

access to justice alliance

SUBMISSION BY THE ACCESS TO JUSTICE ALLIANCE TO THE CONSTITUTIONAL AFFAIRS COMMITTEE ENQUIRY INTO THE IMPLEMENTATION OF THE CARTER REVIEW

The Access to Justice Alliance

The Alliance comprises a large number of organisations including not for profit agencies and private practitioners who provide advice or support for members of the public with legal problems. It was formed in November 2004 out of serious concern about the crisis facing civil legal aid. A list of our supporters is set out at the end of this paper.

The Alliance seeks to protect civil legal aid services and to this end calls on the government to:

- Resource the whole legal aid scheme so that both civil and criminal work can operate within a realistic budget. This means protecting the civil legal aid budget to stop it being used to cover rising expenditure on criminal legal aid.
- Compensate the legal aid budget for the costs of new policies and initiatives.
- Co-ordinate spending by government departments and local authorities on independent legal and advice services and oblige them to contribute appropriate funding
- Review and revise the eligibility criteria to ensure that people of limited means can access justice
- Guarantee quality standards in publicly funded legal and advice services
- Provide co-ordinated funding for strategic and educational legal services (including test cases), social policy, law reform and other non-casework services

We welcome this opportunity to give evidence to the Committee and its aim to consider the impact of the Carter report on legal aid services. As our concern is for the impact on civil legal aid, and social welfare law in particular, our comments are restricted to those issues.

Summary

We believe the proposals set out in the Carter report and the joint Department of Constitutional Affairs (DCA) and Legal Services Commission (LSC) consultation paper *Legal Aid: a sustainable future*, carry many risks for the future of civil legal aid provision. In particular, they will adversely impact on the supply and quality of future legal aid services.

A number of current providers are likely to drop legal aid services as a result of the proposals, and it will be difficult for new providers to enter the market. This may lead to the expansion rather than reduction of advice deserts, with a

risk that for some clients and communities CLS Direct will be their only resource.

We also think that the proposals are likely to impact over time on the quality of legal aid services, as there will be pressure to cut costs to maintain financial viability.

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

A wide variety of organisations provide legal advice and representation, not all of which are funded by the Legal Services Commission (LSC), either wholly or in part. This includes solicitors in private practice, and not for profit organisations. Some organisations are national. Some are local. Some have diverse funding streams, for example from local authorities, central government departments, local communities, trust funds and charities. Some depend on volunteer advisers. Often advice and community groups have developed organically in response to local needs and we see this as one of the strengths of our advice sector.

It is not at all clear that the LSC's proposals can – or should – replace this existing patchwork of funding with a central strategy that brings all funders within its direction. Not all funders will want to lose control of their money, or agree with the LSC's priorities and targets. Local priorities and commitments may change, sometimes at short notice. While we support the principle of consistent funding for adequate advice and legal services throughout the country, we fear that the LSC's proposals to achieve this through CLACs and CLANs are too simplistic.

There is no need for change in order to control spending on civil legal aid, particularly so far as social welfare law is concerned, where costs are currently under control. The proposals are put forward on the basis of cost neutrality, so are apparently not designed to make savings in the overall budget for civil legal aid.

In terms of quality, it is also difficult to see that changing the system of legal aid procurement will bring benefits. It is more likely that it will adversely affect quality of services through pressure to keep costs down.

Is the proposed timetable realistic?

All our supporters agree that the timetable is too ambitious. There have been many changes within legal aid services since the Access to Justice Act 1999. Solicitors firms will now have to make decisions about merging, expanding (or disbanding) departments or closing down as a result of the proposals. These have financial implications that are complex and time-consuming to calculate. Some not for profit organisations will face similar choices, which will be complicated if they have multiple funding streams. In addition to the Carter report, the LSC is also establishing its preferred supplier scheme. In the longer term, the Legal Services Act (when it comes) will inject further uncertainty into the market. As funding contracts are proposed to last only for three years, many will wonder whether the investment they need to make will be justified in view of all the uncertainty involved.

What benefits may be generated for defendants and others. What impacts or disadvantages might result?

Benefits

One of the benefits claimed by the LSC strategy is that clients will be able to receive advice on a wider range of problems from one organisation (CLAC or CLAN) rather than being referred to a number of providers. However, even within the CLAC structure clients may in fact need to attend at different locations or see different advisers, depending on the nature of their problem. Although CLACs were intended, in part, to deal with the problem of referral fatigue (the more people are referred on, the less likely they are to take up the referral) it is by no means clear that they will be successful in this aim. In any event, it is not necessary to change the legal aid procurement system simply to introduce a more effective referral system.

Disadvantages

The introduction of fixed or graduated fees, the unified contract for not for profit organisations, and competitive tendering are all likely to cause a drop in the number of providers. This will increase the risk that advice deserts will grow rather than diminish, with the consequent impact on clients. People may need to travel further, wait longer for appointments, or lose a choice of representative. The principle that there should be 'equality of arms' between parties will be damaged, as fewer people may be able to find a lawyer to represent them in proceedings.

Pressure on costs may lead to increased caseloads, and legal work pushed down to less experienced lawyers or paralegals, which will impact on the quality of services. Young lawyers are already experiencing difficulty in obtaining training contracts and there is widespread concern that if the proposals are implemented, there will be less money and time available for trainees. This will in turn lead to a decline in the numbers of newly qualified solicitors entering legal aid services, and further diminish access to justice.

The pressure on costs will also lead to organisations choosing to take on the easier cases (and clients) because it is less economic to do complex cases. This could have the perverse effect that the more complicated and expensive cases or the most vulnerable or needy clients are left without representation, or referred to CLS Direct, which will not be able to provide them with the level of service needed. It will also have a knock-on effect for courts, MPs' surgeries, local councillors and other agencies as clients seek active assistance from a diminishing pool of providers.

What will be the impact on different communities?

There is no one 'black and ethnic minority' community, but a wide variety of different groups, with their own cultural, ethnic or religious identities. Solicitors firms and local advice groups have grown in response to their needs, and clients are more likely to trust a representative from their own

community. These clients are likely to lose a choice of representative as a consequence of the proposals, as the firms they turn to are, on the whole, small, and may not win a contract.

In rural areas, it is likely that some providers will drop legal aid work (see below). This may leave CLS Direct as the only source of assistance for clients, with all the consequent difficulties set out above. For not for profit providers, if they lose current funding, they may be forced to close, and a community resource will then be lost.

What will the impact of the recommendations be on legal aid providers?

For solicitors firms, there is a great deal of concern as to the proposed level of fixed fees, and many have indicated that they will be significantly worse off under the proposed new fees, whether fixed regionally or nationally. Many are uncertain how to respond to the proposals, and have great difficulty working through the financial calculations and variables to assess whether it will be worthwhile making changes to enable them to continue to bid for contracts. There is a widespread view that the fixed fee regime will lead to cherry-picking of cases and pressure to cut costs (and quality) to remain financially viable. The short notice (3 months) to terminate providers' social welfare contracts, where a CLAC is established, will create many difficulties for those not included in the CLAC.

Not for profit providers will be affected by the introduction of the unified contract, fixed/graduated fees and tendering for CLACs and CLANs. At the moment there is a well-established model of provision, where clients may first turn to a generalist organisation outside the LSC remit (CABx, community groups, Age Concern, Shelter for example) and subsequently be referred to a specialist solicitor. The LSC proposals do not set out how national organisations such as Shelter, Age Concern or MIND will be affected, and this uncertainty makes it hard for them to plan for the future. With the introduction of fixed fees, some not for profit organisations will have to cut the time currently spent on client advice for financial reasons. Yet they often advise the most vulnerable clients with multiple problems and the culture of the organisation may be affected if their priority becomes cost rather than meeting client need.

In rural areas, there are at least two risks. The first is that providers will be forced out of legal aid by the introduction of a minimum income requirement. The second is that already tight profit margins for solicitors will be adversely affected by the new fixed fee system, so that they give up legal aid work. There will be winners and losers, whether a national or regional structure is adopted, and there must be a high risk that the losers will drop out of the market. Again, it may not be practicable for firms in rural areas to merge, so they could not make the efficiency savings this might bring.

For black and ethnic minority firms, as many are small, the impact on them is disproportionate. There may be insufficient mutual interest for such firms to merge – they may be competitors or have very different client bases. They could not therefore make the 'efficiency' savings envisaged by the Carter

report. And even if they do merge, the gearing may be wrong - there may be too many partners and too few supporting legal staff to make the firms economic.

The loss of providers from legal aid work is likely to be a permanent one, as they will lose their reputation, skill base and capability to compete for future contracts.

How will the proposals affect firms of differing size, structure and practitioner mix?

We think the impact on providers who currently have mixed practices (part private and part legal aid, or a mix of criminal and civil legal aid work) will be substantial, and they will face complex calculations as to the cost and benefits of continuing to provide legal aid services. Wherever providers decide to drop their legal aid work is likely to impact on services for clients, which is our major concern.

Will the measures proposed promote the provision of high quality advice and support the effective and efficient operation of the justice system?

We are not clear whether there is a commitment that savings made in the criminal legal aid budget will in fact be transferred to spending on civil legal aid services. However, services provided through legal aid are only one element of the justice system, and there are other areas where costs could be saved, delays reduced or efficiency improved, which will be unaffected by these changes.

We are concerned that the proposals will make it economically unviable for some providers to continue to provide legal aid and advice services. This may lead to further advice deserts. It may also mean that the more vulnerable, difficult or needy clients will not find specialist advice and representation and may slip through the justice net or end up in court unrepresented, thereby increasing the pressure on the system elsewhere.

Quality is also a concern. Pressure on costs will have an impact on quality of service in many ways, as set out above.

RECOMMENDATIONS

- We recommend that a more realistic timetable be adopted. One option is to put it back one year to enable more research to be carried out and consultation on alternative options. A second is to delay the introduction of the proposals until the preferred supplier scheme is fully implemented.
- The impact of changes should be monitored and carefully evaluated, so that any damaging impact on the quality of advice and the justice system can be redressed before it is too late.

- The legal aid budget as a whole should be properly resourced, and the civil legal aid fund protected from any increase in criminal legal aid spending.
- Any fixed fee regime should provide adequate and fair remuneration that is sufficiently flexible to cater for complex and exceptional cases.
- There should be consistent quality standards and peer review should not be transferred to the Law Society.
- The proposed fixed fee and graduated fee structure should be reconsidered to ensure that there is sufficient provision for complex cases.

ACCESS TO JUSTICE ALLIANCE

Supporters include:

AdviceUK
 Advice Services Alliance
 Age Concern England
 Bail for Immigration detainees UK (BID UK)
 British Institute of Human Rights
 Child Poverty Action Group
 Citizens Advice
 Citizenship Foundation
 Discrimination Law Association
 Housing Justice
 JUSTICE
 Law Centres Federation
 Legal Action Group
 Legal Aid Practitioners Group
 Liberty
 One Parent Families
 Public Law Project
 Rights of Women
 Shelter
 Young Legal Aid Lawyers

Dated: 2nd October 2006

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