



The Law Society

## **Access to justice review**

Final Report

November 2010

*defending*  
**rights**

# ACCESS TO JUSTICE REVIEW

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## Foreword

The British legal system has always been the envy of the world. For centuries the UK has been admired the world over for our dedication to upholding the rule of law and our commitment to access to justice. Here at the Law Society we have been steadfast in our belief that one cannot exist without the other. We were committed to that principle over sixty years ago when we played a central role in helping to establish the legal aid system, and we remain committed to it today.

Over the past twenty years, legal aid has become just one of a number of ways by which people can secure access to justice. Insurance funding, conditional fee arrangements and third party funding have introduced new ways for citizens to enforce and defend their rights. All of these options have a role to play. The Government needs to facilitate such options, while ensuring appropriate protection for clients at all levels. We recognise that legal aid should be funding of the last resort, where no other funding is available. However, there are many situations where there is no alternative, and where if legal aid is not available, access to justice will cease to exist.

When we started this review the Law Society committed itself to working with the government and the legal profession to create a long-term sustainable future for access to justice provision in England and Wales. The desire to secure that has not changed, but the election of the Coalition Government in May and the recent Comprehensive Spending Review including the announcement of cuts to the legal aid budget mean that our work takes on a new urgency if we are to continue to protect some of the most vulnerable members of our society.

Even during the so-called good times, legal aid has been subject to substantial government cuts. The level of legal aid funding has been frozen since 2005, despite significant increases in the volume of work. Legal aid is already threadbare, the poor relation of other front line or more media friendly services.

In this report, we put forward the argument that reductions in the legal aid budget do not have to equate to cuts to the availability of legal aid for those who need it. Slashing the legal aid system is not an 'easy' or 'quick' win that some people might think that it is. Cutting the legal aid system, without ensuring that there are other means in place for people to get the expert help they need, is short sighted and a false economy, which is likely to end up costing the State more in the long term through evictions, family breakdown and long drawn out disputes, as well as through the additional costs to all other parts of the justice system of increased numbers of litigants in person.

We are realistic enough to know that the Government will have to make savings over the coming years so this report makes substantial recommendations for how this can be achieved. The keys are improving efficiency in the justice system, finding other sources of funding for cases, and reducing the number of cases for which legally aided advice is required. We also make proposals for greater involvement by solicitors in the commissioning of legal aid and improvements to the way in which the system is administered.

We have consulted widely with people working across the justice system to ensure that this review is as comprehensive, considered and constructive as possible and I hope that the government will be willing to engage with our findings.

If we work together, we can find ways of addressing the challenges the Ministry of Justice is facing, while still protecting some of the most vulnerable people in society. However, the Law Society will not stand back and see justice be eroded. We will continue to fight, as we have over the decades, to ensure that ordinary people can enforce and defend their rights.

Linda Lee  
President of the Law Society

## Acknowledgements

This 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.

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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, Simon Cliff, Stephen Ward. Nasrin Master, Ashmita Shah, Sharon Wallach and Sally Thomas.

## Chapter 1 - introduction

Any democratic, just society requires ways of resolving disputes between its members which are fair and respected. The legal system in England and Wales achieves that. What is more difficult, however, is to ensure that members of society have proper access to advice and representation before that system. Legal disputes are frequently complex and require expert advice and analysis and, can take time to resolve. This costs money and the costs of obtaining the necessary advice and representation will be out of the reach of most ordinary citizens. Thus, it is important, if justice is to be done, that there are ways of ensuring that people are able to have access to that advice and representation – in shorthand, access to justice.

In the last 60 years, a considerable proportion of such advice in contentious matters and where individuals cannot afford to pay privately has been funded by the state through legal aid. Under this system, the state pays lawyers to act on behalf of those eligible for the support. In recent years the number of people eligible for legal aid has declined, as have the types of actions for which it is available. Legal aid has been supplemented by conditional fee arrangements, legal expenses insurance and, more recently, third party funding, all of which have enabled individuals to seek advice and bring claims.

The recent Comprehensive Spending Review has announced that the expenditure on legal aid is to decline by 17% over the next four years – taking a total of £350m out of the system. Lord Justice Jackson's report has far-reaching recommendations which may well make it more difficult for people to bring claims and Lord Young's report on the compensation culture also has implications in this area. There is a significant danger that many people will be unable to access the advice and representation that they need to obtain justice as a result of these changes. This report seeks to address that.

The Law Society commenced work in 2009 on an Access to Justice Review to consider ways in which a sustainable system of providing such advice can be achieved. Earlier this year we published an interim report for consultation with the profession who did in the main endorse our approach and expressed interest in the further development of some of the proposals put forward.

With the election of the Coalition Government in May and the proposed swingeing cuts to public expenditure to which legal aid will not be immune, fresh thinking about sustainable legal aid and access to justice in general has become a task of great urgency. We hope this report will make a significant contribution to the debate.



## **The interim report**

The interim report argued that the current legal aid system is at breaking point and that fresh thinking is required in order to ensure adequate access to justice. It identified several ways to make current legal aid provision more effective and efficient, and ways to develop alternatives to legal aid, partly to ease the pressure on the legal aid system and partly to improve access to justice for clients of modest means who are not eligible for legal aid. The report considered a number of options such as:

- Repayable loans
- Flat rate contributions
- Contingency legal aid fund
- Greater use of legal expenses insurance
- Client account interest
- Polluter pays

As well as looking at alternative funding, the interim report also looked at existing service delivery and possible options for alternative service provision. It acknowledged that private practice is the predominant model for service with the not-for-profit sector such as Law Centres, Advice UK member agencies and Citizens Advice Bureaux providing a significant contribution. Public sector provision is minimal and is limited to a handful of Public Defender Service offices run by the LSC. The main concern about current provision is that the private sector model only works effectively where favourable market conditions exist. However the traditional high street legal aid firm is typically becoming increasingly starved of capital and unable to invest in new geographic areas or new types of service provision.

The interim report looked at an alternative service model based on a triage system, along similar lines to the Dutch Legal Services Counters that have been operating since 2003.

## **Responses to the interim report consultation**

We received a wide range of responses from private practice solicitors, not-for-profit service providers, professional representative bodies and campaigning groups. They were a mixture of detailed responses to the consultation paper, responses to an online questionnaire and responses received from attendees at a series of regional Access to Justice road-shows.

On the whole respondents were positive about the Law Society's review initiative and broadly supported our premise that the current system cannot continue indefinitely. There was also broad support for the description of the main characteristics of access to justice, although some NfP organisations thought that the link between access to justice and overcoming poverty, and the importance of public legal education should be given more prominence. There was wide support for the principle of 'polluter pays' but with some concerns about the practicalities and administrative costs of implementing it. Legal aid loans, flat rate levy, and diverting interest on client accounts to the legal aid fund were generally disliked although there was support for the latter from the NfP sector. Extension of private legal expenses insurance was seen as desirable for middle income earners but not as a viable substitute for legal aid. There was a mixed response to the Dutch triage model, with only a minority being overtly hostile to the idea. We are not making any specific recommendations regarding this model in this paper.

We are grateful to all the respondents for taking time to attend our roadshows, complete our questionnaires and submit detailed responses. We are encouraged that generally the profession appears to appreciate that the current system is unsustainable and that some degree of change is necessary. In this report we seek to outline possibilities for change that will preserve and enhance access to justice and place legal aid on a secure footing for the foreseeable future.

## Chapter 2 - the Government's role in access to justice

The Law Society believes that the government has a fundamental duty to ensure that all citizens can secure access to justice. This duty is met in part by managing the environment in which legal services are delivered to ensure that so far as is possible, the need for legal advice and representation, to enforce and defend rights, is met without recourse to taxpayers' money. But there will always be need that has to be met, and that cannot be met in any other way than through public funding. The second element to the government's duty, therefore, is to manage the procurement and delivery of services funded through legal aid as efficiently as possible. This will best be achieved by allowing the providers of services the freedom to be as efficient as possible.

### The issue

In the past, the choice facing a prospective client was between paying privately and using legal aid. In the last twenty years, many different options have arisen. These include conditional fee agreements, contingency fees, third party funding and insurance options. The Law Society believes that, subject to appropriate safeguards, all of these means of funding legal services have a valuable role to play. We expand further on this in Chapter 4.

The profession also has an important role in exploring new ways of delivering services that are more cost-effective, whoever is paying the bill. This could involve the standardisation of services where this can be done appropriately without compromising the effectiveness of the advice given. Services could be delivered on a "one to many" basis, such as through websites and webinars, rather than always face to face with the client. Telephone and video-linked services may have a part to play.

The market for legal services is changing rapidly. The legal profession faces competition from new providers of legal services under the Legal Services Act. The Internet has opened up new means of delivering legal advice and assistance to prospective clients. Solicitors who wish to remain in business will have to rise to these new challenges. However, their ability to do so will only be as good as the ability of other participants in the justice system to do so, and will also depend on the government providing an environment through the Legal Services Board and its management of legal aid that will enable and encourage innovation.

In the rest of this section, we explore two areas where Government has control over the legal aid system: scope and eligibility and the management of the system.

## Scope and eligibility

Scope and eligibility are the key issues that determine which legal services are available to whom under the legal aid system. When we talk about scope we are referring to the range of legal services available under the legal aid scheme. Eligibility refers to the client's financial eligibility for legal aid which is now subject to a means test in the vast majority of cases.

At a time when public funds are under considerable pressure, it may on the face of it be tempting for government to cut legal aid scope and/or eligibility. We would strongly caution against such an approach which we believe would be a false economy.

There are different financial eligibility rules for civil and criminal schemes but generally speaking only those in receipt of state benefits or, on very low incomes are financially eligible for legal aid. In a period of recession, financial eligibility will inevitably rise as incomes go down because of the increase in unemployment, the increase in short-time and part-time working and, the general depression of wage levels. At the same time demand goes up as those experiencing a drop in income for the reasons stated are quite likely to experience legal problems in a whole range of issues from rights to redundancy pay and entitlement to benefits to housing repossession, mental health care and criminality.

### **We recommend that Government should not take further steps to reduce eligibility.**

Legal aid is available for all but the most minor criminal offences and for a wide range of civil issues, the main exceptions being wills and probate (for those under 75) commercial disputes, conveyancing, personal injury and other civil disputes that could be financed under a conditional or 'no win, no fee' arrangement. Civil matters that fall within the legal aid scheme include family law, clinical negligence, immigration, mental health and the social welfare law areas of housing, debt and welfare benefits.

In certain areas of law the provision of legal aid is necessary under the Human Rights Act. Thus criminal law matters will involve the issue of a right to a fair trial, asylum will raise issues of the right to life and the right to freedom from torture or inhuman and degrading treatment, and child care proceedings are likely to include Article Eight right to family life issues. This is not an exhaustive list but moreover there are powerful arguments that legal aid scope should not just be limited to cases where human rights issues arise.

As we indicated in our Interim Report, there is evidence to suggest that the availability of legal aid to assist with wider social welfare problems can actually prevent greater costs to public funds which are likely to be incurred if legal aid was not available.<sup>1</sup> For example the cost of a few hundred pounds to defend possession proceedings is tiny in relation to the costs of re-housing a homeless family in bed and

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<sup>1</sup> Findings by Citizens Advice indicate that £1 spent on legal aid can save up to £10 in other welfare costs: [https://www.citizensadvice.org.uk/press\\_20101112](https://www.citizensadvice.org.uk/press_20101112)

breakfast accommodation. Moreover access to legal aid can reduce the likelihood of more serious social problems occurring if the initial problem can be resolved. For these reasons we take the view that continuing legal aid availability for social welfare law issues is essential.

There have been arguments that private family law is one area where the scope of legal aid could be reduced. It is easy to argue that such disputes are simply squabbles over contact with children, but it is important to remember that the law provides legal rights here which may well prevent violence or parents taking the law into their own hands. In many couples there is an imbalance of financial or physical power and the law needs to ensure that the weaker is treated fairly. Both sides need to know what their rights are.

We agree that there may well be alternative, cheaper ways of resolving disputes and would support these being explored, but it is essential that both sides should be aware of their legal rights and duties and this can only be obtained from an expert, qualified advisor. Similarly, if those alternative routes fail, the courts ultimately need to be involved.

**We therefore recommend that the scope of legal aid should not be reduced further unless there is satisfactory alternative provision to fund people wishing to seek advice on their rights.**

## **Pro bono work**

Considerable support for litigants who cannot afford the costs of legal action is provided by solicitors and barristers acting pro bono (i.e. for no fee). This has been encouraged by successive Governments and there is some disquiet within the profession that this can be seen as a means of replacing legal aid or reducing its scope.

At present the pro bono organisations operate very clear criteria. They do not provide help where legal aid is available or where there are alternative methods of funding the action (e.g. through conditional or contingency fee agreements). The litigant must have made efforts to provide support,

This is an obviously correct approach and ensures that the £437m worth of work that the professions channels into pro bono work is used most effectively. However it is important to bear in mind that much of this work is transactional or non-contentious work for Third Sector organisations rather than advice to individuals.

However, it is important to remember that pro bono work is based on a willingness to undertake work in individually deserving cases. Its essence is in voluntary charitable acts. The profession cannot be expected to guarantee that particular classes of case will be covered. Nor is it appropriate to base an access to justice policy on the assumption that solicitors with a particular expertise will be willing to undertake a certain level of pro bono work, particularly if the funding and profitability of that work is significantly reduced.

## **The management of legal aid**

The management of legal aid over the past decade has been characterised by three fundamental traits:

1. Centralised planning of the services to be delivered
2. Budgetary control through ever-more arcane eligibility rules
3. Micro-management of the nature of the service to be delivered in individual cases and the method of delivery

Whatever the benefits to government of such planning and control, these characteristics have also created many problems

### ***Centralised planning of services***

Before 2000, the services that were delivered were those identified by local professionals as being needed by their local communities. Over the past 10 years, the LSC has moved to a system whereby it selects what services should be provided.

There are a number of problems with centralised planning. The first is that even by the time the LSC starts to analyse the data on which it develops its plans, that data is historic. By the time the LSC has developed its plans and then commissioned the services, it is many years out of date.

The available data will only tell part of the story. Two neighbouring areas may have very similar demographics, but if one local authority looks after its housing stock and the other neglects it, the two areas will generate vastly different levels of need for advice on housing disrepair cases.

The centralised approach is inflexible. Local incidents such as a change in the political complexion of the council, the closure of a large employer or a flood can all generate new need in an unplanned way. Before 2000, local advice providers were free to meet such needs when they arose.

The LSC has in its latest tender round attempted to procure services in the location where clients live, rather than where the work was delivered. While there is a clear and legitimate rationale behind this approach, it does not take account of other factors that may influence where clients access services, such as where they work, local transport links, and where other services they need are located.

Centralised planning then requires commissioning of the specific services the LSC has decided to deliver. This has led to the development of the concept of “matter starts”, and the construction of the complex, bureaucratic and hugely expensive procurement process for the allocation of contracts. In 2010 the result of this

procurement process has been nothing short of a disaster. The LSC intended that the process would not significantly reduce the supplier base. In fact the outcome would have culled hundreds of family law firms from the system, randomly leaving many towns across the country with no or inadequate supply, and destroying many valuable local services such as domestic violence helplines. Only after a judicial review was this process brought to a halt.

### ***Budgetary control through arcane rules***

Over the past ten years, there has been one consultation after another aimed at reducing cost by targeting legal aid at an ever smaller number of clients and cases. The result of this has been the build-up of hundreds of rules which have to be met before a client can be advised. Advisors have to choose between turning away clients who do not have relevant proof with them, or doing the work and risking not getting paid for it. All of these rules must be audited by the LSC at significant cost.

The problems caused by this approach were amply demonstrated by a proposal in 2009 to restrict legal aid only to those clients who are legally resident in this country. Such a rule would not have excluded a significant number of clients. However, it would have required that solicitors obtain and record on the file proof of legal residence for every single client; and auditors would have to check that this evidence was present.

The complexity of the system as a result of these arcane rules was also one of the underlying causes of the critical NAO reports in 2009. The NAO itself said that one possible approach to its findings other than greater auditing was a simplification of the rules, but no attempt has been made to date to do this.

### ***Micro-management***

The legal aid contracts specify in remarkable detail not only what work solicitors do, but how they should do it. The criminal and civil specifications are full of rules about how casework is to be carried out and recorded. For example, in family cases, in order to progress from level 1 to level 2, the rules require that the solicitor has a second meeting with the client, even when this is completely unnecessary for the conduct of the case. In the criminal contract, detailed rules state when solicitors must or must not attend at the police station with their client, without allowing any scope for professional judgment.

This micro-management extends beyond the conduct of cases to take in file management systems, supervisory arrangements and business management.

The combined effect of these rules is to stifle the development of more efficient processes for undertaking work, and the evolution of more effective business models. Outsiders to the system frequently wonder why solicitors do things in particular inefficient ways. Very often the answer is because the LSC expressly requires it on pain of severe penalties.

The Law Society believes that a fundamental change in ethos is needed, which would have characteristics diametrically opposed to those described above.

1. The system should be based on local planning by those who understand the needs of the communities where the services are being delivered.
2. The government should set the broad parameters for what the system should deliver, but allow flexibility within those parameters.
3. The government should allow organisations the professional and commercial freedom to manage their businesses and services in an economically and professionally rational way.

In Chapter 5 we consider further how these principles might translate into specific proposals for managing legal aid.



## Chapter 3 - addressing the cost drivers

In our interim report, we discussed the major cost-drivers which affect the legal aid budget and provide the reasons why people need legal advice and representation. We identified these as:

- The growth of legislation;
- Procedural inefficiencies in the court system;
- “Polluters” who, in effect, create costs through their actions.

### The growth of legislation

It has been calculated that the last government created over 3000 new criminal offences. It also significantly increased the rights of individuals and provided mechanisms to enforce those rights. The Law Society supported a number of these initiatives and some have had significant social value. However, scant consideration appears to have been given to the costs of enforcing those rights or of prosecutions of new offences. A Legal Aid and Judicial Impact test (LAJIT) was introduced in 2005, to formalise the interdepartmental arrangement that the cost of new legislation should be offset by the sponsor government department through a contribution by them to the legal aid fund, though there appears to have been little accountability for the outcome. Recent figures show that a total of £20m has been credited to the legal aid budget since 2005, which appears implausibly low.

We believe that more rigour needs to be applied here to ensure that government departments accurately calculate the financial cost of enforcing such rights whether from the legal aid fund or for individuals who are not eligible for legal aid. It is essential that policy makers and relevant departments should be accountable for the effects of their policies.

#### We recommend that:

- **every consultation paper that introduces new rights or offences should identify the costs of enforcement and state how those are to be met.**
- **the explanatory notes to every Bill should set out in detail the mechanisms and likely costs of enforcement and how these are to be met.**
- **the National Audit Office should regularly examine whether the predictions proved accurate and, where they are not accurate, should recommend action to be taken to compensate the legal aid fund for the discrepancy and to improve forecasting for the future.**

## Procedural inefficiencies

The operational costs of the justice system are significantly affected by the cost of operating the legal process itself. It is well known, for example, that while the Woolf reforms have significantly reduced the number of civil cases going through the courts, they have had the effect of front-loading the costs. The recent RTA protocol which uses an IT portal is an interesting and important initiative that is capable of delivering significant efficiencies and cost-savings. The system is in its infancy and there have been teething difficulties, but we believe that there is scope for building on that system.

There remain significant inefficiencies, however, in both civil and criminal procedures and in the way in which the administration of the courts work. These create costs for the parties without significant benefits. A particular example can be found within the court service itself which appears to operate without thought for the consequences of its actions. The common practice of listing blocks of cases together, results in witnesses, litigants and lawyers all having to wait in court for much longer than is necessary. This is unacceptable and causes significant costs to be borne by the profession. In addition, the complexity of the law can itself result in unnecessary legal actions and confusion.

### **We recommend that:**

- **There should be a full review of civil procedure, particularly in respect of low value cases.** Our response to Lord Justice Jackson's review of civil costs outlined a number of possible reforms to civil procedure which would be worth investigating further.
- **Judges should be trained, and encouraged to use modern case management procedures for ensuring that cases progress efficiently and that unnecessary costs to the parties are eliminated.**
- **The recommendations by Jackson LJ for the "ticketing" of judges should be carried forward so that judges with appropriate expertise hear cases.**
- **The previous Government's provisions in respect of hearsay and bad character should be repealed. These have resulted in substantial additional arguments and delay and we question whether they have resulted in greater convictions of the guilty.**
- **The historic requirement under the Governor's warrant to produce a prisoner on remand every 28 days to the court could be extended, saving the cost of interim hearings.**
- **Consideration should be given to more cases being dealt with in magistrates' courts, so long as this does not affect the important rights of defendants to be tried by jury.** . We believe this will undoubtedly generate significant savings for the legal system, but any changes must be subject to appropriate safeguards. We also believe that the comparative cost and efficiency of lay and professional judges should be considered.

- **CDS Direct should be abolished.** Evidence shows that the CDS Direct process is protracted and telephone calls often remain unanswered at the police station. This can lead to unnecessary court hearings and appearances further down the line, as defendants who were unable to gain timely advice and assistance often reconsider their positions once they have had advice. We believe cost savings could be made by abolishing CDS Direct and engaging solicitors to handle this work in their locality, without the need to change the rules which prohibits attendance in the vast majority of these cases.
- **There should be an urgent review of the use of Associate Prosecutors.** We are concerned that, too often, such prosecutors do not have the authority to take decision on particular cases and that significant delays arise while they seek authority from decision-makers. It seems to us likely that the savings achieved in the CPS budget are at the expense of the court service and the legal aid system.
- **The CPS should review its charging policy in Very High Cost Cases (VHCCs).** A more strategic approach is needed to reduce costs in complex VHCCs. The CPS was recently reported as having suggested that it could make savings in these cases by being more selective about the number of defendants prosecuted, the selection and number of charges and the volume of material used to support the prosecution. In our view this will be a major improvement that would generate significant savings both to the CPS and MOJ's Court and legal aid budgets.
- **The Law Commission's report on the law of housing tenure should be implemented.** The law governing landlords and tenants is complex and leads to substantial disputes and complication which could be avoid if the law were simplified. In particular, a simple system of secure and standard contracts, in place of the existing multiplicity of tenancy and licence types would provide substantial benefits for both sides.
- **There should be stronger case management and greater resources devoted to the family justice system.** Our submission to the Family Justice Review is annexed at Appendix 2. We consider, in particular, that greater training of the judiciary in case management and reducing the number of hearings, combined with greater resources for bodies, such as CAFCASS, would significantly reduce costs.
- **Caution needs to be exercised in assuming that mediation will necessarily save costs.** While it is clear that mediation can be a valuable and effective way of resolving some disputes at relatively low cost, we do not accept that it is suitable in every, or even in the majority of cases. There will be a number of cases where mediation is entirely unsuitable simply because the parties are so entrenched or the issues so important or complex that a judicial decision is the only practical way of resolving them. A requirement for compulsory mediation assessment to take place may simply add on costs and delay in cases which will end up in court.

- **Significant investment needs to be made in IT within the court service.** Solicitors firms have made substantial advances in the use of IT. This has not been matched by the court service. In particular we believe that the criminal justice system would benefit from facilities for emailed directions and telephone conferences to avoid the need for physical attendance by lawyers at purely routine hearings such as cases listed for mention. At present the court's reliance on a paper based system is grossly inefficient and out of date. Such facilities should not, however, compromise the ability of lawyers to advise clients and defendants to have proper access to justice. We have concerns that the "virtual courts" pilot may have this effect.

## **"Polluters" within the legal system**

Our Interim Report identified significant bodies and organisations which create work for the legal system and, therefore, costs which are outside of the control of the legal aid system. We argued that incentives and disincentives need to be built in to the system to reduce the number of cases that require legal advice and representation. Such "polluters" include local authorities and other organisations that take decisions which are inappropriate or fail to act on their statutory duties. They include prosecuting authorities, such as the CPS whose decisions in some cases can lead to expensive trials and serious damage to defendants. They can also include individuals and bodies within the system, such as those who transport prisoners to court and other agencies whose inefficiency causes delay and, therefore, cost. We argued that financial penalties might provide incentives to greater efficiencies.

The responses that we received were sympathetic to this approach but some argued that it would be damaging because it simply involved scarce resources being diverted from one part of a single pot to another. While we recognise the strength of this point, the fact is that the present system greatly disadvantages the legal aid budget, and distorts the true expenditure on legal aid as compared to the other public services involved. Making costs orders on the normal principles would help to ensure that costs fall where they should, which ought to encourage better decision-making by other public authorities. This in turn would reduce the number of cases unreasonably pursued to litigation by public authorities.

In a time of austerity, it is essential that all involved in the legal system should take responsibility for their decisions and actions and that the legal aid fund or, indeed, individual litigants and defendants should not suffer as a result of poor decisions. We therefore **recommend** that:

- **Courts should use their wasted costs powers to penalise public authorities and others who cause unnecessary costs to be incurred by practitioners and the Legal Aid Fund.**

- **Public authorities, such as the UKBA, local authorities and others whose administrative decisions are overturned by courts and tribunals should be required to pay the costs of the claimant to the legal aid fund, together with a surcharge. This should be rebated where the issue concerned involved a complex area of law.**
- **Similar provisions should apply to prosecuting authorities where a judge finds that a case should not have been brought because of the paucity of evidence.**
- **The threshold for making wasted cost orders should be lowered. Some agencies need more encouragement to comply with court orders and directions, as discussed above. Cases that are cancelled at the last minute or become ineffective due to non compliance by these agencies increase costs and these costs are often borne by the legal aid budget. We believe these costs should be met by the agencies responsible for them and that the costs should not fall solely on the legal aid budget.**

We consider that such financial incentives will encourage decision makers to make appropriate decisions which are not overturned by courts and tribunals. We also believe that those involved in the system should have incentives to avoid inefficiency.

## **Means testing**

The re-introduction of means testing in the criminal courts has demonstrated the fundamental truth that for all the savings that can be made through means testing, there is a significant cost of undertaking such a test. Indeed, means testing for criminal cases was abolished originally because the cost of administering the test outweighed the contributions collected – albeit that it also led to people not applying in the first place, thus ensuring some savings.

In the Crown Court means testing system, it is forecast that around a quarter of defendants will be passported directly into legal aid, and that the means test will have to be applied to the remainder. However, it is expected that only around one quarter of defendants will have to make a contribution, which means that for every test that results in a contribution, the Government is undertaking two that do not.

In the Crown Court, it is likely that the size of the contributions involved will be sufficient that this will still result in savings for the taxpayer. This is, however, uncertain and there is a danger that the cost of administering the means test may be out of all proportion to the savings.

In other areas, particularly in Social Welfare Law it is likely that the cost of operating and auditing the means test outweighs the costs saved by having it.

**We recommend that a full cost-benefit analysis of means testing should be undertaken in all areas of work.**

## Legal Aid rates

The costs of paying practitioners are, clearly, a significant cost for the fund. However, we believe that, with one exception, there is no realistic scope for further cuts in the rates paid to solicitors for legal aid work unless significant changes are made to the standards expected of providers. We would regard such a diminution as unacceptable. There has been no increase in the overall legal aid budget since 2005 and this has meant that practitioners have had to swallow a significant pay cut in real terms. Legal aid payment rates are already substantially lower than rates paid to other lawyers with public sector contracts. One good example is the NHS Litigation Authority panel rates.

The one area of work where it is very difficult to justify current rates of payment lies within the field of Very High Cost Cases where, it seems to us, the amounts paid to senior advocates are unacceptable for any publicly funded system. The fact that it is possible for such advocates to earn in excess of six times the salary of the Prime Minister is unjustifiable. While we recognise that such figures are capable of being distorted because of the payment arrangements for individual years, the fact that some of the same names are earning these high figures in multiple years suggests that there is real scope for reform which could provide significant savings.

**We recommend that the rates for legal aid should set so that no individual, working a normal working week, should be able to obtain an income (after the expenses of practice and employing staff) in excess of £250,000 per year from public funds.**

## Chapter 4 - funding

The efficiencies discussed in Chapter 3 will, we believe, provide substantial savings to the system and improve the efficiency of the justice system. They are not, however, sufficient to bridge the gap of £350m that the Government has identified that it intends to cut from the legal aid bill. This chapter, therefore, considers funding options in the light of this.

It is important to stress from the start that it should be a crucial feature of any civilised, democratic society that individuals should not be denied justice because they are unable to afford it. The fact is, however, that it is expensive to bring or defend many legal actions and will remain so, notwithstanding the savings that we have mentioned in Chapter 3. In criminal cases, a defendant faces the resources of the police and a state prosecution service and needs to be able to ensure that, where there are proper defences, they are investigated properly and put. Many civil cases, particularly those involving clinical negligence, are highly complex and need substantial investigation which costs money. Even in the least complex cases, we share the views of Professor Dame Hazel Genn, quoted in our response to Jackson LJ's report, that there is an irreducible minimum of work that needs to be done and paid for, however simple the case.

This work costs money and needs to be done by experts. The costs of this are likely to be out of the ordinary reach of most people, particularly when this is combined with the risks that arise in most civil cases of paying the other side's costs if the case is unsuccessful. It is for this reason that proper funding mechanisms need to be in place to ensure that individuals are able to enforce their rights or defend themselves against criminal accusations.

In our interim report, we looked at a number of funding options and have consulted upon them. We have also had the opportunity to refine our views on Jackson LJ's report.

Broadly, there are two models for providing outside funding for litigation:

- Privatised funding, whereby the action is funded by a solicitor, insurer or other third party; or
- Public funding, whereby the state, through legal aid system provides financial support for the one or both parties – that is currently funded by the tax system.

## **Privatised funding**

The main mechanisms for privatised funding are:

- Funding by solicitors through conditional and contingency fee agreements;
- Legal expenses insurance; and
- Third party funding, in effect on a contingency basis, whereby the third party takes a percentage of the damages.

### ***Conditional and contingency fee arrangements***

The development of conditional fee agreements (CFAs) has proved a success and has enabled many people who would not otherwise have been able to enforce their rights to do so. There is no evidence that this has led to a growth of unmeritorious claims. The system depends upon solicitors being prepared to fund cases and to take a risk that they will fail. It has been backed by the availability of after the event (ATE) insurance, meaning that most claimants are at very little financial risk in bringing claims.

This has been criticised and Jackson LJ's report recommends that the uplift on damages should not be recoverable by the successful claimant and nor should the ATE premium. Instead, there should be an increase of 10% in general damages and a system of "qualified one way costs shifting" would provide that claimants would only rarely be liable for the other side's costs if they lost. In addition, he proposes that a system of contingency fees should be introduced whereby the solicitor can take a share of the damages.

The Society has the following significant reservations about these proposals:

- The 10% increase in damages may well not cover the uplift – leaving many claimants to fund the uplift from their damages. This will seriously infringe the basic provision that damages should cover the whole loss suffered by the claimant.
- The absence of ATE insurance and the qualified one-way costs shifting rule may well lead to satellite litigation and a number of claimants may well be put off by the risk of liability to the other side. Even if they were not, they would still be liable for disbursements in pursuing the claim since it is highly unlikely that solicitors will finance these. The proposal would also be unfair to defendants who were not covered by insurance.
- The proposals on contingency fees may be worth considering but, again, are likely to offend against the principle of 100% compensation.



We therefore **recommend**:

- **The recommendations in Jackson LJ's report need substantial analysis to ensure that they do not adversely affect access to justice.** This is of particular importance for cases, particularly in clinical negligence, where the costs of bringing and defending the claims are substantial. It is likely that the result of these proposals will be that claimants will receive insufficient compensation for their loss and, in cases where there is significant after care required, this will create injustice.

### ***Legal expenses insurance***

At present legal expenses insurance (LEI) comes as a relatively cheap add-on to many household and motor policies. They can provide significant assistance to policy holders in a number of areas, but we believe that there are substantial difficulties with them:

- They cover a relatively small number of cases and exclude many (e.g. family, crime, and most aspects of social welfare law) that are currently covered by legal aid;
- The limit of the expenses that can be incurred is usually £50,000 which is not adequate to cover complex cases;
- Many of those who rely on legal aid will not buy the cover either because they do not have household or motor insurance or because they cannot afford the additional cost;
- There is a serious lack of transparency about the way in which the policies are managed. First, through a misinterpretation of the relevant EU directive, insurers frequently refuse to allow claimants to use their choice of solicitor. Secondly, this is an area where, through referral fees, insurers tend to make money on claims by referring them to a solicitor who will pay for the claim and act on a CFA, leaving the insurer with a profit and no risk.

Jackson LJ recommended that there should be further encouragement of legal expenses insurance. We believe that there could be scope for this to be achieved and that there might be scope for there to be compulsory insurance to be taken out by particular classes of individual who might be likely to have legal requirements (e.g. company directors) and for the expansion of insurance to cover other areas of law which were directly relevant to their needs. However, before this can happen, it is essential that there should be a full review of the way in which legal expenses insurance is provided and proper consumer protections built in.

We, therefore **recommend** that:

- **There should be a review of the provision of LEI and a proper, enforceable code of practice created dealing with such issues as freedom of choice of lawyer, referral fees and the scope of cover.**
- **In the light of that review, discussions should take place with the insurance industry on the feasibility of additional cover for areas, particularly where there is no monetary compensation available and so a contingency arrangement is inappropriate.**

### ***Third party funding***

As Jackson LJ recognised, third party funding has become an increasingly important method of funding large cases. It could be important as a means of funding high value cases which are outside the reach of most firms of solicitors on a CFA. It may be of particular importance to class actions. As our response to his report argued, however, there needs to be considerable work done before third party funding can be regarded as an important feature of access to justice. First, the funders are presently unregulated and there are no rules or guidance as to the appropriate level of percentage that they can take from damages, their liability for costs or what happens if they become insolvent or wish to withdraw from the action. Proposals for voluntary regulation do not address these problems. We therefore **recommend**

- **Work should be done on providing a statutory code to regulate third party funding.**

### **Public funding**

Most of the methods of funding above, other than insurance, are most attractive where there is a monetary award – and this will be particularly the case if the Jackson recommendations are implemented. Many areas of legal work, particularly housing, immigration, child care, family and mental health may well be unattractive for insurers and, even if insurance were available, it might not be taken up by those who need the advice and representation.

For these reasons, some form of public funding is essential for these cases. However, given the strains on the legal aid budget and the projected savings required, additional resources are needed. We therefore now consider ways in which the legal aid fund could be boosted by other sources of funds.

## ***Funding from the defendant's assets***

Whenever funds are frozen by a court, whether in advance of criminal proceedings or in the context of Proceeds of Crime Act cases, the court should release such funds as are reasonably necessary to pay for the defendant's legal costs. The taxpayer should not have to bear the defence costs. We are particularly aware that upon successful prosecution of a criminal case the assets that are seized are diverted to the Home Office and its agencies. We strongly believe that the first call on such assets should be the legal aid fund. We therefore **recommend**

- **Seized assets should be available to pay the reasonable defence costs of such individuals.**

## ***A loan scheme***

While many individuals may be unable to fund legal action from their immediate resources, it may well be that a loan repayable over a period of five years or more would assist them in gaining advice and representation. This might be helpful to individuals who are subject to minor criminal charges which might not affect their future earning capacity, or those in family or other disputes. It could be an extension of the existing statutory charge and could apply to people who do not meet the means test. It may well require initial funding but could provide significant improvements to access to justice.

The responses to our Interim Report showed interest in this idea, which is not very different from the Statutory Charge that exists already in some civil cases, but provides an earlier return. However, it needs to be remembered that this option will only be attractive to individuals who have a sufficient income to meet the repayments and is unlikely to be realistic for people on low incomes.

## ***A tax on the alcohol industry***

Alcohol is a substantial contributor to criminal activity – it is likely that a very substantial majority of criminal offences would not have been committed but for the influence of alcohol. The alcohol industry currently has a turnover of over £30bn and we believe that consideration should be given to a levy on alcohol which would go directly to the costs of criminal legal aid.

We are aware that the government is currently reviewing alcohol taxation and pricing to tackle problem drinking.

The government has stated that it is likely their review will consider measures including:

- potential options to increase the taxation of high-strength drinks; and
- other targeted measures that can directly impact on public order or public health outcomes.

We believe that the impact on the legal aid fund also needs to be considered and that this is an opportunity for consideration to be given to increase the taxation on wines, beers and spirits by 1 percent with a proportion of that money going to the legal aid budget.. According to Treasury figures this would generate £1 billion per annum, which could be used to offset the £7.9bn cost to the justice system of managing the fall out from alcohol abuse.<sup>2</sup> If only a third of that were given to the legal aid budget, that would very nearly pay for the savings the Government is seeking to make. We therefore **recommend**

- **An increase in the tax on alcohol should be implemented with the money going towards funding the legal aid fund and other criminal justice agencies.**

### ***Contributions by the financial services industry***

The bulk of long fraud trials arise out of the complexity of today's financial markets and of modern transactions. In 2008/9, 48% of the VHCCs were attributed to fraud and cost the justice system, including legal aid, £54.5m. This cost remained at a similar level in 2009/10. Moreover, it is quite clear that the importance of these cases is primarily in ensuring the integrity of the financial services industry, and thus enabling that industry to generate profit. In criminal justice terms, the cost of these cases is out of all proportion to their seriousness, as judged by the level of sentences imposed. We believe that there is scope for a levy on the industry which would aim to cover the costs to the state of prosecuting and defending fraud trials perpetrated within the financial services sector. It would be for the industry to decide how to levy such costs but it would make sense for those costs to be linked directly to the expenditure on such trials in a given year. This would provide an incentive for the industry to improve its own policing. We therefore **recommend**

- **There should be a levy on the financial services industry to cover the costs of the fraud cases arising out of financial crime.**

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<sup>2</sup> Institute of Alcohol Studies factsheet - the cost to criminal justice system £1.8bn; the cost of drink driving - £0.5bn; the cost to services as a consequence of alcohol related crime - £3.5bn; the costs of services in anticipation of alcohol related crime - £2.1bn, – as calculated in 2004.

## **Chapter 5 - the role of the providers**

The providers of legal advice and services have a crucial role to play in providing efficient and high quality legal services. The bulk of such services are provided by solicitors. The majority of such solicitors are highly dedicated practitioners who do not make substantial sums of money out of legal aid but who do provide services that are of huge social value.

As we set out in our interim report, in recent years, solicitors have been beset by a series of initiatives which continually appear to change the goalposts, combined with a substantial growth in the bureaucratic demands placed upon them. This has been combined with no real increase in the resources available within the system since 2004 and, in effect, a pay cut for those undertaking the work. In these circumstances, it is surprising that a number of firms still see a future for themselves in legal aid work. Whether that remains the case after the recent family tender round remains to be seen.

We believe that the profession has a major role to play in delivering efficiencies within the system. We believe that a greater trust in the profession to deliver services locally would provide substantial added value to the system. However, if cuts are to be made then they need to be accompanied by a reduction in the burdens that the profession faces. In this chapter we examine both the role of the providers in managing the system and how the burdens on those providers can be reduced.

### **The role of providers in the management of the system**

In Chapter 2, we discussed some of the issues around the management of the legal aid system, and concluded that there needs to be a fundamental change in approach.

1. The system should be based on local planning by those who understand the needs of the communities where the services are being delivered.
2. The Government should set the broad parameters for what the system should deliver, but allow flexibility within those parameters.
3. The Government should allow organisations the professional and commercial freedom to manage their businesses and services in an economically and professionally rational way.

## ***Local planning***

Before 2000, the planning of services was left to the market. Where solicitors saw a demand for particular types of advice, they would set up services that could be delivered profitably. This approach was not without its problems. It could mean that small pockets of demand were not met. It could lead over time to a situation where demand for a service was decreasing, but existing providers would work to generate additional demand for their services, rather than reducing their services and looking to meet other, more urgent need. Government was therefore not fully in control of the prioritisation of services. It also meant that the Government could not artificially restrict demand. It had to rely on the levers of scope, eligibility and rates to control the budget.

However, the system also had benefits. Services could not be delivered if there was not at least some demand for them. The system was flexible to changing needs, such as the closure of a large employer, the influx of new communities or changes in the local political environment. It also ensured that there were plenty of offices that clients could go to in order to get legally aided services.

The absence of active planning of services also meant that the system survived without much of the current bureaucracy and the costs so entailed. It was the centralised approach to planning that led to the development of matter starts as a “unit of currency”. Before matter starts were introduced, we never had a situation such as emerged last year where firms ran out of contract capacity and were forced to turn away clients with legitimate needs that should have been met. Bizarrely, these firms were told by the LSC to send these clients to their competitors. Before matter starts, there was no need for a complex procurement process that is difficult to manage and which led in September to the Divisional Court declaring that the LSC had managed to act irrationally and arbitrarily, and directly against its own declared strategic interests. The centralised administration of matter starts is an unwieldy and bureaucratic system that fails to allocate resources to where they are needed. We believe that a decentralised local administration of legal aid funds could be more effective in ensuring that valuable resources are more efficiently directed to where they are required.

One early part of the Community Legal Service was the CLS Partnerships. The purpose of these partnerships was to bring together advice sector advisors, lawyers, and funders to map local provision, identify gaps and discuss how to meet unmet need. The initiative ran into two main problems. The first was that the involvement of local authorities was patchy. Where the local authorities were committed and enthusiastic, the Partnerships worked very well. Where they were less keen, the Partnerships tended to wither on the vine. The second problem was that the approach would have worked very well as a way of identifying where additional funding should be focused. Unfortunately, from very soon after the first Partnerships were established, we faced a freeze in the legal aid budget. With no money available to plug the gaps identified, many Partnerships felt they were serving no useful purpose, and they largely died out.

One key feature of Partnerships was that they did not have any powers to decide where funds should be allocated. That power remained with the Legal Services Commission and, where relevant, the local authority. Part of the reason for that was that the inclusion of provider representatives on the partnerships meant that there was a significant risk of conflicts of interest if the Partnership were charged with taking such decisions.

**We recommend that consideration be given to the original market approach and to the extent to which a body similar to the CLS Partnerships, perhaps under the auspices of the local authority, might be charged with allocating part of the budget and identifying priorities and gaps in local areas, in order to mitigate the disadvantages of a pure market approach.**

There are likely to be other functions that could be appropriately handled at a local level. One such is the management of duty solicitor schemes. It may be possible for rotas to be drawn up by local duty solicitor committees. Those rotas could then be given to local police, who would be able to contact the duty solicitor or own solicitor direct, instead of having a need for a separate national bureaucracy in the form of the Defence Solicitor Call Centre. In the event that the client asks for an out of area solicitor, the Law Society's Find A Solicitor website will enable the police to get the necessary contact details. Such a solution would also solve the problem that has been identified over the past couple of years of the police failing to answer the telephone in a large proportion of cases – a problem that is only likely to get worse as the police are facing cuts like everyone else. Since the police would be phoning out to the solicitor, contact would be made direct in the majority of cases, rather than the solicitor having to phone in after being contacted by the DSCC. **We therefore recommend that the Defence Solicitor Call Centre should be abolished.**

### ***The fee structure***

Over the last few years the concepts of “matter starts” and “fixed fees” in civil legal aid have become common. We have referred to the problems with matter starts. In particular, successful firms will have to turn clients away if they are running out of matter starts – particularly likely to be the case towards the end of the financial year – and, people who need advice and representation may be unable to receive it.

This is exacerbated by the fixed fee system. Providers often receive a fixed fee no matter how complex the case. There is thus a disincentive to take on time-consuming, difficult matters, which may often involve the most needy of clients. The “escape clauses” built into the system have been set so high that providers can actually incur a loss in taking on complex matters. A similar problem may arise if Jackson LJ's proposals for fixed fees in civil matters are implemented.

Fixed fees can have advantages. A firm may choose to use the simpler cases to cross-subsidise the more complex ones, thus making a profit on the transaction as a whole. The fact that there are a limited number of matters that a firm can take on strengthens the incentive to avoid complex and difficult cases.

If fixed fees are to work, they must be set at a level which enables firms to take on the more complex cases and provides an incentive for them to do so.

The problem is that the legal aid structure allows only one approach to the delivery of services. Where fixed fees do not apply, the firm has to account for each six minutes of the time spent and for every letter sent. On each case, the advisor has to report to the LSC on a regular basis and often seek authority to undertake further steps. The LSC should not seek to manage each individual case within the system. It should manage the system overall.

There are alternative approaches that we believe could provide a more flexible set of parameters within which advisers could work. One option might be the system that was used for not for profit contracts prior to 2007. Under these contracts, the organisation reported the number of hours it had spent on legal aid cases in total, without breaking it down between cases. Another approach might be to fund a caseworker to deliver a particular service in a particular area, and leave it to the organisation to decide, subject to certain minimum requirements, who will get what assistance. For example, a welfare benefits caseworker might choose to attend a tribunal with their client in a particularly complex case. Clients might be assisted who do not fall within the current financial eligibility limits but who could not afford to pay privately, without in any way damaging the service to eligible clients. Outreach could be provided at the adviser's discretion based on where there appears to be a need, and not only when the national planning body gives permission.

### ***Greater delegation to providers of the management of legal aid contracts***

The existing system places very substantial control in the hands of the LSC. It is, of course, appropriate, that they should monitor providers to ensure that taxpayers obtain value for money. However, we consider that the detailed monitoring of contracts and permissions needed to undertake work can be reformed and that greater trust can be placed on solicitors as providers of services.

Solicitors have been SRA approved, their complaints records have been checked, many have been peer-reviewed, had visits from both the SRA Practising Standards Unit and LSC Contract Compliance Audit teams. They will be insured and clients have the benefit of the Law Society's Compensation fund. They do not need to be micro-managed by the LSC since this leads only to the need to retain otherwise surplus LSC staff, make providers spend an inordinate amount of unpaid time on administration and also often does not help relationships. Greater delegation can only lead to increased efficiency and a reduction in costs.



One model that could be considered is whether a “fund-holding model could be introduced on the lines of that proposed in the NHS for health care provision provided by general practitioners. This involves block funding to consortia of GPs to provide services to patients directly and to commission services from other health providers such as hospitals. It is envisaged that most, if not all of the NHS budget for patient health care we be allocated to GP fund-holders. We believe that a similar model could work for legal aid provision. Providers would receive block funding from the state to provide services for legal aid eligible clients subject to being able to meet requirements set by the government with regard to outputs. It would be the responsibility of providers to manage the budget to ensure that funds are available throughout the year and to fund third parties such as counsel and experts. The main advantage would be that providers would not have to deal with the bureaucracy entailed in individual case by case basis funding. Subject to the overall funding parameters, providers could determine for themselves the most effective means of deploying the funds available. This could encourage greater innovation in service provision.

There could be many models for providing this – whether by large firms or groups of smaller firms. We believe that the profession has the expertise to decide the most efficient model. There would obviously need to be proper outcomes set by the LSC to avoid “cherry-picking” by such firms and the firms would need to be properly resourced by the LSC. However such a model would enable firms to establish local need and provide efficient access to justice.

**We recommend that consideration be given to greater choice and flexibility being given to firms over the way in which they take on and run cases.**

### ***Use of IT***

In every field of life IT and the internet has made greater information available and allowed substantial efficiencies. High street firms are adapting and utilising IT to produce efficiencies and improved service as never before. Firms are offering online instructions, online document access, online drafting, digital mail encryption, video conferencing and 7 day partner access at a standard rate for senior and junior partner levels. In the legal aid field, however, the financial constraints imposed on legal aid firms, law centres and advice agencies have restricted their ability to take full advantage of technological developments which require substantial capital input at the outset.

While, for the majority of contentious cases, it will remain essential for face to face meetings to take place between client and solicitor, there may well be scope for much greater generic advice to be given over the internet. Clearly, this needs to be tempered to allow for the fact that a number clients, including those with disabilities or without access to, or the confidence to use the internet, will need to be catered for in traditional ways.

Furthermore, systems for recording and retrieving generic, non-confidential information about case work could enable agencies to monitor the operation of legal and social policies and contribute more effectively to policy development. In this way database facilities could be used to underpin the development of strategic approaches to the practice of public interest law. If developed on a co-operative basis, with contributions from a wide range of participants, public interest law databases could potentially become a collective resource for all lawyers and legal advice workers involved in this field.

### ***Different business models***

The profession has proved very flexible in developing models for providing services. Recent ones have included:

- “virtual” firms - operating almost wholly from a central server with a computerised case management system, a secure intranet, and an on-line forum to ensure effective communication between its members.
- A “shared services model” whereby back-office services for a number of firms are provided by a single management company, allowing firms to reduce their overheads.
- A shared model where firms practice under the umbrella of a single firm which provides back office services, insurance and, indeed, assistance in marketing and tendering, while maintaining the independence of firms and the quality of the advice that they give.

These models show that law firms are evolving to meet the needs of the market. The Society supports firms taking individual approaches to the way in which they provide services, provided that the basic issues of competence, ethics and standards are not compromised. We believe that many of these models could be of relevance to the “Fund holding” proposal set out above.

**We recommend that the LSC explore greater delegation to solicitors of the funding and management of legal aid through variations on the models discussed above.**

### **Monitoring providers**

The corollary of greater flexibility and firms will be a need to take a different approach to the way in which the LSC monitors compliance and quality.

## ***Dealing with non-compliance***

The LSC has had very strong powers to terminate a provider's contract – sometimes for little or no reason. It is not suggested that this power has been used inappropriately but its mere existence is a cause for concern. The LSC is a large powerful body, most of its providers are small firms with no bargaining powers and have to accept the LSC's exceptionally complex requirements if they want to do the work. These requirements often result in entirely innocent mistakes which could lead to the termination of the contract. The National Audit Office's report in 2009 highlighted an example of this where firms were claiming Level 2 family advice fees rather than Level 1 out of a genuine mistake arising from the ambiguity of the contract.

**We recommend that this be addressed by simplifying the requirements for firms and specifying an element of tolerance for unintentional non-compliance.** This will save time for firms in avoiding bureaucracy and for the LSC in monitoring the compliance.

## ***Quality***

The LSC looks at quality in terms of the management of firms and at the quality of advice. Almost all of those currently undertaking legal aid work would agree that the introduction of the Franchise, and its successor the Specialist Quality Mark, had a significant impact in improving the management of legal aid businesses. However, the SQM is very prescriptive about the way that management has to be undertaken. There are significant elements of the SQM that reflect the professional rules then in place for solicitors. However, we are presently moving towards a markedly different approach based on outcomes-focused regulation, which allows firms more freedom as to how they will achieve the outcomes that regulation is seeking to assure.

We believe that the majority of the detailed financial and personnel management requirements and case management provisions of the SQM may now be unnecessary. First, the LSC has recognised Lexcel as a satisfactory alternative to the SQM. A number of professional indemnity insurers offer discounts on premiums to firms with the Lexcel accreditation. There is therefore a clear incentive for firms to secure such accreditation. Conversely, firms that for reasons of poor internal management have a poor claims record will find it increasingly difficult, if not impossible, to obtain insurance cover.

There are some elements of the SQM which we believe serve directly to enhance quality and should be retained. In particular, we believe that the requirement for minimum ratios of supervisors to caseworkers has a useful purpose; and likewise the requirements for file review processes.

## ***Accreditation and Peer Review***

Quality assurance of a provider's legal work is clearly essential for any publicly funded service. Two mechanisms have been identified for this: peer review and accreditation. The Society's view of peer review is that it is a good method of measuring directly the quality of work undertaken provided that it is done in a way which is proportionate, cost effective and avoids conflicts of interests. This makes it a very expensive tool and one that may not be appropriate at a time when budgets are stretched.

In our view, accreditation schemes provide a good alternative measure of quality. The schemes run by the Law Society have robust criteria for membership and individuals are fully assessed. We therefore **recommend that:**

**The LSC should work with the professions to ensure that accreditation schemes are at the appropriate level required for the public to be assured that firms are able to provide a service of the right quality. They should take advantage of the existing schemes and avoid duplication.**

## ***Payment structures***

In an Annex to the interim report, we explored the interrelationship between different methods of paying for legal aid services, including hourly rates, fixed fees and outcomes measures. We attach that Annex again for ease of reference at Appendix 3.

The current payment structures are riddled with detailed rules determining what can and cannot be paid for under hourly rates, whether you can or cannot claim a higher fixed fee or two separate fixed fees, which category of law a case falls under and therefore which fee is payable. In many contract categories a confusing array of fee types may apply including hourly rates, fixed fees and standard fees. The result is that time has to be spent on considering whether and how cases fit within the structure of the rules that could be better spent on actually delivering the service that is needed.

For cases where hourly rates apply, the applicable rate varies between different contract categories of law and even within case types within the same category. This adds complexity to the system which creates administrative costs both for legal aid providers and the LSC. It also creates the difficulties with non-compliance that we have referred to above.

**We recommend that hourly rates be rationalised so that it is much easier to identify the relevant level of fee.**

# Appendix 1: summary of recommendations

## Chapter 2: the Government's role in access to justice

1. The government should not take any further steps to reduce financial eligibility
2. The scope of legal aid should not be reduced further unless there is satisfactory alternative provision to fund those seeking advice about their rights.

## Chapter 3: addressing the costs drivers

3. Every consultation paper that introduces new rights or offences should identify the costs of enforcement and state how those are to be met.
4. The explanatory notes to every Bill should set out in detail the mechanisms and likely costs of enforcement and how these are to be met and, these predictions should be regularly scrutinised by the National Audit Office, with powers to compensate the legal aid fund where costs have been underestimated.
5. There should be a full review of civil procedure, particularly in respect of low value cases. Our response to Lord Justice Jackson's review of civil costs outlined a number of possible reforms to civil procedure which would be worth investigating further.
6. Judges should be trained, and encouraged to use modern case management procedures for ensuring that cases progress efficiently and that unnecessary costs to the parties are eliminated.
7. The recommendations by Jackson LJ for the "ticketing" of judges should be carried forward so that judges with appropriate expertise hear cases.
8. The previous Government's provisions in respect of hearsay and bad character should be repealed. These have resulted in substantial additional arguments and delay and we question whether they have resulted in greater convictions of the guilty.
9. The historic requirement under the Governor's warrant to produce a prisoner on remand every 28 days to the court could be extended, saving the cost of interim hearings.
10. More cases could be heard in magistrates' courts rather than the Crown Court. We believe this will generate significant savings for the legal system, but any changes must be subject to appropriate safeguards and must not dilute right to trial before a jury. We also believe that the comparative cost and efficiency of lay and professional judges should be considered.
11. CDS Direct should be abolished. Costs savings could be made by abolishing CDS Direct and engaging solicitors to handle this work in their locality, without the need to change the rules which prohibit attendance in the vast majority of these cases.

12. There should be an urgent review of the use of Associate Prosecutors. It seems to us likely that the savings achieved in the CPS budget are at the expense of the court service and the legal aid system.
13. The CPS should review its charging policy in Very High Cost Cases (VHCCs). A more strategic approach is needed to reduce costs in complex VHCCs.
14. The Law Commission's report on the law of housing tenure should be implemented. In particular, a simple system of secure and standard contracts, in place of the existing multiplicity of tenancy and licence types would provide substantial benefits for both sides.
15. There should be stronger case management and greater resources devoted to the family justice system.
16. Caution needs to be exercised in assuming that mediation will necessarily save costs.
17. Significant investment needs to be made in IT within the court service.
18. Courts should use their wasted costs powers to penalise public authorities and others who cause unnecessary costs to be incurred by practitioners and the Legal Aid Fund.
19. Public authorities whose administrative decisions are overturned by courts and tribunals should be required to pay the costs of the claimant to the legal aid fund, together with a surcharge.
20. Similar provisions should apply to prosecuting authorities where a judge finds that a case should not have been brought because of the paucity of evidence.
21. The threshold for making wasted cost orders should be lowered.
22. A full cost benefit analysis of means testing should be undertaken in all areas of work.
23. Rates for legal aid should be set so that no individual fee earner should be able to earn more than £250,000 from public funds.

#### **Chapter 4: funding**

24. The recommendations in Jackson LJ's report need substantial analysis to ensure they do not adversely affect access to justice
25. There should be a review of the provision of legal expenses insurance (LEI) and a proper, enforceable code of practice for LEI provision
26. In the light of that review, discussions should take place with the insurance industry on the feasibility of additional cover for areas, particularly where a contingency arrangement is inappropriate.
27. Work should be done on providing a statutory code to regulate third party funding.
28. Seized assets of defendants should be made available to pay their defence costs.
29. An increased tax on alcohol with the money going to the legal aid fund and other criminal justice agencies.
30. A levy on the financial services industry to cover the costs of fraud cases arising out of financial crime.

## **Chapter 5: the role of providers**

31. Consideration should be given to granting powers to a local body to allocate funds, and identify local priorities and gaps in order to mitigate the disadvantages of a pure market approach.
32. The Defence Solicitor Call Centre should be abolished and replaced with local arrangements,
33. Greater choice and flexibility for firms to determine how they take on and run cases.
34. Simplification of contractual requirements for firms and specifying an element of tolerance for unintentional non-compliance.
35. Streamlining of accreditation schemes to ensure that they are pitched at the correct level to ensure quality and to avoid duplication.
36. Rationalisation of hourly rates to make it easier to identify the relevant fee.

## Appendix 2: Law Society submission to the Family Justice Review

### The Law Society's response

1. The Law Society is the representative body for over 100,000 solicitors in England and Wales. It negotiates on behalf of the solicitors' profession, lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers.
2. The Law Society welcomes the opportunity to comment on the Family Justice Review Call for Evidence.
3. In preparing this response, we sought the views of the specialist committees of the Society - the Family Law Committee and the Children's Law Sub-Committee. These committees are made up of specialist practitioners who have experience of the way in which the family justice system works in practice.
4. The family justice system plays a vital role within society. It allows individuals (and the state) to access, apply to, and seek assistance to help resolve issues concerning families and children.
5. We believe that the current family justice system is capable of meeting the needs of its users, however, at present there is a lack of resources which prevents cases being dealt with efficiently. We have suggested throughout our response a number of ways we believe could assist with capacity concerns and improve the functioning of the family justice system.
6. The Law Society supports the use of alternative dispute resolution mechanisms where appropriate, however we believe that it is imperative that the court system remains open and accessible to those who need and want assistance from the courts.
7. Solicitors play a vital frontline role in the family justice system, and are usually the first place individuals go when their relationship has broken down. Solicitors inform people of their options, provide them with important information about the family justice system and provide support in relation to individual circumstances.
8. We believe that our membership have a key role in family matters to advise and assist parties to resolve their disputes through the most appropriate, effective and efficient means.



9. We now answer the individual questions raised in the paper.

**1. What does the family justice system mean to you? What should the purpose of the family justice system be? What should not be included in the family justice system?**

The family justice system (FJS) exists to allow individuals (and the state) to access, apply to, and seek assistance to help resolve issues concerning families and children.

Family justice does not produce the typical 'winner/loser' scenario which is common in other forms of litigation. The FJS must accept, cope with and adjudicate upon a myriad of complex matters, such as state interference with family life, financial disputes, protection of children, conferring of parental responsibility, medical, educational and health considerations of children and contact and residence disputes. It also needs to be sensitive, responsive and continually evolving to deal with increasing complexities of life such as intercountry adoptions and non-biological parents.

The purpose and function of the system must first be to provide methods of resolution through autonomous decision making where possible, and where a decision must be imposed to provide robust, acceptable and respected decisions, orders, directions and resolutions. It must seek to inform, educate and determine issues and problems. The FJS should be available to assist with all issues which concern families. It should not be selective, nor discriminate. Further, we believe that no steps should be taken to undermine the primacy of the English legal system to determine all matters relating to the law of England and Wales.

The FJS is not limited to court based decisions.

Court based work is usually only a small percentage of cases undertaken by solicitors, a significant proportion of cases are settled outside the court room. We support the exploration of alternative processes of dispute resolution (ADR) for private law disputes, subject to appropriate accreditation, safeguarding, screening and consideration of diversity issues, and only on the basis that those disputes that cannot be resolved outside of the court system, should not be prevented from applying to the court for help. We believe that our membership have a key role in such disputes to advise and assist and represent.

**2. What should the role of the state be when dealing with family-related disputes that do not concern the protection of children or vulnerable adults? To what extent should the state fund this?**

The state inevitably has a role to play in private family life. The state must therefore play a role where disputes arise.

If the state does not provide mechanisms for dispute resolution (DR) when dealing with family related disputes that do not concern the protection of children or vulnerable adults, parties may use destructive methods of resolution whilst competing to achieve the desired results.

When both parties are amicable and co-operative, a dispute may be capable of autonomous resolution albeit often with the assistance of professional help. It is necessary for the state to provide an accessible system which allows individuals to apply to and receive assistance in order to resolve outstanding problems and disputes.

Although this question relates to disputes that do not concern the protection of children or vulnerable adults, in nearly all disputes there is a stronger party and a weaker party, and the state should have in place dispute resolution mechanisms to protect the weaker, but not vulnerable, party from being overpowered and becoming vulnerable, and to deal with issues of child protection.

ADR processes assist many parties to reach agreement but for those who are unable to do so, there must be a concurrent system provided by the state to provide robust, acceptable and respected decisions. Agreements reached and decisions imposed must be enforceable by the state otherwise they become meaningless.

We appreciate the Government's need to find significant savings, and we look forward to working with the Ministry of Justice to streamline processes. However, we fear inequality of arms may result in inequitable consequences without the availability of public funding to resolve family related disputes.

Individuals who cannot find representation have no alternative but to become litigants in person. Some judges have indicated they are already seeing an increase in litigants in person and that they fear a further increase. These cases take more court time as judges are obliged to spend more time in explanation and in eliciting information. Litigants in person cannot be advised as to when it is appropriate to agree settlement terms, therefore pre-hearing settlements or settlements at the door of the court, are less frequent. Litigants in person do not always understand why decisions are taken, have difficulty in accepting them and may well try to bring inappropriate appeals requiring even more court time.

- 3. How effectively does the current family justice system meet the needs of its users? For example:**
- a. Does it have the capacity to deal with all cases comprehensively?**
  - b. How could capacity in the system be increased?**
  - c. How efficient is the system?**
  - d. Does the system ensure equality and diversity?**

The current family justice system is capable of meeting the needs of its users. However, at present there is a lack of resources which prevents cases being dealt with efficiently, and in some cases comprehensively.

The Law Society believes that capacity could be increased through the following mechanisms:

- There is a need for continued robust judicial case management. The judiciary need to drive cases forward and identify at the outset the key issues that need to be determined. Fewer hearings, where appropriate, should be encouraged, and in private law cases consideration should be given at all stages as to whether it is appropriate to refer the case to an ADR process. The use of experts should be judicially managed so that they are used when necessary, and confirmation as to capability of the expert to undertake the report within a set time and for a set hourly rate should also be provided.
- Provision for more specialist family judges, more sitting time and judicial continuity would provide judges with the opportunity to robustly manage their cases and ensure that these cases are dealt with efficiently.
- Greater use of technology, including the basics which are under used such as email but also of telephone/ videoconferencing hearings. In many cases it will not be necessary for solicitors and/or parties to attend court in person for all directions hearings.

The family system is riddled with delay and administrative burdens which prevent the system from running efficiently. The current problems faced by Cafcass, as outlined in question 25, are of significant concern and impact on the efficiency of the FJS. We believe that existing resources should be properly focused and directed to front loading services, which are vital within the FJS.

We believe that the FJS does on the whole ensure equality and diversity to its service users but this is only achievable because the system has various partners in the private and voluntary sectors which enable these rudimentary features to be achieved. For example, solicitors will usually organise interpreters for parties who may require these services to better participate at court hearings. Another example is the aid given to parties with learning difficulties in the form of learning difficulties advocates who are usually sourced from the voluntary sector.

**4. Are there areas within the current system where we could adopt a more inquisitorial approach, whereby the court actively investigates the facts of the case as opposed to an adversarial system where the role of the court is primarily that of an adjudicator between each side? What are the options, and advantages and disadvantages, for: Private disputes arising from divorce or separation? Public matters, where the state intervenes to ensure the protection of children?**

The family courts, particularly in respect of children matters already adopt a more inquisitorial approach than other courts. While the judiciary provide direction as to key issues to be determined, Cafcass officers are needed to do much of the investigation to assist the court. Where findings of fact are necessary, such as in public law cases where threshold is contested (or not sufficiently conceded) or private law cases of domestic violence these matters need to be properly tested by a court.

We note that at present due to the lack of resources, especially by Cafcass, the inquisitorial nature of the system is being somewhat frustrated as restraints are placed on how much time and resources can be utilised in investigating the case.

We believe that the adversarial nature of divorce proceedings should be minimised, and consideration given to simplifying divorce procedure. The introduction of no fault divorce would diminish the adversarial nature of the marriage breakdown.

**5. How far are users able to understand the processes and navigate the family justice system themselves? Are there clear signposts throughout the system? Do users know how and where to access accurate and timely information and advice? Is it readily available? What are the options to support/enable people to resolve these issues without recourse to legal processes?**

Lay parties find it difficult to navigate the FJS. Where parties are legally represented solicitors are able to explain how the system operates, options available, including options outside the court room, and manage the expectations of the client.

We believe that there is information available to parties through pamphlets and online services in respect of process and procedure, but not about the holistic approach to a case which is necessary. We feel that the government could provide more information written in plain English about the FJS on websites such as 'Directgov', as well as consider the use of information DVDs. Frequently lay parties have to be shown the right direction by the judge, which causes unnecessary delay and significant increases in costs, especially for other parties.

## **6. How best can we provide greater contact rights to non-resident parents and grandparents?**

The Children Act 1989 provides rights to non-resident parents and grandparents. We do not believe that the requirement to seek leave of the court acts as a significant barrier preventing family members from applying for a contact order. We believe that this is an important requirement that should not be removed, and suggest that applications for leave should initially be dealt with on paper by a District Judge.

Grandparents and non-resident parents may find it difficult to apply for greater contact rights if they do not have access to legal advice. However, when legal advice is available, aside from concerns around domestic abuse, we feel that most reluctance in respect of contact may on the part of the resident parent be down to emotional issues.

In such cases parents need information to show them the effect hostile or antagonistic behaviour can have on their children. Good quality legal advice and advice from children specialists for all parties can help promote contact. Early management of expectations and lateral thinking to find solutions to difficult geographical and timetabling issues are important. Solicitors, counsellors, and ADR practitioners can play a significant part, where appropriate, in helping disputants agree on greater rights for non-resident parties.

## **7. How effective is alternative dispute resolution (ADR), such as mediation, collaborative law and family group conferencing? What types/models of ADR are more effective and for which circumstances? Does this differ according to cases? How could we improve it and incentivise its use and what safeguards need to be put in place?**

ADR can be very effective, however, ADR only works for those parties who are willing, able and prepared to negotiate and enter into resolution of the family issues which affect them. Those who are not prepared to help find solutions to their family problems are not susceptible to ADR, and, for them, the court process exists to oblige them to engage in the dispute resolution process.

We believe that if consideration is to be given to introducing compulsory assessments, or a compulsory ADR scheme regard should be had to accreditation, safeguarding, screening, cultural and diversity issues.

### Mediation

We have been informed by the Legal Services Commission that in 2009/10 there were 14,687 mediation starts where at least one party was legally aided, with 70% of the mediations closed reaching a full or partial agreement. It is our understanding that mediation is slightly more effective in children matters than in financial matters.

### Collaborative family law

In 2006-2007, approximately 80% of Collaborative Family Law cases, reported as part of Resolution's Collaborative Law Report, achieved settlement on all issues. The Law Society supports the introduction and continued expansion of CFL as one option in the ADR menu.

### Family group conferencing

We believe that Family Group Conferencing is a useful tool in both public and private law matters. The Conference enables wider involvement of family members, and even older children in some cases to play an important role in reaching agreement in proceedings. We would support greater use of Family Group Conferences.

### Family arbitration

A change in primary legislation will be needed to facilitate binding arbitration in the family law arena. Notwithstanding this, the Law Society is working with other stakeholder organisations to create a new Family Arbitration scheme. The scheme will include training and accreditation for suitably experienced family lawyers to conduct family arbitrations.

It is proposed that the scheme will launch during 2011 to cover financial applications only. It may be extended to children later. The only applicable law will be the law of England and Wales.

Prior to the coming into existence of this scheme there has been a Family Law Bar Association family arbitration scheme, but it is our understanding that it has been little used.

### Parenting information programme (PIPs)

Cafcass have stated in relation to PIPs, 'early indications are that this is a successful programme'. At present, PIPs are attended through court order, however, we believe that parties should be able to attend PIPs free of charge without having to be ordered by the courts. Children's welfare is best served when their parents are constructive and child-focused, and where the parents reach concessions on decisions regarding children's upbringing. The Law Society supports parenting information, such as Resolution's 'Parenting After Parting'.

### Incentivising ADR

We suggest that a triage process involving consideration of ADR processes should, in principle, be made available in all private law matters (children and ancillary relief matters), subject to adequate safeguarding in children matters as is currently the case. There is merit in having solicitors and parties select an effective ADR process suited to the dispute, the parties and all the circumstances. Where selection consensus cannot be reached, an appropriate default ADR process might apply.

We understand the government is looking at introducing compulsory mediation assessments, however we do not agree that parties should be compelled to consider mediation over other ADR processes. The focus should be upon resolution through non-court based means, and not mediation per se.

We believe that where ADR is unsuccessful or parties prefer to go to court after consideration of and initial assessment for ADR, access to the courts must always be available.

We also believe that the judiciary should be encouraged to consider at all stages of the hearing whether it is appropriate to refer the case to an ADR process.

### Convening meetings

It may be useful to consider the option of convening meetings for litigants in person or where a solicitor feels this is appropriate. Well trained and experienced family mediators are able to provide a venue for family members in dispute to come to a “convening meeting” to be informed about and consider together the full range of DR and ADR options open and available to them.

### Safeguards

Consideration of ADR processes should not delay those cases where there is an emergency, abuse, or child protection concerns from immediately entering the courts. Safeguarding was introduced for good reason and should not be diluted if a case is taken out of court and is dealt with through ADR processes.

All those assisting ADR process selection must continue to operate all the usual safeguards:

- vulnerable disputants must be assisted in avoiding unnecessary confrontation;
- public funding for appropriate DR or ADR processes must be available for those financially eligible for legal aid;
- consideration of cultural and diversity issues.

Our response to question 25 also discusses Cafcass safeguarding.

**8. To what extent do issues around enforceability of court orders motivate decisions to go to court? To what extent does it affect decisions within and outcomes of cases?**

The public expect that once a court order is made that order will ordinarily be enforced. Whilst the Law Society acknowledges the difficulty in enforcing court orders we do not believe this impacts the motives of those seeking a court order. Litigants do not necessarily appreciate issues around enforceability.

Financial ancillary relief

It is only a court order which can operate to formalise arrangements in relation to a formerly married (or formerly civil partnered) couple's financial interconnectedness.

ADR techniques operate very effectively to bring parties to agreements on such matters which are then "translated" into a court order by consent.

Private law children

In this arena ADR processes rarely produce enforceable outcomes, since parties to ADR do not routinely seek to "translate" the outcomes of their ADR process into consent orders, since the "no order" principle of Children Act 1989 section 1(5) is often interpreted as suggesting that agreed contact arrangements do not need to be embodied in a court order by consent.

The net result is that frustrated parents seeking contact often dismiss ADR processes following periods of contact being inconsistent or refused, and move directly to court proceedings to obtain an enforceable outcome.

In private law children matters we consider the Private Law Programme's court-referred mediation to be an excellent model (whether involving mediation at court or mediation away from court), which results, after issue and early triage, in courts routinely and rapidly turning mediated outcomes into consent orders. Please refer to the LSC's paper on In-Court Mediation for information on their recent pilot.



- 9. Are there elements of cases which could be considered outside of a court setting and if so by whom? For what type of cases would this be appropriate and what sort of settings might be suitable alternatives? What are the benefits and disadvantages?**

Please refer to question 7.

- 10. Would adding a triage stage, whereby cases are assessed as to the appropriate course of action, make the system more efficient; i.e. by speeding processes up, ensuring resource could be allocated appropriately etc? In what areas might this be appropriate?**

Yes, please refer to question 7.

- 11. Do you think the Family Justice System is well organised and managed? What are the strengths and weaknesses of the current governance and management structures? Who should take responsibility for the decision-making process? Who should be responsible for the administrative running of the system?**

Please refer to question 3.

- 12. What systems issues are there? eg how could things like IT, filing and administrative processes be improved?**

The administrative system and processes are out-dated and behind current practices, especially in relation to e-communications. Synchronised communication of the court systems should be introduced, which would assist in preventing duplication of typing out court orders. It would also enable judges who are sitting to place hearing dates into the e-diary for the benefit of all parties, and would help to increase judicial capacity as cases would not be vacated at a later date. We would encourage modern forms of engagement with the courts, such as telephone, video conferencing mechanisms, in accordance with civil procedure.

- 13. Who should take ownership of cases when they are in the family justice system? Who is the case manager? And at which point do and should they relinquish responsibility?**

We believe the judiciary should take ownership of cases. Appointment of a designated judge or clerk is vital in ensuring ownership remains with the judiciary. However, judges must feel able to place responsibility on others to assist with case progression, such as referring cases to ADR, and requesting guardians or Local Authorities to investigate facts.

**14. How can we ensure that there is sufficient and appropriate accountability throughout the system?**

We believe that there should be quality assurance mechanisms in place for all key stakeholders within family proceedings.

Solicitors are bound by the Solicitors' Code of Conduct governed by the Solicitors Regulation Authority and there is a Legal Ombudsman (as of October 2010) to handle any complaints made against a solicitor.

Ideally, we believe that an appraisal system should be established for the judiciary to receive feedback on their performance, and provide public reassurance about judicial quality. However, we recognise that there are significant cost implications in establishing and maintaining such a system.

**15. How well do different organisations/partners in the family justice system work together to resolve cases? What can be done to improve this?**

We believe that on a whole the organisations and partners in the FJS work well towards resolving cases. Legal stakeholders regularly work together in difficult circumstances to discuss ways to resolve complex matters. However, we believe that an improvement in effective working relationships on the part of Cafcass and the LSC would greatly assist in dealing with family matters efficiently.

**16. How clear are the different roles and responsibilities of those who are involved in the family justice system (such as the judiciary, legal practitioners, social workers, Cafcass officers, expert witnesses, administrators, Independent Reviewing Officers, court staff)? Are all these roles necessary? How effectively are these roles fulfilled?**

We believe that each of the listed professionals involved in the process plays a specialised role in proceedings and these roles are clear and distinguishable. We would like to emphasise that we believe experts should only be used where necessary and this should be carefully managed by the judiciary. Further, we note that due to resource constraints not all of these roles are being as effectively fulfilled as they could be. However, we do not feel that any of these roles should be taken out of the system.

**17. Where do you think there is scope to make efficiency savings within the family justice system?**

Improved case management, judicial continuity and early identification of key issues within a case will result in shorter hearings, free up capacity and help to reduce court delays. We are concerned that with the further increase of litigants in person appearing in family matters, lay benches may not ensure robust case management and may not be able to deal efficiently with these cases. Further, the increased use of ADR is likely to lead to efficiency savings.

The Law Society would support any decision by the Family Justice Review panel to investigate whether it would be appropriate to establish a tracking court system for ancillary relief with the judiciary as the gatekeeper, along similar lines to that which is in place for civil cases.

**18. What improvements to funding arrangements and mechanisms could be made?**

We believe that increased use of privately funded welfare reports in private law cases should be encouraged to release the current pressures placed on Cafcass.

**19. Please tell us about your role in the family justice system. What value does this add to the family justice system?**

Solicitors play a vital frontline role in the family justice system, and are usually the first place individuals go when their relationship has broken down. We inform people of their options, including both ADR and court based options, provide them with important information about the FJS and provide support in relation to individuals' circumstances.

Court based work usually represents only a small percentage of the work undertaken by solicitors, as a significant portion of cases are settled outside the court room. The Solicitors' role involves assisting parties reach agreement by providing the necessary advice equipping parties to make informed decisions, and by assisting in negotiations.

**20. What qualifications and experience should be required for the different roles of those who work in the family justice system? What should be included in initial training and continuous professional development?**

We believe that greater awareness across the family justice spectrum of ADR should be encouraged for all roles within the FJS.

**21. Are there sufficient performance management and feedback mechanisms throughout the system as a whole?**

We believe that it is important for key stakeholders to provide constructive feedback to one another and discuss options for maintaining effective working relationships. The judiciary should provide feedback during proceedings to ensure that the key stakeholders are working together to meet timeframes and provide direction as to the steps that should be undertaken throughout the proceedings.

## **22. How could the system be improved to ensure it meets the needs of users and secures positive outcomes for children?**

The FJS is under the strain of ever increasing demands, and increasingly limited resources. However, courts must ensure that the welfare of the child is the paramount consideration. Parents have rights, but it is the welfare of children that is paramount.

We believe that the system could become less bureaucratic. There is an abundance of regulations, circulars, government and judicial guidance, for example, the pagecount for 'Working Together to Safeguard Children' has been:-

- 1999- 120
- 2006- 256
- 2010- 391 pages.

This is of particular concern in the application of thresholds for intervention, removal and the need for further assessments, which can lead to professionals looking for answers other than in guidance, risking both unnecessary intervention and a failure to intervene when required.

The volume of paperwork in care proceedings is ever increasing with Local Authorities left to manage increasingly large oversized bundles.

The system is considered as being too complex, few people understand it. The Plowden report on court fees (September 2009) comments:

'11.18 I have been struck by its complexity and how poorly understood it is, particularly by those from outside the field, but also by some of those within it.... While there is plenty of guidance about how the major elements of the system work, there is little to explain how they relate to each other.'

We believe that consideration should be given to reducing the need for further assessments within the court process. This may be achieved by introducing a good national model form of assessment for social workers to follow.

In some cases there may be an opportunity for social workers, teachers and foster carers who know the family to provide important information which would negate the need to rely on the engagement of an expert, since they may have a better understanding of the family than someone who has limited time to engage. There may also be an opportunity for local resources to be developed.

Delays have been increasing ever since the Children Act 1989 came into force. At its inception, it was expected that care cases should be concluded within 12 weeks. This grew to 40 weeks with the Judicial Case Management Protocol (2003) and with the introduction of Key Performance Indicators to tackle delays, there is a danger that this 'expectation' will slip further to 50 and 80 weeks. It is our understanding that the average length of time taken to conclude a care case is 51 weeks. We believe that the Public Law Outline should be robustly case managed by the judiciary.

**23. How can we ensure sufficient protection is afforded to vulnerable adults through the system?**

Earlier screening provided by Local Authorities in the pre-proceedings phase would assist in earlier identification of vulnerable adults. Consideration should also be given to making use of intermediaries and local advocacy services, with the Judge being the arbiter on who attends to 'represent' parents.

**24. In what types of cases is it important to hear the voice of the child to assist with decision making? How should the child's voice be heard in the family justice system?**

The voice of the child should be heard in all cases where they are involved. Weight should continue to be given according to the child's age and level of understanding. In all cases where a child wants to have a voice, all possible steps should be given to provide this opportunity. Ensuring the voice of the child in private law matters is just as important as in public law matters.

Where appropriate to ensure children's voices are heard children should be legally represented and have a children's guardian actively involved in the case. Further, where appropriate, courts could be more open to the input of other organisations able to relay the child's voice, such as where a child has an existing relationship with a youth worker when proceedings commence. This should not replace the functions of the child's guardian but could provide an additional service to the court when required.

**25. How effective are Cafcass and CAFCASS Cymru? What should their role and remit be in the future?**

The Law Society is concerned with the current operation and effectiveness of Cafcass in both public and private law proceedings. There is evidence that courts nationwide are facing delays in the appointment of guardians in public law cases and substantial delays in the preparation of reports in private law cases. This has put the welfare and safety of children at significant risk.

We are also concerned by the current capacity of guardians. The Society understands that guardians are being nominally appointed in circumstances where they have no capacity to undertake the work required. It is our understanding that currently there is too much work and not enough guardian capacity in some areas.

Where the guardian does not have the capacity to undertake the work required this undermines the tandem working model, and leaves solicitors in a difficult situation where they have nominal instructions on behalf of their child client but in reality they are often inappropriately left to make welfare recommendations.

The Law Society is aware that in many areas there is concern with the time it takes for safeguarding to be completed by Cafcass in private law children matters: it is often routinely incomplete on the majority of cases at first directions appointment. This delay has a consequential and significant impact on the possibility of in-court mediation: judiciary and Cafcass feel unable to release matters for mediation/mediation assessment in the absence of completed safeguarding. Further, there is a misuse of judicial resources where cases are relisted, with no orders made as safeguarding has not been completed. This frustrates the existing triage process in private law children matters.

We understand that changes within Cafcass will be needed to reduce the current backlog, however we do not believe that decreasing the role the guardian plays within a case will be in the child's best interests. We strongly support the principle of a named guardian in each case as outlined in section 41 of the Children's Act 1989, and believe that continuity of a named guardian working in tandem with the child's solicitor throughout proceedings is an important aspect of ensuring the interests of the child are paramount in any given case. The tandem model is a highly respected working model that ensures the voice of the child is not lost.

It is our understanding that a significantly larger portion of Cafcass employee's time is now spent fulfilling internal reporting requirements. There is concern that the current reporting requirements are taking guardians away from courts. Streamlining these reporting requirements may result in increased guardian capacity.

Our comments do not extend to CAFCASS Cymru.

**26. What has guided your response to the questions posed above, e.g. personal experience, feedback from the public, specific research or evidence?**

In preparing this response, we sought the views of the specialist committees of the Society - the Family Law Committee and the Children Law Sub-Committee. These committees are made up of specialist practitioners who have experience of the way in which the family justice system works in practice.

**27. What can be learned from the way in which other sectors work which could be transferred to the family justice system?**

No response.

**28. Do you know of any good and innovative practice in the UK that the Review Panel should consider? What wider services could be tapped into (especially in the children's sector) to support the family justice system?**

We are informed that Liverpool operates a system for fast tracking 'discharge of care order' applications so children do not remain 'looked after' for longer than is necessary.

We are also informed that the Children's Society is setting up a freephone legal information service for 13-19 year olds. The service is being piloted and the aim, subject to funding, is that over time it becomes a national service.

**29. Is there anything we can learn from international examples?**

We believe some aspects of the Australian FJS may assist when considering any reform of the FJS. Some the Australian FJS aspects, include:

- Family Relationship Centres – provide information and advice for families at all stages in their relationship.
- Family Relationship Advice Line – a national telephone service which provides information on relationship issues and advice on parenting arrangements after separation.
- Family Relationships Online – provides information about relationships and separation. It informs people about the range of services available to assist with their relationships issues.

We found the Australian Attorney-General's Department website ([www.ag.gov.au](http://www.ag.gov.au)) to be a helpful source of information.

**30. What question would you have liked us to ask that we haven't posed and what would your response be?**

Further, to our response in question 4, we believe that consideration should be given to simplifying the divorce procedure through the introduction of no fault divorce.

## **Appendix 3: payment mechanisms: 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.

## **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',<sup>3</sup> 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.

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.<sup>4</sup>

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.

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<sup>3</sup> Social Action Group –Time well spent. [www.cabinetoffice.gov.uk/social\\_action.aspx](http://www.cabinetoffice.gov.uk/social_action.aspx)

<sup>4</sup> Figures provided by the LSC

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.

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.