

LEGAL AID – AND WHERE DO WE GO FROM HERE?

One of the difficulties surrounding the forthcoming legal aid reforms has been the speed with which they are being introduced, another, and perhaps more worrying, is the contradictory messages that have been coming out of the various agencies concerned with the reforms.

To start at the beginning:

Legal aid – a market-based approach to reform, to give the Carter Report its full title, was delivered to Lord Falconer of Thornton in July 2006. In the August issue of the Legal Services Commission *Focus Magazine* it was noted that the report made 62 recommendations and the fully-costed proposals should deliver efficiencies within three years across the criminal legal aid budget of £100 million against spend in 2005-6. This would allow a greater proportion of the overall legal aid budget to go to civil and family work.

For this was the problem in a nutshell, criminal legal aid was taking up a disproportionate amount of the legal aid budget and the Carter Reforms would redress the balance by putting more into the civil and family budget, without increasing the overall budget.

But on the whole the legal profession took a more pessimistic view of what Carter would mean. As many as 800 solicitors' firms were said to be set to go out of business if Carter was implemented in its proposed format. Then, on October 14, 2006, it appeared that we were all saved! *The Times* on that day ran the headline "Lawyers win a rethink on reforms on legal aid." The article assured us that the Lord Chancellor had been forced into retreat yesterday over plans to overhaul the £2 billion-a-year legal aid scheme in the face of mounting opposition from solicitors. Lord Falconer of Thornton announced that he was in effect scrapping controversial plans for fixed fees instead of hourly rates in family and civil legal aid cases pending a complete rethink

Which only goes to prove that you should never believe everything that you read in the newspapers!

What actually happened was that Lord Falconer had made a speech to the Law Society Conference on October 13, 2006 in which he had said, amongst other things, that free access to justice for those who need legal aid is as integral to the welfare state as the NHS or state education. Without legal aid for anyone charged with a significant criminal offence the criminal justice system could not function, and could not function fairly. It was essential that everyone could receive representation, and choose their representation as well. Without legal aid for family law, critical decisions around, for example, whether or not a child should be taken into care, could not be properly made. Without legal aid the most socially excluded would not receive advice and support for welfare, debt, relationship and housing problems.

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But – and there is always a but – there was no extra money for public expenditure. Lord Falconer stated that he believed the Carter Reforms were an invaluable step towards providing equality in the justice system and he was committed to making them work. He disagreed that hundreds of law firms would be driven out of practice. He maintained that a market-based approach would lead to increased efficiencies. Fixing prices rewards efficiency. Efficient suppliers would be able to deliver and receive increased volumes of work. Legal Aid was not underfunded. Profitability cannot and will not come about through dipping into the public purse yet further.

The Legal Services Commission supported this view. A comment on its web site on November 3, 2006 stated that the Lord Chancellor and the LSC remained committed to introducing a fixed or graduated fee structure for both civil and crime work. So it appeared that despite the concerns of the profession, the legal aid reforms were going to go ahead, and at breakneck speed.

There were concessions. It was conceded that the proposals for family fees required further consideration, but by and large the mantra was the same: legal aid is not underfunded – there is no bottomless pit – there are finite resources for legal aid – we are committed to the fixed and graduated fee structure. The profession continued to oppose the reforms, and in all there were five judicial review challenges to the legal aid reform programme.

And the confusion continued. The Law Society web site on July 27, 2007 carried the headline "Law Society secures court win on legal aid," whilst the LSC web site the same day maintained "Legal aid reform remains on course."

Of the five judicial review challenges, the one made by the Law Society achieved the most, in that, although the decision did not affect the introduction of the new fee scheme, it was accepted that the amendment clause in the unified contract was not sufficiently precise in respect of changes to the technical specifications as defined in the 1996 Regulations. The LSC announced on September 5, 2007 that it was intending to appeal Mr Justice Beatson's decision relating to the amendment clause in the unified contract.

Hopes were again raised with the publication of the House of Commons Constitutional Affairs Committee report on the implementation of the Carter Review of legal aid. In their conclusions the committee stated that although there is a pressing need to limit a significant rise in expenditure on legal aid, the reform package is being implemented too fast. The report went on to say that there has been a catastrophic deterioration in the relationship between suppliers, their representative organisations and the LSC. Unless the relationship improves, we do not see hour implementation of these reforms can be successful.

The government's response soon put paid to any hopes that the select committee's proposals would be implemented. In typical politician style, the government response acknowledged those parts of the select committee report that support the Carter reforms and ignored those parts that indicated the current reforms are being introduced too fast.

It is interesting to note that on the same day the LSC announced its intention to appeal against Mr Justice Beatson's decision, the Law Society carried a note on its web site that the LSC had announced a delay to its criminal legal aid contract which was due to run until April 2008. What this actually means is that the reforms for criminal work that were to be implemented between October 15, 2007 and January 1, 2008 will now be incorporated into a new criminal contract which will come into effect from January 14, 2008.

The other proposed reforms, as slightly amended following consultation with providers and their representative bodies, will proceed as planned with implementation on October 1, 2007.

So what will these reforms mean for the providers of legal aid and their clients?

The answer has to be that we do not know, but that the signs are not propitious. It would appear that one result of the reforms will be that a number of firms will cease to do legal aid work. Many large firms have been subsidising their legal aid departments for years. In my own local area, two well established firms decided in April to stop doing legal aid, and others are waiting until October to make a firm decision.

Smaller firms, particularly those who have specialised in legal aid, have seen no rise in their remuneration rates since April 2001. What other profession would countenance not having an increase in its fees for over five years, for that matter would the public sector?

Fixed fees will mean that the only way to make a legal aid practice pay will be to have fewer well qualified staff, who will supervise younger, less well qualified staff, which will inevitably lead to a downturn in the quality of the service provided to the client. And where are the younger staff going to be found? Very few newly qualified solicitors see their future in the legal aid sector, as most want to practise in those areas of the law that offer higher returns with less emotional stress.

Let us not kid ourselves, dealing with the people who require the assistance of a legal aid practitioner is not a walk in the park! Mothers whose children have been taken into care; children who have been abused; wives/husbands who are the victims of domestic violence; anybody who requires a duty solicitor to attend a police station at 3 o'clock in the morning are people under a considerable amount of stress who want somebody to do something to help and to do it now!

For a number of years it has been the case that solicitors who practise legal aid, particularly those who practise in the family area, have acted not only as a solicitor, but also as a counsellor, a social worker and often a shoulder to cry on – all for £64.90 an hour! And there is another point – the people who require assistance under legal aid do not have a powerful voice to lobby the government, like the big insurance companies did with conditional fee agreements.

Legal Aid reform is an easy way to cut government spending. There are very few votes in legal aid, which the great British public, by and large, see as going to people who have brought trouble on themselves. The public feel aggrieved that their taxes are being spent to bail them out, knowing all about fat-cat solicitors who will not get out of bed for less than £500.00 an hour. Why should the ordinary person worry that there are no solicitors in their local town who practise legal aid – the only time it will effect them is when they need a solicitor in a hurry and find that the nearest legal aid solicitor is in a town some 30 miles away served by a bus service running once a week!

Maybe this is all too pessimistic. I think it is fair to say that the majority of solicitors who work in legal aid know that the system needed reform, but not in the way that is being proposed and particularly not at the speed with which the reforms are being forced through. The current reforms are taking a hammer to crack a nut.

None of us really know how the legal aid reforms will affect the supply of the service and it will not really be possible to know until the reforms have been in place for at least a year and possibly longer. The worry is that by the time it becomes clear that the reforms have decimated the legal aid sector instead of cutting the legal aid budget, it will be too late to put it right.

Sir James Mathew, an Irish judge, once said that in England justice is open to all – like the doors of the Ritz Hotel. Raymond Chandler remarked that the law isn't justice. My concern is that the legal aid reforms coming into force on October 1 will serve to underline both these comments.

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