



Legal Aid:
60 Years of
Public Service
by Barristers





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It is difficult to imagine turning back the clock and returning to a system without legal aid. Over the last sixty years, legal aid has become a vital safety net not only for those clearly disadvantaged and vulnerable, but also for hardworking ordinary citizens who deserve professional help at times of great anguish and need.

Access to justice is an essential part of our free and democratic society. The legal system cannot function properly without suitably qualified independent lawyers, acting fearlessly on behalf of their clients and in the interests of justice. The principle behind legal aid is that it ensures that representation by such advocates is available regardless of wealth: it is the embodiment of a crucial

partnership between the government and lawyers willing to act in the service of their fellow citizens. The case histories in this booklet are examples of how legal aid has affected individual lives, and led to a just outcome for all concerned. They reflect the experience, hard work, legal acumen, and professional integrity that characterise the barrister's craft. They illustrate the





The Royal Courts of Justice

dedication necessary to enable that craft to be nurtured and developed, within the legal aid system, for the good of society as a whole. They are some of

the events in which the Bar can be immensely proud to have played a part over the past sixty years.

Yet, as we know, there are pressures on this system, and there are very likely more to come. These will diminish its utility and value. Erosion of funding to the legal aid system will inevitably mean that:

- defendants in some criminal trials will not receive fair trials
- families will be placed at risk of serious miscarriages of justice, with children wrongly separated from their natural parents
- the courts will be unable properly to protect babies and children at risk of violence or sexual abuse
- public legal services will become an inadequate alternative to the high quality representation received only by those who can afford it

The need to champion the vision of legal aid has never been more urgent. It is vital that politicians and lawyers should work together to support legal aid in its hour of need.

Desmond Browne QC
Chairman of the Bar of England & Wales



Legal Aid: A Brief History



Following the 1945 Report of the Rushcliffe Committee, Clement Attlee's government established the legal aid system through the Legal Aid and Assistance Act 1949. The Committee had been tasked to look at legal aid in establishing equal access to the law as part of the welfare state.

Previously, no one scheme had existed for granting legal advice. Free representation was granted by the criminal courts, the provision was patchy. Obtaining civil legal advice was also difficult. Free advice was available mostly for divorce work, whilst ad hoc advice was given by wartime Citizens Advice Bureaux.

The Act was given Royal Assent on 30th July 1949. Its objective was to:

'Provide legal advice for those of slender means and resources so that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right.'

The Act allowed barristers to receive 'adequate remuneration' for their work. The Law Society administered the system, gradually covering all courts and some tribunals.

From the 'Sixties onwards, the introduction of 'Green Form' advice extended legal aid

into social welfare law, encouraged by the first Law Centres. The creation of Crown Courts, civil and family law developments in the Magistrates Court, and more work being done in the County Court, all encouraged increases in the number of cases assisted.

However, the growing cost of the system led to change. Administration passed to the Legal Aid Board in 1998, which encouraged greater quality assurance, and franchising. Following a comprehensive review, the Access to Justice Act 1999 created the Legal Services Commission, with two legal aid schemes: the Community Legal Service and the Criminal Defence Service. Providers required contracts with the LSC, quality standards, with set priorities for legal aid. Lord Carter proposed further reforms in 2006, calling for more modernisation, including moving lawyers away from hourly rates to a fixed fee system.





Criminal Legal Aid

Case Study 1

The central principle of criminal legal aid is still true today; anyone accused of a crime for which they might lose their liberty should be defended, whatever their plea. Here is one example.

'For me, the importance of representation came home to me when I met someone who was not represented.'

'I was working in the Crown Court when Mr. A was called on for sentence. He clearly had no idea what was going on. The Judge could not get any sense out of him, and felt that someone needed to represent him. He asked if I would be able to deal with the case, and granted me a representation order. I had no idea what the case was about; speaking to the prosecutor, it transpired that Mr. A had been in custody for about 6 months, without legal advice.'

Upon careful examination the barrister discovered that Mr. A was mentally unwell, and needed treatment. He identified that Mr. A had got involved in a minor dispute.

He was arrested, remanded, and whilst awaiting trial, became overwhelmed. He assaulted one of the guards. When he was brought to court, he pleaded guilty, even though he was clearly unfit to plead.

'I was able to find a solicitor for him, who obtained various reports. Without our representations, he would have simply been sent to prison. We were able to get him into a secure unit, where he was properly diagnosed and treated. Ultimately a Judge was able to sentence him to a hospital order, where he could be treated, thus protecting the public and himself. Without the representation order, Mr. A might well have been sentenced without any understanding of what on earth was going on, contrary to his basic rights.'

'Unless we are sure of guilt the dreadful possibility always remains that a mother, already brutally scarred by unexplained deaths of her babies, may find herself in prison for life for killing them when she should not be there at all.'

Criminal Legal Aid

Case Study 2

Legal aid in criminal cases is not always popular. The case of Angela Cannings was an example where challenging complex evidence, detailed cross-examination, and proper procedure were vital in establishing innocence.

Angela and Terry Cannings had four children, three of whom died in infancy. After the death of their youngest child, Angela Cannings was arrested, and stood trial for the murder of her two sons, Jason and Matthew. The Crown argued she had killed them by smothering them. Angela Cannings consistently denied doing anything to harm her children. For her the deaths were natural, if unexplained, cot deaths.

The Crown's case depended on specialist evidence. The Crown's expert was concerned about the rarity of three infant deaths in the same family. As no natural cause had been identified for the deaths, he concluded that their deaths were caused by a sudden event, possibly as a result of smothering.

In April 2002, the jury convicted her of murder. Angela Canning appealed and was represented on appeal, as at trial. Fresh evidence was submitted relating to her family history, including that of a previously unknown half-sister, whose own children had suffered similar incidents, yet survived. That evidence strengthened a view that there was possibly an unidentified genetic factor that could explain the deaths.

The Court of Appeal concluded that the new evidence presented a realistic possibility of a genetic explanation for the deaths. The court said the rarity of such sad events should not lead to an assumption that the dead infants were deliberately killed. The court recognised,

'...Unless we are sure of guilt the dreadful possibility always remains that a mother, already brutally scarred by unexplained deaths of her babies, may find herself in prison for life for killing them when she should not be there at all. In our community... that is abhorrent.'

The public antipathy to Stagg cannot be exaggerated. His barristers faced the task of defending a vulnerable man facing evidence from various experts, mistaken 'identification' witnesses and a hostile media.

Criminal Legal Aid

Case Study 3

A barrister's professional responsibility is to work to the highest standards, thereby ensuring that justice is properly served. It is vital therefore that the most qualified and experienced advocates conduct long and complex cases – being fairly remunerated for the work that they put in. The case of Colin Stagg illustrates why.

After the brutal murder of Rachel Nickell on Wimbledon Common, there was an overwhelming public clamour for a conviction. After his initial release without charge, Stagg was subjected to an undercover police operation designed to obtain a confession. The police worked with a 'psychological profiler' who sought to give expert evidence about the type of person who would have killed Rachel Nickell. The profiler compared letters between Stagg and an undercover officer as to the type of fantasies held by the killer, and concluded that they shared the same deviant fantasies. The profiling evidence was therefore relied on, in support of a disputed identification of Stagg on the Common around the time of the murder.

Stagg never confessed, despite the investigation being the largest ever then undertaken by the Metropolitan Police. The public antipathy to Stagg cannot be exaggerated. His barristers faced the task of defending a vulnerable man facing evidence from various experts, mistaken 'identification' witnesses and a hostile media.

Stagg's local legal aid solicitor in Putney instructed two experienced barristers with defence experts to deal with every strand of the prosecution case. The trial Judge stopped the case following legal submissions. In December 2008 another man pleaded guilty to the murder and Stagg has now been absolved of any blame. A man who has subsequently been proven to be innocent faced a case that the general public believed was overwhelming. Without proper legal aid the chances are he would still be in custody today.



‘The children were returned to her. Without publicly funded legal aid this mother would have lost her children to adoption.’

Family Legal Aid

Case Study 1

Research has shown that expert family barristers are being driven away from representing the interests of vulnerable children and families as a result of repeated cuts in legal aid pay. The following case illustrates why this is undesirable.

‘A couple of years ago I was instructed on behalf of a mother in care proceedings. Her two sons, aged 3 and 18 months, had been taken into care. Both children had suffered ulcers on their feet.’

‘The local authority said that the mother had caused the children’s ulcers. She only instructed me after the initial hearings when her solicitor had agreed to a psychiatric assessment, which concluded, wrongly, that the mother had Munchausen Syndrome by proxy. There was no primary evidence filed regarding medical records.’

‘The mother convinced me that the children had always suffered genuine illnesses and that she had sought medical advice appropriately. The local authority plan was for adoption of both children.’

‘We therefore asked to see the children’s medical history. On examining the lengthy medical

records, I eventually discovered a small note by a paediatrician in which he made a diagnosis of herpes simplex as the cause of the ulceration.

I conducted research on this rare condition. The papers recounted cases of herpetic whitlow on a child’s foot suffered by an infant who had had cold sores around the mouth, and had a habit of sucking his toes. The mother’s children both sucked their toes.’

‘I applied to rule the psychiatric report inadmissible, and was successful, as well as getting expert paediatric evidence introduced. Following cross-examination the court concluded that there was no evidence to conclude the mother injured the children. The children were returned to her. Without publicly funded legal aid this mother would have lost her children to adoption.’



'The local authority, faced with this excellent assessment and report, agreed that the mother could continue to have contact to the children. This enabled the mother to concede that the children should go into care and be placed for adoption.'

Family Legal Aid

Case Study 2

The commitment of family barristers is reflected in very long working hours, with painstaking attention to the complexities of their cases, often under extreme pressure. The consequences of the court getting it wrong are extremely grave for some of the most vulnerable in society. Here is another example.

'I recently concluded a care case of great complexity. I represented the mother in proceedings where two boys were to be placed for adoption with foster carers, who had been looking after the boys for nearly a year.'

The family had been subject to public law family proceedings previously and the local authority decided to pursue Care Orders leading to adoption. The documents were voluminous, as the barrister had to consider all relevant previous proceedings.

'There were glaring omissions in the case, including inordinate delay. The mother was distraught, had mental health problems, was utterly daunted by the proceedings, and by the thought that she might not see her boys again.'

Our expert's report was extremely thorough. Although it did not recommend the return of the boys, it did recommend occasional direct contact, and regular indirect contact.'

'The local authority, faced with this excellent assessment and report, agreed that the mother could continue to have contact with the children. This enabled the mother to concede that the children should go into care and be placed for adoption. She was able to let the boys go with her blessing, on the basis that she would be able to continue to see them throughout their minority and have the ability to exchange gifts and cards on significant dates. To her and her family, this was priceless. They came out of Court thanking us all, genuinely happy with the result.'

'What would have happened if the legal aid cuts that are proposed had been in place? Based on the huge amount of hours that went into preparation, I would have been forced to do something else to maintain my livelihood. I fear the consequences for the mother had that been the case.'



'There has been highly competent legal representation, in respect of all parties at all times... But for the high quality representation that the father has had, the outcome might have been very different.'



Family Legal Aid

Case Study 3

A further real difficulty in legal aid cases is that the litigants tend to face a number of different legal problems that are interrelated to each other, such as immigration, housing and child welfare issues.

One example was a case involving care proceedings that ended in January 2009. In this case, a father, a former illegal immigrant, obtained a residence order in respect of his young daughter. The Home Office had indicated that if the Judge were minded to make a residence order, it would grant the father indefinite leave to remain, taking account of the child's welfare. Proceedings had been instituted at the time of the child's birth. There had been numerous contested hearings, involving questions such as assessment of the father, his right to accommodation and the extent of the local authority's powers. All were technical and complex. His barrister reported that the local authority position at all stages had been that the child should be placed for adoption, the consequence of which would have been that the father would have been deported.

The nature of the proceedings involved issues of family law, immigration law, administrative law and human rights; the local authority instructed a specialist administrative law barrister. The expertise of the legal aid barrister was critical as the trial Judge pointed out:

'The other issues that I want to raise today relate to the Legal Services Commission's ongoing consultation with respect to changes to public funding. I simply want to make the point, that in this case there has been highly competent legal representation, in respect of all parties at all times... But for the high quality representation that the father has had, the outcome might have been very different.'



Civil Legal Aid

Case Study 1

Legal aid is worth standing up for. It is a powerful weapon in favour of the weak, the victim and hardworking families who deserve a fairer deal from the law. Many have suggested the Community Legal Service is sorely wanting – and yet, properly funded, it can help individuals and repay their investment. One Chancery barrister explains why.

‘A few weeks after his father died, my client’s sister claimed to have found his will under which he gave her his entire estate, and gave my client a derisory £100 each year on his birthday.’

Both the client and his sister were impoverished. Half of their father’s very substantial estate would have made them each comfortable for life. However, it transpired that the will had been the result of a careful fraud, with two apparently plausible witnesses involved. A person claiming to be a professional was appointed executor, and apparently entrusted with the will in the deceased’s lifetime. Numerous witnesses were produced to support the will.

‘With huge effort, care, some luck and the support of the Legal Services Commission (which paid for the forensic document examiner as well as the legal team, including specialist counsel – myself) the fraud was challenged in court and exposed.’

‘The police had refused to prosecute. My client could never have funded the case himself. An evil, mean and insulting fraud would have gone scot-free. My client would have remained penniless, and apparently rejected by his father.’

As the barrister pointed out, forged will cases are very, very rarely successful. But this was; and the papers were sent by the Judge to the CPS. Nor will the legal aid fund be out of pocket. A costs order was secured against the other side, and in any event, there would be a charge on the estate.



A conventional award (like those for personal injury damages) to mark the injury and loss, should be added to the award for pregnancy and birth.

Civil Legal Aid

Case Study 2

Legal aid has often helped make new law and also helped families in cases of alleged clinical negligence, as this example shows.

*Rees v Darlington Memorial Hospital NHS Trust*¹

A disabled claimant sought a sterilisation, because she felt unequal to becoming a mother. The operation failed, for reasons admitted as negligent, and she gave birth to a normal healthy child. However, the existing law² prohibited recovery for the cost of rearing a healthy child.³ A majority of the Court of Appeal allowed the claimant to recover the additional costs of raising the child (those attributable to her disability).

On appeal, the House of Lords affirmed their previous ruling, but mitigated the severity of the existing law. They upheld the existing rule that an unwanted child could not be regarded as a financial liability, without also taking into account the rewards of parenthood.

Nevertheless, the Law Lords acknowledged that the parent had suffered a legal wrong. As a result, the claimant was put at a disadvantage. She had a right to limit the size of her family and the wrong had deprived her of the freedom to do so. So her award of damages did not adequately recognise that loss of freedom.

A conventional award (like those for personal injury damages) to mark the injury and loss should be added to the award for pregnancy and birth. Such an award would not be compensatory, but would recognise the legal wrong done.

The award applies irrespective of health, or disability of parent, or child. Leading and junior counsel represented the claimant, and her claim was funded by legal aid. The decision marks a significant departure from the previous position. It is now known as the '*Rees v Darlington*' head of damages, a rare distinction. The change could not have been achieved had legal aid not been available.

1. [2004] 1 AC 309, House of Lords

2. *McFarlane v Tayside Health Board* [2000] 2 AC 59

3. Where the child is disabled the case is different - *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, Court of Appeal



The availability of legal aid has been central to the development of housing law and to protecting those who would otherwise be unrepresented.

Civil Legal Aid

Case Study 3

The availability of legal aid has been central to the development of housing law and to protecting those who would otherwise be unrepresented. Two areas of housing law demonstrate this: first, on homelessness legislation and the rights under it; and, second, the legal issues surrounding security of tenure.

In *R v Hillingdon LBC, ex p Streeting*,⁴ Mrs Streeting, an Ethiopian married to an Englishman, lived in Greece with their child. The husband died and both Mrs Streeting and child visited the UK for the funeral. She was told that she was not allowed to return to Greece, and could not return to Ethiopia. She had no one in the UK to stay with and was refused assistance on the basis of having no connection with any UK local authority. The Court of Appeal held that homelessness legislation did apply to her. There was a duty to provide her with accommodation, saying:

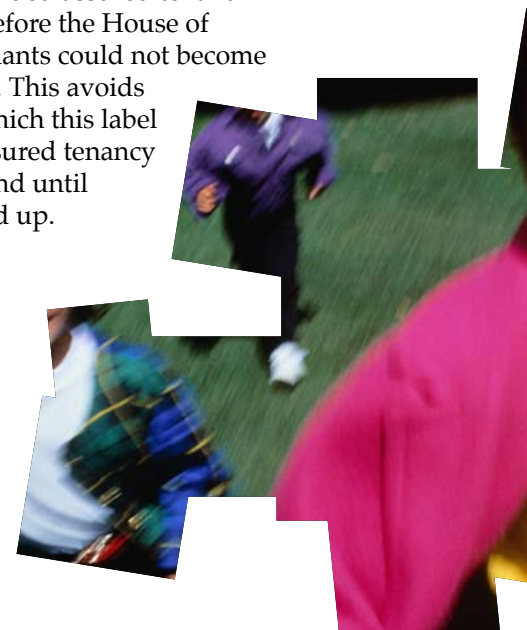
'if ever anyone needed the succor of this Act it is this young woman and her child, homeless refugees in a strange country.'

Legal aid has also assisted the protections afforded to tenants. Prior to *Bristol CC v Hassan*,⁵ a suspended possession order was deemed to end a tenancy, even if both landlord and tenant intended to maintain the tenancy. In *Hassan* the Court of Appeal suggested the use of postponed possession orders. These maintained the tenancy during the postponement, with the added security in requiring the landlord to satisfy the court if that postponement had been breached. Most dramatically, in *Knowsley Housing Trust v White*,⁶ a publicly funded assured tenant successfully argued before the House of Lords that assured tenants could not become 'tolerated trespassers'. This avoids the negative effects which this label carries, because an assured tenancy does not come to an end until possession is delivered up.

4. [1980] 1 WLR 1425

5. [2006] EWCA Civ 656, [2006] 1 WLR 2582

6. [2008] UKHL 70, [2009] 2 WLR 78, HL





Legal Aid and the Public Interest

Recently, the legal aid system has come under close scrutiny. With increased demand for legal services, rising costs and overheads, and a growing legislative burden, aligned with the development of new technologies, the cost to government has risen steadily. The emphasis on providing a quality service, within a managed financial framework, led to the creation of the Legal Aid Board in 1989. This approach has been pursued, more rigorously, by the Legal Services Commission (LSC), which succeeded the Board, from 1999 onwards.

The Government has been reviewing legal aid provision almost continually over the last 5 years. Starting in 2004, with *A Fairer Deal for Legal Aid*, the Government undertook to keep the annual cost of the system at £2 billion, which it had reached. This was followed by an independent review by Lord Carter. Entitled *Legal Aid: A market-based approach to reform*, it focused on measures to control the cost of criminal legal aid. The Government has been concerned that the cost of criminal legal aid was eating into funding for civil legal aid, (both of which are contained through a single, ring-fenced envelope).

The Government has also frozen the fees payable to the providers to the system through the LSC. This has had an impact, as research published in March 2009 by the

Family Law Bar Association proves. These cuts are driving the most experienced advocates – who handle the most complex cases, such as child protection – out of the system.

Government proposals following Carter were contained in *Legal Aid: A Sustainable Future*. This set out proposals for the reform of funding for criminal legal aid, for civil, family and immigration and asylum matters, and finally a contracting regime in support of Lord Carter's objectives. The paper also set a goal that, by 2010/11, the Government would have achieved a new procurement system and a sustainable legal aid scheme. Reforms have also proposed fixed fees for criminal and family work, Best Value Tendering, and a contract for Very High Cost Cases. All have



The Bar Council argues that successive cuts in legal aid pay rates are driving skilled advocates away from publicly funded work, resulting in a loss of high quality representation for the most vulnerable, and undermining the interests of justice.

proved highly contentious.

Many practitioners have opposed the changes. They have challenged whether the changes made will safeguard quality in the system. Many feel that unleashing 'market forces' onto legal aid procurement in the belief that they will reduce the prices paid for those services is untested. This is because the LSC is not operating in a market – it can drive prices up or down as it chooses. Nor has the Government's approach been researched; there is also the inherent risk that the quality of the services for those who need them will be reduced.

The Bar Council argues that successive cuts in legal aid are driving skilled advocates away from publicly funded work, resulting in a loss of high quality representation for the most vulnerable, and undermining the interests of justice. They have also suggested new approaches towards legal aid, like establishing a Conditional Legal Aid Fund (CLAF), as a means of ensuring that access to civil justice is provided to those in need without the means to fund such access privately.

One thing however remains constant: the Bar Council's support for the legal aid system. Desmond Browne QC acknowledged this in May 2009, saying:

'Barristers doing legal aid work are public servants and deserve the respect of the public for their work safeguarding the most vulnerable in society. In the 60th anniversary year of legal aid, the publicly funded Bar is facing death by a thousand cuts. The Bar realises the extent of the financial constraints facing government, but we cannot allow an integral part of the welfare state to wither and die.'

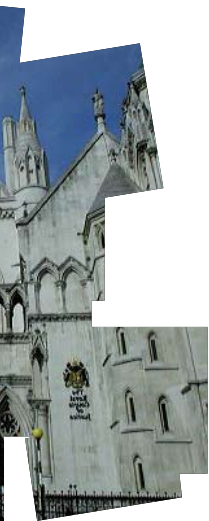




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With particular thanks to Mark Hatcher, Ben Rigby and the members of the Bar Council Public Affairs Committee.



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