

The English Approach to Access to Justice
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This paper summarises the English approach to providing access to the law – which for the last 50 years has relied heavily on subsidising the services of private lawyers. I start by looking at the legal aid scheme and at the recent attempts to reform it. I then consider lay advisors - who can provide high quality help for a wide range of poverty law issues. I end with a brief account of recent attempts to simplify procedures – and ask how far simpler procedures remove the need to advice.

The paper deals with the provisions applying in England and Wales, rather than the whole of the UK. Separate schemes exist in Scotland and Northern Ireland. The Scottish scheme, which began on a similar basis to the English one, puts more emphasis on criminal than civil law issues, and is now developing along different lines.¹

LEGAL AID

The English approach to access to justice has been dominated by legal aid. And legal aid has been dominated by the private profession. The English legal aid scheme, conceived in 1945 in a bout of victory optimism, was a classic ‘judicare scheme’, paying private solicitors to provide services on a case by case basis. Until the latest reforms, introduced in 2000, English legal aid displayed all the strengths and weaknesses of the ‘judicare’ model.

The traditional scheme

Strengths

On the plus side, legal aid has provided help as of right to all those who qualified. People could choose and use their own solicitors in the traditional way. In theory, at least, the only difference was in who paid the bill. The private profession was heavily committed to the scheme, which by the early 1990s, accounted for 12% of solicitors’ earnings, and 27% of barristers’ earnings.² Some 11,000 solicitors’ offices took part, providing wide

¹ England and Wales has one of the highest expenditures on civil legal aid, while Scotland is a major spender on criminal legal aid: see T. Goriely, A. Paterson and C. Tata, *Expenditure on Criminal Legal Aid: Report of a Comparative Pilot Study of Scotland, England and Wales and the Netherlands* (Scottish Office, Edinburgh, 1997). The study found that, despite a similar crime rate, Scotland spent nine times as much on criminal legal aid as the Netherlands, and half as much again as England and Wales.

² See Goriely, “The Government’s Legal Aid Reforms” in ed. A. Zuckerman and R. Cranston, *Reform of Civil Procure: Essays On ‘Access to Justice’*, (Clarendon Press, Oxford, 1995).

geographic coverage.³ Payment was demand led, with the Government obliged to meet all the bills submitted. As demand grew, so did the service.

The scheme was always meant to cover middle income groups as well as the poor. The 1945 Rushcliffe Committee, which developed the original blue print, stressed that legal aid was not just for those 'normally classed as poor' but should extend to all those of moderate means who had difficulty paying for lawyers. The means test has fluctuated over the years, but it has always been generous by international standards. The proportion of households qualifying for at least some help fell from a high of 81% in 1979 to a low of 54% in 1989.⁴

Weaknesses

Unfortunately, judicare schemes also display serious weaknesses. The main lobbying organisation, the Legal Action Group (LAG) has severely criticised English legal aid for the narrow range of services it offered. Help was confined to advice, assistance and representation. These, LAG argued, should be supplemented by information, education and law reform.⁵

Casework was dominated by the traditional areas of lawyers' practice – notably crime, divorce and personal injury. In some ways this was deliberate. One of the main pressures behind the development of civil legal aid in the 1940s was the English dilemma over divorce. At the time, divorce required an expensive action before the High Court. Attempts to simplify the procedure ran in substantial opposition from church groups and from barristers (who made a good living from divorce). However, denying divorce to the working classes also proved politically unacceptable. Government solved the dilemma by keeping divorce expensive but providing a public subsidy.⁶ Although there has since been some simplification of divorce procedure, lawyers' heavy involvement in the process remains. As personal injury work grew, legal aid became a major funder of these cases, although conditional or contingent fees would have provided an acceptable alternative.

The domination of legal aid by a few traditional work areas belied the rhetoric that legal aid would ensure legal rights for the poor. As the National Consumer Council argued in 1989, the scheme:

...does not give the poor and deprived accessible help in those fields of law which are of most concern to them, such as social security, housing debt, employment and immigration. Although legal aid aims to overcome the cost barrier, it does not overcome any of the other barriers which people encounter in using lawyers. It does very little to inform people of their legal rights, and it does not prevent them

³ Above.

⁴ M. Murphy, 'Civil Legal Aid Eligibility Estimates 1979-1990, appendix 1 in Legal Action Group, *A Strategy for Justice* (LAG, London, 1992).

⁵ *A Strategy for Justice*, above.

⁶ See Goriely, 'Making the Welfare State Work' in ed. F. Regan et al., *The Transformation of Legal Aid* (Clarendon Press, Oxford, 1999).

from being intimidated by the idea of going into a solicitor's office. Few solicitors' offices are located in deprived areas where the poor have most need of them, and solicitors receive little training in social welfare law. The problem is circular – the poor do not think of using a lawyer for advice with their problems, hence lawyers do not develop skill and expertise in these areas, and the service is not available to those who wish to use it.⁷

From the late 1980s onwards, more solicitors did start to use the advice scheme (known as “green form”) to provide initial help in areas of social welfare law. Between 1990 and 1993, the number of bills for immigration, welfare benefits, employment, housing and debt doubled (from 220,000 to 467,000).⁸ However, this was mostly fairly rudimentary help – limited to an hour or two of advice. Legal aid does not provide representation before the main tribunals dealing with welfare issues (such as employment or social security tribunals or immigration adjudicators).

The main weakness of legal aid was simply the cost. International comparisons of legal aid expenditure are difficult and can be carried out in many different ways. All of them, however, put England and Wales at or near the top of the list. Blankenburg⁹ describes the British as driving the Rolls Royce of legal aid, with expenditure of almost \$38 per person (compared with under \$2 in the USA, \$9 in Ontario and \$12 in the Netherlands).¹⁰ From 1990 onwards, the ever-increasing cost has dominated the legal aid debate, with successive governments describing legal aid as unaffordable.

Blaming lawyers

Governments have blamed lawyers for increased costs, using the economic theory of ‘supplier-induced demand’. The term first entered the debate in 1994, when a right-wing think-tank claimed that lawyers deliberately oversupplied clients with services because someone else was paying.¹¹ Since then, the notion of supplier-induced demand has generated considerable heat, but not great light.¹² An analysis of rising costs for LAG found a mixed picture. It found that between 1980 and 1989 there had been a real

⁷ NCC, *Ordinary Justice* (HMSO, London, 1989) pp. 99-100.

⁸ Legal Aid Board, *Annual Reports*.

⁹ E. Blankenburg, ‘Lawyers’ Lobby and the Welfare State: The Political Economy of Legal Aid’ in ed. F. Regan et al., *The Transformation of Legal Aid* (Clarendon Press, Oxford, 1999) (reprinted in Sourcebook).

¹⁰ Other comparisons include Conseil D’Etat, *L’Aide juridique*, Section du Rapport et des Etude (Paris, 1990); and Ed Rekosh and others, ‘Access to Justice: Legal Aid for the Underepresented’, in *Pursuing the Public Interest* (Columbia Law School, New York, 2002) (reprinted in Sourcebook).

¹¹ G. Bevan, A. Holland and M. Partington, *Organising Cost-Effective Access to Justice* (Social Market Foundation, London, 1994).

¹² See A. Gray, ‘The Reform of Legal Aid’ (1994) *Oxford Review of Economic Policy* 51; G. Bevan, ‘Has there been Supplier-Induced Demand for Legal Aid?’ (1996) *Civil Justice Quarterly* 98; G. Bevan, ‘Legal Aid: A Case Study in Quasi-Market Failure’ in eds. W. Bartlett and others, *A Revolution in Social Policy: Quasi-Market Reforms in the 1990s* (The Policy Press, Bristol, 1998); D. Wall, ‘Legal Aid, Social Policy and the Architecture of Criminal Justice: The Supplier Induced Inflation Thesis and Legal Aid’ (1996) 23 *Journal of Law and Society* 549; and H. Stewart, ‘An Economic Analysis of Legal Aid Delivery Models’, in *Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Ontario Publications, Toronto, 1997).

increase in divorce costs of 68%, mainly accounted for by an increase in hours claimed per case. Part of the reason was that divorce had become more complex. Domestic violence was taken more seriously; more couples had a house to fight over; and there was some evidence that men were more likely to challenge childcare decisions. However, these reasons did not account for the whole increase: 'there seems to be some element in legal aid costs which is difficult to pin down and which so far as eluded the government and legal aid authorities'.¹³ As lawyers' firms improved their management systems, they were able to record and claim for more hours. Also, litigating is a competitive activity. The more that one side spends, the more the other side needs to spend, leading to inbuilt inflation.

The theory of supplier-induced demand comes in two versions: the strong and the weak. In the strong version, as used by politicians, 'greedy' lawyers are blamed for supplying services that clients do not want or need. There is no empirical support for this. Greed, at least in the pejorative sense, is not a concept known to economics. There is no evidence that lawyers are more or less 'greedy' than any other occupational group. Need mainly boils down to political judgement, and there is no agreed basis on which it can be measured. Strong arguments can be put in favour of most of the services provided, and litigants do seem to want them.

In its weak version, the theory simply states that, in a judicare system, decisions over how much legal aid to supply rest with lawyers. As rational economic actors, lawyers will supply legal aid services when the marginal returns exceed the marginal costs. This contains a very large measure of truth. A major characteristic of the English legal aid system is that lawyers make many important decisions. Subject only to light controls, lawyers have decided where to practice, what services to offer, and how much effort to put into each case. They have tended to supply more legal aid when their other markets (such as house purchase) have been stagnant.

Governments have often felt helpless in the face of rising costs. As the Conservative Government admitted in 1995, 'the measures open to the Government to moderate the increase in cost have been crude'.¹⁴ There were three main options – to reduce remuneration, scope or eligibility. Attempts to reduce lawyers' remuneration proved highly contentious, and ultimately unsuccessful, as lawyers learnt how to manipulate the new rules.¹⁵ With so much of the expenditure focused on so few areas, it was difficult to cut the scope the scheme without affecting its main purpose. For most of the 1990s, attempts to cut expenditure fell mainly on the means test. The contributions clients were

¹³ Goriely, *Legal Aid for Family and Care Work*, Background Paper 1, Nuffield Research Project (Legal Action Group, London, 1991).

¹⁴ Lord Chancellor's Department, *Legal Aid – Targeting Need*, Cm 2854 (HMSO, London, 1995), para. 3.22

¹⁵ For example, standard fees were first proposed in 1989 as a way of controlling the cost of low-level criminal cases. After considerable protest, they were not implemented until 1993. A full description of how solicitors can make maximum use of them is provided in A. Edwards, *Standard Fees in the Magistrates' Court: a Survival Guide* (Law Society, London, 1993). See also T. Goriely, A. Paterson and C. Tata, *Expenditure on Criminal Legal Aid: Report of a Comparative Pilot Study of Scotland, England and Wales and the Netherlands* (Scottish Office, Edinburgh, 1997).

required to pay rose dramatically, while the advice scheme was confined to the very poor.¹⁶

Government's attempt to gain control: the reforms of 2000

In 1998, the incoming Labour Government announced that it would 'modernise' legal aid.¹⁷ A new Legal Services Commission would replace the Legal Aid Board; and civil legal aid would be re-named as the 'Community Legal Service'. Reform, the Government said, would rest on 'three pillars': contracting, planning and prioritisation.

Contracting

When one has stripped away the rhetoric, renaming and embellishments, the core of the reforms is a reduction in the number of solicitors' offices able to provide legal aid services. Whereas previously, almost all solicitors could receive legal aid funding (with only minimal controls), from 2000 onwards only 'contracted' firms were eligible to be paid.¹⁸ In order to receive a contract, firms had to submit to considerably more controls. These are detailed and bureaucratic, covering office systems, supervision and file recording. Firms also have to meet a variety of quality requirements. These include opening their files to auditors from the Legal Services Commission, who use detailed checklists (known as 'transaction criteria') to assess files.¹⁹

Although the incoming Labour Government claimed contracting as its own idea, it builds on developments started by the previous Conservative Government. Since 1994, the Legal Aid Board had been developing a 'franchising scheme', in which legal aid firms were given a slightly higher rate of pay (plus some other benefits) if they could show that they adhered to a set of practice management standards. The Board also worked with academic researchers to develop transaction criteria, as a standard way of measuring the elusive concept of 'quality'. The criteria (or checklists) were based partly on research into actual files and partly on textbooks and expert opinion about what solicitors ought to be doing.²⁰

The main change between 'franchising' and 'contracting' was that franchising was voluntary – firms did not need a franchise in order to receive legal aid money. Contracting, on the other hand, was compulsory. When contracting was introduced, the Board/Commission experimented with further quality controls, including mystery

¹⁶ See Gorieli, "The Government's Legal Aid Reforms", note 1 above.

¹⁷ Lord Chancellor's Department, *Modernising Justice*, Cm 4155 (HMSO, London, 1998) (extracts reprinted in Sourcebook).

¹⁸ Contracting was introduced for the advice scheme in January 2000 and for civil litigation and crime in April 2001.

¹⁹ Specialist Quality Mark Standard (and Guidance), Legal Services Commission, April 2002.

²⁰ A. Sherr, R. Moorhead and A. Paterson, *Lawyers: The Quality Agenda* (HMSO, London, 1994). See also A. Paterson and A. Sherr, 'Quality Legal Services: The Dog that did not Bark', in eds. F. Regan et al., *The Transformation of Legal Aid* (Clarendon Press, Oxford, 1999).

shoppers (when auditors pose as clients) and peer review.²¹ These ideas are still being developed but do not yet constitute a major part of the scheme.

It is difficult to come to a conclusion about whether the increase in controls and monitoring has led to increases in quality, or has served only to increase solicitors' workloads and to demoralise them. Alan Paterson comments that most firms welcomed the measures aimed at improving business efficiency, such as the requirements to have a business plan and accounting systems. However, the transaction criteria proved more controversial, with many complaints that they encouraged a commodified, mechanistic approach to lawyering.²² Research by Hilary Sommerlad uncovered a deep grain of cynicism among junior staff about the new controls.²³ The following quote is typical:

“I had to talk to the auditors. I was briefed first by the Partner, told what to say... largely nonsense, but you have to say it otherwise you might lose your job.”²⁴

Planning

In theory, the reforms introduced a sophisticated new planning system to decide which firms would be granted contracts, and how much work they would be allowed to do. In practice, however, the new system has tended to replicate the *status quo*. At first, the Board set up 11 Regional Legal Services Committees. The Committees used statistical models based on census data to draw up plans; they then consulted on the plans; and produced priority ratings (low, medium or high) for each area. Decisions on awarding contracts were influenced by the ratings.

The planning system was complex, obscure and poorly understood.²⁵ At each stage, it had a tendency to replicate what was there already. The statistical models favoured the urban areas in which solicitors were already situated; consultation meant that the more solicitors in an area, the stronger the pressure for that area to be up-rated; while the decisions on awarding contracts were limited by the number of firms actually applying.²⁶ Originally the amount of work each firm conducted was meant to reflect some prior decision of need. In practice, however, the Commission adjusted the work firms were permitted to do on the basis of the work they were actually doing.²⁷ In many ways it was sensible to

²¹ See R. Moorhead and others, *Quality and Cost: Final Report of the Contracting of Civil Non-Family Advice and Assistance Pilot* (The Stationery Office, London, 2001).

²² A. Paterson and A. Sherr, 'Quality Legal Services: The Dog that did not Bark', in eds. F. Regan et al., *The Transformation of Legal Aid* (Clarendon Press, Oxford, 1999). See also Goriely, 'Debating the Quality of Legal Services', 1 *International Journal of the Legal Profession* 159.

²³ H. Sommerlad, 'The implementation of Quality Initiatives and New Public Management in the Legal Aid Sector', (1999) *IJLP* 326.

²⁴ Above, p. 332.

²⁵ See Goriely, 'Planning Legal Services: is it working?' Justice Debate Working Papers (Legal Action Group, London 2001).

²⁶ Above.

²⁷ As the Legal Services Committee put it in its *Annual Report 2001/01*:

“We adjusted contract schedules to increase the number of matter starts authorised for the whole year *pro rata* to the number of matter starts begun in the first four months of contracting. We maintain the policy that providers should not turn clients away” (p. 7)

adjust contracting to demand – and it prevented massive opposition to the reforms. But it did mean that the new, improved, planned system looked remarkably like the old, unplanned free-for-all.

The Government's emphasis has now shifted away from the 11 Regional Legal Services Committees to 182 Community Legal Services Partnerships. These are much more local, and incorporate New Labour ideas about partnership and communitarianism. They bring together local government, advice workers, solicitors and community groups at a local level. However, they are largely talking shops.²⁸ It is difficult to see how they would shift the current allocation of legal aid, or make difficult decisions about scarce resources.

Prioritising

The final pillar of the new scheme is a new funding assessment, to set priorities about who should receive help. There are two elements to this. First, some types of case (notably personal injury) have been excluded from legal aid altogether. Secondly, the ones that are left must meet detailed criteria set out in a new 'funding code'. The aim is to direct money to combat 'social exclusion'.

Personal injury

The most important change occurred in April 2000, when personal injury actions were excluded from legal aid, on the grounds that clients could use 'conditional fees' (a modified form of contingency fee) instead.²⁹ From an international perspective, this seemed a sensible change, as most jurisdictions have found that contingency fees provide adequate access to justice for this type of case. In practice, most people with small, straightforward personal injury claims have found it easy to bring actions under the new arrangements.³⁰

However, the new arrangements have not been without problems. The Government refused to introduce straightforward contingency fees, which have always generated opposition from senior English lawyers (on the grounds that they are American, commercial and encourage litigation). Instead they opted for a new form of 'recoverable' conditional fee, paid by the losing defendant insurer. These allow claimant lawyers to run up hourly bills, which they pass on to defendants. Predictably, the system has resulted in large cost rises, and has been much criticised by the insurance industry.³¹ Any reforms, however, will be along the lines of fixed fees or contingent fees.³² No one is seriously

When stripped of jargon, this means that the amount of work solicitors were allowed to do in the first year was based on how much they did in the first four months. If they found that work increased as the year wore on, they were allowed to go back to the Commission to ask for increases.

²⁸ For a description of how the partnerships work, see R. Moorhead, *Pioneers in Practice* (Lord Chancellor's Department, London 2000).

²⁹ The more difficult clinical negligence claims remain within the scheme.

³⁰ T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on pre-action behaviour* (The Law Society, London, 2002).

³¹ Recent research into personal injury claims found that costs had risen faster than the rate of inflation, and were set to rise further: see T. Goriely and others, *More Civil Justice?*, above.

³² The Civil Justice Council (an body that advises the Lord Chancellor on civil justice) is currently discussing a fixed fee system for small road traffic cases. See their website at <http://www>.

discussing bringing legal aid back for personal injury claims. In fact, many claimant lawyers seemed glad to be rid of public funding. As one solicitor put it:

In some ways, it's a welcome relief, because public funding became such a... bureaucratic thing. And it ties you so closely to cost limits and to reporting back to the Legal Services Commission and so forth. It's a blessed relief in a sense.³³

Other exclusions: business disputes and 'matters of trust law'

Alongside personal injury, the Government excluded several other areas – an action that generated little debate. Chief among these was the exclusion of any disputes that arose in the course of business; and 'matters of trust law'. It is difficult to make sense of these exclusions except in terms of crude stereotypes. The Government announced that it did not wish to help 'businessmen who failed to insure against the risk of facing legal costs', a phrase laden with overtones (of well-off people, no doubt wearing 'business' suits, and flying 'business' class to a 'business' meeting). This was far removed from the small shopkeepers, builders and drivers who used legal aid to cope with the effects of business failure.³⁴ In a society that increasingly drives people into self-employment, the social consequences of business failure can be severe: debts, bankruptcy, homelessness, family break up and ill health.³⁵ Business failure is a direct route into social exclusion. Nor does the market provide affordable insurance for the self-employed that substitutes for legal aid.³⁶

The exclusion of trust law was given even less justification. The term seems to imply rich kids, inheriting the family millions, and few queried its exclusion for legal aid. In fact, trust is a pervasive doctrine of English law, which arises in a wide variety of different circumstances from buying a house jointly, to protecting the interests of children with disabilities. The Commission has been wrestling to make sense of this exclusion, changing its guidance to progressively reduce its effect. The exclusion now adds complexity without necessarily excluding an identifiable class of case.

The Funding Code

Those cases that remain within legal aid must now meet a detailed funding code, which applies different criteria to different sorts of case. Before 2000, applicants had to meet a general merits test, that was around 50 words long. Now the Code is 59 pages long, and requires guidance of 295 pages to interpret it.³⁷ The result is very considerable confusion about who qualifies for legal aid.

Much of the Code requires solicitors to make detailed predictions about the chances of success, the likely damages and the likely costs. They are combined through detailed

civiljusticecouncil.gov.uk..

³³ Goriely and others, *More Civil Justice?*, above, p. 18.

³⁴ T. Goriely and others, *Breaking the Code: The Impact of Legal Aid Reforms on General Civil Litigation*, (Institute of Advanced Legal Studies, London, 2001).

³⁵ C. Whyley, *Risky Business: the Personal and Financial Costs of Small Business Failure* (Policy Studies Institute, London, 1998).

³⁶ Goriely and others, *Breaking the Code*, above.

³⁷ Legal Services Commission, *Funding Code - Decision Making Guidance*, April 2001.

mathematical formulae, to decide whether legal aid will be granted. The problem, however, is that most solicitors' predictions are extremely inaccurate. A recent study found that out of cases predicted to have an 80% chance of success, only 56% succeeded. Of those with a 60%-80% prediction, only 43% succeeded.³⁸ So far, the Commission has been unable to develop systems to monitor or check the accuracy of the predictions. They have built an overly complex system on shaky foundations.

Assessing the effect of the 2000 reforms

It is difficult to assess the effect of these reforms. Partly, it is still early days for the reforms to have settled down and to have been researched. Partly, one cannot see the wood for the trees, amid the sheer mass of ever changing paperwork that the Legal Services Commission produces.³⁹ There is also a lack of independent comment on legal aid, with most research carried out by the Commission, according to the Commission's agenda.⁴⁰

The first and most obvious change is a reduction in the number of solicitors' firms carrying out legally aided work. For example, while in 1999/2000, 8,900 offices received at least some payments for family work, by March 2002, only 3,800 offered this service. For crime, the number of firms fell from 7,300 in 1997-8 to 2,900 by March 2002.⁴¹ Many firms that previously 'dabbled' in legal aid alongside other work have decided that the bureaucratic requirements and low pay make legal aid uneconomic.

Secondly, there has been a fall in morale among legal aid solicitors. Research by the Law Society (which represents English solicitors) found that many firms were threatening to pull out of legal aid work over the next five years. Around a half said they would stop consumer work; a third would stop housing; and a quarter would stop crime.⁴² In fairness, the Law Society has been issuing threats of this type for many years, which do not necessarily materialise. What is more worrying is that the Legal Services Commission itself is beginning to echo these concerns. Its 2001/02 *Annual Report* comments:

We are concerned about the changes we are seeing in our supplier base. Between March and April 2002, 6% of [civil] suppliers left, including some firms of good

³⁸ Goriely and others, *Breaking the Code*, above.

³⁹ Since 1999, the Regional Legal Services Committees alone have produced 37 separate reports, covering almost 4,000 pages. The Specialist Quality Mark Standards and Guidance run to around 400 pages. The Funding Code Guidance, first produced in April 2000, was changed four times in the first 13 months, with versions dated April 2000, June 2000, November 2000 and April 2001.

⁴⁰ Legal Action Group has called for an independent inspectorate to monitor the scheme: see Karen Mackay, 'Auditing the Auditors – new approaches to quality', *The Justice Debate* paper, May 2001.

⁴¹ Legal Aid Board in England and Wales *Annual Report 1997-8*, p.106 and Legal Services Commission *Annual Report 2001/02*.

⁴² Moulton Hall Ltd, *Access Denied*, Report to the Law Society (London, August 2002). For qualitative research on the loss of morale, see Hilary Sommerlad, 'I've lost the Plot'; an Everyday Story of the 'Political' Legal Aid Lawyer, 28 *Journal of Law and Society*, September 2001 p.335.

quality. We are picking up intelligence through our regional offices that up to 50% of firms are seriously considering stopping or significantly reducing publicly funded work.... Our studies show that at current legal aid rates many firms are marginally profitable.⁴³

There is much talk of a recruitment crisis in legal aid firms, as assistant solicitors shy away from this area.⁴⁴

The third main trend is a fall in the number of legally-aided cases. Some of the fall has been the deliberate result of specific policies. For example, the number of non-family civil legal certificates (to fund litigation rather than advice) fell from around 100,000 in 1999/2000 to 33,000 in 2001/02, reflecting the exclusion of personal injury and business cases, and the more rigorous Funding Code. However, other areas fell too. Although the tests for family work had hardly changed, family litigation fell by 12% in the first year after the introduction of contracting, though it stabilised during 2001/02. This is likely to reflect the reduction in participating firms.

The reforms were designed to shift resources away from personal injury towards social welfare advice (about, for example, welfare benefits, housing, debt and employment). It is therefore worrying that there have also been reductions in this area. Although there have been rises in immigration and mental health work, consumer, debt, housing, employment and welfare benefits all declined between April 01 to March 02. The fall in new cases started was around 8%, from 260,000 to 238,000.⁴⁵ Firms carried out less work than they had been allocated. It appears that if you hit a system it will produce less work, but not necessarily in a predictable way. The reductions in outlets and morale have had almost as much effect as the attempts to prioritise.

Finally, and most depressing of all, the reforms have not controlled costs. Although the number of cases has fallen, the cost per case has increased. The cost of advice (now renamed 'legal help') has increased by 20%, while the cost of litigation has increased by 22%. As a result, last year the Legal Services Commission exceeded its budget by £23 million (out of a total £1,313 million).⁴⁶ The Treasury is demanding a review to see why the new system has failed to keep a grip on costs.

For all the rhetoric about fundamental reform, the legal aid scheme in England and Wales remains an essentially *judicare* scheme, in which the legal profession decides what services to supply, to whom and at what cost. Recent events show that, once such a scheme has developed, it is extremely difficult for politicians and planners to assert control.

⁴³ Legal Services Commission *Annual Report 2001/02*, p. 8.

⁴⁴ Legal Aid Practitioners Group, *Legal Aid: The Next Generation - Recruitment Problems and Possible Solutions*, January 2002.

⁴⁵ Legal Services Commission *Annual Reports 2000/01 and 2001/02*.

⁴⁶ Legal Services Commission *Annual Report 2001/02*, p. 2.

THE ADVICE SECTOR

So far the English experience has been mainly a lesson in what not to do (don't grant unfettered control of legal aid to the legal profession). The English approach to advice centres, however, is more positive, and does provide some examples to draw on.

Britain enjoys a diverse advice sector, including 545 citizens' advice bureaux (CABx) and over 800 'independent' advice centres, grouped together into a loose federation (the Federation of Independent Advice Centres). Although CABx are not the largest network, they are the oldest, the best-known and the best-researched. In fact, many people use the term CAB to refer to all advice centres, in much the same way as all vacuum cleaners are referred to as 'Hoovers'. Many other agencies are, consciously or unconsciously, modelled on CABx. In order to understand the philosophy and purpose of advice centres, it is necessary to understand the history and standing of CABx.

An important part of the Government's 2000 reform programme was the recognition that advice agencies are a crucial ingredient in access to justice. The reforms draw the legal aid scheme and advice sector closer together, by encouraging the Legal Services Commission to give grants to advice centres, and by setting up local partnerships to co-ordinate provision.

Citizens Advice Bureaux

History

CABx were established in 1939 to cope with the disruptions of war. Working with existing voluntary organisations, they used volunteers to give sympathy and friendship 'to all who are in need of it'. By January 1940, 950 bureaux had already dealt with 4 million 'war-time worries' – from 'what to do if one cannot keep up instalments on a wireless set to how to obtain compensation if evacuees damage one's home'.⁴⁷ Inspired by a spirit of wartime collectivism, they declared themselves to be run 'by a community for a community'. They set out to attract 'all kinds of citizens, rich and poor, employer and employee, worker and leisured, landlord and tenant'.⁴⁸ Not only did they tell citizens about the system, they also told the system about citizens. One of their objectives was to 'collect information on the kinds of problems... causing difficulty and distress and to bring such problems to the notice of those who have the power to prevent and solve them'.⁴⁹

CABx were not seen as offering legal advice as such. The legal profession was not involved in setting them up or running them. However, much of the advice they gave was about issues that could be described as legal. Many bureaux developed good relationships with local firms willing to act for free or for cut rates, and would refer work to them.

⁴⁷ *Liverpool Echo*, 3 January 1940.

⁴⁸ Principles of the Citizens' Advice Bureau Service, issued 28 May 1941, National Council of Social Service.

⁴⁹ Above.

A crucial part of the new service was the fact that the central organisation produced 'Citizens Advice Notes': 150 pages of useful information of topics such as war-time legislation, rent and mortgage restrictions, hire purchase and changing one's name. This was kept up-to-date with regular supplements. The notes gave CABx a clear advantage over charitable 'poor man's lawyer schemes' run during the 1920s and 1930s. Poor Man's Lawyer schemes relied on solicitors 'of good standing', who gave advice to the poor as a charitable gesture. Their main problem, however, was that many rich people's solicitors had little knowledge of the areas of law that most concerned the poor.⁵⁰ This is a message that is equally relevant today. A lay volunteer with access to good quality information may do a better job than a 'rich man's lawyer', giving advice outside their area of competence, with no information to fall back on. The information service – now expanded and computerised – continues to be the lifeblood of the CAB service. Much of the training that volunteers are given is about how to use it.

CABx today

The 545 bureaux operate through 2,000 outlets, including outreach work in courts, prisons and hospitals. The service relies increasingly on paid staff. Although the National Association, NACAB, claims that the service has 5,135 paid staff and 11,125 volunteer advisers, this overstates the contributions of volunteers, who put in far fewer hours per week. Most bureaux will run on a central core of paid staff (usually a full-time manager, a full- or part-time deputy manager, plus some specialist advisers). These will manage a variety of volunteers drawn from all walks of life.

In 2001/02, the service dealt with around 5.3 million enquiries (about one for every 10 people in the population). Numbers have been falling (from 6.5 million in 1994), which reflects the fact that cases now take much longer. CABx now give less simple one-off information. Most of their cases involve a detailed interview, and many include follow-up work such as letters and phone calls to creditors, landlords or the welfare authorities.⁵¹

CABx are extremely cost effective. In 2001-02, funding for bureaux was around £103 million, of which over half came from local government. The new trend is that the Legal Services Commission is now the second main funder, accounting for 19% of CAB income. The rest comes from a variety of government agencies and private charities.

CABx continue to bring problems to the notice of those in power. In 2001/02, the central organisation drew on CABx case reports to produce 66 detailed responses and briefings to Government departments, MPs and businesses.

⁵⁰ This point was made by several contemporary critics, including Mervyn Jones, in *Free Legal Advice in England and Wales: a report prepared for the Cambridge University Settlement* (Oxford Slater and Rose, 1939).

⁵¹ NACAB Annual Report 1994/95; R. Moorhead and others, *Quality and Cost: Final Report of the Contracting of Civil Non-Family Advice and Assistance Pilot* (The Stationery Office, London, 2001);

Public perceptions

CABx are extremely well known: around 98% of the population have heard of them.⁵² Most people say they know where their local CAB is.⁵³ Consistently, surveys show that when people are asked where they would go with a problem, they name citizens advice bureaux.⁵⁴ There are deep reservoirs of public goodwill towards CABx – which are generally regarded as helpful, dedicated, informative and friendly.⁵⁵ Users report high levels of satisfaction. Bureaux are particularly valued for putting people at their ease, for listening to and understanding their problems, and for offering non-judgemental support.⁵⁶

However, there is another side the story. CABx are overstretched and underfunded. Hazel Genn found that people were frequently discouraged by ‘limited opening hours, unanswered telephones, full offices and queues’. As one interviewee remarked, the phone ‘is always engaged, you just couldn’t get through’.⁵⁷ NACAB has admitted that 80% of telephone calls are met with an engaged tone, 13% of people wait for more than an hour to be seen and most bureaux are open for less than six hours a day.⁵⁸ These measures are the only way in which CABx can reduce the demands made of them.

The main worry for CABx is that they are becoming over-identified with the chronic problems of the poor – notably welfare benefits and debt – rather than being seen as an accessible service for the whole community. This emerges strongly from NACAB’s own report on users’ views:

Many staff were concerned that public perception of the Service as one providing a full range of information and advice (for example, on consumer matters, discrimination issues, health and education) was fading. Such concerns were clearly justified in the responses from users and non-users that showed that many were uncertain as to the range of services provided... and increasing saw the service as deal with debt and benefit problems.⁵⁹

Thus several people described CABx as for ‘those with no choice and at the edge’, or ‘with nothing else and nowhere to go’. These images were reinforced by the poor, cramped and sub-standard premises of many bureaux. Public perceptions reflect real

⁵² Survey by the Local Government Ombudsman, 1995.

⁵³ McCarthy and others, *Grievances, Complaints and Local Government* (Avebury, Aldershot, 1992).

⁵⁴ For example, one survey found that 80% of the consumers spontaneously names CAB as a source of help and advice – a proportion that rose to 97% after prompting: Research International, *The Charterline Service*, research commissioned by the Cabinet Office, 1992.

⁵⁵ Office of Fair Trading, *Consumer Redress Mechanisms* (London 1991).

⁵⁶ R. Moorhead and others, *Quality and Cost: Final Report of the Contracting of Civil Non-Family Advice and Assistance Pilot* (The Stationery Office, London, 2001); H. Genn, *Paths to Justice: What People think and do about going to law* (Hart Publishing, Oxford, 1999) (extracts reprinted in Sourcebook).

⁵⁷ H. Genn, *Paths to Justice*, above, pp.77-8. Other studies have similar findings – see for example, G. Petterson and others, *Users Views of the CAB Service* (NACAB, London, 1995)

⁵⁸ NACAB, *The CAB Service and Community Legal Services, A Paper for the Lord Chancellor* (London, 1998).

⁵⁹ G. Petterson and others, *Users Views of the CAB Service* (NACAB, London, 1995), p. 19.

trends. Since 1980, debt and welfare benefits work for the poor have come to dominate CAB caseloads – a tendency that is now reinforced by Legal Services Commission grants in these areas.⁶⁰

Other advice agencies

It is difficult to be precise about the 800-900 other advice centres that are not CABx. Many grew out of community groups, and they therefore tend to be more specialist. Many specialise in areas of law, such as housing, debt counselling, immigration or employment. Others target their services to particular sections of the population: women, young people, people with disabilities or particular ethnic groups.

Compared to CABx, they tend to rely more on paid staff, and less on volunteers. The Federation of Independent Advice Centres reports that the average centre now employs five paid staff. They tend to carry out more detailed casework. A growing number of centres (including law centres) employ solicitors. Despite these differences, however, many clients could not say whether they visited an independent centre or a CABx. The differences are more important to providers than to the public.

Quality: can lay staff give good quality legal advice?

A crucial question is how far advice staff can provide a good quality legal service without legal training. There is now a reasonable body of evidence on the quality of advice agencies, from which conclusions can be drawn.

Overall, the results are encouraging. Research from the latest Legal Services Commission pilot made direct comparisons between the way that lawyers and lay advisers handled cases of debt, housing, welfare payments and employment. It found that the quality of lay specialists was often better than that of lawyers.⁶¹ There were four main differences:

- First, lay advisers take longer: between two and two and a half times as long. This was a strong finding across different types of work and across different complexities of case.⁶² Lay people spend longer talking to clients and longer looking up the law.
- Secondly, lay advisers received better client satisfaction scores. Clients rated them more highly on listening to them, explaining things, standing up for their rights and treating them as if they mattered.⁶³
- Thirdly, the study included peer reviews of case files. Solicitors and lay people were equally likely to offer substandard advice – but when lay people are good, they are

⁶⁰ In 2001/02, they accounted for 54% of enquiries, NACAB *Annual Report 2001/02*.

⁶¹ R. Moorhead and others, *Quality and Cost: Final Report of the Contracting of Civil Non-Family Advice and Assistance Pilot* (The Stationery Office, London, 2001).

⁶² Above, p. 91.

⁶³ Above, p. 132.

often very good. Lay advisers were much more likely to have their files rated as excellent (13% for lay advisers, compared to 3% for solicitors).⁶⁴ It seems that the extra time spent listening and looking up the law can pay dividends. It should also be remembered that solicitors would regard many cases in the study as relatively minor matters – ‘only’ tenant disrepair, or benefit entitlement, or debt. Lay advisers were more likely to regard these issues as important.

- The main problem with advice agencies was getting through to them. The pilot included visits by actors posing as clients (referred to as model clients, but often called ‘mystery shoppers’). They offered graphic accounts of the difficulties of making an appointment. They described engaged phones, answer phones, centres that closed early and long waits. Many failed to get seen at all.

Other studies have pointed out that paid specialist staff (albeit without legal training) usually offer a much better service than volunteers. Thus research by Hazel Genn into the effectiveness of tribunal representation found that while specialist lay advisers were as good as solicitors in offering representation at employment tribunals, many volunteers were visibly at sea in their surroundings.⁶⁵ Similarly, earlier research into franchising doubted whether legal aid money should be used on volunteers, who often did not offer the same level of intervention and negotiation.⁶⁶

Studies commissioned by NACAB have highlighted other weaknesses in the advice CABx offer. One of the objectives of the CAB service is that it should offer choices. As the training manual puts it:

Our advice isn’t about telling people what to do. It’s about exploring what choices are available, looking at the implications of these and then letting the client make a decision...⁶⁷

In practice, this is extremely demanding. Most people, having found a solution that ‘works’, will stick with it. A review of housing case files found that 40% failed to cover all the options. For example, where landlords had not carried out repairs, many volunteers simply referred tenants to an environmental health officer. They failed to cover other options such as withholding rent, or applying to the county court.⁶⁸ Similarly, a review of employment advice found that only a third of employment advisers discussed all the possible options. For example, when workers complained about contractual violations at work they were usually told to resign and claim unfair dismissal. Advisers failed to explain how to use the grievance procedures or stand their ground and sue for lost pay.⁶⁹

⁶⁴ Above, p. 109.

⁶⁵ H. Genn and Y. Genn, *The Effectiveness of Representation at Tribunals* (Lord Chancellor’s Department, London, 1989).

⁶⁶ J. Steele and G. Bull, *Fast, Friendly and Expert? Legal Aid Franchising in Advice Agencies without Solicitors* (Policy Studies Institute, London 1996)

⁶⁷ NACAB Trainee Handbook, 1988.

⁶⁸ D. Forbes and S. Wright, *Research into CABx Housing Advice* (NACAB, London, 1990).

⁶⁹ P. Waterhouse and T. Lewis. *Improving the Quality of Employment Advice* (NACAB, London, 1995).

The study also highlighted a particular difficulty that also came out of the recent research with ‘model clients’. When people visited advisers and asked how they could sort out matters for themselves, both lawyers and law advisers often gave them technical explanations of the law rather than practical advice on how to argue with a landlord or employer. A reviewer commented on advice about how to dispute illegal deductions from wages:

Adviser concerned that the deduction... was illegal but... not in a way that was clear to the client. Did not advise on any way of getting the money back or the right to do so. The photocopy of the legislation provided is... daunting and unhelpful.⁷⁰

Recently, NACAB has tried to remedy the deficiencies by providing specialist telephone advice lines for their volunteers to ring about housing and employment issues.

Advice centres: conclusion

The British approach to citizens advice bureaux has been emulated elsewhere. Rekosh and others describe how, since 1996, 17 CABx have been established in Poland: a similar system also operates in the Czech republic.⁷¹ The core of the idea is that if you take sympathetic listeners, train them and provide them with a good quality information system, they are as good as or better than lawyers in helping the public with their problems. The British CAB movement also has a wide social base, and a collectivist ethos – ‘by the community, for the community’. It has managed, very successfully, to avoid being aligned with any political tendency. Since its inception it has collected evidence of problems, and uses them to lobby local and central government and businesses.

The weakness of the advice movement is that it attempts to do too much with too little. Demand significantly exceeds resources, and advice centres respond by rationing through access. When advisers can no longer cope, they take the phone off the hook and lock the doors. Government can pretend that advice is being made available when it is not.

The research evidence also shows just how difficult it is to be a good adviser. One must put people at their ease, listen carefully, communicate with confidence, know the law – and even more importantly, understand the practical implications of trying to argue for one’s rights. Advisers need to have somewhere to turn when the demands prove too much.

SIMPLIFYING PROCEDURES

The final instrument in the Access to Justice trio is procedural simplification. The English Court system has a reputation for being particularly formal, complex and intimidating.

⁷⁰ R. Moorhead and others, *Quality and Cost*, above, p. 150.

⁷¹ “Access to Justice: Legal aid for the Underrepresented” (reprinted in Sourcebook).

One French commentator describes the English as behaving like extra-terrestrials, with their courtrooms, wigs and esoteric language.⁷² It is true that the English enjoy surrounding the law with considerable pomp, ceremony and costume drama - but they tend to reserve these for only a few cases. (And even this formal end of the spectrum has recently been reviewed⁷³). The vast majority of civil claims are resolved more simply. Within the court system, more claims are resolved through the small claims procedure than through the so-called 'normal procedures'.⁷⁴ And more claims are resolved through tribunals or ombudsmen than through the courts.⁷⁵

That said, judicial procedures attract complexity as ships attract barnacles. The struggle to simplify is never ending: as soon as one review is complete, it is time to start another.⁷⁶ To be comprehensive, such reviews need to look at procedures, cost rules, terminology, information systems, buildings, judicial training and support staff. Successful reform is often a question of understanding and detail rather than grand principle. As Baldwin makes clear, there are no easy answers: one needs to adapt procedures to the parties and ensure that 'they are reasonable and proportionate to the issues in dispute'.⁷⁷

The experience of reforming small claims is quite encouraging. Most litigants and judges adapt reasonably well to informality, without any loss of confidence in the quality of the justice provided.⁷⁸ The experience of tribunals is patchy: as Leggatt puts it, 'their quality varies from excellent to inadequate'.⁷⁹

There has also been considerable discussion about the advantages of Alternative Dispute Resolution (ADR) - which is usually equated with mediation. Mediation, however, tends to be talked about rather than used. As Hazel Genn puts it, 'quite simply, current ADR activity in the context of civil and family disputes appears to be negligible'.⁸⁰

Several pilot mediation schemes have been established, and they all report disappointingly low levels of use.⁸¹ The biggest scheme, run by Central London County

⁷² "Les anglais sont comme hors du monde dans leurs 'court rooms' avec leur perruques et leur langue ésotérique": A. Supoit in *Application du droit du travail et diversité culturelle en europe* (Association de Recherches en Science Humaines, Nantes 1992)

⁷³ Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London 1996).

⁷⁴ John Baldwin, 'Access to Justice: The English Experience with Small Claims' World Bank Paper (reprinted in Sourcebook).

⁷⁵ A recent review of tribunals reports that there are now 70 different types of tribunal, dealing with a million cases a year: Sir Andrew Leggatt, *Tribunals of Users – One System, One Service* (HMSO, London, 2001). See also Genn, *Paths to Justice: What People do and think about going to Law* (Hart Publishing, Oxford 1999).

⁷⁶ See, for example, the Woolf and Leggatt reviews, above.

⁷⁷ John Baldwin, 'Access to Justice: The English Experience with Small Claims', World Bank Paper (reprinted in Sourcebook).

⁷⁸ Above.

⁷⁹ Leggatt, *Tribunals of Users*, above, p. 1.

⁸⁰ Genn, *Paths to Justice*, above, p. 261.

⁸¹ See G. Davies and others. *Promoting Mediation: Report of a Study of Bristol Law Society's Mediation Scheme in its Preliminary Phase* (Law Society London, 1996) (during which two cases progressed to full

Court, wrote to the parties in 4,500 cases, offering a mediation session for a nominal £50. Yet in only 5% of cases did both parties agree to mediate.⁸² The evaluation found ignorance and resistance from both lawyers and their clients, with fears that an offer to mediate would be seen as a sign of weakness. Where the parties did try mediation, they tended to be positive about the experience – but there was little evidence that it saved costs. The research also echoed some studies from the developing world that stress the implicit power of mediators to frame the discussion and give social approval to the outcome. As the report put it, ‘evaluation is not absent from mediation; it is simply communicated with more or less subtlety depending on the personality and individuality of the mediator’.⁸³

Can simplified procedures substitute for legal advice?

There is no space to consider all the many issues arising from simplification. Instead, I concentrate on one point: can simplified procedures reduce or eliminate the need for legal advice and representation?

The English research suggests that it may reduce need, but cannot eliminate it. Several studies show how difficult it is to pursue a legal grievance. It requires not only knowledge of law and procedure, but also advocacy skills and emotional fortitude. This emerges clearly from Hazel Genn’s large-scale study, *Paths to Justice*, which looked at people’s experiences of pursuing a dispute. She found that if at first you don’t succeed, you are usually in for the long haul:

About half of those who failed to resolve the problem after taking some action... reported that they found the whole business stressful, and one in five reported that their health had suffered.⁸⁴

Unless you possess a wide range of different skills, you will require some outside help:

Members of the public with low levels of competence in terms of education, income, confidence, verbal skill, literacy skill, and emotional fortitude are likely to need some help in resolving justiciable problems, no matter what the importance of the problem and no matter how intransigent or accommodating the opposition, although this need is likely to be greater where the problem is serious and the opponent is particularly intransigent.⁸⁵

This was also John Baldwin’s conclusion from his study of small claims:

mediation; and L. Mulcahy and others, *Mediating Medical Negligence Claims; An Option for the Future*, (HMSO, London, 1999) (11 cases in two years).

⁸² Hazel Genn, *The Central London County Court Pilot Mediation Scheme: Evaluation Report* (Lord Chancellor’s Department, London, 1998).

⁸³ Above, p. 143.

⁸⁴ Genn, *Paths to Justice*, above, p. 251.

⁸⁵ Genn, *Paths to Justice*, above, p. 254.

The evidence suggests that the average person does not have the necessary knowledge and confidence to launch into even small claims proceedings without guidance and information about their legal position.⁸⁶

Without some support people will fail to understand the legal basis of their disputes, or know how to prove the necessary elements in court:

Small claims litigants need an assurance before the hearing that their claims have a legal validity. They cannot... be expected to know this unaided – or indeed to know how they should go about establishing a legal claim (or a defense) or arguing a legal case in court. Lay litigants frequently arrive in court empty-handed and fail to bring relevant evidence (or indeed, anything at all) to hearings.⁸⁷

Finally, a major study of the effect of representation on tribunal outcomes used multivariate analysis to show that representation has a measurable effect on outcome. Those who appeared at a tribunal hearing without a representative were more likely to lose. They did not know the law; did not know when to speak; did not bring the right papers; and failed to understand the legal intricacies they were faced with. Although sympathetic questioning by tribunal chairman helps, they cannot always know the right question to ask.⁸⁸

CONCLUSION

I was asked to outline a range of English policies on Access to Justice – and to reach a conclusion over which ones have ‘succeeded’, and which have ‘failed’. Legal aid, with its heavy reliance on private solicitors and its high costs, veers towards ‘failure’. The danger of putting legal aid into the control of the legal profession is that the profession will provide only a limited range of services, in a limited number of areas, to a traditional clientele. Moreover, legal costs have an in-built tendency to inflate, leading to ever-increasing public expenditure. Recent reform attempts show how difficult it is for politicians and planners to re-impose controls on a judicare system. The mountains of paper-work and bureaucratic requirements have demoralised lawyers and reduced the client base – without significantly re-directing expenditure, either geographically or between subject areas.

The advice movement, on the other hand, can generally be regarded as a success. Lay people can provided high-quality, sympathetic advice in a wide range of poverty law areas (including debt, housing, employment and welfare benefits). But you can’t set up an advice centre on a shoe-string. Giving advice is not easy: it is especially difficult to explain a range of options and to give firm, practical, advice on how to stand up to people in authority. Advisers will need access to a top-quality information system, together with

⁸⁶ Baldwin, ‘Access to Justice’, above, in Sourcebook.

⁸⁷ Above.

⁸⁸ H. Genn and Y. Genn, *The Effectiveness of Representation at Tribunals* (Lord Chancellor’s Department, London, 1989).

training and backup. And be aware of how centres ration their services – often by simply locking the door. Finally, it is highly cost-effective for centres to have a public policy role, by drawing on the experiences of their clients to lobby for change.

Finally, procedural simplification is neither a pass nor a fail. To extend the examination metaphor, it may be regarded as a necessary but not sufficient qualifying step. Legal systems attract complexity – and complexity needs to be removed from time to time, as part of an ongoing maintenance programme. But it is unlikely that many poor people can take on those in authority without external help. They will need some one to turn to for knowledge of the law, understanding of the procedures and emotional support.

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