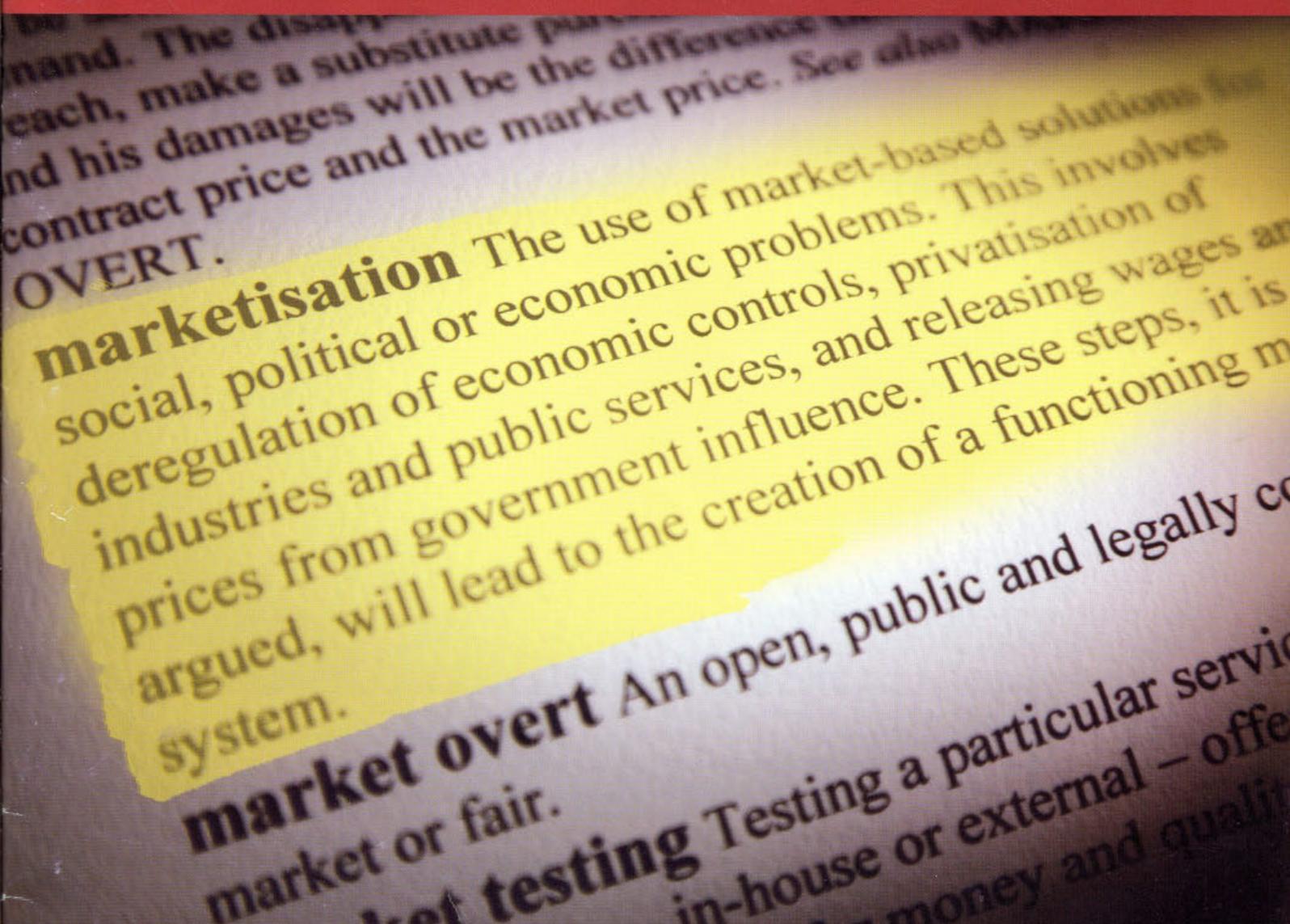


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## MARKETISATION OF LEGAL SERVICES

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In this article, Dexter Whitfield, research fellow at the European Services Strategy Unit, Sustainable Cities Research Institute, Northumbria University and author of *New Labour's attack on public services*,<sup>1</sup> provides an introduction to the marketisation of public services, looking at its ideological underpinning, the five methods of marketising services and its impact on legal services.

## Marketisation of legal services

### Ideological underpinning

A new language pervades the public sector: contestability, commissioning, competition, choice, personalisation and market mechanisms. This article examines the new competitive regime for legal services in the context of the government's strategy to marketise the criminal justice system and all public services.

The cost of legal aid has increased by 10 per cent in real terms since 1997, prisons by 30 per cent and probation by 70 per cent. But the forecast of savings from market 'reforms' is relatively small.

Efficiency and cost cutting are being used to justify Labour's ideological commitment to competition and making markets.

The marketisation of public services is driven by neoliberalism, a conservative economic philosophy which has a number of components such as a belief in the superiority of markets, that competition drives down costs, that the private sector is more efficient and innovative than the public sector and that individual choice will improve the quality of services. It is also claimed that choice will reduce inequality because market forces are a more equalising mechanism than political voice, which the middle classes have traditionally used to benefit most from public services.

### Five methods of marketising services

A five-part typology of methods is used to marketise public services, in particular the criminal justice system and legal services.<sup>2</sup> This covers the specification of services;

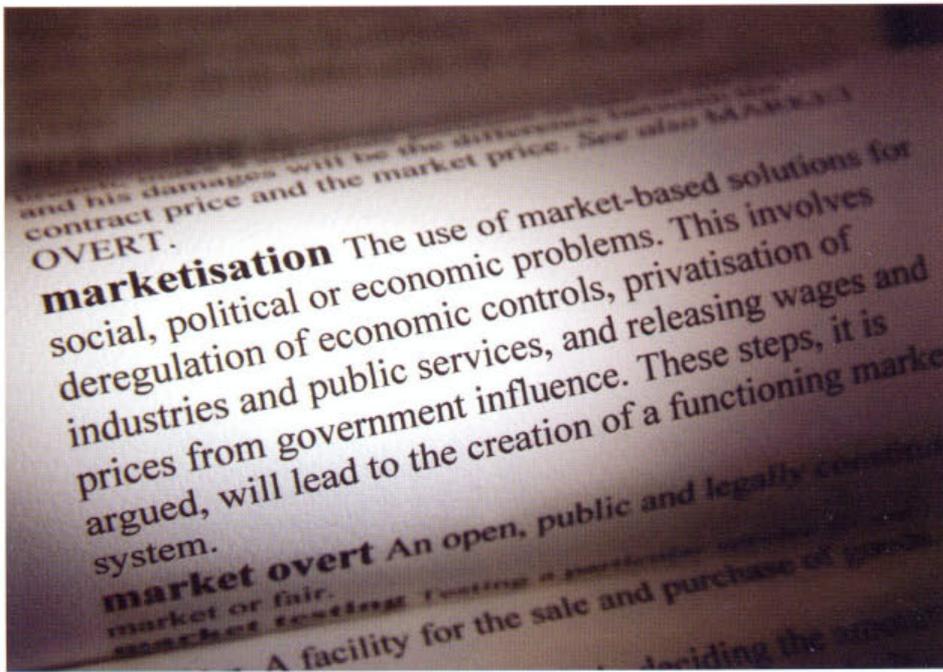
the reorganisation of work so that it can be contracted; the introduction of market mechanisms in the financing, organisation and management of public bodies; treating service users as individual consumers and restructuring democratic accountability by transferring responsibility to new companies, boards and trusts; and, finally, embedding business interests in public policy-making. So how are these methods being applied in legal services and the criminal justice system?

**‘The marketisation of public services is driven by neoliberalism, a conservative economic philosophy which has a number of components such as a belief in the superiority of markets, that competition drives down costs, that the private sector is more efficient and innovative than the public sector and that individual choice will improve the quality of services.’**

■ The commodifying or commercialising of services for competition requires the description, quality and operation of legal services to be changed so that they can be specified, priced and packaged in a contract to comply with the procurement process and the contracting system. The Home Office, the Department for Constitutional Affairs and justice agencies are increasingly outsourcing IT, support services and consultancy as well as prisoner escort services, electronic monitoring, managing accommodation projects for persistent offenders and services to prisons. Legal services are also being outsourced by local authorities, the NHS, government departments and other public bodies in strategic partnerships, framework agreements and through public-private partnership (PPP) advice.

The infrastructure is also being commodified as PPP/private finance initiative (PFI) projects are used for the renewal, replacement and provision of new police stations, courts, prisons, remand centres, hospitals, schools, transport links and other facilities. By December 2006 there were 50 signed PFI projects in the prison, police and court services accounting for £1,367m capital expenditure with many more at the planning and procurement stages. What were previously 'whole' systems or networks are divided into separate projects so that they can be privately financed and operated.

■ Commodifying or commercialising of labour involves reorganising the scope and content of work such as changes in job



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descriptions, responsibilities and staffing levels to match the specification of services. The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) and the Code of Practice on Workforce Matters in Public Sector Service Contracts afford a degree of protection to workers but also make it easier to transfer staff from one employer to another.

■ Neoliberalism also requires the reconfiguration of government into a commissioning role accompanied by the privatisation of assets and withdrawal from provision. Funding is designed to follow patients and pupils, national price tariffs (such as those in the NHS) set prices, new rules restrict access to investment to those authorities which accept privatisation, and competition between public bodies and between public and private providers is intensified.

The new legal services framework is intended to deregulate legal services, abolish anti-competitive rules and set up a new Legal Services Board with statutory powers. A new Office for Legal Complaints will deal with consumer complaints. In-house providers such as the Public Defender Service will have to compete in the market and the contract win-rate will determine its future viability.

The National Offender Management Service, the new contestability and competition regime for prisons and probation services, includes market-testing of all publicly managed prisons and ultimately offender management, the central supervisory function of the probation service.

■ Service users are treated as individual consumers. Services and functions are transferred to arms length companies, trusts and privately controlled companies. Democratic accountability and transparency is eroded as governance is shared by public and private interests with token user representation.

■ Business interests are increasingly embedded in the public sector through contracts, PFI projects, management consultants, representation on boards of

**‘The Carter Review refers to ‘managed competition’, ‘sustainable markets’ and ‘price competition’. But markets are never static and are rarely manageable in the way forecast.’**

arms length companies and trusts, and through greater involvement in the public policy-making process via trade and business associations. Business interests thus have a more powerful role in European, national, regional and local public policy-making, implementation and evaluation.

## ‘Best value’ tendering of legal services

There is a dangerous assumption that branding competitive tendering as ‘best value’ will make the contracting process more acceptable or workable. It is essential that the bid evaluation process assesses quality and price at the same time, irrespective of earlier quality thresholds. The shortlisting of firms is usually via a suitability/capability/quality assessment followed by a combined quality/price assessment on a 70/30 or 50/50 basis.

Both the government’s and expert services firm LECG’s claim that ‘competitive tendering is widely and successfully used in government ... for procurement of products and services such as in health services support, road transport, construction, IT, consulting and many others’ is simply a denial of the evidence.<sup>3</sup> The outsourcing of hospital cleaning has been a disaster with the government forced to spend over £60m on new systems thus eliminating most of the so called savings.<sup>4</sup> One hundred public sector IT projects outsourced to the private sector have had multi-million pound cost increases, delays and system failures.<sup>5</sup> Three out of 22 (14 per cent) strategic service delivery partnerships in local government have failed.<sup>6</sup>

There has been very little discussion about the transaction costs of a market system. The Legal Services Commission (LSC) will bear all the client costs of commissioning, the procurement process, the regulatory regime and managing the market. These costs normally vary between 5–10 per cent of the total cost of the service. Private firms must absorb the cost of bidding.

The notion that fewer, larger firms and greater transparency will produce better information is simplistic. As the client, the LSC will maintain commercial confidentiality and legal services firms will use the same process to maintain secrecy of bids as part of their market strategies.

The Carter Review refers to ‘managed competition’, ‘sustainable markets’ and ‘price competition’. But markets are never static and are rarely manageable in the way forecast. Competitors respond to gains or losses of market power and seek to maximise profit by acquisition, gaming, potentially collusive bidding practices and exploiting regulatory loopholes.

## Impact on legal services

The marketisation of legal services will have a profound effect on solicitors, service users and the criminal justice system:

**The five methods of marketising services:**

■ The commodifying or commercialising of services for competition requires the description, quality and operation of legal services to be changed so that they can be specified, priced and packaged in a contract to comply with the procurement process and the contracting system.

■ Commodifying or commercialising of labour involves reorganising the scope and content of work such as changes in job descriptions, responsibilities and staffing levels to match the specification of services.

■ Neoliberalism also requires the reconfiguration of government into a commissioning role accompanied by the privatisation of assets and withdrawal from provision.

■ Service users are treated as individual consumers.

■ Business interests are increasingly embedded in the public sector through contracts, PFI projects, management consultants, representation on boards of arms length companies and trusts, and through greater involvement in the public policy-making process via trade and business associations.

■ Gaming in legal services is likely to emerge. For example, maximising the number of cases which qualify for being withdrawn from the tendering process and to be treated as cost items. The 'parking' of difficult/complex/unprofitable cases for which time/resources cannot be predicted or are highly uncertain may also develop.

■ Outsourcing of prison/court/police station escort transport has led to delays, with prisoners not being available at the planned time thus increasing waiting time. The government wants larger solicitors' firms but a mixed economy of private companies, social enterprises, community organisations and public sector provision for probation. This fragmentation of provision and responsibilities could make solicitors' work subject to other delays and costs.

■ The introduction of market mechanisms in related services such as Jobcentre Plus, skills and employment training, physical and mental health services, drug and alcohol treatment and support is also likely to increase the level and severity of delays.

■ Market forces are likely to result in changes in the quality of service. Cost pressures could lead to limiting case investigation, for example, in the time allocated to finding witnesses and obtaining statements. The imposition of commercial and contracting restrictions is almost certain to have negative consequences for civil cases in social, welfare, family and immigration matters.

■ Increasing private sector ownership of the criminal justice infrastructure both through PPP projects for prisons, courts and remand centres and through new criminal justice centres will add to the fragmentation of the criminal justice system. The growth of a secondary market of investment funds owning and operating diverse portfolios of PPP facilities could also increase the likelihood of private sector provision of core services.<sup>7</sup>

■ New types of firms could emerge to deliver legal services – they will be influenced by what happens in the probation/prison sector with the possible development of multi-service providers (private companies or social enterprises) running community-based probation programmes and legal services.

■ A loss of accountability and transparency in the criminal justice system when it is increasingly delivered by a plethora of providers contracted by unaccountable boards and trusts mainstreaming commercial confidentiality.

■ Claims that market mechanisms will improve access and quality, recruitment, training and secure long-term sustainability and profitability of legal services while also reducing costs are likely to be exposed as wishful thinking.

The government has embarked on a high-risk strategy. The ultimate impact will be felt most by the service users, particularly those from black and ethnic minorities, and the social justice/equality agenda.

- 1 *New Labour's attack on public services: Modernisation by marketisation? How the commissioning, choice, competition and contestability agenda threatens public services and the welfare state*, Dexter Whitfield, Spokesman Books, 2006, see: [www.spokesmanbooks.com](http://www.spokesmanbooks.com).
- 2 See note 1.
- 3 *Single purchaser market: the procurement of criminal defence services (CDS)*, LECG on behalf of the Law Society, December 2006, p9.
- 4 See note 1.
- 5 *Cost overruns, delays and terminations: 100 outsourced public sector ICT projects*, Research report no 2, European Services Strategy Unit, forthcoming 2007.
- 6 *North Tyneside: A commissioning council?*, UNISON Northern, European Services Strategy Unit, 2006.
- 7 *Financing infrastructure in the 21st century: The long term impact of public private partnerships in Britain and Australia*, Dexter Whitfield, Don Dunstan Foundation, Australian Institute for Social Research, University of Adelaide, Australia, 2007.

■ In April 2007 *Legal Action*, Jane Hickman and Sue Pearson will respond to this article and explore strategy and delivery in legal aid practice. In May 2007 *Legal Action*, Michael MacNeil will finish this series of articles by looking at notions of democratic accountability and the need to build a user's perspective at the strategic policy-making level.

**Glossary**

'Contestability' is achieved by the threat of other providers entering the market thus putting pressure on the existing provider to maintain quality and efficient services.

'Personalisation' is the design and funding of services built around the needs of individuals. For example, direct payments to care users who then purchase their own services.

'Gaming' is the tactics used by service providers to avoid or minimise service delivery to users who require a high level of resources, time and/or specialist support, or reclassifying treatment and level of service to maximise income.