



The Law Society

Access to justice review

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SUPPORTING
solicitors

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Access to Justice Review – Foreword

Last year, the Law Society joined government and the rest of the legal profession to celebrate 60 years of legal aid in England and Wales. If 60 years was a key milestone for the provision of access to justice, it was also a key milestone for the Law Society. The Law Society played an absolutely central role in the creation of the legal aid system and ran it unassisted for nearly forty years.

Although it handed over the administration of legal aid in 1988, the Law Society has maintained a very close interest in its operation. Solicitors serve the law and justice and have a duty to protect the ability of the public to access the means of attaining justice. The Law Society is as determined to play a major part in securing effective access to justice for every citizen in 2010 as it was in 1949 and the years leading up to it.

We are launching this review because, for more than a decade, funding for access to justice has been stretched and reduced in real terms. Policy has seemingly been decided in a haphazard and unconnected manner. Legal aid provision has become less and less viable for many solicitors. It has consequently become increasingly difficult for clients to find a lawyer ready, willing and able to take on a publicly-funded case.

For increasing numbers of lawyers, legal aid work is no longer a financially viable business proposition. The rewards have become too low relative to what a qualified professional can reasonably expect. Providers are expected to take commercial decisions in an environment which has grown increasingly unpredictable. It is impossible to plan for the future in such a volatile market. A recent survey by the National Audit Office reported that 16 per cent of legal aid providers make no profit whatsoever, while another 14 per cent make only 1 to 5 per cent profit. More than one in four firms believe that they are unlikely to be offering publicly funded work in five years time.

No legal aid system can operate without a reliable, healthy and efficient supplier base. Neither, can it operate on an open-ended budget. In the current economic climate it is important to be realistic about the constraints of the present circumstances. In spite of this, legal aid remains demand led and funding must also flow from an assessment of need rather than an arbitrary budget allocation.

As it stands, the current legal aid system is completely unsustainable. It is not delivering genuine access to justice for the public, the government is not satisfied with it and the legal profession is forced increasingly to turn its back on the system. A radical rethink is required to prevent an already fragmented and disillusioned supplier base either from disappearing or becoming ineffective. If solicitors cannot be properly paid for their work, it is the government's obligation to find new ways of delivering the same high standard of access to justice at a lower cost.

The Law Society has welcomed the recent outcome of Sir Ian Magee's review into the governance of legal aid delivery and governance. If we are to resolve the future of a sustainable legal system for the long-term, it is essential that policy-making should be sharply focused and that there should be clear lines of accountability. The Law Society has also welcomed Lord Justice Jackson's recent report into the issue of costs within the civil justice system. Both of these reports have made a valuable contribution to discussion on the provision of access to justice.

There is a great deal left to resolve however. In undertaking this review, the Law Society is committing itself to working with government and the legal profession to create a long-term, sustainable future for access to justice provision in England and Wales. To do so will require

original thinking, a fresh perspective and a willingness to challenge outdated assumptions. This paper will hopefully be the start of a wider debate among lawyers, politicians and other interested parties.

The rule of law cannot exist without access to justice. It is a fundamental right of every citizen and its provision is a front-line service every bit as important as health, education and policing. It is beholden on us all to safeguard its future.

Robert Heslett
President of the Law Society

Access to justice review

Chapter 1

1. Introduction

- 1.1 Any society that wishes to be thought of as just and fair needs to have mechanisms to ensure that the rule of law is maintained and that its members are able to obtain justice properly: the rule of law is meaningless without justice also being freely available.
- 1.2 Access to justice is a social good: the ability to participate in public redress or resolution systems is a measure of the health of any system of government, particularly in a democracy. The critical question is not 'what rights and remedies do we give or what obligations do we impose?' but 'what opportunities do we provide for our citizens to make good their entitlements?'
- 1.3 Access to justice is an expression of process, not an outcome. From an individual's perspective it is about the enforcement of rights, dispute resolution and avoidance of the need to take action to both enforce such rights and resolve disputes in the first place. From a social perspective it is concerned with supporting social order, supporting economic activity, supporting both social justice and social inclusion, supporting the rule of law through the control of the executive and the operation of executive functions and, finally, it is concerned with the promotion of legal health.
- 1.4 After the Second World War, huge strides were made in this country both in protecting the rights of the vulnerable and in providing them with access to enforce those rights. In recent years, however, a significant gap has grown between the rights and remedies granted by government and the available means of accessing them. This is likely to increase in tough economic times.
- 1.5 The Law Society of England and Wales has been expressing concerns about this issue for some years. It is appropriate for it to do so. Solicitors provide the bulk of the core advice and help that is needed by those with legal problems and we have a particular insight into those needs. The Law Society also has a long history of involvement in this area. It was instrumental in setting up legal aid – part of the post-war Attlee government's social welfare reforms - and administered the scheme for many years on behalf of successive governments.
- 1.6 This report seeks to address the major issues that impede access to justice at the moment. Inevitably, it concentrates largely on legal aid and the systems for providing that. However, the recent report by Lord Justice Jackson on costs in civil litigation inevitably has significant ramifications for people's ability to enforce their rights. The Law Society is undertaking significant work to assess that report and its likely effects. In this report we refer to many of the issues arising out of it which affect access to

justice. In addition, it is important that people should be aware of their rights and the remedies available to them. Public legal education has an important role to play in this context.

- 1.7 This report is an interim report. It sets out what we believe the main problems to be and discusses possible solutions. It does not seek to recommend solutions though it does set out the Law Society's views. It also seeks views of everyone involved in the justice system on the issues. Solicitors are not the only providers of legal services and do not operate in a vacuum: their work is influenced by everyone else and it is essential for us to understand their perspectives before making final recommendations.
- 1.8 The report could not have been written without significant help and thought from a number of people. Their names are listed at Appendix 1 and we are grateful to them for their support. The ideas in this paper, however, will not necessarily find favour with all of them and this should not be taken as representing their views.
- 1.9 As part of the debate, we will be organising events round the country to discuss the issues and are planning a major seminar in London. When we have digested views, we will prepare our final report.
- 1.10 Access to justice and the problems of the legal aid system are going to be crucial issues for any government to address in the coming years. This paper seeks to continue a debate. There can be no question of its importance. We urge you to respond and contribute to our thinking. **The closing date for responses is 30 June 2010.** Please see chapter 7 for details on how to respond and for the list of questions raised in this interim report.

Chapter 2

2. Is access to justice being achieved?

2.1 This chapter seeks to define access to justice and to examine the problems that the legal aid system is experiencing at the moment.

A The basic principle

2.2 Supreme Court Justice Brennan said in 1956:

'Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with, but injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in the benefit of impartiality and fairness.'

2.3 In October 2009, Lord Justice Judge said:

'The alternative [to people being able to access justice] is mayhem. The alternative is, 'If nobody else will help me, I will have to find someone to throw bricks through windows', or worse. You end up with the peace being broken and you end up with crimes being committed, crimes of violence.'

2.4 In a mature democracy such as ours, much political time and effort is spent on trying to eliminate, or at least reduce, remediable injustices. Laws are passed, targets are set, inspectors and auditors are put to work and great hopes are raised.

2.5 Justice does not belong to lawyers any more than health belongs to doctors, but when all else fails, the law is the final arbiter of justice. As Lord Neuberger said:

'The purpose of law is to produce justice' (UCL Centre for Ethics and Law 21 Oct 2009)

2.6 *'What moves us, reasonably enough, is not the realisation that the world falls short of being completely just -- which few of us expect -- but that there are clearly remediable injustices around us which we want to eliminate'* (Amartya Sen: The Idea of Justice, 2009)

- 2.7 Legal remedies are only necessary when something has gone wrong, when the usual methods of righting that wrong have failed, and when there is nothing else that can effectively help. This applies to claimants whose welfare benefits are miscalculated, families in damp and unsuitable accommodation and minorities who are harassed or abused or suffered some other wrong as well as to those accused of criminal offences who are entitled to a proper defence.
- 2.8 It is also important to remember, as Jackson LJ pointed out in the context of his Review of Civil Litigation Costs, '*Litigation is a labour intensive process carried out by professionals in the face of skilled opposition. The costs of such process will always be substantial*'.¹ The problem for litigants in pursuing remedies will always be whether they are able to afford the costs and the risks. Legal aid will always be inadequate to meet the needs of all who have no other avenue to justice. Even in the demand-led areas of criminal and family justice there is no doubt that the multitudinous changes over recent years have led to a desperately stretched service.
- 2.9 Failing to provide proper access to justice is a failure of the rule of law, because there can be no effective rule of law if there is no access to justice.
- 2.10 At the Law Society's policy seminar on Access to Justice, Professor Dame Hazel Genn stated there was significant evidence about the needs of people seeking legal advice, in particular that:
- people who are socially excluded tend to experience more problems;
 - a high proportion of people suffer multiple problems;
 - problems often appear in clusters;
 - a cascade effect often occurs, i.e. one problem will have the effect of triggering others;
 - such problems - particularly if unresolved - can have serious impacts on lives, for example family breakdown, unemployment or loss of income, ill-health and disability;
 - there is significant anecdotal evidence of a link between unresolved problems and both poor health and crime.
- 2.11 Evidence shows that low-income groups tend to suffer more problems than higher income groups and are less likely to do anything about them. Further, it seems that many people are not sure where to go or whom to approach to obtain resolution or redress and that there is a clear, significant unmet need for accessible and affordable sources of information and advice.²

¹ Review of Civil Litigation Costs, HMSO, 2010 (hereafter, 'Jackson') chapter 4, page 40.

² Findings from the English and Welsh Civil and Social Justice Survey (CSJS) carried out in 2004, found that a percentage of respondents endeavoured to obtain help but failed to do so and gave up and other respondents tried to get advice but failed to do so.

- 2.12 Access to legal advice and assistance is necessary not only to lift up the socially excluded but also to prevent a slide into social exclusion in the first place.
- 2.13 Access to justice can perhaps be best defined by saying that it is the ability for individuals and groups to obtain enforcement of their rights and appropriate remedies. Fundamental to this are:
- an awareness of rights, entitlements, obligations and responsibilities;
 - an awareness of procedures for resolution;
 - an ability to effectively access resolution systems and procedures;
 - an ability to participate effectively in resolution processes in order to achieve just outcomes.
- 2.14 We believe that for a nation to say that it has proper access to justice the following characteristics need to be in place:
- A respected judiciary of unimpeachable integrity;
 - A system of courts and tribunals which work efficiently to resolve disputes and adjudicate on civil and criminal cases at local and national level;
 - A profession of lawyers with the competence and integrity to provide appropriate advice and representation to those who need it;
 - The ability to access those lawyers and participate in the justice system without risk of financial ruin; taking account of the particular circumstances of the client.
- 2.15 The Law Society believes that the system in England and Wales provides most of these characteristics but that the last bullet point – the ability to participate in the justice system – causes the most difficulties. It is these difficulties that we discuss below.

B The duty of government

- 2.16 It is a fundamental obligation of government to ensure that its citizens have access to justice. *'A society's maturity and humanity will be measured by the degree of dignity it affords to the disaffected and the powerless,' (Paul Oestreicher).*
- 2.17 The European Convention on Human Rights provides that anyone charged with a criminal offence must be provided with legal assistance free of charge where the interests of justice require it and they are unable to afford it themselves. Case law under the Convention has considered in some detail the circumstances in which legal aid might be required as an obligation of the state for both civil and criminal cases.
- 2.18 But there has to be a strong case, based on the needs of society, for providing legal aid well beyond the minimum requirements of the UK's obligations under the ECHR.

After all, government will be judged by how it deals with the issue of justice because justice is the most fundamental of human rights.

- 2.19 In any democratic, just society, government has a duty to ensure that citizens are able to assert their rights in a way which does not put them at risk of bankruptcy, particularly when, as is usually the case, they are faced with a highly resourced and powerful corporation or office of government. This proposition inevitably raises questions about the extent of that duty and of the funding provided by the taxpayer.

C Funding access to justice

- 2.20 The Law Society acknowledges that access to justice is about more than just funding provided by the government. Clients obtain access to justice by paying privately; through insurance; via conditional or contingency fee arrangements; through membership of an organisation or pro bono services. There are also streams of funding for legal advice from charitable bodies, the advice sector and local authorities. However, the costs of legal work are such that it is inevitable that there will be a substantial number of people who are unable to afford to take the risks associated with legal action. It is for them that a safety net, paid for by the taxpayer, is essential.
- 2.21 Legal aid funding currently amounts to around £2 billion per year, out of a total of £620 billion of public expenditure, i.e., less than one third of one percent of public spending. The budgets of the Departments of Work and Pensions, Defence, Health and Education have all increased in the past year by more than the totality of the legal aid budget.
- 2.22 As a result of the 1999 Access to Justice Act, the concept of legal aid having a demand-led budget was abolished. Legal aid became a discretionary benefit that had to be delivered within a fixed budget. The political decision was made that the budget should be capped at around £2 billion. As a result, the budget has not increased in cash terms (and has therefore decreased in real terms) since 2003-4.
- 2.23 Within that fixed budget, crime continues to be demand-led to a significant degree as a result of our obligations under the Human Rights Act. Asylum work and public law Children Act work also have human rights implications. Increasing demands in these areas in the early part of the decade had to be balanced by reductions elsewhere in the budget, achieved largely through more predictable payment schemes for lawyers. The criminal budget is now largely under control, with the possible exception of very high cost cases, but the public law family budget is still subject to upward pressures.
- 2.24 The challenge facing the Legal Services Commission (LSC) has been to control costs in those areas where demand has to be met, and to balance any unavoidable increases with savings in other areas. But this has had to be done in an environment where the LSC has little control over most of the costs drivers in the system. Having squeezed scope and eligibility about as far as they can be, one of the few remaining levers open to the government is lawyers' fees.

- 2.25 The political position of all the main parties seems to be that there will be no more money from central government for legal aid. The Law Society advises - in the strongest possible terms - that whoever is in government cannot expect the current levels of quality, scope and access to remain at the current levels of legal aid funding. We believe that these levels are already far lower than is necessary to provide the service that is needed. Further reductions will be damaging to the most disadvantaged members of society and to the availability of justice in this country. If the government (of whatever political persuasion) is not prepared to fund legal aid appropriately, then it is the responsibility of that government to make the political case as to which services it will no longer provide. In doing so, it may be appropriate to consider what other means exist in order to deliver the services that clients need on a consistent basis. However, due regard must be given to the fact that other sources of help may not be quality assured, may not be permanent, may be open only to specific client groups or limited numbers of people, or may be discretionary and therefore not consistently available. And it must never be forgotten that the most appropriate professionals to provide legal services are lawyers.

D Drivers of costs

- 2.26 One of the major concerns about the legal aid budget is that, in trying to keep it fixed, no account is taken of the various drivers that will increase costs, which are outside the LSC's control and which disproportionately affect the expenditure on legal aid. Indeed, if these could be addressed, there would be major savings in the legal aid budget, in the costs of the justice system generally and in the well-being of many of those who currently seek legal help.

Volume of cases

Crime

- 2.27 In the early part of the decade, a performance indicator was set for the justice system to increase the number of offences for which the offender was brought to justice from the then total of 1 million to 1.25 million by 2011.³ However no provision was made in the legal aid budget to cope with the effects of this target, which will obviously mean more defendants would require criminal legal aid.
- 2.28 Cape and Moorhead⁴ identified various reasons why a greater proportion of those applying for legal aid were succeeding in those applications. They noted that proceedings are much more complex than in the past, and rely to a much greater degree on defendants having been legally advised. They also pointed to a significant increase in both the magistrates' courts and the Crown Court in the proportion of defendants being sentenced to immediate custody (and thus an increase in the proportion who would meet the interests of justice test for the granting of legal aid).

³ Public Service Agreement (PSA) 24 indicator 1 requires improved performance in bringing serious violent, sexual and acquisitive offences to justice over the period 2008-11 (National Criminal Justice Board).

⁴ Demand induced supply? Ed Cape and Richard Moorhead, LSRC, July 2005.

Civil

- 2.29 As a result of the recession, it is estimated that the proportion of households qualifying for some help under the civil legal aid scheme has increased from 29% to 36%. This increase was achieved in part by Lord Bach's welcome decision to increase thresholds below which an individual qualifies by 5% in April 2009. This increase in eligibility, combined with an increased need for advice in the recession, and perhaps also combined with the knock-on effects of the move to national fixed fees for this work, has resulted in a 20% rise in the number of new legal help cases started by solicitors this year compared with last year.
- 2.30 In the early part of 2008, the number of care cases brought by local authorities was declining. This was partly due to the introduction of the Public Law Outline, which set out various steps that a local authority should take before issuing proceedings. To an extent, therefore, the decline may have represented a deferment of proceedings rather than an avoidance of them. The introduction of new, massively increased court fees was also widely believed to have reduced the number of care cases issued. However, in the wake of the Baby P tragedy, local authorities once again became very much more cautious, and there was an immediate and significant increase in the number of care cases raised.⁵
- 2.31 The reality is that a fixed budget is going to have huge difficulties accommodating such increases in work.

'Failure demand' and waste

- 2.32 One of the biggest causes of need for legal aid, and of an increase in the cost of delivering legally aided services, is the failure by other bodies to comply with their legal obligations.
- 2.33 In the social welfare law field, this manifests itself most clearly in the extent to which the need for advice is caused by bad decisions, or often just long delays in making decisions, by public bodies. There is a perception that some such bodies consider it to be cheaper to breach people's rights, and correct matters only when challenged, than to comply with their duties. Wrong or delayed decisions in respect of housing benefit claims can create a demand for advice not only on the benefits claimed but also on possession claims brought due to the resulting arrears.
- 2.34 Social services departments can make poor decisions relating to care services for the elderly and disabled. Bad initial decisions by the immigration authorities lead to higher legal costs in dealing with appeals. But the social and financial costs of wrong decisions can be much greater than the costs of a legal challenge; for example it can lead to family breakdown, mental health issues and crime. One chain of events affecting one person can cost the taxpayer more than providing advice and assistance to a large number of others.

⁵ The number of special Children's Act certificates issued increased from 26,532 in 2008 to 37,321 in 2009 (Legal Services Commission).

- 2.35 More often problems arise as a result of administrative failings, frequently caused by funding problems in other parts of the system. Nottingham County Council has undertaken some work on this, which suggested that around 42% of social welfare law advice requests in the area were caused by such failings.⁶
- 2.36 In crime, there are problems caused by police systems. Recent data suggests that more than a quarter of all calls into the police station go unanswered. This delays lawyers, both from private practice and CDS Direct, in contacting clients to provide advice, and increases the amount of work they have to do to make contact. More worryingly, there have been reports of detained persons proceeding to interview without representation due to delays in being able to speak to a solicitor as a result of the failure of the police to answer the telephone. When clients are bailed to return to the police station, it is not unusual for the officer in the case to be unavailable, thus requiring an unnecessary additional attendance at the police station.
- 2.37 Prosecuting authorities choose which cases to prosecute and which charges to bring. Whether their choices are right or wrong, there will be an impact of those decisions on the legal aid fund. In a high cost criminal case, a prosecution that results in acquittal can cost the taxpayer many millions of pounds in defence costs alone. The costs of the prosecution and the court costs increase the budgetary provisions needed.
- 2.38 There are also many problems at court. The listing system is based on the convenience of the judge or magistrates. This often results in batches of cases being listed at the same time. The effect of this is that lawyers who arrive at court at the time their case is listed to be heard, often have to wait while others are heard, which costs them money. Prosecutors mislay files, meaning that adjournments are needed. When asked to accept a plea to a lesser charge, prosecutors may feel unable to make a decision on the spot and need to refer it back. Prison delivery services fail to bring prisoners to court on time. All of these factors combine to make the court system inefficient in its use of lawyers' time.
- 2.39 In some family cases, extensive expert evidence is requested by the court, but paid for by the parties, most of whom will be legally aided.
- 2.40 These issues raise questions about whether mechanisms can be put in place to require those within the system to consider the legal aid costs and adjust behaviours. Suggestions for this are considered in chapter 4 on funding.

Complexity

- 2.41 Cape and Moorhead identified a number of factors that had increased the complexity of police station cases. They referred to complex laws and processes, including the drawing of inferences from silence, increased police powers and conditional bail. To

⁶ <http://www.adviceuk.org.uk/projects-and-resources/projects/radical/nottinghampilot>

this we could now add conditional cautioning. They also referred to the complexity and/or time-heavy nature of some investigative techniques, such as CCTV footage, computer analysis and DNA testing. These are obviously important developments in the justice system but it must be recognised that they lead to increased costs for the defence.

- 2.42 The civil side is similarly afflicted. In a paper called *Renting Homes*⁷, the Law Commission describes the current state of housing law as 'an irrational, massively over-complicated mess'. Housing is perhaps an extreme example, but it is in the nature of law that develops over time via a mix of case law and statute that complexity results. Periodic review, simplification and codification of the law in areas of social policy could go a long way towards reducing the need for legally aided services.
- 2.43 Moreover, the court system itself is complex and needs to be examined to consider whether just outcomes can be achieved more cheaply than at present. Is there scope for greater use of alternative dispute resolution mechanisms? Can court processes be streamlined and made more efficient? Could some disputes be resolved in tribunals instead of courts? Would some disputes be better resolved by more inquisitorial and less adversarial processes? What are the factors that mean that an individual should receive representation? These are beyond the scope of this paper but they will be crucial to any significant savings in the cost of access to justice.

Changes in the law and government policy

- 2.44 Many changes in the law or in government policy, and the policies of public bodies have a major impact on the legal aid budget. There is now an attempt to measure that impact through the legal aid impact test. However, the fixed legal aid budget has had to absorb the impact of many such changes before the test was first introduced; and even now there are significant doubts as to whether it comes close to reflecting the true cost to the legal aid budget of developments elsewhere in government.
- 2.45 This is heightened still further by the recent trend with legislation - particularly legislation that creates criminal offences, offences that could well result in financial disaster or loss of liberty. Since 1997 it is estimated that more than 4,289 new criminal offences have been created.⁸ The result of this is clear - more technical law requiring more specialist advisers; more people who could fall foul of the law; an increased need for legal advice, assistance and (particularly where loss of liberty could be a consequence) effective representation.
- 2.46 Similarly, in the current Children Schools and Families Bill there are proposals that parents should have enforceable rights against schools and local authorities. It is inevitable that parents will seek legal advice about these rights. We are unaware of

⁷ *Renting Homes* (2006) Law Com No 297, http://www.lawcom.gov.uk/docs/lc297_vol1.pdf and http://www.lawcom.gov.uk/docs/lc297_vol2.pdf.

⁸ Between 1997 and 2009, 4,289 new criminal offences were created, according to a parliamentary question posed by Chris Huhne, Shadow Home Secretary in January 2010. www.chrishuhne.org.uk

any assessment of the effect on legal aid. Whether or not it is appropriate to create such rights, however, the effect on the legal aid budget needs to be considered.

2.47 These are issues that government should take into account in proposing new legislation, particularly legislation that either provides rights to individuals or seeks to create restrictions. There will almost certainly be an access to justice impact that should be part and parcel of the thinking behind the legislative process.

2.48 In 2005 the government committed to undertake a legal aid impact assessment on all new legislation.⁹ However such assessments have never been published. It is not clear whether the assessments were accurate, how far they influenced policy or whether they were acted upon. It would be appropriate for the National Audit Office or the Public Accounts Committee to consider:

- how far assessments have been carried out;
- whether they were accurate; and
- how far they were taken into account in developing policy.

2.49 It could also be argued that a government should always take into account the question of access to justice when considering any form of legislation, whether primary or otherwise. Ideally an 'Access to Justice' impact test should be applied and the legislative process noted to include reference as to whether or not any appropriate conclusions have been taken into account and, if so, in what way.

E The complexity of the legal aid system itself

Split responsibilities

2.50 The split of responsibilities between the MoJ and the LSC has led to confusion and duplication of effort. Changes in approach by the LSC will often have, or potentially have, budgetary consequences which therefore require sign-off by the minister. The LSC does not have freedom of action even for changes that are intended to be cost neutral. Conversely, changes in policy by the MoJ, such as that reflected in the current desire to shift the balance of spending away from criminal defence services and into social welfare law, require the LSC to make changes that they may not have chosen to make. This confusion is amply illustrated by the wording of the MoJ's statement on the best value tendering pilot in which the LSC was 'invited' to drop its proposals on Best Value Tendering. Nobody considers that the LSC has freedom to decline this 'invitation'.¹⁰ It is clearly unsatisfactory if one body is producing policy which another can second guess or which may significantly affect the plans of the other.

⁹ <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo051026/halltext/51026h01.htm>

¹⁰ MOJ press release - 17 December 2009 – Legal Services Commission Best Value Tendering Delayed 'Justice Ministers have today invited the Legal Services Commission not to proceed with its planned pilots for Best Value Tendering'.

- 2.51 This issue has recently been the subject of adverse comment by the National Audit Office,¹¹ and has recently been considered by Sir Ian Magee in his review.¹² Sir Ian shared our concerns about the split responsibilities, and has recommended that the LSC be converted from a non-departmental government body to an Executive Agency of the MoJ. This recommendation has been accepted by the MoJ, and is to be acted upon. We hope that this will address the problem we describe above.
- 2.52 There is clearly a need to ensure that decisions on who receives legal aid are taken at arm's length from the government, and with no ministerial input into decisions on the merits of individual cases. There is also a need to ensure that the expenditure of public money is properly accounted for. When the legislation to convert the LSC is presented, it will be vital to ensure that it enables the MoJ and the LSC to carry out their proper functions, whilst also guarding against improper political interference in individual decisions.
- 2.53 In its submission, the Law Society expressed a preference for the LSC to be given sole responsibility to develop policy within its budget, as LSC staff are closer to practitioners on the ground than MoJ officials. However, were the policy function to be located solely at the MoJ, we would still see this as an improvement on the current arrangements.

Bureaucracy

- 2.54 The administration of the legal aid itself is hugely bureaucratic. Specific decisions have to be made on individual cases and on individual steps within those cases and permission to undertake the work gained before it is begun. This adds time to the process and is costly. There are many detailed rules, with a threat of sometimes significant financial sanctions on firms for small and technical breaches of those rules. There are several dozen different payment rates, some varying by only a few pence.
- 2.55 Any policy justification for such differences seems to have been lost in the mists of time. Because of the number of changes to the payment structures over the past few years, firms have to cope with several different regimes simultaneously, depending on when a case started. The burden of compliance and auditing is often out of all proportion to the sums involved and the uncertainty involved makes it difficult for firms to take business decisions. We discuss this in chapter 6 on procurement.

Contracting decisions

- 2.56 In recent years, the LSC and the MoJ appear to have taken the view that the existing network of small practitioners offering legal aid has not provided value for money.

¹¹ 'The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission', NAO, 27th November 2009

¹² <http://www.justice.gov.uk/publications/docs/legal-aid-delivery.pdf>

There have been a number of initiatives to address this view and it is not clear that either have been helpful. We discuss this further in the chapter 6 on procurement.

- 2.57 Both the LSC and the MoJ have expressed a desire to contract with suppliers of legal services using what they consider to be a market-based approach whereby, in essence, firms bid for work which is provided to the lowest bidder. This led to the unfortunate Best Value Tendering proposals which left a number of suppliers in limbo unable to take basic commercial decisions for some months.
- 2.58 In its report, the Public Accounts Committee criticised the LSC's failure to understand its suppliers and their profitability, and its inability to determine whether its reforms are working or assess the impact they are having on the sustainability of suppliers.

F Impact on practitioners

- 2.59 These problems inevitably have a significant effect on legal aid practitioners themselves. Our impression is that their morale is as low as it has ever been. They feel ground down by the bureaucracy. They feel undervalued by the public, who think they earn far more than they actually do. They feel insulted by politicians and misunderstood by bodies such as the National Audit Office (NAO), whose recent report qualifying the LSC's accounts accused solicitors of overclaiming for billing cases¹³ where the court staff had made errors in the means assessment, and wrongly issued legal aid orders.
- 2.60 The report by the NAO into value for money in the Criminal Defence Service uncovered the fact that almost half of all firms undertaking defence work make less than 10% profit, with the average being 18%. This figure is not a bonus on top of the partners' earnings, it *is* the partners' earnings. Two partners with no other fee earning staff would typically have turnover in the region of £250,000. A profit margin of 18% would mean that they each have an annual income of £22,500 gross.
- 2.61 Nor can lawyers look forward to better times in the future. The MoJ has repeatedly made it clear that there will be no more money for legal aid in the foreseeable future, and indeed if anything, there may be less. The pre-budget report, on 9th December 2009, heralded additional savings to be made from legal aid.
- 2.62 While undoubtedly there are some lawyers who still are able to run profitable practices involving legal aid work, particularly if they have significant volumes of private work from which to generate profits, the future looks grim. The NAO asked defence lawyers about their future intentions. Fewer than half said that it was likely they would be in legal aid in five years' time.¹⁴ Many are just hanging on until retirement, after which their firms may cease to exist, or at least stop undertaking

¹³ The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission', NAO, 27th November 2009

¹⁴ NAO – The Procurement of Criminal Legal Aid in England and Wales by the LSC. Solicitor's Survey for Criminal Legal Aid 27.11.09.

legal aid. The number of young lawyers coming into the profession appears inadequate to make up for these losses, despite the LSC's admirable grants programme to assist students interested in a career in legal aid.

- 2.63 We see a similar picture on the civil and family side. The number of firms undertaking this work has dropped. More than 4,500 solicitors undertook civil contract work, including family, in 2000/01. This reduced to just over 3000 in 2008/09.¹⁵ The Social Welfare Law Coalition undertook some work in 2006 to uncover what services were actually available on the ground, as opposed to what the LSC's contract data implied should be there. They identified many advice deserts.¹⁶

G The current system is at breaking point

- 2.64 The current system is unable satisfactorily to cope with the demands on it. There are doubts about whether the MoJ is getting best value for taxpayers. It is being asked to manage on a fixed budget, the main drivers for which are completely outside its control. It is facing demands from the Treasury to deal with an immediate overspend, even though any changes it makes will take many months, if not years, to feed through the system. The LSC is being asked to toughen up significantly its audit processes, and to gather better data about the system and its suppliers, while at the same time substantially reducing its administration budget.
- 2.65 It is becoming increasingly difficult for clients to find a lawyer ready, willing and able to take on a legally aided case. Some clients have to travel large distances, or phone round dozens of organisations in order to find someone to take their case on; many more give up without finding advice.¹⁷ This may result in problems festering, resulting in more expensive interventions.
- 2.66 For increasing numbers of lawyers, legal aid is no longer a viable business proposition or an acceptable career path. The rewards have become too low relative to what qualified professionals can reasonably expect. The risks are too great. They are expected to take commercial decisions in an environment where the government dictates so much, and reserves so much power to itself to change the terms of any agreement that the free market cannot operate. The level of work in progress and unpaid disbursements that firms have to carry is excessive given the amounts of work undertaken and the level of payment. And as a result of recent constraints on what cases can be taken on and how much time can be spent on them, the government is compromising lawyers' ability to do a good job for their clients, thus weakening one of the final remaining ties keeping them in the system.

¹⁵ Figures provided by the LSC

¹⁶ Desert or Oasis: Mapping Social Welfare Law Provision in England, Social Welfare Law Coalition, October 2006

¹⁷ Finding from the English and Welsh Civil and Social Justice Survey (CSJS) carried out in 2004, found that a number of respondents endeavour to obtain help but failed to do so and gave up and some respondents tried to get advice but failed to do so.

- 2.67 There has been a mismatch between the service the government wanted to deliver and the funding that was made available. This shortfall has been met by lawyers operating within the system, however this cannot be sustained as can be evidenced by the number of lawyers leaving the system.¹⁸ The time has come for a fundamental rethink about how the system should operate and the service that can be delivered for the funding available, if the system is to survive in any meaningful form. Reactive change and short term measures must be replaced by a solid foundation and a measure of certainty to encourage investment and long term planning.

Questions

1. Do you agree with our definition of the main characteristics of access to justice?
2. Is our assessment of the costs drivers complete? Are there other drivers?
3. Are our proposals for improved impact assessment process practical? Will they address the concerns?
4. Do you agree that there should be some form of Access to Justice test as part of the legislative process? If so, what form should such a test take?
5. Given the government's announcement that it intends to convert the LSC into an Executive Agency of the MoJ, how can an independent assessment of cases and funding mechanisms can be assured?
6. Do you agree with our assessment of the problems? Are there others that we have missed?

¹⁸NAO – The Procurement of Criminal Legal Aid in England and Wales by the LSC. Solicitor's Survey for Criminal Legal Aid 27.11.09.

Chapter 3

3. Eligibility and scope for legal aid

3.1 As we have indicated in chapter 2, a major issue for any government is to consider how to prioritise resources.

3.2 No society is likely to have the resources to guarantee free legal advice and representation for all. There has never been the suggestion that, as with health or education, there is a universal right to advice. The system thus far has tended to deal with two questions:

- Who should be eligible for state funding for their legal advice and representation?
- What sort of cases should be covered?

3.3 The rules governing who should be eligible to receive legal aid and for what cases have varied substantially over the years. Eligibility has depended on merit and means. There have been significant variations over the years, but, broadly, the picture has been of declining eligibility (offset to an extent by the recent 5% uplift in eligibility limits for some civil cases) and of fewer cases falling within scope.

A Eligibility

3.4 The Lord Chancellor has the power to prescribe rules governing eligibility for legal aid.¹⁹ This is currently achieved largely by a relatively blunt means test. In a civil case, if their means fall below a certain level, the individual is entitled to legal aid. If their means are between that level and a higher level, then contributions will be required. Beyond that level, there is no legal aid. In criminal cases, most defendants are entitled to legal aid but means testing, having been abolished in late 1990s, has now returned and contributions are required from those with an income above £21,487.²⁰ As the 'mean' gross annual earnings across all employee jobs in 2008 was £26,020²¹ the average person clearly falls outside any free legal help, advice and representation.

3.5 Legal aid is, in essence therefore, a safety net for those who are the most vulnerable. This is unsatisfactory. It needs to be recognised that many people who are not

¹⁹ Section 13(1) of the Access to Justice Act 1999. The power was conferred by the Act on the Lord Chancellor transferred to the Secretary of State and then transferred back to the Lord Chancellor. They are subject to the negative resolution procedure (section 25(10) of the 1999 Act). The Criminal Defence Service Act 2006 gives this power to the Lord Chancellor.

²⁰ MoJ – Post Implementation Review of Means Testing – the Magistrates' Court, October 2007, p.5.

²¹ Figures provided by The Office for National Statistics' Annual Survey of Hours and Earnings (ASHE)

eligible for legal aid are still unable realistically to pay for any major legal action or to take the risk of the other side's costs in the event of failure. As we explain in the funding chapter, there are a number of alternatives, particularly where an individual is seeking damages. But there remain cases where the issues are complex or, particularly in family and immigration cases, where there is no financial outcome likely, where people are financially unable to pursue their remedies. We are concerned that the means testing proposals will exacerbate this in criminal work.

- 3.6 The result is that people will be unlikely to pursue their remedies or will represent themselves - this undoubtedly creates an injustice. If taking out a substantial loan, selling property or causing hardship to the family is necessary in order to finance litigation, many people will understandably prefer not to take the risk. There is a clear unfairness here for those people whose incomes take them above the scope of legal aid.
- 3.7 It is clearly not practical to expect the scope of legal aid to be widened to cover the entire population on a similar basis to the health and education systems. Moreover, the Law Society does not believe that it is right for people who can afford to pay for legal representation to be entitled to support from the state. However, the fact is that the majority of the population cannot easily afford the costs of litigation or the risks of failure.
- 3.8 If access to justice is to be properly achieved there needs to be a more sophisticated approach to eligibility than by simply looking at the means of an individual, without also looking at the likely costs of the case. It is worth asking whether those means are proportionate to the likely costs of the action. It might be appropriate, for example, for legal aid to be available to fund litigation following receipt of initial advice if this would be the only way for that individual enforcing their rights.

B Scope

- 3.9 Originally very few cases were excluded from legal aid (defamation was a particular example). This changed in 1999 with the abolition of legal aid for personal injury cases, neighbour disputes and for cases arising out of a business, by the Access to Justice Act. That Act also permitted conditional fee agreements in a much wider range of cases. Now, in essence, legal aid is available for crime, family and other cases where there is unlikely to be any monetary compensation.
- 3.10 Since then, the advent of the Human Rights Act has meant that there is a legal obligation for the state to provide support for criminal defendants (except those charged with minor offences), for public law family cases and asylum cases, mental health tribunals and some inquests. It has been suggested that legal aid should only be available for cases where there are human rights implications. The Law Society cannot support that view because:
- The Human Rights Act does not cover a number of matters which are of importance to the most vulnerable in society: particularly, housing, debt advice, mental health and disability, challenges to the state, actions against the police,

education, community care, welfare benefits. The Law Society considers that people with these problems are vulnerable and are more likely to need support to assert their rights. A society which aims to be just and inclusive should not deprive its citizens of the support they need to obtain redress or force them to be reliant on charity or discretionary pro bono work.

- In most of these cases, in practice, there is no alternative way of funding legal action.

Family cases

- 3.11 It is important to note that legal aid funding goes towards advice and litigation and, it might be argued, provides an incentive to litigate. There is an increasing view that litigation is not always the most appropriate way in which to resolve disputes. This is particularly the case in family cases.
- 3.12. It is notable that the government has just launched a family justice review²² to look at, amongst other things:
- mediation and similar support strategies that could be used to support individuals themselves to reach agreement about arrangements, rather than having an arrangement imposed by the courts;
 - how to minimise conflict between individuals as far as possible;
 - to find out how far the adversarial nature of the court system is able to promote solutions and good quality family relationships in private law family cases, and what alternative arrangements would be more effective in fostering lasting and positive solutions.
- 3.13 This review will clearly have important ramifications for the legal aid system. But there are other questions which can be raised about the funding for family cases.
- 3.14 Child contact cases often involve very difficult issues between the parties, but it may be questionable how far the state should subsidise court disputes over contact which may simply provide a vehicle for parents to use children against one another in respect of other disputes. Indeed, it could be argued that if, as is often the case, one party is legally aided and the other is not, this provides a weapon for the legally aided party. It would, for example, be possible to pay for parents to receive advice as to the law but to leave them to resolve the details of contact themselves. There have been proposals, for example, that collaborative law or mediation can be cost-effective alternatives to the court process and should be encouraged. There are some objections to this:

²² On 20 January 2010, the Secretaries of State for Justice and Children, Schools and Families and the Welsh Assembly Government Minister for Health and Social Services commissioned a review of the family justice system in England in Wales.

- At present, agreements about contact have to be endorsed by the court and, ultimately, if parents cannot agree on the arrangements the court will have to make a decision. A lack of legal aid would put greater power in the hands of the wealthier party.
- There is little hard evidence to back arguments that mediation or collaborative law is, in fact, cheaper than litigation and where they fail they will be more expensive.
- There is currently no national mediation facility or good standard practice, though some accreditations schemes exist, including those run by the Law Society.
- Mediation without legal representation can be detrimental to the weaker party where there is a power imbalance in terms of education, wealth or access to professional advice.
- There needs to be an effective method for enforcing agreements if they are not complied with.

3.15 One option could be that legal aid could be granted simply for a single court hearing if other options had failed.

3.16 A further aspect of family cases is that there are a substantial number of other people who may need to be represented, for example grandparents. It is arguable that legal aid should only be available to parents of the children in question, unless it is clear that, for some reason, they are unable to look after the children.

Questions

1. Are there other ways of amending the provisions governing eligibility and scope to enable a more sophisticated approach to funding decisions in legally aided cases?
2. Do you agree that contact cases should not automatically be granted legal aid but other options explored instead?
3. Should legal aid continue to be offered for the whole range of work as at present, or should some areas of work be removed from scope, if so which and why?
4. Are there other ways in which the eligibility rules could be amended to produce savings or a more targeted approach?

Chapter 4

4. Funding access to justice

4.1 Individuals wishing to take legal action currently have the following options in addition to legal aid:

- self-representation;
- self-fund advice and representation;
- insurance;
- contingency fees;
- third party funding;
- trade unions and other membership organisations;
- charities and not-for-profit organisations.

A Methods of Funding

Self-representation

4.2 Individuals who represent themselves in court are known as litigants in person. Self-representation is suitable for simple matters but litigants in person could be at a great disadvantage if they are not aware of changes in the law, precedents, time limits, the format to submit evidence and so on. This lack of knowledge and experience could lead to unjust decisions followed by further costs for the litigant in person and increased court costs in wasted time. This is particularly a danger where the other side is a well-funded public authority or insurer, and the litigant in person could end up liable for the opponent's costs. This is recognised in Jackson LJ's report on costs in civil litigation, where he makes it clear that litigation needs to be undertaken by skilled professionals.²³

4.3 The Law Society endorses this view and believes that self-representation should not be encouraged.

Self-funding of advice and representation

4.4 In practice self-funding is only practical for people who are able to afford four-figure fees or more. Those who self-fund advice and representation could also be liable for the costs of the other side if they lose, which could double the overall costs. There is also a risk that they will not get their full costs back even if they are successful.

²³ Review of Civil Litigation Costs, Ch 4, para1:1, p.40

Jackson LJ's report suggests that the number of households which are credibly able to pay these figures is very small indeed.

Insurance

4.5 Most household insurance policies include an element of legal expenses cover which will provide insurance for most non-family civil claims. This is known as before the event insurance (BTE). It is extremely useful in dealing with cases such as road traffic accidents, personal injury at work and employment claims. It takes the risk of adverse costs awards away from the client and funds the action. There are however limitations:

- Typically the maximum level of cover is around £50,000 which is not sufficient to cover more complex cases.
- In addition there is a lack of transparency regarding the test applied as to whether funding is available and the actual amount of funding available to the client at the outset of the case.
- The insurer retains control over the case and, in particular, over the acceptance of settlements and has an obvious interest in the case being undertaken as cheaply and as risk free as possible.
- The insurer is, in most cases, currently able to choose the solicitor to represent the client until an action has commenced, by which time it may in practice be too late to change. Even in complex cases where the client has the ability to select the solicitor of their choice pre issue, some insurers bring pressure to bear on the client so that in truth only the most determined of clients actually exercise that privilege and at the expense of delay in commencing their case.
- Most insurers have panels of solicitors, many of whom will actually bid for cases and pay referral fees to the insurers. The selection criteria for those panels are opaque and there are obvious concerns that cases may be sent to solicitors who are not the most suitable for the client.
- There is no set standard of service for insurers and no consistency about the level of service that a client is entitled to expect.
- In cases where the other side is insured by the same insurer there are obvious conflicts of interest.
- Household insurance is voluntary and there will therefore be sectors of the population who will need some other form of finance.

4.6 It is also possible to obtain insurance to cover the costs of the action after the cause of action has arisen (after the event insurance - ATE). This is often used in conjunction with conditional fee arrangements. The cost of this is frequently very high indeed, though it is at present recoverable on success.

4.7 Jackson LJ's report has recommended substantial changes in insurance arrangements. While recommending that there should be greater encouragement of BTE insurance, he supports the Law Society's concerns about the relationships between insurers and their panels, and recommends the abolition of referral fees.

He also recommends that the ability to recover ATE insurance costs from the other side on success should be abolished.

- 4.8 These recommendations are likely to have significant effects on the market for personal injury and other work, and the Law Society is considering these at present.

Contingency fees

- 4.9 A contingency fee is the generic term used to describe fee arrangements between solicitors and clients where payment of the solicitor's fees is dependent upon the result of litigation or arbitration. Under these arrangements, the lawyer will take the risk on the basis that, if the case is successful, he will be suitably rewarded. In England and Wales there are two types of such arrangement: damages based agreements (DBA) and conditional fee arrangements (CFA).

- under a DBA the lawyer will take a proportion of the damages obtained at the end of the case, typically between 25% and 33%. The arrangements are prohibited in contentious cases but are available for tribunal work (where there is no cost-shifting rule). There may be some additional costs such as counsel or expert fees. These agreements recognise that the costs of such actions are likely to be deducted from the damages and provide litigants with a risk-free way of financing actions. As DBAs only work in cases where damages are awarded, they are entirely unsuitable for immigration and judicial review cases;
- conditional fees are a statutory species of contingency fee and are governed by s58 of the Courts and Legal Services Act 1990. Under a CFA the lawyer is entitled to charge an agreed uplift on the fee if successful. This uplift is recoverable in contentious matters. CFAs were originally permitted for particular classes of cases not covered by legal aid following the Courts and Legal Services Act. They were extended (with the uplift recoverable) following the Access to Justice Act 1999 and are now probably the most common way of funding contentious actions. They are not available in criminal or family work. In addition, it is usual for a client to take out ATE insurance as protection against the other side's costs if the action fails.

The advantages of these arrangements are:

- They provide a way of funding actions for everyone, irrespective of means;
- They provide the client with an assurance that the lawyer has an interest in the case's success;
- As the lawyer has a stake in the case, there is a strong prospect of success, thus limiting the number of hopeless cases that are likely to proceed.

The disadvantages are:

- There is a possibility of a conflict of interest between the lawyer and client over settlements;
- There is the possibility of conflict between the lawyer and his or her duties to the court – thus they are prohibited in family and criminal matters.
- Some DBAs are unclear or take too much of a percentage – we believe this is a particular problem with unregulated advisers;
- They may encourage speculative actions although there is no research to substantiate this.

4.10 There have been a number of significant changes in the rules governing DBAs and CFAs recently. First, the government has tabled regulations following an amendment to the Access to Justice Act 1999 which would limit the percentage that could be charged by the lawyer to 35%. Secondly, significant changes are proposed for CFAs in libel matters. There is an obvious concern that these changes may have a significant effect on the ability of solicitors to take cases which are complex or risky but nevertheless meritorious given these caps.

4.11 In addition, Jackson LJ has recommended that the uplift in fees should no longer be recoverable from the other side but should instead (as it currently is in employment matters) be paid out of the client's damages. He proposes an increase in general damages to compensate for this. He also proposes additionally that there should be 'qualified one-way costs shifting' under which an unsuccessful claimant would not normally be liable for the defendant's costs.

4.12 These proposals give rise to important questions about the extent to which litigants should be expected to bear some or all of the costs of the litigation. In the field of employment law it is common for clients effectively to finance the case out of their damages. This was the case with CFAs in civil work before it was possible to recover the uplifts. On one view, it may well be reasonable to expect litigants to pay something towards the cost of their funding – whether it be by taking out a loan, mortgaging property or by taking it out of damages. On the other hand, most litigants are taking action because they perceive that they have suffered a wrong. The damages system exists to put them in a similar position to where they were before, and the rule of costs following the event flows on from this. These proposals will seem likely to have the result that successful litigants will lose some of their damages in order to pay for their costs, and therefore will inevitably be worse off than if the wrong had not been done to them.

4.13 In other jurisdictions where such arrangements are permitted, there are different arrangements for awarding damages and which, in practice, take account of the lawyers' fees. This is not the case in England and Wales and there needs to be major public debate about whether the existing principle that a victim should receive 100% compensation should be watered down by requiring the victim to pay towards the costs of claiming those damages. That could well be perceived as putting the wrong-doer at an advantage that is wholly unmerited.

4.14 The proposals are likely to have significant effects on access to justice and the Law Society will be watching them and examining the Jackson proposals closely.

Third party funding

4.15 The courts have been increasingly countenancing the growth of third party funders, i.e. third parties who fund a case on a commercial basis and will usually take a share of the damages in compensation for the risk. In practice, such arrangements are only suitable for cases where the damages are likely to be extremely high. It is also important to note that the law governing them has been developed through case law and there is little certainty about their effect. A number of issues need to be resolved:

- In contentious matters, what proportion of the damages is it appropriate for the funder to take, given that damages are relatively low in England and Wales and designed to compensate rather than to fund legal costs?
- How should such agreements be regulated?
- What should be the liability of such funders for costs in the event the case is unsuccessful?

4.16 Until these issues can be dealt with, it is unlikely that these funding methods can be part of the mainstream of litigation funding. It is notable that Jackson LJ's review is proposing some significant changes to the provisions and, in particular, greater liability for third party funders which may reduce the funding available. These proposals need careful examination. The Law Society's present view is that, with appropriate rules, they could provide a way of funding some high value cases.

Trade unions and other membership organisations

4.17 It is common for trades unions or other membership organisations such as professional bodies to provide their members with legal support normally through a collective CFA. It needs to be noted that:

- It only applies to members of such organisations and it is unlikely to extend beyond this;
- Some of the objections which apply to insurance can arguably apply here, such as freedom of choice of solicitor and the control the organisation has over the case, but they are at present less apparent.

Charities and not-for-profit organisations

4.18 Charities and not-for-profit organisations (nfps) are frequently geared towards specific interest groups or specialisms. They may employ lawyers, have panels of lawyers or employ non-lawyers with specialist training. These provide valuable assistance, usually free of charge, but, inevitably, their funds are limited and they are selective about the cases they take on.

Cross-subsidisation

4.19 For many firms, legal aid work is unprofitable and is cross-subsidised by the more profitable privately funded work. There is a view that this is inappropriate and wrong in principle, but the fact is that firms do this to survive. The NAO recently reported that many firms make no profit out of legal aid at all.²⁴ Anecdotally, many firms that have given up legal aid in recent years have cited an unwillingness to continue this cross-subsidy as the very reason for their decision. This cross-subsidy from the profession should not be overlooked.

Pro bono

4.20 There has been a major growth in pro bono work over the past two decades and many lawyers undertake this as a way of putting something back into society.²⁵ Pro bono work represents a major success for the profession in providing access to justice in all areas of law. It does, however, have its limitations:

- It is voluntary, so lawyers are free to only take on cases they feel strongly about;
- Many lawyers undertaking pro bono work do so because they can afford to and may be encouraged by their firms. However they may not have the necessary expertise to undertake much work of the types covered by public funding;
- Much of it will be time-limited – it is unfair to expect individuals to take long or complex cases on a pro bono basis.

4.21 For these reasons, the Law Society stresses that pro bono work cannot and should not act as a substitute for a properly funded legal system.

Public funding and local authorities

4.22 Local authorities frequently fund and support local advice centres. Many of these are charities and provide free advice on welfare issues and are a valuable adjunct to funded legal services. Some employ qualified lawyers or have a mixture of qualified and unqualified staff. The advice and representation they offer is generally of a very high standard.

However:

²⁴ NAO – The Procurement of Criminal Legal Aid in England and Wales by the LSC. Solicitor's Survey for Criminal Legal Aid 27.11.09.

²⁵ www.probonoUK.net

- The organisations are dependent on local authority or charitable funding. A number of law centres, in particular, have closed recently for lack of resources. They cannot therefore be regarded as a permanent source of advice;
- There is likely to be significant variation in the standard of advice and the capacity of these organisations to meet the need – there is no consistent regulation;
- They generally take on work of limited scope, for example some nfps do initial work but have to pass litigation on elsewhere. The scope of advice offered is often limited to initial work but the centre may need to refer more complex work and actual litigation to a solicitor.

Therefore other sources of funding will have to be considered.

Greater funding by individuals

- 4.23 There are cases where an individual might make a contribution in the civil legal aid field. For example a charge might be placed on the matrimonial home in some family cases. At some time in the future that charge will ‘fall in’ and the legal aid costs will be repaid to the LSC.
- 4.24 Contributions can now be required from defendants in criminal cases, subject to an assessment of means. The Law Society considers that this is right in principle but does have continuing concerns as to the processes. It should be appreciated though that most defendants in criminal cases will not have sufficient means enabling them to contribute towards their defence costs.

B Options

- 4.25 There are a number of options to consider for greater contributions from legally aided litigants:

Option 1 – a repayable loan

- 4.26 Money could be paid out from a fund which would become repayable if the litigant achieved a particular level of income, rather like student loans. This would mean, in the longer term, that there would be some money coming back to the fund which could be used to fund other cases. However, it would have the following disadvantages:
- The collection process would cost money and might prove disproportionately expensive;
 - Some litigants would be unwilling to take on the debt and so decide to represent themselves or not take action;

- Many of those helped by legal aid are unlikely to reach a level of income which would trigger a repayment – and in unsuccessful immigration cases, the chances of any repayment are negligible;
- The proposal might make matters worse for people with debt problems.

Option 2 – a flat contribution

4.27 It has been suggested that those convicted with a criminal offence should be required to pay a flat fee of £200 towards their defence costs.²⁶ This could have the following disadvantages:

- The individual may not have access to that amount of money or may simply refuse to pay;
- There might be problems with the Proceeds of Crime Act;
- The costs of collection would need to be considered and these might well be disproportionate;
- The impact of the contribution could prove to be disproportionate to the culpability of the individual.

Option 3 - contingency legal aid fund (CLAF)

4.28 This option has been debated for many years. The scheme has many variants but, broadly, an element of a litigant's damages and, possibly, lawyer's fee, would be paid into a fund and this would be used to pay for further actions.

4.29 This was mooted strongly at the time of the Access to Justice Act 1999 because it was felt that:

- It would avoid the conflicts of interest that conditional fee arrangements would bring;
- It would enable complex and expensive actions to be funded; and
- Avoid the cherry-picking that was likely to prevent 'risky' actions being taken forward.

4.30 However the proposal now seems less practical and desirable for a number of reasons:

- Conditional fee arrangements do not appear to have given rise to the difficulties that were identified – in particular, there is no evidence of conflicts or access to justice issues. In fact, these arrangements have enabled many individuals who would not otherwise have been able to do so to fund actions.

²⁶ The Times, 8 February 2010, 'Tories plan £200 levy for all defendants convicted in court'

- It is hard to see how the system could co-exist with conditional fees. There would be no particular incentive for the lawyer or client to choose funding under the CLAF if the action were suitable for a CFA or DBA. The system would, in effect, require individuals to pay privately or to seek funding under a CLAF. This would be difficult to justify.
- The bureaucracy and costs would be considerable – the costs of risk assessment are successfully borne by the private sector.
- Substantial seed-corn funding would be needed to start the fund, and this is unlikely to come from government. It is hard to imagine that the business sector would be interested in supporting this proposal with some funding in the current financial climate.
- Since personal injury is now largely outside the scope of legal aid there appear to be few other areas where this could realistically operate.

4.31 For these reasons, the Law Society does not consider that a CLAF will assist access to justice. It is notable that Jackson LJ did not recommend a CLAF, though he showed significant interest in the idea and it may be that, in the light of some of his recommendations, the issue should be revisited.

Option 4 – extended legal expense insurance

4.32 The insurance industry currently funds a substantial number of legal actions. There have been proposals to require compulsory legal expense insurance. The Law Society believes it would be worth exploring further, though there may well be a number of issues that need to be considered (as set out below).

Scope

4.33 Legal Expenses Insurance currently covers only some areas of law: family and crime are excluded. It is well established that it is not possible to insure against the consequences of one's own criminality, but it may be possible to insure yourself against defending a criminal charge. In principle there appears to be no reason why insurance should not provide cover for family matters; in Holland for example insurance policies cover mediation expenses in a divorce. The Law Society believes that it would be worth talking to insurers about the extent to which cover could be extended and the likely costs to the individual.

Compulsion

4.34 Legal expenses insurance is an add-on to most household policies. It has considerable advantages in that, as Jackson LJ points out, 'the many subsidise the few', thus keeping premiums affordable. However, few people perceive that they need insurance for legal problems, and those most likely to need it may be unable to afford the premiums. Moreover many households do not hold such policies (and are indeed likely to be the ones most likely to use them). It has been argued that some

form of compulsory insurance would enable scarce taxpayers' resources to be concentrated on other areas.

- 4.35 There are likely to be problems with this. If legal insurance were made compulsory everyone would need to be entitled to assistance in respect of their legal problems. This would mean a substantially expanded insurance market and, potentially, the scope for greatly increased cover. However, it could also be perceived by the general population as another form of tax, disguised as an insurance policy, and could be politically untenable. It would not, in fact, create many savings in that those who could not afford the insurance (for example, because they were on benefits) would probably have to fall within the legal aid net anyway (or might well be perceived to be a high risk for insurers). There might, however, be scope for individuals, particularly those who are not entitled to legal aid, to be encouraged to take out legal expenses insurance if such a move were sweetened by the possibility to off-set premiums against income tax.
- 4.36 If these are to be encouraged, however, there will need to be a significant change in the insurance market. In the Law Society's view, the following issues would need to be addressed:
- The scope of policies;
 - The ability of the client to choose a lawyer and the extent to which the insurer could refuse or impose limitations on payment;
 - The level of service and handling of conflicts that clients could expect;
 - Pricing of policies; and
 - The ability of the insurer to withdraw funding.

Option 5 – client account interest

- 4.37 Proposals have been made that money held by solicitors in their client accounts could be pooled into a central fund and the interest earned on that money could be used to fund legal aid. Similar schemes currently operate in France and parts of the United States.
- 4.38 Such a scheme would need a statutory change. At present, solicitors are required to account to clients for interest received on their money. However, it is possible for solicitors to retain the interest on money held in a general client account. That interest goes to the firm and provides part of the business model. It may cover the costs of administering the account and may well, in some firms, provide a subsidy for legal aid work or reduce the hourly rate charged to clients. It also assists solicitors to obtain cost-effective deals from their banks.
- 4.39 The Law Society believes that the changes proposed would be problematic for the following reasons:

- Interest rates fluctuate with changes in the Bank of England rates.
- There would be no reliable figures upon which to base the support of a national service.
- The cost of administering the system could be significant in terms of establishing IT and other systems and following anti-money laundering procedures.
- The amount of money held in client accounts is uncertain and variable.
- Without the incentive of receiving interest, solicitors may decide the costs of handling the money and the compliance issues are too high to hold client money on account.
- Other professions – for example accountants – are in a similar position. Why should one profession be able to retain client account interest and not solicitors?
- The French and US systems are significantly different and are based on much smaller jurisdictions (in France the departments are administered by the local Bar). It is unlikely they could be replicated here as there are no equivalent local systems.
- The change would have a significant impact on solicitors' practices, particularly high street firms where the client money from conveyancing transactions is substantial. Solicitors could be forced to increase costs to clients in order to maintain their particular business model.

4.40 The end result will be that consumers will, once again, subsidise the legal aid system and the Law Society doubts that this is an appropriate option to pursue. However, given the interest that has been expressed, the Law Society will be undertaking work to ascertain the costs and practicalities of the proposal.

Option 6 - polluter pays

4.41 As we have made clear in chapter 2, a major source of cost in the system include actions and decisions of third parties which either require action to be taken to defend a criminal charge or to challenge an irresponsible decision on the part of a local authority or other government agency.

4.42 One disturbing case was the prosecution of the Southall rail disaster – a prosecution taken by an authority with no experience in this area, where the defendants, who were acquitted, had to expend many millions in order to defend themselves. This and other high profile cases appear to have led to the decision to limit the amounts recoverable by defendants from central funds to what could have been recovered, at legal aid rates. We have provided other examples of such decisions in chapter 2.

4.43 It is inevitable that not every prosecution will succeed and the Law Society recognises that prosecutors must have the discretion in the public interest to take cases to trial which are borderline or where it will be for a jury to make up its mind about the innocence or guilt of a defendant. We also recognise there are strong duties on prosecutors to ensure that prosecutions are in the public interest. However, we consider that it is worth exploring whether a judge should have the power to require a prosecutor to pay from its own funds the cost incurred to the legal

aid system, of a decision to prosecute which was clearly inappropriate or where the prosecutor has caused costs or delay to the defence.

- 4.44 Similarly, we consider that it may be worth exploring similar powers where public authorities have taken decisions or failed to take such decisions in a way that has left the claimant with no option put to sue. A surcharge as a contribution to the costs of providing legal aid could also be considered at the discretion of the judge. This might provide further incentives for authorities to improve their decision-making and would also enable those authorities whose procedures give rise to legal action to be identified.

Questions

1. What are the advantages and disadvantages of a loan scheme to fund actions?
2. To what extent should litigants be required to pay towards their legal costs?
3. Would a legal aid levy be practical?
4. Do you consider that the Jackson report and other issues justify looking again at a CLAF? What issues should be explored?
5. What would the effects be of imposing greater requirements on BTE legal expenses insurance? Is it practical to extend it?
6. What would be required of insurers to provide appropriate protection for litigants?
7. Should there be tax incentives to encourage people to take out legal expenses insurance?
8. Do you agree that it is likely to be impractical for legal expenses insurance to be compulsory and to form the basis of a legal aid system?
9. Do you agree that it will be impractical to fund a legal aid system through interest on client accounts?
10. Should prosecutors and other authorities account for the legal aid used for their actions? What would the impacts be?
11. Are there other ways in which those who cause people to go to court can be deterred from causing costs to the legal aid fund?

Chapter 5

5. Delivery

A Introduction

- 5.1 Currently, legal advice and representation is available to consumers from the following sources:
- Solicitors and barristers in private practice;
 - Independent not-for-profit advice agencies and Law Centres;
 - Charities, advice centres provided by local authorities or under the auspices of the LSC;
 - Unregulated providers (e.g. employment consultants) who are able to provide legal advice and appear in tribunals but are not normally eligible for funding under the legal aid scheme;
 - Telephone advice and other internet advice providers of greater or less reliability;
 - Legal textbooks and other guides, again of varying reliability.
- 5.2 This chapter does not deal with litigants who can source advice or represent themselves. It assumes that most people will need help in obtaining remedies. A description of the various business models that exist to provide that help can be found at Appendix 2.
- 5.3 In looking at this, it is crucial to ask what service provisions are actually required by the public. The following qualities seem to be crucial:
- The provider should be competent to give the advice and representation and should be regulated;
 - The client should have trust in the adviser and should be given a choice of adviser;
 - The adviser should, where possible, be local to the client or able to provide advice to the client in a way convenient for the client;
 - The advice and representation should be available at good value for money for the client or whoever is paying, but with fees at a level which ensures the supplier base can continue.

B Features of Delivery

Regulation and competence

- 5.4 Where a client is relying on a service provider to advise on issues that are likely to require resolution by law it is essential that the adviser should be:
- Competent to provide the advice;
 - Regulated so that any dishonesty, poor service or poor advice can be addressed by the regulator.
- 5.5 This is particularly important where, as in most legal matters, the client is unlikely to be a sophisticated purchaser and is unlikely to be able to judge whether or not the lawyer is the most appropriate for them. Recent research by the Legal Services Board suggested that clients do not shop around for their legal advice.²⁷ This makes it particularly important for appropriate regulation to be available.
- 5.6 It needs to be stated, however, that regulation is expensive. It requires providers to invest properly in training and in compliance. It will limit the sort of work that they can undertake and their opportunities for taking on work. The cost of paying for the regulator needs to be included. Nevertheless, it is a crucial safeguard for clients who are likely to be dealing with hugely significant problems in their lives.
- 5.7 This is not to say that every adviser has to be a regulated professional. Many employees of solicitors and of advice agencies have real expertise in the law and are able to advise clients successfully. Nevertheless, they should be supervised by a regulated person.
- 5.8 Although rarely funded by legal aid, the Law Society believes that there should be consideration of requiring unregulated individuals who are advising the public to be regulated.

Choice of Adviser

- 5.9 It is essential that clients should have a proper choice of adviser. This is because:

²⁷

http://www.legalservicesboard.org.uk/news_publications/press_releases/2009/pdf/30122009_consumer_research.pdf 'Whilst consumer choice is taken for granted in other areas of the economy, the figures suggest that the public feels disempowered when it comes to comparing services and choosing their lawyer – with only 14% having 'shopped around' for the right lawyer. '

- Clients are likely to be discussing intimate personal details about their lives, and it is important that a relationship of trust exists so that the adviser can give appropriate advice;
- There may well be conflicts of interest which prevent an adviser advising a client in a particular case and there is a right to confidentiality which must be maintained;
- There needs to be choice and competition to maintain standards.

5.10 It is disturbing that the government and the LSC appear to be looking to support larger providers. The LSC has contracted some services to large organisations, thus taking them away from their traditional providers. For example, telephone legal advice is provided by CDS Direct on minor criminal matters such as breach of bail and excess alcohol arrests.

5.11 The LSC has also contracted – and has expressed its intention to contract increasingly – with large organisations to provide telephone advice (followed in some instances by specific detailed advice), for example via the Community Legal Service. This may have the result of increasing the number of persons who receive legal advice, although there are probably limitations on the effectiveness of such delivery methods. A project undertaken by Southampton City Council and private practice law firms in the area to provide telephone advice to the general public identified that telephone advice alone is essentially limited and may best operate as a referral function.

Location of the adviser

5.12 The growth of technology has raised suggestions that much advice can be given remotely and that there is no need always for direct contact between the client and their adviser. We doubt this.

5.13 In 2009 the Council on Social Action²⁸ examined the delivery of public services and the relationship between civil legal aid advisers and their clients in the areas of debt, housing, welfare benefits, employment, immigration and asylum. It found significant evidence to support the need for a one to one relationship between adviser and client. Through its research the Council also found that clients valued a deep relationship with an adviser who took the time to listen, explain and sympathise with their situation. This was important to the overall outcome because it created trust and confidence between adviser and client which was in turn essential for gathering accurate information. It also found that the rules and bureaucracy around benefits and rights have become so complex that advisers have an increasingly important role in helping clients navigate the complexities.

5.14 The work of the Council on Social Action strongly suggests that face to face advice is very important to many clients. It is often suggested that this face to face interaction

²⁸ A group set up by the Prime Minister, Gordon Brown, in 2007, to bring together innovators from every sector to generate ideas and initiatives through which government and other key stakeholders can catalyse, develop and celebrate social action.

could be replicated by means of the internet and video technology. It is clear that such technology has a significant role, which can be expected to grow in the coming years. However, in its present state, it has limitations and there are real concerns amongst solicitors as to whether it will be possible to take sufficiently full instructions from the client or to read documents to which clients refer. This may lead to them giving inappropriate or even negligent advice. Consideration needs to be given to the extent to which the regulatory system or the requirements of insurers may inhibit the use of technology.

- 5.15 There are also extensive data security and client confidentiality issues that need to be resolved before too great a reliance is placed on IT and video-based solutions. There may well need to be significant investment in these if there is to be confidence in the system.

Value for money and security of the supplier base

- 5.16 By their nature, legal services need to be supplied by competent, regulated practitioners and, therefore, the cost of this is significant for most people and prohibitive for many. For regular business users, the market appears to work well. Moreover, insurance-based schemes and CFAs have provided considerable impetus for the development of a market, but it is clear that there are many types of legal services where those vehicles are not appropriate.

Quality

- 5.17 It cannot be stressed too highly that consumers who need legal advice and representation tend to need it because they are facing extreme problems in their lives: their liberty, family, employment, housing or future life may be at stake. In order to achieve justice, it is essential that consumers should have access to lawyers who are appropriately skilled and able to represent them properly. Equality of arms is a key principle. Litigation in the higher courts can only be carried out by regulated professionals (usually solicitors and barristers) who have undergone training and are subject to regulation of their conduct and competence. This does not apply to a number of other areas of legal work, particularly in tribunals.
- 5.18 A lawyer is an expensive resource. This is not something to be criticised. Lawyers are trained expert professionals and, in order to maintain quality, an appropriate level of reward is essential. Some of the tasks that fall within the context of legal advice, assistance and representation, however, may not need an experienced solicitor to perform them. Most private practice firms employ a mix of senior and junior lawyers, trainees and paralegals. Particularly in the social welfare law fields, non-solicitor advice agencies also provide advice.
- 5.19 The current approach to remuneration does little to distinguish between work that needs a senior lawyer and work that can be delegated to more junior and less qualified staff. More significantly for the long-term health of the system, it comprehensively fails to ensure that payment levels are appropriate for those parts of legal advice and assistance that require a greater level of expertise.

- 5.20 Legal aid services are currently subject to a range of measures to assure their quality. Most services are delivered through individuals or entities that are subject to regulation. There is a duty to comply with a management standard that ensures mechanisms are in place that will provide the organisational structure within which a quality service will be provided. There are requirements for supervisors of work carried out under the legal aid system to have a minimum level of experience, and many of them also require external accreditation. The LSC also uses peer review in an attempt directly to assess the quality of work done by providers. All of these provide significant burdens on the profession and many question whether the rewards justify this level of assurance. Further work is also being done to improve quality assurance of advocacy.
- 5.21 It is here that significant problems arise over legal aid and the way in which it works for those solicitors who still undertake this work. The fees available for the work have barely increased in the last 10 years²⁹ and practitioners are finding it difficult to maintain levels of service. Many have dropped out of the market and find the processes associated with quality assurance expensive and bureaucratic. There is also a basic question about the level of quality that the LSC can expect from the market, given the rates that it is paying. Ultimately, if solicitors find it impossible to manage the tension between their duties together with the quality requirements imposed by the LSC and making a reasonable profit on the work, then more will drop out of the market. If that happens, there needs to be a substantial debate on exactly what level of quality the state should provide to those who cannot afford legal advice. In the Law Society's view, it cannot be right for such people to have a less competent or regulated service than could be afforded on the private market, but appropriate payment must follow.

C The models of delivery

- 5.22 The descriptions at Appendix 2 set out the main business models for delivering legal services. It is worth looking at the advantages and disadvantages of them here:

Private Practice

- 5.23 This is basic business model for providing the bulk of legal services. These firms have been set up through the investment of their partners to provide an expert service, competing with others in the market. The model has the following advantages:
- It can be very efficient at adapting services to meet the needs of the market and able to keep costs under control – it tends to be more cost-effective than most other models;

²⁹ For example the Legal Aid Handbook for 1998/9 shows the hourly rates for civil legal aid in the high court in 1998/99 for preparation and attendance in the high court was £79.50 in London. The LSC Manual updated regularly states the rate for 2009/10 for the same work is £79.50 per hour.

- The firm's reputation is important and there are strong commercial and competitive incentives to achieve a high standard of service and advice;
- To succeed, it has to be able to respond to the needs of the market.

5.24 It is also worth repeating the point that, historically, solicitors within this model have felt a strong ethical obligation to undertake legal aid work to the extent that there has frequently been a cross-subsidy within the firm for legally aided work. This subsidy takes a number of forms. In some cases, partners whose firms undertake legal aid work draw lower profits than they would if they undertook only private work. In others, the fees from privately paying clients cross-subsidise legal aid work, so that some legal aid firms charge private clients more than they might otherwise need to in order for their firm to continue providing legal aid services. The legal aid network is heavily dependent on an infrastructure that has been set up using private capital, but no longer provides the return on that capital that could reasonably be expected, if there is any return at all. The days have long gone since legal aid rates covered the full market cost of providing the service.³⁰

There are disadvantages with this model:

- It is undertaken by the private market and there is no obligation for a firm to undertake any particular area or piece of work – if work is not profitable for the firm then the firm will not undertake it and there is a danger that clients will be unable to access some legal services;
- Many smaller firms will be less able to deal with sudden changes in the market or the requirements set by changes in legal aid for contracts;
- Quality can vary between firms.

5.25 The Law Society believes that private practice firms have been effective vehicles for providing legal services but that for a variety of reasons the traditional model may find it increasingly difficult to operate. The recession has already subtly altered many firms' culture and approach to business, while the provisions of the Legal Services Act will force structural change upon firms. The evidence seems to show that private practice firms which can embrace risk and change can continue to be a useful method of servicing legal need. In addition, there will still be a place for small firms in meeting certain types of local or specialist legal need.

Public sector provision

5.26 The only model for this has been the Public Defender Service (PDS) pilots.

Advantages would seem to be:

³⁰ The Guardian newspaper reported on public sector pay on 17 November 2009 (sourced from ONS, ASHE and organisation annual reports) that a junior legal aid lawyer was paid £25,000.

- They can guarantee coverage for areas of work;
- It is easier to assure quality in an organisation where there is a single employer.

Disadvantages include:

- Cost – the pilots suggest that the costs of the PDS are higher than for private practice, possibly due to higher overheads and bureaucracy that seem to be associated with public sector organisations;
- Less flexibility – unlike private practice, there are fewer incentives for employees to work out of hours or gain a particular relationship with a client;
- A single service could not cope with the professional issues of conflicts of interest and confidentiality.

This is discussed further in Appendices 2 and 3.

The advice sector

- 5.27 Providers in the advice sector come in a variety of forms and are usually paid for by local authorities or charities. They tend to provide free advice and, occasionally, representation usually in discrete areas of law. Many have arrangements with solicitors to refer work on and many rely on volunteers to provide advice. Others employ solicitors and barristers.

Advantages include:

- Commitment and the charitable ethos;
- Significant expertise in their areas of work, which often include those not covered by solicitors;
- They provide free services to all.

Disadvantages can include:

- Reliance on funding from third parties which may fluctuate;
- They are often relatively small organisations which may not be able to meet the demands placed upon them;
- Quality may vary, particularly if there is strong reliance on volunteers;
- Limited range of services on offer in some cases.

Further discussion on this sector can be found in Appendix 2.

Community Legal Advice Centres and Community Legal Advice Networks

- 5.28 Community Legal Advice Centres (CLACs) are a relatively recent initiative from the LSC. They provide legal advice services on benefits and tax credits, debt, employment, housing, community care and family law. The Law Society believes CLACs and Community Legal Advice Networks (CLANs) may have a serious detrimental effect on existing legal provision in some geographical areas, and that before CLACs are commissioned, current supply should be carefully analysed so that it is not compromised. We understand the reasoning for the establishment of CLACs in areas of low legal advice provision, but these new organisations should be piloted for a fixed term of years. Any roll-out should then stop while a full, open and independent evaluation takes place.
- 5.29 The Law Society's concerns for clients' access to justice in areas where CLACs have been established are as follows:
- **Monopoly provision:** CLACs are designed by the LSC to be local monopolies for social welfare law services within their defined areas. Investment in existing supply, which has grown up over the years in tandem with local need, will disappear if not incorporated into the CLAC. Local ethnic and community groups may be denied the advice and support of those who understand background cultural issues. The ecology of provision may be destroyed.
 - **Lack of competition:** when the CLAC contract term ends, there will be no surviving local social welfare legal aid providers to tender for the next bid round. Should the CLAC collapse financially, there will be no existing local providers to take on the work.
 - **Restriction:** Those clients just outside catchment areas may be excluded from legal service provision. Telephone advice is not a substitute for face to face legal services for most categories of social welfare law, bearing in mind the needs of the vulnerable client base.
 - **Independence:** CLACs must prove they can act independently of the local authority which provides part of their funding.
 - **Conflict:** As there are no other providers in the area, any conflict of interest cases will have to go outside the area for legal advice provision. Telephone advice or time-consuming and expensive travel will lead to inequality of arms for one party.
 - **Cost:** The cost of commissioning the CLACs is significant and additional benefit will need to be shown to prove value for money.
 - **Long term planning for legal aid providers:** The fact that any firm can be given six months' notice because a CLAC is to be established in the area makes progressive business planning impossible and damages the viability of the firm.
- 5.30 In areas of adequate provision, the Law Society believes that the issues CLACs were designed to correct, such as lack of comprehensive advice, can be addressed by robust referral systems.

D Concerns about the present system

- 5.30 This mixture of delivery methods works effectively in a private market. It does not work adequately where the market is unable to provide services at a price that can be afforded by those who need them. There are the following problems:
- The private practice model works well and is capable of providing a competitive, geographically comprehensive service provided that there is the market or the necessary finance available to provide a reasonable return on the investment. As we discuss in the chapter on procurement, this is not the case at the moment;
 - There is insufficient money available to invest in new models of delivery which address these difficulties.
- 5.31 There is no consensus on what appropriate national coverage is, or the most appropriate ways of providing it.

E Other options

- 5.32 In our view, the option of some form of nationalised public legal services is wholly impractical. The fact that the PDS pilots have seen no development of those offices is significant. We believe that it is unlikely that the state could provide the services as efficiently as the private sector. There are, however, other ways of providing services which could be considered.
- 5.33 Triage is traditionally used in medicine and is the process by which individuals are assisted on the basis of the actual or perceived degree of need by assigning them to the most effective and efficient provider so as to ensure optimal care and the best chance of resolution. It is also a system of allocating scarce resources, providing the maximum resources to individuals of highest priority, and few or no resources to individuals of lowest priority. Calls have been heard for a similar system to be adopted in legal aid because the budget is clearly overwhelmed and the system is more and more unable to cope with the demand. A triage system that assists clients based on their individual requirements would help to ensure that those most in need would be seen first.
- 5.34 One country where a form of triage takes place is Holland. In 2004, Holland reformed its legal aid system which was a mixed model of private lawyers, publicly funded organisations, legal aid centres and student law centres, into a new service of legal services counters. Full details are set out at Appendix 3.

The legal services counters have two distinct functions:

- to provide readily available free help; and
- to tackle disputes and legal problems early on, in order to avoid escalation thereby minimising social costs.

5.35 The service is free to everyone and is not means tested. A client can receive unlimited free legal advice and assistance for up to an hour.

Services that are provided free of charge include:

- information;
- clarifying a problem and the client's legal position;
- simple advice and next steps;
- referral to a local lawyer who specialises in the relevant area of law, who is registered with the Legal Aid Board.

5.36 It is clear that this model meets a need by providing supervised initial advice on legal services and referral to other expert lawyers. However it is not clear how it would translate to a significantly larger jurisdiction.

5.37 There are potential problems with the triage proposal. The first is that those providing the triage need a strong level of expertise themselves to identify fully where the problems lie and the ability to refer to the appropriate place. That will be costly. Secondly, if the triage is not done appropriately, there will be delay, further cost and, potentially, injustice as the client has to be directed elsewhere in the system. It is difficult to see how such a system would necessarily improve on the existing system if it were properly funded. A form of triage currently takes place since practitioners will refer clients to others if they lack the expertise to deal with the matter themselves. Very substantial reform of the system would be needed, which would itself cost money and it is not clear that the benefits would outweigh the dangers of further disturbing the market.

The Bristol Law Shop model

5.38 In October 2009 the Bristol Law Shop won the Law Society's Excellence Awards in client care. The Law Shop offers a bundle of services through a shop-front provided by a solicitors' firm. These help with simple legal problems for clients who cannot either get public funding or afford the full cost of using a solicitor's services. Solicitor time spent on a case is minimised and the remuneration of the solicitors is determined by the market. The Law Shop, which has been operating for more than 13 years, also generates new revenue streams from sales of legal forms, books, kits and guides. It is notable, however, that this model has not found favour elsewhere and has not been replicated. It depends very much on the commitment of its founder. It is not clear how far it is a profitable model for the market.

The entry of large organisations into the market

- 5.39 There has been a move in recent years for the LSC and government to consider whether it is appropriate for them to seek to contract directly with a smaller number of larger organisations. This can take a number of forms. The most straightforward is an approach that involves contracting with larger solicitors firms.
- 5.40 There are a number of benefits from such an approach. The LSC may benefit from reduced administration costs. Larger firms may be better able to provide a more consistent service to clients, such as being able to guarantee 24 hour attendance at police stations, and being able to have specialist lawyers across a number of different fields all accessible to clients under one roof. They may also be able to deliver a more consistent, although not necessarily a higher, level of quality. For firms, there may be some economies of scale to be gained from dealing with a greater volume of work.
- 5.41 However, there are also significant drawbacks. A large part of the work undertaken under legal aid has to be delivered to clients where they live. Very often, they live in market towns or rural communities, where the volumes of work that would generate economies of scale do not exist, and where demand for all but the most common services is insufficient to maintain an expert base there. While telephone and video services have their place, in many cases there is no adequate substitute for having a lawyer there on the spot to advise the client.
- 5.42 This situation is exacerbated by the fact that in many fields of law, particularly but not only family and crime, there is a need for multiple providers in a given area to handle conflicts of interest and to ensure there is a degree of choice of solicitor, which is recognised as contributing to the maintenance of quality.
- 5.43 Moreover a disproportionately high number of Black and minority ethnic (BME) solicitors practice through small firms. There is a risk that a move in this direction would have a significant negative impact on services that have developed to serve the particular needs of communities whose cultural and religious backgrounds differ from the norms of white British society.
- 5.44 There is also a risk from the point of view of the purchaser that a move to a smaller number of larger suppliers will shift the balance of power in the relationship towards the suppliers. It may end up giving them a degree of monopoly power that could work against the interests of the taxpayer, both on price and quality.
- 5.45 The LSC's second step in the direction of larger suppliers has been to contract some specific services to large organisations, thus taking them away from their traditional providers. For example, telephone legal advice is provided by CDS Direct on minor criminal matters such as breach of bail and excess alcohol arrests. In immigration, only a small number of specialist contracts are left to deliver services within the fast track asylum scheme. In mental health, the LSC is proposing to contract with a small number of firms to provide legal services in the high security hospitals.

- 5.46 The LSC has also contracted – and has expressed its intention to increasingly contract – with large organisations to provide a comprehensive advice service by telephone (followed in some instances by specific detailed advice), via the Community Legal Service.
- 5.47 The LSC believes it can make savings by focusing all of the delivery of these particular types of service with a small number of organisations. However, in doing so, they remove this work from existing firms, thus militating against them being able to grow sufficiently to generate the economies of scale that would help them to thrive. For the reasons noted above, these types of service and types of contract cannot adequately replace the local face to face delivery of a significant volume of suppliers.

Alternative Business Structures

- 5.48 In the longer term, we are likely to see the advent of alternative business structures (ABS) into the market. The Legal Services Act 2007 allows for the licensing of ABS to provide legal services from October 2011 onwards. The aims of these provisions are to expand the type of business model that can be operated by law firms and to open up the legal services market to existing and new non-lawyer commercial enterprises.
- 5.49 This may include:
- law firms with non-lawyer managers;
 - law firms taken over by a non-lawyer enterprise;
 - floated law firms on the stock-exchange;
 - organisations such as supermarkets or insurance companies providing both legal and non legal services.
- 5.50 The question of access to justice and whether the creation of ABS would be detrimental was raised during the passage of the Legal Services Bill through Parliament. Whilst the Law Society does not contend that ABS will necessarily have a detrimental impact on overall access to justice within England and Wales, it does consider that there is a significant risk that they may have a detrimental impact in certain circumstances unless appropriate safeguards are introduced. In response to this concern Parliament introduced a provision in the Legal Services Act requiring that licensing rules 'should take account of the objective of improving access to justice'.³¹
- 5.51 There are two key concerns about the impact of new commercial entrants. The first is whether they will be able to provide services to the quality that solicitors can at the price that is demanded. There are a number of requirements placed upon solicitors both through regulation and through contractual arrangements with the LSC. These impose burdens on firms which inevitably add to their costs. It would be possible for solicitors to compete and provide services at a lower cost if these requirements were changed. What would be unacceptable would be for differential standards to be permitted.

³¹ Legal Services Act 2007, Part 5, 83 (5)(b)

5.52 Secondly there is a danger that new entrants to the legal market cherry-pick the more lucrative areas of law. This could undermine the financial viability of traditional firms that continue to deliver the full range of services, particularly those which need to be tailored to the client. This would not be an issue if the areas of law covered by legal aid were, in fact, profitable in their own right. However, as mentioned elsewhere in this review, the effects of increased complexity in the law, the ongoing burden of LSC bureaucracy, the continual escalating general practice and business costs and many years without increase in payment rates have made legal aid firms, at best, marginally profitable.

Questions

1. Do you agree with our suggested criteria for successful delivery of legal services?
2. Do you agree that unregulated advisers should be regulated?
3. Is it appropriate that publicly funded advice given by non-lawyers should be supervised by lawyers?
4. How far can new technology be used in delivering legal services without compromising confidentiality or the client/adviser relationship?
5. Do you agree with our assessment of the advantages and disadvantages of the existing business models?
6. Are there other models that should be considered?
7. Do you agree with our assessment that legally aided work should be provided by the private sector?
8. Are there ways in which a 'triage' system could be made to work effectively and at low cost?
9. Do the Dutch or the Law Shop models provide alternative systems which could be used in England and Wales? If so, how?
10. Do you agree with our assessment about the issues surrounding contracts with large firms?
11. Are there ways in which ABS could provide improved publicly funded services?

Chapter 6

6. Procurement of publicly funded services

A Introduction

6.1 The principal matters that we wish to discuss in this chapter are closely linked to the issues discussed in the chapter on delivery and inevitably concentrate on the work of the LSC. They are:

- The way in which the rates of payment for suppliers are set;
- The way in which the contracts are settled and the problems these cause.

6.2 We do not propose to go into the minutiae of the procurement process though, as we have noted, we believe that there have been significant problems with this.

6.3 The Law Society considers that any procurement process for publicly funded legal aid services must:

- Be fair and transparent;
- Provide for appropriate remuneration for providers in a way that is consistent with obtaining good value for money;
- Provide contracts which enable the market to thrive and plan;
- Avoid bureaucratic and unnecessary burdens on suppliers.

B The present position

6.4 At present, procurement is undertaken primarily by the LSC. It is the LSC that decide how to divide the country into procurement areas, how many legal help 'matter starts' to purchase in each field of law per procurement area, the contract terms for organisations wishing to provide legal aid services and the standards of service that must be met. The LSC is also responsible for making payments for work done, including the necessary associated auditing work.

6.5 The LSC procures services by forming contracts with law firms and advice agencies. In the CDS, any organisation that meets the criteria set by the LSC is entitled, as of right, to a contract which permits it to undertake as much or as little criminal defence work as it wishes at prices set by the government. Within the Community Legal Service, contracts are made that permit organisations to undertake a set amount of

work at the legal help level in specified categories of law. The contracts also permit them to undertake an unlimited amount of work under public funding certificates³².

- 6.6 However, the budget is fixed by the MoJ which sets priorities for the fields of law in which services should be provided. The MoJ sets the rates of payment, although the LSC, subject to ministerial approval, devises the fee schemes. The MoJ can make changes to scope and eligibility. The MoJ decides in which parts of the scheme it wishes to make savings and issues consultation papers accordingly.³³
- 6.7 The MoJ claims to be entitled to implement significant changes during the life of contracts let by the LSC, with no negotiation and no compensation paid to contract holders who are adversely affected.
- 6.8 The LSC has recently undertaken a number of joint procurement ventures with local authorities for CLACs and CLANs. These ventures entail extensive discussions between the LSC and local authorities on what services should be provided in the local authority area, who should pay for which services, and where in the area they should be delivered. Specifications are drawn up, and tenders invited to provide the services specified. Because of the different requirements of different local authorities, there are no common sets of terms for these tenders. Each is tailored to the demands of the local authority and the needs of the area. Research by the Legal Services Research Centre into this model of procurement is expected to be published early in 2010.
- 6.9 At present, all fees are set administratively by the LSC, often reflecting statutory instruments laid by the MoJ. There is therefore an uncomfortable mix of statutory and contractual arrangements. Some parts of the legal aid scheme operate on a basis of hourly rates, subject to safeguards that all work carried out was 'necessarily and reasonably'. Some areas work on fixed fees and others work on standard or graduated fees.
- 6.10 Under legal aid, the payment system inevitably creates incentives for firms to take on particular cases and reject others. Under an hourly rate system, firms were reluctant to take on small matters that could be resolved in a single meeting. The bureaucracy associated with opening a new file outweighed the benefit of the fee, and using a 'matter start' on such a case prevented the firm from taking on a matter that might generate a higher fee. Conversely, under the fixed fee system, there is an incentive for firms to take on as many small cases as possible, as these generate the largest profit, and to reject cases and clients with complex needs.
- 6.11 The squeeze on rates over the past few years has led to many firms deciding not to offer legal aid services. Advice deserts have been created in certain fields of law in

³² The contracts permit the LSC to set limits for this work, but in practice the LSC has not done so to date.

³³ For example, the MoJ issued a consultation paper proposing cuts to payments for criminal defence practitioners and changes to the payments structures in a consultation paper titled 'Legal Aid: Funding Reforms', CP18/09, issued on 20 August 2009.

certain parts of the country.³⁴ Because of its financial constraints, the LSC is not able to offer increased rates to attract firms back into these areas.

- 6.12 The government has expressed a wish to move to a model of market cleared prices. Attempts have been made to find a viable model of procurement by market means since January 2005. The latest proposed model had been scheduled for a pilot in Avon and Somerset and Manchester starting in January 2010, but on 17 December 2009, the MoJ announced that following representations from the Law Society and affected practitioners, it had 'invited the Legal Services Commission not to proceed' with the pilot.³⁵ The MoJ is working towards issuing a high level statement on the future of crime tendering in March 2010.

C Current problems

Budgeting issues

- 6.13 We have referred in chapter 2 to the significant budgeting problems faced by the MoJ and LSC as a result of the tensions between demand and the resources available. Despite the fact that much of the pressure on the legal aid budget cannot be controlled by the MoJ or LSC, the Treasury appears unwilling to allow the MoJ to seek further funding in-year to address these pressures. This has a number of consequences that militate against good procurement:
- a) Faced with the need each year to keep within the current year's budget, the MoJ and LSC are forced to make ill-thought-through short term policy changes that are driven purely by the budget. Any attempt to look at long-term strategy is doomed to failure because any decision may have to be reversed only a few months later to deal with the next budgetary crisis. This is illustrated by the demise of various LSC pilot projects, including preferred supplier and family advice and information services, both of which appeared to deliver the policy and service benefits that were intended of them, but were deemed too expensive to proceed with, given the new constraints that existed at the end of the pilots.
 - b) The budgetary constraints oblige the LSC to set artificial limits on the number of clients that can be helped. These limits bear no relation either to the needs of clients or to what makes business sense for firms. The right of firms to market their services is constrained by detailed rules to avoid demand that the budget is unable to meet. In 2009, because demand for services had been much higher than expected, many firms had run out of contract capacity before December, and were told that they could not undertake any new work until April 2010. In many instances, the LSC required them to send clients to business competitors, where the LSC was prepared to fund the work the client needed.

³⁴ Social Welfare Law Coalition research – desert or oasis. Mapping Social Welfare Law Provision in England.

³⁵ Ministry of Justice Statement, 17 December 2009

- c) The LSC's need to keep within its annual cash limit has in recent years regularly led to a position in which the LSC had to disrupt payments in March to its suppliers in order to push some payments into the next financial year. This causes significant cashflow difficulties for providers, who cannot expect their landlords, their staff and their banks - or indeed the tax authorities - to agree to wait for payment. The destabilising effect of such short notice changes inhibits business planning and discourages firms from investing in legal aid services.³⁶
- d) In order to have the flexibility to make the necessary changes to address short term budgetary problems, the LSC has sought to include widely-drawn amendment clauses in its contracts with suppliers. However, such clauses are incompatible with procurement law.³⁷ This has led to the imposition of commercially prejudicial termination provisions.
- e) All of these issues tend to lead the MoJ and LSC to seek to address their budgetary problems by cutting remuneration for solicitors. No attempt is made to justify the fees, paid by reference to the cost of delivering the service, or any consideration about what is a reasonable income for a legal aid lawyer or adviser.³⁸ Moreover, these cuts are not accompanied by any consideration of reductions in the service to be required under the contract, or any freeing up of organisations to deliver services in the way they see fit. On the contrary, the service requirements continue to be increased and the contract for 2010 continues to specify in microscopic detail how services must be delivered and how firms and organisations must be run.

6.14 This is exacerbated by a legal aid contract which is not fit for purpose. It is a repeatedly amended version of the original contract drawn up ten years ago. Many terms in it are legacies of previous payment systems, responses to one-off problems from the distant past, or were developed as a move towards a policy goal since abandoned. It has significant flaws that go beyond the problem of the approach to procurement outlined in the preceding paragraphs.

6.15 As a result of all of these problems, the current system for the procurement of legal aid services does not enable organisations and firms to flourish as businesses. There is now significant independent evidence, particularly in the criminal defence field, that the rates paid for legal aid work are inadequate to ensure that clients can continue to receive a comprehensive and good quality service.³⁹ Many firms have given up legal aid work in recent years, and many more forecast that they will do so within the next five years.⁴⁰

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http://www.legalservices.gov.uk/civil/cls_news_11198.asp?page=1&dm_i=4P,3UVX,29GL0,BZMU,1

³⁷ *R (The Law Society) v Legal Services Commission* [2007] EWCA Civ 1264.

³⁸ The Public Defender Service was intended to be used as a benchmark for costs. See for example the evidence of David Lock, then parliamentary secretary to the Lord Chancellor's Department, to the Second Standing Committee on Delegated Legislation, 14 March 2001.

³⁹ See for example GfK Solicitors Survey, NAO, 27 November 2009; 'The impact on the supplier base of the reduction in criminal fees from April 2007', Otterburn Consulting, LSC, 21 November 2006.

⁴⁰ GfK Solicitors Survey, NAO, 27 November 2009; 'The impact on the supplier base of the reduction in criminal fees from April 2007', Otterburn Consulting, LSC, 21 November 2006.

Inputs, outputs and outcomes

- 6.16 The payment schemes for legal aid are currently focused primarily on inputs (hourly rates) and outputs (fixed, standard and graduated fees for cases). Both methods have their advantages and drawbacks, which are explored in Appendix 3. None of the current schemes attempt to apply an outcome based approach to payments.

Bureaucracy

- 6.17 Because of the way the system has developed over the years, the Legal Services Commission has to make decisions on individual cases, assess bills against the number of letters sent, verify the number of pages of prosecution evidence and record the number of six minute units of time spent on a case. Moreover, because of the constraints on the budget, the LSC has had to bring in more and more rules. Some of these rules set out who does or does not qualify for legal aid, whether through means testing, scope cuts or tightening of the merits test. Others specify what steps have to be completed before a client can move on to a different level of funding, and the lawyer can take further necessary steps on the case.
- 6.18 In order to try to reduce the number of people entitled to seek legal aid, the MoJ and LSC introduce ever more complex rules designed to narrow eligibility for legal aid. These are not easy for solicitors to understand, particularly where an individual is in receipt of a complex set of benefits. Considerable time is required of solicitors to determine whether or not an individual is entitled to legal aid and, on occasion, mistakes in good faith are made solely because of the complexity of the system. These rules also increase the LSC's auditing obligations to ensure that those who are not eligible for legal aid do not receive it.⁴¹ Thus such rules tend to increase the bureaucracy for organisations and the administrative costs of the LSC. It is an arguable point that for many of these rules the costs exceed the savings made from having the rule in the first place.

Market-based tendering

- 6.19 Both the LSC and the MoJ have expressed a desire to contract with suppliers of legal services using what they consider to be a market-based approach whereby firms bid for work, which is awarded to the lowest bidder. Such an approach was considered in depth by Lord Carter of Coles, who broadly supported market tendering in principle, and discussed some of the conditions the government would have to ensure if it was to work. His recommendations included that the environment in which the work was conducted would have to remain stable, that firms would need increased volume as a trade-off for lower prices and that subsequent increases in volume would have to be fully funded. This report was the impetus behind the LSC's recent endeavours to introduce best value tendering (BVT) for the provision of criminal legal aid services. However, the proposals failed to establish the conditions Lord Carter had

⁴¹ Otherwise, the LSC will have its accounts qualified by the National Audit Office, as happened in 2009. 'C&AG Report on Accounts: Community Legal Service Fund and Criminal Defence Service accounts 2008-09', NAO, 29 October 2009.

specified as necessary for tendering to work. Many practitioners remain sceptical as to whether those conditions can ever be established, particularly in the context of a fixed budget but open-ended demand.

- 6.20 The BVT concept was, in the opinion of the Law Society, fundamentally flawed from the outset. The model seemed more suited to the provision of utilities where a calculable market could be identified from a homogenous product. The LSC's BVT model for the provision of services could not guarantee the level of supply or need. Further, under the proposed BVT scheme there was great uncertainty as to the price that would have been paid for other criminal legal aid services (such as for Crown Court work). This lack of certainty would have made it impossible for any firm bids to be submitted. As proposed, there appeared to be no quality assessment beyond a very low threshold.
- 6.21 The Law Society welcomes the LSC's withdrawal of their BVT proposals. However there is concern that such a scheme was allowed to progress to the advanced stage it did. The existing firms in the proposed pilot areas have, in effect, been in limbo for many months. They have been unable to make everyday business decisions such as the renewal of leases the employment of staff or even the ordering of stationery.
- 6.22 While of course government should seek to get the best value for money from its suppliers, two key points need to be remembered. First, value for money must be assessed over time. It does not just mean achieving the lowest price today. Secondly, value for money necessarily includes some assessment of quality. Both of these appear to be absent from the proposals. Indeed, in the case of legal services, the pursuit of a market-based system is surprising, bearing in mind that (i) legal firms already, in effect, compete against each other – those firms that are more available, more adaptable and provide better quality services will attract more work; and (ii) the LSC is already well aware of the cost of providing criminal legal aid services having undertaken a benchmarking pilot with its Public Defender Service. Quite simply, if the price of providing a service of appropriate quality is already known then it could be argued that it would be unwise to allow providers to contract at anything under that threshold.

D Future options

- 6.23 Three possible options of addressing some of these problems are: an independent body determining rates; redrafting the contract, and clients applying direct to legal aid authorities for funding.

An independent body determining rates

- 6.24 As has been made clear, there is no consensus on an appropriate market rate for lawyers and advisers. One way of addressing the problem of the LSC's need to keep within budget and its ability to cut rates of remuneration in order to do so would be to have a separate body determining rates. Many other public servants benefit from a pay review body, including the NHS staff, the armed forces and prison service staff.

- 6.25 The commissioning organisation's role would then be to procure such services as it could at the rates set by this body. Of course, the key difference for legal aid lawyers is that they are not directly employed by the state. However, there is plenty of data available from which a formula could be constructed to determine appropriate rates. If such a body were to be set up, there is no reason why its remit should be limited to legal aid lawyers. It could easily be extended to all other lawyers who are paid for at public expense.

Redrafting the contract

- 6.26 In 2008, the Law Society proposed to the LSC that the contract for 2010 should be drafted from scratch, starting from basic commercial principles. This proposal was rejected in favour of amending the current contract yet again. A discussion from first principles would enable all parties to identify the necessary rules to focus legal aid on the right cases; what rules and powers the procurer reasonably needs to ensure proper accountability of public money; and what could be jettisoned as unnecessary bureaucracy. The discussion could include debate on the relative merits of paying for inputs, outputs and outcomes. As part of this debate, there would be scope for discussion as to where the balance lies between what the procurer needs to govern the system as a whole, and to what extent the procurer needs, in discharging that responsibility, to take decisions on individual cases.
- 6.27 This approach would also open up a discussion about the business needs of organisations. What length of contract is required and what would be the appropriate limits of any termination rights on either side? How should amendments during the life of the contract be controlled? What guarantees would organisations need and could government give as to volume and price?

Clients applying direct to legal aid authorities for funding

- 6.28 In paragraph 6.13 (b), we touched on some of the problems faced by businesses because the LSC allocates contract capacity to firms. In some other jurisdictions, the client deals direct with the legal aid authorities in order to obtain funding for their case. Once successful, the client can then approach any firm willing to work on the terms and conditions set for legal aid. This could address two anomalies in the current situation. Firms would no longer be required to send clients to their competitors even when they were willing to act; and clients would no longer face the obstacle of trying to find out where the available contract capacity could be found - something even the LSC itself cannot tell accurately and contemporaneously. Moreover, firms may find it beneficial to know that all clients who approach them have been pre-confirmed as eligible for legal aid. On the other hand, this would entail the setting up of a new mechanism to assist clients in making their application. There would also be concerns about a decision being made on the merits of funding a case before the merits have been properly considered by a suitably qualified individual.

Contract volumes

- 6.29 There are a range of different pressures that pull in different directions on the question of contract volumes.
- 6.30 Many organisations argue that, particularly in the light of recent cuts, the only commercially viable way forward is to give them contracts that guarantee them a minimum volume of work.
- 6.31 However, the nature of legal aid is such that much of the service has to be delivered where the clients, the courts and the police stations are. In many market towns and rural areas across the country, the volumes are not there to deliver the commercial benefits. The position is exacerbated by the need to ensure a sufficient number of separate organisations to handle conflicts of interest and to allow for some degree of client choice.
- 6.32 Procurement approaches could range from an 'open' approach of setting minimum standards and allowing any organisation that meets those standards to undertake legal aid work, through to allocating only a limited number of contracts, or, as in the 2010 general civil tendering round, holding a tender for volumes of work, and letting however many contracts are required to deliver that volume.
- 6.33 Each of these approaches has its benefits and disadvantages. An open approach is the simplest from a procurement law perspective. However, it does not give any organisation any guarantee of volume, and thus fails to deliver the economies of scale that some organisations perceive that they need. A drawback from the government's perspective is that it does not allow the government to limit the volumes of work undertaken. This exposes them to a budgetary risk. However, it may be a risk that can be taken if the government has sufficient other controls in place to manage the budget. These could be around scope, eligibility and fee levels. The approach suggested above to control volumes by requiring clients to apply to the legal aid authorities direct for funding may be another possible alternative to control volumes at the organisation's level.
- 6.34 The approach of allocating a limited number of contracts would give successful organisations a greater volume of the available work. This may, at least in the short term, enhance the commercial viability of the successful organisations. It also has the potential to deliver greater and more consistent levels of client service and continuity. However, it is not without its risks and difficulties.
- 6.35 There would be many questions to address, such as the extent to which clients would be required to instruct particular firms, as has happened in the civil field as firms have run out of 'matter starts'. Would firms be guaranteed a particular volume, or would they still be competing unconstrained against other successful firms? Would any competition be on price, on quality, on service levels, or on some combination of these criteria? How would police station slots be allocated? Would clients still be entitled to instruct their own solicitor from the police station?
- 6.36 This approach gives rise to major practical and legal procurement problems. It is impossible to ignore the fact that the LSC has been trying to find a model for price competitive tendering for over five years, but has not yet been able to devise a model that can work without significant adverse consequences. Serious difficulties arise because of the complexity and variety of the services to be delivered, the constant changes to the law and the system, as well as the chronic uncertainties about the volume of work that will be required. Quality is difficult to measure and monitor. Because there is no other market than legal aid for much of this work, it is almost impossible to ensure a competitive second round of bidding under any scheme that is

devised. There is also a risk of loss of important specialist supply to particular communities or for particular types of case.

- 6.37 It is almost certain that different approaches will be needed in different parts of the country. What works in an urban area may well be wholly unsuitable for a rural environment. A strategy needs to be developed that will lead to the emergence of commercially viable services, with legal advisers able to provide their expertise where it is needed, across a range of very different market environments.

Questions

1. How can the rules be simplified in a way that will still ensure legal aid is focussed on the right cases?
2. Should payment be for inputs, outputs or outcomes? How do the arguments vary in different fields of law or different types of case?
3. The LSC is overseeing a £2 billion service, made up of over 2 million separate acts of assistance. What decisions on individual acts of assistance should the LSC take, and what should be left to the discretion of the adviser?
4. What terms do organisations need by way of length of contract, amendment provisions and price in order to be able to operate effectively in business terms?
5. Would you support the development of a pay review body to ensure fair pay for legal aid work?
6. What are the pros and cons of a system under which clients apply direct to the legal aid authority for funding for their case?
7. What can be done to mitigate the possible disadvantages of this approach?
8. What advantages and disadvantages do you see from a system in which any firm that met basic standards was permitted to provide civil legal aid services? Would you prefer a system that issued a limited number of contracts? If so, on what basis should the numbers be limited?

Chapter 7

This report is an interim report. We very much seek your views and welcome your feedback on the questions and issues raised herein. Please respond either by post to:

Access to Justice Review
The Law Society
113 Chancery Lane
London WC2A 1PL

DX 56 Lon/Chancery Ln

or by email to: consultationresponse@lawsociety.org.uk

or via our questionnaire which can be accessed through:

www.lawsociety.org.uk/accesstojustice

We list the questions raised within below. Please ensure we receive responses by **30 June 2010**.

7. Questions

1. Do you agree with our definition of the main characteristics of access to justice?
2. Is our assessment of the costs drivers complete? Are there other drivers?
3. Are our proposals for improved impact assessment process practical? Will they address the concerns?
4. Do you agree that there should be some form of Access to Justice test as part of the legislative process? If so, what form should such a test take?
5. Given the government's announcement that it intends to convert the LSC into an Executive Agency of the Ministry of Justice, how can an independent assessment of cases and funding mechanisms can be assured?
6. Do you agree with our assessment of the problems? Are there others that we have missed?
7. Are there other ways of amending the provisions governing eligibility and scope to enable a more sophisticated approach to funding decisions in legally aided cases?
8. Do you agree that contact cases should not automatically be granted legal aid but other options explored instead?
9. Should legal aid continue to be offered for the whole range of work as at present, or should some areas of work be removed from scope, if so which and why?
10. Are there other ways in which the eligibility rules could be amended to produce savings or a more targeted approach?
11. What are the advantages and disadvantages of a loan scheme to fund actions?

12. To what extent should litigants be required to pay towards their legal costs?
13. Would a legal aid levy be practical?
14. Do you consider that the Jackson report and other issues justify looking again at a CLAF? What issues should be explored?
15. What would the effects be of imposing greater requirements on BTE legal expenses insurance? Is it practical to extend it?
16. What would be required of insurers to provide appropriate protection for litigants?
17. Should there be tax incentives to encourage people to take out legal expenses insurance?
18. Do you agree that it is likely to be impractical for legal expenses insurance to be compulsory and to form the basis of a legal aid system?
19. Do you agree that it will be impractical to fund a legal aid system through interest on client accounts?
20. Should prosecutors and other authorities account for the legal aid used for their actions? What would the impacts be?
21. Are there other ways in which those who cause people to go to court can be deterred from causing costs to the legal aid fund?
22. Do you agree with our suggested criteria for successful delivery of legal services?
23. Do you agree that unregulated advisers should be regulated?
24. Is it appropriate that publicly funded advice given by non-lawyers should be supervised by lawyers?
25. How far can new technology be used in delivering legal services without compromising confidentiality or the client/adviser relationship?
26. Do you agree with our assessment of the advantages and disadvantages of the existing business models?
27. Are there other models that should be considered?
28. Do you agree with our assessment that legally aided work should be provided by the private sector?
29. Are there ways in which a 'triage' system could be made to work effectively and at low cost?
30. Do you agree with our assessment about the issues surrounding contracts with large firms?
31. Do the Dutch or the Law Shop models provide alternative systems which could be used in England and Wales? If so, how?
32. Are there ways in which ABS could provide improved publicly funded services?
33. Would you support the development of a pay review body to ensure fair pay for legal aid work?
34. How can the rules be simplified in a way that will still ensure legal aid is focussed on the right cases?
35. Should payment be for inputs, outputs or outcomes? How do the arguments vary in different fields of law or different types of case?

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- 37.** What terms do organisations need by way of length of contract, amendment provisions and price in order to be able to operate effectively in business terms?
- 38.** What are the pros and cons of a system under which clients apply direct to the legal aid authority for funding for their case?
- 39.** What can be done to mitigate the possible disadvantages of this approach?
- 40.** What advantages and disadvantages do you see from a system in which any firm that met basic standards was permitted to provide civil legal aid services? Would you prefer a system that issued a limited number of contracts? If so, on what basis should the numbers be limited?

Appendix 1

The report could not have been written without significant help and thought from a number of people whose names are listed below. The Law Society recognises the time and effort taken by key individuals in putting together this Review and wishes to thank all those involved for their tremendous effort. We are grateful to them for their support.

The ideas in this paper, however, will not necessarily find favour with all of them and this should not be taken as representing their views.

Patrick	Allen	AJC Procurement Group, Hodge Jones & Allen
Naomi	Angell	AJC Funding Group, Osbornes
Nick	Aspley	AJC Procurement Group, Marchant Solicitors
Richard	Atkinson	AJC Delivery Group, Robin Murray & Co
Jenny	Beck	Member of Access to Justice Committee, T V Edwards
Julie	Bishop	AJC Delivery Group, Law Centres UK
Peter	Browne	The Bristol Law Shop
David	Caleb	Member of Access to Justice Committee, Sheratte Caleb & Co
Andrew	Caplen	Council Member, Chair of Access to Justice Committee, Head of Access to Justice Review, Abels
Sarah	Chandler	AJC Funding and Delivery Groups, The College of Law
Shankari	Chandran	Formerly Allen & Overy
Lina	Chauhan	Vickers & Co
Ellie	Chapman	AJC Delivery Group, Anthony Gold
Chris	Clark	Council Member and Member of Access to Justice Committee, Chris Clark Solicitors and Estate Agents
Christopher	Cole	Member of Access to Justice Committee, Cole & Yousaf
Stuart	Collingham	AJC Procurement Group, McKinnells
Russell	Conway	Member of Access to Justice Committee, Chair AJC Delivery Group, Oliver Fisher
Sally	Denton	AJC Delivery Group, Nottingham Law Centre Ltd
Bob	Dynowski	Steel and Shamash
Robert	Drepaul	Vickers
Tom	Dunn	Clifford Chance LLP
Emma	Edhem	Turkish British Lawyers
Steven	Fogel	Decherts
		Freshfields Bruckhaus Deringer
Hazel	Genn	University College London
Adam	Griffith	Advice Services Alliance
Maria	Hamilton	Member of Access to Justice Committee, McMillen Hamilton McCarthy
Ole	Hansen	Member of Access to Justice Committee, Hansen Palomares
Norman	Hartnell	Devon Family Solutions
Wendy	Hewstone	Council Member, AJC Funding Group, Access

		Law LLP
Derek	Hill	Legal Services Commission
Susan	Hotchin	AJC Funding Group, Simpson Millar LLP
Steve	Hynes	Legal Action Group
Laura	Janes	Member of Access to Justice Committee, AJC Delivery Group
Phil	Jew	AJC Procurement Group, Advice UK
Ian	Kelcey	Council Member, Chair of Criminal Law Committee, AJC Procurement Group, Kelcey & Hall
Angus	King	AJC Procurement Group, Cambridge House Law Centre
Timothy	Lawrence	Immigration Law Practitioners' Group
Linda	Lee	Vice President of the Law Society, Chair of Legal Affairs and Policy Board
Ann	Lewis	Advice Services Alliance
Essi	Linstedt	Citizenship Foundation
Isabel	Lloyd-Jones	Member of Access to Justice Committee, AJC Delivery Group, Howells
Sara	Lomri	Member of Access to Justice Committee, AJC Delivery Group, Young Legal Aid Lawyers, Bindmans
Karen	MacKay	Resolution
Nicola	MacKintosh	Mackintosh Duncan
Sunita	Mason	Chair of Family Law Committee, Member of Access to Justice Committee
Joy	Merriam	McCormacks/Criminal Law Solicitors Association
Richard	Moorhead	Cardiff Law School
Roy	Morgan	Legal Aid Practitioners Group
Melissa	Morse	Ministry of Justice
Stephen	Pierce	Pierce Glynn Solicitors
Patrick	Reeve	Legal Services Commission
Helen	Rogers	Allen & Overy
James	Sandbach	Citizens Advice Bureau
Lucy	Scott-Moncrieff	Council Member and Member of Access to Justice Committee, Scott Moncrieff, Harbour & Sinclair
Matthew	Smerdon	Allen & Overy
Alison	Stanley	AJC Delivery Group
Carol	Storer	Member of Access to Justice Committee, Chair of AJC Funding Group, Legal Aid Practitioners' Group
Stefan	Vnuk	AJC Procurement Group, Fisher Meredith
Rodney	Warren	Council Member, Member of Access to Justice Committee, Chair AJC Procurement Group, Rodney Warren & Co
Steve	Wedd	AJC Funding Group
Jonathan	Wheeler	Association of Personal Injury Lawyers
Jenny	White	AJC Delivery Group, Fisher Meredith
Fraser	Whitehead	AJC Access to Justice Group, Russell, Jones & Walker
Lisa	Wintersteiger	Advice Services Alliance

Paul

Yates

Freshfields Bruckhaus Deringer

The Law Society also wishes to recognise the efforts of those individuals who have worked on this Review being, Mark Stobbs, Richard Miller, Andrew Caplen, Alessandra Williams, Nasrin Master, Ashmita Shah, Sharon Wallach and Sally Thomas.

Appendix 2

Current mechanisms and models delivering access to justice services

The private practice model

This is the model through which legal aid services have been primarily provided since the introduction of the scheme.

Facts and figures about private practice firms

The most up-to-date figures available show that in 2008, 74.1% of solicitors with a practising certificate were in private practice, a total of 83,329 individuals.⁴² The vast majority of law firms are relatively small with 85.9% of them in 2008 having four or fewer partners, while sole practices accounted for 44.2% of firms employing only 8.0% of all private practitioners.

The figures show that of the private practice offices, 10,899 were partnerships whereas only 2,138 were incorporated firms and 3,555 were defined as 'commerce and industry' firm offices. An increasing number of partnerships are converting to limited liability practice (LLP) status which has different accounting rules.

In 2008 the 1.9% of firms with 26 or more partners employed 30.8% of all principals and 41.3% of all solicitors in private practice. On average, the largest firms, with 81 or more partners, had 2.11 assistant/associate solicitors per partner compared with between 0.36 and 1.58 in the smaller and medium-sized firms.

Of the private practice firms, 42.5% were located in London and the South East in that period with just over one-quarter of private practice firms, 27.8%, located in London employing 43.7% of all private practitioners.

The billing system

There are two principal ways of billing for work: based on the time spent which, it is argued can provide an incentive for excessive hours to be worked; or the fixed fee which can provide an incentive for practitioners to accept simpler or shorter cases.

The question of profit

The use of the word 'profit' when considering the income of a traditional partnership is often misunderstood. Partners are *not* directors and therefore do not receive a salary, nor are profits distributed to shareholders. Rather, the profits *are* the salary of the partners: for example, in a four partner firm of solicitors which makes a profit of £50,000 in a particular year, each partner will receive a 'salary' of £12,500 for that year.

Regulation

⁴² Trends in the solicitors' profession, Law Society Annual Statistical Report 2008.

A solicitors' practice is comprehensively regulated by the Solicitors' Regulation Authority (SRA). Solicitors have to undergo a detailed, extensive period of training in order to practice. Only solicitors of a certain experience can become business owners and meet the required supervisory requirements. They must undergo continual professional development training on a regular basis to keep up-to-date with changes in the law and procedures. Each owner of the business has strict personal responsibility for everything done by the business, and is subject to severe personal penalties if they fail to discharge that responsibility.

Consumer safe-guards are paramount. Regulation from the SRA has to be in the public interest. Solicitors cannot operate without obtaining compulsory professional indemnity insurance, with a very high minimum requirement.

Finally, all solicitors pay into a fund that compensates clients in the event of loss caused by the dishonesty of a solicitor.

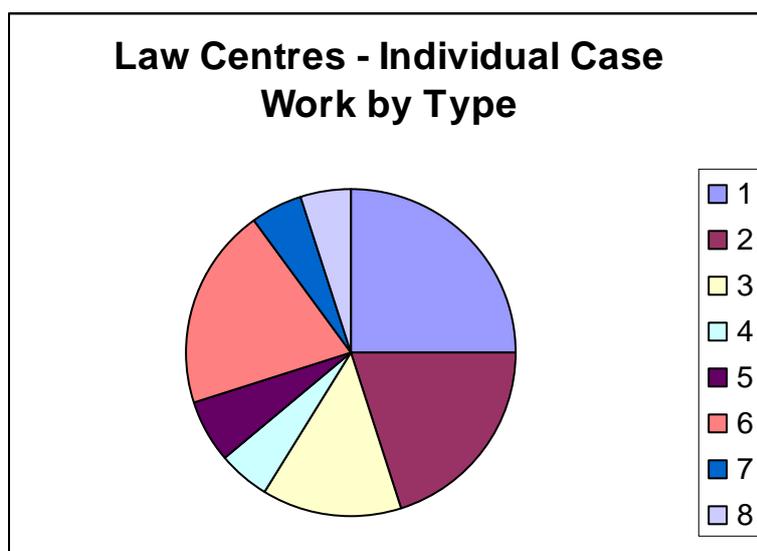
Not-for-profit organisations

Not-for-profit organisations (nfps) include a wide range of different bodies. The majority of nfp bodies providing legal advice are Law Centres or Citizens' Advice Bureaux, which deliver help across a wide range of categories of law, as well as initial advice and signposting. Some of these bodies also deliver specialist level advice and representation. In addition, there are a small number of national specialist networks, such as Shelter and Refugee and Migrant Justice. There are also some small local community groups that have developed in response to particular needs, or to serve particular minority ethnic community groups.

Law Centres

Law Centres provide their local communities with a range of legal services free of charge. There are 52 law centres in England handling individual casework, public legal education and developing legal policy and test cases.

The majority of Law Centres' time and resources is spent on individual casework. Social welfare law is particularly important. The types of case work that Law Centres undertake are:



1	Housing	at 25%
2	Immigration	at 20%
3	Welfare rights	at 14%
4	Education	at 5%
5	Debt	at 6%
6	Employment	at 20%
7	Community care	at 5%
8	Other	at 5%

Law Centres also provide legal educational help to empower individuals to tackle their own problems, as well as providing them with short term solutions. They may be staffed by solicitors and/or barristers (although not always) together with paralegals and assistants (generally) trained in the particular area of law in which they are providing advice.

Law Centres are funded in a number of ways. Some may have the benefit of a LSC contract, others may be dependant either wholly or partly on grant-funding (for example from local authorities) or by donations from businesses, trusts and individuals. They do not exist as commercial enterprises but are generally managed by a non-executive voluntary board. They may have charitable status.

It must be appreciated that although Law Centres are run as nfps they must still make a 'profit' from their activities. Just as the partners in a solicitors' practice must earn enough to pay their own salaries, a law centre must have sufficient funding to pay fixed costs (such as building rents and administrative staff) and to pay salaries.

Citizens Advice Bureaux

The Citizens' Advice website summarises the role of bureaux thus:

'Our Citizens Advice service helps people resolve their legal, money and other problems by providing free, independent and confidential advice, and by influencing policymakers.'

According to their website⁴³ there are 416 bureaux across the country. Each one is established as a separate independent registered charity. They helped 1.9 million with 6 million problems in 2008-09. They have 6,000 paid staff and 21,000 volunteers.

Many, but not all, bureaux hold an LSC contract to deliver specialist advice. The main areas in which they are active are debt, welfare benefits, employment and housing. Some bureaux also have specialists in other fields.

Bureaux also have other sources of funding of the same nature as Law Centres.

The current environment for not-for-profit-organisations

Many nfps are struggling financially. Those with LSC contracts have similar pressures to the solicitors' private practice model: increased administration/bureaucracy, low uneconomic payment rates, the uncertainty and inadequacy of the 'matter starts' system. They have also been affected by a lack of grant funding and donations caused by the economic downturn.

The decision by the LSC to focus with local authorities on community legal advice centres (CLACs) has also had a negative effect, removing possible funding opportunities from nfps.

⁴³ http://www.citizensadvice.org.uk/index/publications/introduction_citizens_advice.htm

Public sector provision

Community Legal Advice Centres

CLACs are a relatively recent initiative from the LSC. They provide legal advice services on benefits and tax credits, debt, employment, housing, community care and family law.

CLACs are open in Derby, Gateshead, Hull, Leicester, Portsmouth, Wakefield, East Riding and West Sussex with further centres planned for Manchester, Barking and Dagenham. They give free initial general legal advice to anyone. Free advice is available for specialist help to clients eligible for legal aid.

If the CLAC is unable to assist, staff will refer the visitor to other local sources of help (generally firms of private practice solicitors), arranging appointments where necessary. In these circumstances, the CLAC acts as a referral agency. Their ultimate intention is to provide a one-stop shop.

CLACs operate in a similar way to Law Centres with funding likely to be available from the LSC and local authorities but not from trusts, businesses or individuals.

CLACs appear to be a good way to set up services where 'advice deserts' have developed. However there has not yet been any proper evaluation of their likely and actual effectiveness. There is particular concern that CLACs are being set up or proposed in areas where there are already adequate private practice and nfp services available. As the LSC may award the CLAC the only or main contract to provide some advice services, the viability of the existing providers could well be threatened.

The Law Society's concerns for access to justice in areas where CLACs have been established are set out in chapter 5.

Community Legal Advice helpline

The LSC runs its own Community Legal Advice (CLA) helpline, available 9 am to 8 pm Monday to Friday and half of Saturday. The service is free to those who are financially eligible and is designed to handle everyday problems via the telephone such as debt, education, welfare benefits, tax credits, employment and housing problems.

Those who do not qualify for free advice are informed of other agencies or organisations that may be able to assist. For those eligible to use the service, the CLA adviser can write letters on their behalf and speak to third parties such as landlords or creditors. They can even prepare bundles of documents for the client to use within employment tribunal proceedings. There is no limit to how often a client can use this service.

The CLA helpline provides a web form by which the adviser will call the client back at a convenient time normally within 24 hours, or the client can get connected via a text. The CLA helpline also provides a language line for instant translation.

CLA advice is also available on digital interactive television for those with limited access to the internet. Using a TV remote control, a client can:

- search the directory for a legal adviser in his or her area;
- obtain information regarding debt, benefits and tax, employment and housing;

- order copies of information leaflets to be sent to his or her home.

CLA advice can also be accessed using a local government digital TV portal that covers the whole of the UK. It is available 24 hours a day free, via Sky, Virgin and Freeview boxes with a modem or broadband connection and on any mobile phone that can access the internet.

The Public Defender Service

The LSC has set up, as a pilot, a limited number of public defender practices to provide criminal defence services in exactly the same way as a traditional solicitors' practice holding an LSC criminal contract. Public defenders provide advice and assistance to those detained in police stations, and advice and representation if matters progress to charging and court proceedings.

Further discussion of the PDS can be found in Appendix 3.

Duty Solicitor Call Centre & Criminal Defence Service Direct

All requests for advice in the police station are now put through to the Duty Solicitor Call Centre (DSCC), even if the suspect has asked to speak to a named solicitor.

If the matter is very minor and there is to be no interview, then the suspect's only right is to telephone advice provided by Criminal Defence Service (CDS) Direct. The tender for this service was won by two firms of solicitors and by Bostalls, a non-solicitor organisation, which provides accredited representatives to attend at the police station as agents of instructed solicitors.

If there is to be an interview, or if the matter is more serious, then the case can be dealt with in one of two ways. If the suspect has asked for the duty solicitor, the DSCC will contact the duty solicitor and instruct them to attend. If the suspect has asked for a named solicitor, the named solicitor will be contacted. The instructed solicitor will then contact the police station and make arrangements to attend.

The system has problems because it adds another link in the chain before advice can be given, which can cause delay. Before the DSCC was introduced, the police contacted the solicitor direct when a named solicitor was instructed.

Most custody centres do not have sufficient staffing to provide a telephone answering service. Statistics have proved that – particularly at busy periods – telephone calls are frequently unanswered.⁴⁴ The solicitor cannot engage in other work (or even get back to sleep!) until the police station answer the telephone. More importantly there is a risk that detained individuals will proceed to interview without legal advice, which in itself may be a breach of their human rights and could result in miscarriages of justice.

⁴⁴ Figures produced by the LSC show that in the period January – March 2009, of the 30,669 calls received - 59.98% were answered and 40.02% were unanswered.

Appendix 3

Inputs, outputs and outcomes

This Appendix looks at the mechanisms for paying suppliers of legal advice. There are three principal options:

- Paying for inputs – for example through hourly rate payment mechanisms and salaried services;
- Payment for outputs - through the fixed or graduated fees for cases, or stages of cases, completed;
- Payment for outcomes - through service level agreements.

Each of these mechanisms has pros and cons.

Payment for inputs

Hourly rates

One of the most important benefits of an hourly rate system is its flexibility. Until fairly recently, most work conducted by solicitors under legal aid was paid for by a system of hourly rates. The main exception was magistrates' court work, which has been paid for under a standard fee system since the early 1990s.

In the past few years, the policy of the MoJ and LSC has been to move to systems of fixed and graduated fees.

The advantages of hourly rates are:

- It only pays for work that is necessarily and reasonably done – though clearly there need to be some safeguards;
- It provides a transparent system for all firms wishing to undertake the work;
- It recognises the actual work needed to be done on a case and is flexible enough to accommodate procedural and legal changes and regional variations that may affect the length of time spent on a case.

The disadvantages of hourly rates are:

- An incentive for firms to maximise the amount of time they spend, which may or may not bear any relation to what is required on the case in order to deliver a good outcome for the client.
- It is bureaucratic in that firms have to report the number of hours they spend and proper checks have to be introduced.
- The system does not encourage efficiency. If a firm develops a process that enables it to deal with a case more quickly, the only effect for the firm is that its fees are reduced.

Public Defender Services

The Public Defender Service (PDS) in England and Wales was launched in 2001, with the opening of public defender offices in Liverpool, Middlesbrough, Darlington and Swansea. Other offices were also opened in Birmingham, Cheltenham and Pontypridd. This was the first salaried criminal defence service in England and Wales.

When it was originally set up, the government argued that it could provide higher quality services than private practice for the same or lower cost. It also believed that it could exert pressure, through benchmarking, on private practice providers to reduce costs, and that it could provide the LSC with management information about the delivery of criminal defence services.

Another key purported benefit of the salaried model was that 'because salaried defenders would not be motivated by profit to maximise the price paid for their services, there would be a better alignment in objectives between the LSC and the PDS than would be possible with private practitioners'.⁴⁵ This would appear to contradict the rationale for the privatisation agenda and the use of private finance initiative contracts in many public arenas where the dominant argument is that the profit motive encourages greater efficiency. However, is this demonstrative of the difficulties in adequately specifying the nature, range and quality of services to be procured in order to procure legal aid through the market?

Research carried out by a team commissioned by the LSC (from 2002 – 2006) found that 'although the model adopted delivers quality defence services it does not achieve the efficiencies expected from independent suppliers.' Even after excluding start-up capital costs, in the first three years of operation, the PDS proved to be between 40% and 90% more expensive than private practice. There was some indication that the position was less bad in the final year of the pilot, but this was inconclusive.

There was perceived to be potential for a PDS in areas where the independent market could not provide sufficient cover at an efficient cost. The researchers concluded, however, that they could not recommend that the service be developed in the context of the current system of contracting, as either a large-scale provider of generalist criminal defence services or as a means of providing competition with, or cost benchmarking for private practice providers in this field on a nationwide basis.⁴⁶ The PDS scheme has not been rolled out.

The experience of the PDS raises some important questions. Was the cost differential due to private practice being greatly more efficient than the salaried service? Or did the costs of the PDS reflect the true price of delivering this service without cross-subsidy from other sources of income, and do the findings reinforce the argument that current legal aid rates are inadequate to cover the costs of this work?

There has been only one attempt to run a salaried service for civil legal aid in this country. In the August 2004 issue of its magazine *Focus*, the LSC announced its intention to set up a directly employed immigration and asylum legal service in Birmingham as an extension of the Birmingham PDS, to be operational by early 2005. The LSC accepted that the costs of this service were likely to be higher than private practice. However, it wanted to monitor costs drivers in immigration and asylum cases. The plan was to record time: each caseworker would be expected to undertake 1100 casework hours per annum. Casework time undertaken by administrative staff would also be monitored. The formula was to have a

⁴⁵ Evaluation of the Public Defender Service in England and Wales, Lee Bridges, Ed Cape, Paul Fenn, Anona Mitchell, Richard Moorhead and Avrom Sherr, 2007, page 3.

⁴⁶ *Ibid*, page 306

senior solicitor, solicitor, experienced caseworker plus trainee solicitor and trainee caseworker.

In fact, this service never opened, and it is difficult to find any public statement of the reasons for it not going ahead.

Payment for outputs

The payment scheme for legal help work changed from hourly rates to fixed fees in 2004. From 2007 fixed fees or graduated fees were introduced for most certificated work, with non family civil court cases and private law family litigation remaining under the hourly rate scheme. These schemes frequently work on a 'swings and roundabouts' basis where, in theory, a surplus of simple cases will be offset by the more complex ones. Some schemes involve an 'escape mechanism' whereby complex cases can be charged by an hourly rate.

The advantages of fixed fee schemes are:

- They arguably reward more efficient practitioners and more highly qualified lawyers who complete cases more quickly;
- They remove any incentive for lawyers to work up a case by putting in more hours than are reasonably needed without having to have a bureaucratic system in place for assessing the bills;
- They can potentially make billing simpler.

The disadvantages include:

- The scheme must be sufficiently sophisticated to reflect the work required on individual cases, on the rates being set at a high enough level and on there being adequate mechanisms to review the fees in the event of changes in the law or the procedures to be followed;
- There is a strong incentive to cut corners on cases and close them as quickly as possible rather than exploring options fully. While we do not claim that solicitors deliberately do a poor job, this may well have an impact on marginal decisions, to the detriment of clients;
- The schemes will need revision in the event of changes in law and procedure – they are not flexible;
- They encourage cherry-picking of the cases where there is likely to be most profit.
- There is an incentive to keep the rates low, with the effect that practitioners are unable to meet the costs of carrying out the work;
- Organisations need to be large and have a high volume of work in order for the fees to work satisfactorily;
- The 'swings and roundabouts' principle only works if there is a genuine mix of cases. This is not within the firms' control – for example: a housing practice in an area where the local authority neglects its housing stock is unlikely to have such a mix, because it will have a greater proportion of disrepair claims;
- The graduated fee schemes can be very complex to administer;
- A paper by the Council on Social Action, 'Time well spent',⁴⁷ suggests that fixed fees may inhibit the ability of advisers to develop a relationship with clients, and that this in turn may lead to poorer outcomes for them.

⁴⁷ Social Action Group –Time well spent. www.cabinetoffice.gov.uk/social_action.aspx

The existing escape mechanism has the effect that the lawyer is at risk to the tune of twice or three times the fixed fee on every case. In some care cases, the lawyer risks doing up to £6,000 worth of work unpaid. Moreover, it is administratively burdensome to claim a case as an exceptional fee. Claims are assessed individually and if costs are reduced this is held against the provider and may even lead to contract sanctions. Many providers feel that this is too great a risk to take. In 2008/9 there were 12,304 civil legal aid exceptional claims of which 4,304 were assessed and 3,244 criminal legal aid exceptional claims of which 1,781 were assessed.⁴⁸

Many suppliers argue that the envisaged swings and roundabouts did not materialise. In order to remain viable, many organisations subsidise legal aid services with funding from other areas – either from privately paid work, or, particularly among nfps, from other streams of income. The Law Centres Federation reported in 2009 that unrestricted reserves have dropped by 70% since fixed fees were introduced because of the build-up of work in progress, due to an inability to close cases quickly enough. Four law centres have already closed and more have suffered serious financial difficulties.

As a result, there is a strong incentive built into the scheme for the easier cases to be taken on while the more difficult ones are turned away. Of these more difficult cases a high proportion of clients come from disadvantaged backgrounds. Inevitably, when clients face barriers to communication, such as a cultural and language barriers, hearing impairment or mental health issues, it will take longer to get instructions from them and to give them advice, so their cases are likely to be at the more expensive end of the range.

Fixed fees have introduced a focus on new ‘matter starts’ or individual acts of assistance, as the principal unit of measurement, with the number of acts of assistance used as a way of measuring the impact of the changes. There is no measurement of the nature of the help given, how high a priority it might be, or how effective the help given was in resolving the client’s issues. It is all solely about the numbers.

Payment for outcomes

In developing Community Legal Advice Services, the LSC has taken to drawing up specifications setting out general aims and services to be provided. However, performance standards are expressed as hard outputs – numbers of clients, percentages from priority groups etc. Service areas such as work to prevent legal problems from arising are not linked to any output targets, let alone outcomes targets. These areas may well be neglected by service providers in their pursuance of hard output targets set for other areas of service.

Community Legal Advice Services are in their early days. Evaluation research regarding them carried out by the Legal Services Research Centre is expected within the next few months and will be useful in considering the benefits and disadvantages of this approach to procurement.

The problem with the focus of procurement on outputs is that the only measure is the direct results of the activity. Outputs generally only tell us that an activity has taken place rather than the difference this has made for clients.

Shorter waiting times tell us that a client has been seen more quickly but not whether his or her problem has been solved. If in the course of seeing the client quickly, appointments are more rushed, then this may not be a positive change. In the longer term this may be a more expensive and less effective service if the same client comes back with a related problem at a later stage.

⁴⁸ Figures provided by the LSC

An output based procurement process also focuses on service areas, for which an output measure can be easily attributed, hence the specification of numbers of clients advised and not quantity of preventative work in Community Legal Advice Services procurement. Output measures also focus on quantity rather than quality, apart from client satisfaction indicators. This can have a distorting effect on the service. Rather than buying a service that concentrates on the most effective service or intervention for the client (and wider community), the purchaser gets a service that seeks to hit crude numerical targets, perhaps at the expense of better outcomes.

Work being carried out by AdviceUK and New Economics Foundation on a sustainable commissioning model for advice services, demonstrates how an outcomes focus could be used that would lead to better value for money for the purchaser and better services for clients and local communities. Service outcomes could be specified, describing the effect of the outputs on the service users, other groups of people or the local area. For instance:

- to prevent social exclusion and legal problems arising ;
- clients being able to manage their finances better;
- increased income for clients;
- enhanced physical and mental well being for clients;
- increased access to skills and employment for priority groups.

Community outcomes can also be specified. An advice service has the potential to contribute to a wide range of social, economic and environmental objectives.

In fact, commissioning of advice services by local authorities is increasingly focused on priorities agreed by the local strategic partnership in the form of the local area agreement (LAA). The LAA sets out how priorities chosen from a range of 188 national indicators (NIs) will be achieved. NIs relate directly to the government's Public Service Agreement (PSA) targets. Although advice is mentioned specifically in only one of the NIs, it has a key role to play in achieving many of the outcomes specified. Work has been carried out by nfps advice networks under the Working Together for Advice Project, to identify clearly where advice can make a contribution. For instance the PSA 9 target is to halve the number of children in poverty by 2010-11, on the way towards eradicating child poverty by 2020. NI 116 targets the proportion of children in poverty and is measured by the proportion of children who live in families in receipt of out of work benefits and working families whose income is below 60% of the median income. Advice services can contribute to this NI in the following ways:

- welfare benefits advice – ensuring entitlement to tax credits and in work benefits maximises opportunities for sustainable employment;
- debt advice – resolution of debt problems and avoidance of recovery action leading to greater stabilisation of circumstances and options for clients, including employment and progression at work;
- housing advice – permanent accommodation and stability of tenure enhance life options including training and employment;
- employment advice – advice on rights at work, national minimum wage and contractual issues promotes quality employment which is more sustainable.

There are, however, real difficulties in working out how such outcomes can be applied to payments to a law firm providing legal advice. These targets may well be suitable for measuring the overall success of the system, but it is hard to see how the outcome of an individual client's case can be determined. Some problems are not readily soluble. In others a solution may have been found which may not have been the correct one. It is hard to see how these can be measured or how it is appropriate that individual law firms' performances and continuation of the contract should be associated with them.

The conclusions appear to be that payment mechanisms for publicly funded work should ensure that:

- There is appropriate recognition of work done;
- There are incentives for efficiency;
- There are incentives to ensure that the best outcomes for the client is achieved;
- Perverse incentives – especially to cherry pick cases should be avoided;
- They involve as little bureaucracy as is consistent with appropriate accountability.

Appendix 4

Alternative ways in which legal services could be delivered The reform of legal aid in Holland 2004 – 2009 ⁴⁹

Introduction

Prior to 2004, The Dutch legal aid system was a mixed model of private lawyers providing legal aid as well as public funded organisations, legal aid centres and student law centres attached to Universities. Trade unions and consumer organisations also delivered legal services through their legal insurance policies. In 2003, 19% of households had legal insurance; by 2006 this had increased to 28%.⁵⁰ Dutch legal expenses insurance offers an insured cover for legal disputes on issues covered by the Dutch legal aid system such as employment, social welfare, social security, housing law, consumer law, administrative law, immigration (for a family member) and adoption. It does not provide cover for advice in divorce cases, criminal cases and most asylum cases.

Brief outline of legal aid in the Netherlands

The Ministry of Justice finances the legal aid boards, although all clients have to make a contribution. Legal aid is administered under the supervision of the Ministry of Justice and is overseen by five regional legal aid boards who are responsible for organising legal aid, (including procurement), supervising the quality of the legal services, monitoring supply and demand, and carrying out research. The legal aid boards advise the Ministry of Justice and Parliament on matters within their concern.

The main providers of legal aid are private law firms and sole practitioners, in areas of law such as crime, family, employment, social welfare, social security, housing law, consumer law, administrative law, asylum and immigration. Lawyers must be registered at the legal aid boards and meet the quality requirements the boards have set.

A lawyer applies to handle a case under the legal aid framework at the legal aid board on behalf of his client. Based on a means and merits test, permission is granted by issuing a certificate which gives the lawyer permission to handle the case and determines the contribution the client has to pay.

The level of the contribution depends on the client's net income; the minimum contribution is € 98 and increases incrementally to a maximum contribution of €732. A partner's income is taken into account. If a person is in receipt of benefits, the minimum contribution is paid by the social security department.

In criminal cases legal aid is free of charge, where the defendant's liberty is at risk.

⁴⁹ Some of the information in this paper was prepared by the Director of the Legal Aid Board in Netherlands, for the 2nd European Forum on Access to Justice, held on February 24-26, 2005.

⁵⁰ Legal Aid in the Netherlands www.rvr.org

At the end of a case the lawyer bills the legal aid board using a certificate to declare the case. The legal aid boards do not pay an hourly rate but fixed fees. Different fixed fees apply to each specific type of cases. The fees are based on an extensive analysis of legal aid cases over a period of time (and are revisited annually). This corresponds to the average amount of time a lawyer spends on a case. When converted to an hourly basis the fee amounts to €110 an hour for an average case.⁵¹ Advance payment is possible for some cases. A small criminal case, for example, would require just under 7 hours of work and be paid at €700. A dismissal case is assessed as requiring 11 hours work and a divorce case is assessed as needing 10 hours work and is paid accordingly.⁵²

In 2004 there were 6,400 legal aid lawyers. Since the change in the system and the increase in pay, the number of legal aid lawyers has grown annually. In 2008 there were 7,154 registered legal aid lawyers⁵³ and 420,000 certificated legally aided cases.⁵⁴ On average a lawyer handles between 50 and 100 legal aid cases per annum although the lawyer cannot do more than 250 cases per year. For example, a divorce case sent to mediation would require either four or eight hours work and a mediator would be paid between €600 – 700.⁵⁵ Over 50% of divorce cases are mediated successfully.⁵⁶ Since March 2009 a couple with children cannot get a divorce without a child care plan in place.⁵⁷

In 2007 the legal aid budget was capped at €400 million,⁵⁸ however as the population of Holland is 16.5 million people, 40% would qualify for legal aid.⁵⁹

The reform

In 2003, Legal Advice Centres began to be replaced by Legal Services Counters. The first Legal Services Counter was opened in June 2003. By 2005, 30 Legal Services Counters had been opened employing 340 people. Each counter can be reached by public transport in one hour. The Legal Services Counters have two distinct functions (i) to provide readily available free help and (ii) to tackle disputes and legal problems early on in order to avoid escalation.

The Legal Services Counters resemble a shop from the outside, with a large open space as a waiting area inside and three counters. They have seating areas, leaflets and an in-house computer system for public use. In the back is a call-centre and rooms for private consulting. All calls come into one phone line and are picked up on a rota system between the call-centres across Holland. Clients who call in are referred to their local Legal Services Counter and an appointment is booked for them. The service is free to everyone and is not means tested. A client can receive up to one hour free legal advice and assistance. There is no

⁵¹ In 2005 the hourly rate was €99 it increases because it is index linked.

⁵² The Dutch Legal Aid Board operates a similar 3 x escape clause to the LSC, requiring lawyers and advisers to do 3 x the work to get a higher rate, any work in-between is not paid for.

⁵³ 45% of whom are women.

⁵⁴ Legal aid in the Netherlands www.rvr.org

⁵⁵ Mediators have to be registered with the Legal Aid Board and comply with quality standards. There are 455 mediators, 51% of these are also registered legal aid lawyers. Legal Aid in the Netherlands www.rvr.org

⁵⁶ There are 2,400 mediators employed – maximum contribution fee is €98.

⁵⁷ Figures provided by the Dutch Bar Association in person on a visit to Holland in November 2009.

⁵⁸ In 2008 the legal aid budget was €441 – expenditure per capita €27. Parliament plans to reduce this by €50 million per year to keep within budget.

⁵⁹ Individuals income which exceeds €33,600 (couple) or €23,800 (single) are not entitled to legal aid. Applicants capital such as savings, must not exceed €20,014. Figures provided by the Dutch Bar Association in person on a visit to Holland in November 2009.

limit on repeat calls.

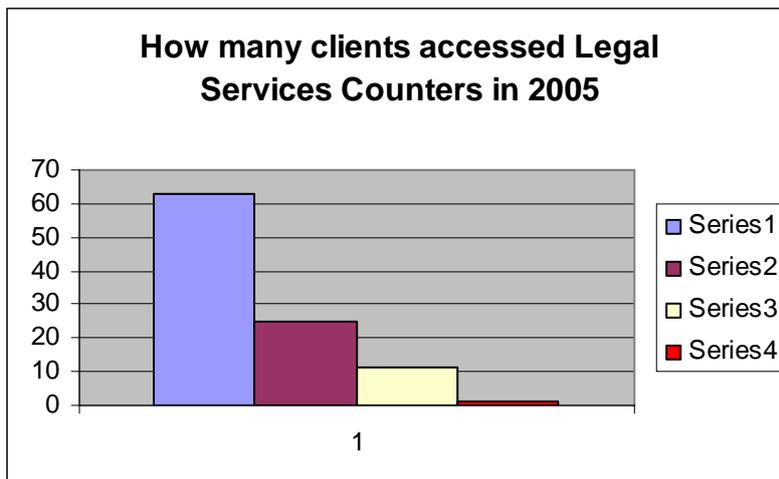
The general format of a centre is that it is staffed by 6 legal advisers (normally 1 lawyer and 5 paralegals)⁶⁰ and a receptionist.

The legal adviser is trained on a wide area of law and has a sophisticated computer system with all the latest information on all matters covered by the counter. A file is opened on line for each client who contacts the counters and this is available to any legal adviser who goes into the system.

Services provided free of charge include:

- Information;
- Clarifying a problem and stating one's legal position;
- Simple advice (next steps, for example, write a letter, a sample letter may be given);
- Referral to a local lawyer who specialises in the relevant area of law and is registered with the Legal Aid Board⁶¹

How the Legal Services Counters were accessed by the public in 2005:⁶²



1. By telephone - 63%
2. In person at the counter - 25%
3. By appointment in the consultation room - 11%
4. By email - 1%

Legal Services Counters are paid for by the Ministry of Justice at a cost of €22 million per

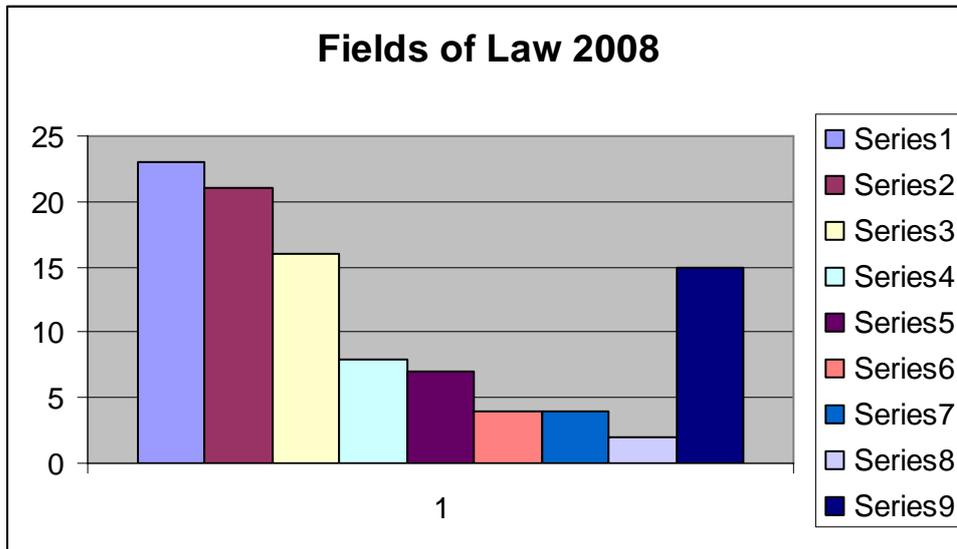
⁶⁰ Since the removal of extensive legal aid and representation, paralegals can be used. The higher education system has a judicial stream that qualifies students for this purpose. Large cities can have up to 10 staff.

⁶¹ The referring is done through a special electronic system for making appointments. The referrals are assigned to the nearest specialist lawyer to the client's home address. The system controls who gets the referral transparently. When a client is referred, the lawyers receives an electronic message with information about the client and his problem and if applicable the advice given. A simple legal problem is charged a standard 3 hour legal advice fee for which the client contributes €39 or €72 dependent on income. www.rvf.org

⁶² These figures are based on the results of the first two Legal Aid Counters opened after the first 6 months in operation.

annum. They are managed independently. The head office, in Utrecht, is responsible for the continuing development and implementation of quality control and education of the centres, the personnel and finances of the centres and the updating of the in-house computer and 'knowledge system' available to the legal advisers.⁶³ The head office employs about 25 people. The Legal Services Counters are fully subsidised by the Legal Aid Board which has authority to give instructions to the Legal Services Counters.⁶⁴

The areas of law covered by the Legal Services Counters:



1. Contract/consumer	23%
2. Labour/employment	21%
3. Family	16%
4. Social Security	8%
5. Housing	7%
6. Criminal	4%
7. Immigration	4%
8. Administrative	2%
9. Other civil cases	15%

Legal Services Counters client breakdown:

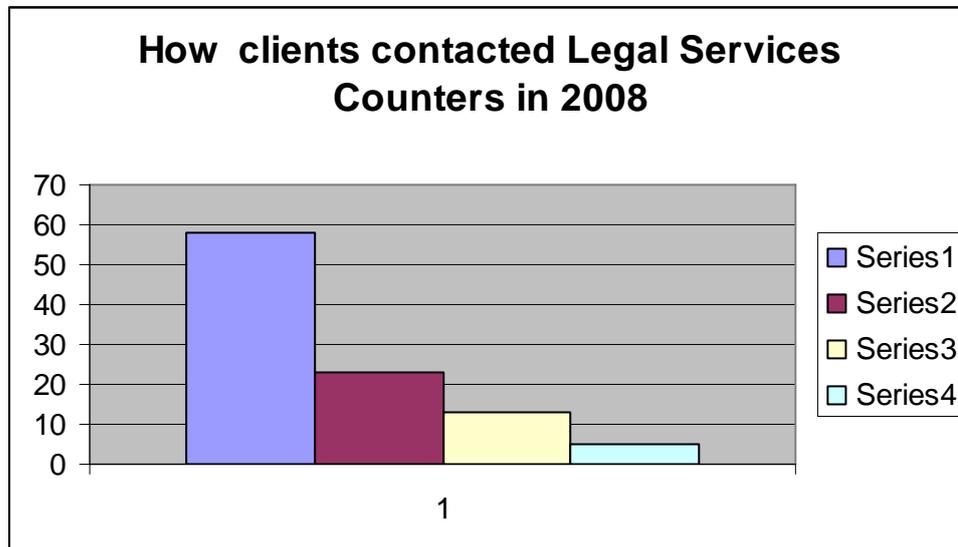
- Approximately 25% of users are immigrants
- 80% of users have a annual income of over € 21,000
- 51% of users are over 40 years old
- 65% of users finished secondary school⁶⁵

⁶³ The Legal Services Counters are closely monitored. Each counter delivers a monthly report which states how many clients were helped through which channels: telephone, email and counter; how much time is spent on each area of law and how many clients were referred to a lawyer. Client satisfaction is also measured. The receiving lawyers are also questioned about their experience: did the client who was referred arrive; is the client well informed about how the legal aid system works and the costs he can expect, and did the Legal Service Centre assess the case properly for referral.

⁶⁴ Since 2009, the Legal Aid Board consists of one central office in Amsterdam and five regional offices.

⁶⁵ 8% had primary schooling and 27% have higher educational training.

Customer surveys have consistently rated the counters as 'good' or 'very good' with an average score of 8.1. Legal aid lawyers are also surveyed and are rated as 'good' with the average score between 7.3 and 7.7.⁶⁶ In 2008, 644,653 people contacted the Legal Services Counters.⁶⁷



1. Telephone 58%⁶⁸
2. In person at the Counters 23%⁶⁹
3. Consultation hour 13%
4. Email & web 5%

It can be seen from the chart above that clients access to the Legal Services Counters has remained almost the same since 2005.⁷⁰

As spend on legal aid has been increasing annually the Dutch government have ordered a cost reduction of €50 million per annum in order to keep the spend at €400 million. It is not known what impact, if any, this will have on the Legal Services Counters.

⁶⁶ Information provided Legal Aid in the Netherlands www.rvr.org

⁶⁷ It is estimated this will grow to 750,000 by the end of 2009, the average annual growth has been consistently between 10 – 15%. Information provided in person by the Legal Service Counters Headquarters in Utrecht in November 2009.

⁶⁸ Telephone calls last on average 8 minutes. 97% of calls are answered within 20 seconds – this was evidenced on a visit to the legal service counters in November 2009.

⁶⁹ A client is given an appointment within 10 days, if the matter is urgent an appointment is arranged immediately.

⁷⁰ In 2005, 63% clients made contact by telephone, 25% made contact in person, 11% made contact by appointment and 1% made contact by email.