



Police Station Reforms: Boundaries, Fixed Fees and New Working Arrangements

Consultation Response

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A Response to Consultation

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1. INTRODUCTION

1.1. This document is a post-consultation response for the Consultation Paper, Police Station Reforms: Boundaries, Fixed Fees and New working Arrangements.

1.2. It will cover:

- The background to the Consultation Paper;
- A summary of the responses to the Consultation Paper;
- A detailed response to the specific questions raised in the Consultation Paper;
- Decisions.

2. BACKGROUND

2.1. On 12 February the LSC published the Consultation Paper, Police Station Reforms: Boundaries, Fixed Fees and New Working Arrangements. The proposals set out in the paper built on the recommendations of the Carter Review and the joint DCA/LSC publication, "Legal Aid Reform: The Way Ahead".

2.2. The aim of these proposals is to:

- Ensure the long-term sustainability of the legal aid provider base and the provision of good quality legal advice and representation to clients;
- Prepare the criminal defence service market for the phased introduction of Best Value Tendering from October 2008;
- Control expenditure in police station attendances between October 2007 - October 2008 and realise savings of **£8 million** to the CDS Budget.

2.3. The Consultation Paper invited comments on:

- The introduction of fixed fees for police station attendances to replace the existing hourly rate payment scheme;
- Merging existing duty solicitor schemes to create larger Boundary Areas;
- A Minimum Contract Threshold that would require providers to have delivered a prescribed value of publicly funded lower crime (police station and magistrates' court) work in order to be eligible for a General Criminal Contract (GCC);
- Allocating duty solicitor slots on the basis of providers' historical volume of legal aid claims rather than on the basis of the number of duty solicitors employed by providers;
- A moratorium on new duty solicitor slots until the introduction of Best Value Tendering (BVT);
- A specific "Out of Area" rule that would require providers to deliver the majority of their police station work in the Boundary Areas in which they satisfied the Minimum Contract Threshold;
- Exceptional rules for providers that deliver 'niche' services;
- The mechanism for Market Entry once the moratorium is in force; and
- Diversity requirements in the GCC standard terms.

2.4. The consultation period closed on 10 April 2007 and this report summarises the responses and sets out preliminary recommendations for the implementation of police station reforms in October 2007 as a basis for discussion.

3. Decisions

Introduction

- 3.1. We believe that the decisions we have taken in relation to the Police Station Reforms continue the proposed progression towards a system of best value tendering (BVT). By introducing fixed fees we are introducing the concept of a unit price for police station attendances. However, we are also alive to the need to stagger the changes required to facilitate the proposed introduction of BVT and have listened to the responses to consultation.

Fixed Fees

- 3.2. We propose to adopt the scheme-based fees model featured in the consultation paper. The savings mentioned above and in the original consultation paper have been derived from the same 16 urban areas that are subject to the revised Magistrates' Court fee regime, and these have been taken out of those areas in equal proportions, equating to a 9.5% reduction in each area. A table of fees and schemes are included at Annex A to this document.
- 3.3. On consultation there was opposition to fixed fees but also considerable support for fees that vary more with the seriousness of the case. Having carried out analysis of claim data we do not believe that the case for a 'serious offence' fee is made out.
- 3.4. This is because there is a good correlation of average case costs in a relatively narrow band that lends itself to a simple fee system giving good control, certainty and simplicity. There is also no correlation between offence type and duration of case. For example, in the context of homicide claims against a notional national average fee, there is a uniform distribution between those cases that fall below the level of the fixed fee, those that fall between the fixed fee and the escape mechanism, and those that would escape and be paid under that system. This indicates that such matters lend themselves to the swings and roundabouts effect that fixed fees are predicated upon.
- 3.5. Provider feedback also suggested an interest in a Magistrates' Court-style fee structure with different thresholds triggering different fees. For the reasons given above in relation to average case costs being distributed across a relatively narrow band, this option is rejected.

Fixed Fees – Data Issues and Rural Areas

- 3.6. The Market Stability project has highlighted a particular issue with the LSC claim data in rural areas. Owing to the relatively large geographical size, small volume of work and low number of providers, central "hub" police stations in large towns are often serviced by providers from both the scheme in which the station is located and the surrounding "satellite" schemes.
- 3.7. In the majority of areas the location of the police station determines the scheme from which duty solicitors are deployed e.g. if a client is detained in a police

- station in Woking and requests a duty solicitor, a solicitor from the Woking scheme is deployed.
- 3.8. However, a number of areas have been identified where it is the location of arrest that determines which duty solicitor attends e.g. a client is arrested in Ashford and detained in Dover police station, a solicitor from the Ashford scheme is deployed.
- 3.9. This mode of operating makes it difficult to assign police stations to specific schemes. This results in a disproportionately high volume of cases being assigned to the schemes and disproportionately low volumes being assigned to the surrounding schemes. Such a distribution can result in the levels of fees in neighbouring schemes varying dramatically.
- 3.10. In those areas where we have identified this pattern of working we have set a single fee for all the schemes that deliver duty solicitor work at the central “hub” police station. In effect this will create a larger boundary area. There will be the option at local level to maintain separate rotas until the proposed introduction of best value tendering to avoid disproportionate cost.

Fixed Fees – The Escape Mechanism

- 3.11. We consulted on whether to pay hourly rates above the escape level only or to pay hourly rates for the entirety of cases that escape. There was no clear majority in favour of either option. Having considered the responses, and also claim value distribution across the range, it appears that the best option is to pay hourly rates above the escape mechanism and not on a paid as claimed basis. This allows us to put more money into the fixed fees and raise their levels, thus boosting remuneration at the high volume end of provider business. The use of this option will also prevent offering any perverse incentives to tip cases over the escape threshold artificially in order to access hourly rates for the whole claim.
- 3.12. Under the original proposals for the escape we suggested a harmonised rate for all police station work, removing the distinction between duty and own rates as well as the social and non-social distinction. We have decided not to implement this element at this stage, because at present our data does not enable us to fix a harmonised rate which is fair to both suppliers and to the Fund. We will bring forward proposals before the proposed introduction of best value tendering.

Boundary Areas

- 3.13. A number of providers expressed the view that, unless we make substantial additional volumes available to providers, the effect of increasing boundary area size would be to increase costs with no easy route to increased efficiency.
- 3.14. We have listened to responses on consultation and we accept that until a mechanism such as best value tendering is in place which will enable suppliers to take on substantially higher volumes of work, the likely result of larger boundary areas would be to increase costs for all. However, increased boundary areas may well be appropriate for best value tendering and we will consider introducing increased boundary areas as part of the planned consultation on best value tendering.

3.15. Nevertheless, in some areas there are clear advantages in altering schemes. For example, where there is scope for rationalisation of schemes because of police operational changes, or where local practice already treats separate schemes as a single rota, we have reflected these in the final schemes. Please refer to the tables at annex A for a full breakdown of schemes from October 2007, and Annex B for maps of the schemes from October 2007.

Minimum Contract Threshold

3.16. We are delaying any decision on the introduction of a minimum contract size, until after the conclusion of the further consultation on slot allocation from October 2007 for several reasons. It will give us time to absorb the lessons from the proposed short consultation on slot allocation and to know the decision on future slot allocation. It will enable us better to understand the strength of the financial case for a minimum contract threshold; data is being refined as part of the work on transforming the LSC. We will be able to assess further developments in the market; and our work on best value tendering will be better developed, which will enable us to assess the likely interaction of a minimum contract threshold and the specification for services.

Slot Allocation

3.17. As a result of the data integrity issues discovered in relation to the Market Stability proposals, it is clear that historic volume-based slot allocation is not a viable option from October 2007. As this was the only option which we consulted upon in the Police Station Reforms paper, we have to conduct a further consultation on slot allocation from October 2007. The consultation was published on 22 June 2007 and closes on 2 August 2007. The paper can be downloaded from www.legalservices.gov.uk

Moratorium

3.18. A moratorium on new contracts will be in place from October 2007. This serves to continue the existing moratorium that was announced on 12 February 2007, which runs until 30 September 2007. This should be distinguished from a moratorium on providers obtaining new duty slots, which is subject to consultation as part of the Slot Allocation consultation detailed above.

Out of Area Rule

3.19. We have decided to delay making a decision on this point alongside our decision on minimum contract size. Fixed fees already provide an incentive to work locally, which was a key objective of the proposed out of area rule.

Niche Providers

3.20. Some “niche” practices which specialise in Crown Court work might be adversely affected by the introduction of a minimum contract size, because they do insufficient police station work to pass the threshold and would therefore not have a General Criminal Contract. Therefore, we will announce whether any

special arrangements should be made for these niche providers alongside our decision on a minimum contract size.

Market Entry

3.21. Providers will only be able to access the market where local need dictates that additional supply is required. Outside of these circumstances, future competitions may offer the only opportunity for new providers to enter the market.

Diversity

3.22. A number of respondents argued that the reform programme would have a negative impact on BME providers and clients and that this would not be sufficiently mitigated by the contract provisions around diversity and non-discrimination.

3.23. However, respondents also stated that the same approach should be adopted for all providers and that the proposed contract provision were sufficient to protect BME fee earners and clients.

3.24. We are committed to ensuring that the legal services we procure reflect the communities that they serve as widely as possible. Each step of the LSC's reform programme has been accompanied by a regulatory impact assessment, which outlines in as much detail as possible the impact on both the racial and gender representation of the legal aid market in terms of firm ownership. This will continue as the reform programme progresses

3.25. The LSC will require providers to comply with contracts that contain provisions regarding anti-discrimination policies, equality and diversity training and communication plans, and an obligation to report ethnicity information on both employees and clients.

3.26. The picture emerging from our research is complex. BME lawyers are well represented in the CDS, and we welcome that. They are employed in both "white" and BME firms, the majority being in white firms. BME firms have more BME clients than white firms, but even BME firms have equal numbers of BME and white clients. There is no evidence that in crime clients attach particular importance to firms being BME owned and controlled. Our policies have to do a number of things:

- Provide BME clients with a high quality service including facilities (e.g. interpretation) which some may need;
- Enable young BME (and white) lawyers to be able to enter the market where that is their choice.

3.27. Having said this, we are confident that our reforms will greatly benefit all providers in the long term and are actively encouraging all practitioners to respond to each consultation we publish to ensure that the views of as many practitioners as possible can be taken into account as we make our decisions throughout the reform process.

4. SUMMARY OF RESPONSES

- 4.1. A total of **358 responses** to the Consultation Paper were received. Of these, the vast majority (327) were responses from solicitors. Responses were received from all of the major representative bodies as well as from the judiciary, police and a Member of Parliament.
- 4.2. All the responses were considered by the CDS Policy Team. An analysis was undertaken to summarise the key points made by respondents to the questions specifically asked and to capture additional points made which were to be taken into consideration. Also, the analysis sought to identify the key concerns for particular stakeholders to enable the LSC to better understand their needs in relation to the proposals.
- 4.3. In addition to the specific comments made in relation to each of the 16 questions contained in the Consultation Paper, the main issues raised were as follows.

Fixed Fees

- 4.4. The majority of respondents stated that the fee levels were too low and a number disagreed with a Fixed Fees payment scheme. The escape threshold of three times the fixed fee was almost unanimously opposed.
- 4.5. Some respondents disagreed with varying rates for each Boundary Area. These respondents felt there could be no justification for higher rates in neighbouring areas and some objected to creating a distinction between rural and urban regions.
- 4.6. Many respondents thought that the location, re-location or closure of custody suites had not been considered in the setting of rates.
- 4.7. A number of rural providers indicated it would be difficult to stay financially viable considering the low volume of cases undertaken and the lengthy distances they are required to travel.
- 4.8. Many providers in general thought the fixed fee would not adequately remunerate them for increased travel within the enlarged areas.
- 4.9. Some respondents indicated that a fixed fee structure would not be suitable for police station work or disagreed with the principle of fixed fees altogether. The most common alternative put forward was a graduated standard fee similar to that used in magistrates' court cases.
- 4.10. The responses indicated Fixed Fees would lead to a reduction in quality as there is no incentive to spend more time on a case if needed, and that more firms would use less experienced staff to attend. It is predicted that a number of providers would take on standard cases and refuse longer or more complex cases.

Boundary Areas

- 4.11. The majority of respondents would prefer to keep the existing schemes rather than change to the new Boundary Areas as larger areas would increase travel and reduce client access. Many providers expressed a preference for free market approach.
- 4.12. Larger providers expressed support for expanded areas – particularly in urban areas. There were also suggestions as to how existing schemes could be altered to better fit with police and HMCS practices.

Minimum Contract Threshold

- 4.13. Most respondents that expressed a preference accepted the idea of a minimum contract size, and agreed that it would mean an increase in volumes for remaining providers. However, a number of providers felt it would be a restraint on trade and lead to the exclusion of small but high quality firms.
- 4.14. The Law Society support a minimum contract size on the condition it is set appropriately. AMCLF are in favour of a threshold in order to ensure economies of scale. LAPG, LCCSA and CLSA are opposed to any minimum threshold.
- 4.15. Several respondents stated that larger contracts would result in a better chance of updating staff and working practices.

Duty Slot Allocation

- 4.16. The majority of respondents did not support the proposed method of allocation based on historic volumes. Many thought the status quo should remain. Other reasons commonly given indicated that the method was unfair due to either the period for calculation used, the inability for providers to expand, or data integrity issues.
- 4.17. LAPG was opposed to allocation by volumes, as it would not reward quality work. LCCSA advocated using the old system of allocation as the proposals would prevent new entrants and create stagnation of the market. CLSA stated the proposals would prevent migration of staff and create financial uncertainty for providers. AMCLF viewed the proposals to allocate slots based on historic volumes as essential.

Moratorium

- 4.18. Although most respondents were in favour of the moratorium in order to stabilise the market, many comments stated it would be anti-competitive and would stifle small providers. Several providers felt it would discourage new solicitors from entering the field.

Out of Area Rule

- 4.19. The majority of respondents were opposed to the out of area allowance. Respondents stated that clients would have reduced choice of solicitor and it

would be a restraint of trade on providers. Many respondents pointed out that the fixed fees would limit the amount of out of area work without this allowance.

- 4.20. A number of providers submitted that rural areas with a small provider base should be exempt from area-based working.

Niche Providers

- 4.21. Most respondents did not approve of the separate transitional arrangements to enable Niche Providers to change their work practices and many voted against Niche Proposals overall. It was commonly felt that all providers should have to provide advice and representation in all areas of work.
- 4.22. Concerns were raised as to the definition of Niche Provider and many thought it should only cover highly specialist provision. Some providers, as well as TLS, expressed unease over the lack of available specialist provision if the proposals went ahead, and whether cases could be properly dealt with without that expertise.

Market Entry

- 4.23. Most respondents did not agree with the proposals for market entry, and it was felt either that the same criteria should apply to all or that new contracts should be awarded on the basis of local need. On the other hand, the proposals were also seen to be highly restrictive and there would be less incentive for new firms to set up.

5. RESPONSES TO SPECIFIC QUESTIONS

Q.1 Do you agree with the fee rates set out in Annexes A-C? Of the options, which do you prefer and why?

Respondents that expressed a preference = 256

Respondents in favour = 15

Respondents against = 241

There was a general feeling that the fee rates set were too low. Concerns were raised that fixed fees would lead to providers “cherry-picking” straightforward cases and refusing to attend in complex matters or cases where clients had particular needs i.e. disability, interpreter required, that would result in the case taking a longer than usual time.

A number of respondents opposed the removal of separate standby payments and the redistribution of costs into the value of the fixed fees. Rural providers in particular stated that they would be adversely affected, as they did not deliver a sufficient volume of work to compensate for the removal of standby payments.

The majority of respondents preferred Option 2 under which hourly rates would be payable for the entire length of cases that exceeded the escape threshold.

Q.2 Do you agree with the proposed threshold of three times the fixed fee? If not, please explain why?

Respondents that expressed a preference = 216

Respondents in favour = 19

Respondents against = 197

The majority of respondents stated that the proposed threshold was too high and that very few cases would last long enough to escape into payment by hourly rates.

Q.3 Which option for payment of cases above the threshold do you prefer, bearing in mind the overall impact on fees?

Respondents that expressed a preference = 127

Option 1 = 62

Option 2 = 65

Neither Appropriate = 127

More respondents preferred Option 2 to Option 1 – a lower fixed but more money made available for cases that pass the escape threshold.

However, given the responses to question 2 the majority of respondents stated that neither option was appropriate as the escape threshold was set too high.

Q4. Do you agree with the principles for constructing new boundary areas?

Respondents addressing the issue of boundary areas tended, for the most part, to confine their comments to their local areas.

Respondents were split on this question with larger providers generally favouring larger boundary areas whilst smaller providers made the case for retaining existing schemes on the basis that they would not be adequately remunerated under a fixed fee regime for the increased travelling requirements in larger areas.

Q5. Are the boundary areas outlined in Annex B in keeping with these principles?

Respondents expressed concern over Boundary Areas that had been enlarged by merging two or more schemes. The argument advanced was that providers would not be able to make a profit from fixed fees if they were required to routinely travel greater distances than they do currently. A number of respondents made reference to The Otterburn report to support this argument.

Some respondents made suggestions regarding how existing duty solicitor schemes could be modified to better reflect current police and HMCS working practices.

Q6. Which London option do you prefer?

The preferred option was to retain the existing duty solicitor schemes. However, of the respondents that expressed a preference for one of the proposed options the majority opted for the option based on HMCS magistrates' court "clusters".

Q7. Do you agree that there should be a minimum threshold in all areas for access to police station work?

Respondents that expressed a preference = 211

Respondents in favour = 126

Respondents against = 85

A majority of respondents were in favour of a minimum contract threshold. Respondents that opposed a threshold were generally from smaller providers and argued that the proposals would have a disproportionately negative impact on BME firms and small but efficient and high quality providers

Q.8 If so do you believe that the proposed threshold should be varied to ensure coverage in all areas?

Respondents that expressed a preference = 109

Respondents in favour = 102

Respondents against = 7

The vast majority of respondents recognised that the minimum contract threshold would have to vary to ensure sufficient coverage in low value / low volume areas.

Q9. In addition, do you feel there should be a higher threshold in some areas, and at what level do you think it should be set?

Respondents that expressed a preference = 118

Respondents in favour = 53

Respondents against = 65

Respondents were split on this issue depending on both provider size and location. Nearly half of respondents that addressed this question were in favour of a higher threshold and Liverpool, Leeds and Nottingham were suggested as areas that could support a higher threshold in addition to London, Manchester and Birmingham.

The providers that opposed a higher threshold did so, for the most part, on the basis that they were opposed to any minimum contract threshold being introduced.

Q10. What are your views on the proposals for slot allocation from October 2007? Please give reasons for your answers. Please make suggestions as to suitable alternatives for slot allocation if possible.

Respondents that expressed a preference = 160

Respondents in favour = 61

Respondents against = 99

The majority of respondents were in favour of the status quo remaining in place and slots being allocated in proportion to the number of duty solicitors employed.

However, there were very strong arguments in favour of historical based allocation to the effect that this had been the Commission's clear direction of travel since the publication of the Way Ahead document and the Market Stability consultation and that providers who had a) delivered significant volumes of work and b) reorganised their businesses in light of the Carter recommendations and subsequent LSC papers would be penalised.

Q11. Do you agree with the proposal for a moratorium on duty slots? Please give reasons for your answers?

Respondents that expressed a preference = 167

Respondents in favour = 94

Respondents against = 73

Providers put forward similar arguments for and against a moratorium on duty slots as they had done for the question on slot allocation.

A small majority were opposed to a moratorium on the basis that it was anti-competitive and would discourage new solicitors from joining criminal defence firms as their ability to advance their careers would be restricted.

Respondents in favour of a moratorium again made reference to the need for a period of stability and planning and the proposals that have been consulted on since the publication of the Carter Review.

Q12. Do you agree with the out of area rule in principle? Which of the options do you prefer? Please give reasons for your answers.

Respondents that expressed a preference = 143

Respondents in favour = 68 (Option 1: 60; Option 2: 4; Other 4)

Respondents against = 75

Respondents were split almost equally on this issue with a slight majority favouring no out of area allowance.

Respondents argued that fixed fees that incorporated travel and waiting would be a sufficient deterrent to providers travelling excessively and that they were best placed to make individual business decisions as to whether a case's potential downstream earnings justified an amount of travel at the investigations stage such that would make the fixed fee unprofitable.

Arguments on the basis of reducing client choice and restraint of trade were also advanced to support the case that an out of area allowance should not be introduced.

Those in favour of the out of area allowance argued that it would ensure they had sufficient volume of work in their local area in order to be profitable under fixed fees. However, it was noted that for this approach to be successful the minimum contract threshold should be set at an appropriate level to ensure volumes of work flowed to remaining providers from those that did not pass the threshold.

Q.13 Do you agree with the principle of creating separate transitional proposals for niche providers? If so, do you agree with the proposals themselves? Please give reasons for your answers.

Respondents that expressed a preference = 114

Respondents in favour = 47

Respondents against = 67

A majority of respondents were not in favour of separate transitional arrangements for niche providers. A significant number of providers stated that rules should be applied equally and that it would be unfair for providers who had deliberately chosen to focus on the most profitable criminal defence services (Crown Court) to be exempt from the minimum contract threshold.

However, strong arguments were advanced in favour of the necessity of niche provision in order to continue the delivery of specialist services to vulnerable client groups.

Q.14 Do you agree that the proposals on market entry are sufficient to allow new providers access to the market? If not, what additional or alternative proposals would you suggest? Please give reasons for your answers.

Respondents that expressed a preference = 102

Respondents in favour = 30

Respondents against = 72

A majority of respondents were opposed to specific measures for market entry and stated a preference for the market to grow on the basis of recommendation and increased turnover. It was also argued that the proposals to allow new entrants only at each new BVT bid round were too restrictive and would discourage new providers entering the market.

A large number of providers considered the current issue of oversupply and argued that a specific mechanism for controlled market entry was required in order to curb current levels of oversupply and that new entrants should only be allowed where regional offices identify a lack of supply in specific areas.

Q.15 Do you agree that these proposals are adequate in meeting the needs of BME clients and providers? Please give reasons for your answers.

Respondents that expressed a preference = 83

Respondents in favour = 32

Respondents against = 51

A number of respondents argued that the reform programme would have a negative impact on BME providers and clients and that this would not be

sufficiently mitigated by the contract provisions around diversity and non-discrimination.

However, the argument was also made that BME providers should not be given preferential treatment and that the proposed contract provision were sufficient to protect BME fee earners and clients.

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