

## **Justice Unions Cross Party Group (JUCPG) Second Meeting held on 22 October 2014**

**Present:** Julie Morgan AM, Rhodri Glyn Thomas AM, Joyce Watson AM, Helen Cunningham (Jenny Rathbone AM support), Alex Still (Jeff Cuthbert AM support), Sian Mile (AM support), Robert James (AM support), Tracey Worth (Napo), Jane Foulner (Napo), Rob Thomas (Napo), Kay Powell (Law Society), Richard Miller (Law Society), John Hancock (POA), Rob Robbins (Unison) and Emily Cannon (Unison).

### **1. WELCOME**

Julie Morgan AM (Cardiff North) welcomed everyone to the second Justice Group Meeting. Julie asked if everyone had read the minutes and were happy with their contents. Tracey Worth also advised the group that the action points from the last meeting have been completed. Tracey also asked if there were any questions in relation to the action points, which there wasn't. Julie then introduced Richard Miller, Head of Legal Aid England and Wales as our key speaker.

### **2. SPEAKER-RICHARD MILLER (See notes at end of minutes)**

Richard provided the group with an update regarding the Ministry of Justice's attempt to reduce the cost of the legal aid bill by 17.5%. Richard explained that Wales had been broken down to six procurement areas which were geographically vast and would make the provision of legal representation difficult in more rural areas; for example, should the plans go ahead there would be four contract areas from H'west to Brecon. The MoJ has suggested that rural legal firms place a joined-up bid; however Richard explained that this is not feasible and would undermine professional rules.

Julie Morgan asked why we as a Nation prosecute more defendants than any other country in Europe. Richard stated that criminological research suggests that other countries have a more lenient criminal justice system. In the UK the media focuses on lenient sentences being imposed and likes to scaremonger. Each government also likes to be seen to be tough on crime.

Rhodri Glyn Thomas asked what the Law Society's view was on devolving legal aid to Wales. Richard said there would be pros and cons to this but would hope that the Welsh Assembly would not forge ahead with the cuts being proposed by the current Westminster government.

Robert James asked what the judiciary and the Magistrates Association views on the legal aid cuts were. Richard stated that the judges don't tend to comment, however there have been some retired judges that have spoken up against the plans. There have also been some publicised cases where judges have ordered the court to foot the bill for legal representation. There has been a lot of support from the judiciary regarding these cuts.

Rob Robbins stated that MoJ is insisting on privatising services and we should work together as a group to fight this. Julie Morgan stated that this impacts on criminal justice across the board and that our work is interlinked. Rob Thomas makes reference to Civil Courts and asked if there will be an increase on defendants defending themselves. Richard states that it may be more common in rural areas due to the geography and defendants may end of defending themselves.

John Hancock asks if there is a risk of more miscarriages of justice should these proposed cuts go ahead. Richard stated that there is a possible knock-on effect.

Emily Cannon specifically raised a question surrounding the Welsh Language Act which was touched on in the speech. Julie Morgan raised concerns that the consultation period was cut short for Welsh Speakers and whether that was grounds to place an appeal. Kay Powell stated that the Law Society was in touch with MoJ regarding the Welsh Language Scheme.

Julie asked what stage the legal aid cuts are at. Richard explained that originally they were meant to submit bids in October 2014, however this has been delayed and they haven't been informed of new timetable as yet.

Jane Foulner asked about how this impacts on children being represented. Richard informed us that it forms the same issue and is of concern.

Julie Morgan asked, if there was a change in government would it put a stop to the legal aid cuts. Richard stated that all three main political parties are committed to reducing the Legal Aid Bill, however Labour hasn't made it clear what they would do. Julie Morgan asked if the plans could be stopped or has it gone too far ahead? Richard explained that it could stop at any time and felt that the schedule is extremely tight in light of the General Election next year.

### Action Points

- The group to write to the MoJ and Welsh Language Commission to voice concern that the recent consultation period was limited to two weeks for Welsh Speakers.
- The group would write to the Children's Commissioner raising concerns surrounding proposed legal aid cuts and how it will impact on young people.
- Members of the group would encourage union members to lobby their MPs with regard to the legal aid cuts and how it will impact more negatively in rural areas.

Minutes Prepared by Tracey Worth, NAPO Cymru.

## **Wales Presentation**

The Law Society is very concerned about the likely impact of the MoJ's plans for criminal defence services. We believe that Wales will be particularly hard hit.

At the moment, any firm that meets the quality standards is entitled to deliver services both to clients who instruct them direct and via the duty solicitor scheme.

Under the new proposals, while any firm would be able to undertake work for clients who instruct them direct, a limited number of firms would be entitled to undertake duty solicitor work. Most firms believe that without duty solicitor work, their businesses would not be viable. All rates are being cut by 17.5%, which most firms believe will finish off many of those who do succeed in getting a contract.

For the purposes of this scheme, the MOJ is dividing Wales into six procurement areas: North Wales 1 and 2, Dyfed-Powys 1 and 2, South Wales and Gwent. North Wales 1 stretches from Colwyn Bay via Denbighshire and Mold to Wrexham. North Wales 2 includes North Anglesey, Dolgellau, Caernarfon and Pwllheli. Dyfed-Powys is divided into two areas, the first covering Amman Valley, Carmarthen East Dyfed and Llanelli, while the second includes the police stations of Brecon and Radnor, mid Wales, north and south Ceredigion and Pembrokeshire. South Wales consists of an area bounded by Swansea, Cardiff and Merthyr Tydfil. The Gwent area includes Newport, the lower Rhymney Valley and East Gwent.

According to MoJ statistics, in 2013-14, 119 firms in Wales conducted at least 50 cases.

Under the new proposals, just 30 duty solicitor contracts would be awarded.

The Ministry recently lost a judicial review because it had not properly consulted on reports it received from Otterburn Legal Consulting and KPMG on its proposals. Its response was to issue a new consultation, which was open for just three weeks. As we noted in our response to the consultation, the Welsh language version only appeared on the MoJ website a week into the consultation period, and it was not possible to respond online in Welsh. The MoJ has had issues before in meeting its obligations in respect of the Welsh language. To do so yet again in a consultation that was only three weeks long seems a particularly severe transgression.

The KPMG report has some very interesting observations on the Lord Chancellor's proposals, which are relevant to four out of the six Welsh procurement areas. KPMG set parameters for the size of contract needed to be viable after the MoJ's 17.5% fee cut; whether there were firms in the

procurement area that were large enough to be able to deliver such a contract; and how much of the market would have to consolidate into the successful firms. In only 21 of the 85 procurement areas across England and Wales could all these parameters be met. In Wales, only South Wales and Gwent "passed" their test.

In 21 areas, including one each of the North Wales and Dyfed-Powys areas, at least one of the tests was not met. In 9 areas, including the remaining two Welsh areas, multiple tests were not met. KPMG urged the MoJ to undertake further analysis to determine whether the market in these 30 areas could survive its proposals. We have seen no evidence that the MoJ has undertaken any such analysis.

But let us now move away from the analysis on paper, and consider the reality on the ground. The MoJ plans require each contract holder to cover duty services across the whole of their procurement area. So in North Wales 1, four firms must stretch themselves across the whole area from Colwyn Bay to Wrexham. In Dyfed Powys 2, a firm must cover everything from Haverfordwest to Brecon to Aberystwyth, and again there will be just four contract holders. The South Wales proposal would see nine contracts all covering an area bounded by Swansea, Cardiff and Merthyr Tydfil.

I spent a couple of days in Wales earlier this year, to see for myself the challenges practitioners in Wales would face in trying to cover such large areas. A colleague from our Wales office drove me around to speak to practitioners from across north and west Wales. Having done that, I would seriously like to challenge officials from the MoJ to drive from Caernarfon to Dolgellau in the middle of winter and then tell me that that is a smart way to procure services. The scenery is beautiful. But we are not trying to give solicitors a chance to spend hours enjoying Wales's scenic beauty. We are trying to get legal services to people who have been arrested as efficiently as possible.

The MoJ's proposal was based on the need to offer bidders a large contract, in order to generate economies of scale, so as to be able to absorb the fee cuts. However, it has recently emerged that the MoJ received a draft report from PA Consulting in August 2013 which questioned whether economies of scale actually exist in this market. It seems very clear in Wales that the MoJ is not offering firms economies of scale. It is merely offering scale. For firms serving their local communities to scale up to provide services across the vast areas envisaged by these proposals would require massive investment and significant additional running costs. It is not plausible that this can be done while absorbing cuts of 17.5%.

The MoJ has suggested that an answer to the problem of geography might be for firms to team up into "delivery partnerships" under which an "applicant organisation" would hold the contract with

the Legal Aid Agency, but would have arrangements with other firms to deliver some of the work under the contract. There are two key problems with this approach. The first is that the KPMG analysis is based on what KPMG says is needed for a contract to be economically viable. Nobody has yet explained how a delivery partnership can work if you are splitting the minimum amount needed to be economically viable among several organisations. The second is that the LAA's rules and the impact of professional obligations are combining to make such arrangements highly bureaucratic and impractical.

The next point I want to talk about is how the decisions will be made as to who gets a contract. Originally, the Ministry intended to use price competitive tendering, but they eventually accepted that that was not a viable approach in this market. Instead, they intend to use "quality and capacity measures". However, the problem we see with this approach is that it is very difficult to identify any measures which are not either so important that they should be mandatory requirements, or so straightforward that all firms currently working in this field will meet them. We are really struggling to see how the MoJ can actually distinguish between firms. We are also still waiting to see how the LAA intends to address the issue of Welsh language services in its procurement process.

So what does the Law Society think the MoJ should do? Our current concern is that the MoJ is falling into the fallacy of "We must do something, this is something, therefore we must do it." We have said from the outset that in our view, no matter how you reorganise the criminal defence market, you can't take 17.5% out of it. That view has been backed up by the PA report, the Otterburn Report and the KPMG report. So my answer to the question is that first, the MoJ should abandon this proposal, which we believe would, if proceeded with, do serious damage to the criminal justice system.

Secondly, you need to look at the reasons why the UK spends so much on criminal legal aid. In addition to the fact that we have an adversarial system, one of the main reasons is that we prosecute many more people than most other countries in Europe. The Council of Europe published data this month that showed we prosecute almost twice as many people as France, and about half as many again as Germany; and yet overall, our criminal justice system costs are middling. It isn't rocket science that if you prosecute more people, you will spend more on criminal defence services.

Thirdly, recent data suggests that costs are coming down anyway. Previous fee cuts are working their way through the system still, and despite the numbers of cases being very high compared with other countries, the numbers have been decreasing for a decade and are continuing to do so. We therefore remain far from convinced that the MoJ has to change anything in order to reach the budgetary target the Treasury has set it.