

Crime provider Q&A: *Lord Carter's Review of Legal Aid Procurement*

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These document and the briefing events are intended to assist in clarifying our current proposals as set out in the consultation document. Your responses should be based on the full consultation document rather than this document or any other statement by LSC/DCA.

POLICE STATION WORK

1. Will minimum contract sizes be introduced for police station work?

Lord Carter has recommended the introduction of a minimum contract threshold from October 2007. An illustrative figure of £50,000 is provided within the report but it is also recognised that any minimum should reflect local and regional needs.

Lord Carter also recommends the introduction of a 'minimum work requirement' from October 2007. This would mean that only firms that had previously delivered a set proportion of work (possibly 1-5%) in an area would be eligible for a new contract in that area. The minimum contract sizes are subject to consultation.

2. How will slots for police station work be allocated, e.g. by scheme, by police station, by firm or by individual duty solicitor?

Currently, firms are limited in the amount of duty solicitor work that they can do by the number of duty solicitors they employ. This is because slots are allocated in direct proportion to the number of solicitors that firms have on the rota. This will allow firms to develop more efficient staffing structures whilst preserving their access to slots. There are also rules on what type of work individuals can undertake, depending on their qualifications.

Carter proposes that, in future, the number of duty solicitors a firm employs will not govern slot allocation. Instead, firms would be awarded a number of slots in proportion to the size of their contract.

3. In what other ways will duty solicitor arrangements be different?

It is also proposed that the duty solicitor service requirements are relaxed in line with own solicitor service requirements. This means that any duty solicitor, accredited representative,

probationary representative (non-indictable offences) and solicitor with the police station qualification will be able to conduct 'duty' work.

4. How will own client work now operate?

Lord Carter proposes that, from April 2007, all own client matters would initially be referred to the Duty Solicitor Call Centre.

CDS Direct, which has shown positive results during the pilot, would also be extended to cover telephone only cases where the client requests their own solicitor. However, if a matter requires a solicitor to attend, it will still be referred to private practice.

Under Lord Carter's proposals, from October 2007, clients will be able to choose any firm in their boundary area. If a client wishes to be advised by a solicitor outside their area they can request this, but the firm would need to be mindful that they have a limited outside area allocation.

5. Will firms be able to use agents for police station work?

At present, no changes are suggested to the way police station agencies operate. Firms will be able to continue using agency staff subject to existing contract rules.

6. What will the minimum standard of quality for firms conducting police station work?

Initially, it is proposed that firms wanting to do any type of legal aid work will be expected to achieve a level 3 (threshold competence) Peer Review result.

In the longer term, when best value tendering is introduced and the Preferred Supplier scheme rolled out nationally (planned for 2009/2010), a level 2 (competence plus) Peer Review result will be required.

7. Will you monitor changes to bail-to returns after these changes have been implemented at police stations?

Lord Carter recognises the need for greater partnership working across the Criminal Justice System and has, for example, recommended roundtable meetings with The Lord Chancellor and key stakeholders.

Clearly the practices of other agencies impact on the delivery of legal aid - this is something which we are very interested in and will seek to influence. Monitoring is essential in order to show impact.

8. How will boundary areas be set and what factors will the LSC take into consideration when forming these areas?

Boundary areas will be set on the basis of the volume and value of historic claims, location of providers and location of police stations and magistrates' courts. The following principles will also be considered:

- The creation of larger areas
- Access for clients (and performance standards)
- The grouping of schemes around the location of providers and travel times.

The LSC plans to consult on the new areas towards the end of 2006.

9. Will local firms have any involvement in how police station boundaries are defined?

The LSC wants to work with firms at a local level prior when it comes to recommending new police station boundaries. As suggested by Lord Carter, any changes would also be subject to a consultation exercise.

10. How much own client work will each firm be able to do outside their boundary area?

Lord Carter has suggested that each firm be able to undertake up to 20% of its work advising own clients outside of their boundary. The LSC is consulting on this figure and is interested in firms' views. It is not proposed that firms are limited in the number of own clients they can assist in their boundary.

11. How will boundary areas be affected by firms with offices in more than one area, e.g. could staff from one office attend a case at a police station in an area where another of office is located?

Slots will be allocated by firm with a notional allocation within each area. It is the firm's decision as to which of its staff carries out the work. However, as attendances are remunerated on a fixed fee basis, it is advisable to minimise drive times.

12. If firms merge, can they take advantage of the police station allocations of both firms before they merged?

Yes, as allocations are to be based on historical uptake.

13. How will the LSC ensure effective local representation under new police station arrangements?

Clients will be able to obtain advice from the duty solicitor or any other provider in their specific boundary area.

Although the new boundaries areas are likely to be larger (and therefore services may be less localised), we are considering what should be done to ensure access. This could, for instance, include requirements to see clients within a fixed timeframe. There will also be measures to ensure that conflicts of interest don't arise.

New arrangements in relation to own solicitor work also mean that firms will be able to carry out a proportion of their contracted work outside of their given contract area (the 'outside area' work allowance). This will provide greater choice and access for clients. Finally, we are considering what provisions should exist for firms offering niche services.

14. How will you deal with a client who is only prepared to be represented by a firm that does not have a contract in the bid area?

The client would only be able to instruct the firm where the firm in question has a proportion of its 'outside area' allowance remaining.

15. When will the information on how areas will be divided into boundary areas for police station and magistrates' court work be available?

The LSC intends to consult on the proposals for new boundary areas in January 2007 and then, following consultation, publish the final schemes in July 2007.

CDS DIRECT / DUTY SOLICITOR CALL CENTRE

1. What's happening with the Duty Solicitor Call Centre and CDS Direct?

The Duty Solicitor Call Centre will continue to operate as it currently does. However, from April 2007, it will also receive calls directly from the police where the client has requested their own solicitor. There will need to be a number of changes, which are currently being considered, in order to implement this proposal and we would look to consult as our thinking develops.

The main element of the CDS Direct project (the provision of advice in telephone-only matters nationally) is expected to be implemented in full and to apply to own client work. The element of the pilot which tested taking calls in situations where the police are not ready to proceed within 90 minutes will not continue.

2. Does the LSC have any results of the success of CDS Direct?

An evaluation of the first six months of the pilot (November 2005 - April 2006) has been conducted. It shows positive findings in terms of increased value for money for the taxpayer, reduced inconvenience for solicitors and the provision of detailed management information. The evaluation is available on the LSC's website.

MAGISTRATES' COURT WORK

1. Do amended standard fees include travel and waiting costs? Will solicitors be disadvantaged if they are kept waiting at court through no fault of their own?

Lord Carter has recommended that travel and waiting no longer be paid separately. Instead, standard fees will be amended to include an element for travel and waiting.

The proposed fees are included in Lord Carter's final report and include travel and waiting but exclude disbursements. Payments made in non-standard fee cases will not include travel and waiting.

The LSC, HMCS and the CPS agree that court waiting times are an issue. They are working together to reduce the number of attendances necessary to conclude a case in the magistrates' court. Any reduction in the number of attendances should result in a reduction in travel and waiting per case.

2. What will the graduated fee scheme for magistrates' court work look like?

Lord Carter's report recommends that the LSC undertakes additional work, including data collection, to develop a new fee structure. We won't know what this will look like until that work has been done, although Lord Carter suggests that the new scheme could include a base fee (dependant on offence and case type) that would include travel and waiting.

A small proportion of cases would escape from the base fee and could be paid on an hourly basis.

3. How will court duty work be paid?

In the same way as present.

4. From Lord Carter's paper, it is unclear on what happens to category 3 standard fees in the magistrates' court.

Committal proceedings are currently the subject of review at the Home Office and changes may be made to the procedure in due course. Carter does not explicitly make a recommendation on committals but states that the Litigator Fee should include any proceedings in the magistrates court as well as the Crown Court fee.

For committals that do not proceed to Crown Court, the litigator fee could not be used as a payment mechanism. These cases will need to be remunerated in the magistrates court and therefore the LSC intend to model a new fee to cover this position.

CROWN COURT WORK

1. Why has the Litigator Fee been modelled using trial length, offence type and pages of prosecution evidence as proxies for the complexity of a case?

The Litigator Fee is a graduated fee model that pays for cases based on the type of case rather than the time taken to prepare the case. A graduated fee must be based on factual information rather than subjective judgment. The trial length, offence type and amount of prosecution evidence in a case are all factual pieces of information that are suitable for use in a graduated fee model.

After examining historic data of the cost of cases over the past four years, the modelling team found a relationship between the cost of a case and the size of the case in terms of length of trial and pages of prosecution evidence (PPE). There is a definite trend that cases with longer trial lengths and more pages of PPE tend to cost more.

We are looking for evidence/responses to the consultation which address the appropriateness of all fees.

2. If a firm does not get a contract for police station/magistrates' court work, will this affect their ability to undertake publicly funded Crown Court work?

Carter calls for a comprehensive level of service from providers. This means coverage from arrest and interview at the police station through to ultimate disposal in the magistrates or Crown Court. This will be subject to a single contract.

However, the LSC has been asked to consider the introduction of niche contracts, representing the work of specialist providers. The LSC is currently undertaking this work.

VERY HIGH COST CASES (VHCCS)

1. How will firms make themselves eligible for exceptionally complex cases?

We believe there is scope to reduce rates in Crown Court work but the main contribution to better value for money is likely to come from working with the most efficient and better quality firms.

Under the proposals, only teams who have a reasonable level of experience who have met the LSC's quality Peer Review standard will be allowed to tender, at which stage the price will be determined by best value tender.

2. Will firms have to do duty solicitor work in order to work on VHCCs?

The expectation is that, in the future, all firms will be able to offer services at the police station, magistrates' court and Crown Court. We have yet to produce detailed plans for specialist contracts, such as VHCC contracts, but it is unlikely that firms will have to offer duty work in order to be eligible for a VHCC contract.

3. How many firms do you see making up a future VHCC panel?

There are currently around 400 firms doing VHCC work. We believe this may go down considerably once we factor in the experience levels and Peer Review ratings being proposed as minimum requirements to tender.

4. Why is it no longer appropriate to have a specialist fraud panel (SFP) when fraud is so significant in the VHCC caseload? Can firms still apply to be on the SFP in the meantime?

There are different views on whether or not fraud cases require additional skills compared to other VHCC. We wish to simplify the bidding process by having just one panel but have sought to keep a balance by saying that panel members who are instructed on a VHCC fraud case must have relevant experience in the team allocated to that case.

In the interim it will still be possible to apply to the SFP and, if successful, use contracts signed before the 'Expression of Interest' stage to count towards the application.

5. Lord Carter has suggested that the LSC needs to improve its management of VHCCs. What is the LSC doing about this?

We accept Lord Carter's views and have already begun the recruitment process for more legal support in the team. We are considering what additional new areas of expertise we need to add.

6. Will Peer Review for potential panel members review previous VHCC cases and, if not, why is this being used as the measure of quality?

Whilst we would prefer to have a specialist system using peer reviewers with VHCC experience, this is not feasible within the timescale. Nevertheless we believe that Peer Review will give a helpful and relevant insight into the quality of work being done by applicant firms and will provide the best quality benchmark available to select candidates for the tender.

We are considering how best to apply peer review to those few firms who almost exclusively do VHCC work.

7. How will the tendering process for VHCC cases work?

This is clearly set out in paragraphs 75-90 of Section 4 of the Carter report.

8. Will all teams who do VHCCs also be allowed to do a percentage of ordinary cases? If not, does this mean the same defendant could be represented by different solicitors?

Teams who are on the VHCC panel will be able to do non-VHCC work subject to the relevant regulations for such work and would be able to represent the same client on different charges.

COUNSEL

- 1. Are you proposing to change the cab rank rule for barristers? If a team is formed with a QC, can that QC take on work for another team/firm of solicitors as counsel representing a defendant in a crown court trial? If so, what happens when the QC's team is approached for work but they are in the middle of a VHCC trial for another firm?**

What we can say is that under the Carter proposals, counsel can be on the list of advocates for more than one firm of solicitors and would manage their work priorities in the same way as they do now. It would be the team leader's responsibility to ensure that the team has sufficient counsel available to them to meet the capacity they have agreed to provide.

- 2. On Very High Cost Cases, can QCs take on any other work if they are part of a case team, even when there is no case?**

The Carter report is silent on this. However, we would expect current practices to continue whereby counsel are responsible for managing their overall commitments.

- 3. Is it true that the Carter report says that a QC can't work for another firm (outside the team)?**

No, it isn't. Nor does he say that a QC can be on more than one team's list of advocates. However our assumption is that, for the panel to work, counsel will need to have the right to be on the list of advocates for more than one team.

CONTRACTS AND FEES

- 1. What scope is there for specialist criminal defence practitioners to undertake legal aid work in the future?**

Primarily, the Carter objective is for contracts to be with firms who can do all levels of work - from the police station to the magistrates' court and Crown Court. We recognise this may not be possible in some rural or small areas.

The Carter proposals state that any specialist contracting arrangements would need to be restricted to a limited number of providers (probably through panels) and only available to those who meet the relevant criteria.

There is a recommendation that the LSC considers how future arrangements for these suppliers might operate.

- 2. Why does the Government and LSC believe that a minimum contract size is necessary?**

In general there are grounds for believing that larger firms are able to offer a number of competitive advantages over smaller ones including a greater ability to:

- offer a wider range of joined-up services
- work within fixed fee systems
- invest in future generations of legal aid lawyers
- engage more effectively with IT changes
- handle the consequences of unexpected staff absences.

For these reasons it may well be right to encourage, and in no way prevent, the growth of larger firms.

3. Will Carter and Preferred Supplier minimum contract sizes be based on firm size or contract size?

If introduced, minimum contract sizes will be based on the size of the contract the firm has with the LSC to do legal aid work.

4. If you introduce a minimum contract size, will Crown Court payments be included in the calculation?

Yes.

5. Will you allow monopoly providers to take on work in a given area if they show they are the most efficient and cost-effective?

It is highly unlikely that we will allow a monopoly provider to deliver a service for a whole area. We must allow for choice, conflicts in interest and competition.

6. The fees implemented as part of the Graduated Fee Scheme for the Bar were based on a large amount of case research. What will the LSC be doing to ensure it sets the right rates for solicitors?

The new Graduated Fee Scheme for litigators considers all the case research available to the LSC.

Furthermore, the LSC has provided the Litigator Fee calculator to The Law Society and has circulated it to a number of service providers to enable them to consider the impact of the new scheme on their caseloads, particularly on cases at the higher end of the spectrum.

Service providers have been invited to feed this information back to the LSC either informally or as part of the formal consultation process.

7. What is the LSC doing to ensure there are enough 'escape routes' for cases that may appear to be simple early on but end up being complex and time-consuming?

Under Lord Carter's proposals cases will 'escape' from the fixed fee when the final costs (based on hours of work performed) go over published thresholds. The key time will be the end of the case rather than the beginning.

8. There is a case for abolishing travel and waiting times during office hours but does the LSC believe it is fair for the Government to abolish travelling times when people have to travel from their home to the police station in the middle of the night?

The proposed fees have taken account of all travel times, including home to police station. Any fees set by competition will also necessarily take account of home to police station travel.

9. How will Carter's proposals work in rural areas where small firms are predominant? Will travel and waiting be applied in these areas?

Fixed fees, as based on CJS areas, do take account of locality and therefore travel and waiting times that are specific to a given area. However, Lord Carter specifically

recommends that rural areas are given consideration and this will be addressed as part of consultation and in fees development.

CRIMINAL JUSTICE SYSTEM

1. What can be done about inefficiencies at the police station, and those within the CPS, which impact on solicitors' ability to work cost-effectively?

Lord Carter acknowledges that work needs to be done to make the Criminal Justice System more efficient. The primary CJS partners, including the CPS, HMCS and the LSC, are working more closely together to resolve issues and we acknowledge that there is still much more to do.

2. Why has there been no attempt to address the real causes of inefficiency in the criminal justice system, as identified by the LSC-funded report: 'Demand Induced Supply'?

The LSC works with other CJS agencies at a national level to ensure that the processes in the Criminal Justice System are as efficient as possible. A good example of this is the Magistrates' Court Review project. This looks to address local issues, such as availability of Advance Information, which will reduce the average number of hearings necessary to conclude a case. The project will be rolled out nationally during 2007.

3. Will other cost drivers in the CJS be subject to review soon?

LSC's regional office teams work closely with other CJS agencies, through Local Criminal Justice Boards and Court User Groups, to reduce waiting times at the police station and in the magistrates' court.

4. Why does peer review apply to defence solicitors only and not barristers, magistrates, judges, the police and prosecutors?

Lord Carter recommends the expansion of a peer review type process for the Bar, and that proposal is part of the consultation. In terms of the other CJS professionals the LSC is not a purchaser of services.

INTRODUCING COMPETITION

1. Many people believe that price competition will lead to the cheapest and poorest value firms getting the work. How does the Government plan to avoid this?

Lord Carter has not proposed pure price competition. Under the proposals, only firms that have demonstrated a sufficient quality standard (via Peer Review) will be able to compete for work from April 2009.

Best value competition will be about ensuring you can offer services on the basis of quality, capacity and price equally.

The LSC will continue to monitor management information and work with firms to ensure standards do not drop. Peer Reviews will also be conducted every three years and the same standard (Competence Plus or higher) would need to be achieved.

2. Why is best value tendering being put forward as the future funding solution when the general response to the London criminal competitive tendering consultation was that this is not something the profession believe will work?

It is essential that legal aid be able to demonstrate that it is offering a wholly efficient, value for money, high quality service, in order to secure the long-term sustainability of the system and before any additional Treasury funds will be committed.

Although respondents to the London competitive tendering consultation were, on the whole, not in favour of price competition many of their concerns were about the speed with which changes were intended. Other concerns about quality have been mitigated by a clear move to best value competition.

There are various stages involved in getting from where we are now to a fully competitive market. These are designed to ensure that the marketplace is ready.

3. How will the LSC stop firms from grouping together and fixing prices?

Under the proposals, there will always be a minimum of 4-6 firms in any boundary area to ensure that the market is not cartelised. The LSC will design the price competition process so that firms are not able to collude.

4. How can this process remain competitive when over time, less and less firms will be able to do the work?

The LSC will be looking to tender around £1.2 billion per year to providers able to service the widespread communities of England and Wales. There will be a need to ensure that sufficient firms continue to undertake this work to ensure an effective market.

TRANSITION

1. How will firms be assisted to make the transition to the new arrangements?

Lord Carter has recommended in his report that The Law Society establish a programme offering financial and business assistance to firms wishing to take advantage. Details have yet to be finalised.

2. How will the grant programme work?

Lord Carter suggests that The Law Society manages it. They will provide firms with further information.

3. Who will be supplying financial assistance for IT upgrades and how can this be applied for?

As the LSC understands it, firms would need to apply directly to The Law Society for this.

4. Where will the Peer Review of firms begin and when? What firms will go first?

It has not been decided which area of the country we will begin Peer Reviewing. We will communicate with all firms when we know more.

5. What can firms do to prepare for Peer Review?

Firms can prepare for the quality assessment process by ensuring they have adequate supervision arrangements in place and that their organisations formally examine feedback from that supervision. Firms should supplement this with their own rigorous file reviews, ensuring that a good range of work from every advisor is assessed.

To help firms with this, the LSC is publishing general findings from the Peer Review process which highlight common problem areas with suggested ways to improve.

A booklet on crime is available from our website: www.legalservices.gov.uk. There is a direct link to the general findings from the front page. Hard copies can be obtained by emailing: peer.review@legalservices.gov.uk. Booklets on the different civil areas will be available shortly.

The LSC has also been running Peer Review workshops with The Law Society. We will share dates of future workshops with providers when they are finalised.

6. Why are rate cuts being made before the market restructuring has taken place?

Restructuring is intended to be a continuing process. The fees proposed within Lord Carter's report are designed to ensure the long-term sustainability of legal aid.

Some of the recommendations, e.g. changes to slot allocation and reduced service level requirements for duty solicitor work, are proposed for as early as January 2007.

It is expected that these changes, along with the restructuring that many firms have already begun, will quickly result in a changed market where fixed fees reward the most efficient firms.

7. Has the LSC the funds to pay off 'work in progress' if large firms are unable to make money from the new fees and decide to stop doing legal aid work?

The LSC would expect firms to act in the best interest of their existing clients. However, in managing possible risks, it is prudent to make contingency plans.

CARTER PRINCIPLES

1. The LSC says that the incentive for providers to work on reduced rates is increased volumes of work. Where is this volume coming from?

Our understanding is that there is unlikely to be a substantial drop in volumes in the near future, although means-testing will transfer some cases to the private sector. But there can be no guarantees about future volumes of crime, or criminal legal aid business, from government.

2. What existing model of procurement has the LSC and Lord Carter based these proposals on?

Fixed fees have proved a successful model for legal aid payments in the Magistrates Court and elsewhere. Competition for services is widely recognised as the best way of achieving value for money, but of course maintaining quality is paramount.

3. What will be the impact of Carter on small firms/sole practitioners?

The impact of Carter will vary from region to region and will depend on specific levels of demand and supply.

Where a provider can meet the minimum contract requirements for an area we will contract with them after April 2007. But contracts will be subject to best value tendering from 2009 onwards.

4. Do you have evidence to show why large firms will be more efficient than smaller ones?

Lord Carter published some economic analysis with his report, on which he partly based his conclusions.

One justification for contracting with large firms is based on their ability to deliver high volumes of work. Within the fixed fee environment it is essential for providers to be able to manage 'case mix risk'. A large firm, by taking on a high volume of work, can ensure that it benefits from the swings and roundabouts effect and retains profitability, whereas a small firm delivering a limited volume of work runs the risk of not having sufficient case mix to ensure they operate at a profit.

5. How will firms survive if rates are cut but no increases in volume are seen?

We expect that the market will quickly adapt to the Carter proposals. Increased market share is central to the proposals and their implementation will create the conditions that allow this to develop.

6. Why are you proposing fixed fees for police station and CAT1 and CAT2 that represent a 22-33% cut in turnover for an efficient organisation?

We do not know where those figures derive from, but they are higher than our estimate of the average reduction in police station fees, which is 5.5%. That may not in practice be the same for each provider. Lord Carter believed that efficient firms could absorb this reduction by adapting their business.

OTHER ISSUES

1. Can the LSC deliver these changes to the timeframe Lord Carter has suggested?

Lord Carter's proposals are subject to consultation. However, the LSC is confident it can implement the recommendations made in Lord Carter's report.

2. What impact will the Carter Review and LSC consultation have on BME firms?

Lord Carter's report makes it very clear that support should be provided to ensure that smaller firms are able to adapt to the new market-based approach and his proposals offer the opportunity for BME firms to grow as much as any others.

There will be a full diversity impact assessment of the proposals.

The LSC is committed to making resources available for the monitoring, assessment and promotion of provider diversity.

3. How does the LSC plan to ensure that the clients who currently use sole practitioners and very small firms continue to have access to justice?

Lord Carter's proposals will not reduce access to justice in any way. There will still be similar numbers of fee earners doing legal aid work – they will just be working within larger firms in some instances.

4. How will consortia or partnership arrangements work in the future?

The LSC will consider carefully how such arrangements could work. The key priority must be to maintain control of quality and price. We would be interested to hear your proposals.

5. What will happen to niche/specialist areas under Carter, e.g. terrorism and fraud?

Lord Carter has recommended that the LSC considers whether specialist areas should be catered for. We will consult on our proposals in the future.

6. What about prison law, appeals and review work?

Lord Carter did not look at these areas for his report. However, the LSC has started its own review of both which we expect to report on in 2007.

7. What does the Carter Report mean for the Public Defender Service?

The LSC is looking at the independent PDS evaluation research in light of Carter's recommendations before making decisions about the future of the PDS. We will be making an announcement later this year.

8. Is there a future for young criminal defenders in legal aid?

The LSC is committed to a £10m rolling programme of grants, made to firms, to provide assistance for young trainee solicitors wishing to join the profession and deliver publicly funded work. Crime has been identified as a priority area in 2006 and applications from firms with Crime contracts will be given preferential treatment alongside other identified priority areas.

9. What about prisoners' rights work?

Prison Law work falls outside Lord Carter's report.

The LSC is looking at whether the Carter approach can be applied to Prison Law and the 'Appeals and Reviews' Class of Work as well. We will present our proposals in 2007.

Existing Prison Law specialist contracts will continue until at least 31 March 2008.

10. Under the new fixed fee regime, will we be expected to send CDS6 reports detailing actual hours/costs spent on each matter?

There are many advantages in continuing to collect 'real time' information on the CDS6 and firms will undoubtedly continue to record time spent on cases for their own internal management purposes. However, we recognise that there is also a need to reduce the transaction costs of legal aid. We will discuss this issue with the Law Society and other representative bodies.