



## **‘Legal Aid: a sustainable future’**

### **(Response of the Public Lawyers in NGOs Group<sup>1</sup>)**

#### **Introduction**

1. The Public Law Project, a national registered charity, was founded in 1990, with the object of providing assistance in matters relating to public law to people and groups who historically have had little or no access to public law remedies. PLP has been a feature of the legal and social policy landscape for some 15 years.
2. PLP defines public law as the framework and principles of law which govern the exercise of power by public bodies, including the administration of justice, the roles of central and local government, the provision of public services, the activity of major public corporations and institutions. It is particularly concerned with the processes of decision making and with the exclusion of significant groups of people from justice.
3. Our aim was and remains, to improve access to public law remedies, such as judicial review and non-judicial redress systems, for example, the statutory ombudsman and complaints procedures, for people whose access to them is restricted by poverty, discrimination or some other form of disadvantage. The Project has three aims:
  - to increase the accountability of public decision makers;
  - to enhance the quality of public decision making; and
  - to improve access to justice.
4. The Access to Justice Act 1999 introduced the current arrangements for publicly funded legal services. PLP proposed that public law should be a discrete category alongside others such as housing and employment, and following extensive campaigning, this proposal was accepted by the Commission. This has resulted in a greater awareness of public law as a specialism amongst practitioners, and has undoubtedly resulted in an

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<sup>1</sup> This is a group made up of lawyers in national NGOs

increase in access to this area of the law for disadvantaged and socially excluded groups.

5. PLP has also played a major role in the development of the Commission's Specialist Support Service, whereby solicitors and advisers working within the Community Legal Service can access specialist advice on complex matters from experts in their field. PLP has been involved as a provider of specialist advice since the service started as a pilot in 2000, and continues to provide advice and training on public law, (as part of a group of some 16 other providers, advising on 9 distinct areas of law). This has further raised awareness of public law principles and remedies amongst solicitors and advisers, better equipping them to provide advice to their clients.
6. The new legal aid system also changed the way in which "public interest" cases were treated within the scheme. Cases which raise issues which impact not only on the individual, but on a whole sector of the population, have enormous potential for protecting rights and for increasing and improving access to justice. This is of particular significance for vulnerable groups, such as elderly people, who are much less likely to be in a position to undertake litigation themselves. In conjunction with other members of the Public Interest Litigation Group, which it convened, PLP proposed a ring-fenced Public Interest Fund within the Legal Aid scheme. This proposal was given serious consideration by the Lord Chancellor's Department and the Legal Aid Board, and representatives from both attended a seminar on the proposal organised jointly with the Law Society, and other organisations, in April 1998. Although the proposal for a separate fund was eventually rejected, public interest cases have been given a degree of priority under the new Funding Code which provides the framework for Community Legal Service funding decisions.
7. As part of those arrangements, the Legal Services Commission is advised on the funding of public interest cases by a Public Interest Advisory Panel, with PLP having accepted an invitation to nominate a member of that panel.

#### **The Carter Report and the Consultation Paper**

8. Both Carter and the Consultation Paper provide a programme of reforms to achieve a "*market based system*" driven by "*best value competition based on quality, competition and price*" that seeks to change the way Government buys legal advice on behalf of the public. In essence, the aim is to move towards a smaller number of more efficient suppliers either through growth or mergers<sup>2</sup> who will eventually compete with each other on price. Civil work will be procured according to "*best value criteria*" from a smaller number of suppliers who can provide the best value service to clients, and deliver a sufficient quantity of service at the most competitive prices<sup>3</sup> "*Correct market price*" will

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<sup>2</sup> Carter Report, Para 146, page 122; Para 11, page 3

<sup>3</sup> Carter Report, Para 18, page 54.

be established by suppliers: “*competing with each other to provide services as efficiently as possible*”<sup>4</sup>.

9. The goal for civil legal aid is for contracts to be tendered on quality, capacity and price<sup>5</sup>. Contracts in social welfare will be covered by CLACs and CLANs, in line with the LSC’s Strategy for CLS <sup>6</sup>. The complete roll-out of CLACs/CLANs is expected from 2009 onwards. By 2011, Carter envisages that there should be a gradual transition from the current system to a “*steady state*” for Civil and Family Services which takes account of the evaluation and roll-out of CLACs/CLANs and where there are:
  - larger, more efficient, good quality suppliers who prosper from increased volumes of work, in which costs are under control;
  - smaller suppliers who have maximised their efficiency and provide a good quality service; and
  - smaller, mixed practice suppliers in areas of limited demand but where access is an issue<sup>7</sup>.

#### **The position of the Public Law Project - general**

10. The proposed arrangements represent a shift away from what individual providers wish to deliver in terms of legal services, and towards what the Commission wishes to purchase. In the context of the provision of goods and services, concepts such as ‘value for money’, and ‘competition’ etc have a particular resonance. However, we believe that in the context of delivering legal services these concepts have the capacity to jar. That said, it is wholly in line with government’s activities in other areas, such as contracting with the voluntary sector, where the nature of the services provided are no longer decided by the sector, (or indeed by the community that it serves), but by the state itself, in accordance with the state’s own priorities and specification. Where the commodity in question is access to the law, the contractor becomes the gatekeeper, and in the context of public law, the gatekeeper is the state. When analysed in this way, the potential dangers become apparent.
11. The Public Law Project is becoming increasingly concerned by this shift, as it believes that it will result in a profoundly different legal and advice sector, one that is tied into service delivery contracts which will threaten the sector’s capacity for any independent action. This is particularly acute for smaller so-called ‘niche’ suppliers, which tend to be the most radical and innovative, but which are likely to be forced into structures in which their identities become lost and original aims and objectives emasculated.

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<sup>4</sup> Carter Report, Para 22, page 54

<sup>5</sup> Carter Report, Para 76, Page 60

<sup>6</sup> Carter Report, Para 21, page 4

<sup>7</sup> Carter Report, Para 72, page 60

12. Although Carter addresses the issue of “*niche suppliers*” in relation to public law children<sup>8</sup>, a wider debate on this topic that would be relevant to the Public Law Project (and others) is not raised either in the Carter Report or in the Consultation Paper. However, Lord Carter emphasises that the LSC: “*should ensure its procurement policies support a sustainable supplier base that has the capacity and capability to deliver a quality, accessible service that meets the needs of clients*”<sup>9</sup>. Further, legal services should be: “*procured in a pragmatic and flexible way, so services are delivered in a way that makes sense to both local suppliers and the communities and locality being served*”<sup>10</sup>. There therefore must be room for at least a debate on flexibility.
13. Because it specialises in public law which sits above all other categories of law, it would be more cost effective for PLP to continue to provide this “*niche*” legal service at a national, rather than a local level, outside the proposed CLACs/CLANs. In its recommendations relating to CLACs/CLANs, Carter states that apart from providing “*the whole bundle of social welfare services*” for an area, centres “*should also expand into other categories of law where feasible*”<sup>11</sup>. As far as public law is concerned, it is more feasible i.e. cost effective for organisations like PLP which have a high level of skill in Public Law to provide advice on a specialist support basis to CLACs/CLANs all over the country. Such an approach is recommended by Carter, albeit briefly: *It is important that there is not one model for community legal advice centres, and the LSC allows centres to develop in a pragmatic and flexible fashion that best suits their potential clients in the area where they are located (including sub-contracting service delivery where necessary.*<sup>12</sup> It is a pity that this recommendation is not highlighted within the consultation itself.
14. We annex a separate document drafted by PLP and submitted on behalf of PLP and other similar national organisations that are involved in the provision of legal services. This document summarises our concerns and proposals, and should be read in conjunction with this response.

### **Consultation Questions - specific**

#### **Parts 2- 4**

15. We have no comment on these questions as we do not provide criminal legal aid services.

#### **Part 5**

16. We understand that peer review will take the place of the current quality assessment process and this is to be welcomed. We also welcome the proposal to take this process away from the Legal Services Commission. So far as the

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<sup>8</sup> Carter Report, Para 109, page 66

<sup>9</sup> Carter Report, Para 88, page 62

<sup>10</sup> Ibid

<sup>11</sup> Carter Report, Para 94, page 63

<sup>12</sup> Carter Report, Recommendation 3.5, page 8

transitional arrangements are concerned, we have no disagreement with the principle. However, (and this is a point we could repeat several times), there is no understanding of the particular ways in which PLP delivers legal services, and reference is again made to the attached document.

17. We have little faith in governmental agencies being involved in 'agenda setting' in relation to strategic legal aid issues. The Legal Services Commission believes that such a group will assist it in 'providing national leadership and direction for the CLS'.<sup>13</sup> So far as the responsibility for the planning and commissioning publicly funded legal services goes, we would be very concerned that a group charged with this responsibility should be comprised solely of the (mostly) public bodies which fund them. We do not accept that service providers can be excluded on account of potential conflicts of interest. In our experience, such a problem is far more likely to arise for local authorities.
18. Sadly, too often, many local authorities equate their interest with the public interest. When push comes to shove (and in the virtual absence of any statutory obligations to fund legal and advice services), we have seen authorities changing funding priorities so as to fund only services that benefit themselves. Thus funding is either withdrawn from independent providers and/or provided to services which concentrate on reducing rent arrears of local authority tenants through debt services or maximising take up of disability benefits which are then clawed back through domiciliary care charges. Longer term planning is also made difficult as local authority funding priorities are far more susceptible to changes on the grounds of political expediency or control. For example, we are aware of cases where the funding of advice services has been withdrawn and then channelled into leisure services following a change in political control.
19. We therefore welcome the apparent backtracking on this approach, with a wider group being envisaged. However, we still do not agree with a 'top down' approach. In addition, we remain concerned at the apparent lack of accountability for decisions made by groups such as Local Strategic Partnerships. These bodies range from unincorporated associations through to limited companies, (of which some are indemnified in terms of costs by local authorities and some not). It is all very well for the Legal Services Commission to state that its work with other funders should be 'open and transparent'<sup>14</sup> but this will be of limited value without proper systems of accountability.

## **Part 6**

20. Tailored fixed fees are to be replaced with a set standard national or regional fee. The difference in the public law fee for London suppliers (reduced from

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<sup>13</sup> Making Legal Rights a Reality, paragraph 5.3

<sup>14</sup> Making Legal Rights a Reality, paragraph 5.8

£378 to £284) is significant. PLP is wary of standard fees within public law, not least because of the apparent lack of objective data as to quality of work, (due in no small measure to the small number of public law peer reviewers). The regional rate should remain until further data is available, and this should be calculated on the basis of the firm's average case costs. Once data as to quality is available, the matter should be reviewed.

21. Also of concern is the fact that the standard fee is meant to cover all our work within public law, including Alternative Dispute Resolution processes. One can understand the logic in excluding proceedings in Magistrates' and Crown Courts and debt proceedings in Magistrates' Courts from the standard fees regime, but this logic must equally apply if a public law dispute is being resolved through a process such as mediation, which can require an equivalent amount of preparation and work. It is after all, an alternative to litigation. Indeed the Commission should consider making Licensed Work applicable to mediation, though an automatic exclusion from standard fees will at least go some way to incentivise the use of ADR.

#### **Parts 7 - 9**

22. These do not apply to the work of PLP.

#### **Part 10**

23. 'Exceptional cases' are to be excluded entirely from the standard fee schemes. They are to be paid for at hourly rates as specified by the contract, subject to any additional scheme rules. These cases will be paid for throughout the year, as and when they are claimed and assessed, rather than at year-end as is the current practice. All exceptional cases will be subject to cost assessment and should the value of the case be assessed at less than the value of the fixed fee only the fixed fee will be paid.

24. In common with agencies such as the Law Society and the Access to Justice Alliance, we believe that the threshold for triggering the 'exceptional case' regime is set far too high. Cases will be treated as exceptional if the value of the work, when calculated on an hourly basis, exceeds four times the value of the fixed fee for the case or a stage of the case. In other words where the fixed fee relates to 6 hours work, a case will only be 'exceptional' if it relates to 36 hours. We entirely share the misgivings of those organisations and believe that there is no merit in such a step.

25. We have no objection to the various payment arrangements proposed.

#### **Part 10**

26. Not applicable.

#### **Part 11.**

27. We have no objection to a unified contract. However, we are confused by the entry threshold - *Unified Contracts will be awarded only to providers to whom we*

*have paid no less than either £25,000 or £50,000 in a period to be specified. The calculation will be based on all legal aid payments made to the firm in the relevant period.* PLP's casework income is in the region of £80,000.00 per annum. However, this includes inter partes costs where the legal costs of the case are borne by the defendant, not by the Legal Services Commission. Clearly, it is in our interest, and in the interest of the Commission, that we do win our cases, as then the claim on the Legal Aid Fund is minimised. Why then are we to be required to make a claim on the Fund of either £25,000 or £50,000 in order to be awarded a contract in the first place? That makes very little sense to us..

28. Clearly, if push comes to shove, we would opt for the lower rate of £25,000, but we seek to be excluded from this requirement altogether as we seek to recover inter partes costs whenever possible.
29. We are also concerned about the very short notice periods and contract lengths. If the Commission wishes to ensure stability within the sector, it must provide greater certainty. How can organisations such as PLP plan for the future otherwise? How can we continue to develop new and innovative ways of delivering legal services when we have the prospect of having the contract terminated upon three months notice? Operating nationally, do we face the prospect of having our own contract terminated because the Commission believes that there is sufficient cover for public law in Islington (where we are based)?
30. We cannot see why any excellent provider of legal services should have its contract revoked on account of the development of a CLAC or CLAN. Such sanctions should only be exercised on grounds of quality.

### **Conclusion**

31. We find little in this document that can assist us in our objectives. This may well be on account of the fact that it is clearly not aimed at organisations like PLP, or at least was not drawn up with any understanding of them. We presume that this is because we do not represent the 'mischief' that this proposed new strategy seeks to counter. We therefore urge those charged with implementing these reforms to consider carefully these and the attached representations and enter into a dialogue with us, and our colleague organisations. Otherwise the Commission and the DCA face the prospect of throwing out the 'baby as well as the bath water'.

Public Law Project  
13<sup>th</sup> October 2005

**'The role of legal NGOs within the new Community Legal Service'  
(Response of the Public Lawyers in NGOs Group )**

**Introduction**

1. This document has been produced at the invitation of the Director of the Community Legal Service, Crispin Passmore. It follows a meeting which took place between representatives of PLINGO, and the Legal Services Commission on the 14th July 2006, about our future relationship with the Community Legal Service.

2. We note that Lord Carter emphasised that the LSC: "should ensure its procurement policies support a sustainable supplier base that has the capacity and capability to deliver a quality, accessible service that meets the needs of clients." We therefore very much welcome this opportunity to contribute to the development of the Community Legal Service and to explain the unique nature of our organisations and the contribution they can make in the provision of legal services.

3. We also trust that our initial meeting and this paper can mark the start of a constructive dialogue between us. Lord Carter also emphasised that legal services should be: "procured in a pragmatic and flexible way, so services are delivered in a way that makes sense to both local suppliers and the communities and locality being served." Clearly, there is no sense in forcing high quality, cost effective providers into structures which lack the flexibility to accommodate and preserve these attributes. The same reasoning must apply to organisations such as ours, which have a national, rather than a local remit.

**What we currently bring to the CLS**

4. We are organisations, mostly charitable, operating on a not for profit basis. Our 'business' is not primarily directed at the bringing in of legal fees, either derived from work within the Community Legal Service, or elsewhere. Many of us see our role as primarily influencing policy, a position that gives us a unique and high level perspective and expertise. Such perspective and expertise is recognised and welcomed by the courts when we do litigate on behalf of ourselves or our clients, and so far as the justice system is concerned, we bring 'added value'.

5. We fill in gaps within the current provision of legal services. We have a national presence, concentrating on themes such as community care and justice for the excluded, supporting and protecting vulnerable people, protecting human rights and the environment. We are proactive and seek out such gaps with the express objective of filling them. Thus, the Howard League has developed a specialism in the rights of detained children – because no one else does. The Public Law Project has done the same in cases of small community groups having funding withdrawn by public sector funders, Friends of the Earth and Liberty have unrivalled knowledge and expertise in environmental and human rights law respectively. The same is true of our other members in their own particular fields. New areas of law, now in the 'mainstream' have been pioneered by PLINGO members, such as human rights and



public law, community care law, and a rights based approach in social security. When seen in this light, the issue of 'competitive tendering' would appear to have no application to us. No-one else does what we do.

6. Our legal teams often undertake work which is not within the scope of the current legal aid scheme, (on account of the subject matter, adjudicating body or on account of the type of client). Indeed, a significant amount of the legal work already has to be funded either by the organisation itself or by other organisations such as the Big Lottery Fund. These additional resources are then made available to members of the public by our participation within the Community Legal Service. The Commission's earlier consultation paper, 'Making Legal Rights a Reality' emphasised the Commission's wish to draw in more funding from 'a wider range of funders'. Thus, a client can access our services through the CLS, and can receive advice and assistance in an area of law which is not provided at all, (or is underprovided) within the CLS - and at no cost to the CLS. The viability of these services which are not funded by the Commission would be put in question if we were no longer able to undertake cases with legal aid.

7. Cases in which our members act are often cases that have significant wider impact such that an area of law that affects a significant group is clarified to the benefit of the public.

8. We wish to continue this work, and see our partnership with the Community Legal Service as key. Our clients are amongst the most disadvantaged and would not be able to access the legal system and bring about change through litigation without the funding and costs protection legal aid can bring.

### **The position of so-called 'niche suppliers'**

9. The Carter Report makes reference to so-called 'niche suppliers' and discusses the role of the 'public law children' suppliers. It recognises the importance of maintaining such suppliers and also recognises that the general proposals within Carter will not achieve this. It goes on to state that if they are to be sustained within the system, then 'there needs to be greater imagination applied, so that a solution is developed'. It suggests using a 'chambers' model. Whilst we would not entirely rule out such an approach for our organisations, there are real difficulties inherent within it.

10. Firstly, it presupposes that we are all 'front line' services, which we are not. Whilst some of us may have what appears to be an 'open door' service, it is only available following an initial diagnostic telephone attendance, or on referral, where an assessment is made as to whether the prospective client meets the client profile of the organisation. That client profile is particular to the individual organisation, (some broader than others) and may change according to the current priorities of that organisation which will itself influence the policy and legal skills that we retain. Appropriate referral arrangements are put in place to deal with those clients we are unable to take on.

11. Secondly, all our organisations work nationally and therefore their potential client base is a national one. All organisations consider it vital to their work and profile to maintain a national presence and becoming subsumed within a 'chamber'; or 'consortium' would militate against this.

12. Thirdly, although our organisations have much in common in terms of structures and models of service delivery, we would appear to be too dissimilar to be able to enter into arrangements with each other, so far as our profile to clients and potential clients is concerned.

13. We suggest that if the CLS wishes its clients to retain access to our services, a different 'solution' needs to be developed. Although Lord Carter appears to be content with the fact that many 'Not for Profit' agencies may withdraw from publicly funded work, we cannot believe that he would count organisations such as ours amongst their number.

#### **Contracting with us – a different solution**

14. In order to maintain all that is positive in the legal work that we do, we see little choice but to work within a system which is flexible enough to allow us the freedom to continue our legal work. We do however recognise that there are aspects of our work patterns that need to be adjusted and we are willing to address these. For example, we accept that we need to improve our referral systems so as to ensure that clients or potential clients do not drop out of the system with referral fatigue. Discussions are ongoing within PLINGO as to how this may be achieved.

15. However, there are concerns that some of our members may not reach the proposed £25/50K threshold for contracting. We consider that there are very good reasons for excepting organisations such as ours from such thresholds. In addition to the matters raised in this note, it is also worth remembering that where a case has been successful (either after trial or where the defendant settles before trial), the client's legal costs are usually paid inter partes and the claim on the legal aid fund is minimal. It cannot be the Commission's intention to provide a perverse incentive against seeking inter partes costs, or to punish successful litigators. Indeed, inter partes costs provide a useful source of unrestricted funds, which can cross subsidise other functions (including advice work).

16. In respect of our casework services, we cannot see how attachment to individual CLACs or CLANs can improve on what we do. If anything, it will reduce client access, as only those within the locality of the particular CLAC or CLAN would have access to us. However, the availability of our specialised services and general expertise to all suppliers and clients, as is the present position, would appear to be by far the more preferable option.

17. Our strategic approach to cases may, from an uninformed perspective, lead to accusations of cherry picking. However, given the resources available to us (most of our members' legal teams number less than 5) it is inevitable that our work has to be focused on particular cases. But as stated above, (see foot note to paragraph 8), this is

reality. All suppliers filter cases – in terms of the client’s means, the strength of their case, the supplier’s expertise or because the current matter start allocation has been exhausted. However, we feel that any such criticism can be met by the means described in paragraph 14 above, and in any case is far outweighed by the strategic value of the cases that we do bring and their impact on very many other clients.

18. We would also wish to explore the possibility of our members being funded directly by the Commission to undertake strategic test case work in our own names, as well as bringing cases on behalf of our clients. Although many of our members have been pioneering the greater availability of ‘Protective Costs Orders’ (which can give a claimant certainty that he will not be required to pay the other party’s costs whatever the outcome of his case), this area of law is still in its infancy. Many strategic issues are better suited for resolution by a court when brought by an NGO rather than an individual client through the legal aid scheme. Few other measures would result in a greater development of the law.

#### **Next steps**

19. Further discussions are necessary amongst PLINGO members in relation to some aspects of this paper. Nevertheless, we feel it would be opportune to arrange a further meeting with the Commission so as to explore the issues raised by this paper, and the Commissions response.

*Conrad Haley (Public Law Project) - on behalf of – PLINGO  
9 October 2006*

## **PLINGO Organisations**

### **Action against Medical Accidents (AvMA)**

AvMA) is an independent charity which promotes better patient safety and justice for people who have been affected by a medical accident. A 'medical accident' is where unintended harm has been caused as a result of treatment or failure to treat appropriately. This includes where the care has been negligent, but does not necessarily mean that it was. AvMA believes that whatever the cause of a medical accident, the people affected deserve explanations, support, and where appropriate, compensation. Furthermore, we all deserve to know that the necessary steps will be taken to prevent similar accidents being repeated.

### **Child Poverty Action Group**

CPAG is the leading charity campaigning for the abolition of poverty among children and young people in the UK and for the improvement of the lives of low-income families. It undertakes test-cases to extend the interpretation of law in favour of claimants using, where appropriate the European Court of Justice and the European Court of Human Rights.

### **Disability Law Service**

DLS aims to provide up-to-date, informed legal advice for people with disabilities, their families, enablers and carers and to undertake casework representing disabled people at every stage of the legal process. The Service gives specialist legal advice on Community Care, Education, Employment, Welfare Benefits and consumer/Contract law.

### **Friends of the Earth**

FOE is one of the leading environmental pressure groups within the UK. Its activities include public education, environmental research and educational research and educational projects. It also seeks to improve access to public law in the environmental context, particularly following the UK Government's ratification of the Aarhus Convention. It's Rights & Justice Centre takes on test cases in environmental public law.

### **Howard League for Penal Reform**

The Howard League for Penal Reform is the oldest penal reform charity in the UK. It also provides legal advice and assistance to professionals working with juveniles in prison and also takes on individual cases, advising and representing children in custody.

### **Liberty**

Liberty is one of the UK's leading human rights and civil liberties organisations. In addition to its campaigning and lobbying work it takes on strategic test cases with a particular focus on cases raising issues under the European Convention on Human

Rights. Most of its cases are civil (and therefore come within the public law category) but it also on occasions represents criminal defendants.

### **MIND**

Mind is the leading mental health charity in England and Wales. We work to create a better life for everyone with experience of mental distress by:

- advancing the views, needs and ambitions of people with mental health problems
- challenging discrimination and promoting inclusion
- influencing policy through campaigning and education
- inspiring the development of quality services which reflect expressed need and diversity
- achieving equal rights through campaigning and education.

### **Prisoners Advice Service**

PAS is a national service offering free, confidential advice & information by legal professionals to prisoners, particularly concerning prisoners' rights and the application of prison rules. It takes up prisoners' complaints about their treatment within the prison system, taking legal action where appropriate.

### **Public Law Project**

PLP was founded in 1990, with the object of providing assistance in matters relating to public law to people and groups who historically have had little or no access to public law remedies. The Project has three aims - to increase the accountability of public decision makers; to enhance the quality of public decision making; and to improve access to justice. It undertakes casework, training and research.