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Access to Justice: A Comparative Analysis of Cuts to Legal Aid

Report of an Expert Workshop Organised by the University of Warwick
in Conjunction with Monash University

Wednesday 19 March 2014

Organised by: Natalie Byrom, Asher Flynn, James Harrison and Jacqueline Hodgson
Funded by: Monash-Warwick Alliance Seed Fund

1. Introduction

This report summarises the proceedings of the expert workshop on the cuts to civil and criminal legal aid held at the University of Warwick on 19 March 2014.¹ The workshop was attended by academics, legal practitioners, funders and civil society actors, all of whom had extensive knowledge of the legal aid changes and their impact in practice.

The workshop comprised three main sessions:

- Legal aid cuts and the changing face of the legal profession (see section 3);
- Legal aid cuts and the lawyer client relationship (see section 4); and
- The broader social consequences of legal aid cuts (see section 5).

In each session the presentations and subsequent extended discussions raised a wide range of issues. Summarised below are the points where there were widely held views, clear findings, strong insights and/or lessons for future practice.

The workshop formed part of a broader project, which brings together the Universities of Warwick and Monash to explore comparatively some of the consequences of the cuts to civil and criminal legal aid in England, Wales and Victoria. The project involves consultations with academic, legal and government/non-government stakeholders and the development of an online presence for external engagement. A second event will be held in July 2014 by Monash, which will explore further some of the themes raised at the Warwick event in an Australian context and build international and comparative expertise with stakeholders, with a view to future funded research.

A compendium of resources, and further information about the project, is available from the 'Access to Justice' project webpage <http://www2.warwick.ac.uk/fac/soc/law/research/centres/accesstojustice/>

Workshop Attendees

Nimrod Ben-Cnaan	Law Centres Network
Jodie Blackstock	JUSTICE
Marie Burton	London School of Economics
Natalie Byrom	University of Warwick
Ed Cape	University of the West of England
Anthony Edwards	TV Edwards
David Fanson	Sansbury Douglas
Asher Flynn	Monash University
Arie Freiberg	Monash University
James Harrison	University of Warwick
Joanna Harwood	University of Warwick
Elaine Hill	Coventry Law Centre
John Hickey	Coventry Law Centre
Jackie Hodgson	University of Warwick
Juliet Horne	University of Warwick
Alan Humphreys	Legal Education Foundation
Sam Kirwan	University of Bristol
Jude McCulloch	Monash University
Joanna Miles	University of Cambridge
Bronwyn Naylor	Monash University
Jennifer Sigafoos	University of Liverpool
Matthew Smerdon	Legal Education Foundation
Ewen Smith	Criminal Cases Review Commission
Thomas Smith	University of Plymouth
Michelle Waite	University of Liverpool

¹ The organisers would like to thank Joanna Harwood and Juliet Horne for acting as rapporteurs for the workshop and producing an excellent first draft of this report.

2. The Victorian Perspective

Presentations:

- Asher Flynn, Monash University, Australia.

The workshop commenced with a reflection on the situation in the Australian State of Victoria, where funding cuts to social and welfare services, underpinned by a government rhetoric of austerity, have increased demand for legal need, while simultaneously increasing the extent of unmet legal need. Recent policy changes instituted by Victoria Legal Aid (VLA) include denying legal representation to: individuals seeking or responding to applications for personal safety intervention orders, and adults or young people in criminal matters where imprisonment or detention order outcomes are unlikely. In the civil arena, funding of parents in family law matters is limited to trial preparation and advice on how to conduct oneself in court. In an effort to ensure “fairness”, VLA introduced a policy that if one party in family law proceedings is unable to access legal aid, then the other party will also be denied legal aid. This has resulted in several cases where women who have accused their partners of family violence, are subject to cross-examination by those partners, creating concern that the cuts increase the vulnerability of women and children trapped in violent environments. Other key changes include ceasing prison visiting services and replacing these with a dedicated Legal Help telephone service.

In the face of restrictive guidelines and cuts, Victorian criminal courts are working with minimum levels of legal aid resources, yet there has been substantive criticism, particularly from women’s groups, that there remains a prioritisation of people facing criminal trials (mainly men), over providing aid in areas like family law, where the main client group is women. While it is likely that there will always be unmet legal needs and contention surrounding legal aid priorities, mirroring the English situation, government cuts to legal aid bring into sharp focus concerns of legality, due process, the rule of law and the ability for vulnerable and marginalised groups to access justice.

In negotiating the funding cuts, VLA have been forced to reconcile legal ethics, morality and financial constraints in determining when and how they can assist the most people with decreasing funds. In a similar vein to the English legal community response, the Victorian legal community has used varying forms of activism against the draconian cuts. The leading body for legal practitioners, the Law Institute of Victoria, for example, has run a number of social network campaigns and petitions highlighting the negative impacts of the cuts.

One of the most notable differences between the Victorian and English approach however is the role of the judiciary, where there has been an unprecedented form of judicial intervention and activism to prevent certain funding decisions being enforceable. This unique form of activism, combined with the strong voice of concern emerging from the legal community, has forced those charged with determining how to deal with the decreasing funds within VLA to reconsider and adjust their funding priorities.

These issues will be examined in more detail at the July workshop and will feature in the second report available in September 2014. The remainder of this report focuses on the impact of the cuts in the English civil and criminal justice systems.

3. Legal aid cuts and the changing face of the legal profession

Presentations:

- Anthony Edwards, TV Edwards.
- Sam Kirwan, University of Bristol.
- Jennifer Sigafoos, University of Liverpool.

The devastating impact of the cuts to civil and criminal legal aid on the legal profession and access to justice:

Both civil and criminal practitioners are under immense financial strain having incurred significant salary reductions. In criminal work, charging rates are dropping so there is reduced demand. The main hope for criminal defence firms is to win high volume work, but the initial and most acute problem will be surviving long enough to build that volume. It cannot be assumed that legal advice is available to all who need it. The cuts to legal aid mark the end of high street legal practice in local communities creating serious concerns about a loss of local expertise, and the emergence of advice deserts. Some advice centres are considering cross-subsidisation using new fee charging work, but specialist criminal defence firms are unlikely to find similar ways to cross-subsidise their work.

Development and retention of expertise in the legal profession:

There is likely to be a substantial loss of expertise at the top of the profession as the cuts accelerate the retirement of experienced staff. Despite growing numbers of law graduates, the reduction in the number of training contracts and pupillages means that there are also too few young practitioners entering the profession. Firms that survive by winning the volume work should be able to offer training contracts but low salaries and student debt will make it difficult to retain newly qualified staff. Criminal firms are cutting overtime and reducing salaries in direct response to legal aid cuts. Barristers will conduct less magistrates’ court work in future, which will mean the loss of the traditional training ground for young barristers. This is matched by a trend in student career decision-making being informed by what pays the bills, as opposed to what might be the most satisfying or rewarding legal work. The major challenge facing the profession is how to preserve, in a meaningful way and in an increasingly hostile financial climate, the culture of legal practitioners being committed to the social value of providing high quality legal advice to all who require it.

Advice-giving charities cannot be expected to fill the gaps left by the legal aid cuts:

People seeking advice who are no longer eligible for legal aid are commonly directed to advice-giving charities. However these charities have themselves lost legal aid funding so face severe difficulties in meeting the additional demand. Advisers are working under time constraints that limit the effectiveness of their advice. Clients are increasingly being asked to undertake work on their own cases and specialist advice and early intervention measures are now far less common.

The potential impact on the criminal justice system:

Criminal defence specialism brought improvements in quality, but small specialist firms are most vulnerable to the cuts, and quality will thus be difficult to sustain. Standards of preparation and advocacy are likely to decline. The CPS is already under considerable strain and relies on non-lawyer staff in the magistrates’ court. Overall there will be an increased risk of

error and there are likely to be more appeals and applications to the Criminal Cases Review Commission. There is a need for a strong Court of Appeal to enforce standards in the investigation and trial process. There appears to be little recognition from the government as to the economic value of lawyers within the legal process and this is a major flaw in their plans.

The rise in the number of litigants in person: Far more people now have to resort to self-representation due to the unavailability of legal aid. This will cause problems for the courts in terms of time, costs and resources, as they struggle to assist and manage litigants in person. Efforts to improve client capability might help mitigate these problems but in a complicated and often daunting system people may not be able to represent themselves adequately or navigate the complexities of the civil or criminal legal systems. Litigants in person also create problems in the cross-examination of witnesses, which could lead to witnesses being unwilling to cooperate with the court process.

An increased role for technology: There was some support among attendees for greater use of, and investment in, technology, particularly for criminal law cases. Video links in police stations, for example, can help reduce the costs of cases and improve efficiency by reducing the time spent on travel. It was noted that technology should, however, be appropriate and tailored to the needs of individual cases. Attendees had mixed views on the benefits of increasing the use of technology in civil law. It was felt that there is a need to differentiate between clients who can, and want to, make use of technology, and those who cannot or do not want to. Telephone only contact was identified as being an inferior form of technology in comparison to video conference communications. A distinction was made between clients known to the practitioner (where video conferencing was seen as less risky) and new clients (where the relationship of professional trust requires personal attendance). (See also section 4 below).

The role to be played by the judiciary: There is the potential for the judiciary to take a bolder stance in opposing the cuts to legal aid and for strategic litigation to try to force a judicial response. This view was formed in response to the judicial activism evident in the Australian State of Victoria (see section two), which prompted changes to the restrictive guidelines on the right to legal representation in criminal cases, in effect, forcing the legal aid authority (Victoria Legal Aid) to re-direct funds towards solicitor attendance at trial.

The need for a forum to enable the development of ideas: The closure of the Legal Services Commission represented the loss of a body with overall responsibility for taking a strategic view on legal aid provision. The Legal Aid Agency is not equipped to fill this gap. It will be important for practitioners, academics and voluntary organisations to collaborate to devise new approaches to the provision of legal services to those who cannot pay. In particular, there is an urgent need to consider alternative models for funding legal advice; one option proposed (with some debate) included insurance packages. One concern around relying on insurance was to also ensure that insurance companies improved their policies in relation to the payment of lawyers. A further question remains as to whether insurance models are workable for those who are not “repeat players” It is important that any new models should continue to reflect as far as possible the values of social responsibility underpinning legal aid.

4: Legal aid cuts and the lawyer client relationship

Presentations:

- Ed Cape, University of the West of England.
- Marie Burton, London School of Economics.
- Elaine Hill, Coventry Law Centre.

The risks posed by the emphasis on a managerial and standardised approach to justice: Client-tailored advice is under threat from increased pressure to meet the needs of the system rather than the client, and from the shift towards larger firms. Fixed fees and contract prices already create disconnect between the fee and the work required. Larger firms will bring less continuity of representation together with a shift from the lawyer-client relationship to an institutional relationship. There is a risk of corporate policies restricting the exercise of professional judgment in individual cases. Over time, these factors may lead to clients losing faith that the institutional adviser is representing their interests.

The loss of visibility of legal advice provision: Many smaller legal practices will be forced to close as a result of the cuts, and legal advice will subsequently become less visible on the high street. This carries with it both the risk of public disengagement with the legal profession and the loss of local knowledge and expertise. For those who access legal advice, there is a risk that a substantial geographical gap will emerge between the lawyer and client, with the client having to incur significant travel costs to access legal advice. It is, therefore, imperative for the practices which survive the cuts to be committed to maintaining a local presence.

The shift from specialist to generalist advice and the increased onus on clients: Funding restrictions have necessitated a shift in many law centres and practices from the provision of specialist advice to generalist advice. This has led to increasing client dissatisfaction, and a loss of trust. There is a need for research to monitor the impact of this shift. Clients have had to take more responsibility for their cases without the assistance of lawyers. This includes clients being asked to prepare and compile all relevant information, which will sometimes involve quite complex material, before getting access to a lawyer for assistance; an issue that is problematic in light of the vulnerability of many individuals who require civil legal assistance. In addition, the increased onus on clients to ascertain documentation to support their applications, such as letters from medical experts confirming the existence of family violence, is costly and places a significant onus on individuals who are already in highly contentious and sometimes dangerous situations. This development is deeply problematic for vulnerable clients who are unable to take on this responsibility. There is a very real risk that these clients will drop out of the system. In addition, with regard to family law, the fall in the use of publicly funded mediation poses additional questions - are clients not accessing mediation because they are unable to locate mediation services? Why are clients who are mediating apparently not accessing publicly funded legal advice in support of this process - are fees just too low for it to be economical for firms to undertake?

Long term cost of a loss of trust in the legal profession: These factors are likely to lead to a loss of confidence and an erosion of trust in the legal profession, and the legal system which could prevent clients disclosing relevant information to

their lawyers. Some clients are likely to disengage and drop out of the process altogether. Clients may also be less likely to feel that justice has been achieved. These changes are likely to lead to costs consequences in the longer term. Clients who lack trust in their adviser may be more difficult to manage and this can cause delays, costs and other adverse consequences across all layers of the legal system. Clients who disengage with the system will fail to resolve their legal issues and this can exacerbate their wider social problems. If criminal clients experience less satisfaction in the procedural justice provided, then this will reduce their trust in the system and potentially their cooperation with the criminal justice institutions more generally. Lack of trust and difficulty in accessing legal advice will lead to further increases in litigants in person, with all the associated costs.

Unmet need caused by the evidence thresholds for accessing legal aid: The requirement for evidence to prove eligibility for legal aid is creating significant difficulty for potentially eligible clients and is leading to exceptionally high drop-out rates amongst clients who are sent to obtain evidence. This creates a risk that there are a significant number of people in need of advice, who will not be able to access it. This also carries the risk of people losing confidence in the legal system.

Concerns were raised about the difficulty of obtaining evidence from some GPs, and the police, in support of applications for legal aid in cases involving domestic abuse. There is a need for training for GPs and the police on domestic abuse, and the building of networks to improve dialogue between professions. The substantial financial cost to individuals of obtaining a letter from a GP to support legal aid applications is also a concern.

Face to face versus telephone advice: Attendees expressed mixed views on the appropriateness of telephone advice. There was debate on the extent to which trust may be built between the lawyer and the client in this context. There are particular drawbacks to telephone advice in relation to vulnerable clients. There was general consensus that video links have value in overcoming some of the shortfalls of telephone contact and that video technology will inevitably play a central role in responding to some of the problems of centralisation of advice services. Telephone services were seen as more appropriate when there was an established relationship between the lawyer and the client, but for new clients, this form of contact was deemed quite problematic.

The need for improvements in the provision of online services: Some attendees commented on the paucity, and limited quality, of existing online sources of advice. In light of the number of people who cannot access legal advice, and who are unaware of where else to turn for help, there would be value in the creation of a centralised online system which signposts to sources of advice and assistance. This might include 'how to' videos on You Tube and using different new technologies to better engage people.

Promoting quality through organisational culture: Organisational culture is key to promoting quality in legal advice and representation and, particularly, in increasing proactivity on the part of advisers. There is a need to articulate what factors contribute to a quality-focused culture within a firm and how these factors can be measured.

5: The broader social consequences of legal aid cuts

Presentations:

- Jodie Blackstock, JUSTICE.
- Nimrod Ben-Cnaan, Law Centres Network.
- Joanna Miles, University of Cambridge.
- Matthew Smerdon, Legal Education Foundation.

Promoting the economic and social benefits of legal advice: Although frequently presented as increasing dependency, legal advice is key to enabling people to exert control over their lives by securing their rights. It is important to interrupt the dominant narrative that legal advice is unnecessary, and that legal aid cuts are unavoidable. There is a lack of awareness among the public of the value of legal aid and the negative impact of the cuts and efforts should be made to broaden public support for the law. In particular, there is a need for further work to capture the less visible and quantifiable economic benefits of legal advice, particularly the role of the lawyer in managing clients and achieving settlements. In the criminal context, good advice can promote clients' confidence in the criminal process which can reduce challenges to convictions, promote cooperation with the criminal justice system and reduce the client's sense of social alienation.

The challenge of mapping the costs of the cuts to legal aid and communicating these costs to policy makers:

It is necessary to devise compatible ways of monitoring the impact of the cuts to legal aid and associated costs. The first step is to assess how much measurement is already taking place. Gaps in the evidence base can then be identified, and responses to these gaps devised. It is also important to ensure that compatible methodologies are used so that the evidence can be collated to produce a robust account of the impact of the cuts nationally. This is not straightforward, particularly when it comes to the less visible costs such as unmet needs and the broader and longer-term social costs resulting from the cuts. Having collated the evidence, effective strategies must be devised in order to communicate the results to policy makers.

Civil legal aid

The importance of preventative measures and a joined up approach: Legal advice plays a significant role in preventing the escalation of problems, but the role played by lawyers in reaching settlements and reducing delay, is underestimated. Supporting advice provision at an early stage is important, as is the embedding of legal services within other areas of community support, such as mental health, in order to meet the needs of people with multiple problems. None of this, however, should be at the cost of the provision of specialist advice. The errors that lead to the need for legal advice in the first place should be targeted, such as inadequate mental health assessments in relation to welfare benefits.

Problems with exceptional funding: There have been extraordinarily low numbers of applications for exceptional funding, accompanied by far fewer grants of funding than projected. Rather than this being indicative of a lack of demand, this is likely to be explained by problems with the system: the application is immensely time-consuming but is not funded; there are no procedures for urgent cases; and there is no safety net of additional assistance for those who lack capacity. There is

also a need to explore the extent to which solicitors are aware in practice of the existence of exceptional funding. In addition, there are real concerns around the government's restricted understanding of what Article 6 requires- is the test applied to determine eligibility for exceptional funding too narrow to be fit for purpose?

There are indications that people are dropping out of the system: In family law cases, the number of applications to court has apparently remained relatively stable following the legal aid cuts (albeit with an increase in litigants in person) and the expectation that people will turn to mediation rather than legal advice has not materialised. In fact, there has been a substantial drop in the number of people mediating using publicly funded mediation services. There is a worrying potential for unmet need among people who are not eligible for standalone lawyers services, and who are not accessing mediation. Mechanisms should be developed to monitor what has happened to those who have dropped out of the system, particularly since they are likely to be the most vulnerable. The longer-term costs to society of cases not being resolved will be significant.

The lack of a silver bullet: There is no one 'solution' to the cuts to legal aid. A range of measures are needed to respond to the changes and to safeguard access to justice.

Criminal legal aid

The limited role of pro bono work and private charging: Criminal defence lawyers already make a considerable contribution to pro bono work in undertaking work which is subsequently not remunerated. The Bar Pro Bono Unit has seen a huge increase in referrals from law centres. Commercial firms send trainee solicitors to assist in advice centres. Such schemes carry costs for the advice centre and benefits to the firms. In practice, it would be more helpful for commercial firms to sponsor the advice centre financially. Private funding is not a practical solution. Specialised criminal firms cannot cross-subsidise with other privately funded work. Criminal representation is often required unexpectedly and urgently making it difficult for families to raise funds to pay the lawyer. Firms need payment of these fees up front due to the high risk of default.

The role of the public defender service (PDS): It is not clear what role the PDS will have following the cuts. It is not anticipated that it will expand under the new funding arrangements as the cost per case seems to be higher and in any event, it seems unlikely that government ideology would tolerate the replacement of private legal service providers with public provision. PDS services will, however, receive guaranteed slots in the duty scheme. The recruitment of QCs to the service may just be a response to the Bar's action on cuts, but this is not yet clear.

The immediate future for criminal defence firms: Firms are likely to need to make immediate salary cuts in order to survive the initial reductions in funding. The next crucial phase will be the decision on whether to bid for the new contracts. Some may take the view that this can only postpone their demise. There is a chance of collective decisions to refuse to engage with the bidding process.

The best criminal legal aid provision in Europe? There is also a need to challenge the government rhetoric around

comparable spending on criminal legal aid across Europe. It is important to take into account the ways in which the prosecutorial and judicial functions in inquisitorial systems contain protections for the defendant so that it is necessary to take account of those costs in assessing the total provision in a jurisdiction. Further work in this area is required.

6. Recommendations for future action

The severity of the cuts makes it difficult to overstate the challenges facing providers of criminal and civil legal aid. Much of the discussion focused on the imminent and long-term impact of the cuts. However, it is also very important to seek to identify positive steps which could be taken both to challenge the cuts and to adapt to the new funding regime. This crucial work requires collaboration between practitioners and academics. Universities have a role to play as a reflective forum for collaborative action which is inter-jurisdictional (e.g. comparing Australia and England), interdisciplinary (bringing together civil and criminal practitioners) and intergenerational (bringing together researchers and practitioners at all stages of their careers).

The following areas of need for further research were identified as particularly important:

- How can we measure and communicate the value of legal representation?
- How can we map the level of unmet need caused by the legal aid and other related cuts?
- How can we measure and communicate the wider economic and social costs resulting from the cuts?
- How can alternative models of legal advice provision be devised and supported?
- How can we articulate and measure the factors which give rise to a culture that promotes quality in organisations providing legal advice and representation?
- How can we measure more accurately the comparative cost of criminal defence across European jurisdictions?

The need for further work was also identified in the following areas:

- The development of sustainable networks between practitioners, academics and voluntary groups to continue this conversation.
- Further work on online resources to signpost clients to available services.
- Further training for solicitors on the availability of exceptional funding
- Further training and collaborative activity in order to ensure that relevant professionals are supporting the work of legal professionals in bringing cases (e.g. work with GPs on providing supporting evidence in relation to claims of sexual and/or domestic violence).

7. Next steps

The Monash conference in July 2014 will explore comparatively some of the themes raised during the Warwick event and seek to discover whether this offers additional insights and possible strategies.

Additional dissemination at this stage includes publishing in range of academic and practitioner outlets and a conference presentation at the British Society of Criminology in July 2014 on comparative understandings of legal aid and representation as part of the right to a fair (criminal) trial.

The project website will document the progression of the project, including further research and publications.
<http://www2.warwick.ac.uk/fac/soc/law/research/centres/accesstojustice/>.

