



**RESPONSE TO THE LSC CONSULTATION PAPER
IMPROVING VALUE FOR MONEY FOR PUBLICLY FUNDED CRIMINAL
DEFENCE SERVICES IN LONDON**

27 May 2005

**Criminal Law Solicitors' Association
Suite 2 Level 6
New England House, New England Street
Brighton, BN1 4GH
DX 2740 Brighton
Email: sue@clsa.co.uk
Tel: 01273 676725**

What price Justice?

A Response by the Criminal Law Solicitors Association

Introduction

The Legal Services Commission has published a consultation paper - ***Improving Value for Money for Publicly Funded Criminal Defence Services in London***. The paper concerns the introduction of managed competition in London through competitive tendering for criminal legal aid work in the police station and at the magistrates' court – “criminal lower”.

The CDS is now undertaking a process of consultation in respect of this proposal and responses to the paper are due by 27th May 2005.

The Criminal Law Solicitors' Association is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law. The CLSA is responding to the consultation on behalf of its members.

Preamble

As a matter of principle, the CLSA is opposed to the concept of price competitive tendering (PCT). The remainder of this paper comprises the CLSA's reasons for taking that approach. Lest there be any doubt, the CLSA's position is that the

proposal to embark on a method of funding “criminal lower” work based on PCT is unworkable and that there are no “fixes” or “tweaks” which will make it work.

PCT is a scheme which the CDS intends to impose on the profession, first in London and then nationally without the benefit of a pilot. The CLSA believes that, in so doing, the CDS is ignoring the “spirit of partnership”, which is often spoken about but, regrettably, seldom seen in practice and that is to be lamented.

The principle of “competitive tendering” has been considered and rejected as a model for government funding in other sectors (where there is, as here, only one “buyer” of services). Where it has been tried it has singularly failed. For example, within the criminal justice system, we have all witnessed the decline in prisoner transport arrangements where prisoners are now routinely late for the start of the court day. Outside the CJS, we can point to the obvious shortfalls in the provision of school meals and the cleaning of hospital wards. Both services are subject to competitive tenders. In both cases, cheapest has been proven not to be best, or even adequate. Further, we believe that PCT is uniquely unsuitable as a mechanism for providing part of the bedrock of Human Rights, legal aid to assist defendants involved in the criminal justice system for the reasons that follow.

The lessons from other areas of the public sector have not been learned and the CDS now proposes to embark on a method of funding which is unashamedly driven by cost. This approach is notwithstanding the fact that the budget for “criminal lower” is broadly under control – representing as it does approximately 25% of the total legal aid spend. This figure is dwarfed by the cost of VHCCs and, specifically, fraud cases.

Objections to PCT

1. The current “criminal lower” system relies for its budgetary inertia on a fundamental dichotomy. First, there has been no general increase in

hourly rates since the commencement of the criminal contracting in 2001 (and actually for almost all of the eight preceding years) although there have been significant reductions in scope. In effect, therefore, the amount that can be properly claimed for helping clients under the contract has been de facto reduced; practitioners are already cut to the bone in this highly demanding and stressful area of work. Secondly, and against that background of chronic under funding, firms are required to purchase premises, fund new technology, provide cost of living rises and training for staff and so on, all of which all come at an ever rising cost.

Legislation and new initiatives by government represent cost drivers of huge effect and which cannot be predicted and planned for. For instance, the new procedural regime under The CJA 2003 has yet to “bed in” but seems likely to increase work considerably in the current Category 2 work in the magistrates’ court. It is difficult to escape the inevitable conclusion that the purchaser of public funded “criminal lower” defence (the CDS) gets excellent value for money under the present system.

It is regrettable that, for years, different government departments have introduced measures which have added to the cost of representation yet those responsible for the legal aid purse have failed to recognise or address the consequences of the decisions of those other departments.

2. A Fundamental Legal Aid Review is under way. It is to be hoped that any changes to the provision of public funded legal services will be considered holistically with a clear strategy to achieve a long term goal. The proposals in this paper should not be considered in isolation.

3. How are the CDS and suppliers to gauge what is a reasonable and sustainable bid? It seems that the only measure employed by the CDS, in effect, will be price and that it is openly accepted by the CDS that there

are likely to be some tactical “zero bids” for “criminal lower” work in some areas. There are no criteria for deciding what is a realistic bid. The PDS cost per case is substantially higher than in private practice and therefore provides an interesting yardstick. The CDS has said that if PCT does not produce a lower spend it will be abandoned, yet practitioners would argue that the cost of providing a quality service has been driven down as low as is possible already. Anything less could only ever be achieved at the expense of quality.

4. The proposal takes no account of the position of practices serving special interest groups such as the mentally ill or ethnic groups who require interpreters or, indeed, firms with large youth court practices. In all these cases the average cost per case is likely to be higher than the norm. The CDS accepts that it has not carried out any research into this problem and has no data on which to base any such research.

5. While the CDS is keen to move away from the concept of a “cull”, it seems that there is perceived to be an oversupply of firms in London. It is conceded by the CDS that there will be a reduction in the number of suppliers if PCT is implemented in its proposed form.

However, while it may be that there are some matters that are particular to London which cause the CDS concern (for instance, travel and wait time) arbitrary imposition of PCT is not the way to solve these difficulties. They, and other issues, could be resolved in a number of different ways through consultation and cooperation with the profession’s representative organisations without the need for the imposition of such a fundamentally flawed system of remuneration.

6. The reduction in suppliers occasioned by PCT will have a serious effect on access to justice. The concept of client choice will be seriously

diminished as will the concept of a firm being required to be reasonably geographically accessible to clients. Many clients are of limited means and cannot travel far to see their lawyer.

7. The proposal takes no account of new Law Society guidance on conflicts of interest. In even a modest sized case involving perhaps four defendants (let alone a large multi party case) there may be difficulties in all defendants obtaining separate representation. There is significant judicial disquiet concerning joint defendants currently being represented by one solicitor. Indeed, no firm will wish to take that risk as applications for wasted costs become increasingly prevalent in this area.
8. PCT is a once only exercise. Once firms have been driven out of the market they are gone forever. What happens in the second round? Where does the competition come from, except from the employees of contracting firms who break away? How can there be a meaningful bid rounds in the future? The Association is very far from convinced that there is a “market” in the current legislative base of the general criminal contract.

Those with tendered contracts would have a strong bargaining position in the future. This will ultimately increase costs to the monopoly purchaser which will end up paying more for a system which will have already produced so many drawbacks – of which access to justice and a reduction of quality of work will be only two.

9. A reduction in the number of suppliers will have an adverse effect on the CLS and civil legal aid. Many suppliers do other areas of publicly funded work, for instance housing, mental health and family. They are open about the fact that the firm’s criminal practice allows them to

carry on with social welfare law categories which are intrinsically unprofitable. Does the CLS not understand why these areas of law are being abandoned up and down the country? In case it needs to be said again, they are fundamentally unprofitable. If the criminal suppliers close there will be a further shortage of civil suppliers and more advice deserts. In many areas of London there is already a marked under supply and waiting lists for appointments. This does not accord with the government's commitment towards access to social justice nor the aim of the CDS to achieve holistic practices serving communities.

10. There will be a twofold effect on training contracts. With fewer firms there will be fewer contracts available. Moreover, those firms which do have contracts are less likely to want to use their resources for training as, even with financial incentives trainees are inevitably a drain on supervisor's fee earning time. There will be a decrease in the number of solicitors entering criminal law and an ever-decreasing pool of qualified personnel.
11. The major problem with the reduction of suppliers is that there is no proper measure of quality in this proposal. Indeed, it is stated that quality is to take second place to price. The CLSA is concerned that cheapest is not only not best but also that it will not even be adequate. The quality of representation will inevitably decline. If the only way to get a contract is to bid low then the amount of work undertaken per case will inevitably be less. There is no slack and to survive firms will have to do less work at a lower price per case to survive.
12. The CDS has produced no evidence of "waste" in the current legal aid system (which is within budget as stated above) but have stated publicly that the level of travel and waiting are of concern, not the time spent on preparation. To save money firms will reduce their

preparation. That reduction will lead inevitably to miscarriages of justice and consequent expense in future appeals, human rights applications and so on. The financial incentive under PCT to do the bare minimum of work on a case is in direct conflict with a competent solicitor's professional duty to do his best for his client.

13. The CLSA is concerned about the true motivation behind the PCT proposal. We have seen in the press and elsewhere in recent months a concerted effort to vilify and demonise some of the most vulnerable members of our society – those who are, by any assessment, ill equipped to defend themselves. The mentally ill, those addicted to drugs, those who have been abused and are replicating established and learnt patterns of behaviour are all cast as villains who have made informed and entirely voluntary choices to follow a criminal life style and who are, therefore, fair game in the war against crime. Some could think that PCT is part of a cohesive and coherent attack, which finds support in some sections of the media, and which has as its cynical goal an increase of the conviction rate by – amongst many other diverse measures - dramatically reducing defence resources.

The CLSA believes that PCT represents a fundamental attack on the basic human right of equality of arms and facilitates the increase in power of the state over the individual. It does so by emasculating the role of the defence advocate in the criminal justice system. Under PCT, publicly funded defence will become little more than token representation, with an emphasis on bargaining for the best plea obtainable and with little thought being given to those who protest their innocence or seek acquittal.

The concept of innocent until proven guilty is likely to be steadily eroded as the prosecution's access to resources designed to further "narrow the justice gap" and redress the balance in favour of the victim becomes ever greater. It is

inevitable that corners will be cut by the defence, which simply will not have the resources to act for a client in the way that solicitors have in the past. Even more worryingly still, corners are likely to be cut by the prosecution in the knowledge that the defence is not sufficiently resourced to challenge the prosecution case. The guilty could go free.

It is the CLSA's view society needs to decide whether it is prepared to pay for a system of criminal defence which is articulate, dedicated and fearless in its defence of the rights of the individual against the state. This should be a matter of public debate.

Certainly, PCT is not the way forward since it manufactures such a blatant and insuperable conflict of interest between client and solicitor that the interests of justice cannot and never will be served by such a method of funding. The client's interests are likely to be constantly and inevitably in conflict with the solicitor's funding interests. While it might be argued that has always been the case even under the present mixed system of standard fees and hourly rates, there are many checks and balances in the current arrangement. "One (very small) size fits all" will mean that practices will have to "shrink" their cases "to fit". If it costs the same to run a trial as to enter a guilty plea at the first hearing then it is not difficult to predict the outcome. Difficult defences will not be run. Points of law will not be taken. Challenging clients will have their cases dealt with in an arbitrary way. At a time when radical developments in criminal jurisprudence are being rolled out, we as a society simply cannot afford to allow criminal defence to wither on the vine.

The clear conflict that the funding position engenders will lead to an inevitable decline in respect for a branch of the legal profession which is already abused by government and media alike. It might just kill publicly funded defence dead in this country as a chosen career for any young solicitor.

These proposals would create a climate in which the lowest bidder gets the work and has not only a financial interest but a business imperative to do the least possible work on a case. At the same time, police powers are increasing almost on a monthly basis through primary legislation and Statutory Instrument.

As the power of the state increases over the individual so should the ability to challenge and question the exercise of that power.

Conclusion

Through the years, practitioners in the field of publicly funded defence have seen many changes. All have, to some greater or lesser extent, affected the ways in which they and their hard working staff have served the communities in which they live. They have cut their cloth to fit the fashion of the day. Some have not survived change. Others have carried on and met the cost of living rises and increased expenditure from their own pockets. A very few have embraced change and due to a combination of circumstances have benefited from it. No one charged with implementing PCT should be under any illusion that this is a change too far. There are other ways of implementing savings. If a surgeon cuts too deep then he risks losing the patient on the operating table. The CLSA is concerned that in this case the patient is not the solicitors' profession (over whose passing, it is accepted, very few would shed a tear) but the concept of criminal justice in this country. The concept of PCT insults not only the many hardworking and dedicated criminal practitioners who work so many hours for, in many cases, so little reward but also the citizens of this country who deserve more from a system of publicly funded criminal defence than "a quick plea bargain".