

Targeting and Access to Justice: An Introduction to Legal Aid Reform in England and Wales

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Introduction

The last few years have seen unprecedented change in the delivery of legal aid services in England and Wales. Glennerster *et al.*'s "third phase" of development of government social spending, characterised as a retreat from universality in welfare service provision flowing from an overwhelming of public resources, has brought about an emphasis on targeting services to those most in need.¹

Until the mid-1990s, the structure of legal aid service delivery in England and Wales remained largely as it had been almost half a century earlier, when the Rushcliffe Committee's recommendations led to the institution of the modern legal aid system.²

Significant changes were brought about in the 1980s. The Police and Criminal Evidence Act 1984 introduced a right to free legal advice for arrested persons. The first formal reductions in eligibility were instituted in 1986, decreasing coverage to around 60% of the population. The Legal Aid Act 1988 transferred the administration of legal aid from the Law Society to a quasi-autonomous Legal Aid Board of England and Wales.³

However, until the mid-1990s, the funding principles and methods of delivery of legal aid services remained much the same. Almost all legal aid funds were paid to solicitors' firms and their instructed barristers. The focus of legal aid work was very much on those areas of law covered traditionally by the legal professions. Payments to solicitors firms were made on a fee-for-service basis. There were no restrictions on the experience or quality of solicitors receiving legal aid payments. The legal merits of applications for civil legal aid were determined exclusively by reference to their importance to individual applicants, and in accordance with a broad funding principle intended to reflect the decision making of a reasonably minded private client. The financial eligibility of legal aid applicants varied as between all the different forms of legal aid, and was for many years determined according to detailed

¹ Glennerster, H., Hills, J., Travers, T. and Hendry, R. (2000) *Paying for Health, Education and Housing*, Oxford: Oxford University Press.

² The Rushcliffe Committee's recommendations formed the basis of the Legal Aid and Advice Act 1949, which in turn provided the foundations of the modern legal aid system.

³ The Law Society is the regulatory body for the solicitors' profession in England and Wales. The Legal Aid Board of England and Wales was a non-departmental governmental body, responsible to the Lord Chancellor's Department. It was replaced by the Legal Services Commission in April 2000.

criteria. Also, the legal aid budget and the geographical pattern of delivery were wholly demand led.

Since the mid-1990s, every one of these funding principles and delivery methods has been reviewed and reformed. An increasing proportion of legal aid funds are now paid to not-for-profit advice agencies, such as Citizens Advice Bureaux. A salaried criminal defence service has been introduced to operate in parallel with the independent solicitors' profession. The focus of civil legal aid work has shifted towards areas of social and welfare law. The focus has also shifted more towards the delivery of early advice. An increasing proportion of fee-for-service payments are being replaced by standardised payments. Only solicitors' firms and not-for-profit advice agencies that have passed a quality audit and entered into contracts with the Legal Services Commission are entitled to receive Legal Services Commission funding. The legal merits of applications for civil legal aid are determined by reference to a comprehensive set of principles contained within a new 'Funding Code', which also introduces the possibility of funding cases on the basis of the general public interest. The civil legal aid budget is no longer demand led. Instead annual budgets are now fixed in advance. Neither is the geographical pattern of funding any longer demand led. Funding pattern changes are now dictated by local, regional and national analyses of the legal needs of the population.

In this paper I will introduce the current legal aid schemes operating in England and Wales. I will outline the costs of running those schemes. I will explain how specific reforms have sought to target legal aid spending; first in respect to the population that benefits from legal aid, then the types of services legal aid covers, and then the suppliers that provide legal aid services. I will spell out the broad government initiative of Community Legal Service Partnerships, that are intended to provide every community with access to a local network of quality assured legal service providers. Finally, I will outline the further changes that are intended to be made to the legal aid system over the next few months and years.

The Landscape of Legal Aid

This section sets out the current legal aid schemes operating in England and Wales, and details their cost, the volumes of work undertaken under them, and the nature of the legal aid supply base. It also introduces the Legal Services Commission's information and education functions.

Most legal aid in England and Wales is now administered by the Legal Services Commission, which superseded the Legal Aid Board of England and Wales in April 2000.⁴ The Legal Services Commission runs two basic

⁴ The only exceptions relate to the criminal legal aid scheme, which is still administered in part by the Lord Chancellor's Department (equivalent to a Ministry of Justice) and the courts. The Lord Chancellor's Department's role in administering higher court criminal legal aid payments will be subsumed by the Legal Services Commission by 2003. The courts' role in deciding upon the merits of criminal legal aid applications will, though,

schemes: the Community Legal Service provides advice and representation for people involved in civil cases; the Criminal Defence Service provides advice and representation for people facing criminal charges.⁵

The Available Help

Legal Services Commission civil legal aid funding (through the Community Legal Service) can be provided for a numbers of levels of help:

- Legal Help
- Help at Court
- Approved Family Help (Help with Mediation / General Family Help)
- Family Mediation
- Legal Representation (Investigative Help / Full Representation)
- Support Funding

Legal Help, which used to be known as ‘advice and assistance’, can include general advice, letters, negotiation, a barrister’s opinion, and preparation of a written case if a case is to go to a court or tribunal. *Help at Court* covers appearances at particular hearings, where a solicitor or adviser does not formally act for the assisted person in the whole proceedings. Both Legal Help and Help at Court services are limited to £500, although additional work can be authorised by the Legal Services Commission.

Approved Family Help provides help in relation to family disputes. It can include the services covered by Legal Help, but also extend to issuing proceedings and providing representation, if necessary to obtain disclosure of information from another party or to obtain a consent order following a settlement. *Help with Mediation* applies to mediated cases; *General Family Help* applies in other cases. *Family Mediation* covers the investigation of whether or not mediation is suitable within family disputes, and if it is, the mediation process itself.

Legal Representation, which used to be called ‘certificated civil legal aid’, can extend to representation through the entire duration of court proceedings. *Full Representation* extends to legal proceedings. *Investigative Help* is restricted to an initial investigation of the strength of civil claims.

Support Funding provides partial funding of high cost cases which, by virtue of their cost, cannot reasonably be fully funded on a private basis. Like Legal

remain vested in the judiciary. All applications and payments relating to the civil legal aid scheme are administered by the Legal Services Commission.

⁵ The Community Legal Service was introduced along with the Legal Services Commission in April 2000. The Criminal Defence was introduced in April 2001. Prior to the introduction of the Criminal Defence Service, the Legal Services Commission administered that element of the criminal legal aid system that had previously been administered by the Legal Aid Board. The power to grant criminal legal aid is vested in the criminal courts, rather than the Legal Services Commission. Also, payments for higher court criminal legal aid are administered by the Lord Chancellor’s Department. As is explained in footnote 4, the Legal Services Commission will take over this task from the Lord Chancellor’s Department by 2003.

Representation, Support Funding can either extend through the entire duration of proceedings (*Litigation Support*), or be restricted to an initial investigation of the strength of civil claims, with a view to a conditional fee agreement (*Investigative Support*).

Criminal legal aid funding can also be provided for a number of levels of help:

- Police Station Advice
- Criminal Advice and Assistance
- Court Duty Solicitor
- Advocacy Assistance
- Criminal Representation

Police Station Advice is available to any person arrested by the police. It covers attendance by a solicitor or solicitor's representative and advice, but is limited to the time spent in custody.

Criminal Advice and Assistance is equivalent in criminal matters, to Legal Help in civil matters. It can include general advice, writing letters, negotiating, getting a barrister's opinion and preparing a written case.

Court Duty Solicitor advice and assistance is available to persons appearing in the lower criminal courts without the benefit of representation. It covers advice and can include *Advocacy Assistance*. *Advocacy Assistance* covers the preparation of a case and initial representation in certain proceedings in both the lower and higher criminal courts.⁶

Criminal Representation, as with Legal Representation in civil matters, covers the preparation of a case along with representation throughout any court process. It also includes advice on appeal against a verdict or sentence and preparation of a notice of appeal.

Eligibility

Civil legal aid in England and Wales is available in respect of those areas of law set out in the Legal Services Commission's Funding Code. In the case of Legal Representation, the Funding Code also stipulates criteria that are used in determining whether cases are sufficiently important, either to the person concerned or the broader public, to justify the expenditure of public funds.

⁶ Advocacy Advice covers representation for prisoners facing disciplinary charges before the prison governor or controller, and for discretionary and automatic lifers and those detained at Her Majesty's Pleasure whose cases are referred to the Parole Board. It also covers representation for those who have failed to pay a fine or obey a court order and are at risk of imprisonment.

Where the Funding Code permits, legal aid is granted to persons who are financially eligible.⁷ In some instances a contribution to the cost of a case is required from an assisted person. Currently, the eligible population amounts to around 47% of the general population. Around one-third of eligible persons are liable to pay contributions.⁸

Police Station Advice is available, as a statutory right, to any person arrested by the police, and is free of charge. Criminal Advice and Assistance is available on the same basis as civil Legal Help. There are generally no financial eligibility restrictions in respect of Advocacy Assistance.⁹

The right to Criminal Representation is decided upon by the criminal courts, and is granted where it is in the 'interests of justice'. There are no financial eligibility restrictions in respect of Criminal Representation, although a judge can require contributions towards the cost of higher court Criminal Representation such is reasonable in all the circumstances of the case.

The Cost and Volume of Legal Aid Work

In the financial year to April 2001, the Legal Services Commission spent a net £1.2 billion on civil and criminal legal aid. In addition, the Lord Chancellor's Department spent £422 million on higher court criminal legal aid, and the Commission spent £72 million on administrative costs. Thus, a net total of £1.7 billion (Y304 billion) was spent on legal aid from all sources.¹⁰

Figure 1 sets out the pattern of legal aid expenditure over the last 5 years. As can be seen, whereas criminal legal aid expenditure has risen considerably over the period illustrated, civil legal aid expenditure has remained stable. This is despite the fact that the number of acts of civil legal aid assistance has reduced by over one-quarter.

Figure 1
Net Legal Aid Expenditure in England and Wales (£ million)¹¹

	1996/7	1997/8	1998/9	1999/0	2000/1
Civil Legal Aid	807	793	836	769	792
Criminal Legal Aid (Lower)	355	384	402	412	450
Criminal Legal Aid (Higher)	309	338	383	371	422
LAB/LSC Administration	54	58	60	62	72
Total	1,525	1,573	1,681	1,614	1,736

⁷ There are no financial eligibility restrictions in respect of public law children matters.

⁸ Buck, A. and Stark, G. (2001) *Means Assessment: Options for Change*, London: Legal Services Commission, LSRC Research Paper No.8

⁹ There is no financial test except where Advocacy Assistance is provided in the prison law class of work.

¹⁰ The gross spend was £2.2 billion (Y386 billion).

¹¹ All figures relate to financial years, except 1996-2000 higher court criminal legal aid figures, which are for calendar years. Figures taken from Legal Aid Board (1997 to 2000) *Annual Report*, London: The Stationary Office; Legal Services Commission (2001) *Annual Report*, London: The Stationary Office; Lord Chancellor's Department (1996 to 2000) *Judicial Statistics*, London: The Stationery Office.

Figure 2 sets out the number of acts of assistance that the expenditure in Figure 1 translates to. In part, the reduced number of civil legal aid acts of assistance (and slightly reduced expenditure) can be attributed to the implementation of the Funding Code in April 2000. However, as the duration of civil cases can be more than one year, the expenditure and acts of assistance totals in Figures 1 and 2 include many cases originating prior to the Funding Code's implementation. The figures must therefore also be interpreted in the light of legal costs inflation and the implementation of civil legal aid contracting.

*Figure 2
Number of Acts of Assistance ('000s)*

	1996/7	1997/8	1998/9	1999/0	2000/1
Civil Legal Aid	1,514	1,524	1,465	1,287	1,034
Criminal Legal Aid (Lower)	1,869	1,966	1,965	1,885	2,173
Criminal Legal Aid (Higher)	115	123	123	118	114
Total	3,498	3,613	3,553	3,260	3,321

Figure 3 breaks down the civil legal aid acts of assistance for 2000/1. Reconfirming the delayed impact of the *Funding Code*, 59,571 acts of assistance in the Legal Representation category are recorded in respect of personal injury cases. This figure is based on cases concluded within 2000/1. If cases *commenced* in 2000/1 are considered, the number reduces to just 13,267. This is a reduction of 78%. Furthermore, just 17% of these latter cases were granted Legal Representation funding certificates under the new statutory framework.

*Figure 3
Number of Civil Legal Aid Acts of Assistance, 2000/1*

	Legal Help (Advice)	Legal Representation
Family	297,125	164,746
Immigration	108,600	1,192
Welfare Benefits	91,119	185
Housing	86,727	13,531
Debt	50,145	1,700
Mental Health	23,886	82
Personal Injury	23,152	59,571
Consumer	14,491	5,468
Employment	12,706	264
Actions Against the Police	6,221	1,882
Clinical Negligence	4,874	8,843
Education	3,184	90
Community Care	1,660	28
Public Law	1,290	2,089
Miscellaneous	36,403	13,088
Total	761,583	272,759

Family cases in the Legal Representation category also reduce by 21% if this alternative mode of calculation is adopted, reflecting also a reduction in the divorce rate and macro-economic changes. The only major category of civil legal aid¹² that does not see such a reduction is immigration.¹³

Figure 4 breaks down the criminal legal aid acts of assistance for 2000/1.

Figure 4
Number of Criminal Legal Aid Acts of Assistance, 2000/1 ('000s)

Scheme	Acts of Assistance
Police Station Advice¹⁴	760.5
Criminal Advice and Assistance	330.1
Court Duty Solicitor	465.3
Contracting Pilot	149.0
Magistrates' Court	467.6
Higher Courts	116.0
Total	2,288.6

Legal Aid Suppliers

Only solicitors' firms and not-for-profit advice agencies that have passed a quality audit and entered into contracts with the Legal Services Commission are entitled to receive Legal Services Commission funding. Once an organisation has obtained a contract, it must continue to pass periodic quality audits in order to maintain its contract status.

Quality audits address both the case and general management standards of organisations. Files are audited to ensure that key pieces of case information are collected and stored in an accessible manner. Management practices are

¹² Categories in which more than 1,000 Legal Representation funding certificates were issued in 2000/1.

¹³ Increase of 48%

¹⁴ There is great variation in the request rate for Police Station Advice across England and Wales. Also, whilst there are some discrepancies in the method by which statistics are collated, there is an upwards trend in the take-up rate for Police Station Advice. Estimates of pre-Police and Criminal Evidence Act 1984 (PACE) rates of legal advice ranged between 3% and 20% (Softley, P. (with the assistance of Brown, D., Forde, B., Mair, G. and Moxon, D.) (1980) *Police Interrogation: An Observational Study in Four Police Stations*, London: HMSO, Home Office Research Study No. 61; Brown, D. (1991) *Investigating Burglary: The Effects of PACE*, London: HMSO, Home Office Research Study No.123). This rose after PACE to about 25% (Brown, D. (1989) *Detention at the Police Station Under the Police and Criminal Evidence Act 1984*, London: HMSO; Sanders, A., Bridges, L., Mulvaney, A. and Crozier, G. (1989) *Advice and Assistance at Police Stations and the 24-Hour Duty Solicitor Scheme*, London: Lord Chancellor's Department); after the 1991 revision in the Codes of Practice to 32% (Brown, D., Ellis, T. and Larcombe, K. (1992) *Changing the Code: Police Detention Under the Revised PACE Codes of Practice*, London: HMSO, Home Office Research Study No.129); and again after the 1995 revisions in the Code of Practice, and the change in the caution, to 40% of suspects requesting legal advice (Bucke, T. and Brown, D. (1997) *In Police Custody: Police Powers and Suspects Rights Under the Revised PACE Codes of Practice*, London: HMSO, Home Office Research Study No.174).

audited to ensure, for example, that appropriate supervision arrangements are in place for junior staff.

The total number of civil legal aid contractors at April 2001 was around 5,220, including around 4,850 solicitors' firms and 370 not-for-profit advice agencies.¹⁵ Between them these contractors share around 10,000 contracts, around 40% of which are for family law services. The total number of criminal legal aid contractors was around 2,800.¹⁶

Civil legal aid expenditure on not-for-profit advice services has risen fourteen fold in the ten years to 2000/01, and now represents around 14% of total Legal Help expenditure. This shift in expenditure is an important component of the shifting focus of civil legal aid towards areas of social and welfare law. It also promotes a greater breadth of service. Not-for-profit agencies specialise in different types of cases as compared to solicitors' firms, even within social and welfare law areas. They also appear to service different types of client.¹⁷

All civil cases in which costs are likely to exceed £25,000 are managed by the Legal Services Commission's Special Cases Unit under individual contracts. These contracts allow the work undertaken within each stage of a case to be agreed, defined and costed in advance. There is a limited budget available for work undertaken under them. This is intended to prevent the relatively small number of very high cost civil cases consuming an unreasonably disproportionate proportion of the overall civil legal aid budget.¹⁸ Around one half of individual civil case contracts relate to clinical negligence.

Criminal cases likely to involve a trial lasting 25 or more days, or costs in excess of £150,000, can also be managed under contract, and it is intended that such will ultimately happen in respect of all such cases.¹⁹

Information and Education

Under the Access to Justice Act 1999, the Legal Services Commission's function extends beyond the administration of the civil and criminal legal aid

¹⁵ Legal Services Commission (2001) *Annual Report*, London: The Stationary Office. The corresponding figure for one year earlier was 5,286. The Legal Services Commission also provides grants to support the activities of several law centres. These grants will ultimately be replaced by contracts.

¹⁶ *Ibid.*

¹⁷ Moorhead, R., Sherr, A., Webley, L., Rogers, S., Sherr, L., Paterson, A. and Domberger, S. (2000) *Quality and Cost: Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot*, London: Legal Services Commission. For example, the caseload of not-for-profit agencies is made up of a far greater proportion of welfare benefits, housing and debt cases. Also, not-for-profit agencies undertake, for example, significantly different types of welfare benefit work; concentrating more on illness, disability and injury benefits. Further, solicitors' firms are more likely to deal with younger clients. Not-for-profit agencies deal with more non-white clients, with Pakistani clients three times as likely to instruct them.

¹⁸ The budget for very high cost civil cases is over £5 million for the 2001/02 financial year. The budget for the 2000/01 financial year was underspent. *Ibid.*

¹⁹ In the 2000/01 financial year, 30 very high cost criminal case contracts were entered into.

systems, to the “provision of general information about the law and legal system and the availability of legal services,”²⁰

To this end, the Legal Services Commission has published, through the Consumers’ Association,²¹ public information leaflets across a broad range of legal topics.²² The Commission has also produced, in association with a local information service, a *Community Legal Service Leaflets Directory*. This provides information on how to obtain law-related leaflets, including those produced by the Legal Services Commission.

A pilot is also being undertaken in the North East of England, aimed at producing materials for inclusion in the schools’ national curriculum.

Targeting and Prioritisation

This section sets out the principal methods used to prioritise the funding of legal services by the Legal Services Commission, through the Community Legal Service Fund. It is divided into three sub-sections. The first is concerned with the people who are eligible to receive legally aided services, and sets out a brief history of legal aid eligibility in England and Wales.²³ The second is concerned with the types of services that are open to legal aid funding, and explains the Legal Services Commission’s Funding Code.²⁴ The third is concerned with the developing methods of identifying the legal service suppliers that will most effectively and fairly meet the *legal needs* of the population. It describes the introduction of Community Legal Service Partnerships across England and Wales, and the development of tools designed to map the prevalence of legal need within and between

²⁰ Access to Justice Act 1999, Section 4(2)(a)

²¹ The Consumers’ Association is a non-profit organisation representing the interests of consumers.

²² Alternatives to Court, Buying and Selling Property, Claiming Asylum, Community Care, Dealing with Debt, Dealing with the Police, Divorce and Separation, Education, Employment, Equal Opportunities, the Human Rights Act, Immigration and Nationality, Losing your Home, Medical Accidents, Mental Health, No-Win No-Fee Actions, Personal Injury, Problems with Goods and Services, Racial Discrimination, Renting and Letting, Rights for People with Disabilities, Welfare Benefits, Wills and Probate.

²³ For further details see, for example, Buck, A. and Stark, G. (2001) *Means Assessment: Options for Change*, London: Legal Services Commission, LSRC Research Paper No.8; Pleasence, P. and Buck, A. (2001) “Needs Assessment and the Prioritisation of Legal Services in England and Wales”, paper presented at the conference of the International Legal Aid Group, Melbourne, 13-16 June 2001.

²⁴ See also, Legal Services Commission (1999) *The Funding Code*, London: Legal Aid Board; Pleasence, P., Buck, A. and Christie, J. (1999) *Testing the Code: Final Report*, London: Legal Aid Board, LABRU Research Paper No.4

partnerships.²⁵ It also again refers to the Legal Services Commission's contracting and quality assurance programme.²⁶

Targeting Individuals: Financial Eligibility for Legal Aid in England and Wales²⁷

From the Middle Ages to the mid-1940s, 'legal aid' was confined to the very poor. Indeed, right up until 1914 legal aid took the form of a charitable scheme available to 'paupers' through the *informa pauperis* procedure, which offered assistance to litigants in the superior courts, but which was, as Sachs has pointed out, "of only occasional use in practice"²⁸ In 1914, the *informa pauperis* procedure was replaced by the *poor person's procedure* (a phrase thought to carry less stigma), helping people in civil cases under the Rules of the Supreme Court. However, again the *poor person's procedure* assisted only litigants in the superior courts, and again lawyers acted on a charitable basis. Also, from the outset, the *poor persons procedure* was confronted with the problem of rising divorce rates after the first world war, and it became increasingly difficult to locate lawyers willing to act free of charge. By the latter stages of the Second World War, the rise in demand for divorce lawyers had placed such strains on the *poor person's procedure* that the Lord Chancellor established a Committee, chaired by Lord Rushcliffe, to review, against a general social demand for a new inclusive welfare state, the existing legal aid provisions and to make recommendations. The Rushcliffe Committee suggested that people should be able to get legal help without being labelled as 'poor persons', that lawyers should receive remuneration for their services, and that, as many people of 'moderate means' need help in bringing or defending legal claims, the great majority of the population should be covered by the legal aid scheme.

Although the Legal Aid and Advice Act 1949 broadly reflected the Rushcliffe Committee's recommendations, maintaining its aspiration of 80% coverage of the population proved difficult. By 1959 financial eligibility was still dictated by rates originally set in the mid-1940s, and although they were uprated in 1960, they then declined again until a 1970 uprating, and then again until a major 1979 uprating. In contrast to the changes brought about in 1979, in 1986 (after an ideological shift in the politics of government) "the Lord Chancellor's Department made the first formal reductions in eligibility since the creation of the legal aid scheme, down-rating allowances by approximately one-sixth"²⁹ In 1986 coverage extended to around 60% of the population. Further

²⁵ See, further, Moorhead, R. (2000) *Pioneers in Practice*, London: Lord Chancellor's Department, Pleasence, P., Buck, A., Goriely, G., Taylor, J., Perkins, H. and Quirk, H. (2001) *Local Legal Need*, London: Legal Services Commission, LSRC Research Paper No.7

²⁶ See also, Orchard, S. (2001) *Legal Services Commission for England and Wales: Use of Contracts*, paper presented at the conference of the International Legal Aid Group, Melbourne, 13-16 June 2001.

²⁷ I am grateful to Tamara Goriely for information she made available on the history of means testing in England and Wales.

²⁸ Sachs, E. (1951), *Legal Aid*, London: Eyre & Spottiswoode, p.4.

²⁹ Gray, A. M. (1994) "The Reform of Legal Aid", In *Oxford Review of Economic Policy*, Vol.10, No.1, p. 51-68, p.57.

modifications in 1993 pushed this down further, to around 50%, and the figure is now around 47%.

Over the last 50 years, as well as the number of financially eligible persons decreasing substantially, the methods used to gauge financial eligibility became more disparate and elaborate. Very different financial eligibility tests developed in respect of the different parts of the civil legal aid system. Also, the principal financial eligibility test, for certificated civil legal aid, became complex and problematic, with a high degree of discretion in relation to personal allowances against income, which could include private school fees. This could advantage applicants with a relatively high income and reasonable standard of living as against applicants with relatively low income, but few discretionary allowances. The test was in no way 'lifestyle neutral'.³⁰

Therefore, when the Legal Aid Board assumed full responsibility for the administration of the civil legal aid financial eligibility tests in 1998, it undertook to review them, and commissioned the Legal Services Research Centre to examine the feasibility of introducing simpler and fairer tests.

The outcome of the review was a set of proposals for new civil legal aid financial eligibility tests, aimed at affording greater harmonisation between the different types of civil legal aid, an increase in the capital allowance levels,³¹ and the introduction of a simpler financial eligibility test, which research suggested would better target people in the lowest income bands, whilst maintaining overall eligibility levels and legal aid expenditure.³² A new set of financial eligibility tests derived from these proposals was introduced this month.

In relation to Criminal Representation, financial eligibility testing was effectively abolished in April 2001, although (as noted above) a judge can require contributions towards the cost of higher court Criminal Representation if such is reasonable in all the circumstances of a case. Given that the vast majority of persons assisted by criminal legal aid were financially eligible under the previous arrangements, such a move involved little cost, yielded substantial administrative savings, and recognised fully the state role in the criminal justice system.

Targeting Services: The Scope of Legal Aid

As has been noted, until the reforms that followed the Rushcliffe Committee report, legal aid was available only to litigants in the higher courts. Even on the introduction of the modern legal aid system in England and Wales, however, certain types of civil case, such as claims in respect of defamation, remained outside its scope. However, following a review of the scope of the system, conducted prior to the transfer of responsibility for its administration from the Legal Aid Board to the Legal Services Commission, a number of

³⁰ Buck, A. (2000) *Assessing Means Assessment*, London: Legal Services Commission, LSRC Research Paper No.5.

³¹ To bring them into line with other welfare benefits.

³² *Supra.*, n.6. Certain forms of legal aid assistance are available on a universal basis.

additional types of case are now excluded. Also, an express form of prioritisation as between in-scope case types has been introduced, the considerations involved in the decision making process have been broadened to include public interest benefits, the cost-benefit criteria upon which individual funding decisions are made have been tightened and become more formalised, and a fixed budget for the most expensive cases has been instituted.³³ Full details of the new principles are contained in the Legal Services Commission's Funding Code.³⁴

There would appear to be three principal reasons for the changes that have been made to the scope of legal aid. First, some types of case have been excluded from the scope because other funding mechanisms are available. So, personal injury claims can now, for the most part, be brought under conditional fee arrangements.³⁵ This is possible because personal injury cases are principally aimed at obtaining damages, are invariably brought against institutional defendants, enjoy high and predictable success rates, and involve fairly predictable costs.³⁶ Nevertheless, not all personal injury claims fit the usual profile, and some – most notably medical negligence claims – can involve significant investigation costs before their legal merits are known (or very high overall costs after their legal merits are known). In recognition of this, the Funding Code allows for routine funding of the investigatory stage of medical negligence cases, and for Support Funding for claims which involve costs (and thus risks) that are higher than can reasonably be borne by solicitors' firms or private individuals.³⁷

Second, some types of case have been deemed to be inappropriate for legal aid funding by virtue of their nature. So, company and partnership law matters are now excluded from scope, along with other matters arising out of the carrying out of a business. Current policy would seem to be that funding for such cases should not be derived from a system that is focused upon enabling *individuals* to access the law. The Department of Trade and Industry already funds advice services relating to business failure,³⁸ and is arguably in a better position to address business issues in a holistic manner.

Third, the individual, social and political importance of different types of case, and individual cases within types, has been recognised as differing widely. Consequently, civil proceedings in which a person's life or liberty is at stake,

³³ For a general discussion of the meaning of public interest in a legal aid context, see Pleasence, P. and Maclean, S. (1999) *The Public Interest*, LABRU Briefing Paper.

³⁴ *Supra.*, n.6

³⁵ For a description of conditional fees, and commentary on conditional fee practice, see Yarrow, S. (2001) *Just Rewards? The Outcome of Conditional Fee Cases*, London: Nuffield.

³⁶ See Pleasence, P. (1998) *Personal Injury Litigation in Practice*, London: Legal Aid Board, LABRU Research Paper No.3

³⁷ Support funding is available where (for the investigation of any personal injury case) disbursements exceed £1,000 or overall costs exceed £5,000, or (for the litigation of any personal injury case) disbursements exceed £5,000 or overall costs exceed £20,000. If, subsequent to the investigation stage, a clinical negligence claim is found to satisfy the requirements of the Funding Code, Full Representation may be available for the remainder of the claim.

³⁸ E.g. Business Debtline, launched in July 2000.

along with certain proceedings under the Children's Act 1989, have been designated as 'top priorities'. It is intended that these cases should always be funded. These are then followed by a series of case types which have been designated as 'high priorities', and receive funding prior to the residual categories of case. High priority categories include domestic violence, housing, social welfare, and abuse of power by a public body cases. Also, for the first time within the English and Welsh legal aid system, cases can be funded on the basis of the general public interest. Thus, cases which are "likely to produce real benefits for a significant number of *other* people, or which raise an important new legal issue" can be funded irrespective of the individual benefit that might accrue to the applicant. In general terms, of course, this individual benefit is a principal criterion in the decision making process, and to that end the Funding Code has tightened up the guidance on what prospects of success and costs-damages ratios are necessary for legal aid funding.³⁹ This guidance is still intended to reflect the historical 'private client' approach to funding decisions, but it is tightly framed and involves little discretion. A private client approach and simple cost-benefit analysis has been deemed inappropriate in respect of certain types of case. For example, in housing possession cases, it is recognised that those most in need are generally very different in character from private clients with reasonable means. Also, the issues involved often go to the heart of a person's general welfare. Therefore, in such cases the Funding Code requires only proportionality between costs and benefits. Finally, as already noted, in view of the fact that the most expensive legally aided cases involve a hugely disproportionate amount of civil legal aid expenditure, a fixed budget has been introduced to limit their encroachment on other legally aided cases.⁴⁰

Targeting Suppliers: Matching the Pattern of Legal Aid Delivery to the Needs of the Population

In the last sub-section it was observed that one method of prioritising legal aid expenditure in England and Wales has been to restrict it in relation to cases for which other forms of funding would be appropriate. Similarly, with the development of Community Legal Service Partnerships, prioritisation can also now be effected through the effective co-ordination of differently funded services, so as to reduce imbalance of supply through ineffective overlapping of funding. Such prioritisation, though, must be predicated on an understanding of where and which services are needed.

Community Legal Service Partnerships were first piloted in 1999, with the aim of bringing together those who fund legal services (e.g. the Legal Services Commission, local authorities, charities, etc.) and supply legal services (e.g. solicitors, law centres, citizens advice bureaux), to promote co-ordination of

³⁹ For an examination of the likely impact of the new guidance, see Pleasence, P., Buck, A. and Christie, J. (1999) *Testing the Code: Final Report*, London: Legal Aid Board, LABRU Research Paper No.4. See also, Goriely, T (2001) *Breaking the Code*, London: Institute of Advanced Legal Studies.

⁴⁰ These changes to the social and cost-benefit criteria used within the legal aid decision making process further indicate, as was suggested above, that the prevailing ideology of legal aid in England and Wales is instrumentalist.

effort so as to best meet the legal needs of local populations. A Lord Chancellor's Department's 1999 consultation paper summarised the risks of a lack of co-ordination.⁴¹

“The funders risk spending money ineffectively, working from too little knowledge, or simply reacting to bids from providers. Even where they target the most needed services, they may fail to achieve the synergistic benefits which complementary funding might give, and they ‘reinvent the wheel’ by developing separate methods of needs assessment. The providers suffer where isolated funders place them in competition for funds; where a lack of a strategic view means that money is provided short term, ad hoc, or with too narrow a focus.”

The Legal Services Commission is under a statutory duty to inform itself about the need for, and pattern of provision of, services that can be provided through legal aid Funding and Community Legal Service Partnerships.⁴² At the local level Community Legal Service Partnerships are charged with assessing local need and supply patterns and developing strategies to most effectively match them.

Historically, the pattern of resource distribution within the modern legal aid system in England and Wales has not been determined by the need for legal aid services. Instead, it has been determined by the distribution of legal service suppliers, which in turn has been determined by historical demand levels (at the supply location), professional interest and profitability. As Foster observed in the early 1970s,

*“The variations in legal provision throughout the country are considerable ... there is irregular dispersal within towns; an unequal distribution between urban and rural areas, and finally an uneven spread nationally.”*⁴³

No doubt, there is some link between need and supply patterns, but it is clearly far from perfect, and the product of accident rather than design.⁴⁴

⁴¹ Lord Chancellor's Department (1999) *The Community Legal Service*, London: Lord Chancellor's Department

⁴² Access to Justice Act 1999, Section 4(6)

⁴³ Foster, K. (1973) 'The Location of Solicitors', in 36 *Modern Law Review* 153

⁴⁴ See for example the analysis in Pleasence, P. *et al* (2001), *Local Legal Need*, London: Legal Services Commission, LSRC Research Paper No.7. This is not, of course, a phenomenon unique to legal aid. For example, the pattern of resource distribution in the early years of the United Kingdom National Health Service (NHS) was not linked to the relative need for resources in different geographical areas. Revenue initially distributed through the NHS served in many ways merely to perpetuate the schism in resource provision already in existence when it was set up, as funding went straight to the hospitals already providing services. As Glennerster *et al* have observed: "During the early post-war years it was believed that abolishing fee payments and creating universal institutions would be enough to meet the needs of the population. But as the welfare state matured, the realisation grew that geographical differences created different levels of need or potential demand for services." (Glennerster *et al*, *supra.*, n.1, p.40)

Consequently, the Legal Services Commission and Community Legal Service Partnerships have had to adopt a number of strategies to assess legal need.

The Legal Services Commission has developed a series of small area legal need models, designed to indicate the relative need for legal services in particular areas of law at ward, local authority and regional levels.⁴⁵ Currently, these models are used as a *starting point* for local analyses of legal need, which in turn inform funding decisions. Ultimately, though, such models could form the basis of a formula funding scheme which would see the fairest possible *objective* distribution of funds to the different geographical areas of the country.

In the context of public health, a 1970 government consultation on National Health Service reorganisation included a commitment to new methods of resource allocation, which eventually resulted in a recommendation that funding distribution be based on a formula reflecting regional population sizes, weighted according to healthcare needs and the unavoidable cost of providing healthcare services.⁴⁶ A form of *weighted capitation formula* has been used to distribute resources ever since.⁴⁷

As it is not possible to directly measure 'healthcare needs', the National Health Service weighted capitation formula uses available proxies for healthcare needs. Similarly, the Legal Services Commission's small area legal need models use available proxies. The basic approach in designing them has been to identify the constituent elements of the problems faced by people requiring particular categories of legal service and adopt measures of those elements (or functions thereof) as proxies, or partial proxies, for need for such services. As the Legal Aid Board's Needs Assessment Group put it,

*"The models identify key factors that are likely to indicate a need for legal help in a particular category of law."*⁴⁸

So, for example, the *housing model* has three main components: unfit households, overcrowded households and homelessness. The three components are weighted according to the proportion of work conducted in each problem area. The unfit households component is based on information used in the 1996 English House Condition Survey (EHCS) and the 1998 Welsh House Condition Survey (WHCS). The overcrowding component is based on a variable from the 1991 census.

⁴⁵ Wards are the smallest electoral districts in England and Wales. Local authorities are local government districts. 'Regional' refers to Legal Services Commission administrative regions.

⁴⁶ These costs can vary greatly from region to region.

⁴⁷ Funding distribution is not tied to the formula. The formula is used to determine each area's *target* share of resources. Actual distribution reflects decisions on the speed at which areas are brought to the targets. It would make no sense to rush to build a whole new set of hospitals, the location of which more accurately reflect healthcare need if the cost was disproportional to the additional benefit. Instead, funding distribution should allow this to happen over time. Although, as is explained below, the optimal location of services, in terms of access, may not always fully reflect the distribution of need.

⁴⁸ LAB Needs Assessment Group (1999) *Needs Assessment*, unpublished report.

The accuracy and efficacy of need models depends on a number of factors. The most important ones being the availability of reliable and up-to-date proxy data and the modelling methodology adopted. Today, as a result of the increasing use of compatible computer systems for storing administrative records, more and more reliable small area proxy data is becoming available. Also, continual increases in computing power allow larger and larger data sets to be manipulated to produce models.

However, even with the availability of reliable and up-to-date proxy data, need models *alone* will always have some limitations. First, they measure proxies and not need itself. Second, scale effects can affect the nature of model outputs. For example, models cannot always effectively deal with closely proximate needy and non-needy populations. Third, the geographical scales used in predictive models do not always reflect underlying social patterns and local identifications. Fourth, rapid social and economic changes can take place, rendering model outputs out-of-date. This is a particular problem where models make use of infrequently updated data, such as that derived from the national census. Fifth, the same need indicators may not be appropriate for different types of areas (e.g. rural and urban). Sixth, patterns of need on their own do not provide a means of identifying the optimum form of service provision to meet need. Consumer behaviour patterns vary dramatically around the country. People in remote rural areas may routinely travel great distances to access basic services. People in urban areas may rarely travel beyond a few miles of their home. Also, generally, people may access services in defined centres (e.g. shopping centres, hospitals, around transport nodes), and so services placed away from such centres may be less accessible than geographically more proximate but less accessible areas.

As well as developing small area models, the Legal Services Commission is undertaking periodic national surveys of people's experience of problems with potential legal solutions. These will, of course, enable the models to be empirically tested. Equally importantly, though, they will allow further development of the general understanding of the prevalence of problems and the behaviour and fate of those people who experience them. This will allow the further development and evaluation of the civil legal aid reform programme, which is principally aimed at maximising the incidence of fair resolutions to people's legal problems.

Individual Community Legal Service Partnerships have also conducted, and continue to conduct local surveys of legal needs. These are aimed at, either enabling them to build effectively upon the outputs of the Legal Services Commission's national surveys and small area models, or at assessing the effectiveness of local partnership programmes. Local surveys are, however, still very much in their developmental stage, and there is concern that their cost cannot always be justified in relation to their impact on local service delivery patterns. There is also still some debate concerning the feasibility and methodology of surveys of legal need. Though, Genn's recent path-breaking work, and the development of the concept of *justiciable*

problems, has provided a seemingly solid intellectual and practical base upon which to undertake such surveys.⁴⁹

Whilst the efforts made by the Legal Services Commission and Community Legal Service partnerships in identifying patterns of legal need and legal services supply can be of some consequence in orchestrating the funding patterns of the major public funders, the Commission's own ability to develop supply to match need would be impossible were it not for the parallel development of legal aid contracting.

⁴⁹ The first empirical study of legal need was conducted by Clark and Corstvet in the 1930s (Clark, C. and Corstvet, E. (1938) 'The Lawyer and the Public: An A.A.L.S Survey, 47 *Yale Law Journal* 1972-93). However, until the 1970s approaches adopted to empirical studies of legal need changed very little. Survey respondents were presented with a series of problems with potential legal solutions. If they were found to have experienced a problem, but to have not obtained the help of a lawyer in resolving it, they were deemed to have had an unmet legal need. Unsurprisingly, the typical conclusion that followed such surveys was that there was "a considerable amount of need for legal services which went unmet, and that unmet need was particularly likely to be found among poorer people" (Abel-Smith, B., Zander, M. and Brooke, R. (1973) *Legal Problems and the Citizen: A Study in Three London Boroughs*, London: Heinemann, p.1).

However, it eventually became appreciated that the mere potential of a legal resolution to a problem could not *on its own* warrant a finding of legal need, and famously, Lewis asked whether a tenant with a leaking roof really needed a lawyer, or just a ladder (Lewis, P. (1973) "Unmet Legal Need", in Morris, P., White, R. and Lewis, P. *Social Needs and Legal Action*, Oxford: Martin Robertson, p.94).

In the 1990s, the assumption that people who received legal services always needed them also started to be challenged, through the concept of 'supplier induced demand'. A Social Market Foundation report applied an economic analysis to the increase in legal aid expenditure, and found that empirical evidence was consistent with the hypothesis of supplier induced demand (Bevan, G., Holland, A. and Partington, M. (1994) *Organising Cost-Effective Access to Justice*, London: Social Market Foundation). However, as Gray has pointed out, the theory is not proved. Empirical evidence is consistent with other explanations, such as changes in social attitudes, legislation and regulation (Gray, A. (1994) "The Reform of Legal Aid", 10 *Oxford Review of Economic Policy* 51).

Today, it is appreciated that there are many stakeholders in the legal process, and talk of need must be clarified with a description of whose need is being discussed. The functioning of the court process, for example, benefits greatly from the professional representation of those appearing in the courts (See Ericson's concept of 'system rights'. in Ericson, R. (1994) 'The Royal Commission and Criminal Justice System Surveillance', in McConville, M. and Bridges, L. (eds.) *Criminal Justice in Crisis*, Aldershot: Edward Elgar). Also, the complexities of the concept of 'need' are better understood. Need is essentially functional. It does not exist independently of an associated end. People do not need legal services, they need the ends which legal services can bring about – even if that is a sense of fairness. Out of this two things can immediately be seen. First, the nature of these ends must be clearly understood – and they may not always be clearly connected to the law even in the context of legal services. Second, that the extent to which legal services can be needed as a *means to an independent end* may vary greatly from case to case. What *type and level* of legal service is required is as important a question as whether legal services are required at all.

As a consequence of the developing understanding of the complexities of the concept of 'legal need', more recent empirical studies have sought only to identify those persons who have experienced problems which could potentially involve legal process, and then characterise the problems and explore people's reasons for either going or not going to law. Thus, Genn introduced the language of 'justiciable problems' to provide a *need neutral* description of problems which have a potential legal solution (Genn, H. (1999) *Paths to Justice*, Oxford: Hart).

As was noted above, only solicitors' firms and advice agencies which hold a contract with the Legal Services Commission are entitled to undertake legal aid work. Separate audits and contracts apply to separate categories of law.⁵⁰ The contracting process therefore provides an effective mechanism whereby the level of legal aid supply in different parts of the country can be regulated. Consequently, changes in supply patterns over time can be effected in light of empirical evidence as to patterns of need and demand for legal services.

This ambition is helped further by the Legal Services Commission's development of a broader range of legal service suppliers and methods of delivery. The Commission is currently piloting a number of non-traditional methods of delivery, with the purpose of identifying those that most effectively provide access to those sections of the population that are geographically or socially remote.

In the 2000/01 financial year the Legal Services Commission spent over £2 million on its *methods of delivery pilot programme*. This saw funds spent on national, regional and local telephone advice services, outreach services (services delivered remote from the supplier's base), and 'second tier' advice services. Second tier advice services are services provided to 'front-line' advisers. They can range from specialist advice support, through specialist advice training, to the conduct of complex cases on referral.

The Future

The legal aid reform programme in England and Wales is not yet complete. In the civil field, alternative methods of delivery continue to be piloted, information services continue to be expanded, and Community Legal Service Partnerships continue to be instituted and developed. Also, the scope of civil legal aid and pattern of its delivery is under constant review, the quality assurance and contracting methods employed by the Legal Services Commission continue to evolve, and alternative forms of dispute resolution continue to be addressed.

In the criminal field, efforts to control the cost of the 1% of cases that consume over 40% of the criminal legal aid budget continue. Individual case management contracts for very high cost criminal cases continue to be rolled out. Also, with the impending transfer of responsibility for higher court payments from the Lord Chancellor's Department to the Legal Services Commission, higher court payment mechanisms are being reviewed. Greater standardisation of payments is likely. Also, salaried criminal defence lawyers are being piloted in selected areas of the country.

⁵⁰ An exception to this is contained within 'tolerance' provisions, which allow organisations with contracts in one category of law to undertake a limited number of cases in other categories.

Conclusions

The legal aid system in England and Wales has been radically transformed over recent years. Pressure on public resources has led to a focus on effective targeting of funds towards those most in need. With expenditure in the 2000/01 financial year reaching a record £1.7 billion, the object of this targeting has not been to cut the cost of legal aid, but rather to ensure that the cost is controlled, and that the services purchased most effectively meet the needs of the population.

To target the individuals who are least able to access legal services using their own resources, a new set of civil legal aid financial eligibility tests have been introduced this month. This sees a significant expansion in eligibility for early stage legal aid services. In respect of criminal legal aid, the financial eligibility test has all but been abolished for representation in the criminal courts.

To target the cases for which funding is most pressing, a comprehensive Funding Code was introduced, setting out detailed criteria upon which civil legal aid funding decisions are to be based. It introduced a system of prioritisation between different categories of law. It also introduced a new public interest ground for legal aid funding.

To target the services which most effectively address the needs of the population, since April 2001 legal aid services can only be provided by solicitors' firms and not-for-profit advice agencies which have successfully passed a quality audit and hold a service contract with the Legal Services Commission. This contracting process ensures not only that the quality of legal aid work is controlled, but also that the pattern of legal aid service delivery can be better married with the pattern of legal need amongst the population.

As areas of social and welfare law are now regarded as being high priority, and as it is increasingly recognised that early intervention is a vital route to effective resolution (and prevention) of such problems, increased funding is being provided to not-for-profit advice agencies, which tend to specialise in these areas of work. Alternative delivery methods are also being piloted, including, on the criminal side, staff lawyers.

To identify the pattern of legal need across the country, the Legal Services Commission has developed a series of small area legal need models, which indicate relative need for single categories of legal aid work as between different areas of the country. To further develop these models, and to provide a mechanism to gauge absolute levels of need and the success of legal aid reforms across the country, the Commission is also undertaking periodic national surveys of need, based on methods developed by Genn in the late 1990s.

Furthermore, since 1999, a network of Community Legal Service Partnerships has been developed, aimed at bringing together those who fund and supply

legal services, and so promote co-ordination of effort so as to best meet the legal needs of local populations. These partnerships now provide an important strategic function at the local level, and generate information about needs and services which can be used at regional and national levels.

To increase awareness of the law and services available to resolve legal problems, the Legal Services Commission is producing a series of information booklets, each dealing with a specific area of law and the processes that can be utilised to resolve problems within it. Also, in one area of the country the Commission is developing materials for inclusion within the schools' national curriculum.

Although there has been great change over the last few years, the process of reform is not yet complete, especially in relation to criminal legal aid. Individual case management contracts for very high cost criminal cases are being rolled out. Also, with the impending transfer of responsibility for higher court payments from the Lord Chancellor's Department to the Legal Services Commission, higher court payment mechanisms are being reviewed. Greater standardisation of payments is likely. Also, salaried criminal defence lawyers are being piloted in selected areas of the country.