

**JUSTICE-ILAG**  
**Legal Aid Newsletter**  
**November and December 2009**

**Opening note**

Happy New Year.

May justice around the world be the safer throughout this year for being – at least partly - in your hands.

Roger

**1. Major Themes of the Issue**

Marvel at how well the Scottish Legal Aid Board (SLAB) seems to have controlled expenditure. Scotland presents all the signs of a well-managed legal aid system, controlled by deft movements of the SLAB's tiller: a few salaried staff lawyers here, fixed price criminal cases there, above all the Holy Grail of a 'whole systems approach' in which procedural and legal aid reform interact.

Check out the position in New Zealand as a blizzard of press coverage announces the results of the legal aid review announced during last year's ILAG conference in Wellington. A link to the report is also provided. It recommends that a loss of autonomy for the Legal Services Agency and is highly critical of the behaviour of legal aid practitioners who are roundly accused of widespread 'rotting' or dishonesty.

Note the chaos in the Cayman Islands where a government firing from the hip with ill-considered reform comes a cropper and is forced to establish a proper review first – a small jurisdiction providing a larger lesson.

Show interest in Professor Mary Jane Mossman's research on Ontario's community legal clinics – still the world's leader in the community-based legal provision of poverty law.

And, finally, consider volunteering a paper for the Legal Services Research Centre's annual conference next summer. Why not escape the miseries of life in legal aid at a particularly stressful time for a few days in a Cambridge college at the end of June and beginning of July?

*Roger*

## **2. Contribution**

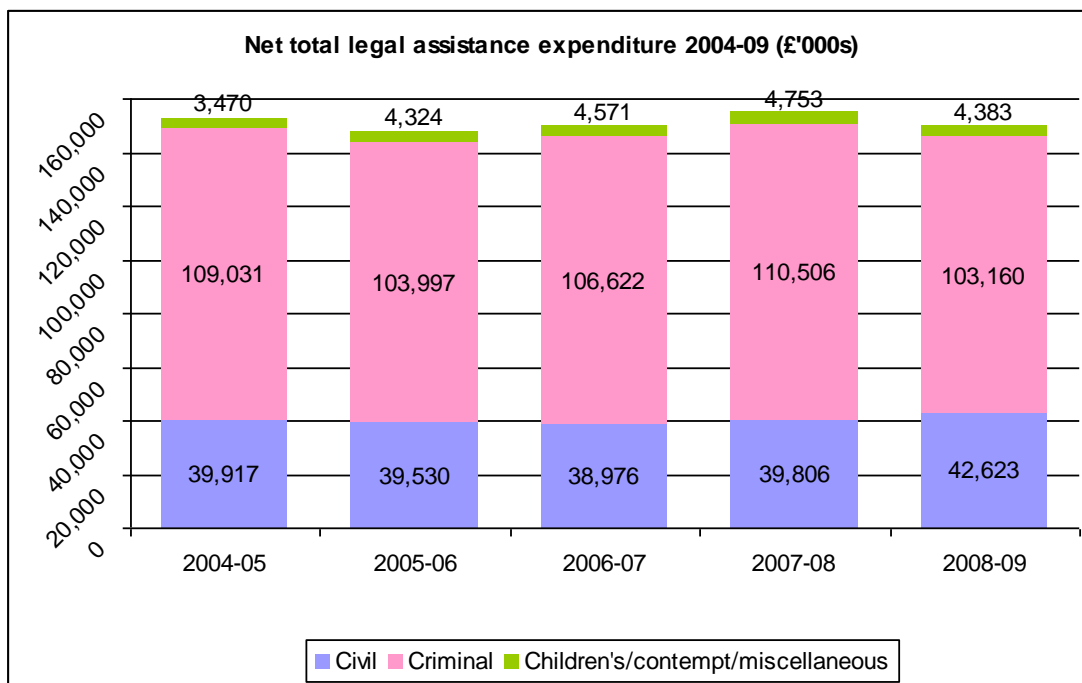
*Colin Lancaster, Director of Policy and Development, Scottish Legal Aid Board, writes:*

It was observed in the previous issue of the Newsletter that, in contrast to many jurisdictions around the world, Scotland has managed to control or even reduce expenditure without the need for swingeing cuts in either scope or financial eligibility. This article very briefly offers suggested explanations for this.

First, a short bit of background. The Scottish legal aid scheme, administered by the Scottish Legal Aid Board, covers a very wide range of both civil and criminal matters. Initial advice is available on any matter of Scots law. Most types of court proceedings are covered by civil legal aid, including personal injury and other money claims. In recent years, there has been significant growth in spending in relation to some administrative tribunals, in particular immigration and asylum and mental health.

Services are provided overwhelmingly by solicitors in private practice, funded on a case by case basis. We have a small network of public defenders (16 solicitors in 7 offices, compared to around 1300 solicitors in 600 private firms). We also now have a small network of civil employed solicitors (15 solicitors in 4 offices, again compared to several hundred private practice firms).

The majority of expenditure is directed towards criminal matters. There is no cap on the budget, making the system one of the few remaining fully demand led systems in the world. Despite this, expenditure in 2008-09 was in fact lower than in three of the four previous years.



Although increasing in the last year (partly as a result of a fee increase for solicitors), civil legal assistance had been largely static for several years, a product of falling volumes and rising case costs. Earlier analysis by the Board

[http://www.slub.org.uk/about\\_us/research/supply/archive/changing\\_world/index.htm](http://www.slub.org.uk/about_us/research/supply/archive/changing_world/index.htm)

suggested a number of reasons for the decline in applications and concluded that it neither reflected nor resulted in significant access to justice problems. In the years following that analysis, applications continued to fall.

Recent trends suggest that at least some of this reduction – and therefore the containment of expenditure – is attributable to the relative unattractiveness of legal aid fees compared to private fees. As the recession has hit other aspects of solicitors' business – particularly residential property sales – we have seen a 35% increase in civil legal aid applications. While some of this increase undoubtedly reflects increased demands due to the recession (home repossession etc), it is perhaps no coincidence that the highest ever number of civil legal aid applications occurred in 1993 – the tail end of the last recession. The fact that solicitors are once again willing to work for legal aid rates suggests that, overall, fees are sufficient, if not particularly competitive when up against the rates chargeable in a booming market.

Further investigation would be required to establish whether we are now seeing supplier-induced demand or whether over the last fifteen years we have seen at least a degree of what might be termed supplier-reduced demand. Some concern had been

expressed in the intervening years about difficulties finding solicitors to do certain types of work in some areas. We addressed the most consistent concerns by employing a small number of solicitors to work in certain parts of the country, but when we suggested doing so in other areas we were told very clearly by the profession that they did not agree that there was any degree of unmet need.

How far the decline in applications affected access to justice therefore remains unclear. By restraining legal aid fee increases in the face of wildly above-inflation rises in private fees, it appears that for the majority of solicitors legal aid became something they would continue to do, but not something they would actively seek to expand. It is worth noting that the resulting stability in expenditure has enabled Scottish Ministers to extend eligibility and maintain the scope of the scheme, in contrast to many other jurisdictions.

Expenditure on criminal legal assistance has fluctuated more than civil and, as by far the largest chunk of expenditure, has driven the overall expenditure figure. The fluctuations in criminal spend are largely, although not exclusively, volume driven. As the number of prosecutions has ebbed and flowed, so has expenditure. This is because case costs for the lower cost but higher volume 'summary' cases have been steady for several years. This stability is a direct result of the fixed payment system introduced in 1999.

Over a period of nine years, there was no change in the level of the fixed payment. Fewer solicitors decided to undertake criminal work but, in line with a wider and growing tendency towards specialisation, the withdrawal was concentrated mainly amongst those solicitors and firms that had previously done very little criminal legal aid work; those that remained were able to become more efficient, take a larger market share and therefore become better able to maintain profits from the static fixed payment.

It had long been argued, however, that the legal aid payment structure incentivised initial pleas of not guilty, only for these to be changed to pleas of guilty at the next available opportunity i.e. once a legal aid payment had been secured. This practice and the extra hearings it necessitated were identified as key reasons for the inefficiency of the summary justice system.

However, defence solicitors had also argued for many years that the wider system discouraged early pleas, including the lack of disclosure of the prosecution evidence. In 2008 as part of a wider programme of reform to the summary justice system, changes were made to the timing and extent of disclosure at the same time as the payment structure was

changed to better reward and therefore incentivise early investigation of the case by the defence. This, it was hoped, would lead to more up front guilty pleas. The modelling that led to the setting of the specific fees was geared to produce an average increase in fees equivalent to inflation since fixed payments were introduced.

The result of the reforms as a whole is that fewer inputs are required from defence solicitors: there are fewer cases and, because of the increase in early pleas, less work is required per case. Early indications are that a substantial increase in early guilty pleas has occurred and, despite an overall reduction in expenditure, around 40% of firms have seen their revenues increase in the first year since the reforms.

The 'whole systems' approach to these reforms built on earlier success in reducing 'churn' in the High Court, which deals with the most serious criminal cases. Changes made there in 2005 also incorporated a legal aid change: a significantly increased payment to encourage early engagement of counsel (advocates and solicitor advocates). Again, this resulted in an increase in early pleas and, alongside other changes designed to improve the way in which cases progressed, a reduction in average case costs and overall expenditure.

Both of these experiences suggest that legal aid change alongside justice system change is more likely to achieve positive results in both contexts. We are now considering how we can take these lessons into other areas, such as mental health and asylum and immigration. Although these areas are far less significant in overall expenditure terms than criminal legal aid, we are hopeful that significant additional savings can be achieved without compromising the availability of representation at an appropriate quality.

### **3. News: Summaries and Links**

These reports are largely compiled from news reports on the internet on the basis of a simple search under the words 'legal aid'. Readers must, just as buyers, beware of authenticity. The links worked at the time of writing but some will fail after a period of time.

#### **Australia**

Concern at decline of federal funding of legal aid in Western Australia: <http://www.thenewlawyer.com.au/article/wa-lawyers-furious-over-legal-aid/504284.aspx>; and New South Wales: <http://www.abc.net.au/news/stories/2009/11/05/2733749.htm>; and Victoria: <http://www.abc.net.au/news/stories/2009/11/06/2735091.htm>; Senate committee reveals gaps in regional and aboriginal access to justice: <http://www.abc.net.au/news/stories/2009/12/10/2767680.htm?site=southwestwa>;

## **Canada:**

Legal Aid Ontario advertises for salaried posts to break criminal practitioner boycott: <http://www.lawtimesnews.com/200911025712/Headline-News/Boycott-battle-deepens>;  
Ontario strike spreads to mental health work: <http://www.theglobeandmail.com/news/national/legal-aid-takes-hits-in-bc-ontario/article1351623/>; attempts by LAO to avoid a court mandated lawyer at a higher than legal aid rate: <http://www.thestar.com/news/ontario/article/722562--legal-aid-can-t-recruit-lawyers>; BC closes regional offices: <http://www.thenewlawyer.com.au/article/wa-lawyers-furious-over-legal-aid/504284.aspx>; Vancouver lawyer alleges government only spends half of money taken on special lawyers' on legal aid: <http://www.vanouverson.com/legal+facing+cuts+service+reduction/2184130/story.html>; BC union takes up the argument: <http://www.nupge.ca/node/2698>; The Ontario boycott continues: [http://www.trinidadexpress.com/index.pl/article\\_news?id=161556279](http://www.trinidadexpress.com/index.pl/article_news?id=161556279); Civil legal advice telephone line and several offices cut in BC: [http://www.bclocalnews.com/vancouver\\_island\\_south/victorianews/news/69990352.html](http://www.bclocalnews.com/vancouver_island_south/victorianews/news/69990352.html);  
Supreme Court to rule on whether legal aid lawyer can withdraw from case if client's legal aid rescinded: <http://www.cbc.ca/canada/north/story/2009/11/17/yukon-legal-scoc.html>; Law Foundation continues funding programme for 11 trainees at clinics and legal aid: <http://www.benzinga.com/pressreleases/m50412/the-law-foundation-of-ontario-continues-connecting-articling-fellowships-for-a->; Criminal dispute in Ontario enters seventh month: <http://www.nationalpost.com/news/canada/story.html?id=2296145>; New Brunswick justice minister orders review into family law legal aid delays: <http://www.cbc.ca/canada/new-brunswick/story/2009/12/04/nb-legal-aid-funding-murphy-531.html>; Ontario practitioner breaks the boycott: <http://www.lawtimesnews.com/200912075953/Headline-News/Cracks-in-boycott>; Reforms of family law system come with only minor new money from legal aid: <http://www.lawtimesnews.com/200912075953/Headline-News/Cracks-in-boycott>; New Brunswick justice minister admits legal aid 'down to bare bones': <http://telegraphjournal.canadaeast.com/front/article/897625>;

## **Cayman Islands**

Row on cut to legal aid continues: <http://www.caymannewsservice.com/headline-news/2009/11/12/jack-stops-mac-legal-aid-plan>; Looks like plan virtually to kill off budget will fail: <http://www.caymannetnews.com/news-19294--8-8---.html>; review announced: <http://www.lawtimesnews.com/200912075953/Headline-News/Cracks-in-boycott>; issues to be considered: <http://www.caycompass.com/cgi-bin/CFPnews.cgi?ID=10388240>;

## **England and Wales:**

Bar leader decries legal aid position:

<http://business.timesonline.co.uk/tol/business/law/article6903342.ece>; Divorce going up and

so are numbers of cases involving emotionally charged disputes over children:

<http://www.guardian.co.uk/lifeandstyle/2009/nov/09/divorce-cases-children-legal-aid>; family

law quotas exhausted as firms turn away prospective clients:

<http://business.timesonline.co.uk/tol/business/law/article6929839.ece>; Expenditure on

criminal legal aid appears to be falling:

[http://www.channel4.com/news/articles/business\\_money/spending+on+legal+aid+aposalready+falling+apos/3438007](http://www.channel4.com/news/articles/business_money/spending+on+legal+aid+aposalready+falling+apos/3438007);

Legal Services Commission criticised in Parliamentary report and

lawyers may have to repay considerable sums of overpayments:

<http://business.timesonline.co.uk/tol/business/law/article6934179.ece>; cuts of unidentified

amount to be made to legal aid budget:

[http://www.telegraph.co.uk/finance/financetopics/budget/6772946/Pre-Budget-report-Legal-](http://www.telegraph.co.uk/finance/financetopics/budget/6772946/Pre-Budget-report-Legal-Aid-and-NHS-database-under-threat.html)

[Aid-and-NHS-database-under-threat.html](http://www.telegraph.co.uk/finance/financetopics/budget/6772946/Pre-Budget-report-Legal-Aid-and-NHS-database-under-threat.html); Law Society launches judicial review of proposal

to reduce costs payable to acquitted defendants:

<http://www.legalbrief.co.za/article.php?story=2009121508103620>; Cuts to some criminal fees

to save £23m; review of Crown Court advocacy fees (defence said to be 18 per cent higher

than prosecution): [http://www.guardian.co.uk/commentisfree/2009/dec/19/legal-aid-](http://www.guardian.co.uk/commentisfree/2009/dec/19/legal-aid-conditional-fee-nhs)

[conditional-fee-nhs](http://www.guardian.co.uk/commentisfree/2009/dec/19/legal-aid-conditional-fee-nhs); editorial extols legal aid rather than conditional fees for personal injury

cases: <http://www.guardian.co.uk/commentisfree/2009/dec/19/legal-aid-conditional-fee-nhs>;

## **Fiji:**

Legal aid commission 'overstretched and under-resourced', says judge:

<http://www.fijitimes.com/story.aspx?id=133690>;

## **Ireland:**

15 per cent cut to criminal legal aid and 5 per cent to civil:

<http://www.irishtimes.com/newspaper/breaking/2009/1209/breaking97.htm>;

## **Israel:**

Knesset considers law on mandatory pro bono:

<http://www.israelnationalnews.com/News/Flash.aspx/174701>;

**India:**

'Justice on wheels' project sends legal advice off on a bus to be more accessible:  
<http://www.dailyindia.com/show/342199.php>;

**New Zealand:**

Legal aid report praised for recommending expansion community legal centres and public defenders: <http://www.voxy.co.nz/politics/dalziel-legal-aid-report-exceeds-expectations/5/31623>; Report criticises Legal Services Agency and recommends loss of independent status: <http://tvnz.co.nz/politics-news/govt-promises-fix-legal-aid-3198822>; The counter-attack arrives: <http://www.scoop.co.nz/stories/HL0911/S00320.htm>; Agency axed as report identifies alleged 200 legal aid lawyers abusing the system: [http://www.nzherald.co.nz/politics/news/article.cfm?c\\_id=280&objectid=10612664](http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10612664); Law Society says most lawyers not corrupt: [http://www.nzherald.co.nz/politics/news/article.cfm?c\\_id=280&objectid=10612911](http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10612911); Legal aid lawyers say that they are being defamed: <http://tvnz.co.nz/national-news/lawyers-considering-legal-action-3221247>; The lawyers say 'put up or shut up' to claims that they took 'top up' fees from legal aid clients: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10613383](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10613383); Chief Executive of LSE, Tim Bannatyne's, post 'disestablished' in reforms to respond to allegations of lack of administrative control <http://tvnz.co.nz/national-news/fallout-legal-aid-review-continues-3242401>;

**Philippines:**

Legal aid extended to police officers:  
<http://www.manilastandardtoday.com/insideNation.htm?f=2009/november/2/nation4.isx&d=/2009/november/2>;

**Rwanda:**

Roll out of free legal advice centres continues:  
<http://allafrica.com/stories/200911090192.html>;

**Serbia:** Reform of legal aid system to be introduced with help from Sweden:  
<http://www.emportal.rs/en/news/serbia/108092.html>;



## **South Africa:**

## **Trinidad and Tobago:**

Lawyer seeks release from legal aid representation as he argues rates go below minimum wage: [http://www.trinidadexpress.com/index.pl/article\\_news?id=161556279](http://www.trinidadexpress.com/index.pl/article_news?id=161556279);

## **United States:**

President Obama pressed to support Jiang Tianyong, a Chinese lawyer refused a right to practice after assisting in legal aid for Tibetan :

<http://www.reuters.com/article/idUSN23263187>; California federal appeals court upholds restrictions on recipients of federal legal aid: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/11/24/BAPR1APBRM.DTL>;

Maryland IOLTA funds reduced by 70 per cent: <http://www.hometownannapolis.com/news/top/2009/12/07-13/Report-Insufficient-funding-for-legal-aid.html>;

Obama appoints conservative to Legal Services Corporation board: <http://www.mcclatchydc.com/crime/story/81144.html>;

Obama signs into law bill to give LSC budget of \$420m (\$30m increase) and remove restrictions on work to be undertaken by LSC funded attorneys: <http://www.mcclatchydc.com/crime/story/81144.html>;

Call for a 'civil Gideon' or right to a lawyer in civil cases continues:

[http://www.newsobserver.com/opinion/columnists\\_blogs/other\\_views/story/202766.html](http://www.newsobserver.com/opinion/columnists_blogs/other_views/story/202766.html);

## **4 Reports and Publications:**

### *New Zealand*

#### *Transforming the Legal Aid System: Final Report and Recommendations*

<http://www.justice.govt.nz/publications/global-publications/t/transforming-the-legal-aid-system/executive-summary#transforming-the-legal-aid>

The following are quotations from the executive summary of the report.

'The legal aid system can no longer focus solely on legal representation one case at a time. It needs to focus on helping people to resolve their problems before they progress further into the justice system, and to leave the justice system by resolving the problems that took them there in the first place. The legal aid system must anticipate and meet legal needs through a variety of means, not just through legal representation. It must be integrated with community-based information and advice services. It needs to have a national overview and be strongly linked into government agencies and non-governmental organisations throughout the justice and social sectors ...

Although a level of independence is necessary in relation to individual grants of legal aid, that independence can be achieved without the expense of creating a standalone agency. It is

time the administering body was brought closer to the government. It now has a key role to play in justice sector policy development and needs to be resourced accordingly. It must have the capability to be responsive to implementing the fundamental changes recommended by this review. The functions of the Legal Services Agency should be moved into the Ministry of Justice, and the decisions which need to be made independently of the government vested in a statutory officer...

The legal aid system needs to focus on the legal needs of Māori and Pacific peoples, and the barriers they face in accessing legal aid, with a view to enhancing their access over time ...

The legal aid system needs a stronger focus on initial advice and assistance, which can help to prevent cases from escalating and requiring expensive legal solutions ...

More needs to be done to encourage quality in legal aid lawyers ...

Seven changes are needed to enhance quality:

- raise the barriers to entry: only lawyers with competence and integrity should be able to enter the legal aid system
- create incentives for lawyers to maintain their competence, quality and integrity
- create a mechanism for the swift ejection of incompetent and/or dishonest lawyers from the legal aid system
- build ties between legal aid lawyers to limit their isolation and minimise the risk of cases falling over because of the lawyer's absence
- require legal aid lawyers to train, supervise, and mentor junior lawyers to ensure long term sustainability of the legal aid workforce
- pay legal aid lawyers in a way that recognises the services they provide
- clarify the roles and responsibilities of the two regulators with an interest in the area: the Legal Services Agency and the Law Society ...

Publicly provided services should be used where case volumes are sufficient to make them an efficient option ...

A new model for procurement would: help to address the quality issues identified above; reduce the administrative burden associated with legal aid; and take advantage of efficiencies. It would involve bulk funding groups of lawyers (whether in firms, chambers, or looser groupings based around a court) led by a senior lawyer who would be responsible for quality ...

The current approach does not focus sufficiently on responsible expenditure of taxpayer funds. High cost case management panels should be chaired by a senior public servant and

include experts who bring legal, economic, and public policy perspectives. This blend should give better decisions focused on value for money, without undermining access to justice for people on legal aid.'

### *Comparing and Understanding Legal Aid Priorities*

Professor Mary Jane Mossman (with Karen Schucher and Claudia Schmeing)

This paper was commissioned by Legal Aid Ontario to “assess a variety of different rationales and compare their advantages and disadvantages in the provision of effective legal aid services in Ontario.” The paper was completed in April 2009, and is forthcoming in (2010) 29:1 *Windsor Review of Legal and Social Issues*.

Following a brief Introduction (Part I), Part II first situates current legal aid programs in Ontario within broader movements for access to justice, identifying themes that have characterized the evolution of legal aid in Ontario. In particular, the paper reveals how the *judicare* (certificate) system tends to identify legal aid priorities in terms of “legal categories” for services, while community legal clinics adopted more systemic approaches to prioritizing their work, focusing on strategies of education, community development and law reform. This Part also reviews recent developments in other jurisdictions, including the United States, Australia, New Zealand, and England and Wales (UK), with brief comments about western Europe. Finally, this Part reviews *Charter* requirements for legal aid services in Canada, and suggests the significance of emerging *Charter values* of equality in defining legal aid priorities.

Part III focuses on the goals of legal aid priorities. It first examines the impact of changes in the administration of justice on the provision of legal aid, including the growth in the number and complexity of regulatory regimes, the expanding range of legal processes, and policies of privatization. This Part also explores the concept of “legal needs” and recent research on “justiciable problems,” and how governmental policies of “social exclusion” and “social inclusion” reflect political choices about the provision of legal aid within the administration of justice. Finally, this Part defines a role for Legal Aid Ontario as *the* state agency with primary responsibility for promoting access to justice for vulnerable individuals and communities, including programs that confront *systemic* problems of inequality.

Finally, Part IV explores three broad approaches to defining legal aid priorities:

- the “legal categories” approach;
- the “legal needs / social exclusion” approach; and
- the “social inclusion / systemic” approach.

In assessing how each of these approaches shapes the content of legal aid to achieve defined goals, this Part assesses the advantages and disadvantages of each approach, and provides concrete examples of ways to implement a social inclusion approach to confront systemic inequality issues. In doing so, the paper also suggests that Ontario's community legal clinics can offer expertise and experience in the use of scarce resources to achieve systemic access to justice goals for vulnerable individuals and communities.

*Mary Jane Mossman*

### *Rationing Justice: the effect of the recession on access to justice in DC*

A Joint Report of the District of Columbia Access to Justice Commission and the D.C. Consortium of Legal Services Providers (9pp) Nov 2009

<http://www.legalaiddc.org/documents/RationingJusticeReport..pdf>

The report can be summarised as: 'Need up: resources down'. It concludes:

'Somewhere in the District a family won't have enough to eat tonight because of a bureaucratic mistake. A child will be hospitalized yet again because the rat droppings in her apartment caused an asthma attack. A veteran who has served in combat will sleep on the street because he could not access the public benefits, mental health services and shelter to which he is entitled. At this time of great and increasing need, lawyers could make a difference for this family, this child and this veteran — as well as the thousands of District residents who face similar problems. Because of the crisis in legal services, there are simply not enough lawyers to help our suffering, low-income neighbors. And next year there will be even fewer. The safety net has been seriously weakened and legal services providers, which have historically been a critical component of that safety net, have fewer resources available to help the most vulnerable members of our community. The result is that justice is being rationed. And, as is too often the case, those most in need are getting too small a measure of justice.'

## **5. Conferences**

### **Forthcoming: Legal Services Research Centre**

The next Legal Services Research Centre's International Research Conference on 'Research into Practice: Legal Service Delivery in a New Decade' will be held at Downing College in Cambridge. The conference will run from Wednesday 30th of June pm to Friday 2nd July 2010. Those wishing to attend can obtain a booking form from our website [www.lsrc.org.uk](http://www.lsrc.org.uk) or by contacting [catrina.denvir@legalservices.gov.uk](mailto:catrina.denvir@legalservices.gov.uk). Late abstract proposals may be considered. Please contact Catrina at the above email address for further information.

## **6. And Finally**

*This newsletter has been compiled by Roger Smith of JUSTICE in London, UK. If you would like to be taken off the circulation list; add someone or contribute some content: contact [rsmith@justice.org.uk](mailto:rsmith@justice.org.uk).*