

# Legal Aid in meltdown

Peter Soar describes a dismal future for legal aid under the reforms of *The Carter Review*.

Legal aid, in its post 1948 form, was a scheme administered by the Law Society on behalf of the government to pay the bills of clients who could not pay by reason of limited means. To take part it was enough that you were a solicitor, no special qualifications or contract were needed. The scheme was gradually extended to cover most contentious work, civil or criminal, and the green form scheme made it possible to give advice on any matter of English law. By the 1970s there were eight or ten thousand firms of solicitors offering legal aid, although most of them did not do a substantial amount. At the other end of the scale some, like myself, developed firms which were largely dependent on legal aid. We took pride in offering to our clients as good a service as they would obtain as paying clients. The national bill rose and there were complaints. In the 1980s the government set up the Legal Aid Board; 12 people

Thoroton, appointed Lord Carter of Coles to settle the future of legal aid for the man in the street. The *Carter Review* (Lord Carter, 2006) has produced, in little over a year, two basic sets of proposals. First, to change the method of payment from hourly fees related to the amount of work done, to fees per case. The profession has latched strongly onto this first proposal, claiming that for the work to be done at the fee levels proposed there would be corner cutting. The second proposal is more insidious and carries a serious threat to the independence of criminal defence lawyers; a threat to their reason for being. The idea is the fruit of a union between the dogma that market forces are best and ignorance of the way in which high street solicitors' offices work. It is what the government meant by buying only what it wanted, the notion that competitive tendering for LSC contracts will produce a stable, mature, sustainable market. These are the words

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of various professions and backgrounds (of whom I was one) to take control from the Law Society and improve the schemes. The Board was succeeded by the Legal Services Commission (LSC), with a wider remit.

There are now three streams of legal aid: civil, criminal and advice services. A system of exclusive contracts was introduced which reach far into the solicitors' conduct of their offices, their filing systems, and their accounts. Successive governments had tried to reduce the cost of legal aid by removing some types of work from legal aid scope. First to go was undefended divorce, followed by all civil work which could be done on a no-win, no-fee basis.

The government last year declared a review of legal aid. Called *A Fair Deal for Legal Aid*, the review was charged with the task of getting control once and for all of this inconvenient public service. The review was to examine different methods of *procurement* of legal services and, to make the matter plain beyond all doubt, the government explained that it would no longer buy what it was offered; it would buy only what it wanted. This rang alarm bells; why would government want to *buy*, that is *own*, legal services and in particular legal defence work?

The Lord Chancellor, Baron Falconer of

of the review, not mine. There will be, under the proposals, fewer offices, many fewer, but the survivors, according to Carter, will be "larger, better quality, more efficient".

There are two fundamental causes of the present pain; one is the government cap imposed on all three streams of legal aid, the other is the rise of the cases known as very high cost. These criminal cases, typically complex fraud, occupy the courts for weeks at a time. Although in number they account for only 1% of the criminal cases, (700 cases, the majority between £100,000 and £200,000 but a few over £1m) they mop up 50% of the criminal defence budget. For example the Jubilee Line fraud case, which collapsed at a late stage, had reported costs of £60m, £14m of which was legal aid. This is like allowing one hospital to hog the money available for 50. Carter has no serious proposals to combat the growth of these cases except to impose a series of bureaucratic controls. The result of these cases sharing the same budget with the rest of legal aid is that civil, matrimonial and community streams are stifled. The true justification for legal aid is that it allows ordinary people, the man in the street, the man on the Clapham omnibus, to exercise and defend rights which are important to them and their families but which would go by the board if legal aid was not available. It is obvious to all except

Carter and the government that this is where the real problem lies and that Carter does nothing effective to solve it. As an interim measure, these very high cost cases should be taken out of the legal aid budget and managed on their own under their own budget. This would allow proper legal aid to breathe and lick its wounds while bringing home to people generally the cost of a tranche of atypical cases now hidden in the overall budget. The government might then be forced to concede that prosecutions involving complex, large-scale crime which necessarily involve many lawyers on both sides, masses of paper work and weeks of research, must be accompanied by payment for the defence of those accused.

The Carter plan for 'ordinary' criminal defence is that the LSC will divide the country into small areas (Carter areas) each centred on a police station. In the world according to Carter, police stations 'generate market share'. The map-making process has already begun. The boundaries of Carter areas will be actually drawn by LSC on maps. Firms of solicitors, selected by the LSC, within each area will be invited to bid for contracts in that area. Between four and six firms in each area might be contracted, this number being deemed sufficient by Carter to provide choice and access for the men women and children in need of legal aid, at the same time avoiding problems caused by conflict of interest. Carter assumes that there will be enough firms left but research commissioned by the Law Society suggests, conservatively, that 800 of the existing 2,200 will drop out. Each contracted firm will be required to accept a given volume of market share emanating from the police stations, but may act for only a small number of existing clients who happen to live beyond the Carter area. These areas are defined in order to secure a fixed quantity of market share while limiting the amount of time spent by solicitors in travelling and in waiting in court and police stations; not in order to improve access or choice for those in need of legal aid.

Firms allowed to tender for Carter contracts will be chosen by the LSC on the basis of their past record. This is known as the free market. Beyond a reference to the introduction of a peer review system, nowhere in all its 120,000 words does the *Carter Review* talk specifically about the lawyerly qualities of knowledge, experience, skill, independence, loyalty, tenacity. Quality and efficiency for Carter are concepts which can be measured by a tick in a box and the use of computers; 'matter starts' (new units of market share), obedience to the terms of the contract, ability to meet targets set by the bureaucracy. The proposed contracts will be for two or three years and would then have to be bid for again. Bidding for a contract is a process which would demand much from a firm in terms of personal resources and hard cash. In the period which elapses between the first and second bidding rounds those firms which were unsuccessful at the

first try will not have been permitted to practice in legal aid. Effectively they will be out of the running. There is much detail in the review about this lack of seed corn, this shrinkage of the gene pool. Carter believes that firms will amalgamate and recruit from those excluded or giving up out of sheer tiredness. It would take too long to set out here the many reasons why this will not happen. Enough to say that, in addition to legal aid, most solicitors also undertake the whole gamut of work carried out in high street offices, most of which is seen as more profitable than legal aid. What more natural than that they should slip their legal aid chains and return, to their partners' relief, to the mainstream? Their criminal defence skills and knowledge, slowly and expensively acquired, lost forever.

Under Carter the free market is no longer that in which solicitors find clients and vice versa; that is damped down in the name of dogma. Solicitors will handle rationed amounts of market share and process units and matter starts on the terms of an LSC contract. No, the 'clients' under Carter will be the solicitors themselves; that dependence, that tie to LSC, that need to look to one source for their next meal – that is the client relationship. Their services bought by the State (LSC), they become mere colonies in the government criminal justice empire. Unable any longer to take the initiative in professional matters, hardly able to order their own affairs, they have become client states of the dominant superpower. One fears not only for the adequacy, but also for the quality and independence of criminal defence work in the future.

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## References

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