

Constitutional Affairs Committee inquiry into the implementation of the Carter Review: The Law Society's submission

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The Law Society



The Law Society of England and Wales regulates and represents more than 120,000 solicitors in England and Wales. This response is from the representation arm of the Law Society although it may, where appropriate, give a view on issues which may have a regulatory aspect. It also represents the views and interests of solicitors in commenting on proposals for better law and lawmaking procedures in both the domestic and European arenas.

The Law Society welcomes the invitation to express its views on the issues raised in the call for evidence in respect of the Carter Review of legal aid procurement by the Constitutional Affairs Committee.

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Introduction

1. The Law Society welcomed the announcement of the Carter Review of legal aid procurement as it seemed to offer an excellent opportunity to reform the system for the better. The Society has long argued that the legal aid system is in need of overhaul¹ as the current system falls far short of meeting the need to provide access to justice and tackle social exclusion.
2. The proposals in the Carter Report represent wholesale change in the way the Government procures criminal and civil legal aid. The aim is to move to a more market-based approach by 2009/10 under which suppliers (overwhelmingly legal aid firms) compete for legal aid contracts by way of best value tendering. In the interim, suppliers will be paid fixed fees for the work and will be expected to make the fundamental business adjustments that will be necessary to ensure delivery of legal aid.
3. The central theme running through the civil and criminal legal aid proposals is the need to control costs. Criminal legal aid will bear the brunt of this process with an anticipated cut of £100 million² including a £10 million cut in both police station and magistrates' court fees³.
4. Whilst the criminal legal aid budget has risen steeply in recent years, there is little evidence to suggest that this is due to an increase in costs controlled by solicitors. A recent independent economic analysis commissioned by the Law Society⁴ which we attach at Annex A, finds that for most criminal and civil matters (excluding combined barristers' and solicitors' costs in the crown court and higher courts) average costs per case have actually fallen in real terms in recent years. Legal aid payments to solicitors have been essentially static for several years, the last pay increase for criminal legal aid being 2001 and civil practitioners received just one rise of 2.5% in 2004.; Indeed research has shown that the main cost drivers have been government policies creating a large number of new offences, more complex procedures and delays within the court service struggling to cope with an increased demand.⁵

¹ The Law Society's 2003 document *Protecting Rights and Tackling Social Exclusion* contained a number of proposals for reforming legal aid, including standard fees for appropriate cases.

² Lord Carter's Review of Legal Aid Procurement (2006) *Legal Aid A market-based approach to reform* p3 paragraph 8

³ According to figures provided to the Law Society by the Legal Services Commission

⁴ LECG Ltd (September 2006) *Legal Aid Reforms Proposed by the Carter Report - Analysis and Commentary*, p4

⁵ Cape and Moorhead (July 2005) *Demand Induced Supply?*

5. The Law Society has no objection in principle to the application of market principles although it urges the greatest care in implementing proposals to achieve this and stresses that the market approach will not guarantee access to justice in certain categories of law and some geographical areas. Nor does the Society oppose the concept of graduated fees. However, current fees and the fees proposed both in relation to criminal and civil legal aid are costed and structured in such a way as to threaten the viability of law firms, thereby posing a serious risk to the legal aid system.

6. The Law Society has conducted a number of surveys of practitioners to gauge the profession's reaction to the proposals and the perceived impact on firms. The results are attached at Annex B, but the key findings were:
 - 82% of family practitioners believe that that their firm was less likely to undertake publicly funded work in the future;
 - 78% of mental health practitioners who are considering continuing to represent publicly funded clients think that the quality of advice/representation they are able to offer will decline;
 - 74% of immigration practitioners said that their firms were less likely to undertake legal aid work in the future and 67% thought that the quality of advice/representation they would be able to offer will decline.

7. Many criminal suppliers have calculated that that their income from fixed or graduated fees could drop by up to 50% compared to current fees. However, even more modest reductions in fees could spell the end for many current suppliers whose profit margins are slim to non-existent⁶. Recent research shows that the profit margins of criminal legal aid practices range from -6% to 2%, indicating real economic fragility⁷. And, however efficient suppliers may be in their service delivery, it is unreasonable to expect them to absorb the costs of inefficiencies in the police station and court systems. The effect of this would be greatly exacerbated by fixed fees.

⁶ Otterburn Legal Consulting (2006) *Lord Carter's Review of Legal Aid Procurement: 2005 and 2006 Surveys of Criminal Firms*

<http://www.legalaidprocurementreview.gov.uk/publications.htm>

⁷ LECG *ibid* para 1.5 (e)

Is there a need to modernise the procurement of legal aid?

8. The current legal aid system faces serious challenges. The supplier base is contracting and the age profile of legal aid practitioners is getting older; there are few incentives for highly indebted law graduates to go into such a poorly paid area of law when rewards in the private and commercial sector are much higher⁸. In 2001 there were 3,500 solicitors' offices providing criminal legal aid, reducing to 2651 in September 2005. The number of offices with civil law contracts has fallen from 4301 in March 2004 to 3632 in March 2006. From the client's perspective it is becoming increasingly difficult to find a lawyer operating on a legal aid basis⁹.

9. Successive legal aid ministers have talked about legal aid being a pillar of the welfare state alongside state education and the National Health Service. However legal aid remains the Cinderella service and this is especially pronounced in relation to civil legal aid. We believe that under-investment in civil legal aid is a false economy as research has shown that failure to access legal advice early enough can result in clusters of social problems such as homelessness, children taken into care and youth crime.¹⁰ Such problems increase costs for other government departments as well as having damaging consequences for the individuals involved and society as a whole.

10. Lord Carter's stated aim (adopted by the Government) is to save £100 million on the 2005/06 criminal legal aid budget resulting in a 20% reduction of the budget over the next four years in real terms (see table below¹¹). It is envisaged that this will be achieved by way of efficiencies "without compromising quality and access to services for clients."¹² By and large, legal aid suppliers operating on tight margins are already operating on a highly efficient basis. It is difficult to envisage how further efficiencies can be made without quality being compromised.

⁸ Career Choices in Law *A Survey of Law Students* Research Study 50 and Career Choices in Law *A Survey of Trainee Solicitors* Research Study 51 February 2004

⁹ One example is of a client who contacted 27 firms in east London for assistance with a child residence dispute until eventually finding a representative in South London. During that time she was unable to see her 6 month old baby for over 2 months.

¹⁰ Pascoe Pleasance & o/s, TSO (2004) *Causes of Action: Civil Law and Social Justice*, p 107

¹¹ Lord Carter's Review *ibid* p 127

¹², *ibid* p.3, para 8.

Expenditure profiles for each of the main areas of legal aid addressed by the review in the transition years up to best value tendering in 2010-11 compared to historic expenditure

£m (RAB)	Cash growth 1997-98 to 2004-05	Outturn 2005-06	Forecast Outturn 2006-07	Year 1 of Transition 2007-08	Year 2 of Transition 2008-09	Year 3 of Transition 2009-10
Defence in police stations and magistrates' courts	32%	523	531 (+2%)	508 (-4%)	503 (-1%)	503 (0%)
Defence in the Crown Court*	96%	635	609 (-4%)	586 (-4%)	560 (-4%)	535 (-4%)
Legal help scheme for non-family work and private family scheme	n/a	377	378 (0%)	390 (+3%)	377 (-3%)	377 (0%)
Public law children scheme and legal help scheme for family work	n/a	342	360 (5%)	373 (+4%)	388 (+4%)	405 (+4%)
Sub-total	26%	1,877	1,878 (0%)	1,857 (-1%)	1,828 (-2%)	1,820 (-1%)
All other expenditure (e.g. single asylum fund, administration costs, Court of Appeal, central funds)	n/a	158	191 (+21%)	217 (+14%)	223 (+3%)	219 (-2%)
Total	37%	2,035	2,069 (+2%)	2,075 (0%)	2,055 (-1%)	2,044 (-1%)

*Crown Court figures exclude disbursements which cost £48 million in 2005-06 and forecast to increase to £65 million in 2010-11.

11. The Government's determination to make costs savings over a period of transition when firms will be required to make major adaptations can only hasten the decline of publicly funded legal advice and representation. The independent economic analysis by LECG¹³ estimated that a minimum of 800 firms would have to close or merge to adapt to the new regime. This is double the estimate by the Carter Review but even if the lower estimate is assumed, it shows that the scale of adaptation is such as to require significant investment rather than reduction in costs.

Benefits and disadvantages of the proposals for defendants and other legal aid recipients

12. The main beneficiary will be the Treasury which stands to gain from the proposed costs savings. It is difficult to envisage what if any benefits will accrue to legal aid clients. The number of legal aid providers will decline, potentially creating further advice deserts. In addition, given the proposals to fix fees at uneconomic levels, it is likely that the quality of service from those remaining will decrease. This is contrary to Lord Carter's stated aim of putting quality at the forefront.
13. The stated commitment to a quality service is welcome, but this can only be achieved if the fee structure allows for a quality service to be delivered. The extension of fixed and graduated fees for both civil and criminal legal aid is proposed as the primary method of achieving costs control. The benefits to the Treasury and the Legal Services Commission are clear as the final cost (excluding most disbursements) of each piece of work done under the fixed fee regime is known at the outset. Fixed fees are also simpler to administer, resulting in costs savings for the LSC.
14. The benefits to legal aid clients and suppliers are less clear. Fixed fees operate, at least in theory, on a 'swings and roundabouts' principle. On a straightforward matter, the fixed fee may be higher than a fee calculated on the basis of hourly rates. For a complex matter the fixed fee is likely to be lower. The consequence for clients is that those with simpler cases are more likely to find representation than those with complex cases, as apart from a sense of public service, there is little incentive for suppliers to take on these matters. Where cases are accepted there will be financial pressures on suppliers to work to a standard that will satisfy basic peer review requirements rather than to pursue excellence, with the consequential diminishing of quality. These pressures will be more acute for criminal legal aid where suppliers will be operating within a system fraught with delay caused by other participants, e.g. police and Crown Prosecution Service.
15. Although the new civil and family fee schemes are stated to be cost neutral, similar pressures will apply. It is proposed that fixed fees will be set at national or, in some instances, regional rates, based on the average cost per case either regionally or nationally. Suppliers who specialise in complex matters, such as education special needs cases, or particularly complex immigration and asylum matters, will therefore be at a greater disadvantage than those who deal with more straightforward cases. The proposals contain an escape clause for cases where costs exceed 4 times the fixed fee; such

¹³ LECG *ibid* para 1.5 (a)

cases to be paid at hourly rates. However this multiplier is set too high and creates risks for suppliers taking on complex matters. For example, if the standard fee is based on 5 hours work, a supplier could do 19 hours work and still only receive the standard fee. Specialists will be compelled to take on more standard cases in order to avoid becoming economically unviable. In the process their capacity to take on specialist cases is likely to diminish. However, for the more general suppliers, there will be no incentive to take on more specialist cases and develop the necessary expertise. The fear is that this structure will cause a 'lowest common denominator' approach, and clients with complex cases requiring specialist knowledge and expertise will find it increasingly difficult to find a legal aid lawyer.

16. Certain benefits, such as greater market power, are claimed for best value tendering and the Law Society does not discount the potential here, say for large firms operating in urban areas. However, our concern is that if the transition phase proceeds at the pace proposed and is otherwise mismanaged, the effect on the supplier base, and consequently access to justice, will be so harmful as to preclude any hope of ultimately reaping the benefits of best value tendering.

Impact on different communities such as black, minority ethnic and rural communities

17. The Law Society believes that the Carter proposals have the potential to impact adversely and disproportionately on black and minority ethnic communities and suppliers. A report commissioned from MDA by the LSC¹⁴ to test the impact of competitive price tendering for London found that in the capital, small firms and BME firms and solicitors are over represented amongst criminal legal aid contractors and that a move to competitive tendering on the basis suggested would have " a disproportionate impact on BME owned and controlled firms, and also on the employment prospects of BME solicitors who are far more likely to be practising in BME-controlled firms than their white counterparts".¹⁵ The report also found that there would be a similar impact outside of London.¹⁶ The Carter proposals, pose similar risks to those identified by the MDA research, as they envisage a significant contraction in the supplier base through the setting of minimum contract sizes and competitive price tendering. The proposals represent the greatest challenge to small firms in respect of which BME suppliers are disproportionately represented. Therefore BME firms, particularly in large urban areas, are more likely to be adversely and disproportionately affected by the Carter proposals.
18. There is also likely to be an adverse impact on BME communities as it has been established that BME clients are far more likely to instruct a solicitor from a BME managed firm¹⁷. This finding is related to civil legal aid but it is our view that it is probably the same for criminal work. This is because BME clients' choice of solicitor is often influenced by the need for a representative with a shared racial, religious or cultural identity or, linguistic ability. The loss of these firms would make it more difficult for BME clients to choose a solicitor who meets their needs. This will restrict access to justice for BME clients and

¹⁴ Research on Ethnic Diversity amongst suppliers of Legal Aid services, MDA, April 2006

¹⁵ *ibid*, p4

¹⁶ *ibid*, p5

¹⁷ *ibid*

could potentially lead to greater social exclusion and contribute to racial and religious tension.

19. The Society is also concerned that the proposals will adversely affect access to justice for disabled clients. Casework for disabled clients can be extremely time consuming as more assistance may be required, e.g. in the taking of instructions and explanation of options as well as additional expenses such as sign language interpreters or home visits. Within a fixed fee structure there is a risk that suppliers will have less economic incentive to take on these cases. Even those suppliers who regard this work as part of their public service duty may find that economic constraints will reduce the number of disabled clients they can assist.
20. There is a risk that rural communities will be adversely affected by the changes that could lead to a further loss of supply in these areas. It is clear that the new fee structures will favour volume suppliers. Those small town high street firms who do relatively small amounts of legal aid work, may not be in a position to grow quickly in order to benefit from economies of scale. They may abandon legal aid work altogether in favour of private paying clients or simply close down, hastening the current steady exodus from legal aid work.
21. The proposal for Community Legal Advice Networks (CLANs) could potentially benefit rural clients and suppliers, providing a network of existing suppliers working together with an effective referrals procedure to provide a range of civil legal aid services between them. The Law Society believes that there is much to commend the CLAN model but as yet there are no proposals to pilot them and, it remains to be seen whether the DCA and the LSC will pursue this as a viable option.

Impact of recommendations on legal aid providers

22. The independent economic analysis by LECG¹⁸ projects that a minimum of 800 firms will have to close or merge to achieve the volume requirement necessary to do legal aid work in the future. The Carter review¹⁹ also highlights the need for major restructuring although, according to LECG, it under-estimates by 100% the number of firms that will have to make major adaptations in respect of criminal legal aid. There will need to be similar adaptations by firms doing civil work and in any case, over 50% do a mixture of both.
23. The Carter review holds out the prospect of increased opportunities for highly efficient volume suppliers. However, any increased efficiencies could take some to materialise as it is doubtful whether firms will either be in a position to bid for larger contracts in April 2007 to coincide with the proposed date for imposing fixed fees for criminal legal aid work. Some of the largest suppliers have voiced concerns that whilst they may be well positioned for competitive tendering in 2009, the biggest challenge is to survive the transitional fixed fee regime. For smaller suppliers the problem may be more acute.

¹⁸ LECG *ibid*, para 1.5 (a)

¹⁹ Lord Carter's Review, *ibid*, Chapter 6, paragraph 36 et seq

24. Recent research²⁰ has confirmed that typically, average profits for criminal legal aid firms, dependant on size may be as low as 2% going down to a -6% loss. This is substantially lower than “comparable” sectors such as financial advisor services or insurance brokers who would expect a return of 10% - 15%. Commenting on these findings, LECG said such low profitability could result in ‘lasting harm to sustainability’²¹ particularly during the transitional period.
25. The existence of a sustainable and effective independent criminal defence service is essential if the government is to meet its obligations under the Human Rights Act. The Public Defender Service is not a viable alternative as, although the evaluation of the PDS pilot has not yet been published, all the indicators are that it has proven to be much more expensive than private practice and it will not be extended.

Impact on firms of differing size, structure and practitioner mix

26. The Carter model envisages a high ratio of fee earners to partners. Suppliers will be under pressure to delegate work to the least qualified fee earners to reduce costs. There is a real risk that quality will suffer if less qualified staff take on work that is beyond their level of experience. Overall, we believe that the risks inherent in establishing businesses on the scale envisaged by the Carter Report, may deter many firms from making the changes, given the uncertainty of the returns.

Whether the measures proposed will promote the provision of high quality advice and support the effective and efficient operation of the Justice System?

27. The Law Society is not convinced that the proposals will promote high quality advice and, given the many variables in the justice system, it is hard to see how these proposals can promote efficiency to any significant extent by only addressing one part of the system. The proposals put the future of legal aid at risk by making it unviable for a significant number of suppliers. This will be the case particularly for smaller specialist suppliers doing complex cases who will not be adequately remunerated under the proposed fixed fee schemes. We believe this will lead to reduced access to justice with those remaining suppliers, of necessity, offering a one- size- fits-all standardised service which may well be incapable of addressing many client needs.
28. The move to fixed fees may result in the Treasury securing better terms in the short term but only at a price of serious risk to the quality of service and its sustainability over the medium and long term.

²⁰ Otterburn Consulting, *ibid*

²¹ LECG *ibid* para 1.5(e)

Is the timetable for implementation suggested in Lord Carter's report realistic?

29. We are concerned that the proposed implementation of key elements of the reforms in April 2007 does not allow sufficient time for the DCA and the LSC to consider the issues raised in response to the consultation and make appropriate amendments.. The concern is twofold. The first is that issues about the details of the fee structures and other organisational matters such as police station boundaries will not be properly addressed within the time allowed. The second is that suppliers will have insufficient time to implement the necessary business changes to survive in the new environment even assuming that the proposed rates of remuneration are viable which we seriously doubt.
30. The latter concern carries over into the transitional period itself. It is during this period, between the new fixed fee contracts and the planned introduction of competitive tendering in April 2009, that the greatest challenge for suppliers will exist. Again, in the independent view of LECG²², great care will be needed in implementing the proposals. It warns that 'if [the transition process] is pushed through without full consideration of the impact on suppliers [it would] disrupt services – criminal and civil, with lasting harm'.

Conclusion

31. The Law Society is very much in favour of reform of the Legal Aid system. It believes the Carter blueprint can be made to work. But this will only be achieved if the DCA and the LSC heed the advice of LECG²³ on how the very significant risks inherent in the reforms, may be mitigated. Successful implementation of the reforms will require a guarantee of income levels that do not threaten the stability of the fragile supplier base. It will also require sensible time-tabling and close evaluation of each stage before proceeding to the next. In the absence of these mitigating measures, there is a serious risk of supply disruption and failure, causing lasting harm to the legal aid system.

²² LECG ibid para 5.3
²³ LECG ibid