

Carter, the future of legal aid and the NfP sector

Table of Contents

1	Introduction	1
2	Key themes of the Carter report.....	1
3	The Carter report and civil legal aid	2
4	Fixed fees – “Legal Aid: a sustainable future”	3
5	Immigration and asylum	5
6	Mental health	5
7	Certificated work	6
8	Proposals for the new unified contract	6
9	Further action	7
10	Further support and guidance	7
	Appendix – regional fees.....	8

1 Introduction

- 1.1 This briefing summarises the key proposals contained in the latest reports published on the future of legal aid. It is not a substitute for reading the reports themselves. ASA's commentary on these reports will form the subject of a further briefing, which will follow shortly.
- 1.2 There are two key documents
- "Legal Aid – a market-based approach to reform" – the final report of Lord Carter's Review of Legal Aid Procurement [the Carter report]
 - "Legal Aid: a sustainable future" – a consultation paper published by the Legal Services Commission and the Department for Constitutional Affairs [the "sustainable future" paper]
- 1.3 The Carter report can be found at <http://www.legalaidprocurementreview.gov.uk/publications.htm>
- 1.4 "Legal Aid: a sustainable future" [and a draft impact assessment] can be found at <http://www.dca.gov.uk/consult/legal-aidsf/sustainable-future.htm>
- 1.5 These documents propose massive changes in the ways in which legal aid services are to be bought and paid for by the LSC. They cover criminal, family and civil work. They link directly to changes already proposed by the LSC in relation to "preferred suppliers" and the CLS Strategy. They also set out some key proposals for the new unified contract, which is due to replace the existing solicitors' and NfP contracts from April 2007.
- 1.6 The Carter report outlines the key principles for the whole of legal aid, and makes proposals in relation to criminal work. The "sustainable future" paper sets out detailed proposals for implementing the changes to criminal work, together with proposals for changes in relation to civil and family work. The "sustainable future" paper is a consultation paper, with a deadline for responses of 12 October 2006.

2 Key themes of the Carter report

- 2.1 The reforms are "directed towards achieving a market based outcome. A healthy legal services market should be driven by best value competition based on quality, capacity and price."¹
- 2.2 There should be "a wholesale move towards fixed pricing." This "rewards efficiency and suppliers who can deliver increased volumes of work. However pricing should be graduated for more complex work so that cases genuinely requiring more expertise and effort are priced fairly."²
- 2.3 There should be "a minimum standard of quality for all legal aid practitioners assured by peer review." The LSC should arrange a peer review of all suppliers seeking a place in the new market between July 2006 and April 2009.³
- 2.4 There should be a transfer of all quality assurance for solicitors from the LSC to the Law Society by April 2009.⁴ NfP agencies that have legal aid contracts but do not

¹ Carter Report p.3

² Ibid p.3-4

³ Ibid p.3 and Recommendation 3.1

employ a qualified solicitor “will need to consider how best they fall under the new quality arrangements, and whether they should develop their own advice standards (based on peer review).”⁵

- 2.5 There needs to be a “managed transition” and a “gradual and targeted introduction of best value tendering.”⁶
- 2.6 Grant programmes should be established and administered by the Law Society to provide support for firms that need to restructure and to improve their IT.⁷
- 2.7 A “steady state market” for civil and family services should be achieved by 2011.⁸

3 The Carter report and civil legal aid

- 3.1 As far as civil legal aid is concerned, the key points of the Carter report are:
- An endorsement of the LSC’s proposals for Community Legal Advice Centres and Networks [CLACs and CLANs]
 - An endorsement of the LSC’s proposal to introduce fixed fees for legal help in all social welfare categories of law from April 2007.
- 3.2 As far as CLACs and CLANs are concerned, the Carter report says that
- CLACs should be allowed to develop in a pragmatic and flexible fashion that best suits their potential clients.⁹
 - The LSC should carefully evaluate the impact of the transition in the first wave of CLACS from 2007, so that lessons can be learnt for later waves from 2008-09 onwards.¹⁰
 - CLANs should be developed in a pragmatic and flexible fashion that makes sense locally, building on informal networks that already exist in some areas.¹¹
 - Options for CLANs should be tested out in different areas to identify which approach works best in each of a variety of circumstances.¹²
 - Practitioner groups and the advice sector should be involved in the development of the role of co-ordinators within CLANs.¹³
- 3.3 Fixed fees for legal help should be “sustainable within the overall legal aid budget and consistent with maintaining a good quality supplier base.”¹⁴
- 3.4 NfP suppliers have higher average costs than solicitors in some categories of cases but not others. This “may reflect a different mix of cases or different degrees of efficiency at dealing with them.” There should be “scope for greater efficiency” in the way that NfP organisations deliver legal advice services.¹⁵

⁴ Recommendation 5.1

⁵ Ibid p.96

⁶ Ibid p.55

⁷ Recommendations 5.8 and 5.9

⁸ Ibid p.60

⁹ Recommendation 3.5

¹⁰ Recommendation 3.6

¹¹ Recommendations 3.7 and 4.28

¹² Recommendation 4.27

¹³ Ibid pp.87-88

¹⁴ Recommendation 4.24

¹⁵ Ibid p. 45

- 3.5 The report endorses the CLS strategy in many respects, proposing that
- Firms and NfP agencies should be encouraged to expand into other categories of civil and family law.¹⁶
 - Contracts in social welfare law [SWL] will cover a local area (top tier local authority) either as sole SWL supplier or as part of a local network.¹⁷
 - “Categories of law including debt, housing and benefits will increasingly be seen as part of a single packaged social welfare service.”¹⁸
 - “The social welfare categories of law should form the core service.”¹⁹
 - All preferred suppliers “should be able to offer a service that ranges from basic advice to court representation in complex cases.”²⁰
- 3.6 2010-11 should see
- The completion of the move to CLACs and CLANs
 - A move to best value tendering for new civil contracts
 - Contracts being tendered on quality, capacity and price.²¹
- 3.7 The allocation of SWL funding between the regions “should be based on a formula using data from means tested benefits e.g. income support as a proxy for legal aid eligibility.”²² The process of moving to indicative budget allocations for SWL through deprivation data “should be managed carefully to minimise any disruption to services.”²³

4 Fixed fees – “Legal Aid: a sustainable future”

- 4.1 The details of the fixed fee proposals are set out in the “sustainable future” paper.
- 4.2 The paper proposes a system of standard fees for the main categories of social welfare law. It states that the fees proposed “have been based on claims and TFF [tailored fixed fee] payments in 2005/06 but exclude claims that we would consider ‘exceptional’”.²⁴
- 4.3 The paper states that the LSC “would prefer to move to a national fee”, which would allow them to re-allocate funds, but recognises the difficulties this would cause for providers in London.
- 4.4 As an alternative, regional fees could be introduced as an interim step to lessen the impact, although the LSC would work towards the introduction of national fees or fees determined by competition by 2010.²⁵
- 4.5 The paper sets out proposed fees for each category of law on the basis of either national fees or regional fees.

¹⁶ Recommendation 3.4

¹⁷ Ibid p.60

¹⁸ Ibid p.63

¹⁹ Ibid

²⁰ Ibid p.65

²¹ Ibid pp.68, 60

²² Ibid p.88

²³ Recommendation 4.29

²⁴ Legal Aid: a sustainable future p.28

²⁵ Ibid

4.6 The table below sets out the proposed national fees for the main categories of social welfare law that are covered by NfP contracts, together with the equivalent number of hours per case on the assumption that NfP contracts in general cost £50 per hour. The table also sets out the NfP average case lengths for cases that were reported during 2004-05.²⁶

4.7 The paper proposes two rates for housing cases. The higher rate is for homelessness and possession cases that presently qualify for higher payment rates within solicitor contracts. The NfP average case lengths do not however distinguish between the two types of housing cases.

	Debt	Employment	Housing	Homeless	Welfare benefits
Proposed national fee	£127	£229	£163	£188	£143
Equivalent in hours	2.5	4.6	3.3	3.8	2.9
NfP average 2004-05	5.2	7.4	3.9	3.9	4.6

4.8 The paper proposes national fees for three other categories in which there are a few NfP contracts:

- Community care: £292 – equivalent to 5.8 hours
- Consumer: £156 – equivalent to 3.1 hours
- Education: £293 – equivalent to 5.9 hours.

4.9 The appendix to this briefing compares the proposed regional fees to NfP regional average case times in 2004-05.

4.10 The paper proposes that “exceptional cases” be dealt with separately. Cases would be treated as exceptional if the value of the work, calculated on an hourly basis exceeds four times the value of the fixed fee. All cases claimed as exceptional would be subject to cost assessment, and paid at hourly rates as specified by the contract.²⁷

4.11 The paper suggests that the fee for tolerance cases should be 15% less than the appropriate fee for cases conducted under a controlled work contract, and that the concept of tolerance would eventually disappear.²⁸

4.12 The paper states that the LSC will explore the development of transitional arrangements for NfP providers. Any such arrangement will need to take into account the existence of work in progress and the impact that this has on an organisation’s ability to take on new cases. The paper suggests that one possible scheme would be to

- Continue to base payments on the current funding formula from April 2007
- Introduce requirements for the numbers of cases to be started by dividing the amount of funding by the relevant standard fee

²⁶ See our report “Case Lengths under NfP Contracts”, at http://www.asauk.org.uk/go/Section_1.html
We have asked the LSC for the equivalent figures for 2005-06 but have not received these yet.

²⁷ Legal Aid: a sustainable future pp.73-74

²⁸ Ibid p.30

- Accept some factors as good reason for a certain level of underperformance, including the fact that the agency is dealing with exceptional cases, as defined above.²⁹

4.13 The possible implications of the proposals for the NfP sector are set out in the Draft Impact Assessment which accompanies the “sustainable future” paper:

“ We have modelled the impact of NFP organisations moving to the TFF Replacement Scheme if fees are set on a national basis and our preliminary analysis suggests that if NfPs do not increase the numbers of matters undertaken, 92% will experience significant decreases in their publicly funded income, and the total spend with the sector in the categories of work covered will reduce by 50% (£21 million).”³⁰

5 Immigration and asylum

5.1 The “sustainable future” paper proposes separate arrangements for immigration and asylum work, which are set out in Chapter 8 of the paper. This should be read in full by the relevant staff [managers and caseworkers] in agencies doing immigration work.

5.2 The key points are

- The introduction of a graduated fee scheme for all immigration cases and for “mainstream” asylum cases
- Separate proposals in relation to
 - Services at the Asylum Screening Unit
 - Services for clients in Detention Centres
 - Services to unaccompanied asylum seeking children
- Transitional arrangements for NfP suppliers.

5.3 The paper also outlines a “supply strategy” consisting of

- A small network of national and possibly regional providers, acting as the backbone of the service
- Supplemented by smaller local providers from private practice, Law Centres and the NfP sector, which are based predominantly near induction centres, hearing centres, detention centres, removal centres and in areas of high dispersal, and are able to provide outreach services where required.³¹

6 Mental health

6.1 The “sustainable future” paper proposes separate arrangements for mental health work, which are set out in Chapter 9 of the paper. This should be read in full by the relevant staff [managers and caseworkers] in agencies doing mental health work.

6.2 The key points are

- The introduction of a new graduated fee scheme linked to a proposed new contract specification

²⁹ Ibid p.31

³⁰ Draft Impact Assessment para 86

³¹ Legal Aid: a sustainable future p.64

- An intention to move towards commissioning mental health services in a more strategic way, letting contracts linked to specific Mental Health Trusts
- Three options for paying for work on behalf of clients detained through criminal proceedings
- Transitional arrangements for NfP suppliers if necessary.

7 Certificated work

- 7.1 The papers do not propose any immediate change to payment methods in relation to civil legal representation. The Carter report recognises that it is difficult to produce a standard fee regime that would work effectively for all categories, although it suggests that further consideration should be given to the possibility of separate standard fee regimes for representation in housing and clinical negligence.³²
- 7.2 The report recommends that
- The LSC should consider whether the current differential between legal help and representation rates should be removed³³
 - The DCA and LSC should consider how various alternatives such as a “success fee” might impact upon the current scheme.³⁴
- 7.3 The “sustainable future” paper announces an intention to introduce standard or graduated fees, where appropriate, for all legal aid work. It states that there will be a consultation on the further extension of such schemes with the intention that new schemes should be in place by 2009.³⁵

8 Proposals for the new unified contract

- 8.1 The “sustainable future” paper sets out a number of proposals for inclusion in the new unified contract, which is proposed to replace the existing Solicitors’ and NfP contracts from April 2007. These are set out in Chapter 11 of the paper, which should be read by anyone responsible for NfP contracts.
- 8.2 The key proposals are as follows:
- The introduction of a minimum fund take, either £25,000 or £50,000 per annum as a prerequisite for obtaining or keeping a contract
 - Providers with outstanding critical quality concerns will not automatically be offered a new contract
 - Immigration suppliers who fail to meet specified criteria in respect of their appeals related work will be offered conditional contracts
 - A required quality standard consisting of a peer review score of 1 or 2
 - Power to terminate the contract, on three months notice, in order to introduce Lord Carter’s reforms or CLACs and CLANs
 - Proposals on self-monitoring, approved personnel, and an open book relationship
 - The removal of level 1 work

³² Carter Report pp.88-89

³³ Recommendation 4.25

³⁴ Recommendation 4.30

³⁵ Legal Aid: as sustainable future p.23

- Changes in relation to sanctions, access and reviews
- Providers must be able to communicate with the LSC electronically
- The LSC will be able to specify the technical functionality of providers' case management systems etc
- The LSC will be able to require the completion of a specified number of Matter Starts (advice and assistance cases), volume of work (by value or otherwise) and mixture of cases.

9 Further action

- 9.1 ASA intends to publish a further bulletin in the near future, setting out our initial response to these proposals.
- 9.2 Agencies are urged to contact their advice networks if they have any concerns about these proposals.
- 9.3 Agencies are urged to reply to the "sustainable future" consultation paper as soon as possible and in any event before 12 October 2006, and to forward a copy of their response to their advice network.

10 Further support and guidance

- 10.1 If you need guidance on any of the issues covered in this email briefing please contact the CLS Support consultancy service on **0870 7700 447 Monday – Friday, 1pm - 4pm** or email cls.support@asauk.org.uk at any time.

Appendix – regional fees

1. The table below sets out the regional fees proposed in the main categories of social welfare law that are covered by NfP contracts. It sets out the equivalent in hours on the assumption that NfP contracts cost £50 per hour. It also sets out the NfP regional average case times in each category in 2004-05.

2. The “sustainable future” paper proposes two rates for housing cases. The higher rate is for homelessness and possession cases that presently qualify for higher payment rates within solicitor contracts. The NfP average case lengths do not distinguish between the two types of housing cases.

3. The “sustainable future” paper combines the Merseyside and North West regions.

4. The Nfp average 2004-05 times are converted from the figures given in minutes in our report “Case Lengths Under Nfp Contracts”.

	Debt	Employment	Housing	Homeless	Welfare benefits
West Midlands	£141	£197	£166	£191	£159
Equivalent in hours	2.8	3.9	3.3	3.8	3.2
Nfp average 2004-05	5.0	4.9	4.6	4.6	5.1
South East	£98	£161	£91	£104	£96
Equivalent in hours	2.0	3.2	1.8	2.1	1.9
Nfp average 2004-05	5.8	7.5	5.1	5.1	5.4
South West	£127	£256	£150	£172	£142
Equivalent in hours	2.5	5.1	3.0	3.4	2.8
Nfp average 2004-05	4.5	6.9	3.0	3.0	4.1
East	£136	£245	£148	£170	£143
Equivalent in hours	2.7	4.9	3.0	3.4	2.9
Nfp average 2004-05	6.0	7.8	3.3	3.3	5.4
Wales	£126	£113	£141	£162	£127
Equivalent in hours	2.5	2.3	2.8	3.2	2.5
Nfp average 2004-05	5.9	6.1	3.0	3.0	4.5
York & Humber	£134	£240	£134	£154	£134
Equivalent in hours	2.7	4.8	2.7	3.1	2.7
Nfp average 2004-05	5.0	8.7	2.4	2.4	3.4

Merseyside	£117	£223	£124	£142	£94
Equivalent in hours	2.3	4.5	2.5	2.8	1.9
Nfp average 2004-05	4.7	7.9	5.3	5.3	3.5
North West	£117	£223	£124	£142	£94
Equivalent in hours	2.3	4.5	2.5	2.8	1.9
Nfp average 2004-05	5.0	6.3	3.9	3.9	4.0
London	£189	£453	£206	£237	£223
Equivalent in hours	3.8	9.1	4.1	4.7	4.7
Nfp average 2004-05	5.5	10.1	5.6	5.6	6.0
North East	£126	£236	£120	£138	£138
Equivalent in hours	2.5	4.7	2.4	2.8	2.8
Nfp average 2004-05	5.2	5.5	4.1	4.1	5.0
East Midlands	£100	£145	£124	£143	£129
Equivalent in hours	2.0	2.9	2.5	2.9	2.6
Nfp average 2004-05	5.3	5.7	4.4	4.4	4.8
South	£122	£187	£147	£169	£185
Equivalent in hours	2.4	3.7	2.9	3.4	3.7
Nfp average 2004-05	6.6	8.3	3.6	3.6	4.7