solicitor posts will go. A very large amount of money will be saved. No one can really complain if the government keeps legal services provision under review and makes savings where possible. The only legitimate complaint arises over quality.

The question now is whether the LSC has got the right solution? Will reasonable quality survive untrammelled price competition?

Bid panels and quality

Improving value for money suggests that quality will be assured by peer review and measuring outcomes. Since the paper does not explain this claim, it is hard to evaluate. Over the past 15 years of research, no one has found a satisfactory way to measure outcomes. If there were one, it is hard to see the point. Perverse incentives to secure acquittals would not cohere with other government policies. The outcome measures to which the consultation paper refers are apparently those obtained from outcome codes under the present scheme. This provides useful information only about price.

Peer reviews are obviously important, and could help raise the quality of work. Including them in the bidding process is positive, but far from sufficient. Peer review of paper files picks up what individual firms choose to record. Quality resides in what happens in reality, not in what the file says. Files may say that advice has been given when, in fact, it was not.

There have been countless examples of cheating at franchise audit (where, in reality, almost nothing was at stake). It is easy to imagine the pressure on a quality manager, in a firm whose multi-million pound future hangs on the 20 files selected for review, to tidy up the paperwork before handing them over.

Furthermore, peer review, in practice, will not be frequent enough to protect clients. Firms with serious quality problems will be able to start up or continue in practice for some time (using their appeal rights) with disastrous consequences for their own clients and the integrity of the system. In order to establish whether quality runs all through the work (and not just through the paper trail) additional scrutiny is needed. The introduction to *Improving value for money* refers to 'risk-based assessment', although later on this turns out to

be a combination of peer review and outcome measures.

It is a shame that the LSC has not taken the opportunity to introduce genuine risk-based assessment. Law firms need to undertake many risk prevention activities that are not manifested on clients' files to meet quality objectives. Firms need to operate a genuine, robust complaint investigation system, provide active and up to date supervision and carry out file reviews. A firm that is running properly should be able to demonstrate how and when it has taken remedial action to deal with poor quality work (which is still manifested by a significant proportion of both criminal defence trainee and qualified lawyers and needs constant attention).

In addition, it is vital that criminal firms maintain an ethos of integrity and openness towards the court. Correlating all of this with peer reviews could provide a really robust set of proxies for quality.

It remains a mystery why the LSC has virtually given up on quality. The savings made from halving the number of criminal defence lawyers in London would more than cover the cost of a decent auditing regime. The cost implications of inefficiency, error and non-performance for the rest of the criminal justice system should make quality a burning concern for the LSC.

The bidding process

The paper says that there will be no negotiation with firms on price, even though the gap between an inferior firm and an excellent one may be tiny. This is, effectively, a system of sealed bids. It is clearly not the way to meet the Criminal Defence Service's statutory objective of 'value for money'.

According to *Improving value for money*, the option of a quality/price-based tender was considered and dismissed on the ground that firms had insufficient experience of tendering. This is an odd argument. Marshalling evidence and presenting a case is part of what lawyers do all day. The LSC has been signalling vigorously for years that competitive tendering was to come. No firm can have missed the advice to ready itself. Most of the larger firms have detailed plans for tendering on quality as well as price. It is extraordinary that the quality/price option has not even been tried. If it were tried and failed, nothing would prevent the LSC from choosing on price. As it stands, the LSC will not even try this option.

This is a surprising abrogation of the LSC's responsibility for quality of work. Frontier Economics' report recommended competition on quality as well as price. The LSC's bare assertion that price competition can be moderated by a quality floor is insufficient to protect clients unless that base is extraordinarily robust. This condition is absent.

Advantages of price competition

Competitive tendering is a rapid and brutal way of rationalising the market. However, it must hold several attractions for the LSC. First, it really would find out (and very quickly) the cheapest rate at which criminal legal aid can be delivered. This has the potential to save a good deal of money. Second, it would sort out which firms are content to work within this kind of framework, and slay ideological opponents at one stroke. Third, it would be proof against any form of judicial review (it is never irrational to let the market decide). There could be no claims of discrimination. Finally, it would dispel any suggestion that the New Labour government treats lawyers any better than other publicly funded service providers.

The outcome of price competition

The paper offers no predictions at all about how price competition – a fearsome weapon – will impact on the system. It would be surprising if the LSC had not considered the various scenarios that could emerge under price competition. If it has, these should be spelled out before the proposals proceed. Research on NHS price competition suggests that adverse consequences often outweigh any gains, for example, by destroying centres of excellence and stripping out infrastructure that has been assembled over years.

Competition on price would produce its own perverse incentives. Having bid a low fixed price per case (£300 is the guideline figure in the consultation paper) there will be a strong incentive for lawyers to avoid trials. This could push the clock back to the early 1970s, when defendants were routinely urged to plead guilty irrespective of the facts.

Similar issues face high maintenance defendants who push up the average cost of a case. Those with mental health problems or chaotic lifestyles will be unwelcome as 'own clients', and may be passed around through the duty scheme every time they come into contact with the law.

There is a distinct risk that the firms which disregarded a decade of urging from the LSC to install expensive IT systems, will win price tendering because they do not carry the same debts as those that heeded the commission's advice. If such firms are lost, the public investment that they represent goes with them. (The counter argument to this is that if an IT system pushes up cost, it is a bit pointless; however, firms will retort that it was the LSC's choice that they installed it in the first place).

If the LSC does not restrict the proportion of work that firms can outsource, we will also see firms vying to subcontract work at the lowest rate. This will result in 'hollowed out' organisations that are in no position to assure service levels to their clients. The LSC is a monopoly purchaser, and will have perfect information about the market. This will allow it to achieve perfect competition – the lowest rate at which services could be provided. As the new regime progresses into further bidding rounds, the firms that respond best to the perverse incentives to avoid summary trials and disruptive clients will turn in cheaper bids. Unscrupulous and uncaring lawyers will be rewarded more with every contract round.

Conclusion

The LSC has opted for remarkably short contracts of one to three years, which will further exaggerate market turbulence. In London, there is little office accommodation on leases for fewer than five years. Investment in IT is usually planned and financed on a three- to five-year cycle. Where contracts are changing hands every year or two, there will be few lawyers who want to take the risk of being left with massive debts. Short term contracts will tend to inhibit firms from investment in premises, training and infrastructure. The short term over-supply of lawyers in criminal practice could turn, very quickly, to a shortage.

All of these outcomes will have an adverse impact on defendants. Equally, they will affect the rest of the criminal justice system, which had been looking to increase reliance on IT for efficiency gains in the near future. The impact on quality of perverse incentives is likely therefore to be cumulative, with long-lasting damage. There are many examples of irreversible damage in other areas of public service that have moved to competition and outsourcing. This is particularly pronounced in areas where expertise and experience are required, such as railway maintenance. The impact on the criminal defence service would be equally dramatic unless the LSC begins to insist on – and assess – quality. There is still time for such measures to be included and built on; if the LSC fails to do so, whomever succeeds Clare Dodgson, the commission's current chief executive, is highly likely to rue the day that the competitive tendering scheme came into force.

1 *Improving value for money for publicly funded criminal defence services in London* available at: www.legalservices.gov.uk.

2 Available at: www.dca.gov.uk/consult/access/mjuspap.pdf, and from TSO, £9.20.

3 *A market analysis of legal aided services provided by solicitors*, available at: www.dca.gov.uk.