

# Parliamentary Brief



The Law Society

## Westminster Hall debate

**'Implementation of the Carter Review of Legal Aid – Third Report from the Constitutional Affairs Committee, Session 2006-07, HC 223, and the Government response thereto, Cm 7158'**

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## **Background**

The Law Society welcomed the announcement of the Carter Review of Legal Aid Procurement, as it offered an excellent opportunity to reform the legal aid system for the better. The Society had long argued that the legal aid system was 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.

However, the Society is greatly concerned at some of the measures being proposed. We are convinced that the effect of the reforms will be seriously to erode access to justice for many thousand of vulnerable people.

The aim of the Carter proposals was to move in stages to a more market-based approach under which suppliers (overwhelmingly legal aid firms) would compete for legal aid contracts by way of best value tendering. In the interim, suppliers would be paid fixed fees for the work and be expected to make the fundamental business adjustments necessary to ensure delivery of legal aid.

In 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>

## **Report of the Constitutional Affairs Committee and the Government's response**

The Committee's report, following its inquiry into the implementation of the Carter Review of Legal Aid Procurement, was published on 1 May. Its conclusions echoed the Law Society's view that if the proposed reforms were to be implemented as proposed, there would be a 'serious risk' to access to justice for the most vulnerable in society. The Committee shared the Society's concerns about the move to competitive tendering, particularly as the 'transitional period' of fixed fees was seen as likely significantly to reduce the numbers of legal aid suppliers. The Committee expressed concern that the Government was embarking on wholesale change of the legal aid system when in fact it ought to be targeting identified areas where costs were rising. The Committee noted that in many areas of legal aid, costs were under control or had fallen.

In its response to the Committee's report, the Government chose to ignore the Committee's warnings, as well as those of leading social welfare charities, legal aid lawyers and even its own economic research<sup>3</sup> about the extreme fragility of the legal aid sector and the threat to access to justice.

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

The main problem for firms that continue to do legal aid is the way in which the Government proposes to introduce fixed fees for this work. If, as is proposed, these are set at uneconomic levels it 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.

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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)

<sup>3</sup> Otterburn: The impact on the supplier base on reductions in criminal fees (November 2006)

What is needed is a different approach to dealing with the problems presented by the limited budget for this work. The Law Society has argued for a move towards the greater use of graduated and standard fees, paid in accordance with a formula that enables solicitors to attend to the needs of their clients whilst enabling the Government to control expenditure. This method of payment has already proved to be successful in the area of Crown Court advocacy and we think it should be applied to all areas of legal aid instead of the crude fixed fees that are proposed.

An independent economic evaluation of the reforms recommended by the Carter Review of legal aid, undertaken by LECG<sup>4</sup> on behalf of the Law Society, highlights the economic fragility of the current supplier base. Average profit margins of legal aid practices range from -6% to 8%. The same study also estimated that anywhere between 570 and 1,060 criminal firms might have to close or merge as a result of the Carter reforms. This is significantly above the estimates 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 very 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.

### **Impact on specific population groups**

Of all the issues considered by the Committee the impact on black and minority ethnic (BME) firms is amongst the most critical. Such firms will be disproportionately disadvantaged by the Government's proposals. So serious is the risk that the question has been raised whether they would constitute a breach of Race Equality legislation.

The Law Society has argued consistently that the Carter proposals have the potential to impact adversely and disproportionately on BME suppliers and the BME communities they serve. A report was commissioned from MDA by the Legal Services Commission (LSC)<sup>5</sup> to test the impact on BME firms 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>6</sup> The report also found that there would be a similar impact outside of London.<sup>7</sup> 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.

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>8</sup>

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4 'Review of Proposals for Legal Aid: New Working Arrangements and Best Value Tendering' – LECG; 30 April 2007

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

6 Ibid, p4

7 Ibid, p5

8 Ibid

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 BME backgrounds.

The Society is also concerned that the proposals will adversely affect access to justice for disabled clients. The provision of legal assistance to disabled clients can be extremely time consuming.. Very often, additional time is needed for 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 restrict 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

## **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. In the short term, if the Government wishes to achieve this, it is essential that the reform programme is taken forward on the basis of a more realistic timetable and that the move towards fixed fees in most areas of work is reconsidered, in favour of properly designed graduated fee schemes. Failure to do so will result in large numbers of suppliers giving up legal aid work

Longer term, the supply of legal aid is also severely threatened by the fact that fewer and fewer new entrants to the profession are choosing to do legal aid work. Early in 2004, the Law Society undertook research<sup>9</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 their reaction to the Government's legal aid reform proposals and the perceived impact on their firms.<sup>10</sup> The key findings were:

- 82% of family practitioners said 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 said that the quality of advice/representation they were able to offer would decline;

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<sup>9</sup> Career Choices in Law: A Survey of Trainee Solicitors (Early Findings) January 2004

<sup>10</sup> [www.whatpricejustice.lawsociety.org.uk](http://www.whatpricejustice.lawsociety.org.uk)

- 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 would decline.

## **Conclusion**

The Society believes this reform programme is ill-thought out and being rushed through with the potential to destabilise the legal aid system. There is a very real risk that many law firms will not have the financial reserves to survive what will certainly be a difficult transitional period. A reduction in supply will leave the most vulnerable members of society without adequate legal help, damaging the Government's efforts to address social exclusion, which will in turn increase the burden on the public purse.

It is essential that more time is taken to devise a realistic reform plan to avoid irretrievable damage being done to access to justice. We therefore call on the Government to review the reforms in partnership with all stakeholders to develop an alternative way forward that addresses the Government's requirements but does not threaten access to legal assistance for vulnerable people.