

The Future of Legal Aid – Sir Bill Callaghan

Thank you for inviting me to address you today.

When people ask me about the future of legal aid my first inclination is always to pause, reflect and think about its history.

The modern legal aid system dates from 1949, following the report of the Rushcliffe Committee. It was a time of dramatic change with the creation of the National Health Service, many key parts of the economy being brought into public ownership, and a society rebuilding itself following the ravages of war.

In the decades that have followed there have been many significant milestones. For example:

1970 – the first law centre opening in a west London butcher's shop

1986 – the duty solicitor scheme beginning in police stations

2004 – specialist civil legal advice made available over a telephone helpline and website

But in those early days the provision was very narrow. Until 1970 legal aid covered mainly criminal and matrimonial and divorce cases. Civil legal aid was administered by The Law Society until the Legal Aid Act 1988, which established the Legal Aid Board. The budget was relatively small and I was interested to see a piece from the Director of Justice Roger Smith. He writes that in 1970 The Law Society took £2m a year to administer an expenditure of just £12m.

Throughout the 1970s there was a serious upward curve in legal aid expenditure with the opening of Law Centres and more emphasis on housing and employment work.

And as Sir Ian Magee identified in his 2010 review of legal aid delivery and governance it was the 20 year period from 1979/80 to 1999/00 that was particularly significant with expenditure rising by an average of 9.6% a year.

It was in 2000 that my own organisation the Legal Services Commission took over as a replacement for the Legal Aid Board. The growth in the budget was seen as unsustainable and was stabilised at £2.1bn in 2003/04. A lot of work went into halting the increases that were taking place, including the introduction of fixed fees and graduated fees.

But the big picture is that we now have a legal aid system that has a fundamental role in our society and goes way beyond the unsatisfactory arrangements that

existed before the Second World War. And, of course, throughout the post war period the contribution of The Law Society has always been pivotal.

The importance of dialogue and understanding in bringing us to this point cannot be underestimated.

This is particularly true if we look at the LSC's relations with The Law Society. As this audience will know relations deteriorated markedly in 2010. We spent a lot of time, effort and money in court. And the spotlight was on our disagreements.

Matters came to a head with The Law Society's successful Judicial Review of our family contracts tender in September 2010 and The Law Society's suggested remedy to quash the tender exercise completely.

Since then there has been a sea change. I've been very encouraged to hear voices on all sides echoing my own desire for more dialogue, respect for different points of view and a focus on the clients.

The Government has had tough decisions to take about spending. There have been cuts in fees and Legal Aid Reform means changes to the scope of legal aid in areas such as private family law. Legal aid will be available only for mediation and not for representation in court. Other scope changes include removal of social welfare law from scope. There are also changes to eligibility rules.

These reforms are big policy issues and are rightly and properly the domain of Government.

In fact, I have always been clear that an appointed body, such as the LSC which I chair, cannot make policy. That must be for ministers and Parliament to decide.

Our job is to deliver what the Government wants as effectively as possible. But there are times when it is appropriate to speak up. For myself, I think it is only right to give advice to ministers on the practicability of their policy wishes.

For example, the Commission is clear that the successful delivery of legal aid needs a viable provider base.

That is why I felt compelled to write to the Lord Chancellor and Justice Secretary Ken Clarke last year highlighting my fears about potential operational problems that could result from the scope and speed of the legal aid reform process.

It is also incumbent on me to remind ministers that our current status imposes certain duties upon the LSC. Until the new legislation is enacted the LSC retains considerable powers as a non-departmental public body under the Access to Justice Act.

They respect this fact and that is why I have voiced my concern that independent decision-making should be safeguarded in the new Executive Agency.

The Legal Aid, Sentencing and Punishment of Offenders Bill provides for a civil servant to be the Director of legal aid casework. The Bill quite properly prohibits the Lord Chancellor from giving direction and guidance on individual cases. That is an essential safeguard.

My strong view, and it is also the strong view of Commissioners, is that independence must be clear from the decision-making process.

This issue has attracted the attention of Parliament's Joint Committee on Human Rights, which called on the Government to put in place a system for appealing the Director's decisions to an independent court of tribunal. This was the preferred solution put forward by LSC Commissioners to Ken Clarke last year and he has reassured us that he does not want to be involved in the decision-making process.

However, although the Bill does provide for directions and guidance about the general functions of the Director, the detail about what that guidance will be has yet to be worked out. My view is that the Director should be able to draw on the advice of lawyers who are outside the Government legal service, in the same way that the LSC operates now, free from Government influence.

We can all see the importance of this issue from the Baha Mousa case. As you know Baha Mousa's death after being arrested by British troops in Basra was the subject of a public enquiry. It was an enquiry that could not have happened if the LSC had not funded a judicial review.

The Bill is currently at the Committee Stage in the House of Lords where there has been considerable discussion about this principle and many other matters. Indeed, the Bill has been in the Lords since 3 November last year.

As I have stressed our focus at the LSC is administration. We are keenly aware that it is people like you who are on the frontline providing quality advice and representation.

Key issues such as Legal Aid Reform and our approach to commissioning inevitably create problems that require meetings and discussion.

In commissioning services – reflecting the legal aid reforms – the LSC must follow an open and transparent tender process. This creates inevitable tensions where applicants are unsuccessful in obtaining contracts. We want to maintain a constructive dialogue with the profession to overcome these obstacles as far as possible.

In advance of the recent family tender exercise we held constructive discussions with representative bodies about our proposals. This, alongside lessons learned from previous tender exercises ensured that we were able to implement a simpler and more effective tender process for those family contracts that started this month (February 2012).

This was to the benefit of providers as more than 93% of applicant offices completed the tender process successfully. Contracts were offered to 2,268 offices which equated to 96% of the volume of offices that were previously undertaking family work. Further, the LSC secured good access for clients to family services across England and Wales.

However, some issues were raised about providers who were unsuccessful because they made mistakes in their tenders. The LSC had previously communicated that, to ensure equality of treatment for all applicants, they would be unable to intervene in the tender process, to point out to providers, or correct, any errors they may have made. It was therefore disappointing to see these errors being made.

The LSC was in agreement with The Law Society and other representative bodies that it would be preferable to find a constructive and pragmatic way forward, particularly as these will be interim contracts ahead of the implementation of the legal aid reforms. So we will be running a further tender process for licence only family and family and housing contracts.

This will give providers who were previously unsuccessful the opportunity to continue to undertake publicly funded family work while considering their longer term plans in light of the reforms to legal aid.

In my view this exercise has shown the value of a good working relationship between the LSC and representative bodies.

Of course, the bigger picture on commissioning is that the Government will inevitably take a keen interest in this issue because of its budgetary impact.

The ongoing administration of new matter start allocations is now attracting particular attention because it takes a great deal of effort for both providers and LSC staff.

The removal of a fixed allocation of new matter starts is one idea that has been put to us by representative bodies. Fixed allocations mean that more popular providers often run out of work and are refused an increase while other providers in the area have unused matter starts.

A more open competition at client level would be one way of dealing with this issue and we think it should improve the quality of provision and client care.

What we're talking about here is licensing civil contract work rather than simply allocating a fixed number of new matter starts.

There is still a lot discussion to be had about the detail of how this will work. But we envisage introducing this approach in April 2013 at the same time as the LSC is abolished and the new Executive Agency takes over.

The Government has also made plain its commitment to developing a criminal legal aid competition strategy. The plan is to begin discussions about how it could work in late 2013 once Legal Aid Reform, regulatory changes allowing Alternative Business Structures and the introduction of the Quality Assurance Scheme for Advocates (QASA) have all bedded down. The target for first contracts to go live is the summer of 2015.

We know these are difficult times for legal aid providers. We are committed to hearing their concerns. We're demonstrating that commitment in the Provider Reference Group events we are running later this month (February) and in March 2012.

We ran similar events across England and Wales last summer and more than 1,000 legal aid practitioners were able to discuss and listen to updates on issues such as Legal Aid Reform, payment systems and the importance of sticking to the terms of our contracts.

One area we will be updating providers on at these events is payment backlogs. Big improvements have been made and we have tackled problems by working with representative bodies.

We targeted our resources towards payments and away from auditing and this has brought positive results. Most of our case work is now being processed within service levels. Specific examples include processing work for civil payments on account. When submitted electronically these are now going through in 2-3 days and those that are paper-based in 12 days.

Another example is the work we are doing with the courts to improve crime case performance. Backlogs for magistrates' courts claims have reduced by 60%; we are now processing both litigator and advocate bills within service levels and are continuing our efforts to reduce backlogs even more. For advocate claims, the backlogs have now fallen by 15% and are at their lowest level since last July.

A big significant change for the legal profession is the introduction of Alternative Business Structures.

It's very early days and the Solicitors Regulation Authority has only recently begun processing applications. But it will be very interesting to see what we can all learn from new entrants into the market.

But whether we are talking about existing firms or new entrants for us at the LSC quality is the key.

One current quality issue is quality assurance for advocates, be they members of the Bar or Solicitor Advocates.

We are part of the ongoing dialogue to develop the Quality Assurance Scheme for Advocates (QASA). This is a major issue but responsibility for the design of the scheme rests with the regulators. I would also say that any decision on linking QASA levels to payments is one for ministers to make – not the LSC.

Our interest is to ensure that the agreed QASA scheme meets our requirements as the largest purchaser of criminal defence advocacy services.

I'm sure you'll be aware that the Government is putting the spotlight on waste and inefficiency in the criminal justice system. For example, the Crown Prosecution Service has made a major commitment to move to digital working this year.

We ourselves are planning to introduce more civil online working to grant legal aid and pay bills. But this is another area where we are working with legal aid providers. So, a pilot is being lined up to test the new ways of working. This will take place in South Tyneside in 2012.

A big challenge for the LSC as we move to agency status is the fact that we are downsizing and losing staff. Our admin costs are reducing and stand at £107 million for the current financial year. The Government's aim is to reduce our current spend by 23% over three years.

If you remember the figures for The Law Society's admin costs, which were 17 per cent of the then budget, our current admin costs at 5 per cent compare well.

We know that our financial performance is important to our reputation and to prepare us for our transition to an agency. Improvements to our financial checks and controls are continuing as we tackle issues identified by the National Audit Office and the Public Accounts Committee.

Last year's acknowledgement from the National Audit Office that the LSC had made "considerable progress" to reduce the level of legal aid overpayments to providers is particularly pleasing.

I should also mention that we have a new chief executive starting later this month (27 February). Matthew Coats joins us from the UK Border Force and will be building on the work of Carolyn Downs, who placed great emphasis on the importance of building relations.

I said at the start that when people question the future of legal aid I like to reflect on the start of our modern legal aid system – on 30 July 1949.

Over the succeeding decades since the Legal Aid and Advice Bill received Royal Assent a legal aid scheme has developed that serves England and Wales very well.

Yes, there are changes to scope and eligibility but it remains a system that compares favourably with any in the world. And our reduced budget of £1.7bn remains a sizeable amount for the new Executive Agency to work with. Criminal legal aid remains for all in the Crown Court, though the well off will have to repay through a system of means testing.

There is no question in anything now being proposed of any return to the ad hoc arrangements which existed before 1949.

So does legal aid have a future?

Yes.

Does that mean there will not be changes?

No.

But together the LSC and legal aid providers can manage the changes ahead.

Together we can deal with differences of opinion and robust exchanges.

And together we can ensure that clients receive high quality legal aid and that the interests of the taxpayer are protected.