Jane Hickman, a partner at Hickman & Rose solicitors, and Sue Pearson, a partner at Bowser, Ollard & Bentley solicitors, respond to Dexter Whitfield's article, 'Marketisation of legal services', March 2007 *Legal Action* 6, and explore strategy and delivery in legal aid practice. In May 2007 *Legal Action*, Michael MacNeil will finish this series of articles by looking at notions of democratic accountability and the need to build a user's perspective at the strategic policy-making level.

The legal aid market

Introduction

Dexter Whitfield links Lord Carter's recommendations for reform with Labour's marketisation policies. But in assessing the proposed changes it is worth remembering that legal aid has always been delivered by the market. Unlike other post-war Labour policies, the Legal Aid and Advice Act 1949 involved neither nationalisation nor any detailed central planning. It was the first experiment outside wartime in the systematic purchase of publicly funded services from the private sector.

Like all markets this one has delivered many unintended consequences including the 50-fold real money increase in budget from 1949 to 2001 when costs were capped. Other unexpected features have included the dogged commitment of three generations of providers and the altruism of its most able lawyers who chose to forego the fabulous incomes available in commercial work. But, despite all the expenditure and all the commitment, access to legal assistance is patchy and quality not guaranteed.

There are swathes of the country where legal advice is inaccessible and unevenly dispersed. In urban areas there is an excess of supply, driving up the cost of doing the work. The 1949 government would not have planned a system which provided 488 criminal law firms in London, and none in stretches of Suffolk and Norfolk. Nor would it have left much of South Essex without a housing lawyer.

Over-supply has sapped providers and left them hungry for work.[1] In *An inquiry into the nature and causes of the wealth of nations* (1776), Adam Smith remarked on how little curates earned compared with master masons (the anecdotal plumbers of the 18th century). From medieval times, he pointed out, public charity educated an excess of poor scholars whose only hope of work lay in seeking holy orders. Since entry to the curacy was easy, its numbers grew apace and wages fell. The parallel with modern legal aid is striking.

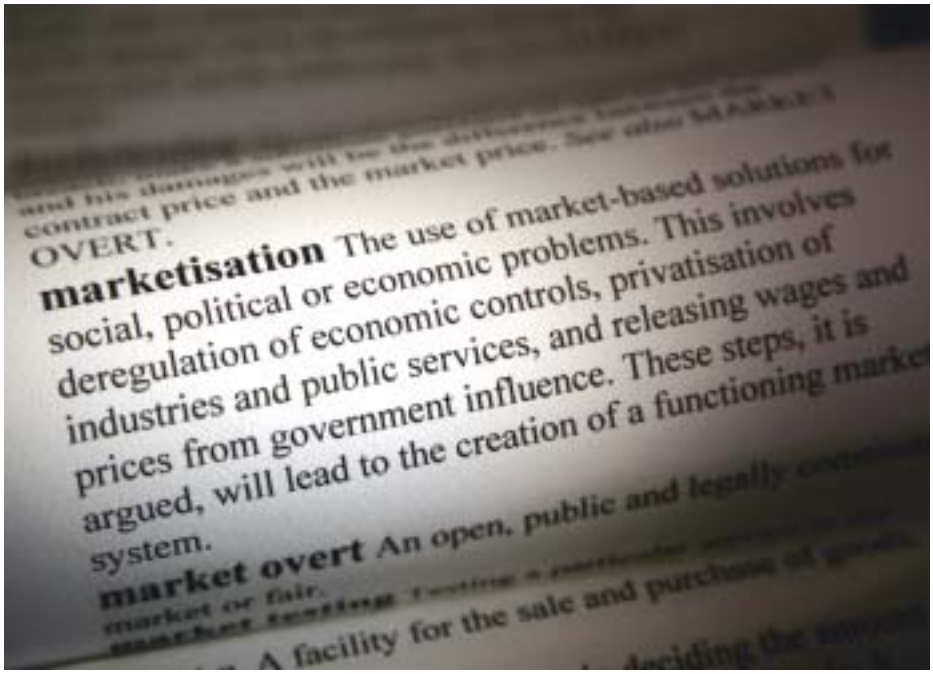
Insufficient work for lawyers has resulted in gaming. Legal aid lawyers win continuing professional development credits learning to squeeze the most from legal aid, queuing up for courses like the shamelessly entitled 'How to make crime pay'. Over-supply also leads to excessive work done on cases, both to drive up fees and to win over clients, a phenomenon also identified in the US private healthcare market and referred to as the 'medical arms race'.[2] Like all markets, legal aid supply exhibits moral hazards such as cheating and shirking, and there is a steady flow of cases in the Court of Appeal alleging substandard work.

The Legal Services Commission (LSC) has struggled for a decade to cope with this unplanned market; trammeling it with quality standards; battering it with audits; choking it with price freezes. The government has sought to control costs by removing entitlement to help for many legal problems (including personal injury). But there has never been the will to clamp down decisively on shoddy practice and it has never redirected a new firm to an area of unmet need. Strategic planning is impossible in the system as it stands. Legal aid therefore remains a misshapen creature that fails to meet the needs of the public as it should, for all the altruism of individual lawyers.

Efficiency in commercial firms

There is a wealth of precedent in commercial practice for rationalising legal services, overlooked by critics such as Dexter Whitfield whose gaze is focused on the public sector. Giant corporations which need to buy in legal services have been enjoying the gains obtained from rationalising their supplier base, redefining the task and seeking tenders. The classic case study is the US chemical firm DuPont, which, in 1991, reduced its 314 external law firms to 34.[3] It enjoys an improved service, lower costs and a very successful partnership relationship with the 34 firms that remained. Early in 2007, Linde AG, the global gas and engineering group, cut its law firm panel from more than 150 to only five and aims to establish closer relationships with the winning firms including the UK's Linklaters.[4]

There is a useful set of classifications devised by former Harvard Business School Professor David Maister which helps to explain this.[5] Maister divides different types of legal service into the three 'Es' according to the expertise, experience or efficiency which they require. Expertise work is original, cutting-edge stuff, which on legal aid is most likely to arise in public law. It calls



JOANNE O'BRIEN

for a few centres of excellence where such skills are fostered, perhaps alongside private and conditional fee arrangement work. Experience work is complex but not novel, and requires specialist attention from lawyers with years of experience. Efficiency work like routine personal injury, debt recovery or routine domestic conveyancing lends itself to bulk supply, can be mechanised, and is marketed on price (with quality simply part of the specification).

As technology advances, more and more law can be automated. Scarce resources are best spent on delegating this kind of work to less expensive staff and monitoring their progress with IT. What clients for such efficiency services may lose in personal touch or responsiveness they will almost certainly gain in quality control, speed and value for money. If savings are then spent on improving access to legal services in other areas this is a Benthamite good. A small percentage of the remaining work will fall within the expertise and experience categories. It should be handled by dedicated units of skilled lawyers who have enough work to delegate that which could be performed by a paralegal.

In this light it is clear that Community Legal Advice Networks designed to deal with simple problems cheaply in areas where access is poor, and to limit lawyer input to where it is really needed, are potentially a designer solution to a 60-year-old problem.

For the legal aid market to move decisively towards this kind of stratified service is therefore not the beginning of the end. Unless given a powerful shove in this direction legal aid will remain expensive for the state, inefficient for recipients and unsatisfying for lawyers. But change is hard to implement where there is natural inbuilt resistance from providers. Price competition is a crude but powerful engine for rapid change. It will force lawyers to maximise delegation and will reward investment in useful technology. It occurs without subjective judgment on which providers should survive so is proof against litigation, which is no small consideration when trying to reform a lawyer-led service.

Inevitably, this will be a destructive process as well as a creative one. It will be painful and will arouse opposition but the alternative is fragmented and unplanned legal aid services lacking the modern technology and workflow organisation that private clients get without question nowadays.

The move to reform legal aid provision could, therefore, be viewed as a welcome assertion of the role of the state in planning public provision. The aim is to use carefully designed market incentives to reshape supply. This is where the questions ought to begin.

Quality concerns

The purpose of legal aid is to provide fair trial processes and to prevent legal and economic problems aggravating social exclusion. It is also to enable other social welfare systems, as well as the criminal justice system, to work properly. It is a waste of money to purchase legal services below the quality levels required to achieve these objectives and quite unfair that some people cannot access these services because of advice deserts. Will the price mechanism which Lord Carter recommends direct resources where they are most needed, in particular to rural areas and neglected areas of law, and will it preserve adequate levels of quality while doing so?

Here it is useful to look at the public sector, which has endured 25 years of 'improving efficiency' via contestability and public choice thanks to the ideologically driven process known as 'new public management'. Evidence of its benefits in health and education is patchy, despite its ubiquitous nature.[6] When private firms deliver public services, improving productivity by simply cutting inputs may damage quality and fail to meet other objectives. Research on the NHS internal market which brought about greater competition between hospitals found a decrease in the quality of outcomes as measured by higher death rates following hospital admission for a heart attack.[7] Something more is needed to ensure that new arrangements offer real improvements.

For many years there have been calls for legal aid quality to be assured by peer review.[8] There has been a widespread welcome of the start of peer reviewing and the preferred supplier scheme which depends on it. However, the purpose of peer review is beginning to look somewhat obscure. Having spent 15 years exhorting firms to deliver quality,[9] the standard required for the first round of price competition in criminal work is only 'threshold competence'. The LSC also now says that firms will be peer reviewed only once in the 30-month period leading up to competition. These two facts combined remove any serious quality floor from legal aid. Peer review needs more teeth and more resources.

Specialists need protection

If it is wasteful for experienced lawyers in firms with insufficient high-level work to pad out their billable hours with efficiency work, the reverse is also true. It is quite wrong for lawyers to be pushed to delegate too far or to skimp on difficult work. There are numerous structural flaws in Lord Carter's proposals where over-delegation threatens to undermine the interests of justice.

Various specialist areas of law will come under pressure from fixed fees.

Typically these are cases which require high levels of skill, where a great deal is at stake and where there are wide variations in the amounts of work needed. Fixed fees will be highly damaging in these areas and steps must be taken to retain expertise in them. These include complex non-Very High Cost Case Crown Court cases for which Lord Carter's sums are now being revised by the LSC. In family work, children's care work should become a funding category in its own right, with specialist panel status required to deliver this service. This would acknowledge the need for specialist skill and enable it to be adequately remunerated. There are many other areas where similar considerations apply.

Altruism rejected

But perhaps the worst mistake the LSC is making is to embrace with over-enthusiasm the government's theory of what motivates people to deliver public services at all. As so often now occurs, well-intentioned reforms are perceived to kick altruistic providers in the teeth. The message seems to be that only money counts.

According to a King's Fund paper, new NHS contracts for hospital consultants which failed to recognise altruism have added considerably to cost and have undermined professionalism.[10] The paper quotes one hospital manager as saying:

We now have very well remunerated doctors and greater clarity about work. The cost has been a loss of sense of vocation and what it means to be a professional and self-directing.

The same effect is clearly emerging in legal services. The government might have hoped that quality providers would see the benefit of change and lend it some support. Instead there is already a palpable sense of outrage from legal aid providers of every kind towards the LSC and the government for the way in which reform is being conducted. To have united such a diverse and fragmented profession in unanimous opposition to these reforms represents an extraordinary failure to communicate and to lead.

The inclusion of a much firmer commitment to quality, and a promise that funds released in the shakeout would be redeployed to other areas of need, would be the best way to pull at least some of the profession into supporting the reform process. If that is impossible for some reason, it will be necessary for the LSC and the government to explain precisely why, given their prior stated commitment to quality of work on behalf of clients.

Price competitive tendering in crime

Sadly, the position of criminal firms is likely to deteriorate further in the coming months. Successful price competition depends on a suitable constellation of firms reaching the entry gate. Achieving real efficiency (the objective of the competition) takes resourcefulness, ability to invest and a reasonably long-term perspective. The LSC needs competitors which can display these characteristics, and should therefore be managing the approach to competition with skill and sensitivity.

Unfortunately, there is no evidence of these qualities on display. The government accepted Lord Carter's recommendation of an interim stage in which providers were weaned off their beloved hourly rates and on to fixed, standard and graduated fees (described by Lord Carter as 'time and support to take the necessary steps to remain viable and sustainable under the new arrangements').[11]

But while Lord Carter was working on the grand design for the future of legal services, the Department for Constitutional Affairs and the LSC were toiling on a separate and quintessentially short-term scheme to deal with their overdraft. In 2006, the government pushed through the Criminal Defence Service Act 2006, assuring parliament that means-testing was needed to deal with affluent defendants (see 'Justice extorts no kind of price', February 2007 *Legal Action* 3).

Means-testing was implemented three months after Lord Carter's report, and shortly before the government replied in its own paper *Legal aid reform: the way ahead*.[12] To the surprise of no-one actually working in criminal defence, the means test reduced the grant of legal aid by about 25 per cent and left many wretched defendants without help. It also removed a significant chunk of work from criminal defence firms, right before a wave of diversion reforms started to remove defendants from the system. The timing was stunningly inept and the sums were wrong. Too much money has been taken out of the system too early in the process. Lord Carter's recommended move to fixed and graduated fees comes on top of these losses. It is not rocket science to observe that structural reform must precede efficiency gains. All this was predicted by the profession, and dismissed by the LSC and the politicians as special pleading. Confidence in the ability of the LSC to manage the process of change has been severely undermined.

Instead of creating a market which is 'viable and sustainable', a quality-blind process of attrition is now under way in which many of the most competent and committed suppliers will be devastated well before the competition starts. Like Adam Smith's curates, criminal firms are trying to tighten their belts but most will starve to death before Lord Carter's reforms ever come to pass. Those which stagger up to the starting gate for one of Lord Carter's auctions will be in no fit state to offer real efficiency savings and are unlikely to meet the need of the criminal justice system for modern technology. The waste which this represents can hardly be overstated.

1 *A market analysis of legal aided services provided by solicitors*, Frontier Economics, December 2003, available at: www.dca.gov.uk.
2 *Competition in NHS quasi-markets*, Martin Chalkley and James Malcomson, Oxford Review of Economic Policy, Volume 12, No 4, 1996.
3 *Commercial Lawyer*, Chambers & Partners, Issue 24, 1998.
4 'Linde turns to Linklaters, DLA Piper for new panel', *The Lawyer*, Amy Dry and Steve Hoare, 5 March 2007, available at: www.thelawyer.com.
5 *Managing the professional service firm*, David Maister, Free Press, 1993.
6 For example, *Productivity in public services*, Helen Simpson, Centre for Market and Public Organisation (CMPO) working paper 07/164, University of Bristol, 2006, available at: www.bris.ac.uk.
7 *Does competition between hospitals improve the quality of care? Hospital death rates and the NHS internal market*, Carol Propper, Simon Burgess and Katherine Green, CMPO discussion paper, University of Bristol, 2002, available at: www.efm.bris.ac.uk.
8 For example, *Peer review in legal and advice services*, John Seargeant, Advice Services Alliance, November 2003, available at: www.asauk.org.uk.
9 For example, *Introducing contracts for criminal defence services with lawyers in private practice*, Legal Aid Board, August 1999.
10 *Assessing the new NHS consultant contract: A something for something deal?*, James Buchan and Sally Williams, King's Fund, 2006, available at: www.kingsfund.org.uk.
11 *Legal aid: a market-based approach to reform*, Lord Carter's Review of Legal Aid Procurement, July 2006, available at: www.legalaidprocurementreview.gov.uk.
12 Cm 6993, DCA and LSC, November 2006. available at: www.dca.gov.uk.