Liberty response to the Legal Services Commission Consultation:

“Legal Aid: A Sustainable Future”

October 2006
About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK’s leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora and undertake independent, funded research.

Liberty policy papers are available at


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**Introduction**

1. This response does not focus on the impact of the proposed reforms on Liberty’s own ability to continue to provide publicly funded advice and representation. These are dealt with in more detail in the submission by the Public Lawyers in NGOs Group (PLINGO) which Liberty adopts. In their present form, the proposals would exclude Liberty from the legal aid scheme. We are a category 1 supplier with a national reputation for human rights and civil liberties expertise and unrivalled experience of litigation in the European Court of Human Rights. The majority of our advice provision is not funded by the Legal Services Commission and our income from legally aided work is very low (partly, it should be said, as a result of obtaining *inter partes* costs orders). Nonetheless it is extremely important that we are able to offer legal aid to our clients where possible. It does not seem sensible or cost effective to exclude a national resource such as Liberty from legal aid. Our ability to provide a specialist service for clients (both lay clients and members of the legal profession) would be greatly reduced were we to be excluded from legal aid work.

2. The main purpose of this response is to address the wider civil liberties and human rights implications of the proposals. The following principles must inform any future changes to legal aid provision in the UK:

- Legal aid is an important public service and should be recognised as such. The role of civil legal aid in reducing social exclusion is, for example, well documented.

- The provision of legal aid is in some cases demanded by the UK’s obligations to provide a fair trial under the European Convention on Human Rights.

- The principle of equality of arms will never be achieved if publicly funded legal representation is of a lesser quality than privately funded representation, or is so scarce as to be in practical terms unavailable.

From the outset we acknowledge that the system of legal aid in England and Wales is better than in many other European countries. This is something we should be proud of and we should continue to strive for excellence rather than adopting a ‘lowest common denominator’ approach.
Need for change to procurement strategy

3. The present proposals are based on an increase in legal aid spending which is said to justify an overhaul to the entire system of legal aid procurement. An analysis commissioned by the Law Society\(^1\) (the ‘LECG report’) explains that in fact most areas of legal aid spending have not increased during the past few years, and the only real areas of increase are in Crown Court and higher court costs (7.4% and 8.1% per case annually between 2002-06), and indeed the LSC’s own administration costs (10.6% annually over the period). With that in mind, it is unclear whether the need for radical procurement overhaul is really made out.

4. Liberty is concerned that the primary motivation for these reforms is to provide certainty of expenditure. If this is achieved at the expense of quality, or carries with it the risk that there will simply be insufficient supply, the reforms will be extremely damaging to the interests of justice and to social inclusion.

5. It appears that the true drivers of increased legal aid costs have been insufficiently analysed either by Lord Carter’s review or by the DCA/LSC. Without such an analysis, and a package of reforms tailored to meet those conclusions,\(^2\) there is of course no reason to expect that costs will not continue to rise. When they do, the reforms mean that it is the suppliers who will have to shoulder a costs burden over which they have little or no control.

6. The reforms purport to create a ‘market’ for the supply of legal aid. This ignores the fact that suppliers already operate within a quality market which is driven by the needs of clients, rather than by cost. The legal profession is highly dependent on recommendations by word of mouth. Clients follow reputation. The reforms create a conflict between the needs of clients (purely quality-driven since the client does not pay) and the aims of government (largely cost-driven since the government is not the recipient of the legal services paid for).

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\(^1\) ‘Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary’ Peter Grindley, LECG Ltd., 25.9.06

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7. In addition, the proposals ignore the fact that, where Government is the sole purchaser of services, whether it fixes the price or not, no true market can exist. It remains to be seen what will happen if competitive tendering forces the price of services above that which the Government is willing to pay. Legal aid rates have been suppressed for years and legal aid work is presently paid at rates in the region of a quarter to half of market rates. This has meant that the profit of legal aid firms is incredibly low,\(^3\) and has led to crises in recruitment and retention at these firms and an aging supplier base. Against that background, the idea that a ‘surplus’ can be generated by increased efficiencies is optimistic. Firms already at financial breaking point may not have sufficient capital or incentive to invest and restructure in the distant and dwindling hope of generating a profit – particularly if their contracts can then be terminated on 3 months’ notice by the LSC. It is likely that a surplus can only be generated through the use of inexperienced and unqualified staff and other savings which will directly impact on the quality of service provided.

8. Lord Carter makes recommendations\(^4\) regarding costs drivers external to legal suppliers, such as changes to legislation or policy, but these do not seem to be implemented in anything like the detailed manner that has been applied to restructuring the legal aid procurement scheme. According to the DCA website, the ‘legal aid impact test’ only applies when the introduction of new criminal sanctions or civil penalties is under consideration. Many other factors can also increase costs (for example increased numbers of prosecutions, increasing complexity of criminal conduct and police investigatory techniques) yet the legal aid impact test will have no application to these factors. Liberty is concerned that the benefit of the legal aid impact test may be minimal and its usefulness as a tool for controlling costs should not be overstated.

9. Liberty has grave doubts about whether it is either appropriate or sustainable for the risk of increased costs (largely outside the control of suppliers) to be transferred

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\(^2\) For example those identified in ‘Demand induced supply? Identifying cost drivers in criminal defence work’, Professor Ed Cape and Professor Richard Moorhead’s report for the LSC.

\(^3\) The LECG report estimates at page 7 that average revenues in CDS firms may be as low as 2% profit to -6% loss.

\(^4\) i.e. recommendations 6.3, 6.4.
away from Government and onto the suppliers of legal aid – with the consequent risk to the quality and supply of legal aid that entails.

**Impact on vulnerable clients**

10. The move to fixed fees for all cases and the ‘escape’ at 4 times the fixed fee will act as a disincentive to suppliers taking on more complicated cases, or more complicated clients. Clients with mental health problems, drug or alcohol dependency, disabilities and/or who do not speak English are amongst the most vulnerable people in our society, and yet the reforms directly militate against their representation. The reforms are predicated on the assumption that a surplus can be generated by increased efficiencies in the provision of services. These intended ‘efficiencies’ take no account of the difficulties in providing a service to clients with special needs.

11. In the proposed fixed fee system, it can only make financial sense for firms to take on complicated or demanding clients/cases if either they cost 4 times the fixed fee, or if a number of other cases cost significantly less than the fixed fee. Both of these scenarios seem relatively unlikely. If already-stretched suppliers are forced to shoulder the financial risk of providing legal aid, they are likely to minimize that risk by taking on those cases which are most predictable and most fit the standard pattern. Those suppliers who at present routinely undertake more complicated work will no longer be rewarded for their additional commitment and expertise.

12. Liberty is concerned that the proposed system provides no incentive for suppliers to take on this type of difficult work/vulnerable clients and suggests that measures to ensure that these clients are not overlooked should be built into the system.

13. Further, in order to make the fixed fee system economically viable, it is quite clear that firms will have to rely heavily on poorly-paid unqualified / paralegal or very junior staff. This will undoubtedly have negative implications for the quality of legal advice provided.
Reduction of choice

14. It is acknowledged by Lord Carter and all other commentators that the proposed reforms will reduce the number of firms providing legal aid work. There are undoubtedly some advantages of larger firms in that they would hopefully be able to deal with all clients’ advice needs and prevent referral fatigue. They may be better resourced and have a greater and broader level of in-house expertise.

15. On the other hand, fewer larger firms would undoubtedly decrease the level of choice available to clients. Clients may have to wait longer and travel further. Advice deserts, which are already a serious problem in many areas of the country, may increase and spread into criminal legal aid. In rural areas there may be insufficient work to support more than one large firm, which could lead to serious conflict issues. If a larger firm goes out of business there could be a serious disruption to the level of supply in a given area, which could not easily be replaced.

16. Optimum choice would probably mean a spread of large and small firms, generalist and specialist, in order best to meet clients’ needs in different areas of law and regions of the country, and to minimise the risk of major interruptions to supply.

17. Liberty is particularly concerned at the reduction of choice in relation to police station work and advice and representation in detention centres.

Police station advice

18. Lord Carter’s review provides\(^5\) that clients should have the right to choose their police station representative provided that the representative of choice either has a contract within the same boundary area, or has not exhausted an allowance of 20% of their allocated work provided outside their own boundary area. This means that if the firm of choice has already exhausted their 20% allocation, the client will have to accept alternative representation.

\(^5\) Chapter 4, paragraph 16
19. Liberty does not believe that the case for this restriction is made out. In densely populated areas such as London, it seems quite likely that clients will frequently prefer a representative from outside the boundary area in question and the 20% allocation may be quickly exhausted. If travel and waiting for police station work is not to be separately remunerated, we do not understand the need for a restriction of this nature. In view of the state’s obligations under Article 6 ECHR, it is inappropriate that a Defendant’s choice of representative should be restricted for the administrative convenience of the LSC and without a compelling justification. Equally, Lord Carter himself acknowledges\(^6\) that choice at the police station stage is important to encourage consistency of representation from police station through to the courts, which he says should have a positive impact on the criminal justice system. Given the obvious sense and costs savings inherent in consistency of representation, Liberty believes that the 20% limit is too low and the need for any restriction is not convincingly established.

**Detention centres**

20. Equally concerning are the proposals to let ‘exclusive’ contracts for advice and representation to those in immigration detention.

21. Research conducted by Bail for Immigration Detainees (‘BID’)\(^7\) raises a number of concerns about the quality of representation provided under a similar pilot duty scheme at Harmondsworth and Yarl’s Wood to people detained under the fast-track system. In particular, the research found that providers may be erring on the side of caution and underestimating the prospects of success of asylum appeals, leaving 77% of fast-track appellants without publicly funded representation at appeal stage.\(^8\) Proposals to introduce sanctions for those firms achieving a less than 40% success rate on appeals seem likely to exacerbate this trend. BID also noticed a marked failure to apply to take cases out of the fast track, and a dearth of bail applications.

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\(^6\) Chapter 5, paragraph 123
\(^7\) ‘Working against the clock: inadequacy and injustice in the fast track system’, Bail for Immigration Detainees
\(^8\) 60% had no representation at all on appeal. Half of those with private representation had secured it because their publicly funded representation was discontinued by the supplier.
22. Whilst Liberty supports the idea of on-site provision of legal advice to detainees, we see no reason why such representation should be exclusively provided by the one or two organisations with such a contract. Many detainees may already have representation from other firms and it would seem infinitely preferable that existing representatives be able to continue acting for a client (if the client so chooses) when they already have considerable knowledge of the client’s immigration/asylum history. Equally, Liberty is concerned that those suppliers with expertise in more complex, urgent or higher court work may not seek contracts to provide all advice at detention centres. Whilst there is an argument for a duty type scheme at detention centres to ensure that those detained can obtain advice, Liberty seeks assurances that other representatives without a detention centre contract will be able to act for immigration detainees as well.

**Discriminatory impact of reforms**

23. It is widely acknowledged that the reforms will have an indirectly discriminatory impact on BME firms, which are generally smaller and therefore more likely to have to close under the proposals. In those circumstances, we do not see how the proposals for simply monitoring the impact and requiring firms to have an equal opportunities policy are likely to lessen it. Monitoring is a tool to enable a discriminatory impact to be noted: it is not an anti-discrimination measure in itself.

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