

PLA Working Paper - Survey of views on potential process change

Introduction

We posed a short survey of 10 questions covering views on the existing system and potential changes to it. The survey was circulated by email to PLA Members, and on to Non-PLA Members through contacts. We had a good response to the survey with 39 member responses and 50 non-member responses.

Summary Conclusion

Responses reflected diverse views and did not reflect a clear trend in terms of a new or alternative process. In general responses were in favour of an alternative system although the preferred scope and intended objective of this system was varied. Costs and delay featured heavily as concerns with the existing system and matters which respondents would like to see addressed in any alternative.

There was also significant concern from the non-PLA member group about damage to reputation. We had anticipated that this would be a concern of economic operators but given the mix of respondents in that response group it seems this concern must also be felt by contracting authorities.

The questions focussed on the potential creation of an alternative process and the benefits, risks and drawbacks associated. As such only a few questions offered retaining the current system as an option. Question 2 asked what options respondents would be in favour of and offered retaining the existing system 'as is' or with minor tweaks. In both groups of respondents retaining the existing system received the fewest responses but did receive some support. Tweaking the existing system polled slightly higher in both groups, with 28% and 27% respectively.

Question 4 focussed on the respondents concerns with an alternative system. In the PLA response group this question this received a lot of free text responses with the focus on the difficulty of creating a cheaper system that maintained the balance and fairness of the current system. This did not appear to be such a significant consideration for the non-PLA group whose main concern was that this would create more litigation.

PLA members tend to be practitioners with a special interest in procurement, whether in-house or in private firms and it is perhaps this academic interest in the law that has raised this concern when it does not seem to be held by those working in contracting authorities.

The strongest consensus from all the questions is in respect of those making decisions, with the majority of both respondent groups wanting procurement professionals to sit alongside lawyers/judges when considering challenges.

Despite the concerns around the probity of a quicker process by PLA members, the latter group's responses were in favour of a quicker process with less administrative burden but with the ability to make all orders currently open to the high court.

Survey respondents

PLA Members were not asked to identify their employer/position; however, non-members were asked in what area they worked.

Amongst Non-PLA respondents there was a good spread of sectors represented, primarily (36%) from local authorities. Others were from health, education, utilities and blue light services. 4% of respondents identified as economic operators, however in the 'other' responses there were 4 responses identified as procurement consultants or other private firms.

Question	PLA	Non-PLA	Comment
<p>Q1 What is your biggest concern with regards to possible challenges to procurement process?</p> <p>Respondents were able to select multiple answers</p>	<p>For Members the majority of answers identified delay (61%) and liability for costs/damages (59%).</p> <p>In the free text a number of responses comment on the 'strategic' use of challenges to disrupt a procurement.</p>	<p>Non-members responded to the first two points in almost identical proportions with 60% citing delay and 58% selecting liability for costs/damages.</p> <p>For non-members reputational consequences also received significant response at 48%.</p>	<p>We anticipated that reputational issues may be a concern primarily for economic operators, but the number of responses in this area from the non-PLA group does not correlate with the number of private/economic operator responses. This suggests that some public entities also have concerns about the reputational impact of challenges.</p>
<p>Q2 Changes to the process - "Would you be in favour of..."</p> <p>In this question we posed a number of alternatives through which respondents were asked to indicate</p>	<p>Two options relating to maintaining existing litigation or 'tweaking' the existing system received the fewest positive responses (15% and 28% respectively).</p> <p>The responses demonstrated majority in favour of a cheaper and quicker</p>	<p>59% are in favour of a cheaper, quick alternative to high court litigation.</p> <p>67% were in favour of an alternative system alongside High Court litigation.</p>	<p>The high level of responses to both an alternative to the High Court and a separate system alongside high court litigation gives a clear indication that this is not envisaged as a complete replacement of the High Court.</p>

<p>whether they would be in favour of the introduction of various options.</p> <p>Respondents were able to select multiple answers</p>	<p>alternative to High Court litigation (59%) and an alternative alongside High Court litigation (54%).</p>		<p>This question also gave the option of retaining the existing system with minimal changes which did not receive a favourable response from either group.</p>
<p>Q3 In designing any reform, what are you key driving factors?</p> <ul style="list-style-type: none"> - Speed - Low cost - Lower complexity - Scope of remedy available - Introduction of industry expertise into decision making <p>Respondents could only choose one answer.</p>	<p>38% responded that all of these factors were important, and 26% responded that speed was most important.</p> <p>One respondent chose to answer 'other' and commented that speed and cost were equally important to them.</p>	<p>As for PLA members, the majority of Non-members selected 'all of the above' (28%). There were also high response levels for lower complexity (22%) and speed (20%).</p>	<p>The spread in these responses means that it is not possible to identify one factor that is of particular important to the respondents when redesigning the process but does show dissatisfaction with a number of aspects of the existing system.</p>
<p>Q4 what would be your principal concern with an alternative to High Court litigation. Possible answers were:</p> <ul style="list-style-type: none"> - It would not be quicker; - Costs would not be lower; - Would result in more litigation; 	<p>The answers to this question were roughly evenly split between 10 - 20%¹, with 'other' receiving the highest number of responses at 26%.</p> <p>The responses received under this heading focussed on the difficulty of creating a simple system, including the concern that if it were too 'light touch' it would not protect defendants, but if comprehensive it would become overly complex and</p>	<p>This question received a more decisive response with 50% responding that this approach would result in more litigation.</p> <p>'all of the above' received the second highest response at 30%.</p>	<p>Concern about higher rates of litigation were expected from this question, although quicker resolution of disputes could lessen the impact of this.</p> <p>The responses from the PLA member group in relation to the difficulty of balancing fairness and sufficiently rigorous process is considered to be the</p>

¹ I don't understand this sentence

<ul style="list-style-type: none"> - All of the above; - None of the above; - other 	<p>would not end up being quicker or cheaper.</p>		<p>biggest hurdle in designing an alternative to the High Court.</p>
<p>Q5 if an alternative to High Court litigation was to be considered/ introduced would you favour</p> <ul style="list-style-type: none"> - complete replacement - alternative available at choice of claimant - alternative only if both parties agree - alternative for simple/fact-based case 	<p>Responses on this point were well spread but the alternative contemplating an alternative system for simple or fact-based matters received 36% of responses.</p> <p>The second highest response was where both parties agreed to using the alternative process (26%).</p> <p>The single text response proposed an alternative for all disputes except when a claim for damages is being made which would continue as a Part 7 claim in the High Court.</p>	<p>The split of responses on this point was clearer cut from the non-PLA group with 58% preferred an alternative for simple or fact-based cases.</p>	<p>The majority of respondents endorsed this as a supplementary process alongside the High Court.</p> <p>17% and 16% respectively responded that the new process could be a complete replacement: while a minority of respondents this illustrates a view that the current system could be removed in its entirety and therefore represents a willingness to see substantial changes in the law.</p>
<p>Q6 if reforms were introduced who should make the decision:</p> <ul style="list-style-type: none"> - judge, as per current system - tribunal of procurement professionals and lawyers; - all procurement professionals 	<p>This question saw the most decisive response with 77% of respondents agreeing that tribunals should be formed of both lawyers and procurement professionals.</p>	<p>Again there was a strong consensus that the tribunal should comprise both lawyers and procurement professionals receiving 82% of responses.</p>	<p>This question saw one of the most conclusive responses in favour of including procurement professionals in the decision making.</p>
<p>Q7 if reforms were to be introduced, would you want:</p>	<p>The two most prominent responses to this question were that a quick process would be preferred, even if this removed disclosure, extensive pleadings or cross</p>	<p>Responses to this question were well spread with 40% in favour of a quicker, cheaper process and 40% in favour of a two-tier</p>	<p>The responses to this question again point to the perceived</p>

<ul style="list-style-type: none"> - quicker cheaper process - retain existing process - an appeal route to the high court - two tier system as for employment 	<p>examination (51%) and that the alternative system should have a route of appeal to the High Court (59%).</p>	<p>system as for employment law matters.</p>	<p>need for a quicker process alongside the High Court.²</p>
<p>Q8 What orders should an alternative tribunal be empowered to make?</p>	<p>The majority of respondents considered that an alternative tribunal should be empowered to make all orders that the High Court can currently make (49%).</p> <p>The second largest group of respondents felt that the alternative tribunal should only have the power to make declaratory judgements (28%).</p>	<p>As for Members, the majority of respondents considered that the alternative tribunal should be able to make all orders (52%).</p> <p>The second highest group of respondents favoured the ability to make declaratory judgements and financial awards but not declarations of ineffectiveness (30%).</p>	<p>Despite the implications of a quicker process being less interrogative and likely to proceed without elements such as full disclosure and cross examination, the respondents were largely in favour of the alternative tribunal having the power to grant all orders currently open to the High Court.</p>
<p>Q9 position regarding costs</p>	<p>64% felt that costs ought to continue to be dealt with as they are currently dealt with.</p>	<p>Responses on this question were almost evenly split with 54% in favour of each party bearing its own costs and 46% preferring the current costs regime to be maintained.</p>	<p>A slim majority preferred the existing costs position, although previous responses anticipate that the alternative would involve lower costs than the current High Court process.</p>
<p>Q10 the final question sought general comments</p>	<p>Nine responses were received in response to this question, many covered points under questions above.</p>	<p>This question was not contained in the Non-member survey due to the limit on question</p>	

² As drafted, this sounded as if we were finding support for a view we already held, whereas I would recommend that the analysis should be presented from a neutral standpoint

	<p>Several responses raised the appropriateness of public bodies making settlement payments out of public money.</p> <p>Responses also considered other jurisdictions which are covered in another section of our report.</p>	<p>numbers, and the inclusion of the initial question.</p>	
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