



Speech given at the Legal Policy Forum Seminar

By Paul Mendelle QC

on

“Legal Aid – Funding and Access”

9 February 2010

1. I am a criminal barrister and I speak of legal aid as it affects practising advocates. This is not an expert view but maybe it is the view of the majority of criminal advocates like me and who the CBA is proud to represent.
2. So in my allotted 5 minutes here are my five points. They are not original and I'm reassured that others have mentioned some or all of them.
3. **First**, the government should recognise that the lawyers do not drive up the costs of legal aid, it is the government's own actions. You cannot create over 3,000 new criminal offences – almost half of which can attract a prison sentence - enact 23 criminal justice acts and increase the prison population by 20,000 since 1997, and expect it to have no effect on the legal aid budget.

4. The Howard League has reported that penal policy and the criminal justice system have been primarily responsible for increasing prison numbers. The recently published Justice committee report is to the same effect. Stop blaming lawyers, , and start taking responsibility and recognise that the budget has to go up. The LA budget is frozen at 2006 level of £2.1bn whereas the demand would have increased it to £2.7bn, so there is already a decline in real terms of 22%, yet you want to cut still more

5. **Secondly**, you ought to know how the legal services market works, you must understand for instance that litigators and advocates do different jobs, **both** vital if the CJS is to work properly. It is very depressing to be told by commissioners as I was last year that they regard the difference between barristers and solicitors as no more than the difference between dispensing and ophthalmic opticians. That is a profoundly ignorant view.

6. And if you don't understand your market then you run the risk that the changes you introduce will have the effect of distorting and impeding access to justice. BVT, OCOF, contractual terms for advocates have all had this effect and the Legal Services Commission is seen by many as destructive one of the best aspects of the CJS, the independent bar, a cornerstone of the constitution.

7. Advocates want schemes that are light touch and not bureaucratic. We aren't in the office from 9-5 we're in court, so we like a fixed fee scheme that is rational and pays fairly.
8. . We spent 18 months designing the Advocates GFS Plus, fixed fee scheme for these very high cost cases that it are said to consume so much of the legal aid pie, and what did we find? That in the 8 years since the Legal Services Commission introduced the separate regime for VHC cases the Legal Services Commission has not compiled sufficient data to be able to formally consult on our scheme, so it is relegated to an annex.
9. **Thirdly**, increase rates in line with inflation. Don't let them stagnate for 10 years as they did from 1997 to 2007 , the years when the economy boomed saw our rates unchanged, now when the economy falls off cliff for no reason to do with us, we are to suffer reductions that take us back to where we started over 10 years ago, and we are expected to do even more work for the same money as a result of all the legislative changes you have introduced.
10. **Fourthly**, don't let the admin tail wag the dog, that is, allow admin convenience to distort the way legal services are provided. For instance, the Legal Services Commission now insists that payment is no longer made to all advocates who appear but only to the instructed advocate who then has to pay all the substitute advocates. At the lowest this means that that admin cost is

pushed onto the advocates, so it may look like efficiency but it's efficiency at our cost, so is that a real or fair saving to the system?

11.At its worst, It opens up abuse of the system as less scrupulous firms use in house advocates as the i.a. to keep the lion's share of the fee

12.And finally and most crucially, you have to care about quality not just pay it lip service.

13.Because if you keep driving down costs, you drive down quality, something the LSC seems to care too little about. I had a conversation at the time of BVT in which I was told by Carolyn Regan that if there were 2 bids, one at Peer Review 2 at a slightly higher price than for a Peer Review 3, the Legal Services Commission would go for the lower price.

14.If you drive down standards and quality, you may think that you are saving money but you are piling up the costs elsewhere and they are unseen and uncounted

15.You might save £2K in the cost of providing legal aid in a case but what if as a result of poor quality representation that defendant goes to prison for 6 months more than they should have, you have cost £20K in prison accommodation costs alone, never mind the costs of social and family disruption.

16. Sooner or later you are going to have to trust us. There will always be a dishonest minority who abuse the system but don't punish us all by making the system cumbersome and bureaucratic, because those dishonest few will still find a way to bilk the system

17. What almost every criminal practitioner would welcome is an extended period of benign neglect while the criminal justice system struggles to digest the bloated statutes that are chucked at us annually with out any consideration of the extra costs involved.

18. You could just leave us alone.

Paul Mendelle

9 February 2010