Lawyers and the Future of Legal Aid

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I had a profound sense of disappointment several weeks ago when reading the Law pages of The Scotsman. Amongst the ‘funnies’ was a short paragraph concerning a party litigant who was to be listed as a vexatious litigant. After noting how the individual admitted that he conducted proceedings in a manner that was as obstructive, time consuming and expensive a manner as possible for his opponent, the newspaper suggested that he ought to consider a career in the legal profession.

I recognise that in the public consciousness, lawyers are not particularly popular. Despite much-touted research by the Law Society of Scotland that most clients are happy with their own lawyers, the overall image of lawyers is frequently a negative one. One commonly asked question is “how can you defend people you know are criminals?”. This inevitably leads me into an explanation of the professional code of ethics about what is and what is not permissible in representing someone who admits to having committed the offence they are charged with, the role of giving advice, and the reasons why all people are entitled to representation and advice regardless of the crime they are accused of. The intention is to help the questioner understand that criminal lawyers (and lawyers generally) perform a necessary and creditable job in protecting the rights of the individual.

A further popular perception is that lawyers make their livelihood from their clients’ misery. Those who believe that also assume that lawyers manipulate the legal system in order to maximise their incomes at the expense of the best interests of their clients. This perception also assumes that all lawyers are corrupt and that the entire legal system is inherently self-serving and corrupt. This is not a portrayal I can accept as accurate. There will always be some people who act in this manner. As in all walks of life, there will be people who make mistakes or deliberately act in their own selfish interests. Mistakes do not make people dishonest. Actual dishonesty by lawyers is fortunately rare.

What has all of this got to do with the future of legal aid? Quite a lot, I believe. One would have to possess the instincts of an ostrich and a neck longer than a giraffe to realise that there are likely to be significant changes to the provision of legal aid in Scotland within the next couple of years. The current Scottish Government has got some very difficult financial decisions to make in light of the cuts to its funding which will result from the UK Government’s public spending cutbacks. The decision not to implement immediate changes means that this winter will see a double-whammy of stored up cuts together with further cutbacks arising from the Chancellor’s Comprehensive Spending Review in October. I believe that it will not only be impossible for legal aid financing to escape the cutbacks, but that it is inevitable that this leads to a major review of legal aid provision in Scotland. In turn, that could have a profound impact on the provision of legal services. It will also have a profound impact on access to justice.

There are already a few tentative signs of where we are heading. Before looking at these however, let us look at what is happening in England. As in many areas, the system for delivering legal aid in England is quite different to that in Scotland. Both jurisdictions have to confront the same problems, and in many areas of the law it is neither surprising nor unusual to find that each jurisdiction has come up with the same or similar answers (even if they used different routes to get there).

Contracting & Tendering

A number of years ago the English went down the route of contracting for legal aid work. A solicitor would not automatically provide legal aid but if (s)he chose to do so, they had to agree to a contract with specified conditions and standards. Hourly rates for work done were replaced with fixed fees. The result is that some types of work were slightly more profitable than others. This required loss-making areas of legal aid work to be cross-subsidised by those areas that made a profit. It also discouraged practitioners from loss-making types of work. Another consequence of the change from hourly rates to fixed fees was that legal service providers had to obtain loans in order to cover outlays for work in progress. In the case of the charity Refugee and Migrant Justice (originally the Refugee Legal Centre) this process led to the organisation being forced into administration and closing its doors in July 2010.

The process of contracting has now developed into a process of tendering. Tenders will be issued for different types of work. With the exceptions of crime and mental health, it also means that contracts will be awarded to the lowest bidder. It is clear that there is considered to be an ‘over-supply’ of providers in some geographical areas for certain types of work. The new tendering procedures will mean that there will be fewer providers of legal aid legal services. A further result of this process is that a client will not necessarily be able to use the same solicitors for family law and housing law problems. Some firms and organisations will bid as a consortium. A major concern is that many current legal aid providers will be forced out. This will happen either because they do not get a contract for their geographical area, or they do not get enough work under their contract for it to be economic to continue to provide a service. England has been experimenting with a public defender service. This has raised concern about the creeping introduction of a full public defender service in place of independent criminal lawyers. The Legal Services Commission is directing funding towards advice services working in conjunction with solicitors.
Cut backs

A cut back in criminal legal aid fees was announced in December 2009 as part of the Labour government’s own savings for 2010/2011. In addition to further cuts in criminal legal aid fees the last Government also announced plans to restrict civil legal aid for non-UK residents and in judicial review cases. This was all part of a process of finding £343m in efficiency savings, and a further £360m in savings in the criminal justice system and in legal aid. The new Government announced a review of the legal aid system in June 2010. Jonathon Djangoly, the legal aid minister, has said that legal aid will be part of the process of further cuts. The Secretary of State for Justice, Kenneth Clarke, is apparently considering proposals to force people to take out insurance against the possible costs of legal action. In England 80% of the population was eligible for means tested legal aid in 1950. That figure had fallen to 29% by 2008. It is difficult to see how eligibility for legal aid and access to legal aid services will not fall further in light of the changes already in hand, as well as whatever is still to come.

Follow Thy Neighbour?

In Scotland we are already well down some of the paths that are being trod in England. Procedures in the civil and criminal courts have been substantially revised already with a view to making the system more efficient and cheaper. The transfer of work away from the High Court of Justice towards the sheriff courts is part of the same process. We too have seen the introduction of public defender solicitors’ offices, and direct funding of legal services to different bodies. Fixed fees for work have been introduced and then not uprated in subsequent years. The result is a progressive cut in legal aid fees for people doing this work.

Another trend has been to divert the provision of certain types of work away from lawyers. The in-court advice services are one example. Not everyone wants to see a solicitor. This is often because of concerns that they will have to pay to do so, or because they do not think that a solicitor would be able to help. Whatever the reason, the ability to get such advice has been an important way of increasing access to justice. It has allowed people with housing, debt, consumer credit, welfare benefits and similar problems to get assistance where they might well have no help at all. For registered social landlords it has had benefits too as it often means that they have been able to get rent arrears issues sorted out without having to go through a time consuming and costly litigation and eviction process. These initiatives are further extended by the Home Owner and Debtor Protection (Scotland) Act 2010 which allows non-legally qualified representatives to act for defenders in mortgage repossession cases.

We should anticipate that, at the very least, past trends will continue. This means, for example, that lawyers’ fees in civil legal aid cases will come under close scrutiny. We should expect to see proposals for a major revision of the civil legal aid regulations, moving towards fixed fees for every area of work with little or no room for discretionary decision making by auditors of court. Once fixed, it is unlikely that those fees will be reviewed for many years to come. Scotland has not gone down the route of contracting (yet), but there are signs of a tendency towards that. The Draft Proposed Guidance – Verification of Financial Eligibility for Advice & Assistance / ABWOR Civil and Children’s Cases was highly prescriptive. Essentially it set out contractual conditions before work could qualify for payment, with the onus being thrown entirely on the solicitor. The proposal was bureaucratic and would be resource intensive to operate. It also manifested a considerable distrust of the legal profession. The only need to be that specific and mandatory is because of an implied underlying assumption that the lawyers operating it could not be trusted to act honestly. The impression that is beginning to come through from the Scottish Legal Aid Board, and many of our politicians, is that it is they who know best how to operate legal services, and that it is the lawyers who are the problem.

Another question is, what does all this mean for the Gill Review? It seems unlikely that the Scottish Government could afford to push ahead with expensive structural reforms at a time when every aspect of public spending is under such strong pressure to find cost savings. Will there be a desire to remove even more areas of work away from lawyers and into the hands of lay representatives as an alternative? Will the funding be there to ensure that there is no drop off in quality of representation as a consequence? Civil servants and politicians might see lawyers as a problem. It is these lawyers though who have worked so hard over many decades to defend the rights and improve the lives of the socially excluded on a practical level on a daily basis.

My fear is that legal aid will yet again be seen as a soft target. Attacks on lawyers and lawyers fees will resonate well with the general public, but it is the same public who will end up suffering the most as legal aid services shrink under the burdens of economic reality and regulatory disdain. Legal aid remained a Cinderella public service, but it is the lawyers who are the problem. Legal aid remained a Cinderella public service, but it is the lawyers who are the problem.

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