

Making Civil Legal Aid Work

31 October 2008

This paper is a private position paper, drafted specifically for the Parliamentary Under Secretary of State, Lord Bach. It is a joint paper, prepared by the LGA Labour Group, Unite and the Socialist Societies, with input and support from other comrades from the Labour Party and the legal community.

The paper is split into three sections:

1. A Political Statement
2. An overview of the current situation; and
3. Areas for further consideration.

1. Political Statement

1.1. Earlier this year, a number of amendments relating to the reforms of the Legal Services Commission were tabled and attached to the Labour Party's *Crime, Justice, Citizenship and Equalities* Policy Commission document. These amendments were debated at the National Policy Forum (NPF) meeting at Warwick University between 25 and 27 July. Consensus was achieved on most of these issues.

1.2. The LGA Labour Group submitted an amendment (#3971) calling for an independent review of the civil legal aid system:

'There have been significant changes in the civil legal aid system and there is concern that access to justice is thereby becoming more difficult. We will commission an independent review of the civil legal aid system, one of the great legacies of the Attlee Government.'

No consensus could be achieved over this amendment, and Sir Jeremy Beecham, Leader of the LGA Labour Group, moved it to a vote at the full plenary session of the NPF on Sunday 27 July. The amendment received 41 votes and, as such, was moved as a minority position to be debated at annual conference.

1.3. At Manchester, the trade unions – led by Unite – indicated their support for the LGA Labour Group position, and there is little doubt that the amendment would have been passed if put to a vote. However, in a series of discussions with ministers and colleagues from the NPF, a compromise was reached by which ministers agreed to take another look at the way the current changes are panning out, in concert with a group of representatives able to review the position independently of the Legal Services Commission. Relying on this undertaking, and in the interest of maintaining unity at a very difficult period for both the Party and the Government, the amendment was withdrawn.

1.4. Only a month has passed since Manchester, but the onset of possible recession, on the back of the ongoing credit crunch, has increased the urgency with which this issue needs to be resolved. As families up and down the country begin to face up to the prospect of economic adversity, the need for good quality, independent advice and casework will increase, in many areas exponentially. Furthermore, people will start turning to local advice agencies and legal aid solicitors in order to help cope with unexpected changes in their personal circumstances. We know already, for example, that the CABs have seen a 35% increase in demand on some of their services.

1.5. However, unless the ongoing problem of adequate funding and provision is solved, many people will find that the advice and expertise they need will not be available to them. Urgent action (in the form of reviewing current funding mechanisms and looking at different, sustainable, funding streams) must be taken to save law centres, CAB specialist services and other, community-based, providers – many of which are being forced to reduce services and/or face insolvency. Many are surviving by recourse to redundancies and to fairly dramatic reductions in staff terms and conditions.

1.6. We also need to find a way of stemming the flow of high quality legal firms away from legal aid work.

1.7. The Government has taken strong and decisive action to help shield people in the UK from the effects of economic down-turn, and we applaud that. **However, the change in economic circumstances over the past month or so means that the Government must take an urgent look at the commitment given to us at Party conference.** Civil legal aid is an essential element of a successful strategy to reduce poverty and to ensure that all sections of society receive quality services that meet their needs and give them access to a range of opportunities. The need for those that depend on this service is no less vital than for those who rely on public services such as health. Indeed, effective legal aid and advice should help save expenditure on welfare, housing and social care by staving off family breakdown, social exclusion or homelessness before it occurs.

1.8. We believe that any comprehensive package of financial aid and advice can only have real purchase if it takes into account the help and support needed by the growing numbers of people who are likely to find themselves faced with some unenviable decisions as the current economic winds grow colder.

National Policy Forum Members

Sir Jeremy Beecham, NEC and Leader of the LGA Labour Group

Cllr Ann Lucas, NEC and LGA Labour Group

Cllr Sharon Taylor, LGA Labour Group

Cllr John Gyford, LGA Labour Group

Cllr Mehboob Khan, LGA Labour Group

Dame Sally Powell, LGA Labour Group

Cath Speight, Chair of the NEC and UNITE

Jack Dromey, NEC, Treasurer of the Labour Party and UNITE

Diana Holland, NEC and UNITE

Jacky Peacock, Socialist Societies (Labour Housing Group)

Dianne Hayter, NEC and Socialist Societies (National Union of Labour & Socialist Clubs)

Martin Rathfelder, Socialist Societies (Socialist Health Association)

Simon Wright, Socialist Societies (LGBT Labour)

Other Party members and affiliates

Rachael Maskell, UNITE

Alan Scott, UNITE

Ruth Hayes, Islington CLP and Unite branch secretary (representing CAB, Law Centres and others)

Stephen Hockman QC, Peterborough CLP

Robert Latham, Holborn & St Pancras CLP and executive member of the Housing Law Practitioners Association

Nathan Yeowell, Head of Office, LGA Labour Group (NPF member 2007/08)

2. Overview

2.1. Whilst there is no denial that the overall spend on Legal Aid has seen an unprecedented increase under the Labour Government, Civil Legal Aid has seen a reduction in real terms. **Civil legal aid is an essential element of a successful strategy to reduce poverty and to ensure that all sections of society receive quality services that meet their needs and give them access to a range of opportunities. The need for those that depend on this service is no less vital than for those who rely on public services such as health.**

2.2. Since the last reforms of the legal aid system through the Legal Services Commission, we have been saddled with an unworkable contracting system, which has had a damaging impact on service providers and, ultimately, the end user. It is for this reason that the LGA Labour Group, Unite and the Socialist Societies - along with employers and other recipients of Legal Services Commission funding – have been calling for an urgent and independent review of the current funding arrangements.

2.3. We believe that it is necessary to:

- Change the way in which services are both designed and commissioned;
- Change the way in which resources are distributed; and
- Take urgent action to save existing law centres and community-based advice providers, many of which are facing the threat of closure, and a number of which have already been forced to shut up shop, and others have had to withdraw from Legal Services Commission contracts because they cannot make them viable. What is more, other providers are facing severe cash-flow problems as a result of the new contracting arrangements.

More than two thirds of all social welfare law legal aid is delivered via the not for profit sector and the current situation has reached crisis point. Many solicitors are withdrawing from legal aid provision, thereby further restricting choice in an area where it is essential.

2.4 Finally, immediate measures need to be taken to make sufficient provision for services where charity trustees are forced to cut terms and conditions of employment simply to maintain a service under the new terms of the new contract.

Areas at risk

2.5. We want to draw the Government's attention to the areas where urgent interventions are required now, in an attempt to save services which are in demand, and yet are being forced to close due to the way that funding is currently being distributed.

2.6. The Government must provide a solution to prevent further closures of centres providing civil legal aid. We know that four Law Centres have already closed this year and that two more are unlikely to make it to Christmas. A total of ten Law Centres currently providing services may not be in a position to do so by the end of the 2008/09 financial year, unless a rescue package is put in place. There is further, much larger group, facing real difficulties. This is as a result of the unrealistic fixed fee levels and cash flow implications of the way the Legal Services Commission has distributed its resources, which withholds payment to not for profit providers until after completion of a case, which in some cases can be up to a year-or-so later.

'We face a stark choice – dumb down the work we do for clients or face bankruptcy', (Brent Community Law Centre).

2.7. Clearly, closure of these services will cause huge hardship, primarily in low income households. Not only will the provision of legal aid be lost, but all the other volunteer time and additional funding streams will disappear. In many parts of the country, not for profit agencies are the only providers of advice and legal help for people in work (and who are just outside the means test for legal aid). The absence of such support at this crucial time is likely to undermine the economic wherewithal of certain sections of the community and lead to people losing their homes and jobs unnecessarily. **This loss of an infrastructure for advice in a local community will make it extremely hard for local authorities and Local Strategic Partnerships (LSPs) to meet their targets, especially around child poverty and worklessness.**

The important work of Law Centres has been recognised at the highest levels of the legal system. In the recent case of *R (Faarah) v Southwark*, the approved judgment singled out the good work of the Southwark Law Centre:

'[A]ll the members of this court would wish to express their appreciation of the skilful professional service which Ms Faarah has had from the Southwark Law Centre. As the history set out by Lord Justice Toulson shows, the law centre, by careful and well-informed correspondence, was able to locate and challenge the precise error of public administration which this appeal has confirmed. It is of importance to the administration of justice, as well as to many individuals, that there should continue to be law centres like Southwark's which are able to offer professional help of high calibre to the neediest people.' (Case No: C1/2008/0774, 11/07/2008)

2.8. Once an agency has closed, it is very difficult to re-establish provision – there is a loss of confidence in the local community that a service is viable, making it hard to recruit new trustees and volunteers, and the financial costs of establishing a new office base, IT and equipment, recruitment, etc. are prohibitive. Equally, professional skills and years of experience in helping vulnerable and low income clients will be lost as posts are made redundant.

2.9. In the area of immigration advice, the rules stipulated by the Legal Services Commission has made it mandatory for advisers to undergo comprehensive training, often in areas which do not relate directly to the work of the advisers. The cost of this training for practitioners or not for profit organisations has been expensive. Ideally, we think that modular training should be made available, so that it is focused on the requirements of the work to ensure competencies to the correct level. The funding of this training also needs to be reviewed, with providers receiving adequate recompense to meet the additional costs.

2.10. Perhaps most importantly, service users (many of whom are already struggling to make ends meet) will be denied access to advice and to the civil justice system, with a high price to be paid in both human misery and preventable economic inactivity. It is well documented that £1 spent on civil legal aid will amount to a £15 saving in statutory services elsewhere in the budget. With inequality in our society under increasingly close scrutiny, this is not something that Labour wants to be associated with, since it chides with our core values.

2.11. Many organisations have been forced to restructure, and the economics of the fixed fee system is driving down skills in the sector. This will have a long-term detrimental impact on what can be achieved for service users, the quality of the service and the number of people available to give the support and the terms and conditions of employment. *(Please see the attached UNITE briefing for further information).*

The case for an independent review of civil legal aid

2.12. As referred to above, a review into the way that Civil Legal Aid is funded and provided could not be timelier.

2.13. The impact of the credit crunch over the last 12 months and, more dramatically, the financial shocks of the past month or so, have caused many new potential clients to seek the support of legal aid funded services. The number of unemployed is on the rise, with all the consequences attendant to it. We believe that the demand for aid and advice services will continue to grow as any recession deepens.

On 28 October, the Financial Services Authority announced that the number of house repossessions in the second quarter of 2008 was 11,054, up 71% compared with the second quarter of 2007. The Council of Mortgage Lenders has also estimated that 45,000 homes in the UK will be repossessed in 2008, up from 27,100 last year.

On 15 October, National Statistics announced that the unemployment rate was 5.7% for the three months to August 2008, up 0.5% over the previous quarter and up 0.4% over the year. The number of unemployed people increased by 164,000 over the quarter and by 146,000 over the year, to reach 1.79 million. The last time there were larger quarterly increases in the unemployment rate and level was in the early 1990s. The claimant count was 939,900 in September 2008, up 31,800 over the previous month and up 104,900 over the year. The redundancy level for the three months to August 2008 was 147,000, up 28,000 both over the quarter and over the year.

2.14. Under these circumstances, we believe that **the resource allocation for legal aid has to be reviewed, together with the criteria to identify eligibility to ensure that service is in step with service demands.** As the Government is making provision in a range of areas to mitigate the worst possible consequences of this economic downturn, it is essential that the size of the budget allocated to Civil Legal Aid is increased, in order to prevent further fall out. Compared to other areas, the increase necessary would be relatively low, yet with a far reaching impact.

2.15. Many organisations also depend on Trust income, which has been hit very hard by the economic downturn. Trusts' grant making is dependent upon the returns on their investments. Others benefit from donations from City firms, as well as their volunteer time, and they are also predicted to be affected. Other cash donations may not be sustainable and the loss of Lottery funds to the broader sector has also had an impact.

2.16. Regardless of the type of legal support, it is essential that help through the legal aid system reaches those who depend on it to access the justice system, whether formally or informally, and that those who provide these essential services are not penalised in the process. We need to ensure that the system protects and empowers the most vulnerable members of our society. Particular concern has been expressed by agencies supplying advice in the areas of housing, employment, benefits and immigration where cases can be of a less routine nature and more complex. Fixed rate funding does not match the demands placed on these areas of advice work. Additionally, those services located in London and some other areas are at a disadvantage as the cost of living and the cost of premises are not taken into account by Legal Services Commission contracts.

2.17. With a Government committed to the provisions of individualised services, it is essential that a range of providers is available, from across the sectors. The creation of CLACs (Community Legal Aid Centres) has removed choice, with the preferred bidder, or consortia of organisations, winning a contract to provide the services under that contract. With the removal of viable alternatives, both the quality of services and the terms and conditions of those who deliver them is driven down. We have already seen this where CLACs have been introduced, (e.g. in Hull) and know this practice all too well in other areas of the third sector, which is frequently exposed to such competitive procurement processes. The same is true of CLANs (Community Legal Advice Networks). The reality is that large providers are not always the best, and yet the system of CLACs and CLANs provides the larger organisations the greatest opportunities for winning the contracts.

2.18. In its recent report *It's the System, Stupid! Radically Rethinking Advice*, Advice UK indicated that local authorities put around four times as much funding into advice as the Legal Services Commission. Further resources are invested by Primary Care Trusts, Strategic Partnerships and similar agencies (e.g. ALMOs). If agencies lose their Legal Services Commission funding, the impact on their staffing structure and overheads is very likely to mean that they are unable to deliver other local advice services. The levels of leverage are very high, and there is a huge risk that the current commissioning process will lead to a massive loss of overall access to advice, casework and legal representation. **The independent review must take account of the range of need in a local community and the long term investment by a number of funders.**

2.19. Legal aid cases are rarely routine and predictable. A fixed fee regime is designed for work that can easily be measured in fixed units of time and input, and whilst this may be true in a limited area of advice work, much of the work undertaken by legal aid providers would be better served by a funding system that actually reflected the level and volume of work done. Resources cannot be focused on where they will have the most impact under the current arrangements, and since many not for profit agencies have traditionally provided support for the most vulnerable clients and with the most critical cases, again those that require the more complex advice are greatly disadvantaged. Even the ability to draw down additional resource for some of these cases is woefully inadequate.

2.20. Currently organisations are reporting that they now have to prioritise short term advice work rather than complex cases in order to survive under the fixed fee regime. This does not match well with the needs of clients, and does not enable services to help clients with the problems that matter to them most. It is not the best use of public funds.

2.21. There is a financial incentive (in fact, an imperative) to take on short 'quick win' pieces of advice, and a huge financial penalty in taking on an issue such as homelessness. This is because current funding does not cover the cost and time that such cases demand. We know that the vast majority of our members, due to their dedication to their clients, are working hundreds of hours of unpaid overtime to match service requirements, as the Legal Service Commission funding is so unrealistic. **There is little doubt that complex cases are not compensated by cases requiring quick advice. This is unsustainable.**

'The Commission's target is to increase 'acts of assistance' within the same cost to the Treasury. This is misconceived, since what really counts is whether a difference is made to someone's life – 10 people receiving a bit of advice and a letter is not necessarily better than two people being housed, and two people keeping their jobs. There is a loss of quality and a loss of capacity to take on the most vulnerable clients. There is no limit to how long we can spend on a case, but there's a limit to what we will be paid for it [apart from Exceptional Claims which apply to only a handful of cases]. Our housing team is being expected to deliver almost 4 times as many cases to generate the same income as under the old contract... This means we can do less homelessness work, in which we had a very good track record. We are turning away around 50 homelessness-related cases a month as we cannot afford to take them on and have any chance of meeting our target', (Islington Community Law Centre).

2.23. As the LGA Labour Group's original NPF amendment sets out, we are proud that it was a Labour Government that introduced legal aid and are equally proud that it remains one of the great legacies of the Atlee Government. Access to social justice is a core value of the Labour Party today and therefore we need to be able to demonstrate this to those who so readily depend on its policies to receive fairness and justice, such as those on the margins and those being subjected to the abuses of others. Law centres and other providers have not just acted as a service provider but have provided a much more holistic service to clients.

2.24. Whilst CLACs and CLANs were initially believed to provide a focus for accessing legal aid, they have done so at a huge cost to expertise already in existence - the Hull CAB, for example, which recently lost its contract. This system was not devised on an evidence base, or in partnership with the sector. It has not been introduced as a pilot study and is failing the Civil Legal Advice sector. Urgent review is necessary and we are also asking that no further contracts are granted under the CLACs and CLANs scheme until this independent review is completed.

2.25. The not for profit sector and other known practitioners have developed expertise in this work over decades. With ever changing and complex systems of welfare support, coupled with a challenging legal environment, people depend on the evolved skill base of those organisations which are at the heart of current provision. This is not something that can easily be learnt and therefore the contracts being won by the private sector under Legal Services Commission funding regimes are being granted on low cost rather than quality. This is against everyone's interests. It is using the most vulnerable as a marketable commodity, something that goes against the grain of the very ethos of the Labour Party. It is the added value and community links and expertise that the not for profit sector brought to the legal aid work that is being eroded.

'There is still general concern that the Legal Services Commission does not understand the nature of the third sector and the added value that is provided by organisations such as citizens advice bureaux... They not only deal with the legal issues, but look more widely at the problems that led somebody to get into legal difficulties. They also address the need for counselling and financial advice. Frankly, the tendering of services within Government sometimes misses the point in relation to that added value,' (The Rt Hon Alun Michael MP, House of Commons, 28 October 2008).

2.26. Finally, any review should also examine the work of the Legal Services Commission as an organisation and service provider to ensure that it is operating with the same degree of efficiency that is expected of front line agencies.

3. Areas for further consideration

3.1. It is important that any review has sufficient scope to address the needs of vulnerable clients, local communities and the not for profit sector; to ensure that Civil Legal Aid is funded in a way that maximises outcomes for users; and to ensure an holistic approach to multi-agency partnership working.

3.2. The review itself should work with key bodies including Unite, the LGA, the Law Centres Federation, Advice UK, Citizen Advice, the Advice Services Alliance, the Law Society and LAPG. **We need to ensure that the views and concerns of those working in the sector – not to mention those that benefit from the service – are actively sought.**

3.3. Following are some suggestions of areas that we think the review should include.

- What impact have the recent changes in funding had on not for profit and other legal aid practitioners? We need a financial framework that allows the former to survive and provides enough of an incentive for quality legal aid providers to remain within the system;
- How can we make performance and assessment frameworks more reflective of the dynamic nature of the not for profit sector? The Office of the Third Sector has promoted ‘intelligent commissioning’ – *i.e.* focusing on the service that needs to be delivered rather than a market focused approach which drives down quality, terms and conditions of employment, on the basis of cost and causes problems to arise elsewhere in the welfare system. At the very least, processes for procuring services need to be faster, less bureaucratic and less complex;
- How can we ensure that choice is available to service users in line with the Government’s promotion of choice throughout public services?
- How do we safeguard quality of employment?
- Similarly, how do we safeguard quality of delivery? The Legal Services Commission has abandoned its ‘Preferred Supplier’ scheme, and has not published a schedule for peer reviews, which are the best indicator of quality. Good quality work is cheapest in the long term as it delivers sustainable solutions, and clients deserve the best possible services from public funds, as does the tax payer;
- How can we work towards a system of payment in advance? **We believe that this is essential;**
- **Services should be priced according to the actual cost of delivering them.** The Legal Services Commission’s telephone advice service, for example, is funded on the basis of hours worked, and we would hope that any review ensured this principle, and that of full cost recovery, is applied universally. Current funding mechanisms do not necessarily reflect the impact of the service or the quality of the work;
- More widely, we think that any review should look again at the issue of telephone advice. It is more effective for a number of clients to be given telephone-based support locally rather than through a national call centre, and would ultimately save time and resources. The Legal Services Commission has had a 50% increase in calls since Level One work was removed from the scope of contracts, replacing the acts of assistance delivered and funded as part of local provision. We understand that there are issues around the quality of some of the work commissioned under the telephone advice contract;

- We need to encourage funding for partnership working at a local level and also develop good practice including housing benefits services, housing aid centres and children's centres. We also need to see what wider, strategic, role can be played by local authorities: do we need to push harder for access to advice to be included in the next iteration of performance indicators and/or Local/Multi Area Agreements? To what extent can local public services provide a one-stop-shop for match-funding through the LSP framework?
- It is essential to ensure that terms and conditions of employment in the sector are not allowed to spiral down to match poor funding arrangements, since this will mean that the sector will lose quality employees and this will in turn impact on service delivery. It is also important that when services are being transferred that TUPE is applied. Many Legal Services Commission contracts have been transferred with organisations avoiding the use of TUPE;
- How can we encourage greater cross-subsidisation? One possibility would be to raise money from successful litigation funded by legal aid where damages are recovered, which could then be used to cross-subsidise non-pecuniary cases. Cases could be conducted on a contingency basis, with a proportion of damages recovered going into the Legal Aid Fund, or on a conditional fee basis, with the all or part of the success fee going into the Fund. In either case, we think that legal aid should be restored for personal injury claims – at the very least, we would like to unpick the Secretary of State for Justice's desire to address 'no win no fee' practices, as stated at this year's Party conference in Manchester;
- How can we unlock alternative funding streams? Can we build upon the good work done by many city law firms and look at ways of clustering or 'beaconing' legal and not for profit practices? And
- How can funding ensure that preventative work is funded alongside the servicing of cases?