

# THE HISTORY OF LEGAL AID 1945 - 2010

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By Sir Henry Brooke

## **Bach Commission on Access to Justice – Appendix 6**

This paper sets out the origins of the legal aid system and how it developed over the years until the election of the coalition government in 2010

*Please note: This appendix was written by Sir Henry Brooke and considered by the Bach Commission. It should not be read as the collective work of the commission.*

## Appendix 6: The History of Legal Aid 1945-2010<sup>1</sup>

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## Preface

Between May and July 2016 I was involved in the task of sorting out and reordering the large quantity of valuable information which came to Lord Bach's Access to Justice Commission in response to its Call for Written Evidence.

It seemed to me unrealistic to attempt to chart the future without understanding something of the past, and in this essay I will be sketching out the history of legal aid in England and Wales between the report of the Rushcliffe Committee in 1945 (which led to the Legal Aid and Advice Act 1949) and the fall of Mr Gordon Brown's Government in May 2010.

In this endeavour I have drawn very heavily on three books published by the Legal Action Group which are all still available through its online website: *Justice, Redressing the balance*, written in 1997 by Roger Smith, when he was still director of LAG; *The Justice Gap*, written in 2009 by Steve Hynes, the new Director of LAG. and the journalist Jon Robins; and *Austerity Justice* (2012), also written by Steve Hynes. I have also drawn on three volumes in the Hamlyn Lectures series – the State of Justice (Michael Zander, 2000), Judging Civil Justice (Hazel Genn, 2008) and Lawyers and the Public Good (Alan Paterson, 2012). All these books form compulsory reading for anyone studying this subject.

It is not possible to understand the growth of expenditure on legal aid without appreciating that in England and Wales our form of adversarial system of justice is very much more complex (and much more expensive as a direct consequence) than the systems of justice in other developed countries. As a former chairman of the Law Commission I know that there has never been any very effective drive to simplify the law, and Parliament has shown no inclination or willingness to do anything other than add year by year to a mass of often fiendishly complicated legislation. And when successive official reports have recommended some limitation in the scope of the jury system, Parliament has always rejected the call, without doing anything very much by way of recognising just how expensive this system is when it is used for long, complex trials. These are some of the reasons why it has been ludicrous for ministers, arriving new to the problems, to repeat the mantra that we have the most expensive legal aid system in the world without doing anything much to understand, let alone to try and remedy, the underlying causes.

Professor Paterson observed in 2012 (see page 75 of his book of lectures) that recent research had showed the bulk of the drivers for the increasing cost of legal aid lay outside the control of the legal profession. They included the creation of more and more criminal offences and the passing of more and more legislation without proper impact assessments; playing intergovernmental budget games – over VAT on legal fees and increasing court fees – which involved huge payments to the Treasury; and the failure of government agencies (central and local) to fulfil their legal obligations. This final point came up again and again in the evidence we received on the need for costly tribunal systems in the social welfare field to undo the effect of swathes of bad initial decisions that are made within Government.

Sir Henry Brooke  
August 2017

## The Origins of Legal Aid

Although access to the courts has long been recognised as a constitutional right, there was – until relatively recently – no constitutional right to the provision of legal assistance at public expense if one could not afford a lawyer, although from time to time statutory or quasi-statutory arrangements provided some form of help. For instance, the Court of Requests, established by the Privy Council as a poor man’s small claims court in Tudor and early Stuart times, provided legal help for those who needed it, and in more recent times the Poor Prisoners Defence Act 1903 ensured that legal aid would be paid once it was decided that a prisoner had a defence.<sup>2</sup>

There was also the Poor Man’s Lawyers movement, first established at the end of the nineteenth century at Mansfield House and Toynbee Hall, charitable settlements in East London, which provided pro bono help that stopped short of representation in court. In 1926 one of its founders explicitly recognised the limitations of charity in providing access to justice, saying that it made the rule of law “an anaemic attenuated make-believe which we flash in the eyes of the poor as justice”.<sup>3</sup> A little earlier a committee chaired by Mr Justice Finlay, responding to a witness who had used the analogy of health to argue for a “Legal Hospital System”, expressed the view that while it was the state’s interests for people to be healthy, it was not necessarily in its interest for them to be litigious.

There was always a tradition by which lawyers on occasion provided pro bono services on an ad hoc basis, but this was an unpredictable source of assistance and attracted a strong social stigma because of its explicit link with the concept of pauperism.

During the Second World War the Law Society had had to set up a salaried divorce department because of the non-availability of pro bono lawyers, but it was not anxious to continue this service after the war, and in 1944 the Coalition Government set up the Rushcliffe Committee, chaired by Lord Rushcliffe, a former backbench Conservative MP, to advise it on the way forward.

The Committee reported in 1945, and the post-war Labour Government accepted its recommendations, saying in a White Paper in 1948 that legislation would be introduced

*“to provide legal advice for those of slender means and resources, so that no one would be financially unable to prosecute a just and reasonable claim or defend a legal right; and to allow counsel and solicitors to be remunerated for their services.”*

Legal aid, however was never one of the four pillars of the new welfare state.<sup>4</sup>

Under the Legal Aid and Advice Act 1949 legal aid was to be available in all courts and tribunals where lawyers normally appeared for private clients. Eligibility should be extended to those of “small or moderate means”, and above a free limit there should be a sliding scale of contributions.

There should be a test of merit: for civil cases they should be judged on a basis similar to that applied to private clients. Legal aid was to be funded by the state, but administered by the Law Society. The Lord Chancellor was to be the responsible minister, assisted by an advisory committee. Means investigations were to be undertaken by the National Assistance Board. Barristers and solicitors should receive adequate remuneration.

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<sup>2</sup> In CJ Sansom’s novel *Revelation*, set in 1543, the hero Matthew Shardlake was one of two barristers appointed to plead before the Court of Requests in support of poor men’s pleas. He was promoted to sergeant at the time of his appointment.

<sup>3</sup> FCG Gurney Chapman, *Justice and the Poor in England* (1926) p 21.

<sup>4</sup> These were the NHS; universal housing; state security (benefits); and universal education.

The essence of the system established by this Act was that if a citizen with a legal problem could establish that he/she qualified for legal aid under the means test and the merits test, he/she had an entitlement to legal aid. There was an annual budget approved by Parliament, but if the budget was exceeded, a supplementary grant was always obtained. This applied to both civil and criminal legal aid.

The history of legal aid since then can be conveniently divided into six periods:

- I. **1945-1970.** The foundation of legal aid. The emergence of the first challenge to its structure through the law centre movement.
- II. **1970-1986.** The opening of the first law centre in North Kensington. This period witnessed the absorption by the private profession of the law centre threat.
- III. **1986-1997.** Lord Hailsham, as Lord Chancellor, initiated the first intended cuts to civil legal aid eligibility. The Conservative Government began to prioritise the restraint of the legal aid budget in the face of unprecedented rises in cost. A Consultation Paper was published in 1995 and a White Paper in 1996. The Labour Party, which won the 1997 election, had a looser commitment to future policies, but it was determined to live within the Conservative party's spending estimates.
- IV. **1997-2005.** The Access to Justice Act 1999 created a new Community Legal Service and a Criminal Defence Service. The former represented an attempt to plan the provision of poverty legal services through Community Legal Service Partnerships, but this ambitious project had failed by 2005 when new policies had to be adopted. The latter created a structure for the provision of criminal legal aid, which was continuing to increase in cost at an exponential rate. It also saw the absorption of criminal legal aid in the Crown Court and the higher courts into the mainstream legal aid budget.
- V. **2005-2010.** The legal aid budget had now been brought more or less under control at a figure of £2.1 billion, but Community Legal Advice Centres (or Networks), a new venture, were showing no signs of becoming firmly established, and there was a long-running dispute between the Government and the legal profession over the former's desire to introduce arrangements for price competitive tendering for legal aid contracts.
- VI. **2010-2016.** The austerity policies of the new Coalition Government required significant cuts to be made to the legal aid budget. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made very substantial changes to the arrangements for civil and family legal aid, introducing for the first time the concept that legal aid would only be available for those legal topics which came within the scope of the new statutory scheme. Lawyers' fees were reduced, and the dispute about the appropriateness of competitive tendering in the criminal courts continued to rumble on.

### **The First Period (1945-1970)**

In considering how to replace the Law Society's salaried divorce department with a statutory scheme of legal aid and advice with more ambitious credentials the Rushcliffe Committee rejected a service by salaried lawyers oriented towards the particular needs of the poor, an idea put forward by the Haldane Society, under which legal aid would be based in a thousand of the new Citizens Advice Bureaux. It also rejected an idea by the Poor Man's Lawyers' Association, which would have given priority to Rent Act disputes, workmen's compensation claims, small claims and hire purchase disputes.

Divorce work in the High Court was to be the first target of the new scheme, and there would then be a gradual extension of the scheme into other areas of civil work. In the early 1960s legal aid was available in the county courts and in the magistrates' courts. Criminal legal aid expanded in the 1960s, particularly after a committee chaired by Mr Justice Widgery had identified with clarity in 1964 the principles on which legal aid should be available to those charged with criminal offences in magistrates' courts.<sup>5</sup> The administration of criminal legal aid in the Crown Court and also in the higher courts was until quite recently under the control of those courts.

By 1970 overall legal aid expenditure was still low. There had been an annual rate of expansion of over 50% in terms of costs, but the scheme was still overwhelmingly concerned with the consequences of divorce and other matrimonial problems. Social welfare law<sup>6</sup> was largely ignored. A 1969 survey of legal aid certificates in Birmingham revealed 86% family; 9% personal injury, and 5% others.

In 1969-1970 the Advisory Committee said that greater attention should be given to the needs of people appearing before tribunals. It called for some form of ancillary legal services. This was the time of the radical lawyers' movement in the USA, which supported the civil rights movement in the 1950s and 1960s and led to the acceptance of legal services as an integral part of President Johnson's "war against poverty".

In the Society of Labour Lawyers' pamphlet *Justice for All* (December 1968) Michael Zander described the work of the US neighbourhood law firms in the United States. In this country community-based groups were now springing up, and community action involved experiments with the use of the law to back its campaigns. At about the same time Conservative Lawyers published a pamphlet called *Rough Justice* which called for more planning of legal services, together with grants for solicitors to set up practices in poorer areas.

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<sup>5</sup> Crown Court cases and criminal cases in the higher courts were not included in the legal aid budget until April 2003.

<sup>6</sup> This term included landlord & tenant, immigration, welfare benefits, consumer law, debt, and employment cases.

The first law centre was opened in North Kensington on 17<sup>th</sup> July 1970. Its lawyers worked with the Notting Hill Residents' Association. Its aim was to provide:

*"a first rate solicitors' service for the people of the North Kensington community; a service which is easily accessible, not intimidating, to which people could turn as they would to the family doctor – or, as someone who could afford it, to the family solicitor".*

In answer to this initiative the Legal Aid Advisory Committee advocated the creation of a new and flexible legal advice service, whose beneficiaries would be the private profession. Law centres, it thought, should be transferred to the direct control of the Law Society.

### **The Second Period (1970-1986)**

Legal Aid expanded throughout this period both in its range of schemes and in expenditure. A new Green Form scheme was introduced for advice and assistance on any matter of English law on the basis of a simplified test of income and expenditure, which was carried out by the solicitor.

Duty solicitor schemes in magistrates' courts were gradually expanded, and they became statutory in 1984. Duty schemes for advice in police stations, as per the Police and Criminal Evidence Act 1984 (PACE), were introduced two years later.

At the beginning of this period legal aid had constituted a very minor source of income for the legal profession. By 1975-76, however, it constituted 7% of the total fees earned by solicitors, rising to 11% ten years later. 30% of the Bar's income came from legal aid in 1977 (20% of it from criminal legal aid), when the Royal Commission on Legal Services pointed to the Bar's dependence on legal aid as a source of income. During the 1970s the number of those practising at the Bar roughly doubled, while the size of the solicitors' profession increased by 50%.

The causes of the increase in legal aid expenditure included a massive increase in criminal work, with legal representation for criminal cases in magistrates' courts now being the norm: there was an increase from 20% in 1969 to over 80% in 1986 in the number of defendants represented on legal aid in indictable offences in the magistrates' courts.

There was also a soaring divorce rate, rising from 4 in 1,000 marriages in 1968, to 9 in 1,000 three years later, and just under 13 in 1,000 in 1986. Legal aid was not available for the divorce itself from 1977 onwards, but the number of ancillary applications relating to maintenance and children continued to rise, as did the number of women seeking protection from domestic violence.

Eligibility for legal aid originally included 80% of the population. In 1973 the figure was 40%, but by 1979 it had increased to 79%. It retained this level in the early 1980s before falling during the rest of that decade.

The introduction of the Green Form scheme had originally been advocated by the Law Society for the purposes of the social welfare law work pioneered by law centres, but in fact over 50% of the Green Form bills in 1985-86 related to personal injury, crime and family matters. There was a growth in the

number of Green Forms in social welfare law from 27,000 (1975-76) to 172,000 (1985-86), but as a percentage of the total number of all green form bills the increase in social welfare law advice increased from only 11% to 17%.

The numbers of law centres steadily increased, first in London, and then in the provinces as well. The Law Society hoped to control them by setting conditions on the waiver of professional rules on advertising and sharing fees. In its report for 1973-74 it attacked law centres for stirring up political and quasi-political confrontations. Lord Elwyn-Jones, the Lord Chancellor, then brokered an accommodation whereby law centres could not compete with private practices in traditional areas such as adult crime, matrimonial work, personal injury, probate and conveyancing. The Law Society would then grant the necessary permissions. In 1979 the Law Society told the Royal Commission on Legal Services that law centres were not a threat: indeed, they generated work for private practices.

During the 1970s, in spite of their steady growth, there were danger signals for law centres over their financial viability, and in 1975 Central Government funding was made available for eight law centres which were in financial difficulties. So far as the advice sector was concerned, CABx were established during the Second World War, but they were then neglected. In the 1970s, however, they increasingly found favour with local authorities, and their numbers doubled from 473 in 1966 to 869 20 years later. The volume of inquiries more than quadrupled (from 1.3 million to 6.8 million). Several hundred, independent advice centres were also set up and there was a gradual development of local authority-funded specialist advice services, some provided by the local authority and some voluntary, mainly for housing, social security and debt.

There were a few small experiments in the employment of lawyers in the advice sector. A combined CAB and law centre was established in Paddington in 1973, and another in Hackney in 1976. Community lawyers (who gave advice and also trained legal advisers) were employed by CABx in North Kensington, Lewisham and Waltham Forest. By 1977 ten CABx employed lawyers, and the National Association of Citizens' Advice Bureaux (NACAB) resolved to develop more posts. They developed the idea of "resource lawyers" who would assist the overwhelmingly lay workforce of the bureaux.

The Royal Commission on Legal Services (1976-79) recommended no great changes. It appeared to be almost hostile to law centres and salaried lawyers' services. It considered that the time had come to move from a period of experiment to one of consolidation. It was in favour of continuity, the orderly development of services, adequate resources, and proper administrative and financial control. Law Centres should be transposed into more manageable and better managed citizens' law centres.

The Commission also adopted a conservative line in relation to CABx. It said the division of function between the CAB service's paralegal work and the use of professional lawyers was now on a sensible and practical basis, and it should stay that way. CABx should not build up teams of lawyers to give legal advice to individuals.

When the Conservative Government came to power in 1979, it continued the existing funding support for the eight law centres, but said that as a general rule law centres should be funded by local

authorities in future. Until 1982 the Department of the Environment had funded many new law centres and other advice centres through its Urban Aid programme. After 1982 local government was increasingly the major funder of agencies giving advice in the social welfare law field. Conservative local authorities, however, were largely reluctant to fund law centres. As a result, financially secure law centres were increasingly to be found in Labour areas throughout the 1980s and 1990s. Law centres were never a large enough force to dominate the mainstream of publicly funded services. They survived in relatively small numbers on the periphery of things, and in general attracted very low levels of local government funding.

Local authorities tended to be more greatly impressed by the claims of advice agencies, whose numbers and funding increased massively. Under Ken Livingstone the GLC produced a positive flood of funding for advice agencies providing advice in general and welfare benefits work. In the 1970s there had been periods when a degree of rivalry between law centres and the advice sector was apparent, but in the following decade it looked as if the two sectors had embarked on different courses.

From the 1980s onwards the rising cost to the taxpayer of the legal aid budget became increasingly a matter of political concern. By 1986, total payments under all forms of legal aid were £419 million, and the net cost to the Exchequer (when client contributions and other costs recovered had been taken into account) was £342 million. The cost of criminal legal aid was now well over 50% of the total budget. The share of criminal legal aid in the magistrates' courts had doubled since 1969-70. It was now 25% of all legal aid costs. In February 1986, there was the first major cut to entitlements. Dependents' additions were slashed by 17%.

In 1986 the Cabinet Office's Efficiency Scrutiny of Legal Aid laid the ground for the transfer of legal aid administration from the Law Society to a new Legal Aid Board [LAB]. This was a technical and overdue recognition of the proper roles of government and the professions, but it was also a defining moment, and it saw the beginning of a new era. In December 1988 Steve Orchard, who had spent his whole working life in the service of the courts, was appointed the first chief executive of the LAB, a post he held<sup>7</sup> for the next 15 years.

### **The Third Period (1986-1997)**

#### **The increase in costs of the legal aid scheme**

The legal aid debate since the mid-1980s was increasingly dominated by its cost. In 1985-86 the total cost was £319 million, and this had risen to £1.4 billion by 1995-96 (civil – including family – £675 million; criminal £530 million; advice and assistance £272 million). In the decade between 1986-87 and 1995-96 the average annual increase in expenditure was 16%: in three years (1990-91, 1991-92 and 1992-93) the annual rise was 20% (in 1991-92 it was almost one third). These rises far outstripped the number of bills paid. One cause of the increase, though a minor contributor to the total picture, was the greater involvement of solicitors in advice/assistance work, especially social welfare law:

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<sup>7</sup> He became chief executive of the Legal Services Commission when it replaced the Legal Aid Board in 2000.

*Table: increased involvement of solicitors in advice/ assistance work*

	<b>1986-87</b>	<b>1996-97</b>
<b>Green form advice (bills paid):</b>	980,507	1,531,972
<b>Social welfare green form advice:</b>	356,272	744,936

There was also a disproportionate increase in immigration/ nationality and welfare benefit matters because of:

- a) a tightening up of immigration legislation and greater sophistication by lawyers in response; and
- b) the fact that a lot of firms hired welfare benefit workers from the voluntary sector. The quality and depth of the advice they provided is unknown.

### **Cuts in Eligibility**

Lord Mackay (who was Lord Chancellor between 1987 and 1997) made cuts in eligibility and decided to move towards standard fees. As a result, by the mid-1990s the increase in the total number of cases was more or less equivalent to the increase in total cost. Criminal legal aid was more or less protected.

Under the cuts to civil legal advice eligibility, the contributory levels of qualification were totally removed, and the scheme was reduced to bedrock eligibility at income support rates.

Civil legal aid eligibility was also in the firing line. This table shows the percentage of households eligible for civil legal aid on income grounds:

<b>1979-80</b>	<b>77%</b>
<b>1992-93</b>	53%
<b>1993-94</b>	48%
<b>1994-95</b>	47%

Legal aid became increasingly available only to those whose income was at the lowest levels, together with those who had to pay contributions at higher rates for longer periods. By 1996-97 7.5% of all those who were offered legal aid were liable for contributions at an annual rate of more than £500.

### **Law centres and nfp advice agencies**

There was a total of 56 law centres in 1986, and 53 in England and Wales alone in 1997. The increase in green form payment to both law centres and nfp agencies employing lawyers is shown in this table:

<b>Green form payments</b>	<b>1990-91</b>	<b>1996-97</b>
Law centres	£1 million	£1.8 million
Advice agencies employing lawyers	£202,000	£1.9 million

The LAB also dispensed about £2 million to agencies which did not employ lawyers, as part of a pilot project. Although law centres received £2.1 million out of £2.4 million in 1990-1, five years later they received a much smaller share (£3.7 million out of £8.2 million) of the money paid to all not for profit [nfp] organisations. Law centres gave high priority to serving ethnic minority communities, but they were dwarfed by the number of advice agencies.

In 1995-96 900 organisations were members of the Federation of Independent Advice Centres. Within the CAB service there were over 700 separate bureaux (and over 1,000 outlets). CABx dealt with 6.5 million problems brought to them by 3.5 million people. The strength of the advice sector here meant that we had no network of centrally funded law centres as in Ontario and Australia. The national Government grant to NACAB was £12 million. In contrast the LAB grant to the Law Centres Federation was £67,000.

In order to improve the quality of provision, the LAB created a system of legal aid franchises in which a firm's performance would be measured by agreed quality levels in return for receiving benefits in the way the LAB treated them. In its 1991-92 report, it set out three major areas in which quality could be measured. Adequate performance was required, as gauged by visits which included a measurement of performance in three separate areas:

- General management – measured by the Law Society's Practice Management Standard;
- Competence at form filling – easily measured;
- Work done for clients: files were picked at random, and a non-lawyer would assign a standard score, measured against a standard list.

This approach went some way towards developing a credible system for assessing the quality of legal aid firms' advice that was previously absent. The LAB revisited the practice of peer review and found it prohibitively expensive.

### **The introduction of a cap to legal aid expenditure**

In July 1995 Lord Mackay responded to pressure from the Treasury in a Green Paper<sup>8</sup> which outlined radical proposals for altering the existing legal aid scheme. By far the most important was the proposal that legal aid expenditure should be capped or subject to a ceiling. A fierce critical reaction followed.

In July 1996 Lord Mackay's White Paper<sup>9</sup> broadly confirmed the plans he had outlined the previous year.

As at April 1997, 1,740 offices (out of 12,000 who were paid for legal aid work) had a franchise in at least one area of work. The LAB said its target was 2,500. They conducted two pilot programmes in the use of nfp agencies. The first, which provided grants to law centres etc. to explore various alternative methods of delivering services, did not produce any practical long term results. The second, however, which examined whether advice agencies could deliver legal advice, as recommended by the Cabinet Office's 1986 Efficiency Scrutiny, was claimed to be great

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<sup>8</sup> *Legal Aid – Targeting Need*, Cm 2854 (1995).

<sup>9</sup> *Striking the Balance*, Cm 3305 (1996).

success. However, more than a third of the people interviewed by the 42 pilot agencies were ineligible for legal aid, and the agencies undertook relatively low level advice. Only a few did more than this.

This third period in the history of legal aid ended with the election of the Labour Government in 1997.

### **The Fourth Period (1997-2005)**

Between 1997 and 2005 expenditure on civil legal aid fell by a quarter in real terms, while spending on criminal legal aid increased by 37% in real terms.<sup>10</sup> This increase in expenditure on criminal cases was mirrored by an increase in the cost of the Crown Prosecution Service by over 46% between 1998-99 and 2004-05, which the Government attributed to its determination to tackle persistent offending and anti-social behaviour and to increase the number of offenders brought to justice.<sup>11</sup>

In cash terms, the Legal Services Commission's net expenditure on criminal legal aid and civil legal aid (in all its forms) in the last five years of this Fourth Period is shown in the following tables:<sup>12</sup>

	<b>Criminal Defence Service</b>	<b>Crown Court &amp; higher courts representation</b>	<b>Total</b>
<b>2000-1</b>	£450 million	£422 million	£872 m
<b>2001-2</b>	£508 million	£474 million	£982 m
<b>2002-3</b>	£526 million	£569 million	£1,095 m
<b>2003-4</b>	£523 million	£645 million	£1,178 m
<b>2004-5</b>	£509 million	£682 million	£1,191 m

	<b>Legal Help</b>	<b>Civil Representation</b>	<b>Total</b>
<b>2000-1</b>	£232 million	£560 million	£792 m
<b>2001-2</b>	£258 million	£476 million	£734 m
<b>2002-3</b>	£329 million	£483 million	£812 m
<b>2003-4</b>	£384 million	£514 million	£898 m
<b>2004-5</b>	£356 million	£490 million	£846 m

A graph on page 26 of Sir Ian Magee's *Review of Legal Aid Delivery and Governance* (2010) shows the steep decrease in civil non-family legal aid expenditure following the removal of much civil legal aid representation from scope that was effected by Schedule 2 of the Access to Justice Act 1999. The graph shows a decrease in cash terms from about £400 million in 1996-97 to about £200 million in 2004-05.<sup>13</sup>

<sup>10</sup> Hazel Genn. (2008) *Judging Civil Justice*, p 41.

<sup>11</sup> DCA. (2005) *A Fairer Deal for Legal Aid*, Cm 6591, Figure 5.

<sup>12</sup> The figures are derived from the tables that appear in successive Annual Reports of the Legal Services Commission from 2000-01 onwards.

<sup>13</sup> On the other hand, expenditure on legal aid in immigration work is shown to increase from a negligible level in 1996-97 to about £200 million in 2004-05 before starting to fall off again.

Expenditure on all forms of family legal aid, on the other hand, remained fairly steady in cash terms at about £400 million throughout this fourth period.

The period also saw the rise and fall of the first determined attempt to match the provision of advice in social welfare law [SWL] with the identified need for it in different parts of the country.

Throughout this period the Legal Services Research Centre, which was founded by the Legal Aid Board in 1996, was doing valuable work in studying the phenomenon of “problem clusters” and identifying the needs of people for legal advice at grass roots level.

The Legal Services Commission was also running an admirable scheme of sponsoring the training of lawyers in legal aid firms and in some of the law centres, so that there would be a cadre of newly trained legal aid lawyers to provide continuity of provision in the future.

Both the Research Centre and the training scheme were axed when the Coalition Government came to power in 2010.

### **The Community Legal Service**

New Labour’s manifesto for the 1997 General Election contained a commitment that a new Community Legal Service would provide the public with a comprehensive network of legal support. This would match local demand with available provision. Its proposals also included the introduction of better regional planning of services and a wide-ranging review of legal aid provision. Lord Irvine, who was Lord Chancellor between 1997 and 2003, had a coherent vision for the service. His ambition was to co-ordinate a raggedly disparate landscape of providers. He always faced the problem, however, that the Treasury did not regard expenditure on legal aid as a spending priority, so that no new money was allocated towards the achievement of his ambition. The Blair Government accepted the previous Government’s spending limits in its early years, so that he had to do the best he could within the confines of existing resources.

Immediately after taking office he invited Sir Peter Middleton to advise him on aspects of the way forward, both in relation to legal aid services and also in relation to Lord Woolf’s proposals for the reform of the civil justice system. In relation to legal aid Sir Peter Middleton’s report contained a proposal that all legal aid money claims should be replaced by Conditional Fee Agreements [CFAs].<sup>14</sup> There would be fixed price contracts for blocks of work in relation to all civil and criminal work, and the means test would be tightened.

Lord Irvine announced these proposals in a speech at the Law Society’s conference in Cardiff in October 1997 which coincided with the publication of this report. Most civil cases would be taken out of the legal aid scheme. They should be funded through CFAs. Family cases would stay within the scheme. Lord Irvine defended this change by saying:

*“Excluding claims for money or damages from legal aid will put those on low incomes, middle incomes and high incomes on an equal footing”.*

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<sup>14</sup> In February 1998 Lord Irvine announced that clinical negligence cases would now still remain in scope for legal aid. This represented a change in his original proposals.

He claimed that the extension of CFAs would result in £69 million being available for social welfare law cases in 1999-00 and £100 million in the following year.

He added that he wanted the new Community Legal Service to facilitate:

*“the refocusing of the legal aid scheme as a tool to help poor people solve social welfare problems by gaining access to the justice system”.*

He said that there were many existing information and advice services – the CABx, the law centres, the advice centres and mediation bodies:

*“We intend to co-ordinate these services under a coherent scheme which will provide a service to the whole public which is both easy to access and easy to understand”.*

He added:

*“The CLS is the first attempt ever by government to deliver legal services in a joined-up way. It will provide a framework for comprehensive local networks of good quality legal advice services supported by co-ordinated funding, and based on the needs of local people”.*

The CLS was therefore a strategy to make the local area the focus for delivery of poverty services, delivering it through a partnership of the legal profession, the advice sector, local authorities and the LSC. The strategy was very ambitious. Professor Alan Paterson has said that getting the potential partners to come together would involve a huge commitment of staff and resources from the LSC, and it would only work if there was something in it for everyone. What Steve Orchard was trying to do was to shift resources to Community Legal Services and SWL, and this meant that someone had to give up resources. In principle redistributing resources made sense once it had been accepted, as most commentators then did, that resources for legal aid were finite.

Thirteen regional committees were established in 1997-98, to co-ordinate local planning of civil law services. Each had six members (four from outside the LSC). They were asked to draw up plans for discrete geographical areas and bid zones (which usually followed unitary local authority boundaries). They used statistical data (including figures for means-tested benefits) to draw up plans for the provision of civil law services in their area. They also prioritised the needs for new services.<sup>15</sup> There was rational planning for the first time, but this turned out to be a short-lived phenomenon.

In 1998 the total legal aid bill was roughly £1.6 billion net.

In its 1998 White Paper “Modernising Justice” the Government said that the CLS would mean that every community had access to a comprehensive network of legal service providers of consistently good quality, so that people with actual or potential legal problems would be able to find the

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<sup>15</sup> For example, the West Midlands Legal Services Committee found a high level of need for all areas of law in Birmingham, but a low level in rural South Staffordshire.

information and help they needed. The White Paper gave as the first objective of the new system that it should

*“direct the available resources to where they are most needed, to reflect defined priorities”.*

The subsequent Access to Justice Bill reflected these ideas. Under Schedule 2 of what became the Access of Justice Act 1999, personal injury negligence cases (excluding clinical negligence), conveyancing, boundary disputes, the making of wills, matters of trust law, defamation and malicious falsehood, matters of company or partnership law or other matters arising out of business, advocacy in proceedings other than those listed as exceptions in that schedule, and many types of proceedings in magistrates’ courts were no longer in scope.

The CLS was to include a core of specialist quality-marked firms and organisations which overlapped with a much wider group of non-specialist services, also quality-marked as information and advice providers.

Five quality marks were eventually established:

- Self-help information
- Assisted information
- General help
- General help and caseworks
- Specialist help

Quality marks were also established for websites, telephone services and mediation services. A website called “Justask” was established to provide information on legal matters and to signpost members of the public to providers.<sup>16</sup>

The Access to Justice Act 1999 was to be implemented in April 2000. In a consultation paper published in May 1999<sup>17</sup> the Government said:

*“Many people received effective legal help, but if you live in an area with few or no convenient advice centres, or do not know where to go for help, you can end up having to work very hard to find support, travelling a long distance or receiving no support at all.”*

The paper described a sprawling advice sector comprising private practice lawyers, independent advice centres, CABx and law centres:

*“This effort is on a scale without rival anywhere in the world and a great tribute to the community spirit of our people. It involves nearly 6,000 professional staff and some 30,000 volunteers working in over 3,000 centres, dealing with over 10 million*

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<sup>16</sup> A CLS Directory also provided information on local solicitors, legal advice and information services in England and Wales.

<sup>17</sup> Lord Chancellor’s Department. (1999) *The Community Legal Service: A Consultation Paper*.

*inquiries each year. Total public funding is difficult to estimate accurately, but probably £250 million a year. On the face of it, this provision should be adequate to meet priority need.”<sup>18</sup>*

The challenge was presented in these terms:

*“Despite the fact that nearly 2,000 separate agencies are involved, a person may be unable to find the right kind of help for his or her particular problem within a reasonable distance of home because:*

- *Services have grown up in an ad hoc, unplanned and uncoordinated manner dependent on discretionary funding from local authorities, charities and central government;*
- *Need is not assessed coherently, as funding for advice is provided by a range of central bodies without any co-ordination or common systems;*
- *As a result, funding does not consistently follow need and those running agencies find that far too much of their time is spent dealing with various separate funders who each have their own criteria for funding;*
- *There is no common data base of providers on which people can draw, nor any standard quality accreditation system on which they can rely;*
- *Cross-referrals and networking does not always occur”.*

In this paper the Government floated the idea of CLS partnerships in every bid zone in order to develop better local networks and to plan legal services.

The Government’s plans, therefore, included a determined attempt to engage the third sector.<sup>19</sup> The functions of the new Legal Services Commission included assessing local needs for legal services and, once priorities had been determined in the light of directions given by the Lord Chancellor, to match funding to the identified needs.<sup>20</sup> The meeting of need would be done by different agencies using different means and methodologies, by the LSC centrally,<sup>21</sup> by each of its Regional Committees, and by the new partnerships that would be set up all over the country to bring together funders and providers of legal services at local level.<sup>22</sup> The setting of a predetermined budget meant, by definition, that there had to be rationing to ensure that the budget was not overspent.

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<sup>18</sup> The authors of the Justice Gap commented at p 63: *“As the paper went on to demonstrate, this provision might have been testimony to great commitment but it was a chaotic way to provide a public service.”*

<sup>19</sup> The number of nfp organisations holding franchises grew from the initial 42 pilots to over 400 franchises by 2002-03.

<sup>20</sup> See the *Consultation Paper on the Community Legal Service*, fn 17 above, p 34.

<sup>21</sup> The LSC had started to develop statistical needs assessment models.

<sup>22</sup> Funders included the relevant office of the LSC, local authorities and other bodies, and providers (who might make the necessary provision individually or in partnership with others) included solicitors, CABx, advice agencies, law centres and housing centres.

Under his new statutory powers the Lord Chancellor<sup>23</sup> started by designating two categories of priority. In “top priority” cases the CLS had to ensure that all cases were funded. Initially only certain proceedings under the Children Act and civil proceedings in which the life or liberty of the subject were at stake belonged to this category.

Priority was then given to housing cases and other “social welfare” cases that enabled people to avoid or climb out of social exclusion, domestic violence cases, cases concerning the welfare of children and cases alleging serious wrongdoing, breach of human rights or abuse of position or power by a public body or public servant (such as a police officer).

It was estimated at that time that the Government’s decision to withdraw legal aid from the cases that would no longer be in scope would save about £35 million.<sup>24</sup>

The Government floated the idea of extending legal aid to Employment Tribunals. This was opposed by employers, and in due course dropped.

The Access to Justice Act 1999 imposed a hard cap on overall expenditure on legal aid.<sup>25</sup> The Treasury was determined not to allow legal aid expenditure to exceed the approved budget.

It would now be compulsory to hold a specialist quality mark in order to apply for a block contract. The new legal help scheme (which replaced the Green Form scheme) drastically reduced the number of firms offering legal aid. Block contracts were contracts to carry out fixed amounts of legal aid work. When the new system came into force, about 5,500 contracts were awarded to firms and organisations which possessed franchises,<sup>26</sup> including 50 of the 52 law centres. CABx mainly received contracts in welfare benefits and debt. The contracts contained an entitlement to a fixed number of “matter starts”, which could not be exceeded without the explicit approval of the LSC.<sup>27</sup> In October 1999 legal aid was also extended to representation in immigration appeal tribunals.<sup>28</sup>

By 2002 the whole legal aid system was approaching crisis due to the hard cap on expenditure.

In April and September 2002 there were small increases in eligibility. In April about 150,000 people (1.7% of the population) were brought into eligibility. In September, the income cap was raised from

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<sup>23</sup> In an interview he gave in 2008, five years after his retirement, Steve Orchard said that Lord Irvine had really been engaged with legal aid. Competitive tendering in legal services had been a New Labour innovation.

<sup>24</sup> P.Pleasence. (1999) *Testing the Code*, Fig. 53, p 36. The savings were calculated at £41 million (of which £36 million was ascribed to personal injury cases after taking into account a deduction of £5 million being deducted from this sum on account of retained contributions and receipts from the statutory charge).

<sup>25</sup> It also established a Criminal Defence Service, which included provision for salaried defenders.

<sup>26</sup> Previously about 10,000 firms had been involved in civil and family legal aid cases to a greater or lesser extent.

<sup>27</sup> Most contracted nfp organisations were provided with cash to pay for posts to undertake 1,100 hours of work per full-time caseworker.

<sup>28</sup> Immigration advice was always administered centrally by the LSC. Because of the great increase in the number of asylum-seekers during this period, immigration advice and assistance cases nearly doubled (from 87,363 to 155,865) between 1997-8 and 2002-03.

£2,034 to £2,250 per month for civil and family work (700,000 people). In reality, the Community Legal Service produced no extra funds for civil legal aid.

In June 2003 Steve Orchard said that the biggest cost driver was criminal legal aid, driven by Government policy.<sup>29</sup>

In 2000 the Government Spending Review permitted some modest growth (in cash terms) in the overall legal aid budget:

2001-2	£1.717 billion
2002-3	£1.748 billion
2003-4	£1.819 billion
2004-5	£1.929 billion

In the event, by 2003-04 there was an overspend of about £190 million, with the main increases being attributed to magistrates' court cases, very high cost criminal cases and immigration cases. This overspend fuelled the Government's desire to find some even more dramatic way to contain legal aid expenditure. A Fundamental Legal Aid Review, initiated by the new Department for Constitutional Affairs in 2004, produced conclusions the following year that were never formally published, although their findings were said to be reflected in the Government paper *A Fairer Deal for Legal Aid* (2005).

### **The failure of the CLS Partnerships**

The key function of the CLS was the attempt to establish partnerships between local stakeholders and providers charged with:

- (i) assessing local supply;
- (ii) assessing local need; and
- (iii) sorting out the mismatch.<sup>30</sup>

The first two aims always made sense, but the CLS would not work because it was too labour-intensive for the LSC and because local authorities were not prepared to cede power over funding.<sup>31</sup> It was never likely that the better resourced areas of the country would be willing to transfer their resources to poorer areas, or that the funders of one form of over-supply would be willing to fund an under-supply controlled by another agency.

This all soon ran out of steam, not least because of the lack of resources.

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<sup>29</sup> By 2003 the legal aid budget was getting out of control in criminal work, and to a lesser extent, in immigration.

<sup>30</sup> By 2002 over 200 Community Legal Services Partnerships were in place, and the LSC was employing more than 100 staff at a cost of £4 million to administer them.

<sup>31</sup> Professor Michel Zander had predicted that this would happen. See Michael Zander. (2000) *The State of Justice*, pp 12-13.

A Matrix Research and Consultancy Report (2004) found there had been a number of fundamental weaknesses, not least a lack of clarity about the service's aims.<sup>32</sup> It was also vulnerable to policy changes within government, and to the increasing cash demands of the Criminal Defence Service. The report was particularly damning on CLS Partnerships. It said that their role was unclear and that any initial enthusiasm there had been was petering out due to lack of resources. A fundamental problem was the very uneven spread of social welfare law services.<sup>33</sup> There were dramatically variable levels of spending on SWL across the country.<sup>34</sup> Those councils who spent most would lose most if the expenditure was spread equally.

The report said that there was a leadership vacuum, and an absence of any overall accountability for the CLS, with no clear dedicated leader driving the changes forward. It was hard to object to the ambition behind the creation of the CLS Partnerships [CLSPs], but it was easy to foresee that a lack of common interest – both between funders and providers and between providers themselves – would mean that the initiative would prove a frustrating endeavour. Contracts for family, welfare benefits, housing, debt, employment and consumer law were reducing in number, which demonstrated that LSC funding was not being refocused by directing it towards social exclusion.<sup>35</sup>

A research study for the Advice Services Alliance, which was published in 2004, found that the CLSPs were dying on their feet. Most of the 20 respondents thought that they had done nothing to meet the needs they identified, and that they had failed to make any difference. As a consequence, although the LSC claimed 99% coverage of the country by 2003, they were being deserted by solicitors in private practice and by community groups. The only funders were the LSC and local authorities.<sup>36</sup>

In short, CLSPs did not achieve what they had set out to achieve. There was a lack of cash to develop services,<sup>37</sup> and they were an easy target for savings when the financial crisis hit. The Treasury took the view that expenditure on SWL was discretionary, and that it could be axed to offset the increase in the cost of the CDS. Soon after Sir Michael Bichard became chairman of the LSC in April 2005, a decision was taken to wind up the regional planning committees on the grounds that they were “of no benefit to providers or clients”.

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<sup>32</sup> The report referred to an “ideological hole in the centre”.

<sup>33</sup> Ibid.

<sup>34</sup> A table on page 68 of the Justice Gap showed “five top spenders” who had been spending between 235% and 373% of what the LSC had calculated they should be spending on SWL, and “bottom five spenders” who were spending between 23% and 35% of what had been calculated as appropriate. Four London boroughs (Camden, Hackney & City, Tower Hamlets and Ealing) were in the first category, and two (Kingston and Bexley) were in the second, which also included Surrey and the East Riding of Yorkshire.

<sup>35</sup> In contrast, contracts for public law, community care, actions against the police, education, immigration, clinical negligence and mental health were all increasing.

<sup>36</sup> CAB research found that CABx were active participants in partnerships, but only 16% of respondents felt that their efforts were justified.

<sup>37</sup> No resources were allocated for new expenditure once gaps in provision had been identified, apart from what was available from a £5 million Partnership Innovation Budget, which provided seed funding for innovative ventures.

### The Criminal Defence Service

This was mainly a repackaging of existing suppliers into a rebranded service with specialist quality marks.<sup>38</sup> It was created by the Access to Justice Act 1999, which also contained provision for the appointment of salaried public defenders.<sup>39</sup>

In its December 1998 White Paper the Government reported that the cost of criminal legal aid was “rising at an alarming rate”: a 44% increase in the five years between 1992-93 (£507 million) and 1997-98 (£733 million). Very high cost criminal cases were identified as presenting a particular challenge: in 1996-97 42% of legal aid spending in the Crown Court (almost £16 million) was being spent on 1% of the cases. A new Criminal Defence Service would be established, provided by private firms under contracts with fixed prices for different categories of work. Separate contracts would be negotiated on an individual basis for cases where the trial was estimated to last for 25 days or more.

The LSC asked firms if they wanted to become part of the new CDS by applying for advice and assistance contracts, including police station and magistrates’ court work, which were to come into force in April 2001. Quality marks were now compulsory. There had previously been 3,500 firms engaged in criminal defence cases, and just over 500 small suppliers dropped out now.

In February 2001, there was the first pay rise for 8 years, and after other concessions had been achieved the Law Society eventually recommended that firms should sign the new contracts.

Crown Court and higher court criminal cases were brought into the legal aid budget with effect from April 2003. In 2000-01 they cost £422 million. This had risen to £695.5 million by 2005-06 (almost one third of the total budget).<sup>40</sup> Very High Cost Cases (VHCC) represented 1% of the total caseload but they swallowed up 50% of the Crown Court budget. Lord Falconer, who became Lord Chancellor in June 2003, blamed the Bar much later for using every part of the system to get as much money as possible. He said that fees were still too high and cases were lasting too long. The Government, however, seemed to some observers to be blind to other pressures on the criminal budget.

This table<sup>41</sup> shows a more detailed breakdown of the way in which expenditure on criminal legal aid (measured in £ millions) increased between 2000-01 and 2006-07:

	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
<b>Total criminal legal aid</b>	872	982	1,096	1,178	1,192	1,197	1,171
<b>Police Station</b>	117	140	169	175	172	174	178
<b>Lower Courts</b>	233	221	338	340	325	330	309
<b>Higher Courts</b>	422	474	569	645	682	695	648

<sup>38</sup> New Labour’s 1997 manifesto contained no reference to criminal legal aid or to a criminal defence service.

<sup>39</sup> In the event, for a variety of reasons, the public defender service turned out to be more costly at that time than the engagement of solicitors in private practice.

<sup>40</sup> The Blair Government introduced a torrent of new criminal justice legislation during these years. Indeed, the Judicial Studies Board had to arrange a special training programme for the whole of the criminal judiciary in advance of the Criminal Justice Act 2003 coming into force, and the complexities of this legislation encountered constant criticism in the higher courts.

<sup>41</sup> The figures are taken from the Table on p 147 of *The Justice Gap*.

### The Fifth Period (2005-2010)

#### Total Expenditure on all forms of legal assistance

The Legal Services Commission (LSC)'s net expenditure (£ million) on criminal legal aid and civil legal aid (in all its forms) in the five years of this Fifth Period is shown in the following table (which also includes the equivalent figures for 2000-1):

<b>CRIMINAL</b>	Criminal Defence Service	Crown Court & higher courts representation	<b>Total</b>	
2000-1	450	422	<b>872</b>	
2005-6	501	695	<b>1,196</b>	
2006-7	529	642	<b>1,171</b>	
2007-8	476	674	<b>1,150</b>	
2008-9	498	676	<b>1,174</b>	
2009-10	463	658	<b>1,121</b>	

  

<b>CIVIL</b>	Legal Help	Civil Representation	<b>Total</b>	<b>Overall Total</b>
2000-1	232	560	<b>792</b>	<b>1,664</b>
2005-6	284	547	<b>831</b>	<b>2,027</b>
2006-7	261	548	<b>809</b>	<b>1,980</b>
2007-8	254	541	<b>795</b>	<b>1,945</b>
2008-9	273	613	<b>886</b>	<b>2,060</b>
2009-10	324	792	<b>1,116</b>	<b>2,237</b>

The tables show that, broadly speaking, total expenditure during this Fifth Period was kept within the Treasury-imposed cap of £2.1 billion. This was not adjusted for the incidence of inflation, and because there were always pressures<sup>42</sup> which would have meant a steady increase in costs unless remedial action was taken on a continuing basis, the history of these years is one in which the efforts of both

<sup>42</sup> Research on cost drivers in criminal defence work showed that decisions taken beyond the remit and direct influence of the LSC and defence lawyers had a significant impact on criminal legal aid expenditure and accounted for a significant proportion of the increase in expenditure over the previous decade. These factors included the greater use of imprisonment and the fact that the number of arrests was creeping up. See LSRC, Ed Cape and Richard Moorhead (2007) *Demand induced supply? Identifying cost drivers in criminal defence work. A report to the Legal Services Commission.*

the LSC and its sponsoring department were dominated by the need to find different kinds of cost-cutting devices.

Some savings were achieved by killing off the LSC's local planning structures in 2005-6. During that period, it consolidated power into a Central London bureaucracy. As a result, it was easier for it to disengage from suppliers' interests and to pursue a strategy of becoming a procurement agency rather than the administrator of the legal aid system. The two chief executives, Clare Dodgson (2003-06<sup>43</sup>) and Carolyn Regan (2006-10) were both very experienced managers, but neither had had Steve Orchard's long experience within the courts before taking on the job, and it has been suggested that they did not attract the trust of the legal profession in the way their predecessor had.

The LSC would now take a more centralist role in controlling how advice was provided and by whom it should be provided. Crispin Passmore (a former manager of a law centre) was appointed the first director of the Community Legal Service.

### **Eligibility and Coverage**

Eligibility for civil legal aid (including a small increase in eligibility 2008-09):

1986	63%
1998	52%
1999	51%
2000	50%
2001	46%
2005	41%
2007	29%

The increase in average earnings was faster than the rate of inflation. There were also demographic changes relating to the age and partnership status of the population, the introduction of working tax credits and child tax credits, and reforms to civil legal aid. The reduction in eligibility was not due to a reduction in passported benefits.

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<sup>43</sup> Clare Dodgson was away on long-term sick leave for her last 12 months at the Commission.

**Some more statistics**

This table shows the reported incidence of problem types in 2000-1 and 2007-8 and the great expansion of legal help for social welfare law:

<b>Completed matters</b>	<b>2000-1</b>	<b>2007-8</b>
<b>Debt</b>	56,116	111,708
<b>Welfare benefits</b>	101,525	120,028
<b>Housing</b>	106,735	159,118
<b>Employment</b>	14,013	21,076
<b>Community care</b>	2,392	4,630

As more solicitors in private practice abandoned legal aid work, between 2002 and 2008 there was a very marked shift in the proportion of legal help and social welfare law (SWL) advice that was provided by not for profit providers (nfps). In 2002 the LSC had been set a target of providing £20 million of contracted work through nfps. In 2007-8 the equivalent figure was more than £80 million: 31% of annual legal help expenditure, and 67% of provision of SWL advice. However, although the LSC would have liked to see more providers being able to offer the full range of SWL services, in 2006 only six legal aid providers in England and Wales delivered services in all five SWL categories. No law centre had that degree of coverage, and only half the 470 CABx undertook specialist legal advice at all.

By the end of 2008 legal aid had no local dimension to the planning of services and the LSC did not indulge in any consultation with the public over their expectations. This had been possible when the regional planning committees and Community Legal Service Partnerships existed, when firms and nfp agencies had had forums in which their views could be expressed.

In 2007-08 250,877 members of the public were helped by the Community Legal Advice helpline.<sup>44</sup>

As at 31 March 2010 the LSC held 2,390 civil and 1,697 criminal contracts with legal aid providers. This table shows the breakdown, and the number of offices involved:

**Contract type: No. providers: No. offices:**

Civil – solicitor	2,058	2,802
Civil – nfp	332	404
<b>Total civil</b>	<b>2,390</b>	<b>3,206</b>
<b>Criminal</b>	<b>1,697</b>	<b>2,137</b>

<sup>44</sup> The first 15 minutes are provided non-means tested by a generalist adviser.

In 2009-10 the LSC delivered 1.43 million acts of assistance through the Community Legal Service and 1.17 million Legal Help acts of assistance via face-to-face and telephone advice.<sup>45</sup>

### CLACs and CLANs

The Fourth Period had seen the rise and fall of legal service partnerships. This period witnessed the rise and fall of CLACs and CLANs.<sup>46</sup>

A paper<sup>47</sup> published by the Department of Constitutional Affairs (DCA) in August 2005 set out to address the issue of coordinating services more effectively, so that they would be better able to address the clusters of problems which clients faced. In other words, the public needed coordinated advice, ideally a one-stop shop to avoid them being passed from pillar to post and get lost in the system.

The DCA's proposed solution included the issuing of joint tenders with local authorities for social welfare and family law services: Community Legal Advice Centres (CLACs). The concept of "problem clusters"<sup>48</sup> drew on a Legal Services Research Centre paper "*Causes of Action*",<sup>49</sup> of which an updated version had been republished (following a second survey) by the time the LSC published its policy proposals in March 2006.<sup>50</sup> Because the problems they were addressing are remarkably similar to those that still exist (and are now better understood) today, it is worth setting out the problems and the proposed solution.

The LSC identified the problems in these terms:

- Over 40% of people who have problems do not seek advice;
- 1 in 7 of those who seek advice fail to get it, mainly because the adviser can't help;
- The more a person gets referred on, the less likely they are to get advice;
- Civil justice problems lead to other problems;
- The estimated cost of civil justice problems reported in the 2004 survey for individuals and public services is £13 billion;
  - E.g. 16% of civil justice problems lead to physical ill-health and 27% to stress-related illness;
- People who are socially excluded have multiple problems.

"*Causes of Action*" they said, provided evidence of the need for:

- visible advice services;

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<sup>45</sup> The statistics in the last two paragraphs are taken from the Legal Services Commission's Annual Report and Accounts, 2009-10.

<sup>46</sup> Community Legal Advice Centres and Community Legal Advice Networks.

<sup>47</sup> DCA, *A Fairer Deal for Legal Aid* (Cm 659, 2005).

<sup>48</sup> There were three principal and distinct problem clusters: Family (domestic violence, divorce, relationship and family problems); Homelessness (rented housing, homelessness, benefits); and Economic (money and debt, consumer employment problems).

<sup>49</sup> Legal Services Commission. Pascoe Pleasance et al (2004) *Causes of action, civil law and social justice. The final report of the first LSRC survey of justiciable problems.*

<sup>50</sup> Legal Services Commission. (2006) *Making Legal Rights a Reality.*

- accessible advice services;
- services which can deal with clusters of problems;
- services which minimise the need for referrals;
- effective referrals;
- legal education so that people understand that problems can be resolved; and
- effective self-help material to support those able to act for themselves.

The LSC's new strategy advocated a new approach to the way in which civil legal and advice services were funded, purchased and delivered. They had a vision of services which were:

- client-focused and accessible;
- independent; cost-effective and coordinated; and
- quality-assured.

The creation of CLACs and CLANs was one of the main proposals in the new strategy. A CLAC would:

- provide free, independent, face-to-face legal advice services to tackle civil justice issues at the earliest opportunity;
- take strategic action to solve the causes of common problems and play a role in educating people about their legal rights;
- target those with the greatest need for legal advice services, including those who did not get help from current services;
- be jointly funded by the LSC and the local authority; and
- be a single legal entity.

In contrast, a Community Legal Advice Network (CLAN) would cover a larger geographical area with a less dense population than a CLAC. It was envisaged that CLANs would deliver outreach into community centres, GP surgeries or schools; provide services in locally important languages; and reduce, where possible, the need for clients to travel.

CLACs were most likely to be in urban areas – local authority areas with more than 50,000 benefits claimants. These were likely to be high on the Index of Multiple Deprivation and contain a Neighbourhood Renewal area or Communities First area.

Leicester and Gateshead would be the first two centres to be commissioned. The LSC's initial analysis in March 2006 suggested that England and Wales could be covered by up to 75 CLACs and 36 CLANs, although this would depend on local factors, including the view of the local authority.<sup>51</sup>

In brief, the LSC was seeking to establish "jointly funded, face-to-face legal and advice services to specialise in social welfare law and to combine disparate services in a one-stop shop." There was to be a move from private practice to the not for profit (nfp) sector. As part of New Labour's attack on

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<sup>51</sup> And in Wales the Welsh Assembly Government.

social exclusion, the LSC wanted CLACs to provide multiple services under one roof to tackle the difficulties faced by those with multiple and cluster problems.

Crispin Passmore said that the LSC would expect a 3-year commitment to funding before going into partnership with a local authority to form a CLAC. It was for a local authority to decide how much it wanted to fund advice.

The role of local authority funding within a CLAC, however, was not defined.<sup>52</sup> It was expected to cover generalist advice service, specialist services for ineligible clients, and services that were out of scope (notably tribunal presentation). There were no identifiable minimum standards. The specifications for the first five CLACs revealed considerable variation.

As to the history, a CLAC was established in Gateshead in May 2007. CLACs at Leicester, Derby and Portsmouth followed a year later, with a CLAC being opened in Hull in October 2008.<sup>53</sup> The first CLAN was established in the East Riding of Yorkshire in March 2010, and a new CLAC, in Barking & Dagenham, followed shortly afterwards. That was all.

Although the LSC had been conducting active discussions with local authorities to establish six more CLACs and four more CLANS in 2010,<sup>54</sup> these details show that in the end only one more CLAC and one CLAN was ever established. The big constraint on their roll-out lay in local authorities' unwillingness to fund legal services. In 2007 local authorities provided £66 million (46%) of funding for CABx, and the LSC provided £30 million (20%). They had different aims. An adequate tender specification was never successfully devised.

Critics said that the project seemed to be compromised by a crude and divisive tendering process with little respect for the providers. The trouble was that once again the LSC lacked the political clout to force local government to share its vision or funding for local advice by pooling resources with the LSC for holistic advice and assistance provision. In addition, the problems of replacing 5,000 traditional firms with up to 50 large-scale providers proved insurmountable.

The Hull tender showed how controversial and radical these proposals could be. It was won by an out of town bid from A4E and a Sheffield law firm. The LSC and Hull County Council would jointly provide £3.5 million. The Hull CAB was shut out, even though it was one of the largest in the Citizens Advice network. It might survive, but some people claimed that Leicester Law Centre had been forced to close after funding cuts because of the CLAC.

There would probably never have been more than a limited number of CLACs, because of the local authorities' reluctance to enter into joint funding. In a study he conducted in 2010 Professor Richard

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<sup>52</sup> For a description of the problems faced by joint commissioning by two funding bodies with different aims, see *Closing the Justice Gap* (ed Jon Robins, 2010) pp 36-7.

<sup>53</sup> A MoJ study in 2009 found that the first five CLACs then in existence were managing adequately, but had been costly and time-consuming to set up. (See Ministry of Justice. (2009) *Legal Advice and the Local Level*.)

<sup>54</sup> CLACs at Barking & Dagenham, Cardiff, Manchester, Stockport, Sunderland and Wakefield; and CLANS in the East Riding of Yorkshire, Gloucestershire and West Sussex.

Moorhead found that CLACs and CLANs also ran up against the intransigencies and entrenched positions of local organisations.<sup>55</sup>

### **Other Developments**

Because of the Treasury's insistence that the legal aid budget must be effectively capped, the history of these years shows a whole series of policy stop-start initiatives in which the LSC was purporting to continue to prize the quality of the services provided through LSC funding while being constrained by its parent department to attempt different methods of reducing their cost.

#### Specialist support

One of the successes of the LSC's initial range of policies was the specialist support services they funded, whereby frontline providers could access free advice, support, mentoring and low cost training in order to help them maintain a high quality standard of services. As late as April 2005 it issued a statement to the effect that these services had proved invaluable, and a new three-year contract was being negotiated.

Later that year, however, providers were told that their new contracts would not be signed, and in January 2006 that their existing contracts would be terminated because the service no longer fitted into the LSC's current priorities, and the money would be better spent in providing services direct to the public, shorn of this expert back-up assistance.

This change of policy was strongly criticised by the Constitutional Affairs Committee of the House of Commons two months later, and the High Court made an interim order extending the scheme until December. The LSC said it would reassess its decision and it withdrew the notices of termination, acknowledging the damage this episode had caused in its relationship with practitioners.

#### Best Value Tendering (BVT)

The LSC used this tendering system, which was in widespread use with public bodies, when it awarded new civil contracts in 2004. The BVT system takes into account factors other than mere pricing, such as the quality of a firm's IT, training, supervision and so on. It regarded BVT as a "tried and tested method."

#### Price Competitive Testing (PCT)

In 2005, however, the LSC proposed a pilot project in London<sup>56</sup> which would involve PCT for criminal defence services. It claimed that this form of tendering would improve quality as well as saving money, but in fact 95% of all existing suppliers were accepted onto the panel who were invited to bid. The only factor that would then be considered would be the price they offered. The LSC said: "No other factors will be considered at this stage as all suppliers will have passed the quality threshold". This

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<sup>55</sup> Professor Richard Moorhead, *Process Evaluation of CLACs and CLANs*, 2010. This study contains a very full exposition of the reasons why the experiment failed.

<sup>56</sup> Legal Services Commission. (2005) *Improving Value for Money for Publicly Funded Criminal Defence Services in London*.

proposal encountered such a hostile reception from practitioners<sup>57</sup> that it was postponed following the announcement of a review of legal aid procurement which Lord Carter was invited to carry out.

### Preferred Suppliers

In 2004 Clare Dodgson, the new chief executive of the LSC wished to cut down the bureaucratic burdens on suppliers. The LSC dropped its commitment to non-specialist quality marks. They were costly to audit, and considered not relevant to core LSC business. The LSC now set the level for entering the system at “threshold competence”: the lowest level. This was a risk to quality, especially with the introduction of fixed fees.

During that year there were pilot projects in preferred supplier arrangements, on the basis that they would be replaced in due course by peer review. Ideally, the LSC wanted responsibility for quality and accreditation to pass to the Law Society. This would introduce a very welcome reduction in bureaucracy and an increase in the contracting firms’ autonomy. After a successful pilot the LSC issued a consultation paper in 2006 in which it proposed that it would contract only with preferred suppliers by 2009.<sup>58</sup> However, it soon abandoned this idea in the wake of the Carter Review, although in an announcement on its website it insisted that key elements of the scheme would be incorporated in other reforms.

### Peer Review

In 2005 LSC identified<sup>59</sup> Independent Peer Review as the best way to measure the quality of their providers, and they followed up this proposal by announcing<sup>60</sup> it would introduce an independent system that had been developed by Professor Avrom Sherr, of the Institute of Advanced Legal Studies. The Institute would operate the system, train the reviewers and deal with consistency issues. The LSC’s sole role would be to administer the scheme. This development was welcomed by practitioners, who had been concerned that the LSC’s previous methods had not addressed questions of quality directly.

All this yo-yoing on policy initiatives was very divisive internally.<sup>61</sup>

### Lord Carter’s Review

Prior to Lord Carter’s report, senior people within the LSC had decided that the deployment of competitive tendering for criminal services was the solution to the control of costs. As has been mentioned already, a planned pilot project for the London area was fiercely opposed. This was when Lord Falconer appointed Lord Carter to carry out a review.

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<sup>57</sup> One solicitor said that the fact that his firm was peer reviewed and placed in the top three firms nationally would count for little against being undercut “by a bloke with a mobile phone working out of the front room”.

<sup>58</sup> Legal Services Commission. (2006) *Quality Relationships Delivering Quality Outcomes*.

<sup>59</sup> Legal Services Commission. (2005) *Independent Peer Review of Legal Advice and Legal Work*.

<sup>60</sup> Legal Services Commission. (2005) *Independent Peer Review? The Process*.

<sup>61</sup> See *The Justice Gap* (Steve Hynes and Jon Robins, 2009), p 52 for a blistering attack on the abandonment of the preferred supplier arrangements by the LSC Commissioner responsible for the crime portfolio at that time.

*“We had to break the hold of the criminal practitioners and force them to restructure so that we could get more control over the costs of provision”.*

His main policy concerns were the 37% increase in criminal legal aid expenditure since 1997, and the 24% decrease in civil legal aid expenditure (except asylum).

Against this background Lord Carter was invited to review how new models of procurement could be implemented to deliver enhanced value for money and a sustainable supply for legal aid. He was asked to produce a plan by early 2006 describing what action the Government would need to take to enable the legal professions to adapt successfully to new procurement methods.

#### The Carter Report (2006)

Lord Carter produced an interim report in February 2006,<sup>62</sup> and a final report in July 2006.<sup>63</sup> His main recommendations were as follows:

##### *Criminal*

- i. Redrawing the duty solicitor schemes into larger boundaries and introducing block contracts for police station work;
- ii. Fixed fees for police station work;
- iii. A graduated fees scheme for magistrates' court work;
- iv. A reform of the fees paid in Crown Court cases;
- v. Panels to bid for high cost cases on a Best Value Tendering (BVT) basis;
- vi. A spending cut of 20% on Crown Court cases, and a rebalancing of work away from the senior to the junior Bar.

##### *Civil*

- i. Fixed or graduated fees for all work;
- ii. A unified contract for all civil work, limiting the contracts to either £25,000 or £50,000;
- iii. BVT for all civil contracts: suppliers to bid against published criteria (including quality).

He acknowledged that some organisations would have to merge, or to discontinue legal aid work as the market consolidated.

#### Fixing Costs (2007)

In preparation for the introduction of BVT the LSC introduced a system of fixed fees for all civil and criminal legal aid work. Previously most nfp suppliers had received a fixed payment for a block of work, whereas private providers were paid by the case. Transitional arrangements were put in place for nfp suppliers.

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<sup>62</sup> Lord Carter. (February 2006) *Procurement of Criminal Defence Services: market-based reform.*

<sup>63</sup> Lord Carter. (July 2006) *Review of legal aid procurement.*

The first stage consisted in introducing the unified contracts and then the fixed fees. Fixed fees represented a 9% reduction in pay for police station work, and a 16% reduction in pay for magistrates' court work. As is described below, 95% of private practice firms eventually signed the new criminal legal aid contract which came into effect in January 2008.

## **The Sixth Period (2007-2010)**

### **The final years of the Labour Government**

The remaining years of the Labour Government saw continuing tensions between the Ministry of Justice (MoJ)<sup>64</sup>/LSC on the one hand and the two sides of the legal profession on the other, and also between the MoJ and the LSC which both possessed policy-forming roles at a time when under continuing Treasury pressure continuous efforts had to be made to find new ways of controlling total legal aid expenditure within the permitted limit. Thirty consultation papers were issued between 2006 and 2010, and this fact alone gives an indication of which shows the number of different initiatives that were being pursued.

### **Civil legal aid contracts**

On the civil side, a compromise was reached with the Law Society in November 2007 following its successful litigation about the lawfulness of the new civil legal aid contracts.<sup>65</sup> Under this agreement there would be no price competitive tendering until 2013 at the earliest, and there would be some small increase in the rates paid in cases. (As part of this agreement, the introduction of BVT was delayed until 2009). No new CLACs or CLANs would be created before 2010 other than those already listed for consideration and consultation.

In 2009 the LSC sought to introduce redesigned civil legal aid contracts. These contained requirements that successful tenderers for the new social welfare law contracts should be able to provide services in housing, benefits and debt work, while bidders for new family law contracts were to be given preference if they were members of two specialist panels (for children and domestic abuse). The tendering arrangements caused consternation among firms who currently held family law contracts. The number of family law contracts was reduced by 46% in this tendering round, with good firms losing out altogether and new, untried firms getting all the cases for which they had bid. Here, too, the Law Society brought things to a halt when in September 2010 the High Court ruled in their favour that the legal profession had been given insufficient notice of the new selection criteria.<sup>66</sup>

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<sup>64</sup> The Ministry of Justice was created in May 2007. It took over responsibility for legal aid policy from the Department of Constitutional Affairs, which was abolished.

<sup>65</sup> *R (Law Society) v Legal Services Commission* [2007] EWHC 1848 (Admin); [2007] EWCA Civ 1264.

<sup>66</sup> *R (Law Society) v Legal Services Commission* [2010] EWHC 2550 (Admin). Moses LJ described the prevailing anxieties in these terms: "*The reduction caused serious and vociferous concern. It was not just a question of numbers. It was not merely a question of dismay that those who had spent their professional lives for little reward providing publicly funded services to the deprived, socially disadvantaged and excluded were no longer to be permitted to do so. The focus of concern was that those who were acknowledged to be highly skilled and experienced professionals were no longer going to be able to deploy those skills in areas where they were most needed. That concern was expressed not merely by those who had failed, but by those who had succeeded, and by those who had come to know, trust and rely upon solicitors practising in a difficult and demanding jurisdiction, namely clients, minority representative organisations and judges.*"

### **Criminal legal aid contracts**

On the criminal side, the Law Society's success in judicial review proceedings over the introduction of fixed fees for criminal legal aid work led to the LSC deciding to give notice of termination of the existing criminal contracts and to put them through a new tendering process, with the new contracts commencing in January 2008. Although some well-known firms dropped out, and it was calculated that the introduction of the new fixed fees would mean a 9% reduction in pay for police station work and a 16% reduction in fees for magistrates' court work, in the event 95% of the private practice firms and every law centre signed the new contracts.

So far as Crown Court cases were concerned, the LSC's plans were frustrated when only 130 of the advocates who had joined a new specialist criminal panel were willing to agree the new contracts on offer in March 2008. A compromise was then negotiated. There would be an increase of 5% in fees for VHCC cases at a cost of £6 million up to July 2009. This would be paid for by reducing the number of cases in which two counsel could be instructed. There would then be a revised payment scheme based on graduated fees.

During 2008 the LSC embarked on an effort to introduce BVT into police station and magistrates' court work, while at the same time disavowing any ambition to achieve any savings through this move. This, too, was abandoned the following year, although a pilot scheme in two areas lived on, only to be wound up shortly before the General Election.

### **The National Audit Office Report and the Magee Review**

Throughout this start-stop saga the LSC succeeded in operating within the Treasury-imposed cap by introducing new means tests in criminal cases or cutting criminal legal aid fees. They also sought to limit to legal aid rates the amount of costs an acquitted defendant could recover from central funds, but the relevant regulations were struck down by the High Court in June 2010,<sup>67</sup> and it was left to a new government to reintroduce them on a lawful basis.

The LSC came under criticism in a National Audit Office (NAO) Report in October 2009 when it was found that just under £25 million had been paid out in solicitors' fees to which they were not entitled (in the following accounting year the equivalent figure was £76.5 million).<sup>68</sup>

It was against this background, coupled with some uneasy relationships between the LSC and MoJ officials (bolstered by a concern that the Government was seeking to interfere on political grounds with the LSC's discretion in individual cases), that a former Head of HM Courts Service, Sir Ian Magee, was invited to undertake a review of the operation of the LSC and of its budget. In his report, published in March 2010, Sir Ian recommended that responsibility for the formulation of legal aid policy should be vested in MoJ alone, and he also found serious weaknesses in the LSC's forecasting and other financial management systems. The Government announced that it would abolish the LSC

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<sup>67</sup> *R (Law Society) v Legal Services Commission* [2010] EWHC 1406 (Admin). The history of this saga is described in a Parliamentary briefing. Accessed September 2017:

<http://researchbriefings.files.parliament.uk/documents/SN05213/SN05213.pdf>

<sup>68</sup> A survey conducted by the NAO at this time revealed tensions in the relationship between the legal profession and the LSC. 36% of the solicitor respondents perceived the LSC as "unhelpful" and 29% believed the LSC did not fully understand the legal system.

and transfer the administration of legal aid to a new executive agency of MoJ. Carolyn Regan, the LSC's chief executive, resigned on the spot.

The Labour Government's final action, announced shortly before the General Election, was to cut fees in Crown Court cases by 4.5%, with a further cut of 13.5% scheduled to follow two years later.