



YOUNG LEGAL AID LAWYERS
“LEGAL AID – AN INTRODUCTION”
SEPTEMBER 2012

1. Background to the modern legal aid system¹

The modern system of legal aid was created by the Legal Advice and Assistance Act 1949. The scheme was a direct result of the recommendations of the Rushcliffe committee, which reported to Parliament in May 1945². Rushcliffe’s recommendations included that:

- Legal aid should be available in all courts and in such manner as will enable persons in need to have access to the professional help they require.
- This provision should not be limited to those who are normally classed as poor but should include a wider income group.
- Those who cannot afford to pay anything for legal aid should receive this free of cost.
- There should be a scale of contributions for those who can pay something toward costs.
- The cost of the scheme should be borne by the state, but the scheme should not be administered either as a department of state or by local authorities.
- The legal profession should be responsible for the administration of the scheme
- Barristers and solicitors should receive adequate remuneration for their services.

The civil legal aid scheme began to operate in 1950 at which time it provided 80% of the population with a means-tested entitlement to legal aid³. By 1973 this had dropped to 40% and by 2008 it only covered 29% of the population⁴. This rose to 36% in 2009 as a result of the economic climate⁵. At first legal aid was predominantly used in criminal cases and for divorces. This gradually changed in the decades following the inception of the scheme and cultural change coupled with the establishment of Law Centres in the 1970’s resulted in an increased emphasis on areas such as housing and employment.

2. Legal aid now – how the scheme works

(a) The Access to Justice Act 1999 and the LSC

The Access to Justice Act 1999 (AJA 1999) created the Legal Services Commission (LSC) which now holds responsibility for administering the legal aid scheme. Criminal legal aid is

administered under the Criminal Defence Service whereas civil legal aid falls under the Community Legal Service. Almost all legal aid is delivered through contracts between the LSC and solicitors' firms and other advice agencies. The LSC has wide powers though these are guided to an extent by the Government through statutory instruments, directions and guidance. Crucially however, by section 23 of the AJA 1999, Ministers have no part to play in individual funding decisions. In this context it is noteworthy that Sir Ian Magee, in his 2010 review into the delivery of legal aid, recommended that the administration of the legal aid scheme be taken on by an executive agency of the Ministry of Justice (MoJ), which is now due to happen following the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

The contracting process between solicitors' firms and the LSC was particularly fraught in 2010. During the tendering process for the family law contracts the LSC did not inform firms of the fact that they would need to have two separate types of professional accreditation if they were to succeed in their bid, until very late in the day. As a result many experienced firms were unsuccessful in their bids as there was no time to gain this accreditation despite the fact that they were capable of doing so. The Law Society subsequently sought judicial review of the LSC's tendering process. Striking the process down as unlawful and irrational the High Court said:

*"The LSC deprived itself of the opportunity to identify the best qualified firms according to external judgment... The LSC diminished the pool of those who could, by accreditation, have demonstrated their knowledge, commitment and experience. In short, the LSC defeated its own ends."*⁶

(b) Criminal Legal Aid

The Criminal Defence Service (CDS) covers:

- free legal advice from a solicitor at the police station during questioning. This is free regardless of the person's income. It may be from the client's own solicitor, from a duty solicitor or from CDS Direct telephone service;
- advice and assistance from a solicitor on criminal matters (i.e. general advice, writing letters, negotiation, getting a barrister's opinion and preparing a written case etc.);
- advocacy assistance: this covers help from a solicitor in preparing a case and representation in certain proceedings in the Magistrates' and Crown Court. This may also cover representation for prisoners facing disciplinary charges in prison as well as Parole Board Hearings;

- representation in the form of help from a solicitor preparing a defence before a court hearing as well as representation at the hearing by a solicitor or barrister; and
- the provision of a duty solicitor to provide free legal advice and representation at the Magistrates' Court.

The grant of legal aid in criminal cases must be in the "interests of justice" otherwise the case will not be funded. A potential loss of livelihood or liberty are relevant considerations in applying this test as are the complexity of the proceedings and the capacity of the defendant to represent themselves. Those who appear in the Crown Court are automatically deemed to have passed the interests of justice test.

Criminal legal aid is also subject to a means test, though this is not applied to those detained at a police station. About half of all defendants receive free legal aid at the Magistrates' Court, and about 3 out of 4 at the Crown Court. When someone applies for legal aid at court, if the case passes the Interests of Justice test they automatically qualify for free legal aid if they are under 18 or receive specific state benefits, which are: income support, income-based job seeker's allowance, guarantee pension credit or income-related employment and support allowance.

If a defendant fails the means test and their case is in the Magistrates' Court, they will not be given legal aid and will be expected to pay for their costs privately. For cases before the Magistrates' Court those earning less than £12,475 per year (this figure is weighted to take into account family circumstances) will be eligible. Anyone who earns more than £22,325 will not be eligible. For those whose salaries fall between these figures they will only be eligible if their annual disposable income is less than £3,398.

If a defendant is facing proceedings in the Crown Court the means test will determine the amount they will need to contribute towards their defence costs; this could be from their income, their capital or a combination of both. If they are found not guilty, any payments made will be refunded with interest. They still have the right to decline legal aid and pay for their costs privately.

Unlike the civil legal aid budget, the criminal legal aid budget is not capped.

(c) Civil Legal Aid

(i) Scope of work

The Community Legal Service covers:

- initial advice and assistance with any legal problem;
- a solicitor who can speak on someone's behalf at court hearings without formally representing them;
- help and advice on family disputes, including assistance with family mediation; and
- legal representation in court proceedings.

However, legal aid is not available for all issues. The AJA 1999 excludes personal injury cases (other than clinical negligence) from the scope of legal aid on the basis that conditional fee agreements may be used instead, as well as business cases, boundary disputes, company and trust law. Aside from this, most types of case remain in scope and much of the civil legal aid budget is spent on debt, housing, family disputes, immigration, employment and welfare benefit issues.

Legal aid is not available for funding representation in the small claims court and most tribunals (the mental health and immigration tribunals being the main exceptions to this). However, for these issues including tribunals covering employment and welfare benefits, legal aid can provide initial advice to the client, but the scheme stops at the door of the tribunal. Some individuals are able to obtain pro-bono representation at these tribunals. Those who cannot, go unrepresented.

There are several different levels of civil legal aid including "Legal Help" for initial advice and assistance and "Legal Representation" for civil legal aid in court proceedings or where litigation is contemplated. Where the prospects of success in litigation are unclear providers can work under a form of Legal Representation called "Investigative Help".

For advice services funded under Legal Help, together with representation at mental health and immigration tribunals the contract between the LSC and the provider limits the volume of work by the allocation of "matter starts" – effectively a quota on the number of cases which a firm can do. For other civil legal aid however, the contract is effectively a licence to do the work and funding for each individual case will be granted according to the LSC's funding code⁷.

(ii) Decision to grant funding

For Legal Help work solicitors are authorized by the LSC to make the decision about whether to grant funding or not. With Legal Representation it is generally the LSC which decides whether the public funding test is met or not. However, in certain urgent cases solicitors can use their "devolved powers" to issue emergency Legal Representation to the client. The LSC still makes

the final decision about whether to grant funding (confirming or hopefully in rare cases overturning the solicitor's decision), but this allows solicitors to act quickly for their clients to protect their position.

In deciding whether to grant funding in a given case consideration is given to the prospects of the case succeeding and the cost benefit of the case as well as whether the case has a "significant wider public interest" or raises "significant human rights issues". Different tests are applied depending on the area of law. For example, when considering whether to grant Legal Representation in a housing possession case there is no requirement for the client to have at least a 50% chance of obtaining a successful outcome due to the importance of the issue for the client. Whereas in clinical negligence cases the client must have at least a 50-60% chance of succeeding in their case for Legal Representation to be granted.

(iii) Financial eligibility

Those in receipt of income support, income-based job seeker's allowance, guarantee pension credit or income-related employment and support allowance will automatically be eligible for civil legal aid. Otherwise a person will qualify if they have a gross monthly income not exceeding £2,657, a monthly disposable income not exceeding £733 and disposable capital of £8,000 or less (£3,000 in immigration matters at the tribunal). The figure for "disposable" income is reached by deducting allowances for items such as tax, maintenance payments, a set amount for employment expenses, rent/mortgage payments and an allowance for dependants. When calculating disposable capital, the first £100,000 of equity in a person's home is disregarded. Where the property is the "subject matter of the dispute" a more generous disregard is applied.

These eligibility criteria meant that in 2009 only 36% of the population was eligible for legal aid – an increase on the previous year induced by the recession, but still hugely below the 80% eligible at the inception of the scheme. In respect of this dwindling pool of people financially eligible for civil legal aid Lord Justice Jackson, in his final report on the cost of civil litigation stated:

*"the continued tightening of financial eligibility criteria, so as to exclude people who could not possibly afford to litigate, inhibits access to justice... In my view any further tightening of the financial eligibility criteria would be unacceptable... I place on record my firm view that it would be quite wrong to tighten the eligibility criteria further, so that an even larger percentage of the population falls outside the legal aid net."*⁸

(iv) Statutory Charge

Where a client has received legal aid under Legal Representation/Family Help Higher and the result of their case is that they have kept or gained property or money the client will probably have to pay back some or all of the costs of their case. The LSC will do this by placing a “charge” or claim on the money or property, unless the client chooses to pay the legal costs off at an early stage.

3. Advice deserts

Practitioners and campaigners have expressed concerns over the number of vulnerable people who cannot afford a lawyer who are ineligible to get legal aid. According to the campaign group Justice for All, 2.3 million people have been unable to get help for a civil justice problem when they needed it⁹. On top of this they state that less than 50% of young people facing serious problems, for example in housing and education, get the advice they need. They also note that many are having to travel further and further to get advice, stating that 70% of people say they had to travel more than five miles to get advice. They go on to highlight the knock on cost of this unmet legal need (for example an unresolved employment issue may lead to job loss, debt and homelessness) stating that appropriate advice early on can save £10 for every £1 invested¹⁰.

4. How much does it cost and what is it spent on?

In 2008–09, according to the Ministry of Justice, the total spend on legal aid was £2.1bn. £1.182 billion of this was spent on criminal legal aid and £0.917bn on civil legal aid¹¹. According to the 2009 National Audit Office (NAO) paper on the procurement of legal aid this breaks down as 1.6 million and 1.3 million acts of assistance for criminal and civil issues respectively¹². Most criminal legal aid acts of assistance happen in police stations and Magistrates’ Courts, but most expenditure is at the Crown Court¹³.

Since 2003-04 criminal legal aid expenditure has decreased by 12% in real terms, and civil legal aid expenditure by 15%¹⁴. However, according to the same NAO figures the number of civil acts of assistance has actually risen during this period. The NAO credit the rise in the need for civil legal aid as being a direct response to the economic climate. It is fair to say that much of the economic adversity of this period still persists, and the amount of legal need, particularly in areas such as debt, housing and employment is unlikely to be any less great.

According to MoJ figures, 97% of those who received civil legal aid in 2008-09 were in the poorest two-fifths of the population. Almost 80% of those receiving legal help and around 90% of those receiving legal representation were in the poorest one fifth¹⁵.

5. Remuneration

The level of remuneration for legal aid work has become increasingly politically charged. In early 2010 for example, then Justice Secretary Jack Straw, announced the latest set of proposed cuts to criminal legal aid in the same press release as he revealed the highest earning legal aid lawyers in the year 2008-2009¹⁶. The latter, presumably, to provide political cover for the former. Within this list there were five barristers earning in excess of £700,000 per annum for criminal defence work. While the variation and the complexity of the fee structures across legally aided work makes it difficult to generalise, according to *the Guardian* the median salary of a legal aid solicitor is a rather more modest £25,000 per annum¹⁷.

In addition, the fact that a greater number of acts of assistance are being done for less money, means that remuneration is decreasing. In addition the data on solicitors' firms accompanying the NAO's report indicates that one in six firms stated that they were not making any profit at all from criminal legal aid cases¹⁸. 14% of those surveyed were on the verge of walking away, stating that it was "very unlikely" that they would still be conducting criminal legal aid in five years time. The primary reasons given for this were a lack of profitability and the likely introduction of best value tendering¹⁹.

In October 2011, a 10% reduction in fees for civil legal aid work was introduced. The same reduction applied to family fees from 1st February 2012. Under the same legislation the Government introduced caps for payment of experts funded under the legal aid scheme. In some areas of law this has made it very difficult to obtain experts for clients' cases with the necessary skills and expertise.

6. International comparisons²⁰

The legal aid system in England and Wales is frequently compared favourably with that of other countries. The MoJ describes it as "one of the most comprehensive, and generous in the world"²¹. In support of this assertion the NAO notes that the LSC spends £22 per capita on criminal legal aid, more than any other comparable developed nation except Northern Ireland²². However, they highlight that these differences are partly attributable to the greater defence costs inherent in an adversarial legal system, in contrast to jurisdictions where judges play a

greater investigative role. It should also be noted that over the period of time which the NAO analysed, over one million more prosecutions were brought in England and Wales than in any other country under comparison.

REFERENCES IN THE PAPER

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- ² Report of the Committee on Legal Aid and Legal Advice in England and Wales (Cmd. 6641)
- ³ S. Hynes & J. Robin p21
- ⁴ *Ibid*
- ⁵ Lord Justice Jackson "Review of Civil Litigation Costs: Final Report" December 2009 <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-6F09672EB6A/0/jacksonfinalreport140110.pdf>
pp 68-69 paragraph 3.2
- ⁶ *Law Society v LSC* [2010] EWHC 2550 (Admin) paragraph 107
- ⁷ Available at http://www.legalservices.gov.uk/civil/guidance/funding_code.asp
- ⁸ Jackson "Review of Civil Litigation Costs: Final Report" December 2009 pp 68-69 paragraph 3.2
- ⁹ <http://www.justice-for-all.org.uk/What-were-about/What-the-problem-is>
- ¹⁰ <http://www.justice-for-all.org.uk/What-were-about/Why-its-important>
- ¹¹ Ministry of Justice, *Proposals for the reform of legal aid in England and Wales*, November 2010 3.35-3.36
- ¹² NAO *The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission* November 2009 http://www.nao.org.uk/publications/0910/procurement_of_legal_aid.aspx page 10 paragraph 1.2
- ¹³ *Ibid*
- ¹⁴ NAO 2009 page 10 paragraph 1.3
- ¹⁵ Legal Aid Reforms: Scope Changes Impact Assessment <http://www.justice.gov.uk/consultations/docs/legalaidiascope.pdf> paragraph 42 page 11
- ¹⁶ <http://www.justice.gov.uk/news/newsrelease220310b.htm>
- ¹⁷ <http://www.guardian.co.uk/news/datablog/2009/nov/17/public-sector-pay-uk-data>
- ¹⁸ *Solicitor summary for criminal legal aid*
http://www.nao.org.uk/publications/0910/procurement_of_legal_aid.aspx
paragraph 6.2.2 18
- ¹⁹ *Ibid.* paragraphs 6.3-6.3.1
- ²⁰ As for 11, 3.41-3.45
- ²¹ *Ibid* 3.41
- ²² NAO 2009 Report page 14 paragraph 1.8