
Introduction: the justice gap

At the time of writing in late 2008, the country is in the grip of a growing economic crisis. The number of people losing their jobs is on the sharpest incline since the recession of the early 1990s, and the number of homes being repossessed is rocketing, with some 120 people losing their homes each day. At this time, perhaps more than any other period in the last decade, people of all means need access to good quality legal advice.

It is 60 years since our system of legal aid was first conceived as part of the welfare state; however, we are now at an impasse. Fewer than one in three of us are eligible for help under the scheme that has slowly but steadily been eroded. Campaigners have spoken out increasingly vociferously about the legal aid ‘desertification’ where tracts of England and Wales are left with little or no access to free legal advice. Practitioners complain bitterly about the demoralising cumulative impact of years of continuous reform, pay freezes, or begrudging rises in rates that have long fallen behind inflation. There is compelling evidence of private practice law firms leaving publicly-funded law.

It is inaccurate to suggest that legal aid has entered some new period of crisis. However, that ‘crisis’, as a result of a long-term absence of vision on the part of those that run legal aid together with an alienated supplier base, has become a way of life for the sector.

This book is the Legal Action Group’s (LAG’s) contribution to a debate about the future of legal aid at a time when that future – certainly, that of the civil scheme – seems far from certain. *The Justice Gap* attempts to identify the principles that LAG believes should underpin a modern legal aid system. The book also seeks to make a case for its place among the other vital public services and to look

forward and identify proposals for improving access to justice. Legal aid was recently described as the ‘most friendless wing of the welfare state’.¹ Perhaps above all, the book seeks to explain why an unfairly under-valued, embattled but essential public service like legal aid still matters and why that service should be supported by public and politicians alike.

So, let’s start with a question: why does the concept of equal ‘access to justice’ matter today? As good a place as any to begin to answer that question is Dover county court one Wednesday morning in mid-April 2008 when research for *The Justice Gap* began. Courts like this up and down the country occupy the frontline of the so-called credit crunch. It was repossessions day and the presiding judge District Judge Parnell had 35 cases listed. According to the court listings, his caseload included six mortgage possession cases where lenders were taking legal action to reclaim properties and seven ‘suspended’ possession cases where, if the homeowner defaulted one more time, lenders could go for immediate eviction.

On the day LAG visited the court, people’s homes were literally on the line. ‘People often arrive traumatised’, Jacqui O’Carroll told *Legal Action*. Anxious homeowners struck deals with the mortgage company ‘agents’ – usually local solicitors, often trainees, instructed to act on the behalf of the company – either to pay back arrears in stages or to give up their home. Most people turned up at the court, having received a summons, without any independent advice and often resigned to losing their home.

‘Homeowners arrive unsure of what’s going on, totally ill-informed, and prepared to lose everything because they think there’s no alternative’, said O’Carroll, manager of the legal services unit at Shepway Citizens Advice Bureau who also ran the court advice desk. ‘The pressure is huge especially from the less scrupulous providers who will insist they’ll get possession and even tell homeowners not to bother to turn up.’

The reality is that in 21st century Britain you can lose the roof over your head – often unnecessarily – through a legal process, in ignorance of the law, and after having been misled about any rights you might have, without having access to publicly-funded legal advice. As O’Carroll explained to those in the court waiting room, borrowers are entitled to repay debts over the remaining period of the mortgage no matter what the lenders tell them (as laid down in the 1995 landmark ruling *Cheltenham & Gloucester Building Society v Norgan*²).

Few, if any, homeowners who came into Dover county court that day took legal advice. They did not see the need to. ‘Does anybody

need help?’ O’Carroll asked when no one knocked on the door of her office. Occasionally she took a more proactive approach, interjecting between homeowners and mortgage company reps as they bashed out deals (‘Would you like to have a quick chat with me before you agree to anything?’). It quickly became apparent that homeowners were routinely committing themselves to hopelessly unrealistic repayment schemes that they could not afford for fear of losing their homes, or even voluntarily agreeing to give them up.

So where does legal aid fit into this dismal picture? For a start, many homeowners will by definition be barred from the legal aid scheme. Public funding is only available to people who have less than £100,000 equity in their home (their disposable income has to be less than £649 per month). The advice available from O’Carroll, however, was not subject to any means test, though its provision is arbitrary. At the time of LAG’s visit, the Legal Services Commission (LSC), which runs the legal aid scheme, funded 94 advice services out of 230 county courts. Within three months of the *Legal Action* report, the LSC made funding available for another 20 schemes.

LAG argues that a critical test for our legal aid system is not just that homeowners fearful of losing their homes should receive proper independent advice about their legal rights. It is also crucial that people understand that they have that right, that there is an adequately funded network of advisers well-placed to provide it, and that those services are clearly signposted. The legal aid system in 2008 falls well short of that.

Without a coherent set of principles, our modern system of legal aid flounders and that has been a considerable part of the story of the recent period. The book starts with a statement of principles that LAG believes should underpin a legal system for the 21st century.

(1) Access to justice is the constitutional right of each citizen

Legal aid was meant to ensure this. The Rushcliffe report, which was the basis on which the modern legal aid system was founded, stated that legal aid should be available in those types of cases in which lawyers normally represented private individual clients. Legal should not be limited to those people ‘normally classed as poor, but should include those of ‘small or moderate means’. The legal aid system never fully realised these ideals. Currently civil legal aid is in danger of becoming a sink service for a minority of the population.

(2) The right to access justice applies equally to civil and criminal law

Civil legal aid, particularly social welfare law, has always been the poor relation in the system. The civil legal aid budget urgently needs to be separated from the growing criminal budget.

(3) The interests of the citizen should determine policy on access to justice issues, not those of the providers of services

Up until 1988 the Law Society administered legal aid. It ran the system largely in the interests of lawyer as opposed to the public. Legal aid policy is still mainly determined by interests groups and not the users of legally aided advice services. The public are not consulted over the type of system they want.

(4) The constitutional right to be regarded as innocent until proved guilty should be respected as a cardinal principle of criminal law

Legal aid was first established at the beginning of the last century for criminal cases as it was increasingly recognised legal representation was essential to guarantee a fair trial. Criminal legal aid is under pressure due to the numerous changes in the law and the administration of justice, but the government fails to recognise this. Equally the inadequacy of some publicly funded services is undermining the protections defendants' rights under legislation such as the Police and Criminal Evidence Act 1984 and the Human Rights Act 1998.

(5) Promoting access to justice requires some policies including law reform, education and legal services

The legal aid system has become too focused on funding individual cases. It has neglected its role in wider legal education and the more creative use of the law to tackle legal problems systematically.

(6) Proposals for reform must take account of the realistic levels of resources but these should not be seen as defining policy

The modern legal aid system has been designed on the basis of the legal services that can be bought within the current budget of £2 billion rather than an understanding of who should be under the scheme and to what assistance they should be entitled.

1 Jonathan Freedland.

2 [1996] 1 WLR 343.