

SUBMISSIONS BY MIDDLESEX LAW SOCIETY TO THE DEPARTMENT OF CONSTITUTIONAL AFFAIRS SELECT COMMITTEE IN RELATION TO THE GOVERNMENT'S CONSULTATION PAPER ON LEGAL AID.

A. INTRODUCTION

- 1 The Middlesex Law Society ("MLS") represents approximately 2723 solicitors in the north and west of London. Many members of the Society specialise either in Criminal or Childcare and their income derives largely from publicly funded work. This document has been drafted by Edward Lock, who is a member of the Law Society's Children Panel ("the Panel") and Family Convener of MLS and Sundeep Bhatia who is a Criminal sole practitioner and Criminal Convener of MLS. So far as publicly funded childcare work is concerned, the Association of Lawyers ("ALC") for Children has made detailed submissions to the Select Committee and these are endorsed by the MLS. In particular, the MLS accepts and endorses the figures put forward by the ALC, and its criticism of the figures used by Lord Carter of Coles in his report ("the Carter Report"). These submissions deal with issues of particular importance to the MLS.

B SMALL FIRMS

1. The MLS has 1088 firms, of which 964 comprise either sole practitioners or firms with two partners. It has a higher preponderance of such firms than any other Law Society in the country.
2. Lord Carter considers that, even with the drastically reduced costs proposed, firms can make a profit, provided that small firms merge with other small firms or larger firms. However, the lack of reality in the proposals in the Carter Report is exemplified by the fact that it is proposed that the new arrangements come into force in six months time. Is it suggested that mergers of firms can take place within such a short period? Where is the funding for such mergers to come from? Certainly, Lord Carter talks of grants and loans being made available to help firms restructure, but no indication has been given as to where these might come from. Insofar as interest is payable on monies advanced, this together with the reduced fees proposed will simply push firms in to insolvency.
- 3 In relation to criminal defence work fixed fees to be introduced in March 07 represent a significant reduction in income in circumstances where the planned "efficiencies" contemplated in Lord Carter's report will not have been introduced. All criminal firms will be forced to absorb this cut in circumstances where they are already running at marginal profit rates or substantial losses. Small firms will be more vulnerable and this move will threaten their existence.

4. Even if a merger were to take place, it cannot be said that it is remotely in the public interest. Almost by definition, the clients in Public Law Childcare case are among the most disadvantaged in our society. Many are on income support and most are of below average intelligence and do not have English as a first language. Even at present, they find it difficult to travel to solicitors who are sufficiently close to where they live. If there were to be large mergers of firms, such clients would be unlikely to be able to instruct solicitors, even if, in the merged firms, it was considered profitable to carry out this sort of work at all, which, as the ALC report indicates, is unlikely.

Forced and rushed mergers are unlikely to work in circumstances where individual firms have their own individual culture and administration.

5. Further, Lord Carter has wholly failed to indicate why a merger of firms would, in fact, lead to more profitable firms. If he thinks that a merger of firms would mean that one solicitor from the firm could attend Court and conduct several cases, he is demonstrably mistaken. A Public Law Childcare Case is such that it is rarely realistic for a solicitor to deal with more than one case in a morning, and probably a day.

The same is true in criminal work. At a police station there are often several teams of officers waiting to deal with several suspects. If one solicitor from one firm deals with all suspects then there will be many officers waiting for that solicitor to finish a preceding case. This situation does not arise if several solicitors from different firms are present.

In the same way, at the magistrates court cases are often listed in several different court rooms. One solicitor from one firm dealing with many cases in many courtrooms will cause waiting times and delays in the magistrates courts.

6. The Carter Report also fails to take into account the question of conflict of interest. Typically, in a Public Law Childcare Case, there are represented in court (1) The Local Authority; (2) The child or children; (3) the Mother; (4) the Father; that is the usual minimum, to which there may be added, depending upon the case, separate representatives for a child who is able to give instructions independent of a Guardian; members of the extended family, such as a grandparent, who may be putting forward their own case for having care of the child or children. Examples can be given of cases involving up to 12 parties.
7. Even in a case involving four parties, it is already difficult within certain London Boroughs within the MLS constituency to find enough solicitors to act. If solicitors have to be found outside the Borough, then further costs will be incurred in respect of travel, quite apart from the significant disadvantage which the client will suffer as a result of not

having a local solicitor.. Lord Carter gives no indication that he has taken this into account.

8. Conflicts of interest are also frequent in criminal work. At present if a firm acting at a police station encounters or perceives that a conflict of interest is likely then the matter is referred back to the duty solicitor call centre who telephones other duty solicitors who are members of the scheme covering that police station until a volunteer is found.

The Carter Report advocates restricting each police station scheme to five firms He states that the firm that finds the conflict should appoint the next solicitor.

This appears to be contrary to the professional code of conduct of solicitors which says that a solicitor who discovers a conflict of interest must withdraw from representing that client at once.

Moreover it is debatable that a pool of five firms in an area would easily allow another firm to be allocated.

In the MLS area there are currently dozens of solicitors on each duty rota so the problem does not arise.

C. ETHNIC MINORITIES AND DIVERSITY

9. Approximately 80% of clients in Public Law Childcare cases in the area of the MLS are from ethnic minorities and do not have sufficient command of English. At best this means that they have to be taken slowly through documents, and explanations as to their position and the options open to them. At worst, it means that every letter and report has to be translated into their native language, and every meeting attended by an interpreter. It is generally accepted that, if an interpreter appears for a client, it trebles the length both of meetings and of the time which they take to give evidence in Court. Yet Lord Carter suggests that all this additional work should be carried for no extra charge. Furthermore, standards will deteriorate and ineffective and inadequate instructions will lead to poor case management
10. Of course, this problem can be mitigated, but not avoided, if the solicitor in question speaks the same language as the client. However, since the number of solicitors practicing in Childcare has already reduced, as a result of the fact that there has been only one rate increase in the last 12 years – see figures in ALC report – and is likely to decrease further, if the present proposals, or anything remotely similar come into force, it is increasingly unlikely that such a lawyer will be available, still less within reasonable distance of the client. Even now, there are within the MLS area only 51 solicitors on the Panel, of which 20 are from the ethnic minorities.

11. There is a general criticism of proposals to the effect that the fees are so badly structured that there will be cherry picking as to which cases solicitors will take. In this context, and for the reasons given above, it is quite clear that it will be completely uneconomic for solicitors to take on cases involving clients from the ethnic minorities, and that such clients will therefore not have proper representation.
12. The current proposals are that the uplift given for work done by members of the Panel should be removed. Apart from the fact that the skill and dedication required to be admitted to the Panel should be recognised, the effect of this move, if implemented, would be to dumb down the quality and advice and representation given to clients. Any doubt on this score was removed by the Parliamentary Under Secretary at the DCA, Mrs Vera Baird , at a meeting of lawyers on 21st August , when she said that firms “would need to work in a different way”. She then went on to explain that this meant that preliminary work would have to be done by unskilled, untrained and unaccredited staff. However, the initial stages are often crucial, in that clear authoritative advice given then can lead to parents working in partnership with the local authority, which is not only to the benefit of the children concerned, but also obviates the need for, and costs of, proceedings.
13. There are, however, many Black Minority Ethnic (“BME”) owned firms in criminal defence who employ staff from BME backgrounds and who have both a linguistic and cultural empathy with the communities they represent. Many of these firms are small and hold criminal contracts of less than £50,000. The existence of these firms is threatened by Lord Carter’s reforms.

Lord Carter’s report indicates that such small BME firms will be disproportionately affected within the Middlesex law society area .Table 5.17 of the report indicates that in London 22% of Black and ethnic minority firms will need to restructure as opposed to 12% of white British firms)

Lord Carter justifies his proposals on the basis that when studied on a national basis an equivalent proportion of BME firms are affected as their indigenous counterparts.

This does not take in to consideration the fact that BME firms and communities are not evenly spread around the country and therefore some regions, such as London are disproportionately affected

The MLS is of the view that Lord Carter’s proposals are not Race Relations Act compliant and demands a full impact assessment before any of the reforms are implemented

If firms representing BME communities disappear then this will directly affect access to justice for these communities.

14. Even if these firms survived access to justice would still be restricted for these communities because of the proposals that firstly all police station telephone advice should be given by a legal services commission telephone call centre and secondly by means of restricting a firms ability to do police station work outside of the area it holds a contract in to 20% of the work it undertakes in that police station area.

Thus if a non English speaker is arrested in Ealing and wants his usual firm from Uxbridge then, he/she will only be able to receive telephone advice from a call centre unless he/she is going to be interviewed. If not then the firm would never know that a client requesting its services had been arrested. This would be deeply disturbing for the detainee who would not then have the right to speak to a familiar voice of a lawyer who has a cultural empathy with them.

Even if the suspect were to be interviewed then if the Uxbridge firm did not hold a police station contract in Ealing it would have to decide whether or not to use up part of its 20% allocation out of area which meant that it would have to do one less case within the Uxbridge area. If the Uxbridge firm had already used up its 20% allocation then it would not be paid for doing the work in Ealing and the suspect would have to use the duty firm or one of the four other firms in the Ealing area who will not necessarily have the requisite cultural or linguistic empathy.

- 15 The government is very keen for there to be cultural diversity within the legal system. Yet the Carter proposals contradict this.

BME solicitors, often establish their own firms because they reach glass ceilings in the non BME firms they work for. They therefore work hard to establish their own firms which compete on a level playing field with long established non BME firms. They therefore hold control of their destinies and do not require statutory or regulatory assistance to protect themselves .They therefore create a wealth of talent from which BME solicitors can be selected for high office.

Yet Lord Carters reforms threaten such firms and seek to supposedly “protect” individual minority solicitors by means of monitoring and forcing firms to hold written diversity policies. This takes control of solicitors destinies out of their hands and is an inadequate means of ensuring continued diversity within the legal profession .It also does nothing to protect the presence of BME lawyers at the highest echelons of the legal profession.

D. MISCARRIAGES OF JUSTICE IN CRIMINAL CASES

16. The planned reforms in criminal defence work will lead to significant reductions in professional standards. In order to ensure their continued existence firms will be forced to send less experienced staff to the magistrate's court and in particular, to the police station.

At present London firms are paid £70 per plus VAT per hour for police station done as duty solicitor out of hours. A duty solicitor on call to do this work would normally be paid £35 to £40 per hour by the firm. However, from March 2007 firms in the London area will be paid a fixed fee of £316 per case. This sum includes vat, travel and waiting. The effect of this is that firms will not be able to afford to send experienced solicitors to the police station out of hours.

Inexperienced accredited representatives will be sent in their place. Lord Carters report makes this possible by relaxing who can do duty solicitor work and by making this dependent on a firms historical ability to do a quantity of work rather than on the basis of the number of duty solicitors a firm employs. There is no substitute for experience and despite peer review there will be an increased number of miscarriages of justice

E. RECRUITMENT

17. Young lawyers do not wish to enter a field they perceive as being underpaid with anti social working hours. The carter report offers more work for less money and neuters the status of the duty solicitor and the Law Society's Panel making the work even less attractive. The impact on future legal training of these proposals has not even been considered.

F. LITIGATORS FEE AT CROWN COURT

18. The system is currently not sufficiently flexible. The number of proxies needs to be rethought and increased.

G. WHY IS THE CARTER REPORT FLAWED?

19. In the first place, contrary to what Mrs Baird has said, the report is neither independent nor expert. The Chairman of the Committee was appointed to the House of Lords by the Prime Minister, and commissioned to prepare the Report by the Lord Chancellor. Lord Carter chose to have on his committee members of the Department of Constitutional Affairs, and a sole solicitor from a City Firm. He

studiously avoided having on his committee a single person who had knowledge of childcare law and who could have provided information which would have enabled him to avoid the blatant mistakes in his report which are highlighted in the ALC submission. To take but one example, even now the LSC are not clear as to what is meant by “a case” or “a claim”. A solicitor with experience in Childcare Law could have pointed Lord Carter in the right direction at a fraction of the cost of £1,500,000 which his official report has cost the taxpayer. Nor does Lord Carter seem to have any understanding of the different situation, in terms of public funding, which arises, depending upon whether a solicitor is acting for, say, six children, as opposed to acting for, say, a mother, in a case involving six children.

20. It is quite clear that Lord Carter's sole remit was to try to save the costs of the Public Funding Scheme, in relation to Childcare. However, in doing so, and in suggesting that solicitors can continue to make reasonable profits, he has entirely ignored the fact that there has been only one rate increase in the last 12 years, and that was for panel members only and was 15% in 2001. Mrs Baird told a meeting of lawyers on 21st August 2006 that the public would not stand for any increase. Despite this, she no doubt believes that the public is quite happy to have increased her parliamentary salary, in common with that of every other MP, by 41% over the eight years to April 2006. This is not to suggest that MPs should not have had their pay rises but, rather, to point out that one of the facets of a parliamentary democracy is that the Government may and should from time to time bring in to force measures which might not command the support of the people if put to a referendum. Typically this is appropriate where the rights of minorities are concerned

H. SUMMARY

21. If these proposals, or anything remotely close to these proposals come into force, there will be huge deserts within the area of the Middlesex Law Society as well as the country at large, where Children and parents are without representation in childcare cases, notwithstanding that the seizure of a child from its family has been defined, quite correctly, as the most draconian step that the state can take. In the light of his proposals, Lord Carter should have given serious consideration to the question of whether, if his proposals were to be put into effect, the Government would be complying with Article 6 (Right of a Fair Trial) and Article 8 (Right to respect and private family life) of the European Convention on Human Rights.

I. RECOMMENDATIONS

22. As to Public Law Childcare, the MLS endorses the recommendations made by the ALC.
23. As to Criminal Law, the MLS makes the following recommendations:

- (1) A full impact assessment needs to be conducted as to the effect of these reforms on BME firms, solicitors and BME communities.
- (2) The LSC and Government should reconsider the 20% own client out of area rule. Firms should be allowed to represent own clients wherever they are arrested. The fact that such firms will not be paid a travel and waiting element is an incentive for them not to do so.
- (3) The LSC and Government must reconsider the decision for all initial criminal telephone advice to go via the CDS direct call centre. Such a move destroys the perceived independence of criminal defence firms and will alienate non speaking clients and the long established goodwill between firms and the clients they represent.
- (4) The decision to allocate duty solicitors slot to firms on the basis of historical capacity rather than number of duty solicitors should be reversed since it destroys the career path of young solicitors in criminal defence work and will inevitably lead to a deskilling of representation at the Police Station.
- (5) The level of fixed fees at the Police Station needs to be revised. The current fees represent a significant decrease in income which will cause many firms to disappear.
- (6) Fees should not be reduced until such time as the perceived "efficiencies" under Lord Carter's proposals have been implemented and firms have been given sufficient time and opportunity to restructure.
- (7) The litigators graduated fee scheme needs to be rethought so that sufficient proxies are introduced
- (8) The exact nature of grants being paid to firms to restructure must be published in full and implemented before any reforms are introduced.