

Peer pressure

The Legal Services Commission's peer review scheme has been thrown into turmoil after one crime firm forced it to back down over a ruling – and suggested it had set a precedent – and peer reviewers themselves threatened rebellion, *Criminal Law Bulletin* can reveal.

The future demise of the much-lauded peer review process first came into doubt late in March, when London firm Kaim Todner started a judicial review against the LSC after it was rated as 'below competence' on 15 of files. Below Kaim Todner partner Karen Todner gives her account of her experience of peer review.

Andrew Keogh, partner at Tuckers, a peer reviewer who acted for Kaim Todner in the process, said in his witness statement that to the contrary, Kaim Todner's actions had been at least of threshold competence or in some cases exemplary rather than 'below competent'. He said: "In relation to this particular peer review I find that the errors in the initial report (both those accepted by the peer reviewer and those not) are of a fundamental nature. There is a lack of justification for many of the comments made, little emphasis on the good work that can be found on the files and scoring that does not in my view correspond to the peer review criteria."

The LSC hit back: "The agreement the LSC has reached with Kaim Todner to disregard the outcome of their peer review for crime work does not affect any other legal aid provider. The decision is only relevant to Kaim Todner. The firm will soon undergo a fresh peer review. Kaim Todner expressed dissatisfaction with the process their peer review followed. We have decided that the points the firm raised have merit and have put procedures in place to ensure the same problems do not occur in the future."

The LSC spokesman added: "The peer review process used by the LSC has been independently developed, and is managed by the Institute of Advanced Legal Studies. Peer review is a key tool for the LSC to assure the quality of providers performance. It enables the LSC to ensure that clients are receiving high quality legal advice. Peer review has been recognised by the profession as the best mechanism to assess the quality of work conducted by providers."

However, legal aid consultant Simon Pottinger, director of JRS, disagreed that the Kaim Todner

case is a one-off, backing practitioners' views that the LSC is now running scared about judicial review on peer review. "There are any number of potential challenges over the way the scheme has been set up and the way it has been run," he argued. "I would have no problem with peer review if it was tied into an advisory role but I have a problem with great weight being placed on a subjective process." He said the main problems were the lack of an appeals process and contractual sanctions.

Meanwhile, peer reviewers themselves have also protested about the way the scheme is run and how it may operate in light of the Carter review. Ros Olleson, a freelance solicitor and peer reviewer, says there is now 'universal support' for the CLSA's position on peer review – she explained that peer reviewers wanted a guarantee that lawyers would be paid properly for maintaining quality standards and were currently composing a formal letter to that effect. "There is a body of discontent amongst crime practitioners over the contradictory position we are in," she explained. "They cannot expect us to provide the same level of service under current fee structures."

Former CLSA chair Helen Cousins agreed that many criminal defence solicitors would be happy to sign up to the letter. "A lot of us are concerned that quality can't be maintained under the current economic regime," she said, adding that it had proved difficult morally for firms to be set against each other. "We are being set up as the LSC's police officers and I am not prepared to do it," she said. "Peer review is better than a 'ticky box' process but it is becoming scientific rather than the gut instinct of the fellow professional."

From the frontline

Here Kaim Todner partner Karen Todner describes her firm's experiences of peer review:

"The problem about peer review for the profession is that until it all goes wrong no one really looks at it and realises what it's all about. It's only when, like me, you have a terrible experience of the process that you look into it in detail and realise what an appalling procedure it is. I hate to think how much the LSC have paid the Institute of Advanced Studies (IALS) to implement it – and ended up with a worthless marker of quality.

My firm is one of the largest providers of criminal legal advice in the country. Frankly you don't grow in the way we have unless clients want to come back to

you and you are doing at least an OK job for the client. When peer review was introduced, because there was so much else going on with Carter, I really didn't pay too much attention to it. "Later I thought it would be good for my CV to be a peer reviewer and applied for the job. At my interview I was told they wouldn't dream of any asking me any legal questions as they were sure I knew more than the interviewers. Against this background my firm was asked for 15 files to be peer reviewed last September. I had a look at them and was more than happy with them – if I had been the peer reviewer I would have given them a 3. A few weeks later we received the report back – it was very short and poorly written. It gave the files a category 4 rating. We were shocked to say the least but were confident that we could address the issues in the report particularly as we realised the peer reviewer had got many of the files mixed up – for example referring to file reviews on one file that were actually on another. However when we read the report in detail we were amazed by some of the comments made. My partners and I had moments of self doubt – thinking maybe we've had the law wrong all these years – maybe it's us? But then we would think no – this peer reviewer's just an idiot!

I was advised that notes must be made by a peer reviewer when they write their report so we requested those notes – we were advised they did not exist. I was not too surprised by this because by this time I was making various enquiries into the peer review process. I was shocked to learn that in the training given by the IALS the peer reviewers are advised to destroy their notes and delete the computer programme they have to complete giving the rating for each file when reaching their conclusions – so that firms cannot have access to them. I'm not sure this is even conduct befitting a solicitor, never mind someone sitting in judgement of others. We made our representations on appeal based on the report sent by the peer reviewer. However I didn't have much confidence in the process by that time as I now appreciated that appeal process is for the same peer reviewer to look at the documents and although in the company of senior peer reviewer (whatever that may mean), the senior peer reviewer cannot override the original peer reviewer – so the person dealing with the appeal is the same as the original peer reviewer. Doesn't seem like much of an appeal process to me – especially when were telling the original peer reviewer that he had made errors and got the law wrong!

"Before Christmas we were sent a further very short report stating that whilst the peer reviewer

accepted that he had made some errors, none of our representations persuaded him to change his mind and that the rating would remain the same. The firm received a contract notice. I spoke to various people at the LSC telling them "You have made a mistake". Some of them acknowledged that did seem to be the case – but said that we would have another peer review in six months and provided we didn't get another 4 not to worry about it! Not to worry about it! We had received a contract notice – one more and we were out of business. 125 good people lose their jobs and the business I've worked at for 17 years down the pan – I couldn't believe it.

"I was advised that the next step was to make a formal complaint about the lack of note provided so that is what I did."

She then received the notes from the peer reviewer. "I could not believe it when I saw that the firm had actually received, of the 15 files, one 2, eight 3s and six 4s. Somehow that comes to an overall total of 4 – not when I did maths at school. I was told that peer review is not a mathematical exercise – but if the logical answer is not going to be followed then surely proper reasons must be given for it? I was also astonished to see that one of the files which was given a rating of 4 was actually marked in every category for that file as a 3 but then the overall mark was a 4 – madness. What's more – two of the files that were given a 4 weren't even mentioned in the peer reviewers report at all. We therefore presumed that they were not of concern – but in fact they were two of the files we should have been appealing against – one fifth of the files reviewed didn't get a mention at all in the peer reviewer's report."

After further fruitless correspondence with the LSC, Karen Todner decided to bring judicial review proceedings. "One week before the hearing I received a letter simply enclosing a draft order," she continues. "We had won and the decision would be quashed and they would pay our costs – but there was no apology, no nothing."

She believes firms should be able to request peer reviewer's notes of files and that a proper appeals process should be put in place.

"Until problems like this are resolved the LSC should look very carefully at that what they have actually got for their money from the IALS because in my view it's not very much," she warns. "And the profession should think very cautiously about cooperating with such a poorly thought out yet draconian scheme."

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