

# LEGAL AID IN THE TWENTY FIRST CENTURY

## **The Background**

Legal aid saves citizens from homelessness and destitution; protects the rights of the mentally ill; goes towards fair trials and correcting miscarriages of justice; keeps children with their parents; assures the socially deprived a basic standard of living; and forces the Government to comply with peremptory norms of international law including the prohibition against torture and preventing the return of refugees to countries where they face persecution. Lawyers entering this sector have quite different motivations to those found in corporate ivory towers. A big advantage of working in legal aid is the people, and diversity of people, you meet, whether colleagues, supervisors, clients or judges. All cases matter, and many will have a big impact on the lives of the people involved, regardless of the outcome.

The legal aid sector is the obvious place for any new lawyer hoping to help ordinary people given that Britain's legal aid system is internationally acknowledged as the most comprehensive and effective justice mechanism of its kind in the world; a fact rarely lost on domestic practitioners and politicians.

For a system that is supposedly held in such regard by the Government it is concerning to hear repeated debates as to whether it will soon end up a relic of the post-war welfare movement.

Last year, a legal aid practitioner attending the College of Law said students were 'mad' to consider working in such an unstable area of law. A *New Statesman* journalist begins yet another rant, 'now that legal aid is over...' with grim finality. The Law Society's legal aid manager, Richard Miller, is frequently criticising the Legal Services Commission (LSC), the quango responsible for administering the £2bn legal aid budget, over the content and direction of its numerous proposals and consultations to change the legal aid system.

In short, since 2005, the LSC has introduced a number of drastic changes to the way in which legal services are paid for and delivered which have resulted in widespread concerns about access to justice for ordinary people and whether it is feasible for legal aid solicitors to continue providing a good quality service under increasingly difficult conditions.

Many feel strongly that the piecemeal erosion of legal aid will result in the destruction of one of our basic tenets of justice: 'access to justice'. Given the rate with which the LSC is steaming ahead (itself a sore point among practitioners) in its push to overhaul the provision of publicly funded legal services, it can be bewildering trying to keep up with its latest questionable initiatives.

The Government have long made it clear that the legal aid budget was becoming problematic due to spiralling costs. The Ministry of Justice set out to bring this growth within manageable parameters. 'Problem areas' were identified in both criminal and civil public funding: 'Very High Cost Cases' (VHCCs) in the Crown Court such as large scale frauds and complex murder cases which account for around 60% of the cost of the criminal budget although they make up just one per cent of cases and child care proceedings which are often prolonged and expensive due to the high cost of expert reports and assessments.

## **The New Way for Legal Aid – Fixed Fees, Competitive Tendering, And Larger Firms**

The Government paper published in 2005, *A Fairer Deal for Legal Aid*, was the precursor to Lord Carter's review of legal aid. Lord Carter, an economist by training, was given the task of proposing a system that would make cost-savings 'across the board'. While legal aid lawyers

would hesitate to argue against greater efficiencies in the system, there were concerns that the reforms would generate savings through proposals that would result in poorer provision of legal advice.

The principal proposals to come out of the Carter Review were designed to create a competitive and good value legal aid market based on the principles of providing value to the taxpayer through economies of scale.

The initial phase was to introduce fixed fee schemes whereby lawyers are paid a fixed sum per case set by the LSC, regardless of the complexity or length of the case (with some exceptions in certain instances). The aim is to break from the tradition of paying lawyers on an hourly basis for the work they do.

The LSC cannot generalise how long a particular lawyer will have to spend on a case before being sure that a good quality outcome is achievable. Precise information is required for the LSC to have any hope of fairly calculating a generalised flat fee. In its review of the Carter report, the Select Committee of the Department of Constitutional Affairs revealed that the LSC was far from this stage of data collection, and that there is no evidence that is any closer. Paying little heed to the Select Committee's warning not to embark on setting fixed fees until more accurate information was available; the LSC has cast its programme of fixed fees across the legal aid sector.

The fixed fee for homelessness cases, for instance, is around £180, yet they typically take 6-7 hours to resolve. Based on the old hourly rates system, 50% of the lawyer's time is now worked *pro bono*. The alternative is for law firms to reduce the time spent on cases – or to use less skilled paralegals paid cheaper salaries to work on these cases. Such bargaining means that either the cash-strapped law firms and the Not for Profit (NfP) sector are penalised, or the chances of securing a just outcome are waved good-bye.

There are issues surrounding how the LSC is presenting the results of the fixed fee system, especially that its presentation of statistics that are claimed by the LSC to point to the success of the scheme is fundamentally flawed. Each case is logged by the LSC as an 'act of assistance', regardless of its result. Further, the fixed fees system encourages file splitting so that lawyers must open as many files as possible for their clients – each being recorded as an act of assistance. This satisfies a politically and financially motivated focus on the *number* of acts of assistance, ignoring the quality of outcome for each client. This myopia is reflected in a statement by Lord Hunt (the ex-legal aid minister), that '[M]ore than 800,000 items of civil and family legal help were delivered in 2006-07 - an increase of a third in two years. That's a great deal more help for the people who need it.' Correct, if one subscribes to such universal classification: but what but what his Lordship failed to reference was the *kind* of service these people received or the outcomes achieved. Addressing cases as 'items of legal help' is symptomatic of a statistical numbers game that features heavily in Government legal aid policy formulation.

The second phase proposed by Lord Carter was 'Best Value Tendering' (BVT). BVT involves competitive tendering for contracts by legal aid suppliers. Suppliers must calculate their notional minimum fee for each case. The total value of their bid will crudely correspond to the estimated price per case multiplied by the number of cases they believe can take on. This is the spirit of the 'market-based approach'. The idea is that practitioners will effectively propose their own fixed fees under BVT.

Central to the BVT proposal is that the free market sets the price and so market inefficiencies will be eliminated. However, the auctioning of contracts encourages suppliers to 'bid low'. Contract winners who find their bid values unsustainable may necessarily resort to practices that compromise quality in order to save money.

Contracts under BVT will last for a number of years, during which time circumstances will undoubtedly change. For example, Government legislation may create greater complexity within

cases. During the contract period suppliers will have to adjust to such changes while fulfilling their contracted minimum caseload obligations. The potential for standards to slip is real.

The award of contracts is linked to the capacity of the suppliers, which includes how many cases a supplier calculates it can take on, and the potential for growth to accommodate increasing demand. This criterion favours larger suppliers and will threaten the viability of smaller, niche and specialist providers of legal services. When small suppliers close down, it is the communities they once served that feel the effect of the closure most acutely; particularly those of black, minority and ethnic origin (BME), often most comfortable when dealing with smaller BME-run firms.

## **The Black Hole (Of Lost Talent) And The Drought In Recruitment**

The cost saving that the Government wishes to make by commercialising the delivery of legal aid services cannot justify the inequality and exclusion of some of society's most vulnerable and disadvantaged – after all, who is legal aid for? This point was pleaded passionately by Jacqueline Everett before the Select Committee of the DCA, a solicitor who was forced to close her housing practice after 20 years of community service because of the threat to the delivery of legal aid services that the LSC was carrying out. Whether it is because legal representatives of the most deprived were forced to predict how much a three-year caseload bill would total, and in the end found it unaffordable to conduct their cases properly; or whether it is down to the closure of local firms and the loss of a 'pool of experienced and dedicated people' with nothing with which to replace them; or even that the remaining firms are encouraged by the flat fee to resort to 'cherry-picking cases with model clients in order to avoid time-consuming cases' – a weary legal aid profession must work even harder to minimise the fall-out from fixed fees and BVT on its clients and ensure that their clients' best interests remain at the forefront of how cases are conducted.

Larger sized firms will facilitate a key Carter vision: hyper 'gearing' – where there is a high ratio of unqualified fee earners (such as paralegals) to qualified solicitors within every firm. It is also known as the Carter pyramid model. The more paralegals to qualified solicitors, the higher the 'gearing', and the wider the base of the pyramid structure, with partners nesting at the top. Gearing is standard good business practice in all law firms and the Law Society recommends a ratio of around one partner to one and a half fee-earners. However the Carter model expects gearing ratios of one partner to *fifty* fee-earners in legal aid firms! With the onset of hyper gearing, it is clear what route many entrants into legal aid will be forced to take before landing a training contract. The pyramid model encourages firms to recruit paralegals over trainees. As the pool of paralegals is increasing, this is becoming the only way to a training contract with some big legal aid outfits. If the best firms can only be reached by jumping through paralegal hoops the number and quality of entrants will be profoundly affected.

It is not the place of the public sector to pay equivalent salaries to those won by equivalent private sector employees. But in order to attract a high calibre of recruits, it is important that remuneration for publicly funded lawyers is at least competitive. This makes Lord Chancellor Jack Straw's recent warning in a speech made at the London School of Economics that publicly funded lawyers should 'reconsider [their] expectations of earnings' very worrying. Such brazen disregard for a section of society that is rarely recognised for the social utility of its work should not have a place in national Government. Why doesn't Jack Straw 'reconsider' the position of the publicly funded Government Legal Service lawyers, who enjoy wages approaching City standards, and rarely work more than a nine-to-five, with attractive benefits and long holidays? These are the same lawyers who were unable to prevent the RBS chairman from walking away at 50 with a pension of £700,000 per week, for a series of disastrous deals that have imperilled the finances of millions and devalued our banking system's international reputation.

Legal aid lawyers take on challenging cases with a high level of responsibility. Many have been through as many years' training as better-paid accountants, actuaries, or NHS doctors. It is to the detriment of the poor and socially deprived, who rely on capable legal aid lawyers, that the

Government refuses to live with the reality that they must be paid a professional's wage if professional standards are to be maintained.

## **The Spectacular Failure To Understand**

*A Fairer Deal for Legal Aid* was intended to rein in the rising costs of two sectors of legal aid provision – VHCCs and child care proceedings. The Government's post-Carter changes to legal aid do not deliver this. What they represent is a failure to ask why there has been increasing expenditure in these areas. Professor Cape, as cited in the Department for Constitutional Affairs' comprehensive treatment of the Carter review, spelt out the implication of the flawed review to the DCA panel: 'the proposed solution will not solve the problem because the fundamental causes have not been understood, let alone been tackled'.

Rather, fixed fees, BVT, and the pyramid model take money from financially precarious areas of criminal and civil work, where costs have 'increased only slowly if at all, and often decreased on a per case basis'. In Carter's false economy this windfall will cross-subsidise the cost of VHCCs and child care proceedings, to generate projected savings of £100m by 2010. Yet as long as these problem areas are not addressed, the 'unsustainable' growth in the cost of providing legal aid will continue, abated only by skimming more money from economically stable areas of legal aid. In effect, the Carter review simply recommended 'robbing Peter to pay Paul'.

## **The Ongoing Campaign To Salvage Justice And Instil Respect**

Pressure from dedicated organisations such as Legal Action Group (LAG), Legal Aid Practitioners' Group (LAPG), and Young Legal Aid Lawyers (YLAL) is directed towards changing the attitude of ministers and the LSC towards legal aid. While the decisions of the LSC continue to fly in the face of the responses it receives to its numerous post-Carter consultations, there have been victories.

Legal aid providers have held the Unified Contract for civil work with the LSC since they were forced to sign it in 2007. Some firms stuck to their guns, and refused to sign the contract in the first place. Yet many broke agreements not to sign, beginning with the biggest, and rippling down across the sector. The Court of Appeal held the Unified Contract as 'unfit for clarity' in late 2007. The LSC was forced to rethink its approach, increasing fixed-fees and postponing BVT for civil and family work until 2013 (although criminal BVT has already been consulted on).

Greater solidarity among service providers is mandatory to demonstrate that the LSC's abuse of its monopoly position that utilises the failure and fortune of real peoples' lives as gambling chips will not be tolerated. This is the minimum that legal aid lawyers must do to fulfil a duty to act in their clients' best interests.

LSC measures that appear counter-intuitive to people with their clients' welfare in mind must be challenged and set aside. When the LSC wrongly claims that it acts with the best interest of clients at heart these claims must be refuted and denounced. It is now, more than ever, that legal aid needs committed, capable, and competent incoming solicitors to guarantee the access to justice promised by the Government and to shape future reforms for the better.

## From GDL/LPC to a career in legal aid

This year I began working towards going into legal aid. At university it was not as ubiquitously touted as corporate routes. Here, I present some of the methods that I have found most useful in trying to learn about legal aid, contribute to legal aid debates, and hunting for a legal aid employer.

### ***Carter review – what did it say?***

The DCA Committee report '**Implementation of the Carter Review of Legal Aid**' is an excellent starting point for an overview of the Carter proposals, including practitioners' responses to the proposals, the point of view of academic commentators, and transcripts of interviews between the Committee and major figures including Lord Carter himself. Keep an eye out for a moving contribution from Jacqueline Everett, now a lecturer at the College of Law.

### ***Campaigning***

Joining YLAL is a fantastic platform for legal aid campaigning and contributing to the legal aid debate. You can keep abreast of the latest developments in legal aid and gauge the response of a variety of lawyers to such changes as well as offering your own opinion. The group are friendly and will welcome questions you may have about legal aid or wider social policy. Register with YLAL via their website and find out when the next meeting is being held under 'Events' in the left-hand menu. It is also a useful CV builder, and is a brilliant way of impressing good legal aid employers, whether because of its presence on your CV, or from what you will be able to discuss in covering letters and interviews as a result of attending meetings. [www.younglegalaidlawyers.org](http://www.younglegalaidlawyers.org)

If you can afford it, subscribe to Legal Action Group magazine. Highly informative and another attractive way for keeping a finger on the pulse of changes in legal aid. [www.lag.org.uk](http://www.lag.org.uk)

Human Rights Lawyers' Association (HRLA), Justice, The Haldane Society

### ***Pro bono work***

A good body of work experience is essential to demonstrate two qualities that all legal aid firms will look for in CVs – commitment and passion. Do not just focus on the College of Law's pro bono work scheme – normally you can only get placed with one organisation via the College. Try contacting organisations directly. The Free Representation Unit (FRU) will allow you to take real cases on an ad hoc basis, so you can work them around your schedule. The following are a few names of places that I have found useful in addition to FRU:

- Citizens' Advice Bureau (CAB), Mary Ward Legal Centre, Law Centres – *family, housing, employment, benefits*
- The Prisoners' Advice Service – *prison law, crime, human rights*
- The Refugee Legal Centre (RLC) – formidable training reputation, Bail Immigration Detainees (BiD), the Refugee Council, the Immigration Advisory Service (IAS), Detainees Advice Service (DAS) – *immigration*
- Interights, Kurdish Human Rights Project (KHRP), the Medical Foundation for the Care of Victims of Torture – *human rights*
- City University's pro bono webpage - [www.city.ac.uk/law/pro\\_bono/index.html#](http://www.city.ac.uk/law/pro_bono/index.html#)

***Latest news stories:*** Specifically searching for 'legal aid' etc in the Law Society websites' search box to uncover a wealth of news articles that will update you on the as well as older news pieces for background reading.

***Law firm/chambers manual:*** Chambers & Partners. Forget the Law Society's Training Contract & Pupillage handbook, I say – written by firms, for themselves.

***Training contract finder:***

Unfortunately, legal aid firms use different avenues for advertising their training contracts. You therefore risk many slipping under your nose. Even where a vacancy is found, I know people have missed out because firms have advertised a wrong deadline on some websites. My advice is to call the firm to cross check their application deadline every time.

- The LAPG website – many paralegal/training contract vacancies were advertised this year under 'Students – Training Contracts' in the left hand menu.
- Look under 'Immediate Vacancies' on the lawcareers.net website for the latest training contract developments.
- College of Law Vacancy database – conduct a general training contract search and then weed out legal aid firms.
- College of Law notice board (outside Careers' Service) – at the time of writing there have been vacancies that did not make it on to the electronic database, so check both.
- LAG magazine (currently hard copy only) – one excellent civil liberties firm's training contract advert could only be found in this magazine.
- LSC training contract grant recipients list available to download from its website.