

Justice Committee's inquiry into access to justice, February 2011

Submission from the Legal Action Group

The legal aid system's retreat from the high street

About LAG

Legal Action Group (LAG) is a charity which promotes equal access to justice as a fundamental democratic right. LAG is independent of the providers and funders of legal services, and seeks to represent the interests of the public, particularly the vulnerable and socially excluded, by improving legal services, the law and the administration of justice. We also aim to increase lawyers, advisers and the general public's knowledge of the law through our programme of publications and training.

LAG is concerned about the potential impact of the proposals in the government's green paper on legal aid. We believe these will have a significant effect on the ability of many ordinary members of the public to access justice. Vulnerable and socially excluded people particularly will find it increasingly difficult to get the help and advice they need on civil legal problems. The government's own analysis shows they will be disproportionately hit by the proposals. This paper discusses the decline in the number of legal aid providers over recent years, as well as the likely impact of the government's proposals on both criminal and civil legal aid.

1. Civil legal aid and the numbers game

The following table breaks down the number of legal aid contracts over the last five years by category of law.

<u>Table 1ⁱ</u>	09/10	08/09	07/08	06/07	05/06
Family	2,434	2,677	2,692	2,756	2,887
Housing	501	561	542	571	592
Welfare benefits	428	445	435	459	467
Debt	404	423	405	407	411
Personal injury	386	354	833	914	960
Immigration	223	247	263	313	367
Mental health	210	243	250	273	283
Employment	190	218	200	216	222
Clinical negligence	218	175	262	275	273
Community care	100	113	93	73	76
Actions against the police	57	67	69	72	75
Public law	45	46	49	44	46
Education	38	44	46	51	57
Consumer	33	37	38	39	40
Total non-family	2,833	2,973	3,485	3,707	3,869
Total	5,267	5,650	6,177	6,463	6,756

In most areas of law there has been a steady decline in the number of contracts held by firms and not for profit (NfP) organisations as they continue to leave the legal aid system. The number of legal aid contracts is greater than the number of individual firms and NfP organisations in the system, as many hold contracts in more than one area of law and some have more than one contract in the same category of law if they operate from locations in different areas of the country. There are now only

2,058 individual civil legal aid solicitor firms in the legal aid system, down 195 on the previous year (2008/09); and 28 NfP organisations have left civil legal aid in the last year leaving a total of 332. The table below breaks down the number of civil legal aid contracts held by firms, telephone contracts and NfP organisations over the last year.ⁱⁱ

Table 2

Contracts 2009/10	Provider type		
	Solicitors	NFP	Telephone
Family	2,414	16	4
Housing	326	165	10
Welfare benefits	124	297	7
Debt	129	267	8
Personal injury	386		
Immigration	161	62	
Mental health	207	3	
Employment	103	78	9
Clinical negligence	218		
Community care	71	29	
Actions against the police	57		
Public law	45		
Education	29	7	2
Consumer	31	2	
Total non-family	1,887	910	36
Total	4,301	926	40

Until early 2000 any solicitor could undertake legal aid work provided s/he had held a practising certificate for more than three years. From January 2000, firms and NfP agencies had to hold a quality mark awarded by the Legal Services Commission (LSC) in the relevant area of law to be able to provide a legal aid service. In civil legal aid, after the introduction of compulsory quality marks, the number of providers was reduced from around 10,000 to 4,860 and further falls have left the current number at around 2,400. The attrition rate for criminal providers has not been as great, but it is still significant. In 2000 there were 2,925 criminal legal aid providers. There are now 1,697 criminal legal aid firms, 84 less than last year.ⁱⁱⁱ

In LAG's view the introduction of compulsory quality marks improved both the quality and management standards in organisations providing legal aid services. However, it did significantly reduce the number of access points for legal aid and changes to legal aid, such as the introduction of fixed fees three years ago, have caused a continued decline in the number of legal aid providers.

In civil legal aid, family law has always been predominant with most large towns having at least some family legal aid providers. As both tables show, though, in other areas of civil law the number of providers is much smaller which means that coverage outside the larger conurbations has always been at best patchy.

From retreat to rout

The following table estimates the number of contracts in each area of law after the proposed cuts to scope are implemented. In family law it is estimated that around 60

per cent of firms would be forced out of the system. This estimate is based on the loss of 82 per cent of the existing spend on legal help, the system of initial advice and help on a legal problem, and 41 per cent of the spending on legal representation.^{iv} The other figures are based on the loss of legal help income. A dash indicates the areas of law which have been cut entirely from scope.

Table 3

Contracts	Provider Type		
	Solicitors	NFP	Telephone
Family	965	0	4
Housing	226	165	10
Welfare benefits	-	-	-
Debt	32	66	2
Personal injury	-	-	-
Immigration	120	45	-
Mental health	207	3	-
Employment	-	-	-
Clinical negligence	-	-	-
Community care	71	29	-
Actions against the police	30	-	-
Public law	45	-	-
Education	-	-	-
Consumer	-	-	-
Total non-family	731	308	16
Total	1,696		

It is difficult to estimate accurately the total number of providers which would be left in the system with such a large number of contracts being cut. LAG believes it would be around 900 firms of solicitors, but this figure could be much lower as it would not be viable for many firms to continue in the legal aid system especially with the proposed cuts to scope in family law. Around 100 NfP providers might remain, but again this figure could be much lower as the areas completely cut from scope, such as welfare benefits, have a larger impact on NfP agencies. LAG believes if the government's proposals are implemented the attrition in the number of providers over recent years will become a rout and legal aid will cease to be viable as a nationwide public service.

The solicitor firms continuing with legal aid would tend to specialise in child protection and domestic violence cases and would be concentrated in large urban areas such as London and the West Midlands, with the risk of up to 60 per cent of the population who live outside these areas being excluded from access to legal aid services. LAG fears this would result in a substantial risk of there being insufficient firms to allow for conflicts of interest. Firms would also tend to be more geographically isolated than they are now, making it less likely for clients to be able to travel to alternatives if their local firm was conflicted out in a case.

LAG is suggesting that a more detailed assessment of the impact of the proposed changes in civil family legal aid needs to be undertaken. This impact assessment needs to accurately model, as far as possible, the number and location of firms specialising in family law which would remain in the system to ensure that the

general public in all areas of the country are within reasonable travelling distance of a family lawyer. **LAG is asking the Justice Committee to support this request.**

The situation is worse with regard to other areas of law. Housing law providers currently tend to be mainly confined to the large conurbations with a few trying to cover big geographical areas; clients either have to travel long distances or rely on telephone advice services. LAG believes it is difficult to progress cases beyond initial advice through telephone services and the findings of our recent opinion poll on legal aid services indicate that the lowest social groups, while being more likely to qualify for civil legal aid, are the least likely to use telephone advice services.^v

In the other areas of law, services are currently confined to a small number of providers. Over the years civil legal aid services have tended to develop in conurbations with a large number of eligible clients living in close proximity to solicitor firms and NfP providers. This has led to an uneven spread of services with some areas being served relatively well while others are not.

Table four shows the top five spending areas and the five lowest spending areas in the country for civil legal aid. The table was compiled for LAG's book on legal aid policy which was published in 2009.^{vi} Especially in the low spending areas the civil legal aid expenditure tends to be concentrated in family cases. The indicative spend figures are what the LSC has calculated would be the appropriate level of spending in the area if civil legal aid resources were evenly spread across the country according to demand. This is compared with the actual spend per area.

Table 4			
Top five spenders	LSC Indicative	Actual	% spend against indicative
Camden	590,983	2,206,712	373.4
Hackney and City	663,945	2,209,640	332.8
Tower Hamlets	639,317	1,689,447	264.26
Ealing	642,831	1,579,569	246.1
Liverpool	1,187,302	2,798,663	235.72
Bottom five spenders			
Surrey	529,271	2,264,806	23.37
East Riding	710,950	191,296	26.91
Kingston	632,527	173,065	27.36
South Herefordshire	1,396,982	425,061	30.43
Bexley	407,806	144,457	35.42

It should be stressed that the high spending areas are reacting to the demand for services and that the demand for services in the low spending areas is suppressed by the lack of services. The history of civil legal aid shows that the pattern of provision on the ground determines whether the public can access their legal rights. If no services are available the public are marooned from both advice and representation in civil law. LAG fears that if the planned scope changes go ahead this

will be exacerbated, as the remaining legal aid services will be further concentrated, leading to a postcode lottery for services, which the bulk of the population will lose.

Poor and vulnerable denied access to justice

The document, *Legal aid reform: scope changes. Equalities impact assessment*, was published by the Ministry of Justice (MoJ) with the green paper on legal aid along with other impact assessments. This document, using the available data, sets out to assess the likely impact of the proposed cuts on groups of people protected by equalities legislation. It would be fair to say that the report pulls no punches with regard to detailing what the proposed legal aid cuts will mean for the most poor and vulnerable in society. For example, the removal of debt, family, non-homelessness housing matters and welfare benefits would impact on the following:

- Debt: will have a disproportionate impact on sick and disabled people
- Family legal aid cuts: 65 per cent of the client group are women
- Non-homelessness housing matters: will have a disproportionate impact on women, black, Asian and minority ethnic (BAME) and ill or disabled clients
- Welfare benefits: will have a disproportionate impact on women, BAME and ill or disabled clients

The paper acknowledges that civil legal aid is a service which tends to serve higher numbers of people from protected groups compared with the general population. LAG would add that as the service is subject to a means test it overwhelmingly serves the very poorest people in the country. The equalities impact assessment paper argues that while most of the proposed scope cuts will have a disproportionate impact on protected groups this can be justified by the need to control public expenditure, the availability of other sources of advice and the need to focus legal aid on meeting domestic and international treaty obligations.

As demonstrated above if these cuts are agreed the number of civil legal aid providers would be substantially reduced, cutting off many people from the civil legal advice that remains within the scope of the legal aid scheme. Those people seeking advice on the areas of law cut from scope would have to rely on voluntary advice services which are under pressure from legal aid and other public spending cuts. In December last year LAG wrote to the MoJ asking ministers to consider establishing a commission to enquire into the future of social welfare law (SWL) services.^{vii} To date we have not had a response from the government to our request. ***We are requesting that the Justice Committee consider supporting LAG's suggestion to establish such a commission.***

The aim of the commission (or review as it could be called), would be to provide a future strategy for SWL balancing the need for society's most vulnerable people to have access to quality independent legal advice with the government's spending plans. The commission's tasks would be to:

1. Assess the availability and quality of services to the public in each area of law.
2. Research the funding and other resources available for advice services across government.
3. Make recommendations on the better integration of funding and infrastructure for advice services.

4. Make recommendations on the future provision of SWL services including appropriate sources of funding.

LAG is urging the government to think again about its proposals for civil legal aid as if they proceed as they now stand, many people would be unable to obtain advice on or enforce many of their civil legal rights. We fear that this would lead to an underclass of people disenfranchised from civil justice and indifferent to the rule of law.

2. Criminal legal aid

As advice and representation has to be guaranteed in criminal cases due to the European Convention on Human Rights, LAG believes that criminal legal aid is less vulnerable to reductions in access to justice. However, due to legal aid changes, such as the reintroduction of the means test, and other pressures, over the last ten years, a process of consolidation has been taking place as firms merge, take over other firms or decide to leave criminal legal aid work.

At £700m, the cost of advocacy before Crown and other higher courts makes up the bulk of expenditure in criminal legal aid. Just under 18 per cent (£125m) of this budget was spent on 397 Very High Cost Cases (VHCCs) in the year 2008/09. VHCCs, which include complex fraud and terrorism cases, make up less than one per cent of the higher courts cases and have been the target of a number of government-inspired initiatives to cut their costs in recent years. There have been two stand-offs, in 2004 and 2008, between the Bar and the government over VHCC pay rates. On both occasions the Bar has managed to boycott taking on new cases as a protest against rate cuts and wrung concessions from the government, the most eye-catching being a £17m overall increase in cash in 2004. In 2008, a compromise was also reached over fee rates.^{viii}

Reductions to advocates' fees in criminal cases were pushed through before the general election last year. Only five days after a consultation on proposed new rates closed, the government tabled the changes in a statutory instrument. From 27 April 2010, nine days before the general election, fees in Crown Court cases were cut by 4.5 per cent with further cuts planned over the next two years to lead to a total cut of 13.5 per cent.

From 14 July 2010, the threshold at which VHCC fees apply was raised from 40 to 60 days. The government also decided to abandon the VHCC specialist panel system and revert to contracts with individual firms for new cases. As the terms of reference to this enquiry imply, the government could look again at fees in VHCCs, but it would be difficult to make any further cuts while the current cuts are being implemented. Also, LAG believes time is needed to assess the impact of the change to the threshold at which VHCCs apply.

Competitive tendering

In a paper published on 22 March 2010 the government outlined plans to reduce the number of criminal legal aid firms through a best value tendering process.^{ix} It believed the process would leave around eight to ten firms in each of the 42 criminal justice areas and these firms would be compelled to do the full range of criminal law work. Up to 75 per cent of firms would have been forced to close under the proposals. The government abandoned these plans after pressure from the Law Society and others.

In the green paper on legal aid the government has announced its intention to introduce a competitive tendering process for criminal legal aid work. LAG believes that around ten per cent of the budget for criminal legal aid could be saved if such a system was introduced. However, we see two main drawbacks. First, the supplier base would shrink which could eventually leave a few national firms forming a cartel which could dictate prices. Second, it would end choice for criminal legal aid clients, they would be forced to take the representative available rather than being able to pick from a range of local firms. LAG believes that this lack of choice would risk a reduction in quality and independence of legal services.

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ⁱ Tables 1 and 2 appear in the *LAG legal aid handbook 2011*, edited by Vicky Ling and Simon Pugh, which is due to be published in February 2011.

ⁱⁱ *Statistical information 2009/10*, LSC, p1.

ⁱⁱⁱ *Annual report and accounts 2009/10*, LSC, p6 and *Annual report and accounts 2008/09*, LSC, p10.

^{iv} *Legal aid reform: scope changes. Impact assessment*, MoJ 028, pp16 and 17.

^v *Social welfare law: what is fair?*, LAG, 2010, p7.

^{vi} Steve Hynes and Jon Robins, *The Justice Gap: whatever happened to legal aid?*, LAG, 2009, p68.

^{vii} We define SWL as housing, benefits, immigration, debt, employment, community care and other areas of public law.

^{viii} Steve Hynes and Jon Robins, *The Justice Gap: whatever happened to legal aid?*, LAG, 2009, p119.

^{ix} *Restructuring the delivery of criminal defence services*, MoJ, 22 March 2010.