JUSTICE
59 Carter Lane
London
EC4V 5AQ
DX 323 Chancery Lane
(020) 7329 5100
(020) 7329 5055
admin@justice.org.uk
www.justice.org.uk

Rt Hon Kenneth Clarke QC MP
Lord Chancellor and Secretary of State for Justice,
102 Petty France
London
SW1H 9AJ

23rd July 2010

Dear Mr Clarke,

Legal aid: principles to underlie policy

We note that you are contemplating cuts to the budget for legal aid. We recognise that it is impossible to argue that legal aid should be exempt from the consideration currently being given to other areas of government spending – without ourselves conceding that such cuts are necessary or desirable.

This letter concerns the principles by which policy should be guided. We fear that, without a solid base in principle, cuts may be made on a contingent basis that devastate the coherence of the justice system. We make a plea that decisions are made only on the basis of a clearly articulated policy that makes sense both in terms of the government's overall spending plans but also in terms of justice policy. If cuts to legal aid are to be made, then we consider that the following principles provide the framework in which they should be considered.

First, the provisions of the European Convention on Human Rights (ECHR) describe the minimum parameters of legal aid's scope. Articles 5 and 6 ECHR, in particular, effectively require publicly funded legal assistance in certain criminal cases and a limited range of civil cases. Specifically, in relation to the duty solicitor police station scheme, the provisions of the

Convention have been interpreted by the European Court of Human Rights (EctHR). You will be aware that the case of *Salduz v Turkey* puts an onus on states to provide legal advice and assistance at any police interview where suspects may make a statement which is determinative of their case. In our view, this substantially supports the case for a police station duty solicitor scheme under which a suspect is entitled to the physical presence of a lawyer during police questioning. JUSTICE intervened in the case of *Cadder v HM Advocate* in which it looks likely that the Supreme Court will underline the importance of this requirement in relation to Scotland. Furthermore, the jurisprudence of the ECtHR has incorporated the crucial concept of equality of arms between parties. That must be enshrined as a bedrock principle of the justice system.

Second, the government must accept that rich and poor alike are entitled, in the words engraved on the US Supreme Court and apparently derived from an oration of Pericles, to 'equal justice under the law'. This does not necessarily require legal aid for all but, if legal aid is to be more severely rationed than currently, adherence to this principle demands serious thought to compensating arrangements for forum, procedure and substantive law. Legal aid expenditure was cut in the late 1970s when legal aid was removed from divorce proceedings at the same time as divorce law and proceedings were reformed. This was unpopular with lawyers but, in the event, clients benefitted from divorce legislation that sought largely to remove the concept of fault. So, there is precedent for the satisfactory making of savings through the reform of substantive law and procedural provisions.

Acceptance of this principle puts the government under an obligation to mitigate the effect of legal aid cuts so that the poor do not simply receive second class justice. This will happen if disproportionate advantage is given to the party with the greatest financial resources in any dispute. Thus, any withdrawal of legal aid in family cases would have to be accompanied by measures which prevent the likely immediate practical consequence ie a weakening of the position of women. Similarly, reduction of assistance in criminal cases might have to be counterbalanced by other measures to protect the position of the defendant eg repeal of provisions that allow inferences from silence.

Furthermore, if, as seems likely, we are to see more unrepresented defendants in both civil and criminal cases, then compensating arrangements will be required in terms of the perceived role of judges; the timetabling of cases to allow them to take longer; and the provision of alternative sources of assistance through bodies like Citizens Advice or court-based 'self-help centers' of the kind which have been provided in the Californian courts.

Third, legal aid has developed over 40 years to address the particular civil problems of the poor. The result is that around £150m is spent on 'poverty' law: housing, debt, mental health and so on. It is entirely possible that resources could be saved on simplifying the labyrinthine complexities of setting up Community Legal Advice Networks and Community Legal Advice Centres. We hope that the government would hold to the principle that the state needs to help the poor with the legal problems that are particularly theirs.

Fourth, Conservative party policy before election emphasised the need to look for new forms of funding of legal aid. It is important this is not forgotten. For example, it may well be that certain forms of serious financial fraud also involve regulatory infractions. In such cases, it might well be that defence and prosecution costs could be met out of regulatory fees payable to the appropriate regulatory body.

Finally, a valuable function of civil legal aid is its funding of cases which hold public bodies to account through such litigation as judicial review. This highlights a particular – and wider – problem in terms of the grant or refusal of funding. It is entirely appropriate for government to set terms on scope and eligibility. However, it would not be right in principle or practice for the government to be responsible for the exercise of any discretion in whether legal aid be granted or refused in any particular case where the government was itself a party – as occurs in any criminal case or any judicial review application. Accordingly, if the government is to proceed with the demise of the Legal Services Commission, as was the intention of the Labour government, then arrangements are required for decision-making on the grant or refusal of legal aid in individual cases to be taken by a person or institution which is independent of government itself. Otherwise, there is an obvious conflict of interest.

We look forward to hearing the results of your review of policy in due course. If it would in any way assist, we would welcome the opportunity to see you to discuss both these issues and others of concern to your department.

Yours sincerely

Roger Smith OBE
Director