

APRIL 16, 2013

Legal Aid – some thoughts



<http://barrister999.files.wordpress.com/2013/04/endoflegalaid1.jpg>

If you venture into the legal blogosphere right now you can see many erudite blogs about the Ministry of Justice's proposed "reforms" of the legal aid system.

I'm taking to blogging for the first time to add my voice to the dissenters.

This is a difficult exercise. I am so incensed by the proposals and there are so many points to make that it is difficult to distil them down into any sensible article. I suppose the Powers That Be know that, as it helps them. If you can't write your campaign slogan on a small yellow sticky note it's going to be hard to win over the public.

The Consultation

In summary, the Ministry of Justice has unveiled a "consultation" on reforming legal aid, mostly criminal legal aid. Other areas of practice are also hit, and some have already been hit hard in recent months

http://downloads.ilegal.org.uk/2013/SHUSH_2013.pdf)- ask any family lawyer. The current consultation can be seen here (<https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>). Responses are due by 4 June – every interested citizen, and certainly every criminal lawyer, should respond, and not feel limited by the questions. At the bottom of this article is a link to the petition, (<http://epetitions.direct.gov.uk/petitions/48628>) which everyone should sign.

In short form, which is not easy, the current proposals are as follows:

1. Legally-aided criminal defendants will be deprived of the ability to choose their own solicitor. A defence representative will be allocated to them.

2. Only providers (like solicitors' firms, or more likely large corporations: Serco, G4S, Capita etc) who successfully bid for contracts, which run for three years initially, will be able to provide legal aid criminal advice and representation. They will succeed if, having satisfied pretty basic quality and delivery criteria, they bid the lowest price per unit of work.
3. The majority of work would be paid per unit, i.e. one case. Bidding providers will set their own price in the auction, but the ceiling for such prices is a deduction of 17.5% from current average costs. The reality is that to be ensured of victory the bids will be much lower than this.
4. In any given Criminal Justice System area (basically the counties, with some exceptions) the number of providers will be limited. In Nottinghamshire 6, in Lincolnshire 4, in Manchester 37, etc. Each provider gets an equal share of the available work, fixed and immovable. The number of providers (ie. firms) drops from 1,600 to a maximum of 400 but in reality more like 40 or so nationwide.
5. The proposals cover all legal aid litigation work (i.e. the solicitor side of things) including in the Crown Court.
6. There are significant cuts for other fees too, most notably advocacy fees in the Crown Court, and fees in Very High Cost Criminal Cases (VHCCs). These escape contracting, for the time being at least.

There is no discussion in the paper as to whether this model is the best way of going forward, or whether it is necessary at all. That has led me to put "consultation" in inverted commas because it seems to me that MOJ is not really interested in the answers.

If you want further confirmation of that, note that Chris Grayling, Secretary of State for Justice, has recently pronounced that the time for such exercises would be reduced, so instead of three months we get eight weeks. That might be fine if details were known in advance and only a small number of organisations needed to respond. It's not adequate when the proposals were veiled until they were revealed to the press on the morning of the launch at the start of the consultation period. It's not adequate when the proposals are so complex and need very careful analysis. It's not adequate when it must be known to MOJ that many of the stakeholders who need to respond will need to analyse and convene special meetings with a number of very busy people in order to agree a corporate position.

Add to that that the questions asked in the consultation document don't go to the heart of the issue:

- Is there any other area in which MOJ spends money and in which it could be saved?
- Is price competitive tendering going to save money, bearing in mind the cost of bringing it in?
- What will the plans do to the justice system as a whole?

- What are the costs associated with the plans which are not directly accountable to the MOJ departmental budget, e.g. miscarriages of justice, delays in the court system, redundancies in the legal sector, the closure of firms which were supported by crime but offered other services?
- And the most basic question of all, namely do you agree that price competitive tendering is a suitable mechanism for rationing legal aid expenditure?

MOJ does not ask those questions. It would rather that people find it difficult or impossible to respond, and so fail to do so, and it doesn't ask the above questions because it will not like, and therefore does not care about, the answers. (That doesn't mean that you can't give them the answers – if you do respond then feel free to object, and you should say so as often and in as many ways as possible.)

Be under no illusions. This is not an exercise in Government reaching out to citizens and asking for suggestions as to the best way forward. This is a rubber stamping exercise on decisions which have already been taken.

So what we have here is a failure to ask the basic questions, and instead asking about the details. To draw a rather bleak analogy (because that's how I feel right now), this is the hangman asking the condemned as he steps onto the trapdoor not, "Would you prefer it if I don't pull this lever?" but:

"Would Sir prefer a blue hood over his head, or maybe this nice yellow one?"

What will be the effects of these changes?

The proposals will all but destroy UK justice. Although our justice system is often criticised in the press, it should be remembered that our courts and our lawyers are regarded as some of the best in the World. We are an exemplar of how justice should be done. Our Government should be proud of the courts and what they achieve.

Unfortunately, if these proposals go through, that will no longer be the case.

Quality will no longer have a place

At present, the market regulates quality. In general, solicitors who provide a good service tend to be instructed more regularly by clients, and grow as a result. Barristers are equally market regulated. "You're only as good as your last case" as the old adage goes.

The new system removes that. Quality is considered at a preliminary stage in the tendering process, and is likely to be largely a tick box exercise which the majority can comply with.

However, quality has no impact in the final bid round and the decision as to who gets the contract. Only the lowest bidders will succeed. A bid could be ten times the quality but if it is £1 too much the bid may fail.

It's worse than that. Once the contracts are in place the market share is fixed and the volume of work will never exceed the allocated portion, so in an area with four providers they will each get one quarter of the cases. No more. No less. No matter what happens (pretty much). So there is no incentive at all to provide a good service. A Gold Standard of service, or a plastic toilet brush standard of service, will equate to the same thing. No provider will benefit from providing a great service, and no provider will be punished in the market for providing a poor service.

The only commercial necessity will be to provide a cheap service. That is inevitable when only the lowest bidders will succeed and there are built in cost ceilings but no floor, leading to deep cuts in what can realistically be provided. Quality for its own sake has no value.

As far as clients are concerned, this will manifest itself in a number of ways:

- Face to face meetings with the lawyers involved will end, except perhaps at court. There will be no time to dedicate to discussing the case, ironing out the problems, or winning trust.
- Preparation will be limited to the minimum. Material may not be read properly, videos may not be watched, experts may not be instructed.
- Clients will ever increasingly be represented by in-house advocates. That's the only way to make this profitable. This is not always a bad thing (I am such a person) but it is the death knell for the independent Bar, and with it all the skills necessary for the prosecution and defence of the most serious cases.

You might wonder why you should care. The answer is that the above issues have a knock-on effect at court. Cases which are not properly prepared have a way of going wrong. People are wrongly convicted, trials are lengthened or adjourned because it becomes apparent that there have been issues overlooked, cases which should have pleaded or cracked don't do so because the discussions haven't taken place or there is a lack of trust between lawyer and client. In the worst cases juries may have to be discharged, or convictions may be quashed because there is a doubt as to whether they were safe.

All of that adds up to wasted court time, and lives ruined. Victims have to undergo the ordeal of a trial more than once if the jury is discharged and the prosecution have to have a second go. They may be distressed by that, or may not turn up the second time leading to a potentially unjust acquittal. On the other side of the card, innocent people find themselves in prison, away from their families, with no job. Their families may end up having to claim benefits, or be made homeless. They may not be able to get a job on release, even if exonerated on appeal. They may develop depression and other disorders. Some may even commit suicide. There are huge costs whenever these sorts of things happen. These costs and wider impacts have not been taken into account.

And if the independent bar fails, our court system will be much the poorer and very serious criminals may escape justice.

The End of the High Street Solicitor

In towns up and down the country there are small or medium firms of solicitors which undertake a mix of work. In recent years they've been squeezed from all sides: increased regulation, competition from banks and large insurance firms, online competition, the collapse of the housing market.

All of those firms are small businesses employing a number of people. Even the very smallest usually involves at least one or two solicitors and an administrator or secretary.

For many these High Street firms are the face of the law in their local area. They provide face to face advice on all manner of issues, from divorces to conveyancing, boundary disputes to wills.

Many of these firms do criminal law too. Their specialists know the local area, know the police officers and courts (or at least they did before the local court was closed by MOJ last year), and above all know the client base.

All that knowledge is useful, as it means discussions with clients and others are informed. A witness cannot pull the wool over the lawyer's eyes because of that knowledge, and neither can a client. A client can't say "in that previous burglary I was only a lookout" because the solicitor knows otherwise from the last case. A client can't say "I've never had a drug problem" because the solicitor knows about that too. The regular MO is known, as are their associates and hangouts. It all helps to smooth the path of justice and avoid problems which stem from a lack of knowledge.

That's not all.

The steady flow of criminal work subsidises the other services offered. It is not necessarily the case that a firm can keep running with crime stripped out, especially with the other savage cuts elsewhere in the legal aid system.

These small to medium firms have next to no chance of successfully winning a contract. They can't afford the expansion which may be required, or to operate with the low prices necessitated by the new arrangements.

If they don't win a contract, they may have to make their criminal lawyers redundant. It doesn't end there. The criminal secretaries and junior clerks also have to go. The agency which helps them with police stations goes as well. So do the numerous experts, enquiry agents and other providers.

Then the firm has to ask if the family lawyers who'd been just about hanging on after April's cuts remain worthwhile. Probably not, so they and their team lose their jobs.

The personal injury lawyers have had a difficult time as well, with reductions in recoverable fees, and they may not be viable.

The conveyancing partner, struggling in a weak housing market, also faces difficulties.

Before long, the entire firm is not economically viable and the entire business folds. All its staff, lawyers and non-lawyers, lose their jobs and there is nowhere else for them to go because the majority of other local firms are in the same position. Their offices are vacated and become empty eyesores on the High Street.

For the client wanting a will drawn up or a house sold, they have no choice. Where previously they might have obtained an online quote but gone to their local solicitor who they can trust and visit face to face, they no longer have that option. It's the large online company or nothing.

That lack of competition has an impact. Online providers can put their prices up because they no longer have effective competition on the High Street. Inevitably the few High Street firms remaining put their prices up too – with less income from other sources they have to pay their leases somehow.

If these changes come in you can expect to see the effective end of the High Street solicitor within two years or so.

This is not me being paranoid. The Government in its paper recognises that the minimum level of firms leaving the criminal sector is 1,200. That level assumes that there are no new entrants to the market, and no bidder makes a play for more than one area.

The reality of these plans is that upwards of 1,500 firms will leave that market, and many or even most will close their doors for the last time.

The End of the Criminal Bar

Meanwhile, the barristers suffer too. The High Street solicitors who sent their work have gone, so Chambers – already faced with increased volumes of work being covered in house – have to go cap in hand to the new contract providers.

Those providers have to be merciless to make their low bid worthwhile. They drive a hard bargain and counsel find themselves working as agents on fixed fees for a fraction of the actual cost. The work which went to local chambers goes to different, cheaper, sets. Quality is driven down and counsel also find it impossible to survive.

With the solicitors' profession weakened after the divide and rule approach taken by the Government succeeded, the Bar is in a weak position to resist the onward extension of price competitive tendering. The Bar ends up having to scrape the barrel for the fees available once advocacy services have been put out to tender, or more likely subsumed into the litigator fee as part of a "one case one fee" arrangement.

The Government is clearly trying to divide the professions so that it isn't faced with unified solicitors and barristers. That's why Crown Court advocacy is presently excluded from contracting.

That's not how it'll stay. It will only be a short time before a one case one fee (OCOF, or presumably in this case Criminal One Case One Fee, er... COCOF!) arrangement comes in. The Bar would have no power to resist, the criminal solicitors would not assist because they'd all be redundant, and the final nail in the coffin of the independent Bar would be hammered home. Its loss would be mourned only by those few who still believe in the luxury of justice.

This would suit the large corporations who would now be running all aspects of the justice system. After all, at that stage you could be investigated by a G4S contractor, held in police cells and looked after by a G4S Civilian Detention Officer, conveyed to the Court cells and detained there by GeoAmey or G4S staff, defended by a corporate representative from SercoLegal or similar, and remanded or held after conviction in a prison run by Serco or G4S. If you're released subject to an electronically monitored (tagged) curfew at any stage they'll be monitoring that, and prosecute any breaches.

This is not good for justice. It is arguably not that great for shareholders of those big companies, until you realise that once the traditional supplier base of independent solicitors and barristers has been destroyed, they can put their prices up.

Victims and defendants, the Court and Judges, and society as a whole would be poorly served. The expertise of the solicitors, and of the Bar – particularly at the senior end – would be lost, and gone forever. The pool of advocates who make up the majority of our criminal judges would also be drained.

Within a few years our legal system would be but a pale shadow of its former self.

The End of Client Choice

Removing client choice is essential to the operation of the plans. Equal market share cannot be guaranteed if clients can choose where to go. We end up with a system of allocated lawyers foisted on unwilling clients.

This is a major constitutional change. It brings us closer to the system in some other jurisdictions, most notably the US, where lawyers are allocated to defendants. You need only read some of the harrowing tales about poorly defended cases in the US courts to know how well that works.

I have already referred to some of the advantages of a lawyer – client relationship, and the lack of any quality incentive.

With the end of client choice, work with the established criminals who make up a large proportion of the work of the courts will be much harder. At present an experienced and familiar lawyer, or even an unfamiliar one from a trusted firm, can make things run much more smoothly because the relationship enables often unpalatable advice to be given and accepted much more easily.

It is perhaps not appreciated by the majority that what happens in a criminal case is in the hands of the defendant. Criminal defendants are usually disadvantaged, they may not understand everything that happens, they may not necessarily want to co-operate with the process. They probably didn't get into that situation by being sensible and right-thinking members of the public. Left to their own devices many will simply plead not guilty and deny everything even if the evidence is totally against them. Others may need a trial but have difficulty conveying their case to the court, or even to their lawyer. Some will refuse to talk or discuss at all until they can trust their team.

In the hands of good, trusted (chosen) lawyers, the number of trials is reduced because those who ought to plead guilty can do so trusting that it is the best thing to do, those for whom there is a sensible compromise plea can get into that situation as a result of the lawyers negotiating, and the trials are sharply focused on the right areas of dispute and therefore kept as short and easily manageable as possible.

These changes will lead to an increase in the number of trials, and an increase in the number of applications to vacate guilty pleas. That's expensive but again has not been factored in.

The proposals give no credence to the advantages of the current system and do not recognise its benefits.

The End of Justice

Make no mistake, these proposals are not about getting a better deal for the taxpayer.

If this was an open debate about how to save money in the public interest the MOJ could have come to those who work in the system – from the police all the way through the CPS, Probation, the Courts, and defence solicitors and barristers, and asked what the way forward should be. With a good faith approach there would have been a good faith response and many good suggestions would have been made.

There has been no such approach, and the matter is apparently not up for debate now.

Instead, MOJ has spent taxpayers' money negatively briefing the media about "fat cat lawyers", knowing that these claims are untrue or misleading, and has come up with proposals which will destroy the present justice system, lead to many delays in the court system and will fail victims, defendants, witnesses and their families, and will destroy both sides of the legal professions. Many thousands of hardworking people will lose their jobs, and valuable local businesses will shut down.

I know that it's hard to inspire any sympathy for legal aid lawyers, or lawyers of any kind. The Secretary of State for Justice pretty much says so in his recent consultation paper when he observes that the system has lost much of its credibility with the public. But of course the only reason the system lacks credibility is because elected politicians have failed to accept the responsibility for defending this valuable system and confronting misunderstandings and misinformation. They have instead compounded those issues.

This is, of course, deeply ironic, because neither politicians nor the more popular press are renowned either for their morals or integrity, nor are they known in some cases for a lack of a tendency to line their own pockets at public expense (and indeed to use the services of criminal lawyers), yet for some reason much of the population are prepared to trust their judgement on this issue.

This is deeply worrying. The rule of law is a fundamental feature of a democratic society; the courts, and those who work in or serving them, should be respected.

It is a basic responsibility, indeed duty, of any sensible elected politician, and particularly a Lord Chancellor with the role of Secretary of State for Justice, to properly educate the public about the importance of the legal system, and to respect and uphold its traditions.

What we have, however, is repeated denigration of the system and its practitioners. We have respect for human rights undermined by elected politicians misrepresenting decisions of the courts ([see Catgate \(http://ukhumanrightsblog.com/2011/10/06/what-the-first-catgate-appeal-judgment-actually-says/\)](http://ukhumanrightsblog.com/2011/10/06/what-the-first-catgate-appeal-judgment-actually-says/) for example), we have elected politicians using criminal cases in support of wholly different policy agendas without regard for what the courts actually said (the recent Philpott case), we have lawyers repeatedly portrayed as “fat cats” when the statistics themselves are misleading and in any event the small sample used is not in any way representative.

All of this is calculated to make it more difficult for lawyers who work within the system to win the public over. It is calculated to make sure that justice is understood only as “criminals going to prison” and never “person falsely accused acquitted”, or even that most unpalatable “the Prosecution failed to prove their case so the right verdict was not guilty, whatever anyone suspected”. Defence lawyers are those who sponge off the system being paid extortionate amounts of money to get people off on technicalities.

This forgets that legal aid is important because it ensures that the most vulnerable in society are legally represented. It contributes to the rule of law and the right of everyone to have a fair trial. Even those technical points taken by the lawyers have a social and legal utility – they develop and clarify the law and ensure that justice is done within the law and not outside its confines.

The fairness of a country’s justice system is a good barometer for the freedom of that society. Democracy is founded on the rule of law. Without the rule of law it becomes rule of the powerful and unscrupulous. The kinds of societies in which people can be imprisoned without fair trials and without evidence being required are not the sorts of societies in which most of us want to live.

For a justice system based on adversarial trials, where each side presents its case and tests that of the other in order to provide the court with an opportunity to find the truth, you need both sides to be roughly equally balanced. Both sides need to be competent and able to operate.

Once you have a situation in which one side is more powerful than the other, or one side is better represented than the other, or even in which one side is somehow regarded as less worthy than the other, the adversarial system no longer works properly.

And that is a tragedy for us all.

What can be done?

For a start, don't accept everything you read in the newspapers about this. Much of it may be wrong.

If you disagree with the plans, write to your MP and tell them. You can find out who your MP is here. (<http://www.theyworkforyou.com/>)

Sign the petition: Save UK Justice. (<http://epetitions.direct.gov.uk/petitions/48628>)

Respond to the consultation and tell them you fundamentally disagree. Answer the unasked questions.

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35 comments



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Andrew Bishop

Excellent piece. Really good analysis. Just two points:-

1. You say market share and volume are fixed. That isn't quite right. Market share is fixed but there is no guarantee of volume. The contract pays per case. The figures are a couple of years out of date and arrests have generally diminished (overuse of