JOURNAL OF THE LIBERAL DEMOCRAT LAWYERS' ASSOCIATION

The Legal *Democrat*

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This special edition is devoted to the issues arising from the Government's proposed "reforms" of Legal Aid.

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Autumn 2011

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Editors' Note

This edition is dedicated exclusively to legal aid and access to justice, providing a range of perspectives on the current debate over the legal aid reforms in Ken Clarke's Legal Aid, Sentencing and Punishment of Offenders Bill. It should be read by anyone concerned with justice in this country.

We all understand and value the basic notion of justice, but there is a political problem when it comes to legal aid. For politicians, mandarins, opinion formers and journalists of all colours and persuasions it is not a sexy issue. It grapples with complexity - a bit like your Facebook status option which asks you to signify your relationship and you have to tick "its complicated"! Your heart says one thing, your head another; your solicitor advises a particular course but the Treasury takes a different view and has the upper hand.

As a result, for years legal aid has limped along as a Cinderella service compared to other public services we value such as health and education – never able to go the ball to reach its true potential. But today's threat is more grave – it is whether there will be any legal aid in the future at all.

This edition's contributors all sound a warning note. LDLA Chair Alistair Webster outlines the Party's position agreed at Spring conference in Sheffield and finds current policies are falling short. Geoff Payne as FPC Vice-Chair quotes Freud on justice and ask why, if our coalition partners can't accept Spending Review strictures when it comes to prisons and sentencing, should we accept legal aid bearing the brunt of cuts. James Sandbach from the CAB service pleads for the Government not to abandon community advice, or ignore all the evidence about its benefits. Jo Shaw explains how justice for vulnerable women will be put at risk. Evan Harris reminds us about how important legal aid is to the rule of law. Roger Crouch argues that in a civilised society the vulnerable must have access to justice.

No one is denying that there are tough choices to be made. But if the coalition departs from an agreed consensus and settlement on access to justice – the basic standards accepted for the past four decades, then we have to understand and face the consequences – whether political, social or for the quality of justice available.

Michael Hall and James Sandbach

ALISTAIR WEBSTER

Alistair is Chair of the Liberal Democrat Lawyers' Association. He was called to the Bar in 1976 and has been Queen's Counsel since 1995. He practises as a barrister in London and Manchester.

Holding the Party to account

At the Party's Spring Conference, I proposed a motion on legal aid. The motion recited the appalling failures of the Labour government and the LSC in relation to legal aid "reform", failures which had been identified time and again by the select committees which had examined them.

"Reforms" – I put it in quotes because it really means cuts – had been introduced at breakneck speed without understanding their likely consequences and without proper trialling. The motion called upon the government to pause and not to introduce yet more cuts without trialling them and understanding their consequences.

It is easy to identify the consequences to date: ask any judge who has to deal with cases in the Crown and County Courts: the relentless driving down of unit costs has been accompanied by a similar driving down of quality of representation: a disaster for a liberal democracy where the rule of law is essential to the compact between citizen and the state.

It is, of course, a political trick (and a third rate one at that, beloved of Labour ministers) to attack anyone who is able to offer a critique from the point of view of someone who is actually involved on a daily basis with legal aid as being the biased view of a producer: always play the man, rather than the ball. Conferences are rarely gatherings at which the lawyers' views prevail: witness recent conference decisions upon televising procedures and the age of criminal responsibility. But this motion was a different story: it was passed with only one vote against! Rarely can any motion have attracted such universal support.

And so it is with profound disappointment that I have to report that the government has ignored every particular of the party's policy. The Legal Aid, Sentencing and Punishment of Offenders Bill contains exactly the type of statist rubbish which the party would have condemned had they been proposed by Labour. There was overwhelming response to the green paper. The government has made an utter mockery of consultation : it has simply ignored the responses.

In proposing the motion, we took it as a given that savings would have to be made in relation to legal aid. We made positive proposals: use funds frozen under the Proceeds of Crime Act; encourage insurance for office holders; spend less on imprisoning far too many people. There are also huge savings which could be made by the abolition of the massively bureaucratic and fundamentally unfit for purpose LSC.

All this was ignored. There can be, and will be, argument about the efficacy of the perennial salami-slicing of fees. I personally know young lawyers who have gone into areas such as housing law who are now in despair and whose goodwill (and hope) has completely evaporated. I do not wish to deal with levels of fees in this article, save to say that, in my view, the proposed levels are not sustainable.

What is particularly alarming is the way in which the Bill is drafted so as to grant unfettered discretions to ministers, removing even the very basic safeguards which were included in the Access to Justice Act, 1999.

First, the bill fails to ensure that the obligation under Article 6(3) ECHR can be met. It grants to the Lord Chancellor, via clauses 1.1 and 2.1, powers to make regulations which are significantly unfettered. There is no obligation (central to the motion) to ensure that the powers are subject to the obligation to ensure (as currently provided by s. 25 Access to Justice Act, 1999) that there are a sufficient number of competent persons and bodies to provide the relevant services. This means that regulations can be introduced without trialling and without anything other than lip service to the need to ensure that this essential duty owed by the state to its citizens is met by ensuring that there are sufficient numbers of competent lawyers practising in the relevant fields. These clauses must be amended.

Secondly, it is fundamental to the legal aid system, as operated to date, that the citizen has a free choice of lawyer, subject to competence and an adequate fee. This is to be thrown out of the window, it appears. Unhappily, the reality is that the range of such advocates will significantly diminish in the light of other proposals in the bill (which will drive able practitioners out of publicly funded work). But the principle remains. S. 15 Access to Justice Act specifically guarantees the right. There is no such provision in the bill: it will repeal s. 15. This represents a fundamental change which cannot be justified and it should be resisted. One can only hope that this is an omission by error, rather than design.

Thirdly, a sinister (there is no other word) reappearance of the discredited Labour proposal to refuse the costs of acquitted defendants. Let us start from a self-evident truth: that it is the state which has chosen to bring a charge against a citizen which fails. The citizen should be, in normal circumstances, entitled to recover the costs of defending himself. The proposal that the costs of an acquitted defendant should not be able to recover his costs (Schedule 6), is a moral and constitutional outrage. It was forced though by the Labour government and successfully challenged as unlawful. The arguments in support of it are slippery and spurious and do no credit

to the government. It is particularly unintelligent, given that the development of insurance policies provides a good alternative to public funding. Indeed, there is a good argument, which we endorse,(as is substantially the case at present) for insisting upon appropriate insurance for directors and officers of PLCs. The costs of high profile fraud prosecutions take up a significant proportion of the legal aid budget.

This proposed clause, hidden, in accordance with the best traditions of the civil service, in a schedule, will kill such alternative funding dead. There may be an argument for limiting the amount of costs recoverable, but a blanket refusal of them cannot be justified. There could be no argument against limiting recovery to costs which are necessary, reasonable and proportionate to the nature of the allegation. Thus, the recoverable costs (much cited) of Steven Gerrard on an assault case would be much lower than those reported, as they would be disproportionate to the charge.

Third, there are vague and unsatisfactory proposals in relation to advice and representation at police stations. The provision of advice and assistance at police stations is an essential component of reforms (Police and Criminal Evidence Act, 1984) which have been very successful in eliminating many of the bad practices which used to surround "verballing" at police stations. Until the reforms, much time was spent during criminal trials examining allegations that apparent confessions had either been invented or inappropriately obtained. This now rarely happens, saving enormously on expensive court time. The bill proposes a means test and some undefined criteria. What is essential is that:

a. Any criteria are defined in the Act, and not left to poorly scrutinised secondary legislation;

b. Any means-testing should lead to contributions owed and recovered after the advice, and not to a non-availability of advice at the police station.

We do not want the clock to be set back by ill-considered provisions which take a sledgehammer to break a nut.

There are other areas which are objectionable which will be dealt with by others in this issue of the Legal Democrat. These are fundamental issues and, in my view, represent a touchstone as to whether there is any purpose in being in government. As I said when proposing the motion, after years of attacks upon civil rights, the coalition agreement contained much which is close to our hearts. But, unless we can provide the means for people to enforce rights, and to defend rights, the rowing back of state intrusion and the reinforcement of rights will be of no use at all. Justice is no justice unless there is good access to it. This Bill will not provide it.

Alistair Webster Q.C.

GEOFF PAYNE

The Legal Aid, Sentencing and Punishment of Offenders Bill: the death knell of justice for all?

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Sigmund Freud observed that the first requisite of civilization is that of justice. One can well see why. A society without justice at its centre is one that is deficient at its core. That is why Liberal Democrats have articulated our commitment to a free, fair and open society at the very start of our constitution. It is in our DNA.

Justice, however, must be freely available. Walls must not be placed between it and ordinary citizens. The minute that justice becomes available only to the wealthy, or those with a particular education, or accent, knowledge or experience, is the minute that, on Freud's analysis, civilization fails. As Eleanor Roosevelt said, "*justice cannot be for one side alone, but must be for both*".

The challenge in recent times has been to secure that accessibility of justice. From the battle for employment rights, to the ability to challenge perverse decisions of the state through judicial review; from the fight for fair terms when it comes to banks and loan companies to the struggle to ensure that those seriously injured through

clinical negligence are given the means to lead fulfilling lives, the campaign for access to justice has been a long and hard one. As the ex-slaves found to their cost in the period immediately after the American civil war, it is one thing to have basic rights on paper but quite another to be able to enforce them.

The problem is that parties do not approach the courts equal. The employee, for example, wrongly dismissed by a large company. The tenant badly treated by a powerful and unscrupulous landlord. The citizen challenging the might of the state in the form of the Local Education Authority or National Health Service. The inequality bites when one side to litigation can afford expert advice and representation and the other cannot. Under those circumstances, the only thing that can even begin to level the playing field is a properly resourced system of legal aid. It is a political and moral imperative.

In these difficult economic times, there is a very powerful case for cutting expenditure until the deficit becomes manageable. It ill becomes the Labour Party, who contributed so much to our present woes, to complain about that. There is no justification, however, for cuts that bear the on those least able to withstand them, namely the poor and the vulnerable. In the context of legal aid, cuts that deprive the poor and vulnerable of access to justice are unacceptable.

The Legal Aid, Sentencing and Punishment of Offenders Bill would remove many if not most education, debt, housing, clinical negligence and family law cases from the scope of legal aid. The Government hopes that it will save over £300 million. The human cost however is 250,000 fewer family matters, 140,000 fewer welfare benefit cases, 50,000 fewer housing cases and 30,000 sets of employment proceedings that would be funded. Every one of those cases could involve someone seriously wronged and potentially without redress. As the Law Society have pointed out, they include the carer whose welfare benefits are wrongly stopped, the parents whose child has been unfairly denied Special Educational Needs provision, the employee thrown out of a job in breach of contract and about to lose their livelihood, the patient whose life has been ruined through medical negligence or the father denied access to his children for no reason other than spite. Each case an injustice. Each one bringing misery. For every instance where an injured party cannot enforce their rights, to use Freud's word, our civilization is demeaned.

It is not only a restriction of the scope of legal aid that causes injustice. Relentless cuts in fees have a similar effect. In criminal defence, the sector is threatened with a destabilizing, market driven, price competitive tendering exercise. This is despite the fact that fees have not risen in real terms for ten years (notwithstanding one blip that was rapidly reversed) and studies have shown that solicitors firms in crime are operating at the very margins of profitability. If the aim is to drive out the tenacious and those that fight for their clients, then it is likely to succeed.

There are growing restrictions on what the Legal Services Commission (LSC) is prepared to fund for the defence. I know of one extremely serious three-month

criminal prosecution in which the crown has the benefit of expert evidence galore whilst those defending have had to spend weeks negotiating in order to secure even a paltry level of agreement. In one instance, I understand that there is a not a single expert that is prepared to compile a report for the fee agreed by the LSC. Apparently, one week from trial, no expert evidence is available at all. It is a very dangerous place indeed where the state funds the prosecution generously but the defence has to operate on a shoestring.

Crime is not a popular area politically. Nevertheless, one only has to look at the famous miscarriage of justice cases, from the Birmingham Six to the Guildford Four, the M25 Three and, more recently, the Sally Clark case, to see that the courts do not always get it right. A criminal justice system operated on the cheap through a 'market' mechanism will only add more names to that already over-lengthy list of miscarriages of justice.

Proponents of the cuts claim that our legal aid system is more expensive than elsewhere in the world. It is a costly system but an important one nonetheless. There are a number of reasons for the cost, its adversarial nature being the main one. According to the Criminal Bar Association, when the cost of legal aid is added to the costs of the Courts Service and prosecution, the expenditure is roughly the same as that in many other developed countries. The only difference is that they have an inquisitorial system where the cost falls on the court administration rather than the lawyers as in our adversarial one.

Another reason for increasing costs is the relentlessly increasing number of criminal offences. The sometimes shambolic administration in the Courts Service should not be overlooked either.

There are two other extremely important factors that must not be overlooked. The first is that there are instances where a government has to spend money to save money. Legal advice is a prime example. The National Association of Citizens Advice Bureaux reckons that a pound spent on housing advice saves £2.34 in the long run, a pound spent on debt advice saves £2.98 in costs later. Legal aid is the same. Consider a system where the only way to fund a clinical negligence case was through a conditional fee agreement with a solicitor. Every time the National Health Service was found against in court, it would be liable for an even greater costs bill than it is now, shunting the burden of funding litigation from the Ministry of Justice to the Department of Health, increasing it as it goes. That is not to mention that added costs and delay of large numbers of litigants in person. The question therefore is not whether we can afford to have the system we presently have, but whether we can afford not to.

The second factor is that there are savings ready to be had. In crime, removing the barrier on the defendant's restrained funds being used to pay their legal costs, a

restriction that only drives them to the already pushed legal aid fund, is one. Identifying the costs of new criminal offences before they are enacted is another. Greater technology in courts across the board is a third. Elsewhere, improving the quality of first instance decision-making would save on appeal costs and encouraging public authorities not to make perverse decisions in the first place would lead to fewer applications for judicial review. The costs of acquitted persons should not fall on the legal aid budget and there must be a much greater use of costs orders against bodies that bring proceedings that should never have been brought.

Reducing the massive prison population and investing in constructive schemes to ensure that people are not criminalised in the first place would save enormous sums. So would adopting a sensible approach to drugs policy that focused more on breaking addiction than on costly prosecutions.

In Spring, the Liberal Democrat Federal Conference passed an excellent motion seeking a full examination of how the administration of justice could become more cost-effective without jeopardising quality and whether alternative methods of funding might be found. Suggestions for savings were made but securing access to justice for the most vulnerable was found to be the greatest priority. Unfortunately, just a few months on, the opposite appears to occurring.

It is not too late to act. Yes, there have to be cuts but the money need not come from putting justice out of the reach of those who need it most. The Tories were able to unpick the Comprehensive Spending Review and generate a spending gulf in the Ministry of Justice by forcing a 'U' turn on progressive prison policies. It is time that Liberal Democrats made their voice heard on legal aid. As Martin Luther King Jr. said, "*justice denied diminishes justice everywhere*".

On that measure, if the cuts in the Legal Aid, Sentencing and Punishment of Offenders Bill take effect, it is likely that justice will be diminished greatly.

Geoff Payne September 2011

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A word of advice

It's been over 30 years since the National Consumer Council referred to access to advice as the "fourth right of citizenship."[1] They were ahead of their time, predicting the coming of an "information age", in which peoples capabilities to live a full life as responsible citizens would depend on access to organised, specialist information spheres and pointers to navigate complex consumer choices and labour markets, as well the labyrinth of state bureaucracy and law. Our Party has long recognised that liberating people through access to the legal system is ancillary to our commitment to human rights, constitutional governance and civil liberties, that systems of redress such as our courts are a basic community good, and that "equality before the law" is a fundamental pillar of a liberal democracy - these principles around access to justice have been restated in countless Liberal Democrat policy motions and papers.

Today, that vision of individuals empowered through access to knowledge and redress in respect of both their rights and responsibilities could be set back generations by the ill thought out proposals for legal aid reform now working their way through Parliament in the Legal Aid, Sentencing and Punishment of Offenders Bill. That the legal aid budget needs to be reduced as part of Whitehall's overall contribution to deficit reduction is not in dispute![2] What is in dispute is the way that the Justice Ministry (MoJ) have gone about the business of legal aid reform to reduce public costs. We are told by our Ministers and spokesmen in the Coalition that the

[1] *The fourth right of citizenship: a review of local advice services.* National Consumer Council (1977)
[2] Note however that MoJ's savings target in legal aid is to achieve a £350million budget reduction, but the impact assessments state the Bill will result in a £450 million reduction in legal aid funding

guiding principle for public services reform and related deficit reduction cuts is to "*cut the fat and not the muscle*." However, in a tragic travesty of evidence based policy-making, Ministers and Officials at the MoJ have gone straight for the muscle over the fat - especially when it comes to civil legal aid!

Myths and prejudice

There appear to be deep misunderstandings, as well as staggering generalisations, about the basic anatomy of today's legal aid and civil justice systems. Ministers tell us that we live in an overly "litigious society", that that legal aid contributes to this, that our system is the most expensive in the world, and that our culture of rights is an underpinning social malaise. A legal profession greedy to profit from state subsidies, a rush to court proceedings as the first port of call for problems, and a regulatory obsession with workplace rights and health and safety are all cited as problems. It is also confidently asserted that our tribunal system is perfectly suited for applicants to represent themselves, without even the benefit of initial expert advice. Finally, Ministers claim that many of the issues over which people seek help from the legal aid system aren't really legal matters at all, but are simply social problems that people need to deal with themselves with the assistance of "general advice".

We have also seen countless articles in the popular press depicting legal aid as the last refuge of welfare frauds, squatters, scrounging immigrants and serial divorcers; meanwhile Tory MPs have attacked the Law Society and Bar Council as “bewigged Scargills.” Legal aid contract funding for CABx and non-profit agencies has been attacked as a new labour statist intervention, whilst in fact this was introduced and championed by the previous conservative Government. The spinning about feckless clients and greedy lawyers has been quite deliberately sanctioned from within the Government in order to trash the legal aid brand, and provide political cover for the current reforms. But all of this background mood music makes for very bad policy-making when it comes to working out just how best we can ration resources to support citizens and deliver access to justice in an age of austerity and public sector cuts. The devil, as always, is in the detail – and it is over the detail that our policy-makers seem to have lost the plot.

Low hanging fruit

Firstly, read the fine print of the legal aid reforms and is becomes clear that, as a deliberate strategy, the part of the legal aid budget that has been most heavily targeted for cuts is "civil legal help" - that is advice on common family, money, consumer, housing, work and welfare issues which have a legal dimension.[3] This is civil law as most people know and experience it - a tricky relationship breakdown, an unfair dismissal from work, a sickness benefit appeal, a mortgage in arrears. Social welfare advice is predominantly delivered *not by private practice, but by legal aid funded not for profit agencies such as Citizens Advice Bureaux and Law Centres* -

[3] Proposals for the Reform of Legal Aid in England and Wales, Ministry of Justice 2010

most of this advice work is specifically directed at avoiding litigation, catching problems early and finding solutions. These agencies are set to lose around 80 per cent of their legal aid funding for specialist advice as employment law, social security law, immigration law, debt law, consumer law, landlord-tenant law and some other housing issues are specifically excluded from the scope of civil legal aid by the Bill. Help delivered by private solicitors such as with medical negligence issues, education/school disputes and family law advice, is also being drastically cut or excluded altogether. Indeed, for those whose families and marriages/relationships are coming apart, only those experiencing legally proven domestic violence or dealing with child protection issues will qualify for family legal aid and advice in the future.

As a result around 595,000 people will lose their ability to get free expert advice (Legal Help) over their problems, whilst a further 50,000 will lose their entitlement to obtain free representation in civil courts and tribunals under the scheme.[4] In other words it is civil legal advice that takes the biggest budget cut – around 66 per cent (compared to a 38 per cent cut for representation in civil cases/matters). This is the MoJ's version of "low hanging fruit" - stuff to cut as it's an easy target which the Ministry does not consider to be its responsibility! Meanwhile criminal legal aid expenditure, which has always absorbed the largest share of the budget, will remain largely untouched by the reforms.

But why target legal aid cuts on early advice given by CABx and niche specialist practices to which help ameliorate the worst effects of poverty, exclusion, poor decisions or negligent actions? Ministers have shrugged their shoulders and said they see no alternative options. Needs must, the cut to the legal aid budget must be delivered, and this is the most effective way - however unfortunate the consequences may be! Yet a more detached and objective view of legal aid expenditure and policy suggests there are plenty of other options for reform and cutting costs.

Take criminal legal aid for example, legal aid expenditure on ‘’high cost” cases in 2009-10 cases was £672 million – the cost of defence representation in around just 400 cases. QC fees from legal aid in other crime cases are also significantly higher than standard advocacy/ barrister fees, even though it is unclear that QC’s are routinely needed, meaning and additional uplift costing £42million to the legal aid fund. Experts fees paid from the legal aid fund across the boards were £155 million. Finally, in public law children’s’ cases children often get represented twice by 2 solicitors/advocates, one acting as ‘’guardian,” costing an additional £83 million from legal aid.[5] These are known structural problems with the higher levels of fees, and it is easy to see why legal aid gets a bad name when a few individual elite QC barristers can walk away with over a quarter of a million (£) income a year from the legal aid fund for representing known wealthy scoundrels in high cost criminal and fraud trials.

[4] Ministry of Justice revised Impact Assessment, 2011
[5] Above data all from Legal Services Commission

Fat or muscle?

Now, I am assuming that all liberal democrats accept John Stuart Mill's basic dictum that political ethics should be about doing *the greatest good for the greatest number*. I am therefore at a loss to find a liberal defence to a policy which seeks to find budget savings by cutting out low cost advice, whilst leaving in place a system that continues to waste money on high costs cases, inflated expert fees and QC fees which benefit only a few hundred (albeit difficult) cases. Advice on civil issues, by contrast, is delivered at around a fee of around of only £200 or less per case, and helps nearly a million people a year – preventing problems as homelessness, ending domestic violence, cancelling debt and restoring jobs, earnings or benefits. Outcomes are reported as around 80 percent positive.[6] Salaries in the advice/social and family sectors are low, whilst expertise and skill in managing vulnerable clients is extremely high. Yet this is the sector that is being dealt a death-throes cut of £440 million (£280m from scope/eligibility reductions and £160m for remuneration cuts as civil fees are cut by 10% across the board).[7] I question whether this is a fair way to wield the knife, given all the options for reform. At the start of the legal aid review, Ministers and officials said they wanted to look at wholesale changes rather than 'salami slicing' – too right, cutting pretty much all the legal aid funding for social welfare law and most of the civil scheme is outright butchery!

But there is another respect in which the MoJ is failing to target the fat - namely the bureaucracy that has grown up around legal aid. The Legal Services Commission spend around £120 million a year just in administration - this has largely been a function of the previous Labour Government's obsession with top down commissioning and tendering processes, prescriptive targets and contracts, and paper chasing audit exercises. Yet it is estimated that, following implementation of the reforms in the Legal Aid Bill, the Ministry of Justice - in taking over the LSC's functions - will be spending at least as much and potentially a lot more on this level of bureaucracy in administering what remains of legal aid. Indeed, the Bill comes replete with so many complex, impenetrable rules and definitions about reduced entitlement, that the Legal Services Commission itself has warned that the Ministry will have to spend significantly more on administration in the future, and that these administration levels could erode the planned savings.[8] Alistair Webster QC (see previous article) therefore rightly brands this whole approach to managing legal aid as a public sector budget as "statist nonsense."

Short thrift for short term solutions

But then the Government's legal aid reforms have received short thrift from pretty much all quarters. When the Ministry of Justice consulted on the legal aid proposals in a Green Paper earlier this year, they received an unprecedented 5,000 critical responses, not just from lawyers, judges and their representative bodies but also

[6] LSC outcomes data for civil legal help
[7] Ministry of Justice Impact Assessment
[8] LSC formal response to Green Paper, 2011

from a cross sector of charities, civil society and community groups from Mumsnet and the Women's' Institute to all of the disability charities, trades unions, social housing organisations, and from many legal aid users.[9] The Justice Select Committee have likewise criticised the reforms which "sit uneasily with the Government's commitment to protect the most vulnerable in society " and "present a severe challenge to many of those involved with the justice system"; the Committee warned of a "significant under-supply of providers or 'advice deserts'" and called on Ministers "to look at other proposals to reduce the cost of legal aid".[10] Concerns about the impact of the reforms have been heard from voices as diverse as Supreme Court Judges, churches, the Parliamentary Ombudsman, the Mayor of London, the Low Income Tax Reform Group, medical practitioner groups, Consumer Focus, local authorities, children's' charities and Kidsco's unique Camilla Batmanghelidjh, Joanna Lumley and the Gurkas, pro-bono groups, the Administrative Justice Council, and our very own Evan Harris who have all voiced their concerns in uncharacteristic language.

Behind the shrill expressions of concern and outrage though, there is a remarkable degree of consistency amongst the detractors to the reforms. Firstly, everyone believes that cutting all early advice out of the system is fundamentally a false economy. Not least because the courts get clogged up with unmeritorious or unprepared (as well as unrepresented) cases, and because early advice can save many social and economic costs, most of which have to get picked up by other public services (eg courts, police/criminal justice, health services, housing authorities, social services, DWP etc). I should declare an interest here - having published research based on the known outcomes data from legal aid advice casework in social welfare categories, which suggests that at least in areas of debt, housing, employment and welfare benefits the return on every £pound invested in early advice is in the order of £2-8.[11]

Secondly, there is also common ground from the Bar Council and Law Society, to academics, mental health charities and advocacy groups, that there are alternative and better ways of delivering the legal aid budget savings, and that delivering such savings is perfectly possible. The will is there, but it would require a more constructive approach by the MoJ towards its stakeholders, in order find a way forwards to delivering major budget savings through restructuring fees, simplifying procedures and substantive law, reducing red tape, improving decision-making to reduce demand on legal aid services and where appropriate making the "polluter pay" for legal costs (for example making the legal costs of benefit appeals a DWP responsibility). However, the consultation exercise was profoundly defective and left no scope for new ideas. All policy was decided behind closed doors at the Treasury last summer (2010), and Ministers' brief has been to 'hold the line' despite all

[9] *Saving Justice: Where next for legal aid – Views from responses to the green Paper Consultation exercise in England and Wales,* Justice for All May 2011
[10] *Government's proposed reform of legal aid – Justice Committee Report*, 2011
[11] *Towards a business case for legal aid,* Citizens Advice 2010

opposition. In a sign of their increasing desperation for an intellectually robust defence of the changes, we hear Government politicians simply repeating the mantra that our legal aid budget is amongst the highest in the developed world, and therefore needs to be cut via drastic measures.

International comparisons

However, what Ministers will NOT tell you is *how* those comparator jurisdictions have actually achieved lower legal aid costs than England and Wales. How for example in Scotland is it possible that legal aid spending is significantly lower per head than England, whilst a higher proportion of the population is eligible for the service and the scope of the Scottish scheme covers every conceivable legal issue? How did the Netherlands legal aid reform programme reduce its legal aid spend – it did so in 2003 by investing in front end "Legal Service Counters" which screens, assesses and advises on all initial legal inquiries.[12] Similarly, Lithuania reduced its legal aid spend through introducing a ''primary" legal aid scheme which provides pre-court advice, whilst Belgium has made savings through establishing district level *Commissie voor Juridische Bijstand* or *Commission d'Aide Juridique* composed of representatives of the local bar and 'public centres for social welfare', which deliver practical information, preliminary advice and admission requirements for legal aid.[13] Canada has invested more in public legal education to reduce its legal aid budget.[14] I could go on with many such examples, but the message is about better demand management, information and early advice rather than restrictive legislation to curtail entitlement.

It is therefore palpable nonsense, when put into any proper international comparative context, to claim as the MoJ does that what happens is England "is by far one of the most comprehensive, and expensive, legal aid provisions in the world" or that it is available for a wider range of issues than elsewhere.[15] Indeed if you look at spending on justice systems as a whole, the UK spend is lower the both European and OECD averages – there are also systemic differences between jurisdictions, many civil law (rather than common law) jurisdictions' legal redress processes are managed through inquisitorial or compensatory rather than adversarial proceedings, and there are also different balances of legal aid expenditures in federalised countries as between state, federal and local levels, and different allocations between legal aid and court costs.[16] Our mediocre ranking on the international scales of justice should come as no surprise, given the UK's poor record of foot dragging in signing up to

[12] http://www.rvr.org/binaries/rbv-downloads/brochures/def-opmaakvoorsel-brochure-legal-aid--rvr90265-_ve.pdf
[13] Access to justice in Europe: an overview of challenges and opportunities, European Union Agency for fundamental rights, 2010
[14] http://cfcj-fcjc.org/docs/2003/newsviews06-en.pdf
[15] *Government response to consultation on Proposals for the Reform of Legal Aid in England and Wales,* Ministry of Justice 2011
[16] Ministry of Justice, *International comparison of publicly funded legal services and justice systems,* Roger Bowles and Amanda Perry, University of York

international instruments and standards on rights and justice, and putting them into effect in our legal framework.

So what is the way forward for access to justice in England and Wales? I would like to think that the Bill could be amended so that at least some earlier, low cost advice could be covered and deliver solutions that can prevent and resolve civil problems in the most cost effective way. If our Members of Parliament don't have the time to grapple with the economics and detail of legal aid policy, they should at least be conscious that in future their constituency surgeries will be full of constituents looking for help with complex problems, and will have nowhere else to go once local specialist advice agencies lose all their legal aid funding. They should also be warned that the civil legal problems taken out of scope not go away, due to the extent of unmet demand that already exists – surveys have consistently shown that around third of the adult population have unresolved civil legal problems.[17]

State, market or self help?

Is a market solution viable in the face of dwindling public funding? The market – i.e. the privately or insurance funded legal sector of solicitors and legal advisers which charges notoriously high fees for even an hour of advice - scarcely penetrates those in the lower income quintiles. The private sector has been sadly retreating from providing "legal aid" style services for many years – 15 years ago around 13,000 solicitors offices provided legal aid – now that number is around 2,000 and set to reduce by half again as a result of the reforms. It is hard to see the private sector working well in this field without some public subsidy, just as it is hard to see insurers willing to underwrite social welfare law issues - let alone at price consumers can afford. And in a parallel reform, obtaining legal help through "no win no fee" agreements will become far harder in future under provisions of the Bill which expose civil claimants to additional costs.[18] Leaving advice provision to the market will also bring its own moral hazards, as we have seen with the growth of unregulated, fee charging debt management and claims management companies which excel at hard sell marketing and pocketing most of their clients compensation, as well as financial advisers offering all manner of risky 'products' to low income consumers and loan sharks posing as honest 'advisers'.

Should we just rely on self-help, alternative remedies such as Ombudsmen, and the voluntary and pro-bono sectors to fill the gap? This is the Ministry of Justice's approach – but they neglected to mention in their Green Paper that almost all of the existing specialist advice services offered in the voluntary sector are actually funded by legal aid, and there are few other sources of funding for this level of advice – or

[17] *Causes of Action - Civil law and social exclusion* LSRC (the Legal Services Research Centre has run surveys on legal need for nearly a decade - their findings, re a third of adults with civil issues, have remained pretty consistent)

[18] Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill introduces changes proposed by Lord Justice Jackson to eradicate unsuccessful defendants (ie the wrongdoers) liability to pay successful claimants legal costs.

even for training volunteers to deliver specialist legal advice. Nor did the Green Paper mention that most pro-bono law services are 'hosted' by voluntary sector advice services. And whilst we can all agree that alternative dispute resolution systems (mediation, Ombudsmen, ACAS, etc) are desirable, even these require specialist information, advice and support for people to access and not all are free at the point of delivery.

But perhaps there is a way forward? Before the changes are implemented we should take heed of the wider public service reform agenda. There are significant savings to be made by simply devolving the legal aid budget to the appropriate local level of delivery. This approach to delivery is being trialled with increasing success in so many other areas of public services; for example the "Total Place" pilots have been favourably assessed, and supported by the Local Government Association as a model for "place based" budgets.[19] Over the past year the Coalition Government have taken this approach as step further in implementing DCLG's 'community budgets' proposals, with sixteen areas to be given direct control over a specified set of Whitehall funding streams. This is very much the direction of travel in the Localism Bill of removing artificial ring-fences and letting reduced spending allocations be prioritised at a local level so that services can be adapted flexibly to meet local needs.

Similarly, the Health and Social Care Bill takes a decentralised approach to management and services procurement by providing for local consortia of medical professionals to lead on NHS commissioning. The overriding aims of Public Services White Paper Public is that "services should be decentralised to the lowest appropriate level," focussed on the users and results, "open to a range of providers" and shaped by public engagement and accountability. The White paper therefore envisages a key strategic role for local charities and bodies in shaping and delivering services.[20] (As an example in the Department of Business 'consumer landscape' Citizens Advice and local trading standards take over consumer advocacy from the big regulators and quangos). Finally, the Government's "Red Tape Challenge" sets out to remove unnecessary regulatory burdens on local charities and businesses providing vital services to local communities.[21]

A liberal democrat solution

Our Ministers concerned with justice, legal aid and public services policy should listen to these movements and "inner voices" within the coalition. Do we really want to impose more state bureaucracy on the legal aid system? Should we perhaps be looking at taking LSC/MoJ bureaucracy and transaction costs out of the picture? A simple solution is on offer in a Citizens' Advice proposal that if the Ministry of Justice could divert just £20 million of the budget that is currently spent solely on

[19] *Place-based budgets - the future governance of local public services*, LGA 2010

[20] Open Public Services, July 2011

[21] *Report of the Task Force established to consider how to cut red tape for small charities, voluntary organisations and social enterprises*. Cabinet Office 2010

administration (benefiting no-one beyond the civil service) in order to establish a new delivery model based on local advice partnerships, and then the remaining civil legal help budget (for advice work) could be distributed through a national charity structure with local 'hub' presence through grant in aid, under a requirement to establish and co-ordinate around 60 *Local Legal Advice Partnerships*, based on best practice in Bradford and many other areas, which would bring together local councillors, existing advice providers, local solicitors and other relevant agencies and local representatives.

This model could make the truncated budget go further to help more people; whilst it still requires well trained specialists and professionals to work, it could shift towards a network of paid specialists supporting a large number of well-trained volunteer problem solvers, rather than a network of paid lawyers solving problems directly. Each Local Legal Advice Partnership would identify and map local advice needs and provide locally appropriate advice from within the partnership. This would ensure that local agencies, voluntary sector organisations and the private sector work together effectively, avoid duplication and share back-office functions and information wherever possible. It would provide for greater local accountability and tailoring, encourage local partnership working, remove duplication, reduce bureaucracy, shift back office spend to the front line, demonstrate faith in the voluntary sector and big society approaches and revitalise volunteering in this area. It would also remove duplicatory audit processes and reduce red-tape. Redirecting resources from the wasteful £120 million admin spend should be a political priority for us – just consider the benefits. A further £15 million diversion from bureaucracy to the front line could pay for the provision of advice to around 120,000 appellants before benefit tribunals, which they would be otherwise denied as a result of the legal aid cuts.

Before ruling out such innovative ideas, we should pause for thought also and consider the consequences if the legal aid system and sector simply collapses as a result of the reforms in their current guise. Three major not for profit agencies have already gone bust in the past few months,[22] a third to half of law centres are set to close as a result of the reforms, and CABx are desperately scrabbling around for alternative funding in order to keep their doors open. Advice deserts will cover the country and become ever more arid. What happens if the 'advice market' becomes dominated by the sharp practice of private providers rather than servicing the public's advice needs? There is a significant risk of a "market failure" into which Government will be forced to intervene in future years, as a market failure on this scale in the legal sector could have profound consequences for the rule of law.

For these reasons, there are many eyes now watching exactly how Liberal Democrat MPs, Peers (as well as Councillors at Council leaders at local level) react to these changes. The next two months are the last opportunity to lobby for even small changes to the proposals as they go through Parliament - proposals which should

[22] The Immigration Law Advisory Service, Migrant Justice, and Law for All.

have received far more robust scrutiny and concern from our front-bench! As the debate over Health Bill has shown, even eleventh hour interventions from our leaders can see common sense prevail over Tory spin and dogma. Like many in our party, I was proud to hear our Ministers put their head on the bloc over preserving the Human Rights Act - they should do the same on access to justice. Our credibility in owning and leading on “community politics” depends on working with and championing community advice organisations like CABx. Our claim to put citizens before state depends on a workable and settled system of legal redress. And our constitutional preamble says it all.

This issue is therefore a litmus test for the principles and future of the Party, for constitutional values and the legitimacy of our coalition. The practicalities may have changed, but the bedrock post-war principles for justice policy established by Lords Rushcliffe (Tory), William Beveridge (Liberal) and Lord Franks (Liberal) have not. What has changed remarkably over the past eighteen months are attitudes towards the state's support for access to justice - but is this really a justice policy shift, or is it about the most efficient use of scarce resources? As Lady Justice Hale has said in a recent lecture that if we want to spend less on courts, law and lawyers "we have to be prepared to spend money on initial advice and assistance schemes because that is where most problems are solved" and she concludes with a warning that "The big society will be the big loser if everyone does not believe that the law is there for them." [23]

The challenge then is to promote a distinctively liberal and community driven approach towards access to justice and legal equality in today's coalition politics. Our MPs should be challenging officials in the Justice Ministry to look at alternative options and packages to deliver a substantially cheaper but more effective and inclusive legal aid system. At the very least our top team in Government should be negotiating hard for concessions and improvements to the Bill, and not acquiescing in the dismemberment of civil legal aid. But above all we must change the mood music, or else lose our identity - the last thing we can afford as our legacy in Government is to short-change our society on the quality of justice. For Liberal Democrat principles, policy and actions this is not so much a "clause 4 moment" as a clause 1 moment!

James Sandbach *September 2011*

[23] http://www.supremecourt.gov.uk/docs/speech_110627.pdf

EVAN HARRIS

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Evan is now Vice-Chair of the party's Federal Policy Committee.

The rule of law

The riots in London and elsewhere this summer have been a timely reminder of how much we value the rule the law, the consequences of its breakdown – mob rule, riots, vigilantism and dysfunctional communities hardly bear thinking about. The responses to the riots have also highlighted the central role of the justice system in tackling a spectrum of issues from incivility to outright violence and repeat criminality. Our Party's emphasis in the wake of the riots on restorative justice solutions, taking responsibility and making good the damage is fundamentally what a proper justice system is all about.

Legal aid acts as an integral part of such a justice system, ensuring that decisions are taken fairly and that both sides of a problem get a fair hearing – whether that's in a benefit appeal tribunal or criminal prosecution in the Crown Court. Earlier this year I was asked to take part in an independent Commission of Inquiry on legal aid supported by the Haldane Society and Young Legal Aid Lawyers. [1] The other panellists were Diana Holland of the TUC and Canon Nicholas Sagovsky; and we were aided in our hearings by the expert questioning and insights of Michael Mansfield QC.

The Commission was established to investigate the role of legal aid, how it impacts the public, and what the costs (to the public and the Government) of any cuts would be, and we did so by receiving testimony directly from those receiving and delivering the service. We also looked at the arguments in favour of reducing legal aid contained in the Government's 2010 green paper on legal aid reform - together with reports from Policy Exchange, the Adam Smith Institute and the Society of Conservative Lawyers – as well as the arguments for the retention and improvement of legal aid as a central plank of the rule of law made by human rights and legal representation charities.

The panel were especially struck by the testimonies from legal aid users, their stories of struggle and hardship and just what misfortunes and miseries would have befallen them if they had not had access to legal aid. I heard from a mother re-united with her daughter, a refugee saved from torture, several people who had been homeless or evicted, or whose problems had become so desperate that they had been hospitalised. The case histories that impressed us were diverse, with each problem having a potentially devastating impact on the individual and their family. It seemed to us

impossible to consider some of these areas of law as not important enough to allow people the means of legal representation. The panel also saw that cases weren't split into neat packages according to legal specialism. We received testimony from people whose debt problems spilt over into housing difficulties; immigration problems into welfare and housing. The idea that some of these areas will receive support but others not goes against common sense and legal practicality.

We also received direct testimony that threw the Government's claims of saving money - the prime motivation for the reforms - into doubt. Experienced solicitors told the panel of the likelihood that an increase in litigants in person would lengthen court time and increase costs. Effective advice from lawyers often allows people to avoid the courts in the first place. Without legal aid, many people told us their problems would only have escalated. One person was able, once she and her 12-year-old sister's housing was secured, to go to university. We were always conscious of the public spending constraints but it struck me if such interventions succeed in turning around these desperate situations and keeping people more or less on the 'straight and narrow' than the 'careless and chaotic', then legal aid must be doing something right! A reasonable bang for public bucks!

The Commission's final report was called "Unequal before the law." The Commission was unanimous in concluding from the evidence that legal aid is a vital service in economically challenging times. The Commission was struck by the extent to which legal aid (eg social welfare advice) is geared up towards solving the problems of poverty. Above all it makes processes fairer and more equal for citizens. A particular feature of the cases was that so many of them arose from decisions of the state - local authorities, educational bodies or health trusts. Legal aid was the only way for some people to challenge these decisions. If we abandon legal aid, it is hard to see how this basic standard of equal citizenship can be maintained.

It is also hard to foresee the consequences of not providing legal aid or a similar type of service, except that it should be obvious that there will be serious consequences down the line. The Government does recognise this. Buried deep in the Ministry of Justice's Impact Assessments accompanying the legal aid green paper is a warning that the proposals run the risk that "A significant reduction in fairness of dispute resolution may be associated with wider social and economic costs such as:

· reduced social cohesion. For example, failure to apply the rule of law fairly may generate an inclination not to respect rules and regulations and not comply with social norms and expectations, generating social costs;

· increased criminality. This may arise if unresolved civil or family disputes escalate, or if criminal means are used to resolve disputes in future, or if a known lack of legal aid encourages people to take advantage of others who might find it harder to defend themselves in future;

· reduced business and economic efficiency. Failure to enforce rights and not applying the rule of law may undermine work incentives, business uncertainty and the operation of markets;

· increased resource costs for other Departments. If civil and family issues are not resolved effectively people might continue to rely upon the state, including because failure to resolve one issue may lead to another arising. This may

include health, housing, education and other local authority services including services provided by the voluntary and community sector;

· increased transfer payments from other Departments. Similar to the above, reduced resource transfers from the legal aid fund might lead to increased financial transfers to the poorest, e.g. via welfare benefits or tax credits. For example, if people who previously received legal aid might use their own savings in future to finance a case, and in doing so they might pass a benefits threshold."

So we come to the current debate on legal aid reform. Our Party's responsible approach to deficit reduction should tackle the problems at source! If half of all benefit appeals are finding that DWP decisions are wrong, this needs to be tackled as if these decisions were taken correctly, then legal action would be unnecessary. I'd make similar arguments about the UK Border Agency in respect of asylum and immigration appeals, or about enforcement of workplace rights and best practice in the public sector. Personal debt and housing problems also need to be tackled at source. However, taking areas of law such as welfare benefits out of the scope of legal aid will mean that these more systemic problems will fall below the radar and get worse – we need to keep legal aid, but keep pressing down ruthlessly on the cost drivers.

I can't claim to have studied the Legal Aid Bill in detail, but as others have said, taking a complex system and making it more complex, or taking a rationed system and rationing it further so only the most extreme case are fundable, is not the way forward. I applaud the work of LDLA in campaigning on this issue and promoting last spring's conference motion as the right set of principles to follow. The speed at which legislation gets introduced means that we often miss what's important, and this edition of Legal Democrat does an excellent job in exposing the weaknesses of the Legal Aid Bill. This Bill needs far more scrutiny; if I were still in Parliament I could not in good conscience vote for the Bill in its current form.

Dr Evan Harris

Vice-chair, Federal Policy Committee

[1] Unequal before the law

ROGER CROUCH

Roger practises as a Solicitor with Carter Bells LLP in Kingston-upon-Thames, and specialises in wills, trusts, probate and tax planning.

He is a member of the Liberal Democrats in Twickenham.

Legal aid: essential in a civilised society?

Legal aid may not garner the attention that those other hallmarks of a fair society - health, social security, and housing - always attract but we would be wrong to underestimate the importance of legal aid in providing access to justice for the most vulnerable in our communities.

In the aftermath of the Second World War, it was thought that the creation of a unified legal aid scheme, along with the implementation of the Beveridge Report in other areas of social welfare, would create a fairer society for a post-war age in which it was recognised that equality of access and the right of representation before the law was fundamental in a just society. The Rushcliffe Committee made a number of recommendations that led to the establishment of the first legal aid scheme by the Legal Aid and Legal Advice Act 1949.

With prime time billing before the Leader's Speech, the Liberal Democrats at our Spring Conference earlier this year reasserted their support to those principles first established in 1949: that those who are on low incomes or are disadvantaged should receive assistance in getting access to the courts and legal advice.

The Government, however, is determined to plough ahead with a series of heavy cuts that will mean legal aid is no longer available for many family law, immigration, housing and debt cases. Whilst lawyers may not have fallen as low as bankers, it would be wrong for the Government to rely on public support for a measure that will reduce the income of lawyers – the longer-term effect on the clients they represent could be potentially catastrophic. It is inevitable that all Government departments must reduce their budgets and introduce efficiency savings and I welcome the reforms that will reduce ambulance chasing in the area of personal injury law. However, I would argue that access to legal aid and legal advice provides long-term solutions for individuals and may actually reduce the burden on the state, for example, a debt problem that is resolved quickly with advice paid for by legal aid will not result in, say, eviction from a property and a requirement on the local authority

to rehouse, cause a stress related illness, which leads to knock on costs for health services and employers. Problems resolved early avoids unnecessary litigation.

As a solicitor in private practice, charging a fairly hefty hourly rate, I know it is impossible for me to provide access to legal advice for the most vulnerable in my local community. However, I want the reassurance that I can refer injustices and legal problems for those that cannot pay private rates to a legal aid practitioner, preferably one who has been assessed as providing excellent advice by the Legal Services Commission, or to the local citizen's advice bureau or law centre staffed, either on a paid or voluntary basis, by suitably qualified experts.

Much of my own work involves providing advice to indviduals, or their families or carers, who are becoming or have become mentally incapacitated. Many of these clients are elderly and are coming to terms with the onset of dementia; the majority of these clients have sufficient wealth to pay a private rate. From time to time, however, I will be approached by the family of a younger person who may have been detained in hospital under the Mental Health Act. If they have insufficient resources, I am unable to help and refer the matter to a member of the Mental Health Lawyers Association who is able to provide advice within the scope of the legal aid scheme without having to apply a means-test.

Under the Government's proposals, these lawyers now face a 10% reduction in fees. Many of these lawyers will cease practising and in many areas of the country the vulnerable will not have access to mental health representation. For many younger lawyers, mental health law will no longer be an attractive career path on qualification. This is all at a time when, partly due to the economic downturn and increasing unemployment, mental health problems are increasing.

As Liberal Democrats we should, surely, support those lawyers who are acting for individuals whose liberty has been removed without the sanction of a court. Cases before the mental health tribunal revolve around issues of unnecessary detention and, at the other extreme, providing a patient with their liberty with the risk that the patient is a danger to themselves or the public.

This is just one example of the work legal aid practitioners undertake in order to secure the operation of justice in a civilised society where the vulnerable should have access to legal remedies. I don't want to see legal aid reduced to a rump service assisting only those who are accused of a crime or a seeking custody of children – it is an essential service worthy of protection in order to secure our fundamental right to equality before the law. Do we really want a legal system that provides super-injunctions to footballers keen to hide their infidelities but does not provide access to justice for those who have been incorrectly detained or those who need benefits advice?

Roger Crouch

JO SHAW

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She is a member of the Liberal Democrat Federal Executive and the Federal Conference Committee.

Jo has been co-opted on to the Campaign for Gender Balance.

She is a member of the Council of Liberty.

The family barrister's perspective

The future for the funding of family cases for the poorest in our society is a depressing subject. For myself, yes, because the work I enjoy doing is going to be more difficult to justify economically. For my instructing solicitors, yes, because these reforms are going to make hard-working underpaid lawyers even harder working for even less pay. For my clients, yes because many of them will no longer qualify for legal aid, effectively taking them outside of the legal system in a lot of cases. For my clients' children, yes, because they will be affected by their parents' battles being undertaken often without proper advice and representation. And for society, yes, because the effect of these "reforms" will have a knock on effect on us all.

A great deal of my practice is in the field of family law. I work in cases involving ancillary relief (financial provision on divorce); private children matters – disputes between separated parents about contact / residence / change of name / removal from the jurisdiction of England and Wales; public law matters – disputes between the state and the parents about whether a child should be removed from the care of their parents or whether the state should share parental responsibility for that child, and injunction cases – seeking occupation orders and non-molestation orders for people, (all women victims in the cases I have dealt with) who have been the victim of domestic violence. All of these areas of law are going to be affected by the government's proposals for reform of (cuts to) legal aid.

I believe these cuts run contrary to our basic principles as Liberal Democrats:

The Liberal Democrats exist to build and safeguard a fair, free and open society, in which we seek to balance the fundamental values of liberty, equality and community, and in which no one shall be enslaved by poverty, ignorance or conformity. We champion the freedom, dignity and well-being of individuals, we acknowledge and respect their right to freedom of conscience and their right to develop their talents to the full.

Indeed the government's rationale for the decisions being made about where and how to cut legal aid is based on cases which arise from the "personal choice" of the party seeking public funding. Of course it is true that some individuals' separation or divorce is due to purely personal choice. But it is very rarely the personal choice of their child who is directly affected by that choice and who may well lose their contact with the non-resident parent, usually their father.

How much reform can one system take all at once

Before I seek to address some of the specific problems thrown up by the proposed changes, let's have a look at what reviews/ changes are already taking place in the arena of family law. This should be set in context. Prior to these set out below there have been seven previous reviews of family law since 1989 and no fewer than 30 reviews of legal aid since 2006.

The evidence of the effect of the changes and reviews set out below is awaited and so has not formed part of the considerations for the further reforms proposed This would seem to be at least illogical if not downright stupid:

- The Family Justice Review the final report of which is due in autumn 2011. This Review is tasked with examining the private and public law system, the use of mediation in family cases, the experience for children in family cases, the process of seeking ancillary relief and divorce, and how the family justice system is organised. It's interim report in March 2011 made wide-ranging proposals for a wholescale reorganisation of family justice, many of which are very sensible, but which will all have cost implications, certainly initially and some into the future, for example the establishment of a Family Justice Service with its own staff and Chief Executive, and a single family court instead of the three layers of family justice (Magistrates, County and High Courts) currently.
- Implementation of the Family Advocacy Scheme, aimed at streamlining the pay for barristers and solicitors in the family courts and to control the increasing cost of family legal aid and reducing the amount spent on work outside legal advice and representation. This was implemented for all new cases for which legal aid certificates were applied for after 9th May 2011.

- The Revised Private Law Programme commenced in April 2010 which has as one of its two key objectives "to save unnecessary expense" and allotting appropriate resources to a case while taking account of the need of the court to allocate appropriate resources to other cases. This has continued the use of the First Hearing Dispute Resolution Appointment utilising the services of Cafcass and the judiciary to try and resolve contact and residence cases at an early stage, with a degree of success.
- Research as to the effect of litigants in person on the courts service. The government seems to acknowledge that there is no substantive research in this area but nevertheless asserts that this would not have a significant impact on ongoing court or tribunal costs.
- Implementation of the 10% cut in fees for family cases, as from February 2012.

What is involved for family cases

The proposals include:

- Removing all private law cases from the scope of legal aid, no matter what the income level or personal circumstances (mental health problems, substance abuse issues etc) of the parent except where there is objective evidence of domestic violence against the funded party or where abuse of a child is alleged against the non-funded party
- Reducing the eligibility amount so all those with savings of over £1000 will have to pay a £100 contribution towards their costs, even if they only receive an income by way of state "passport" benefits
- Requiring greater contributions from those who do qualify for legal aid
- Greater reliance and insistence on mediation.

The government's equality impact assessment is clear that the proposed reforms will have a greater impact on women, ill and disabled people and BAME communities. It will also have a disproportionate impact on the legal practices of women and BAME practitioners. For those practising in civil legal aid, the cuts will mean an average 42% reduction in income.

The problem with mediation

Our own Lord McNally has espoused the virtues of mediation, and, for many cases, he is right. There, however, is a caveat: mediation works for some cases, but not all. The Master of the Rolls, Lord Neuberger has described mediation as "***...a complement to the justice system and not as a substitute for effective access to justice....***"

Mediation has a cost, does not necessarily lead to finality of proceedings and can leave vulnerable people without an effective means of resolving their problems. Experience tells me that parties are more not less likely to negotiate

effectively and sensibly when they have legal representation. The over-reliance on mediation will preclude this.

Over 90% of parents do resolve their disputes without reference to the court system. The remaining few need an effective means to resolve their dispute

Litigants in person

As the Lord Chancellor himself said in December 2010: "***I personally accept that every court dreads suddenly discovering that there is a difficult case where one of the litigants insists on appearing in person"***

Of course the litigants in person resulting from the proposed changes will not have chosen to represent themselves. They will have been forced into that position. My experience of clients who have the benefit of legal aid tells me that often, but not always, they are more vulnerable, less able to cope with a large amount of written material, sometimes complex legal principles and formal proceedings. My experience of appearing against litigants in person is as follows:

- Cases are much less likely to settle, as the litigant in person often feels, understandably, that they do not wish to try and negotiate with a trained experienced lawyer, but feel safer waiting to put their case before the judge
- Parties are more likely to take and stick to unrealistic positions
- Cases are likely to take longer. Deadlines for disclosure of documents, exchange of evidence, drafting of pleadings are missed and reset. Hearings are sometimes missed or simply not attended. Hearings take longer as the judge quite properly takes time to explain the proceedings at each stage to the unrepresented party. Issues are less likely to be narrowed down. More hearings are sometimes required to get cases managed properly. Final hearings take longer as all issues have to be addressed, questioning takes longer, submissions cannot be easily shortened by judicial intervention encouraging an advocate to concentrate on the aspects of the case which are proving most challenging for the judge to decide and so on. The impact of this on the courts service should be clear. Longer cases equal delay which equals additional expense to the court service. This has not been adequately considered, if at all, in the proposals.
- The case is more expensive for the other party (usually legally aided, so the costs paid by the LSC will increase)
- There will be no ability for funding of experts regarding mental health / substance abuse issues of a non-funded party. This will lead to issues of

considerable importance being left unclear, which is particularly concerning for Children Act matters.
    - Cases are much more stressful for both parties.
    - There is a higher likelihood of a miscarriage of justice for the non-represented party.

- Cases not involving domestic violence or allegations of child abuse will not receive any assistance (unless they fall within the "exceptional" category so clearly these cases will be very few in number). These cases will involve couples in disputes about child contact and residence arrangements, financial provision on divorce or separation of non-married couples, and some injunctions. There will be a large number of cases where, therefore, both sides of the dispute are expected to represent themselves. These cases are likely to take longer to resolve with the parties more likely to get into entrenched positions requiring final hearings.

  <u>When is violence, violence?</u>

  In cases involving domestic violence, the consequences of the reforms are likely to be significant, even though funding of the victim will be provided in certain circumstances. Domestic violence takes many forms: intimidation, threats of violence, emotional abuse, use of abusive language, control (eg by locking the victim in the home), physical violence; only victims in the latter cases would be funded according to the original consultation paper. In so doing the government ignored its own definition of what domestic violence involves:

  "Domestic violence does not just mean that your partner is hitting you. The abuse can be psychological, physical, sexual or emotional. Domestic violence can also include many things, such as the constant breaking of trust, psychological games, harassment and financial control. It is rarely a one-off incident and is usually a pattern of abuse and controlling behaviour.
  It can affect adults in all types of relationships and can also involve violence between parents and children."

  It now appears that the Ministry of Justice accepts that it would not just be cases of actual physical violence which would be eligible for funding, the precise definition contained within the Bill (Schedule 1 para 10(9)) refers to physical or mental abuse including sexual abuse and abuse involving violence, neglect, maltreatment and exploitation. One hopes that will not lead to cases of violence as defined above by the Home Office being excluded by the MoJ. What is clear, however, is that without objective evidence (a conviction, a previous fact-finding decision or a referral to a Multi-Agency Risk Assessment Conference with a plan put in place against the alleged perpetrator) such cases will not be funded.

  There are 15.4 million incidences of domestic violence in any one year. A fraction are reported to the police. Even fewer are reported to charities

involved with victims of domestic violence and still fewer result in applications for injunctive relief. There are particular issues regarding revealing let alone reporting violence in some BME communities.

The eligibility requirements therefore make it likely that thousands of genuine victims of domestic violence will not qualify for help, because they have been unable to report the abuse they have suffered. For those who are able to report it, the courts will have more cases to deal with in order that the gateway to eligibility for legal aid is achieved, adding to the costs of either the criminal or civil legal system.

More fact-finding hearings become necessary

Currently in a large number of non-molestation cases, undertakings are used as an entirely appropriate, quick, efficient and cheap resolution of the application. The acceptance of undertakings means a case can be resolved, sometimes at the first hearing, without the need for preparation of witness statements, disclosure and a final hearing. They are therefore an ideal way for many of such cases to be concluded.

The MoJ is clear that in an injunction case which has been concluded by way of undertakings by the alleged perpetrator to the alleged victim, this will not suffice for the purposes of eligibility. This is because there has been no finding of fact regarding an incident or incidences of violence. The government's approach means that I will no longer be advising my clients to accept an undertaking, as this may prejudice their ability to obtain funding for a future case where contact and residence issues are being contested or where the matrimonial assets are being divided.

This is another way in which the courts will be troubled with lengthy cases which otherwise would not have been required. A fact finding hearing in a non-molestation case can easily take a full day of court time, with additional time being required in cases where there is a great deal of evidence or where interpreters are required.

Who will be represented?

It is only the alleged victim of the violence who will be represented. His or her ex-partner will not qualify. So a subject of false allegations will not be represented so as to be able to defend themselves effectively. A genuine perpetrator will not receive the advice and assistance they need to resolve the case more quickly.

Additionally, the victim of domestic violence will have to face their attacker in person.

As I have said above, cases where one party is unrepresented (especially where violence is alleged) are much more likely to require a trial to bring them to a

conclusion. In trials of these cases a victim will have to be cross-examined by his or her attacker. The Ministry of Justice is aware of this, but believes that this can be countered by judicial intervention and control of the proceedings, and by the represented person's advocate "addressing any inappropriate conduct on the abuser's part".

This response ignores the human side of these cases. Any victim is highly likely to be intimidated by, if not still afraid of, their attacker.

To require vulnerable people to put themselves through the ordeal of facing their attacker in court is inhumane. With the best will in the world, I can do a lot of things as an advocate, but I cannot erase the effects of years of fear and abuse just by my presence and by informing the court of an inappropriate question, look or comment.

In addition, the rules on funding of cases involving domestic violence only allow for a very narrow eligibility. In order to be eligible, there will have had to be a conviction of the perpetrator of an offence concerning violence or abuse; or the victim of such violence will, within the twelve months immediately preceding the application for public funding, have had to had a finding of fact hearing in the family court regarding violence against him/her, been referred to a Multi-Agency Risk Assessment Conference and a plan having been put in place to protect them against violence by the other party, where an injunction order has been obtained by the victim which is still in force.

The eligibility rules also give a perverse incentive to a potential party to a dispute to make false allegations of violence. There are also likely to be a higher number of cross-allegations of violence in order that both parties will be represented.

Advice deserts

For people living in rural areas, there is a real risk that they will struggle to find a firm able to represent them. Firstly because there may be only one firm in a particular area which undertakes public funded family work, that firm may be struggling to cope with its workload and unable to take on any further cases; and secondly because if both parties are (exceptionally) eligible for public funding there may be issues of conflict. The party seeking representation may have to look far afield to find a firm that can act for him or her, adding to the cost of travel for the party to see their solicitor, and for the firm which does act when a court attendance is necessary.

Experts

The proposed cuts include a further reduction in the fees payable to experts. In public law cases such experts are often invaluable. It is not yet clear how the fee reduction will effect public law (and private law) cases, but it is reasonable to assume that there will be fewer experts prepared to do the work for a reduced fee.

This will have an effect on delay which is to be minimised if at all possible in all cases involving children for obvious reasons.

Conclusion

In recent months the Conservative party's love of bashing absent fathers has shown itself again in the aftermath of the riots. Yet the proposed cuts to legal aid will do a great deal of harm to children's prospects of having contact with their non-resident parent. They will also lead to greater stress, anxiety and difficulty for the parents themselves. They will clog up the justice system with inexperienced people trying their best to protect what is most dear to them. The cost to society will be great and ongoing.

It may be obvious by now that I am not a fan of these cuts. I have grave concerns about the impact they will have on my clients, on the costs of legal system and the costs they will cause for society more widely. It seems to me that they will lead to harm to parties, their children, the courts service and society as a whole. There is real concern that the effect of the reforms will lead to parties taking matters into their own hands rather than trying to get through the legal system unassisted.

The reforms are being introduced without first allowing the work which is already underway to reform and improve the family legal system to take place, let alone see what the effects of these reforms are. Such an approach to a vital area of human life for a government which claims to be family-friendly is extraordinarily short-sighted and will have long-term damaging effects. Liberal Democrats should be campaigning against the cuts to legal aid if we care about the most vulnerable in our society.

Jo Shaw

What is Liberal Democrat Policy on legal aid?

Policy is made by Federal Conference and refined through policy papers produced by working groups and supported by the Party's policy staff. There has not been a working group on access to justice for some years, although LDLA has in the past established its
own working group to report on the issues, and received backing for the conclusions from Conference. Here are the most recent outcomes from Conference on legal aid issues.

March 2011

Conference notes that:

I. The party and the coalition government are committed to the promotion of civil liberties, social justice and the elimination of unnecessary and intrusive state powers brought in by previous governments.

II. Access to the courts and redress to protect and enforce human and civil rights is an essential component of those rights, as recognised by the European Convention on Human Rights.

III. Those least advantaged in society are often those who most need assistance in getting access to the courts and legal advice.

IV. A properly funded system whereby access to justice and the courts is not denied to those otherwise unable to bear the costs is a mark of a modern, civilised and democratic society.

V. Steps taken by the Labour Government in relation to cutting legal aid provision were ill-considered and inadequately trialled, as was repeatedly found by the relevant Select Committees.

While recognising the many competing claims upon public funds and the poor economic circumstances bequeathed by the Labour government, conference calls upon the government to ensure that before any further cuts are made to the Legal Aid budget or new schemes adopted:

A. Full consideration, assessments and trials are carried out as to any proposed changes or reductions before they are introduced; including: i) A full examination of how the administration of justice can become more cost effective without reducing the quality of that justice. ii) An examination of alternative methods of funding

access to justice.

B. Those discussions, trials and assessments should study the impact upon:

i) The access to courts for those on low incomes.

ii) The availability and sustainability of a suitable and adequate number of appropriately qualified and experienced lawyers prepared to undertake publicly funded work.

iii) The effect of such changes upon the sustainability of legal service providers such as Citizens Advice Bureaux and the burden placed on charities with limited funds providing support facilities to those who, being unable to afford legal representation, have to represent themselves in civil and matrimonial matters.

C. A more strategic approach is adopted by public authorities towards provision, funding and delivery of legal and advice services in communities on issues such as welfare benefits, debt, housing and employment.

Conference further calls upon the government to:

1. Ensure that the legal aid budget is not made to bear costs which should fall elsewhere, by:

a) Ensuring that the costs of acquitted persons do not fall upon the legal aid funds.

b) Repealing section 41 (4) and (5) Proceeds of Crime Act, 2002 (which prevents restrained funds being used by the person restrained in his own defence).

c) Enabling the courts to use cost orders against public or private bodies which bring proceedings unsuccessfully, or unnecessarily (such as acting in breach of pre-action protocols).

2. Make the necessary savings from the budget of the Ministry of Justice by significantly reducing the prison population and investing more in community orders and penalties and constructive alternatives to criminalisation.

Furthermore Conference calls for the government to:

I) Before undertaking any further changes to Legal Aid, commission an independent study on the overall cost to public funds due to the impact on other budgets and other government departments as a consequence of any loss of access to adequate legal advice by those with housing, immigration, employment and education cases.

II) Ensure that proper consideration be given for the scope for savings to be made by improvements in Legal Services Commission decision-making and by reducing the costs of appeals by raising the quality of first decisions by public authorities.

III) Reject any changes to Legal Aid which lead to significant reductions in access to justice, a lack of sustainability of public funded legal services or false economies as a result of knock-on costs to public funds of cuts to legal aid.

March 2008

Conference believes that:

A. Access to justice for all is one of the cornerstones of a free and liberal society and that a robust legal aid service is therefore essential.

B. Government must ensure value for money from the legal aid service; but that this must not be at the expense of access to justice.

Conference notes that legal aid cases are typically those around such areas as housing law, immigration, domestic violence, and debt.

Conference further notes the findings of the 2006 Carter report into legal aid procurement and the Government's consequent move to replace hourly rates for legal aid by fixed fees.

Conference believes that:

I. The inclusion of travel costs within the fixed fee will reduce access to justice for clients in remote areas or those requiring access to specialist practitioners.

II. Fixed fees will inevitably reduce the time available for the more complex cases, so undermining the equal access to justice that legal aid is designed to ensure.

III. A fixed fee approach is inappropriate in the context of legal advice to the most vulnerable clients.

Conference also notes with concern that:

a) The Law Society estimate that as many as 800 law practices may abandon legal aid as a result of these proposals, equivalent to a quarter of all current providers of legal aid advice.

b) The Government's own proposals for a unified contract for civil legal aid have been found by the Court of Appeal to be in breach of EU procurement regulations.

c) The House of Commons Constitutional Affairs Committee has concluded that:

i) Black and ethnic minority lawyers and their clients will be disproportionately disadvantaged by these proposals.

ii) There is a breakdown in the relationship between the Legal Services Commission and legal aid providers, which is at crisis point.

iii) The Government has introduced these plans too quickly, in too rigid a way and with insufficient evidence.

Conference reaffirms the Liberal Democrat commitment to a robust legal aid system ensuring quality representation and access to justice for all.

Conference calls on the Government to:

1. Put any further implementation of the Carter reforms on hold, pending a full assessment of the impact on the most vulnerable clients.

2. Reject the imposition of a flat fixed fee approach which will hurt vulnerable clients, and undermine access to justice in both urban and rural areas.

3. Move to a new framework for funding legal aid, which recognises the needs of vulnerable clients and the complexity of cases in which they are involved.

4. Pilot any new arrangements so that the costs and benefits can be judged in practice before introducing these more widely.

Autumn 2004 - A Right to Justice

Conference:

i) Believes that an effective legal aid system should provide equal access for all to high-quality legal services.

ii) Is concerned that the provision of civil legal aid is falling far short of that objective.

Conference notes with concern that:

a) Public funding for legal advice and assistance in civil matters is now and increasingly entirely inadequate to reflect the above principles.

b) Since the Access to Justice Act 1999 the number of solicitors' offices undertaking publicly funded work has reduced from over 10,000 to around 5,000, leading to widespread 'advice deserts'.

c) The contracting regime run by the Legal Services Commission has involved rationing the number of clients advised, without regard to the merits of their cases.

d) The freezing of the Legal Aid Budget since 2001-02 and increases in priority spending on criminal and asylum cases have substantially reduced resources for important areas of social welfare law, including housing, employment, family and debt.

e) The rates paid for legal aid work, frozen since 2001-02, have dropped to deterrent levels.

f) The pervasive and inflexible bureaucracy involved in the contracting system has driven many of the best solicitors and advice agencies away from publicly funded work.

g) The overall effect of all of the above has been substantially to diminish access to justice for the poorer citizens in society, and thereby cause hardship.

h) While many lawyers undertake work pro bono, for which they are to be commended, such work cannot and should not be expected to address the serious unmet need for legal services.

Conference therefore calls upon the Government to:

1. Establish a Department of Justice, with the resourcing and organisation of publicly funded legal services as a key responsibility of the new Department.

2. Ring-fence the civil legal aid budget, so that increases in priority spending on criminal and asylum cases do not reduce the remaining civil budget.

3. Stop rationing the number of clients a solicitor or advice agency may advise and substitute a system of carefully adjusted criteria governing the scope of and eligibility for legal aid, to be applied fairly and universally.

4. Substitute for the present heavily regulated contracts a flexible system of service level agreements, tailored to the skills and capacity of service providers.

5. Establish a network of call centres and community justice centres country-wide to offer legal advice and information as cost-effectively as possible.

6. Encourage the development of outreach services in remoter areas.

7. Introduce a scheme of regulation for organisations providing services under conditional fee agreements.

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