JUSTICE Tom Sargant memorial annual lecture 2012

After the Act: what future for legal aid?

Roger Smith OBE, director of JUSTICE

Tuesday 16 October 2012

Freshfields Bruckhaus Deringer LLP, London

JUSTICE

advancing access to justice, human rights and the rule of law

JUSTICE Tom Sargant memorial annual lecture 2012

After the Act: what future for legal aid?

Roger Smith OBE, director of JUSTICE

Given at Freshfields Bruckhaus Deringer LLP, London on Tuesday 16 October 2012

Last week, Lord McNally told a Legal Aid Practitioners' Group conference that 'it is time to move on from LASPO'. He was referring to the Legal Aid, Sentencing and Prevention of Offenders Act 2012. His reference to LASPO was shorthand for the package of cuts to scope, remuneration and eligibility largely enshrined in, but not limited to, LASPO itself. LASPO's cuts to applicants' scope and eligibility come into force in April next year: cuts to lawyers' remuneration have begun and there is more to follow. Lord McNally is fed up with people still whingeing about cuts that are, as far as ministers are concerned, done and dusted.

This lecture is an extended riposte to Lord McNally. I want to begin with a general point that extends beyond legal aid. The coalition's cuts have, understandably, been presented and understood as about the saving of money. However, for legal aid as elsewhere, cuts of the magnitude projected pose a challenge for government way beyond the financial. They are so deep that they open up fundamental questions of purpose. Take the example of local authorities. Councils in the vanguard of response to the cuts, like Barnet, are priding themselves on the degree to which they outsource their functions. But, beyond a point, shouldn't they just be replaced by commissioning outposts of the central government departments? The same sort of fundamental questions arise about our foreign policy and armed services. Sooner or later, ministers are going to have to lead us through fundamental issues about our democracy, role and very identity.

This speech is spurred by Lord McNally but its text comes from Lord Mackay, by far the best Lord Chancellor of my time. He said in 1991: 'We have gone about as far as we can without radical change.'[1]

My thesis is that the LASPO cuts require radical change, probably beyond that contemplated by Lord Mackay. They slice so hard into the heart of legal aid that we are forced to reconceptualise the objective of policy. They are a repudiation of the bipartisan development of legal aid that has extended through my working lifetime. All major political parties and all governments operated on the premise that the poor were entitled to, and would progressively receive, legal services available to the rich. The expansion began with the 'green form' universal advice scheme introduced by Lord Hailsham, a Conservative Lord

Chancellor, and implemented in the year that I was admitted, 1973; legal aid expanded in the criminal courts in the 1970s through both Heath and Wilson governments; statutory duty solicitor schemes in magistrates' courts and police stations were introduced in 1986 when Mrs Thatcher was in her prime; private practitioners took on public and social welfare law in the 80s and 90s through the reigns of Mrs Thatcher and Tony Blair. Now, this is coming to a sharp stop and into sharper reverse.

There is no rabbit to pull out of a hat which will protect the provision of legal services to the poor at levels that we have had. These cuts provide a massive challenge. The most effective response may be to advance a process not a product. We have no option but to take up Lord Mackay's challenge and open a discussion of the radical change that these cuts demand. That is why I disagree with Lord McNally. We cannot move on in the way that he wants – in part, because the government has not fully appreciated what it has done.

The LASPO cuts essentially reduce legal aid policy to one aim: the delivery of the lowest level of service that will comply with our minimum obligations under the European Convention on Human Rights at the least possible cost. The European Convention is a marvellous document but it amounts to a necessary but not sufficient element of our constitutional framework. Such a reductionist approach is surely unacceptable. Lord McNally, as the legal aid minister, has much more work to do in order to make sense of his package of cuts.

JUSTICE, like many organisations represented in this room, lobbied against both the cuts and the bill. Well, we lost. The bill went through almost unscathed – minor amendments to cuts, a token statement of independence in relation to the Director of Legal Aid Casework, little more. The cost of legal aid is reducing by a quarter over the next three years. And no minister of any party is going to turn the clock back. In the haunting words of Bruce Springsteen: 'These jobs are going, boys and they ain't coming back.'[2]

There are admitted political dangers in accepting the position that I am advocating. I want to recognise them upfront. An alternative way forward would be stubbornly to refuse to participate in any further discussion of policy other than defending what we have managed to keep and demanding the return of what we have lost. We could justify this coherently enough on the basis do that government's only concern is financial and so is ours. In such an argument, we give no succour. Any suggestions for a different set of policies, we would just assume, will be open to abuse – savings will be grabbed, balancing expenditure ignored.

On the other hand, such a scorched earth defence surrenders any attempt to alter the terms of the debate and to engage at the level of principle as well as on the pragmatic. We surely need a set of policies that we can advance to any political party that wants to devise a coherent justice strategy. We have to find an approach which is coherent and comprehensible to a wider public than lawyers; meets fundamental constitutional

requirements and is deliverable within something like the existing budget. If we cannot find a ringing defence of legal aid expenditure, then the future lies before us – decline by an unending series of salami slices.

Let me spoil the suspense and announce the six steps of my argument which I will then draw out in more detail:

1. The current model of seeing legal aid as stand-alone provision is unsustainable
2. We need to reconceive the objective of our justice policy as a whole. The objective and ideal should be that we deliver equal justice to all
3. Equal justice requires an access to justice approach with legal aid reconceived as only one of a set of linked policies and provision – including reform of substantive law, methods of adjudication, the provision of non-legal assistance
4. Such an access to justice approach builds up from the availability of information and ends with the funding of lawyers – not the other way round
5. We need to maximise the benefit of the information revolution through which we are currently going and foster innovation
6. To deliver equal justice, we need one government department and one budget.

Legal aid

Legal aid is a comparatively small area of government expenditure but still significant enough. As the coalition government came into office, its cost was one third of one per cent of total government expenditure but that amounted to around £2.1bn a year – tempting enough to offer savings worth having. It was not always so big and has grown very fast over the last twenty years. In 1992-3, it reached a net figure of £1bn for the first time. Ten years later it had doubled to £2bn. After a scare about its inexorable rise in the 90s, expenditure has now been contained and flat-lined for the last few years.

The majority of legal aid expenditure is on the provision of defence services to suspects and defendants – around £1.2bn. Civil costs £900m, two-thirds of which goes to family cases. These are all official figures, somewhat blurred at the edges and, for example, include VAT. Three major groups of clients benefit from legal aid in its current form:

- suspects and criminal defendants, overwhelmingly male. Their entitlement will continue
- those involved in family disputes – the majority of whom are women. In private cases, scope will be reduced to those facing domestic violence

- clients troubled by the kinds of problems that particularly affect those unable to afford lawyers – what we have called 'social welfare' problems and North Americans, more graphically, 'poverty law' – of which the four largest areas are housing (around 170,000 cases for which payment was claimed in 2008/9), welfare benefits (137,000) debt (132,000) and immigration/asylum (around 90,000).[3] These are the cases where scope will be removed or decimated

Personal injury claimants were once a large fourth group: they were largely moved onto conditional fees some time ago.

One common characteristic of legal aid civil clients is clear – they are very poor and getting poorer. Means testing now affects criminal defendants. Financial eligibility for civil legal aid has dropped like a stone from the late 1970s. In 1979-80, 77 per cent of all households were eligible. By the 1993-4, eligibility dropped for the first time under 50 per cent. In 2007, before the recession impacted, the Ministry of Justice estimated eligibility at 29 per cent of the population. Its current estimate is 36 per cent. By comparison, around 50 per cent of the population receive income from at least one social security benefit.[4] The ministry's impact statement on its cuts programme stated:

> *legal aid recipients are among the most disadvantaged in society, reflecting both the nature of the problems they face as well as the eligibility rules of legal aid.*[5]

The number of people actually assisted by legal aid is impossible to identify because the statistics cover cases not people and, in any event, have become obsessed with information about lawyers and not their clients. A total of just under 3 million 'acts of assistance' are given each year – slightly more in crime than in civil. We might reasonably estimate – given the number of people with multiple problems – that this is the equivalent of assistance to around 2.5 million people. On this basis, the cuts will remove about 20 per cent of recipients, all with incomes at or around minimum means-tested benefit levels, from eligibility.

The determinants and causes of legal aid expenditure have caused long-running dispute between the legal profession and the government. Ministers have consistently blamed lawyers for inflating costs. One of the most eloquent was Jack Straw. Announcing earlier cuts, he said:

> *In the early 1970s there were just over 2,500 practising barristers and about 32,000 solicitors, compared with 15,000 and 115,000 respectively today. This is equal to one lawyer for every 400 people. We are in grave danger of becoming overlawyered and underrepresented*.[6]

He was making a dangerous equation of lawyers and legal aid, excluding any reference to clients. Ken Clarke did the same thing. It shows why we have to have to look for a justification for legal aid which is more fundamental. Lawyers have an obvious material interest in legal aid, just as doctors do in NHS spending. It does not mean that their clients and patients have fictitious needs.

There are undoubtedly some extraneous factors to the rise of costs. This can be seen most clearly in relation to crime. Tougher policies over the last twenty years have the consequences that you would expect on expenditure. A Ministry of Justice briefing document gives a battery of statistics that demonstrate the issue. The number of offences 'brought to justice' in the six years to 2003 doubled. The number of committals from magistrates for Crown Court sentencing has risen by almost 40 per cent just in the two years from 2008 to 2010.[7]

Politicians often lament that England and Wales spends more than other countries on legal aid but ministry figures show the position is somewhat more complicated than is often portrayed. In 2006, on government figures, legal aid in England and Wales cost £37 per head of population; courts and judges £19; and prosecution costs were £10 per head. That makes a total of £66 per head of the population. By contrast, the Netherlands spends a thrifty £14 per head on legal aid but spends much more than the UK on judges as you would expect for a civil law country, £32, and £21 on prosecution costs. That gives a total of £67 per head for the total provision of services. So, on these figures, the Dutch who appear to spend less than half of what we do on legal aid, actually spend more on the combined total of judges, courts, legal aid and prosecution. There are countless methodological difficulties in such comparisons. For example, the Ministry of Justice reveals that continental countries appear to pay their judges somewhat less than we do. For example, on its figures, the French appear to be able to get a judge at the highest level for around £70,000 a year and the miserly Germans for £58,068. The comparable domestic rate was £156,958.[8] If other countries paid UK rates to their judges, then there would be even less difference in the comparable overall cost of the justice systems.

Nevertheless, it is undoubtedly true that we have had one of the best legal aid systems in the world. We can, however, no longer say that it is actually the best. Research in which JUSTICE was involved suggested that of eight European countries studied in depth, Finland actually had the most comprehensive provision in terms of eligibility and scope. An estimated 80 per cent of the Finnish population is eligible for legal aid – more than double ours.[9] There may well be other countries, probably in Scandinavia, that are as good.

It is true that no other country has a legal profession for which legal aid is so integrated into the overall pattern of the delivery of legal services and so important as a source of income. Again, there are methodological difficulties in being precise about figures, but in 2000, the last year in which the Law Society published information, it calculated that gross legal aid

payments amounted to just under 15 per cent of turnover of all solicitors. This was probably the equivalent of slightly less net, around 12 per cent when allowance is made for VAT and disbursements. The percentage has probably diminished slightly since then and might now be around 10 per cent – still significant. The Bar has traditionally been more reticent though it did once release figures. We know that legal aid amounted to 27 per cent of its total income in 1989-90.[10] As late as the 1990s, not only was the absolute amount earned by solicitors from legal aid rising, so too was legal aid's proportion of total turnover. There is no reason to think that the Bar would be any different.

The legal profession has known very well what was coming. As early as 1993, the Bar could see the inevitable: it warned that 'it is likely that the Bar will decline in size'.[11] Since then, it is a sobering thought that, on Bar Council figures, the number of practising barristers has actually more than doubled from 7,735 to 15,387. The legal professions might well feel that they done rather better than they feared. It is pretty clear that the current model of legal aid as the funder of a significant part of both branches of the legal profession is no longer sustainable.

Identification of the role of legal aid in funding the profession is particularly important because the former Lord Chancellor made it the centrepiece of this justification for cuts. He told the *Today* programme: 'We're not taking legal aid from women and children. We're taking legal aid from lawyers.'[12] This is a little disingenuous. The government's original analysis of the cuts package was that total savings would be between £395m and £440m a year. The cuts were presumably deliberately balanced so that clients took the brunt of two-thirds of the cuts in reduced scope and practitioners one third in lowered remuneration – the proportions are too clear to be accidental:

- The largest single slice of savings comes from restricting the scope of the scheme. This will save between £251m and £286m annually. Assuming mean figures for savings between the two estimated extremes, clients take an expected hit of 64 per cent of reduced expenditure
- Furthermore, clients were expected to contribute a further 3.4 per cent to the cuts through increased contributions and supplementary slices of contribution, the detail of which has been dropped but probably without effect on the size of the cut
- The largest single source of cut is in relation to private family work which will account for about 60 per cent of the savings from scope reductions. The other major source is areas of social welfare law unprotected by the Human Rights Act

The ministry itself has quantified the number of potential clients who are losers. They will be about half a million, of whom around 90 per cent will lose entitlement and 10 per cent will face increased contributions. Since the cuts overwhelming affect family and social welfare law, unsurprisingly, the ministry accepts that the will 'have a disproportionate impact on women' (57 per cent to 43 per cent), on black and minority ethnic clients (27 per cent); and

that 'we cannot rule out that there may be a disproportionate impact' on those who have a disability (20 per cent). Almost two-thirds of the projected savings on scope will come from family law. A further fifth will come from social welfare law. The imposition of a requirement to go through a 'telephone gateway' to get advice on civil matters instead of receiving direct 'face to face'[13] advice will save another £2m.

Ken Clarke was, of course, right in one sense: the legal profession loses income from both reduced business and reduced payments for work that is retained. Lawyers will receive £150m less in remuneration for work they will still undertake. The overall percentage loss of all work for solicitors is unclear but the ministry estimates that barristers undertaking civil work will lose 42 per cent of their income and those doing criminal work 12 per cent. This will significantly depress both the numbers and incomes of those remaining in the field. Around a third of barristers undertake legally aided criminal work with a slightly higher proportion undertaking legally aided civil work. So, this will have a widespread impact.

The government has made little more than a ritual attempt to justify its actions in anything other than the need for savings. This is what has made them so difficult to oppose. Ken Clarke made a fist at arguing that lawyers were being removed where they were superfluous. He told the BBC:

> *I propose to introduce a more targeted civil and family scheme which will discourage people from resorting to lawyers whenever they face a problem, and instead encourage them to consider more suitable methods of dispute resolution.*[14]

However, there was no supporting research to suggest that people were using lawyers irresponsibly or what would constitute more suitable methods of dispute resolution.

Behind the cuts lies no overarching vision – just a search for cash. Indeed, the cuts were formulated in a way which gave no recognition for previous virtue.

The effect of the cuts

There must be some considerable doubt as to whether the LASPO cuts will meet the savings predicted and, therefore, we might have to prepare for worse to come. The criminal legal aid budget is sensitive to overall criminal justice policy and to waves of criminality. An increase in imprisonment would be likely lead to greater defence costs. An increase in domestic violence will scupper the family law savings but is almost unavoidable. Reported domestic violence will rocket as lawyers seize on what is required to make a successful legal aid application and clients have reduced incentive not to pursue allegations of violence by former partners. The cuts to social welfare law are surely too complicated to be sustainable. The LASPO schedule that deals with the scope of civil legal advice stretches over 27 pages. It sets out lists of included and excluded types of case, replacing a simple provision originally

in the Legal Aid and Assistance Act 1972 which authorised legal advice to eligible persons on 'any matter of English law'.

The extent to which ministers have recognised the likelihood of a shortfall is unclear. The smart thing would have been to announce cuts of 23 per cent but privately say 16 per cent. However, if this is not the plan (and it probably isn't) then legal aid faces a further spiral downwards on a further series of cuts to scope and eligibility as ministers scramble to provide the Treasury with what they have promised. The President of the London Criminal Courts Solicitors' Association recently reported:

> *The 'product quality' that is being delivered to the consumers of the legal profession's services (our clients) is without doubt being affected. It is foolish not to recognise this.*[15]

This is an obvious problem and we need to take steps to guard against it.

The current state of our legal aid in this jurisdiction looks particularly gloomy if you consider what has happened in other comparable jurisdictions. Back in the 1970s, when I had just qualified, we looked to the US for inspiration. In a little known irony of history, President Nixon appointed a Legal Services Corporation that included in its membership the young Hillary Rodham Clinton. It led the world in looking at legal need and comparing delivery systems. But, later presidents were more opposed to civil legal services than Nixon. In particular, Reagan had opposed all federal funding for civil legal aid while Governor of California. He went for a zero budget to annihilate the LSC and, though he did not get it, he crippled subsequent developments. The annual federal budget for civil legal services in 2012 was $348m or a paltry £215m, albeit that there are some supplementary sources of income for US schemes. The consequences of current low funding in the US sound depressingly familiar. A recent report stated:

> *LSC-funded programs reduced attorneys by 12.5 percent, paralegals by 17.4 percent and administrative staff by 12.7 percent. Programs closed 29 offices in 2012, many of them in rural areas where it can be particularly difficult for individuals to find alternative assistance. As a result, the LSC-funded civil legal aid program served 81,000 fewer low-income Americans.*[16]

Decline in the US has been followed by Australia and Canada as they have slashed their provision and ended with what few of us would consider satisfactory levels of scope, eligibility or quality.

Equal justice under law

To make any kind of sense of the current level of funding, we need radically to reconceive how we see legal aid. To do this, we need to forget the interests of the legal profession. They are secondary. It is harsh, but out must go any consideration of the value of legal aid in protecting the Bar, young lawyers, High Street solicitors, black and minority ethnic practitioners. If these are in danger – and they are – then it is up to the professions, not government, to remove any unwarranted discrimination and the market to identify the winners and the losers. The preservation of these minorities cannot be any kind of justification for government spending. This, we have to justify in the interests of the ultimate recipients of legal aid, not the intermediary providers.

Legal aid needs a coherent policy objective. And it needs to be something more than an anodyne version of the widely used one of providing 'access to justice'. This phrase has become totally debased. Ken Clarke asserted it as 'the hallmark of a civilised society' even as he implemented his cuts package.[17] Back in 1995, the Lord Chancellor's Department even opened a green paper on legal aid with the following in its first paragraph: 'The aim of the government is to improve access to justice.'[18]

The problem is meaning. The phrase has worthy origins. In a legal aid context, it was advanced by two academics in the 1970s at the European University in Florence, Professors Cappelletti and Garth, as the unifying theme of a dizzying world study. They developed the idea as a way of taking policy beyond the simple funding of more lawyers which they recognised would only go so far. Access to justice was 'an attempt to attack access barriers in a more articulate and comprehensive manner': it 'tries to attack ... barriers comprehensively, questioning the full array of institutions, procedures and persons that characterize our judicial systems'. [19]

Cappelletti and Garth's formulation was a major advance. However, access to justice, as originally conceived, described a process or an approach. It certainly does not describe a goal because it avoids the obvious question: 'how much access is enough?' As the Canadian academic, Professor Rod Macdonald plaintively put it, 'Before access to justice there was just justice'.[20] He was making an important point. 'Access' is in danger of becoming a limitation on the attainment of the fundamental goal of justice. The ideal has to be the delivery of justice: not just access to a chance of it.

The basic policy goal has surely to be that anyone in society, rich or poor, is entitled to expect that any dispute is settled on its own intrinsic legal merit and not by the extraneous issue of the different resources of the parties. We can call this equal justice under law. This would be particularly apposite because it is, in fact, the phrase engraved on the architrave of the US Supreme Court building. It is a worthy ideal though the US is certainly not a good example of its achievement. But it can still be our goal and provide the test by which we

judge our effectiveness in meeting it. To quote a voice from within the US Supreme Court, in the case of *Griffin v. Illinois* 'there can be no equal justice where the kind of trial a man gets depends on the amount of money he has'.[21]

The emphasis on equal justice avoids the implication that the poor might be satisfied with a little justice while the rich and powerful get a lot: access is important not in itself but because of the outcome that it facilitates. It is not, for example, satisfactory if former husbands are represented in matrimonial disputes while their former wives routinely are not – a predictable result of one of the major cuts in the current package. If we use the concept of equal justice under the law, then at least we get a standard by which we can judge our performance.

A holistic, access to justice approach

A true access to justice approach will tax ministers to the limit and beyond. This is why Lord McNally cannot be allowed to move on too quickly. It involves the kind of holistic approach to policy which is much praised but little followed. Our task is to maximise what we can get for the total amount of money that we spend on justice, including but not limited to, legal aid. As a very practical matter, this may be impossible under our current governmental arrangements. We need one department and one budget. The Ministry of Justice should pass prisons back to the Home Office where they belong. The Lord Chancellor should be firmly concerned with developing justice policy and managing the interface between the government and the judiciary. He or she should take the kind of personal responsibility for development legal aid policy which, frankly, we have not seen in any of the Lord Chancellors since Lord Mackay.

There are a number of issues for such a Lord Chancellor to address. These are six outside the field of legal aid as it would be traditionally considered.

The first is the impact of substantive law. Politicians will be reluctant, but they need to simplify the law if it can save costs if prosecution or defence. For example, they should begin to take the Law Commission seriously. The commission has called in recent years for reform of the specialised defences to murder. Politicians have been running scared of these because they don't want to seem soft on crime but, in truth, murder's defences are so different from those to other crimes only because of the impact of a death penalty long since abolished. In *Murder, Manslaughter and Infanticide* in 2006, the commission recommended a major reform of murder into two degrees and manslaughter. Its recommendations were only partially implemented.

To consideration of the substantive law can be added, as a second example, rationalisation of how disputes are adjudicated. From an access to justice point of view, it is the combined cost of legal aid and the rest of the justice system that counts. So, we need also to look at

adjudication. We have just completed a major judicialisation of the tribunal structure. But, we may have been mistaken. An ombudsman model might be cheaper and more effective. Witness the success of the financial ombudsman as compared with the courts. The flexibility and positive approach of the ombudsman system opens up interesting possibilities in terms of costs.

My third example is sentencing. As Chris Grayling may be about to find out, the Ministry of Justice budget can no longer afford to back draconian sentencing. Out have already gone Jack Straw's grandiose plans for enormous Titan prisons. In future, all Home and Justice Secretaries have to be honest about the cost of brave new criminal justice legislation of the kind favoured by Tony Blair. We need community punishments to work – for financial reasons as much as anything else.

Fourth, we may need to look at the elimination of discretion in judicial decision-making. The Law Commission has just issued a further paper on the financial arrangements following divorce. As the commission explains:

> *under the current law, the meaning of needs is unclear and there is confusion about the extent to which one spouse should be required to meet the other's needs, and for how long.*[22]

Here is an example of how the elimination of discretion and ensuing simplification could lower costs.

Fifth, the criminal justice budget is dominated by very high cost cases which amount to about half of the total budget. They need particular examination to see whether the cost can be reduced. It may be the greater use of strict offences for various types of white collar fraud.

Sixth, where litigation is appropriate, we may want to look at offsetting costs by rigorous implementation of a 'polluter pays' principle against institutional parties. Why should, for example, the government not stand to pay tribunal costs when it loses a social security or immigration case? Market principles are powerful things: let us use them to improve standards – if only at the rate of a nominal £50 per case. We might get spectacular results. At present, the ministry usually does not bother even to turn up to social security hearings because there is no financial advantage in doing so: if it loses, it can always appeal. A financial penalty for loss might concentrate its mind on the merits of the case. The transfer of the budget for social security tribunals to what is now the Ministry of Justice leaves the former sponsoring department with no economic rationale for avoiding appeals and, indeed, every incentive to be slapdash in its decision-making. Imposition of costs against the department might be some compensation for the widespread removal of legal advice on social security matters introduced by LASPO. We might want even to revisit the old chestnut

of whether the defence and prosecution of many serious fraud trials might be transformed if re-branded as failures of City regulation and funded through funds raised by regulatory fees.

In summary, we need to unleash innovation by way of new ways of looking at solving old problems by placing them within a wider context and keeping a firm eye on two governing principles:

- We have a fixed budget for our whole justice system but we can shift money within headings
- Our task is to deliver equal justice for rich and poor. We have a wider goal than a reduced budget.

Legal costs

Any policy for legal aid has to address the question of cost of legal services. Here, the government has only one idea – which it inherited from its Labour predecessor. It wants to restrict the number of providers; eliminate client choice of lawyer; institute compulsory competitive tendering for blocks of cases; and then drive down prices through this version of a market mechanism. There have been plans to do this with solicitors for some years. They will be extended to barristers.

However, we are beginning to appreciate through cases like G4S and the West Coast main line that competitive tendering for government services is not quite the panacea that it has been portrayed. The issues of quality and delivery are equally important. It is tempting for ministers to see competitive tendering as an invisible hand that will deliver savings and deliver them from the opprobrium of discriminating judgements. However, there are myriad problems. If government wishes to go down the road of tendering – and myself, I would not – then we must put greater emphasis on quality. Instead of providers competing on price, let government set the price directly and have the practitioners compete on what they will provide for that level of fee. That will kill the dream of unexpected savings from low ball bids but it would allow government to plan and to spend what it decides is necessary and practitioners to compete not for the price that they can give government but the service that they can deliver clients. It may also mean that we avoid the situation that has occurred in the States where, in the face of rock bottom rates of pay, professional organisations like the American Bar Association seek to specify maximum caseload limits to prevent the exploitation of the lawyers employed to deliver services. So, let providers compete on how much supervision, investigation, client interviews, specialist support they promise to fund and undertake, not how far they can eliminate their competitors by underbidding and then clean up when they have an effective monopoly.

The internet

Above all, we need to build up our provision on a clean slate – and from the bottom up. We should not begin with the lawyer: we should begin with the person who has a problem. Logically, consideration of how people might get equal justice begins with how they might know what their position is, not how they get a lawyer. We need to look at basic sources of information. We are in the midst of an information revolution. How can we use the internet? Much existing internet advice is, frankly, little more than digital leaflets but there are the beginnings of attempts to use the internet's possibilities – for example, Co-op Legal Services and the work of firms like Epoch in combining document assembly programmes with telephone or video communication. How could the state inspire a good level of interactive information and advice using new technology? Can the public and the private work together in some way on the challenge of providing basic knowledge?

The government proposes a commercially run telephone 'hot line' as the gateway for advice, seemingly staffed by non-professionally trained call centre workers linked to a commercial organisation selling legal services. Why is there no consideration of the provision of something like Legal Direct to replicate NHS Direct? If we cannot afford face to face services why can't we put on the net a diagnostic alternative that provides everyone with a basic service? Perhaps we need a competitive innovation fund to kick start provision.

Some people will not use the net. We may be moving to the provision of government services in a way which is digital by default. But the digital divide exists and some people will need face to face advice. We should hold to the 1972 ideal of advice for all and we could build upward on net-based advice. Labour rebranded civil legal aid as the community legal service but, frankly, this was never given a coherent meaning. It is even worse now that civil legal aid is an particularly incoherent mix of the rump of family and social welfare law. We need to think whether we could make more sense of things. JUSTICE costs about one third of a million a year. You could get three organisations like JUSTICE for one million – three lawyers, three support staff. For a mere £10m you could get 30. You could start to consider how for a tiny transfer within the budget you could have 29 law centre type operations around the country in areas of the greatest deprivation in terms of use of the internet plus a national centre of excellence. You begin to have an interesting and innovative pilot to run in which you could retain the spirit of the NGO sector and the commitment to a universal advice provision within within an overall legal aid scheme.

The internet has all sorts of opportunities and, of course, all sorts of limitations. But there must be massive possibilities. The Dutch are developing on-line mediation in family matters – could this work here? The government has wound up the highly respected Legal Services Research Centre which kept tabs on international research but it would be worth collaborating with other countries developing net-based systems of advice, mediation and adjudication. The Dutch government funds a project at Tilberg University to encourage

innovation in methods of solving legal problems. It has a web presence at www.innovatingjustice.com . It announces:

> *Across the world, courts, legal systems and legal professionals are challenged to deliver more justice. We nurture promising innovations with knowledge, networks and tools.*

This is just the sort of initiative with which the UK government should be establishing links and with which it should be exchanging ideas. A regrettable consequence of the abolition of the Legal Services Commission is that is now probably more unlikely.

The Dutch have focused on-line mediation in divorce. This is the kind of development that the UK needs to follow. People going through divorce will not have an easier time because of the withdrawal of legal aid: they will still need support and they should not be abandoned. The state should acknowledge responsibility for their plight even if its policy is to encourage commercial sources to develop cheap on-line assistance that can be offered to all.

To make any progress, we need some certainty about resources. We need a deal. Legal aid will take its hit but we must know that we can work within the residual amounts allocated to the justice system as a whole. The cut has been a quarter. That is enormous. An expectation that more can be squeezed out is unrealistic. We will avoid a lot of defensive trench warfare to protect what provision we have if governments could explicitly accept that. Government needs to allow us time to absorb this level of retrenchment.

This is undoubtedly dangerous territory. Those of us concerned with the provision of justice need to tread with care. The reorganisation of the justice system required by the cuts has to be negotiated in a way that cannot be abused by governments who just want savings. The justice system has just taken a cut of a quarter: now let us deal with the consequences in a sensible and rational way. We need to articulate an overall coherent policy based on seeing the cost of the justice system as an integrated whole in which we can juggle the number and cost of judges and courts with that of legal aid and information systems. We need to avoid government's sweeping up one part of the package and rejecting the counterbalance. As Robert Frost said: 'May no fate willfully misunderstand me, And half grant what I wish.'[23]

Conclusion

Cuts of the level that we are now experiencing mean that we have to reconceptualise public services. We may be poorer but we must be smarter. And we should remember the fundamental purpose of a society's legal system: in the words of Judge Learned Hand it is 'the tolerable accommodation of the conflicting interests of society'.[24] If we start excluding

the poor and disadvantaged from that accommodation in practice, society fragments. Let us end, as I began, with Lord McNally. No. It is not time to move on from LASPO. It is time to deal with its full implications. And that requires the kind of radical change foreseen by Lord Mackay.

---

[1] Lord Mackay, Speech, 4 October 1991

[2] Bruce Springsteen, 'My Hometown', from the album 'Born in the USA', 1984

[3] *Legal Aid Review, Map of Legal Aid Spend*, Legal Services Commission/Ministry of Justice, April 2010 pp29-31

[4] *A Survey of the UK Benefit System*, Institute of Fiscal Studies 2010, p3

[5] *Legal Aid Reform in England and Wales: cumulative legal aid reform proposals*, Ministry of Justice, November 2010, para 38

[6] Jack Straw *Daily Mail* 23 March 2010

[7] See footnote 3. Disclosed as the result of an FOI request and has not been published as such

[8] LSC/Ministry of Justice paper – see footnote 3

[9] *Effective Criminal Defence in Europe,* Cape, Namadze, Smith and Spronken, Intersentia 2010 p560

[10] *Strategies for the Future*, Bar Council Strategy Group,1990, p18

[11] *The Work of the Young Bar*, Joint Working Party of the Young Barristers Committee and Legal Services Committee of the Bar, 1993, p7

[12] As reported in the *Daily Telegraph*, 5 March 2012.

[13] *Cumulative Impact: Equalities Impact Assessment,* Ministry of Justice, 2011

[14] www.bbc.co.uk/news/uk-11741289, 15 November 2010

[15] *The London Advocate,* LCSSA, September 2012, p4

[16] Alan Houseman, Centre for Law and Social Policy http://www.clasp.org/issues?type=civil_legal_assistance

[17] *Guardian* 6 October 2011

[18] *Legal Aid – Targeting Need*, Lord Chancellor's Department HMSO, 1995, Para 1.1

[19] *Access to Justice: Volume II,* M Cappelletti and B Garth, Sitjhoff and Noordhof, 1978, p124

[20] R Macdonald 'Access to justice and law reform', *The Windsor Yearbook of Access to Justice: Tenth Anniversary Volume*, University of Windsor, 1990, p326

[21] *Griffin v. Illinois*, 351 U.S. 12 (1956)

[22] http://lawcommission.justice.gov.uk/news/1961.htm

[23] Robert Frost, 'Birches' from *The Poetry of Robert Frost*, Henry Holt & Co, 1969

[24] Quoted by Philip Hamburger in 'The Great Judge' *Life Magazine*, 4 November 1946