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23rd January 2009

AJTC Response to Consultation: Civil Bid Rounds for 2010 Contracts

This is the Administrative Justice and Tribunals Council's ("the AJTC") response to the Legal Services Commission's (LSC) consultation: "Civil Bid Rounds for 2010 Contracts", dated 31 October 2008.

The AJTC's interest in this consultation arises not only from its oversight of the tribunal system but also from its oversight of the administrative justice system as a whole. That function involves considering how the system might be made more accessible, fair and efficient, having particular regard to the needs of users.

The AJTC broadly welcomes the consultation paper's explicit recognition that legal aid provides a fundamental underpinning of the justice system, enabling access to justice for those who cannot afford to pay for legal advice and representation. This is particularly critical in the mental health, and immigration and asylum jurisdictions, the users of which are amongst the most vulnerable in society, including those whose liberty is at stake and children. For these vulnerable users, there is a particular need for legally aided advice and representation throughout the process to ensure that they can assert and pursue their rights effectively. It is for this reason that the AJTC's response is focussed on proposals which particularly affect users in the mental health and immigration and asylum jurisdictions.

The AJTC broadly supports the high level objectives outlined in the foreword of procuring more user-focused services and ensuring easier access to face-to-face advice. The foreword proposes that this is to be achieved through the introduction of integrated and seamless service delivery; new matter start (NMS) sizes; additional service quality criteria; and redefining the geographical basis upon which services are procured to align them with the location of users more closely. The AJTC is concerned, however, that some of these proposals might not achieve their specified purpose and conversely, that in some cases, they might impact negatively on users who require publicly funded advice and representation.

Mental Health

The AJTC supports the paper's strategic focus on ensuring that clients detained under the Mental Health Act have access to advice and representation before the Mental Health Review Tribunal. While it is clearly important that individuals detained in special hospitals have access to face-to-face advice and representation (3.10) because of the impact compulsory detention has on their liberty, this should not be at the expense of those

detained in other hospitals or subject to Community Treatment Orders. The AJTC supports the proposal that providers should be able to provide advice and representation across the full spectrum of mental health issues (3.11).

Whilst the AJTC broadly agrees with the stated rationale for introducing minimum requirements for NMS in this jurisdiction (4.26), it notes that the new requirement for a minimum level of 30 NMS will require providers bidding for new contracts to demonstrate their capacity to develop their services to meet this threshold. This may be difficult for some new or smaller providers or those wishing to develop their business in new geographical areas. This is also of particular concern in sparsely populated areas, where demand may fall well below this threshold, forcing some users to travel greater distances to obtain legal advice and representation.

The AJTC considers that the proximity of legal services is an important consideration in promoting users' access to justice and recognises the importance, from a user perspective, of efforts to align supply with demand more closely. It broadly supports the proposal that procurement areas be defined in accordance with the 10 Strategic Health Authorities for reasons of more effective integration and links with other public services, including health services (5.11).

The AJTC is, however, concerned that the requirement for providers to meet 85% of their NMS within their procurement area will not allow for sufficient flexibility in the context of recent changes in legislation, which will make it difficult to predict with any certainty where there is likely to be most demand for services. Moreover, the movement of users, either from one geographical area to another or from local hospitals into high security hospitals which comprise separate procurement areas (5.14), could reduce the choice of provider for some very vulnerable users. It also risks interrupting the continuity of service provision for these users.

The proposal to treat the three high security hospitals as separate procurement areas (5.13-5.14) and the restrictions on non-high security hospital providers delivering advice in these areas (5.48) will generally prevent users in those hospitals from obtaining advice and representation from providers outside that specified procurement area. The AJTC strongly disagrees with this approach. Users whose personal liberty is at stake should retain an unfettered right to choose their legal aid provider. There is also the risk that those few providers with high security hospital contracts will find it difficult to maintain and demonstrate their independence from the hospital authorities.

The AJTC supports the relative flexibility currently afforded to mental health practitioners to operate outside the procurement areas where they are physically located. This flexibility is essential if the delivery of services in remote areas is to be achieved (5.35). However, the requirement that full time earners must be based in the procurement area in which they deliver services may still be too prescriptive to maintain service levels across all localities.

Access to justice and users' consumer choice of provider may be unduly restricted if the proposals result in a net reduction in the number of providers who are willing to provide services in any given area. These concerns are echoed in the immigration and asylum jurisdiction, where some proposals may have an even greater impact on the number and distribution of providers.

Setting minimum ratios of supervisors to caseworkers (4.38) and the use of peer review (4.47) are important ways to ensure that quality standards are maintained. The AJTC supports the requirement of membership of the Solicitors Regulation Authority Mental Health Review Tribunal Accreditation Scheme for representatives with high security

hospital contracts appearing before the tribunal (4.49) but suggests that this requirement should be extended to representatives at all Mental Health Review Tribunal hearings.

It will also be important to invest resources in raising awareness with key stakeholders and users about how the new system will work in specific procurement areas.

Asylum and Immigration

The AJTC welcomes the LSC's strategic focus on asylum since the users of asylum services are often among the most vulnerable. However, this focus should not disadvantage other vulnerable users who require high quality immigration services. In the context of a rapidly changing legislative and policy environment, the AJTC is not convinced that the types and location of legal services users require is best determined by the primary driver of Home Office processing and accommodation policy (3.13). There are a significant number of user sub-groups in this jurisdiction which fall outside the New Asylum Model. They include those making fresh asylum applications; those applying for further leave to remain on asylum or Article 3 grounds; and individuals who have been granted refugee status with 5 years leave to remain who will be obliged to apply for indefinite leave to remain.

The AJTC is concerned that the proposed minimum 100 NMS requirement for combined asylum and immigration services and those focusing on immigration or asylum only, is set too high. Setting such a high requirement could have negative implications for access to justice, particularly in remote areas and the quality of services users receive. In particular, the pressure to achieve 100 NMS may deter providers from taking on longer running and more complex cases. The AJTC also questions the rationale for setting NMS thresholds at half this size for providers who wish to supply services in immigration with asylum (4.25). The consultation paper does not provide sufficient evidence to justify the wide disparities between minimum NMS requirements across and within the different legal aid jurisdictions. The proposal that providers who fail to meet the prescribed NMS requirements should face the automatic sanction of having their contract terminated (4.29) strikes us as being unnecessarily punitive and is likely to have negative implications for the achievement and maintenance of high quality standards over the long term.

The AJTC is concerned that defining procurement areas as the six Home Office policy boundaries, with Wales and the South West split into two areas (5.3, 5.15), may not adequately cater to the needs of potential service users living outside Home Office dispersal regions in the community rather than in section 4 accommodation. The AJTC would also question the rationale for further narrowing down procurement areas, in this jurisdiction, to access points; and of requiring providers to bid separately for each access point having committed themselves to opening hours (5.21), and a permanent or part time presence in each (5.36). The justification for defining access points in London differently on the basis of four groups of boroughs (5.23 & 5.24) is unclear. The requirement that providers participate in any rota scheme for dispersed asylum applicants may achieve broader coverage, but is unlikely to guarantee the requisite levels of advice and representation for all users, especially those with more complex cases (6.15 & 6.16).

The proposal that procurement areas for services for the particularly vulnerable user group of unaccompanied asylum seeking children should be defined by the currently undesignated Specialist Local Authority Areas (5.25), is of particular concern. The AJTC considers that it is the experience, expertise and quality of advice and representation available to these groups that is of primary significance, rather than their geographical location. Moreover, some child users will fall outside the scope of SLAs, including age

disputed cases, detained young people, children in reunited families, and those in families making an asylum claim in their own right.

The AJTC does not favour the proposal to make the 40% success rate in appeals mandatory with sanctions against non-compliant providers' (6.19). In particular, it has not seen any evidence to support a correlation between this KPI and poor quality representation. Rather, it suggests that this requirement may impair access to representation for users with complex cases, particularly asylum users detained in the fast track, given low overall success rates of appeals for users in this sub-group.

In summary, whilst the AJTC supports the broad objectives of the LSC's proposed reform of publicly funded legal aid, it has concerns about the precise manner in which the LSC proposes to achieve some of its objectives, from the perspective of vulnerable users, particularly the users of mental health and immigration and asylum services.