

The Advice Services Alliance's submission to the Constitutional Affairs Committee's inquiry into the implementation of the Carter Review

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1 About the Advice Services Alliance

- 1.1 The Advice Services Alliance (ASA) was established in 1980, and is the umbrella organisation for independent advice networks in the U.K.
- 1.2 Full membership of ASA is open to national networks of independent advice services in the U.K. Current full members are:

[Advice UK](#)

[Age Concern England](#)

[Citizens Advice](#)

[DIAL UK](#)

[Law Centres Federation](#)

[Scottish Association of Law Centres](#)

[Shelter](#)

[Shelter Cymru](#)

[Youth Access](#)

- 1.3 Our members represent over 2,000 organisations that provide a range of advice, legal and other services to members of the public. Most of these organisations offer services within a local area, but some of them are regional or national. They are largely funded through public sector grants and contracts, and charitable fundraising. There are currently 452 Not for Profit [NfP] agencies that have contracts with the Legal Services Commission [LSC]. With some limited exceptions, services are offered to 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 'social welfare law').
- 1.4 This submission is primarily concerned with the proposals in relation to social welfare law that are contained in the consultation paper entitled "Legal Aid: a sustainable future". We have published an initial response to these proposals.¹

¹ See *Legal aid: a sustainable future? – An initial response from the Advice Services Alliance*, available at: <http://www.asauk.org.uk/fileLibrary/pdf/Laidsus.pdf>

2 Recommendations

2.1 We would invite the committee to consider the following:

Recommendation 1

Any change in payment methods should be deferred until all preferred suppliers have been selected. This will allow for further research to be carried out into the determinants of case costs.

Recommendation 2

Further research and analysis needs to be carried out into the types of cases undertaken in social welfare law; the types of clients helped; the case mix of different providers and the factors that are linked to different case lengths. This should be a joint exercise between the LSC and representative bodies for the two sectors.

Recommendation 3

Alternatives to the existing proposals should be considered. These include: tailored fixed fees; higher fee levels; more categories of fees; graduated fees; more sophisticated escape mechanisms; and special provision for niche organisations.

Recommendation 4

There should be further research, a full debate and proper consultation before any changes are made to the allocation of funding for social welfare law between the regions.

3 Is there a need to modernize the procurement of legal aid?

- 3.1 In relation to social welfare law, we do not believe that changes in procurement methods are needed. Spending on social welfare law represents a small proportion of the total legal aid budget, and one in which costs are firmly under control, by virtue of the tailored fixed fee system for solicitors and the capped nature of NfP contracts. The number of acts of assistance has already increased significantly, according to the LSC, and action is already being taken by the LSC in relation to underperformance by some NfP suppliers.
- 3.2 The problems in relation to social welfare law are not to do with procurement methods, but lack of supply, the existence of 'advice deserts', and limitations on the scope of legal aid, particularly as regards representation at tribunals.

4 Is the timetable for implementation suggested in Lord Carter's report realistic?

- 4.1 We do not believe that the LSC has the capacity to implement wide-ranging changes to legal aid, the preferred supplier scheme and the CLS Strategy simultaneously. We do not believe that they have the peer review resources to keep to their own timetable in relation to preferred supplier, or the timetable proposed by Lord Carter.

We do not see how they can implement any such changes and at the same time reduce their administration costs by 30%, as suggested by Lord Carter.²

5 What benefits, impacts and disadvantages might result from implementation?

5.1 We believe that the introduction of fixed fees in social welfare law, as proposed by the LSC, would be seriously detrimental to the provision of advice and assistance in this area of law, given

- The variation in case costs/lengths that exists within these areas
- The fact that the proposed implementation is out of sync with the proposed implementation of the preferred supplier proposals
- The fact that the LSC does not seem to know what types of cases it wishes to “buy”
- The likely effects on the cases that suppliers will take on
- The likely effect on quality
- The likely effect on the overall provision of services to clients in social welfare law.

5.2 There are alternative payment methods that should be considered. These include: an extension of tailored fixed fees; higher fee levels; more categories of fees; graduated fees; more sophisticated escape mechanisms; and special provision for niche organisations.³

5.3 Any change in payment methods should be deferred until all preferred suppliers have been selected. This will allow for further research to be carried out into the determinants of case costs.

The variation in case lengths

5.4 There is huge variation in the type and extent of work done by providers in social welfare law. Within each category of law there are wide differences in the tailored fixed fees by which solicitors are currently paid (which are reflected in the regional fees proposed) and in the average case lengths of NfP organisations.

5.5 Our analysis of NfP case lengths,⁴ based on data collected by the LSC, suggests that most of the differences are due to variations in

- The types of cases
- The types of clients
- The extent of work done on cases
- The location of suppliers

5.6 Our analysis shows that

- Certain types of cases take longer than others (e.g. multiple debt cases in debt, appeals in welfare benefits, unfair dismissal and discrimination cases in employment)

² Carter report p.7

³ See *Legal aid: a sustainable future? – An initial response from the Advice Services Alliance* pp.9-11

⁴ Available at <http://www.asauk.org.uk/fileLibrary/pdf/cslgthnfpcon.pdf>

- Cases for certain types of clients take longer (with particular reference to clients' ethnicity and, sometimes, disability status)
- There is a correlation between the time spent on a case and the stage at which the case is concluded (as between 'first meeting', 'further work', 'putting case for client' and 'representation at court/tribunal')
- The achievement of particular results for clients is associated with longer case times.

The 'what, who and how'

- 5.7 The "sustainable future" paper suggests that the CLS Strategy and Preferred Supplier proposals set out "**what** services we intend to buy" and "**who** we will buy these services from", while the paper itself sets out "**how** we will pay for those services."⁵
- 5.8 **Who:** the Preferred Supplier proposals state that the LSC wishes to contract with suppliers whose quality has been demonstrated by peer review scores of 1 or 2.
- 5.9 **What:** the CLS strategy emphasises the importance of delivering services in social welfare law, and in particular the "core" subjects of community care, debt, employment, housing and welfare benefits. It does not however say what types of cases within those categories are seen as priorities. There is a wide range of types of cases within each category, which helps to explain why there is such diversity in the average case lengths of different suppliers. The only indication of priorities provided has been the higher payment rates introduced for certain possession and homelessness cases, which have been carried over into the fixed fee proposals.
- 5.10 **How:** the present proposals seek to change 'how' services are paid for before the LSC has established 'who' the preferred suppliers will be, or 'what' it wishes to buy.
- 5.11 There are two obvious dangers involved here.
- 5.12 Firstly, fixed fees could influence the services provided by suppliers, before the LSC has decided what it really wants to buy and who it wants to buy services from. Although it may be possible to retrieve this situation later, the LSC may by then have lost some of the suppliers best able to meet the LSC's priorities.
- 5.13 Secondly, the proposals could affect the quality of supply before the preferred supplier process has established a benchmark.
- 5.14 These problems arise because the proposals are likely to have a direct impact on the types of cases taken on and the quality of services provided.

Case mix

- 5.15 Where suppliers have average case lengths or costs that are higher than the value of the fixed fee, the incentive will be to reduce their average case lengths or costs. This is likely to involve
- Looking for the easy / short cases and the easy clients and/or
 - Avoiding long, difficult and complex cases and clients.
- 5.16 As Lord Carter says: "If the LSC targets only case volumes, there is a risk that some suppliers may not wish to pursue complex cases."⁶

⁵ *Legal Aid: a sustainable future* p.21

⁶ Carter report p.85

- 5.17 Where suppliers have average case lengths or costs that are equivalent to or lower than the value of the fixed fee, the incentive will be to maintain their previous case mix, and possibly to look for more shorter cases in order to increase the profitability of the work done. There will be no incentive to widen their case mix to take on a significant number of cases that exceed the value of the fixed fee.
- 5.18 Our analysis of NfP case lengths shows that there are clear differences in case lengths or costs between different types of cases within each category. These are not accidental. In employment, for example, discrimination cases take much longer than other types of cases. In welfare benefits, benefit appeals take significantly longer than other types of cases. Once fixed fees are introduced, these differences become much more important to suppliers.
- 5.19 The LSC has suggested that it will be able to detect organisations that are doing more easy/short cases either by peer review or by other monitoring procedures. We do not see how peer review will be able to detect this since this is an issue to do with case mix, not quality.
- 5.20 The LSC has stated that they will monitor case mix and outcomes to ensure that suppliers continue to provide an appropriate service.⁷ We do not believe that the LSC's present reporting systems are capable of doing this. Even if they are, we are not clear what the LSC can do about it, apart from imposing requirements about case mix. This however assumes that the LSC has decided what its priorities are within each category of law. At the moment we have seen no evidence of this.

Quality

- 5.21 Although the CLS Strategy and the Preferred Supplier proposals set out whom the LSC would like to contract with in the future, the LSC is actually proposing to change the 'how' before they change the 'who'. This means that they risk foregoing the quality assurance that should be provided by the preferred supplier scheme.
- 5.22 Shorter or simpler cases can of course be done well. They may even be done more quickly by high quality suppliers.
- 5.23 There is however a potential conflict between fixed fees and quality. This was demonstrated by the research carried out for the LSC and reported as *Quality and Cost*.⁸ The research found that solicitors funded to provide a fixed number of matter starts for a fixed fee performed worse than others in the three areas of quality (as measured by peer review), client satisfaction and outcomes. We set out as an appendix to this paper a summary of the relevant findings of this research.
- 5.24 Where suppliers have case lengths or costs which are higher than the value represented by the fixed fee, caseworkers are likely to be under pressure to handle the longer cases more quickly. This is likely to involve cutting corners, which is likely to be to the detriment of the client.
- 5.25 There is a further risk that suppliers will limit the amount of work they do on cases that are taken on, which will have a direct impact on the quality of services provided.
- 5.26 If these proposals are implemented, there is a real risk that the LSC will drive out some good suppliers, while keeping in high volume suppliers who may not be providing quality services.

⁷ Provider Q&A: *Legal Aid: a sustainable future* Civil and Family Legal Aid p.2

⁸ Moorhead et al *Quality and Cost: Final Report of the Contracting of Civil, Non-Family Advice and Assistance Pilot* (2001)

The overall provision of services in social welfare law

- 5.27 The need for suppliers to meet case targets is likely to have significant effects on the ways in which social welfare law cases are dealt with both within and outside organisations that have contracts with the LSC.
- 5.28 Where suppliers have higher than average case costs they may be forced to do a significant number of short cases in order to meet their targets. This is likely to distort any rational division of roles as between different types of service. Specialist agencies may have to take on work that has previously been carried out by community groups and other generalist advice agencies. The balance between face-to-face and telephone advice services could also be affected. Some cases that could be dealt with over the telephone are likely to be directed towards face-to-face advice in order to help meet the targets of providers.
- 5.29 The need to meet targets is also likely to threaten co-operation between face-to-face suppliers, referral patterns and referrals themselves, as providers hold on to short cases and try to refer longer or more complex cases.
- 5.30 The need to meet targets threatens the rational use of specialists within agencies that provide both generalist and specialist services. Specialists are likely to spend more time on shorter or simple cases in order to achieve their case targets.
- 5.31 The need to meet targets is also likely to distort the relationship between specialist agencies and other agencies and community organisations. Many cases which would presently be referred to specialist organisations may be rejected, and have to be dealt with by non-specialist agencies and community groups which may not have the necessary expertise.
- 5.32 One of the LSC's aims in proposing fixed fees for social welfare law is to increase the number of clients who are helped. We believe that the proposals are likely to have this effect, as far as some providers are concerned, since they will be looking to take on more short/easy cases. At the same time however, there is likely to be a reduction in the number of suppliers, as many will withdraw from providing legal aid services rather than continue under the proposed fixed fees. Even if, overall, there is an increase in the number of clients helped, this is likely to be at the expense of clients who have more difficult or longer cases and need help the most.

6 What impact will the proposals have on different communities (such as Black, Minority Ethnic and rural communities)?

- 6.1 We have noted already that the need for suppliers to meet their targets may lead them to seek to avoid long, difficult and complex cases and clients.
- 6.2 This is likely to affect a disproportionate number of clients who
- have a disability
 - are members of BME communities
 - need an interpreter
- 6.3 The *Causes of Action* research found that ethnicity was particularly influential in predicting problems relating to discrimination, immigration, and unsafe or unsatisfactory rented housing.⁹ Discrimination cases were found to take much longer than other types of employment cases in our analysis of NfP case lengths. The same

⁹ *Causes of Action*, second edition p.37

is likely to be true for non-employment discrimination cases. Problems with unsafe or unsatisfactory rented housing are also likely to be more time consuming than other housing cases.¹⁰

- 6.4 The proposals in relation to immigration and asylum work will directly affect members of BME or refugee communities. We understand that the Immigration Law Practitioners Association will be providing evidence to the committee and we defer to their expertise in this area. We believe that the proposals for immigration and asylum work are likely to have a direct effect on the quality and quantity of supply in this area.
- 6.5 Fixed fees are most suitable for large organisations with a large and mixed intake of cases and clients. That description does not match many organisations, and especially NfP organisations, which have a high proportion of clients of diverse backgrounds.
- 6.6 The problem would seem to be particularly acute in London. Our analysis of NfP cases in 2004-05 revealed that the proportion of clients who were classified as other than White British was 64% in debt, 73% in housing, 74% in benefits and 75% in employment. The overall effects of fixed fees, in terms of case mix and quality, are likely to be the same for NfPs as for solicitors' firms. In London at least it seems that it will be largely non-White British clients who will suffer as a result.
- 6.7 A further problem concerns the recommendation by Lord Carter that the allocation of social welfare law funding should be based on a formula using data from means tested benefits e.g. income support as a proxy for legal aid eligibility.¹¹ Our previous analysis suggested that the most significant effect of implementing such a proposal would be a reduction in the allocation of funding to London of approximately 24%.¹² We have set out elsewhere some of the reasons why we believe that such a change cannot be justified.¹³ What is clear however is that such a change would have an indirect discriminatory impact given the high proportion of members of BME communities in London.¹⁴
- 6.8 It is our view that no action should be taken by the LSC to implement any redistribution of the legal help budget along the lines proposed by Lord Carter without further research, full debate and proper consultation.

7 What impact will the recommendations have on legal aid providers?

- 7.1 From public statements that we have heard and the results of the recent surveys conducted by the Law Society, we believe that a significant number of solicitors firms will give up legal aid work in one or more categories of law, if these proposals are implemented.
- 7.2 In a Draft Impact Assessment published on the DCA website it is suggested that up to 92% of NfPs would lose income, representing up to 50% of the sector's income, if

¹⁰ Cases classed as 'disrepair' were the longest type of housing cases in our analysis of NfP case lengths in 2004-05.

¹¹ Carter report p.80; see also recommendation 4.29

¹² Adam Griffith, *Regional Planning and its Limitations* p.67

¹³ *Legal aid: a sustainable future? – An initial response from the Advice Services Alliance* pp.11-12

¹⁴ According to the 2001 Census: 59.8% of the London population is White: British; 71.2% is White; 28.8% are from minority ethnic groups. See *Focus on London 2003*, table 2.12.

NfPs do not increase the numbers of cases taken on.¹⁵ While many NfPs are likely to be able to increase the numbers of cases taken on, we would expect many to suffer significant reductions in income.

8 How will the proposals affect firms of differing size, structure and practitioner mix?

- 8.1 We would expect the proposals to affect firms of varying sizes in different ways. Smaller firms may find it harder to achieve a sufficiently varied case mix to enable them to benefit from the “swings and roundabouts” effects that are claimed to justify fixed fees. Niche or specialist firms may find it particularly difficult to continue. Larger firms may find it easier to achieve a varied case mix, but, by virtue of their size, may feel more exposed, and less willing to take the risks involved of continuing in areas that seem particularly likely to be unprofitable.

9 Will the measures proposed promote the provision of high quality advice and support the effective and efficient operation of the Justice System?

- 9.1 We believe that the overall effect of fixed fees in social welfare law will be to reduce the provision of high quality services and access to the justice system. We refer to our analysis above on the likely impact of fixed fees on
- Case mix
 - Quality
 - The overall provision of services in social welfare law.

10 Supplementary note on Quality and Cost¹⁶

- 10.1 The research used four experimental groups. The first three groups were solicitors and the fourth group was made up of NfP agencies. Group 1 were paid a piece rate for hours worked, Group 2 were paid a certain amount of money and were told to do as much advice and assistance work as possible with that amount, Group 3 were given a fixed amount of money and were asked to do a certain number of cases, Group 4 were paid for a certain number of hours irrespective of the number of cases.
- 10.2 The amount of money provided bore a strong relationship to the amounts earned in previous years by those firms. The number of cases for the third group bore a strong relationship to the number of cases dealt with by those firms in previous years.
- 10.3 The researchers peer reviewed the work of all four groups and compared the results. They found that:

“Group 3 was significantly poorer at giving advice at the right time than Group 1 (about 10% of cases were poorer). They were also less likely to incur disbursements where disbursements were actually appropriate than Groups 1 and 2. Group 3’s failure to carry out other work was felt to be inappropriate in a greater proportion of cases than Group 2. This may provide an indication of how the constraints of

¹⁵ Draft Impact Assessment para 86

¹⁶ Moorhead et al *Quality and Cost: Final Report of the Contracting of Civil, Non-Family Advice and Assistance Pilot* (2001)

*contracting work against Group 3; discouraging disbursements and the carrying out of appropriate work.”*¹⁷

10.4 As part of the research, clients were asked about their levels of satisfaction:

“Group 3 clients were significantly more likely to report that their case was taking too long (51% compared with 34% in Group 1 and 39% in Group 2).

*Group 2 received higher overall ratings of satisfaction than Group 3. Group 2 clients rated their contractees as excellent in 51% of cases compared with 36% of cases in Group 3. Group 3 received ratings of very good in 32% of cases compared with 26% cases in Group 2. However, cases rated as excellent or very good showed Group 2 as receiving positive assessments in 77% of cases compared with 69% of cases in Group 3.”*¹⁸

10.5 The study also compared case endpoints. Group 3 had the largest percentage of matters that ended with the outcome unknown to the adviser (39% compared with 32% for Group 1 and 30% for Group 2). Group 2’s clients were said to be better able to plan and/or manage their affairs as a result of legal intervention most frequently (26%), Group 3’s client’s least often (16%). The report concludes:

“Group 3 performed more poorly on nearly all outcome indicators than the other two solicitor groups”.

10.6 Therefore, in the three areas of peer review, client satisfaction and endpoints, the experimental group funded to provide a fixed number of matter starts for a fixed fee performed worst.

10.7 The overall conclusion to the report states:

*“Contracting as structured through Group 3 in the solicitors sector has had a negative effect on quality when compared with the control (Group 1) and the group most similar to NFPs (Group 2). Part of the explanation for this is the combination of volume requirements with fixed prices for blocks of work.”*¹⁹

¹⁷ Ibid p.112

¹⁸ Ibid p.133

¹⁹ Ibid p.227