

Title: Transforming Legal Aid: Introducing Competition in the Criminal Legal Aid Market IA No: MoJ199 Lead department or agency: Ministry of Justice Other departments or agencies: Legal Aid Agency	Impact Assessment (IA)	
	Date: 09/04/2013	
	Stage: Consultation	
	Source of intervention: Domestic	
	Type of measure: Secondary Legislation	
		Contact for enquiries: Matt Shelley matthew.shelley@legalaid.gsi.gov.uk
Summary: Intervention and Options		RPC Opinion: RPC Opinion Status

Cost of Preferred (or more likely) Option					
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?		
£m	£m	£m	No	NA	
<p>What is the problem under consideration? Why is government intervention necessary?</p> <p>We currently spend over £1bn per year on criminal legal aid services delivered by over 1600 providers and over 4000 advocates in England and Wales. Against a backdrop of continuing financial pressure on public finances, we need to reduce the cost of the scheme, but to do so in ways which ensure that limited public resources are targeted through improving efficiency and administrative simplification in the criminal legal aid provider market.</p> <p>What are the policy objectives and the intended effects?</p> <p>We believe that the single most effective way of ensuring the taxpayer is getting value for money for criminal legal aid services is to move away from the current complex system of administratively set fees, through the introduction of a system of competitive tendering, whereby providers themselves determine the best price at which they can offer their services. The Government's preferred approach is to introduce competition first for the full range of litigation services (except Very High Cost Cases (Crime)) and magistrates' court representation.</p> <p>This impact assessment is confined to four design elements of the proposed competition model, which may require legislative change:</p> <p>(i) Proposal that clients would generally have no choice in the provider allocated to them at the point of requesting advice, and would be required to stay with that provider for the duration of the case, subject to exceptional circumstances in which clients might be permitted to change their allocated provider (either at the outset or during a case)</p> <p>(ii) Proposed reduction in contract numbers</p> <p>(iii) Proposed introduction of fixed fee scheme for Crown Court cases with 500 pages of prosecution evidence or less</p> <p>(iv) Proposed price cap for each fee set at 17.5% below current average claim value in procurement area and 17.5% reduction in administratively set rates for all other classes of work within scope of the proposed competed contract¹ where the remuneration level would not be set by the price competition.</p> <p>What policy options have been considered, including any alternatives to regulation?</p> <p>Each design element has been assessed against the "do nothing" option.</p> <p>Will the policy be reviewed? We will monitor the impacts of the policy. If applicable, set review date: /Year</p>					
Does implementation go beyond minimum EU requirements?					
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.			N/A		
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)	Micro Yes/No	< 20 Yes/No	Small Yes/No	Medium Yes/No	Large Yes/No

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister:



Date: 09/04/2013

¹ See Annex E of the consultation document

Summary: Analysis & Evidence

Description: Transforming Legal Aid: Introducing Competition in the Criminal Legal Aid Market
FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: Negligible
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)	
Low	-		-	-	
High	-		-	-	
Best Estimate			£120m		
Description and scale of key monetised costs by 'main affected groups'					
Legal aid providers: Legal aid providers are expected to experience a decrease in fee revenue of £120m per annum in steady state. This, however, is set against the opportunities we are attempting to create in terms of economies of scale and other efficiencies. The impact on the long term profitability of successful providers is uncertain.					
Other key non-monetised costs by 'main affected groups'					
Legal aid providers: Legal aid providers are likely to incur a one-off cost as they reorganise in response to this competitive tender.					
The Legal Aid Agency will incur a one off cost in making the administration changes. These costs are currently unknown, subject to the final outcome of the consultation.					
BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)	
Low				Optional	
High				Optional	
Best Estimate			£120m	Optional	
Description and scale of key monetised benefits by 'main affected groups'					
Legal Aid Fund: The legal aid fund will have a reduced spend of approximately £120m per annum in the steady state.					
The Legal Aid Agency will make estimated administrative savings of £2m per annum.					
Other key non-monetised benefits by 'main affected groups'					
Key assumptions/sensitivities/risks					
				Discount rate (%)	N/A

BUSINESS ASSESSMENT (Design Element 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	No	NA

Evidence Base (for summary sheets)

1. Introduction

Background

1. This Impact Assessment (IA) accompanies the Ministry of Justice's (MoJ's) consultation on "*Transforming Legal Aid: Delivering a More Credible and Efficient System*". The associated consultation document was published on 9 April 2013 and can be found at: www.justice.gov.uk
2. The legal aid scheme involves the public procurement of legal services and determines the terms and conditions of access to these services. Expenditure accrued to the Legal Aid Fund was just over £2bn in 2011/12. This represented around 25% of the Ministry of Justice's (MoJ) net resource budget.
3. The Legal Aid Agency (LAA) is responsible for administering the legal aid scheme in England and Wales. We currently spend over £1bn per year on criminal legal aid services delivered by over 1600 providers and over 4000 advocates.
4. Against a backdrop of continuing financial pressure on public finances, we need to reduce the cost of the scheme, but to do so in ways which ensure that limited public resources are targeted through improving efficiency and administrative simplification in the criminal legal aid provider market.

Policy Objectives

5. Legal aid is a fundamental part of our system but resources are not limitless. We believe that the single most effective way of ensuring the taxpayer is getting value for money for criminal legal aid services is to move away from the current complex system of administratively set fees, through the introduction of a system of competitive tendering, whereby providers themselves determine the best price at which they can offer their services. The Government's preferred approach for the future of criminal legal aid services is to introduce competition for the full range of litigation (except Very High Cost Cases (Crime) which are subject to separate proposals¹) services and magistrates' court representation.
6. We recognise that this would require a major change in the operation of the market, but it is our view that competition is the best way to promote value for money, innovation and efficiency, as well as improved resource allocation. There is experience of operating price competitive tendering in other criminal and civil legal aid services, including the award of the Defence Solicitor Call Centre (DSCC) contract, Criminal Defence Direct (CD Direct)² contracts and the Civil Legal Advice contracts. These tendering exercises have delivered improved value for money for the taxpayer.
7. Our proposed model would result in consolidation of the market, making it easier to access greater volumes of work and allowing control of the case from end to end. By gaining longer and larger contracts with greater certainty of volumes, successful applicants would have increased opportunities to scale up to achieve economies of scale and scope and provide a more efficient service. We propose to move away from our current position where the government can terminate an awarded contract at six months notice, at nil cost. In future we propose there will be compensation payable by government if we terminate prematurely. This would give firms the confidence to invest in the restructuring required in the knowledge they would be in receipt of larger and more certain returns over a longer period of time. Whilst encouraging consolidation through expansion or forming consortia, the model allows providers the freedom to develop the most efficient approach in delivering the service (e.g. the extent to which they sub-contract).

¹ See Impact Assessment on "Transforming Legal Aid : Reforming fees in criminal legal aid"

² Formerly known as Criminal Defence Service Direct or CDS Direct

8. We are also aiming to encourage providers to work efficiently and enable the earliest possible resolution of cases, thereby supporting our wider objective of a more efficient and proportionate criminal justice system, which gets it right first time.

Policy

9. This IA is confined to four elements of the proposed competition model:
- (i) Proposal that clients would generally have no choice in the provider allocated to them at the point of requesting advice, and would be required to stay with that provider for the duration of the case, subject to exceptional circumstances in which clients might be permitted to change their allocated provider (either at the outset or during a case)
 - (ii) Proposed reduction in contract numbers
 - (iii) Proposed introduction of fixed fee scheme for Crown Court cases with 500 pages of prosecution evidence or less
 - (iv) Proposed price cap for each fee³ set at 17.5% below current average claim value in procurement area against which providers will bid and 17.5% reduction in administratively set rates for all other classes of work within scope of the proposed competed contract⁴ where the remuneration level would not be set by the price competition.

Main affected groups

10. The following key groups are likely to be affected by the three design elements outlined above of the proposed price competition model:
- Criminal legal aid service providers - organisations contracted with the LAA to deliver criminal legal aid services.
 - Future clients eligible for criminal legal aid services; and
 - LAA.

Costs and benefits

11. This IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales, with the aim of understanding the overall impact on society from implementing these proposed fee reforms. The costs and benefits of each reform are compared to the “do nothing” option. IAs place strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are some aspects that cannot always be monetised.
12. This IA considers the impact of the design elements proposed when implemented as a package as opposed to in isolation.

Methodology and Assumptions

13. The following assumptions have been made in the estimation of the costs and benefits:

³ There will be fixed fees for (a) Police Station work, (b) Magistrates Court work, (c) Crown Court trials 500 pages of prosecution evidence or less, and providers will be asked to bid at a minimum discount of 17.5% against the current Litigators Graduated Fee Scheme for Crown Court trials with over 500 pages of prosecution evidence.

⁴ See Annex E of the consultation document

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- (i) Providers will deliver an acceptable level and quality of service.
 - (ii) All savings figures have been rounded to the nearest £1m for estimates below £10m and to the nearest £5m for estimates above £10m. All volume changes have been rounded to the nearest 100 cases.
 - (iii) All estimates are made using 2011-2012 LAA administrative data.
14. The “do nothing” option in each of the design elements below is the base case. This in effect would mean that the current fee remuneration rates and market structure would continue to operate as now. As this option is compared against itself, its costs and benefits are zero, as is its Net Present Value (NPV).

Design Element 1: Client choice

Description

15. Under the proposed model of competition, clients would generally have no choice in the provider allocated to them at the point of requesting advice, and would be required to stay with that provider for the duration of the case, subject to exceptional circumstances in which clients might be permitted to change their allocated provider (either at the outset or during a case).
16. Currently, clients are able to select any provider that holds an LAA contract and, in certain circumstances following the grant of a representation order, transfer to another provider should they wish.

Impact

Legal aid service providers

17. The proposal to remove a client’s right to choose their provider will have an impact on those current providers successful in being awarded a new contract in terms of their business model. On average, currently 60% of police station attendance work is obtained by providers from clients selecting that provider rather than through being on a duty scheme.
18. Giving the provider greater certainty by restricting a client’s right to choose their provider at the point of request and to transfer to a new provider will have a positive impact on providers, enabling them to retain business throughout the life of a case. This increased certainty over case volumes will enable providers to fully exploit economies of scale and scope and in turn offer their services at a lower cost to the taxpayer. If client choice were retained as now as a part of this model – both at the outset or allowing clients to switch providers at different stages of the process – this would introduce a level of uncertainty over the case volumes a provider would be allocated. We believe this level of uncertainty might lead to higher prices being bid in the competition.

Future clients eligible for criminal legal aid services

19. Under the proposed model, clients would still have access to the same criminal legal aid services as they do now. We recognise that in some instances there may be particular circumstances (for example, a professional conflict of interest exists) where the allocated provider may not be in a position to offer effective representation. We therefore propose providing for some exceptional circumstances in which clients are permitted to change their allocated legal representative (either at the outset or during a case).
20. The LAA will maintain robust standards for quality of service both at the point of tender and through the life of the contract, whereby resource is dedicated to monitoring fewer providers. This will help ensure that clients continue to receive taxpayer funded legal services of acceptable quality.

LAA Administrative Costs

21. In order to manage the allocation of clients to providers, the LAA will administer the process through a system akin to the current Defence Solicitor Call Centre. There may be additional costs in running a system to address the transfer of clients from one provider to another and to establish a team responsible for determining transfers prior to the grant of the representation order.
22. The cost to the LAA of amending a current process will be determined by a separate competitive tendering process.

Risks and Uncertainties

23. Client choice may in certain circumstances (where quality is easy to measure and clients have good information about the relative effectiveness of different providers) give an incentive to provide a legal aid service of a level of quality above the acceptable level specified by the LAA, as firms effectively compete on quality rather than price. The removal of choice may reduce the extent to which firms offer services above acceptable levels. We will ensure that quality does not fall below acceptable levels by carefully monitor quality and institute robust quality assurance processes to ensure it does not fall to an unacceptable level. We will also work with regulators to ensure they are aware of such a risk and through the enforcement of the relevant Codes of Conduct, identify and address any shortfall in standards.

Design Element 2: Contract numbers

Description

24. The LAA currently contracts with over 1,600 separate organisations to deliver services under the 2010 Standard Crime Contract.
25. Our proposed model would result in consolidation of the market, making it easier to access greater volumes of work and allowing control of the case from end to end. By gaining longer and larger contracts with greater certainty of volumes, successful applicants would have increased opportunities to scale up to achieve economies of scale and scope and provide a more efficient service. Our proposed model would give firms the confidence to invest in the restructuring required in the knowledge they would be in receipt of larger and more certain returns over a longer period of time. Whilst encouraging consolidation, the model allows providers the freedom to develop the most efficient approach in delivering the service (e.g. the extent to which they sub-contract).

Impact

Legal aid service providers

26. The following table sets out an illustrative number of contracts in each proposed procurement area.

Proposed procurement area	Proposed contract numbers in area
Avon and Somerset and Gloucestershire	12
Bedfordshire	7
Cambridgeshire	4
Cheshire	9
Cleveland	6
Cumbria	4
Derbyshire	7

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Devon and Cornwall	10
Dorset	4
Durham	6
Dyfed-Powys	4
Essex	7
Greater Manchester	37
Gwent	4
Hampshire	9
Hertfordshire	7
Humberside	4
Kent	5
Lancashire	14
Leicestershire	5
Lincolnshire	4
London West and Central	38
London North and East	27
London South	18
Merseyside	14
Norfolk	4
North Wales	4
North Yorkshire	4
Northamptonshire	4
Northumbria	10
Nottinghamshire	6
South Wales	9
South Yorkshire	8
Staffordshire	7
Suffolk	4
Surrey	4
Sussex	8
Thames Valley	4
Warwickshire and West Mercia	9
West Midlands	20
West Yorkshire	25
Wiltshire	4
Total	400

27. Based on our assessment, the LAA claim data for the period October 2010 to September 2011 would suggest approximately 400 contracts with providers across England and Wales would be appropriate. This approach would entail a significant reduction in the number of contracts with providers in each procurement area. However, whilst the proposed model would result in fewer contracts, those contract holders may choose to use agents in the relevant procurement area to deliver services where that is the best way of delivering the service. Giving providers the opportunity to be more flexible in the way they structure their business and in doing so deliver the service, whether that is through joint ventures, use of agents or Alternative Business Structures (ABS), is also essential if a more efficient and cost effective criminal legal aid system is to be established.
28. This will also help to maintain competition in the market over the longer term by allowing firms that are not able to scale up before the first bid continued access to the legal aid market. The impact

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on individual providers of the reduction in contract numbers is therefore uncertain. Additionally, larger contracts with more certain volumes may encourage new entrants into the legal aid market.

29. We recognise there is likely to be a one-off cost to providers as they reorganise in response to this competitive tender. We will be working during the consultation period and beyond to help facilitate these reorganisations.

Legal Aid Fund

30. Our proposed approach allows potential for savings by offering larger contracts with greater certainty of volumes. However, these contracts are not too big to prevent a new firm entering the market in the future; thereby ensuring prospects for future competition are not damaged.

LAA Administrative Costs

31. There will be a financial saving to LAA Administrative Costs through a reduction in Contract Management, Case Management and auditing resources required to administer the delivery of criminal legal aid services through fewer contractors. This change contributes to the estimated saving from the proposed competition model in LAA Administrative Costs of £2m per annum.

Risks and Uncertainties

32. There is a risk that the price competition may not attract sufficient applicants whether from existing providers prepared to grow their business to the level required or from new entrants. The likelihood of this risk is greater in some procurement areas due to the current level of fragmentation. We intend to use the consultation period and post consultation to engage actively with the market to discuss the proposed market restructuring.

Design Element 3: Crown Court litigation fee scheme

Description

33. One of the aims of the competition model design is to simplify and streamline the administration of the scheme, to help drive efficiencies for the benefit both of providers and the LAA. We have therefore designed a model that uses fixed fees as far as reasonably and economically practicable. Having a fixed fee encourages the swift resolution of a case, as there are no incentives to prolong a case and receive higher revenue.
34. The most significant change to the fee schemes as proposed under this model is to replace the current litigator graduated fee scheme, applied nationally, for the majority of Crown Court litigation cases with a fixed fee for each case, for each provider (in their procurement area). We propose to apply a fixed fee to all Crown Court cases where the pages of prosecution evidence (PPE) do not exceed 500.
35. Our assessment is that the fees paid to cases with over 500 PPE are too volatile for a fixed fee to be suitable. Every year, there are only small volumes of cases with over 500 PPE in each proposed procurement area, and the current fees paid per case – and amount of work involved – can vary widely. Setting these cases into a fixed fee scheme would heavily penalise a provider who is allocated an extremely complex case. Due to the small volumes, they are unlikely to be able to offset their losses by being allocated other cases in this category. Therefore, it is our conclusion that cases with over 500 PPE should continue to be paid according to the current fee scheme, albeit at a discounted rate.

Impact

Legal aid service providers

36. The extent to which there would be a financial impact (positive or negative) on providers from introducing a fixed fee scheme for such cases will depend entirely on the case mix each provider is allocated.
37. One of the factors we propose to consider in determining the contracts in an area in a CJS procurement area is to limit the potential impact of introducing a fixed fee scheme. A series of fee schemes that are largely based on fixed fees (as proposed in paragraphs 4.105-4.119 of the consultation paper) mean that providers might make a profit on the fixed fee because relatively little work was required on the case. However, in other cases which required more work, they could make a loss. In order to manage the level of risk of financial loss faced by providers, contracts need to offer sufficient volume in order for them to cope with variations in case mix.
38. Our judgement is that based on 2010/11 claim data, for any given allocation of cases to providers, it would be reasonable to expect providers to absorb up to a 3% change in revenue⁵, in any one year, relative to what they would have received on the same mix of cases. For example, based on the LAA claim data for the period October 2010 to September 2011, for an area with a current average claim value of £400, we have aimed to be statistically confident⁶ that under the proposed fixed fee schemes, the average claim value would be no less than £388 (-3%) and no more than £412 (+3%). We will use the most up to date LAA administrative data to calculate the number of contracts in each area required to achieve this equivalent level of confidence⁷.

Future clients eligible for criminal legal aid services

39. We do not envisage there would be any impact on future clients eligible for criminal legal aid services by introducing a fixed fee for Crown Court cases with 500 PPE or less.
40. The LAA will maintain robust standards for quality of service both at the point of tender and through the life of the contract, where resource is dedicated to monitoring fewer providers. This will help ensure that clients continue to receive taxpayer funded legal services of acceptable quality.

LAA Administrative Costs

41. There would be a financial saving to LAA Administrative Costs through the introduction of a fixed fee for Crown Court cases with 500 PPE or less. This change contributes to the estimated saving from the proposed competition model in LAA Administrative Costs of £2m per annum.

Risks and Uncertainties

42. There is a risk that under a fixed fee system, a provider could be allocated a series of complex and consequently "expensive" cases, thereby making substantial losses. However, we have tried to mitigate this as much as possible by giving providers sufficient volumes to ensure the level of risk is acceptable.

⁵ Before adjusting for recent fee changes and the results of the competitive tendering process.

⁶ At the 95% level.

⁷ Based on LAA administrative data on legal aid claims from October 2010 to September 2011 for claims at the police station, the Magistrates' Court and Crown Court (under 500 pages of evidence).

Design Element 4: Remuneration levelDescription

43. Some rates of pay for work within the scope of the competed contract will be set by the price competition, others such as appeals and reviews and prison law will be set administratively⁸. For those determined by the price competition, we propose to include a price cap under which applicants will be invited to submit their price bid. For the rates of pay set administratively, we propose to reduce existing rates. Both the price cap and the reduction will be set at 17.5% below the current rates paid under the current contract.
44. In Part 2 of Annex D of the consultation paper we set out the price caps for each fixed fee and average litigator graduated fee claim. The current rates of pay for each of the classes of work with administratively set rates are set out in regulations⁹. With the exception of those classes of work where the rate of pay is determined by the price competition, the proposal is to reduce these rates by 17.5%.

Impact

45. With a 17.5% price cap and a reduction in administratively set rates, providers will receive less fee income from legal aid. However, we believe the proposed model encourages the consolidation of the legal aid market, which will provide opportunities for providers to be more efficient.

Risks and Uncertainties

46. There is a risk that a 17.5% price cap and a reduction in administratively set rates will discourage providers to bid for the work. To mitigate this, the LAA and representative bodies propose to run a series of market engagement events to help providers to identify efficiencies and also facilitate the networking of providers of all sizes to scale up and consolidate. The government needs to find savings to reduce the budget deficit, and we believe price competition is a more sustainable way of achieving those savings than through a flat fee cut.

Costs*Legal aid service providers*

47. The overall cost impact on current providers successful in being awarded a new contract following the competitive tendering exercise will depend both on the prices bid at each fixed fee and graduated fee discount and the mix of cases allocated to each provider.
48. We estimate a 17.5% reduction in the fees paid for criminal litigation would deliver around an estimated £120m per annum reduction in fees paid to legal aid service providers in the steady state.

Future clients eligible for criminal legal aid services

49. We do not envisage there would be any impact on future clients eligible for criminal legal aid services by introducing the price cap and the reductions to administratively set rates.

⁸ For more detail on which prices will be set administratively, see the Consultation Document Annex E

⁹ Criminal Legal Aid (Remuneration) Regulations 2013.

Benefits

Legal Aid Fund

50. There will be a financial saving to the Legal Aid Fund. This equates to the reduced income payable to providers and is estimated to reduce criminal legal aid expenditure by approximately £120m per annum in steady state.

Wider economic benefits

51. A reduction in Government spending associated with the reduction in criminal legal aid expenditure would contribute to achieving the Government's macroeconomic objectives, in particular contributing to the reduction of the size of the budget deficit.

Enforcement and implementation

52. Subject to the outcome of consultation, the design elements of the proposed competition model would be implemented and enforced by the new competed contract and, where necessary, changes to secondary legislation.