“Improving value for money for public use and funded criminal defence services in London”

A response by

Solicitors Association of Higher Court Advocates [SAHCA]

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About the Solicitors Association of Higher Court Advocates [SAHCA] and the affect Competitive Tendering in CDS 'lower' may have on Solicitor Advocacy in CDS 'higher'.

SAHCA was established in 1994 with the extension of rights of audience in the Higher Courts to solicitors that same year.

SAHCA members range from high street based practitioners in market towns to large City firms. Membership comprises of QCs and Advocates who undertake leading and junior work in court as well as being litigators. Members sit as Recorders and have gone on to join the High Court and Circuit Court benches. In criminal law, SAHCA membership is drawn from both from those who prosecute and those who defend. All areas of criminal law and practice are covered from an advocate's and litigator's point of view whether it be cases dealt with by the Serious Fraud Office or in the Youth Court. SAHCA membership experience embraces taking cases from their inception in the police station to the highest courts in the land.

SAHCA is able to offer a unique perspective on such a consultation paper as our members undertake work both in CDS *lower* as well as elsewhere. Our perspective is from the vantage point of working within the criminal justice system as a whole. It is worth noting at this juncture that the thrust of all relevant proposals from government departments and agencies when considering structural changes to the criminal justice system have had as there contextual perspective, a desire for a single system where possible. In this respect this consultation paper is counter intuitive to previous governmental initiatives and if Price Competitive Tendering (PCT) is brought in for CDS *lower* then we fear it will have a detrimental effect on long term aims to bring about, where possible, a unified criminal justice system as criminal lawyers work in both CDS lower and higher. Solicitor Advocates who are basically organically linked to a firm where the work arises through CDS lower, will under PCT rules end up having to desert their hard won Crown court practices and the legal profession in criminal law in London (more than elsewhere at the moment) which is becoming more fused – in the public interest – will revert back to solicitors and barristers and double manning will continue. The PCT straightjacket will frustrate any move towards the LDPs envisaged by the *Clementi Review* as there may be little or no scope for such developments. If LDPs do take off – it will be in criminal law in London before anywhere else. It is in London that the example is most likely to be set. So the LSC and DCA would do well to consider whether a grander more worthy project is worth jeopardising by the introduction of PCT into a budgetary environment which does not even need it. We

suggest that the structural 'side affect' of PCT in terms of the future development of the profession does not warrant the exercise.

There are now over 1200 criminal law solicitor advocates who have been granted rights of audience as a result of legislative changes. The number of solicitor advocates with higher court rights will dramatically increase and within 10 years will outnumber the criminal bar. This jurisdiction will then for the first time have the ability to provide vertically integrated services embracing both CDS lower and higher. We believe that Price Competitive Tendering (PCT) will have a retarding affect on this positive development brought about by long term government thinking as opposed to short term budgetary pressures (from elsewhere in the system) that have lead to the PCT consultation paper being put out.

THE CONTEXT FOR COMPTETIVE TENDERING

The present system

The present system of proving criminal defence services is flexible and market based. New suppliers enter the system and plug demand where they see it manifesting itself. Whilst the system is not a perfect one, it is nonetheless an efficient one, which through the market mechanism does actually work. The latter is an overlooked fact. Whilst there may be problems with the system, the same are capable of being resolved without recourse to an unworkable, 'price only matters' type of system being suggested by the Consultation Paper with lip service being paid to quality issues. In the market place, low quality providers or "lazy" providers are soon either abandoned by their employees or their clients. Hard working and conscientious providers are rewarded by reputations in the community that they serve which leads to an enhanced number of cases undertaken as well as staff increases as good solicitors are drawn to such firms. Vertically integrated firms which have all CDS lower and higher services including advocacy are now finally coming to the fore in market share terms.

Budgetary stability

The LSC are on record as agreeing that the budget for CDS lower is under control. The overspend, if any, is in the so called CDS higher. The LSC is also aware that expenditure rises not because of initiatives by defence lawyers but other governmental agencies. In its annual report for 2002/2003 the LSC complained that

"CDS spend is significantly driven by factors outside the Commission's control...Other criminal justice agencies continue to make significant changes to law and procedure.....the impact of which on the CDS expenditure is not taken into account when proposals are developed and costed".

If LSC has been unable to work this out, is it right that providers will have to cope with the same cost drivers (over which they will have even less control/input on a fixed budget?).

The experience of competitive tendering exercises in other areas

It is notable that the concept of 'best value' has been rejected in the consultation document. Whilst a quality threshold does exist (albeit in a fairly meaningless form) the process prioritises price above all else – the lowest bidder wins. When this system has been tried in other public services, quality has suffered dramatically. This was recognised by the Government in 1997 when Compulsory Competitive Tendering

(CCT) was abolished for local public services. In the consultation document for that abolition, it was noted

"That under CCT, quality was neglected and efficiency gains were uneven and uncertain and it has proved inflexible in practice. There were significant costs for employees, leading to high staff turnover and demoralisation of those expected to provide quality services. In short, Compulsive Competitive Tendering provided a poor deal for employees, employers and the service users".

Under the proposals that have been set out in the consultation paper, there is an incentive for any Legal Aid provider to spend as little time as possible on each case to maximise profits. Such an incentive would not apply in any other field of public service and clearly has not been associated with equivalent provision such as that by GPs. Like criminal defence solicitors, GPs are paid from public funds for work they do out of office hours. In recent negotiations with the government, GPs contracts have changed so that either they or Primary Care Trusts provide these services. In either case, great care has been taken to ensure that the quality of medical care given is the most important factor. It has not been suggested that price only competitive tendering is an appropriate means to do this.

This proposed Competitive Tendering exercise is very different from others in that given the fact that there is a monopoly purchaser and that the overwhelming number of suppliers of these services do not supply services to any other purchaser; those that fail in the initial bid round will become extinct. In other words, the consequences of this proposal are irreversible.

Some facts about London

(all data set out here is in the 2001 census or from the Greater London Authority)

London is the most cosmopolitan place on earth.

We set out some random facts from the 2001 census.

- At the last census in 2001, England as a whole was 87% white British, while London was 59.8% white British.
- At the last census there was a large variation of white British compared to others between outer London (65.6%) and inner London (50.5%).
- London has over 100 "international districts" where more than two substantial ethnic minorities co exist along with the indigenous community.
- The city has more than 50 non indigenous communities with populations of 10,000 or more.
- Altogether more than 300 languages are spoken by the people of London.
- Virtually every race, nation, culture and religion in the world can claim at least a handful of Londoners.
- According to the 2001 census, 30% of London residents were born outside London (i.e 2.2 million known people) and even this total takes no account of second and third generation immigrants.
- Throughout the 1990s, Greater London was the fastest growing part of the UK, and yet the white population in that time actually fell.
- In Southall, just 8.7 percent of the population consider themselves white British.
- Tower Hamlets has the highest proportion of Muslim residents of any local authority in the country.
- Brent and Newham have by far the lowest European born population, with 64% and 65.7% respectively.
- London's Muslim population of 607,803 people is probably the most diverse anywhere in the world besides Mecca.

- The 2001 census contained an optional religious question. A total of 621, 366 people (8.7%) did not answer it. This was the third post popular choice, after Christian (58.2%) and no religion (15.8%).

- There are many parts of London where black Africans make up between 6% - 35% of the population (for details please refer to GLA London ethnic maps on the internet link supplied in the BME section of this response)

- There are significant parts of London where the black Caribbean population make up between 6% - 22.9% of the population (for details please refer to GLA London ethnic maps on the internet link supplied in the BME section of this response).

- There are large parts of West London where the Indian population make up between 6% - 54.2% of the population (for details please refer to GLA London ethnic maps on the internet link supplied in the BME section of this response).

- In Tower Hamlets and Newham between 10% - 58.2% of the population are of Bangladeshi origin (for details please refer to GLA London ethnic maps on the internet link supplied in the BME section of this response)

We presume that the LSC has not studied the detailed analysis/London maps by ethnicity produced by the GLA as otherwise it would not be making the proposals it does in this paper.

London has a vast population with its central areas such as large parts of Westminster and the City of London having very few residents but a large daily commuting population. These are areas where there is nonetheless a large amount of criminal activity and a certain number of court houses and police stations in order to process those apprehended for alleged criminal activity. Other parts of London have large council estates and other deprived areas where there are again high crime figures which require attendant defence services. In each of these boroughs there are any number of different communities with their own cultures and background. They are all catered for when they require criminal law defence services. This is the CDS lower market in operation and moreover, the one market well regulated within acceptable budgetary parameters by the LSC by the simple fact that the LSC has let the market work rather than intervene by such blunt instruments as PCT.

<u>The report by Frontier Economics (FER).</u>

The conclusions of this report are based on just under 10% return of questionnaires by Firms undertaking Legal Aid work of all types.

Of this 10%, 16% said they would take on more work at current rates, a further 24% stated that they would need to hire more staff and/or expand their premises to do so.

Nevertheless 44% said that they would not take on more work at current rates. Nevertheless, the whole case for "surplus supply" on which the case for PCT is essentially provided for on the back of responses set out above.

The report is clear about its lack of relevant data (FER 1.1.4**)**

"to undertake an analysis of the supply of any product or services, one would ideally wish to have information over a period of time relating to the quantity of the service supplied, the price of the service, the price of other services that could alternately be supplied and the cost of supplying this service. For most services this data is typically not available and <u>legal services are no exception</u>" (emphasis added).

The FER also made an interesting finding at 3.3:

"if finding of this work is that in the short term genuine spare capacity in the market as whole is likely to be limited, implying that the extent of any excess applied is also likely to be limited. To achieve a significant increase in the supply of legally aided work would require Firms to substitute away from private Client work and/or to hire an potentially expand their offices".

Linked to this is a further finding by FER 2.1.1 p17 which is extremely important in considering the specifics of Criminal Law Firms**:**

"switching between providing advice on criminal and civil cases is considered to be very difficult, 80% of Firms stated that is difficult or relatively difficult to close".

In other words criminal law has become a specialist area of law.

This is due to the fact that there has over the last 15 years been a flood of detailed regulatory law and statutes creating new criminal offences. The process continues with the Criminal Justice Act 2003.

Wholesale changes have been made over the last 15 years to the rights of silence, burdens of proof, rules of character evidence, rules of hearsay etc. All of the above are not designed to simplify procedures but in fact to complicate them. As this process has continued apace,

the notion that expenditure on criminal defence services should not rise is as tenable as the claim that defence lawyers have brought about the changed scenario.

Another statement from the FER is worth nothing. It appears that page 76 onwards and pertains to the lack of data of the entry of Solicitors to the profession which may be thought to have a vital bearing on criminal legal aid practices. At page 78 it is asserted that

"the extent to which this (decline and supply of new lawyers) impact Firms seeking solicitors for legally aided work requires further exploration".

Yet it seems that this exploration will not of course take place before the wholesale changes of the PCT exercise has been pushed through.

It seems clear that the authors of the FER themselves were of the view that results of their findings may or may not be justified many years down the line but it was the case that tentative conclusions could not be justified at the point that they were made. The overall conclusions of FER (at1.8) assert

" there may be some spare capacity in the legal services market".

No rational policy maker would base a PCT strategy on such a tentatively premise.

No rational policymaker would on such a conclusion even try a pilot where the results would be irreversible.

QUALITY ISSUES

The LSC paper more or less concedes that the Commission has yet to master this issue in terms of assessing the quality of work it purchases. Yet this is recognised as a statutory obligation of the Commission (para 1.9) at page 37 of the consultation paper where the commission concedes that

"the commission does not believe that the current quality assessment tools or the data we hold on our CDS suppliers would allow us to distinguish between suppliers to this degree in a fair and robust way".

This concedes that the CDS/LSC is not best placed to assess quality of services. To assess quality we therefore have to return to the present market mechanism and the current position where the acceptable quality of services is determined by the client. This is of course subject to professional and minimum standards. However the market, (in all its imperfections) does tend to favour those suppliers who achieve better outcomes for their clients or provide a service that the client appreciates.

An absence of any type of quality assurance (that is absolutely vital to the provision of good legal services in the context of complex laws) is a black hole at the heart of this consultation papers proposal of competitive tendering based on price alone. SAHCA is of the view that due to a host of other factors, even if quality assessments were built into a regime; competitive tendering would remain unworkable in this area. Those reasons are set out below.

INPUTS/OUTPUTS

It is not possible to have a system of competitive tendering where the inputs are not in the control of either contracting party. In the context of CDS lower the following example should show up how ill conceived the notion of competitive tendering in terms of fixed price per case can be. The single example we use is in relation to the new provisions of bad character evidence.

The CJA 2003 brought in new laws in relation to not only the bad character of the defendant but also that of any witness for the prosecution or defence. A new set of complex laws have been established setting out a series of “gateways” through which bad character evidence can be adduced. Prior to this the law was quite simple and straight forward and did not impact on the cost of a case. The new rules were intended to come into force on the 4th April 2005. The Commission has conceded in meetings with practitioner organisations, that in a competitive tendering environment if a new law were to be imposed by statute which caused a rise in costs then an additional payment would be made on top of the previously existing bid per case. At this point a question arises as to how that extra segment of payment would be arrived at. Would there be an independent arbiter of the amount to be set? Be that as it may whilst it was understood that the new law would come into force on the 4th April 2005; the Court of Appeal decided that according to its method of statutory interpretation these new laws in relation to bad character would be effective as of the 15th December 2004 which is when they decided the case of *Bradley*. So far in this scenario we have a tendering environment being influenced by new statute and also the Court of Appeal bring forward an implementation date. Presumably in a post tendering environment this would lead to another round of negotiations for an extra amount to be added to the bid price previously tendered per case. This of course is necessary due to the fact that the inputs have been changed unilaterally without consultation as a result of judicial decision making.

The passing of the bad character provisions under the CJA 2003 and their “earlier” implementation by the Court of Appeal has added at least one extra hearing (a cost driver of some 25%) to the cost of a case as each of these cases where bad character is an issue must have a prior preliminary hearing – pre-trial review in the Magistrates Court prior to trial. In the time scale between the 15th December 2004 when the rules were brought in by the Court of Appeal and the 15th May 2005 different courts had different court procedures for dealing with these issues. However the Court of Appeal then revisited the issue in the case of *Bovell* on the 25th April 2005 where it basically stated that whilst previous convictions can of course be revisited as allowed under the change of law, a considerably large amount of material would be

required before any such applications could be made. In other words in the stroke of a single paragraph of the judgement (paragraph 2) several hours worth of work may have been added to each case where bad character is an issue. In a post competitive tendering environment therefore, the law firm would once again have to revert back to the commission and an additional price would have to be agreed in addition to the pre-agreed bid tender price. There would soon be in place a system which was defined more by its exceptions than its original price.

It can therefore be seen that even in the context of CDS lower the following institutions would significantly affect the inputs:

1. Parliament by passing new laws of substance or procedure.

2. The Court of Appeal by setting out the depths and breadth of enquiries necessary and the amount of evidence and format of that evidence necessary in order for a case to proceed.

3. Each Magistrates Court with it's own idiosyncratic set of pre-trial reviews.

4. The Law Society is a regulator and sets standards that may impact on price tendering. For instance it is presently the case that each solicitor must complete 16 hours of continuing professional development in terms of attending courses per year. It is apparently planned that this number is to be raised dramatically. Any professional entity biding for cases at a fixed price would have taken this into account as part of their overheads. This particular item in the firm's budget could have it's cost tripled without any means of recovering it through cost of services provided which is in any business the life blood of that business.

It may therefore be seen that in the light of the various institutions that compel what inputs have to be made into a case renders a competitive tendering scheme unworkable. The issue is compounded by the fact that the inputs required by multifarious agencies occur randomly and in a tendering environment would often occur after a bid price has been submitted and agreed.

In addition certain types of cases that feature clients with learning difficulties or mental health problems inevitably require larger inputs than might otherwise be the case. Under price competitive tendering schemes for such services it is these most vulnerable clients who would not be at all well catered for. The extra inputs required here are sought to be ignored by the LSC.

BLACK MINORITY ETHNIC (BME) FIRMS and ETHNIC MINORITY CLIENTS

The LSC are aware of the fact that it has duties under Section 71 of the Race Relations Act 1976 (RRA) as amended by the Race Relations (Amendment) Act 2000 (RRAA). The RRA prohibits direct and indirect discrimination on the basis of race. In addition, the RRAA imposes a new general duty on the LSC to have due regard, in carrying out its functions, to the need to eliminate unlawful discrimination and promote equality of opportunity and good race relations between persons of different racial groups. The LSC is also required to publish an Equality Scheme setting out arrangements for assessing, consulting, monitoring and reporting on the impact of its policies on the promotion of race equality. The LSC may not necessarily be acting fairly either in letter or the spirit of the law whilst on the one hand seeking to make all aware of its duties and obligations and at the same time to actively pursue plans to reduce the number of suppliers.

We find the way the statistics have been set out at page 40 of the Consultation Paper somewhat troubling. Whilst a sample from which the statistics are extrapolated is said to be a sample of 30%; we understand that the sample from which the London CDS suppliers data is collated represents a total of 55 BME firms and 77 non BME firms. The sample again is very small.

We are even more troubled by some of the statistics as set out at page 40 which for example seek to assert that the number of small London criminal firms that are BME amount to some 48%. This seems to suggest a near 50% market share of small firms. This could conveniently lend itself to an assertion that there was no discrimination in this sector either way when price competitive tendering mechanisms are brought into play and there is an inevitable "cull" as it would effect all in the same way.

We also draw attention to the fact that the label BME is a broad generalisation and under this umbrella term come all sorts of different peoples from all over the planet both in terms of clients serviced and in terms of lawyers servicing them.

We have already set out above some facts about London drawn from the 2001 census and the Greater London Authority as published in a single day in the Guardian newspaper on the 21st January 2005: see **http://www.guardian.co.uk/britain/article/0,,1395534,00.html**. This link leads to all GLA ethnic maps and also the Office of National Statistics.

BID ZONES/TRAVEL/WAITING

Bid zones

Once again any decision to enlarge bid zones beyond borough level would be counter intuitive to all previous official thinking. It took many years for various government agencies from provision of policing to any other provision to be identifiably brought within borough boundaries. Retaining existing bid zones along borough level would be symmetrical with the provision of social services/drug rehabilitation etc. At the same time the simple physical inescapable conclusion of London being a single city where people move from borough to borough (or are so moved by the police/prison service) cannot also be overlooked. There is no halfway house between the boroughs on the one hand and the rest of the city on the other. This does not mean that there is no merit in having local clients serviced by locally based solicitors in the borough where the clients live or any adjacent borough. The CDS would do well to recall the experience of the Civil Contracting round in relation to mental health services in 1999/2000 when an attempt to set up bid zones whilst ignoring the fact that London was a single city had to be abandoned. This was so due to the fact that clients resident in one borough would commit crimes in another borough and would then be hospitalised in a different borough.

Travel

Similarly in criminal law matters a client can be based in one borough and commit a crime in another borough and be incarcerated in yet another borough if not entirely out of London. Some clients are from the inception of the case remanded in custody at a location far from either where their solicitor is based or where they themselves reside. In such instances, the provision of “locally based services” is simply not possible.

All of the above inevitable has an unpredictable effect on travelling times.

More or less constant refurbishment of one custody suite or the other, or the movement of prisoners from one prison to another are too variable an arbitrary occurrence for travel time to be either abolished or standardised. It is the state that decides where the lawyer is to travel to see his client.

Another unfortunate example here is the practice of Customs and Excise who tend to process most of their cases occurring in the South East of England in their holding centre in the City of London. This means that local solicitors in the square mile are called in to assist the detained persons. Subsequently it seems to be in the exclusive

discretion of the case officer as to which court the defendants are going to be charged in. Whilst there is a court house based no more than a few hundred yards from the detention centre, it is not uncommon for case officers from Customs and Excise to take the charged defendants to any other court in London or even, in the numerous cases of importation of either drugs or evasion of excise duty, to the port of entry such as Portsmouth/Southampton etc. The clients are then remanded into Winchester prison in that particular instance. For cases of importation of goods emanating from Felixstowe, clients will be brought down by the Customs and Excise to their holding unit in London for interview and then produced before Magistrates in Ipswich. In this case the prisoners will be remanded into HMP Norwich.

The facts that emerge from the above scenarios are that local solicitors in the City of London area and Tower Hamlets have over many, many years developed and expertise in customs and excise law; the defendants are in most instances also based in London but customs choose to prosecute them outside London.

In all instances of travel time, very little in terms of costs is driven by defence lawyers

Waiting

This is another instance of that that which is completely outside the control of defence lawyers. Waiting is paid at very low rates and no defence lawyer wishes to make claims at such low rates. In other words no defence lawyer wants to spend a lot of their time in waiting either for the police to make up their minds as to whether or not to charge the defendant or even for the decision to be passed up to the CPS which even adds more waiting time which for criminal defence lawyers is time wasted. However waiting time can vary from between 5 minutes to in one known instance, 8 hours. All pre charge waiting time is driven by either police or Prosecutors.

Court waiting time is driven by even more agencies:

Prison van services/clients/Prosecutors/Courts.

In almost all instances of court waiting time there is no action driven by defence lawyers.

Conclusion

Price competitive tendering is an unnecessary exercise being conducted in an environment where there is complete and efficient budgetary control and market mechanisms ensure renewal of the supplier base to serve a most complex marketplace in terms of demographics and complexity of cases that occur.

Competitive tendering in this particular market place, given its monopoly purchaser; will lead to irreversible catastrophic consequences for the provision of criminal services wherein those who do not bid low enough will be eliminated from the market place for good. At the same time the bodies charged with procuring these services will have failed in their statutory duty to ensure quality being provided (as the lowest bidder will win) and the rule of law, the maintenance of which is upheld partly through the legal profession, will be undermined.

One of the effects of competitive tendering in London would be to crystallise the criminal justice system into higher and lower providers when the thrust of recent positive legislative changes has meant that vertically integrated firms are beginning to emerge. Within the next few years such vertical integration will afford funding bodies with more opportunities to rationalise the system. Competitive tendering will retard such positive developments.