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Colonising law for the poor: access to justice in the new regulatory state

Peter Sanderson and Hilary Sommerlad

Legal aid represents an interesting, if neglected, area of New Labour's policy agenda. Its significance derives not only from the fact that a disproportionate number of key figures in New Labour shadow and governmental posts earned their living from legal aid work in the 1980s and 1990s, but also from the fact that the development of policy in this area from 1995 onwards exemplifies the attempt to reconcile a discourse of social justice with the techniques of New Public Management (NPM) and the parallel discourse of commitment to the citizen as public service consumer.

This chapter will explore some of the resulting tensions in New Labour rhetoric and policy in this area. We will initially identify the ways in which legal aid could be seen to underpin the practical realisation of social justice and citizenship as envisaged by T. H. Marshall, before outlining the history of legal aid reform from 1995 onwards, culminating in the reforms which followed on from the Carter reviews of Legal Aid in 2006. In the course of this review we will explore the discursive properties of Ministerial statements and policy documents on legal aid, and the way in which the social construction of some legal aid clients and their lawyers as parasitical has been used to justify the transformation of the scheme. We will then identify ways in which the reforms have become increasingly influenced by conceptions of value for money and the new regulatory state (Braithwaite, 2000). The consequent transformation which has been wrought in legal aid is, we would argue, inimical to the very ideals of social justice that New Labour politicians claimed to be promoting.

The chapter is a critical analysis of legal aid policy and discourse based on documentary and secondary sources. In addition, the authors have used data gathered in the course of a series of research projects on legal aid lawyers over the past decade (Sommerlad, 1999, 2001; Sommerlad and Sanderson, 2009, for accounts of methodology),

including twelve interviews conducted by the authors specifically for this chapter with policy makers, national representatives of major advice agencies, representatives of legal aid practitioners, and partners in prominent legal aid specialist firms.

Publicly funded legal advice and representation have depended heavily on a supply base of committed solicitors and barristers working for substantially less than the large sums featuring in Ministerial statements and the front pages of popular newspapers, as well as the work of law centres and other not-for-profit (NFP) advice agencies. The development of the new form of regulation of the sector by means of cost control, contract and audit has 'colonised' the practice of legal aid lawyers in the manner identified by Michael Power (1997) in his analysis of the audit society: affected organisations begin to strive for the measurable goals imposed from outside, rather than the less tangible value-based goals (of which 'justice' is a good example) which were previously the focus of their activity. The consequent transformation of the values and practices of both individual practitioners and the organisations they work for has, we argue, had a deleterious effect on law work with the poor and socially excluded.

Legal aid as a cornerstone of citizenship

The lack of access to legal services in the 1920s to settle housing disputes and workers' accident claims prompted one of the founders of the 'Poor Man's Lawyer' movement to describe the rule of law as 'an anaemic attenuated make-believe which we flourish in the eyes of the poor as "justice"'.¹ Twenty-five years later T. H. Marshall made essentially the same point: 'the civil element [of citizenship] is composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts' and 'the right to justice. The last is of a different order from the others, because it is the right to defend and assert all one's rights on terms of equality with others and by due process of law' (1950, 10–11).

Not only are all other rights ultimately dependent on the right and ability to litigate (Cappelletti and Garth, 1981) on terms of equality with others, but the need of the disempowered for this right exceeds that of other citizens. In any society, poor people are more likely to get into trouble with the law, come into contact with state agencies, suffer violence and abuse, experience precarious and sometimes dangerous employment, live in poor-quality housing and be exploited by, for instance, private landlords. Further, as the Legal Services Research

Centre (LSRC) research into legal need and problem clusters has shown, civil justice problems are often both aspects of broader social, economic and health problems, and tend to compound such problems and cause new ones (Plesence *et al.*, 2004; 2006) – for instance, poor people are more likely to suffer health problems, and an extensive body of research links this with civil law problems (e.g. BMA, 1998; Amato, 2000). These problems are also intimately connected with power imbalances. Two of the key dimensions of social inequality are lower levels of education and limited access to the skills and technologies which could assist in independent problem resolution, and research also suggests that the poor are more likely to feel powerless and not entitled to take action (Sandefur, 2007).

Further, access to justice has become more vital for poor people in the UK in recent decades as a result of the expansion of civil law rights and obligations related to, for example, children (Goriely, 1998), and because they have experienced the brunt of the restructuring of the economy and the related neo-liberal reconfiguration of the welfare state. As is well known, the Conservative administrations presided over a dramatic increase in poverty, and, whilst New Labour policies initially achieved a reduction in poverty, a report published by the Joseph Rowntree Foundation in 2009 (see Hills *et al.*, 2009) showed an increase in numbers of people in ‘deep poverty’, that is, below 40 per cent of the median. At the same time, the privatisation of large parts of state provision frequently included lighter regulation and entailed a corresponding privatisation of enforcement (Braithwaite, 2000) whilst the increased targeting of welfare increased the need for the vulnerable citizen to be able to dispute the ways in which discretion is exercised. Legal aid offers a means of combating what Colin Crouch has termed the ‘degradation and residualisation of public services’ (2001), of holding government to account, and challenging the stigmatisation of poverty. In addition, it is the last resort of those at the sharp end of the politicisation of the criminal justice system, and the elision between civil and criminal law, for example in antisocial behaviour legislation.

The case for providing universal access to legal advice and representation as a necessary corollary to the provision of public welfare goods and the objective of social justice is therefore a strong one, as was recognised by Tony Blair in 1996: ‘legally enforceable rights and duties underpin a democratic society, and access to justice is essential to make these rights and duties real’ (Bean, 1996, xiii). However, from the inception of the Legal Aid Scheme, the form of access that should be provided has been a matter of debate. On the one hand, providing state funding towards access to private solicitors’ firms and barristers carries risks in terms the

development of what economists call ‘moral hazard’ (the danger that ‘expert professionals’ will use the inability of clients to assess the value of their services to extract an excessive rent from their professional licence) and politicians call a ‘gravy train’. On the other, the provision of cheaper salaried services based on the American ‘public defender’ model appears to breach the principle that parties entering an adversarial legal system should do so on the basis of ‘equality of arms’. This dilemma appears as a recurring theme throughout the history of legal aid.

The origins and expansion of legal aid, 1945–1986

As with other services which developed as bespoke products delivered by expensive professionals to a small number of private, monied clients, opening up legal services to the wider community generated difficult questions about the role of the professional, and in particular about who should administer these services and define their substance, quality, access to them and their cost. Marshall had envisaged a simplification of the processes of dispute resolution in the form of cheap, non-expert salaried advisers and the education of the ordinary citizen in the law, an option which was prefigured in the establishment of Citizens’ Advice Bureau (CAB) legal advice sessions during the Second World War. But despite strong representations to the 1944 Rushcliffe Committee that the legal aid scheme should be based on such a salaried service and focused on housing, debt and benefit problems (Hynes and Robins, 2009), the committee decided in favour of the Law Society proposal for a ‘judicare’ scheme (Goriely, 1996, *passim*). Judicare was administered by the legal profession, and offered equal access to adversarial litigation processes, provided by solicitors in private practice, and barristers, who were paid on the basis of hourly rates with little control over quality or cost. This decision laid the ground for future public expenditure problems. It also skewed the scheme towards the interests of private solicitors, few of whom had either an interest or expertise in welfare problems: services available were therefore limited primarily to family law (and criminal defence). Where new services were established specifically to meet new legal needs, such as tribunals, no right to legal representation was granted.

By the late 1960s various factors coalesced to renew concern with access to justice. The community, anti-statist (and anti-professional) civil rights politics and new equality discourses of the time clearly identified the deficiencies in the paternalistic Beveridge welfare model and, in the case of legal aid, highlighted the failure of the scheme to serve impoverished and vulnerable communities. At the same time,

the percentage of the population eligible for legal aid had fallen from nearly 80 per cent in 1949 to 40 per cent. One result was an increase in voluntary-sector involvement in tribunal representation and the provision of social welfare legal advice. The sector's strong emphasis on strategic solutions to poverty also fuelled recourse to public-law solutions. This policy work was reinforced by the political use the civil rights movement of the 1960s and 1870s made of the courts, and the related development of the law centre movement (Robins, 2008).

Together these developments contributed to an expansion of legal aid. In 1973 the 'Green Form Scheme' was introduced, enabling advisers to give advice or assistance on any matter of English law after the application of a simple means test (Hynes and Robins, 2009). In 1979 the Labour government raised eligibility levels so that 79 per cent of the population were entitled to legal aid. This period also saw the spread of law centres and the establishment of 'radical' solicitors' practices committed to a political use of law such as the judicial review of government and government agency decisions and the extension of legal regulation into such 'private' spheres as the family.

The reform programme: 1986 to the 2006 Carter Report and beyond

It is a commonplace that the expansion of social citizenship was largely halted with the election of a Conservative administration in 1979, the radical restructuring of the UK economy and the related crisis of welfare. The resulting reforms to legal aid, which began in 1986 with a cut in eligibility, largely parallel the NPM techniques applied to other areas of the public sector: a dual strategy of financial retrenchment and managerial control designed to produce cultural change which would, in turn, achieve both VFM for the taxpayer and improved quality for the consumer (Hood, 1991). These included the transfer of the legal aid scheme from the solicitors' profession to a government quango, Legal Aid Board (LAB), enacted by the Legal Aid Act 1988. Cost control was achieved through abolition of the link between legal aid fees and private fees, and reductions in scope (for instance, property and probate ceased to be matters for which a client could obtain legal aid) and eligibility. Levels of eligibility were further reduced in 1992/93 so that only 53 per cent of households could qualify for legal aid.

Control over professional work, cultural change and the quality of service delivery were addressed through the introduction of legal aid franchising. This (initially non-compulsory) system of quality assurance initiated the micro-regulation of professional work through manage-

ment audits (by non-lawyers) of criminal and civil legal aid files against the transaction criteria which had been devised as proxy measures of the quality of substantive work (Sherr *et al.*, 1994). The objective of making law firms more commercial was addressed by the requirement that firms must make annual business plans. The installation of an economic calculus to evaluate the justice system, in which law was therefore depicted as a product or service like any other, entailed only slight reference to access to justice (Smith, 1996) – instead the problem was represented as one of ‘over-consumption of legality’ (Abel, 2003: 287). In this consumerist discourse legal aid clients therefore figured as ‘flawed consumers’ (Bauman, 1997), ‘abusers of the service’ (Clarke, 2004), ‘state-funded rotweillers’ whose access to public funds placed opponents at an unfair advantage’,² suggesting that the taxpayer was the real client. The narrative of the undeserving, frivolous legal aid litigant was complemented by a discourse of contempt for and mistrust of the legal aid practitioner, justifying the LAB’s control over her. We discuss this discourse of contempt in greater detail below.

New Labour and the Access to Justice Act 1999

As in other areas of the public sector, New Labour’s legal aid policy was more nuanced (Clarke, 2004), to the point of self-contradiction. On the one hand access to justice, a drive to raise quality, a focus on social welfare law, partnership with the voluntary sector³ and a pervasive emphasis on the need to target social exclusion have been consistent themes. In 1999 this shift in emphasis resulted in the Access to Justice Act (AJA), which replaced the Legal Aid Board with the Legal Services Commission (LSC) as the quango overseeing the administration of legal aid funding. It also established the Criminal Defence Service (CDS) and the Community Legal Service (CLS). The CLS represented an attempt to integrate legal aid firms with generalist and specialist legal advice services, and general advice services into regional ‘seamless webs’, leading in 1999 to the establishment of Community Legal Service Partnerships (CLSPs). The policy change is also evident in the formidable body of research conducted by the LSRC into the extent of ‘justiciable problems’ (Pleasence *et al.*, 2004, 2006) and concern with the role of ‘unmet legal need’ in the persistence of social exclusion (DCA/LCF, 2001, 2004).⁴ This research provided an underpinning methodology for the LSC’s allocation of resources designed to meet key welfare law needs in areas such as housing and community care, and to develop innovative projects such as the Money Advice Pilot.

However, these developments did not solve the issue of access. The dilemma over whether legal aid provides access just to a ‘service’, or to

a just outcome to a cause, remains significant, in part because in other ways New Labour policy can be viewed as a continuation and development of Conservative initiatives. For instance, the AJA removed some civil legal aid cases, notably personal injury claims, from the scheme and effectively replaced their funding by Conditional Fee Arrangements (CFAs),⁵ and whilst this measure was presented as increasing access to justice, insurance premiums excluded the poorest in society.⁶ In addition, the legislation strengthened NPM controls over the suppliers of legal aid services and laid the basis for a system of contracts which would replace franchising, and would control the unit cost of cases and the number of cases suppliers could take on. The continuing drive to contain costs also resulted in a tightening up of the merits test which all applications for legal aid must pass, and the introduction of a hard cap on civil legal aid expenditure. Together these measures replaced an entitlement to civil legal aid services by a 'scheme of prioritising cases and resources (rationing) as a way of meeting the needs of the general public within a limited budget' (Moorhead, 2001: 550; Sommerlad, 1999). As a result, New Labour policy increased the emphasis on the 'responsibilisation' of the individual: through the provision of advice and information about legal problems (LCD/LCF, 2001) by, for instance, the Community Legal Advice Web site (Legal Services Commission, 2009) it was hoped that individuals would be able to understand and solve their legal problems by themselves.

The verdict on the AJA by one expert commentator on legal aid was damning:

The 1949 Act was an opening of the door to justice for citizens. The 1999 Act has in effect erected a large notice over that door entitled 'Restricted Entry . . . The truth is that the Government's reforms spring not from a desire to improve access to justice but from the Treasury's need to control the budget. The entire new system flows from the decision to cap the budget. (Zander, 2000)

The conclusion that the imposition of a hard cap would 'infect the whole enterprise' appears to have been borne out by subsequent developments. The continuing rise in the cost of criminal legal aid,⁷ and of some civil cases, most notably immigration, produced a crisis in the CLS, the abolition of CLSPs and the commissioning of a series of reviews of the legal aid scheme.⁸

The Carter Report

These developments culminated in the decision to commission Lord Carter of Coles to review legal aid, and in particular criminal legal aid

(Carter, 2006), with the aim, as Lord Falconer argued, of forcing criminal practitioners ‘to restructure . . . [to] get more control over the costs of provision’ (Hynes and Robins, 2009). However, the disproportionate impact which Carter’s proposals would have had on firms run by black and minority ethnic (BME) practitioners (MDA, 2006) led to its rejection by the then Minister.

Instead it was decided to impose aspects of Carter’s recommendations on law firms and the NFP sector with a contract for civil legal aid, despite the fact that no research had been conducted into how this would impact on them. The resulting ‘route map’ for civil legal aid work produced by the LSC in 2008 (in *Focus*, LSC, 2008) introduced the following measures: fixed or graduated fees for a substantial part of civil work, a unified contract for all work, and Best Value Tendering for bulk contracts (limited to £25 or £50,000).⁹ The impact of the Carter reforms on the character of legal aid provision is discussed in detail later in this chapter: the burden of our argument is that they represented the culmination of a process whereby cost containment strategies, combined with micro-management of legal aid transactions, impacted negatively on access to quality legal advice.

A further development in legal advice services was the establishment of Community Legal Advice Centres (CLACs) and Networks (CLANs), which, it was argued, would improve access to justice by providing a ‘one-stop shop’ responsive to local needs (LSC, 2005).¹⁰ The proposals have been criticised on the grounds of insufficient funding, the level of quality of service they will be held to, the difficulties monopoly suppliers face in dealing with conflicts of interest between clients and their lack of independence from local authorities (Griffith, 2008).

Before discussing the impact of the post-1997 legal aid policy agenda we will explore the way in which New Labour politicians have provided a discursive justification of their strategy through a specific framing of the ‘problem’ of legal aid, and the character of legal aid practitioners.

Fat cats on a gravy train: the discourse of contempt

The ambivalence of New Labour policy on the form and delivery of legal aid has been matched by the character of the public announcements by Ministers responsible for legal aid. New Labour’s public stances on legal aid have been characterised by twin binary oppositions. The first counterposes ‘fat cat’ lawyers to the taxpayer who funds their alleged excesses, while the second counterposes the ‘vulnerable’ who are ‘most in need’ of legal aid on the one hand to the undeserving and dangerous legal aid applicants, and the vexatious and litigious champions of the

'compensation culture', on the other. In 2003 the then Home Secretary, David Blunkett, was reported on the BBC giving his full backing to Tony Blair's promise to cut public spending on what he called the legal aid 'gravy train':

On Thursday, the day of his speech to the Labour Party conference, Mr Blunkett told BBC Radio 4's Today programme the public would be 'horrified' if it knew the way asylum appeals were over-used and 'the way in which lawyers make a lot of money out of it'. (BBC, 2003)

In a competition for resources, asylum seekers struggle to achieve public support and credibility, and as a result the wave of reform of the asylum system ushered in by the Asylum and Immigration Act 2004 not only included faster removal powers and a reduction in the appeal rights of asylum seekers, but also a reduction in the length of time that legally aided immigration advisers were permitted to spend on a case, from forty hours to five (Burnett, 2008). The Lord Chancellor's response to anxiety about the consequences of this reduction was to claim that he was 'absolutely determined to ensure that the money that is spent, is spent on those who actually need the help' (Burnett, 2008), without explaining how the distinction could be made between the needy and the rest.

The implicit distinction between the deserving and undeserving recipient of legal aid was evident in the justifications offered by the Labour government for the fixed-price tendering introduced following the Carter review of procurement. Announcing the implementation of the fixed-cost case approach, the Legal Aid Minister, Vera Baird, stressed that 'in order to sustain the best-resourced legal aid system in the world we must make sure we get the best value from it. That is the only way to ensure that *those who need it most*, vulnerable people suffering from family and social welfare problems, can be sure it is there for them' (Ministry of Justice, 2007, our emphasis)

The overarching frame for legal aid discourse has been to identify expenditure on it as 'a problem'. Thus, in announcing the Carter review, Lord Falconer announced that he was 'determined to tackle the problem of legal aid' (BBC, 2007). The problem was identified as both the overall expenditure figure and also the fact of it being a larger figure per head of population than in other countries. However, whereas increasing expenditure on health, education and even prisons (see Gibb, 2008) was regarded as praiseworthy, expenditure on legal aid was presented as excessive and unacceptable. As Lord Chancellor in the Brown administration Jack Straw also identified the growth of the profession as a problem. In the course of one sentence he managed

simultaneously to identify the binary opposition between lawyer and taxpayer and to use health and education as a contrasting, meritorious object of public spending: ‘There are now three times as many lawyers in private practice but paid for by the taxpayer as there were three decades ago: the budget has grown faster than the health and education services’ (cited in Gibb, 2008). Another aspect of Straw’s verbal assault on lawyers concerned the success fees involved in civil litigation under the CFA arrangements, the very fees which he was responsible for introducing, as a substitute for legally aided civil litigation, during his time as Home Secretary. He told the *Daily Mail* that he had instructed ‘the services I control to be much tougher on compensation claims, such as for injuries at work’ (cited in Brogan, 2009).

As well as drawing a line between the deserving and undeserving applicant for legal aid, New Labour’s rhetorical stance sought to move away from outcome-based conceptions of legal advice to a model where the key measurement was of procedural quality, and where advice was conceived of in units, so that success was measured in terms of volumes of advice units offered. In response to a critical article in the *Guardian* in 2008 the Legal Aid Minister, Lord Hunt, cited the fact that ‘the LSC funded 800,000 acts of civil and family assistance, up by a third within two years’ (Hunt, 2008): this figure, however, failed to distinguish a hit on an advice Web site from a matter followed through to a successful conclusion through representation in a court or tribunal. The sentiment of many practitioners is that this transmogrification of legal aid undermined its core purpose of providing access to justice, and we explore the impact of the reforms further in the following section.

Colonisation and attrition: the effects of change

In his discussion of the impact of auditing practice Power refers to the colonisation process, whereby ‘the values and practices which make auditing possible penetrate deep into the core of organisational operations . . . in the creation over time of new mentalities, new incentives and perceptions of significance’ (1997: 97). We would argue that colonisation has taken two forms. Firstly, the form of contractual regulation applied to legal advice provision in the last decade has radically circumscribed the capacity of legal advisers to make autonomous decisions about the amount of time and degree of expertise which they apply to particular cases: a process we have reported elsewhere (Sommerlad and Sanderson, 2009). The result has been precisely to create new mentalities, incentives and perceptions of significance.

Secondly, the use of procurement policies to transform the supplier

base has had complex effects. Committed legal aid specialists concentrated in the 'high street' medium-size practice have found it difficult to remain viable, and independent advice agencies, such as Citizens' Advice, have become increasingly dependent on LSC funding for their specialist advice provision, in such a way as to significantly transform their approach to their avowed mission. This section explores the impact of the Carter reforms in the light of these two forms of colonisation.

The immediate reaction to the LSC's proposals for change post-Carter was that they would exacerbate supplier attrition, encourage 'cherry-picking' and result in poorer-quality service, especially for the most vulnerable (Law Society, 2006). For instance, Burke Niazi Solicitors' response to the LSC consultation on Carter (LSC, 2006a) detailed the losses (around 50 per cent in most categories) which fixed fees would entail and argued:

the scheme you propose will prejudice vulnerable and disabled clients, especially those with mental difficulties, most of whom we represent, as their cases take longer to prepare . . . [it] will [also] discriminate against clients from minority ethnic groups where language barriers often mean it takes twice as long to prepare and advise on their cases. (Mental Health Lawyers' Association, 2006)

The link between attrition, cherry-picking and poor quality is implicit in these comments; however, for the sake of clarity we will discuss them separately.

Attrition

Access to justice depends on a healthy supplier base, but even prior to Carter there had been increasing concern about 'advice deserts' (Sandbach, 2004). Over the years the sector has suffered from low morale for a variety of reasons, including the administrative burden entailed in legal aid work and the discourse of contempt discussed above. Both law firms and agencies have therefore found it increasingly difficult to recruit (Sommerlad, 2001; Sommerlad and Sanderson, 2009), and there has been a steady decline in legal aid providers; for instance, the numbers of solicitors' offices holding a CLS contract went from 4,932 in 2001–02 to 3,632 in 2005–06 (Law Society, 2007). The HoCCA expressed grave concern that fixed fees would exacerbate this situation, given the very precarious financial position of many civil legal aid suppliers, and the fact that the fees are frequently considerably lower than many firms' tailored fixed fees, which were based on their

average cost in handling particular categories of cases. For instance in one firm the fixed fee for housing was £174, whereas the tailored fixed fee had been £540.

It appears clear that the predicted contraction in the supplier base is taking place: 2006–07 the numbers of solicitors' offices holding a CLS contract declined to 3,437¹¹ and the Law Society Legal Aid spokesman stated that significant withdrawal from the CLS was taking place in rural areas such as the North West, Kent and East Anglia, where:

there is probably only a relatively small amount of legal aid work and therefore the costs of maintaining a contract to do it – all the administration the LSC demands – becomes disproportionate and so other departments put pressure on those doing legal aid work to give it up.

Attrition of the supply base is not, however, limited to rural areas. For instance, Lambeth has seen a 50 per cent reduction in the number of law firms undertaking social welfare law through legal aid from twenty five in 2005 to thirteen in 2008, and there is no longer any firm offering legally aided employment law. Nor is attrition limited to solicitor providers; law centres and other NFP agencies have closed, or ceased to hold CLS contracts.¹² As Richard Jenner, Director of the Advice Services Alliance (ASA), observed, 'agencies that are geared towards doing straightforward cases will be fine. Our concern is that those agencies that undertake complex cases and /or cases for clients with language difficulties, disabilities or other special needs are going to struggle' (Hynes and Robins, 2009). It is predicted that the combined effect of the unified contract and the introduction of CLACs and CLANs will lead to more closures.

A managing partner of a firm in a large town in the north of England gave the following account of the impact of fixed fees on family law work:

take stand-alone divorces, we used to get £220 and VAT, whereas now it's £197 and VAT; we only do around fifty a year of these, as it's unusual for people to just want a divorce with no other issues, but for a firm like this that loss shaves away at profit margins which are already so slim

and as a result:

for the first time we've decided not to bid for the LSC grant-aided training contracts because I felt that I couldn't commit myself to that time because the financial situation is so precarious.

Her subsequent explanation for why the firm did do stand-alone divorces – 'because, as with all these matters, people's problems are

intertwined' points to the multiplier effect of attrition in single specialisms. Similarly, another practitioner spoke of the difficulties the decline in housing lawyers posed for her clients who had suffered domestic violence, but explained that her firm had been obliged to withdraw from housing because:

our housing worker left and we couldn't replace her because you must have an experienced person because otherwise you need someone to supervise her but then you can't afford to pay an experienced person because of the low level of the fixed fee. There are now only three firms in — [large northern city] doing legally aided housing work.

The managing partner of a legal aid firm in London described provision there as

very fragile, like a patchwork quilt – lawyers refer clients to other providers in the borough and beyond – you tinker with this at your peril . . . but they [the LSC] want to spend less on cases in London – yet it's in London that there is massive unmet need – as their own studies have shown.

He continued:

for every civil/ family case we take on we turn away at least seven, because despite the fact that we are a large firm we do not have the capacity to take on all these cases.

All respondents spoke of the effect of attrition on the clients, who (in the words of one practitioner) 'circulate round and round as many suppliers as they can to see if someone can take them on – we know that because we get people who've been round to many firms before coming to us – and in the end they give up'. An informant from an NFP agency spoke of the very great difficulties she now encountered in finding a solicitor to do injunctions for battered women clients, and correspondingly a family lawyer said that she was sometimes overwhelmed by requests for this service. As another spokesperson pointed out, this 'shrinking and increasingly concentrated sector assumes that people will travel for help yet of course we're talking of clients who are least likely to be able to travel – i.e. have no money, no transport, problems of getting child care, etc.'

Cherry picking

As the above comments indicate, the imposition of 'average costs per case for everybody, taking no account of whether you serve particularly vulnerable communities', generates an economic logic which effectively dictates 'cherry picking'. As a result, the following comment

was typical: ‘many firms get clients whose first language is not English and for whom the particular firm is not their first port of call – they’re being shunted round London – 70 per cent of social welfare clients are BME’. As the witnesses to HoCCA and responses to the LSC consultation explained, such clients generally demand more time, and the difficulties of successfully justifying the extra work incentivises cherrypicking:

It’s impossible to complete a case under the fixed fee and difficult cases therefore entail a great deal of worry as to whether you will get paid for the work you do at all, and mean you under time-record for the work you do out of fear that if the case becomes an exceptional claim (i.e. 3 times the fixed fee, entitling you to a detailed assessment of the file to see if you should be paid the full amount for the hours you have done, as under the old system) your costs will be down assessed by the LSC on the basis that it has taken you too long to do the work. This happened to quite a few of my exceptional claims in the Housing department and I had to spend hours and hours of non-chargeable time making appeal submissions to the LSC’

A managing partner spelled out the links between the financial impact on his firm of the fee structure and cherrypicking:

we are only expected to submit exceptional claims in about 20 per cent of cases [therefore] we are effectively regularly doing large amounts of *pro bono* work on our cases, producing a loss in income to the firm of £150,000 for doing the same work, seeing the same clients, at the same quality level before fixed fees were introduced.

He went on to say that this sum represented about 3 per cent of the firm’s total income, the equivalent of half the annual profit of the firm, and that this loss was therefore obliging the firm to ‘filter out more cases that are likely to exceed the fixed fee level but not get into the exceptional category.’ As a result, this firm used a paralegal who was doing her LPC part-time to operate its own triage service, to ‘filter the work effectively’.

Another solicitor explained that the fee structure meant that her firm no longer took any homelessness cases, as these always required more than the three hours’ work allowed for by the fixed fee. A trainee solicitor described how the immigration department of her (highly respected) legal aid firm cherrypicked cases:

we have far more referrals than we can take on, so we constantly – daily – turn down a lot of cases, but when there is capacity the solicitor will look for a ‘legacy case’ – where we are able to avoid the fixed fee because the client initially made a claim before that date. These cases are particularly

challenging and the clients in more need of expert specialist legal advice because the history of their asylum cases here needs untangling and explaining . . . we get a lot of these referrals. That makes it difficult to judge how many of the post-1/10/07 cases we turn down directly as a result of the fixed fee. But I know that it's an incentive for avoiding such cases, and as there's so much unmet legal need, and so many legacy cases, it is not too difficult to avoid them for now. However, a lot of solicitors do fear for the future of the immigration department in this firm and immigration solicitors in general, and how we will be able to give diagnostic legal help level advice once the legacy cases have run out.

A spokesperson for the ASA expressed concern about the low take-up by advice agencies of the provision for the payment of exceptional cases, 'given that the fixed fee scheme has been running for over a year now – that suggests cherrypicking – i.e. that a lot of providers are not doing any difficult cases'. As he went on to reflect, however, it could also mean that 'maybe [some] people are getting a poorer service because they are having less time spent on their cases . . .' Other respondents also expressed concern that the logic of the reforms dictated that the quality of advice would suffer, and some alleged that the focus on cost meant that the LSC was no longer concerned about quality, and that this was evidenced by the lowering of contracting standards:

there are five levels . . . you had to score 2 (competence plus) to get into the Preferred Supplier Pilot Scheme but now . . . all you need for any of the LSC contracts. is a 3 (competent) . . . because the LSC doesn't want to pay for 1 and 2. The thing is if you score 1 or 2 then it's likely that your average costs will be higher because there's a clear link . . . between the quality of work and the amount of time spent. (Moorhead, 2001)

The LSC specification of particular combinations of categories of work which must be bid for, the minimum limits on the size of contracts and the low fees pose an immediate threat to both the supply base and the quality of service, since this favours large firms and agencies able to do high-volume routine work. It correspondingly poses difficulties for many smaller agencies and firms, especially those committed to specialist and /or high-quality work, including a disproportionate number of BME firms whose main clientele tends to be BME. At the same time it was also predicted that the failure, when fixing the fees, to take account of the client base of particular firms or agencies would cause practitioners who specialised in complex cases to 'leave, retire and not be replaced, and, increasingly, we will have all the parties represented by non-specialist solicitors' (Professor Masson to HoCCA: 4). As a result the managing partner of a well respected legal aid practice said, 'effec-

tively what we are seeing is the rise of legal aid factories like — and — [two large firms known to employ large numbers of paralegals] in the form of both qualified legal executives and unqualified clerks, at low rates of pay)’.

Deteriorating service

Thus, just as cherrypicking is ineluctably linked to fixed fees, so too is the quality of service. A firm which consistently scored high in peer review and is named as one of the pre-eminent law firms in the country for education had had a tailored fixed fee for educational cases, including special needs tribunal cases, of £1,092, which, the managing partner of the firm argued, reflected both their clients’ needs and the level of expertise and work they put into such cases; the fixed fee for the work is £302. In his words, when the LSC introduced fixed fees ‘all the quality stuff went out of the window, because they’re now explicitly going for the lowest common denominator’. As a result, as mental health specialists Burke Niazi Solicitors make clear, it seems likely that many of the providers who leave the scheme will be those who deliver a high-quality service:

you will be driving out the quality solicitors who put so much time and effort into their cases, particularly those who have strived to enhance their qualifications by getting on to the various panels of the Law Society and other professional bodies.

Conclusion

As we noted at the beginning of this chapter, equality of access to effective legal advice and representation is a cornerstone of a Marshallian model of social and political citizenship. This is because the law is an essential resource for the powerful – for the state in refusing entry to asylum seekers,¹³ in attempting to reduce antisocial behaviour and in its expenditure on welfare benefits; to landlords and lenders in recovering assets; and to employers in disposing of unwanted employees – and there may be few limits to the amount that these powerful actors are prepared to spend on maximising the possibility of achieving a result in their favour.¹⁴ In an adversarial system it is frequently the case that the defendants or respondents are both ignorant of the law and lack any corresponding resources to defend themselves – in fact they may often be ignorant even of their right to do so. Flawed though it has been, and tainted by its association with the socio-economic inequality which the law implicitly endorses, legal aid nevertheless was a signifier that poor

people's problems were as important as those of the powerful. A rhetorical commitment to the cause of the socially excluded was a persistent theme in New Labour's policy portfolio from the mid-1990s onwards, and this commitment provided the background rationale for many of the post-1998 reforms to Legal Aid.

The significance of the legal aid reform programme over the past two decades is not simply in the way it has narrowed eligibility,¹⁵ stigmatised legal aid lawyers and increased the difficulty of accessing local assistance, but also in its introduction of a calculus which has served to diminish that importance. By 2010 the Labour government legal aid policy was in effect saying that poor people's problems could be worth only two or three hours of a paralegal's time, and no more.¹⁶

The *reductio ad absurdum* of this paradigm is the public trumpeting of hits on legal advice Web sites or initial diagnostic phone advice as constituting an increase in access to justice, when it is impossible to gauge not merely whether any individual hit or piece of phone advice has resulted in a just outcome but also whether the 'client' has even understood the 'advice'.¹⁷ This approach elides the distinction between the provision of a service and the achievement of a just outcome.

This reduction of civil legal aid to 'largely a *sink service* for people on means-tested benefits' (Hynes and Robins, 2009, our emphasis) corresponds to Crouch's characterisation of the neo-liberal reforms as involving the residualisation, distortion and degradation of public-sector services. It is ironic that as the dominance of the neo-liberal paradigm is challenged by its manifest failure in the economic sphere its legacy should be in part the erosion of the last legal resort of the predictable victims of that failure.

Notes

- 1 Gurney-Champion (1926: 21), cited in Hynes and Robins (2009).
- 2 Under-Secretary at the Lord Chancellor's Department Gary Streeter, who consistently deployed stigma as a strategic weapon in the attack on legal aid: 'Streeter confirms legally aided litigants are rottweilers', (1996) *New Law Journal*, 1378.
- 3 A pilot project with forty-two voluntary advice agencies, begun by Lord Irvine, grew to over 400 by 2002–03 (see Sommerlad and Sanderson, 2009).
- 4 Further work by the LSRC, referred to in the Introduction, delineated the interrelated and consequently complex character of the 'clusters' of legal problems faced by poor people.
- 5 CFAs had been brought in through the Courts and Legal Services Act 1990; see Yarrow and Abrams (1999).

- 6 At the time, the Legal Action Group (LAG) estimated that ‘as much as £100 million in compensation would be lost by 75,000 people whose cases were currently funded by legal aid’ (in Hynes and Robins, 2009).
- 7 The period between when Labour came to power and 2005 had seen a 37 per cent increase in criminal legal aid. Although this was in large part due to government policy (Orchard, Legal Action June 2003: 7, cited in Hynes and Robins, 2009), the Treasury had set a ceiling of £2 billion on legal aid expenditure.
- 8 This brief account telescopes a number of important developments which contributed to the eventual commissioning of the Carter Review, including personnel changes within both the Lord Chancellor’s Department and the LSC, independent research which revealed CLSPs to be ineffective, largely due to under-resourcing, leading to gaps in provision; vulnerable to government policy changes and cash demands of CDS (Matrix Report, 2004).
- 9 This is a very broad-brush outline of what has been an extremely complex development involving judicial reviews of LSC proposals, negotiations with the various stakeholders in the CLS and the phased introduction of different parts of the proposals.
- 10 CLACs and CLANs connect with the recognition as a result of the LSRC work of the interconnected nature of poor people’s problems; the LSC has described its objectives in establishing them as ‘tackling disadvantage and promoting social inclusion; delivering legal advice services to local communities according to local needs and priorities; providing quality integrated legal advice services ranging from basic information to representation in court, which offer value for money and are supported by co-ordinated funding’.
- 11 The LSC has not released the figures for 2007–08.
- 12 The NFP providers holding a CLS contract had risen from 389 in 2001–02 to 469. However, by 2007 the number had declined to 458.
- 13 The extension and democratisation of the law – due in large part to legal aid – has led to its increasing use to challenge state power (Bondy and Sunkin, 2008), often on behalf of unpopular causes. When the cutbacks in welfare lead to legally aided challenges against government agencies, and when legal aid is used to fund judicial reviews of Ministers’ decisions about, for instance, asylum seekers, it seems plausible to argue that the legal aid scheme may be a relatively popular target amongst Ministers: see, for example, the assertion by Phil Woolas, the Home Office Minister responsible for immigration, that a successful appellant to the Immigration Appeals Tribunal had ‘no right to be in this country’ and that immigration lawyers and charities were ‘playing the system’ (Barkham, 2008).
- 14 When challenged about whether the expenditure of £8,000 on prosecuting a man for gesturing at police officers through a car window was an appropriate use of public funds, the Crown Prosecution Service responded that ‘at no point is cost a factor because we don’t put a price on justice’ (Savill, 2008).

- 15 Eligibility has declined from 52 per cent in 1998 to, in 2007, in the words of one respondent, 'the 29 per cent who are the poorest in society, who operate in a marginalised twilight zone'.
- 16 This implicit devaluation of the legal aid client and her problems necessarily entails a devaluation of her lawyer. So we have a nexus – cheap lawyers for cheap people producing substandard product. This has resulted in the delegation of legal aid work to least-cost labour, that is, to the least experienced practitioners, and this is now explicitly endorsed by LSC; yet the combination of social and legal need and the disadvantage of clients can often accentuate the complexity of poor people's problems.
- 17 One practitioner described this 'service' in the following way: 'It's an upfront diagnostic service rolled out by a few large organisations, some of which are not law firms . . . so what you get effectively is poor-quality initial advice which is not solicitor-led. For instance, — have been advertising for case workers at £16,000 per annum, "no legal experience required" . . .'

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Statutes

- Access to Justice Act 1999
Courts and Legal Services Act 1990
Legal Aid and Advice Act 1949
Legal Aid Act 1988

Glossary of terms

- AJA Access to Justice Act 1999, the first major reforming Act of the 1997 administration in the field of legal aid. It established the Legal Services Commission as the body which administers legal aid, and the Community Legal Service and Criminal Defence Service.
- ASA Advice Services Alliance, a national umbrella body for independent advice providers.
- BME black and minority ethnic.
- CAB Citizens' Advice Bureau.
- CLAC Community Legal Advice Centre.

Peter Sanderson and Hilary Sommerlad

CLAN Community Legal Advice Network.

CLS Community Legal Service.

CLSP Community Legal Service Partnership.

CFA contingency fee arrangement, or 'no win, no fee' agreement, introduced to relieve the pressure on public funding of civil legal aid.

CDS Criminal Defence Service.

DCA Department for Constitutional Affairs, the government department which succeeded the Lord Chancellor's Department, and was in turn succeeded by the Ministry of Justice.

HoCCA

LCF Law Centres Federation.

LAB Legal Aid Board.

LSC Legal Services Commission.

LSRC Legal Services Research Centre.

NFP not-for-profit sector, legal advice providers from outside the private solicitor firm sector, including advice charities, Citizens' Advice and law centres.

NPM New Public Management.

VFM value for money.