

We are the Independent Defence Lawyers Group (“IDL”), an association of 70 solicitors firms in London specialising in criminal practise.

IDL believes that the Report concluding that review, *Legal Aid: A Market-Based Approach to Reform* (“Carter”), and the subsequent Report presented to Parliament by the Lord Chancellor (*A Fairer Deal for Legal Aid* (“Fairer Deal”)) contain a series of recommendations which, collectively, constitute a threat to the future viability and integrity of the criminal justice system.

## 1: Summary of Existing System

1.1: Between April 2001 and October 2006 all criminal defence work was capable of being funded, free of charge, through the Legal Services Commission (“LSC”)<sup>1</sup>.

Carter proceeds on the assumption that the State will continue to be the sole provider of criminal defence funding, primarily through the private sector.

There is compelling evidence that contracting work with independent firms is substantially cheaper than organizing delivery through directly employed staff (the Public Defender Service, a costly experiment that the LSC continues to run)<sup>2</sup>.

Previously, eligibility for public funding was means tested (with the result that some Defendants had to pay a contribution and that others were not eligible at all).

Some Defendants (typically those charged with ‘white collar’ offences) continue to elect to pay privately (either directly out of their own pocket, through their employers, or drawing on insurance policies) notwithstanding entitlement to free legal representation.

Anomalously, means testing has been recently reintroduced (with a very low threshold of £3,156 disposal annual income out of total annual gross income of up to £20,740) for criminal defence work in only the very lowest tier of courts<sup>3</sup>. It is presently unclear whether means testing will be reintroduced for higher court work<sup>4</sup>.

---

<sup>1</sup> Access to Justice Act 1999 (c. 22)

<sup>2</sup> The PDS was established in 2001. Start up costs have been significant (in the first two years, approximately £2 million direct start up costs and approximately £6.3 million running costs for eight regional offices – equivalent to a budget of £½ per annum to start up and run a new office over two years). The outcome of research on the performance of the PDS is awaited. See: [http://www.legalservices.gov.uk/docs/pds/PDSannual\\_report\\_final.pdf](http://www.legalservices.gov.uk/docs/pds/PDSannual_report_final.pdf)

<sup>3</sup> Criminal Defence Service Act 2006 (c. 9)

<sup>4</sup> Note the contrast with Scotland where all work in lower courts is fully funded and work in the higher courts is means-tested. The Legal Aid system has also been subject to a recent review by the Scottish Executive. See: <http://www.scotland.gov.uk/Publications/2004/11/20182/45886>

- 1.2: The accounts of the LSC show legal aid payments of £1,716.9 million (£983.2 million attributable to criminal defence work) in 2001-02<sup>5</sup>, £2,066.4 million (£1,179.2 million to crime) in 2003-04<sup>6</sup>, £2,038 million (£1,193.3 million to crime) in 2004-05<sup>7</sup> and £2,027.8 million in 2006 (£1,196 million to crime)<sup>8</sup>.

Total LSC expenditure is actually falling.

Total expenditure on the CPS (the main prosecutorial branch) increased from £346 million in 2001 to £604 million (estimated) in 2006 (a 75% increase) and the number of full-time employees has increased in the same period from 5,564 to 7,846 (an increase in personnel of 40%)<sup>9</sup>.

Total expenditure on the Serious Fraud Office increased from £23 million to a projected £41 million (a 78% increase) in the same period<sup>10</sup>.

Expenditure by the Revenue & Customs Prosecution Office (a new agency) is projected to be £38 million for 2005-2006<sup>11</sup>. Budgetary allocations for the purposes of investigating criminal activity are not known but there are indications that the Revenue is devoting very substantial resources to this (recently doubling its personnel (to 1,000 officers) to investigate just VAT offences<sup>12</sup>).

The Police Grant for this same period increased from £3,995 million to £4,573 million (a 15% overall increase)<sup>13</sup>.

- 1.3: *Expense of Time* surveys regularly published by the Law Society show average charge out rates to privately paying clients for solicitors of different experience operating in different geographical locations and incorporate a calculation of overheads (lease, insurances, etc), salaries and a profit element<sup>14</sup>.

The current guideline hourly rates for solicitors engaged in commercial or civil litigation in London are as follows:

---

<sup>5</sup> LSC Annual Report 2001-02, Page 1: £509.1 million on police station and lower court work and £474.1 million on higher court work

<sup>6</sup> LSC Annual Report 2003-04, Page 4: £534.2 million on police station and lower courts work and £645 million on higher courts criminal work

<sup>7</sup> LSC Annual Report 2004-05, Page 6: £510.9 million on police station and lower court work and £682.4 million on higher court criminal work.

<sup>8</sup> LSC Annual Report 2005-06, Page 7: £501.9 million on police station and lower court work and £695.5 million on higher court work.

<sup>9</sup> <http://www.cps.gov.uk/publications/docs/lodeptreport06.pdf>

<sup>10</sup> [http://www.sfo.gov.uk/publications/2005\\_2006/sectiontwo\\_05.asp](http://www.sfo.gov.uk/publications/2005_2006/sectiontwo_05.asp)

<sup>11</sup> <http://www.rcpo.gov.uk/rcpo/about/reportsplans.shtml>

<sup>12</sup> *The Guardian*, 12<sup>th</sup> September 2006.

<sup>13</sup> [http://police.homeoffice.gov.uk/news-and-publications/publication/finance-and-business-planning/POLICE\\_GRANT\\_REPORT\\_01\\_02.pdf](http://police.homeoffice.gov.uk/news-and-publications/publication/finance-and-business-planning/POLICE_GRANT_REPORT_01_02.pdf)

<sup>14</sup> Michael J Cook, *Litigation Focus*, 8, November 2003

- City of London – Senior Solicitor £359 per hour and other solicitor £259 per hour;
- Central London – Senior Solicitor £276 per hour and other solicitor £210 per hour;
- Outer London – Senior Solicitor £198-£232 per hour and other solicitor £149-£198 per hour.<sup>15</sup>

The present rates of remuneration for publicly funded criminal defence work are as follows:

#### 1.3.1: Police Station:

Payment is by hour and is in a range of £56.20 to £80 per hour (depending on the time of day, with work as a duty solicitor attracting higher rates - especially where a serious offence is being dealt with). Most rates were set in April 2001 but there has been a revision of rates for serious offences since then.

Uniquely in the system of public funding, travel and waiting are paid at the same rate as actual attendances on a Duty client.

#### 1.3.2: Magistrates Court:

The basic hourly rate for work on the case papers (in London) is £52.55 for all solicitors regardless of seniority. Travel and waiting are remunerated at approximately one half of that figure. Advocacy (actually pleading in Court) is paid at a slightly higher levels.

There has been no change in these rates since April 2001.

#### 1.3.3: Crown Court:

The basic rate of remuneration (in London) for working on papers (checking prosecution evidence, taking instructions from a Defendant, etc) for experienced solicitors is £55.75 and for less experienced solicitors is £47.25<sup>16</sup>.

These rates have remained unchanged since 1<sup>st</sup> April 1996<sup>17</sup>.

Hourly rates for travel and waiting are approximately one half of that general rate. Rates for attendance at Court are approximately two-thirds.

There are four different payment regimes:

##### 1.3.3.1: Standard Fees: for cases involving very little work.

<sup>15</sup> [http://www.hmcourts-service.gov.uk/publications/guidance/scco/appendix\\_2.htm](http://www.hmcourts-service.gov.uk/publications/guidance/scco/appendix_2.htm)

<sup>16</sup> Criminal Defence Service (Funding) Order 2001, Schedule 2 (SI 2001/855)

<sup>17</sup> having previously steadily increased from £42.50 in 1988

- 1.3.3.2: Ex post facto (that is, “paid after the event”): calculated at basic hourly rates set out above and paid through a specialist agency of the Court Service, the National Taxing Team<sup>18</sup>.
- 1.3.3.3: Ex post facto with “enhancement”: calculated at basic hourly rate plus 100% (the maximum since October 2005 – previously higher in complex fraud cases<sup>19</sup>) for work in the most difficult and arduous cases (murder, child sex offences, complex fraud, conspiracies to import drugs, etc). The maximum hourly rate achievable is £111.50 for a Senior Solicitor and £94.50 for a less experienced solicitor.
- 1.3.3.4: Very High Costs Cases: a totally different regime wherein the LSC contracts with firms for a particular cases and agrees in advance to the number of hours to be worked. The hourly rates of remuneration are (mostly) significantly higher (£180 to £110 for Senior Solicitors and £140 to £90 for other qualified solicitors).

## 2: Costs Drivers

There have been a large number of changes in the way in which the criminal justice system operates in the last ten years or so.

These changes have all contributed to substantially increase the time necessary (and, hence, the cost) to prepare a case (especially Crown Court cases).

- 2.1: New forms of evidence:
- 2.1.2: This is of two types – CCTV footage obtained from private operators and surveillance footage. In cases of relative complexity (especially where conspiracy is charged) this film can (and often does) run into hundreds of hours.
- 2.1.3: Where several defendants are charged their mobile telephone billing records will – always - be interrogated to assess any links between them. These records can run to many (sometimes hundreds of) pages.

---

<sup>18</sup> It should be noted that a cardinal and central rule within the current system as it applies to publicly funded criminal work is that payment should only be for a “reasonable amount for work reasonably done”. In other words, the least efficient will be penalised when they present their claim for payment and will (and do) meet with a refusal to pay for a substantial number of the hours worked - see *R v John Singh & Co, ex parte Supreme Court Taxing Office*, [1997] 1 CLR 39 for a spectacular example of solicitors’ costs being hugely pared back.

<sup>19</sup> Criminal Defence Service (Funding) (Amendment) Order 2005 (SI 2005/2621)

2.1.4: Materials generated by information technology figure importantly in cases, both in respect of internet communication and also in respect of documents stored electronically.

2.2: Unused Material:

Huge swathes of documentation can be ingathered. It is now normal in large fraud cases to find that there exist hundreds of thousands of pages of unused material.

Even smaller cases often generate substantial amounts of unused (due to the increased resources of investigating authorities).

The problems associated with Unused Material (the volume of this material and the time associated with checking it) have been recently addressed<sup>20</sup>.

2.3: New offences and patterns of prosecuting:

2.3.1: The Government has legislated to introduce no less than 3,000 new criminal offences in its nine years in office (almost one for everyday)<sup>21</sup>.

2.3.2: Large-scale prosecutions for fraud are a phenomenon of the last twenty years. There has been an increase in one particular type of prosecution for what is known as “carousel” or “missing trader” fraud. There are estimates that some 9,000 individuals<sup>22</sup> may now be operating criminally in this area and that the loss to the Revenue runs to several billions of pounds. These prosecutions are very paper intensive.

2.3.3: Prosecutions for terrorism offences have been, and are highly likely to be, hugely expensive.

2.3.4: Some prosecutions have been extremely badly handled and have resulted in huge sums of money being thrown away<sup>23</sup>.

2.4: Procedural changes (some examples – there are many others):

2.4.1: The right of the prosecution to draw inferences from the silence or refusal of a defendant to answer questions in interview<sup>24</sup>.

2.4.2: The duty on the defence to serve a Defence Case Statement<sup>25</sup>.

---

<sup>20</sup> See Fairer Deal, Page 26, Paragraphs 5.15–5.24

<sup>21</sup> *The Independent*, 16<sup>th</sup> August 2006.

<sup>22</sup> *The Guardian*, 30<sup>th</sup> August 2006.

<sup>23</sup> See the *Butterfield Report* and the collapse of Operation Venison last year - <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/06/30/nlaw30.xml>

<sup>24</sup> Criminal Justice and Public Order Act 1994 (c 33).

<sup>25</sup> Criminal Procedure and Investigations Act 1996 (c 25)

2.4.3: The ability to introduce evidence of bad character<sup>26</sup>

2.4.4: The Crown has been equipped with increasingly powerful powers to provisionally confiscate and to then obtain the forfeiture of assets<sup>27</sup>. Where once these powers were used only occasionally they are now always deployed where financial benefit from crime is suspected<sup>28</sup>.

### 3: Objections

Carter states that fundamental change must be made in the way legal aid services are procured so that:

1. clients have access to good quality legal advice and representation;
2. a good quality, efficient supplier base thrives and remains sustainable;
3. the taxpayer and government receive value for money; and,
4. the justice system is more efficient, effective and simple<sup>29</sup>.

To these criteria, a fifth element is also added – the need to ensure that black and ethnic minority (“BME”) firms and solicitors are not disadvantaged<sup>30</sup>.

IDL has many objections to the Carter proposals (and is concerned that some the figures seem incorrect<sup>31</sup> and some of the empirical evidence on which it relies seems flawed<sup>32</sup>).

Constraints of space preclude making detailed objections in respect of specific proposals and our representations will have, of necessity, to be confined to broad themes at the present time.

3.1: The projections are that overall legal aid spending on criminal defence work will decrease by 5.6% between 2006 and 2008 and by 11.4% by 2010 (in non inflation adjusted figures)<sup>33</sup>.

There are inadequacies in the current system as it already exists.

There has been a decrease in the value of the hourly rate paid in the existing scheme (Paragraph 1.3.3 above).

---

<sup>26</sup> Criminal Justice Act 2003 (c 44)

<sup>27</sup> Proceeds of Crime Act 2002 (c 29)

<sup>28</sup> Through a new agency, the Assets Recovery Unit

<sup>29</sup> Carter, Executive Summary – Page 3, Paragraph 3

<sup>30</sup> Carter, Executive Summary – Page 6, Paragraph 34

<sup>31</sup> For example, the payment figure for police station work in 2001-02 is stated to be £126.9 million (at Page 24, Paragraph 14), but the figure in the LSC Annual Report for that year is £140.255 million (at Page 45)?

<sup>32</sup> The assertion, for example, in relation to waiting time in the Crown Court at Page 40, Paragraph 120.

<sup>33</sup> Carter, Page 127, Table 6.1

Consumer Price Index (“CPI”) figures are as follows: April 1996 = 88; April 2006<sup>34</sup>.

Making the appropriate adjustments for inflation, the value of £55.75 in April 1996 is approximately £48.30 today and of £47.25 is approximately £40.90.

Currently, a Senior Solicitor working in Central London will achieve at best approximately 40% (and usually 20% - £55.75) of the level of hourly remuneration of his peer working on civil or commercial litigation (£276 – see Paragraph 1.3 above)<sup>35</sup>.

Solicitors engaged in publicly funded criminal defence in London work operate their practices in a commercial environment where overheads (leases, etc) are very high at a fraction of the remuneration figures their peers are able to attract. Those comparably (and absolutely) poor rates of remuneration mean that they are also at a significant disadvantage in attracting new qualified personnel<sup>36</sup>.

A sharp reduction in the number of firms undertaking publicly funded criminal defence work is a desired outcome in Carter. The Law Society has commissioned a report from LECG Ltd<sup>37</sup>. This indicates that a very large number of firms will be unable to survive in the new Carter environment (many more than Carter predicts).

Costs pressures are most acute in London.

3.2: There are four ‘budgets’ for criminal defence work – at police stations, in magistrates courts, Crown Court ex post facto and Crown Court VHCC.

3.2.1: The increase in the cost of police station work is said to be in the order of 35% for an increase in volume in instances of police station advice of only 24% in the period 2001-02 to 2005-06<sup>38</sup>.

No account in Carter seems to have been taken for the increase in rates for certain types of police station attendance (and these may well have had an impact due to the increased investigation of terrorist offences since September 2001)<sup>39</sup>.

---

<sup>34</sup> [http://www.statistics.gov.uk/downloads/theme\\_economy/FocusonCPI\\_Aug\\_2006.pdf](http://www.statistics.gov.uk/downloads/theme_economy/FocusonCPI_Aug_2006.pdf)

<sup>35</sup> Up to 1994 solicitors in criminal practice were able to achieve the same hourly rates as their peers.

<sup>36</sup> Note the salaries available and the commensurate mortgage possibilities: Non-Qualified: £20-26K (usually £24-£25K) = £78K; to 1yr PQE: £23- £27K (usually £26K) = £81K; 1-3 yr PQE: £26-£32K (usually £26-29K) = £96K; Duty Solicitors: £33-£45K + 50% Out of Hour fees (a ‘norm’ of £40K) = £135K+

<sup>37</sup> *Legal Aid Reforms Proposed by the Carter Report*, LECG, 25<sup>th</sup> September 2006

<sup>38</sup> Carter, Page 24, Paragraph 14 – but note that the average costs of a police station attendance were £246 in 2001-02 and £265 in 2004-05 (the last year when the LSC provided a full breakdown) – a 7.3% increase.

<sup>39</sup> The current probe into the recent bomb plot is estimated to be costing the Metropolitan Police £1 million a week (<http://news.bbc.co.uk/1/hi/uk/5389708.stm> - 28th September 2006). The police station costs of attending solicitors are likely to be very high.

Much time is spent waiting at police stations. This issue is entirely in the hands of investigating officers. Simple reforms to the way in which arrangements are made for suspects are interviewed would address this problem<sup>40</sup>.

3.2.2: Costs in the lower courts rose from £187 million in 2001-02 (for 423,395 grants of public funding)<sup>41</sup> to £295 million in 2005-06 (581,307 grants)<sup>42</sup> – equivalent to an average increase per case from £440 to £507 (a 15% rise). It should be noted, however, that the figure is currently stable (average cost per case was £506 in 2003-04<sup>43</sup> and £503 in 2004-2005<sup>44</sup>) and, therefore, declining in real terms. The surge in claims between 2001-02 and 2005-06 can be attributed (in large part) to the sudden free provision of public funding without means testing from April 2001 (the impact of this would have only started feeding through in the second half of 2001-02).

Costs of work in the lower courts are set to further decline in absolute terms in the wake of the reintroduction of means testing (see Paragraph 1.1 above) and also increased restrictions on grants of public funding (through a tightened “interests of justice test”).

3.2.3: Costs in the Crown Court rose from approximately £480 million in 2001-02 to approximately £695 million in 2005-06 (from a base of some £400 million in 1997-98)<sup>45</sup>. Payments to solicitors have increased from approximately £210 million in 2001-02 to £330 million in 2005-06 and to barristers (who were already operating under a graduated fee scheme) from £270 million to £365 million for the same period<sup>46</sup>.

The VHCC scheme has been operating since 2001. The available figures<sup>47</sup> indicate that the payments have increased from £15 million in 2002-03 to £103 million in 2005-06.

Accordingly, £103 million of the current £695 million is now covered by VHCC payments. This is approximately 15% of the total and is set to increase significantly as a proportion as more cases are centrally contracted<sup>48</sup>.

---

<sup>40</sup> Relevant CPI figures are as follows: August 2001 = 94.5; August 2006 = 102.9 - an 8.2% inflation increase - [http://www.statistics.gov.uk/downloads/theme\\_economy/FocusonCPI\\_Aug\\_2006.pdf](http://www.statistics.gov.uk/downloads/theme_economy/FocusonCPI_Aug_2006.pdf)

<sup>41</sup> LSC Annual Report 2001-02, Page 45

<sup>42</sup> LSC Annual Report 2005-06, Page 22

<sup>43</sup> LSC Annual Report 2003-04, Page 54

<sup>44</sup> LSC Annual Report 2004-05, Page 44

<sup>45</sup> Figures extrapolated from Fairer Deal, Page 14, Figure 8

<sup>46</sup> Figures extrapolated from Fairer Deal, page 15, Figure 15

<sup>47</sup> Carter, Page 28, Paragraph 48, Table 2.1

<sup>48</sup> See Carter, Page 72, Paragraph 18, for recommendations that this process of centrally contracting should be pushed even further.

That part of costs payable to solicitors for Crown Court work on an ex post facto basis is, thus, set to decrease as a share of the absolute total for Crown Court work on current trends.

At present any firm with the requisite internal skill set is able to apply to have a case become a VHCC. Carter envisages the number of firms being able to tender for VHCC contracts in the future being heavily restricted (between 75 and 150 firms<sup>49</sup>).

Public funding of criminal defence work was never intended to support (often) wealthy individuals charged with financial misfeasance (such as those typically prosecuted by the SFO).

Why did Carter not consider the possibility of encouraging private provision for criminal work (for example, through insurance policies (there is already an active D & O insurance market))?<sup>50</sup>

Payments for publicly funded criminal defence work will, thus, be concentrated towards a few large firms (between 5% and 10% of the total on Carter projections), with all other firms<sup>51</sup> having to operate in an environment where they face absolute (not just real) cuts in levels of remuneration for the type of work they are still able to undertake (police station attendances and appearing in the lower courts, non centrally contracted cases in the higher courts) and further face ever diminishing income streams as they are excluded from the ever greater volume of VHCC work.

It is difficult to see envisage how, for example, the goal of ensuring that there are a minimum number of firms able to undertake police station work in the scheme proposed by Carter can be sustained in these circumstances.

If there is pressure on the overall Legal Aid budget why should frontline service providers to those in genuine need be those to bear the brunt of cost cuts?

- 3.3: It is suggested that the rise in the cost of funding criminal defence work has been driven by the global increase in the number of solicitors in the last twenty years<sup>52</sup>.

The proportion of women and individuals drawn from BME working in the profession is high (and increasing)<sup>53</sup>. In 1991, there were 57,167 solicitors holding practising certificates (“PCS”), of whom 25% were women and 2% were

---

<sup>49</sup> Carter, page 59, Paragraph 6

<sup>50</sup> As the Scottish Executive has done in its Strategic Review of Legal Aid provision. See Paragraphs 3.46-3.47 at <http://www.scotland.gov.uk/Publications/2004/11/20182/45886>

<sup>51</sup> Carter envisages a total of approximately 1700 being left

<sup>52</sup> See Fairer Deal, Page 10, Paragraph 2.11 and Figure 2

<sup>53</sup> See a speech by the Rt Hon Harriet Harman at the Royal Lancaster Park Hotel on 12<sup>th</sup> November 2003 for a flavour of what the profession was like as late as 1970:

<http://www.harrietharman.labour.co.uk/ViewPage.cfm?Action=LargeText&Page=11616>

drawn from BME. In 2005, there were 100,938 solicitors with PCS, of whom 51.5% were women and 8.7% drawn from BME<sup>54</sup>.

The proportion of partners who are women has increased significantly in the same period. The proportion of partners who are drawn from BME is not known (the Law Society does not appear to have gathered data on this).

Typically, minorities encounter high entry thresholds into many areas of business activity (meaning that they often refused access to capital resources<sup>55</sup>, and that they encounter implied and unfamiliar, but highly important, 'rules of engagement'<sup>56</sup>).

Access to positions of success and independence through the solicitors' profession for women and BME is presently straightforward as the entry threshold is low (the only requirement is academic ability) and as access to public funding for work is a transparent process (at the moment, any solicitor with requisite experience can apply for a General Criminal Contract with the LSC - thereby securing an immediate revenue stream to be used, inter alia, as secure collateral for borrowing).

On the Carter model, not only will there be fewer firms but the ratio of partners to staff will be significantly increased (fewer partners)<sup>57</sup>.

In London, there is a particularly high concentration of BME and it is believed that there is a concomitantly high number of BME who are solicitors and partners and that those solicitors and partners are concentrated in small to medium practices which specialise in publicly funded (especially criminal) work.

The process of driving many small firms out of publicly funded criminal practise (and, indeed, out of business altogether) and of increasing the size of firms whilst reducing the prospects for advancement will, inevitably, affect the career prospects of women and (especially) BME.

Further, it is difficult to envisage how new firms in which women or BME have an important stake can enter the post Carter public procurement market for criminal defence services given the significant start up costs involved<sup>58</sup>, the restrictions to be placed on market share<sup>59</sup>, the threats to profit margins generally<sup>60</sup>, and the much reduced revenue streams (making borrowing harder).

---

<sup>54</sup> <http://www.lawsociety.org.uk/aboutlawsociety/whatwedo/researchandtrends/factsheets.law>

<sup>55</sup> see David Deakins, Trevor Jones, Monder Ram, David Smallbone; *Journal of Ethnic and Migration Studies*, Vol. 29, 2003

<sup>56</sup> Such as membership of clubs or a history of participation in certain sports

<sup>57</sup> See comments in Carter at Page 43, Paragraphs 132 and following

<sup>58</sup> Compare the situation with the Public Defender Service. See note 2 above.

<sup>59</sup> See, for example, Carter, Page 71, Paragraph 12

<sup>60</sup> See the LECG report for a detailed analysis of this at Pages 75-78.