



Running on Empty

Civil Legal Aid Report Summary and Headline Findings – January 2021

The General Council of the Bar, known as the Bar Council, is the Approved Regulator of the Bar of England and Wales, and the representative body for the profession. It discharges its regulatory functions through the independent Bar Standards Board. The Bar Council currently represents 16,927 practicing barristers in England and Wales.

Between July and September 2020, the Bar Council interviewed 16 civil legal aid barristers and clerks. Our interviewees were sampled to be broadly representative of the profession in terms of area of practice, protected characteristics and the region of England and Wales in which they primarily practiced.

A full report is currently being compiled in collaboration with the interviewees and will be published in January 2021. As part of the Bar Council's October submission to the Justice Select Committee's inquiry into the future of legal aid, it was felt it would be helpful to prepare this short summary of the anticipated headline findings in advance of the publication of the full report.

Headline findings:

- 1. The widespread closures of advice centres and high street solicitors, and increased pressure on those that remain, has seriously impacted the Bar**

Early legal help and advice (particularly regarding welfare benefits advice) prevents legal work becoming stressful and unnecessarily complicated. Barristers feel that clients who have cases with legal merit are often not able to access a good solicitor. The hinterland of unmet legal need is a separate and serious issue in its own right.

The lack of access to early legal advice can mean that, for those who manage to find support, their case has become more complicated and urgent by the time it reaches a barrister. Barristers are frequently having to take on cases that would have never needed the trouble and expense of court time had their clients received sensible welfare benefits advice in the early stages of their legal

problem. Solicitors firms that do still take on legal aid work are stretched thin, resulting in difficult and stressful working conditions for solicitors and barristers.

2. There is a serious problem with inequality of arms when it comes to bereaved families being represented at inquests.

Bereaved families are only able to access legal aid for inquests when Article 2 has been engaged or where there is a wider public interest, meaning broadly it has been demonstrated that the state had a duty of care to the person who died. The fixed brief fee for inquests is too low to give junior counsel time to fully prepare for and attend the first day of the hearing in which they are to represent a bereaved family. Decision-making as to which inquests get exceptional case legal aid funding can feel obtuse and, even if funding is granted, it can come very late, making the process stressful for families and their legal representatives.

In a complicated case that may involve two, three or four core state agencies (the police, the Ministry of Justice, a local authority, a health trust, for example), each state agency will be represented by counsel or a team of counsel, likely to be much more experienced than the counsel for the family. This means that, in practice, a bereaved family is likely to be represented by one junior barrister who, despite best efforts, has not had the time or resource to fully familiarise themselves with the background, get to know the family, investigate or probe the case, and is in court facing a number of more senior practitioners.

This appears and is unfair. Although in February 2019 the Ministry of Justice confirmed its position that it would not be widening the legal aid provision for bereaved families at inquests¹ it seems clear this is unsatisfactory. Junior barristers experience huge pressure to do additional unpaid work or to represent families for free at inquests, and often feel unable to compete, even in the inquisitorial spirit with which inquests are intended to be heard, with more experienced and better resourced counsel.

3. Increased case volume is made to compensate for the reduction in fees

Since the implementation of Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), fee income for certain kinds of civil legal aid case

¹ Ministry of Justice (February 2019) "Final Review of Legal Aid for Inquests"
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777034/review-of-legal-aid-for-inquests.pdf

has dramatically reduced. Senior practitioners can be earning a considerably lower hourly rate in cash terms than they were at the start of their careers.

In theory, this could lead barristers to turn away from legal aid work in favour of better-paid private work. Many, despite preferring legal aid work, do choose to supplement their income with private work. But to balance their vocation for legal aid work with their financial obligations, practitioners have tended to compensate for the reduction in fees by taking on more cases and working longer hours.

This results in an all-hours, last-minute working culture where there is little time to pause, reflect and consider cases, and still less for a healthy work-life balance. The Bar has always been a place where people will choose to spend long and antisocial hours completing the work to a high standard, but there is a feeling that 60 or 70-hour weeks, all-nighters and weekend working are now becoming the basic expectation in order to maintain a financially viable practice.

4. Unsustainability for those coming in at the junior end

There is a widespread acknowledgement among civil legal aid practitioners that they consciously choose to go into publicly funded work knowing they will earn substantially less than colleagues in private practice, but feeling nonetheless a vocation for the kind of work they are doing, and an intellectual interest in the legal issues at play.

That being said, the rates of pay at the junior end are now so low, particularly when seen alongside increased living costs and student debt, that although recruitment is healthy at the moment, there are concerns among practitioners relating to sustainability at the junior end in relation to:

- a. Recruiting and retaining the best quality candidates for publicly funded work.
- b. Social mobility for those from less privileged backgrounds where they do not have financial support from a family or partner being able to build *and advance* their practice in terms of the type of case they are able or choose to take on.
- c. Burnout resulting from years of financial stress and emotional pressure, training, securing pupillage then tenancy at the Bar, and then taking on a heavy caseload often necessitating considerable travel and out-of-pocket expenses to build a practice.

5. Processes at the Legal Aid Agency feel obtuse and complicated

There is a widespread perception of a “culture of refusal” at the Legal Aid Agency and, further, a lack of transparency in the decision-making process by which funding is awarded. Barristers and clerks feel there is no accessible clear guidance available on how to word or structure applications for legal aid or exceptional case funding. It can feel as though decisions on funding are arbitrary and lacking in due attention to the merits of a case.

This results in problems for counsel, clerks and clients. Clerks and counsel (and the solicitors they work with) do huge amounts of wasted administrative work in applying for funding; counsel can end up doing involuntary unpaid work on cases where there are delays in funding applications; and clients can be left in a position where they do not know whether or not they will be liable for the legal costs of their case.