

# **A BRIEF HISTORY OF LEGAL AID**

## **A Practitioner's Perspective**

### **1. The Expansion of Legal Aid**

1.1 In the 1970s and 80s there was a large expansion of Legal Aid which was at that time essentially an adjunct to the other work of solicitors firms, there being some 7000 suppliers, Legal Aid work sitting alongside normal commercial work like conveyancing, probate and contract.

1.2 Administered by the Law Society the hourly rates were not as high as those prevailing in the private client and commercial world but nevertheless were related to the cost of time.

1.3 The cost of time was calculated by assigning a target for chargeable hours for each fee earner, usually 1200 hours per annum, a notional salary for solicitors and partners and dividing overheads by the numbers of fee earners to find out applicable hourly rates.

1.4 Provision was made for lower hourly rates for travel and waiting, a problem that has always been apparent in legal aid work which is often not office based but court based, and in the case of crime, prison and police station based, with the consequence that large parts of chargeable hours were consumed in lower paid hourly rates. Fixed fee schemes containing 'rolled up' time spent travelling and waiting 'hide' the true costs of cases within their simplicity.

1.5 However, in terms of cost benefit it is also to be noted that the organisation of courts and the interaction of advocates and the tribunal and particularly the flow of work provided by ushers in Magistrates Courts is highly efficient; face to face interactions provide courts with good quality information upon which to base decisions.

### **2. A Changing Supplier Base**

2.1 As Legal Aid expanded the Law Society administration was unable to cope. Delay in payment became a well-known public fact and eventually the decision was made to move the administration of Legal Aid away from the Law Society into the hands of an independent Legal Aid Board. This was at inception essentially a cashier organisation but it also had within it a desire to promote and implement policy.

2.2 What had also happened is that a number of more specialist Legal Aid suppliers had come into being whose main purpose was to provide Legal Aid services in the community, usually both civil and crime covering the full range of civil, family law,

welfare benefits, housing, mental health and immigration. In essence a numerous and independent “legally aided” sector was a by-product of the expansion of funding and scope.

2.3 It had been, and remains, a major component of this system that the supplier base provides its own capital in order to set up organisations, provide premises and employ people. In this sense it is a free market where entrepreneurs have invested their own capital identifying gaps in the market and establishing businesses.

2.4 There were parallel changes in the private solicitor marketplace as conveyancing lost its fixed fee structures and in the more successful private client firms partners often became dissatisfied with low hourly rates of return in legal aid work and began shedding that work, a process accelerated from the 1990s as Legal Aid rates became frozen and eroded by inflation. Lord MacKay decided to abolish his Legal Aid Advisory Committee. The current panel constituted to assist in the review of criminal Legal Aid is a distant echo of that forerunner.

### **3. The Rise of Contracting**

3.1 The Legal Aid Board brought forward the idea that suppliers would be contracted to supply Legal Aid services coupled to the idea of a quality mark. This had some basis in academic research (see the book, *Standing Accused* by McConville and Others which lamented poor standards in criminal work).

3.2 Other major structural developments were the establishing of the Crown Prosecution Service following major public scandals involving forced confessions by police officers and also the technological development of tape recording which allowed a new mode for conducting interviews. The 1984 Police and Criminal Evidence Act also introduced the idea of the delivery of rights by independent Custody Officers whilst extending police powers. One particularly significant development was the decision to allow the police 24 hours in which to detain a person before charge. This was fiercely debated with 12 hours as a viable alternative but this was rejected and 24 hours underpins the subsequent development of a lackadaisical approach to the investigation whilst the person is in custody. Providing access to legal advice in the Police Station was a major costs driver.

3.3 Initially contracting was to be voluntary and was expressly said not to be a policy which would become compulsory. Of course it did and very unfortunately contracting became a major dividing factor, there being separate crime and civil contracts. This rupture of services had profound consequences on the market causing firms to choose between spheres and although many continue to operate both there was also a large bureaucratic burden. That burden was another factor in private client firms continuing to abandon Legal Aid services.

#### **4. A Rich Ecology**

4.1 What the entrepreneurial activity had created, in the context of the expansion of Legal Aid to meet need, was a rich fabric of firms and services. We have sometimes likened this to the ecology of a rainforest, diverse, valuable and especially establishing in local communities a variety of client choice and a feeling amongst clients, usually poorer and working class, that they had access to justice through “their” solicitor.

#### **5. Reform and the Market**

5.1 The foundation of reform was a myth, that Legal Aid expenditure was “out of control” accompanied by a sinister subtext that the forces driving expenditure were the supplier base improperly exploiting Legal Aid. Academic research showed that the driving factor was in fact the rise in need and volume of cases and a tsunami of legislation, especially in crime. Nevertheless this myth took hold.

5.2 The Paradox in the early 2000s was that the government was substantially investing in workers compensation schemes and rightly so, but whilst it spent billions on the one hand in those schemes it sought to cut Legal Aid expenditure by millions on the other.

5.3 Lord Carter proposed a crude simplistic trade off of volume for price a theme that has bedevilled so called “reform” ever since and dominated proposals for change.

5.4 The proposals that came forward were administratively complex and essentially foundered as they were unable to resolve contradictions between rewarding incumbent suppliers with market share and providing opportunities for new entrants, whilst also hopelessly confusing the nature of the market with other markets where there are multiple opportunities for suppliers to bid for work.

5.5 This is worth spelling out. The Ministry of Justice is a single purchaser of Legal Aid services. It sets prices. The suppliers when they bid for work (however defined) face an existential crisis. If their bid fails then they are out of business. There is no alternative place for them to bid.

5.6 In other words this Legal Aid market for services is not like, for example, the NHS, which procures across a vast organisation for multiple services offering bidders the opportunities to bid for different sizes of contract in different geographical areas in circumstances where, therefore, the failure of a bid is not terminal to their business.

5.7 It was an historic strength of the system that it was open. In other words there were no limits on the number of contractors and sufficient prices allowed a degree of entrepreneurial activity to fill in gaps in the market place. As prices have declined so has that activity. However there are two other benefits from the way in which this market has operated.

5.8 A key element to successful entrepreneurial activity has been establishing reputation and this has been driven by the other key element of client choice. The introduction of the Duty Solicitor Schemes enabled firms to source a more “captive” work stream and gain clients through duty solicitor activity in courts and police stations. Nevertheless it still remained and remains an important element for all firms that the quality of what they do is sufficient to draw that client back to them or achieve word of mouth referrals. In this way client choice drives quality.

5.9 Unfortunately restrictions on the ability to transfer Representation Orders have led to a decline in consumer/client choice. There is a consumer paradox for people who are initially arrested, represented by a duty solicitor and bailed or released under investigation. At that stage, pre-charge, there is no Legal Aid available and they are actually free to make enquiries in the marketplace to find out if the solicitor they have accessed accidentally as the duty solicitor is the person best placed to represent them or whether they could find an alternative with better reputation. In this way consumers are free to move around within the market.

5.10 However, if for example, a person is arrested for murder, has a duty solicitor and is remanded in custody they then find it very difficult to change due to the rules which to this degree undermine an aspect of client choice.

5.11 Contracting has also restricted the market by restricting the opportunities for new entrants to the start of each contract cycle as well as being a system which has severed civil and criminal services. The most startling reform that could be contemplated would be ending contracting completely. This would be a return to a pre-contracting era where all firms needed to do was to keep within the rules in respect of claims and payments. In other words that the work was properly done and claimed. Such a more open system would certainly allow new entrants and with other incentives and structural changes, allow firms to re-establish mixed practices of civil and crime and provide more local integrated services needed to meet the vast unmet need.

5.12 It is not difficult to be imaginative about what is possible in the Legal Aid market. The Legal Services Commission as the successor to the Legal Aid Board had a worthwhile initiative through which firms took on trainees who were subsidised directly by the LSC in return for a contractual commitment to stay in Legal Aid work for a period of time.

5.13 Legal Aid as a bespoke subject ought to be an option within law school courses and participation can be leveraged through grant, the relief of debt and payments to suppliers to provide subsequent training contracts.

## **6. A Fundamental Problem**

6.1 Underpinning access to justice are the rights to a fair trial and equality of arms between the parties. Crucial is the adversarial system working properly to ensure that the court has before it all admissible evidence in order that the fundamental objective, which is the pursuit of truth, is achieved.

6.2 No one is facing up to the work, time and costs issues posed by the explosion of electronic material. It simply means that in cases where it is relevant (and there is often a contest about what is and what is not properly served as evidence or unused material) the evidence has got to be examined and deployed by prosecution and defence. These are tasks which have made the process of litigation more time intensive and more costly. This is for the police as investigators, the prosecution as an independent prosecutorial body assessing the evidence and for the defendants. All require extra resources in the long term in a degree of magnitude to properly cope with the technological development. There is no shortcut and it simply requires more money and acceptance that this will be a demand led system that cannot be contained with fixed "envelopes" of cost.

## **7. The Erosion of Value**

7.1 The above argument in relation to the explosion of electronic material forms a context for the major other issue which has been the erosion of value. It is not possible for solicitors and counsel to continue negotiating around the same envelope of money being deployed for cases in new ways. Inventing other proxies for value or combining proxies with time or combining other structures of payment such as standard fees, non-standard fees, higher-standard fees still has to account for both the explosion in evidence and the fact that current values have been eroded to a degree where the work is unsustainable.

7.2 That unsustainability is evidenced by the recruitment and retention crisis within solicitors firms conducting criminal work. It is also evidenced by the almost complete separation of private client work and Legal Aid work within the solicitor's profession and by the advancing age of the cohort of duty solicitors.

7.3 Research might also reveal a very similar pattern in relation to the ages of partners or directors of firms within the supplier base which is also similarly advancing. Career opportunities have been truncated by the short horizon of business, the uncertainty of profits and the lack of career paths.

7.4 One way of exiting is to the Crown Prosecution Service which now offers substantially better terms than are available generally within the defence community. Another way of exiting is to simply abandon the work and take up different careers. For students with vast debt Legal Aid is deeply unattractive.

## **8. Access to Justice**

8.1 It was a by-product of the expansion of Legal Aid and the availability of firms within communities providing a range of legally aided services that many millions of people could buy into the idea that there was a degree of access to justice.

8.2 Much is written about alienation, voices not being heard, and the unrepresentative nature of politics, inequality and the socially excluded. Legal Aid cuts, in particular LASPO, have formed a backdrop which has accentuated exclusion.

8.3 Exclusion also has direct economic consequences. A family with less income because they are unable to challenge welfare benefit decisions live in greater poverty. Children in greater poverty are more likely to fail in the education system, often being excluded, more vulnerable to drift into gangs, crime and county lines drug dealing. Similarly challenging are living in conditions of disrepair, losing housing and the gross disruption of family life where there are cycles of imprisonment, alcohol and drug abuse and devastating adverse immigration decisions and deportation. Many live and are brought up in deeply hostile environments and too often the inability of fathers to access contact and maintain parenting has potentially disastrous consequences.

8.4 Add to these other factors such as loss of youth clubs, social workers, and the pressure of schools to exclude pupils. It is no wonder that the world of gang affiliation with its sense of identity and drug dealing giving access to otherwise unattainable riches is such a lure to young people and indeed older people involved in organised crime.

8.5 The extent of organised crime has been highlighted by the National Crime Agency in its bid for between £2-3billion to combat what it describes as a major threat to security and wellbeing. Will that funding and these initiatives drive more cases into the Criminal Justice System? The idea that more cases will arise which demand more resources stands in stark contrast to falling volume as a result of the debacle of the RUI stance adopted by many police forces in relation to the many thousands of people arrested.

8.6 What all of this means, including the review itself, is an extremely unstable environment for Legal Aid practitioners. Low margins make firms highly vulnerable to changes in case volume and case mix. A two year "review" is irrelevant to the immediate crisis. What is required is at least a short term injection of funds, the making good of the last 8.75% cut which was predicated on the manipulation of the supplier base producing fewer suppliers with higher volumes, which never took place, and which was in itself arbitrary and unfair. What is also needed however are not only higher levels of remuneration, but an imaginative reworking of incentives and structure to support an independent legal profession and a degree of stability which would allow businesses to flourish whilst meeting need.

## **9. London and its Hinterland**

9.1 At over 650 square miles with the largest concentration of population in the country London poses particular problems for Legal Aid lawyers.

9.1 It is an area of higher cost. Those costs relate to the costs of business premises, higher wages and higher costs for employees for accommodation and travel. In a recent Reed Business Support Salary Guide for 2019 an Office Manager in London is said to command a wage of £40,100. In the East Midlands the figure £23,700 and the North East £29,200 and the North West £23,900. In the South West and Wales the figure falls to £22,300.

9.3 Traditionally the particular costs base of London were recognised by additional London Weighting supplements on hourly rates. There is a powerful case for the reintroduction of London Weighting within any newly devised scheme.

9.4 Another myth is that there was an oversupply of firms in London. This is not true and the number of firms is proportionate to the population. This was established in passing by the KPMG report in the failed debacle of tendering Duty Solicitor Schemes.

9.5 London is the centre of political protest and government and inevitably public protest type crime tends to arise more often and so does financial crime attached to London being the centre of financial services.

9.6 A fundamental problems for practitioners has been the complete absence of planning. There is no court near a police station which is near a prison, they are spread haphazardly. The system has developed without the slightest regard for efficiencies that might arise from locating services together. Indeed plans to relocate remand prisoners only in Wandsworth, Belmarsh and Highdown, which is actually outside London in Sutton, would only exacerbate the problems.

9.7 Very large distances must now be traversed across London for defendants, 'victims' and witnesses and indeed all the participants in the court process.

9.8 The idea has been advanced frequently by the LCCSA for over a decade that there ought to be reform of the Duty Solicitor Scheme. At present solicitors join two court schemes plus associated youth court schemes but are allocated to as many as eight or nine 24 hour police station schemes depending on the location of their office. This thins volume in any particular court. Bringing the schemes into line so that solicitors are allocated two or three police stations schemes most contiguous to their office and the court schemes ought to produce a greater volume of work for firms in their local courts.

9.9 Incidentally scheme inflation, by which many more people joined each individual scheme, was a product of a policy decision by the LSC to automatically allocate all qualifying solicitors, depending on the whereabouts of their office to every scheme that was available.

## **10. Opportunity or Threat? The Criminal Legal Aid Fee Review**

10.1 The immediate impulse for the review was the promise to the Bar to review the AGFS arrangements. That promise was then conflated with the existing idea of a review of the LGFS (no doubt more urgent from the perspective of the MOJ after the successful JR of their plan to cut £30M or so from the LGFS Scheme) and then in turn extended to encompass all fee schemes, police stations, magistrates' courts and the VHCC scheme.

10.2 Three elements dominate legal aid fees for the last twenty five years. The erosion of fee structures by inflation. The endless cuts to EVERY fee scheme. The hugely bureaucratic, unmanageable and failed 'reform' proposals encompassing Best Value Tendering, Price Competitive Tendering and 2 tier contracting of duty solicitors schemes and other similar debacles including VHCC and family contracts. The 2 Tier debacle was accompanied by a completely arbitrary 17.5% cut in fees. What is extraordinary is the sheer scale of that cut; 17.5%, not 1.5 or 2% but this huge figure. Subsequently 8.75% was restored after the failure of the scheme, still leaving practitioners with a completely arbitrary 8.75% cut.

10.3 The common theme has been an approach to Legal Aid as a 'market' (fundamentally misunderstood, see para 5.) to be manipulated with the sole objective of driving down price (cuts) encouraged by overtures from a handful of 'larger' suppliers who sought greater volume and market share. In civil the hatchet of LASPO simply removed access to justice for millions of people and further disrupted and eroded the supplier base. .

10.4 What has been absent is any coherent view of Legal Aid based on principles of fair trial, equality of arms or access to justice through increasing the resource that enables people to believe they have the means (legally aided lawyers) to pursue their rights, that their stake in society and belief in its fairness, in the application of the rule of law to them, has meaning because they can rebalance the unfair advantage of 'others' who have the power (landlords, Councils, the DWP, insurance companies, the Home Office, Police) by instructing 'their' lawyer. This is the real context of rearranging fee structures; it is not an end in itself but only one component of policy that ought to have this enabling outcome. This Review perpetuates the division of crime and civil being confined to criminal Legal Aid fees when the reality is that legal aid services are accessed across lifetimes in multiple ways as need overlaps the civil and criminal boundaries.



10.5 That vision is entirely absent from this Review which is framed as the 'right time to think more widely about the future of criminal legal aid schemes', without any commitment to any funding increase, only to the 'right level' of legal aid provision. It is most likely to be a missed opportunity and actually another 'cut'. The ravaging of value by inflation will not be addressed by a permanent compensatory mechanism, and any 'ambitious' attempt to manipulate the market will yet again misread its reality and lead to JR and debacle. Is this to be a moment (actually a year or two with continuing ministerial reshuffles) for reinvigorating access to justice (restoring the £1 billion about 1/800<sup>th</sup> of government expenditure) or another episode in the erosion of Legal Aid and its supplier base?

10.6 In the period 2004/2005 to 2019 Government Expenditure rose from around £400 billion to over £800 billion. In that period removing £1 billion from Legal Aid was a political choice. The courageous and correct political choice would be to restore access to justice by expanding the Legal Aid spend by £1 billion.

10.7 The complete absence of a commitment to restore funding levels and the absence of vision are depressing. There is little to indicate that the trajectory of the history of Legal Aid will change. Rather that the reality that will emerge will remain one of cuts, loss of services and more people who believe that justice is not to be found within the society in which they live.

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