

# Parliamentary Brief



The Law Society

## The future of legal aid

### Westminster Hall debate - Thursday 11 January 2007

#### Legal Aid Reforms

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 overhaul,<sup>1</sup> as the current system falls far short of meeting the need to provide access to justice and tackle social exclusion.

The Carter proposals 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.

Legal aid is a vital public service which serves some of the most vulnerable members of Society, but its future is being threatened by continued under-investment by the Government and the way the Government proposes to introduce many of the recommendations made by the Carter Review. The Law Society has advised that there must see an immediate increase in funding for legal aid, otherwise access to justice will be severely compromised.

On 8 November 2006, the Law Society launched its What Price Justice? campaign to raise awareness of the value of legal aid and legal aid lawyers, using real examples of how clients have benefited from legal aid advice. The campaign is supported by a wide range of organisations, including MIND, Shelter, NSPCC, the Refugee Council, Advice UK, and the Child Poverty Action Group.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> Further information on the campaign can be found at [www.whatpricejustice.lawsociety.org.uk](http://www.whatpricejustice.lawsociety.org.uk)

Criminal legal aid solicitors' fees were last increased in 2001. During the last five years, civil legal aid solicitors have received one increase in fees of 2.5 per cent in 2004. As a result, an increasing number of legal aid practitioners are being forced to give up this work. In 2001, 3500 offices provided criminal legal aid services, yet the number of solicitors' offices under contract at September 2005 was down to just 2,651. In addition, the number of solicitors' offices with general civil contracts decreased by 7.2 per cent between March 2004 and March 2006, falling from 4,301 to 3,632.

### **Impact of the Carter Review recommendations on legal aid providers**

The Law Society is concerned that some of the key proposals – for example, the wholesale application of fixed fees set at uneconomic levels - will adversely affect the quality of advice provided and will cause even more experienced solicitors to abandon legal aid. Specialist solicitors doing complex cases, involving, for example, child care proceedings or individuals with mental health problems, 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, incapable of addressing many client needs.

The Society also doubts that the recommendations will promote efficiency as they apply only to one sector of the justice system. Inefficiencies in other related sectors are rife but these were not tackled by the Carter Review.

An independent economic evaluation of the reforms recommended by the Carter Review of legal aid, undertaken by LECG<sup>3</sup> on behalf of the Law Society, highlights the economic fragility of the current supplier base. Average profit margins of criminal legal aid practices range from -6% to 2%. The same study also estimated that a minimum of 800 firms would have to close or merge as a result of the Carter reforms. This is double the estimate given in the Carter Report.

LECG also warned that the imposition of fixed fees during the transition period, in advance of firms having the opportunity to restructure to achieve potential efficiencies, would pose a serious threat to the viability of firms and could result in a disruption or complete failure of supply in some areas.

While 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. LECG found 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. Indeed 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.

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. The Society believes 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 the development of clusters of social problems such as homelessness, children taken into care and youth crime. Such problems increase costs for other government departments as well as having damaging consequences for the individuals involved and society as a whole.

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<sup>3</sup> 'Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary' – LECG; 25 September 2006

Concern for the future of the legal aid system is widely shared throughout the legal profession. Prior to Christmas, some 28 leading City firms – most of which have very active pro bono programmes – signed a letter to the Lord Chancellor to record their concerns that the most vulnerable in society may be affected by the cuts, because solicitors will no longer be able to afford to take on legal aid work.

## **The future of supply**

The Carter Review talked of the need to ensure a sustainable supplier base for the future by encouraging new entrants to the profession to take up a career in legal aid

Early in 2004, the Law Society undertook research<sup>4</sup> with first year trainee solicitors and second year law students, to ascertain their career aspirations. The findings made gloomy reading for those concerned about future legal aid supply. Although, 'all things being equal' (factoring in debt, career prospects, salary etc), 59% of students and 50% of trainees would consider a career in legal aid work, as things stood only 7% of trainees and 21% of students saw their careers following that direction.

The Law Society has recently conducted a number of surveys of practitioners to gauge the profession's reaction to the proposals and the perceived impact on firms.<sup>5</sup> The key findings were:

- 82% of family practitioners believe 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.

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

The Law Society believes that the Carter proposals have the potential to impact adversely and disproportionately on black and minority ethnic (BME) communities and suppliers. A report was commissioned from MDA by the Legal Services Commission (LSC)<sup>6</sup> to test the impact of competitive price tendering for London. The main finding was that in London, small firms and BME firms 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".<sup>7</sup> The report also found that there would be a similar impact outside of London.<sup>8</sup> The Carter proposals pose similar risks to those identified by the MDA

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<sup>4</sup> Career Choices in Law: A Survey of Trainee Solicitors (Early Findings) January 2004  
<sup>5</sup> [www.whatpricejustice.lawsociety.org.uk](http://www.whatpricejustice.lawsociety.org.uk)

<sup>6</sup> Research on Ethnic Diversity amongst suppliers of Legal Aid services, MDA, April 2006

<sup>7</sup> Ibid, p4

<sup>8</sup> Ibid, p5

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.

There is also likely to be a corresponding 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 firm.<sup>9</sup> This finding is related to civil legal aid but it is likely that in many cases, the same may be true for criminal work. Research has found that 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 could potentially lead to greater social exclusion of individuals from black and minority ethnic backgrounds.

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 is often required. For example, additional time may be needed in the taking of instructions and explanation of options. There may also be the need to incur additional expenses in relation to 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 significantly restricts the number of disabled clients they can assist.

There is a very real risk that rural communities will be particularly adversely affected by the changes as a result of a contraction in the supplier base. It is clear that the market model promoted by the Carter Review and accepted by the Government will favour volume suppliers. Small town high street firms which do relatively small amounts of legal aid work, may not be able to achieve the size and capacity required quickly enough to win contracts in the new market. The likelihood is that they will abandon legal aid work altogether in favour of private paying clients or simply close down, leaving large swathes of rural England and Wales without local supply

### **Magistrates' courts means testing**

Means testing was reintroduced in the magistrates' courts in October 2006 with estimated savings of £35 million. The Law Society did not oppose this, stating that those in a position to pay for their defence should do so. However it insisted all along that the scheme should be simple to operate. In reality, it has given rise to a range of problems which have run the risk of defendants being denied legal aid unnecessarily and of defence solicitors providing representation for no payment.

The Society believes that the Department for Constitutional Affairs and the Legal Services Commission should commit publicly to a full scale review of the means test scheme within six months, recognising that sufficient time will be needed to allow relevant statistics to be collected. That review should aim to identify:

- the incidence of incorrect refusal of legal aid;
- the effect overall on solicitors' workload in the magistrates' courts (the LSC estimates a trend of 25% decline);

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<sup>9</sup> Ibid

- the combined effect of reduced solicitors' workload as a result of the means test and arising from other policy initiatives e.g. increased use of cautioning;
- the true cost of administration of the scheme; and
- the actual savings that are likely to emerge.

## **Conclusion**

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 Department for Constitutional Affairs and the Legal Services Commission heed the advice of LECG 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.

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