

#### Introduction

Thompsons is the largest and most experience trade union law firm in the UK. It has a network of 28 offices across the UK, including the separate legal jurisdictions of Scotland and Northern Ireland.

Thompsons, on behalf of our trade union clients, provides union members accused of work-related criminal acts with access to specialist criminal legal services. We are therefore a niche provider.

We operate specialist criminal law units from a small number of regional centres with very high success rates. The overwhelming majority (95%) of our cases are dealt with as “no further action” or our clients are acquitted.

We specialise in acting for teachers and care workers in abuse and assault cases and emergency workers accused of causing death by dangerous driving. We also specialise in health and safety investigations, inquests and the employment law consequences of criminal investigations.

Our clients are professionals without experience of criminal accusations. They are of good character and the majority are determined to clear their name. Their salaries are paid whilst they are accused. Where they are innocent it is best that they are rehabilitated back into their workplaces and able to become productive again as soon as possible.

The service provided begins at arrest and extends to Crown Court trial and any related appeal proceedings. Union members are arrested all over the country in small numbers. Therefore there are too few cases in any one area for a police station or court contract and the specialist service presents no threat to local suppliers.

It is a service that is enormously appreciated by unions and their members. Those who hold positions of trust run a higher risk of being falsely accused.

If we are to have high quality public services and if we are to protect children entrusted into care (whether at school or in a care home) we need to ensure that those who represent public servants accused of inappropriate behaviour are specialists in what they do.

Niche providers should be allowed to specialise on a national basis. The alternative is that hard-working people and families whose livelihoods and careers are at stake as a result of accusations against them will be denied access to justice through specialist criminal law representation. Allowing niche providers to specialise on a national basis would result in no additional administrative costs for the LAA. In fact there are likely to be both administrative and delivery efficiency savings.

#### Our response

*Ministry of Justice – Transforming Legal Aid: delivering a more credible and efficient system*

Before setting out Thompsons’ position in relation to the Law Society’s own consultation, it is perhaps sensible to address in summary our view on the proposals currently being consulted upon by the Ministry of Justice.

Trade Unions provide members accused of work-related criminal acts with access to specialist criminal legal services. These are niche providers. They operate specialist criminal law units from a small number of regional centres with very high success rates. The ‘*price competitive tendering*’ proposals provide for a highly restrictive process that abandons client choice and quality and will exclude niche providers and would very likely mean the end of this specialist service.

The proposals herald the creation of mass criminal generalists, firms able to deal with the recidivist criminal but wholly unequipped for the specialism that work-related crime calls for.

The proposals are poorly thought through and do not adequately tackle the very many complex issues which arise in the procurement and supply of criminal legal services. The inadequate period of consultation, the lack of a proper pilot scheme and the proposed introduction of these radical reforms by way of secondary legislation, open the proposals to challenge.

The coalition government is quick to try and identify itself as on the side of the hard working family. These proposals will mean that many hard working people on low wages – a group the coalition government seeks to champion -, and who are employed in jobs which make them vulnerable to false and malicious criminal allegations, will be denied any choice regarding which lawyer they want to represent them in proceedings which could change their lives irrevocably.

Bizarrely, the proposals in their current form also provide that in Crown Court proceedings even those who know they do not qualify for legal aid, will be financially penalised if they fail to make an application for funding even though they know it will fail. In the absence of such an entirely futile application, the individual who pays for the services of a solicitor privately will be unable to recover their legal costs in the Crown Court on acquittal.

Many firms will correctly point out that the relationship which exists between a solicitor and a longstanding client who trusts them is of significant benefit to the smooth and economic running of the criminal justice system. The proposals ride roughshod over relationship.

The majority of Thompsons' clients have no previous experience of the criminal justice system. Consequently, there is no long standing relationship between the client and representative. However, given their previous good character and lack of experience of the criminal justice system, our clients are reasonably more demanding in terms of the explanations and advice they require. Such an intensive level of client care is simply not provided for in the proposals as they stand.

Thompsons' clients have issues in their cases which call for legal representation with specific expertise in this area. The potential employment implications of an individual being arrested at a police station as opposed to being dealt with as a voluntary attendee are significant and the advice we give is focussed on the risks of the outcome of the police investigation. The effect of prosecution on future employability and the linked consideration of vetting and barring from particular careers has to be uppermost in our minds.

We are frequently involved in challenges to entries on Enhanced Criminal Records Certificates and it is important that where it is proper to do so a "no crime entry" is the outcome rather than a misleading record, with all the prejudice it entails in relation to future employment. With respect, few general crime solicitors have any experience or knowledge of this work or the interrelationship between the investigation and future employability.

In addition, our cases usually involve parallel employment proceedings. Our solicitors have extensive knowledge of employment law and can where necessary work with Thompsons' national employment rights unit. Access to such a resource is normally absent from general crime solicitors, few of whom have any employment rights background or knowledge.

There is no parallel for Thompsons' success rate of 95% among general crime practices. It reflects our specialist skills and commitment.

Our lawyers' skills and experience is a reflection of the fact that at Thompsons we attract high quality criminal lawyers because the work is seen to be specialist. As such we provide a training ground for lawyers in a specialist practice that enables them to be more effective if and when they move into other firms. That training and specialism will be lost if these proposals go ahead.

Given the nature of the niche service undertaken by Thompsons, our work will never be concentrated in one geographical location. It is scattered across England and Wales and it will therefore be uneconomical and impractical for us to choose one area in which to bid.

Because we may have a single case in Newcastle, another in Aberystwyth or another in Southampton, our work is also no threat to the overall geographical monopoly that will exist. Our specialist unit provides its highly successful service to a limited audience so will have no noticeable financial impact on local firms who may hold a franchise.

Our clients get highly specialised help wherever they are arrested. That we provide this service at Legal Aid rates and are willing to accept local police station prices in the current arrangement is an enormous benefit to both the client and to the Ministry of Justice as the purchaser of legal services. The government gets extremely high value for its money.

The current proposals would require that access to that value be limited to those able to pay privately or provided on a pro bono basis according to the means of our clients or our own decision not to charge them for our services.

This is completely unrealistic. The vast majority of our clients are in work and members of hardworking families. We have already expressed our concerns with regard to the potential impact of means testing in Crown Court on such individuals. To expect people on relatively modest incomes to pay for such services or for us to deliver them for free is not viable.

We are dismayed that the Ministry of Justice pays no consideration at all to the value of niche practices such as our own, rekindling proposals to deny such firms access to public funding by imposing bidding criteria that they are unlikely to be able to meet or which will be entirely uneconomic.

We share the repeatedly pronounced position of the Law Society and the wider profession that awarding contracts of this sort on the basis of price competition alone is unsustainable. We further support the Law Society's view that these proposals may very likely lead to market collapse, causing untold damage to clients, the supplier base and the overall integrity of the justice system.

Putting to one side the very many bankruptcies and job losses which would effect those solicitors and support staff working in firms who did not secure contracts, it is difficult to envisage how those securing contracts in many of the geographical areas could possibly remain economically viable. A firm successful in the bidding process cannot in any way legitimately influence the overall market size, which will always be dictated by external forces (number of crimes reported, number of arrests made, increasing use of non-court disposals). Equally, under these proposals, a firm cannot increase the 'price per unit' or influence its market share. As a result, the only control on profitability a firm could exert is in respect of its own overheads.

Over recent years, every means by which a criminal firm can generate income has been reduced. Fixed fees in the police station, Magistrates and Crown Court have been eroded by inflation and the ability to recover private rates on a 'Defence Costs Order' has been removed. In direct response to these conditions, many if not all firms have cut overheads 'to the bone'. Firms successful in the bidding process will not be able to absorb the proposed cuts by further reducing overheads without there being a significant negative impact on quality.

The fundamental flaw in a tendering process based on price alone is that a proper market, governed by the rules of the market, cannot prevail. The client has no interest in the cost of the service provided to him/her and the government as the sole purchaser of services has a monopoly which they can and do seek to exploit.

The proposals are an unreasonable, unnecessary and a dysfunctional way to organise and fund legal representation for people suspected (but not necessarily guilty) of committing a crime.

*The Law Society – Procuring criminal defence services: is there a better way?*

We fundamentally reject the changes to the criminal legal aid system proposed by the government. However, we do not share the Law Society's pessimistic view that a substantial reduction in funding for criminal legal aid is inevitable.

The Ministry of Justice's claims in relation to the cost of criminal legal aid to the tax payer are wrong and must be challenged.

Over recent years we have seen the introduction of fixed fees in the police station, Magistrates Court and Crown Court. Those fixed fees were a significant reduction in income at the time they were introduced and have not risen in line with inflation since. In addition, we have absorbed the capping of 'Defence Costs Orders' at legal aid rates and seen the introduction of defendant contributions towards defence costs in the Crown Court. There has also been a far more proactive approach to the recovery of prosecution costs from convicted Defendants.

This, viewed in the context of a society which is reporting fewer crimes, police forces making fewer arrests

and a significant increase in out of court disposals mean that the criminal legal aid budget cannot have “spiralled out of control” as asserted by the Secretary of State for Justice.

We support the very many steps that are being taken by the Law Society and other representatives groups to organise and harness opposition to these proposals. We believe that further examination of the steps which can be taken to oppose this attack on access to justice outright is needed.

Even if we are wrong about the inevitability of fee reduction, we do not consider the correct way to ‘limit the damage’ is to accept such a premise at the outset. Organised opposition to these plans is in our view more likely to secure the greatest number of concessions from the government on the very many issues on which we disagree.

Thompsons would find it very difficult to support the principal proposal by our representative body that an across the board fee cut, somewhere in excess of 17.5%, is the best outcome that can be achieved. The Law Society recognises that this outcome would in itself be the death knell for a large proportion of the supplier base, although in a different manner proposed by the Ministry of Justice.

Notwithstanding that point of view, there are other aspects of the consultation with which we agree.

### **Response to the questions**

- 1. Have we identified the problems correctly?**
- 2. Do you agree that the allocation of duty slots should no longer be based on the number of duty solicitors a firm has, thus ‘breaking the link’ between numbers of duty solicitors and slots?**
- 3. Are there any other problems within the control of the MOJ we should be addressing?**

Given the nature of Thompsons’ criminal practice, we do not express any strong views in relation to these questions. But we reject the government’s view that the criminal legal aid budget is either spiralling or out of control and as such do not accept the suggestion that there is an overall ‘need’ for consolidation and all that the euphemism implies.

#### **4. Would you support greater use of peer review as a quality measure?**

As we understand it, this question is posed in line with the premise that in any future competitive procurement process, quality should be the determining factor as opposed to price. If a restructuring of the criminal defence market is necessary, we agree that quality of service should be determinative.

On that basis we would support the greater use of peer review as a means by which to assess the quality of advice and client care being provided by a firm. Whilst we share the Law Society’s view on the limitations of peer review, we believe that assessment of files by other professionals, who fully understand what they are considering, is a more credible guide than other processes which have been adopted.

#### **5. If peer review were to become routine once more, what is your view on the appropriate relationship between peer review, CLAS and QASA?**

We acknowledge that peer review has limitations. Whatever is or is not written on a client’s file, it cannot of itself inform a quality assessment of the lawyer conducting the case. A file will not fully reflect the quality of the advice and service provided during a police investigation, nor will it demonstrate to an assessor the ability of a particular lawyer to conduct contested hearings in Court.

For that reason we agree that if quality is to be a determining factor in any procurement process, there must be some credible way to assess skills which cannot be readily determined by reading a file.

#### **6. To what extent could these schemes be used for comparing between firms as opposed to being used as thresholds that all firms must pass?**

Thompsons believes that such schemes should in the first instance be confined to thresholds which must be attained. There may be some scope for using such schemes as a comparative indicator of quality between

competing firms, but without further detail to consider, we would take the view that such schemes should be indicative but not of themselves determinative.

**7. Do you agree that it would not be appropriate to impose any threshold criteria by reference to QASA?**

We consider that some use of QASA as a threshold may be appropriate as set out above.

**8. Do you agree that in the event of the government introducing a selective process, a firm with one or more level three advocates should be given credit over a firm that does not?**

Without resiling from the position adopted above, we do not believe that when assessing quality, additional credit should be given to firms with one or more level three advocates. Firms who keep this level of Crown Court work 'in house' do not in our view, necessarily provide a better quality service to clients than those who engage the independent Bar for this purpose. Many would in fact argue the exact opposite is the case.

Given the support that solicitors currently enjoy from the Bar on the issue of price competitive tendering, it would appear unwise to support proposals which would inevitably lead to a split between the two sides of the profession.

**9. Do you agree that basic experience of the main categories of work should be a minimum threshold requirement?**

It has to be the case that experience of the main categories of criminal work should be a minimum threshold required in any procurement process.

**10. Are there any other types of experience that should be required as part of the threshold?**

There are no other types of experience which should be part of a minimum threshold requirement, above and beyond the ability to properly and fully conduct the main categories of criminal law work.

**11. In the event of the government introducing a selective process, would you agree that broader experience is a legitimate factor by which to distinguish between firms?**

Thompsons believes that there are a number of matters ancillary to the criminal process, experience of which should be taken into account when assessing the quality of the overall service being provided to the client.

**12. What types of experience should lead to a firm gaining additional credit in the event of a selective process?**

It is our view that an ability to demonstrate knowledge and experience of dealing with criminal offences which would attract legal aid, but do not come before the courts as a matter of routine, should gain a firm extra credit.

In addition, an ability to deal with the following kind of cases should be indicative of an added level of quality:

- (i) Health and Safety Executive prosecutions
- (ii) Investigations/Prosecutions pursued by bodies other than the police. For example rail accident investigators, the Independent Police Complaints Commission, civilian counter fraud officers and local authorities
- (iii) Proceeds of Crime Act matters
- (iv) Traffic Commissioner matters
- (v) Hybrid criminal/civil actions against the police
- (vi) Judicial reviews of bodies such as the police and Crown Prosecution Service.

**13. Do you agree that being registered to take trainees should not be a threshold requirement in any forthcoming tender process?**

This would unfairly impact upon sole practitioners, small firms and criminal law only enterprises who could not meet this requirement. An inability to meet this requirement does not translate to an inability to provide a high quality criminal law service.

**14. In the event of the Government introducing a selective process, should a firm that is registered to take trainees be given credit over a firm who is not?**

Yes. The long term viability of the profession requires that trainees are able to find training contracts. The position is particularly acute in the provision of criminal law services which appear, at least anecdotally, to be failing to attract new entrants to the profession. We therefore believe it would be justified to give some credit to firms who provide opportunities to trainees.

**15. Should further credit be given to a registered firm based on the number of trainees it has actually taken on, and if so, over what period?**

No. There are many and varied reasons why a firm may choose not to take on a trainee at the end of their training contract. Making this a requirement may lead to firms retaining unsuitable trainees simply to ensure that they have a greater opportunity to obtain a contract

**16. Do you believe that in principle there should be a minimum contract size?**

**17. Would you support a minimum contract size based on this mechanism? (a minimum contract size via contract terms)**

**18. If a minimum contract size were to be set on this basis, at what level should it be set?**

**19. If a minimum contract size is introduced should there be different levels set in London and outside? Should there be any other variation for rural areas, and if so, what?**

**20. Should any minimum be set at office level or firm level?**

As we have said, we object in principal to the artificial control of contract size. However, if this option were preferred, it is our view that the size of contract held by the firm, and not a particular office, should be the determining factor. This would reflect the complete picture of the service provided by a firm rather than focusing on only a small element of the provision of services under the contract.

**21. Would you support a minimum contract size based on this mechanism? (allocating blocks of duty solicitor slots at a price set by the Government)**

**22. If this mechanism were introduced, what should be the smallest number of slots for which a firm could bid?**

The implementation of this criteria would be fatal for some firms, particularly those who operate niche practices, like Thompsons, with experience and knowledge of representing professionals involved in the Criminal Justice System as a consequence of work related crimes. There appears to be no justification or reason for contracts to be won on the basis of the source of work only.

**23. Do you think that a tender could work based on 'blocks' of police station cases?**

**24. If Yes, do you agree with the suggested outline above?**

**25. What other issues would need to be addressed in such a model?**

**26. What disadvantages, if any, do you see with such a proposal?**

Any such approach excludes niche practices like Thompsons, whose work is spread throughout England and Wales. Any such arrangements would require a firm to have work concentrated in a particular area to succeed in a procurement process and subsequently make that work profitable.

**27. Would you support the requirement that firms should be asked to provide evidence of the capital available to support their bid and/or approval of the business plan by their bank?**

Thompsons would support any requirement which helps to guard against firms making bids for work which are unrealistic. Clearly there is a significant risk to clients and the smooth running of the criminal justice system should a firm go bust as a result of securing a contract on terms it could not sustain. It is equally true that it would be inherently unfair on firms who have been unsuccessful in a tender, as a result of the fact that they have properly stated the rate at which they could afford to carry out a contract.

**28. What other measures could be used to protect firms from unrealistic “suicide bids” by others?**

We have no view to express on this other than the provision of capital details and/or a properly approved business plan.

**29. Do you think that there should be a maximum bid size in each bid area?**

**30. Do you think that there should be a minimum number of firms per bid area?**

Again, we object to the premise of artificial control of contract size for the reasons expressed above.

**31. to 35. Limiting expansion**

We express no view.

**35. Do you believe that firms should be required to undertake all work, rather than being permitted to cherry pick the higher level work and the bigger cases?**

Firms which cherry pick the most financially lucrative cases are depriving others which undertake all aspects of criminal law work - resources that they need to resource other work within the system. We agree that firms awarded a legal aid contract should as a matter of course be obliged to take on the full range of criminal work.

**36. Do you believe that very high cost cases should be treated differently? If so, how should cases be handled?**

Thompsons does not routinely deal with VHCC cases. We do however note the disproportionate amount of the legal aid budget which is spent on such cases and consider that there must be some significant scope for saving which could cushion those practitioners dealing with more routine work affecting a far greater percentage of the population.

**37. Do you believe that the retention of work in-house rather than using agents would tend to assure a higher degree of quality?**

The use of agents does not in our view necessarily reduce the quality of service provided to a client and in some circumstances, may in fact improve it. For example, experienced police station accredited representatives are often more adept in police station advice and assistance than a criminal law solicitor who spends much of their time in the local Magistrate Court. Given the wealth of agents available to firms, competition for work ensures that quality remains high. Any agent that a client or firm feels is not offering the highest level of service will simply be jettisoned in favour of another who does.

It is also difficult to see how any such provision would lead to significant savings for the taxpayer in relation to the system which currently operates.

**38. Would the suggested mechanisms for such a provision work?**

We do not consider that such a provision would be indicative of quality and as such, we do not believe the suggested mechanism is necessary.

**39. If a provision requiring work to be retained in-house were to be introduced, what level of work conducted by agents would be necessary to ensure reasonable flexibility to cover staff absences and emergencies?**

We do not support the premise of this provision.

**40. If such measures were to be introduced, should advocacy be included, handled separately or excluded from any such provision?**

As we have stated previously, when assessing quality, additional credit should not be given to firms who retain in house advocacy at a particular level. Firms who keep Crown Court work in house do not necessarily provide a better quality service to their client than those who engage the independent Bar for this purpose. Many would in fact argue the exact opposite is the case.

It would appear unwise to support proposals which would inevitably lead to a split between the two sides of the profession.

**41. Could such a measure be used as a way of selecting between providers rather than as a threshold requirement, by giving preference to those firms retaining more work in-house?**

For the reasons expressed above, we do not support this suggestion.

**42. to 44. Matters pertaining to VHCC**

Thompsons does not routinely deal with VHCC cases and as such have no strong views on this topic. However, we note the disproportionate amount of the legal aid budget which is spent on such cases and believe that there must be some significant scope for saving which could cushion those practitioners dealing with more routine work.

**45. to 51. Alternative sources of income**

If a defendant's means are so modest that they qualify for legal aid, it is difficult to justify imposing a further financial burden on them to repay that funding in the manner of a loan. It is however not entirely clear to us what is being proposed. Would this loan only be available to those who pass the means test, or would it be available to all? Would it be restricted to the Crown Court or applicable in the Magistrates Court? We would need to consider further detail before providing a meaningful view on this issue.

We do however entirely reject the idea of top up fees since it must inevitably lead to a poorer level of services for those who are unable to pay.

**Further information:**  
**Thompsons Solicitors**  
**Congress House**  
**Great Russell Street**  
**London**  
**WC1B 3LW**  
**[jenniewalsh@thompsons.law.co.uk](mailto:jenniewalsh@thompsons.law.co.uk)**