

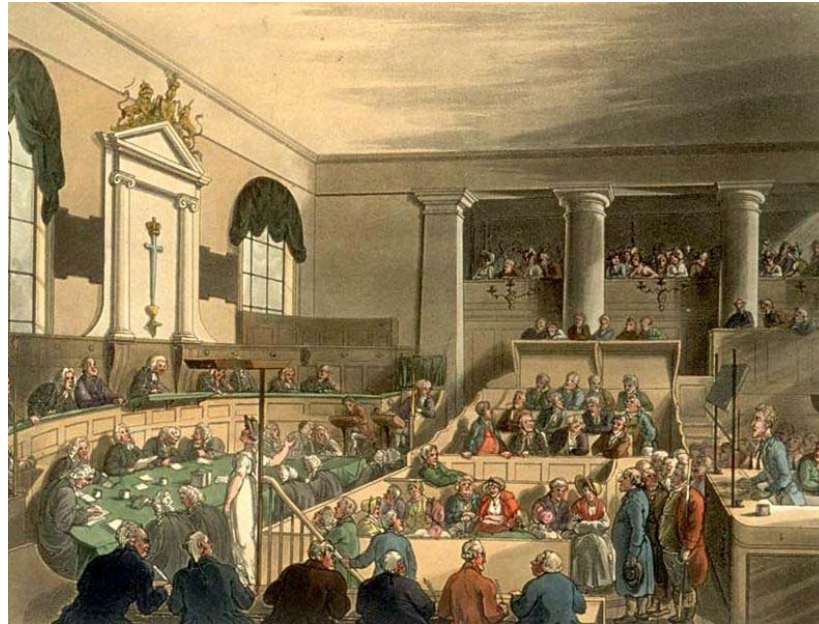
# Access to justice and legal aid in criminal cases

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# The right to legal aid in criminal cases

- No defence lawyers until 1836 - then only if defendants could pay
- Poor Prisoners Defence Act 1903 – had to disclose defence at committal
- 1930 amendment – Removed disclosure requirement + introduced “interests of justice” test, extended to magistrates’ courts



Reliance upon good will of lawyers

- Legal Aid and Advice Act 1949 – extension to pre-court advice
- Further acts over 1950s and 60s expanded scope of right, in conjunction with expansion of right to legal assistance
- Recognised people should not be denied access to justice by means



# International Standards

- Article 6(3)(c) European Convention on Human Rights:

*Everyone charged with a criminal offence has the following minimum rights:*

*... To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*

- Rights must be practical and effective, not theoretical and illusory (*Airey v Ireland* (1979))
- Where deprivation of liberty is at stake, the interests of justice call for legal representation (*Benham v UK* (1996))
- Regulation of legal aid lawyers must be stringent as quality and effectiveness must not become substandard (*Pavlenko v Russia* (2010))



# International Standards

- UN Principles on the Role of Lawyers (1990)
- UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)
- UN Handbook on early access to legal aid in criminal justice processes (2014)

*legal advice, assistance and representation for victims and for arrested, prosecuted and detained persons in the criminal justice process, provided free of charge for those without means*



# The value of legal aid

*The legal aid system is one of the proudest legacies of the progressive post-war Labour governments. [Lord Falconer, Lord Chancellor, 2005](#)*

*Ensuring that those accused of a crime have the right to a defence is a vital part of our justice system. I am determined to uphold that principle and to protect access to justice. Legal aid guarantees a defence for those who cannot afford it, and that will always remain the case. [Chris Grayling, Lord Chancellor, 2014](#)*

*Equally, I believe it is right that in upholding that principle, we ensure that the interests of taxpayers are properly protected by a Government that delivers the savings necessary to reduce the deficit and that seeks a more efficient criminal justice system, including legal aid.*



# Changes to legal aid provision

## Solicitors

- 8.75% cut from 20<sup>th</sup> March across all areas of work (police station, magistrates court advice and representation, Crown court litigation)
- 30% cut to Very High Cost Cases from December
- New contracts open to 500 entities (currently 1600 providers) at a further 8.75% cut on current rates for both duty and own client work

## Barristers and Solicitor Advocates

- 30% cut to Very High Cost Cases from December
- Average 6% cut to Crown court advocacy – tapering fees per day after 3 days until day 51

Lone junior fees in *Next Steps, Annex 3*:

Case type	standard fee	Day 3-40	Day 41-50	Day 51+
homicide	2,770	419	210	225





# Changes to legal aid provision

## Positive outcomes:

- Retention of right to choose
- Abandonment of price competitive tendering
- Slight increase in advocate fees for guilty pleas and cracked trials

However, profit margins already cut so narrow from previous cuts that many say they will not be able to survive.

## First protests in the history of the legal profession

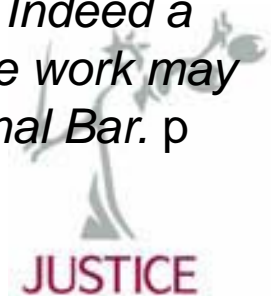


# Government view

*Whilst legal aid provides a source of guaranteed work for advocates, and there will be a small proportion of cases that require very experienced advocates, a lot of the work is more straightforward and able to be handled effectively and competently by relatively junior advocates. As long as that legal aid work continues to be performed to the required standard, some suppliers leaving the market is not necessarily a concern. p45, Next Steps*

*It is not the role of Government to ensure that legal aid provides a particular level of earnings for an increasing number of advocates but to ensure the sustainable provision of effective representation. p45, Next Steps*

*We would not accept that this means talented people capable of delivering quality advocacy would no longer be attracted to the criminal Bar. Indeed a market where advocates have the opportunity of undertaking more work may increase the likelihood of drawing talented individuals to the criminal Bar. p 46, Next Steps*





# What would you want from a lawyer?



Imagine you attend a protest in objection to rising tuition fees. The protest involves thousands of people, some of whom become agitated and start to shout at the police. The activity escalates and missiles are thrown into the police lines and criminal damage is caused to surrounding buildings, leading to kettling and arrests.

The crowd pushes you towards the 'trouble makers' and you are arrested along with a number of others on suspicion of affray and criminal damage. You are taken to the local police station where your detention is authorised for the police to continue their enquiries. You are asked if you want legal advice.

Do you want legal advice?

What would you hope to receive from your lawyer?



# Group Discussion

1. How important is the right to choose a lawyer in practice?
2. Are there too many lawyers?
3. Does money ensure quality?
4. Are bigger firms better?



# Final thoughts

- Lawyers provide a public service but they are not public servants
- An effective defence requires quality, not adequate, legal representation to ensure that a person receives a fair trial
- The lower the money paid to lawyers, the less 'goodwill' they will employ in a job they do because they believe in access to justice

*The message you have chosen to send to the MOJ has rung out loud and clear. In the absence of their goodwill, you are only prepared to do your own work. In this past week at least 200 cases have been returned, only 3 have been picked up. As professionals, we take no pleasure in causing disruption to the courts or in leaving defendants unrepresented. But our goodwill has been taken far too much for granted. Nigel Lithman QC, 17 March 2014*





## **JUSTICE Student Human Rights Network Conference 2014**

**22 March 2014**

### **Workshop 2: Access to justice and legal aid in criminal cases<sup>1</sup>**

The Ministry of Justice (MoJ) published a consultation paper "*Transforming legal aid: delivering a more credible and efficient system*" on 9<sup>th</sup> April 2013 to announce further cuts to legal aid in both criminal and civil cases.

A further consultation entitled "*Transforming legal aid: next steps*" was published in September, with amended proposals regarding criminal legal aid following some 16,000 responses to the first consultation. On 27<sup>th</sup> February 2014 the Ministry of Justice (MoJ) published its response to the *Next Steps*. This response, while making some concessions to objections voiced by the legal profession, confirmed the MoJ's intention to significantly reduce the fees paid to lawyers by way of public funding and implement a tendering process for duty solicitor contracts.

The UK's international legal obligations require that effective and equal access to justice is assured in the criminal justice system, to ensure individual rights are protected without unjustifiable exclusion on the basis of means, status or other characteristics. JUSTICE is ultimately concerned that the legal aid reforms entirely neglect the significance of legal aid as a safeguard for ensuring an effective defence and therefore a fair trial.

### **Forthcoming Changes**

#### **Fees**

Statutory Instrument No. 415 of 2014 amends the criminal legal aid regulations to reduce solicitors' fees by 8.75% on current work from 20<sup>th</sup> March 2014. A further 8.75% will be cut on new contracts that are sought from June 2015. Barristers' fees will be reduced by an average of 6% in Crown Court cases; this is in addition to a 30% reduction in Very High Cost Cases (discussed below) and prior cuts since 1997.

JUSTICE is concerned that no profession can absorb cuts at the level proposed without undermining the service its members provide. It is inevitable that these cuts, in addition to cuts implemented in previous years, will lead to representation of a lesser quality for those who need legal aid than for those who are able to pay privately. Both solicitors and barristers undertaking criminal work have warned that they will not be able to continue their current

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<sup>1</sup> Our thanks to Sam Coe, JUSTICE winter internship programme 2014 intern, for assistance in researching and preparing this hand-out.

practices on the proposed rates. The reduction in fees therefore risks hundreds of high street firms specialising in criminal defence work to close, which could create “advice deserts” in towns and cities where defendants will be unable to secure adequate legal representation. Firms that continue to accept legal aid work are likely to have to replace more experienced, and therefore more expensive, solicitors with unqualified or junior associate solicitors who are far cheaper, but with less experience.

### **Very High Cost Cases**

In December, the MoJ implemented a 30% reduction in fees for barristers acting in cases deemed “very high cost”, generally involving economic and financial crimes with lengthy and complex trials. Virtually all barristers have refused to accept at the reduced rates, arguing that their contracts cannot be unilaterally amended.

As a consequence, a number of serious fraud cases are already facing derailment due to an absence of counsel. This includes a £200m conspiracy trial at Southwark Crown Court and a £100m film financing case in Birmingham. At the beginning of March, Dominic Grieve, the Attorney General, agreed to provide an *amicus curiae* (a friend of the court) to attend a pre-trial hearing listed to determine whether an unrepresented defendant could, as a matter of law, receive a fair trial. The case concerns a conspiracy to defraud allegation with eight defendants, none of whom have found a barrister to represent them. In a further case involving insider-trading, the court heard that one defendant has tried unsuccessfully to instruct more than 300 barristers to act for him. The government funded Public Defender Service, due to a lack of resources, has also been unable to provide advocates for these cases. The Legal Aid Agency has attempted to downgrade some cases from ‘very high cost’ to the standard ‘graduated’ fee but remains unsuccessful in securing counsel for work that is clearly complex and deserving of the higher payment.

These cases demonstrate an immediate consequence of the reduction in fees. If barristers continue to refuse work at a reduced rate, an increasing number of cases will face the same difficulties. JUSTICE is concerned for the effect this will have on equality of arms and fair trial for defendants who face serious charges and may ultimately have to represent themselves in lengthy and complex proceedings.

### **Duty solicitor contracts**

In the original consultation paper, the MoJ proposed to invite for tender all criminal legal aid work except advocacy in the Crown Court. This would have required providers to bid for contracts for legal aid work, with the lowest bidder being awarded the contract. In “*Next Steps*,” price was fortunately dropped as a tendering requirement, in recognition of the uncertainty of legal advice as a market commodity.

Nevertheless, the MoJ confirmed in February that the number of duty solicitor contracts will be cut from around 1,600 to just 525 (210 in London), spread across 97 procurement areas. The tendering process for new contracts is expected to start in April 2014 and will require firms to demonstrate both the ability to provide a larger case supply, and a reduced cost with 17.5% less funding per case than is currently available. It has been estimated that half of the criminal legal aid firms in the UK will close, with those remaining, competing to provide more for less.

JUSTICE is concerned that this change will result in the disappearance of high street criminal law firms, which will severely reduce access to justice for those without independent means. There is a real risk that this will leave defendants either unrepresented or represented by a large firm, focused on cost and speed rather than quality advice.

## **Guilty pleas**

JUSTICE is concerned that the increase in fees for mentions and cracked trials, and tapering fees combined with an overall reduction of fees for barristers may provide lawyers with a financial incentive to encourage clients to plead guilty and a disincentive to test the Crown's case at trial.

Whilst we are confident that lawyers would not advise clients to plead guilty against their best interests, we question how the justice system can remain to be seen as credible and fair when there is a perverse focus on cost rather than the presumption of innocence.

## **Right to choose a solicitor**

The original consultation paper removed the right of a client to choose their own solicitor; instead they would be allocated one upon first request for legal assistance through legal aid, and would have to retain them for the duration of the case. JUSTICE criticised this proposal, emphasising that choice is the ultimate arbiter of quality and independence in legal services. Following similar concerns across the profession, this proposal was dropped in September.

JUSTICE welcomes the retention of client choice in legal services but expresses concern that proposals such as this highlight the danger of the Government's utilitarian approach to legal aid and scepticism towards the value of legal advice and representation. The preservation of the right to choose a solicitor is severely undermined by the reality that, as a result of the remaining proposals, quality advice may not be available to those who are choosing.

The UK prides itself on providing one of the best systems of legal representation in the world, irrespective of whether a person has means. JUSTICE has grave concerns that these cuts will create a two-tier system of representation, where quality lawyers become a luxury, not a right. In that future world there is an increased risk that miscarriages of justice will take place, and the guilty will go free.

## ***Issues for Group Discussion***

### **1) How important is the right to choose a lawyer in practice?**

- Is it more important at some stages than others?
- What might the impact be upon a fair trial if someone is unable to choose?

### **2) Are there too many lawyers?**

The MoJ's response to *Next Steps* asserts that we can afford to reduce the number of lawyers undertaking criminal work, particularly at the Bar.<sup>2</sup>

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<sup>2</sup> It indicates that there was a 4% increase in barristers between 2007 and 2011. There are now 15,550 approx. barristers in practice, of which 4,931 received public funding in criminal cases in 2012/13. Of these, the amount of cases undertaken and fees claimed varied significantly. For example, 921 barristers only took an average of three legal aid cases each, at below £10,000 in claims.

- Do barristers provide a necessary function in criminal cases or should we fuse the profession?
- What impact on choice and quality might a reduced profession have?

**3) Does money ensure quality?**

- How much might it cost to ensure that one lawyer is better than another?
- Are other factors important in ensuring quality?

**4) Are bigger firms better?**

- Can lessons be learned from large commercial law firms for the provision of criminal legal aid?
- Does the type of work and location of criminal advice and assistance prevent helpful comparisons being drawn?