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The Future of the 3rd Sector

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Introduction

1. I have worked for 3rd sector organisations for the last 7 years (from 2002 to 2007) with the Refugee Legal Centre, and from 2007 to date with the Public Law Project. With PLP, I have worked closely with other members of the 3rd sector as their legal adviser.
2. PLP is a voluntary sector organisation that exists to increase access to public law remedies (such as judicial review and complaints procedures) for disadvantaged groups, and to improve accountability in public body decision makers. For the last few years we have been working with the voluntary sector together with NAVCA as part of the Empowering the Voluntary Sector scheme. Through the scheme, voluntary sector organisations can receive free public law advice by telephoning an advice line staffed by PLP lawyers.
3. My limited knowledge of the 3rd sector comes mostly from listening to, and advising on, the sector's public law problems. These are usually funding-related (why funding was unreasonably or unfairly pulled from an existing project, or why it was unreasonably or unfairly not granted to a new one).
4. Lawyers are bad at most things apart from law, and many of them are bad at that. I would have thought that I am uniquely ill-qualified to give a balanced wide-ranging vision of what the future holds for the sector. That is because a lawyer tends to see problems, to analyse them in minute detail without regard to the bigger picture, and to forget that the system sometimes works. So forgive me if what I have to say is blinkered and pessimistic. I'm doing my best to overcome my disadvantages.

What is the 3rd sector for?

5. The answer to that question will help shape the sector's future. I don't feel qualified to answer it. But please bear it in mind.
6. Looking at the literature, one phrase keeps cropping up:

"Transforming public services".
7. For example, as Ann Blackmore wrote for NCVO's 2006 publication "How voluntary and community organisations can help transform public services:

"Government remains committed to reforming public services and enabling the voluntary and community sector to take on a greater role in public service delivery".
8. And it is envisaged that one of the roles the 3rd sector can play is to accept the transfer of services from the public sector, to open up the market for service delivery with the intention of increasing competition and promoting efficiency. What follows is based on the premise that this is a role the 3rd sector will continue to play.
9. But that is perhaps not a forgone conclusion. I return to the question "What is the 3rd sector for?" Please keep it in mind.

Trends

10. I would like to focus on two trends:
 - A reduction in the proportion of the 3rd sector's funding by grant to its funding by contract
 - An increase in the legalisation of public service delivery

A reduction in the proportion of grant funding to contract funding

11. Over the 4 years from 2001/2 to 2005/6, the grant income received by the 3rd sector remained between £4billion and £5billion. Over the same period the amount of income received through contracts increased from around £4billion to around £7billion¹.
12. As the economic recession takes hold, it is to be expected that the amount of money made available to the sector on the relatively unrestricted basis afforded by a grant will reduce. Government will want to focus scarce resources on achieving outcomes and discharging statutory duties.

¹ NCVO, UK Civil Society Almanac 2008, cited at para 23 of the Public Administration Select Committee's report, "Public Services and the Third Sector: Rhetoric and Reality"(26 June 2008)

13. The sector will therefore be increasingly forced to bid for contracts to survive. What's the problem with that?

Changing the nature of the organisation

14. At the Refugee Legal Centre, where I worked for 5 years, I was first the only solicitor, (and then one of two) in the organisation's litigation team. We brought cases to stop the removal of individual asylum seekers, and also litigated strategically, for example, to challenge the systematic forced destitution of asylum seekers. The experience of the voluntary sector in managing the State's policy of enforced destitution may be instructive.
15. 3rd sector organisations, some of which may be here today, bid to win contracts to provide temporary accommodation and other services to asylum seekers. The system only permitted them to offer accommodation to those who were accepted as eligible by the National Asylum Support Service, a branch of the Home Office. NASS was poorly managed, and (in my opinion) was operated in a particularly callous manner towards its service users. The morality (as well as the legality) of a system that refused food and shelter to those who were also refused permission to work and had no other source of support was widely questioned, not least by members of the 3rd sector organisations themselves.
16. But the result was that 3rd sector organisations that had been set up with a view to supporting asylum seekers found themselves turning cold, sick and hungry people away in the middle of winter. I do not know whether the voluntary sector nature of those organisations added some quality to the service that they offered that would have been absent had the service been offered by a private contractor such as Global Solutions Limited. Maybe they did. But I would suggest that delivering those services involved the 3rd sector organisations in practices that they had not anticipated beforehand, and which changed the nature of their organisations.
17. Another example is the RLC itself. When I started there in 2002, it was grant funded by the Home Office, and there were 4 offices around the country. A few years later the grant had ended. In its place came funding from the Legal Services Commission, the body that administers the legal aid system. The period of the crossover was a traumatic one for the organisation. Suddenly, the basis on which funding was available was contractual.
18. I was never a manager, but by way of example, my impression was that while it was granted funded, RLC had been able to respond to crucial policy work, such as responding to consultation exercises without worrying excessively about how that work was to be funded. But under the new contractual arrangements, such work was not, so far as I was aware, related to service delivery in the Legal Services Commission's view, or, more importantly, in their contract. In any event, the character of the organisation changed.

19. My view of whether or not it changed for the better is unimportant. But I think it is undeniable that the change was largely driven by the demands of the LSC, and the LSC's view of what would benefit the RLC's clients.
20. For example, instead of the four offices that existed in 2002, the RLC now has eleven. While I was not party to the strategic decision-making that led to the expansion, I believe it is highly likely to have been linked to indications given by the LSC that they were minded to redirect funding away from London (where the LSC considered there to be an adequate supply of publicly funded legal advice) to the regions. If the RLC had a different view to the LSC on whether a national presence was necessary (and I don't know whether they did or not), it probably would not have mattered much. The RLC's choice would have been to not bid for future contracts.
21. It seems to me that the change from grant to contract funding must lead away from the voluntary sector's traditional advantages of being community-based, focused on the needs of its target groups, able to build users' trust, and independent and willing to confront the improper use of State power.
22. Instead it leads to the 3rd sector turning into the private sector's poor relation. For example, the Legal Services Commission used to offer 2 contracts, one for solicitors in private practice, and one for not for profit organisations. From 2007 the distinction between the two contracts was abolished – there is now one unified contract. I think it is a safe bet that private firms of solicitors have not become more like the not for profit sector.
23. And there is much to be lost. In 2006 the LSC announced the abolition of the Specialist Support service, by which PLP was funded to give specialist legal advice on public law to solicitors and advice agencies with an LSC contract. PLP responded by bringing a claim for judicial review against the LSC on the basis that the consultation process had been inadequate. Other organisations giving specialist advice in other areas of law were also affected. But these organisations refused to join in or publicly support the action. The reason for that decision may have been an unwillingness to bite the hand that was feeding it.
24. This is a theme that has arisen time and again in the 2 years I have been working with the sector. One can understand it: only a fool would take its funder to court.
25. Except that if you don't bite the hand that feeds you, you may end up being throttled by it. Or at least bullied into accepting things that may not be in your community's interests.
26. And anyway litigation can work: for example the LSC did not fight the case brought by PLP, and agreed to a consultation process, following which the Specialist Support service still operates.

27. I am not advocating litigation as a solution save where there is no other: but if the voluntary sector does not stand up to the misuse of State power, something is wrong. And I would suggest that that something is the tendency of a contract for services to become a Faustian Pact. And once made, such pacts cannot be broken.
28. So what is the 3rd sector for?

An increase in the legalisation of public service delivery

29. I first worked for PLP in 1995, for six months as a volunteer, and the next six months as a temporary employee. It was my first job as a public lawyer. In those days judicial review was fast developing. Many public bodies did not know much about judicial review and how to avoid it. We tried to bring test cases to further social welfare law. Public bodies fought cases that many of them would not fight nowadays. It was a bit like shooting fish in a barrel.
30. Now things are different. Lawyers like my colleagues and I at PLP have succeeded in raising awareness on the part of public bodies of the demands of public law. That is a good thing in some respects. It means that examples of overt unfairness and unreasonableness are nowadays harder to find.
31. But at the same time, public bodies have realised that the demands of public law are procedural, not substantive, reflecting the deference shown by the courts to the rights of democratically elected politicians. So that provided the procedures used are fair and reasonable, a court will not intervene in the eventual decision, provided it is not barking mad.
32. This has resulted in lawyers playing an important role in advising on the practical steps necessary to introduce policy initiatives. Public bodies that want to achieve a sensitive objective (eg charging for services that used to be provided free at the point of use) may seek legal advice while a policy is still in gestation, so as to minimise the risk of a successful legal challenge later when it is born. For example, in a case I brought last year, a London local authority engaged the same QC to advise on a policy initiative on at least two separate occasions over a period of little over a year.
33. So lawyers are increasingly advising on the procedural steps that need to be taken to ensure a policy objective can be achieved with the minimum risk of litigation. And while that is a good thing if it means that policies are formulated in accordance with a lawful procedure, I would argue that lawyers can have a stifling effect on the democratic decision-making process. Why? Because lawyers tend to have no expertise in formulating policy, they are focussed on risk avoidance, and they only have the concerns of their clients (rather than the wider community) in mind. So lawyers will try to achieve the outcome of introducing a new policy

rather than achieving the outcome of getting the decision as to whether or not to introduce the policy, right.

34. This tendency to legalise relationships also manifests itself in other aspects of public bodies' decision-making. For example, it can lead to commissioning models where non-negotiable draft contracts attached to the tender documentation shift virtually all risk entirely onto the bidder, and where potential bidders may only have a matter of weeks in which to familiarise themselves with the legal consequences of the contract they are bidding for.
35. Or contracts where the commissioning body retains sweeping powers to terminate the contract and seek compensation for even relatively minor contract breaches.
36. The law is harsh and unforgiving when it comes to property rights. But it is clear. If you don't want to be bound by a contract, don't sign it. Let the buyer beware. This is the harsh world of the private sector. Is it where the 3rd sector increasingly sees its place?
37. There is little to shield the 3rd sector from the harsh contractual realities of the private sector. Just the compact.

The compact

38. We do not even know the legal significance of the compact. We do know that it is intended not to create binding legal relations. But is it maladministration for a local authority to breach its compact commitments? We do not yet know. In a number of cases PLP has been involved in, the Local Government Ombudsman has refused to investigate breaches of the compact because the ombudsman took the view that the complaint related to a commercial dispute.
39. Does a commitment on the part of a local authority to sign up to a compact create a legitimate expectation on the part of the 3rd sector organisation, that is to say, an expectation that a breach of the public body's obligations under the compact may in certain circumstances found a right to seek judicial review of the public body's actions in the High Court?
40. This has only been considered in one Administrative Court case so far as we know. The case is *R (Berry) v Cumbria County Council* [2007] EWHC 3144 (Admin)². All HHJ Mackie (sitting as a deputy high court judge) said was this:

"It seems to me that the compact was more than a wish list but less than a contract. It is a commitment of intent between the parties concerned. It does not seem to me the reference to 12 weeks incorporates - like a commercial contract often construed in this room might - the Cabinet Office material.

² [http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2007/3144.html&query=title+\(+berry+\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2007/3144.html&query=title+(+berry+)&method=boolean)

The parties are free, within reason, not to comply with the compact although I accept the force of [counsel for the claimant's] submission that the 12 weeks must have come from somewhere. It was an indication of what might be an appropriate period for consultation about a major matter place given the restraints on the funding of the voluntary sector and availability of their resources. It is a yardstick."

41. So that's clear then...
42. And this is as good as the protection gets for the 3rd sector "given the restraints on the funding of the voluntary sector and availability of their resources".
43. There is a good side to the involvement of lawyers: they can mean that the weak are not bullied. But, the 3rd sector doesn't have access to lawyers as a general rule, and their legal remedies are very limited – many 3rd sector organisations will not be able to afford the costs and risks of litigation (either to secure contractual rights or to bring a claim for judicial review), or the damage to relationships that inevitably follows.
44. Do we want to go down this route? If so, we need to spend more money on lawyers, we need to develop the hard-nosed bottom lines of the private sector. We need to form consortia and think big. But what about our client-focus? What about our community links? Doesn't our strength derive from thinking small, from thinking about our communities?
45. What is the 3rd Sector for? It is partly down to us to decide. Do we want to compete with the Big Boys, using the Compact as a fig leaf to hide our modest endowments? Do we want to huff and puff through our expensive lawyers – in house or retained – to fight for our rights, no doubt – but also, inevitably, to bully those weaker than we are and threaten them till they submit? Or do we want to be just another Woolworths, omnipresent, a brand the public can trust?
46. Because we all know what happened to them.

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