



**CBA RESPONSE**  
**To LSC Consultation Paper entitled**  
**“Best Value Tendering For Criminal Defence Services”**  
**Dated December 2007**

**Introduction**

1. The LSC has issued a consultation paper entitled “Best Value Tendering for Criminal Defence Services<sup>1</sup>” the consultation process for which finishes on 3 March 2008. Best Value Tendering replaces what was previously labelled Price Competitive Tendering (“PCT”)<sup>2</sup>.
2. The LSC are provisionally proposing a four-stage roll-out of BVT. Initially confined to police station and magistrates’ court work, the earliest possible implementation date for which is January 2009<sup>3</sup>, the LSC says that BVT will need to run through at least two phases before it is extended to services in the Crown Court by “at least 2011”<sup>4</sup>.
3. Although the CBA is one of the consultees, the timetable means that the focus of the Paper is very much on the changes to the way solicitors are to be paid for police station and lower courts’ work. By its very nature, phase 1 of BVT will only be open to solicitors.
4. Indeed, barristers are not mentioned at all until Annex 1 paragraphs 5.25 and 5.26<sup>5</sup> which state that it is “*is too early to draw even speculative conclusions about the impact on barristers*” and that Crown Court tendering may be based on a *combination of the Advocates Graduated Fee Scheme and the*

---

<sup>1</sup> On 10 December 2007

1. <sup>2</sup> In the spring of 2007 the LSC expressed an intention to introduce PCT for criminal defence legal services, in conjunction with a scheme for a single payment for litigation and advocacy for each case (“OCOF”) as from October 2008. The change in language is presumably designed to show that the Government is not solely concerned with cost but also with quality

<sup>3</sup> Paragraph 3.18

<sup>4</sup> Paragraph 3.21

<sup>5</sup> Page 70

*Litigators' Graduated Fee Scheme or, if is introduced in the interim, the Single Fee, on which we will be consulting next year."*

5. The paper poses some 37 questions for consultees.<sup>6</sup> The core consultation issue –tendering- is dealt with in the first 40 or so pages, culminating in the summary of the consultation questions finishing on page 51. However, the paper comprises 8 chapters and 7 Annexes extending to nearly double that length at 96 pages.
6. Much of the important detail is tucked away in these Annexes which are, in effect, the small print.

### **Executive Summary**

7. The first consultation question is:

*"Which of the options in chapter two (administrative fees, public defender, BVT) do you believe is the most effective way to procure criminal legal services? Please give supporting reasons."*

8. The LSC itself favours BVT<sup>8</sup> and the paper does **not** seem to be a precursor to the national extension of the Public Defender system since it expressly discounts the idea<sup>9</sup>.
9. **The CBA opposes the introduction of BVT because it believes tendering is a wholly inappropriate method of providing legal services. We have therefore confined ourselves to dealing with this first and most crucial issue of principle.**
10. The remaining 36 questions deal with practical issues, seemingly predicated on the assumption that BVT will be introduced. This assumption seems a leap of faith since although the paper asserts that:

*"The procurement of professional services, including legal services, is common around the world."<sup>10</sup>*

there is no evidence provided or cited to support that assertion.

---

<sup>6</sup> Summarised in chapter 7 page 49.

<sup>7</sup> Chapter 2 page 12

<sup>8</sup> Paragraph 1.11

<sup>9</sup> Annex 1 paragraph 4.4 page 66

<sup>10</sup> Foreword Page 5

11. **Indeed, generally throughout the paper, virtually no evidence is provided that BVT is a tried and successful method of publicly funding legal aid anywhere in the world.**
12. We are comforted by the LSC's acknowledgement of the importance of maintaining the quality of criminal defence services as an essential part of a credible criminal justice system. We would wish to make clear our view that the maintenance of quality of service must remain the over-riding principle. Any measure which has the effect of undermining or subrogating this principle is anathema to anyone with a genuine interest in maintaining the very highest ideals of justice.
13. As the present consultation is only concerned with tendering for police station and magistrates' court work, the introduction of BVT in these areas is unlikely to have a direct impact on an accused person's ability to instruct a barrister of his or her choice.
14. However, the introduction of BVT for Crown Court work would inevitably have a significant impact both on members of the Criminal Bar and those wishing to instruct them. It is for this reason that we, as representatives of practitioners at the Criminal Bar, regard it as imperative to express our view as to the appropriateness or otherwise of BVT as a method of procuring criminal defence services

### **LSC Assumption: BVT is Way Forward**

15. We have shown that the Consultation Paper is premised on the basis that the answer to the first question is that BVT is the most effective way to procure criminal defence services. We do not accept such a premise.
16. It is interesting to note that it is the effectiveness of the procurement of the services rather than their provision which is at the heart of the consultation process. With the focus so directed at the goals of the monopoly legal aid procurer, rather than the providers of the services themselves, the wider intangible values that underpin the quality of the criminal justice system but that cannot be expressed in monetary terms, are at risk of being subordinated to budgetary targets and cost-cutting.
17. We also wonder exactly what "effective" means in the context of procuring criminal defence services. What is the criterion of success by which that effectiveness is to be measured? It is

hard to avoid the conclusion that success or failure will be measured simply in terms of cost saving (a topic we return to below).

### **BVT: An Unsuitable And Inappropriate Model**

18. The CBA has always accepted that there should be financial certainty in relation to Crown Court expenditure. That is why we supported the introduction of and then the gradual extension of the Graduated Fee Scheme. What underpins that Scheme is the recognition that Crown Court cases are not uniform. This principle applies equally to other areas of the law, both publicly and privately funded. The fact that not all cases are the same means that they cannot be treated as if they were, they should not be regarded as a unit or a commodity which can be bought and sold.
19. The Graduated Fee Scheme distinguishes between different types of offences, takes proper account of the size of the case (by reference to the volume of evidence, the numbers of witnesses and defendants, the length of the case, and so on) and the whether and when the defendant pleads guilty. Each of these distinctions is important for its own reasons.
20. No tendering process could properly cater for those distinctions and any attempt to create one would simply be an attempt to replicate the Graduated Fee Scheme. We envisage that this could actually be more expensive to administer for the both the LSC and the Bar than the current Graduated Fee Scheme.
21. We do not accept that BVT is an appropriate scheme for the purchase of advocacy or litigation services. These services are by definition complex personal services that cannot properly be bundled as a commodity to be supplied at a bid price. There is a world of difference between tendering for advocacy services and tendering for refuse clearance. The emptying of one rubbish bin will be very much like the emptying of any other. The same cannot be said of criminal cases – they vary enormously in complexity and length. The quality of the refuse clearance is readily assessable by simple objective standards. The assessment of the quality of litigation and advocacy services is infinitely more complex and not amenable to any simple test.
22. We have very real concerns that under BVT prices may be reduced at the expense of quality. It is hard to avoid the conclusion that constant downward pressure on prices will

inevitably lead to lower quality representation and advocacy. In such circumstances the public interest would be the first to suffer if publicly-funded litigation and advocacy were treated in this way. Would the inevitable outcome of the introduction of such a scheme not be a two-tier system where the very best quality litigation and advocacy was only available to those able to afford to pay for it themselves?

### **Doubts over Quality Assurance**

23. Quality assurance is an essential pre-requisite for the legitimacy of any scheme to provide criminal defence services. Identifying appropriate mechanisms to provide quality assurance for advocacy services is particularly complex. If there is to be anything other than a perfunctory nod in the direction of this important issue, the cost of operating a complex system of quality assurance may swallow up any perceived savings achieved through the introduction of BVT.
24. We are unclear as to who will be vested with the ownership of quality standards and assurance mechanisms – will it be the professional regulators? If so, it is pertinent to observe that the role of the professional regulators is to ensure that practitioners do not fall below a minimum standard. It is not their role currently to actively take steps to raise standards or ensure the very highest quality.
25. Will quality assurance in reality amount to no more than the application of the lowest common denominator?

### **Quality sacrificed to Price**

26. The LSC is keen to draw a distinction between BVT and price competitive tendering (PCT) lest anyone should make the mistake of thinking that this exercise was merely concerned with cost-cutting. It states that with BVT the emphasis will be upon ensuring quality of service as well as obtaining the service at the best price. It disowns any suggestion that its concern is exclusively to establish the lowest price for the service:

*"BVT is not a simple price competition - as well as producing price efficiency, best value tendering must be capable of maintaining the quality and integrity of the criminal legal aid service. The issue of quality and its relationship to BVT is crucial to any discussion on reform"<sup>11</sup>*

---

<sup>11</sup> Paragraph 2.16

27. Whilst the LSC is keen to espouse high principles the independent observer may be forgiven for having reservations about the relative importance of quality and price in the mind of the LSC when it says<sup>12</sup>:

*" The Commission believes that prices resulting from best value tendering may differ from current levels, potentially rising or falling dependent on the nature of each individual market. However, we expect that overall the current cost of criminal legal aid will not rise as a result of BVT. It may well fall helping us to rebalance the legal aid budget in the first instance and enabling us to help more people within our budgetary limits."*

*If, however, the evidence of the first phase is that prices overall are rising, the Commission would address with the Government how best to deal with this. In this instance we would consider the current scope of Legal Aid as a whole in order that we can keep within our budget."*

28. In the light of such comments there must be legitimate concern that this latest LSC initiative has little to do with maintaining the quality and integrity of the criminal legal aid service but everything to do with cost cutting.

29. For instance, that the purpose and intended effect of the reforms to legal aid is to save money is expressed in Annex 1<sup>13</sup>

30. The costs of criminal legal aid<sup>14</sup> show that the spend on Crown Court and higher courts representation was £647.9m in 2006/7 out of a total spend on all criminal legal aid of £1,171.4m.<sup>15</sup>

31. Surprisingly, the LSC does not claim that BVT will in fact save money:

---

<sup>12</sup> Paragraphs 2.17 to 2.18

<sup>13</sup> Beginning at page 65 which provides "3.10. The period 1997/8 to 2004/5 saw spending on lower crime (police station and magistrates' court) legal aid increase by 32%, Crown Court litigation costs increased by 120% and Crown Court advocacy costs increased by 78%. The reform programme is aimed at reducing spend in respect of the CDS, with a series of fixed and graduated fee schemes which deliver savings and help to prepare the market for BVT, if pursued. The proposal to introduce BVT from January 2009 will offer increasing value for money by enabling providers to set their own rates based on the actual costs of providing good quality publicly funded criminal defence services."

<sup>14</sup> Table 7 page 81

<sup>15</sup> To which must be added the £114.4m spent on LSC administration (about 10% of expenditure).

*"5.30. The LSC cannot predict or control the end price that might emerge as a result of any future tendering. At this early stage, we envisage that the end result will be overall cost neutral with increases in some areas and decreases in others. This being said, our thinking is not yet so advanced that we can predict with any accuracy the impact of this policy on criminal legal aid expenditure. However, any overall increase as a result of tendering may inevitably lead to a re-evaluation of the scope of both criminal and civil legal aid."*

32. It seems that if BVT does not lead to a reduction of costs, the LSC will look at the scheme again, so there is no finality here. If the government feels it costs too much, it seems it will alter the rules again.

### **Price at the expense of Choice and Diversity**

33. The phased approach to BVT will become, it is suggested, a self-fulfilling prophesy irrespective of the merits. Staged introduction will create the market and define it. Solicitors will be forced to bid for units of police station and magistrates' court work. Those who fail to win a tender (or sufficient tender to remain financially viable) will inevitably move to other areas of work or go out of business altogether. There is therefore no sense in which they could or would survive so as to return to the market at some later date when a second tendering process is invited. The effect on smaller firms will be obvious and in particular on BEM firms servicing their communities and others. They will leave the market and not return.

34. The suggestion that only those who successfully bid in the first phase (police stations and magistrates' court work) could bid for second or third phases (Crown Court work)<sup>16</sup> is to be viewed with the gravest concern. The effect would be to prevent barristers bidding for Crown Court work because they cannot bid for police station and magistrates' court work. It is assumed that this "current thinking" is not designed to have this result but, at the very least, the proposal appears not to have been thought through.

### **Insufficient Detail to Meaningfully Respond**

35. We are inclined to the view that the detailed questions set out in the Consultation Paper cannot be answered in a vacuum. There is, at present, a complete absence of a concrete context

---

<sup>16</sup> Paragraph 3.8

within which to formulate meaningful answers to such detailed questions.

36. The Consultation Paper does not state what the unit of contract currency will be (other than to make clear that it will not be hours of service provision). What are suppliers to bid for? A basket of 100 cases at £X per case? Will this apply to any case regardless of gravity, complexity and size?
37. In such an information vacuum, how can one begin to make an informed judgment as to whether BVT is even feasible let alone the best method of securing quality legal services at a fair price?
38. We have seen no evidence in the Consultation Paper or elsewhere to suggest that the benefits and costs of BVT for the purchase of legal services has been properly and favourably assessed.

### **Summary**

39. The CBA has long recognised there needs to be budgeting predictability for publicly-funded criminal defence services in the Crown Court. That predictability is currently provided by the Graduated Fee Scheme, which, we believe, is both cost-effective and relatively cheap to administer.
40. We believe that the replacement of the existing scheme with BVT would result in a highly bureaucratic system both for the Bar and the Legal Services Commission; and whatever the tendering process, any process which did not seek to distinguish between different types and complexities of cases would not have the respect of the profession and would be grossly unfair as it would run the risk of both overpayment and underpayment. Such a tendering system would be unlikely to produce any savings for the Treasury as any reduction in the payments to advocates might be counterbalanced by increased costs in establishing and running any fair tendering process.
41. Crown Court advocacy is frequently stressful, requires a range of skills and training and is presently performed, without significant exception, to a high level by a profession with high ethical standards. Whilst the method of payment for that advocacy has not created those skills and standards, there is a real risk that the lowering of payment levels through tendering would seriously erode those skills and standards. Such a risk is plainly not in the public interest and ought to be avoided.

42. The way to avoid that risk is to ensure that payments for criminal defence services in the Crown Court are not part of any tendering process. We are unanimously of the view that payment for advocacy services in the Crown Court should instead be kept within the current Graduated Fee Scheme. It is that Scheme, with the financial certainty that it has created, that has made it the model that has in turn been used to create the litigators' graduated fee scheme.
43. **We firmly conclude that BVT is an inappropriate method of funding Crown Court litigation and advocacy and should not be introduced, whatever the outcome of its application to police station and magistrates' court work**

**CBA WORKING PARTY**

Paul Mendelle QC  
Simon Mayo QC  
Peter Lodder QC  
Paul Bogan  
Jonathan Mann  
David Young  
Sarah Buckingham  
Fiona Jackson  
James Leonard

**24 February 2008**