

# ACCESS TO JUSTICE: A COMPARATIVE ANALYSIS OF CUTS TO LEGAL AID THE CHANGING FACE OF THE LEGAL PROFESSION

A short paper presented on 19<sup>th</sup> March 2014 to a symposium organised by the University of  
Warwick and Monash University Victoria Australia

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## Introduction

I qualified as a solicitor in 1974 at the beginning of the substantial growth in Legal Aid work. I have always worked in a single firm which had its origins in the East End of London. Because of the area in which we work we have relied very heavily on the Legal Aid fund and between 80 and 90% of our income still comes from that source.

Very early in the 80's I could see that the margins on Legal Aid work was significantly lower than in other areas of law, I took the view that the only way to make a sufficient profit to reward the partners and invest in the business, was to grow large. As a result and in anticipation of the latest round of changes we have taken part in a series of planned mergers that gives us access to the whole of the London market.

*"I have been personally involved in criminal law policy for very many years working on both what were the known as the Criminal Justice Consultative Committee and the Sentencing Guidelines Council. I was a member of the Law Society's Criminal Law Committee for 11 years and a member of the Legal Services Commission for 7 with non-executive responsibility for the Criminal Defence Service and the establishment of public defender service."*

I spend 4 months a year training other solicitors and this means I travel across the country and meet a very large number of my colleagues. I am very familiar with their anxieties and concerns, however, I have always had a bias towards a larger firm and my comments should be seen in that context. This paper is not based on detailed research, which is for others, but on my personal impressions

## **Setting of the context**

The primary difficulty facing criminal lawyers is that the work is intensely personnel heavy. If someone is arrested and to be interviewed a lawyer is needed to attend at the police station. If someone is to attend at court a lawyer is required to be at court with them. As Legal Aid rates have reduced it has not been possible to reduce proportionately the number of staff one requires, save where the courts themselves have amalgamated so reducing the responsibilities placed upon us. However the criminal justice system is appallingly inefficient so that any such benefits are soon lost. Criminal investigations also have little regard to defence responsibilities and the courts start later and take longer than has ever been the case.

## **The factors affecting change**

The main drivers of change have been:

- The level of demand
- The nature of remuneration
- The quality of the work
- Geographical issues, and as we move to the future,
- Technology

Technology has a very significant part to play in the future development of criminal law services. I work with a highly developed case management system operated on the Cloud so that we can work from any office and indeed at home to the firm's system. It has meant that we do not rely on any substantial secretarial assistance and have thus been able to cut our overheads in that respect. We would not have survived so long if that had not been possible.

We are beginning to see the use of technology in the courts. The use of video links is well established both from the courts to the prisons and from police stations to the courts. These are working well. The video links to prisons are particularly popular with clients so they do not have to move their belongings.

However, if a criminal defence profession is to survive a great deal more has to be done and it has to be done urgently. Sir Brian Levenson is now exploring the possibility of conducting some hearings by video and I welcome that investigation. It should be possible to conduct all preliminary hearings by video link without the need to travel- at all levels of court.

However, the greatest saving in time and cost would be to link solicitors to the police stations. We would then advise over the telephone and could sit in on the interview by the same link.

This is not without its difficulties. The first difficulty is one of confidentiality. New buildings are being constructed without any consideration of this aspect. *In a new police station in Wales the walls are so thin that even without video technology police officers can listen in on the privileged conversations between solicitors and their clients. With the need for some volume on the video screen this would be all too easy.*

However, we should not be afraid of this development as the new generation of clients is more than happy to work with a screen.

The second difficulty is the cost of investment. Criminal law firms do not have any money to invest and banks are increasingly reluctant to assist. The government hope that special schemes can be developed but the interest rates on these schemes are at present prohibitive.

### **The old face of the legal profession**

I joined a relatively small firm in 1972 *as an articled clerk*. That was the shape of most firms that practised in criminal law at the time. The work was substantially local. Quality was basic. Firms were supported by a small able Bar. Fees were based on hourly rates. Firms undertook Legal Aid work as an act of social responsibility and were happy to cross subsidise.

### **The initial growth of the professions**

The coming of the duty solicitor scheme in the 1970s and its extension to the police stations in the 1980s, led to a huge increase in demand and with hourly rates firms expanded rapidly. The Bar also grew rapidly and quality was very varied including at the most senior levels. For solicitors the quality had to be pushed up and the accreditation scheme was introduced to ensure that suitable staff were undertaking police station work.

*The need to maintain a quality of work is something to which I have always been committed. The peer review initiative was one of the most positive of my time at the Legal Services Commission. However, its cost has now meant it is purely a policing exercise for very bad firms rather than a process by which quality standards could constantly be improved, the purpose for which it was designed.*

### **The recent face of the legal profession**

With such growth, controls on expenditure became inevitable. Fixed fees replaced hourly rates. Firms began to realise that profit margins from criminal law were very different to that from other areas of practice. Cross subsidisation became impossible. In firms of all sizes the criminal law team became marginalised and split away to practise on their own. This increased specialisation and where there was specialisation quality improved. When the Bar negotiated a good pay settlement, solicitors realised that advocacy in the higher courts could increase their income and the Bar began to come under pressure.

### **The professional firm of the future**

The government's announcement that there is over a 2 year period to be a further reduction of 17.5% in income is a devastating blow. For those of us in London we are having great difficulty understanding how we are even meant to survive the first 8.75% part of this reduction. To introduce the reduction ahead of market change was deeply ill-judged. We have not been making profits at that level for some time and have only survived so far by investing heavily in technology and reducing every possible overhead. The issue both in London and elsewhere is whether the full reduction can be met by increase in volume, but nothing is to be done in this respect for 15 months at least. The problems are exacerbated by falling rates of prosecution

with substantial diversion away from the courts. The decision to require that major firms outside London should reduce their case loads is an extraordinary one based in a theory of competition, but does not recognise the reality of the expertise on the street.

Outside the “Carter” (urban) areas firms remain small and growth will be challenging- the possibility of partnerships being allowed is a significant gain.

In London with a very large number of bidding areas; it is possible that firms will become of a size that they can recover the 17.5% reduction.

What do I therefore see as the future? It seems to me that it is very questionable what type of service will survive the next year. Quality must be substantially in doubt.

If we manage to bring enough larger firms into existence to take up the work in the country areas, in the conurbations outside London to take up the work given up by large firms, and to cope with the workload in London it is possible that a service of sorts will continue. That description alone identifies the risks

The Bar cannot survive in its present form. Although I have in the past been critical of the earnings of the Bar my view is that their pay is now so low that no person can reasonably be expected to attend at a Crown Court for a single case. The Bar will have to shrink substantially in size and become a trials only profession. Most barristers will first qualify as solicitors to gain their general experience. Only the best will transfer to the Bar. Quality will improve

We will see solicitors increasingly working from home to avoid the cost of rent with centralised interview facilities for those clients who choose to come to the office. These will be serviced offices because one could not take on the obligation of a rent when there is a new bid round only 4 years away and one that may very well be price sensitive.

There is already a substantial proportion of the criminal law profession working only as self employed agents. They will increase in number and the new contracts will

allow 25% of work to be undertaken by them. My anticipation is that the figure will be higher, continuity if representation will again become an issue.

For the first time I believe that the whole existing system could collapse.

Whether it does or not, a service of sorts will have to be provided. For me the test is whether that will be an industrial service where clients are not seen as individuals, or a service more akin to the best supermarkets that can provide high quality in large quantities. The firms of the future will have to be carefully structured, which clients may not appreciate. Salaries will be modest even by the standards of public service. To recruit the best as we do now will be a remarkable challenge.

A quality service is not impossible but the chances are I conclude sadly stacked against it.