Whingeing poms and whining lawyers

Roger Smith

This account of legal aid in parts of the mother country sets one's mind a' musing about whether there should be a legal aid equivalent of Medicare.

Roger Smith is Director of the Legal Action Group, UK.

Around 60% of all criminal legal aid practitioners in Britain are considering giving up publicly funded work because of inadequate funding, argues the Law Society of England and Wales. Meanwhile, paymaster Lord Mackay stares at a cost blow-out that has attracted Treasury notice, and makes speeches in which he says ominously, 'We are now just about at the limit of what is supportable without radical changes'. In these difficult waters, the Legal Action Group seeks to chart a course which goes beyond a fatalistic assessment that any change would be even worse than what we have now.

The Legal Action Group (LAG)

The Legal Action Group was formed in 1972 in the wave of interest and excitement about legal services that led to the development of law centres and the discovery of the need for 'welfare law'. It now has about 1200 members and seeks to express a progressive view of how legal services might be developed.

LAG is largely self-financing and raises its income from publications, training and subscriptions to its monthly journal, *Legal Action*, formerly known as the *LAG Bulletin*.

The Group currently has a grant to rework its policies on how publicly funded legal services in the UK should develop. As part of this, I have looked at comparable schemes in Australia, Canada and the Netherlands.

An Australian observer of the British legal system might legitimately consider that lawyers were whingeing all the way to the bank. Expenditure on legal aid in England and Wales (excluding administration costs) totalled £680m in 1990-91 ($324m). This was £110m ($52m) more than in the previous financial year. Ten years ago, in 1980-81, expenditure was about £140m ($67m). Gross legal aid fees to the legal profession are currently close to £1 billion a year ($476m). Expenditure per head of population is a little higher than in Australia. For England and Wales in 1989-90, expenditure amounted to over £24 ($11.50) per person. In New South Wales, the comparable figure is about $11 and in Victoria about $10 per person. British per capita expenditure on legal aid is perhaps the highest in the world.

A constitutional digression

Legal aid provides a microcosm of British society and history. It cannot be understood without a cursory knowledge of some of the murkier areas of the British constitution.

England and Wales, Northern Ireland, and Scotland all have separate legal jurisdictions. Legal aid schemes for each are broadly the same but statistics are kept separately. Figures given below relate only to England and Wales.

In England and Wales, legal aid is the responsibility of the Lord Chancellor. This post is, confusingly, held at the moment by a Scot, Lord Mackay. The position of Lord Chancellor is that of an anachronistic figure who, contrary to any doctrine of the separation of powers, is a senior judge, member of the cabinet of the government of the day, and speaker of the House of Lords.

Administration of legal aid is divided between the Legal Aid Board which, in 1989, took from the Law Society administration of all legal aid and advice except for legal aid in the higher Crown Courts, still administered through the higher criminal, or Crown Courts. Statistics on legal aid are produced by two different bodies on two different bases — those for the Crown Courts by reference to the calendar year, and for the rest by reference to the British financial year which runs from April. This inhibits easy discussion of the overall pattern of expenditure, particularly because less information is gathered by the Crown Courts than by the Legal Aid Board.

For comparative purposes, British figures have been translated at an exchange rate of $2.1 to £1. The population of England and Wales is assumed to be 50 million and that of Australia 17 million.

The problem of being first

In 1949, Britain led the world in the introduction of a comprehensive legal aid scheme covering both criminal and civil matters. It owed its origin to a

pragmatic report prepared by a committee under Lord Rushcliffe. This did not use the stirring rhetoric favoured in the Beveridge report which was to restructure the social security schemes at the heart of the post-war welfare state.

In retrospect the report is a surprisingly low-key document. It assumes it was self-evident there should be some comprehensive scheme of civil and criminal legal aid, using the solicitors and barristers returning to private practice from the war; the Law Society should organise it; and no detailed costings were necessary. It would be a mistake, said the report, for legal aid to be confined simply to the very poor.

It was left to the Lord Chancellor's Department of the time to inject a bit of sparkle into this idea. It stated, in a memorandum to Parliament in 1949, the purpose of legal aid was: 'no-one will be financially unable to prosecute a just and reasonable claim or defend a legal right'. Some measure of the debasement of thought about legal aid is a definition by the same department in 1991 of legal aid as 'a conditional financial support, provided by the tax-payer, for individuals whose financial circumstances would prevent them from taking or defending proceedings without assistance with their legal costs'.

There are now at least eight definably separate schemes for legal aid and advice in Britain.

	Gross expenditure in 1990 £m	Net expenditure in 1990 £m
Legal advice	92	88
Civil legal aid	336	208
Criminal		
Magistrates Courts	173	170
Crown Courts	155	153
Duty solicitor		
24-hours	37	37
Magistrates Courts	7	7
Total	£800m	£663m

Ignoring the United States

British legal aid was not rethought in light of the developments in America during the 1960s and 1970s which so influenced thinking in Australia and elsewhere. Private practice was well in control of legal aid, operating on a case by case basis with a demand-led government budget. The recognition of new needs was accommodated by the development of additional schemes.

The one manifestation of American developments which looked as if it might threaten the profession's control was the law centre movement which gathered pace during the 1970s. Despite some central government funding, law centres have largely obtained their money from local authorities. Partly in consequence, law centres have tended to adopt a perspective focused on the communities in which centres are based rather than, and perhaps at the expense of, making a national impact. At their peak, the number of law centres rose to 60 but has now fallen back to 56, largely under the pernicious influence of the poll tax's effect on local authority expenditure.

There is no salaried provision of the kind undertaken by many Australian Legal Aid Commissions, and private practitioners in England and Wales receive 94% of all public funds disbursed through legal aid. This appears to be a higher figure than in any other jurisdiction. The comparable figure, for example, for New South Wales, is just under 60% and for Victoria, 62.5%. In the Canadian province of Ontario it is 71%; in Quebec it is only 29%.

The day of reckoning

The problem is now that the day of reckoning has come. Lord Hailsham, Mrs Thatcher's first Lord Chancellor, used to boast that legal aid was 'the fastest growing social service'. Throughout the 1980s, the Lord Chancellor and his department effectively danced a *pas de deux* with the Treasury. Every year, they promised some new wheeze would save money and stop the rapid increase of expenditure. It never did but, the next year, something else was promised.

In a series of speeches, which began very definably in late 1991, Lord Hailsham's successor, Lord Mackay, has raised the temperature and indicated that he is serious about restraining the increase in cost. He has taken to quoting Dickens' Mr Micawber on effective family budgeting:

> Annual income £20, annual expenditure £19.19.6d, result happiness. Annual income £20, annual expenditure £20.0.6d, result misery.
>
> [adding] Unlike Mr Micawber I cannot trust to luck that 'something will turn up'

Comments like these, made at a Law Society conference in October 1991, understandably make legal aid lawyers nervous.

Government strategy has been hindered by an internal battle between the Lord Chancellor's Department and the Treasury. Although traditionally seen as the enemy by private practitioners, the objective evidence suggests the Lord Chancellor's Department has fought strongly for its interests within government. It has consistently tried to steer Treasury interest away from the major areas of expenditure into what it regarded as more marginal zones. This, unfortunately, has involved the threat of restriction in welfare law.

The assault on advice

The first serious assault came in 1986 with an 'efficiency scrutiny'. These were highly fashionable under Mrs Thatcher's premiership. Three or four junior civil servants were given 100 days to examine some intractable government problem and to suggest solutions which had escaped everyone else. The legal aid scrutiny suggested that large areas of advice work could be diverted from solicitors to lay advice agencies, notably the Citizens Advice Bureau (CAB) movement.

British CABx are well resourced; larger bureaux have salaried managers and, in the bigger cities, there are often other full-time advisers to give a professional spine to an organisation which still depends overwhelmingly on volunteer advisers. There are very few lawyers employed within the CAB service, and a recent study of the quality of CAB housing advice has raised questions as to the level of ability and interest of CABx over the country in more complicated areas of work. After an internal wrangle which pitched its central bureaucracy against bureaux workers in the field, the CAB service rejected the offer of extra funds for extra work.

One result of the legal aid scrutiny was to cut the coverage of the green form legal advice scheme. This had covered advice on any matter of English law. Initially used unimaginatively for criminal and matrimonial cases, its existence has slowly encouraged private practitioners into the fields of employment law, housing, social security and immigration work, where law centres demonstrated a major lack of legal resources.

In 1990-91, 'welfare law' cases accounted for almost a quarter of all legal advice. The statistics for numbers of bills paid were:

Housing	74 545
HP and debt	60 002
Welfare benefits	50 377
Employment	20 881
Immigration	14 660
Consumer	19 379
Total	239 444

In 1988, advice for wills, except in certain circumstances, was excluded. This made a negligible impact on cost but was a symbolic first step in withdrawing comprehensive coverage. In July 1991, the Home Office and the Lord Chancellor proposed the removal of advice for immigration work from the advice scheme and its transfer to a Home Office-funded organisation, the United Kingdom Immigrants Advisory Service, widely held to be less independent and more tractable than solicitors. This was linked to tighter control of asylum seekers. The future of a highly controversial Bill to implement the Government's proposals remains unclear.

The so-called 'safety net'

Other government policies present a less direct attack on the welfare law undertaken by solicitors. In July 1991, the Lord Chancellor's Department issued a consultation paper on proposals to change the civil legal aid scheme. It suggested that what it called a 'safety net' might be added. This would mean that, as now, some applicants for civil legal aid would get free legal aid. Others might pay a small contribution. This is currently 25% of all disposable income over a lower threshold and less than an upper limit, as well as a capital contribution if capital is between a lower and an upper cut-off limit. However, at a particular point, unspecified by the report, potential litigants would have to begin their actions as private clients and incur costs up to a specified level before an application for legal aid could be made. Thereafter it would be granted on a contributory basis.

The Lord Chancellor's Department suggested that this might deter a number of litigants and require others to pay more for litigation. This in turn would liberate funds so that the eligibility levels could be raised. The document was redolent of a particularly unattractive approach to publicly funded legal services; it specifically stated, in words which would be politically explosive in almost any other area of government expenditure: 'Where a benefit is free, people are likely to use it freely because they lose nothing by doing so'.

The proposal may have been laid to rest by the Legal Aid Board's surprise temerity in telling the Government that it was unworkable and impractical.

Remuneration

Legal aid has now become big business for both solicitors and barristers. In its latest statistical report the Law Society stated that, for 1989-90, legal aid constituted 10.9% of the income of all solicitors, though discrepancies in the treatment of Value Added Tax probably mean that the true percentage is rather lower, at around 9%. It calculated that legal aid brought solicitors about £500 million out of their $4.5 billion total income. In areas outside London and the prosperous south east of the country, solicitors' percentage of income from legal aid is significantly higher than the national average. For instance, in relatively deprived Merseyside and the north, it rises to 18.5%.

The relative dependence of the Bar on legal aid is even greater. A recent report produced by its General Council, *Strategies for the Future*, revealed reliable figures on barristers' income for the first time this decade. In 1989 the Bar's annual turnover was just over £400 million. Legal aid accounted for about 27% of barristers' total turnover. A further 11% came to the Bar as a result of its work in prosecuting criminal cases.

Such a dependence by the legal profession on legal aid as a source of income has predictably led to constant battles over remuneration. Solicitors have been particularly aggrieved as their costs have gone up significantly more than the retail price index by which legal aid has generally been increased each year. The boom of the mid and late 1980s increased the distress of the legal aid sector of the profession, as earnings available to commercial specialists accelerated above legal aid earnings. It is this that has led the Law Society to run scare stories that solicitors are pulling out of the legal aid scheme.

There is little indication of any predicted walk-out in the latest statistics. About two-thirds of all solicitors' offices receive a payment from the Legal Aid Board during the year. This figure has remained relatively constant over the last five years. In fact, the Legal Aid Board's statistics suggest that many offices are doing more legal aid. The end of the 1980s boom and the current period of prolonged recession has, if anything, brought people back into a legal aid scheme which has the advantage, at least, of assured payment.

Eligibility

Over the last 20 years, criminal work has taken up an increasing amount of the legal aid budget. Legal aid has been used to ease congestion in the Magistrates Courts and to increase the number of defendants who can be processed. The percentage of defendants in Magistrates Courts who plead not guilty and are represented under legal aid has grown from 8% in 1966 to a staggering 84% in 20 years. The equivalent percentage in the Crown Courts hovers close to the 100% figure.

In addition, duty solicitor schemes have been established that have led to major new expenditure. In return for dropping its opposition to increased powers for the police in the *Police and Criminal Evidence Act* 1984, the Law Society obtained a 24-hour duty solicitor scheme designed to send a solicitor or clerk to every arrested person who requested one. The consequence in 1990 was £37 million expenditure — and a lot of rather tired and disgruntled criminal practitioners.

The explosion of criminal costs has been another reason for the attack on the civil side, as it has been sacrificed in an attempt by the Lord Chancellor's Department to hold down costs. In addition to direct cuts, e.g. to dependents' allowances in 1986, eligibility has been allowed, for a number of reasons, to decline from a 1979 high point when over 70% of the population was eligible. At first this decline was denied by the government but some fall is now accepted, although there is debate as to its precise degree.

Independent analysis of the statistics, commissioned jointly by LAG and the Law Society, suggests that eligibility for legal advice on income grounds in England, Scotland and Wales has fallen from 66% of the population in 1979 to 37% in 1990. In relation to full civil legal aid, 11 million adults have fallen out of scope since 1979.

The mystery of the rising cost

One of the Treasury's main concerns about the rise in the legal aid budget is that it is in part due to increased costs per case. These have risen over the last five years, at something about double the rate of inflation and the consequent increase in hourly rates.

The reasons for this rise are not clear. There is some evidence that there are now more civil cases of a very complex nature. Government is clearly suspicious solicitors are compensating for

what they see as low annual increases in the hourly amount by making each case take longer. Solicitors counter this by suggesting they are simply recording the amount of time spent per case more carefully, particularly now more and more solicitors' offices are computerised. The reality probably lies somewhere in between.

The Lord Chancellor's response is the obvious one: a move towards fixed fees. These have already been introduced at the Magistrates Court level in criminal cases and are soon to be extended to at least the more simple type of Crown Court case. The Lord Chancellor's Department has plans to introduce fixed fees in relation to civil cases, starting with personal injury cases.

Franchises and contracts

The Government is also attracted to bulk contracts with the larger legal aid providers and moving towards fixed fees would assist this development. The drive for such contracts has been one of the priorities of the Legal Aid Board that took over legal aid administration from the Law Society in 1989. It coined the word 'franchises' for these contracts, no doubt feeling that the commercial flavour of the word suited the spirit of the age. Solicitors and possibly a number of lay advice agencies, will be given certain preferential treatment, e.g. in relation to payment on account and certain delegated decision-making powers, if they enter into a franchising agreement.

The development of contracts has led the Legal Aid Board to stumble on the issue of quality. It has justified its interest in such contracts in the name of improving their quality rather than easing administration. The current specification for a franchise in a pilot scheme operating in Birmingham contains requirements about supervision, training and library resources. The Board has commissioned a couple of academics to identify objective factors that correlate with high quality work so it can specify attainment of these in future versions of the specification.

The emphasis on quality has successfully wrong-footed the Law Society. Its Council is still gung-ho for the non-regulation that was the hallmark of the 1980s. It has recently thrown out proposals for specialist panels and, outrageously, has rejected the mild proposal that a solicitor is under a professional duty to tell a client at the outset of a case the basis on which he or she will subsequently be charged fees. It now finds that one consequence of this *laissez-faire* attitude is that it has supinely allowed the Board to move towards dictating professional standards for 10% of solicitors' work.

The Legal Aid Board and the Government have occupied the high moral ground vacated by the profession in relation to the quality issue. This has two problems. First, it must ultimately be dangerous for the profession to cede control over quality standards to government, which has a conflict of interest as the funder of legal aid. Second, the long-term implication of franchises must be government will drive prices down by setting the standard at which cases are handled and the total amount which is paid.

In its own interest, the profession would have been better advised to retain control over quality standards, if only as a bargaining chip when it wants to argue that remuneration rates will not allow a decent quality of work.

What is to be done?

The way forward for a group like LAG in the current political situation is extremely difficult. LAG has consistently argued for greater salaried provision and greater government direction of its legal aid program. In the financial situation of the 1990s, it would be naive not to see both as a potential threat to a budget which is still demand-led and for which areas of eligibility, though falling, are still significantly higher than in many other countries — including most Australian States. There do seem to be a number of lessons from experience abroad which could, nevertheless, be implemented.

First, the identification of legal aid with private practice that exists within the UK should be broken. It clearly is right to deploy a range of legal service provision, incorporating private practice, salaried lawyers and autonomous law centres, to deliver an appropriate mix of services. Savings should be made and Australian experience suggests, contrary to British prejudice, that salaried lawyers can provide high quality services.

Second, in structural terms, Australian Legal Aid Commissions very much approximate to the kind of Legal Services Corporation that LAG has argued for over the last 20 years. The fact that most commissioners are appointed as the result of nominations from outside bodies at least gives the opportunity for greater independence than that of our Legal Aid Board which is effectively under the total control of the Lord Chancellor. On the other hand, the Australian model of cash-limited Commission budgets has the predictable result of what appears to an outsider to be chronic under-funding. Some element of a demand-led service must be worth preserving.

Third, publicly funded legal services must be broadened beyond the delivery of advice, assistance and representation. Most Australian Legal Aid Commissions retain at least a notional commitment to the other two main arms of what should be an appropriate range of services. They espouse education and information work as well as maintaining some form of commitment to law reform. Acceptance of such goals has still to be won in the UK.

The danger for publicly funded legal services in the UK is that they will continue to be dominated by casework, delivered by private practitioners, yoked into the system by tight contracts with a government-appointed Legal Aid Board. This would mean that the UK successfully side-steps any long-term influence from the vitality, energy and politics of the development of publicly funded legal services that has emanated from the United States in the 1960s and 1970s.

The alternative is that the pressure of rising costs will create a breakthrough in British legal services that allows a new wave of development and innovation to emerge. This might release a tremendously exciting period of activity in which there could be experiments with different forms of service provision — salaried lawyers, different types of community legal centres and specialist centres of excellence.

On past performance, Britain will probably opt for a period of slow and unimaginative decline, but you have to go on hoping.