

**L C C S A**

**RESPONSE TO CARTER INTERIM REPORT**

**8 MAY 2006**

This paper is the response by the London Criminal Courts Solicitors Association to the interim report of Lord Carter's Review of Legal Aid Procurement dated 9 February 2006.

**1. Introduction**

This paper is an interim response to an interim report. Lord Carter of Coles has indicated that he intends to publish his final report at the end of Spring 2006. The work undertaken by Lord Carter's Review follows a series of investigations and proposals made in recent years concerning the reform of the legal aid system in England and Wales. These proposals, including the Department of Constitutional Affairs "Fundamental Legal Aid Review" and the Legal Services Commission's 2005 proposal for Price Competitive Tendering in London arose from concerns at the increase in total expenditure of legal aid and in particular a perceived failure on the part of the DCA and the LSC to keep expenditure within financial limits.

Lord Carter's interim report is sub-titled, "Market-based Reform" and proposes that procurement of publically funded criminal defence services be restructured wholesale on market principles. Our principal concerns with the interim report are that the application of market-based reform (particularly price competition amongst suppliers) will undermine the core values of our independent criminal defence system. The interim report is too narrowly focused on the internal workings of criminal legal aid: very little weight is attached to the very important external factors which have and continue to drive up the cost of legal aid. We are concerned that the findings of the interim report are notably not underpinned by economic research and any evaluation of the impact of the proposed reforms is notable by its absence. The impression is created that this latest

Review is pre-occupied with the need to bring an over spent budget under control in the short term. In our view Lord Carter ought to have been allowed the time and resources necessary to develop a deeper and more realistic understanding of the reasons for the increased cost of legal aid expenditure so that proposals for reform would ensure a sustainable and reasonably remunerated supplier base in the long term, ensuring that the criminal defence system had the capacity and strength to maintain itself in the political and legal climate which has seen a vast expansion in the legal powers and financial resources of the prosecuting authorities.

The LCCSA note that Lord Carter's interim report contains no financial analysis or pricing of any of the proposals made for new ways in delivering criminal defence services in the police station, magistrates court, crown court and for very high cost cases. In the absence of any indicative pricing or overall budget it is not possible for this paper to comment in detail on the impact which the new schemes may have on the profitability or otherwise of the proposed new schemes. However, given the very low rates of pay for legal aid work we are bound to express our concern that the fixed pricing proposed may have a damaging effect on the sustainability of the supplier base and therefore there may be a negative impact on the quality and availability of publically funded legal advice for both civil and criminal cases.

## **2. The Present Market**

Publically funded legal services (both civil and criminal) are presently provided by a large network of firms and solicitors established throughout England and Wales. Low rates means low levels of profitability yet manage to sustain the essential desirability of independence and client choice. Firms vary widely in size, many offer a broad range of services and some are specialist niche practices catering for particular types of client or legal problems. Firms compete largely by reputation and provide an effective market and a very good quality of service. The price paid by government, measured by average hourly rates, is very low compared to rates in the private sector and is far lower than the

price paid by government departments instructing private law firms. In many instances legal aid rates are far below that of the broad average direct cost of supplying the service.

### **3. Market based reform**

Whilst Lord Carter's interim report contains no indicative pricing, it is apparent that the report anticipates that prices paid in future are likely to be lower than at present. It is our concern that a reduction in the price payable for publically funded legal services will lead to a reduction in quality. Firms will be forced to employ fewer qualified staff and pare overheads to a minimum. This will lead to deprofessionalisation and casualisation of the profession. The consequence of such reform is likely to be poorer preparation of cases. This threatens the equality of arms between defence and prosecution. Poorer defence case preparation will inevitably lead to a reduction in the quality of decision making by courts. This in turn poses the risk of more miscarriages of justice and an increase in the number (and cost) of appeals.

### **4. Trading Price for Volume**

The market based approach anticipates efficiency savings via the creation of fewer and larger firms which will benefit from economies of scale and allow for the reduction in procurement costs. In particular it is perceived that relocation of practices will lead to savings in travel and waiting time. Solicitors, wherever their offices are located, will always have to travel, be it to a police station or a prison or a court. Any benefits that might arise from relocation are therefore necessarily limited. The costs of relocation in themselves present a major disincentive for firms to move their businesses. Unless specific and workable provision is made to allow smaller practices to continue there is a serious risk that certain valuable niche and black minority ethnic practices will disappear altogether. The elimination of BME firms has serious implications for diversity throughout the criminal justice system and for social inclusion within society. The DCA has made efforts to encourage greater diversity on the bench but these efforts will be undermined by the reduction in BME suppliers. In the interests of social cohesion it is

vital that the diversity of clientele within the criminal justice system is reflected by diversity in the supplier base.

## **5. Costs Drivers**

Lord Carter's Review of legal aid procurement is a response by government to increased spending on criminal legal aid. There is strong evidence that increases in the amount spent by government on criminal legal aid are the consequence of costs drivers outside the control of publically funded criminal defence services. We refer to the analysis contained in our original submissions to the Lord Carter Review to be found at : <http://www.lccsa.org.uk/assets/documents/Consultation/LCCSAs%20Response%20-%20A%20Fairer%20Deal%20for%20Legal%20Aid%2023122005.pdf> and refer to the recent findings of Professor Ed Cape and Professor Richard Moorhead in their research paper, "Demand Induced Supply?".

Since the commencement of Lord Carter's Review the government has announced a further raft of initiatives which will have the impact of driving up the cost of criminal legal aid. In particular, we refer to the creation of the new Serious Organised Crime Agency with an annual budget of £400million. The LCCSA supports initiatives which improve the fight against crime but insists that government needs to acknowledge the inevitable consequence which such initiatives have for the funding of criminal defence services. The creation of SOCA is intended to lead to new, large and more complex prosecutions. If there is to be balance and fairness in the criminal justice system then the DCA must be allowed to meet the on-cost of funding the defence in these new cases. In our representations to the FLAR and the Carter Review we have recommended the establishment of an institutional framework to protect the criminal legal aid budget from the destabilising effect of a few very high cost criminal cases. We are disappointed that the government seems unwilling to establish mechanisms to control costs in this area and renew our plea that government should introduce an effective method of controlling this very small number of cases which has a disproportionate and very damaging effect on the budget.

When establishing Lord Carter's Review in July 2005 the Lord Chancellor expressed concern that an increase in spend of criminal legal aid was reducing the amount of money available to fund advice and representation in civil and family cases. The most recently available figures from the DCA suggest that spending on civil and family cases has not been constrained by the cost of criminal legal aid. The amount spent on civil and family legal aid has gone down from £750million in 1997 to £722million, which, when one takes inflation into account, is the equivalent of a £200million – or 22% - real terms cut. This reduction in spend on civil and family cases is not due to any overspend on criminal cases. Spending on civil cases has fallen because the rates payable in civil cases is now so low and unprofitable that lawyers are now for financial reasons unable to take up new cases. See further the adjournment debate on the community legal service, Hansard, Monday 27 March 2006, column 658 etc.

### **About the LCCSA**

The London Criminal Courts Solicitors' Association (LCCSA) represents the interests of specialist criminal lawyers in the London area. Founded in 1948 it now has over 1,000 members including Crown prosecutors, freelance advocates and many honorary members who are circuit judges and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interests of the members on any matters which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts including those who are in the course of their training.

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