

Consultation response

Ministry of Justice: Transforming legal aid

Overview

- 1. The Legal Services Consumer Panel is firmly opposed to the proposal to remove client choice. We consider this is unfair in principle, is not the most effective means of achieving the intended competition benefits of the proposals, goes against the grain of government policy for other public services, risks undermining quality and vulnerable clients may suffer most.**
- 2. Confidence in the legal aid system may be undermined if people accused of a crime are allocated legal representation by an agency of the state which is seeking to convict them. Consumers value choice and our data suggests they exercise choice in the legal aid market. Consumers are better placed to make informed choices in the criminal arena due to the high incentives and as some have past experience to draw on.**
- 3. The benefits of allowing consumers to exercise choice in public services are well-rehearsed. It is a core feature of government policy in areas such as health and social care, education and social housing. The legal aid proposals ran counter to these developments.**
- 4. Allowing consumers to choose their lawyer would help to safeguard quality as poor providers know they will be punished by the market. The proposed model has other inherent quality risks, e.g. the heavy weight on price in the tender process and the small number of contracts in many procurement areas. It is particularly invidious that consumers cannot switch mid-case (unless in exceptional circumstances) and have to be reallocated an alternative provider by a system which has already failed them.**
- 5. There is scope to consider further how to ensure ongoing quality standards by publishing provider performance data such as success rates, peer review scores and complaints. Even if choice is removed, this would be an important accountability mechanism.**
- 6. Vulnerable clients benefit from having a pre-existing relationship with their provider, while clients may more readily accept unpalatable advice from a lawyer they know and trust. Retaining choice would preserve the resulting time and cost savings to the criminal justice system and spare victims and witnesses the ordeal of appearing in court.**
- 7. There is an opportunity to strengthen the diversity element of contracts by incorporating the relevant British Standard (BS18477) on vulnerable consumers. This is already being actively considered by the Legal Aid Agency in another context.**

The proposals

8. The Panel's statutory remit is such that it is appropriate for us to only comment on issues having regulatory implications for the legal services market. This response, therefore, focuses on a single element of the legal aid proposals: removing client choice of provider in criminal work.
9. Government has decided to introduce price competition into the criminal legal aid market initially for the full range of litigation services (except Very High Cost Cases) and magistrates' court representation only, but now wishes to consult on the proposed model. Under the proposed model, 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).
10. Currently, clients are able to select any provider that holds a Legal Aid Agency (LAA) contract and, in certain circumstances following the grant of a representation order, transfer to another provider should they wish. However, the consultation proposes the removal of client choice is necessary as the proposed model of competition relies on providers having exclusive access to a greater share of work in a procurement area and retention of the client's instructions from the start of the case to the end, enabling them to exploit economies of scale and scope and in turn offer their services at a lower price than it currently pays. If client choice were retained as now as a part of this model this would introduce a level of uncertainty over the case volumes a provider would be allocated.

11. The Panel's response draws on established consumer principles on choice, our previous work on empowering consumers and data from our Tracker Survey. For the last three years the Panel has commissioned YouGov to survey the general public and recent users of legal services as part of our evidence base for assessing progress in implementing the Legal Services Act reforms. This offers a rich dataset on issues around choice of provider including for clients funded through legal aid. The legal aid data is reported across all areas of law; the sample size does not allow robust conclusions on the criminal area alone, but the findings have indicative value. The raw data is made available on the Panel's website for everyone to access.

The Panel's response

12. The Legal Services Consumer Panel is firmly opposed to the proposal to remove client choice. We consider this is unfair in principle, is not the most effective means of achieving the intended competition benefits of the proposals, goes against the grain of government policy for other public services, risks undermining quality and vulnerable clients may suffer most.

A point of principle

13. One of the stated aims of the proposals is to deliver a system that commands public confidence. However, confidence will surely be undermined in a system where people accused of a crime are allocated a legal representative by an agency of the state which is seeking to convict them. This proposal may undermine public perceptions of the independence of the legal profession.

14. Choice is one of the most cherished principles of the consumer movement; it promotes people taking responsibility for their decisions and can deliver a range of competition benefits, as described below. Granting choice should not depend on who pays for the service, but we note that other aspects of the legal aid proposals will mean more people making a financial contribution towards the costs of their own defence. These costs could be considerable, even taking into account the possibility they will be reimbursed depending on the outcome. It is alarming that consumers are invited to pay for legal representation but have no say over who their representative is. A consequence is that more people will have no option but to pay privately (at greater cost) or choose to represent themselves.

15. Work by the Office of Fair Trading (OFT) suggests that choice has an intrinsic value – i.e. people value choice for its own sake even if it has no impact on the cost or quality of services – and the Panel's Tracker Survey data supports this. In the 2013 exercise, half of those funded through legal aid felt they had a good or fair amount of choice of provider. Furthermore, people funded through legal aid were more likely to shop around than those paying privately (see Charts 1 and 2 at the end of this response). This may be because legal aid clients have better access to lists of providers thus prompting choice, while comparison websites are little used by consumers in the private sphere. We also note from the Impact Assessment that 60% of police station attendance work is obtained by providers from clients selecting that provider rather than through being on a

duty scheme. Again, this supports the idea that people value choice in legal aid.

Making competition work

16. The benefits of consumer choice in public services have been analysed in some detail by the OFT. It has summarised the benefits of competition as a driver that can:
- Place downward pressure on costs
 - Force firms to be more focused on meeting customer needs
 - Lead to more efficient allocations of resources between firms
 - Act as a spur to innovation
17. The OFT emphasises that: '*competition works best when there is a well developed demand side, made up of confident and well informed consumers, and an efficient supply side, made up of a number of different suppliers all competing against one another to gain market share. In the context of public service markets, an active demand side means giving users a degree of choice over the services they consume. An efficient supply side means, in most cases, securing a degree of competition between different providers. In an effective market, choice and competition should be mutually reinforcing. Confident and informed consumers activate competition by rewarding those providers that deliver the best services that most suit their needs.*'
18. The OFT's analysis acknowledges that choice is less likely to be effective where there are serious constraints on consumers exercising choice. Some of these barriers, such as asymmetries of information and people's capability to act, are present in the legal services market. Vulnerable clients in

particular are less able to exercise informed choice. However, overall we consider that consumers are better placed to make good choices in the criminal arena than in other parts of the market. This is due to high incentives for consumers to make careful choices (since their liberty is at stake) and a sizeable element of 'repeat customers' (ex-offenders) who can learn from experience.

19. The decision to remove choice is surprising given the direction of government policy on public services in other departments. In fields such as health and social care, education and social housing, there is a trend to give people more control over decisions affecting them, including by giving people a greater financial stake in their choices, emphasising personal responsibility for decisions and involving people directly in the design and delivery of services and their regulation. Agencies are opening up a wide range of complaints and performance data they collect about businesses to inform consumer choice and give powerful incentives for providers to behave fairly.
20. When markets work well they are shaped by consumer needs, but the proposed model is built around the commercial needs of providers. We recognise that providers require an element of certainty about case volumes in order to make bids an attractive proposition. However, providers are already benefiting from these proposals through the greater size of contracts; removing client choice now stacks the odds too heavily in their favour. Certainty of cash flow should be subject to satisfactory performance yet the current model offers no mechanism for consumers to punish substandard work by

voting with their feet. Alternative models should be explored that include an element of 'managed choice'. School places is an example where people can express preferences without these affecting the quantity of providers; in theory, managed choice promotes services that respond to characteristics which consumers value.

21. We recognise that one expected benefit of the model is the provision of end-to-end services. However, it seems particularly invidious that there are tight restrictions on switching provider mid-case and those who get over this hurdle are then reallocated to an alternative provider by the LAA and may not choose their own provider. Clients are unlikely to have confidence in a system which has already allocated an unsuitable provider. These cases should hopefully be relatively rare and so the arguments about guaranteed cash flows should not apply. Even if client choice is removed at the initial allocation stage, there is scope to rethink the change of provider aspect of the model.

Safeguarding quality

22. The Panel foresees a series of risks that quality may deteriorate due to the reforms. Consumers are not able to reward the best firms or punish the poorest ones because they cannot choose who will represent them or switch provider during their case unless in exceptional circumstances. Fees are being significantly cut; we do not comment on whether the proposed new rates are fair, but observe that the level of savings to be made is high and this will force providers to change the way they provide services, possibly in ways that will reduce quality. Any system of competitive bidding carries

risks of corner-cutting, but the heavy focus on price in the tender criteria, as opposed to other factors, increases this risk. The small number of contracts being awarded in some procurement areas (e.g. 4 contracts in 14 areas of the country) means the LAA will be under pressure not to withdraw a contract due to poor performance given the high disruption to service that might follow.

23. In the absence of client choice, since the LAA is acting on clients' behalf, the tender process should seek to mirror the factors that would drive choice if it were available. The Panel's Tracker Survey (see Chart 3) suggests that a range of factors influence people's decisions. Notably, reputation and specialist expertise (quality) and location and speed of delivery (service features) are all ranked higher than price in consumers' priorities. While the LAA must of course achieve value for money for taxpayers, quality of work must be a key driver in the tender process. However, as long as certain minimum quality thresholds are met (not all of which are disclosed in the consultation document), contracts will be awarded purely based on lowest price bid. There is no incentive on providers to deliver services exceeding the minimum standards.
24. There will be some quality controls as the proposed procurement process will assess the provider's suitability, experience and capability, and their Delivery Plan, before reaching a price competition. In addition to criteria used to assess tenders, there will be various conditions of tender, listed below. However, while helpful, most of these focus on running a successful business rather than technical competence or service standards. For example, checks on each provider's complaints history is a surprising omission. The consultation document states that ongoing service standards will be specified, but we cannot assess these as they have not been published and there appear to be no plans to consult on them. The proposed conditions of tender are:
- Subject to regulation by one of the legal sector regulators
 - Hold (or commit to acquire within a specified time period) a relevant quality standard (either the LAA's Specialist Quality Mark, Lexcel or an equivalent standard agreed by the LAA)
 - No confirmed poor peer review ratings
 - Accessible premises
 - Security controls
25. In addition to quality factors informing the process for awarding contracts, there must be a robust system for monitoring ongoing quality and penalties for poor quality work. However, while the Impact Assessment makes commitments to carefully monitor standards, institute robust quality controls and address shortfalls, the consultation is silent on how this will operate in practice.
26. There is an opportunity to be innovative about introducing powerful incentives for providers to ensure quality. This might include publication of peer review scores, success rates and complaints data. Such transparency tools are a key plank of the government's consumer empowerment strategy. When combined with granting choice for clients, this would be a powerful tool to maintain quality as providers could compete on service as well as on price. However, even if the proposed model of removing client choice were to remain, this

data still offers a valuable accountability mechanism – clients and taxpayers should be able to find out if their money is being spent wisely.

Impact on vulnerable clients

27. The Panel is concerned that removing client choice will have the biggest impact on the most vulnerable defendants who benefit from an existing relationship with their legal representative. We are persuaded by arguments made by many lawyers in their comments on the proposals, that time and money is saved by knowing if a client has special needs, e.g. a pre-existing mental health condition. Furthermore, that when a lawyer is known and trusted by a repeat client, they are more likely to accept advice which may be unpalatable to them, e.g. to make a guilty plea rather than proceed to trial. These relationships not only deliver savings to the justice system, but spare victims and witnesses the emotional stress and time of appearing in court.
28. As the Equalities Impact Assessment concedes, the proposed model may have a disproportionate impact on men and BME people who are overrepresented among criminal legal aid clients generally in comparison to the population as a whole.
29. We welcome the assurance that the future crime contract is likely to have similar, if not the same, provisions with regard obligations for providers to have a written equality and diversity policy that, as a minimum, must include how the provider would meet the diverse needs of their clients (including making reasonable adjustments for clients with disabilities). However, the government

could go further by encouraging providers to adopt the relevant British Standard on vulnerable consumers (BS 18477). The Standard is designed to:

- Encourage the use of fair, ethical and inclusive practices
 - Show organisations how to identify vulnerable consumers and how to treat them fairly to help them comply with the law
 - Help organisations to understand what consumers have a right to expect from them
 - Improve accessibility to services for all
 - Increase consumer confidence in service providers
30. The Standard was written with the help of consumer groups and disability charities. It is increasingly being recognised in the sector as the Legal Services Board has stated it will invite the approved regulators to demonstrate how they are incorporating the Standard into their work; the Council for Licensed Conveyancers has integrated it into their code of conduct. The LAA has told the Panel it will review its service standards for the Community Legal Advice gateway later this year and as part of this will consider incorporating the Standard as one of the service standards for the gateway operator. In summary, a good momentum is building behind this important initiative and the competitive tendering proposals offer an opportunity to make further progress.

May 2013

Chart 1 – Perceptions choice by funding method, 2013

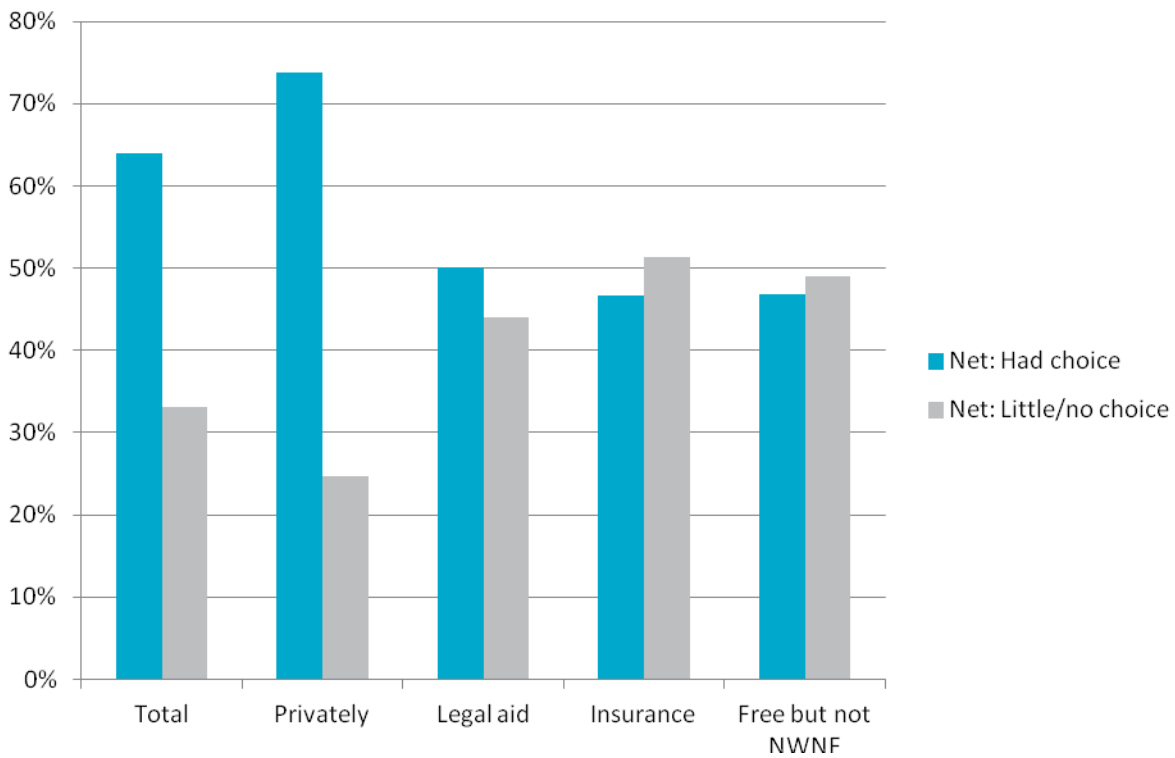


Chart 2 – Funding method and shopping around, 2013

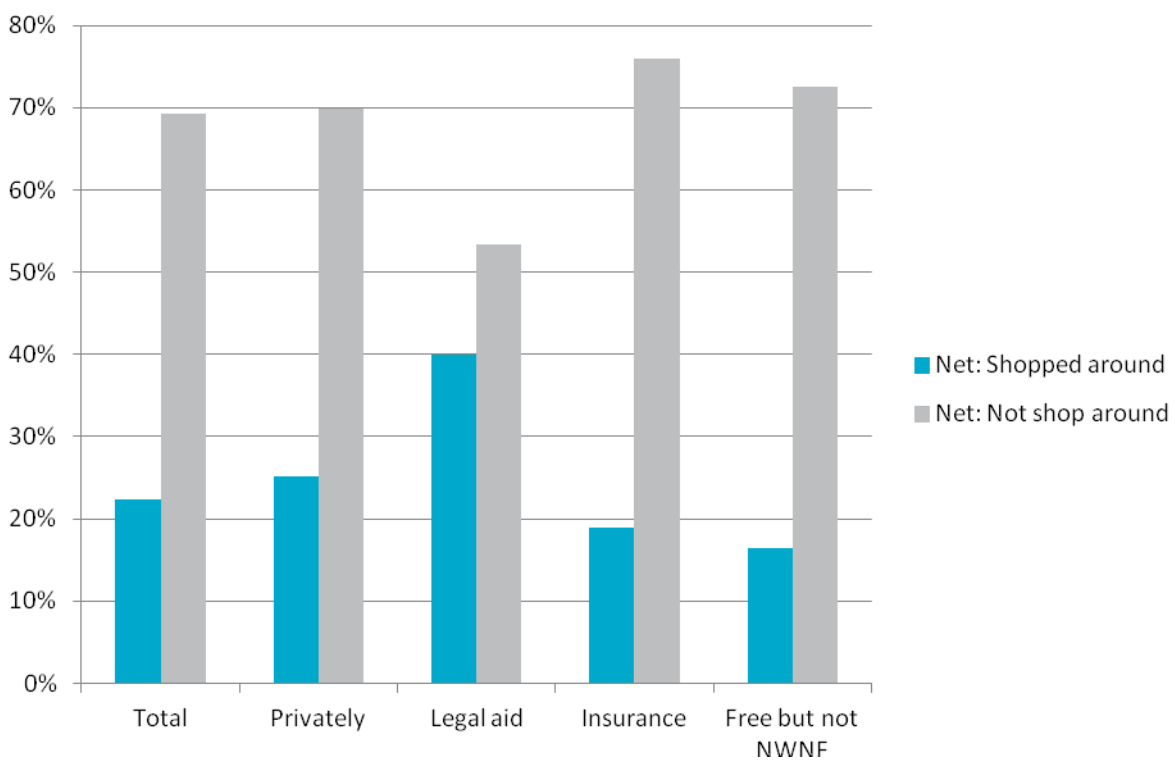


Chart 3 – Choice factors, 2012-13

