

Improving access to justice for those in receipt of legal aid

Introduction

1. Thank you for inviting me to share my views about ensuring access to justice.
2. I'm pleased to see that this consultation document has sparked debate amongst the legal community about a variety of topics such as Public Legal Education, alternative systems of delivery and increased use of internet services as suggested by Richard Susskind in last Thursday's edition of The Times.¹
3. However, I am not going to talk about different methods of delivery as I feel that I am better placed to pass on experience about how access to justice is actually working on the ground.
4. I am fortunate as an Independent Consultant to spend, on average, 4 out of every 5 days working with law firms, citizens advice bureau, Law Centres, and advice agencies. I see how the contract works in practice and have witnessed a change in provider behaviour since some of the reforms contained in the Unified Contract were introduced by the Legal Services Commission in October 2007. The new system has reduced morale for advisers but more importantly, as I will explain, the reforms have adversely affected true access to justice for clients.
5. I would like to use this session to focus on some ideas that I feel would make a real difference in increasing the quality of legal aid services provided to clients.
6. These ideas will focus upon changing the remuneration system for civil controlled work and improving the legal aid brand by ensuring that the Legal Services Commission (LSC) adopt consistent audit practices across the provider base rather than micro managing a sample of its providers. I will also briefly discuss how to improve the collation of client feedback in order to make it more meaningful and suggest that a pilot for monitoring client outcomes is considered.

Access to Justice has improved over the last 10 years

7. Before I do that, I think it is important to acknowledge, from a client's perspective, some of the key reforms that have happened over the past ten years that unquestionably improved access to justice. Following the passing of the Human Rights Act, the Government has widened the scope of funding in the Mental Health and Immigration categories to include advice and representation at appeal. Prior to this reform, clients would either be unrepresented or would often be advised by privately funded non-solicitor agencies which were largely unregulated and often provided very poor services at that time.

¹ <http://business.timesonline.co.uk/tol/business/law/article7124273.ece>

8. Further, the regulation of non-solicitor immigration & asylum advisers through the Office of the Immigration Services Commissioner has made it far more difficult for unscrupulous advisers to exploit vulnerable clients.
9. Also, I believe that the LSC has made some significant strides in helping to improve the quality of service provided to clients. For instance, the introduction of the Franchise Quality Assurance Standard and later the Specialist Quality Mark (SQM) has helped providers to improve their systems and, while controversial at the time, much of the content of the SQM is now universally adopted. In fact, some of the key content of the SQM is now reflected in Rule 5 of the Solicitors Code of Conduct and is similar, in many ways, to the Law Society's Lexcel Quality Assurance Standard.
10. The introduction of Peer Review and the Preferred Supplier initiative by the LSC a few years ago was also important in demonstrating that quality of advice would be central to any future contracting regime.
11. If only the Commission had stuck with their original yardstick of only contracting with providers that scored one of the top two grades by a certain future date, the Commission would not have needed to devise complex controversial selection criteria in the recent civil tendering exercise.
12. So what is so wrong with the reforms brought about by the introduction of the Unified Contract?
13. The main problem has been the side-effects caused by the introduction of a fixed fee system for controlled work. Under this system, you must ensure that do not spend too long on cases otherwise you will go to the wall. For instance, if you are paid a fixed fee of £230 (roughly equivalent to £50 an hour) then you need to ensure on average that the time you spend on these cases is around the 4 hour mark. If your average was say 6 or 8 hours, your service would not be viable and you either need to close your service or be cross subsidised by other work.
14. This is one of the reasons why there are so few employment advice providers with LSC contracts. It's simply not viable to complete what are often lengthy and difficult cases for a fixed fee of just £230.
15. If you work in a solicitors practice or a Law Centre or a CAB, particularly when working with vulnerable clients, you can imagine what effect it can have on caseworkers' morale if you know you have to finish cases within a certain timescale. You are tempted to take short cuts or perhaps provide limited advice. You may hope that some advice is better than no advice and that the client is able to manage many of their problems themselves.
16. Fixed fee payment systems are supposed to encourage efficiency and they do in as far as they discourage caseworkers from un-necessarily lengthening a client's matter. However,

they also mean that advisers spend less time with clients which is why the system doesn't serve clients' needs for quality of advice.

17. So, I'd like to offer some thoughts about remuneration systems. Fair pay for providing legal aid services is critical in ensuring access to justice. If the pay system is not fair, then the end product that clients receive will not represent true access to justice.
18. Chapter 6 of the Access to Justice review paper and its accompanying annex covers procurement and the way in which rates for payment for providers are set.
19. The chapter accurately sums up the advantages and disadvantages of an hourly rate payment system and a fixed fee system. The paper makes the point that, by paying hourly rates, there is a risk that providers may not wish to take on small matters that could be resolved in one meeting. Pay fixed fees and you encourage providers to accept smaller matters and reject difficult complex cases.
20. Some providers have taken care to ensure that the time they spend on cases does not exceed the amount of time that they are being paid for. This means that cases are closed earlier than they otherwise would have been with potentially adverse consequences for the client.
21. Arguably, the Contract encourages this behaviour. In the current Unified Contract and in the new Standard Contract which will come into force in October, providers are allowed to reduce the amount of time that they spend on cases by up to 20% compared to what they would have spent had they been paid on a hourly rate basis. This has helped some providers to swallow a fixed fee system but it is the clients that effectively pay for this reduction in quality.
22. For anyone who is particularly interested in client care, I would highly recommend a paper written by the Council on Social Action called 'Time Well Spent'². As pointed out in the Access to Justice Review, this paper suggested that fixed fees may inhibit the ability of advisers to develop a relationship with clients which may in turn lead to poorer outcomes for clients.
23. One of the less obvious problems with a fixed fee system is the unbelievable number of rules and regulations that accompany such a regime. Under the present system, providers must divert a significant proportion of their time away from helping clients into managing a complex set of rules and ensuring that they keep up to date with the ever changing audit system and regulations.
24. In short, a fixed fee system affects access to justice because it means that advisers cannot always spend sufficient time to resolve the client's problem and also because of the time

² <http://www.cabinetoffice.gov.uk/media/309446/time-well-spent.pdf>

spent managing the contract rather than assisting the client. It's clear therefore that, with controlled work, the answer is not fixed fees but I am not convinced that hourly rates are the answer either.

25. We are all aware that the LSC has sought to move away from paying hourly rates wherever possible. Pay hours, said one recent Legal Aid Minister, and you get hours. And I feel sure that the Government is unlikely to be persuaded that a return to hourly rates is desirable.
26. When considering alternative payment systems, we must have value for money at the core and think about how we would spend the money if it was coming out of our own pocket.
27. If I was paying for Legal Help, I would want a system that:
 - a. Does not adversely affect client care
 - b. Is sustainable and does not lead to higher costs for the taxpayer
 - c. Is easy for providers and auditors to understand
 - d. Is acceptable to the National Audit Office
28. The answer, as with so many problems, already exists. In many ways, it would be surprising if it didn't given the vast number of schemes and pilots the LSC has introduced over the years.
29. The answer lies in a system which is a compromise between fixed fees and hourly rates. It is a simple graduated fee system.
30. Presently, we have fixed fees for most civil categories but very complex staged graduated fees in the Immigration, Mental Health and Family categories.
31. When I say a 'simple graduated fee scheme' I mean a scheme that covers all types of cases without layers of special or additional payments. The scheme could either operate with slightly higher fees inclusive of disbursements or slightly lower fees exclusive of disbursements. I would prefer a scheme that was exclusive of disbursements so as not to provide an unintended disincentive to instructing an expert.
32. A simple graduated fee scheme would pay a lower standard fee for smaller, routine cases where advisers were not spending time on complex problems. A higher standard fee would be paid in cases where advisers needed to spend longer with clients in order to properly resolve their problems. An exceptional payment (or non-standard fee) would be payable at hourly rates for long running cases. In order to work out which fee is payable, you continue to time record casework and, if the amount of work recorded doesn't exceed a specified threshold, a lower standard fee is payable. If it does exceed the threshold, a higher standard fee is payable. A third threshold for exceptional or non-standard payments would also need to be introduced for long running cases.

33. Those of you who have experience in Criminal law will recognise this idea. A simple graduated fee scheme is how crime advisers are paid for work in the Magistrates Court.
34. One of the clever unintended consequences of this remuneration scheme as evidenced with criminal lawyers is that this scheme is largely self-policing. If a crime firm claims a higher standard fee on a high number of occasions when they should have claimed a lower standard fee, then they will have to pay back a very significant sum of money after audit because, in some cases, the LSC can extrapolate their findings across other files. This had led to most crime firms being very careful about those claims which just fall into higher standard fee territory.
35. The point is that, if you are only a few pounds above the threshold into a Higher Standard Fee, then you may slip into a lower standard fee if only a few letters or telephone calls are disallowed. For this reason, many trainers, including Anthony Edwards, have suggested caution about claiming the higher fee unless the practitioner is at least £50 clear of the Higher Standard Fee threshold.
36. If the words 'audit' and 'extrapolate' have worried you, please relax. Very few crime firms fail this audit. Why I am so sure? Because it has been a very long time since I and other consultants that I am friendly with have been instructed to assist with such an appeal!
37. The Crime Contract Compliance audit is a tried and tested audit tool and does not require any work at designing a new audit. It could easily replace the current Fixed Fee Contract Compliance Audit.
38. From a practitioner's point of view, this scheme in the crime category has not proved to be controversial. Certainly not in comparison to other remuneration schemes that have been introduced by the LSC. And unlike fixed fees where you have to worry about your case-mix in order to experience the so called swings and roundabouts effect, you will always get paid a fee which fairly reflects the amount of time spent on the matter.
39. The key advantages of this scheme are:
 - a. Clients receiving appropriate time and attention to their case thereby increasing true access to justice
 - b. Advisers not having to worry whether they were spending too long or too little time on their case
 - c. Abolishing the Fixed Fee Margin Contract Key Performance Indicator
 - d. Having a system which would be easy for the LSC to 'sell' to the National Audit Office
40. So, the key point here, is that cost does not matter nearly as much as value for money. It shouldn't matter so much how many matter starts are delivered each year, rather it should matter more whether clients' problems have actually been solved.

Client Outcomes

41. When it comes to measuring outcomes, it is difficult to truly measure client outcomes. Different people mean different things when they talk about outcomes. To be clear, I interpret outcomes as what happens to the client after the case has been concluded rather than the end point of a case which should be regarded as an output not as an outcome.
42. The fact that outcomes are difficult to measure should not stop us seeking to try to measure them. In order to properly measure outcomes, a degree of contact with the client is probably necessary for some time after the case has been concluded. For this reason, it is too expensive and unwieldy to measure true outcomes for every case concluded. However, as with client satisfaction, there is a very strong case for those who commission legal aid services to carry out an outcomes measurement exercise on a sampling basis. This will help those who pay for legal aid to better understand whether what they pay for actually represents value for money.

Measuring Client Satisfaction

43. Another change which would help the Government understand whether what they are paying for represents value for money is outsourcing the measurement of client satisfaction. Currently, providers are asked to implement and monitor a client satisfaction system which is available to LSC auditors on request.
44. There are various problems with the current approach including:
 - a. Clients may not wish to offend their lawyer by providing negative feedback
 - b. Those that decide to return questionnaires to providers may be particularly happy or unhappy clients thus skewing the sample
 - c. Providers may be tempted not to show auditors the questionnaires which are particularly negative
 - d. Costs of collection and analysis are borne by already stretched providers
45. Asking providers to manage a client feedback system cannot be said to be independent. For client satisfaction feedback to be properly meaningful the system must be truly independent and this means preferably outsourcing this task to a specialist provider or, less preferably, carrying out the task in-house at the LSC.

The Audit System

46. I'd like to finish by making some comments on the audit system and how this also indirectly affects access to justice.
47. There are a plethora of audits including Peer Review, Control Audits, Contract Compliance, Case Splitting and a new initiative known as Provider Dashboard.

48. The LSC decide which franchised or contracted providers get audited partly on the basis of how much money they claim from the fund and partly because of performance against the Key Performance Indicators listed in the LSC contract. This is the LSC view of risk.
49. This means that some large providers are audited once, twice or three times a year while other organisations have not been audited for several years. I have clients in both camps.
50. So, some suppliers providing services under the legal aid brand are audited to distraction while others are left alone for several years.
51. This is very, very different to practice in the private sector. In the private sector, where an organisation franchises providers to deliver services under its brand, it always audits all of its providers on an equal basis. It cannot afford to do otherwise because if one outlet of a franchise provides a shoddy service, it affects the brand for everyone else.
52. This is not only true of the major high street franchises, it also applies to non-franchised high street names. When I was a Store Manager at Marks & Spencer and before that a Branch Manager for Abbey National as it used to be called, I was aware that all stores or branches would all be audited every year to ensure that the brand name was protected.
53. I am not suggesting that all providers are audited ever year but I am arguing for fairness and consistency of treatment. Not so much from the providers point of view but from clients' point of view. How it can be fair that a client can choose a provider with no way of knowing whether they have been checked for quality of service or advice for several years.
54. And rather than have separate audits for the Case Splitting, Contract Compliance. Provider Dashboard and Control audits, consideration should be given to combining as many of these audits as possible into one audit in order to reduce the significant amount of micro management that currently exists.

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