

LEGAL AID AND ACCESS TO JUSTICE: RATIONAL DECISION-MAKING AND THE COST OF DOING IT BADLY

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Introduction

In a period of recession and severe constraints on public spending, lawyers are not immune. They cannot expect to escape pain-free when it comes to regulation and control of public expenditure. Yet a series of developments in legal aid expenditure in recent times has revealed a profound lack of understanding by public policy-makers about the dangers of knee-jerk reactions to cuts designed to keep the Treasury content. It should go without saying that in any decent democratic society governed by the rule of law, any person charged with an offence that threatens their livelihood, their reputation or their liberty should be entitled to proper legal representation.

It should also be axiomatic that when the most vulnerable members of society, be they fathers, mothers or children who are caught up in family proceedings, or defendants in criminal proceedings, find themselves enmeshed in the wheels of justice they are entitled to proper legal representation. It should be equally trite to observe that a justice system that creaks and groans puts the rule of law at issue. If free men and women are unable to exercise rights which the law gives them, they are in chains. A properly funded justice system, which provides proper legal representation to those who need it, acts as a bulwark for the weak and vulnerable against a powerful state. Like the jury, the justice system is like a lamp that keeps freedom alive.

What is at stake?

Whether it addresses criminal, family or other matters, the justice system is an inherently human and, as such, frail system. It involves a large cast of decision-makers as well as others who may be profoundly affected by their decisions and the outcomes to which they lead. Lives, livelihoods and reputations are often at stake, to say nothing of the liberty of the subject. The system involves defendants facing potentially serious sanctions, or victims nursing a sense of grievance and wanting to see justice done. It involves witnesses nervous

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about the ordeal of going to court and being cross-examined. It involves judges tasked with important decisions about monitoring the fairness of criminal trials, and jurors in whose hands the ultimate decision about the criminal defendant lies. It involves probation and social services who have to pick up the pieces and advise sentencing judges on community service options. And, at the very centre, one finds the advocate, prosecuting and defending, acting for claimants and defendants. For this system to function fairly and properly, the Ministry of Justice and the Legal Services Commission, who are responsible for legal aid policy, and its administration, must put quality of advocacy at the heart of their decision-making process. Reduction of costs with no regard to the consequences for the justice system will have real moral and social implications, in addition to the longer-term implications for the public purse if the justice system is unable to function as it should.

Role of the advocate

Every judge knows that good advocacy lubricates the system. Equally, every judge knows that bad advocacy can be disastrous. It can cause adjournments, lead to costly overruns in trials and result in juries having to be discharged. Bad decision-making by advocates can lead to defendants spending longer on remand, defendants receiving longer custodial or community sentences, and increases in the cost of policing, probation and the provision of social services. Bad decision-making causes additional and expensive expert and other reports adding to the cost of the justice system generally. Advocates and litigators do different jobs, and this division of labour is something which the LSC does not seem to recognise; both roles are vital if the criminal justice system is to function properly and both specialisms should be supported in order to maintain an efficient and effective justice system.

Cost of cuts

The rationale behind the present round of legal aid cuts is to reduce the budget and deficit. However no independent work appears to have been undertaken to identify or assess the knock-on financial costs or broader societal effects of the constraints on legal aid expenditure. In order to examine both the proposition and the consequences it is necessary to establish a series of propositions.

Growth in demand for legal aid

First, it is clear that demand for legal aid is growing year on year. In this regard the budget for legal aid is going south whereas demand is going north; there is an ever expanding north-south divide. In an answer given recently in the House of Commons, the Solicitor General stated that the number of acts of legal assistance had increased from 2.5 million in 2008 to 2.9 million in 2009. In evidence given in December 2009 to an inquiry by the Public Accounts Committee (PAC) into the procurement of criminal legal aid by the Legal Services Commission (LSC), the LSC explained that the legal aid budget had been frozen at 2006

levels at £2.1 billion.³ But it was also explained that if the budget had increased to keep pace with the increase in demand for legal aid the budget would now stand at £2.7 billion i.e. there has been a decline in real terms in the budget of £600m. Further, the LSC also explained to the PAC that although legal aid was available to defendants in police stations, in only about 50% of cases was legal aid actually received. The LSC indicated that it was taking steps to discover why this low level of uptake existed and, consequently, to increase the level of uptake. Naturally enough, this will increase the pressure on the legal aid budget.

Demand-led growth

The next proposition is that the causes of the increase in legal aid are not “supplier led”. Not so long ago Civil Servants apparently believed that solicitors were manipulating the system and were responsible for the significant increase in legal aid demand. There was a barely concealed suggestion that solicitors were, in effect, cheating the system and this was the root cause behind the increase in demand. In 2005 Professor Cape and Professor Moorhead conducted research for the Legal Services Commission which was designed to identify cost drivers in criminal defence work.⁴ They debunked the pejorative suggestion that solicitors were the cause of the problem. In fact, as Cape and Moorhead and the Howard League for Penal Reform in its 2009 publication *Do Better Do Less: Report of the Commission on English Prisons Today* made clear and as common sense dictates, the causes of the increase were largely due to decisions taken by Government. These included factors such as differences in the decision to prosecute, increases in the complexity of legislation and the creation of new criminal offences (since 1997 over 3000 new offences have been created via 23 criminal justice acts; half of these offences can attract a prison sentence), increases in the number of cases being sent to the Crown Court for trial, increases in case length and increases in the level of pressure brought by Government to raise the severity of sentences.

Pressure to achieve savings and impact on quality

The next proposition is that, in the present circumstances, there is an inexorable pressure to extract even more savings from the system. One way to achieve this is by paying practitioners less but requiring them to do the same or more work. The same applies to the Bar. Increasingly the payment rules are structured so as to require work to be done that is unpaid. Unused material is an example; there is no payment attributable to reviewing this material even though all barristers know that it has to be reviewed because frequently evidence relevant to the defence is found lurking there.

The expression “driving rates down to the market” is one now heard regularly articulated by Government officials. In evidence to the PAC, the LSC referred to their desire to see

³ *The procurement of legal aid in England and Wales by the Legal Services Commission* (HC 322, February 2010), Evidence 1, Q4.

⁴ Ed Cape and Richard Moorhead, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work: A Report to the Legal Services Commission* (2005, Legal Services Research Centre).

solicitors' firms innovate and thereby gain "market share". The LSC's analysis of developments reflected, as they put it, a move to a "market-based set of prices". Expressions such as these led the PAC to ask how using tendering devices such as Best Value Tendering (BVT) could guarantee best value for money because, manifestly, that concept involves an understanding of the quality of the service which is required. But the LSC have no answer. The LSC has no quality assurance scheme in place and, in the event, its attempts to promote one have not borne fruit. As a result, the three professional regulators (the Bar Standards Board (BSB), the Solicitors Regulation Authority (SRA) and the Institute of Legal Executives (ILEX)) have taken the initiative.⁵ In the absence of quality standards, the LSC was forced to answer that quality was guaranteed by peer review processes. Yet, that did not satisfy members of the PAC who have expressed justified concern about the absence of an adequate quality assurance scheme that would enable the LSC to determine whether it was obtaining best value for money for the taxpayer.

The report of the PAC was highly critical of the LSC's performance because the LSC did not have the internal procedures in place to enable it to determine whether its projects and policies were effective when measured against a best value standard. More importantly, with a stated policy objective of driving prices down to market levels, even if it remains true that you can always find "someone to do the job", the instructed person will almost certainly be someone with less experience and probably the only person around who is prepared to do the case for less money. A central conclusion of the PAC, which was based on the findings of the earlier report of the National Audit Office (NAO),⁶ was that the LSC simply did not understand its supplier base and lacked even the basic data to assess whether their funding projects and plans were capable of generating best value for the taxpayer. Legal aid rates stagnated for ten years between 1997 and 2007, and the publicly-funded Bar is now facing cuts which will see rates taken to pre-1997 levels, despite the huge increase in workload thanks to the creation of many new offences. The LSC has also introduced administrative innovations which are labelled 'efficiencies' but which, in practice, increase the time cost to the advocates. This is not efficiency and in the long term simply increases the cost to the taxpayer. Value for money does not mean the cheapest advocate around. It does not mean rates driven down to the market. It does not mean rates set purely by competitive market forces. It means cost effective delivery up to a certain standard.

Understanding the market for legal services

A central theme running through the NAO's findings, and the more recent report of the PAC, is that legal aid exists for a purpose. It is not an act of munificence on the part of a benign Government. Rather, it exists because proper funding of civil and criminal rights is

⁵ See the December 2009 consultation paper at:

<http://www.barstandardsboard.org.uk/consultations/OpenConsultations/>

⁶ *The procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission* (HC 29, 2009-10).

fundamental to the rule of law and, as such, underpins our democratic way of life. Alongside the public interest in protecting access to justice is the right of the taxpayer to ensure that public money is well spent on his or her behalf. To strike the right balance, the disinterested task of Government must therefore be impartially to understand and interpret the dynamics of the market for the provision of legal services and to frame policies rationally and fairly. It is for this reason that the findings of the NAO and the PAC about basic informational gaps in the LSC's understanding of its markets are so devastating.⁷

Consequences of inadequate data

This brings us to the last proposition. It is central to the ability of Government's ability to administer a legal aid system that it collects and analyses proper data. Only by so doing will the Government be able to balance the taxpayer's right to fair value of money with the fundamental right of access to justice. The inadequacy of the LSC's data has most recently affected its consultation on Very High Cost Cases (VHCCs); since their introduction eight years ago the LSC has not compiled sufficient data to be able to formally consult on the Advocates GFS Plus so that it has been relegated to an annex while data is collected. If the pips are squeezed out of advocacy funding then inevitably quality suffers. The PAC understood this and expressed significant concerns in this regard. If quality declines justice declines commensurately. Miscarriages of justice and unjust decisions may result. Equally, if the taxpayer deserves value for money, the taxpayer is short-changed by squeezing legal aid which causes other unintended consequences resulting in increased expenditure elsewhere, whether in the courts service, in the social services and probation services, and in the prison service. It costs approximately £7-10,000 per day to run a court in a busy Crown Court centre. If trials are adjourned or juries discharged, expensive assets remain idle and costs are squandered. If defendants remain on remand for longer periods, or spend longer in custody than is justified, further costs are incurred and charged to the public purse. These costs all add up: it costs an average of nearly £41,000 a year to keep a person in prison (and the average cost of each prison place built between 2002 and 2004 was just under £100,000).⁸ If

⁷ The criticisms of the LSC's administration of criminal legal aid echoed the findings of the Justice Committee which investigated the LSC's handling of family legal aid reform: see 8th Report, *Family Law Reform* (HC 714) published in July 2009. The Justice Committee concluded that the LSC's approach to cuts in family fees was based on incomplete data and a superficial understanding of the supply of legal services in family law. The Committee found that the LSC had failed to examine the factors pushing up costs and had not taken action in response to the *actual* pressures on the legal aid budget (*ibid*, paragraph 18). The Committee commented that lack of transparency and last minute data-gathering (paragraph 32) and flaws in the LSC's evidence base had damaged the confidence of stakeholders. It had also led to an exodus of experienced practitioners from the family Bar into other areas of practice or from the Bar altogether and had led to less efficient case-management. The adverse effects of the LSC's proposed cuts were being borne disproportionately by women and Black and Minority Ethnic practitioners and likely to have adverse knock-on effects on the pool of talent from which the judiciary of the future would be drawn (paragraph 53).

⁸ *Prison Reform Trust Fact file* (December 2008).

defendants are wrongfully convicted, greater numbers of inappropriate sentences will be imposed and more appeals will be brought against sentence. The costs of the administration of justice will increase needlessly - and significantly having regard to the fact 3,000 new criminal offences have been created since 1997, almost half of which can attract a prison sentence, following the enactment of 23 criminal justice Acts of Parliament over the last 12 years.⁹

Has the Ministry of Justice undertaken any research into these costs - which economists refer to as "externalities" - and, if so, why has it not been published? When is it planned that the research should be undertaken?

The recession creates pressures which almost respond to it. Responses can be rational and educated. Responses which result in knee-jerks can be, and invariably are, counter-productive. The Bar Council's position is hence simple: we know the pain has to be shared. We will not bury our heads in the sand. But we seek educated, sophisticated responses which eschew the tempting pre-election "let's bash the lawyers approach to the administration of legal aid."

⁹ See *Do Better Do Less: Report of the Commission on English Prisons Today* (2009, Howard League for Penal Reform).