The battle for Legal Aid
Special 12-page report

Plus: ISRAEL & THE COURTS by Daniel Machover & Kate Maynard
MOAZZAM BEGG speaks at Haldane lecture
BAE, SFO AND THE SAUDIS by Jamie Beagent
TURKISH LAWYERS TAKE STAND by Azam Zia

Plus all the latest news & comment
The Haldane Society was founded in 1930. It provides a forum for the discussion and analysis of law and the legal system, both nationally and internationally, from a socialist perspective. It holds frequent public meetings and conducts educational programmes. The Haldane Society is independent of any political party. Membership comprises lawyers, academics, students and legal workers as well as trade union and labour movement affiliates.

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Many thanks to all our contributors and members who have helped with this issue
Weighted against Carter

What unites the Haldane Society with the Law Society, Bar Council, Civil Justice Council, the Master of the Rolls, the President of the Family Division and other Lords Justices? Along with thousands of legal aid practitioners, and their umbrella groups, we’re all opposed to the government’s and Legal Services Commission’s proposals for fixed fees, and competitive tendering. Far from being “a fairer deal for legal aid”, the very real possibility is that implementation of these proposals could kill the legal aid system stone-dead. The House of Commons Constitutional Affairs Committee (CAC) commented that the reaction of the proposals from the legal profession and other commentators was “overwhelmingly hostile”, it had received the largest number of submissions of any of its inquiries so far, and “almost all legal aid practitioners informed us that they were contemplating leaving the legal aid market or that they had already done so”.

The crisis is severe for individual practitioners. Nobody can accuse legal aid lawyers of being “fat cats”. The immigration, housing, family, and criminal practitioners featured on these pages work long hours, in private practice or not-for-profit agencies, to keep a roof over their clients’ homes, keep them safe from persecution, force the state to provide subsistence, keep their families together, and keep them out of jail. They do that because they are committed to the clients, not for personal riches. As the squeeze gets worse, all of us in the legal aid world are looking over our shoulders at how we will personally survive.

But the real crisis is whether the clients will survive. As advice deserts spread, as even the new CLACs and CLANs are under-funded, as private practitioners abandon legal aid for work that allows them to pay their own housing costs, who is going to fight for Ms N, fleeing domestic violence, living in a foreign country, having a nervous breakdown and disbelieved by the Home Office? Who will be on hand to prevent police officers from reverting to the bad old days of fabricating evidence, before legal advice at police stations became free and accessible? Who will provide the drop-in services and telephone advice lines run by Law Centres to those who (just) fail to qualify for legal aid? Who is going to spend the time with a mentally ill client, building up trust so that she can make an informed decision? Who is going to sort out the nightmarish tangle of housing benefit decisions?

Carol Storer, Piers Mostyn, Sonia Routledge, Damian Hanley, Kathy Meade, Clare Connolly, Penny Mackinder, and Angus King all paint a grim, but accurate, future of the devastation of publicly-funded legal services under Carter.

As Jamie Ritchie points out, there never was a golden era of legal aid. When it was first introduced, in the 1940s, it was simply a way of ensuring that people with very low incomes didn’t go unrepresented in criminal, matrimonial or personal injury proceedings. In the 1970s, radical lawyers (usually Haldane Society members) found new ways of using legal aid: expanding its scope to housing, domestic violence, welfare benefits, immigration law and developing those areas of the law at the same time; delivering legal services through law centres and other not-for-profit organisations; seeing litigation as a tool alongside industrial action and other forms of protest or campaigning; developing specialist legal aid firms; diversifying the legal profession.

This government intends to turn the clock back. The CAC warns “the most vulnerable clients – those most in need of legal aid assistance – are likely to suffer”. The response from the Law Society, whilst officially on the side of its legal aid practitioners, has been disappointing. That of the Bar Council is even worse. We need the whole of the legal profession, not just the legal aid practitioners, to resist these proposals, not out of self-interest, but in the interests of present and future clients.

Meanwhile, we’re pleased to report some legal victories. Daniel Machover and Kate Maynard write on the use of international law to issue arrest warrants against war criminals in the Israeli government. Azam Zia reports on Turkish lawyer Behic Asci’s successful hunger strike, forcing the Turkish government to relax some its isolation measures in Turkey F-type prisons. Chris Williams and Mike Mansfield QC represented the Humdall family at the inquest of their son, Tom, murdered by Israeli soldiers. Tony Blair and Peter Goldsmith may have let British Aerospace off the hook by stopping the Serious Fraud Office inquiry into the payment of bribes, but they can’t stop the voluntary sector litigating to get BAE in the dock. Few of the domestic victories would have been possible without legal aid, and none of them would have been possible without the expertise of legal aid lawyers.

The Society concluded our series of human rights lectures for this year with an inspirational talk by Moazzam Begg on his three-year incarceration in Guantanamo Bay and Bagram. Sadat Sayeed led us through the tortuous path of litigation trying to force the US government to accept due process. The story is one of brave lawyers, but a reluctant Supreme Court and an aggressive government that legislates to legalise whatever the Supreme Court has declared unlawful. Sarah Burton from Amnest International spoke on the campaign to Close Down Guantanamo Bay – and the Haldane Society is proud to support it. Having heard Moazzam speak, we are even more determined that all of the inmates should be released.

Thanks go to Rebekah Wilson for editing Socialist Lawyer so ably for the last two years, and now participating in the Haldane Society from Nepal. Hannah Rought-Brooks has stepped into her shoes, supported by a collective, and so Socialist Lawyer goes from strength to strength.

Liz Davies, chair, Haldane Society

Guantánamo: even

On February 2007 the US military announced that it had prepared fresh charges against three Guantánamo detainees: David Hicks of Australia, Salim Hamdan of Yemen, and Omar Khadr of Canada. Salim Hamdan was accused of acting as Osama bin Laden’s driver in Afghanistan and of transporting weapons for al-Qaeda. Omar Khadr faced charges of murder in violation of the law of war, attempted murder in violation of the law of war, spying, conspiracy and also providing material support for terrorism.

David Hicks pleaded guilty to the charge of providing material support for terrorism. In May 2007 he was transferred back to Australia to serve his nine month sentence. June 2007, however, witnessed a rather unusual twist, with US Military judges throwing out the cases against Salim Hamdan and Omar Khadr on the basis that the military had failed to designate both men as ‘unlawful enemy combatants’. They had previously been designated as ‘enemy combatants’, but the word ‘unlawful’ was missing from their designation and hence the judges of the new Military Commission Act 2006 (MCA) military commission held that the court had no jurisdiction. This has thrown the administration’s efforts to prosecute various individuals at Guantánamo into disarray, and may well have consequences for future prosecutions before the military commissions given that all of the detainees at the detention facility have been assessed as ‘enemy combatants’ before the coming into force of the MCA. The ruling may mean that all the detainees held at Guantánamo will have to be redesignated as ‘unlawful enemy combatants’, which would require separate hearings for all of them before the CSRT. Following the decisions to throw out the cases against Hamdan and Khadr, the Pentagon’s lawyers filed a motion for reconsideration asking the military judges to reconsider their decision. The Pentagon submits that there is no material difference between ‘enemy combatant’ and ‘unlawful enemy combatant’. Whilst this is an embarrassing setback for the administration, it remains to be seen whether it will bring the detainees any closer to release from Guantánamo.

Death in custody
On May 31st 2007, a Saudi man named as Abd al-Rahman al-Amiri, was found not breathing in his cell at Guantánamo, and guards could not revive him. This is the fourth such death at the camp, after two Saudis and a Yemeni prisoner were found hanged in an apparent suicide at Guantánamo in June last year. An investigation is ongoing.

April

10: People in prison: 80,309. Prison Governors’ Association warns that an overuse of “indeterminate” sentences is creating chaos, and inflexible “breach” procedures that see released offenders back in custody for a non-show or being late for appointments is driving prison numbers up.

15: Three senior magistrates resign over surcharges on fines for offenders. (government’s £15 “victims’ surcharge” which JP’s are required to impose on any offender they fine). The Magistrates Association has condemned the scheme as “fundamentally flawed”.

16: Undercover reporter working as a prison officer in Rye Hill – a private jail strongly criticised over the murder of one inmate and the “avoidable” suicides of vulnerable inmates – exposes conditions where inmates have easy access to drugs and subject staff to intimidation.

18: Research commissioned by the UK Drug Policy Commission shows that the courts hand out three times as much prison time for drug offences as a decade ago but tough sentencing has done little to stem the flow of drugs onto the streets.
Powell wants it shut

A senior US officer caused outrage at the time by describing the suicides of three men as an act of asymmetric warfare and a good PR move on the part of terrorist suspects.

The US authorities would not reveal how this most recent death came about, but a spokesman for US Southern Command said Mr Amiri’s cell had been “regularly” monitored by guards. Amnesty said such harsh and inhumane conditions at the camp were “pushing people to the edge”. Commander Rick Haupt said he had been force-fed with a nasal tube at the time, Commander Haupt said. The president of the Center for Constitutional Rights, Michael Ratner, told the Associated Press news agency that the death was likely an act of desperation. “You have five-and-a-half years of desperation there with no legal way out” Mr Ratner said.

UK prison shame

Our penal system is one of the worst in Europe. We have a higher prison population per capita than any other country in Europe, the lowest age of criminal responsibility in Europe (being 10 in England and eight in Scotland) and the highest propensity to lock up our children, not only for the commission of criminal offences, but also for breaching civil orders, despite the UN’s requirement that the incarceration of juveniles should be a last resort.

So it was not without some anxiety that I agreed to give a paper in April on the state of our prison system at a seminar in Munich called ‘Prisons in Europe – zones without rights?’ organised by the European Democratic Lawyers. For some reason the association had never had any input from our island on this issue. I was therefore to be the first to set out the position. The reaction from most countries was one of horror, despite the fact that our system appears to overshadow a general trend towards increased incarceration across Europe. Rising prison populations; more stringent conditions for the release of dangerous prisoners; and the general use of incarceration as a response to the ‘terrorist threat’. While Britain stands as the leader in Europe with a prison population at almost 149 per every 100,000 (the next closest is Spain with 146 per 100,000 capita), the US far outstrips us, with around five times as many.

Immigration detention was also an issue, with presenters generally expressing outrage at its use, even though the length of detention is restricted to a certain number of days in their countries. For instance, in Italy, people can only be detained as immigrants for a period of up to 60 days. Of course, here we have no such long-stop position.

However, there were some clear competitors in the running for most draconian incarceration policy amongst our counterparts in Europe: particularly shocking were the higher prison populations in countries such as Belgium (being 97 in Belgium), the Netherlands (116 in the Netherlands), and Spain (118 in Spain) and the high number of prison places in countries such as France (being 89 in France) and the Czech Republic (being 88 in the Czech Republic). The number of prisoners in Italy was also far higher than in any other European country. It is clear that we have a much higher prison population than any other country in Europe.

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More calls to close the camp

Former US Secretary of State Colin Powell added his voice to the call for the immediate closure of the camp at Guantánamo Bay. Speaking on US television, Mr Powell said that detainees held there should be transferred to prisons in the US. He also called for the abolition of the military tribunal system, saying terror suspects should face trial under existing US federal laws. Mr Powell told NBC’s Meet the Press television programme “I would simply move them to the United States and put them into our federal legal system. The concern was, well then they’ll have access to lawyers, then they’ll have access to writs of habeas corpus. So what? Let them. Isn’t that what our system is all about?” He then stated “If it were up to me I would close Guantánamo not tomorrow but this afternoon….. Essentially, we have shaken the belief the world had in America’s justice system by keeping a place like Guantánamo open and creating things like the military commission.”

Sadat Sayeed
Hodge panders to immigration is for asylum seekers and immigrants” said David Woods, Director of Housing.

As a matter of fact and law, asylum-seekers are excluded from applying for social housing. So are most recent arrivals into the UK. Refugees, and those granted humanitarian protection by the Home Office, are entitled to apply precisely because the asylum rules require that people fleeing persecution should be given equal treatment once their refugee status is recognised. European Union nationals who are not working are excluded from social housing. Those who are working are unlikely to need it. Those who are entitled to apply

Margaret Hodge’s comments in May that “we should look at [housing] policies where the legitimate sense of entitlement felt by the indigenous family overrides the legitimate need demonstrated by the new migrants” are wrong factually, legally and in the analysis of the problem. Above all she’s propagating racism.

Ironically, the MP for Barking’s comments came just two weeks after Barking & Dagenham council had set out its approach in completely different terms: “the mythology that we’re trying to fight around here is that government investment in overcrowding and rising populations, with no signs of brightening, delegates at the conference appeared genuinely concerned at the scope of our legislative framework to provide for the incarceration of children as young as ten, as well as the availability of a custodial sentence for breaches of civil orders. While we may only have a small handful of children under the age of 14 in custody, the structure of our criminal system sends a very strong and unpleasant message to our counterparts in Europe about our views on crime and culpability. Combined with the well known fact that recidivism is particularly high amongst young offenders, our approach does not bode well for the future.

Laura Janes

May

7: The campaign Strangers into Citizens is launched. It aims to lobby for a “pathway into citizenship” through a two-year work permit for migrants who have been in Britain for more than four years so that they can earn a living legally and pay taxes.

10: The official cost of the national identity card system has soared in the past six months by £340m. It means that the total cost of the project is now £5.75bn. This is unlikely to be the final bill as it excludes the costs of the ID card scheme to government departments outside the Home Office.

10: David Keogh, a Whitehall official, and Leo O’Connor, a Labour MP’s researcher, are jailed for disclosing the minutes of a meeting between Blair and Bush about Iraq. An Old Bailey judge imposed gagging orders on the media preventing the publishing of a comment made by Keogh, even though it was said in open court.

12: The Independent police Complaints Commission is to investigate allegations that some off-duty officers attended a British National party event to mark St George’s Day in Manchester.
Fairford: Two are victorious

On 22nd May, Phil Pritchard and Toby Olditch were found not guilty of conspiring to cause criminal damage at RAF Fairford in Gloucestershire on the eve of the invasion of Iraq in March 2003. They successfully argued before a jury at Bristol Crown Court that their actions had been reasonable because other means of legitimate protest against the war had failed.

The two men had been arrested when they broke into Fairford carrying bolts and screws to be placed inside B52 bombers’ engines and pictures of smiling Iraqi children to be stuck on the payload door. They were held on remand for three months and told that they could expect a jail sentence of up to 10 years. Their first trial in October 2006, ended in a hung jury. Their defence relied on two points: that they were acting to prevent a crime, namely potential war crimes against Iraqi civilians, and to prevent criminal damage to Iraqi property. The protesters argued that war crimes would be committed in the bombing as the B52s carried cluster weapon.

Judge Tom Crowther had told the jury that they should ignore “Reasonable action”: Phil and Toby

the racists on housing in east London

have to wait in the same queue as everyone else. Their need for social housing is assessed on the same basis as everyone else. They don’t queue-jump, on the basis of their immigration status or anything else.

So who is Hodge talking about? She’s conflating two separate issues: the mythology (as her own Director of Housing puts it) that recent arrivals get priority in the housing queue, and a sense that some people might be considered recent arrivals, no doubt because of the colour of their skin. Even if it were the case that asylum seekers were queue-jumping, Hodge should know that “asylum-seeker” is racist code for anyone whose face doesn’t fit.

She’s also attacking the concept that council and housing association tenancies should be allocated solely on the basis of relative need. Even now, need is not the sole arbiter of which desperate household gets which home. Councils may already give some priority to those who have a local connection to the area and to existing tenants seeking transfers (See the recent litigation over Barnet’s allocation scheme: R (Lim) v Barnet LBC [2006] EWHC 1041, [2007] EWCA Civ 132). But quite rightly underlying the statutory basis that governs councils’ allocation schemes (Part 6 Housing Act 1996) is an emphasis that generally homes should be allocated to the most needy first. Of course, how to prioritise different types of need is a tricky political issue. Does the overcrowded family have priority over the single person living in a hostel? Should a family fleeing racial harassment be re-housed quickly, leaving another family in damp accommodation waiting? Part 6 Housing Act 1996 is right to identify different categories of need, and then leave it to local elected politicians to draw up schemes that recognise those different needs.

The problem with social housing is not the rules governing allocation, but the diminishing number of homes available for thousands of desperate families. Shelter’s estimate is that the government should be building 20,000 new council and housing association homes each year.

If Hodge thinks that pandering to racism will help her re-election, she’s mistaken. First, for every racist vote won to Labour, there will be anti-racist votes lost. Second, she’s gifting votes to the BNP, who can argue on the doorstep that voters who agree with Hodge should vote for the unapologetic racists: themselves.

Hodge’s comments have attracted near universal condemnation and ninety-eight lawyers, including several prominent members of the Haldane Society, signed a letter published in The Observer calling for her to resign or be sacked.

14: An Algerian, Mouloud Shali, who was branded a terrorist suspect after being acquitted in the ricin plot trial, is cleared of being a threat to British national security. But the special immigration appeals commission dismissed appeals against deportation from three other Algerian terror suspects, ruling that diplomatic assurances from the Algerian government were enough to ensure their safety.

16: Judge Tom Crowther had told the jury that they should ignore “Reasonable action”: Phil and Toby

17: A jury finds that a series of failings by the prison service contributed to the death of Shahid Aziz, who was stabbed by his violent white cellmate, Peter McCann. An assessment of the threat McCann posed relied solely on asking him whether he was dangerous.

18: The House of Commons votes to exempt itself from its own Freedom of Information Act, ending the compulsory legal requirement for MPs to disclose their expenses and introducing further curbs on the release of already protected MPs’ correspondence.

20: Mike Schwarz, this is the closest to going to war. “In strict legal terms the verdict is not significant; what is significant is that you had 12 jury members who unanimously found these defendants not guilty and that really is a clear barometer of the public’s views of the lawfulness of what the government did. In effect the jury was saying that war crimes were committed. And the Judge allowed them, which is in some way, a judicial endorsement.”

21: An all-party group of MPs urges the government to introduce effective controls over US rendition flights. Questions have been raised about 170 possible CIA rendition flights through the UK.
Palestine forty years on: enough!

On 9th June 20,000 demonstrators showed their support for the Palestinians living under occupation in a march and rally held to mark the 40th anniversary of the Israeli occupation of the West Bank, Gaza and East Jerusalem. The rally in Trafalgar Square was organised by the Enough! Campaign; a coalition of over 50 charities, trade unions, faith and other campaign groups.

Mustafa Barghouti, the Palestinian Authority’s minister of information, addressed the rally calling for international support to the democratically elected government. He compared the situation to apartheid South Africa stating that “Israel cannot be changed from within, there needs to be pressure from outside.” His call for a boycott of Israel was echoed by several speakers.

Bishop Riah Abu El Assal, the Anglican bishop of Jerusalem, spoke of his belief in the ultimate victory of peace based on justice. Bruce Kent, of Pax Christi and CND, spoke of peace and praised Israelis and Jews who campaign for justice for the Palestinians, and who formed a major part of the coalition. Ne’Tan’l Silverman, an Israeli member of Combatants for Peace, a group of Palestinian and Israeli ex-combatants that works to encourage dialogue between those Israelis working for peace and with ordinary Palestinians suffering under the occupation and those Israelis living in solidarity with them, addressed the rally about his group’s vital work.

Several British politicians spoke calling for an end to the occupation and Alison Shepherd, President of the Trade Union Congress, stated that the TUC had renewed its policy of support to the Palestinian and to add its voice to the growing call for an end to occupation. She highlighted the worsening economic situation, increased poverty, and the exploitation of Palestinian workers.

There were demonstrations around the world. In Tel Aviv thousands of people gathered to attend a rally organized by groups including Meretz, Peace Now and Anarchists Against the Wall. In South Africa, 2,500 people from solidarity groups, trade unions and faith-based organisations, gathered in Cape Town and joined a march that walked peacefully through the Cape Town chanting in unison for an end to the occupation and freedom for all Palestinians.

Tragically, the words of Mustafa Barghouti and Ishmael Haniya urging support for the unity government, have already been overtaken by events in Gaza. It is essential that the campaign for a just peace in Palestine and Israel is not distracted by the internal chaos, and that we stand in solidarity with ordinary Palestinians suffering under the occupation and those Israelis working for peace and justice alongside them.

Lords’ judgment: he

Baha Mousa died of 93 injuries inflicted by multiple soldiers none of whom were charged, as the judge in the court martial found, “as a result of a more or less obvious closing of ranks”. He had been beaten, subjected to stress techniques and hooded. Responsibility for that lies, again in the words of the judge, “at brigade and beyond”. In the same incident another man was beaten and tortured so badly that he nearly died of renal failure. Another five men were seriously injured.

This successful House of Lords judgment in June means there must be a full, public and independent inquiry into what went wrong. This inquiry will have to explore issues arising from what is on the public record in these proceedings (R (Al Skeini) v Secretary of State for Defence [2007] UKHL 26).

These issues include: A policy that led to the dropping of the 1972 ban on hooding, stressing, sleep deprivation, food deprivation and white noise; a written policy on hooding detainees that reflected verbal and written NATO policy; that there was complete confusion at the highest level as to what was lawful or not; that when the head of Army Legal Services blew the whistle on hooding and stressing he was told that the attorney general had advised that the Human Rights Act did not apply, and ac-
was victim of torture

was victim of torture

Racial Equality believes the
The Commission for

12: The Commission for Racial Equality believes the government breached anti-discrimination laws after changing its immigration programme for highly skilled workers. They had previously been allowed to pledge to make Britain their main home and claim permanent residence after four years. But IT specialists, scientists and others have been affected by the retrospective application of new rules that prioritise age, education and previous earnings and no longer take into account previous work experience or professional achievement.

14: The law lords dismiss arguments by the Ministry of Defence and Lord Goldsmith, the Attorney General that the Human Rights Act does not apply to UK forces detaining foreign prisoners, in particular Baha Mousa, a Basra hotel receptionist who died while in British custody in 2003.

16: Ministers announce a policy review of the legal clause which allows parents to inflict "reasonable chastisement" on their children, so long as they don't leave a mark.

18: The law lords agree to hear an appeal by the mothers of two soldiers killed in Iraq, who argue that the government violated their sons’ right to life by rushing into war on inadequate legal grounds. This could force the government to hold an independent inquiry into the war's legality.

The family of Baha Mousa, the victims of all these incidents and the public are entitled to know the answers to some pressing questions:

• In the Mousa incident, were all the right people charged with the right offences?
• Bearing in mind the noise of the soldiers shouting abuse, the screaming of the prisoners and the scale of the site, who in command knew what was going on in the crucial 36 hours before Mousa died?
• Who knew or ought to have known, that the banned techniques had been reintroduced, including a written policy on hooding?
• How is it that at the highest levels, even after Mousa had died, there was ignorance of the fact of the 1972 ban?
• On what basis did the attorney-general advise and did he say unequivocally that hooding, stressing and other banned techniques were absolutely prohibited, and that the Convention against Torture applied?
• It is imperative that the government and military face up to these issues. Further efforts to suppress material and legitimate debate issues. Further efforts to suppress material and legitimate debate issues. Further efforts to suppress material and legitimate debate must stop.

Public Interest Lawyers
Solicitors for the Mousa family.
www.publicinterestlawyers.co.uk

Donald Rumsfeld: war criminal

We will go on pursuing them…”

On 27th April the German federal prosecutor dismissed the complaint filed in Germany against former US secretary of defence Donald Rumsfeld and other US officials, for torture and war crimes. The prosecutor based her decision on three main points: the absence of any suspects in Germany; the unlikelihood of any suspects visiting Germany in the future; and the impossibility of a successful investigation.

The complaint states that because of the failure of authorities in the United States and Iraq to launch any independent investigation into the responsibility of high-level US officials for torture, despite a documented paper trail and government memos implicating them in direct as well as command responsibility for torture, and because the US has refused to join the International Criminal Court, it is the legal obligation of states such as Germany to take up cases under their universal jurisdiction laws.

“Fundamentally, this is a political and not a legal decision,” said the CCR President, Michael Ratner. “We will continue to pursue Rumsfeld, Gonzales, and the others – they should not feel they can travel outside the US without risk. Our goal is no safe haven for torturers.”

The German law of universal jurisdiction expressly states that it is a universal duty to fight torture and other serious crimes, no matter where they occur or what the nationality of the perpetrators and victims are. Kaleck and his colleagues have Haldane’s full support in their important action.

Bill Bowring
What is Tony Blair’s real legacy?

Tony Blair is obsessed with how he will be viewed by history. One word will suffice: Iraq.

But from his time as shadow home secretary right through to prime minister, he also pursued a ‘zero tolerance’ policy on crime.

New Labour has been committed to a strong state, reflected both in the money poured into law and order and the number of new laws that have been passed; Britain now spends more on the criminal justice system and policing than France, Germany or the US and has placed 2,685 new laws on the statute books since 1997, an increase of 22% in the decade from 1987-1996. Hence, prison numbers have grown at an astonishing rate from 60,000 to over 80,000 in ten years, with those figures set to continue to rise into the next decade. The criminalisation of youths has been particularly close to Blair’s heart, leading to almost 12,000 of those incarcerated being under the age of 21. Social problems caused by economic inequality are now acts of anti-social behaviour, dealt with by the imposition of anti-social behaviour orders. Over four million CCTV cameras currently operate in Britain and with the introduction of ID cards the erosion of personal privacy is set to continue. As well as Iraq, Blair’s legacy is a more unequal, divided society.

Pakistan dictator takes on his legacy

The suspension of the chief justice of the supreme court of Pakistan, Iftikhar Chaudhry, by President Musharraf, has unleashed a torrent of protests, met with escalating repression.

Chaudhry presided over a supreme court that has recently taken decisions that have dismayed Musharraf’s government. It ruled against a sale of Pakistan Steel Mills to a friend of Musharraf’s, declared a bill giving the police power to enforce observance of Islamic practices and values to be unconstitutional, and has directed the government to answer questions about those who have ‘disappeared’ (often at the behest of the US) in recent years.

On 9th March, Musharraf called Chaudhry personally to his residence and told him to resign. When Chaudhry refused, he was kept under house arrest, declared “non-functional”, accused of “corrupt misuse of office” and an acting chief justice was appointed.

There is no basis in the Constitution of Pakistan for this kind of government intervention.

Within days of Chaudhry’s suspension, lawyers across Pakistan launched unprecedented protests. They boycotted court proceedings and held large rallies, supported by the NGO movement and Benazir Bhutto’s People’s Party (PPP). Chaudhry was released from house arrest in May. He was due to address a rally in Karachi, Pakistan’s largest city, controlled by the Muttahida Qaumi Movement (MQM), supporters of Musharraf. The MQM disrupted the rally with armed force. Roads were blocked, cars were burned, hundreds of people were injured and over 40 Chaudhry supporters were killed. The police were said to be complicit, arresting over 800 Chaudhry supporters.

Television offices were fired on by MQM gunmen.

Since March, Chaudhry and the government have been battling it out in court. The government argued that the court has no jurisdiction to hear Chaudhry’s complaint that his suspension

Why Haldane should go on the ATTAC

Haldane’s participation in European developments is intensifying. This is shown by two events which took place in Hanover on 22-24th June 2007.

The European Lawyers for Democracy and Human Rights (ELDH) – see www.eldh.eu – of which Haldane is a founder, held its annual general assembly on 22nd June, with representatives from the Basque country, Bulgaria, England, France, Germany, Italy and Romania. There are currently applications for membership from Turkey and the Netherlands. We were also joined by Silke Studzinsky, of our sister association the European Democratic Lawyers. I was re-elected president of ELDH.

It was splendid to see participation in ELDH events by Haldane members. Tim Potter took part in trial observations of cases against Basques in Madrid; and Laura Janes participated in the ELDH/EDL seminar “Prisons in Europe”, held in Munich in October 2006. Highlights of the past year included: the conference “Social Rights in Europe” in Berlin, in May 2006; the conference “Frontiers of Europe: Areas Without Rights” held in Barcelona in October 2006; the conference “Alternative ECOFIN” held in Berlin in April 2007; and the conference “Labour and Justice in a Globalised World” held in Freiburg in May 2007. We also attended the Arab Lawyers Union conference in Damascus in January 2006, and joined many protest actions, as well as participating in the activities of the European Network Against Racism (ENAR) of which ELDH is a member.

ELDH was also one of the sponsors, with ATTAC (“the world is not for sale”), of the conference “The EU Constitutional Treaty: Criticisms and Alternatives”, held on 23-24th June. This was attended by over 150 activists.

18: The Ministry of Justice confirms that the rules governing the use of restraint techniques based on inflicting pain in privately-run children’s jails are to be widened to allow staff to use them to enforce everyday discipline. Restraint techniques were used on 301 children as young as 12.

20: A ruling by the law lords rules that an 84-year-old woman with Alzheimer’s disease placed in a private care home by Birmingham city council is not covered by the Human Rights Act. The ruling leaves more than 300,000 vulnerable elderly people in private care homes.

22: A senior civil servant who drew up the rules on restraining teenagers in child jails strongly criticises ministers for making changes which will allow private security staff to use “pain-compliance” physical restraint techniques.

26: No policemen or soldiers are to be charged in connection with the loyalist murder of the solicitor Pat Finucane. Finucane, a civil rights lawyer who defended republican suspects was killed by gunmen from the Ulster defence Association in February 1989.
Young Legal Aid Lawyers

Carter’s dumb idea: young legal aid lawyers are feeling the pinch

Carter’s ‘dumbing down’ of legal aid will have a devastating impact on the quality of new entrants to the profession, reducing incentives for young lawyers to work in legal aid. In particular, this will be caused by making training contracts even less attractive for providers, who are instead encouraged to make as much use as possible of paralegals. This will have a direct impact on the quality of lawyers available to future legal aid clients.

Carter envisages that firms practicing in legal aid can be profitable, provided they use a ‘pyramid structure’ based on having one partner to every 10 solicitors and 50 paralegals. The then Minister for Legal Aid supports this notion advocating the increased use of paralegals to do less skilled work such as taking witness statements. For example, in a meeting with the minister last year, a YLAL member who is a trainee described the difficulties in working on a fixed fee in dealing with a very disturbed victim of domestic violence. The trainee argued that it took a great deal of time to establish a relationship of trust following which she was unable to extract essential information required for the full and detailed preparation of her case. The then Minister suggested that this could be done by a paralegal, yet the trainee objected that this would only add another layer of work and serve to distance her from the client. Further, the trainee added, she wanted to spend the time to take detailed instructions properly so she could feel she had provided a quality service and partly so she could learn how to fully prepare a case. The Minister appeared unconvincing although he did consider that our proposal of making a commitment to training part of the contract with the LSC was one worth considering.

In response to a survey we conducted of 100 YLAL members in autumn 2006, many respondents emphasised that training contract jobs were being axed in favour of recruiting paralegals. The following response was echoed many times throughout the survey: "I am trying to get a paralegal position in a criminal firm in the hope of being offered career progression and have been told by firms that they cannot offer me anything due to the uncertainty of their practice due to Carter. I was very close to being recruited in a firm as a paralegal with a view to becoming a trainee, and then I was told that due to the proposals they were not only not taking on new trainees but also downsizing."

Although the Solicitor’s Regulation Authority has recently announced that it will hold out on the abolition of the minimum salary for trainees, the salaries for legal aid trainees are very rarely much above the minimum law society wage and the prospects of continued employment or a decent pay rise in the future are bleak. For the many young legal aid lawyers searching for a training contract, the most obvious alternative is of course to seek paralegal work.

Anecdotal evidence amongst our membership suggests that paralegals are the flavour of the month (as envisaged by Carter) partly because they are not subject to the same protections as trainees. Members desperately seeking training contracts have been offered the chance to do free work experience followed by a period of paralegal work for virtually national minimum wage with a view in the long run to being able to apply for a training contract. Other members, sometimes with extensive casework experience, are being employed as paralegals in environments where they are expected to manage a caseload at a level far above that at a trainee but on a salary some £4,000 less than a trainee working in the same firm. There is an extent to which firms have been encouraged by the new changes to do this in order to survive. However, if we are to avoid the next generation of legal aid lawyers being unhappy and, more importantly, unqualified bunch unable to practice in the best interests of our clients, firm action needs to be taken now! This action also needs to include protection for the junior bar who are finding their work in the lower criminal courts hurriedly drying up with the advent of solicitors undertaking increased advocacy roles on the basis of cost. This will inevitably impact on recruitment to the junior bar, as a knock on result.

While the LSC plans to make their sponsored training contract scheme a little more flexible and accessible for 2007, there will only be 100 grants available: a mere drop in the ocean when urgent action is needed now to protect the future of both our legal aid lawyers, and in turn and more importantly, our legal aid clients.

Laura Janes, Chair YLAL
www.younglegalaidlawyers.org

ATTAC was founded in 1998, and its first concrete proposal was the taxation of financial transactions in order to create a development fund and to help curb stock market speculation. Hence its name: the Association for the Taxation of Financial Transactions to Aid Citizens (see www.attac.org). The ATTAC network is active on a wide range of issues: the WTO and international financial institutions; debt; taxation of financial transactions; tax havens; public services; water; and free-trade zones. It is a key participant in the European Social Forum. However, although there are ATTAC organisations in 18 European countries, there is none in Britain.

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27: After nearly 200 years the stigmatising legal term “common prostitute” is to be removed from the statute book. The announcement came as part of a package of criminal justice reforms.

28: An inquest jury finds that the death of Gareth Myatt could have been prevented. Gareth was a 15-year-old teenager who died while being restrained by three guards at a privately-run youth prison. The verdict was of accidental death and found that the lack of an adequate safety assessment and staff’s lack of knowledge contributed to his death.

6: Two anti-war protesters who broke into an RAF base in the build-up to the invasion of Iraq are found guilty of causing criminal damage to American vehicles, there they argued that they had acted lawfully by trying to prevent more serious war crimes being committed by the US. Their trial followed a three-year battle by anti-war protesters to be allowed to challenge the legality of the war in their defence. The appeal court said they could argue they acted to prevent war crimes, but could not contest the legality of the invasion.

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In 2005 Hickman and Rose solicitors worked with lawyers from the Palestinian Centre for Human Rights (PCHR) on files of evidence for use in England and Wales relating to alleged ‘grave breaches’ of the Fourth Geneva Convention 1949 (Protection of Civilian Persons in Time of War). These included torture – which is also an international crime regardless of the existence of a military occupation.

Evidence files relating to Gaza cases were handed over to the anti-terrorist and war crimes unit of the Metropolitan police on 26th August 2005.

Naturally, in such cases, lawyers in England and Wales are reliant to a great extent on the collection of evidence by lawyers and other human rights defenders in the Occupied Palestinian Territory (OPT). The cases discussed here therefore have their origins in work carried out by many such people, primarily PCHR, led by Raji Sourani, and by a variety of other lawyers, NGOs, academics and researchers working in the OPT. Without this professional, dedicated and often dangerous work, it would simply not have been possible to credibly pursue cases in England and Wales.

Grave breaches are criminalised in England and Wales under the Geneva Conventions Act 1957. The 1957 Act was introduced in order to comply with this country’s treaty obligations to provide domestic laws to enable ‘universal jurisdiction’ to be exercised over the grave breaches specified in the four Geneva Conventions of 1949. Ireland passed a very similar Act in April 1962, as did many commonwealth countries during that period.

There is no rule under international criminal law that alleged victims can only seek remedies in third countries after being denied any remedy through the occupier’s legal system, or for some other technical breach of applicable administrative law;

2. The killing of Noha Shukri Al Makadma on 3rd March 2003 as the result of a punitive house demolition;
3. The killing of Mohamad Abd Elrahman on 30th December 2001;
4. The dropping of a one ton bomb on the Al Daraj neighbourhood of Gaza City on 22nd July 2002.

Unfortunately, the record shows that most alleged grave breaches in the OPT are not even investigated as such by Israel. They are either ignored or officially sanctioned as legal in the teeth of international legal opinion to the contrary.

Punitive house demolitions

According to PCHR, between 29th September 2000 and 31st January 2005, more than 2,702 houses in the Gaza Strip were completely demolished by the Israeli occupying forces following the outbreak of the (second) intifada, rendering thousands of Palestinian civilians homeless. B’Tselem put the figure of house demolitions in the whole of the OPT from September 2000 to November 2004, as 4,170.

A policy brief by Harvard University to the United Nations Information System on the Question of Palestine (UNIS-PAL), defined house demolitions as broadly falling within three categories:

1. First, houses are demolished by Israeli occupation forces because a building permit was not sought prior to their construction, or for some other technical breach of applicable administrative law;
2. Second, houses are demolished as part of military operations. Such destructions are arguably necessary during armed hostilities and fall to be judged under the rules relating to military necessity;
3. Finally, demolitions occur outside the scope of military operations or Israeli administrative power in the OPT. These demolitions are purportedly a response against persons suspected of taking part in – or directly supporting – criminal or guerrilla activities. These demolitions are referred to routinely as “punitive demolitions.”

The distinction in practice is often difficult to determine, particularly between the second and third type.

A series of cases in the Supreme Court of Israel confirm that the domestic courts do not regard the policy of punitive house demolitions as unlawful. For example Almarin v IDF Commander in Gaza Strip HCJ 2722/92 (the authority of
the commander extends to the destruction of those parts of
the property that are owned or used by members of the family
of the suspect or by others), Janimat v OC Central Com-
mand HCJ 2006/97 (the court refused to interfere with the
discretion of the military commander and stop the house de-
molition ordered by the military commander of the West
Bank).

The authority for punitive house demolitions stem from
the Defence (Emergency) Regulations 1945 (according to Is-
raeli courts that insist the Regulations are still good law).
These regulations were introduced into the legal structure of
Palestine by Britain, in response to resistance to British rule.
Regulation 119(1) states:

A Military Commander may by order direct the forfei-
ture to the Government of Palestine of any house, structure,
or land from which he has reason to suspect that any firearm
has been illegally discharged, or any bomb, grenade or ex-
plosive or incendiary article illegally thrown, or of any house,
structure or land situated in any area, town, village, quarter
or street the inhabitants or some of the inhabitants of which
he is satisfied have committed, or attempted to commit, or
abetted the commission of, or been accessories after the fact
to the commission of, any offence against these Regulations
involving violence or intimidation or any Military Court of-
ference; and when any house, structure or land is forfeited as
aforesaid, the Military Commander may destroy the house
or the structure or anything growing on the land.

Demolitions purportedly required by military necessity
must be judged by internationally accepted criteria (i.e. as set
out in the above policy brief to UNISPAL):-

i) The individual house must offer an essential and immedi-
ate contribution to the enemy's military operation and,
therefore, endanger the security of the occupation forces;

ii) The demolition of the house must, at the time, be an ad-
equate response to that specific threat and there must be
no less intrusive response possible;

iii) The demolition of the house must offer concrete military
advantages that outweigh the damage caused to the civil-
ian asset and its consequences on the life of Palestinian in-
dividuals and families.

The facts of each case must meet this relatively high thresh-
old, otherwise the house demolition in question is not mili-
tarily necessary.

In August and September 2005, two cases involving house
demolitions were presented to the police and Bow Street Mag-
istrates’ Court in relation to Doron Almog, alleging the grave
breach of ‘extensive destruction of property not justified by
military necessity and carried out unlawfully and wantonly’.

One involved the demolition of 59 houses in Rafah by bull-
dozer on 10th January 2002. The IDF gave conflicting and
inconsistent reasons for these demolitions, including that the
operation was a retaliatory measure for the (unrelated) death
of two Israeli soldiers, to weaken the fear of the existence of
tunnels, and for purported reasons of military necessity.

The other case involved the punitive demolition of the
house of the family of a suspected suicide bomber by dyna-
mite, which partially demolished a neighbouring house killing
Noha Shukri Al Makadma who was in her ninth month of
pregnancy. In the case of the killing of Noha Shukri Al
Makadma, it was alleged that the property destruction was
extensive as part of a wider policy of ‘extensive’ punitive
house demolitions of the Government of Israel and imple-
mented by military commanders. It was further alleged that
her death also amounted to the grave breach of wilful killing.

The victims in both of these cases claimed that these de-
molitions were illegal, but no investigation took place. PCHR
attempted to instigate investigations into both of these cases. In
relation to the case of the 59 house demolitions, PCHR wrote
to the IDF legal advisor requesting a criminal investigation, but
no reply was received. In relation to the house demolition that
killed Noha Shukri Al Makadma, PCHR wrote to the legal ad-
visor of the IDF requesting an inquiry and for disciplinary mea-
sures to be brought against those responsible. In its reply, the
Ministry of Defence expressed regret for the ‘injuries of guilt-
Universal Jurisdiction versus Israel: Who Will Win?

less people” but rejected the request for an inquiry.

Evidence of two other similar punitive house demolitions by dynamite in the Gaza Strip conducted in the four months prior to the death of Noha Shukri Al Makadmna and ending in civilian deaths, were also presented to the British police as “evidence of similar fact”. In both these cases PCHR wrote to the legal advisor of the IDF requesting criminal investigations and asking for the IDF to change their practices to avoid further deaths of innocent civilians. In one case no reply was ever received. In the other, without any obvious inquiry, the reply stated that there was “no suspicion of any breach of duty by the IDF to warrant the opening of a criminal investigation”.

On 17th February 2005, Defence Minister Shaul Mofaz announced the end to the policy of demolishing the houses of “terrorist’s” families. However, the demolition of Palestinian homes purportedly for reasons of military necessity has not abated.

Targeted assassinations

According to PCHR, from 29th September 2000 to 31st January 2005, Israeli occupying forces and settlers killed 2,714 Palestinian Civilians in the OPT. Four hundred and eighteen (14%) were killed in assassination operations, and of these, at least 154 were bystanders, of whom 44 were children.

Evidence in relation to one of these assassination operations was presented to the British police. This was the well known case of the assassination of Salah Shehadeh.

Between 11.30 pm and midnight on 22nd July 2002, an Israeli F16 fighter plane dropped a one ton bomb on the al-Daraj neighbourhood of Gaza City (the al-Daraj bombing). The target of the bombing was the house of Shehadeh, and it was a direct hit. However, his house was in one of the most densely populated residential areas on earth.

In total, fifteen people died in the blast. Up to 150 people received injuries, some of them serious and permanent. Eight houses in the vicinity of the bombing were completely destroyed and a further nine partially destroyed. A further twenty one houses received moderate damage.

The IDF Spokesperson’s Announcement of 23rd July 2002 stated that:

“The IDF attack last night was directed at Salah Shehadeh and him alone. The strike was accurate, carried out using designated technology. The objective is to thwart future and upcoming terror activities by attacking the source itself, namely Shehadeh. There was no intention of harming members of his family or other civilians.”

The ‘Yesh Gvul’ movement in Israel filed a petition in the Israeli High Court on 30th September 2003, asking the court to require the Attorney General and the Military Advocate General to mount a criminal investigation with a view to putting on trial all those in the command chain of the bombing.

The State of Israel maintained that the assassination itself was lawful and that the military operation was proportionate to the legitimate aim of killing Shehadeh. It stated in its response on behalf of the State Attorney’s Office that the potential for the death of civilians and the destruction of property was considered before going on to take the risk, and ordering the bombing mission:

“It is important to emphasize that one of the central considerations, which were accounted for throughout all planning stages of the operation against Shehadeh and its approval was the proportionality consideration – the obligation to make sure that hitting Shehadeh would not lead to hitting the civilian population in his vicinity, disproportion to the military aims the operation set out to achieve. The discussions largely dealt with the subject of hitting civilians, which may be a result of attacking Shehadeh.”

“After the discussion for instance, it had been decided to carry out the attack in the late hours of the evening (close to midnight), when pedestrians would not be expected to move around the street close to the house of Shehadeh.”

“Also upon such consideration it had been decided to use one bomb of 1000 Kg (which was the quantity of explosives required in order to achieve in reasonable probability the aim of the operation) and not two bombs of 500 Kg each, because the use of two bombs would increase considerably the risk of missing the target and as a result endangering a building close to that of the intended target with a direct hit.

At the end, after receiving precise intelligence information about the hiding place of Shehadeh, the execution of the operation had been decided according to the abovementioned outline. This decision was taken at the highest level, having described the importance of stopping the activity of Shehadeh, despite the information and estimates of the damages to other people, which may be caused as a result of the attack.”

After the State’s reply, on 3rd March 2004, the court suspended the case, pending a decision on another petition (filed by the Public Committee Against Torture in Israel in January 2002) challenging the lawfulness of the assassination policy of the State of Israel.

On 16th February 2005, a hearing of the ‘assassination policy’ petition was held, and that petition was itself adjourned indefinitely as a result of Prime Minister Sharon’s commitment at the Sharm-el Sheikh summit of 8th February 2005, to suspend the policy of assassinations (“pre-emptive liquidations”).

The Yesh Gvul movement wrote to the High Court requesting the petition for a criminal investigation into the bombing to be re-opened. Yesh Gvul requested a hearing and the State was given to 15th June 2005 to respond. A hearing took place on 5th September 2005, when the case was adjourned indefinitely (as in the ‘assassinations policy’ case).

During the course of September 2005, advocates for the petitioners asked for a hearing on the assassination policy case, in response to the public resumption of that policy by
bombing remains undecided!

Meanwhile, the international view of the al-Daraj bombing was that it was unlawful and disproportionate. This view is certainly held by the British Government. The International Committee of the Red Cross (ICRC) issued a press release of 23rd July 2002, entitled ‘Civilians must not be attacked’. Several members of the UN Security Council condemned the bombing in those terms, including Jack Straw, then British Foreign Secretary, who was in the chair, at its meeting on 24th July 2002. Before travelling to the UN, Jack Straw had told the House of Commons that he would ensure that Sir Patrick Cormack’s views “which I think the whole house shares, about the unjustified and disproportionate nature of the attack and its consequences are conveyed to the ambassador and, through him, to the Israeli Government.”

Similarly, after the assassination of the spiritual leader of Hamas, Sheikh Yassin, by the Government of Israel, Jack Straw confirmed that the British Government considered the policy of “so-called assassinations – straightforward killings as “unlawful, unjustified and self-defeating, and they damage the case that Israel makes in the world. The fact that the killings led to the deaths of not only those whom Israel holds responsible for terrorism, but entirely innocent bystanders, including children, simply emphasises the unlawful nature of that approach, and it’s counter-productive effect.”

Despite the international view taken towards the criminal nature of the acts described above, it is clear that a climate of impunity has taken hold in Israel and its occupying army, that is unchecked by its own criminal or civil justice system. It is doubtful whether the ruling of 13th December 2006 in the assassination policy case will have any real impact in this regard if in fact criminal investigations into cases such as al-Daraj simply don’t take place. One of the few ways to combat impunity is the practical application of universal jurisdiction.

### The Almog case

Mr Almog was due to speak at a synagogue in Solihull, Birmingham, on 11th September 2005. The police failed to make a decision whether they would arrest Doron Almog under their ‘general arrest’ powers but adopted a neutral stance in relation to the application to Bow Street Magistrates’ Court for an arrest warrant. This does not require the consent of the police, the Director of Public Prosecutions (DPP) or the Attorney General (s25 Prosecution of Offences Act 1985), whereas a prosecution under the 1957 Act in principle requires all their involvement, and in practice the Attorney General must provide his consent for proceedings to be instituted. On 10th September 2005, a warrant was issued for the arrest of Doron Almog in relation to the complaint regarding the 59 house demolitions. The Senior District Judge indicated that the other cases would be more appropriately proceeded with by giving the police the opportunity to interview Doron Almog under caution (The issue of an arrest warrant in a case precludes that step.) On 11th September 2005, Doron Almog evaded arrest at Heathrow airport when he was advised to remain on the incoming El-Al airplane, returning to Israel on it despite the police officers being in the airport. A complaint about the police conduct on the day is, after a long battle, now the subject of a fully IPCC supervised investigation.

The British Government decided to review the law following lobbying by the Government of Israel to try to ensure that in future similar arrest warrants cannot be issued at the request of complainants.

### The law

The importance to civilians under occupation of the practical application of ‘universal jurisdiction’ cannot be underestimated. Indeed those who drafted the Fourth Geneva Con-
universal jurisdiction versus israel: who will win?

The creation of ad hoc international criminal tribunals set up under resolutions of the UN Security Council. There is no chance of such an ad hoc tribunal being established in the foreseeable future in the case of Israel, as the US would veto such a proposal at the UN Security Council. Furthermore, the International Criminal Court cannot deal with alleged Israeli war crimes as Israel has refused to sign up to it.

Criminal trials in the domestic courts of third-party states might have deterred many war crimes. However, many alleged crimes in, for example, the occupied territories, Kuwait and East Timor have gone unchallenged across the world. Israelis, Iraqis and Indonesians should have been arrested and tried in other countries, to ensure legal accountability but also to deter criminality.

Sadly, individual states have lacked the political will to prosecute foreign war criminals. Countries have resisted getting ‘involved’, even though they have a legal duty to ‘seek out and prosecute alleged war criminals and either prosecute or extradite those accused of committing offences contrary to the UN Convention Against Torture’. This is arguably a continuing failure to comply with (or even accept) the duty to prosecute or extradite those suspected of committing serious international crimes. Not only will this frustrate all attempts to bring such alleged offenders to justice but it will bolster the sense of impunity of such persons.

The British police have discretion as to whether or not to investigate particular criminal allegations. That discretion has to be exercised lawfully. The law of England and Wales does not entitle the police a ‘get out clause’ not to investigate any allegations of such offences, as that would amount to an absolute discretion to ignore the duty to uphold the law. So, which cases should it investigate? What is the future for universal jurisdiction in England and Wales?

Quite simply, the police in different countries, need to allocate resources to investigate credible allegations of war crimes and torture. In the past the police in the UK were given resources specifically to pursue investigations under the War Crimes Act 1991. More than £11 million was reportedly spent by the Home Office (the majority of which was allocated to the police) in support of the investigation of alleged war criminals resident in Britain, resulting in only two prosecutions and only one conviction. Such cases of war crimes were specifically funded by central Government over an extended period. The reported cost of investigations to the end of 1996 was approximately £1 million for the Metropolitan Police and approximately £2 million for the CPS and the expected cost of investigations for 1996-97 was about £630,000. Home Office special funding for the war crimes unit stopped in 1995, but it was stated during a Parliamentary debate in March 1997 that the Metropolitan police would receive a total of £1.7 billion in 1997-98 for all their policing needs, including war crimes investigations.

The investigative resources (police officer time and expenses) required to prepare evidence files for advice from the CPS in some of these cases is relatively modest. For example, in each of the Gaza cases provided to the police the suspect has been identified, witnesses identified etc. No great difficulties are posed in obtaining further evidence locally in relation to the cases now with the police. Anyhow, it would be perverse if a State, such as Israel, were to be ‘rewarded’ (i.e. by police inaction) for making it more difficult for the British police to investigate alleged crimes committed under military occupation. These will clearly be much cheaper cases to investigate than those previously investigated under the 1991 Act. Indeed, in some cases the investigative burden is minimal and the case will revolve primarily around legal issues.

DAC Peter Clarke commented just after what is reported to have been the first conviction under s134 Criminal Justice

The British Government decided to review the law following lobbying by the Government of Israel

article 147 – duty to search

The authoritative commentary on the Convention published by the International Committee of the Red Cross says:

“As soon as a contracting party realises that there is on its territory a person who has committed . . . a [grave] breach, its duty is to ascertain that the person is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State.”

The ICRC commentary confirms that a High Contracting Party is not entitled to sit back and do nothing but has an active obligation to search. It follows that this duty should include maintaining border controls that enable a state to ensure that known suspects seeking to enter the jurisdiction are arrested on arrival. In the British context, common sense dictates that the necessary spontaneous police action can only occur where alleged war crimes have been investigated at the point where the police are able to ascertain whether there are reasonable grounds to arrest a suspect who arrives in or is discovered in the jurisdiction. The deterrent value of this Article hinges largely on this obligation. There is certainly no question under the Convention that the nationality of the individual concerned or of any victim is relevant to the exercise of jurisdiction. The ICRC Commentary, following the passage referred to above, states:

“The Court proceedings should be carried out in a uniform manner whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same Courts.”

The unequivocal wording of the duty of each High Contracting Party in article 146 of the Convention indicates that once a suspect is located in the territory of a High Contracting Party, the state has a duty to either prosecute or extradite the alleged war criminal to enable a prosecution. The duty to ‘prosecute or extradite’ has been emphasised by the UN on several occasions.

Winning the battle against Israeli war crimes

Where war crimes, genocide and crimes against humanity are concerned, instead of individual countries doing their duty, in the few cases where international consensus has been possible, a “pooling of resources” has been achieved through

the creation of ad hoc international criminal tribunals set up under resolutions of the UN Security Council. There is no chance of such an ad hoc tribunal being established in the foreseeable future in the case of Israel, as the US would veto such a proposal at the UN Security Council. Furthermore, the International Criminal Court cannot deal with alleged Israeli war crimes as Israel has refused to sign up to it.
Act, the conviction of Mr Zardad, an Afghan warlord:

"We had to find witnesses in remote parts of Afghanistan and give them the confidence to come forward to give evidence in a British court. The fact that they did so is testament to their courage and to the skill of the police officers who supported them. It was a huge challenge, in the prevailing circumstances in Afghanistan, to investigate and find evidence to the standard demanded by the British courts. Today's verdict shows what can be achieved, and that the UK is not a safe haven for people like Zardad."

This suggests that there will not be impunity in England and Wales for torturers or war criminals, even after the investigative burden placed on the police since the bombings in London of 7th July 2005. Police forces around the world will continue to be given evidence to consider on a case by case basis. The task facing victims and their legal advisers is to persuade police forces across the world to conduct expeditious and robust preliminary investigations so that decisions can be made in each case whether to arrest the suspect on arrival in their jurisdiction. Police forces can then put themselves in a position to arrest and charge arriving suspects, where the evidence permits.

If the police engage with these issues in a serious way, the very prospect of alleged war criminals being brought to justice in Britain or any other country is likely to provide a deterrent to future perpetrators of war crimes. Hopefully, a new protocol agreed between the police and CPS will improve the speed and quality of investigations into such cases. Criminal trials of Israeli suspects would certainly provide genuine deterrence and begin to provide justice for victims, where justice has eluded them at home. The end of impunity would then be in sight.

If Israel wins its battle against universal jurisdiction, this will be another disaster for the Palestinians.

This article is an abridged and updated version of an article by Daniel Machover and Kate Maynard, Prosecuting Alleged Israeli War Criminals in England and Wales (2006). More information about PCHR can be found on its website at: www.pchrgaza.org. Daniel is a solicitor and partner at Hickman and Rose while Kate is a solicitor at Hickman and Rose.

INTENTIONAL KILLING

URNDALL INQUEST:
JURY SAYS IT WAS INTENTIONAL KILLING

Tom Hurndall was shot in the head by an Israeli soldier on the afternoon of the 11th April 2003, in the Yibnah district of Rafah, in Gaza. Tom remained in a coma, from which he never recovered, following the shooting and sadly died on 13th January 2004 in a London Hospital.

At the time of the shooting there were no ongoing armed hostilities. Children were playing in the area and he was wearing a fluorescent orange top to alert the Israel Defence Forces (IDF) of his presence. Tom was first taken to a Hospital in Rafah before being transferred to one in an Israeli settlement and then Soroka hospital in Israel before being repatriated to London.

Tom was a twenty-one year old student of journalism and photography at Manchester Metropolitan University. He had entered Gaza five days before the incident with the International Solidarity Movement (ISM). On the 11th of April Tom and other ISM members had been planning to erect a tent in the Yibnah district, to protest at the repeated shooting at civilians by IDF forces. The protest was initiated by the shooting of two Palestinian children in Yibnah on the 9th and 10th of April 2003.

The organization Human Rights Watch (HRW) interviewed separately six witnesses to the incident four days later and they gave consistent testimony of the following account: Tom, ten foreign ISM members, and two local contacts, were on their way to the place where the tent was to be erected, when they came to a T junction on a street which was directly overlooked by an IDF watchtower 150 metres away. There was a moun
HURNDALL INQUEST: JURY SAYS IT WAS INTENTIONAL KILLING

of earth and rubble in the street on which some children were playing. A series of six shots was fired into the wall of a building near to the mound from the direction of the watchtower. The children became frightened and froze. Tom first helped two little girls walk back to a place of safety and then went to fetch a young boy. Witnesses then described him being shot as he went to pick up the child from the earth mound.

Israeli radio reported two days later “The IDF says that soldiers spotted a young man wearing camouflage attire moving towards an IDF position while shooting. The Israeli troops returned accurate fire and the man was hit.”

Tom’s family flew to Israel immediately after the shooting and arranged through the British embassy to visit the site of the incident. Initial attempts by Tom’s father, Anthony Hurndall, a solicitor, to meet with IDF representatives were met with refusals despite it being made clear by the family that they were not seeking to blame but to investigate.

The family eventually met with the IDF on 26th May 2003 by which time the IDF had performed its own operational inquiry into the shooting by soldiers of the Southern Command. This inquiry found the IDF had fired a single bullet at an armed Palestinian man dressed in camouflage who fired three shots into the air with a pistol and two shots toward the observation post. That operational inquiry did not attempt to interview any of the civilian witnesses nearby and relied upon the testimony of the commander who shot Tom and another soldier who was in the watchtower.

By the time of the meeting Anthony Hurndall had made his own preliminary inquiries of witnesses in Gaza and he informed the IDF that their investigation was incorrect. A significant discrepancy was the location of the shooting identified in the IDF report. The IDF declined to correct or reopen their operational investigation. Likewise the IDF denied the family access to CCTV footage from the observation post.

An Israeli human rights group, the Public Committee against Torture in Israel (PCATI), formally requested that the case be investigated. In October 2003 the IDF opened a military investigation. This was due largely to the strenuous efforts of Tom’s parents and siblings and the continuous media interest they attracted.

Dissatisfied with the IDF’s lack of accuracy Anthony Hurndall compiled a dossier of information including witness statements of ISM members, photographers and local Palestinians present at the time of the shooting. In early July 2003 the dossier was eventually passed on to the Israeli Judge Advocate General’s office. The IDF then opened a Military Police investigation and in the final week of December 2003 the police arrested the soldier who shot Tom. The soldier in question was Sgt Taysir Hayb from the Bedouin Patrol Battalion of the IDF.

The soldier’s lawyer and the Hurndall family voiced concerns that he was being used as a scapegoat for a wider culture of impunity that existed within the IDF. In January 2004 Sgt Taysir Hayb was charged with manslaughter and a trial began in December 2004. During the proceedings he admitted he had lied about Tom carrying a gun but said he was under orders to fire even on unarmed people. He said that after shooting Tom he had reported it to his commander: “I told him that I did what I was supposed to: anyone who enters a firing zone must be taken out [the commander] always says this.”

The creation of indiscriminate killing zones by occupying military, which did not differentiate between combatants and civilians, would violate the Fourth Geneva Convention 1949 (GCIV). In June 2005 Sgt Taysir Hayb was found guilty of manslaughter and charged of submitting false testimony. He was sentenced to eight years imprisonment and was the first Israeli soldier to be convicted over the death of a foreign national during the most recent Israeli – Palestinian violence (The second Intifada, which began in September 2000).

The inquest

The inquest before the St. Pancras Coroner, which had been opened shortly after Tom’s death, was adjourned pending the outcome of enquires and proceedings in Israel.

The proceedings were resumed and came before a jury on the 10th April 2006 for one day. The same jury had delivered a verdict of unlawful killing, on the 6th April 2006, in the case of James Miller, a film maker/cameraman who had also been shot by the IDF in Gaza, within weeks of the shooting of Tom. Despite being invited to participate as an interested party the Israeli Government formally declined to attend the inquest.

The family’s legal team argued before the Coroner that the case engaged the investigative obligations of Article 2 of the European convention on Human Rights and Fundamental Freedoms 1951 (the Right to Life) irrespective of the death having occurred overseas at the hands of agents of a foreign state. The application of Article 2 would then allow the inquiry to be widened in order to identify, during the course of the inquest, other person, higher up in the military chain of command to Sgt. Taysir Hayb, responsible for aiding and abetting Tom’s killing. This approach bore in mind the strict rule that an inquest verdict must not seek to name any individual(s) responsible for a crime or civil wrong.

The submission that the inquest engaged Article 2 was based on the following propositions:

1) The investigating state does not have to be directly or indirectly involved in causing a death in order to engage the need for an article 2 compliant investigation.
2) The Fourth Geneva Convention 1949 (GCIV), which the UK has ratified, makes the killing of non-combatant civilians by military personnel unlawful under international law. The Geneva Convention Act 1957 (GCA) creates criminal offences for breaches of the GCIV and provides the UK domestic criminal courts with an international jurisdiction to prosecute and punish the perpetrators of GCIV violations where-
ever they occur in the world. The GCA 1957 thereby fixes the UK state authorities with a duty to punish those responsible for deaths of British citizens (and victims of other nationalities) wherever they occur in the world when those deaths are caused in breach of the GCIV. Thus the words in the Menson decision (Menson v UK App. No. 47916/99, (6/5/2003 admissibility decision) “... the state ... take appropriate steps to safeguard the lives of those within its jurisdiction ... Article 2:1 imposes a duty on every state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery ‘within its jurisdiction’” means that the territorial jurisdiction of the UK criminal courts are extended anywhere in the world for the purposes of the GCA.

3) The GCA 1957 also provides that prosecutions can only be commenced with the permission of the Attorney General. Therefore the Attorney General in the UK has the legal power to use every means at his disposal to bring suspects before the criminal courts when perpetrators set foot in the UK. Thus if military personnel kill civilians, in violation of the GCIV, anywhere in the world, legal powers exist for them to be prosecuted in the UK courts if those civilians happen to be British citizens.

4) The duty to punish created by the GCA 1957 carries with it a corresponding obligation to investigate and prevent similar deaths of British citizens (and other nationalities) by punishing those responsible. Accordingly for an inquest to be compliant with Article 2 of the ECHR it must “play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed”.

5) The need for an Article 2 compliant inquest was not overcome by the ability of the family of the deceased to report matters to the Attorney General to consider a GCA 1957 prosecution because after reporting matters the family would have no further part to play in that process and therefore would not discharge the state’s obligations under Article 2. The importance of family participation in the investigation is central for the Investigative Obligation to be discharged by the state. The importance of family participation is underlined by the need for the family to have effective legal representation in the process of death investigation.

During the course of the proceedings the jury heard moving testimony from Tom’s parents who had expended a large amount of time and money to establish the true facts surrounding his death.

Mrs. Jocelyn Hurndall said she had received an email from Tom on the 11th of April just hours before the shooting which she read out:

“April 6 2003. I have been shot at, gassed, chased by soldiers, had sound grenades thrown within metres of me, been hit by falling debris and been in the path of a 10-tonne D-9 [military bulldozer] that didn’t stop. As we approached, I kept expecting a part of my body to be hit by an ‘invisible’ force and shot of pain. It took a huge amount of will to continue. I wondered what it would be like to be shot, and strangely I wasn’t too scared. It is strange to know that each night people are shot and killed for breaking military curfew, and in the darkness on the north west side there is an Israeli settlement and a few hundred metres away with military snipers in between and any one of four of us could be being watched through a sniper’s sights at this moment. The certainty is that they are watching, and it is the decision of any one Israeli soldier or settler that my life depends. I know that I would probably never know what hit me, but it’s part of the job to be as visible as possible”.

Mrs Hurndall also described what she believed to be her son’s last words. About half an hour before he was shot he had been talking to a Palestinian man, who had been telling him how difficult life was for residents in Rafah, she told the jury:

“Tom put his hands on his shoulder and said ‘We want to make a difference. Really those were his last words’.

Mr. Anthony Hurndall told the inquest that his son and other activists from ISM had gone out to try and block tanks that had been shooting into houses at random. Tom had seen a group of ten to 15 children playing on a mound of sand, and noticed bullets hitting the ground between them. The children fled but several were overcome with fear and could not move.

Tom went to take one girl out of the line of fire, which he did successfully, but when he went back, as he knelt down [to collect another child], he was shot.

Mr. Hurndall also described his efforts to establish the circumstances surrounding Tom’s death. He said that the Israelis had initially admitted someone had been shot, but claimed it had been a gunman who had opened fire first. After photographs of Tom having been shot in the head emerged, the Israeli military later admitted that Sgt. Tayyis Hayb – a sentry who was prone to fits of madness – had shot him using telescopic sights. He testified that:

“They just lied continuously... It was a case of them shooting civilians and then making up a story. And they were not used to being challenged”.

He also added that there had been a “general policy” for soldiers to shoot civilians without fear of reprisals. Mr Hurndall felt that although Hayb had been sentenced the issue of the culture of impunity within the Israeli army had not been addressed and commented that “this goes much higher up the chain”.

During the course of examining witnesses, counsel for the family identified the names of senior officers in the military chain of command responsible for violations of the Geneva Convention.

The hearing lasted one day and the jury of 10 returned a verdict of unlawful killing expressed as:

“He was shot intentionally with the intention of disarming him”.

The narrative went on to say:

“The jury would like to express its dismay with the lack of cooperation from the Israeli authorities”.

In concluding the proceedings the Coroner, Dr. Andrew Reid stated that he would write to the Attorney General to see whether there was any further legal action that could be taken in relation to the deaths of Tom Hurndall and James Miller.

The deaths of Tom Hurndall and James Miller occurred in the context of the most recent intifada which started in 2000. According to B’Tselem an Israeli Human Rights Organisation, 1737 Palestinian civilians who had not been participating in fighting have been killed by the IDF. The army has investigated only 131 cases of wounding and killing which has led to 12 trials.

The case of Tom Hurndall illustrates that were it not for the tireless efforts of his family no one would have been held accountable for his murder. This case and that of James Miller briefly lifted the lid on a deplorable situation where the killing of non combatants by soldiers in the Israeli Defence Forces was able to continue with virtual impunity.

"The Tom Hurndall case and that of James Miller briefly lifted the lid on a situation where the killing of non combatants by soldiers in the Israeli Defence Forces was able to continue with virtual impunity"
That’s the view of Moazzam Begg, speaking at the Haldane Society’s human rights lecture at the end of May. Moazzam began his talk by stressing that he was not calling for the closure of Guantánamo but for the release of the remaining detainees. He recalled that he and others were described as ‘enemy combatants’ and ‘enemy aliens’. He went on to note that there was a connection between the history of slavery, the dehumanising of slaves and their lack of rights in the United States and the use of extraordinary rendition, involving the denial of rights, whereby people are kidnapped and detained.

“I was taken to Guantánamo after being detained at Kandahar and Bagram. Few of the soldiers who held us captive knew local languages such as Farsi and Pashto. When Americans enslaved Africans they enslaved people who looked different and dehumanised them. Like them, we had no rights, no human rights. We were dressed in orange to mark us out as terrorists, as bad persons. The process of treating detainees in this way, came from somewhere, emanated from something. How can soldiers kick a detainee so hard that the detainee screams ‘God help me!’ and then kick him again and again until a bruise develops, until the blood clots and he dies? An interpretation of the standard operating procedure permits this. That order came from the top: Bush, Cheney, Rumsfeld and so on.

“It was said that people needed to be shackled and hooded in case they bit through the cables of an aircraft in an attempt to bring

Another speaker, Sadat Sayeed, calls for the closure of Guantánamo. See Sadat’s update on Guantánamo in the news pages.
it down. When you were in Guantánamo, they said you must have done something to bring it on yourself. The rules of the game had already changed before July 2005. Guantánamo detainees were from every country save America, nationals of every country bar the USA. Even though US citizens were captured in the war on terror, the lack of US detainees tells you that they do what they do there because they can.

“In Rasul v Bush the challenge to detention was brought via an attempt to secure the right to habeas corpus. Following that judgment we could make an application to be released, or for reasons to be shown for continuing detention. The US government challenged it and kept people in detention while they challenged it. No habeas corpus application has ever been brought in circumstances where the detainee tells you that they do what they do there because they can.

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“There are British residents who are not British citizens who are detained in Guantánamo. No one is campaigning for them. Guantánamo has 335 detainees but they are the tip of the iceberg. There are others in Bagram, Diego Garcia and other ghost detention centres. Some new people come to Guantánamo including Khaled Sheikh Mohammed. He is an al-Qaida person, one of the highest ranking. He is interrogated in a room by the CIA. I am told that my fate will be the same as his and others. I’ll leave you to figure out why he has disappeared. He was taken to Egypt and tortured. He confessed he was trying to get weapons of mass destruction from Saddam in 2003. I was told I was to be sent to Egypt. Colin Powell said he had received credible evidence that al-Qaida was going to get weapons of mass destruction from Iraq. The CIA now accept that the statement was made under duress. For him the worst thing is not torture but that they invaded a nation based on his statement. The worst thing for me is not that I could have been sent to Egypt. The use of a statement as the basis for an invasion is more frightening to me than being separated from my family for the rest of my life.”
Far from being a ‘fairer deal for legal aid’, the government’s proposals for fixed fees and competitive tendering could kill the legal aid system stone-dead. Our contributors to this special report outline the reality today of publicly-funded legal services.

Public funding

by Carol Storer

How is it possible that proposals from the Department of Constitutional Affairs (DCA) (as it was until 9th May this year) and the Legal Services Commission (LSC) which were welcomed by the Law Society and Legal Action (in part at least) have now reached such a low point?

The recently published House of Commons Constitutional Affairs Committee Report summarises the current position: “There has been a catastrophic deterioration in the relationship between suppliers, their representative organisations, and the LSC. Unless the relationship improves, we do not see how implementation of these reforms can be successful. We urge all involved in legal aid reform to re-engage in a more constructive dialogue.” (Report, 1st May 2007)

Reviews and consultations

In July 2005, ‘A Fairer Deal for Legal Aid’ was published. This set out a strategic way forward for legal aid and Lord Carter was appointed to review the procurement of legal aid. He subsequently produced proposals for a competitive market based system for legal aid procurement based on quality, capacity and price. Over 2,300 responses were received to the consultation on Carter’s Report.

‘Legal Aid Reform: the Way Ahead’ was subsequently published in November 2006. Although it was stressed that responses had been taken into account, the direction of travel remained very firmly set. At the end of February 2007 the LSC published the proposed unified contract. It had to be signed by the end of March 2007 to enable providers to continue delivering legal aid work from 1st April 2007. Some of the detail to go in the specifications to that contract is still under negotiation.

Richard Miller is the Director of the Legal Aid Practitioners Group (LAPG). His concerns about the flurry of plans, consultations and re-consultations by the LSC were highlighted in an LAPG press release on 4th March 2007 and this was referred to by the Select Committee: “Today I have downloaded nineteen pdf files from the Legal Services Commission website, including annexes and regulatory impact assessments. This is on top of consultations published earlier this month on police station boundaries and the very high cost criminal case panel, not to mention the negotiations on the new unified contract. I am paid full time to keep on top of the LSC’s initiatives, and I can barely cope with this blizzard of publications. How on earth can any practitioner who is trying to conduct a substantial caseload to a high standard be expected to do so? The sheer volume, speed and extent of the changes is liable to destroy the legal aid system even if the substance doesn’t.”

Current proposals

There are proposals for integrated social welfare law ‘outlets’ in 125 areas. Whether they will still be called Community Legal Advice Centres (CLACs) and Community Legal Advice Networks (CLANs) we do not know. The first one was announced in May in Gateshead; the law centre, CAB and three firms have joined together to bid for and run this CLAC.

What is the aim? To provide a holistic service as people have clusters of problems – they should be able to get advice and representation under one roof or at least from one organisation. It will also reduce the LSC administration cost as it will deal with one organisation i.e. one contractor not with lots of different contractors as at present.

What do we know is that for suppliers in an area where there is a tender to run the social welfare law provision it seems highly unlikely that they will be able to continue carrying out legal aid work if they are unsuccessful in the bid. There is no new money coming through so the only way a CLAC or a CLAN can be funded is by putting all the money in that area into that body. And taking away the contracts of others in that bid zone.

Fixed fees start in October this year. A survey by the Housing Law Practitioners Association of its members revealed many of them would not be financially viable to continue delivering work at the rate of £171 plus VAT. Solicitors acting for landlords may well receive that for less than an hour’s work, but solicitors acting for tenants or the homeless will receive £171 for the whole case, funded under the legal help scheme.

There has been a decision not to pay any more in London which is of huge concern in view of the number of black and minority ethnic clients advised and represented in London. The LSC is aware that London practices will be under huge financial pressure and are likely to withdraw from legal aid. Its argument is that in a fixed budget it has looked at the effect over the whole country and under-funded regions outside London will benefit.

The fear with fixed fees is what sort of service will people who have complex cases get? And what about people whose cases take longer, if English is a second language or if the client has mental health problems? While the LSC will point to an escape mechanism (if cases take three times longer than the average the hourly rate will be paid) it will be time consuming to monitor contracts and organisations will have to balance providing advice and remaining solvent.
The Access to Justice Alliance

The Access to Justice Alliance was formed in November 2004 and has been campaigning ever since, focusing on civil issues in particular social welfare law. It is supported by community groups, national charities, lawyers, advisers and others who feel strongly that justice should remain accessible to all. (See www.accesstojusticealliance.org.uk for a full list). The Alliance believes that the funding crisis facing legal aid cannot be ignored any longer.

The Alliance calls on the government to:
1. Resource the whole legal aid scheme so that both civil and criminal work can operate within a realistic budget. This means protecting the civil legal aid budget to stop it being used to cover rising expenditure on criminal legal aid.
2. Compensate the legal aid budget for the costs of new policies and initiatives.
3. Co-ordinate spending by government departments and local authorities on independent legal and advice services and oblige them to contribute appropriate funding.
4. Review and revise the eligibility criteria and extend legal aid for representation in tribunals to ensure that people of limited means can access justice.
5. Guarantee quality standards in publicly funded legal and advice services.
6. Provide co-ordinated funding for strategic and education legal services (including test cases), social policy, law reform and other non-casework services.

The Alliance, formed before July 2005, might have been expected to welcome the LSC goals but the proposals that month led to an increase in activity not a decrease. The LSC vision is often admirable but huge changes are being proposed at a time when many experienced practitioners have given up or are pulling out of legal aid work. Wholesale change without careful analysis of pilot projects is a huge gamble.

Users

What do the reforms mean for users of legal aid? We simply do not know, they improve services.

Will there be enough suppliers?

Numbers dropped in April 2007 as some organisations decided to stop carrying out legal aid work then rather than wait any longer. The notice provision for providers to terminate contracts is three months. It is possible that more firms will terminate their contracts. One of the difficulties faced by providers was when the terms of the contract were announced, at the end of February 2007. People may well have signed up in March 2007 to buy enough time (April – September this year) to pull out of legal aid work or to close down. Dexter Montague, a firm in Reading committed to legal aid work, made the decision to give it up.

What about after round one? It seems unlikely that organisations will be around to bid three years later when re-tendering takes place.

This is a sector where there has been virtually no increase in rates over the last ten years and where already over 8,000 organisations have left legal aid work since franchising started in the early 1990s. There is great uncertainty over the future.

Black and ethnic minorities

Lynton Orrett, on behalf of the Black Solicitors Network, and Sailesh Mehta gave evidence to the Select Committee highlighting the effect on black and minority ethnic communities. Firms that grew up to work with communities expect to have to merge. But that was not the reason why they grew up as they did – mergers would move them further from their client base. Although there were discussions with Carter about funding costs of mergers, that has not happened.

Where do we go from here?

Are there any positives? Will centrally planned social welfare providers be able to operate successfully? Will current providers end up employing and still providing top quality advice and representation? What are the risks on quality? There is a quality threshold but it is not high. It can be argued that users of legal aid face problems now. In the future there will be fixed fees and organisations set up to provide advice and representation within a fixed budget.

The LSC would point to CLS Direct as a partial response to the challenges; anyone can now access advice by telephone in social welfare law. Eligibility checks take place after initial advice is given.

The LSC would argue that by funding CLACs and CLANs there will be certainty and there will be cover.

New competitors are likely to arrive and it will look like protectionism to say that is per se a bad thing. The legal services bill going through parliament means that it is more likely that traditional firms and organisations will change.

Conclusion

There are at least three judicial review cases going through the courts challenging current proposals. The Law Society has put considerable resources into the ‘What Price Justice?’ campaign. Some private practices are pulling out of legal aid work. The not for profit sector was warned that it would lose up to 50% of its funding. Gateshead CLAC will start operating and others will start trading; the first CLAN for example may well be in Cornwall.

At an Access to Justice Alliance meeting recently, Alan Beith MP, Chair of the Select Committee, stressed that while fixed fees were hogging the headlines in fact the bigger threat was competitive tendering. The government must be hoping that marketisation can deliver high quality advice and cover the country. And that everyone who is expressing concerns are wrong. The next few months are crucial.

NEWCOMERS

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NEWCOMERS

This does not simply mean civil legal aid. Most criminal legal aid firms operate on the edge of profitability. The profit margins of criminal legal aid providers range from -6% to 2% according to LECG.

The House of Commons Constitutional Affairs Committee (CAC) published a report in May based on a wide range of evidence. Its overall assessment was that the financial position of many criminal legal aid suppliers was highly fragile, with those in a financially strong overall assessment was that the financial position of many criminal legal aid suppliers was highly fragile, with those in a financially strong position “very much in the minority” (para 47). A Law Society survey of 262 firms confirmed this. 91% thought they would see a drop in criminal legal aid fees, 50% thought this would be a reduction of between 11-25% and 42% in of 26% or more. There can be little doubt that the level of cuts sought will threaten the business viability of a significant number of solicitors firms.
the government’s argument – based on neo-liberal capitalist economics of which Margaret Thatcher would be proud – is that a proliferation of small firms is economically inefficient as a method of delivering the service. But this is fundamentally flawed. Firstly, there has been a 10% decline in the number of solicitors’ offices providing criminal legal aid (from 2,925 to 2,608 between 2001 and 2006). If anything the problem is ensuring that adequate coverage exists.

These changes are not based on serious research analysing what has driven expenditure increases in the past decade. Independent academic research by Professor Ed Cape has found that the main areas of increased expenditure (for instance in serious criminal cases in the Crown Court) have been due to an increase in the volume and number of claims. The increase in cost per case has risen little above inflation.

There has been a constant stream of new legislation – with a plethora of changes to procedure, complex sentencing and hundreds of new criminal offences. Substantial increases have been made to the police and prosecution budgets. There is a greater reliance on sophisticated expert and technical data. Is it any surprise that the cost of criminal legal aid has also risen? In fact it’s struggling to keep pace with real needs and costs.

Shouldn’t we expect a high level of expenditure for criminal legal aid in a society with a growing inequality, the lowest social mobility and highest drug addiction rates in Europe and, according to a UN report, the most deprived children in the developed world?

The soaring prison population is much higher than any other European country per head of population (with a 20,000 increase under New Labour). It seems absurd to suggest that the cost of criminal defence should remain static. The government’s answer to the endless prison over-crowding crisis is not to slash prisoner numbers to the European average – as any rational analysis would suggest – saving billions of pounds, and reducing the re-offending rate. It is to throw cash at a further massive prison building programme that will line the pockets of the private sector firms that will rake in the profits.

Carter estimated that the reforms would cause 400 firms to cease providing legal aid; the Law Society said 800. LECG said that Carter underestimated by 100% the number of firms that would have to make major adaptations in respect of criminal legal aid. Whichever way you look at it there will be a substantial loss in choice of firms and thousands of solicitors are likely to leave the field.

The first stage of Carter implementation involves across the board fixed fees. Police station attendance is said to be a major cause of cost increases. But LECG found that the number of attendances per case had increased and whereas the waiting cost per attendance had gone up 4.3% per year, travel had declined by 1.3% in the period 2001-5 (CAC para 88). Attendances and waiting time are, of course, almost entirely under the control of the police and not solicitors.

The impact of the introduction of fixed fees is likely to be serious. It will deprive solicitors of the flexibility to adapt the resources required to meet the real needs of the client and the complexity of the case. An ‘escape clause’, allowing hourly payments, will only kick in where the work required is several times the standard allowed. The vast majority will not be able to avail of this. In most cases solicitors will have strong financial pressures driving them away from cases that even might involve more work than standard. Even the uncertainty involved and the difficulties of planning will make them unattractive.

Anyone involved in this area will be readily familiar with the problems this will create. The most vulnerable clients will suffer – those with language problems, mental health difficulties, personality disorders, drug addicts, those with disabilities, the large number who have real problems managing their daily lives – due to childcare, abusive relationships, illiteracy or simply poor motivation.

These are all clients who need and deserve more time and attention. In many cases they also require additional resources. How many solicitors who have concerns about their clients’ linguistic ability, mental capacity or health will feel as inclined to make represen-

### Housing

by Angus King

In the 13 years that I have been a legal aid housing solicitor in South London, two things have remained constant: the rates of pay (which have risen only once, in 1996) and a feeling amongst my fellow practitioners that the end of the civil legal aid system is just around the next corner.

So far it hasn’t quite happened; ‘advice deserts’ have appeared in other parts of the country, but, in London and the other major cities, legal aid housing solicitors have clung on and kept the system going. But the recent proposals for civil legal aid funding have produced a palpable sense that this time the barrel really is about to go over the waterfall.

In housing, legal help typically funds advice on:
- The homeless challenging decisions by the local authority that they are not entitled to housing assistance;
- Tenants facing eviction for rent arrears and other problems;
- Tenants with complex housing benefit problems;
- Tenants harassed by their landlords;
- Asylum seekers challenging decisions by local authorities or NASS in regard to their support or accommodation.

In other words, a cross section of the most marginalised and vulnerable members of society. Any reduction in help to this group is likely to have severe consequences for the people most unable to help themselves.

In housing, as in other areas of social welfare law, Legal Help has long been a loss maker and has been cross-subsidised either by other funding or other sources of income. Most private firms have tried to minimise the amount of legal help work that they do, but it still forms a significant part of a legal aid firm’s income. This is even truer in the not-for-profit sector which has traditionally delivered more advice work and less litigation.

Previously legal help work was paid at an hourly rate with costs controlled by an audit process. About two years ago, private solicitors (but not the not-for-profit sector) started to be paid under the tailored fixed fee scheme (TFFs) under which a supplier is paid the same amount for every case, irrespective of length or complexity. The rate is calculated on a supplier’s average costs per case. Vari-

*24 Socialist Lawyer ● July 2007*
tations to the custody sergeant and risk a signif-
nificant further delay for an interpreter, ap-
propriate adult or doctor?

There will be an incentive not to give de-
tailed advice, not to fight for more disclosure
and not to consider all avenues but instead to
take the easy option of a full and frank early
admission of ‘guilt’. Unscrupulous officers,
aware that legal representatives are on a fixed
fee, may be tempted to string out the process
in the hope of enhancing such ‘incentives’.

Similar considerations apply in the magis-
trates courts where the loss of waiting time
money will, for reasons that are entirely out-
side the solicitor’s control, result in similar
pressures coming to bear.

The incorporation of travel into the fixed
fee will drive down quality and choice. A
handful of large firms will carve up the work.
With the same few firms constantly re-ap-
ppearing in the same police stations and courts,
there will be greater pressure to accommo-
date without the challenge of competition.
Defendants who are arrested away from home
will not be able to retain their solicitor
of choice who may have an essential and
long-term understanding of their needs.

What happens at these early stages will
have an impact on every subsequent stage in-
cluding verdict, sentence and appeal. More
miscarriages of justice and a further public
loss of confidence will be the outcome. It
is therefore critical that the system is sta-
ted in operation since 1999. There has been an
increase in fixed fee caseloads for criminal
work, from October 2008 will exacerbate the
impact of the changes on black and
ethnic minority firms and solicitors has been
well documented. There will be a serious
knock-on impact on the confidence of the
BME communities in the police and the
courts, which is already at rock bottom. This
will in turn discourage co-operation –
whether it is to sign to give evi-
dence or to plead guilty. A criminal justice
system plagued by racism from top to bottom
– on its own official self-assessment – will face
less challenge and accountability.

Speaking of the related impact on spe-
cialist or ‘niche’ providers, Michael
Schwarz of Bindmans has said: “Human
rights will be at risk – it will be an encour-
agement for negligence or abuse by state of-
icials and is a recipe for injustice.” (Law

This prognosis is not simply guesswork.
The CAC heard evidence from Scotland –
where fixed fees for criminal work have been
in operation since 1999. There has been an
increase in fixed fee caseloads for criminal
work, from October this year, all housing law sup-
pliers will be paid at a fixed rate per case of
£171 (3.1 hours) irrespective of length or
complexity. This fee is the same whether you
handle a case of one hour’s work in Penzance or
Newcastle and whether your client’s case
is one minute’s work or 20 hours; it takes no account of local conditions
or your client’s individual circumstances.

Difficult clients and complex cases take
time. Legal aid lawyers could obviously
maximise their profits by taking on as many
short and simple cases as possible. Apart from
the fact that this is something that many
would find distasteful, the new system will
apply sanctions to suppliers if more than a
fixed percentage of their caseload is below the
fixed rate. To mitigate the effects of the stand-
ard rate, the LSC points to the ‘exceptional
cases’ escape mechanism (see Carol Storer
p22-23). However payment for these will not
be automatic but subject to audit and ap-
proval on a file by file basis by the Legal Ser-
dices Commission. Past experience suggest
that the Commission will do its best to limit
payments for such ‘exceptional’ cases. Cases
that take longer than 3.1 hours but less than
9.3 will simply incur a loss.

In other words if you take on a case that is
likely to last more than the standard length
there is every chance that your firm or advice
agency will end up making a loss on it. This
is a clear disincentive to switch away from
cases that are likely to be lengthy, difficult or
complex, such as those involving clients who
are disabled or whose first language is not
English, or those who are just unfortunate
ever to receive expert advice.

In housing the clients most likely to be ef-
fected are the homeless clients challenging de-

cisions by local authorities that they are not
eligible for housing assistance, and clients
with rent arrears arising out of complex ben-
etit problems. The law relating to both is
complicated and often not well understood
by the local authorities that administer it.
Such cases inevitably involve extended in-
volvement by the advisor and under the new
scheme will become even more uneconomic
to take on. The government and the LSC argue
that the changes will encourage more
‘acts of assistance’ and deliver legal help and
advice to more people. If they do, they may
not deliver it to the people who need it most,
those who are most needy and who most
need expert advice.

Even more dangerously, the reforms are
likely to ineradicably alter the basis of legal
aid supply. Housing advice is almost entirely
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subject to the ‘exceptional
cases’ escape mechanism (see Carol Storer
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Even more dangerously, the reforms are
likely to ineradicably alter the basis of legal
aid supply. Housing advice is almost entirely
delivered by small organisations who may
find it impossible to achieve the spread of
cases that the Minister insists will make legal
help viable. Such advice agencies may face a
bleak choice – do legal help at a loss or not do
it all.
Many private firms are starting to opt for the latter. In March the LSC took the first steps towards implementation of the new scheme by requiring all organisations delivering legal help work to sign new contracts. Many legal aid firms initially refused to sign the contract on the grounds of unfairness but were forced to back down at the last minute on the grounds of unfairness but were forced to back down at the last minute. The culling of all small suppliers dovetails with the government’s longer term objective, which is the amalgamation of small providers into larger units, first by competitive tendering and then by the establishment of CLACs, CLANs, or their latest variation, Integrated Social Welfare Centres (ISWCs) (see Carol Storer’s article on pages 22-23).

ISWCs are a modification of earlier proposals for CLACs and CLANs. The original idea was to have one universal supplier of legal aid services in each of 72 zones across the UK, funded in part by the LSC and in part by the local authority. They are to be established by withdrawal of funding from other suppliers. When they were proposed two years ago, CLACs and CLANs met with almost universal opposition and so they have been slightly modified, at least for London where they have been replaced by ISWCs. The proposal now is that there will be one ISWC per borough. Each is to be an individual legal entity and will contract with the LSC. Each centre will then subcontract to provide all the services across the borough.

ISWCs are not proposed to come into force until 2010 at the earliest and if they do, they may be in a heavily modified form. The purpose of CLACs and CLANs (and now presumably ISWCs) is to remedy a ‘fragmented system’ where clients go from advice agency to solicitor to advice agency and so on, eventually succumbing to ‘referral fatigue’ and unable to find the assistance they need. Undoubtedly this happens, but not because of fragmentation in the system but because in areas of high deprivation the demand for advice far exceeds the supply. There just aren’t enough legal aid housing advisors to go round and putting whatever is left of them in three years time all together in one building is not going to solve the problem.

CLACs, CLANs and ISWCs are also intended to achieve economies of scale by amalgamating a number of smaller firms and advice agencies into one large organisation. It is doubtful whether this will happen. Any advantages gained by legal aid supermarkets are going to be outweighed by disadvantages such as the loss of diversity, geographical isolation and prohibitive start-up costs.

Whether such centres will be attractive to either local authorities (who are expected to contribute to their funding), or the few remaining practitioners still doing housing work at that stage, is debatable.

Many older practitioners are beginning to feel that they have had enough, partners in smaller firms are taking the view that they should leave legal aid while they are still solvent and – burdened with debt from their university courses and their LPC – legal aid housing work is not an attractive area for younger lawyers.

Nobody is in favour of these reforms apart from the government and the LSC. A number of organisations have stepped up to criticise the proposals including Shelter, MIND, CPAG and Age Concern. Lord Carter himself seems to be having second thoughts about some aspects of the scheme and the Commons Constitutional Affairs Committee which reported on the proposed reforms in May, was scathing in its criticisms.

Perhaps the government is right. Maybe in five years time the general public will be enjoying the benefit of numerous acts of high quality assistance brought to them by slimmed-down efficient lawyers in shining new integrated social welfare centres, funded by supermarkets or insurance companies.

But if the government is wrong and the current supplier base collapses as many have warned, then that will be bad news for tenants and the homeless.

Asylum and Immigration

by Sonia Routledge & Damian Hanley

For asylum and immigration clients, the potential consequences of the proposed reforms to legal aid could not be greater. It is no exaggeration at all to say that in asylum cases, and in non-asylum immigration matters in which human rights are at issue, what is at stake is often an individual’s life. When the stakes are this high, the principal risk arising from having no legal representation or poor legal representation is very simply that a person at risk of persecution and other human rights violations will be forcibly removed from this country and returned to their persecutors in the country from which they fled.

For those of us engaged in providing legal advice and representation, the people we meet in our daily work are precisely those people who can, through the filter of a television screen, seem so far away as to be almost ‘unreal’. But here they are: the victims of human trafficking, the victims of torture who have dared to express beliefs contrary to the beliefs of the ruling power in their country, the victims of homophobic violence which is accepted and connived at by state authorities, the young girls who have been forced into marriage with men five times their age, the young boys who have been forced to carry guns and fight in civil wars, the young women fleeing from the prospect of having intimate relations with men five times their age, and the young girls who have been forced into marriage with men five times their age. When the stakes are this high, the sexual abuse they have suffered is often so profound. It is not possible or acceptable for us to put such vulnerable people as we represent under pressure to give their accounts as quickly as possible so that efficiency savings can be achieved for the government.

Cases of this kind require time and a great deal of care in preparation and presentation. The Courts expect nothing less. In R v Secretary of State for the Home Department, ex p Siwakumar the court stated: “It has been said time and again that asylum cases call for consideration with ‘the most anxious scrutiny’: see, for example, R v Secretary of State for the Home Department, Ex parte Bugdaycay. That is not a mantra to which only lip service should be paid. It recognises the fact that what is at stake in these cases is fundamental human rights, including the right to life itself.’’

There is no point at all in the court insisting that all decision-makers examine asylum cases with the most anxious scrutiny if the case before the decision-maker has not been carefully and thoroughly prepared. But the provision of the specialist advice required by asylum seekers and immigrants is now under threat of disappearing altogether as a result of the reforms to legal aid proposed by the government and the LSC. Many individual legal aid suppliers have earned well-deserved reputations as specialists in particular categories of
asylum and immigration work. Some firms and not-for-profit organisations have emerged as specialists in immigration work, others in complex asylum and human rights work. Even within individual firms particular areas of expertise have emerged, and this is surely something to be welcomed and nurtured. Yet the proposed reforms posit that, in order to survive the transitional period of the fixed fee regime (which itself is a precursor to Best Value Tendering – BVT), all firms will need to take on an ‘appropriate case mix’. It is said that the losses we will take on complex cases will be balanced by the gains we will make under fixed fees in ‘straightforward’ cases. The LSC’s vision is apparently that efficient firms with the right case mix will emerge from the transitional period of fixed fees well-placed and on an equal footing to go on to compete for contracts to undertake legal aid work when the process of BVT begins.

We need to pause here. Firstly, the idea that there can be any such thing as a ‘straightforward’ asylum or human rights case is dangerously in the extreme. Any practitioner who takes a simple checklist approach to taking instructions in such a case ought to find another career. Any practitioner who believes that the complexities of these cases can be reduced to a three-page statement is seriously mistaken. Some immigration cases may have the potential to be reasonably straightforward, but even those cases in which it should be relatively quick and easy to achieve a just outcome for the client, can become unbelievably and unnecessarily complicated, protracted and of course expensive because of poor quality decision-making on the part of the Home Office.

The quality of decision-making by entry clearance officers at overseas posts and case-handling by the Border and Immigration Agency of the Home Office is not something over which practitioners can exercise any control, but we and our clients certainly have to live with the consequences.

Secondly, it is very clear that on asylum cases, a big financial loss would be incurred, because the proposed fixed fees represent only about 50% of the average cost per successful case calculated on the basis of payment per hour of work undertaken. It’s also clear, and less well-known, that on non-asylum immigration cases a loss would also be taken under fixed fees, albeit a loss of a smaller magnitude. So it is not the case that ‘swings and roundabouts’ will see us all through. The basic fixed fees for asylum cases at the application stage are £450 and for asylum cases at the appeal stage (cases which go to a full hearing) £600 for preparation and £320 for representation at the hearing itself. The fixed fees for non-asylum immigration are £225 at the initial application stage and £480 for preparation for a full appeal hearing, with representation at the hearing this time attracting a fee of £250. The ‘escape threshold’ is said to apply, but our experiences within the current system whereby we are required to apply to the LSC for extensions of funding once we reach certain financial limits have already shown that the LSC does not always understand what work is needed on a case and why. The ‘escape threshold’ therefore provides scant comfort. And in any event it is clear that the overall ‘logic’ of the proposals indicates that those firms which, during the transitional fixed fee period, frequently apply for hourly rates under the ‘escape threshold’ will not be well placed to compete for contracts under BVT.

The proposed fixed fees are simply inadequate by any standards. The LSC has admitted that the fees were not calculated on the basis of historical data about average costs per case in asylum and immigration matters. In business terms there is only one obvious solution for firms facing the prospect of significant financial losses under the fixed fee regime: to dramatically reduce the number of complex asylum and human rights matters started, in favour of expanding capacity to take on what the firm hopes will turn out to be more straightforward immigration cases. Moreover the obligation on all solicitors to work to adequate professional standards and to act at all times in clients’ best interests, suggests that under the new regime firms would have to turn away complex cases and accept only those we could be sure could be properly completed within the time that the fixed fee realistically represents. This represents a great danger for clients with complex cases.

In its report the House of Commons Constitutional Affairs Committee (CAC) acknowledged that large firms with a high volume of straightforward cases may stand to benefit from the ‘swings and roundabouts principle but noted: “...not everywhere is the Legal Aid market suited for the development of large providers. We have particular doubts with regard to the area of social welfare law. The introduction of flat fixed fee schemes in ... asylum and immigration may thus have unintended adverse consequences for the quality and availability of publicly funded legal services across the country.”

The LSC asserts that ‘cherry picking’ simple cases will not be acceptable, and maintains that the case mixes of individual firms will be monitored in the run-up to BVT to ensure that firms are able to maintain economic viability and competitive advantage by simply refusing to take on any but the most potentially straightforward cases. But CAC expressed serious doubts about the extent to which the LSC could identify and therefore address cherry picking. It found: “...schemes which only provide for relatively low fixed fees with very little representation provide economic disincentives to taking on more complex cases. This is likely to disadvantage already vulnerable clients.”

There is already a problem with access to quality representation in immigration and asylum. CAC noted that between 2001 – 2006 there had been a 24% decline in the number of firms holding a contract to undertake publicly funded immigration and asylum work. In one of the authors’ firms we have to turn away up to 30 potential new clients each week because we simply do not have the capacity to take on their cases. Often their cases are complex. Sometimes their circumstances have changed significantly since an initial application to the Home Office was rejected. Sometimes they have suffered from having had poor legal representation in the past, invariably at the hands of advisors more concerned with ‘efficiency’ than with thorough work conducted to appropriate professional standards. Often these people have previously been turned away by other firms because of lack of capacity. If firms are now placed in a situation in which their very survival seems to depend on minimising the number of complex cases they take on, the problem with access to representation will get even worse. In its conclusions, CAC recognised the existing problems around access to representation and the need to safeguard a quality supplier base, stating: “Where the Legal Aid supplier base is already vulnerable, continuing, significant decline, reforms to the Legal Aid remuneration and procurement must not lead to a further acceleration of this decline and reduction of the profitability of Legal Aid work.”

In his evidence to CAC, the Master of the Rolls, Sir Anthony Clarke also acknowledged the fragility of the supplier base: “There have been problems in the past with civil practitioners giving up publicly funded work for economic reasons and it is obviously very undesirable that that should occur.”

The government thinks that the best way forward in safeguarding access to representation is to have fewer but larger firms, able to achieve efficiencies which smaller practices cannot. This may be so, but CAC expressed clear concerns about an increase in the size of providers risks bringing about a decrease in the quality of advice and representation they provide. Efficiencies would likely be achieved through the recruitment of unqualified and inexperienced caseworkers and through always delegating work down to the lowest possible grade. CAC’s most insightful
A Legal Services Board (a Quasi-Autonomous Non-Governmental Organisation) would be set up to oversee professional organisations which then licensed any and every business that wanted to provide legal services on condition that it honoured any ‘legal voucher’ presented to it, so long as they had lawyers with the expertise to provide that legal service. The Legal Services Board would negotiate with the providers’ representatives a rate of payment at an hourly rate.

There would be a market in legal services as organisations competed for business. Government would not interfere in the running of businesses or quality control, which would be the responsibility of professional organisations. The only requirement would be that any licensed legal provider had to belong to one of the professional organisations.

Oh you poor sweet naïve little thing.

You see what has to happen is that in order to create a market, the quango has to prescribe every detail of the management of providers, down to the colour of their socks, if those providers are highly trained professionals working in partnership and taking all the risks. If on the other hand the providers are corporations owned by shareholders, they can do what they like. That’s what creates a market.

The outcry that greeted the fixed and graduated fee tables that emerged with the LSC paper “Legal Aid: a sustainable future” was probably loudest from family lawyers, and particularly from lawyers working in public law proceedings. Care cases were identified along with criminal very high cost cases as escalating in cost in recent years.

Across the country representative organisations and grass roots groups protested (in the face of despairing cries of “but it’s cost neutral” from the Minister and LSC reps at consultation events round the country) that the proposed fees would represent a cut in income of between 25% and 45%.

Such was the outcry that the lord chancellor staged a ‘coup de théâtre’ at the Law

Family

by Penny Mackinder

If I was designing a system to ensure that poor people had the same access to justice as rich people, I would do it something like this. I would ask the poor people to go somewhere quite near to them to find out if they were poor enough to be eligible for the legal advice. That might be the library, job centre, advice centre, day centre, doctor’s clinic, church, Post Office (what’s one of them?), courthouse, etc, etc, maybe even the pub. If the answer was yes, or “yes, if you contribute”, they would get a voucher or unique identifying number.

The most profitable and efficient Legal Aid providers are not necessarily always the one providing clients with advice and representation at the highest quality… The LSC has a substantial peer review programme because there is a robust link between quality and efficiency is telling. Similarly we would have expected the LSC to produce evidence of a link between the size of a firm and the quality of its work to support its reform proposals if such evidence were available. It has not.

CAC acknowledged that there is a real risk of specialist suppliers being lost to the legal aid system because under the fixed fee regime it will simply be impossible for them to obtain a reasonable return for their work. The reality is that the government has no reliable information at all about the extent to which the Legal Aid system as a whole will survive the transitional period of fixed fees, nor does it have any idea of what kind of firms will survive or emerge to bid for work under BVT.

So much is at stake for our clients. The potential consequences of not getting timely access to quality representation are that they won’t understand how the system works, and how the facts of their cases should be presented to the Home Office. They might be detained by the Immigration Service in the UK without access to a court to challenge their detention. They might be unlawfully removed from the UK to a country in which they are at risk of persecution and other human rights violations. They might be separated from close family members for protection. For victims of trafficking, the most likely consequence of being returned to the country from which they came, is that they will be sent straight back into the hands of the traffickers. And poor quality representation is really no better than having no representation at all. In asylum and human rights cases, it is often very difficult for an applicant to substantiate the basis of their claim with evidence from their own country, much turns on the credibility of the applicant. Representatives who prepare hurried statements do a tremendous disservice to their clients, because once the decision-maker and subsequently the court has assessed that the account simply does not stack up, it is all but impossible for a just outcome to be attained by any subsequent representative, however much care they might take with preparation.

Further attention to the detail of the new terms and conditions under which legal aid for immigration and asylum cases will be available makes very grim reading for our clients. Take the case of entry clearance appeals, where the appellant is overseas, seeking to challenge the refusal of an entry clearance officer to grant a visa for entry to the UK. In family reunion cases (e.g. in which a person has established refugee status in the UK and has the right to have immediate family join them), it has been accepted by the LSC since 2004 that the UK-based sponsor of the application should be able to sign the relevant legal aid (CLR) forms. Under the new terms, only the actual appellant will be allowed to sign. The appellant might be in a refugee camp or a village in Africa, with no proper post facilities and certainly no fax. The Appellant may be illiterate or may speak no English, and so even if we can get the form to them within the deadline for lodging the appeal, they may not have a clue how to complete it. The LSC has given no good reason for reverting to the pre-2004 position and the effect of it doing so will be to deny many people access to justice by effectively denying them access to a court.

For clients in detention, the LSC will be conducting a bid round for exclusive contracts for providing legal services to immigration detainees later this year, with contracts starting on 1st October 2007. Further details have not yet been published by the LSC. The reasonable costs of a bail ap
application, charged at an hourly rate, up to a limit of £500, are to be allowed from 1st October 2007 and are currently outside the graduated fee scheme, to enable the LSC to gather data on ‘average’ costs, before imposing a fixed fee at some point in the future. It is to be hoped that no fixed fee is imposed for bail applications, given this may dissuade suppliers from taking on complicated bail applications that take time to prepare and given that an individual’s liberty is at stake.

The pilot for providing immigration advice for individuals detained in police stations in England and Wales has been rolled over until October, with the LSC yet to make a decision on whether to continue the service. If it is to be continued this will again be awarded to suppliers via exclusive contracts following competitive bids. The main difficulty with this pilot has been finding a supplier in the area where the client is detained. Given the fixed fee proposals set out above and the dwindling supplier base, if contracts are awarded, this problem is likely to worsen in the future. This will make the position more common that an advisor tells a detainee he/she has a potential application that can be made to the bail immigration adjudicator but he/she has a potential application that can be made to the bail immigration adjudicator but no supplier can be found to help lodge it.

It is also clear that the LSC envisages that one supplier will deal with one matter from start to finish, and will claim the fixed fees as applicable. This fails to take account of the reality of clients wishing to transfer from one supplier to another, due to allegations of negligence and/or inadequate professional work and also of suppliers wishing to transfer a client to another advisor due to a conflict of interest or due to being professionally embarrassed. Rised. If there is only one fixed fee for each matter then it is going to be very difficult if not impossible for a client to instruct a new solicitor under Legal Help/CLR. The scheme would require either that the second supplier will have to do the work at that stage of the proceedings for free or the first supplier waives the fixed fee. Clients who feel they have been poorly represented will have no access to justice or will have to pay for it themselves (which they won’t have the money to do).

It is not surprising, when one considers the magnitude of these risks, that CAC concluded its assessment of the government’s proposals as follows: “...the DCA/LSC’s intention of a nationwide imposition of fixed fees followed rapidly by competitive tendering across the entire Legal Aid system is a breathtaking risk.”

After years of representing clients who have come from, or who are living in situations of tremendous adversity, we still often find ourselves overwhelmed by their bravery.

As well as the place of safety with which we are bound to provide them in accordance with our international obligations, our clients deserve recognition for their outstanding courage and their refusal, even in the face of the harshest adversity, to accept the cruelty of persecution and human rights abuse as somehow being their fate. What they certainly deserve is the very best quality legal advice and representation that we can offer them. Vera Baird has said that “The hallmark of a decent society is good legal advice and representation for the community.” At the same time the government is seeking to achieve savings in the legal aid budget of £100 million by 2010, from the spend in 2006-07. How has the £15.6 million the DCA spent on consultants in 2005 – 06 helped to advance the cause of providing ‘good legal advice and representation for the community’ (Gazette, 31st May 2007)? What is certain is that to compromise the provision of good legal advice and access to justice to such a vulnerable client group as asylum seekers and immigrants would indeed indicate the emergence of a much less decent society.

\[ Table: \]

| Level 1 – Initial advice National (excluding VAT) | £136 |
| Level 2 – Negotiation National (excluding VAT) | £306 |
| Level 3 – Full representation (excluding VAT) | £3,460 |

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<td>Child</td>
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<td>Joined Party</td>
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<tr>
<td>Parent</td>
<td>High 2</td>
<td>£4,098</td>
</tr>
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The Commission’s example: A solicitor based in Brighton acting for a parent where the client had sought early advice, and the case had then proceeded to the county court and was resolved following the case management conference, would receive the following fees: £136 + £306 + £3,460 (exclusive of VAT).

Sonia Routledge is a Solicitor at Birnberg Perce & Partners. Damian Hanley is a Partner at Wilson & Co Solicitors. With thanks to Sadat Sayeed and Smita Bajaria.

Society Conference, a few days after the consultation closed, announcing that they would go “back to the drawing board”. The Law Society Gazette even described Caroline Little, of the Association of Lawyers for Children, as “briefly dumbstruck” at the announcement.

Far be it from me to suggest that the DC might try to ‘bury bad news’, but the new proposals did emerge in March when everyone was preoccupied with whether or not to sign the new contract at all, and certainly slipped under my personal radar, although not that of LAPG’s director Richard Miller (see Carol Storey’s article, pages 22-23). The response period for the consultation closed in mid-April. I am concerned about this because firms will not have had the same opportunity to compare new figures with historical ones to see how they will impact.

If there was any idea that the scheme would be simpler to operate than the hourly costing rules, that is quickly dispelled. There are separate schemes for care proceedings, private law children work, and private law ancillary relief. Uncontested divorce remains within the fixed fee scheme for controlled work. Domestic violence injunctions are outside the scheme, and TOLAT (Trusts of Land and Appointment of Trustees Act) (see box below). I’m not going to bore you with all the tables or your brain like mine (see box below). I’m not going to bore you with all the tables or your brain like mine (see box below).
If access to private law help with children is not available, frustrated parents are more likely to report their ex-partner to social services or the NSPCC, bringing in an escalation of intervention and then cost. In a sense, the impact of the failure of the system is too hard to contemplate. Because that is the risk. The House of Commons Constitutional Affairs Committee report rightly concludes: “Again, we are deeply concerned that the effective reduction in case fees for a significant number of specialist family legal aid suppliers will make it increasingly unattractive to practice in this field of law. It is unlikely that these fee schemes would halt the trend of family lawyers leaving the legal aid system, let alone reverse it.”

Penny Mackinder is a specialist family law locum who is on the editorial board of Legal Aid Review, the Journal of the Legal Aid Practitioners Group.

Law centres

by Clara Connolly & Kathy Meade

It should have been heartening on 31st May 2007 to hear the then Legal Aid Minister Vera Baird hail legal services which “model the law around the public and not vice versa” at the opening of the new Gateshead CLAC (see Jamie Ritchie article, pages 32-33). This first CLAC, funded jointly by the LSC and Gateshead Council, is meant to spearhead the development of one stop shops for people seeking legal advice on housing, debt, welfare benefits, community care, employment and family problems all around the country. The law centre and Citizens’ Advice Bureau form the backbone of this new organisation with three local law firms contracted to provide specialist family, community care and public law advice and representation. What is more, the CLAC is funded to ‘take action’ on the causes of problems and to empower people to assert their legal rights. Isn’t this close to what the law centre movement has been advocating for years?

Shouldn’t it also have been cheering to hear the LSC arguing the case for CLACs on the proven grounds that civil justice problems lead to further social welfare problems, that those who socially excluded experience the most problems, that only half of those who have problems seek advice and that a sizeable proportion give up because they can’t find the right person or agency to help them…? Isn’t this also what law centres (amongst others) have been saying for years in every funding application, in every annual report, in every effort and running. Over the last decade between 50 and 60 law centres have been in operation. Since 2001 seven new law centres have been established. Law centres have always had the capacity to act as the inspi-

native model of not-for-profit legal services; accessible, flexible, informal and responsive to the needs of their local neighbourhood. There were too few lawyers specialising in social welfare law and there was no legal aid for important areas of work such as employment tribunal representation. Many low income people were also excluded from legal aid by tough means-testing. Even more did not have a law firm locally and even if they did, they did not find them user-friendly. As the thrust of the Community Legal Service’s five year strategy ‘Making Legal Rights A Reality’ sadly confirms, the situation is little changed 30 years on.

Free independent legal advice irrespective of means, accountability to the local community through management committees, outreach sessions in community centres, telephone advice lines and drop in sessions, campaigns on issues of social justice, test cases and educating the community about their legal rights became the hallmarks of law centre public service. The first law centres opened in North Kensington, Brent and Cardiff in 1970. By 1974 another 13 were up and running. Over the last 30 years CLACs have established some of the most effective organisations in the country, shaping the way legal aid can be delivered.

Law centres were the inspiration of radical lawyers in the 1970s who envisaged an alter-

true of a spouse overseas or missing, unco-operative or difficult, a missing marriage certificate…) you will find it difficult or impossible to find a solicitor. Either there will be no one, or they will not have the skill or experience to help.
struggled to survive against financial odds. Charitable trusts and donations got the first law centres off the ground. In 1974 local authority grants first became available and in 1975 the Lord Chancellor’s Department provided grants to some law centres where local councils refused to assist. Throughout the late 1970s and the early 1980s, local government led the way in recognising that access to good quality legal advice and representation was an essential part of any strategy to support poor and disadvantaged communities. But since local councils were under no statutory obligation to fund legal advice, the development of new law centres and the survival of existing ones was almost entirely dependent on who was in political control.

The last 10 years have seen a steady erosion in local authority funding. Not a year has passed without one law centre or another facing imminent closure because of funding cuts. In order to survive law centres have had to rely more and more on income from the LSC. This in turn has skewed the focus of law centres towards casework and threatened their distinctive and unique role in providing outreach and drop in advice, campaigning and legal education.

In 2001, Hackney council cut its grant of £190,000 to Hackney community law centre by 25% with knock-on cuts in the anti-deportation campaign and outreach work provided by the law centre. In 2006, Hilldington law centre were told that its £50,000 grant would go completely. Already in 2007, after changes in political control of the local council, Camden community law centre faces an 18% cut clawed back from a proposed 40% cut. Camden community law centre has lost 60% of its council grant, threatening four out of the 12 solicitor posts. Other law centres in London like North Kensington, rely on grants from the Association of London Government which are themselves far from secure. Short term funding from successful charity and Lottery Bids for new innovative work shored up Hackney law centre but provided no long term security. Other law centres have similarly obtained short term project funding to compensate for inadequate (or non-existent) local authority grants but those sources are subject to severe competition and are available only for new work and not core services.

This already precarious position is now under further threat from the Carter reforms, which set about cutting the legal aid budget through the market forces of fixed fees and competitive tendering. It seems that only the government is deaf to concerns about the changes coming into force at breakneck speed over the next 6-18 months. Most recently the House of Commons Constitutional Affairs Committee said that government’s plan was “a breathtaking risk” to justice among the most vulnerable in society.

The ‘one size fits all’ contract (in operation since April 2007) ends the ‘not-for-profit’ (NIP) arrangements which had been devised by the LSC in recognition of the special position of law centres in the legal aid market. With fixed fees in advance, so that we did not have to carry a destabilising burden of debt while awaiting payment for work done. Within a negotiated yearly budget, we could exercise our judgment more independently about expenditure on medical and expert reports. These small but significant concessions are now gone.

Gone too is the one LSC concession to the law centre ideal of free access to legal advice, regardless of means: the ‘level one’ or pre-specialist slot of free legal advice. At our drop ins and on telephone advice lines we have been able to offer advice, for example to victims of discrimination at work who are above (often just) the financial threshold for legal aid. We might be able to advance that payment so that we did not have to carry a destabilising burden of debt while awaiting payment for work done. Within a negotiated yearly budget, we could exercise our judgment more independently about expenditure on medical and expert reports. These small but significant concessions are now gone.

The fixed fees regime is supposed to create a level playing field in advance of competitive tendering (i.e. iron out any “anomalies” between NIP and private sectors) and force the smaller or financially weaker firms/centres to merge or close, regardless of their contribution to meeting local need. A fixed fee regime is new for the NIP sector, although more generous ‘tailored’ fixed fees have been common among private practitioners for some time. The impact will be catastrophic for many of our clients as this example illustrates.

Ms N has been refused permission by the Home Office to stay under the domestic violence rule but she has a right of appeal. She has failed to provide the standard evidence of police intervention, of court involvement or of contemporaneous medical evidence of injury. The Home Office has not considered the issue that the domestic servitude in the marital family has made it unthinkable for wives to call the police and impossible to gain independent access to a GP. Ms N has suffered a nervous breakdown; the after effects of the abuse and also of the difficulty of surviving without benefits (to which she is not entitled because of her immigration status). Ms N was referred to a law centre (or dedicated private firm) because it involves complex and specialist work, as well as sympathetic and patient handling. The time spent on such an appeal could be up to 30 hours, in our experience. Traumatised clients with mental health problems have difficulty giving instructions, and evidence has to be sought from informal, non-statutory sources, such as statements from friends/neighbours. The fees would be higher than normal; to cover expert psychiatric evidence on the effects of domestic violence on mental health, and expert evidence on the cultural context, as well as interpreters’ fees. It would certainly involve a pre-hearing conference and a trial with a skilled barrister. Under the current regime it would be time-consuming to persuade the LSC to approve the costs and time of such a case plan, but not impossible for a determined representative.

Under the fixed fees regime the time allowed for preparation of such an appeal is reduced to three hours. The barrister’s fixed fee would not cover a conference beforehand; and there is a cap per case for expert’s and interpreter’s fees. There will be an option to apply for payment under the ‘exceptional’ category – but only 20% of cases are allowed in this category, and the LSC has the discretion of slashing costs incurred as ‘unreasonable’. Post-OCTOBER 2007 it is most likely this case would not be fought at all, since the law centre would be under pressure to draw a line on the basis of costs and not on the intrinsic merit of the case. Without pursuing her right of appeal, Ms N would face removal to her country of origin where she would probably suffer social ostracism, destitution and complete mental breakdown. But in any event if expert evidence and intensive casework, her appeal would have every chance of success.

For our housing and other social welfare clients there is a similar drive for costs to dictate. Under the new regime we will be paid for a fixed number of ‘case matter starts’ per month for a standard fee. In London, where the law centres’ average case time for housing cases falls at around 5.4 hours (i.e. well above the standard fixed fee but significantly below the exceptional category), quality will suffer under the pressure to complete the required number of new cases essential for the law centres financial survival.

The routine case, with standardised advice and case preparation, will be the only way to fulfil the LSC targets. We know from research conducted by the LSC itself that law centres have more successful outcomes, and take more time per case. The combination is not a coincidence.

Even if we can devise strategies for survival under the fixed fees regime, we will certainly not survive the next phase: competitive tendering. Unless of course...
private practitioners in our areas have been forced out of social welfare completely, and we are the only ones left…

In this context, the CLAC model heralded in Gateshead is simply a mockery of the ideals which the law centres have fought to preserve. It is a creature of the Carter reforms and is little more than a reconfiguration of the money already paid to an under-funded law centre and other not-for-profit organisations. The project was put out to competitive tendering on a budget that had not changed in 10 years. The Leicester CLAC tender has already foundered because the law centre submitted that they and their local partners could not meet the specification for the amount of cash offered.

Change is essential to realise access to justice across the country and the vision which has inspired law centres across three decades. The current government however, while paying lip-service to the ideals of public service and access to justice for the socially excluded, is writing the epitaph of law centres with its programme of market reform. The consequences for the people and communities we try to serve will be disastrous.

Clara Connolly and Kathy Meade currently work in London law centres.

The history

by Jamie Ritchie

There was never a golden era of Legal Aid. Set up by Labour in the aftermath of the Second World War, it was never a general legal service for those who could not afford lawyers. It was simply a way of ensuring individual representation in certain court processes: notably crime, where there always was some kind of service; divorce (increasing in the aftermath of war); and personal injury, where unions already provided legal aid.

At the time the Law Society was a powerful force in the land. It argued that it should administer all civil legal aid – to safeguard independence. The government, unwilling to take on the Law Society, conceded. There were few solicitors (under 30,000) in England and Wales. They were divided between the City lawyers (fabulous fees), in-house lawyers and high street practitioners (conveyancing, probate, small businesses and some litigation). These last became the providers of legal aid, both criminal and civil.

In practice this created no real attempt to branch out beyond the well-tried areas of crime, matrimonial and personal injury.

Putting right the injustices of the world was low on solicitors’ priorities. Their education, social background and working practice taught them to think like employers, landlords and business people. They did not conceive of employees, tenants, social security claimants, immigrants, ethnic minorities, gays and lesbians, disabled people, women or anyone out of their social class as having much in the way of rights or even as deserving them. Solicitors were unapproachable; not people to whom such sections of society would turn in a crisis.

All this changed in the 1970s. Graduates came to law school questioning everything. Meanwhile claimants’ unions were campaigning about social security rights. Council tenants were staging rent strikes. Squatters were fighting bailiffs. Suspects were exposing the police for planting drugs. Groups of migrant workers joined unions and took industrial action. Women’s refuges appeared. Lawyers were forced to question old ways of working. Law Centres sprung up all over. New or unused remedies were tried on behalf of poor people and some of them found to work. The ‘green form’ scheme (now known as Legal Help) was introduced. Legal Action Group magazine, LAG (now Legal Action), constantly ran articles on the “imaginative use” of legal aid. Many more women became lawyers, as did people from ethnic minorities and people from working class backgrounds. Ways of providing legal services outside the ‘judicare’ case-by-case approach of legal aid were established.

At first the Law Society, mindful of its members, dug in its heels and resisted the advent of Law Centres. It relied on practice rules that were blatantly anti-competitive and it took a beating. After that its hostility changed to support as it became apparent that the new public interest in legal rights was creating more work for solicitors.

The Thatcher government of the 1980s promised deregulation for the rich and powerful. It tried (unsuccessfully) to remove substantive legal fetters on big business and (more effectively) to cut enforcement mechanisms – health and safety inspectors, environmental health officers, social workers, tenancy relations officers, planning departments, tax inspectors and others. The result was a measure of impunity for landlords, speculators, business tycoons, etc.

This was accompanied by closer regulation of the poor and powerless; in employment, housing, immigration, social security, public order, police powers, etc. Speculators and investigators, bailiffs, police, employers, landlords, officials, moneylenders and the like increasingly dominated the lives of the poor. Democratic accountability of state-funded services was reduced through privatisation and quangos. Unemployment was used to keep down militancy. Institutions on which people traditionally relied for protection (trade unions, tenants’ organisations, local councillors etc.) were weakened.

Above all the Tories wore down on public spending. They were not called ‘neo-liberals’ then, but they aimed to keep the UK competitive for inward investment through low taxation (cuts in public services), a compliant labour force and fiscal policies later enshrined in the convergence criteria of the Maastricht Treaty. As a result people were forced increasingly to individual court action, and so to legal aid, to solve problems for which traditionally they would have found redress elsewhere. The uncapped legal aid budget simply grew. So, with increasing complexity of regulation, so did specialisation among legal aid lawyers. This development of legal services was uneven. It varied from city to city and outside big conurbations there still exist what they call ‘advice deserts’.

Meanwhile the Law Society, hitherto regarding the Tories as its friend, was forced (partly by pressure from ‘consumers’), to give up its conveyancing and probate monopolies and to relax restrictions on advertising and charging. Administration of legal aid was transferred to the Legal Aid Board. Similarly, there was relentless pressure on the Law Society’s failure to police its members’ shoddy work. The reforms caused by this continue even now.
For the Tories the main problem with a demand-led legal aid scheme was that the budget was potentially limitless and appeared to be getting out of control. They grappled with notions of ‘gate-keeping’ but found no solution. Bureaucratic means were adopted to control costs; financial eligibility rules were tightened up and sometimes, in response to protests, relaxed. There were changes in the scope of services available, Green form extensions were closely policed. Legal aid (public funding) became more restricted.

A corps of reliable and committed private legal aid practitioners was built up. But far too many solicitors ‘continued to dabble’. The culture persisted of misdefining legal problems of the poor as simple, soluble by common sense and not worth the trouble of privately funded work. Increasing demand for legally aided work made it easy to establish a practice. On any view of solicitors’ conduct rules, the abysmal quality of some work was beyond conduct. But the penalties were for the most part in no position to make effective complaints. The Law Society, torn between its representative and regulatory roles, failed to take action to improve standards. Immigration, an area of legal service for which there was no monopoly and the only form of regulation was by the Law Society, was notorious for its poor standards. The Labour government legislated for a system of regulation in 1999. The Legal Aid Board addressed this with extremely unpopular bureaucratic devices (transaction criteria and file reviews in which quality was measured largely by tidiness of files).

With New Labour in 1997 came (inevitably) a New Vocabulary – Community Legal Service, Legal Services Commission, Community Legal Service Partnerships, Legal Help, Help at Court, Public Funding, Access to Justice, Social Exclusion, Fat Cat Lawyers. And not just a New Vocabulary:

- The standard of work was tackled through file audits. These are essentially market mechanisms – purchaser-imposed standards. The LSC is no longer buying an irreducible minimum standard of service. It is bartering standards in a market place. This is why the independence of the new peer reviewing process (already identified as too costly) must be defended.
- The increasing budget was dealt with at a stroke by capping it. This has been the most damaging change. While government creates ever more criminal offences plus new powers and procedures for dealing with criminal, terrorist and anti-social behaviour, criminal legal aid costs more. So housing, employment, family law, welfare rights and debt are being reborn as social welfare law. It is not clear why these clusters of problems are not deemed to arise in the wake of problems with immigration, community care, mental health, education, criminal charges, personal injury and complaints about public authorities.

Research suggests that when you lose your house, or your job, or your spouse, problems amenable to legal solution arise in ‘clusters’. So housing, employment, family law, welfare rights and debt are being reborn as ‘social welfare law’. It is not clear why these clusters of problems are not deemed to arise in the wake of problems with immigration, community care, mental health, criminal charges, personal injury and complaints about public authorities.

So all access to ‘social welfare law’ is through a CLAC or a CLAN in each area (see Carol Storey on p22). For those CLACs or CLANs that consist of several organisations the LSC wants only one ‘lead contractor’. The other categories of law will be covered by separate contracts. Big suppliers (who can cut unit costs) will be at an advantage. The effects on ethnic minority suppliers (and supply) have not been measured. When – it is inevitable – the legal aid resources available in an area are insufficient, whether in quality or in quantity, the government will blame local CLACs and CLANs.

The plans involve competitive forces which will favour those who provide the skimpiest service, with only the exhortation of peer reviews exerting pressure for improvement; and even closer designation by government for CLANs that both of what rights will be enforced and of the extent to which they will be enforced. It is, in fact, a recipe for executive influence over judicial processes.

The opposition to the plans was unprecedented. There was a chance to stop the plans in March 2007 with calls for a collective rejection of the LSC’s unified contract. The Law Society got legal advice which said, in effect, “don’t sign this dodgy contract” and faced calls for a boycott enthusiastically applauded at meeting after meeting. But it heeded instead claims from the LSC, liberally distributed among all involved, that a boycott would breach competition law. As regulator it advised members that a boycott would breach competition law and breach competition law was unprofessional conduct. Thus was lost an opportunity for the Law Society with the support of the whole legal profession and the public to save legal aid and recover some of its past respect.

For decades the Law Society’s professional rules and their application have been attacked as an abuse of monopoly power or as a fetter on free trade. Each time the Law Society has retreated (probably correctly). Retreat in the face of the magic word ‘competition’ has become a reflex. Unfortunately it no longer appears capable of sustaining the integrity of solicitors (and the rule of law) against the ideology and greed of the market.

The legal profession as a whole and the Law Society in particular must get a grip on the issue of standards. There may have been an era when qualifying as a solicitor and behaving as a gentleman were accepted. It may be that nowadays market forces are sufficient for the rich and powerful to get the service they want. It may also be that the middle classes will now get the standards they seek as a result of new regulatory arrangements. But the regulation needed in the legal aid sector, paid as it is at anything between a tenth and a third of private sector rates, is mainly of standards of work. The standards must be set not by the LSC, nor by Tescos and Capita (reputedly waiting in the wings for opportunities to bid for CLACs and CLANs), but by the legal profession itself.

The cost of peer reviews must continue to be borne by the Legal Aid Fund. Peer reviewers should be employed independently of the LSC, preferably, if they show themselves equal to the task, by the professional bodies. The whole legal profession should be refusing to allow this travesty. It should not simply be left to the judiciary to decide in the judicial review process.

Even Lord McKay, the Tory lord chancellor, promised institutional safeguards against abuse by government of its position over legal aid. If it was good enough for him it should be good enough for the current secretary of state for justice.
THE PERPLEXING CASE OF THE ARMS MANUFACTURER, THE TOTALITARIAN REGIME AND THE PUBLIC INTEREST

by Jamie Beagent

On 14th December last year the Attorney General announced to Parliament that the Serious Fraud Office (SFO) was discontinuing its investigation into allegations of bribery and corruption surrounding the dealings between BAE Systems Plc and the Saudi Arabian regime.

The decision was met with a mixture of outrage and resigned expectation. In the weeks running up to the announcement it had been widely reported, based on numerous government leaks, that the Saudis were threatening the UK with various consequences unless the SFO investigation was called off. Threats to sever diplomatic cooperation were apparently accompanied by threats to discontinue payments under the Al Yamamah arms deal – leaving the UK taxpayer to pick up the bill.

In 1985/6 and 1988, the UK signed high value arms deals with the government of Saudi Arabia for the supply of Tornado fighter and ground attack aircraft. These deals are collectively known as “Al Yamamah” (“the dove”). As well as actual hardware, the package included servicing and training. The aircraft and associated services are and were paid for in oil, not cash. The Al Yamamah deals are on a government to government basis, although the actual hardware, servicing and training is all provided by BAE. Since the time that these deals were initially entered into there have been widespread concerns that BAE may have made corrupt payments in order to secure the deals.

Aside from ongoing payments under the Al Yamamah deals, a memorandum of understanding between the UK government and the government of Saudi Arabia was agreed for a further £10 billion Eurofighter deal for 72 fighter aircraft in August 2006.

By 2nd December 2006, it was being reported that the Saudi threats had increased further. The Daily Telegraph reported that “Saudi Arabia has given Britain ten days to halt a fraud investigation into the country’s arms trade – or lose a £10 billion Eurofighter contract” and “Tony Blair has been told that the deal faces the axe in 10 days unless he intervenes to bring the two-year investigation to a close.”

The catalyst for this increase in Saudi pressure appeared to be that the SFO was about to obtain access to Swiss bank accounts which would have revealed the destination of commission payments allegedly made by BAE. On 29th November 2006 The Guardian had reported “legal sources” saying that secret payments from BAE Systems have been found in Swiss accounts linked to Wafic Said, a middle-man linked to the Saudi royal family.

At the same time it was widely reported that BAE themselves were lobbying intensely in an attempt to have the investigation halted as the recently announced Eurofighter deal teetered in the balance and the SFO investigation looked to be on the verge of unearthing more embarrassing and damaging revelations.

The SFO investigation had begun in November 2004 following allegations made by whistle-blower Peter Gardiner, a travel agent, that he had spent £60 million on behalf of BAE. Gardiner had said: “It’s more a question of what we didn’t spend it on than what we did.” Luxury cars, school fees, apartments and air travel for Saudi officials and royals are mentioned as well as the transfer of funds into private bank accounts.

The investigation now seemed to be on the brink of the breakthrough it needed. In December 2006 forensic investigators were preparing to fly to Switzerland to inspect the accounts.

It was against this background and following a flurry of diplomatic and ministerial-level activity that the decision to discontinue the investigation was announced by the SFO and the Attorney General. The decision was said to have been taken following representations made to the Attorney General and the Director of the SFO concerning the need to safeguard national and international security and that it had been “necessary to balance the need to maintain the rule of law against the wider public interest”.

The SFO’s short announcement declared that no weight had been given to commercial interests or to the national economic interest. The reason for this statement appears to have been to intimate that the decision had been taken in accordance with the UK’s international obligations under the OECD Anti-bribery Convention, which the UK had signed on 17th December 1997. Specifically, Article 5 of the OECD Convention prohibits signatory states, when considering investigating or prosecuting instances of bribery and corruption, from taking into account: “…considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

The SFO explicitly distanced the decision from the national economic interest (the risk of losing the Eurofighter contract was receiving significant press coverage at this time) but the statement’s silence on the question of the impact on relations with another state was deafening.
The Attorney General's significantly longer statement to Parliament did make explicit reference to the OECD Convention but seemed to contradict itself on the key question of whether the evidential burden of proof, which the Attorney General considered would prevent a successful prosecution, then it begs the question as to why the investigation was not continued earlier before enormous resources were put into trawling through the evidence. It was not as if this was the first time that the Attorney General had considered the question of whether the investigation should be continued.

Following lobbying from BAE, the Attorney General had apparently conducted a Shawcross exercise and “consulted” ministers, including Blair, in January 2006. He concluded that: “it was not possible at that stage to say whether the evidential test for a prosecution would ultimately be met but he was satisfied that there were proper and sufficient grounds for the SFO to continue the investigation”.

What exactly had changed between January and December 2006, save for the sudden advance in the investigation leading the SFO to the brink of studying the Swiss bank accounts?

The Shawcross procedure for determining the public interest in proceeding with a prosecution makes it clear that the Attorney General “may consult with any of his colleagues in government… The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put under pressure by his colleagues in this matter.”

However, following the formal announcement of the decision to drop the investigation, Blair was keen to throw in his two pennies worth and take full responsibility for the decision. He could not have been clearer that the UK's relations with Saudi Arabia were at the heart of the decision to drop the investigation when he made a statement to the press on 15th December. “Our relationship with Saudi Arabia is totally important for our country in terms of counter-terrorism, in terms of the broader Middle East and in terms of helping in respect of Israel-Palestine – and that strategic interest comes first. If this prosecution had gone forward all that would have happened is we would have had months, perhaps years, of ill-feeling between us and a key ally.”

Tony Blair's confession that he took full responsibility for the decision seems to fly in the face of the Attorney General's line that he had invited the views of ministers under the well-established Shawcross procedure:

“I'm afraid, in the end, my role as Prime Minister is to advise on what's in the public interest and I consider that it was clear that the decision was taken in this regard and I take full responsibility.”

Blair once again affirmed his position to the House of Commons following the recent embarrassing revelations in The Guardian and on Panorama that multi-million pound payments had been made to Prince Bandar of Saudi Arabia from a Bank of England account under the joint control of BAE and the MOD. Responding to a question as to why this information was withheld from the OECD, Blair stated: “If he wants to blame anyone for this he can blame me, and I'm perfectly happy to take responsibility for it.”

Picking through these confusing and, in significant part, contradictory statements seems to lead to only one realistic conclusion: that however it is dressed-up, this was a decision that was taken under extreme duress from Saudi Arabia and that effectively the UK had been blackmailed by one of the more corrupt and backward states in the world (the human rights situation in Saudi Arabia is described by Amnesty International as ‘dire’ with no political parties, trade unions or free press and with women disenfranchised and widely reported use of torture and extra judicial killings) into discontinuing an investigation into corruption and that all of this was done in breach of the UK's international obligations.

An indication of where the primary concern of Blair's may actually lie can perhaps be ascertained from his often repeated refrain when discussing the decision: “[leaving] aside the fact that we would have lost thousands of UK jobs”.

The decision has drawn criticism from amongst others the OECD itself, the government of the USA and France, F&C Asset Management (one of the UK's biggest institutional investors) and a wide range of international NGOs. The overwhelming view is that the UK gave in to political pressure and that its capitulation to Saudi Arabia amounted to a breach of the OECD Convention.

This is certainly the view taken by Corner House Research and Campaign Against Arms Trade (CAAT), the two campaigning NGOs presently bringing a judicial review of the decision to discontinue the investigation. The two NGOs acted quickly, sending a letter before presentiment bringing a judicial review of the decision to discontinue the investigation. The two NGOs acted quickly, sending a letter before claim on 18th December.

The basis of the legal challenge is that the decision to end the investigation into BAE was taken in clear breach of the UK's international obligations under Article 5 of the OECD Convention of which it is a member. It is a principle of international law that where a public authority appears to take into account such obligations when taking a decision, the authority's line that he had invited the views of ministers under the well-established Shawcross procedure:

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Picking through these confusing and, in significant part, contradictory statements seems to lead to only one realistic conclusion: that however it is dressed-up, this was a decision that was taken under extreme duress from Saudi Arabia and that effectively the UK had been blackmailed by one of the more corrupt and backward states in the world (the human rights situation in Saudi Arabia is described by Amnesty International as ‘dire’ with no political parties, trade unions or free press and with women disenfranchised and widely reported use of torture and extra judicial killings) into discontinuing an investigation into corruption and that all of this was done in breach of the UK's international obligations.

An indication of where the primary concern of Blair's may actually lie can perhaps be ascertained from his often repeated refrain when discussing the decision: “[leaving] aside the fact that we would have lost thousands of UK jobs”.

The decision has drawn criticism from amongst others the OECD itself, the government of the USA and France, F&C Asset Management (one of the UK's biggest institutional investors) and a wide range of international NGOs. The overwhelming view is that the UK gave in to political pressure and that its capitulation to Saudi Arabia amounted to a breach of the OECD Convention.

This is certainly the view taken by Corner House Research and Campaign Against Arms Trade (CAAT), the two campaigning NGOs presently bringing a judicial review of the decision to discontinue the investigation. The two NGOs acted quickly, sending a letter before claim on 18th December.

The basis of the legal challenge is that the decision to end the investigation into BAE was taken in clear breach of the UK's international obligations under Article 5 of the OECD Convention of which it is a member. It is a principle of international law that where a public authority appears to take into account such obligations when taking a decision, the authority's line that he had invited the views of ministers under the well-established Shawcross procedure:

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Blair once again affirm...
the Court will review the decision for compliance (R-v-SSHDI, ex parte Launder [1997] 1 WLR 839).

The National Security argument itself seems to be purely a smokescreen. It is common ground that bribery and corruption are causes of international crime and terrorism. In Blair’s own words at the G8 summit in St Petersburg, 2006: “Corruption threatens our shared agenda on global security… we recognise that corrupt practices contribute to the spread of organised crime and terrorism.”

The academic commentators on the OECD Convention take the view that there can be no national security exemption, or if one must be read into the Convention it could only be construed in the most narrow terms. Presumably, such a scenario might be where there was a bomb ticking under Parliament and the blackmailing state concerned had vital information as to its whereabouts. Although such a real and present threat to national security ought only to lead to a temporary exception to the general obligation.

It is also widely acknowledged that the regime in Saudi Arabia is effectively propped up by the Western powers and needs us more than we need it. Is it seriously being suggested by the government that any important security information will not reach us via the US? The government’s embarrassment at the refusal of John Scarlett of MI6 to sign up to the dossier apparently presented to the Director of SFO gives a further hint that the national security argument may not actually be all that it has been dressed up to appear.

These are questions which the Court ought to consider – with the aid of a special advocate representing CAAT and Corner House if it is necessary to delve into security sensitive information.

However, before the government had even responded to the letter before claim, events took a dramatic turn which would shed light on the murky world of international arms dealing and the activities of the far right. On 10th January 2007, CAAT’s solicitors received a letter from Allen & Overy, BAE’s solicitors, enclosing the print out of an internal CAAT email distributed to members of the organisation’s steering committee and which contained sensitive and legally privileged material. The short accompanying letter stated that BAE had “recently received electronically [the email].…This email was not solicited by our client.” The email as returned had also been redacted to remove the routing information so that any clue as to the source and passage of the email was removed.

This was a bombshell that threatened to derail the judicial review. CAAT’s ability to consult freely and openly with their legal team had apparently been compromised either by a mole or moles or by an external spy who had the ability to hack into the internal emails of the NGO. This was particularly distressing and divisive for CAAT which is a non-hierarchical organisation that bases its decision making on trust and a communal approach.

It was also not the first time that CAAT had found themselves in this position. In September 2003, the Sunday Times had published articles alleging that BAE had paid a company to infiltrate CAAT and collect information about its workings and activities. Following further investigation by CAAT it had transpired that one of their most trusted and long-standing staff members was involved in the spying.

CAAT had put these damaging revelations behind them but once again, and at a critical point while bringing the legal challenge to the discontinuation of the investigation into BAE, it seemed that it had fallen victim to spying and that its ability to properly conduct the judicial review had been compromised. There was a real risk that BAE may have access to confidential communications relating to the proposed legal proceedings to which they were a party and, of course, had a critical interest in the outcome.

It was of course perfectly proper behaviour for Allen & Overy, once they became aware that their client was in possession of privileged material belonging to CAAT, to return the document to them. However, BAE’s subsequent conduct proved to be obstructive in the extreme. They refused to cooperate on any level in revealing the source of the email, refusing to provide unredacted copies of the email with the routing information, stating that the email was unsolicited and insisting that CAAT had no right to any further information.

They clearly expected this to be the end of the matter and, it seems, must have considered that CAAT did not have the resources or the will to pursue the matter. BAE insisted that CAAT’s demands for this information were baseless and that any attempt to bring proceedings would be met with an application for costs – a not insignificant threat given BAE’s vast resources and the involvement of expensive City solicitors.

Unfortunately for them, BAE misjudged the situation. CAAT’s legal team decided to pursue the matter on a no-win, no-fee basis and instigated injunctive proceedings to compel BAE to say where they had got the email from. CAAT invoked the ‘Norwich Pharmacal’ jurisdiction (more commonly used by large businesses to protect their intellectual property) arguing that they were victims of wrongdoing and that BAE were mixed-up in that wrongdoing and ought therefore to be compelled to give up any information that they had about it.

In an important breakthrough, CAAT were also successful in arguing that they should be granted the benefit of a protective costs order (PCO) in these private law proceedings because the apparent spying seriously compromised their ability to run the judicial review proceedings which they were bringing in the public interest. This PCO meant that CAAT’s potential exposure to adverse costs was limited to an affordable level and that BAE’s threat of costs no longer had the chilling effect that was intended.

Having already obtained an injunction ensuring that BAE could not destroy any evidence, BAE continued to fight the application tooth and nail, turning up at the full hearing with two silks and insisting (though without producing any evidence as to how they had come into possession of the email) that they were not mixed-up in any wrongdoing.

Mr Justice King thought otherwise and in

“The decision to end the investigation into BAE was taken in clear breach of the UK’s international obligations under Article 5 of the OECD convention”
granting Norwich Pharmacal relief in a judgment dated 26th February 2007, ordered that BAE produce an affidavit disclosing all they knew about the receipt of the email and to provide CAAT with full unredacted copies of the email. He characterised BAE’s conduct of the litigation as “obstructing justice”. These proceedings are still afoot but there was a further significant twist to follow as BAE’s affidavit revealed where the email had come from.

The affidavit prepared by BAE’s Security Director revealed that the email was sent onto them by one Paul Mercer. Mercer was retained by BAE under a contract to provide them with “media services”. For the tidy sum of £2,500 per month, he was required to provide BAE with “general information about the activities being undertaken by protest groups and about any specific threats to [BAE].” Under the terms of the contract, he was not to provide BAE with information that was illegally obtained or that was not publicly available, but was permitted to use “human sources” to obtain information, a polite euphemism for spies or agents.

Paul Mercer is an interesting character. Media reports since his role in the affair became public, suggest that he was a close friend of the Tory shadow defence secretary Julian Lewis MP. Reports also linked him to a number of extreme right wing organisations and he has acknowledged that he used to spend a lot of time with campaigning NGOs in his role as a “journalist” and “photographer”. He was certainly extremely hard to locate and contact – his only publicly available address being a mail drop-off at a newsagents.

Armed with this information about the role of Mercer in supplying the email to BAE, CAAT embarked upon a further set of injunctive proceedings to compel Mercer to reveal what he knew about the source of the email. An ex parte injunction was obtained and, after some difficulty in tracking him down, he was served.

Compelled by a Court order to produce an affidavit himself, Mercer presented a remarkable story as to how the email came into his possession.

The email had been sent by CAAT’s parliamentary coordinator to an email list managed through an (apparently) secure mail-server, at 17:09 on Friday 29th December shortly before close of business for the New Year bank holiday. We already knew from the unredacted email that Mercer had sent the email on to BAE at 6.23 am on Tuesday 2nd January, the first working day after the Bank Holiday.

What Mercer now revealed was that he had received the email anonymously by post on an otherwise blank CD-ROM. Mercer says that he collected the package from his newsgagent drop-off address on the Saturday morning. Therefore, the email must have been burnt onto the CD in a narrow window between the sending of the email and last post on the Friday and then must have successfully negotiated the Christmas/New Year period post to arrive at Mercer’s drop-off address the following morning.

Further investigations of the CD-ROM showed that all of the meta-data (the codes on the disk which show, for example, the author of a document) had been removed. All that is except the time of burning (about 5.50 pm) which conveniently fitted the small window of possibility whereby this delivery of the email could have taken place.

Mercer, for his part, confirmed that the CD-ROM was the only item in the envelope delivered to him and that he could not recall what the post-mark on the envelope was.

Obviously this was a far from satisfactory conclusion for CAAT as the trail seemed to have gone cold. However, having established from Mercer that this was the only occasion on which he had received confidential information belonging to CAAT, that he had otherwise only ever supplied publicly available information regarding CAAT to BAE and upon obtaining undertakings from him that he would immediately inform CAAT if such information came to him again, it was felt that CAAT had done all it could in these circumstances to prevent the risk of a future leak of privileged information to the parties to the judicial review. CAAT duly settled the proceedings with Mercer on these terms.

Whilst these ancillary proceedings had been pursued the judicial review was necessarily put on hold. Outline proceedings were issued on a holding basis on 23rd February 2007. However, with resolution of the proceedings against Mercer and with additional securing arrangements in place between CAAT and its legal team, the judicial review claim was finalised and submitted to the High Court on 19th April 2007.

Matters have moved on since then and the Court has made a preliminary decision on the papers on the question of whether to grant permission for the judicial review to proceed. In an Order dated 29th May, Mr Justice Collins took the view that the government’s pleading of national security was a trump card. He did not accept the academics’ interpretation of Article 5 of the Convention and refused to be drawn into permitting the Court to review the purported compliance with it in accordance with the principles in [Launder].

However disappointing Collins J’s approach is, this is not the end of the matter. The Corner House and CAAT have renewed the application for permission and it will now be considered at an oral hearing in the coming months. They and the legal team behind them are optimistic that the Court will be persuaded to allow a full hearing of the claim.

The recent revelations about the potential complicity of the highest levels of UK government in the previously secret multi-million pound payments to Prince Bandar had not come to light at the time that Collins J was considering the question of permission. These allegations add further to the shady background to the decision to drop the investigation and the convoluted and often contradictory statements emanating from the key players in the decision.

It is time for the Courts to flex their constitutional muscles and review one of the most controversial prosecution decisions of recent years, a decision which has damaged the UK’s international standing and its reputation in the fight against crime, corruption and terrorism.

* * *

**Jannie Beagnt is a solicitor at Leigh Day & Co who act for The Corner House and Campaign Against Arms Trade in their judicial review of the Serious Fraud Office.**

Regular updates on the judicial review can be obtained from the following websites: www.leighday.co.uk www.thecornerhouse.org.uk www.caat.org.uk

Socialist Lawyer • July 2007 • 37
The Turkish government has long faced protests against the inhuman condition in which many of its prisoners are kept. The voices they most want to silence are the political prisoners, who have been protesting against isolation, assaults, deaths in prison for many years. In 1999-2000, in an attempt to control and abuse prisoners, they built eleven F-type prisons, where prisoners are kept isolated, from each other and from the outside world. Since then, prisoners have been starving themselves to death in protest at these conditions. After watching 122 of his clients die, lawyer Behic Asci (right) embarked on his own eight months long hunger strike, ended his fast after the government agreed more relaxed rules.

On 20th October 2000, hunger strikes began, started by 100 prisoners spread over 25 prisons around Turkey. On 19th December, normal prison guards were removed. Thousands of soldiers were brought in to transfer the prisoners into the new F-types. 8335 special troops were used. Chemical bombs were used unlike anything anyone had seen. Many prisoners were killed by gunshot wounds. Survivors had injuries ranging from chemical burns and smashed eye sockets to paralysis. Soldiers set fire to Bayram Pasa Prison while prisoners were still inside. Prisoners were forced into the F-type prisons, which, while structurally complete were not yet equipped with utilities like heating. The protest escalated to outside the prison in a show of solidarity that was not so easily censored. Members of Tayyad (Friends and Family of Prisoners) started a hunger strike outside prison. 12 members died. At the same time, hunger striker Arzu Guler had been released from prison on condition that she ceased her protest. She stayed with members of Tayyad but continued her death fast in protest of the isolation and torture of her fellow inmates. On 5th November 2001 hundreds of military police attacked the house she was staying in. Four people died, including Arzu Guler. They were beaten unconscious, and executed with a shot to the head. No investigation was ever launched. No policeman was ever brought to trial.

The hunger strikes have continued since 2000. We saw footage of Fatima Koypur, lying on a bed dying in March 2006. She was the 122nd death in opposition to isolation. Behic Asci went to all 122 funerals. We are shown a video of him making a statement after his 75th day on death fast. He lists all the medical deficiencies that result from isolation: restriction of vision, hearing damage, viral infection, nerve damage, premature menopause, sleep problems, hallucinations, extreme emotional problems. At the People’s Law Bureau, where Behic used to work, we meet XXXX (name withheld). She is a gentle lady, with laughing eyes and a lovely smile. She has severe disfiguring chemical-type burns covering her head, around her eyes and arms and on the back of her hands. She was in Bayram Pasa prison during the December 2000 crackdown. "At the time I was staying in a large dormitory in Bayram Pasa. Early in the morning we heard bombs going off and the sounds of machinery. They were trying to tear the walls down. From the rooftops nearby security forces started shooting grenades, gas grenades. With this as best we could under these conditions. We soaked cloth in water to use as masks to assist our breathing. We knew that the state was capable of anything, from past experience we knew. But on this occasion the state didn’t even issue a warning. There was a lot of gas, a lot of gas. People were truing to get to the windows to breath but the guards would get even more volatile if they did. The guards were shooting at people. Holes were put in the roof and these were used to put gas grenades in. It is hard to describe what gas it was, but people were losing control of their reactions. There were violent convulsions among inmates. At least 300 of these grenades were thrown in. "We tried to get down to the dining hall, we all were suffering effects from this new type of bomb, I am unsure about time. The attack started at 5am and at about 12:00 midday we tried to escape downstairs, we didn’t try before because it is near the doors and the hall and it would be easier to bomb us from there." "All this was done by the military police, the regular forces. It was more a military operation. They were making holes in the roof to throw gas bombs in. These were special troops, not normal prison guards. " Then they dropped a second type of gas bomb in, lowered in a special type of cage. At first the gas was grey then it came out as black smoke. Then people started to die. Six women died. The place started to fill with smoke, so much we couldn’t see. There was no fire at this point, just smoke. I got to my feet and got to a window. I was looking at my hands, my skin was melting away, it was almost as though it was becoming transparent. I could see under my skin. The skin on my head, my hair, my forehead and my face were all affected, it was burning peoples’ flesh. We tried to go downstairs, then we went back to rescue the people we realised were left behind. We couldn’t rescue six of our friends, who died as a result of the gas. The police burnt the prison to hide the fact that the women had died from gas. They didn’t care about the damage because the prisoners that lived there were going to be relocated anyway. The injured were taken to hospital, everyone else was taken to another prison. It was not clear who was dead, who was alive,
bodies were so badly burnt. The guards were laughing and taunting us saying, “We made your friends kebab, and we are going to make you kebab. Prison staff are employed by Minister of Justice, they are the normal prison guards. But when the Gendarmerie came they were special trained, nothing to do with Minister of Justice. They, like the security staff normally surround the prison, were National Security Council employed. They got the normal staff out before they started. When we came downstairs the fire department came and sprayed water on us. Our skin was damaged, they did it to torture us further. I remember the pain. After that they did it by force and put us in isolation cells in another prison. F-types. They were only partially built, and had no heating, even though it was mid-December. I was in prison for eight years, suspected of being a member of DHKP-C, I was never officially charged, I was on remand all this time. I was released because there was not enough evidence to convict. I was released in 2003.”

We were shown a DVD of the attack on Bayram Pasa prison. There were images of the gendarmerie smashing holes in the roofs of prisons with sledgehammers. As the operation goes on inside, protesters outside are attacked. We are shown footage of a vicious attack on mainly female relatives of prisoners. We see a woman on her knees being hit in the face with a rifle butt while another soldier runs up and brutally kicks her in the face. We see soldiers stamping on the heads of unmoving women. Images of burnt, still bodies, pictures of gendarmerie dragging unmoving women away, still beating them, of a woman being dragged down the stairs by her arms and legs a soldier leaning over and punching her in the head.

Once the F-type prisons were established, prisoners were isolated. They occupy prison cells which are specially designed so that other inmates can’t be seen – the speciality of the F-type. Prisoners are only allowed out for family or lawyers’ visits. Prison abuse can go unnoticed; guards are unchecked.

In dormitory prisons, they could defend or at the very least witness an attack on a prisoner. In the very least it is impossible. They are alone. It is considered worse for a non political prisoner because they have no higher purpose to struggle for. In some F-type prisons, inmates do drawings. Some prisons allow craft materials, some not. Some guards can be bribed, some not.

Masala is a political magazine from Kendira Prison. They can be sent by post. Many times they are confiscated, censored, from prison to prison, month to month, and subject to subject.

At the moment there are no restrictions for lawyers, they can visit their clients at any time. The lawyers used to be subjected to full body searches but after 2001, when the lawyers protested about this treatment, the practice was stopped. There is a glass barrier between lawyer and client, but lawyers can just talk to each other with raised voices but there is no confidentiality because a guard is always present. Behic protested after guards kept interfering and interrupting his conferences with his clients.

There are currently 11 F-Type prisons with another opening soon. Women Political prisoners stay in L-Type prisons, high security women’s prisons. They will be in solitary confinement. Any one over 15 years old is charged as an adult.

The aims of the protest are for the government to abolish F-Type prisons all together but it is thought that this needs to be done in stages. The first stage is to reduce and eventually abolish isolation. The Turkish state is denying that isolation exists saying that inspectors are allowed to go in and inspect any time they want. The government claims that F-Type prisons are up to European standards.

In the house of one of the supporters of the death fast we were shown a shrine. There are many pictures of those that have died in the struggle, belongings, some as simple as a pen. There is a pair of gloves knitted by one of them. We were shown ornaments of birds in cages, roses in glass and wooden boxes, all made by inmates. We visited Tayyad, and spoke to one member who was a prisoner for 12 years in Bayram Pasa prison from 1991 until 2000. After the December 2000 attack she was put into Bakirkoy Womans prison. She was released three years later. She told us how Tayyad was mainly a support association for prisoners. After the 1980 military coup, when a large number of people were imprisoned for their beliefs, families and friends would gather regularly outside the gates of the prisons. Routinely abused by prison staff, they united and formed Tayyad. They felt it was necessary to take a stand against the blatant injustice. When Tayyad started it was relatives standing by relatives who had been imprisoned, increasingly as time passed it became idealists and activists who disagreed with the system.

As its reputation grew, the state pressure grew. Premises of Tayyad were raided and sealed, members were arrested on suspicion of membership to banned political groups. Tayyad continued amidst the pressure.

Our guide was in the death fast in 1996 while in Bayram Pasa. Tortured in prison he constantly has pins and needles in his hands and is partially paralysed from the effects. When he was undergoing torture they asked for information about his friends, they offered him a house and car. His torture continued because of his refusal.

“In the 1990s the Justice Minister was Mehmet Acar who was directly involved in torturing pregnant women. Nothing has changed. How can you expect justice under a system like this? What kind of life can you expect to live? The DHKP-C is banned because we cannot do business with the government. Mehmet Acar, Jemel Gizecek. We can not show their hands. We cannot do business with Bush. At the moment PKK would make deals with the Western governments if it would weaken Turkish government. This is a disgrace. I would only support a Kurdish state if there was a referendum with the Kurdish people that that is what they want.”

We meet with the Modern Contemporary Lawyers group. “We are democratic socialist, left wing lawyers. We are part of the political opposition in Turkey. When Turkey tried to please the EU they changed the penal code. We were campaigning to close down the state security court, we thought we succeeded. Then they re-opened it as the Severe Crimes Court. It’s exactly the same. We tried to inform the public, with leaflets to make them aware. We refused to enter prison or court if we were searched. Our papers and clothes used to be checked. Female lawyers were forced to change out of wired bras. When the lawyers refused to go into court judgement was given in their absence. Always against the client. 80% of appeal cases are decided before the hearing, no proper explanation is given for their decision, sometimes none at all.”

The response from the international community has been disappointing. Two reports were written by the Commission for the Prevention of Torture. The first visit in 2001 said that F-Type prisons were up to standard. The second visit in 2004 said that isolation was far more severe than was considered acceptable. It looked at both prisons and police stations, and confirmed that the treatment of prisoners was harsh and isolation was extreme. Amnesty International tell us that there is currently no project for the F-type prisons. There are rules they have to follow. They can’t work directly against the government. They can’t work directly for the Behic Asci case. Or the Turkish prison cases.

We gave a press conference under the Tayyad offices, 10 offices of Yuruyus (a socialist newspaper) and Ozan, who print for Yuruyus. Fifteen people were arrested including the chairwoman of HOC. Three have been released.

Behic Asci ended his fast in January 2007, when the Ministry of Justice released a circular accepting that groups of 10 prisoners can come together for 10 hours a week without any condition. There are still concerns about whether the government will uphold this circular, and whether they will increase the freedoms of the prisoners to 20 hours and more. But for now, in honour of the 122 who have died and the hundreds more who are disabled for life through the death fasts, for the hundreds who are held on remand awaiting trial, and those who are convicted for standing for their beliefs, it is seen as a victory.

Azarn Zia is Associate Director of the Harvard Negotiation Insight Initiative based at Harvard Law School.
Annual General Meeting

with guest speaker:
Shami Chakrabarti (Director, Liberty)
7pm, Tuesday 9th October 2007
at The College of Law,
14 Store St, London WC1

The AGM will also receive the executive’s annual report, elect new executive and consider motions. More info: www.haldane.org

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