

Lord Carter of Cole's review of legal aid procurement

The Advice Services Alliance's submission

Contents

1	Introduction	1
2	Advice Services Alliance	1
3	Funding	2
4	Voluntary sector funding – background	4
5	Legal Aid funding	5
6	Quality	8
7	Efficiency	9

1 Introduction

- 1.1 This is the first submission of the Advice Services Alliance (ASA) to Lord Carter's Review of Legal Aid Procurement (the Review).
- 1.2 The scope of the Review is broad. At this stage, following discussions with the Review Team, we are limiting our submission to the following issues:
- Advice Services Alliance
 - Funding
 - Voluntary sector funding – background
 - Legal Aid funding
 - Quality
 - Efficiency
- 1.3 We are happy to address other issues, or expand on the above issues, if this would be helpful.
- 1.4 A draft of this submission has been seen by all of ASA's members listed in paragraph 2.3 below. We have attempted to incorporate their comments and views. We are aware that some of our members will be making separate submissions to the Review.

2 Advice Services Alliance

- 2.1 The Advice Services Alliance (ASA) was established in 1980, and is the umbrella organisation for independent advice networks in the U.K. Our aims are to:
- champion the development of high quality information, advice and legal services;
 - ensure that people are not denied access to such services on account of lack of means, discrimination or other disadvantage;
 - encourage co-operation between organisations providing such services;
 - provide a forum for the discussion of issues of common interest or concern to advice organisations.
- 2.2 ASA is the lead negotiating body on behalf of the Not-for-Profit (NfP) sector in relation to the Quality Mark and contracts with the Legal Services Commission.
- 2.3 Full membership of ASA is open to national networks of independent advice services in the U.K. Current full members include:
- Advice UK
 - Age Concern England
 - Citizens Advice
 - DIAL UK (the disability information and advice service)
 - Law Centres Federation
 - Shelter (which covers England, Scotland & NI)
 - Shelter Cymru (which covers Wales)
 - Youth Access
- 2.4 Between them our members represent over 2,000 organisations which provide a range of services, including advice, to diverse groups throughout the U.K. Most of

these organisations offer services within a local area, but some of them are regional or national in scope. Most advice agencies are constituted as companies limited by guarantee and are registered charities.

- 2.5 With some limited exceptions, services are offered to all users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as areas of 'social welfare law').
- 2.6 In view of this, this submission will focus on issues concerning the funding of social welfare law advice and on issues concerning the funding of NfP or voluntary agencies. We therefore will make no specific comment on issues which relate to criminal, family, mental health, or personal injury work.
- 2.7 The networks most closely involved with the delivery of legal aid services are Advice UK, Citizens Advice, Law Centres Federation and Shelter.

3 Funding

- 3.1 The funding of advice in relation to social welfare law problems is a patchwork – with large holes or gaps. No one funder supports all of the work that clients need. Clients with social welfare problems often need a combination of legal and practical advice. They also need support, advocacy and representation. Some, but not all, of this work comes within the scope of the legal aid scheme.
- 3.2 Two examples may illustrate this point:
 - A client might seek advice in relation to a refusal of a claim for a welfare benefit. The Legal Help scheme (subject to eligibility) will fund the provision of advice about whether the benefit decision is correct, about what action the client should take and will fund the drafting of letter(s) and any appeal application. However, the Legal Help scheme does not cover representation at a Tribunal hearing, nor does it normally cover assisting the client to fill in another welfare benefit application form.
 - A homeless single person might seek advice in relation to the refusal of a local authority to house them on the ground that they are not in priority need. Whilst the Legal Help scheme covers the provision of advice about whether this is a lawful decision and whether additional evidence should be obtained, the scheme does not cover supporting the client in finding emergency hostel accommodation whilst the evidence is collected.
- 3.3 Many advice agencies also provide services to people who cannot afford to pay for legal advice, but who are not eligible for legal aid on the basis of their means.
- 3.4 Further, the legal aid scheme does not cover important preventative work such as community education and outreach work with vulnerable groups, which aims to ensure that people are aware of their rights and the importance of early resolution of their problems. Similarly, the legal aid scheme does not fund social policy work where agencies provide feedback to government (both local and central) about how policies and decisions are affecting people - work which can also, in the long term, help to prevent problems arising.
- 3.5 In order to provide a more comprehensive service to clients, advice agencies have sought support from other funders. However, many agencies have gaps in their service caused by funding problems, and the funding of advice is inconsistent both geographically and in relation to different subject areas.

- 3.6 Therefore, any review of the procurement of legal aid services needs to take into account that whilst the LSC is an important funder of the advice sector, it is one of many.

Legal Services Commission funding

- 3.7 Our latest information is that 465 organisations have a Not-for-Profit Contract (NfP Contract) with the LSC to deliver Legal Help. Approximately 100 of these organisations employ solicitors. In addition, a handful of NfP organisations which employ solicitors have opted for the LSC private practice contract.
- 3.8 We understand from the LSC that NfP organisations receive some £50 million p.a. under NfP Contracts for Legal Help in social welfare law, and a further £30 million p.a. for immigration work.
- 3.9 NfP agencies are also funded by the LSC to provide licensed work, specialist support, housing duty possession schemes and several pilot or special projects such as a housing rights promotion scheme in the North West.
- 3.10 In 2003/2004 LSC contracts accounted for 19.3%¹ of CAB funding. Advice UK estimate that legal aid accounts for under 20% of their members' income, and the Law Centres Federation estimate that legal aid accounts for about 50% of Law Centre funding. In respect of Shelter, in 2003/2004 CLS contracts accounted for 38% of the funding to their housing advice centres in England. Members of Youth Access, DIAL UK, and Age Concern receive either no or very little money through the legal aid scheme.
- 3.11 It is important to emphasise that the above percentages are averages. There are a few advice agencies and Law Centres which are funded by the LSC only and there are, of course, many advice agencies which receive no LSC funding.
- 3.12 The NfP Contract was developed during the mid/late 1990s in negotiations between the LSC and ASA. Although some NfP solicitor agencies had delivered legal aid services for some time, most notably Law Centres, the LSC wanted to bring non-solicitor agencies in to the delivery of legal aid services. This decision was informed by research² which concluded that "non-solicitor agencies can make a significant contribution to the Lord Chancellor's objectives for legal aid" (page xi). The NfP contract was developed to take account of the special circumstances of voluntary organisations, in particular their need for a certainty of cash-flow.
- 3.13 Many LSC NfP contracts are relatively small. Of the 465 contracts, 92 are for less than £50,000 and 227 are worth less than £100,000. These smaller contracts often provide important access points to specialist advice in rural areas and for particular minority groups.

Local authority funding

- 3.14 Taken together, local authorities are probably the largest funders of the advice sector. However, they are each very different from each other, with different priorities, funding different types and levels of service. In order to meet their own targets and political priorities, most local authorities prioritise the funding of advice in welfare benefits and debt.

¹ *Making Legal Rights a Reality – Volume 2* (page 25), LSC, 2005

² *Fast, Friendly and Expert?* Jane Steele and Gillian Bull, PSI publishing, 1996

- 3.15 Whilst local authorities are under a statutory duty to provide advice in order to prevent homelessness, they are not required to fund any other advice. This means that some give very little funding to advice, whilst others are substantial funders.
- 3.16 Local authority funding can lead to problems of conflict of interest. Local authorities are responsible for the delivery of many social welfare services and therefore advice work in certain areas of law (notably housing, education and community care) can involve challenging local authority practices and decision making. It is not unknown for local authorities to review the funding of advice providers who challenge them.
- 3.17 Local authority funding is often short term, frequently annual. This makes it difficult to plan over the medium term.

Other sources of funding

- 3.18 Advice agencies also receive funding from many other sources: central government, charitable foundations (including the Big Lottery Fund), and private donations (including pro bono services). Again, each funding stream is for different services with different priorities.
- 3.19 It may be helpful to give a few examples. The DTI has recently announced a programme worth £45 million over two years to deliver an increase in the availability of face-to-face debt advice. The ODPM funds second tier specialist advice via the National Homelessness Advice Service which aims to identify problems early and intervene with information and advice to avoid more complex legal disputes further on. Finally, the Big Lottery Fund has recently announced an “advice programme” worth £50 million over three years which will fund strategic work that is “additional” to that funded from statutory sources.
- 3.20 Most, but not all, of these “other” sources of funding are given for fixed term projects, often for two or three year periods. One of the challenges facing an advice agency manager is to “repackage” short term projects so that levels or types of service can be maintained. Again, the short term nature of this funding can cause organisational and financial problems.

4 Voluntary sector funding – background

- 4.1 It may be helpful for the Review Team to have an overview of government policy in relation to the funding of the wider voluntary sector for public service delivery. We are happy to provide more information if necessary.
- 4.2 Until about 1990, most advice agencies received “core funding” from local authorities to cover “overheads and core services” and this was supplemented by “project funding” from charitable foundations and other statutory sources – with project funding often priced on a marginal cost basis.
- 4.3 **It should be noted that the current LSC NfP contract was negotiated on the assumption that advice agencies would already be receiving core funding from a local authority.**
- 4.4 Over time, a growing number of local authorities have converted their core funding into contracts for services or into grants accompanied by a service level agreement. This has led advice agencies to realise that their projects were underfunded with insufficient allowance for overhead costs.
- 4.5 In response to this problem, in September 2002, the Treasury stated that “*Funders should recognise that it is legitimate for providers to include the relevant elements of*

*overheads in their cost estimates before providing a given service under service agreement or contract.*³

- 4.6 Subsequently, the Active Community Unit has published proposals⁴ that the voluntary sector compact should focus on the funding relationship between public sector bodies and the voluntary and community sector. They have suggested that public sector bodies should be encouraged to, for example, respect the independence of the sector, consult widely, minimise bureaucracy, implement multi-year funding models and, where projects are funded by grants, give a legitimate proportion of funding for overhead costs.
- 4.7 However, there is evidence that voluntary organisations have found it difficult to achieve full cost recovery. Most recently, in June 2005, the National Audit Office⁵ found that
- *There has been little progress on reimbursing the full costs of service delivery. .*
 - *There is still plenty of scope for moving to longer-term funding and away from annual awards*
 - *Funders have made better progress in streamlining application processes and moving to funding in advance of expenditure*
 - *There has been less success in reducing the burden of monitoring*
- 4.8 These findings certainly chime with anecdotal evidence gathered by ASA at training courses on *Costing your Services*, where several managers reported significant funder resistance to the principles of full cost recovery, to longer term funding and to fair risk-sharing as between funder and advice agency.
- 4.9 The overall picture therefore is of agencies trying to provide as comprehensive a service as possible by juggling often precarious funding streams.

5 Legal Aid funding

- 5.1 Over the past 10 years or so, legal aid funding has certainly increased the capacity of the NfP advice sector to provide specialist legal advice to their clients. Further, it is fair to say that the overall shape of the NfP contract (i.e. a block contract for the delivery of a certain number of hours of legal advice) has worked well.
- 5.2 Improvements in the procurement of legal aid will not solve all of the problems facing the advice sector.
- 5.3 Having said this, we believe that there are a number of improvements which would improve the efficiency and effectiveness of our legal aid work.
- 5.4 Firstly, we strongly urge a review of the bureaucracy involved in the administration of legal aid. The scheme is now extremely complex and the requirements very detailed. The scheme is not always well understood, even by LSC employees. The complexity is exacerbated by frequent tinkering with bureaucratic requirements, often in response to the latest budgetary pressures on the LSC.

³ *Treasury cross cutting review of the role of the voluntary sector in service delivery*, HM Treasury, 2002

⁴ *Strengthening Partnerships: Next Steps for Compact*, Home Office, March 2005

⁵ *Working with the Third Sector*, National Audit Office, 2005 – the quotations are taken from the Executive Summary

- 5.5 Secondly, and this follows from our first point, the civil legal aid scheme needs stable funding, so that services can be properly and strategically planned. It is our view that this cannot be achieved without ring-fencing the civil legal aid budget in order to protect it from consistent growth in criminal legal aid spending. Further, it is essential that the DCA is able to protect legal aid budgets from pressures caused by new legislation and changes in government administration.
- 5.6 A stable budget, properly managed, should enable the LSC to re-introduce annual RPI increases in the contract payments. NfP contract payments have not increased with inflation for three years in spite of the fact that agencies are contractually obliged to pay inflation increases in salaries and other costs. We have anecdotal evidence that this is now causing severe financial hardship to some organisations, who are managing by postponing spending on items such as replacing or repairing equipment such as computers or photocopiers and other expenditure. This must impact on their effectiveness. It is relevant here to point out that many agencies have suffered problems in recruiting and retaining staff. For example, Shelter reports that, after extensive advertising, they have been unable to recruit supervisor level staff in Cheshire, Manchester and Bournemouth. In relation to caseworker level posts they have had to reduce their requirements and put more resources into training and supervision. In Cumbria, they have completely failed to recruit a housing solicitor in spite of extensive advertising.
- 5.7 We believe that there needs to be a review of the contractual arrangements for the funding of initial advice work and for short cases. At the moment, the bureaucratic requirements can be disproportionate. We support the suggestion made in the recent LSC strategy document, *Making Legal Rights a Reality*, that the means test should be abolished for some areas of law – notably homelessness and welfare benefits. We have also proposed to the LSC that they should introduce different arrangements for short cases, perhaps applying to those lasting less than 2 hours.
- 5.8 We would welcome greater flexibility in contractual requirements, as long as this is not at the expense of quality. Specifically, we propose that the LSC should not prescribe the number of hours an agency should perform in each subject. Currently, for example, some contracts for 1,100 hours of legal work specify that 550 hours should be in welfare benefits and 550 hours in debt. On both a local and national level advice needs can change relatively quickly, for a variety of reasons, and we believe that it is important that agencies can respond to what clients need. We therefore propose that, subject to no diminution in quality thresholds in the relevant subjects, contracts should be “global” to enable agencies to respond to the needs of their clients.
- 5.9 The LSC have recently proposed to us that the NfP contract should be amended to introduce minimum case targets. This proposal is equivalent to introducing a standard fixed fee per case. We are extremely concerned about this proposal. The LSC has provided evidence⁶ to the networks which suggests that such a change would have a detrimental impact on agencies which have a higher than average proportion of clients from ethnic minorities, conduct more complex casework, achieve better outcomes, and are based in London. It is our view that we need significantly better understanding of cost drivers before moving to such a system. There is a danger that fixed fees introduce the incentive to cherry pick the easier cases. We also refer to research conducted on behalf of the LSC⁷ which found that “the shift to a contracted model with minimum volume requirements caused a significant diminution of quality”.

⁶ in a document called *Setting NfP case Targets, Summary of Analysis, September 2005*

⁷ R Moorhead, A Sherr et al: *Quality and Cost, TSO 2002, p 216*

- 5.10 Finally, some of our members have expressed significant concern about lack of consistency across LSC regional offices. We propose that the LSC should be encouraged to ensure that regional offices share information and learning about their procurement plans and practices.

Block contracting

- 5.11 The current NfP contract with the LSC is a block contract for a number of hours of advice. Whilst we have criticism of the over-bureaucratic nature of the contract, it has provided a degree of certainty and, importantly, has reduced cash-flow problems for relatively small providers.
- 5.12 Having said this, the current contract does not result in the fair sharing of risks between the LSC and advice agencies. In particular, many contracted agencies have experienced problems in delivering the hours requirements because of long term sickness and maternity leave, problems exacerbated by difficulties in recruiting suitably qualified staff. Increasingly, it is not possible to recruit advisers who can hit the ground running and agencies are having to invest scarce resources in additional induction, training and supervision. One option would be to consider introducing an insurance fund to cover such risks.

Price competition

- 5.13 The Advice Services Alliance is opposed to competitive tendering. We refer the Review Team to our response to the LSC consultation paper on the introduction of competitive tendering for criminal work in London. Our concerns can be summarised as follows.
- 5.14 We are concerned about the impact of price competition on quality. In the words of the risk assessment appended to the consultation document itself, there is a risk that *“suppliers [will] submit unrealistically low bids to win work which, in turn, may lead to a downward pressure on quality. In addition, suppliers who do not submit realistically priced bids may reduce the time spent on cases because they will no longer be paid for each hour worked”*.
- 5.15 Further, we are also concerned that price competition is part of a growing emphasis on competition between fewer and larger suppliers for the delivery of legal aid work. In our view, this contradicts previous attempts on the part of the LSC to promote co-operation and partnership between agencies, whether or not they hold contracts with the LSC, aimed at improving access to legal services. There is a concern that a presumption in favour of larger agencies threatens access for members of BMER (Black, Minority Ethnic and Refugee) groups as well as members of other minority groups, who often feel more comfortable approaching their own community organisations.
- 5.16 Finally it should be noted that in 2001, the authors of *Quality and Cost* concluded that whilst *“This pilot has not been set up as a test of the pros- and cons- of competitive tendering, [it] does provide some evidence relevant to the debate. The findings suggest that understandings of service specification and legal work quality are not sufficiently robust to withstand the commercial pressures of competitive tendering”*⁸. It is our view that this is still the case.

Lead suppliers

- 5.17 We are concerned about the proposal in *A Fairer Deal for Legal Aid* that contracts should be developed with lead suppliers, and consider that the impact of this

⁸ R Moorhead, A Sherr et al: *Quality and Cost*, TSO 2002, p xi

proposal on NfP contractors in particular needs significantly more thought. There are already good examples of consortium working in the NfP sector, most notably in the development of County Court Housing Possession Duty Schemes. However, these arrangements and relationships have been built up over time. We are concerned that a lead supplier system could result in an imbalance of power between agencies and could, over time, be detrimental to organisations with small contracts.

- 5.18 Further, we are concerned that this proposal would involve the transfer of transaction costs from the LSC to suppliers, but without adequate compensation for the additional costs and risks involved.
- 5.19 We need diversity of supply to reflect the diverse client base and to preserve client choice in order to deal with conflict of interest problems.

6 Quality

- 6.1 On the whole, we are pleased with recent developments in the assessment of the quality of legal aid services.
- 6.2 We support LSC developments in relation to peer review, where independent and experienced practitioners are asked to assess the quality of legal work. We consider that all methods of service delivery should be subject to peer review, including the expanded telephone advice services.
- 6.3 We also consider that the recently developed report format for peer reviews provides helpful feedback for agency managers, and should support improvements in the quality of work.
- 6.4 It is our view that all legal aid providers should be peer reviewed and that this method of assessment should be relied on for making any decision to terminate contracts on the grounds of quality. Whilst we appreciate that peer review is expensive, and understand why the LSC might want to explore proxy measures (such as looking at case outcomes), it is our view that proxy measures should be used only as an indicator for prioritising assessment by peer review and not as a measure in themselves.
- 6.5 We support LSC plans to spread learning from peer review more generally. However, this will need to be developed into accessible training if agencies are to get the full benefit.
- 6.6 We also support the principles behind the preferred supplier scheme and are pleased that it is to be rolled out to the NfP sector at the same time as private practice. We understand that the LSC will be publishing a consultation paper on the scheme soon, and we look forward to commenting on it. Our comments will be influenced by the fact that the scheme has been piloted with private practice contract holders, but not with NfP organisations. We anticipate that there will be different issues affecting the NfP sector and LSC will have to be flexible when starting the rollout.
- 6.7 As we have already stated, the sector is facing significant problems with recruiting skilled and experienced advisers. In conjunction with our members, workforce development issues need to be tackled if the quality of advice is to be maintained and improved. We have supported the LSC trainee solicitor scheme, and would welcome the development of a similar scheme for non-solicitor advisers.

7 Efficiency

- 7.1 As we have already stated, we consider that there is an opportunity to review the bureaucratic nature of the current legal aid scheme.
- 7.2 We consider that there is potential for efficiency benefits in reviewing the funding arrangements for initial diagnosis and advice. This work involves a complex range of interpersonal and legal skills and, if it is done well, can improve the accessibility of advice and reduce the number of referrals.
- 7.3 The Review may want to consider the efficiency benefits that flow from social policy work, which can provide long term and wide-ranging benefits for the wider community as well as preventing problems for individual clients. For example, working with local authorities to improve the administration of housing benefit can help to prevent homelessness and, in the long term, reduce legal aid expenditure on defending possession proceedings.
- 7.4 We consider that efficiency sometimes requires investment. As we have already outlined in section 3 above, most NfP agencies are managing as best they can with insufficient and short term funding and simply don't have the surpluses or security of funding to make necessary investments such as the introduction of webcam/video linkage equipment.
- 7.5 We would emphasise the importance of the advice networks (and ASA itself, through its Community Legal Service Support Project) in supporting the efficiency and quality of advice provision by NfP agencies. We understand that the NfP sector as a whole consistently achieves higher scores in peer review assessments. This is in part due to the training, advice and capacity building by infrastructure organisations and it is important that this is recognised and supported.
- 7.6 Finally, as we have outlined earlier, a more consistent approach to local authority funding of advice and a more co-ordinated approach by other government departments would significantly improve the efficiency of services. Although we appreciate that this is outside the strict terms of reference for this Review, we consider that these are issues that the Review could usefully highlight.