

## **Justice in Employment Disputes? Early results from a study of the role of Citizens Advice**

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#### **Introduction**

Accessing justice in employment disputes has long been problematic. Employment law has developed as a highly specialised field, seemingly impenetrable to non-specialists; Employment Tribunals are courts in all but name. In this context, the unrepresented applicant – the applicant who cannot afford a lawyer – already has much stacked against them. With the decline in trades unions and unionised work environments, many more are turning to Citizens Advice Bureau for support in this highly legalised field.

This paper reports on early results from a study of the role played by Citizens Advice Bureaux (CAB) in supporting people who approach them for support in dealing with employment problems.<sup>1</sup> We use this data to examine the continuum of degrees of legal support that clients' experience – from full representation by a qualified employment solicitor up to and (sometimes) including representation at an Employment Tribunal (ET), through to examples of DIY practice where clients are expected to undertake steps themselves to resolve their employment problems with limited support from a CAB adviser.

Our analysis leads us to conclude that access to justice can be seen to be partly dependent upon an interaction between specific models of employment advice delivery, changing legal procedures and processes, and the resources of clients. This has implications for the continued dependence of some citizens upon legal advice and the possibilities (or otherwise) for unrepresented applicants at tribunals to access justice, particularly in light of cuts to legal aid and funding in the advice sector.

In Part I we set out the background to the research project, reviewing existing research on experiences of ETS and describe the significant legal changes that have taken place during the research period, most notably the introduction of fees to take cases to an Employment Tribunal, which has resulted in a drop of applications of 80%. We then set out why Citizens Advice provides an important point in which to access the experiences of vulnerable, unrepresented people with employment problems as they attempt to resolve their dispute, and map out a typology of advice delivery models in our case study sites, as well as demonstrating the impact of the Coalition Government's 'austerity' measures on these models of advice delivery.

In Part II we explore the relationship between models of advice delivery and clients' routes to justice, including the differential development of clients' understandings of law and legality. We briefly sketch out the theoretical concept of legal consciousness, which underpins the study of Citizens Advice, as a new institutional site of legal consciousness formation. Using initial data from

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our research we highlight the relationship at play between the resources of CAB clients and the institutional processes they come into contact with, most importantly those of CAB and the Employment Tribunal.

## Part I – Research Context

### *The need for detailed qualitative research*

For some time now there has been a political rhetoric surrounding the employment law system in the UK which claims that it is 'far too costly, time-consuming, and complex' for employers and that 'it is too easy [for employees] to make unmerited claims'<sup>2</sup>. However, a pilot study carried out by Busby and McDermont in 2010 of vulnerable workers attempting to resolve employment problems through ETs told a different story. Research participants experienced highly formalised, bureaucratic, court-like procedures that discourage participation. Facing legal teams of well-financed employers, such workers experienced the ET as a *barrier* to justice. Settlements reached pre-Tribunal left them without jobs, inadequately compensated and often traumatised by the experience.

The pilot study led us to set up an in-depth study of how people without the means to afford legal representation resolved their employment disputes. With the decline of trades unions and the growth in small and non-unionised firms, many workers now look to voluntary organisations such as the CAB for advice and representation to such an extent that it has been suggested that Citizens Advice has become a new industrial relations actor in the UK (Abbot, 1998). For local bureaux, employment-related queries have become the third most important area of their work. Research for the Department of Business, Enterprise & Regulatory Reform (BERR) research found CABx as the most commonly-cited external provider of advice to employees (Dunstan and Anderson, 2008: 3). CABx have become particularly important for those workers whose employment status is vulnerable or precarious, that is, those workers without access to trades unions, often in temporary employment including agency workers, and whose resources mean that they have no access to professional legal services. Citizens Advice also plays a significant role in campaigning for policy change in the employment rights field.<sup>3</sup>

We found that there was very little research that could be drawn upon in designing this project. There is little empirical research that looks at the experiences of applicants to Employment Tribunals that is independent of the government departments responsible for employment relations (DTI/BERR/BIS), or ACAS. The last significant empirical academic study, carried out by Linda Dickens and colleagues at the ESRC Industrial Relations Research Unit, was published in 1985 (Dickens et al 1985) and predates many significant legislative changes that have been made to the system of employment law.

What empirical evidence exists is largely through large-scale surveys. Since 1987 the government department responsible for employment relations, currently Department of Business, Innovation

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<sup>2</sup> Vince Cable, Business Secretary's speech to the Engineering Employers' Federation, 23 November 2011, at <http://www.bis.gov.uk/news/speeches/vince-cable-reforming-employment-relations>, accessed 21/05/12, in which proposals were announced, inter alia, to increase the qualifying period for unfair dismissal claims to two years, to consult on the introduction of fees for lodging a tribunal claim and for taking the claim to a hearing, and to refer all employment claims to ACAS for pre-claim conciliation

<sup>3</sup> For example, see their policy briefings issued over the last ten years concerning unpaid ET awards: [http://www.citizensadvice.org.uk/index/publications/er\\_employment](http://www.citizensadvice.org.uk/index/publications/er_employment)

and Skills (BIS), has been publishing findings from the Survey of Employment Tribunal Applications (SETA), periodic surveys of a random sample of employee applicants and employer respondents in Employment Tribunal cases.<sup>4</sup> These surveys tend to paint a fairly rosy picture: SETA 2008 reported that three-quarters of claimants were satisfied with the workings of ETs, (Peters et al: 70) and seven out of 10 believed that the ET hearing gave each party a fair chance to make their case (p69). Significantly, the 2008 survey showed a marked decrease in the number of claimants who had received representation, from 40% in 2003 to 32% in 2008.

We would argue, however, that this research throws little light on the experiences of the most vulnerable of workers, most commonly with small-scale problems of under- or non-payment of wages, or unfair dismissal claims. The large-scale SETA surveys tell us little about those 25% who were dissatisfied. More problematically, they tell us nothing about those who refused to take part in research. Whilst this is always a problem for empirical researchers, we would argue that, in the context under discussion, the experiences of these people would be significant, if they could be accessed. Two smaller-scale and more in-depth qualitative research projects examining the experiences of people taking sexual orientation claims and religion or belief discrimination claimants concluded that 'claimants found the employment tribunal system and its processes to be bureaucratic, confusing and legalistic' (Denvir et al, 2007: 150; also see Aston et al 2006, Peters et al 2006). Given the stress and trauma felt by the most vulnerable workers, demonstrated in the research into race discrimination, sexual orientation and religious belief claims, it is very likely that those whose experience of the ET system was most traumatic may not feel able to subject themselves to the re-living of this experience that could occur in relating it to researchers. This absent group, then, would perhaps tell a very different story. It was these stories we wanted to be telling.

With this as background, we worked with Citizens Advice (both the national umbrella organisation and local bureaux) to design a research project that would track people from the point at which they came to a CAB with their employment problem, following them and their adviser(s) as they sought out paths to resolve their disputes.

### *Changes in employment law, processes and legal aid cuts*

The pilot study research was carried out prior to the election of the Con-Dem Coalition government in 2010. However, even before a change of government, the rhetoric of Employment Tribunals as too costly and too much favouring employees was circulating – one might say that Vince Cable was simply amplifying New Labour's pro-business rhetoric. Hardly surprising then, that a number of important and dramatic changes have been brought in by the Coalition Government under the banner of 'austerity'. These changes, a few of which summarised below, have not only further undermined access to justice for workers but have impacted on our field study sites and the practices they adopt, as will be shown in the following section.

- Cuts to the Legal Aid Board funding, including the abolition of legal aid for employment issues from April 2013 (England and Wales)
- Limit on cost orders by Employment tribunals increased from £10,000 to £20,000
- Removal of lay members on ETs: for most types of cases including unfair dismissals, a single employment judge is now permitted to sit alone

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<sup>4</sup> In the 2008 survey, this constituted 2,020 claimant and 2,007 employer cases (Peters et al, 2010: 2)

- Unfair dismissal qualifying period extended from one to two years
- Fees for Employment Tribunals introduced (not Northern Ireland) in July 2013.

For successive governments, reducing the costs of the Employment Tribunal service has been a priority. In 2010 the Coalition Government launched its (ongoing) Employment Law Review aimed at identifying policies viewed as 'burdensome' for employers which aims to simplify (i.e. deregulate) employment law. This was accompanied by the consultation exercise 'Resolving Workplace Disputes', the infamous Beechcroft Report and the 'red tape challenge' by which members of the public are encouraged to respond via a website to proposals to cut 'unnecessary' regulation with employment law being a particular target. Many of the reforms have arisen from that agenda, aimed at reducing the costs to the government and to employers. The most effective of these, from the government's point of view, has been the introduction of fees to be paid by applicants who wish to make a claim to an ET. From end July 2013, claimants were required to pay an issue fee when submitting the claim form ET1 to the Tribunal service of £160 or £250 (depending on the type/complexity of the case). If the case was to go to a hearing then a further fee of £230 or £950 had to be paid – again by the claimant and not the respondent employer. Unsurprisingly, these fees have deterred many from making applications to ETs. When, on 13<sup>th</sup> March 2014, the Ministry of Justice published statistics which show that the number of claims made to employment tribunals in the period October to December 2013 had fallen by 79% compared to the same quarter in 2012. Even Government ministers seem to have been taken aback by the size of the fall, suggesting they would keep the matter 'under review' (Hall 2014). Our research tells us that many claims are for fairly small amounts – for unpaid wages or holiday pay that might amount to no more than £300. A simple financial calculation would dissuade anyone from pursuing claims like these but to a worker on minimum wage taking home £250 a week, £300 is a lot of money.

However, it is not just governments who have been concerned about the costs of Employment Tribunals. Advice organisations have long worried about the cost of supporting claimants through the complex labyrinth of employment law and the tribunal process. For CAB, one of their most valuable resources is the *time* of their advisers, both volunteers and paid staff. The availability of time becomes an important issue for CABx in their approach to dealing with employment cases presented by clients. CAB managers frequently decide that their advisers should not take on representation of clients at tribunals or in depth case work because of the enormous time commitment required to prepare cases as well as attending ET hearings (which can often be scheduled for at least two days). One adviser, who had taken a highly complex case all the way to tribunal stage, said that he had done so because it had 'strategic' implications; however, dealing with this case meant that he was not there for many other clients who came to the bureau for advice and support.

Cuts in legal aid funding have directly impacted on the ways in which CAB can offer advice. As the next section demonstrates, some CAB had received legal aid funding which enabled them to employ specialist legal support to deal with employment cases. Bureau D in our study employed a solicitor with employment expertise. Following the withdrawal of legal aid the service continued for a short period using transition funding. The bureau has managed to retain the solicitor by securing lottery funding, but she is only able to directly take on discrimination cases and those that might be seen as policy relevant such as agency work. Most of her time is now seen overseeing a new voluntary

employment team, because developing voluntary resources in the advice sector was the main criteria for the funding.

Even for those bureaux that did not rely on legal aid funding, the legal aid cuts have dramatically impacted on their service delivery, as they find an increase in people seeking their services as other agencies and law centres are cut or closed. Bureaux A now works more closely with a local law centre and an employment solicitor who works there, providing an employment advice session for two hours a week, in house.

*Mapping a typology of advice delivery*

**Table 1: Summary of participating bureaux employment advice delivery**

Site	Location	% Ethnic minorities	% JSA claimants (% males) <sup>5</sup>	CAB employment service provided
A	London borough	46	4.5 (5.3)	<ul style="list-style-type: none"> <li>▪ Generalist advice for less complex cases; CAB advisors with more specialist employment knowledge provide basic advice and undertake limited case work up to and at Employment Tribunal; clients with potential on-going casework needs referred to local law centre</li> <li>▪ Pro bono solicitor offering one session per month</li> </ul>
B	Town and surrounds, Scotland	<1	5.9 (8.3)	<ul style="list-style-type: none"> <li>▪ Solicitor, acting for clients up to and at Employment Tribunal</li> </ul>
C	Town and surrounds, Scotland	<1	5.7 (7.8)	<ul style="list-style-type: none"> <li>▪ CAB advisor with specialist employment knowledge (including legal training), advice up to and occasionally at Employment Tribunal</li> <li>▪ Generalist advisors</li> </ul>
D	Urban, England	9	4.5 (5.8)	<ul style="list-style-type: none"> <li>▪ Employment Solicitor will take on some discrimination cases, up to but not at Employment Tribunal</li> <li>▪ Generalist employment advice provided by volunteer team, supervised by employment solicitor, for less complex cases only.</li> </ul>
E	Urban, England	16	3.5 (4.5)	<ul style="list-style-type: none"> <li>▪ CAB advisors with generalist/specialist employment knowledge provide advice for less complex cases, undertaking casework, up to and sometimes at Employment Tribunal</li> <li>▪ Volunteer employment solicitor</li> </ul>
F	Urban, Scotland	5	6.4 (9.2)	<ul style="list-style-type: none"> <li>▪ CAB advisor with specialist employment knowledge (including legal training), advice up to and occasionally at Employment Tribunal</li> </ul>

The employment advice services provided by the bureaux in our study represent a continuum of degrees of legal support: from full representation by a solicitor, through to instances of DIY legal practices by clients with some degree of CAB support. In general, we found that, where a solicitor was involved the solicitor tended to run a case *for* the client, ‘acting on their behalf’, often with the client understanding little about what was going on. Where bureau believed the client had sufficient understanding of legal processes, and/or where they had insufficient resources to provide more support, clients were expected to undertake a lot of the formal legal work themselves to resolve their employment dispute. In Part II we briefly sketch out some of the conceptual tools used to analyse the data, before providing evidence of the interplay between models of advice, resources of CAB and the resources and legal understandings of clients, through an analysis of the narratives of their cases. To conclude, we draw out some important concerns for improving access to justice.

<sup>5</sup> Great Britain 3.3% (4.3%) males

## Part II Research Methodology - New Sites of Legal Consciousness – New Ways of Thinking about Law

Of primary conceptual importance to this study is the tradition of *legal consciousness* scholarship (e.g. Engels 1998, Silbey, 2005). Legal consciousness has been developed as a methodology by socio-legal scholars in an attempt to move away from a 'law-first' paradigm (Sarat & Kearns 1993) which understands law as primarily mediated through lawyers, courts and other court-like legal institutions, instead focusing on people's subjective experiences in everyday encounters with law. Law for legal consciousness scholars is 'portrayed from the bottom up as a continuing production of practical reason and action' (Ewick and Silbey 1998:19), seen 'as all over' (Sarat 1990), requiring ethnographic fieldwork to tap into its everyday workings<sup>6</sup>. Legal consciousness scholarship looks at people's interaction with law and legality in their ordinary daily lives, dealing with everyday instances of how law shapes actions and thoughts. In these settings law is 'commonplace' (Ewick and Silbey, 1998), consciousness of law is constructed from a myriad of experiences, education and environments, as well as within the specific encounter with law – an encounter that may not be recognised as a legal one until another institution, such as an advice agency, names it as such.

'Legal consciousness', then, is not reducible to what an individual thinks about law, but is a collective phenomenon related to broader economic, social and cultural relationships. It is not simply an understanding of 'legal capability' that can be tested and measured, but a relational formation that varies across time and location. This approach understands law not as a distinct system, but as a set of understandings, values and practices that are embedded in and emergent of the social world, therefore importantly collaborating with other social structures such as family, gender and education (Silbey 2005:346). Within the context of this research the institutional setting of third sector advice organisations is seen as central to the development of 'cultural meaning, social inequality, and legal consciousness' (Silbey, 2005: 360). Ewick and Silbey, usefully begin to develop a form of cultural analysis which integrates human action and structural constraint, by drawing on broadly structurationist European thought (Bourdieu 1977, 1990, Giddens 1984) which constructs the reciprocal relationship between subjective and objective aspects of the social world. Cultural schemas, ways of understanding the world, are actively re-enacted and invoked in the process of making sense of the world (Ewick & Silbey 1998:40), in interplay with economic, social and cultural resources, consisting of material assets and human capacities, which are unequally distributed in the social world. Resources and schemas are reciprocally interwoven, with each realising the other. Fundamentally Ewick and Silbey note that, 'the differential distribution of resources, together with the differential access to schemas, underwrites variations in social power and agency' (Ewick and Silbey 1998:41), and therefore access to justice.

It is these concepts and their interrelationship which will now be employed to analyse some of our data, exploring how the resources and understandings of clients interact with the CAB advice they receive, as they seek to resolve their employment dispute through the tribunal system. People go to a CAB with varying degrees of understanding about their legal rights in relation to their dispute and varying expectations about how the law may apply to their particular employment problem. CAB advisers are involved in complex processes of interpretation, diagnosing the client's problem and

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<sup>6</sup> Our fieldwork involved an in depth mixed methods approach of observation of CAB advice appointments, CAB office work and Employment Tribunal hearings, regular conversational contact with CAB clients, interviews with both CAB clients and CAB workers, and CAB client diaries, as well as attributes data of bureaux and clients.

what can be done about it. They 'translate' back to the client how employment law relates to the dispute. It is an aim of Citizens Advice that clients become empowered through developing greater understanding of what has happened to them and by becoming actively involved in the process of resolving the problem. The extent to which an advisor will encourage client involvement will depend upon the competencies and resources of the client, as well as the approach of the adviser and the resources available to the bureau. Our initial findings suggest that clients with greater levels of education (cultural capital and symbolic mastery), social resources in the forms of associations and networks (social capital) and economic capital are better able to navigate the system and inform themselves of relevant legal processes. Those with fewer resources are more reliant upon the advice and support of the CAB, and when this is not available, access to justice is threatened.

### *Comparing Three Cases to Highlight Differential Access to Justice - Rationale for Selected Cases and Structure of Analysis*

Analytically in this section we seek to highlight how the narratives of employee's everyday experiences, and their perceptions and actions are related to the possession of economic, cultural and social capitals, and the advice (and institutional resources) they received from the CAB. Three employment tribunal cases are analysed comparatively using the full extent of the in-depth data elicited. Each case emanates from one of the three bureaux in our English sample of CAB: A, D, E<sup>7</sup> [see table for bureaux specific employment advice systems]. In Bureaux A, at the time of the case, funding for specialist employment advice was limited to some in depth case work by a paid specialist employment adviser, AiiSA007, as well as generalist advice. In Bureaux D, Colin was one of the last cases to be supported by legal aid, which funded the bureau's employment solicitor DSOL01 in case work. Bureau E ran a generalist employment advice service not reliant on specialist employment funding, with a voluntary team having received employment advice training by the national Specialist Support Unit within Citizens Advice. They had the additional resource of a volunteer, ESOLV01, a professional employment solicitor, working for half a day a week.

The cases analysed have also been chosen because of the similarity of the legal claim, unfair dismissal, to allow for their greater comparability. Two of the claims were for constructive unfair dismissal, and one for unfair dismissal. All three were strong cases, in the judgement of CAB legal advisers – i.e. they had legal merits in terms of legal argument and evidence. These cases were differently supported by CAB advisers with differing amounts of formal legal education (legal capital) but also in relation to economic resources of the bureaux and the model of service delivery the client encountered, within which they received support. All three cases will be comparatively assessed and the analysis structured by looking chronologically at the dispute over time, from the participant's initial perceptions of their dispute in the workplace; to their understanding and use of formal dispute procedures; attendance at the CAB for advice, and the types of support and help they received there, focusing upon processes of translation, and including their experience of entering the employment tribunal system by submission of an ET1 form; then experience of the ET system and its legal procedures; finally experience and perceptions of outcome. Their three cases culminated in an award from a tribunal hearing for Colin, a strike out after a pre-hearing for Lena, and a pre-hearing settlement in the case of Caroline.

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<sup>7</sup> Pseudonyms for bureaux, are the capital letters of A, D, E [see in table]. Second letters are used if there are more than one site at a bureau (e.g. Aii). Workers codes are prefixed by the letter of the bureau then solicitor - SOL, volunteer solicitor - SOLV, specialist adviser - SA, and manager - MAN, then with a number at the end.

The cases of Lena, Colin and Caroline have been chosen primarily because they highlight the different routes to justice experienced by the participants, partly because of the ways in which they demonstrate the interplay of client and CAB resources. Colin had his case run for him by the bureau employment solicitor, DSOL01, who acted on his behalf throughout most of the tribunal procedures, but DSOL01 was not funded to represent him at the hearing. He won his case partly because of the substantial legal labour of DSOL01, but did not possess much cultural and social capital to navigate the process himself. Being little involved in developing the legal case, his understandings of legality did not develop extensively during the process.

Lena possessed more cultural and social capital than Colin but received only a small amount of advice from the specialist adviser AiiSA007, which later aggrieved her, and she had to undertake the ET on her own. 'Confused'<sup>8</sup> by legality and the legal processes, her case was struck out at a pre-hearing stage, which decided on the reasonableness of her claim for an extension to the time limit for ET1 submission. The chance of success for this type of time extension is small, but her lack of legal competency and advice meant that she was not able to build a reasonable case based upon sound legal argument and evidence, and she was easily defeated by the respondent's barrister.

The final case of Caroline is of a participant relatively rich in cultural and social capital, who was able to navigate the tribunal process with plenty of hard legal work on her own, with some advice from bureau E, in particular the volunteer employment solicitor, ESOLV01. She settled her case, which was partly to do with the introduction of fees as discussed in the first section and concern about having to represent herself in the hearing because she was not prepared to pay for a barrister, nor able to receive one free of charge.

### *Differential Perception and Action concerning Emerging Employment Dispute and Workplace Dispute Procedures*

All of our three participants developed different types and degrees of perception and understanding of what was happening to them in their workplace, which was causing them problems. Felstiner, Abel and Sarat (1980) usefully explore the emergence of a dispute by identifying three basic processes, firstly that a problem needs to be identified as injurious (named), then blame needs to be apportioned (blamed), and then finally, if this has been rejected, even if partially by the other party, it is claimed for. The injurious experience(s) then become a dispute. This first section looks at how the participants named, blamed and claimed in their dispute before they came to the CAB, and how their perceptions and actions can be related to the resources they possessed.

#### *Colin and Abuse over 7 Years*

Colin is 42 and was an unskilled car valet, on the minimum wage, at a small, local, family run car sales business, where he had worked for 8 years. He had no written employment contract, indicating the informality of employment conditions. His father was 'a coalman digging in the pits', before de-industrialisation set in. Colin left school with no educational qualifications and is dyslexic. He had previously worked in a semi-skilled job in another local industry, before being made redundant. He can be situated in a middle working class position through his income level, and his and his father's occupations (economic capital) and his educational qualifications (cultural capital).

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<sup>8</sup> " inverted comments indicate verbatim speech by research participants.

After a year of employment at the car sales business, he was moved between sales sites after the previous car valet left and won a case in an employment tribunal for bullying and harassment against the same site manager, the son of the owner. Colin's powerlessness is noticeable from talking about being moved, which was the beginning of his problems at work,

'I went to work one morning down there....I was told to get my stuff and got to work up the other side, because the previous valet, took them, him to court and he won. I wasn't given the option to go there. I was told.'

Possessing no contract and therefore formal stipulation of terms and conditions as well as a vague understanding of employment rights, Colin just went along with it. Over a seven year period Colin then experienced constant personal abuse and bullying from his site manager, as did other members of staff, who left, without taking legal action. His boss for instance would phone Colin up on a Saturday, knowing he did not work weekends, harassing him in front of his kids.

Colin knew he was being wronged, and that he was experiencing harm, but put up with it because; as he told us continually he 'loved' his job. His narrative below expresses the powerlessness he experienced in his relationship with his boss and partial perception of his treatment; his rights and what to do about it, through his informal questioning of his changing work conditions; his boss's knowledge that he would not leave the job and constant threats for him to leave; as well as informal attempts on Colin's part to prevent his ill treatment, by informally asking the owner of the business, the father, to do something about it, knowing partially that there were laws to help him but unable to use them:

'The [new] mechanic came in on Wednesday, then on Thursday, [my boss] says to me, 'we've got a new mechanic starting Monday, he says, you're hours have changed now – instead of being half past 8, you're working from 9, have a half hour dinner, where I'd had an hour, and finishing the same time. I quizzed him, I said, I says to him, like, 'well, can you do that, like? Know what I mean, Why?' he said, he's like, 'get your stuff and go if you don't like it'. This is what it was like all the time. But he knew I stayed because I enjoyed my job. His motto was, with people and customers, 'john-boy, that's my nickname there, john boy will never leave'- I was like his rubbing rag, all the crap he had, I had it. He offloaded it onto me. He put it on me. I spoke to his father several times about it, thinking that was the better thing. But now, I knew I should have put a letter of grievance in every time. Because you do, you're part of system, I'm Joe Bloggs; I'm nothing.' His dad says, 'well, he's under a lot of stress.' I says, 'well, there's laws out there to protect me from this'. 'Well'; and he just walks away, smiling.'

His wife, slightly more educated than Colin, with 8 O levels, was a care worker like her mother. Her father was 'a big manager at the pits...in charge of the electricians', according to Colin. Colin's wife phoned ACAS just before the final event which caused him to resign, because she says,

'I knew they gives help with things going on employment...they told me about the procedure, the letter of grievance, that you put that in first...and then see how they responded to that.'

The final straw for Colin was when his boss phoned him at a hospital appointment he was attending, because of a prolonged period of dizziness he had been experiencing. His boss had begrudgingly allowed him time off and then had verbally abused him on his mobile phone, telling him to get back to work straightaway. Colin collapsed in the hospital during the tests and was advised by the nurses not to immediately return to work. Colin 'broke down' that night. He decided he couldn't carry on at work, and later said,

'I felt I was forced out of me job.' His wife asked him that night, 'have you tried phoning ACAS? Why don't you try phoning somebody?' 'I says 'who? Then I phoned a solicitor first [from the local paper) and he says 'have you been in touch with ACAS?' I says 'no', and then I phoned ACAS and somebody phoned me back a couple of days later and it just went from there.'

The private solicitor and ACAS advised Colin to write a grievance letter, which his wife wrote for him. Colin persistently stated, 'I never heard of a grievance', but also said the same about his wife, before she phoned ACAS, 'She's educated and she'd never heard of it'. Colin found the private solicitor very helpful, but was not able to afford him, 'he was brilliant, he was, but he was dear so I couldn't afford it', so the solicitor advised Colin to go to the CAB where a solicitor could help him free of charge. The solicitor interpreted Colin's experiences into a legal claim of constructive dismissal, a term Colin had never heard of before, and it's conceptualisation he did not fully understand, mispronouncing the word when he met DSOL01 (the CAB solicitor) in his first in depth advice appointment and after this, when asked what it meant, he replied, 'I sort of understand. I was forced to quit'. Later on during the process however, Colin's general understandings of what had happened to him, its impact upon his personal life and how he would deal with it from now on, had changed,

'I just took it for too long. It's just messed with me now. If I went to another employer now, and they did that to me, I'd have to do a letter straightaway, and I'll probably finish, cos I can't go down that way again. I nearly lost my kids and my missus through it.'

### *Lena and Credit Betting*

Lena was a manager of a Betting Shop, working for the same company for 22 years, and earned £24,000 per annum. She is 47 and has a business studies degree from a school of commerce in Ireland. Her father was a photographer for a local newspaper. They are lower middle class, and Lena had a stable career in her line of work, although noticeably had not been given a pay rise for 16 years. Lena was suddenly placed under 'informal' investigation for credit betting with other members of staff, when the company was being re-structured. Credit betting is when staff allow clients to place bets without immediately taking money for them. Lena had been informally called into a meeting with a security member of staff for 'a chat about a cheque', which she was 'really shocked' about. She found the meeting 'cloak and dagger', with the conversation moving swiftly on to accusations being made against her of 'allowing customers to credit bet'. She was extremely perturbed because she 'had never been in a situation like this', and offered to resign, with the response from the security staff forcing her not to,

"well if you do that' she goes 'we will put this on your reference that you resigned during an investigation''.

Lena was dumbfounded about the allegations, believing herself to be wronged. It had been accepted informal practice for staff to let high profile customers credit bet. In her last shop it had been shown to her by her previous manager. Although contravening formal company policies, staff had previously been expected to turn a blind eye to it, so that high spending customers would continue to place a high level of bets. As she states in a common sense yet insightful way this was an informal arrangement,

'it was something the customer was allowed to do for 5 years, so to me it was common practice – it was like sending my mum to the local shop for 5 years, picking up a pint of milk, and the shop assistant knew she'd done it every day, and at some point in that day, she just paid for it because she was a regular.'

Formal disciplinary procedures began for many members of staff, and for Lena, they 'did not feel right', with her unsure about these procedures – not knowing if they were formal meetings first of all, whether they should be recorded, and why confidential information was seeping out from them to other colleagues. Noticeably, with no trade union presence, there was no collective action undertaken by staff in response to the investigations and ensuing dismissals. But Lena contacted ACAS after her second investigatory meeting, once being advised by someone to do so; noticeably this was earlier than Colin, whose wife did so shortly before he resigned. Lena knew that some members of staff were keeping their jobs and others not and ACAS advised her legally that it was not correct for her employer to have 'two rule books' and that it was 'selective dismissal',

'because if there is a rule in place in the company that actually says that you cannot credit bet then it should actually be the same with every member of staff.'

They advised her to speak to her manager, particularly as she had never been disciplined before, but her company said they were dismissing those they had CCTV evidence of. At this time she partially knew her employer was what she called, a 'kiss and tell company' and she was asked to name her supervisor and provide evidence that she had learnt credit betting off her. She explained that she honestly could not say she had had an explicit conversation about credit betting with her manager. She was therefore dismissed for gross misconduct and given seven days to appeal, which she did. The company dragged out the appeal process, with a meeting arranged a month after the dismissal, as is common practice by some employers in our findings, to prevent claims being made to a tribunal. In the mean time she found another lower management job with a rival company. ACAS again advised her that she needed minutes from previous disciplinary meetings and 'various things within your possession to actually carry on' in the appeal. She requested these but did not get a response from her ex company. It was only when she was dismissed two months later from her new job because her reference from her previous company had been received which stated that she had been dismissed for gross misconduct, that (following advice from a friend, therefore exhibiting some degree of social capital) she decided to do something formally about her situation.

In a final interview Lena explains how she did not know about workplace disciplinary or dispute procedures, her rights, where to seek advice, and connected to this, rules and regulations on credit betting;

'I mean you don't know these procedures because nobody actually informs you of anything, you know like your rights, you don't know that you could go to ACAS, that at any point you could you know, take the company to court....there's nothing even though there is a set of rule books which not being funny, were changed actually after my investigation and after they sacked so many people.....Basically there was nothing in the books that actually said look, you know if anything ever happens...it was never ever mentioned credit betting.'

### *Caroline and Bullying*

Caroline was an events manager of two sites for an events company. She had worked for the company for three years and has a University degree. From her active involvement in dispute procedures at her workplace, running her own legal case through the tribunal system and the experiences she narrates, she will initially be positioned as middle class and capital rich (we are yet to collect further data about her income and family background). Caroline lucidly explains the beginnings of her employment dispute, and coming to realise she was being bullied by her line manager:

'It then all kind of started about three months after, the same man who did promote me, started then....making my life quite difficult....saying that I hadn't been doing procedures and things when, actually, I hadn't had the training to do the procedures and things....It generally went on from there...There was very unrealistic deadlines and I kind of got the feeling that I was... there was a feeling amongst most of my colleagues for a number of months that I was a kind of a scapegoat for things that happened or I was being blamed for stuff and it was just a general sign of bullying, to be honest.'

Her boss targeted her more, trying to investigate her 'over some customer complaints' that reflected badly on her service,

'which were all just... nothing I'd done was wrong and yet in the investigation, the questioning was very abrupt. It was more like an interrogation...shortly after that meeting I became just a little bit sort of frightened in his presence...he was quite aggressive, quite threatening.....I felt like he really abused his power over me, in that sense.'

A month or so later,

'my old boss started being quite indiscrete with other managers, asking them to collect evidence against me for not doing my job properly, with a view to sacking me, which one of my assistant managers phoned me about.'

Caroline was beginning to get help from colleagues, indicating supportive social networks, by gaining greater understanding of what was going on. She also possessed knowledge of how to make initial workplace claims, phoning, 'the company's confidential Speak Up line'. Soon after a one to one private meeting with her boss, when he asked others to leave as he customarily did 'so it couldn't be witnessed', she became 'really ill with stress', needing 'first aid assistance in work', which he ignored. A month later whilst her boss was on leave, an audit was carried out giving 100% scores for her unit, and she was told by the auditors that,

'if it hadn't been for my hard work and effort...the whole unit wouldn't have pulled through and would have failed. I was all over the place then because I was thinking, 'hang on, one guy is saying I'm not good at my job, and I've got proof that I've passed the audit', and that made me even more ill because the stress from the confusion then, you know, I was really doubting myself and my job and then, about March time, I then decided to go off sick after putting in a grievance against him.'

Caroline was able to, if with some ambiguous confusion; make greater sense of her experiences than were Colin and Lena. She began to understand what was happening to her, and not only that it was not right but that she could do something about it. She began to think about making a grievance claim, with the help of colleagues, further utilising resources within her social relationships, with one person being 'very knowledgeable with sort of HR procedures'. Another, an ex NHS employee, had left work for similar reasons and 'was very clear and helped a lot', as well as a senior manager, who encouraged her 'to go forward with the grievance procedures because of bullying.' As she states on reflection,

'I had a little knowledge of it. I knew I had rights; I knew that I wasn't being treated very well and I knew what I had to do to kind of... to make the grievance happen.'

Unsurprisingly Caroline had already been to the CAB when she began to feel really ill. She had actively sought out legal advice early on in her dispute, unlike Colin and to a lesser degree Lena. Caroline articulates a focussed reason for attending the CAB, which displays a greater understanding of what she legally needed and how she needed to collect evidence for her case,

'in terms of my legal rights, you know, I think that was one thing I was unsure of, was okay, where do I stand with this legally...everyone kept telling me bullying is a really, really hard thing to prove, just keep collecting the evidence, keep noting it down, and that's kind of what I did really. I kept on noting down everything and I kind of collected all that together and wrote it down formally.'

The CAB gave advice on dispute procedures as well, and the investigation by her employer into her grievance was perceived by Caroline to be procedurally wholly inadequate and inappropriate and would make up part of her case as she became more legally aware of events, through CAB advice, her social networks, and her existing understandings and competencies.

### ***Attending the CAB, Experience of Advice and Submitting the ET1***

All three participants attended the CAB at different stages during their dispute, and this illuminates to a degree their differential perception of their problem, and the resources available to them in seeking to resolve it, legally. All went through the gateway system, which operates in all England and Wales CABx, but not Scotland, in which the client's problem is 'diagnosed' in a 10 minute interview. From this appointment they will be signposted to another agency, provided with information to address the problem themselves, or if the problem is considered to require it, given an appointment with an adviser. All three were sent on to advice appointments and experienced different degrees and types of legal advice, dependent on the resources available in the bureau, the

advice approach of the adviser, the complexity of the case and the bureau's perception of the clients' competencies, and therefore needs.

Colin was told by the bureau employment solicitor DSOL01 that he would need to wait until he was longer out of work to qualify for legal aid. This he did and was then seen by DSOL01 six weeks later. She scrupulously checked his eligibility and decided she was able to take him on and run his case under legal aid. He later said,

'I couldn't have done it without that....I was on minimum wage, on £6.18', 'if I hadn't applied I would've been snookered...I would have just had to move on.'

DSOL01 took down the details of his case in a very business-like and professional manner, teasing out details of his experiences and applying them to employment law, confirming the legal judgement of a claim for constructive dismissal. She tested the soundness of evidence for this by persistently seeking actual accounts of the verbal abuse Colin experienced. She knew (because of her legal training and experience) that he would need this evidence in a hearing, but Colin had problems providing it, not remembering actual words, as did his witnesses, which was a concern to her. DSOL01 began acting on Colin's behalf – funded to do so, with this her normal way of operating as an employment solicitor. Colin had little involvement in the case, as he explains how it took the emotional burden off him because of her greater competencies and his inabilities,

'she's done all of it, she's wonderful....we met a couple of times, I brought in some evidence and we did stuff over the phone... I'll give her, her due. She's clever,' and 'it's just like a weight lifting....just reassuring.'

This is a common way for solicitors in our research to run cases, where there has been specialist funding to do so. DSOL01 would keep him updated and tried to translate some sense of the procedures and law, but Colin did not really understand what was going on. She would write letters for him, and when asked if he could have done this himself, his response was decisive,

'no way. I wouldn't have done that. I'm not stupid and I'm not thick. But I'm slightly dyslexic and that. I mean, I can read and write but my writing isn't brilliant'

This highlighted his lesser possession of symbolic mastery (cultural capital). Within the first advice appointment, DSOL01, persuaded of the merits of the case, took down details to submit an ET1 form on his behalf, something which the other two participants did themselves with some help from the CAB.

Returning to Lena's story, she had spoken to ACAS, re-engaging with them, after losing her next job because of her dismissal for gross misconduct from her previous employer. ACAS had re-opened her case because of this, telling her this was not fair and the two cases could be linked. A friend told her,

'you really have to sort this out...you can't keep getting jobs and basically losing them because of your reference....you really need to take the company to court.'

She was desperate, 'in a vicious circle', and walking past the CAB on the high street, she went in. She was seen by AiiSA007, the specialist employment adviser at bureau A, four days later and as she explains,

'he just told me the employment law is 3 months, minus a day and you've run out of time, and he explained what it meant for me to run out of time and he went over my paperwork, and he explained to me why it was so important to fill out the form, he asked what had happened, I explained and he felt I had strong grounds for unfair dismissal.'

Without previous knowledge of employment tribunals, and the deadline for ET1 submissions, coupled with the unfolding events of her first dismissal, prolonged appeal (tactically so on the part of the employer), her re-employment and her utter distress over this period, she sought an extension, with AiiSA007 giving her some advice as to arguments to make for this and briefly running through how to fill out the ET1 form. He was clear that the tribunal was very strict about extensions. Lena never realised properly, because of her lack of legal understanding and related cultural capital, that the prospect of her case would hinge on this and this was to be her downfall. AiiSA007's translation of this matter did not work sufficiently therefore, because of her lesser cultural and legal competencies and understandings, with AiiSA007 unable to provide more support because of his limited funding. However because of Lena's relatively greater possession of symbolic mastery than Colin, she did fill out her own ET1 form, which she found 'fine' and 'pretty straightforward,' but she did not get AiiSA007 to check it, nor did he offer to as in Caroline's case.

Caroline, capital rich, took a lot of time filling out her own ET1 form once she resigned her post, to make sure it was right, with ESOLV01 (the CAB's volunteer employment solicitor) just looking over it and adding some legal terminology, possessing the legal capital to do so,

'ESOLV01 was quite happy with how I'd done it. It was just putting in a few more kind of legal bumf, I suppose, to my own kind of words.'

In part because she was anxious to ensure the ET1 Form was completed correctly, Caroline just missed out on submitting it before the introduction of ET fees. However, because she possessed enough economic capital and the moral conviction to put the claim in, she paid the initial claim submission fee,

'I had to pay £250 which at the time was a big brunt but it was something I wanted to do and I knew I had to do it to bring justification to that situation.'

Before this the CAB, in particular EMAN02, the manager of advice services and supervisor of the newly formed voluntary employment advice team, had seen Caroline during her grievance procedures and rectified the doubts she had about her claims of bullying, her levels of cultural capital allowing her to properly utilise his translations. You can hear her understanding developing in this quote, as she sought to allay her doubts about the nature of the dispute, and whether the 'naming' and 'blaming' was correct or whether it was all in her head. She realised she needed a legal opinion as to whether she had a legal claim and how that needed to be evidenced:

'I got a quote from the [private] solicitors and you know it was just extortionate fees and, at the time, I think I really wasn't sure whether I had a case, whether it was good enough, whether I was just... because for so many months this guy had made me believe that everything was in my head, you know, I found it very hard to self believe at that time and I almost needed as much opinion as possible to make myself believe that what was happening

was wrong. So I think I needed as much opinion as possible and certainly, after going down to the CAB, and they told me to start recording everything.'

EMAN02 then handed over the case to ESOLV01, the volunteer employment solicitor, who gave Caroline ideas, understandings and rationales which, because of her greater cultural competencies, she was able to utilise to frame her DIY legal work in terms of legal concepts, practice and logic, unlike in the previous two stories:

'they made it quite clear that there was obviously constructive dismissal, unfair dismissal, and the fact that I'm not being dismissed, makes it very, very hard....kind of through coercion....ESOLV01 gave me a sentence initially that really led me to keep proving and I think she said constructive dismissal is where you can no longer trust the company to protect your health or wellbeing, and that was the line that I tried to prove all the way through the bundle and the tribunal but, before it got to that stage, the CAB, they advised me quite clearly on how the grievance procedure works, on how appeal procedure works.'

### *The Employment Tribunal Process and Outcomes*

As we can see Caroline was some getting help from the CAB, but less than Colin who did little during the tribunal process up until his hearing with DSOL01 running the case and a lot more than Lena. These varying levels of support reflected, in part, the funding available to provide advice and representation, but also judgements made by bureau advisers as to the ability of clients to pursue their own case. Caroline was able to marshal the support she was given to her own advantage, converting her existing cultural capital into legal capital and, utilising CAB support and other social capital networks, she was able to navigate the tribunal system profitably, carrying out 'DIY law'. Translation in Caroline's case works because CAB resources – staff, time and expertise – interact in the legal advice exchange with the dispositions and competencies of the client. There is correspondence between the two, so the client is able to get what she needs: because she understands (to a degree) the general abstract language of law and appreciating the practices required, she is able to understand the advice she is given, using the detail provided by the 'experts' to supplement her own understanding. Her greater degree of education and symbolic mastery means she can engage with legality and master it, at least for the purposes of navigating the employment tribunal process.

As mentioned above, Caroline was also supported by strong capital rich relationships: including a partner (a manager in a courier company) who had been professionally involved in an employment tribunal; and a family friend who was an HR officer in a solicitor's firm, who looked over various legal documents for her during the process and gave her advice. Caroline proactively sought out help from the CAB, making herself heard and demanding attention. As such she displays legal entitlement, as well as cultural entitlement, in which certain dominant classed people (the middle classes) are confident, able and willing to engage with formal institutions to further their rights and gain rewards, whether it be seeking a job (contacting the right people, going up the right channels, interviewing well) or help from medical doctors (identifying issues, explaining symptoms and seeking help). Both are classic cases of the dynamics of access to employment or health services, akin to processes involved in access to justice, in this case through advice services.

Caroline sends so many emails with requests for information and advice to the CAB that it becomes difficult for the manager to deal with. The bureau's resources are stretched by Caroline's demands.

ESOLV01, only volunteers one morning a week at the bureau, and often does not receive the information Caroline has sent the CAB. Caroline is very unhappy about this and complains. Field-notes display the earnest, almost professional, resource-based way she is managing things and her expectations of the CAB to meet her needs:

'The client was then quite annoyed that ESOLV01 had not received the document she has sent to EMAN02. She said very confidently, 'that was the whole point of the meeting to go through the documents with ESOLV01', which she had sent.'

Caroline therefore has the competencies and desire to seek legal advice and make use of it – to play the legal game. The CAB is able to provide support through their volunteer employment team, unlike bureaux A, which has lost its specialist funding and is not really able to help with some cases, like Lena's, as she struggles on without the resources to support herself. In contrast Caroline has a long list of questions to ask in advice appointments. The questions and queries have been chiselled out, in relation to what she needs to know through her developing understanding of procedures in the Tribunal and what is expected of her. They are about how and what to do, as she asks in one of her requests,

'ESOLV01 – The thing [is] I want to know, so it is done the right way, so it is not missed, do I need to phone them and invite [witnesses]?'

Another example in the many questions she asked, was how to prepare and exchange witness statements, something Lena did not get help with and was dictated to by the solicitor for the respondent, where the power imbalance was vast in terms of legal capitals and know-how. Lena had to truly go it alone and was extremely ill prepared for her pre-hearing and tribunal procedures because she did not possess the social and cultural capitals to work out what she should do legally, and needed to do, and did not have the legal advice from the CAB to make up for this deficiency. Her ET1 was accepted and then the respondent challenged the extension of the time limit for submission, I think knowing she had a strong claim for unfair dismissal, and that it was potentially dangerous at a corporate level. Lena was firstly given a day in court which was then changed to two hours to decide whether she should be granted the extension of the time limit. But she never really understood this and always felt she should have had her day in court and that what really mattered was never discussed after her case was struck out.

Lena's confusion about the purpose of the pre-hearing and the 'bundle' she was required to be prepared for this, put her at a great disadvantage. The 'bundle' was lawyers' terminology our research participants commonly had problems understanding. Lena refers to it as,

'a kind of legal bits and bobs, which didn't make any sense to me whatsoever.'

She actually wrongly sent witness statements she had collected for the main hearing regarding the claim of unfair dismissal to the respondent for the pre-hearing. With little help from AiiSA007, she was not prepared for the hearing and had to interact with the respondent's solicitor on her own. The respondent's solicitor threatened that they would seek costs against her, which she thought was a scare tactic and spoke to ACAS about. Additionally the respondent did not send their documents until the day after the pre-hearing, putting Lena at a further disadvantage, but she did not raise this in the hearing. Noticeably Lena did not provide a witness statement nor built a legal case explaining

why her ET1 was submitted late. In her confusion as to the purpose of the pre-hearing she brought along one of her witnesses for the claim of unfair dismissal (which was not to be heard that day). In the pre-hearing, she felt that the respondent's barrister could articulate the issues in ways she could not, and he attacked her reasons for the lateness of her application and mounted a strong argument against her. As she explains,

'it was very difficult being up against the barrister because he was kind of like persuading the judge that I was very much aware of what the procedures were and that basically I had just allowed time to lapse through my own fault.'

Lena crumbled in the face of this legal onslaught, admitting that perhaps ACAS had notified her of the three month one day when she spoke to them the first time, when investigation into credit betting took place. According to her account later, she had a doctor's note to explain that she was stressed at the time of speaking to ACAS, but she did not think about including this in her case. She also did not raise the important issue of the respondent's delaying tactics over her appeal. The judge decided that her reasons for a time extension were not reasonable and her case was struck out. She wanted to appeal, but with AiiSA007 not replying to her requests for advice, she decided against it, having been through enough already. Below she articulates her misgivings about the paperwork, the tribunal procedures she could not understand, and her lack of education in law to do this, as well as the need for greater legal advice,

'It was kind of mind-boggling because I didn't actually understand...it was like one minute they're [the respondent] asking to say what I wanted, the next minute they're actually threatening that if I do take them to court, they're going to make sure I incurred the court costs. It was like a bit of a rollercoaster. I was blind to it really because I am not really educated in law, so the actual technicalities of it all and the actual wording of the paperwork, sometimes it's like ... if you're not aware of all this, it's kind of, like, you need help really because you need somebody who actually understands it all and can say, this is what you need to do, this is how you need to present it, this is what the procedure is – for that, I didn't know any of that, I was just like doing what I thought was right.'

The complexities of employment law and tribunal procedures were a barrier to Lena's pursuit of justice. Her case for unfair dismissal was strong, a fact recognised by the judge when refusing to award the respondent costs in the pre-hearing. However Lena's attempts at DIY law were unsuccessful because she did not possess the resources and competencies to 'do law' and also because the CAB had insufficient resources to provide the support she needed. In contrast, in Colin's case the CAB solicitor was able to construct a strong legal case for constructive dismissal based on facts that could be evidenced, and met with him twice before the hearing to run through questions he should use to cross examine the respondent and his witnesses. However, when asked to add any more questions he produced 9 or 10 with the help of his sister and wife which were mostly statements and the questions they did come up with, according to the bureau solicitor, would be easily refuted and detrimental to his case. Neither Colin nor his family were able to understand what was legally expected of them, even when DSOL01 had tried to explain. She also explained the procedures for the hearing and prepared the necessary copies of bundles and documents, but because Colin possessed little cultural capital he did not pick up much understanding of the legal technicalities, she was trying to explain and the translation did not work.

At the tribunal hearing he did not understand anything about the hearing procedures or what documents to hand over, and the clerk took them off him, 'it was a relief. I'm glad he took it off me'. He fumbled his way through the hearing with the help of the judge, but said

'Some of the words the judge said I didn't understand them...I mean he went to a proper school.'

However the fact that the respondent was also a litigant in person and did not have legal representation meant that there was less of a power imbalance in terms of competencies between the two parties, with the respondent not properly knowing the protocol of hearing procedures and practices. It also did not help the respondent that he did not admit to having been to a tribunal before, when he had, and the fact that he did not bring any of the ten witnesses he had statements from. The judge believed Colin and found in his favour for constructive dismissal, owing mainly to the meticulously prepared legal case of DSOL01. This case had been funded by legal aid however, now stopped all together for such cases. Cases like Colin's will now not be able to gain legal redress, particularly for people who are resource poor and require legal aid more than others, and certainly would by no means be able to pay the cost of tribunal fees.

The new fees regime certainly affected the thinking of Caroline as she considered whether to represent herself at a hearing. She also decided against doing so because she could not bring herself to cross examine the person who bullied her and was concerned that she would be up against a barrister. However resource rich, Caroline had found major flaws in the respondent's bundle and had firm evidence to prove this. Now legally entitled, she told ACAS, when going through settlement procedures, to send her documents highlighting these major inconsistencies to the respondent. The ACAS officer questioned her about this tactic, as a practice she did not recommend, but Caroline told her to do it nevertheless. Caroline told ACAS what to do in the legal arm wrestle. It was successful and forced the arm of the respondent to settle before the hearing. They offered the minimum amount Caroline would accept of £5,000, and Caroline settled. Caroline however knew that her ex company had set aside a year's salary of hers, if they needed it, so it appears the respondent got off lightly, because Caroline was concerned about pursuing the claim to the hearing, and had simply had enough of the legal battle.

## Conclusion

Our data highlights the contingent yet patterned nature of access to justice. An interplay of available legal advice services with the limitations and possibilities of applicants' own resources leads to differing degrees of access to justice – all too often, very little access at all.

The cases we have chosen for this paper are fairly typical of our study as a whole. Through our research relationship with CAB we have been able to show how people can manage (or not) with different types and levels of legal help. Unfortunately, the level of support that bureau D was able to provide – a solicitor experienced in the practice of employment law – is no longer available, except for those discrimination cases that still attract legal aid funding. Working alongside these differing levels of institutional support, are the differing levels of understandings of law and legality that clients bring to the dispute and develop as their dispute progresses.

Our analysis highlights how, as we would anticipate, structural inequalities play a significant role in navigating the complex nature of the employment tribunal system; some claimants are more vulnerable than others in resolving their dispute through formal legal means. The story of Colin shows the very high level of resources from a legal practitioner that is needed throughout the employment tribunal process in order to construct a case that is robust enough to carry the day when the client is low on resources and has no confidence of their understanding of legal processes. Lena had to go it alone without much legal advice or enough resources of her own to muster, and tripped up on legal technicalities and the complexity of law. Caroline's story demonstrates that even where an applicant has a high level of personal resources and makes good use of legal advice, the fear of litigating in person, in the hearing, as well as the need to pay fees, created enough doubt for a premature settlement, limiting the potential to 'do-it-yourself' in the employment tribunal system.

The tribunal system was developed in the hope of providing a greater level playing field for unrepresented litigants within a less legalistic environment. From our initial analyses of our data set this is far from the truth. It is a highly complex legal system, which without some degree of representation and preparation by expert legal advisers, those resource poor, and most vulnerable of workers, have little chance of succeeding, particularly where their cases are legally complex. The fact that legal aid for employment disputes has been stopped except for discrimination cases in employment tribunals, and alternative routes of funding for legal advice is drying up within the ideological 'age of austerity', means that it is near impossible for justice to be obtained for the unrepresented.

The interaction of the highly complex system of employment law and now the requirement to pay fees to take cases to an employment tribunal is destroying the possibility of access to justice in employment disputes. Even for those less complex legal cases such as non-payment of wages or holiday pay, it is not so much the complexity but the tribunal fees (which are often equal to or greater than the award sought) that means that employment tribunals are becoming less and less an 'access to justice'. Citizens Advice, the last port of call for many who wish to lodge a claim, are now advising clients that it is not worth the gamble. Bureaux like E in our research have built up capacity by training up volunteers; through early intervention prior to formal legal proceedings they may provide a route to some form of compensation - but not necessarily justice. With lower levels of trade union representation and the de-collectivisation and individualisation of work places, many workers will not even realise that they have been wronged, not knowing their rights or what can be done about them.

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## **Acts of Assistance: Post-LASPO Innovation and Continuity in the Work of Non-Profit Legal Advisers**

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### **Abstract**

Advice has become increasingly essential as a means of negotiating the tricky terrains of existence in settings of socio-economic crisis, where state funds are being withdrawn, and where government arrangements rely on, converge with, regulate or exist in awkward compatibility with those emerging in the non-profit and business sectors. People wishing to actualize their rights are required to negotiate with an array of institutions, each with its own not immediately obvious sets of rules and procedures, requirements, and standards of evidence. Advice givers act as brokers, finding ways to traverse these gaps, persuading bureaucrats to communicate with one another, or challenging inadequate decisions by more adversarial means.

Based on ethnographic fieldwork situated in the offices of two London not-for-profit legal services providers, Southwark Law Centre, the Community Links legal advice centre and Advice Portsmouth, this paper charts legal advisers' attempts to make the state more relational, against the background of policies aimed at producing the opposite effect. Our 2012 and 2014 fieldwork shows that a legally formalized position which distances legal and paralegal advisers both from state officials and clients (even when they seemed to be acting in their most relational mode) is a key basis of their power. To what extent has the loss of Legal Aid funding undermined this perceived independence, and how are advisers adapting?

The powerful 'master ideal' (Selznick 1994) of access to justice is widely viewed as the foundation of democratic society (Bingham 2010). Yet this is also a historically contingent concept which bears a close relationship to particular forms of state (Sommerlad 2008). It can have widely different meanings in different historical and geographical contexts: for instance in the United States there is no federal provision for legal aid in civil cases, whereas in the United Kingdom, until recently, state-funded legal aid was available in all the areas of social welfare law<sup>i</sup> (see Biggs 2011; Moorhead and Robinson 2006). The architects of the British welfare state viewed legal aid as the key to guaranteeing the right to justice, which would underpin all other rights. In the adversarial common-law British justice system, where the law is to a significant extent made and administered by judges in ordinary courts and where litigation routinely alters legislation through an accumulation of precedents, access to justice depends to a large degree on equality of arms. Legal aid, originally envisioned as being more or less universally available, was intended to guarantee access to a legal expert familiar with recent case law, and underpin the giving of basic advice even in the most lowly of settings (Biggs 2011: 19-22).

The Beveridge ideal of bringing about social fairness and tackling endemic inequality by creating a level playing field through legal aid was gradually eroded as subsequent governments sought to control the spiralling legal aid bill by tightening eligibility criteria, gradually excluding all but the poorest claimants (Sommerlad 2008, Biggs 2011). Finally, departing from Lord Beveridge's vision of legal aid as a guarantee of universal access to justice the Conservative/Liberal Democrat coalition, as part of its austerity package, passed the 2012 Legal Aid Sentencing and Punishment of Offenders (LASPO) Bill, which cuts most civil cases out of the scope of legal aid. The first tranche of our research took place in two London advice organisations prior to the legal aid cuts, and our second tranche, which is ongoing, returns to these and other sites to consider the effects of the cuts in terms of access to justice and the emergence of innovative advice structures.

### **Advice and the relational state**

Whilst the architects of Britain's welfare state understood, on the eve of its establishment, that funded legal advice would be central to establishing citizen equality before the law, what was less fully grasped was how central such advice would become in enabling fairness of access to the services that welfare state was itself to provide. This paper considers the work of the advice givers who staff the many law centers and advice charities that proliferate in a modern welfare state. Contributing to the ethnographic exploration of the relational state as it emerges from the interactions of officials and citizens, it explores the role played by such intermediary/advisers<sup>ii</sup> in facilitating state-citizen interactions as they translate complex life circumstances into persuasive cases framed in terms of appropriate legal definitions. By highlighting these actors' engagements with officials from various state agencies, on the one hand, and citizen/clients, on the other, we explore "how state formations are continuously recreated and transformed through embedded relations" (Thelen, Veters, von Benda-Beckmann, forthcoming).

Although the state is often referred to in the singular, reflecting how citizens experience it as monolithic and indivisible (Abrams 1988), writings on the everyday state also show the divergent and inconsistent ways in which citizens engage with it locally (Fuller and Harriss 2001). In the English welfare state, social security is administered via a particularly labyrinthine multiplicity of different agencies. The state at the local level provides its services in an uncoordinated manner. Different departments exist to provide diverse resources, and increasing levels of professionalization are required to navigate between these, but those at the lower levels of each separate bureaucracy are often increasingly inexpert. People are required to negotiate with an array of institutions, each with its own rules and procedures, in order to actualize their rights. Furthermore, problems arising in one area often have unanticipated effects on others.

Advice-givers attempt, as brokers, to find ways of traversing these gaps and of forcing bureaucrats to communicate with each other, and sometimes confront inadequate decisions by taking more confrontational steps that may end in litigation. Legal advisers have thus become increasingly essential to help people negotiate the tricky terrains of existence, and to translate between, mediate or challenge the often inappropriate decisions made by officials and bureaucrats

charged with gatekeeping the provision of state services to the public (Dubois 2009, Eule 2012; Good 2007; Moorhead and Robinson 2006: 27-28; 35). In England and Wales,<sup>iii</sup> such assistance is particularly necessary in the closely interrelated areas of indebtedness, housing, employment, social security, and immigration and asylum: matters which often converge to form “problem clusters” (Moorhead and Robinson 2006; Pleasence et al. 2004), and which were removed from the scope of legal aid in 2013.

The extent to which such advice is “legal” in character, and the level of legal formality involved, depended on the tier<sup>iv</sup> of advice one needs to access to resolve the problem. Some cases involve routine bureaucratic operations which may not require sophisticated legal expertise, whilst others depend for their success on timely information regarding the latest changes in case law, correctly understanding bureaucratic procedures, or expertly presenting evidence. Some cases may require full representation at court and even make case law. The first tier of advice consists of front line organisations (citizens advice bureaux or other advice charities) whose task, in the first instance, is triage and referral. Typically, a person walks in and presents his/her problem to a volunteer or generalist adviser whose role is to decide whom they should see next: some are 'signposted' (referred) to other agencies more expert in handling their specific problem, others are given appointments with an in-house adviser capable of handling routine interventions (chasing up welfare benefits applications, filing appeals, explaining routine legal procedures or negotiating with debt collecting agencies). A minority of cases are referred to second and third tier advice organisations such as law centres which are more similar to law practices, employing a staff of specialist solicitors and offering full legal representation at court.

Much of this advice concerns the successful navigation of the social security system, which combines a fiendishly complex web of funds, some work and income related, others not: Housing Benefit, Employment and Support Allowance (ESA), Income Support (IS), Personal Independence Payment (PIP), Carer's Allowance, Job Seeker's Allowance (JSA), Child Tax Credits, Council Tax Benefit and so forth. Each of these funds is administered, in a poorly coordinated manner, by a different set of officials in various departments, some national, others local: the government's

Department of Work and Pensions administers most social security benefits; and the Inland Revenue (HMRC) is responsible for tax credits; local authorities (councils) allocate emergency and longer term housing and collect council tax debts; the Home Office deals with asylum and immigration. The government's 2012 Welfare Reform Bill promised radically to streamline these services by introducing the Universal Credit (UC), an ambitiously innovative social security system. However, serious IT problems have meant its implementation has stalled, and several welfare benefits experts we spoke with speculated that it could be abandoned altogether.

Advice centre clients are typically people afflicted by the “problem clusters” mentioned above, brought on by illness, mental or physical, loss of employment, the breakdown of relationships, youthful inexperience, poor language skills, or interactions with the system that result in prosecution or pursuit of arrears that clients are unable to, or in some cases should not have been required to, repay. Others, owing to officials' ignorance of the legislation or unwillingness to give them a fair hearing, are denied access benefits to which they are entitled. Such are, particularly recently, the numerous appeals of DWP decisions denying eligibility for disability related benefits or challenging decisions to shift disabled people on to work related benefits (circa 70% of these are successful, but they require costly expert reports that clients can scarcely afford to pay for on their own). In many cases, the temporary suspension of one benefit owing for instance to people failing to report changes in their circumstances, not complying with jobseeking requirements, having a temporary spike in earnings, or a breakdown of communication due to lost mail or poor language skills, triggers the retrospective revocation of other benefits, resulting in large “overpayment demands,” asking the claimant to return money already received, often thousands of pounds, or face benefits fraud charges. If Housing Benefit is thus suspended, and the situation not dealt with promptly, rent arrears can quickly mount up and bring financial ruin. Many such clients are extremely vulnerable and may require prompt intervention to prevent or at least delay imminent destitution and homelessness. In other words, the problems resulting from the failure of a key aspect of the welfare system on which the client has become reliant, are as serious as, or more serious than, the elements of the initial “problem cluster” itself. Much of the advisers'

work is aimed at halting this cascade of problems by addressing them within the limited appeal time frames.

Until 2013, all such services were largely funded by legal aid, administered by the Legal Services Commission (LSC) which imposed rigorous command and control style targets and required elaborate, time consuming case work for even routine problems. Advice agencies were awarded a fixed yearly number of 'matter starts' for each area of social welfare law, but these numbers did not often fit the demand. Vast amounts of staff time was spent gatekeeping, processing paperwork or justifying case expenditures to satisfy LSC requirements. This was a source of growing frustration to advisers and their managers at the charities we researched in 2011-12, and they anticipated the end of legal aid with mixed feelings: on one hand the loss of the lion's share of their funding would make survival uncertain; on the other hand however, they would be free to innovate and run advice services as they, rather than the LSC, saw fit. In 2014 we returned to find out how these innovative ideas and strategies have matured, and how the cuts have reshaped advice giving organisations' interactions with their funders and clients.

### **Fieldwork methods, sites, and innovations**

Our fieldwork methods rely mainly on participant observation and semi-structured interviews aimed at gathering comparative data to produce a 'thick' description of legal advice in several diverse settings, underpinned by detailed, carefully contextualised case studies. We documented different forms of triage practice, both during the legal aid regime and afterwards, sat in on numerous caseworkers' consultations with clients, traced the progress of selected cases, analysed case documents, observed tribunal hearings, interviewed advisers, advice users and administrative staff, charity executives and policy campaigners and sat in on training and business strategy planning meetings. Whilst most of the caseworkers we shadowed were fully qualified solicitors, we also observed the work of solicitor trainees, other paralegals, law student interns, volunteers and administrative staff.

Our 2011-12 fieldwork, prior to the civil legal aid funding cuts, was conducted in two London

advice charities: Southwark Law Center (SLC), a legal charity which worked only by referral, employing mostly solicitors and specialising in more complex, second and third tier cases, and the Legal Advice Centre at East London charity Community Links (CL) which carried out first and second tier work. In 2014, funded by the Leverhulme Trust, we began a new research tranche focused on innovation, which revisits our old sites and adds new ones, including the Portsmouth local authority's housing advice services and the innovative Advice Portsmouth, a legal advice centre that is experimentally applying the waste cutting and streamlining strategies originally developed at Japan's Toyota factories.

Community links (CL) is a charity offering a wide array of services in addition to legal advice. These include various 'social care' forms of advice (such as mentoring programmes to prevent truancy in schools), a government contract to assist people back into work, a creche and food bank, and various forms of outreach for trained staff and local community volunteers, as well as policy research and campaigning, working with statutory providers to promote an early intervention agenda. Their guiding idea is pragmatically to discover what works, refine it and teach local people how to replicate it. To this end they draw in resources from corporate sponsors, various state and local government commissioners, businesses and other charities to and from whom they subcontract services. CL's legal advice facilities are a cluster of interrelated services: the Advice Centre, which employs four solicitors (specialising in social security, employment, housing and debt) used to deal mostly with legally aided cases, and now handles matters requiring solicitor expertise; a welfare benefits solicitor runs an internship programme funded by a City law firm, and instructs student interns recruited from Russell Group universities in basic advice and representation; a weekly form filling service is run by volunteers (university work placement students, interns and members of the local community); an Evening Law surgery uses pro bono solicitor trainees from City law firms, and an outreach programme employs a paralegal to give on-site advice to mentally ill patients at hospitals in the borough. In addition to these facilities, CL runs a number of 'community hubs' and trains "advice champions" to spot problems early and refer people to their advice services.

Following the cuts, CL no longer has a legal aid contract, but it has managed to retain all its expert staff. Advice surgeries are held at least twice a week, with the former legal aid 'gateway assessor' now triaging people in a two step process. First she speaks to each person for a few minutes to discover whether they have the right paperwork and can be helped at CL or should be referred elsewhere. She then meets with each person for about 10-15 minutes, resolving simple problems and booking appointments with expert solicitors in the more complex cases (the current wait seems to be 3 days to a week). CL belongs to a consortium of seven local organisations – referring clients to some of them, running joint programmes with others and offering occasional legal training as required. Prior to the cuts the Advice Centre's manager spent some time in the United States, researching the provision of advice in civil cases, including *pro bono* services, community law clinics in New York and Chicago and fundraising structures. They are now considering how some of these ideas could be applied here (particularly in fundraising and community activism), but acknowledge that this is quite challenging given the vast differences between the UK and US contexts.

SLC is a community-owned and -operated legal charity dedicated to providing specialist legal services in the areas of immigration, employment, social security, and housing.<sup>v</sup> In contrast to CL it works by referral only. Clients come by appointment to see a specialist in the relevant area of the law, while non-clients are normally signposted to a local first tier advice organization. It is subject to the Law Society's more stringent regulatory regime, which requires a high proportion of a Law Center's staff to be fully qualified solicitors. Advisor/client interactions are also subject to a more formal rigor. For these solicitors and their paralegal assistants, the act of giving advice may never be informal because actions taken during the advice encounter have a constitutive and binding effect, shaping the future of a case. Speaking to a person about his or her problems can be taken to constitute a retainer, thereby rendering a solicitor responsible for the case. Accordingly, SLC advisers do not give casual advice to non-clients, but instead contribute to the provision of more informal advice by training staff at local first tier agencies such as CABx. Thus, SLC is an organization of experts that operates as part of a network, receiving referrals for more complicated

legal matters from front line advice providers, and educating advisers employed by the latter, as well as local government decision makers, regarding the correct application of the law. Law centre ethos stresses legal professionalism: as a solicitor from another law centre told me after hearing a debate about how advice can help people improve their lives, “I do not tell people how to change their lives; I provide a professional service to resolve their problems”.

SLC has not changed much since the legal aid cuts and still has a legal aid contract. It retains the same staff and covers the same areas of the law, but funding now comes mostly from the two nearest local authorities as well as various trust funders and government grants for specific projects. Nor has the use of free volunteer labour increased: with the exception of university student work placements, which have been used for many years, reliance on volunteers has actually dropped, their training being considered too intensive in terms of staff time, given that people can rarely commit to a staying long enough to justify this investment. The centre still operates by referral only, as part of the Southwark Legal Advice Network, which includes Blackfriars Advice Centre, Cambridge House Law Centre, Asian Advice Service, and Southwark CAB. These collaborations involve referrals and providing up to date training on case law and its applications not just to local consortium partners but also to local authority staff. For over 10 years, SLC has worked closely with the CAB, providing outreach and relying on them for triage. As SLC's director put it, “they are excellent at what they do, and people know them, so they are usually the first port of call”. She stresses the importance of outreach activities in developing closer relations with partner organisations:

“the key to developing such close collaborations is trust. Going to the CAB once a week [for outreach sessions] helps build up the personal relations on which smooth functioning relies.

Working with other organisations is about people trusting each other and understanding how each other works”.

In the face of overwhelming demand, SLC has been developing its business strategy together with the two local authorities, aiming strategically to identify the areas of the law where need is most pressing in these boroughs, and find sites where one-off outreach sessions could be held so as to

reach the most vulnerable people. Far from losing skilled staff, they are actually increasing capacity, adding a new full time welfare benefits expert post and taking on more immigration/asylum cases. The most radical change SLC currently considers adding for profit services in the area of immigration law (thanks to a change in the rules, not for profit law centres can now add for profit legal practice style work without establishing a separate business). Islington Law Centre is already experimenting with such arrangements, and SLC is watching the results with great interest.

Advice Portsmouth is one half of a redesigned Community Legal Access Centre (CLAC), itself an earlier New Labour innovation. Owned by local charity The You Trust, Advice Portsmouth was initially a second and third tier legal advice centre staffed mainly by solicitors and taking referrals from the local CAB (the other half of the CLAC). Owing to inter-organisational differences in ethos and management the CLAC dissolved, and on the eve of the legal aid cuts Portsmouth City Council (PCC) offered funding if the service was redesigned using the Vanguard method, based on Taiichi Ohno's rethinking of the Toyota Production System in order to help organisations switch from a command and control to a 'systems thinking' approach designed to cut waste and create client-centred services. Unusual among local authorities in its enthusiasm for innovation, PCC had already introduced this systems thinking approach to its own housing advice office, with good results. Reverting to the chain's more 'traditional' approach, the CAB left the partnership and competed for the PCC funding against Advice Portsmouth, the eventual winner. AP's advisers and managers spent a year carrying out research by interviewing service users and shadowing advice sessions and trying out different options so as to design a more streamlined and client-centered service. AP's director, Jane Henderson, contrasts the result with the traditional 'rigid gateway' operated by the CAB. In the latter:

“people queued up very early in the morning and were given numbers and forms to fill out. No help was available from the receptionist, who wasn't allowed to say anything that might be construed as advice. Advisers were told to address people by number, and reprimanded if they used names. The gateway assessor then spent 6 minutes hearing each person's

issue— it was not enough to get to the nub of the problem. After a further wait, the client was invited to a small, barren interview room and repeated their story to a low-skilled volunteer. They were then left alone whilst the volunteer went to find the answer and have it checked by a supervisor – often repeatedly if the problem was complex. Those referred to an expert would recount the story yet again a third time. There was an average 6 hour wait, in an unfriendly anteroom, with no access to water or public toilets. Advice was very fragmented. We started [the redesign] by asking people what they wanted and removing barriers to advice and the duplication of effort”.

In the redesigned service walk-in clients can see a solicitor within 30 minutes on average. The service is quite different to the former, LSC-endorsed model. It is organised on a strictly drop-in basis rather than by appointment. The receptionist is a generalist adviser who resolves the simplest problems herself, suggests steps people can take on their own (using the computers and phones provided in the waiting room), and books those whose issues require an adviser for an immediate appointment. People are thus triaged without being aware of it. The welcoming, comfortable waiting room offers computer terminals and a telephone, information booklets explaining various benefits funds, notices various local charitable schemes, TVs displaying the news, children's toys, free water, access to a toilet. A former volunteer is paid to interact with clients and offer any assistance needed.

Advice staff are all solicitors or highly experienced paralegals. AP has dispensed with the use of low skilled staff or volunteers in advice – but they are used for administrative support. Each adviser deals with all types of problems, consulting expert colleagues, online databases, case law books and reference texts where necessary. Any new training undertaken by an individual adviser is 'cascaded' down to the others, resulting in upskilling. Paperwork is vastly simplified compared to the legal aid era – no case letters are sent, and all notes are immediately entered into the database where they can be seen by all advisers. There is less continuity in casework: people are discouraged from booking appointments and seeing one adviser repeatedly (this does happen occasionally) and are helped by the next available adviser when they come in. An ethos of self-

sufficiency is promoted: people are given the means and encouraged to do as much as they can themselves. Advisers are told to give clients what they request, but also to encourage them to undertake the steps they are capable of taking on their own, providing assistance where it is most needed. At the same time, advisers do search for the root causes of problem clusters, asking probing questions to identify any serious issues the client may have neglected to mention. “We don't want to encourage dependency on an adviser, but at the same time we don't mind 'revolving door' clients and people coming back repeatedly” AP's manager, herself a solicitor, told us. “We can help them in chunks, once a step has been dealt with, they'll tackle the next”.

Because of their focus on clients, AP has opted not to work with other organisations or do much outreach, which they find inefficient. The exception is the bi-weekly 'Peace of Mind' advice legal surgery for mentally ill in- and out- patients, created at AP's initiative and held at the local hospital. The object is to ensure patients receive the benefits to which they are entitled and will not have their illness exacerbated by stressful legal problems, or end up homeless or penniless when discharged. In comparing the old advice model with the new, numbers are eloquent: on the final day of the legally-aided advice system, 54 people came in or called AP, of which 22 were assisted, 17 were deferred to other services and 15 could not be helped. On the day after switching to the new model, 60 people called or walked in, 49 were helped immediately, 2 were deferred to other agencies and four could not be helped. In the past year, the centre has helped over 11 000 people.

On the eve of the legal aid cuts campaigners predicted that advice would be 'dumbed down', and market pressures result in downskilling. Organisations, it was argued, would be forced to drive down labour costs by eliminating expensive face to face advice and highly skilled staff, relying instead on low-skilled paralegals and volunteers, or on technological solutions. Early findings at our three sites do not support the 'dumbing down' predictions. On the contrary, the numbers of expert staff in all organisations stayed the same and will actually increase. AP made the service more competitive and efficient through an upskilling strategy, dispensing with the 'cheap' but inefficient low skilled staff, not the experts, whilst SLC is adding more expert posts to meet market demand. The advocates of the systems thinking approach argue that the LSC's

transactional model, bureaucratic requirements and controls had created a service that was more about itself and its own targets than about clients. In the case of AP, greater receptivity to a market logic seems to have had the fortuitous effect of shifting the focus back to the client, making the service more responsive to his/her needs and priorities. Face to face advice by experienced staff appears simply to be more efficient and marketable than more abbreviated and fragmented alternatives, or currently existing technological solutions. The next section looks more closely at the mediation work advisers routinely perform between their clients and the state, in order to explore how access to justice may be changing with the end of the legal aid regime.

### **Between litigation and negotiation: advice and access to justice**

Advisers' relational strategies in dealing with state officials span a continuum ranging from litigation to negotiation and collaboration; from a normative approach that calls upon state officials to follow the rules, to more discretionary, and personal, entreaties. While litigation often entails an adversarial stance towards local state officials, negotiation is built on collaboration, and aims to build a culture of mutual trust between local authorities and service providers. The two approaches are not mutually exclusive: different types of legal problems foster different degrees of adversarialism and/or negotiation. On occasion, one is used to buttress the other. The threat of litigation, for example, was often used as leverage in negotiations. At other times, legal services providers and local authorities join together in programs aimed at improving the workings of the system, setting aside adversarialism in the name of mutual cooperation. Conversely, in some immigration and housing cases, adversarialism could be exacerbated to the point where solicitors sought a judicial review, in which both sides were obliged to disclose all their evidence before a judge.

Several SLC advisers pointed out in various ways that their work is about actively defining, through their cases, how the law should function in a fair society, thus potentially making legal history. In theory, this involved continually engaging with the latest case law, with the ultimate aim of challenging legislation through the courts and of going beyond the application of the law in order to probe tensions within and openly drive challenges to unfair legislation. Each case that comes

through the doors of SLC and CL may go all the way to the Supreme Court. Even if such instances are relatively rare, the fact that they exist, say SLC employees, reflects a broader commitment by the increasingly embattled legal professionals to ensure that these formal legal channels remain open to all. Another way in which solicitors actualize an ideal of justice is by ensuring that cases are taken to their logical conclusion. In deciding what course is best for a client, they see themselves as guided by duty of care, even if the LSC or its successor, the LAA may, on occasion, refuse to pay for work done after a certain stage in the case (for instance when a temporary solution had been offered by the opposing side), leaving SLC out of pocket.

Adversarialism is a source of ambivalence for advisers like Emma, an SLC solicitor specializing in housing law, who sees it as tactically useful and even ethically necessary, but at the same time aspires towards a more reconciliatory approach. Council housing office employees, by routinely ignoring the “nice letter” written by SLC solicitors, “push us into being aggressive and adversarial.” This, as SLC personnel acknowledge, is due to diminishing housing stock; although local authorities have a legal duty to accommodate the vulnerable, they lack the resources needed, forcing them to focus on gatekeeping, and to turn away legitimate applicants, even those with priority need, whenever possible. As another SLC solicitor explained to us, the housing authority “will often prevaricate and obfuscate by providing accommodation to a destitute or homeless family for a short period, of say seven days or even less in some cases, but refuse to comply with [their] duty to provide longer term accommodation until the very last moment.” The pressure continually to cut down expenditures has thus exacerbated levels of adversarialism. When, in the 1990s, Emma worked for a local authority housing office, her supervisor would urge her to believe every woman who asked to be rehoused claiming to be a victim of domestic violence, so as to avoid any possibility of returning a victim to her abuser. Now council officials try, whenever possible, to avoid helping the vulnerable clients she represents. Aware that the most fruitful approach would combine adversarial elements with aspects of the negotiation which seemed more desirable, Emma and others wished there could be a 'culture change' to move past this “negativity.”

Vulnerable people often exist “below the radar” of the authorities, afraid to approach them and claim the assistance to which they may be entitled. Advisers are essential facilitators in the

process of legalising one's position. As one CL solicitor observed, “unless you make contact, [the authorities] can't help you.” In the case of one woman with housing problems and an uncertain immigration status, she “was afraid to make contact and ask for emergency housing assistance and immigration advice because she was mentally ill and feared she would be sectioned. Hence, she remained on the streets and no one knew she needed help.” In immigration and asylum cases particularly, the adviser guides the client through the process of approaching the authorities, and has the power to resolve and obliterate an “illegal” past, but this often involves delicate negotiations with different state agencies. Now that immigration has been removed from the scope of legal aid, SLC's director tells us their services are in greater demand than ever. She also signals the rise of more unscrupulous advisers, who will pursue an asylum case even if the alternate immigration case is significantly stronger, simply because asylum is still in scope.

Advisers often orchestrate complex interactions intended to secure for the client a range of forms of assistance. This involves contacting various state agencies, drawing them into a complex web of relations. To facilitate these interactions, advisers create diachronic representations of the client's history of contacts with the state, describing these in ways that are legible to state officials, to enable them to act on the information. By carrying out all these tasks, the adviser in effect “conjures up” the state for her client in a variety of relational guises. Some of these incarnations are more benevolent than others. One set of officials, for instance those in the Home Office, might be the hostile party delaying and obstructing a resolution of the case, whilst other officials, such as those in the local Social Services, might step in to offer psychiatric care, emergency shelter, and so on.

Given the shifting, even contradictory, positions of the state in these various guises, advisers' skills at coordinating claimant interactions with the state are essential. Timing can be crucial, and the day-to-day management of a case might involve delicate interactions with officials in various state agencies, sometimes pressing for a decision, at other times biding one's time. In order to do this, the paralegal in one case drew on her grasp of the contingencies under which her counterparts in the Home Office operate. Possessing knowledge of the targets that structured their work she could gage quite accurately what might have happened to the paperwork and how long it

would be good to wait before pressing for a decision, thus maximizing the likelihood that it would be a positive one.

Advice can be said to “make the state work,” setting to right errors of public administration and policing the way local agencies fulfill their obligations to citizens. After the legal aid cuts, local authorities seem to be increasingly picking up the bill for advice. Tempering earlier statements about the adversarial character of relations, one informant pointed out to us that Southwark council had agreed to fund a significant proportion of SLC's budget after the legal aid cuts. This, in his view, amounted to the local authority making sure that its own low-level employees acted as they ought. Similarly, Portsmouth City Council (PCC) not only generously funds AP, but has taken the lead in promoting innovative experiments to make advice more attuned to users' needs. Both CL and SLC ran advice outreach programmes aimed at reducing the number of tenants being evicted from council properties, whilst PCC has its own dedicated council tenant advice centre and has granted us research access. SLC also organised a scheme to train council employees to identify and help tenants at risk of eviction, and volunteer advisers from the local community to offer further help. The council was also asked to revise its policies, leading to a large drop in evictions. After three years, however, the LSC stopped funding this project, arguing that SLC should instead concentrate on “acts of assistance” (narrowly framed legal matters).

The degree of local authority involvement in advice depends largely on ideological and political commitments. CL has not secured any local authority funding for its advice centre, although it does provide some outreach services under council auspices. This is because this particular council has been inclined to limit access to welfare benefits advice on the grounds that it keeps people dependent on state welfare, and that reducing or eliminating it would result in more people getting off benefits and into work. Yet such rejections can also result in closer synergies, as happened when the council developed its own advice structures to serve these goals.

In their interactions with officials, advisers often tried to help by providing advice to both officials and the clients they are supposed to serve. Thus, CL collaborated with local counterparts within the council's employment office to develop a mutually beneficial program suggested by a group of advice staff that understood the needs and pitfalls faced by government employees. The

resulting translation and form-filling service operated by volunteers led to a 70% reduction in claims rejections arising from mistakes and omissions on forms. The two organizations then worked together to push for the nationwide adoption of this plan, but difficulties in obtaining approval from head office led to the termination of the service (Barbour 2007: 52). Here, micromanagement from the top was a problem shared by both CL advisers and local government employees, generating some solidarity between them. Disjunctures may thus occur between front line and central tiers of state agencies, enabling advisers to establish a rapport with their official counterparts in the local state, blurring the boundaries between them, and generating solidarity against those higher up the chain.

Such solidarity can provide a basis for negotiation on behalf of clients. Luka, one of CL's advisers, told us that he approaches government officials by first making it clear that he assumes they are keen to follow the law, thereby implicitly holding them to this assumption. Then he simply proves that they have failed to do so. This technique defuses any personal adversarial element that might otherwise hamper negotiations. "You must always begin negotiations from the other guy's point of view" Luka explains. In a case where a tenant is threatened with eviction, he tells the council official, "If you accept a small monthly repayment of the rent arrears, at least you'll get something. Otherwise you will never see any of the money."

The manager of CL's advice center, herself a solicitor, told us they actively cultivated this negotiation-based approach. When asked why few of CL's cases incur the higher levels of legal aid funding that accompany referral upwards, she explained that advisers avoid long, litigious situations, instead prioritizing quick settlements, which are thought to be more advantageous to the client. To this end, mutual trust and win-win solutions are promoted in interactions with local officials. CL thus recruited the local state to partake (at least to some extent) in its vision of an integrated and functional community. When negotiating directly on behalf of the vulnerable, caseworkers were particularly effective if they succeeded in combining rule-oriented and more "relational" logics, professional authority and long term access to friendly contacts at government agencies. The organization's symbolic capital ensured that cases would be judged on their individual merits rather than, as all too often happened, on the plaintiffs' ability to speak for

themselves.

While collaborations between legal advice-givers and the state frequently succeed in resolving serious problems, SLC's Emma felt they also blur boundaries, hence diluting the adversarial tactics sometimes needed for robust legal interventions. "If you get pally with the other side" it could lead to conflicts of interest and "muddy the waters ... it becomes harder to completely look out for your client's interest," said Emma, invoking a hypothetical case where a solicitor might advise a tenant under the council's auspices one week, and next week—switching sides—might meet him as a court duty adviser and take his case against the council. The blurring of boundaries can damage the legal expert adviser's neutrality, on which his/her power to mediate is founded.

### **Legal advice and clients: friendly objectification and the creation of evidence**

In the relations between advisers and clients, friendly encouragement was predominant. However, while mediation and negotiation are central to the practice, legal advice also plays an important gatekeeping role, since lawyers and paralegals help monitor access to state resources and to the formal justice system itself. They do so by turning away cases without merit and robustly framing the evidence in those with merit so as to fit legal tests. Evidence is a key object of contestation in transactions between various state organs, advisers, and individuals seeking to actualize their rights. In building a legal case, caseworkers gradually strip away extraneous detail in order to arrive at a persuasive line of argument (Good 2007: 15), performing a work of translation between the man on the street and the culture of a legal system whose logic and rules of evidence are far from obvious. If this work is not carried out expertly before filing a legal case, the right evidence may be unwittingly left out from the witness statement, leading to its exclusion and thus the collapse of the case.

Robert, a trainee solicitor at SLC, explained that the evidential arrangements in the legal system do not simply aim to ensure that each citizen has his or her day in court, but also to prevent unnecessary litigation. The advice giving explored in our ethnography was largely aimed at helping people stay *out of* court. People without legal advice are more likely to go to court, but it is often more advantageous to negotiate a settlement before proceeding to a hearing, thus avoiding the

possibility of being made to pay the other side's costs. Clients, Robert points out, are not always aware of this and tend to get passionate about their cases, building great expectations around the tantalizing promise of justice. The adviser's job, in such cases, is to provide perspective:

...to refocus them on what the tribunal will actually do, because their ideas are often based on complete misconceptions. [The judge] will want to know very specific things. ... A lot of people are using the word discrimination but they do not mean discrimination in the legal sense, only in the sense of being treated differently. They have a different understanding of the word and concept to that of the judge and the tribunal. People are also ill equipped to put their evidence in the witness statement. They do not know *what constitutes valid evidence* and *what they need to prove*. [emphasis added]

Robert illustrated some of the pitfalls of access to justice with a case he had encountered during a one-off advice session. People, he said, understandably tend to get passionate about their cases: “when you are wronged you get angry, withdrawn, depressed... People lose all sense of worth because of a loss of purpose.” When this happens,

part of the adviser's job is to help people deal with that... [by acknowledging] that you understand they have been wronged but [also explaining]... how their obsession is different to the issue of fairness. [The] claimant needs to be told to give up worrying and obsessing about the case, abandoning himself to a spiral of difficulty, relationship breakdown, financial loss, all of it encompassed by this massive thing in their mind – the legal case. I try to stop this happening. I think legal advice can help people to reclaim a bit of their self-esteem and understand how to move on.

In discussing how lay persons' beliefs about the law relate to legal process, anthropologists Conley and O'Barr observed that some people tend to take a rule-oriented approach to their problems, evaluating them in terms of neutral principles and emphasizing these principles in their accounts. Others tend to display a relational orientation, “characterized by a ‘fuzzier’ definition of issues whereby rights and responsibilities are predicated on ‘a broad notion of social interdependence rather than on the application of rules’” (Good 2007: 21, citing Conley and O'Barr 1990; see also Genn 1999: 256-257). Relationally oriented perspectives are not irrational or unstructured, but they

conform to a different logic to that of the legal system, rendering them ineffectual in this context. Advisers, then, are needed to perform a work of logical translation, conveying human expectations into legal context.

Relationality is not limited to personal, face-to-face interactions between citizens and representatives of the state; it is also central to the legalistic approach to the state adopted by legal advisers, who expect—or instruct—officials to know and observe the rules. In the eyes of the law, normatively guided actions are opposed to the exercise of personal discretion, which could be seen as more relational in the sense that officials are called upon to make decisions based on more personal considerations – although the law does recognise the exercise of discretion alongside the application of rules, viewing the two as complementary (Bingham 2010: 48-54). One can argue that all state environments involve pragmatic configurations – different relational modalities - that combine personal/ discretionary and impersonal/rule-centered strategies. In our case, the advisers are experts who can strategically play upon the boundary between personal discretion and normative rigor, drawing on a thorough understanding of the latter. Needless to say, an unaided client would be far less equal to the task, not knowing how to effectively draw upon the relational opportunities (both normative and discretionary) offered and created by interactions with the state (Genn 1999: 256-257).

The act of creating evidence is also an act of objectification (Engelke 2008), carried out both by low-level government officials and caseworkers themselves in the course of their interviews. Advisers aim to mitigate the disempowering effect of interactions with the state by educating clients about their rights. As shown by studies of other law centers, the adviser was, in effect, persuading the client to follow the rules by guiding him in appropriate attitudes to evidence. This friendly/educative role, occasionally verging on the paternalistic, was combined with a stern “recognition that due process must be followed” (James and Killick 2012: 450), and if necessary compliance with it enforced. To an extent, advisers have to participate in gatekeeping activities in reference to welfare benefits. For instance, when in the course of an interview Luka suspected that a client was misrepresenting his circumstances, he felt he ought not to take the case. Instead, he said, “It is my job to tell you that you are applying for the wrong benefit.” When the client persisted,

Luka helped him fill out his appeal form, explained the process, and ended the interview. He intended to close the file because the case was likely to fail. On a lighter note, CL's triage lady was overheard by us telling a client: "you are not entitled to Housing Benefit for that period, you were abroad" to which he replied: "I wasn't abroad, I was in Africa!" "And where do you think Africa is, the next street? What do you think abroad is?", the feisty lady rejoined. "The Carriibbean!"

## **Conclusions**

The British welfare state was envisioned as executing social interventions through concerted command and control programs implemented by state institutions. Its designers envisioned an equally centralized approach to legal aid. When the work was subcontracted to the third sector, a command and control model was retained by overseeing organisations like the LSC ('command' refers to the presentation of quality standards and targets, and 'control' refers to sanctions resulting from non-compliance). Without exception, the advisers we interviewed were delighted to be free of this management style, but what should replace it?

The naturalisation of the neoliberal paradigm in public services has been widely expected to erode access to justice, but we argue that developments on the ground are more complex.

Sommerlad (2008: 190), for instance, viewed the discourse of marketisation, contractualisation and individualisation as essentially undemocratic, contrasting its hierarchical form of citizenship with an ideal typical social democratic model, where a structural system of empowering rights and obligations nurtures a "thick" version of the rule of law (Selznick 1994). As the neoliberal paradigm penetrates deep into the advice sector, will access to the law become a luxury, with the have-nots receiving merely a routinised and diminished justice (see Moorhead and Pleasance 2003: 4-6)?

The position of advisers who mediate between the state and citizens is, in some ways, not unlike that of brokers and mediators more generally (James 2011). In the well-known discussion of the village headman in British Central Africa, his dilemma arises from his being subject to irreconcilable demands based on conflicting value systems: the expectations of his kin and followers (in our case the advisees) and the political, legalistic and impersonal logic of the state

(Gluckman et al 1949). The headman is unable to please the latter without upsetting the former and vice versa. However, his knowledge of the extent of his local support, and of its heterogeneous nature, allows him some room for maneuver (Kuper 1970). Advisers' success in helping their clients depends, in similar vein, on their knowledge of and skill in exploiting the gaps between different state (and supra-state) agencies, sometimes using a relational and at other times a legalistic logic (or, most often, combining the two). Their room for maneuver is enhanced by claims of independence both from their clients and from the state – they can be trusted to mediate fairly because they are distinct from both parties involved in the mediation.

The assumption of their independence stems from the widely accepted premise of the opposition between state and civil society (see Hann and Dunn 1996): a premise which serves here as a helpful fiction. In the area of legal aid (but not only here) charities have long depended for their survival on contracts with state commissioners. Such money comes with strings attached, and commissioners' targets and controls shape advice in crucial ways. It would be inaccurate to claim that legal charities are merely carrying out state directives, but their financial dependence on commissioning bodies means their *de facto* autonomy is narrower than the ideology of the separation between state and civil society would imply. But this ideology is the cornerstone on which their power leverage vis-à-vis state bureaucracies is founded. In reality the picture is neither one characterized by a separation between state and civil society, nor is it one in which a monolithic neoliberal state is ineluctably and progressively eroding the independence of the third sector. Instead, what we are seeing is ever more complex, blurred and idiosyncratic tangles of state, business and third sector in the field of public services.

With legal aid funding increasingly restricted, advice services were already undergoing drastic change even prior to the civil legal aid cuts, as a wide range of organisations - statutory providers, third sector organizations, and private businesses – collaborated and/or competed for contracts. Since the Thatcher era, as a result of state agencies routinely subcontracting public services to the most successful bidder (see Moorhead 2001), the demarcations between service providers have undergone continual renegotiation, giving rise to a cross-pollination of values and approaches. Government contracts often forced organizations governed by distinct and even

opposing logics to work together, developing a common ground. For instance, when one advice-giving organization competed against a private company for a government contract and won, it later subcontracted work to this former competitor: the charity thus came to define how the subcontracting business should deliver the service, influencing its values and ethos. The separation of spheres is an aspiration in line with theories of modernity and democracy, but one that flies in the face of the actual tendency of such arenas to overlap (Narotzky and Smith 2006), especially in settings characterized by the outsourcing logics associated with neoliberalism.

Our tentative data suggests that following the legal aid cuts the news may not be all bad. Though it is still very early days, our three organisations seem to be bucking predictions to find their market niches by upskilling rather than downskilling or losing expert staff. The AP experiment suggests that in terms of the number of people helped and the speed of resolving cases, face to face advice by professionals with radically trimmed down management and bureaucratic burdens is simply more economically viable than lower skilled, more fragmented advice or current technological alternatives. Crucially, it is also what clients want. AP's design has marked neoliberal features: the emphasis on self-reliance, stress on giving the client what s/he wants, preoccupation with waste trimming, abbreviation of paperwork and reduction of civic educational activities. Yet undeniably, both clients and advice staff seem genuinely delighted with the system's functioning, and the feedback, taken religiously from each advisee, is highly laudatory. An interesting study by Lawler *et al* (2008) explored tensions in Australian public legal services between an ideology of 'citizen' entitlement focused on educating and empowering, and one of self-help by 'consumers'. They found that interventions geared towards the former tended to be developed from a provider rather than client point of view, but that market forces, privileged by users, seem to give the consumer greater power over the content of legal advice.

Crucially, advice centres are not intended to replace formal legal process – unlike the alternative resolution structures rightly critiqued by scholars as offering a 'lesser', entirely inadequate form of justice (see eg Nader and Grande 2001, Abel 1980). As Sommerlad (2008: 189-90) put it, the “neoliberal state project tends to exclude the poor from democratic, legal and

governmental process, other than as its objects". Whether managed in a neoliberal style or not, legal advisers' work does much to erode such exclusion. Whilst advice may engender greater compliance with the law, it also holds the state to account in a plethora of routine cases often generated by the benefits system's failures, but which would be unlikely to get a fair hearing otherwise. For instance, whilst the coalition government recently made it much more difficult to appeal welfare benefits decisions before independent ombudsmen, advice centres currently play a key role in reversing this policy wherever possible in everyday practice.

In a thought provoking article, anthropologist James Ferguson (2010) suggests that we should distinguish between neoliberal "arts of government" (for instance the 'systems thinking' approach to public services) and the class-based ideological "project" of neoliberalism. Such a distinction, he argues, would reveal how fundamentally polyvalent neoliberal mechanisms of government – and their uses – can be. Neoliberal governance, he suggests, is here to stay, but it can be co-opted and put to work towards goals of greater social inclusion traditionally associated with the left. Ironically, thanks to the removal of means testing and bureaucratic burdens, AP is now able to help more than twice the number of people it formerly did. Redesigns such as this, using neoliberal arts of governance but committed to social inclusion, suggest that the removal of civil cases from the scope of legal aid might, in some cases, produce the opposite effect to that expected: far more people can now freely access such highly skilled and timely advice.

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i An umbrella term referring to areas of the law most likely to affect vulnerable people: debt, housing, social security, employment, immigration, and asylum.

ii Advice agencies' approaches to social intervention tend to be framed either as "legal services" or—less legal in focus—"social care," although in practice, lines are blurred and some organizations combine approaches. Our research focused on legal advice, but some of the organisations where it was located, such as CL, also offer social care advice and aim, to some extent, to blend the two approaches.

iii The administrative division is relevant to our cases. Other parts of the UK have their own legal systems, parliaments, and advice arrangements.

iv The legal advice field is structured in three tiers. Most organisations provide first and second tier interventions which tend to be fairly routine. Third tier interventions are the most 'legal' in nature, requiring more elaborate casework and representation at court. Second and third tier advisers are often solicitors, or paralegals trained in one or more particular area(s) of case law, whereas first tier advisers, also known as generalists, may be volunteers or dedicated staff without specific legal qualifications.

v SLC, is part of a wider UK federation, inspired by the US Law Center movement of the 1970s: it seeks to make the law freely available to ordinary people, and stresses the provision of high quality legal services and the promotion of legal education by various means.

# **“It’s just like going to see the doctor”: the accessibility of Citizens Advice in GP surgeries.**

## **Abstract**

It is well documented that many people experience problems accessing advice services, problems which are often exacerbated for people experiencing social exclusion. Research highlights not only the practical difficulties of access but also the feelings of fear, embarrassment, powerlessness or resignation which prevent some people from seeking advice. Qualitative research suggests that such feelings are particularly characteristic amongst disadvantaged or marginalized people who are faced with justiciable problems. Drawing on qualitative data, researchers have also argued that the delivery of advice in GP settings helps clients to overcome some of these barriers through the familiarity, anonymity and confidentiality which such settings are seen to provide and through the encouragement of health professionals who ‘legitimize’ the act of seeking advice.

This paper seeks to test the findings of these qualitative studies across the population of Citizens Advice clients who access face-to-face advice at either a high street or GP setting. First, the paper describes some of the key differences in the socio-demographic characteristics and problem types of high street and GP advice clients. Second, it explores the extent to which Citizens Advice clients felt nervous or embarrassed about seeking advice or worried that seeking advice could make their situation worse, and tests whether people who were facing issues of social exclusion and people who were encouraged to seek advice by a health professional had higher levels of these feelings than people who were not in these groups. Finally, it describes how important the familiarity and anonymity of the GP surgery were to GP advice clients and tests whether the importance of the anonymity of the advice location varied across problem type and anxiety level. The paper should be of interest to both commissioners of advice services and advice practitioners who wish to increase their understanding of the benefits of providing health services and advice services in the same location.

## **1 Introduction**

Much of the survey research carried out on advice in GP settings has focused on the health benefits of such advice. This paper draws on a survey of Citizens Advice clients to explore the ways in which the delivery of advice in GP settings may help to increase the accessibility of advice. In particular, it focuses on clients' feelings about seeking advice and the attributes of the GP setting which may help to address some of these feelings. The paper is part of a wider research project which seeks to understand how the delivery of advice in an 'everyday' setting, such as a GP surgery, shapes peoples' experiences of law in their daily lives, in particular amongst people who are experiencing social exclusion.

Research into the experience of justiciable problems highlights that feelings of fear and powerlessness are common reasons given for inaction when people are faced with such problems (Genn et al., 2004, Pleasence et al., 2006). Qualitative researchers have also found that feelings of powerlessness, embarrassment, fear and resignation are characteristic amongst socially excluded people who are faced with justiciable problems (Sandefur, 2007, Gilliom, 2001, Bumiller, 1992). For example, legal consciousness studies have shown that people with social security problems, and people facing discrimination, often fear that seeking advice or taking action will result in a loss of control and worsening of their situation (Bumiller, 1992, Sarat, 1990). Such studies also show that people may not 'turn to law' because they do not want the label of 'victim' which they perceive is given to them by law (Bumiller, 1992; Engel and Munger, 2003). Similarly, research on the experience of debt and the claiming of social security benefits has found that issues of stigma deter people from seeking advice (eg Orton, 2008, Corden, 1999, Costigan et al., 1999), whilst, more broadly, poverty research highlights the sense of stigma and powerlessness expressed by many people living with poverty and social exclusion (eg Beresford et al., 1999, Hooper et al., 2007, Commission on Poverty Power and Participation, 2000). This paper therefore seeks firstly to quantify the extent to which Citizens Advice clients feel nervous and embarrassed about seeking advice and the extent to which they are worried that seeking advice may make their situation worse. It also tests the hypothesis that people experiencing issues of social exclusion will be more likely to have higher levels of these feelings than people who are not in this group.

Secondly, it has been argued that the delivery of advice in GP settings helps people who are embarrassed or fearful about seeking advice to access advice services, because of the familiarity and anonymity of the location and because of the encouragement given by health professionals based in these settings; it is suggested that such encouragement helps to 'legitimise' the act of seeking advice (Burrows et al., 2011, Sherr et al., 2002, Sherratt et al., 2000, Galvin et al., 2000). This paper therefore tests the hypothesis that people who are encouraged to seek advice by a health professional will be more likely to have high levels of these feelings than people who are not encouraged by a health professional. The paper also explores the importance to GP advice clients of the familiarity, trust and anonymity of the GP location, and tests the hypotheses that people who have high levels of anxiety about seeking advice and people seeking advice about debt will place more importance on the anonymity of the advice location than people not in these groups.

## **2 Methods**

### *Survey design*

The survey was designed for Citizens Advice clients who had received a face-to-face advice session in either a high street or GP advice setting. Respondents were asked a range of questions covering their experiences of the accessibility of advice, how they felt about seeking advice, their motivations for seeking advice, and the outcomes of advice in relation to issues of empowerment. The survey was designed to be self-completed wherever possible because of the limited resources available to provide help with the form; testing of the survey also indicated that some people preferred the anonymity that self-completion provides. Some bureaux were able to help clients with completing the form where literacy or language issues meant that they could not do so on their own; this help was provided by the adviser. It is possible that such help will introduce some bias into the results but conversely, the effects of not giving such help also introduce bias since people with literacy and language difficulties will then be under-represented. Whether clients received such help was recorded so that it could be controlled for in analysis. Not all bureaux were able to offer this help because of the resources it required, and it is therefore still likely that people with literacy difficulties, and people who did not have English as a first language will be under-represented in the sample. This is an important caveat since such difficulties will not be uncommon amongst Citizens Advice clients.

The survey design was tested through a focus group with staff and volunteers and through cognitive testing of some of the questions with Citizens Advice clients. These resulted in some changes being made both in terms of the question content and the number of questions asked.

### *Implementation*

The survey was run by ten Citizens Advice bureaux based predominantly in the South West of England and Wales. These areas were chosen in order to keep travelling distances manageable for the researcher. Two bureaux from outside this area that had advisers based in a large number of GP practices also participated. The sample was therefore a non-probability sample rather than a probability sample. Such a design should be treated with caution with regards to the generalisability of the results because of the risk that the sample will not reflect accurately the population from which it is drawn. However, it should be noted that probability samples may also be subject to bias for example, because of incomplete coverage of the population or non-response; it has also been argued that in some cases non-probability samples have generated results which are as good as probability-based surveys (Baker et al., 2013).

Most of the bureaux in the sample offered their GP based advice to patients of the GP practice only, but in a few surgeries this restriction did not apply, that is, the advice service was available to anyone. Nearly all delivered generalist advice in their GP based service, but a few offered both generalist and specialist advice, and one area delivered advice on benefits only in their GP practices. Generalist advice is defined by Citizens Advice as giving advice on any topic; it can be one-off advice or on-going 'casework' but stops short of representing clients for example at tribunals. Specialist advice is delivered in a particular area of advice, usually benefits or debt, and includes working at a more specialized level, for example, representing clients at tribunals. However, it should be said that in practice these categories can merge into one another. For example, generalist advisers may have specialized knowledge in particular areas of advice and specialist workers may not always be able to offer representation because of issues of resources.

Those bureaux which were initially interested in participating in the survey were from a mixture of urban and rural settings; however, a number had to withdraw before the

survey was run and these were predominantly from urban areas. Thus of the ten bureaux that took part only one was from a large urban area, three were from “other” urban areas, and the remaining six were from rural areas. Rural advice clients are therefore likely to be over-represented in the sample.

Most of the bureaux ran the survey for a two month period at some point between March and May 2012. The intention was that all clients who received a face-to-face advice session during the survey period would be asked by the adviser at the end of the session if they would be willing to complete the survey. Advisers were given information leaflets to help them explain to clients the purpose of the survey. Clients could either complete the survey straight after the advice session or return it to the researcher in a pre-paid envelope. Observation of the process in one bureau indicated that advisers did not always ask clients to complete the form, either because of the pressures of time, or because they forgot, or because they did not think it appropriate to ask some clients to complete the form. This therefore will introduce another source of bias into the results.

A total of 412 surveys were returned. The number of responses varied greatly between bureaux; thus, three of the bureaux returned 70 per cent of the forms. A response rate was calculated from administrative data provided by most of the bureaux, which gave the total number of ‘unique’ clients who had received face to face advice at the bureau during the survey period. Amongst the three bureaux which returned the majority of forms the response rate of high street clients was 10 per cent. The response rate for GP clients amongst these three bureaux was more varied ranging from 25 per cent to 41 percent. The low response rates will be due either to clients not being asked to complete the form as discussed above or to clients not wishing to or being unable to complete the form.

The issue of non-response is a particular limitation of self-completed surveys and introduces another source of bias into the sample; Citizens Advice staff involved in the research also reported that non-response is a common issue for them in the surveys which they run. However, initial examination of the administrative records at one of the fieldwork sites indicates that the socio-economic characteristics of their client base broadly matched the socio-economic characteristics of the survey respondents from their area.

### **3 Findings**

In the first part of this section I describe the key characteristics of the survey sample: first, the socio-demographic characteristics of respondents; second, issues of social exclusion, measured by how respondents felt they were managing financially, and whether they felt cut off or alone; third, the types of problem about which they sought advice; and finally, the degree to which health professionals were involved in encouraging people to seek advice. These characteristics are explored by the advice location (GP/High St) and geographical location (urban/rural). In the second part of the section I go on to consider the survey findings in relation to respondents' feelings about seeking advice and the importance they place on the attributes of the GP advice location.

#### ***The sample***

##### *Socio-demographic characteristics*

Table 1 describes the socio-demographic characteristics of advice clients by advice location and urban/rural location. In both urban and rural areas there were a number of differences in the socio-demographic characteristics of GP and high street advice clients. Firstly, as might be expected, in both rural and urban areas a higher proportion of GP advice clients than high street advice clients had long term health problems or disabilities; this effect was stronger in the urban than rural locations. Secondly, with regards to economic status, in both rural and urban areas fewer GP than high street advice clients were unemployed and more GP than high street advice clients were incapable of work because of sickness or disability. In urban areas, there were also more GP than high street clients who were in the 'other' economic category, and fewer GP clients than high street clients who were in paid work. Thirdly, with regards to age, in both rural and urban areas a higher proportion of GP than high street clients was aged 55 or over and a lower proportion was aged under 45; however, the effect was greater in the urban than rural areas. Fourthly, in urban areas a higher proportion of high street than GP clients was of ethnic minority origin; however, it should be noticed that GP advice workers from one urban area reported that many of their clients were not able to complete the survey because of language difficulties, and this finding is therefore unlikely to be reliable. The number of ethnic minority clients from rural areas was very small and any difference across settings would therefore not be possible to

observe. Finally, there were some very small differences in the gender of clients across GP and high street locations in both rural and urban locations.

**TABLE 1: Socio-demographic characteristics of respondents by advice location (%)**

	Urban			Rural		
	GP	High Street	Cramer's V	GP	High Street	Cramer's V
<b>Economic status</b>			.38**			.22*
Unable to work because of long term health or disability	54	27		48	35	
In paid work	7	27		23	21	
Retired	15	12		14	14	
Other	22	13		11	15	
Unemployed	2	21		4	15	
<b>Long-term health problems or disabilities</b>	79	43	.33**	66	49	.18**
<b>Age</b>			.26			.10
65 or over	21	9		14	11	
55-64	25	16		24	20	
45-54	21	19		30	29	
35-44	21	23		16	20	
18-34	14	33		17	21	
<b>Ethnic minority</b>	14	22	.10	1.5	1.5	.01
<b>Gender</b>			.08			.04
Female	59	51		51	55	
Male	41	49		49	45	

N (urban) = 142    N (rural) = 270

\*\* p<.01

\* p<.05

The differences between GP and high street clients in economic status and long-term health status were statistically significant in both areas (rural p<.01 urban p<.05); however the differences in age, ethnic origin and gender across GP and high street settings were not significant in either rural or urban areas (p>.05).

These findings indicate that those groups who are more likely to be GP advice than high street advice clients are the groups that are more likely to visit the surgery on a regular basis: research on access to primary health care shows that older people and people with long-term health problems have higher rates of consultation with GPs compared with the general population (Campbell and Roland, 1996). This in turn suggests that people are most likely to find out about the GP advice service by visiting

the practice. It may also indicate that the people who use the GP advice service are the people who are more familiar and more comfortable with the setting.

The low proportion of unemployed GP advice clients in both rural and urban areas is of interest since research on access to primary health care shows that unemployed people consult their GPs more often than employed people (eg Scaife et al., 2000, Carr-Hill et al., 1996). If this is the case then we might expect that a higher proportion of GP advice clients than high street advice clients would be unemployed and a lower proportion of GP advice than high street advice clients would be in paid work. However, this is not the case in either rural or urban areas. The question as to why GP advice clients are less likely than high street advice clients to be unemployed is one which seems worthy of further investigation. It is possible that there is a connection with age, since half of the unemployed people in the sample were in the 18-34 age group, who were also less likely to attend the GP than high street setting. It may also reflect the spatial clustering of unemployment in the larger population centres served by high street advice services.

### *Types of advice problem*

Table 2 shows the types of problem about which respondents sought advice. When completing the survey form, respondents could detail as many problems as they wished; Table 3 shows that the majority of respondents had sought advice about one problem type only, of which the most common were benefits and debt.

**TABLE 2 Citizens Advice clients' advice problems by category and number of problem types.**

<b>Type of problem</b>	<b>%</b>
Benefits	57
Debt	30
Employment	11
Housing/homelessness	11
Discrimination	3
Relationship breakdown	4
Other	12
<b>Number of problem types</b>	
1	77
2	18
3	5

N=411

In order to enable comparison between problem types, a new variable was created (Table 3). Given that the majority of enquiries were about single problems, and the majority of these were about benefits and debt, the new variable categorises problem type into benefits only, debt only, 'other single problem type' and finally multiple problems. From this it can be seen that 39 per cent of people were seeking advice about benefits problems only, 18 per cent were seeking advice about debt problems only, 20 per cent were seeking advice about other single problem types (for example, employment or housing) and 23 per cent were seeking advice about multiple problem types. In both rural and urban areas a higher proportion of GP clients than high street clients sought advice about benefits only, and a lower proportion of high street than GP clients sought advice about debt and other single problem types. However, these differences were smaller in the rural area and were not statistically significant. In urban areas there was no difference across GP and high street settings in the proportions of people seeking advice about multiple problem types; in rural areas a slightly smaller proportion of GP than rural clients sought advice about multiple problem types.

It is possible that the differences in problem type across GP and high street settings are explained in part by the different socio-demographic characteristics of GP and high street clients. It may also be due to differences in the types and levels of advice offered in high street and GP settings. Most participating bureaux offered 'generalist' advice in their GP based services; but arrangements for the delivery of specialist advice differed across bureaux. Thus, for example, in one bureaux, the GP based advisers would refer clients in need of specialist debt advice to their specialist advisers who were based in high street settings. Finally, in one of the urban areas, the advice given was benefits only up to a specialist level. This may explain to some extent the difference between GP and high street clients in urban areas.

**TABLE 3 Problem type of Citizens Advice clients by advice location (%)**

	All	Urban <sup>1</sup>		Rural <sup>2</sup>	
		GP	High Street	GP	High Street
<b>Problem type</b>					
Benefits only	39	61	28	47	32
Debt only	18	9	26	14	19
Other single problem type	20	7	25	18	23
Multiple problems	23	23	22	21	25

<sup>1</sup> p<.01 Cramers V = .36 N = 141

<sup>2</sup> p>.05 Cramers V = .15 N=270

### *Financial circumstances and social isolation*

Table 4 details the financial circumstances and social isolation of respondents. Firstly, respondents were asked how well they were managing financially. Across the sample 59 per cent of respondents were finding it very or quite difficult to manage and 27 per cent were just about getting by. By comparison, in 2010-11 12 per cent of the general population reported that they were finding it very or quite difficult to manage financially whilst 27 per cent were just about getting by (Harding, 2011). This finding therefore demonstrates the degree of financial difficulty experienced by Citizens Advice clients compared with the general population. In both urban and rural areas, GP clients were more likely than high street clients to say they were finding it very or quite difficult to manage financially and less likely to report that they were doing alright or living comfortably compared with high street clients. However, this difference was very small in rural areas and was not statistically significant in either urban or rural areas.

**TABLE 4 Financial circumstances and social isolation of Citizens Advice clients by advice location (%)**

	Urban			Rural	
	All	GP	High Street	GP	High Street
<b>Financial circumstances<sup>1</sup></b>					
Finding it very or quite difficult	59	63	50	64	61
Just about getting by	27	26	27	26	27
Doing alright or living comfortably	13	12	24	10	12
<b>Feeling cut off or alone because of:<sup>2</sup></b>					
Lack of money	44	48	44	44	43
Physical or mental health problems which limit everyday activities <sup>3</sup>	38	61	32	38	35
Lack of own transport or inadequate public transport	18	25	17	19	15
Lack of contact with friends or family	21	25	22	18	22
Other	17	14	24	13	17
Feeling cut off or alone for one or more reasons	68	71	71	34	31

N (urban) = 136 N(rural) = 265

<sup>1</sup>Cramer's V (urban) = .15 p>.05 Cramers V (rural) = .04 p>.05

<sup>2</sup>respondents could answer yes to as many categories as applied, hence the percentages add up to more than 100.

<sup>3</sup>Cramer's V (urban)=.28 p<.01

Table 4 also shows that 67 per cent of respondents reported feeling cut off or alone for one or more reasons, the most common of which were lack of money and health problems. Thirty per cent of clients gave one reason for feeling isolated, 18 per cent gave two reasons and 20 per cent gave three reasons or more. In urban areas GP clients were more likely than high street clients to report feeling isolated because of health problems; this is to be expected given the higher proportion of GP clients with health problems. However, in rural areas there was very little difference between GP and high street clients in the proportion of people who felt isolated for this reason, despite the fact that in rural areas there were more GP than high street clients who had long-term health problems. In urban areas high street clients were also more likely to report feeling isolated for 'other' reasons; this category included feeling isolated because of long working hours or discrimination and it is therefore possible that this difference is in part explained by the fact that in urban areas high street clients were more likely than GP clients to be in paid work or of ethnic minority origin.

#### *Encouragement by health professionals*

One other key difference between GP and high street respondents concerned their pathways to advice. Across the sample 23 per cent of respondents said they sought advice because they were encouraged to do so by a health professional. However, GP clients were 11 times more likely than high street clients to have been encouraged in this way ( $\chi^2 = 73.6, p < .001$ ). Thus, 42 per cent of GP clients were encouraged to seek advice by a health professional compared with 6 per cent of high street clients. These differences existed in both urban and rural areas although they were greater in urban areas. The differences remain when controlling for the difference in the long-term health status of GP and high street clients. Thus, in a logistic regression model incorporating advice location and long-term health status, GP clients were 8.7 times more likely than high street clients to have been encouraged by a health professional to seek advice regardless of their health status (Table 5). These findings therefore suggest that health professionals were much more influential in GP advice clients' decisions to seek advice compared with high street clients whether they had long-term health problems or not.

**TABLE 5: Citizens Advice clients encouraged by a health professional to seek advice: logistic regression odds ratios**

	%	Logistic regression odds ratio (95% Confidence Interval)
<b>All</b>	23	
<b>Advice Location</b>		
GP surgery	42	8.7 (4.6-17.2)**
High street	6	Reference group
<b>Long-term health problem</b>		
Yes	33	3.7 (2.0 – 6.9)**
No	9	Reference group

N=401 p<.01 Nagelkerke R Square = .32

Note: the % column shows the percentage of people in the group listed in the left hand column who were encouraged to seek advice by a health professional

### ***Feelings about seeking advice***

Having described the characteristics of the sample and the ways in which they differed across GP and high street settings, I now turn to considering how respondents felt about seeking advice. In the introduction I outlined how research has shown that people often do not seek advice because of feelings of fear, powerlessness or embarrassment. Respondents were therefore asked to rate on a scale of 1 to 10 how nervous and embarrassed they felt about seeking advice and how worried they had been that getting advice might make their situation worse. Feelings of nervousness and embarrassment were common with 76 per cent of respondents saying they felt some degree of nervousness and 71 per cent saying they felt some degree of embarrassment. Around 40 per cent of respondents gave scores of 6 or more for their feelings of nervousness and embarrassment. The proportion of people who expressed some worry that seeking advice might make their situation worse was lower but still notable at fifty six per cent. Twenty per cent of respondents gave a score of 6 or more for worry that getting advice could make their situation worse.

**TABLE 6 Citizens Advice clients levels of nervousness, embarrassment and worry about seeking advice (%)**

	%		
	0	1-5	6-10
<b>Nervous</b>	24	36	40
<b>Embarrassed</b>	30	33	38
<b>Worried that getting advice might make the situation worse</b>	44	37	20

N=406

Reliability analysis indicates that these three variables have a high degree of correlation (Cronbach's alpha = 0.8). They were therefore combined into one scale called 'anxiety about seeking advice' by calculating the mean of the scores for nervousness, embarrassment and worry for each respondent. Analysis of this new variable shows that 17 per cent of respondents gave a score of 0 to each of the questions; that is, they were not at all nervous, embarrassed or worried that seeking advice would make their situation worse; 59 nine per cent of respondents had anxiety scores of more than 0 up to and including 6 and 24 per cent had a score of over 6. This last group, representing the top quartile of the anxiety distribution, was categorized as 'high anxiety' for the purpose of further analysis.

Respondents were also asked if they had delayed seeking advice for a number of reasons. Table 7 shows the proportion of respondents who had not sought advice earlier because they thought they could deal with the problem on their own, they thought nothing could be done, or they were too scared. The table shows that 35 per cent of respondents had delayed seeking advice because they thought they could deal with the problem on their own, 18 per cent had thought that nothing could be done about the problem, and 13 per cent had been too scared. The table also shows that people who were categorized as 'high anxiety' in relation to seeking advice were more likely to have delayed seeking advice for these reasons. Thus these findings indicate that a 'high' level of anxiety as defined above, was problematic to the extent that it was associated with delays in seeking advice.

**TABLE 7 Citizens Advice clients who delayed seeking advice by high anxiety: odds ratios**

		Thought I could deal with the problem on my own		Didn't think anything could be done about the problem		Was too scared	
		%	Odds ratio	%	Odds ratio	%	Odds ratio
<b>All</b>		35		18		13	
<b>High anxiety<sup>1</sup></b>	<b>Yes</b>	48	2.1**	32	2.9**	35	7.0**
	<b>No</b>	31		14		7	

N = 405      \*\* p<.01      Pearsons Chi-square odds ratio

### *Patterns of difference in anxiety*

Four hypotheses were tested with regards to anxiety about seeking advice. The first two test the broad hypothesis that people who are socially excluded will have higher levels of anxiety about seeking advice than people who are not socially excluded; struggling financially and feeling cut off or alone were used as indicators of exclusion. The third hypothesis tested was that people who were encouraged to seek advice by a GP would have higher levels of anxiety than people who were not encouraged in this way because they would be more likely to need such encouragement to overcome their anxiety. Problem type and socio-demographic variables were also tested in order to be able to control for any variation in anxiety associated with these variables. Finally, the variable which measured whether people were helped to complete the survey form was also tested in order to be able to control for any variations in answers by completion method.

Bivariate analysis (Table 8) shows that problem type had the strongest association with anxiety out of the variables which were tested. Thus, people with debt problems, people with multiple problems and people with 'other' single problem types, were all more likely than people with benefits problems to have high levels of anxiety about seeking advice. The effect was strongest for people seeking advice about debt who were 5.4 times more likely than people seeking advice about benefits to have high levels of anxiety.

**TABLE 8 Citizens Advice clients with high anxiety levels: bivariate and multivariate odds ratios.**

	%	Bivariate odds ratio <sup>1</sup>	Multivariate odds ratio <sup>2</sup>
<b>All</b>	24		
<b>Problem type</b>			
Debt	40	3.5**	5.4** (2.6-11.4)
Other single problem type	17	1.1	2.5* (1.1-5.6)
Multiple problems	28	2.0*	2.0* (1.1-4.0)
Benefits	16	Reference group	
<b>Feeling cut off or alone</b>			
Yes	29	3.0**	3.6** (1.8-7.3)
No	12		
<b>Helped with survey form</b>			
No	26	2.4**	2.0 (1.0-4.3)
Yes			
<b>Finding it very or quite difficult to manage financially</b>			
Yes	31	3.0**	2.4** (1.3-4.4)
No	13		
<b>Encouraged by health professional to seek advice</b>			
Yes	33	1.9*	2.0** (1.1-3.7)
No	21		
<b>Long-term health problems or disabilities</b>			
Yes	25	1.3	
No	21		
<b>Economic status</b>			
In paid work	28	2.2	
Unable to work because of long-term health or disabilities	27	2.1	
Unemployed	19	1.3	
Retired	17	1.2	
Other	15	Reference group	
<b>Age</b>			
65 or over	20	Reference group	
55-64	21	1.1	
45-54	26	1.4	
35-44	25	1.4	
18-34	22	1.2	
<b>Gender</b>			
Female	24	1.0	
Male	24		

Note: the % column shows the percentage of people in the group listed in the left hand column who had high anxiety about seeking advice. For example 40 per cent of people seeking advice about debt had high anxiety compared with 17 per cent of people seeking advice about other single problem types.

<sup>1</sup>Chi-square bivariate odds ratio    <sup>2</sup>Logistic regression odds ratio    Nagelkerke R square = .22

With regards to social exclusion, people who felt cut off or alone and people who were struggling financially were both 3 times more likely than people who did not feel cut off or alone and people who were not struggling financially to have high levels of anxiety about seeking advice; these results were statistically significant ( $p < .01$ ). Thus, this hypothesis was supported.

Analysis also shows that people who were encouraged by a health professional to seek advice were 1.9 times more likely to have high levels of anxiety about seeking advice than people who were not encouraged in this way (Table 8); this was statistically significant ( $p < .05$ ). Thus this hypothesis was also supported.

People who completed the survey form without the help of an adviser were 2.5 times more likely to have high levels of anxiety than people who were helped to complete the form ( $p < .01$ ). This may indicate that respondents who were helped to complete the form did not wish to reveal such feelings to the adviser. There were also some differences across economic status; people who were in paid work and people who were unable to work because of health problems or disability were just over twice as likely as people in the 'other' economic category to have high levels of anxiety. It is possible that these differences are explained by differences in problem type across different economic groups. However these differences were not statistically significant. The differences across age were smaller and again not statistically significant.

Those variables which had a significant association with high anxiety were tested further in a multivariate logistic regression model, in order to be able to control for the differences associated with each variable. The results show that problem type, feeling cut off or alone, struggling financially and being encouraged by a health professional to seek advice were all independently associated with high levels of anxiety about seeking advice. That is, people in these groups were more likely to have high levels of anxiety about seeking advice regardless of the other factors in the model. These findings will be discussed further in the discussion section below.

### ***The importance of the GP location***

The preceding section sought to establish the extent to which Citizens Advice clients felt nervous, embarrassed and fearful about seeking advice and to test whether certain groups were more likely to experience high levels of such ‘anxiety’. The following section turns to consider the attributes of the GP location which have been identified in qualitative research as important in helping to address feelings of anxiety, and to explore the level of importance which GP clients placed on these attributes.

Table 9 shows the importance that GP clients place on the familiarity, trustworthiness and anonymity of the GP location. Just under 80 per cent of respondents rated trust in the location as very important and just over 70 per cent said that knowing the location was very important to them. Thus, the majority of GP respondents rate these two attributes as very important to them. The proportion of people rating the anonymity of the service as very important was lower but still notable, at just over 40 per cent of respondent.

**TABLE 9 Importance of GP service characteristics to Citizens Advice clients accessing GP based services (%)**

	%			
	Very important	Quite important	Not very important	Not at all important
<b>Importance of advice being:</b>				
In a place I know	73	18	7	2
In a place I trust	80	13	4	2
In a place where no one can see that I am visiting Citizens Advice	43	19	17	21

*N* = 175

The variable measuring the importance of the anonymity of advice was analyzed further given the greater variance in the answers to this question compared with the other two variables. It was hypothesized that people with high levels of anxiety would be more likely to say that anonymity was very important than people who did not have high levels of anxiety. Given previous research findings that people seeking advice about debt are particularly concerned about issues of stigma it was also hypothesized that people seeking advice about debt would be more likely than people seeking advice about other issues to say that the anonymity of the GP setting was very important.

Table 10 shows that people with high levels of anxiety were 3.7 times more likely than people not in this group to say that the anonymity of the advice setting was very important. People seeking advice about debt were similarly 3.5 times more likely than people not seeking advice about debt to say this. Multivariate logistic regression indicates that these differences are independent of each other, although the odds ratios reduce slightly in this model. In other words, GP clients seeking advice about debt were 2.9 times more likely than GP clients not seeking advice about debt to say that the anonymity of advice was very important regardless of their levels of anxiety; similarly GP clients who had high levels of anxiety about seeking advice were 2.8 times more likely to say that the anonymity of advice was important than GP clients not in this group regardless of their problem type.

**TABLE 10 GP advice clients who said that it was very important that advice was in a place where no one could see that they were visiting Citizens Advice: odds ratios.**

		%	Bivariate Odds Ratio	Multivariate odds ratio
<b>High anxiety</b>	Y	66	3.7** (1.8-7.5)	2.9** (1.4-6.1)
	N	34	Reference group	
<b>Seeking advice about debt<sup>1</sup></b>	Y	66	3.5** (1.7-7.3)	2.8** (1.3-5.9)
	N	35	Reference group	

Nagelkerke R square = .16 \*\* p<.01

<sup>1</sup>Because of the smaller sample size, the original dichotomous variable was used; that is people who were seeking advice about debt are compared with people who were not seeking advice about debt. Thus 'yes' in this context includes respondents who were seeking advice about multiple problems which included debt.

### *Visiting another advice location*

Respondents were also asked how likely they would be to visit a high street or GP advice location if such a service was available to them and they needed advice in the future. Table 11 shows firstly that just under half (49 per cent) of GP advice clients said that they would be not at all likely or not very likely to visit a high street service. By comparison, only 17 per cent of high street clients said they would be 'not at all likely' or 'not very likely' to visit a GP service and 67 per cent said that they would be 'very likely' or 'quite likely' to visit such a service if one was available to them. These results

suggest that amongst Citizens Advice clients there is a preference for GP based advice services over high street services.

**TABLE 11: How likely Citizens Advice clients would be to visit a high street office or GP location by anxiety about seeking advice (%)**

How likely would you be to visit a high street bureau office/GP surgery for advice?	GP clients (%)			High Street clients (%)		
	All	High anxiety <sup>1</sup>		All	High anxiety <sup>2</sup>	
		Yes	No		Yes	No
Not at all/not very likely	49	60	45	16	9	19
Very/quite likely	43	27	50	67	72	66
Don't know	8	13	6	17	20	15
<b>N</b>	<b>174</b>			<b>215</b>		

<sup>1</sup> Cramers V = .22 p<.05

<sup>2</sup> Cramer's V = .11 p>.05

Table 11 also shows that GP advice clients with high anxiety were less likely to say that they would visit a high street setting compared with GP advice clients who did not have high anxiety (27 per cent vs 50 per cent). By comparison, high street clients with high anxiety were slightly more likely to say that they *would* visit a GP location than high street clients who did not have high levels of anxiety (72 per cent vs 66 per cent). Taken together these results suggest that the preference for GP services is slightly stronger amongst people with high anxiety.

Finally, respondents who said that they were unlikely to visit a high street service were asked for their reasons for this (Table 12). The most common responses were that the respondent did not like going to places that they did not know (46 per cent) followed by not wanting to be seen visiting Citizens Advice (37 per cent), not knowing where the high street office was (35 per cent), and the high street office being too far away (32 per cent). Thus concerns about the lack of familiarity and visibility of high street services were as common as concerns about distance and lack of knowledge of their location.

**TABLE 12: Citizens Advice GP advice clients’ reasons for being unlikely to visit a high street office**

Reason for being unlikely to visit high st office	% of GP clients who are unlikely to go to a high street service	% of all GP clients
Don’t like going to places I don’t know	46	22
Don’t want to be seen visiting Citizens Advice	37	17
Don’t know where it is	35	17
Too far away	32	15
Costs too much to get there	21	10
Other	18	10
<b>N</b>	<b>85</b>	<b>179</b>

## 4 Summary and discussion

The survey findings have shown firstly that many Citizens Advice clients experienced feelings of nervousness, and embarrassment about seeking advice as well as worry that seeking advice might make their situation worse. The findings also show that high levels of these feelings were likely to be problematic since they were associated with delays in seeking advice; people who had high levels of such anxiety were more likely than people not in this group to have delayed seeking advice because they thought nothing could be done about their problem, because they thought that they could deal with the problem on their own, or because they were too scared.

Secondly, the findings demonstrate that a high proportion of Citizens Advice clients were struggling financially or feeling isolated and that people in these groups were more likely to have high levels of anxiety about seeking advice, regardless of their problem type, or other socio-demographic characteristics. This finding supports the arguments of qualitative researchers that the legal problems of people who are poor or disadvantaged are in particular shaped by fear, stigma and powerlessness. The finding also emphasizes the importance of Citizens Advice being proactive in making contact with marginalized or excluded people, that is, of delivering advice services in ways which help to address and alleviate these feelings.

Turning to the provision of advice in health care settings, the findings showed firstly, that people who were encouraged to seek advice by a health professional were approximately twice as likely to have high levels of anxiety about seeking advice as

people who were not encouraged to seek advice by a health professional. Although such an association cannot prove causality, it suggests that the encouragement of health professionals is influential in enabling people who are embarrassed or fearful about seeking to advice to access advice. This finding is particularly pertinent for GP based advice services given that people seeking advice at GP surgeries were much more likely to have been encouraged to seek advice by a health professional than people seeking advice at a high street service. It also supports the arguments of previous research that staff based in outreach agencies who have trusted relationships with service users, play an important role in the delivery of outreach advice services, by encouraging people to seek advice who may be reluctant to do so (references).

The findings also showed that problem type contributed towards anxiety about seeking advice; in particular, people seeking advice about debt were over 5 times more likely to have high levels of anxiety than people seeking advice about benefits. These higher anxiety levels may in part reflect higher levels of embarrassment and stigma associated with debt compared with benefits problems. This argument is supported by the finding that people seeking advice about debt were more likely than people not seeking advice about debt to say that the anonymity of the GP surgery was very important to them. In addition it is likely that a higher proportion of people seeking advice about debt will be in a dispute situation compared with people seeking advice about benefits, since the latter group will include people making benefit claims as well as benefits disputes. Research has shown that as people's debt problems increase, they experience the behavior of creditors as increasingly intrusive and aggressive (eg Orton, 2008). Thus peoples' higher levels of anxiety about seeking advice about debt may also reflect a greater degree of conflict and intimidation compared with people seeking advice about benefits.

The survey findings also showed that a lower proportion of GP than high street clients sought advice about debt and a higher proportion sought advice about benefits, although this difference was smaller in rural than urban settings. Greasley and Small (2002:4) describe how previous research on advice services in GP surgeries also found that a high proportion of enquiries concern social security benefits, particularly sickness and disability benefits. They suggest that this is likely to reflect the health status of people using GP advice services, but may also reflect the types of referrals made by health professionals and the focus of some GP advice services on the provision of

benefits advice. Given the above findings that people seeking advice about debt have higher levels of anxiety about seeking advice and place greater importance on the anonymity of advice than people seeking advice about benefits, practitioners and policy makers may therefore wish to consider promoting or increasing the availability of debt advice in GP settings. This could involve ensuring that health professionals are aware of the debt advice that GP advisers provides; it may also involve training of health professionals so that they are able to identify the signs of debt problems and to raise such issues particularly in the case of patients who are embarrassed by their situation. Issues of training however, are likely to be contentious as some health professionals may see this as a step too far away from their remit. Finally, promoting the availability of GP advice services to unemployed people and people in paid work (who were less likely to use GP than high street services) may result in an increase in enquiries about debt, since a higher proportion of these groups sought advice about debt compared with people with long-term health problems (29 per cent of unemployed people and 32 per cent of people in paid work, compared with 9 per cent of people with long-term health problems).

With regards to the attributes of the GP setting, the findings demonstrated that knowing and trusting the GP setting were very important to the majority of GP clients, and that the anonymity of the setting was important to a sizeable minority. The findings also suggested that there is a preference for advice in GP rather than high street locations, in particular amongst people with high anxiety about seeking advice. The lack of familiarity and anonymity of high street based services were as common reasons for not visiting high street services as concerns about distance.

Taken together these findings underscore the importance of Citizens Advice and other advice services being proactive in making contact with people in need of advice, both by providing advice in outreach locations which are trusted and familiar to people and by working with trusted professionals who can act as 'problem noticers' (Pleasence et al 2006: 2). One of the distinctive advantages of the GP setting is the anonymity and privacy that the setting provides. Thus, clients and advisers who were interviewed as part of this research project described how other patients in the waiting room would not have known that they were seeing a Citizens Advice adviser. Such anonymity may be more difficult to maintain in other outreach locations such as community centres which are not designed primarily to be confidential and private spaces.

The findings also showed that unemployed people and younger people were less likely to use GP advice service than high street services in both rural and urban areas which seems worthy of further investigation. It may be the case that people in these groups are less likely to be aware of the service or it may be that they are less inclined to use the service because they are less familiar or comfortable with a GP location. It would therefore be interesting to see if an increase of promotion of the GP advice services at locations other than the surgery results in changes to the demographics of GP advice clients. Such promotion could take place not only through posters and literature but through Citizens Advice visiting such venues, for example, community centres, youth centres, or Job Centres, not to give advice, but to talk about the GP advice service. Thus, one client who was interviewed in the qualitative part of this research was very emphatic about the need for Citizens Advice to “get out there” in order to promote the service.

## **Conclusion**

This paper has sought, first, to increase our understanding of the barriers faced by people in need of advice by measuring the extent to which Citizens Advice clients feel nervous or embarrassed about seeking advice or worried that seeking advice will mean that they lose control of their situation. Second, it has shown how the attributes of the GP advice setting help to address some of these barriers. The paper has shown that such feelings are more common amongst people experiencing disadvantage, and thus supported the arguments made by legal consciousness and other qualitative researchers that feelings of powerlessness, shame and resignation in relation to legal or justiciable problems, are shaped by inequalities in power. The research evidence will also be of interest to researchers and practitioners concerned with the provision of debt advice, since it has shown firstly, that people seeking advice about debt are more likely to experience high levels of anxiety than people seeking advice about benefits, and secondly, that they are more likely to place importance on the anonymity of advice than people seeking advice about other issues.

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**Beyond Remedy: Does Civil Legal Assistance  
Matter for Democratic Governance?**  
*A draft dissertation chapter*

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Impoverished Americans, a group typically characterized by low levels of civic and political engagement, experience an average of 1.3 legal problems per household per year (LSC 2005, 2009). Of the 54 million people qualifying for free civil legal services, about two million seek it out each year. Due to scarce resources, only half of those are helped.<sup>1</sup> Although those seeking legal services are driven by their interest in solving their legal problems, ending up in a legal services office might have consequences beyond the remedial benefits of the service itself. Researchers have studied the economic impact of legal services for states, communities, and individuals (Abel and Vignola 2004), as well as how individuals come to operationalize their civil justice claims as questions of law (Sandefur 2008, 2010). Few studies, however, have addressed how the receipt of legal assistance might shape the civil and political lives of the people it serves. Under what conditions do legal services influence the political and civic engagement of those seek aid?

In this paper, I attempt to provide insight into this question through a modified policy feedback approach, which suggests that policies have a reciprocal effect on those who interact with them. The receipt of civil legal services serves as a mechanism by which qualifying individuals engage with legal institutions, potentially developing valuable civic skills and feelings of political and legal agency. Civil legal aid provides a unique case for investigating how people interact with political institutions, as civil legal assistance is not guaranteed to those who seek it out, thus providing study groups of those receiving legal aid and those who do not. Moreover, legal aid is delivered by a variety of different kinds of organizations, which may vary in their ability to encourage the development of skills and efficacy.

I begin by engaging with several different literatures. The policy feedback framework will inform my research design choices, but I identify areas in which this framework could be extended to include the mechanism of legal services for the poor as a valuable point of departure from current empirical and theoretical work. I also explain why I think that the provision of legal services and experiences with legal services providers can develop efficacy and civic skills amongst those who access services. Next, I suggest why I think that programmatic differences across legal services providers might lead to greater or fewer opportunities for individuals to develop skills and efficacy. Within these sections, I introduce my hypotheses, derived from my theoretical expectations. Finally, I describe my data collection process, methods, and preliminary results. I conclude with a discussion of my future work with these data, as well as suggestions for future research in this field.

### **The Policy Feedback Framework**

Many factors contribute to the great disadvantage in civic and political engagement of poor people: less-developed civic skills and less access to resources (Verba *et al.* 1995), fewer ties to community organizations (Radcliff and Davis 2000), disinterest and lack of efficacy – the feeling that one can affect change and that institutions will be responsive (Campbell *et al.* 1954;

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<sup>1</sup> Estimated population served by federally-funded legal services; estimates for organizations not funded by the LSC not readily available.

Scott and Acock 1979), legal-institutional barriers to participation (Weaver and Lerman 2010; Piven and Cloward 1988; Freeman 2004; Barreto *et al.* 2009), socioeconomic status (Walsh *et al.* 2004), educational attainment (Levinson 2007), and race (Calvo and Rosenstone 1989). All of the above factors work against the equality of participation across social classes, but some of these factors can be impacted through interactions with institutions, like the courts or agencies administering social services. That is, efficacy, information, skills, and interest may all be influenced by an individual's interaction with institutions through the opportunities provided by such interactions (Mettler 2005; Campbell 2003a).

Policy feedback is a relatively new way of thinking about the aforementioned "moveable" factors that influence individual political participation in the field of political science. Although E.E. Schattschneider wrote in 1935 that "new policies create a new politics" (288), scholarly work on the ways in which changes in social policies feed back into client populations and change their interactions with government did not become prevalent until the 1990s. In the policy feedback approach, social policies are not considered to be end products alone, but as "factors that set political forces in motion and shape political agency in the citizenry" (Bruch *et al.* 2009, 2; see also Pierson 1993; Svalfors 2007).<sup>2</sup> Although constant within a policy, the effects on client populations can vary greatly between policies. In its broadest, most responsive form, a policy can spark movements and create long-lasting citizen engagement through the development of civic skills and feelings of effective citizenship (Campbell 2003b). In other forms, policies can demobilize and discourage individual participation. This literature investigates how social policies interact with their clients by inhibiting or encouraging political participation based on elements of program design. Organizational structure (Mettler and Soss 2004), resource distribution (Verba *et al.* 1995), length and scope of programmatic benefits (Campbell 2003a), and the information such programs provide through interactions (Mettler 2005; Soss 2000) are all factors that can affect the interaction effects, such as political efficacy, and resource effects, such as civic skills.

Policy feedback helps explain the effects of legal aid because accessing legal services both has a benefit component and an institutional interaction component. By seeking out a benefit administered by an institution, individuals accessing legal services have the potential to experience political and civic consequences via mechanisms similar to those articulated by the policy feedback approach. Although hypotheses about the relationship between individual and administration of services vary across policies in the policy feedback literature, civil legal services is unique in that the delivery of legal services can vary greatly by organization, creating a diversity of consequences within a single "policy." Moreover, because civil legal assistance is not a universal or targeted program providing benefits to all those who qualify, this work can help explain the consequences of being denied a service, which is not well understood in the

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<sup>2</sup> The policy feedback approach has similar features to a constitutive theory of law, which states that the law has a reciprocal relationship with society (*see* Ewick and Silbey 1998; Hunt 1993). Here, it is suggested that it is not only the law which impacts everyday life, but interactions with institutions which effectuate those laws.

current literature. These two unique variations in legal services provide an opportunity to advance our understanding of how institutional designs engender civic and political consequences.

### *Conceptualizing Political Efficacy within the Policy Feedback Framework*

Political efficacy has an internal and external dimension (Acock *et al.* 1985). Self-efficacy (internal) can be defined as “the individual’s judgments of their capabilities to organize and execute a course of action required to attain designated types of performances” (Bandura 1986, 391). Internal political efficacy focuses on the individual’s confidence in her capacities to both understand politics and act within the political realm (Bandura 1986; Balch 1974; Converse 1972). One’s judgments about abilities to navigate within the political system need not be positively correlated with expectations of positive outcomes. External efficacy, or an individual’s belief that the political system is responsive to her participation, is more related to trust in government institutions than to trust in self (Converse 1972).

Although earlier work considered indicators of internal and external political efficacy as generally stable across time (Abramson 1983; Iyengar 1980), work in policy feedback finds that interactions with government programs can enhance efficacy (Soss 2000). Internal efficacy is developed by navigating a complex system like Aid to Families with Dependent Children (AFDC), which contrasts with filing a (relatively) straightforward Social Security claim (Campbell 2003a, 198). In Soss’s study of individuals receiving AFDC benefits, individuals receiving aid were more likely than the non-recipient public to feel they were “well qualified to participate in politics” (Soss 2000; Campbell 2003a, 157). The policy feedback literature associates external efficacy with policy learning, or “the lessons programs convey about citizenship and clients’ role in the political system” (Campbell 2003b, 12). If programs are administered in a way that is perceived to be fair and just, citizens will feel externally effective – they will perceive the program and more broadly, the government, as fair – an effect echoed by the procedural fairness literature (Lind *et al.* 1990; DeCremer 2003). Conversely, negative policy learning may occur when program administration is perceived as demeaning or oppressive (Soss 2000).<sup>3</sup>

The American legal system is considered procedurally complex and difficult for the average person to navigate (American Bar Association 2004). Although unrepresented claimants may be able to access the system superficially, those without counsel are at a great comparative disadvantage (Fuller 1961; Galanter 1974). Without an intermediary, one will often fail to effectively utilize legal procedures, often leading to frustration with the system and with self (Engler 2010; Rhode 2004; Adler *et al.* 1983). As such, I predict that accessing the system with the assistance of a legal service professional may positively impact one’s internal and external efficacy, as an individual will gain confidence in their ability to utilize the system and gain

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<sup>3</sup> An individual may experience development on the external dimension and not on the internal dimension, or vice versa.

greater understanding of the procedures therein.<sup>4</sup> Gaining a greater understanding of the procedures may also positively impact one's feelings of procedural fairness, or the feelings that an institution makes decisions in transparent, fair ways (Tyler 1990; Tyler and Rasinski 1991).

If an individual is denied legal services, I predict that she will experience a negative impact to her efficacy.<sup>5</sup> Although there is no study of legal services, nor of a social policy, that studies the impact of service denial directly, some suggest that the inability to retain an attorney due to financial concerns is correlated with negative perceptions of the legal system, including lower evaluations of procedural fairness and court legitimacy (Rottman 2005). Consistent with my view of internal and external efficacy development, individuals denied legal services may feel less confidence in their ability to navigate the legal system and will not gain greater understanding of legal procedures, leading to a negative impact on efficacy. As a corollary, individuals that have more experience with legal services providers and the justice system more generally will have higher levels of internal and external efficacy than those who do not have such experience.

*H1:* Individuals who have had increasing numbers of opportunities to interact with legal services providers will feel more internally and externally effective on a legal dimension than those with fewer or no interactions.

*H1a:* Individuals who have had increasing numbers of opportunities to interact with legal institutions will feel more internally and externally effective on a legal dimension than those with fewer or no interactions.

*H2:* Individuals who receive civil legal services from a legal services office will see an increase in their self-reported internal and external efficacy, and those who are denied will see a decrease in their self-reported internal and external efficacy.

*H3:* Individuals receiving civil legal services will have greater feelings of the procedural fairness of the justice system, compared with those who do not.

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<sup>4</sup> I do expect that individuals seeking out legal services will perceive higher levels of internal efficacy, as they are taking the initiative to seek out the services. But, because this study compares those who do not receive aid to those who do from a group seeking services, I predict the baseline for the study group will be similar on the internal efficacy dimension. In a future iteration of this project, I will control for the ways in which individuals arrived to the office in order to control for recommendations from friends and other social services, which might moderate internal efficacy (indicating less self-motivation).

<sup>5</sup> Most offices that deny a qualifying individual services do not do so without providing brief advice and possibly a referral. The survey will include a question asking individuals not receiving extended services if they received brief advice. If an individual received brief advice, I predict that she will experience positive benefits of a smaller magnitude than if she had received extended services.

Alternatively, lawyers, notably poverty lawyers, may not be effective advocates. Lawyers in legal aid clinics are often perceived by clients as providing “less than zealous advocacy on their behalf” (Sarat 1990, 349-51). Lawyers are also considered oppressive (Alfieri 1987, 661-65), as well as domineering (White 1990, 861). These perceived characteristics of lawyers by clients might discourage the positive efficacy effects an individual would feel as a result of an interaction with a legal aid attorney. Some providers might fit this category, so it is important to consider variation in clients’ perception of the quality of service.<sup>6</sup>

### *Conceptualizing Civic Skills within the Policy Feedback Framework*

Although political efficacy serves as an important predictor of civic and political participation, civic skills and knowledge are also required to effectively participate in public life. Civic skills can be defined as the “organizational and communication skills which allow the use of time and money effectively in a political arena” (Verba *et al.* 1995, 304). Verba and colleagues note that civic skills are a part of an important package of predictors for both civic engagement and political participation (1995). The vast majority of civic skills are learned during primary and secondary education, but there is potential for the development of skills well into adulthood (Brady *et al.* 1995; Verba *et al.* 1995).

Skills can be developed through organizational affiliations and also through practicing skills via interactions with institutions. The policy feedback literature elaborates on the relationship between organizational structure and civic skill learning (Marston 1993). Bruch and colleagues illustrate how programs like Head Start provide participants the opportunity to develop skills to organize and manage meetings effectively (Bruch *et al.* 2009). Hacker suggests that “the resources offered through public policies and programs, especially to less advantaged members of the polity who are most lacking in the factors that lead to participation, are likely to have been highly instrumental for enhancing civic skills and networks, prompting citizens to be more interested in politics” (Hacker *et al.* 2007, 197).

Civil legal assistance can provide opportunities for individuals to practice and learn valuable civic skills like oral and written communication, collaborative decision-making, and critical thinking (Kirlin 2003). Although the provision of legal services might not have a deliberate skill development component, through conversations with legal aid providers, individuals might gain confidence in their ability to communicate with people in positions of authority, write letters or fill out forms related to their legal problems, and gain more experience in working with a partner or group to make decisions. Individuals who are denied legal services will experience no change in their initially reported civic skills, as they will not have the opportunity to develop skills through interactions with a provider. As such, the following hypotheses are derived about civic skill development:

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<sup>6</sup> While not applicable in the analysis of the pre-surveys, this variable will be including in a future iteration pre-post comparison models.

*H4*: Individuals that have not had previous experience with a legal services provider will have fewer opportunities to practice civic skills relevant to the legal environment.

*H4a*: Individuals with more experience with justice institutions will have more opportunities to practice civil skills relevant to the legal environment.

*H5*: Individuals that receive legal services from a legal services provider will have more opportunities to practice civic skills than those who are denied services.

*H5a*: Individuals that receive greater “dosage” of legal services, or interact repeatedly with a legal services provider, will have increasing opportunities to practice skills relevant to the legal environment.

Increasing amounts of the practice of civic skills may also be related to the confidence individuals have in using those skills in legal contexts. Although survey respondents might overestimate their confidence in the exercise of civic skills when they self-report, I predict that individuals with more objective practice of civic skills obtainable in a legal services context will be more confident in the exercise of these skills than those who do not practice skills (see Brady et al. 1995, 275-279). In the civic education context, the practice of skills is related to increased confidence in carrying out those skills in the future (see CIRCLE 2003; Gould 2011). Moreover, the practice of skill acts might also increase an individual’s knowledge about the ways in which she might solve current or future legal problems.

*H6*: Individuals that have had more opportunities to practice civic skills will feel more confident in exercising skills relevant to a legal environment.

*H7*: Individuals that have had more opportunities to practice civic skills will be more likely to articulate solutions to their legal problems than those with less civic skills practice.

Alternatively, scholarly work has suggested that individuals conceive of judicial independence in the literal sense – the judicial branch is disconnected from the political system at large – and as a result, individuals do not see the judicial branch as acting “politically” (Casey 1974; Scheb and Lyons 2000; Gibson *et al* 2003). Because of this, claimants may not associate their interactions with the legal system to broader political and civic consequences. However, the policy feedback literature provides evidence supporting the stretching of experiences to other seemingly unrelated situations. For example, parents participating in the Head Start program were taught civic skills and engaged in collaborative problem solving with case workers in crafting their children’s early schooling goals. These experiences then translated into both higher levels of perceived internal efficacy as well as higher levels of civic skills practice and

confidence in exercising those skills (Soss 2000). Additional work suggests that individuals are cognizant of the politicization of the judicial branch, and might associate actions by the judiciary as political acts, making the association of judicial interactions and political participation more clear (Baird and Gangl 2006).

### ***The Impact of Diverse Legal Service Providers***

Legal aid is delivered by an institutionally diverse array of structures which might impact the likelihood an individual will experience a civic or political benefit. Clinics funded in part by the federal government's Legal Services Corporation (LSC) are a major provider of services. Limits are placed on the ways in which these providers may administer services: they cannot take certain kinds of cases (i.e., school desegregation, selective service, some abortion cases, cases that challenge federal laws), and cannot pursue certain kinds of actions to assist claimants (i.e., class actions, community training and organizing, lobbying and rule making, political activities). This is in part due to the Office of Economic Opportunity-funded (OEO) legal victories.<sup>7</sup> The OEO's successes arguably led to the creation of the more restricted LSC and its limited mandate for funding recipients (Houseman and Perle 2007; NLADA 2011).

Offices that do not receive funding from the LSC are more likely to have control over their service offerings – both in the form of cases accepted and tactics utilized. One variation is the holistic or cooperative model in which the relationship between client and practitioner is more equal and collaborative. More focus is placed on mobilizing and educating clients to become better self-advocates and more integrated into their communities, among other purposes (Bellow 1996). Individuals seeking out legal services may access a variety of offices, and each office potentially delivers legal services in different ways. I postulate that these institutional variations matter, notably the receipt or non-receipt of LSC funding. Organizations that receive funding from the LSC are limited in the kinds of work they can do, and those limitations may lead to a lesser likelihood that an individual would experience the same civic skill development opportunities that she would in an office encouraging client education and collaboration. In institutional arrangements encouraging more comprehensive problem solving efforts, I think there will be a greater likelihood for collaborative effort between lawyer and client, supporting skill building (Minow 1996).

The policy feedback literature posits that the consequences of receiving benefits has constant effects across clients within individual programs, but that those consequences will vary between programs. Because there is variation between legal service providers in both the types of cases they can take and the kinds of services they can provide, it is important to consider how institutional variation operates in policy feedback. Programs targeting the poor can be fundamentally different in the kinds of benefits they provide, the ways those benefits are administered, and the authority relationships formed as a result (Mead 2004). Some means-

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<sup>7</sup> See *Shapiro v. Thompson* (1969), which led to expansive welfare reform, and *Goldberg v. Kelly* (1970), which extended due process rights to those threatened with deprivation of government benefits.

tested programs, like Head Start, promote civic and political benefits by treating recipients as equal partners and through encouraging participation in their child's education (Soss 2000). Additionally, policies designed to encourage the expression of a client's voice through fair procedures can produce positive effects (Soss 2000; Mettler 2005). Others, like AFDC, disempower through the opacity of benefit provision and the paternalistic nature of the caseworker-client relationship (Soss 2000). As a result, institutional designs encouraging education of clients have a significant positive impact on client skills and efficacy.

*H8:* The civic skill and efficacy benefits of the receipt of legal services will be lower in offices that are limited programmatically in their delivery of services, as compared to offices without such limitations on service provision.

## Data and Methods

Answering the research questions at hand required a unique data gathering adventure. In order to analyze the conditions under which legal services provision results in political and civic consequences for those seeking services, I utilized a mixed methods approach, drawing from both pre- and post- surveys and interviews. Because the receipt (or non-receipt) of legal services is the treatment of interest, it is important to capture baseline measurements by surveying individuals before their first substantive interaction with a legal service provider and to track changes in those variables over time – a modified pre-post design. Similar research designs have been implemented in the civic education and learning literature, which often measures the impact of coursework on a student's civic knowledge and skills (Campbell 2006; Galston 2001; Hunter and Brisbin 2000).

Policy feedback scholars have not utilized a pre-post model with a survey instrument, and often employ qualitative studies of those seeking benefits (Soss 2000), large N studies tapping the effects of policies through aggregate change in a population (social security work), or post-interaction qualitative and quantitative methods (Mettler 2002). This design is fundamentally different than those implemented in past works of policy feedback. By tracking a larger number of individuals as they interact with legal aid organizations through surveying and interviewing, we can gain more generalizable evidence of an effect than in a qualitative study and a greater understanding of the mechanisms underlying policy feedback than in the large N, post-interaction studies.

Pre-surveys were administered in several mid-Atlantic legal services offices over a month-long period in Spring 2014, with the goal of ensuring diversity of institutional designs of offices and service delivery.<sup>8</sup> The initial surveys were administered before an individual's first substantive interaction with a legal service provider, that is, while they were waiting in a lobby for their initial contact with a provider. This strategy is used so that I capture an individual's

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<sup>8</sup> In the next section, I go into greater detail about the offices themselves.

baseline opinions on the statements of interest before experiencing an interaction.<sup>9</sup> Each individual seeking civil legal services during an office's designated intake period was approached and asked to be a participant in the research project by either the author or a research assistant. Generally, people agreed to participate in the project, and after completing the informed consent process, each participant took a self-administered survey.<sup>10</sup> At the completion of the survey, the participant was remunerated for their assistance and contact information was retained. A follow-up survey was then mailed respondents at their most convenient address.<sup>11</sup> Additionally, brief in-person interviews occurred during the pre-survey period.

### *Site Selection*

Offices selected to participate in this project were chosen based on both institutional design variation, as well as to allow for the greatest possible sample size of research participants. This study was best suited to a legal services office with lobby-based walk-in intake, or intake occurring in-office during specified times. Legal services offices considered for the project were in the Mid-Atlantic region to allow for the ease of travel of the researcher and efficient use of grant funding. This region contained offices of both institutional types (restricted and non-restricted by federal funding), and offices within these groups both utilized lobby-based walk-in intake procedures.

Each office selected for participation in the project has a high volume walk-in intake period multiple days per week. Two offices currently receive funding from the Legal Services Corporation (LSC), and as such, are limited in practicing certain kinds of casework, advocacy, and community outreach work, and two offices are not subjected to the same kinds of federal funding limitations.<sup>12</sup> Each office is situated within the downtown area of a large urban area, easily accessible by bus and train lines to those individuals seeking out legal services. Each office handles a variety of different kinds of civil cases, and the intake volume is more or less consistent across the offices included in the project. As seen in Table 1, approximately 65% of respondents were surveyed in an office that did not receive federal funding, and approximately 35% in an office that did receive such funding. In total, 199 participants were surveyed for this preliminary iteration of the project.

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<sup>9</sup> As legal services offices move more intake procedures to the telephone and online forms, such a research methodology will be more difficult to utilize. The researcher notes that there are not systematic differences in the socioeconomic or demographic characteristics of individuals seeking initial intake screening via phone or in person.

<sup>10</sup> The combined participation rate for all office visits was 77.7%.

<sup>11</sup> Some respondents had unstable housing situations, and instead of indicating their own address, wrote down the address of a family member, friend, or place of employment.

<sup>12</sup> One office of the latter type is not included in this preliminary study due to time constraints.

**Table 1. Respondent Characteristics**

<i>Respondents by Office Type</i>		<i>Gender</i>	
			<i>%</i>
Type 1 (Federally Funded)	70	Female	59
Type 2 (Not Federally Funded)	129	Male	41
<b>Total Respondents</b>	<b>199</b>	<b>Total Responses</b>	<b>194</b>
<i>Age Bracket of Respondents</i>		<i>Usage of Other Social Services</i>	
	<i>%</i>		<i>%</i>
18-24	7.37	Head Start	3.77
25-34	16.32	TANF	9.4
35-44	19.47	SSI	34
45-54	21.05	Housing Assistance	12
55-64	24.21	Food Stamps/SNAP	46.5
65+	11.58	Unemployment Benefits	2
<b>Total Responses</b>	<b>190</b>	<b>Total Responses</b>	<b>142</b>
<i>Racial Identification</i>		<i>Length of Time the Problem has Bothered Respondent</i>	
	<i>%</i>		<i>%</i>
American Indian/Alaskan Native	1.66	Less than a month	23.46
Asian	1.66	1-6 months	29.61
African American	76.8	Over 6 months - year	13.41
Caucasian	9.94	Over a year	33.52
Mixed Race	9.94		
<b>Total Responses</b>	<b>181</b>	<b>Total Responses</b>	<b>179</b>

Note: Table 1 refers to the respondents in the final administration version of the survey for this preliminary project. Former iterations of the survey were piloted, and are not included here.

### *Individual Respondents*

For the purposes of this project, no formalized selection model for selecting participants is utilized. Instead, with the help of research assistants, each individual seeking out legal services during an office's intake period was asked to participate in the project. Because the number of people accessing legal services intake in a given day was manageable for the project's administration, it was not necessary to randomize the administration of the survey in a given office.<sup>13</sup>

Intake here is defined as an individual's first interaction with a legal services provider in which substantive information about a legal claim is made known. In the walk-in intake context, individuals seeking legal services sign in at a front desk, and are not "triaged" until they are called back to be interviewed by either a paralegal or lawyer. During the intake process, an

<sup>13</sup> In an average intake period (lasting 2.5 to 3 hours), anywhere from 5-35 potential clients were asked to participate in the project.

individual may receive some level of limited advice or services, may be denied services due to the problem not being one solvable by either civil legal means or by the particular office (in this case, a referral to another office may be offered), or the potential client may receive word that further representation will be assigned to their case.

Across the offices, socioeconomic and demographic characteristics of respondents were fairly similar; individuals reporting any particular demographic characteristic or socioeconomic indicator utilized no single office at a statistically significantly higher rate. As seen in Table 1, a majority of respondents in this preliminary study are African American. There are slightly more women in the survey administration than men. Almost half of respondents report using food stamps/SNAP, and approximately 71% of the population reported using at least one social service program. No particular age bracket is overwhelmingly represented in the project.

The follow-up method for this preliminary study is as follows: Each individual participating in the initial administration of the survey also filled out a data sheet with contact information – including a home or preferred mailing address, an email address, preferred phone number(s), and days and times that would be best for follow-up contact. Individuals were then mailed a follow-up survey approximately one and a half weeks after their initial survey was conducted. Two weeks following the initial follow-up administration, individuals that had not returned the survey were called or emailed asking if they had received the survey. If so, they were reminded to return it, and if not, an additional survey was mailed to them.

Although mailing follow-up surveys is considerably more cost effective, there is mixed scholarship about response rates from mailed surveys. Though some studies yield 60-80% response (Hoinville & Jowell 1978), it is not uncommon to have a response rate between 10-30% (Luck, Wales & Taylor 1970; Boyd & Westfall 1972). Research suggests that preliminary notification and reminders for those not submitting surveys in a timely manner is useful in stimulating response rates (Heberlein & Baumgartner 1978; Yu and Cooper 1983). I compensate each person for completing the follow-up survey, a remuneration tactic associated with the retention of underrepresented groups (minority groups, those below the poverty line), which my project almost exclusively targets (Stratford *et al.* 2003; Mack *et al.* 1998; James 1997; Church 1993; Hopkins and Gullikson 1992). For this preliminary study, I received 56 follow-up responses, or the equivalent of 19.3% of the total pre-survey population.<sup>14</sup>

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<sup>14</sup> Many of the main questions of interest for this project exist over multiple versions of the survey instrument. As such, some of the pre-post comparisons are made across all 56 follow-ups, while some are only relevant for a subsection of the respondents. 29 of the 56 responses are from the final survey administration pool (pre-survey N=199), while an additional 27 are from a past iteration of the survey (pre-survey N=90). Pre-survey analysis is conducted only on the final administration version of the pre-survey. Such differences are noted in the analysis.

### *Measuring Efficacy*<sup>15</sup>

I measure efficacy by adapting valid and reliable measures from other studies (Craig *et al.* 1990; Niemi *et al.* 1991; Morrell 2003). In this project, internal and external efficacy are measured through an aggregation of individual responses on measures adapted from the American National Election Studies (ANES) to create 6-point Likert scales (with measures “strongly agree” to “strongly disagree”). Individuals will respond to the questions by indicating their agreement with statements about how responsive courts are to their needs, tapping external efficacy (“The courts care about solving legal problems for people in situations like mine,”) and how confident they feel in their ability to utilize the legal system, tapping internal efficacy (“I have a good understanding of how to fix legal problems using the court system,,” “I have a good understanding of how the courts work,,” “If a friend or family member needs legal help, I can recommend places they can go for help”). The internal efficacy questions have been scaled using principal components factor analysis, a common approach for utilizing multiple Likert scales tapping one construct, with higher values indicating higher levels of internal efficacy (see Craig *et al.* 1990).<sup>16</sup> These statements are constant across the iterations of the survey and changes in response (aggregate change in the Likert scales) are measured between the pre- and post-survey responses of the project’s participants.

### *Measuring Civic Skills*

There is little large-N work done on civic skill development; scholarship generally focuses either on skill development in the civics classroom or qualitative work on those accessing social programs (CIRCLE 2010; Soss 2000). As a result, it is difficult to craft questions that reflect national trends in data gathering. The most common (static) measure of civic skills can be found in Verba and colleagues’ Civic Voluntarism Model (CVM) (1995; see also Brady *et al.* 1995). I have adapted questions from the CVM to best fit into my conception of the civic skills that will be influenced by an individual’s interaction with legal services (see also Kirlin 2003). By asking the questions at repeated iterations and tracking an individual’s increase or decrease in confidence in utilizing the identified civic skills, as well as the number of times the individual has the opportunity to practice relevant civic skills, I tap development of skills.<sup>17</sup>

I draw on both Verba and colleagues’ definitions of civic skills and Kirlin’s work, which more broadly defines a universe of civic skills, to develop my measures of civic skill development. Although individuals, especially within marginalized communities, tend to over-report socially desirable behaviors, I include measures of confidence in utilizing civic skills related to the legal environment. Individuals were asked to report their confidence in exercising oral communication skills, critical thinking skills, and collaborative problem solving skills in a

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<sup>15</sup> Survey questions related to the main dependent variables of interest are also listed in the Appendix.

<sup>16</sup> Scale reliability coefficient = .814

<sup>17</sup> Civic skills statements are listed in the Appendix.

legal context. I created a scale out of these skill act confidence measures using principal components factor analysis, with higher values indicating greater levels of confidence.<sup>18</sup>

I also utilize Verba and colleagues' measure of civic skill attainment as the amount of practice an individual has in performing certain civic skills, which are traditionally conceived of as being practiced in employment, church, and political group settings (Verba et al. 1995; Brady et al. 1995). Here, I adapt Verba and colleagues' notion of practicing civic skills to the legal context. I derive a series of civic skills that could plausibly be practiced in the legal context, drawing from Kirlin's conception of civic skills as defined as written and oral communication, collaborative problem solving, and critical thinking (Kirlin 2003; 2006). The pre-survey asks if the respondent has practiced any of these civic skills in the legal context in the past 12 months, and the post survey asks if the respondent had the opportunity to practice any of these skills in their most recent interactions with a legal services provider. Greater values of the measure of civic skills practice variable represent greater numbers of civic skill practicing activities partaken in the past 12 months, as well as in the respondent's most recent legal services interaction. The post survey also includes control variables for the client's perceptions of the lawyer's encouragement of the practice of these skills; as if the lawyer (or institutional structure of the delivery of legal services in a particular office) disallows the practice of civic skills, fewer opportunities to practice skills will be available.<sup>19</sup>

#### *Knowledge and Other Relevant Measures*

In the civic education literature, civic skills development and civic knowledge are often correlated; in situations where civic skills are learned, knowledge of concepts related to civic life are also established (Neimi and Junn 1998; see generally Meirick and Wackman 2004; Vercellotti and Matto 2010). Typically, civic knowledge is measured as a response to a factual question, like "Who represents your district in Congress?" or "Who is the Deputy Director of your city's Parks and Recreation Department?" Here, I extend this logic by asking respondents if they could articulate an additional solution to their legal problem if free legal services did not exist. The variable is binary; for those who say they do not know of an additional solution or steps to solve their problem, the measure is coded as 0. For those who can articulate what steps they would take, the measure is coded as 1.

Participants were also asked about their perceptions of procedural fairness of the justice system. Feelings of procedural fairness are correlated with external efficacy (DeCremer 2003, Soss 2000). I posit that procedural fairness, or feelings of fair treatment by an institution, will be enhanced by the ability to more successfully navigate the complexities of the legal system with the help of a legal service provider.<sup>20</sup> Procedural fairness statements were evaluated by

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<sup>18</sup> Scale reliability coefficient = .91

<sup>19</sup> Analysis of this relationship will be included in a future draft of this paper.

<sup>20</sup> Some lawyers may discourage these positive efficacy effects, consistent with the alternative explanation forwarded in the efficacy section. The empirical modeling strategy will attempt to

participants using 6-point Likert scales (with measures “strongly agree” to “strongly disagree”), derived from the National Center for State Courts’ assessment of California courts (Rottman 2005). I derived a scale out of these procedural fairness measures using principal components factor analysis, with higher values indicating greater feelings of procedural fairness.<sup>21</sup>

### *Control Variables*

The control variables in the pre-survey models vary by model, according to the traditional explanations in the prevailing literatures on civic skills and internal and external efficacy. Prior experience in a civil or criminal case might influence the skill-building opportunities an individual has had in their lives, as well as their perceptions of internal and external efficacy. These variables are binary, with 1 indicating past experience in a civil or criminal case, and 0 indicating no experience. Confidence in the usage of civic skills may also be related to socioeconomic and demographic characteristics. As such, control variables are included to account for education level (higher values indicate greater levels of educational attainment), minority status (a binary variable indicating a respondent’s self-identified racial background), gender (a binary variable with 1 indicating a female), and income level (a binary variable with 1 indicating an income under \$10,000/year). Similar controls are added in the internal and external efficacy models. The external efficacy model also includes a control variable tapping an individual’s perceptions of procedural fairness of civil courts, which was described in the previous section.

### *Modeling Strategies*

For the purposes of this project, I analyze both the pre-survey data and the differences between the pre- and post-survey responses for participants returning post-surveys. Analysis of the pre-survey data will be done using simple multiple regression and logit methods, utilizing robust standard errors and adjusted R-squared values when appropriate. Individuals included in the initial analysis of the pre-survey data completed a survey before going through the intake process at a legal services office, affording baseline measures of the variables of interest without the influence of any interactions with legal services professionals, through the intake process or otherwise.

Pre-post survey comparisons will be analyzed in this iteration of the project using simple difference in means tests of the dependent variables of interest. Because respondents were not selected to receive services based on their pre-survey levels of internal or external efficacy, or their prior level of skills practice in the legal environment, comparisons can be made across groups for the relative differences in the effect of legal services on these measures of interest. In essence, the treatment is not systematically related to the dependent variables of interest in this project. As such, it is statistically unproblematic to compare the effect of the receipt of services

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control for differences in experiences by asking respondents about their perceptions of their individual providers. This analysis will be added in a future iteration of this paper.

<sup>21</sup> Scale reliability coefficient = .90

on these measures in a relatively simple way. However, in this preliminary analysis, the number of post-survey responses is low. It is important to keep this in mind when considering the results and the generalizability of the findings to a broader pool of individuals seeking out legal services.

## **Results; Pre-Survey Comparisons and Analysis**

The analysis of the pre-survey results illustrates encouraging trends in the relationship between practicing skills in the legal environment, differences in perceptions of internal and external efficacy, knowledge of solutions to legal problems, and confidence in the exercise of skills. In order to motivate the analysis of the pre- and post-survey differences, it is important to demonstrate that experience in the legal environment encourages the practice and development of civic skills relevant to civic life, and that those skills are connected to confidence in the exercise of skills and the development of relevant legal knowledge (*H4, H4a, H6, H7*). Moreover, the pre-survey analysis will demonstrate that experiences with legal aid have a positive relationship to feelings of external and internal efficacy (*H1, H1a*).

### *Opportunities to Practice Civic Skills*

First, it is important to assess if there is a relationship between practicing civic skills that are obtainable through interactions with legal services with an individual's experiences (or lack thereof) with legal services providers, as well as legal institutions more broadly defined. To assess the potential opportunities to practice civic skills as that practice relates to the legal environment, I used a generalized linear model with a Poisson (count) model link that seeks to demonstrate the relationship between skills practicing opportunities and interactions with legal institutions. Out of the six civic skill practicing opportunities measured in this project, 18% of the population reported not practicing any civic skills in the legal context over the past 12 months, with 7.5% of the population reporting practicing all six. The mean number of skills practiced was 2.76, with a standard deviation of 1.94 skills practiced. As illustrated in Table 2, individuals that have any past experience as parties in civil cases are statistically significantly more likely to have practiced a greater number of civic skills related to the legal environment in the past 12 months than those without such experiences.<sup>22</sup>

Even more striking is that, even controlling for past criminal and civil case experience, individuals that had been to a legal aid office were statistically significantly more likely to have had practiced civic skills related to the legal environment over the last 12 months than those who had never been to a legal aid office. This result motivates greater understanding of the relationship between the “deliverables” of civic skill development and the practice of civic skills in the legal environment. In essence, what are the consequences of practicing skills that are obtainable in the legal services context?

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<sup>22</sup> Past experience in a criminal case is nearly significant at the 0.1 level, one tailed test.

**Table 2. Skill Building Opportunities in the Legal Environment; Poisson Model**

	Expected Sign	Coeff.
Prior Civil Legal Aid Experience	+	0.429*** (.086)
Party in Civil Case	+	0.255*** (.102)
Party in Criminal Case	+	0.175 (.109)
Constant		0.738*** (.066)
Log Likelihood		-396.07
Residual dF		193
N		197

Note: Generalized Linear Model with Poisson Link.  $p < .01$  \*\*\*,  $p < .05$  \*\*,  $p < .1$  \*, one tailed test.

Table 3 demonstrates that confidence in the usage of civic skills related to the legal environment is not necessarily directly attributable to past experience in a legal aid office.<sup>23</sup> This is not totally surprising, given findings related to the likelihood of marginalized groups (like those accessing legal services) to over-report on self-reported confidence measures (Verba et al. 1995; Brady et al. 1995). No measure of legal experience is statistically significantly related to higher levels of confidence in the usage of civic skills in the legal context, but two control variables are significant. First, individuals reporting higher levels of educational achievement report higher levels of confidence in utilizing skills related to the legal context, and second, individuals of minority background report statistically significantly lower levels of confidence in civil skill usage.

<sup>23</sup> The mean score for the pre-survey population for the confidence scale was .161, with a standard deviation of 1.

**Table 3. Confidence in Legal Skill Usage**

	Expected Sign	Coeff.
No Legal Aid Experience	-	-0.241 (.161)
Party in Civil Case	+	0.061 (.206)
Party in Criminal Case	-	-0.026 (.214)
Education Level	+	0.278** (.122)
Minority	-	-0.407** (.168)
Low-Income (under \$10,000)	-	0.002 (.156)
Constant		-0.339 (.358)
F		2.32**
R <sup>2</sup>		0.39
N		165

Note: OLS model with robust standard errors reported.  $p < .01$  \*\*\*,  $p < .05$  \*\*,  $p < .1$  \*; one tailed test.

Turning to the relationship between knowledge of how to solve legal problems and past experiences practicing legal skills, Table 4 illustrates an initial examination of the effect of civic skills practice and civil case experience on a potential legal aid client's ability to articulate a solution to their legal problem. In the pre-survey, potential clients were asked if they could list or name any steps to solve their current legal problem if free legal services did not exist. This question, unlike those analyzed in the previous tables, is open ended. Almost 59% of the surveyed population responded that they did not know an alternative way to solve their problem, or that they were not sure how to go about solving their problem without the assistance of a free legal services provider.

In this initial analysis, there is a statistically significant relationship between prior skill usage in the legal context and the ability to articulate an additional solution to a legal problem – individuals that have practiced any civic skills related to the legal environment are more likely to be able to articulate a solution than those who have not practiced any skills in the past 12 months. This relationship holds even when controlling for other kinds of legal interactions that could inform an individual about solutions to legal problems. Individuals reporting past experience in a civil case are also significantly less likely to report that they could not articulate a

solution to a legal problem. Past participation in a criminal case and education level are both not significant in the model, but the signs are in the expected direction.

**Table 4. Knowledge of Solutions to Current Legal Problem; Logit Model**

	Expected Sign	Coeff.
Prior Legal Skill Experience (Binary, Past 12 Months)	-	-0.799** (.445)
Party in Civil Case	-	-0.942*** (.389)
Party in Criminal Case	-	-0.010 (.402)
Education Level	-	-0.181 (.202)
Constant		1.696*** (.548)
Wald Chi <sup>2</sup>		12.42***
Pseudo R <sup>2</sup>		0.05
N		193

Note: Logit model with robust standard errors reported. Negative values indicate decrease in likelihood of reporting “don’t know” or “unsure”; p<.01 \*\*\*, p<.05 \*\*, p<.1\*, one tailed test.

#### *Variation in Efficacy by Legal Experience*

Using only the pre-survey data for this analysis, I then compared individuals’ reported efficacy levels by their prior experience with legal services. On the whole, individuals without prior experience with a legal services provider self-reported lower levels of efficacy and knowledge than those with prior experience.<sup>24</sup> This result comports with the general finding in policy feedback research, which reasons that experiences in navigating institutions is related to higher levels of internal efficacy, and higher levels of external efficacy are related to fair and transparent usage of procedures and benefits by institutions or policies. I discuss these findings in turn.

As seen in Table 5 it is clear that individuals without past experience in a legal aid office are statistically significantly less likely to feel higher levels of internal efficacy.<sup>25</sup> This means that individuals that have not had the opportunity to engage with the legal system with the assistance

<sup>24</sup> It is not uncommon for individuals to overestimate on these self-reported measures (Verba et al. 1995; Brady et al. 1995). But, here it is most interesting that individuals with fewer legal experiences are systematically under-reporting on these measures, indicating a difference between those with previous experiences and those without.

<sup>25</sup> The mean score for the pre-survey population for the internal efficacy scale was .247, with a standard deviation of 1.

of legal aid are less likely to feel confident in their own understanding of how to fix legal problems or to solve problems using the civil justice system, as well as less likely to feel comfortable recommending places friends and family could go to solve their legal problems. This effect is significant even when controlling for other factors that might increase one's feelings of internal efficacy, like past experience in a civil case. The model also controls for more traditional factors related to feelings of internal efficacy, which perform in the model as expected. Individuals obtaining higher levels of educational achievement report higher levels of internal efficacy. Also consistent with this scholarship is the finding that minority status is related to lower levels of perceived efficacy, as compared to the internal efficacy of whites.<sup>26</sup>

**Table 5. Internal Efficacy and the Legal Environment**

	Expected Sign	Coeff.
No Legal Aid Experience	-	-0.299** (.159)
Party in Civil Case	+	0.462** (.212)
Female	-	-0.117 (.039)
Education Level	+	0.277** (.116)
Minority	-	-0.390*** (.153)
Low-Income (under \$10,000)	-	0.083 (.147)
Constant		-0.275 (.349)
F		4.73***
R <sup>2</sup>		0.132
N		158

Note: OLS model with robust standard errors reported. p<.01 \*\*\*, p<.05 \*\*, p<.1\*, one tailed test

Table 6 reports the results from the external efficacy model of the pre-survey results.<sup>27</sup> Again, it is clear that individuals with no prior legal aid experience report lower levels of

<sup>26</sup> The model in Table 5 has also been run controlling for feelings of external efficacy; the results are consistent across both models.

<sup>27</sup> The mean score for the pre-survey population for the external efficacy measure was 3.77, with a standard deviation of 1.43.

external efficacy than those with prior experience. This means that individuals that have not had the opportunity engage with the legal system in the legal aid context report lower levels of agreement with the courts caring about solving problems for people in legal situations similar to their own. Variation in feelings of external efficacy, or the court's likelihood of responsiveness to solving problems of people in similar situations, may also vary based on the individual's past court experience. Prior involvement in a civil case has no statistically significant relationship with feelings of external efficacy, but individuals that have prior experience participating in a criminal case are statistically significantly less likely to perceive the courts as responsive to the needs of people in similar situations to theirs. Moreover, there is a strong positive relationship between feeling that the courts are procedurally fair with the external efficacy measure. This comports with the policy feedback literature, which states that if a policy's benefits are distributed in a fair and transparent manner, individuals will perceive institutions are more responsive to their needs. In this case, individuals perceiving the courts are procedurally fair report higher levels of external efficacy. In general, variables tapping socioeconomic and demographic characteristics of those in the sample have no effect on the respondents' feelings of external efficacy.

**Table 6. External Efficacy and the Legal Environment**

	Expected Sign	Coeff.
No Legal Aid Experience	-	-0.358** (.219)
Party in Civil Case	+	0.108 (.206)
Party in Criminal Case	-	-0.514** (.307)
Procedural Fairness Scale	+	0.828*** (.103)
Female	-	-0.041 (.201)
Education Level	+	0.139 (.135)
Minority	-	0.048 (.233)
Low-Income (under \$10,000)	-	-0.021 (.206)
Constant		3.529*** (.414)
F		12.04***
R <sup>2</sup>		0.39
N		144

Note: OLS model with robust standard errors reported.  $p < .01$  \*\*\*,  $p < .05$  \*\*,  $p < .1$ , one-tailed test.

### Motivations for Analysis of Pre- and Post-Survey Differences

The pre-survey comparisons across those seeking out legal services provide us with some interesting insights about the population that accesses services. There are significant differences between those who have accessed legal services before in terms of feeling internally or externally effective vis-à-vis the civil justice system, and those who have been to legal services before were more likely to have practiced more civic skills related to the legal environment. Further, additional practice of skills was positively related to a prospective client's ability to articulate alternative ways to solve their legal problem if free legal services were not available. But, the pre-survey data does not allow for the investigation of a single legal aid "treatment" – that is, the pre-survey instrument alone cannot allow for comparisons across different kinds of legal aid exposures for this group of respondents. What effect does accessing services have on

the pre-survey measures of efficacy and civic skill development? The following section will explore these topics.

### **Preliminary Results; Pre- and Post-Survey Comparisons and Analysis**

Although the pre-survey analysis demonstrated that individuals with past legal services experiences felt more internally and externally efficacious and had more opportunities to practice civic skills relevant to the legal environment, it is unclear what the effect of interacting with legal services is when considering the effect of an isolated encounter. As such, it is important to explore the differences in respondent's attitudes and behaviors both across different categories in the post-survey, as well as between the pre- and post-survey for individual respondents. The pre-post analysis illustrates notable patterns in the relationship between perceptions of internal and external efficacy as those attitudes relate to the receipt or denial of services (*H2*). The practice of civic skills also varies across the receipt or denial of services (*H5*).<sup>28</sup> Additionally, the practice of skills and the overall change in perceived efficacy varies slightly based on the delivery method of the office itself (*H8*). I explore these results here and discuss the limitations of this preliminary analysis.<sup>29</sup>

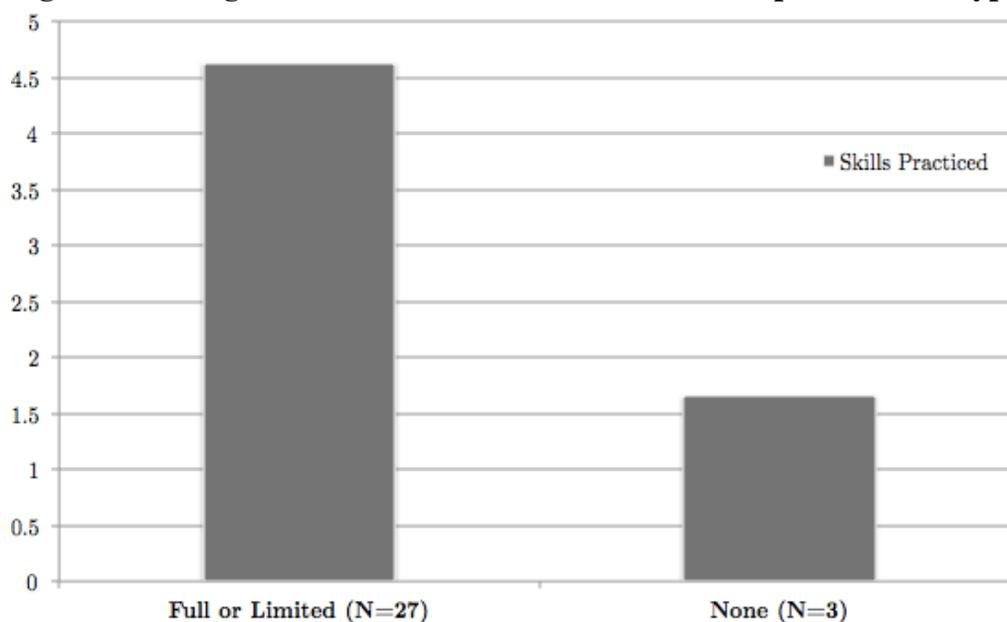
#### *Variation in Skill Practice by Legal Services Experience*

In the pre-post analysis, I first analyzed the difference in the number of civic skills a survey respondent practiced as a result of their most proximate legal aid experience. On average, individuals reporting the receipt of full or limited legal services practiced on average 3 more civic skills than those respondents who did not receive legal services. This result comports with hypothesis 5, which states that individuals receiving legal services will practice more civic skills related to the legal environment than those who are denied services. Because the sample size here is very low (only 3 people in this sample are in the "no services" category), it would be imprudent to make generalizable claims based on this evidence. But, the results in Figure 1 are encouraging and are demonstrative of the hypothesized pattern, and the difference in the mean number of civic skills practiced by each of these groups is statistically significant ( $t=-1.78$ ,  $p=0.04$ ).

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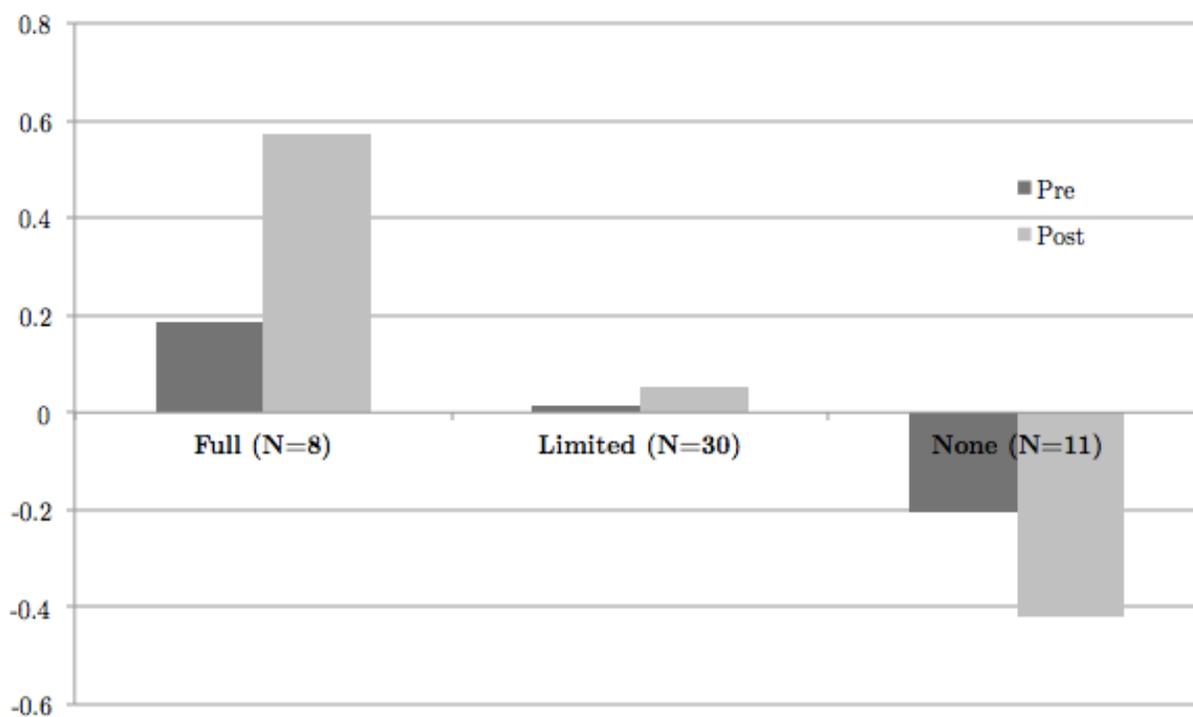
<sup>28</sup> A future version of this paper will include Hypothesis H5a, which predicts that additional interactions with legal services has an additive effect on the opportunities to practice civic skills relevant to the legal environment.

<sup>29</sup> I note that the demographic and socioeconomic characteristics of the follow-up group are statistically similar to those of the full pre-survey pool. Moreover, post-survey respondents do not vary significantly from the full pre-survey pool on the pre-survey measures of the dependent variables of interest.

**Figure 1. Average Number of Skills Practiced Across Representation Type**

Confidence in the utilization of civic skills also varies based on the receipt or non-receipt of representation, as seen in Figure 2. Individuals receiving full representation from a legal services office see a considerable jump in their average confidence in using civic skills in the legal context, and individuals that do not receive services see a decline in their confidence. For the group receiving limited services, no noticeable change in confidence in using civic skills is detectable. Differences in reported confidence in utilizing civic skills in a legal context across groups in the pre-survey are not statistically significant, and the change in confidence within groups is also not significant for any group. There is a significant difference in the post-survey confidence levels between the full representation group and the no representation group, indicating that the receipt (non-receipt) of legal aid services is related to higher (lower) reported levels of confidence in exercising civic skills related to the legal context. ( $t=-2.59$ ,  $p=0.01$ ).

**Figure 2. Pre- and Post-Survey Measures in Confidence in Skill Usage Across Representation Type**



\*Pre-survey differences across representation types are not significantly different.

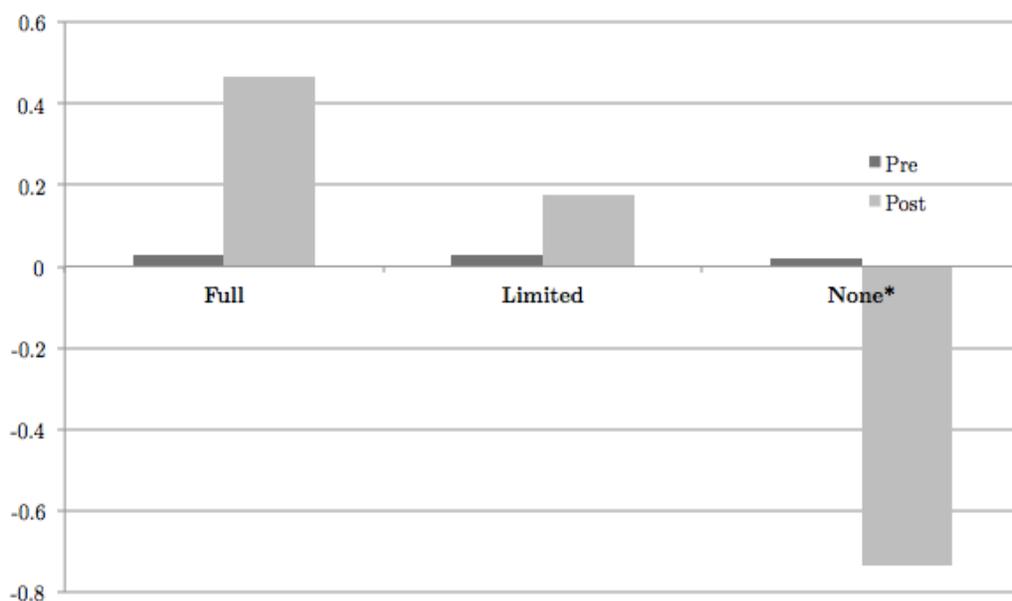
Results for the civic skills measures in the pre-post analysis are encouraging. Because the administration of the follow-up surveys did not include self-reporting measures of civic skills practice across both versions, a considerably smaller N is present in the skills practicing figure. Despite this limited sample, this result encourages further study of the variation in the number of civic skills practiced by those receiving and not receiving legal services. Additionally, all follow-up surveys submitted were utilized in the pre-post analysis of confidence in the usage of civic skills in the legal context. Although confidence in skill usage was not significantly attributed to prior civic skills practice in the pre-survey analysis, it is empirically promising to see the significant relationship between the post-surveyed groups of those receiving full representation and those not receiving representation. It is also important to remember that because the post-survey pool is so small, that one should be careful about generalizing these results to the broader population of those seeking legal services, but these results are encouraging for future data collection and analysis.

#### *Variation in Internal and External Efficacy by Legal Services Experience*

Next, I analyzed the differences in respondents' self-reported internal and external efficacy scores across the survey administrations. Figure 3 introduces the results of the pre-post analysis for the internal efficacy scales. The pattern demonstrated in Figure 3 is quite striking –

individuals reporting the receipt of full or limited legal services saw increases in their perceived internal efficacy in the legal context, and individuals reporting that they had not received legal services saw their internal efficacy score decrease significantly. For the group that is denied services, the change in internal efficacy perception is statistically significant ( $t=2.46, p=.02$ ). There is a significant difference in the post-survey internal efficacy levels between the full representation group and the no representation group, indicating that the receipt (non-receipt) of legal aid services is related to higher (lower) levels of internal efficacy in the legal context ( $t=-2.21, p=.02$ ). Individuals that receive legal services report higher levels of agreement with statements related to their capacity to navigate the court system and solve their legal problems than those who do not receive services. Again, because the pool of responses is small for these analyses, it is important to be careful about making generalizations to a broader population of those seeking legal services.

**Figure 3. Pre- and Post- Survey Measures of Perceived Internal Efficacy Across Representation Type**

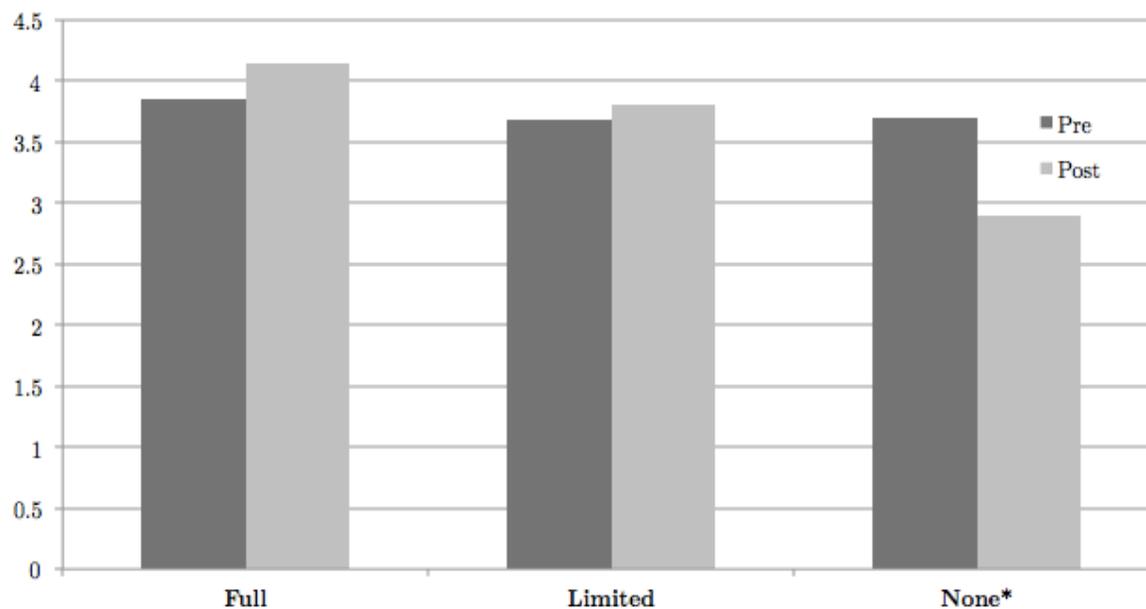


\* Within group difference is statistically significant at the .05 level.

External efficacy gains are also seen amongst the full and limited representation groups, and a decrease in reported external efficacy is detected in the group of respondents receiving no legal services. Figure 4 introduces the results of the pre-post analysis for the external efficacy measure, which asks if respondents believe that the civil courts are responsive to the needs of claimants with problems like theirs. The pattern demonstrated in Figure 4 demonstrates that individuals reporting the receipt of full or limited legal services saw slight increases in their mean perceived internal efficacy in the legal context, and individuals reporting that they had not

received legal services saw their mean external efficacy score decrease significantly ( $t=2.29$ ,  $p=.03$ ). For the group that is denied services, the change in reported external efficacy is statistically significant. There is also a significant difference in the post-survey internal efficacy levels between the full representation group and the no representation group, indicating that the receipt (non-receipt) of legal aid services is related to higher (lower) levels of external efficacy in the legal context ( $t=-2.09$ ,  $p=.03$ ). Individuals that receive legal services report higher levels of agreement that the courts care about solving problems for people in similar legal situations.

**Figure 4. Pre- and Post-Survey Measures of Perceived External Efficacy Across Representation Type**

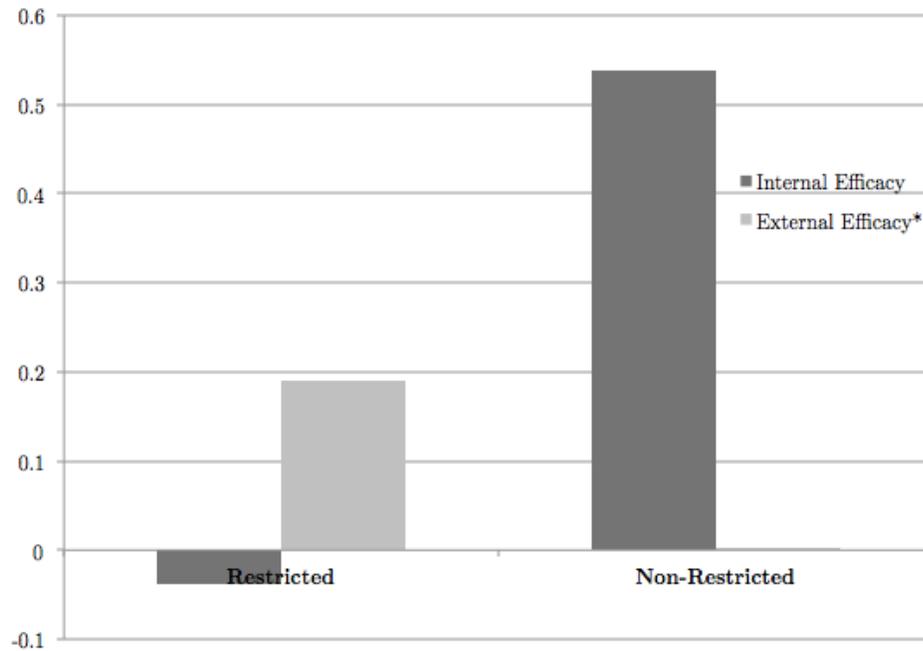


\* Within group difference is statistically significant at the .05 level.

#### *Variation in Efficacy and Skills Practicing Opportunities by Legal Services Office Type*

Next I discuss the results relevant to Hypothesis 8, which predicts that individuals accessing offices with different service delivery restrictions will experience different efficacy and skill effects as they relate to the delivery of the services themselves. Figure 5 illustrates the differences in internal and external efficacy across restricted and non-restricted office types. As demonstrated, there is no statistically significant difference for individuals receiving full or limited representation on respondents' perceived external efficacy. For those accessing offices without federal restrictions on service delivery, there was no change at all in the mean reported external efficacy scores. There is a significant difference in the internal efficacy scores across office types ( $t=-2.38$ ,  $p=.01$ ). Individuals receiving services from offices with fewer restrictions on delivery reported significantly higher levels of internal efficacy in the post-survey than those who accessed offices with restrictions on delivery. Perhaps in these non-restricted offices, additional benefits are conferred that result in an individual feeling more internally efficacious in the legal context.

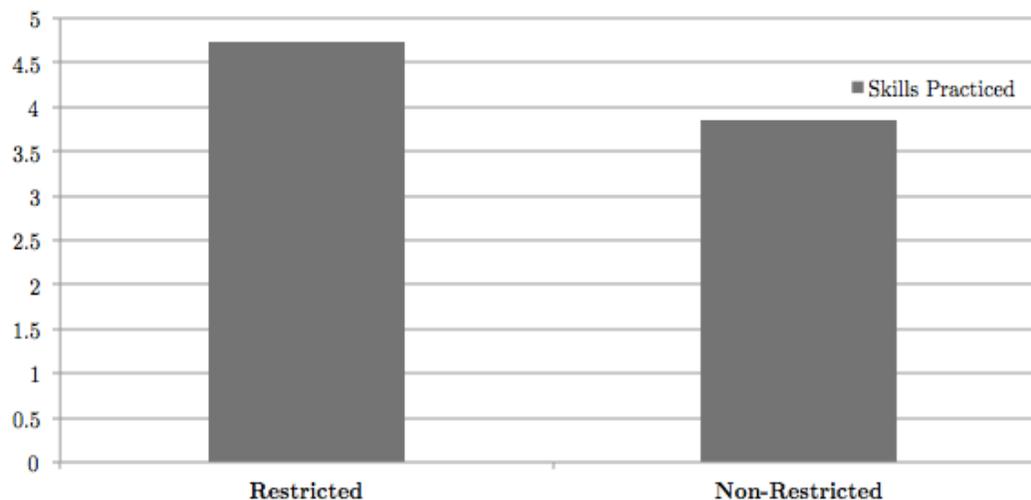
**Figure 5. Differences in Internal and External Efficacy Change by Office Type for Limited or Full Representation**



\* There is no change in the mean external efficacy score for individuals accessing the non-restricted offices; the difference in the external efficacy scores across offices is not statistically significant.

There is also no statistically significant difference in the number of skills a respondent receiving full or limited services has the opportunity to practice when comparing these opportunities across office types. Although there is approximately a 1 skill practice difference across offices for those receiving any level of services, this difference is not significant. This result may demonstrate that for individuals receiving services from legal services offices, the opportunities present to practice civic skills relevant to the legal environment are constant across service delivery types, regardless of the restrictions some offices may have on the kinds of advocacy work and community outreach activities they may undertake.

**Figure 6. Average Number of Skills Practiced by Office Type for Limited or Full Representation**



## Discussion and Conclusion

The preliminary results demonstrate interesting patterns amongst individuals seeking out legal services, but further investigation is needed. Below, I provide an overview of the results of this initial analysis, the theoretical and empirical consequences of this line of research, a brief discussion of implications for the practitioner community, and suggestions for future research.

In the pre-survey analysis, I demonstrated that individuals seeking out legal services do not come to an office with uniform levels of civic skill practice, efficacy, or confidence in interacting with legal institutions. These individuals vary based not only on some of the more traditional predictors of skills practice or efficacy, but also on past legal experiences. Individuals with a greater breadth of experiences in the civil legal context report higher levels of internal efficacy than those who have fewer experiences. This group also has had more opportunities to practice the civic skills relevant to the legal environment. Respondents who had prior experience practicing skills were better able to articulate an alternative solution to solving their legal problem, as opposed to those who had no proximate skills practicing experiences. These pre-survey results motivated the analysis of the effect of an isolated experience with a legal services office.

In the pre-post analysis, I found that variation in the type of services received by a respondent appears to have a measurable effect on a respondent's sense of internal or external efficacy related to the legal context, but further testing is needed in order to make generalizable claims to a population seeking legal services. Individuals receiving full or limited legal services reported higher levels of internal and external efficacy after the receipt of services, and individuals not receiving services reported significantly lower levels of both internal and external

efficacy. Although the level of change between individuals within the full and limited representation groups was not statistically significant, the difference in the post-survey measures of reported external and internal efficacy was significant across the full and no representation groups. Because the pre-survey scores were not statistically different across these groups, it is not unreasonable to suspect that there is a relationship between the receipt or denial of services on these individuals' levels of efficacy across the full and non-represented groups for this particular sample.

Respondents also reported higher levels of civic skills practice when receiving services of any kind, as opposed to respondents that did not receive legal services from a provider in this sample. Moreover, individuals that received either full or limited representation reported higher levels of confidence in exercising civic skills relevant to the legal environment, as compared to those who were denied services. The receipt of legal services is significantly related to higher levels of confidence and skills practiced across groups in the post-survey results for respondents in this sample.

Before exploring the potential implications of this work, it is important that I mention the limitations of these data and the results of this preliminary study. There is still much to be done in order to uncover the relationship between the receipt or non-receipt of services and respondents' perceptions of their internal or external efficacy, as well as of their civic skill growth and the confidence in exercising those skills. Because the initial N size in the pre-survey is limited, and as such, the N size in the post-survey even more so, significant generalizations about the effect of legal services on these outcome variables of interest should not be made without consideration of the size of the survey sample studied. I fully intend to continue the data gathering process both longitudinally for those already participating in the project, and cross-sectionally by adding respondents to the project through added initial survey administrations.

Setting the data limitations aside, what can these initial results tell us about the effect of receiving (or not receiving) legal services, and how does this effect confirm or disconfirm what we know about the policy feedback model of institutional interactions? The legal services office appears to be a site of interactions with democratic (legal) institutions – interactions in which individuals are conferred benefits that influence their beliefs about legal institutions and of their efficacy in navigating legal institutions. Further, these interactions allow for the practice of skills that are relevant to building civic capacity amongst those with considerably fewer opportunities to practice skills, as compared to those traditionally not qualifying for legal services.<sup>30</sup>

Where this study diverges from the policy feedback literature is in its consideration of both the programmatic variation in the delivery of benefits, as well as the effect of the denial of services. Services may not be administered in the same way across offices, and the delivery of services may be limited by the constraints of funding sources. The provision of legal services demonstrates that the ways in which programs vary in their delivery of a “policy” effects the benefits conferred upon those receiving services. Moreover, legal services are not a universal service provided to all those qualifying. Dramatic depression of efficacy and confidence in the

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<sup>30</sup> i.e., those of higher socioeconomic status.

use of skills relevant to the legal environment is seen amongst the respondents that did not receive legal services, as compared to those who received full services.<sup>31</sup> Additionally, those individuals who were denied services did not have as many opportunities to practice civic skills as those who received full or limited services.

Empirically, this paper begins to demonstrate the utility of a pre-post design for the study of the effect of the administration of policies, be they means-tested or otherwise, on the populations that seek out those services. By capturing baseline measures before individuals interact with an institution, researchers are better situated to detect the effects of the receipt or non-receipt of programmatic benefits at the individual level. Further work in this area may include a whole host of outcome variables related to the theoretical interests of both policy feedback and institutional design scholars.

Although this project is only in its initial stage of development, important implications exist for the practitioner community as well. A notable finding is related to the non-receipt of legal services – individuals that are denied services report lower levels of internal and external efficacy, as well as of skills practicing. Individuals that did not receive services were no different, on average, in the pre-survey measures of the variables of interest than those who received services, yet they reported dramatically lower levels of internal and external efficacy in the legal context, and lower numbers of civic skills practiced. For this population, it may be important for practitioners to consider ways in which to reframe the non-receipt of services – regardless of the receipt of services, individuals may still gain knowledge and information about the legal nature of their claim or the additional options they may have to solve their problem. Further study is needed to better understand the subjective or objective nature of the non-receipt of legal services and its effect on those who do not receive limited or full representation or assistance.

Many opportunities exist to broaden the scope of this research. As mentioned in the introduction, most work on the provision of legal services focuses on the economic benefits or traditionally conceived outcomes (i.e., winning or losing) of legal services. This project instead asks, what additional benefits does an individual gain as a result of receiving services? There are, of course, many other theoretically-motivated “benefits” that could be studied in this context – drawing from the civic education, policy feedback, and efficacy literatures. Future analysis will also include consideration of additional variables contained within the survey instrument, including measuring the change in respondents’ levels of stress and uncertainty surrounding their legal problem.

Relevant to this particular project, the data collection is yet to be finished. Further analysis of pre-survey and post-survey data is still being conducted, and future iterations of the survey will be put in to the field to allow for more stringent statistical testing of results. Questions also remain regarding the effect of additional interactions with a legal services

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<sup>31</sup> This relationship is also present when comparing the pre- and post-values of the aforementioned measures for the group that did not receive services (i.e., the difference within the group is statistically significant).

provider over the course of a case. Does each additional interaction have an additive effect for the development of skills and efficacy? I am also interested in likelihood that individuals will follow-up on tasks assigned to them by legal services providers, which could be considered as a measurable “outcome” of the practice of civic skills in the legal services office. Also noticeably missing from this preliminary study is analysis of any qualitative sort – open-ended survey questions and interview data are still being analyzed for inclusion in this project.

## APPENDIX

1. *Internal Legal Efficacy* (1-6 Likert Scales, strongly disagree to strongly agree)
  - a. I have a good understanding of how to fix legal problems using the court system
  - b. I have a good understanding of how the courts work
  - c. If a friend or family member needs legal help, I can recommend places they can go for help
  
2. *External Legal Efficacy* (1-6 Likert Scales, strongly disagree to strongly agree)
  - a. The courts care about solving legal problems for people in situations like mine
  
3. *Civic Skills* (binary response)  
*In the past 12 months...*
  - a. Have you spoken to a lawyer about a legal problem? / Have you had an open discussion with a lawyer about a legal problem?
  - b. Have you asked a question when a lawyer said something you did not understand?
  - c. Have you understood the advice of a lawyer?
  - d. Have you filled out paperwork related to a legal problem **without** help from a lawyer or other professional?
  - e. Have you written a letter that would help you solve a legal problem?
  - f. Have you found resources (on the internet, at the library, at a court) related to a legal problem?
  
4. *Confidence in Use of Civic Skills* (1-6 Likert Scales, strongly disagree to strongly agree)
  - a. I feel confident speaking clearly to a lawyer or other professional about my legal problems
  - b. I feel confident asking a question when a lawyer says something I don't understand
  - c. I feel confident I can fill out paperwork related to my legal problem **without** the help of a lawyer or other professional
  - d. I feel confident I can have an open discussion with a lawyer or other professional about my legal problem
  - e. I feel confident I can find resources that will help me explain my problem to a lawyer or other professional
  
5. *Legal Knowledge* (open ended response)
  - a. If free legal help didn't exist, what steps would you take to solve your problem?
  
6. *Procedural Fairness* (1-6 Likert Scales, strongly disagree to strongly agree)
  - a. The courts are fair in their case decisions
  - b. The courts listen carefully to what people have to say
  - c. Judges are honest
  - d. Courts protect the rights of citizens
  - e. The courts guarantee everyone a fair trial

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## THE ROLE OF LEGAL EDUCATION IN ADDRESSING PROBLEMS OF ACCESS TO JUSTICE

ANA MATANZO VICENS\*

“Regrettably, law schools spend a lot of time on the substantive legal issues and often not enough time teaching students what it means to be a lawyer.”<sup>1</sup>

### INTRODUCTION

The exclusion of economically disadvantaged groups from the administration of justice has consistently posed a distressing predicament for judicial systems around the world. The problem challenges the most basic notions of the rule of law and seriously questions the commitment of lawyers to their social responsibilities as officers of the courts. The formulation of effective solutions for the access to justice deficit calls for a comprehensive and multifaceted approach from all branches of government, the Judiciary in particular, the Bar and all the legal institutions that are entrusted with the protection of the very foundations of our democratic society. In this respect, law schools, as gatekeepers of the profession, are compelled to revisit the way they inculcate the professional values that shape the ethos of future lawyers. This position paper aims to examine how academic programs can be designed to promote access to justice. In doing so, the paper focuses on the ternary approach that has been adopted by the School of Law of the University of Puerto Rico, which mainly consists a live-client clinical offering that is part of the core curriculum, a voluntary *pro bono* program and, more recently, the active participation of law students in projects of empirical research about the legal profession. This approach marks a significant turn from the leading case discussion model, in favor of a more experiential method placed in the context of the provision of legal services for the disadvantaged, best described by the maxim: *learning by serving and serving by learning*.

The actual financial crisis has for sure aggravated the access to justice shortcomings. The situation now demands for law schools to assume the responsibility of transforming their academic programs to transcend the conventional knowledge they teach and the training of competent skills they typically address through their curricula. Reforming legal education in the face of the financial downturn requires innovation and a true commitment to the idea that economic forces should not condition the vindication of basic rights. It also requires law schools to understand the value of public service programs as catalysts for equality and justice, which will inevitably result in less socioeconomic conflicts and disputes through the creation of a more egalitarian and harmonious civil society.

### I. THE PROBLEM OF ACCESS TO JUSTICE AND THE CHALLENGES IT POSES FOR LEGAL EDUCATION

The access to justice deficit endured by economically disadvantaged sectors has been a longstanding concern of the American bar, its judicial system and the legal community in

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<sup>1</sup> Sonia Sotomayor, Associate Justice, United States Supreme Court, Keynote Address at the University of Puerto Rico in Occasion of her *Honoris Causa* Degree Award (May 5, 2014), *available at* <http://aldia.microjuris.com/2014/05/02/derecho-upr-otorgara-honoris-causa-a-la-jueza-sonia-sotomayor/>.

general.<sup>2</sup> The economic prosperity that prevailed during the nineties increased the commercial character of legal professional services. This inevitably led to a generalized perception of the legal profession as one inherently corporate and economically driven. Concerned by the undermined public trust in the profession, by the end of the last century leading legal institutions in the United States engaged in significant efforts geared towards the reinforcement of the paradigmatic values that have traditionally characterized lawyers as professionals committed to public service and the common good. Both the American Bar Association (ABA) and the Association of American Law Schools (AALS), grappling with problems of access to justice, examined the responsibility of all entities concerned with the regulation of the legal profession and proposed affirmative steps for advancing equal access to the American judicial system. As a result, a number of standards and policies were adopted in order to propitiate the creation of a *pro bono* culture through legal education.

To those effects, the MacCrate report, published in 1992,<sup>3</sup> emphasized on the duty lawyers have to promote access to justice through the offering of *pro bono* services, as one of the paramount values of the profession. In 1993, the ABA created the Standing Committee on *Pro Bono* and Public Service and the *Pro Bono* Center. Subsequently, the Haynsworth report,<sup>4</sup> published in 1996, represented a major effort to enact measures directed to instill in lawyers a high sense of professionalism and a commitment to public service. These major efforts launched by the ABA were followed by two reports by the AALS: the *Learning to Serve* report, published in 1999, and a report titled *Pursuing Equal Justice: Law Schools and the Provision of Social Services*, published in 2003. Both reports were fundamental in researching the role of law schools in guaranteeing access to justice. The first report, led to the creation of the AALS *Pro Bono* Project, the first organized effort by the AALS to address the role of *pro bono* and public service in legal education.

In 1998, for example, in her inaugural speech as President of the AALS, Professor Deborah L. Rhode reported that the United States, despite having the world's highest concentration of lawyers, met less than a fifth of the legal needs of its low income populations, even though public service was recognized as a distinctive aptitude of the legal profession.<sup>5</sup> Such statistics dramatically denounced the serious gap between what lawyers profess and what they actually

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<sup>2</sup> Early in the first stages of the American legal profession regulation, Canon 12 of the 1908 ABA Canons of Ethics established that “the profession is a branch of the administration of justice and not a mere money-getting trade.” AMERICAN BAR ASSOCIATION, CANONS OF PROF'L ETHICS, Canon 12 (1908). Additionally, the ABA first coined the term “*pro bono*” in 1930, defining it as representation of low-income persons for free or reduced rates. See Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities*, 77 TUL. L. REV. 91, 115 (2002) (citing ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 148 (1935) (endorsing free legal work for indigent citizens; not prohibited by Canons); cf. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 171 (1937) (stating that the personal and confidential nature of the client-lawyer relationship, and highest professional traditions, precluded the use of binding minimum fee schedules); ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 191 (1939) (finding improper the use of advertisements to solicit employment at reduced rates by persons unable to pay customary legal fees); ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 307 (1962) (concluding that the Bar Association may sponsor and inform the public of an annual legal check-up program, provided that no individual lawyers' names are advertised and no minimum fee schedules are used)).

<sup>3</sup> See American Bar Association, *The Large Firm Phenomenon, an Educational Continuum, Report on the Task Force on Law Schools and the Profession: Narrowing the Gap*, A.B.A. LEGAL EDUC. AND PROF. DEV. 75-88 (1992) (MacCrate Report).

<sup>4</sup> See American Bar Association, *Teaching and Learning Professionalism*, SEC. LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE PROFESSIONALISM COMMISSION 1 (1996) (Haynsworth Report).

<sup>5</sup> Deborah L. Rhode, *The Professional Responsibility of Professional Schools* (speech before the AALS House of Representatives at the Annual Meeting in January) (1998), available at <http://www.aals.org/presidents/messages/speech98.html>.

perform and evidenced how legal education programs had failed in their responsibility to instill in law students a deep-seated *pro bono* culture and a sense of commitment to public service. In her speech, Rhode expressed that “legal educators can do more to foster a culture of commitment to public service among future practitioners. And such a commitment could do more to help those with greatest needs and least access to legal assistance.”<sup>6</sup>

More recently, in 2007, the AALS Commission on *Pro Bono* and Public Service Opportunities launched two major proposals in order to improve the teaching of the professional ethic of *pro bono* service in the legal education context. The proposals consisted of: (1) encouraging law schools to make available at least one *pro bono* opportunity during their law school careers, and (2) impelling law schools to adopt a formal policy to encourage and support faculty members to perform *pro bono* work. The report that encompassed both proposals indicated that over a dozen American law schools required all students to perform *pro bono* work on a law related field as a condition for graduation. As of today, ninety-eight law schools have some type of formal school wide *pro bono* program, including the University of Puerto Rico, which is one of only twelve schools with a clinical program.<sup>7</sup> The AALS commission, however, found that “at most American law schools, only a minority of the student body participates in *pro bono* projects during while enrolled at school.”<sup>8</sup> The report thoroughly discusses the benefits of *pro bono* work, not only because it provides needed legal services to people who are unable to afford them, which is, in itself, is a commendable value, but also because *pro bono* work equips students with skills and qualities that enhance the legal profession. Particularly, the report points out how law-related public service helps students develop a sense of giving back to the community while they “also open students’ eyes to the substantive needs of poor people, to the bureaucracies with which they have to deal, and to the courts that hear the matters in which they are involved.”<sup>9</sup>

It is no coincidence, then, that in 2006, the ABA’s Section of Legal Education and Admissions to the Bar adopted Standard 302, which provides, in its relevant part, that:

(b) A law school shall offer substantial opportunities for:

(1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence;

(2) student participation in *pro bono* activities . . .<sup>10</sup>

The adoption of this Standard and its interpretation undoubtedly reflected the bar’s concern with student exposure to clinical and *pro bono* work and the benefits it derives. Nonetheless, the Standard is vague at best and does not impose on law schools specific requirements for

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<sup>6</sup> *Id.*

<sup>7</sup> See AALS *Pro Bono* Project, *Location of Pro Bono Programs in Law Schools*, available at <http://www.aals.org/probono/location.html>.

<sup>8</sup> The report’s findings state: “Our central conclusion is equally brief and blunt: law schools should do more.” AALS *Pro Bono* Project, *Learning to Serve*, available at <http://www.aals.org/probono/report2.html#findings>.

<sup>9</sup> *Id.*

<sup>10</sup> ABA Standards and Rules of Procedure for Approval of Law Schools (2013-2014), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_final\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_body.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf).

compliance. States like New York, however, have adopted bar admission rules that require a certain amount of *pro bono* service hours in order to be admitted to practice the legal profession. Albeit the fact that the scope of the present analysis does not encompass the regulation of the provision of *pro bono* services, it is important to highlight that the ABA's Model Rules of Professional Conduct, which were subject to amendments in 2002 and 2007, also contemplate *pro bono* work by lawyers. Specifically, Model Rule 6.1 provides a definition of *pro bono* work and establishes that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay."<sup>11</sup> The rule also establishes that lawyers should aspire to comply with fifty hours of *pro bono* work a year. It must be noted, though, that this rule is purely aspirational and does not intend to establish a mechanism to monitor the hours, nor a scheme of disciplinary sanctions for lawyers who fail to conform to its requirements.<sup>12</sup>

Finally, in March 2012, the Access to Justice Initiative was created within the Department of Justice, which aims "to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status."<sup>13</sup> Taking into account the importance of law schools in fulfilling their agenda, the initiative sought for support from law school programs such as the Harvard Law School Program on the Legal Profession, the Stanford Center on the Legal Profession and the American Bar Association. After a meeting held in Stanford in 2011, the Consortium on Access to Justice was created with the mission of promoting research and teaching on the topic of access to justice across law schools. The Consortium's first report, written by Deborah L. Rhode, first addresses the lack of empirical data to ascertain unmet needs and measure the effectiveness of implemented models in order to formulate a rational basis for policy-making.<sup>14</sup> Generally, the report focuses on the lack of data pertaining to the multiple facets of *pro bono* service, including the capability of public interest legal organizations in addressing the needs of the poor. Recognizing that the current financial climate has made lawyers and academics more receptive to discussions regarding access to justice, Rhode highlights the need for better and more accurate data in order to adopt more effective measures and policies. Rhode also emphasizes the role of the universities in this field of work,<sup>15</sup> by stating that:

Law schools and funding organizations could play a more active role by inviting proposals and providing grants. . . . Regional partnerships could pursue similar objectives with local law schools, bar associations, service providers, and access to justice commissions. Linking research projects to graduate and law school courses could substantially expand the students available for work on access to justice, and build commitment to the issue among future scholars and practitioners.<sup>16</sup>

The report also discusses ways in which law schools can develop an agenda to address access to justice. First, the report recommends curricular integration of courses such as Ethics, Professional Responsibility, Public Interest Law and specialized courses on social justice, in order to get

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<sup>11</sup> MODEL RULES OF PROF'L CONDUCT R.6.1.

<sup>12</sup> Currently, twenty nine states have adopted *pro bono* policies that incorporate Model Rule 6.1 standard. Puerto Rico is not amongst them. See American Bar Association, *State-by-State Pro Bono Service Rules*, available at [http://americanbar.org/probono\\_public\\_service/policy/state\\_ethics\\_rules.html](http://americanbar.org/probono_public_service/policy/state_ethics_rules.html). Out of these twenty nine, only eight have adopted mandatory *pro bono* reporting rules.

<sup>13</sup> See USDOJ: Access to Justice Initiative, available at <http://www.justice.gov/atj/>.

<sup>14</sup> See Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531 (2013).

<sup>15</sup> *Id.* at 544.

<sup>16</sup> *Id.*

students better acquainted with their social responsibility as lawyers through exposure. Secondly, certain programmatic initiatives are proposed, such as voluntary *pro bono* programs and the creation of partnerships with organizations that provide legal services to the poor. This type of professional socialization will in turn allow students to develop, early in their professional careers, skills of cultural competence, and to enhance their sensibility for the legal needs of diverse communities. Rhode reasons that: “To make that possible, legal educators must do more to educate themselves, their students, and the public concerning systemic failures in our delivery of legal services. If the academy is seriously committed to instilling values of equal justice in its students, then its own priorities must reflect that commitment.”<sup>17</sup> Additionally, and pertaining to the research component of the agenda, Rhode proposes that law schools should engage in systematic research of its own efforts concerning access to justice.<sup>18</sup>

## II. THE ECONOMIC RECESSION AS AN OPPORTUNITY FOR REINVENTION AND INNOVATION IN LEGAL EDUCATION

One of the first issues addressed by the Access to Justice Initiative of the Department of Justice is the recent economic recession and its impact on the offering of legal services for those enduring economic hardships. This crisis has resulted in a renewed urgency for more research and education efforts geared to close the justice gap.<sup>19</sup> The difficulties confronted by poor litigants without legal representation have seriously increased in recent years due to the ongoing economic crisis. “High rates of unemployment, bankruptcies, foreclosures, and reductions in social services have created more demands for legal representation at the same time that many of its providers are facing cutbacks in their own budgets.”<sup>20</sup> Indeed, these are times of substantial reductions in the allocation of public funds for the provision of free legal services for low-income clients. In Puerto Rico, for example, the Legal Services Corporation (Servicios Legales de Puerto Rico, Inc.), experienced significant budget cuts starting in 2011, with a total reduction of federal funds that amounts to almost five million dollars within the next two years, when the new demographic regulations established by the federal government take effect.<sup>21</sup> Other states have not been exempted from these budget cuts.<sup>22</sup> Since legal representation is only constitutionally guaranteed in cases where life or liberty is at stake, large sectors of the population which lack the means to secure the protection of their rights are left unprotected because justice is too technical and expensive a commodity and thus, it is only reserved for those with sufficient means to afford it.

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<sup>17</sup> *Id.* at 550.

<sup>18</sup> *See id.* at 549. Some of the research topics Rhode proposes are the following:

How much coverage are students actually getting through clinics, pro bono programs, substantive courses and intern or externships? How do students, graduates and experts in the field evaluate the effectiveness of current curricular and programmatic initiatives? What improvements might they suggest? What kinds of law school experiences affect students’ subsequent involvement in pro bono work and public interest legal careers?

*Id.* at 549-50.

<sup>19</sup> *See* Legal Services Corporation, Documenting the Justice Gap in America: The Current Unmet Civil Needs of Low Income Americans 1-13 (2009), available at [http://www.lsc.gov/pdfs/dcoumenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/dcoumenting_the_justice_gap_in_america_2009.pdf)

<sup>20</sup> *Id.* at 531.

<sup>21</sup> *See* El Cucubano, Servicios Legales de Puerto Rico, Vol. XXI, N. 85 (April-June 2013) at 3, available at <http://www.servicioslegales.org/Home/PublicWeb/cucubano/85.pdf>.

<sup>22</sup> For a detailed discussion on budget cuts for legal services, see Columbia Law School Human Rights Clinic, *Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases* (2013), available at [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Access%20to%20Justice%20Shadow%20Report%20-%20Final%20\(small%20size\).pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Access%20to%20Justice%20Shadow%20Report%20-%20Final%20(small%20size).pdf).

In Puerto Rico, where almost half the population lives under the standard level of poverty, the situation critically undermines the legitimacy of the rule of law system and the notion of equal protection that inspires it. The constitutional right to counsel is not recognized for civil cases tried in federal and Puerto Rican courts. Contrary to some nations such as Spain, Canada and the United Kingdom,<sup>23</sup> where justice at no cost for the poor is constitutionally guaranteed, in our courts the government, federal or local, has no obligation whatsoever to provide legal representation to needy parties in civil matters such as evictions, foreclosures, domestic violence, workplace discrimination, the denial of medical assistance and loss of child custody, amongst others. To cover those needs, the public policy that has developed over the years has delegated this responsibility upon the Bar, thus assigning lawyers a paramount role in the provision of free legal services for the poor, though not in a mandatory fashion. The rationale behind this policy “rests on two premises: first, that access to legal services is a fundamental need, and second, that lawyers have some responsibility to help make those services available.”<sup>24</sup> The privileged and essential position that lawyers hold within the justice system, further supports this rationale. Unquestionably, “[t]he practice of law is a monopoly. . . . The public may gain access to the justice system and may obtain those services defined by the Bar as “legal” only from lawyers. The restraint thus imposed on the public’s ability to obtain what lawyers provide is very real.”<sup>25</sup> However, relying in lawyers to comply with the responsibility of offering free legal services in the midst of an economic recession undoubtedly entails serious perils. In order to construct a more accessible and equitable justice system expanding the access to justice for all, the solutions demand a more comprehensive and concerted approach. In that task, law schools have to undertake a leading role.

### III. THE UNIVERSITY OF PUERTO RICO SCHOOL OF LAW: AN AGENDA FOR ACCESS TO JUSTICE

The University of Puerto Rico School of Law, as the only public-funded law school in the Island, has strategically positioned the access to justice agenda as a priority, inserting it in its academic program the extracurricular offerings it sponsors, the faculty recruitment efforts it conducts and the adoption of admission criteria and procedures that aspire for a more diverse legal profession and a more egalitarian and representative judicial system.

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<sup>23</sup> Even these countries have experienced budget cuts for programs that provide citizens with free legal services. See e.g., <http://periodistas-es.com/tutela-judicial-efectiva-mas-recortes-en-espana-34532Ñ> (Spain); <http://www.theguardian.com/law/2011/oct/06/access-to-justice-legal-aid-cuts>.

<sup>24</sup> Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 Fordham L. Rev. 2415, 2418 (1999).

<sup>25</sup> Barlow F. Christensen, *The Lawyers’ Pro Bono Publico Responsibility*, 6 ABA FOUNDATION RES. J. 1, 15. Additionally, citing the president of the ABA, Barlow Christensen points out that:

The public who grants a small segment of the population the exclusive privilege of making a living practicing law has the right to demand that those so favored accept public service as one of their prime responsibilities.

. . . .

If a legal monopoly is a viable societal institution, lawyers in order to maintain the monopoly must fill those essential needs which will otherwise not be met unless lawyers meet them, including the rendering of those public services which the monopoly itself makes lawyers peculiarly qualified to perform.

*Id.* at 6.

Fully aware of the paramount role placed on lawyers in matters of access to justice, the School has adopted as its mission the education for the formation of capable lawyers who, in turn, are conscious of their social responsibilities. Cognizant of the implications of designing a curriculum solely concerned with the substantive subjects required to be admitted to the legal profession, the School of Law has managed to integrate courses that go beyond those core subjects.<sup>26</sup> Course offerings focusing on legal ethics, the legal profession and the intersection of poverty, culture and sociology, allow for students to ponder on their role as future jurists and professionals, as well as on their responsibility to guarantee access to the legal system for the most relegated sectors of the Puerto Rican society. In that order, as part of the first year curriculum, all incoming students are required to take the course: The Legal Profession, which gives them the opportunity to get acquainted with the values that have historically shaped the ethos the profession, thus reflecting upon the responsibilities of lawyers and their obligation to ensure equal access to justice.

The School's integral approach to the problem of access to justice represents a cohesive effort to eradicate barriers that hinder the full protection of the law.<sup>27</sup> The School's ternary approach, consisting of a clinical practice, *pro bono* service and empirical research, represents a model for legal education that can be replicated and adapted in other law schools and law faculties around the world.<sup>28</sup> This section describes in detail the School's program and discusses its adaptability and efficacy, as well as the short and long-term results it has yielded.

#### *A. Clinical Program*

For more than half a century, the Legal Aid Clinic of the University of Puerto Rico (UPR) has been an integral component of the Law School curriculum. It was founded in 1952, way before the call for similar offerings that appeared in some American law schools during the sixties, in midst of the civil rights movement. What started as a pioneering modest project, today consists of fourteen (14) different sections, with a maximum of fifteen (15) students each, focused on diverse subject areas, such as Immigration Law, Civil Law, Mediation, Criminal Law, Environmental Law, Labor Law, Gender Discrimination and Community Organization and Development, among others. The clinic offering, a graduation requirement is designed as a two-semester course for students in their last year. It aims to introduce students into the professional role, representing real clients under the supervision and mentoring of a clinic professor. The main objective of the experience is to initiate students in the adoption of their professional ethos, providing some guidance in the first steps of a long decision making process about what kind of lawyer they choose to be, instilling in them a sense of professional responsibility toward their clients. At the same time, the students are trained in the forensic skills that are needed for the competent practice of the profession. But most significantly, the experience allows for students to come close and better understand the urgent needs of large underprivileged sectors of the Island, in particular those whose who are in need of

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<sup>26</sup> Interestingly, as a mixed jurisdiction, Puerto Rico follows the *Common Law* case method, while the majority of its private law derives from the civil tradition.

<sup>27</sup> As part of these efforts, in 2002, the Law School cosponsored with the Supreme Court the first Congress on Access to Justice, held in San Juan during the spring of 2002 as part of the annual judicial conference.

<sup>28</sup> In recognition for the School's efforts in the Access to justice agenda, the school's former dean, doctor Efrén Rivera Ramos, was awarded the Deborah L. Rhode Award given by the AALS in its 2006 Annual Meeting.

legal protection in areas not regularly served by the private Bar.<sup>29</sup> The Community Development clinic, for example, represents community-based groups and constitutes the only provider of free legal services in this field in the Island. Services include legal representation before state and municipal agencies, legislative lobbying, community organizing, educational workshops and litigation in judicial forums. Recently, this clinic was responsible for drafting and successfully lobbying legislation that requires community participation before a municipality can exercise its power of eminent domain. Just this year, the clinic on Gender Discrimination drafted a petition to the Inter American Commission of Human Rights in order to denounce the lack of recognition of fundamental rights to the LGBTT community in Puerto Rico.

In sum, the Legal Aid Clinic of the University of Puerto Rico exposes students to the practice of the profession while ensuring that the needs of economically disadvantaged persons are well served. For over sixty years, students have acquired experience on different areas of the Law and have developed a sense of commitment to noble causes through a deep understanding of their role within the justice system. The insertion of this type of experiential learning into the core of the academic curriculum, guarantees for all students, regardless of their involvement in other public service initiatives, the opportunity to delve into the problems of access to justice and the professional call of duty to satisfy the needs of those who cannot afford legal representation.

### *B. Pro Bono Program*

The long public service tradition embodied in the clinical program served, in turn, as a natural platform for the creation of the University of Puerto Rico School of Law *Pro Bono* Program. The initiative was the result of extensive research and coordination. Launched in 2007, the program's main objective was precisely to foment the study of issues related to access to justice and formulate an agenda for social change. It is a voluntary program, which aspires to stimulate in students the willingness and readiness to engage in public service initiatives, expecting these experiences will help them get a thorough understanding of their professional responsibilities toward society.<sup>30</sup> Currently, the *Pro Bono* Program has eighteen different initiatives with over 250 students participating. These initiatives include legal orientation on fields such as Intellectual Property, Immigration Law, Labor Law, services to the prison population and a program that exposes high school students from economically disadvantaged backgrounds to the legal profession. Students, under the guidance and supervision of a faculty member, an alumni or the dean of student affairs, run all of these *pro bono* initiatives. Today, seven years after its creation, there is a general consensus among students who have participated in the program, as well as professors who have served as mentors, that engaging in *pro bono* service has provided a valuable learning opportunity to reflect upon the nature of the profession and better understand the complex social problems that affect our society. Most importantly, *pro bono* service has provided students the opportunity to project themselves as legal professionals who care and are sensible to the needs of marginalized sectors, hence instilling in them a notion of a professional role much more committed to social

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<sup>29</sup> See Ana Matanzo Vicens, *La Educación jurídica clínica en Puerto Rico: La Clínica de Asistencia Legal de la Universidad de Puerto Rico*, 60 REV. JUR. UPR 3 (1991).

<sup>30</sup> ANA MATANZO VICENS, LA FORMACIÓN DE JURISTAS DESDE EL CONTEXTO DEL SERVICIO PRO BONO: TENDENCIAS Y DESARROLLOS EN LOS NUEVOS MODELOS DE EDUCACIÓN JURÍDICA (2011).

change and justice. Undoubtedly, through these experiences, students receive a well-rounded education that transcends what they learn in the traditional classroom and impels them to apply the substantive knowledge they have acquired to real life situations.

One of the school's most successful *pro bono* initiatives consists of an educational outreach program which was by itself started in 2003 with an initial grant from the Law School Admissions Council and with the endorsement of the Department of Education of Puerto Rico. *Enlace con Escuelas Públicas* (Bridges with Public Schools), as the program is called, targets economically disadvantaged students, commencing in high school and monitoring their progress through their college careers. The purpose of the program is twofold: (1) to increase the students' ability to think critically and analytically in order to give them a sense of empowerment through the knowledge of their legal rights, and (2) to encourage participating students to pursue law related careers, in order to diversify the legal profession in the Island. Through the program, each year, on each Saturday morning of the Spring Semester, law students teach courses on different areas of the Law to an average of seventy students from public high schools across the Island. The program is conducted as part of the school's strategy to enhance access to justice by increasing socioeconomic diversity in the Law School student body and, consequently, in the legal profession.<sup>31</sup>

Through the school's *pro bono* program, students offer workshops and conferences to different groups on topics related to law, justice and citizen participation. Students who are part of this initiative receive the mentorship and support of faculty members and start developing early in their academic careers skills and knowledge pertaining to different areas in the field of Law. More importantly, the program inculcates in its participants a commitment to justice and public service. The program represents a structured and visible incorporation of a public service dimension as an essential component of the professional formation of law students.

### *C. The Legal Profession: A Subject of Research and Scholarly Work*

All of the previously described efforts laid a solid foundation from which to pursue greater research related to the legal profession in its role in abridging the justice gap. Most recently, in coordination with the Director of the Legal Aid Clinic and one of the main economic and planning consulting firms in the Island, Fundación Estudios Técnicos, Inc., the author conducted a comprehensive study of the legal profession entitled *The Offering of Pro Bono Services and Access to Justice*. The results of phase I of this study, which was completed during the current academic year, shed light into the perceptions and attitudes of the members of the legal profession regarding their commitment to provide legal services for economically disadvantaged clients. The initiative, which had its origins in similar projects conducted by the ABA and other legal institutions, stands as the first empirical study conducted in Puerto Rico geared toward the assessment of the *pro bono* services rendered by members of the legal profession in the Island. It represented the first concerted effort in the last

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<sup>31</sup> An Enlace law student participant, inspired by his experience in the program, recently researched and published an article analyzing the barriers that high school students from economically disadvantaged communities face in trying to access legal education. See Alexander G. Reynoso Vázquez, *Acceso a la educación superior para grupos social y económicamente desfavorecidos: Situación en las escuelas de Derecho de Puerto Rico*, 83 REV. JUR. UPR 193 (2014).

forty years to document and obtain accurate information about the attitudes and behaviors of lawyers toward *pro bono* services.

In a jurisdiction where justice is a very expensive and technical commodity, and where public funds allocated to legal aid is very limited, particularly in civil matters, the study intended to find answers to questions such as: (1) What is the profile of those lawyers who offer *pro bono* services, which factors motivate them and which do not?; (2) How do lawyers feel about the responsibility to ensure access of justice?; (3) What are their opinions regarding how the cost of justice should be defrayed?; (4) How can the citizenry vindicate its rights when they lack the financial means to afford a legal representative?; (5) Should the State bear the costs of ensuring access to justice for all or should it fall upon the members of the legal profession to provide legal services to the poor?; (6) How can we formulate an effective public policy to attend the problems of access to justice?, and (7) What are the lawyers' perceptions about the distribution of *pro bono* work amongst those who practice the legal profession? Is it equally distributed or is it disproportionately dispensed by a sector of the profession?

In order to find answers to these questions, a detailed survey that was first designed and later administered, following an aleatory method among the profession, and finally answered by over 500 lawyers across the Island. Understanding the need for precise and reliable data, the survey attempted to ascertain who are the lawyers who usually provide *pro bono* services, as these are defined by ABA's Model Rule 6.1, what are their demographic and professional profiles, the size of their legal offices, as well as the factors that promote or discourage their disposition to provide such services. The survey was administered with the help of a number of students who had to get acquainted with the theoretical foundations of the investigation and later were trained according to the survey's methodology. Over seventy students took part in this project by assisting lawyers in completing the survey.

As previously mentioned, the survey's questions focused on four main aspects of *pro bono* services. The first part of the survey explored the demographic profile, practice and location of those lawyers who engage in *pro bono* work. The second part focused on the type of legal services provided, the areas of Law that those encompassed, their nature and the time spent on public service initiatives. The third part addressed the role of the intermediary institutions that provide legal services for the poor in Puerto Rico, as well as on the efficacy of the measures adopted by the governmental branches to ensure access to legal representation. Finally, the survey ascertained lawyers' perceptions of *pro bono* work, the motivations behind rendering legal services to the needy and how informed lawyers were regarding the different programs and initiatives that attempt to tackle the access to justice conundrum.

The information obtained through the survey represents an important first step in the process of gathering reliable data concerning the Puerto Rican legal profession and the state of affairs regarding unmet legal need in the Island. Moreover, this research provided an opportunity for students to get better acquainted with the profession they aspire to be part of as well as to reflect on their own notions concerning the social responsibilities they will assume as future professionals.

Furthermore, with this research project, the Law School, by encouraging the production of knowledge, has motivated students to contribute to the articulation of public policy in the area of access to justice. Toward that end, the students are currently writing an article analyzing the data obtained through the study for the purpose of formulating recommendations for the adoption of effective measures and a public policy leading to a more equitable and accessible judicial system.

## CONCLUSION

The problem of access to justice, as exacerbated by the current financial situation, calls into question the legitimacy of the justice system and the legal profession itself. The inability of those most vulnerable to the economic recession to obtain adequate legal representation significantly undermines public trust on the institutions responsible for ensuring equal access to justice. Amongst these institutions, law schools are particularly compelled to examine and revisit their academic programs in the interests of incorporating a more targeted and specifically construed agenda that addresses the inherent values of the legal profession. As stated in the Carnegie Report, a major study published in 2007 that calls for the reform of legal education:

“In actual professional practice, it is often not the particular knowledge or special skill of the lawyer or physician that is critical, important as these are. At moments when judgment is at premium, when the practitioner is called on to intervene or react with integrity for the values of the profession, it is the quality of the individual’s formation that is at issue. The holistic qualities count: the sense of intuitive engagement, of habitual disposition that enable the practitioner to perform reliably and artfully. Thinking about how to train these capacities inevitably calls up words such as integration and focus to describe deep engagement with the knowledge, skills and defining loyalties of the profession.”<sup>32</sup>

In this context, law schools today have an inescapable duty to provide students with learning opportunities designed to develop a sense of social responsibility so that, when “*called on to intervene or react with integrity for the values of the profession*,”<sup>33</sup> their formation will not be at issue and they will respond accordingly.

Paradoxically, the strained financial scenario and the problems of access to justice that it entails have provided the legal academia with an invaluable opportunity to reinvent itself. It is the responsibility of law schools to instil in students the values of “the ethos of law reform, social justice, and the continuous improvement of the law and of the operation of the legal system [which] convert the critical mindset, as applied with high level skills to a sound knowledge base, into a positive and constructive force for tangible movement. It enables lawyers to really add value to the society which they serve and which gives them a privileged position.”<sup>34</sup>

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<sup>32</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 85 (2007).

<sup>33</sup> *Id.*

<sup>34</sup> Michael Coper, *Legal Knowledge, the Responsibility of Lawyers, and the Task of Law Schools*, 39 U. TOL. L. REV. 251 (2008).

In this regard, the initiatives undertaken by the University of Puerto Rico School of Law, as described above, demonstrate that in trying to fulfil this responsibility the learning process is substantially enriched, by providing future jurists with a better understanding of their role as instruments for social change for the enhancement of the judicial system and, consequently, the attainment of a more democratic society.

# **The factors that influence mediation referral practices and barriers to its adoption: A survey of construction lawyers in England & Wales**

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There is scant knowledge & understanding of Construction Lawyers' role in the referral of cases to Mediation, and the barriers to the wider adoption of mediation by disputing parties and the legal fraternity within England & Wales. Based upon a survey of legal advisers in England and Wales, this paper examines the factors that influence mediation referral practices and barriers to its adoption. The findings of the survey reveal that while the majority of Construction Lawyers had experience of mediation, many do not refer cases to mediation regularly. The survey results also suggest that barriers to adoption are much less to do with self-reported financial interests or personal preferences, rather more to do with the dominance of 'repeat players' who seemingly monopolize the Construction Dispute Resolution Market, restricting less experienced practitioners from gaining expertise to counsel clients on the intricacies of the process. This will require reform of the 'market monopoly', niche service provision characteristic of the dispute resolution marketplace within the Construction Field. There is also a need to develop more enhanced mechanisms to more clearly define & regulate the role of the Lawyer within mediation settings & disseminate the appropriate use of the process to legal practitioners as consumers of dispute resolution tools. Contrary to anecdotal evidence, the survey results indicate the inability to create enforceable precedents from mediation or judicial ambivalence do not act as deterrents to the referral of cases to mediation.

Keywords: Construction, Lawyers, Mediation Referral Practices

## **Introduction**

Warren Burger, a former Chief Justice of the United States of America, once said:

'The obligation of our professions...is to server as healers of human conflict. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with the minimum stress on the participants. That is what justice is all about' (Burger, 1982)

Certain questions regarding the value of litigation require to be levelled at Warren Burger's comments. Dispute resolution is a service industry and must recognise client needs (Bok, 1983). This theme has been taken up by many leading members of the judiciary and was the cornerstone of Lord Woolf's interim and final reviews of English civil litigation, Access to Justice (Woolf, 1996). The recommendations made by Lord Woolf were embodied into the Civil Procedure Rules (CPR) and, among these, mediation was brought in as an option for consideration before court proceedings commenced (Roberts, 2002).

With the introduction in April 1999 of the Civil Procedure Rules proposed by Lord Woolf, judges in England have power to stay proceedings for one month either with the consent of both parties or on their own initiative to allow a period of time for mediation to be conducted (Genn, 2013)

CPR Rule 1.4 provides that:

“The court must further the over-riding objective by actively managing cases

Active case management includes ... (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.”

The English courts also have power to use costs awards as a sanction against parties who refuse unreasonably to attempt mediation. This ability in the English Rules to encourage the use of mediation has been backed up by comment and orders from judges in a series of cases since 2000 culminating in the decision of the Court of Appeal in *Halsey v Milton Keynes NHS Trust* decided in May 2004. In *Halsey* the Court of Appeal examined the question of when a costs sanction would or would not be imposed on a successful party who had unreasonably refused to enter into mediation beforehand (Hodges & Tulibacka, 2009).

The decision in *Halsey* was that the refusal of the NHS Trust to mediate was reasonable because they believed correctly that they would win and the claimant failed to satisfy the test of establishing that mediation had a reasonable chance of success. The court also held that in a relatively small claim such as this the cost of mediation would have been disproportionately high. *Halsey* was referred to in the decision of the Court of Appeal in *Burchell v Balland* decided in April 2005. In another case decided in 2005, *The Wethered Estate Limited v Michael Davis and Others* the court accepted that, just because there had been mediation, this did not prevent a party from claiming that a delay in going to mediation was unreasonable. In *Earl of Malmesbury v Strutt & Parker* decided in March 2008 Justice Jack examined the conduct of parties at mediation as a relevant factor in making a costs award where the mediation had not resulted in settlement.

The above cases demonstrate the approach now taken in England by making it clear that the English Courts will not tolerate unreasonable refusal to take part in mediation where the parties have contracted to mediate or where the courts consider it might achieve a settlement outcome (Gaitskell, 2005). They will even go so far as to consider whether the parties' conduct at the mediation was unreasonable if the parties waive the confidentiality of the mediation process (Gould, 2007). As a result of these changes in the Rules and resultant pressure from the judiciary the position in England is that the use of mediation in particular, has increased significantly since the introduction of the Civil Procedure Rules (Dwyer & Dwyer, 2009).

The more recent Jackson Cost Review has provided greater impetus for the use of mediation (Genn, 2013). A failure to respond to a request to engage in mediation may also be deemed unreasonable by the courts as for example, in the case of *PGF II SA v OMFS Company 1 Limited*. Nevertheless, while the Rules are being used by the courts in England and Wales increasingly to 'encourage' parties to look to alternative methods to settle differences, little can be gleaned from the literature on the central role of construction lawyers in mediation, and more specifically the extent to which they refrain from the referring cases to mediation in a manner inconsistent with their clients' interests. Much of the Construction-based research so far has focused on how mediation is bearing up in practice, its use, appealability and possible improvements (e.g. Gould, 2007; Gould, 2009; Gould et al, 2010)

## **Lawyers as Gatekeepers to Mediation**

It is widely accepted that lawyers play an intermediary role between their clients and the legal system (Welsh, 2001). Socio-legal scholars have long examined the ways in which the legal professionals assist clients understand the vagaries of the legal process, how legal rules relate to individual problems and the workings of the legal institutions across different jurisdictions (Murray, 1996). As part of this continuing scholarly tradition, examples abound of research into the role of lawyers in the mediation process as ‘gatekeepers’ both within & across jurisdictional boundaries and within differing contexts (for example, McAdoo & Welsh, 1997). There has been much debate and discussion on the role that lawyers should play in the mediation process (Reich 2002). Increasingly, lawyers are involved in mediations as advocates (Goldfien, and Robbennolt, 2007).

The engagement of lawyers in mediation is seemingly attributed to the growth of court-annexed mediation provisions in which disputants are represented by legal counsel. Although a wide array of reasons for lawyer entanglement in the process can be seen from the literature including client demand and the seeking out of more enriching work from lawyers (see, Clark, 2012).

It is widely recognised that the increasing involvement of lawyers in mediation can affect the way in which the process is conducted, the lawyer-client power balance and the perception of the process itself (Wissler, 2003). It is also widely documented that the practice of mediation is affected by the way lawyers perceive and utilise it, such that they are commonly referred to as gatekeepers in to the process (Welsh, 2004). Indeed, a growing body of research work demonstrates that lawyers’ control which disputes are mediated, the choice of mediator, and the prioritisation of interests within the process itself. If we accept that lawyers’ perceptions & values influence the ability of mediation to deliver potential benefits, then it follows that lawyers’ interest need to be taken into account for mediation to be more widely adopted as a favoured means of dispute resolution; notwithstanding that lawyers’ interests can often diverge from those of clients (Sela, 2009). Wissler (2003) notes that many of the policies used to promote the greater use of mediation have focused on the legal practitioner rather than the client–base. The writings typically show that lawyers initiate discussion of mediation, insofar as they have significant influence on clients’ perceptions and use of the process.

### **Barriers to lawyers’ use of mediation**

There are a plethora of academic studies on the barriers to lawyers’ use of mediation. However, there is scant knowledge on the nature, scope & influence of these barriers. There have been some notable exceptions that have attempted to address the knowledge gap, nevertheless. Wissler (2003) usefully summarises the types of barriers, drawing on US-based research. These include: lack of knowledge and familiarity with mediation processes (Kannerman & Tversky, 1995) attitudes and perceptions of mediation; negative experiences with the process, financial and economic interest (Sternlight, 1999) and the extent of judicial involvement in the mediation process (Guthrie, 2001).

## **Research Design**

The aim of the research was to explore construction lawyers' use of mediation, incentives & barriers to conduct, in addition potential agency-related problems. A web-based questionnaire first used to explore Israeli Commercial Lawyers' interaction with mediation (Sela, 2009) & adapted for the Construction Context, was deployed for the purposes of data collection. There are many advantages to a quantitative approach (Couper, 200). Quantitative data can be measured and scored more easily because it is collected using surveys and questionnaires. Qualitative data are more difficult to measure because they obtain opinions and ideas collected from interviews and focus groups. Quantitative methodologies also have the strength of establishing generalities and the ability to study large numbers of participants. The study explored lawyers' attitudes to mediation, the extent and nature of lawyers' use of the process, and the factors and barriers that determine whether mediation is used.

There is no publicly available directory of Construction Lawyers in England & Wales. In order to establish a representative sample of construction lawyers, the creation of a new database was necessary, combining membership lists of professional associations. The combined database comprised the 'population' of construction layers in England & Wales, which included 761 practitioners. Although the database was incomplete, since not all construction lawyers are listed in professional association directories, it was the best available option for the investigation. For the purposes of this study, a random sample generator yielded a sample of 563 construction lawyers. This number was further narrowed down due to additional coverage challenges. The survey was eventually distributed to 400 construction lawyers in England & Wales. A small sample of legal practitioners provided us assistance with the pilot study process. The respondents were told the questionnaire was a pre-test and the group were questioned about their understanding of the questionnaire and asked to comment on possible rephrasing or clarity of questions. Following the test, certain revisions were undertaken.

The length of the questionnaire to be completed was thus shortened accordingly. It was anticipated that this would lead to a better response rate. The final response rate from the survey was 53%. This figure compares favourably with other online surveys more generally, and specifically ones relate to the lawyers (Gupta et al, 2002).

### **Analysis of Questionnaire Results**

When all the questionnaires were returned through Survey Monkey, the analysis of the questionnaire data was then undertaken. The statistical analysis of the survey data was undertaken using the SPSS software package.

#### ***Firm size and level of experience within the legal profession***

Figure 1 and 2 provide a breakdown of distribution of respondents' by firm size & their level experience within the legal profession respectively.

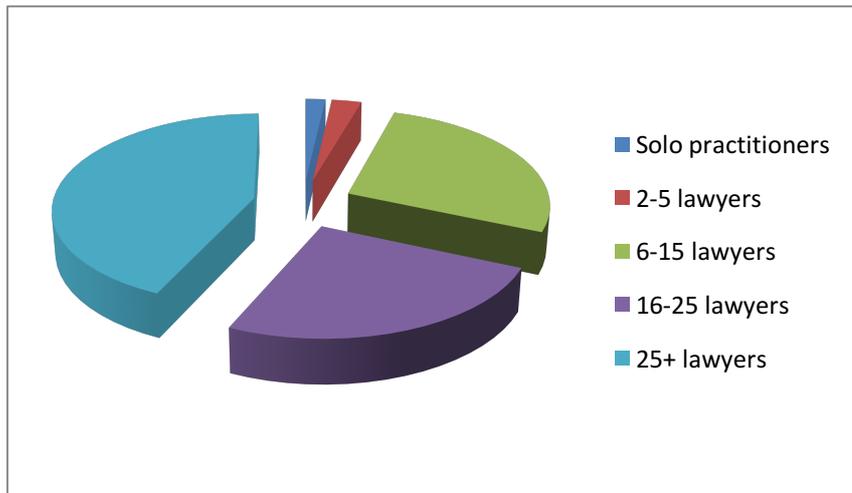


Figure 1: *Distribution of Respondents' by firm size*

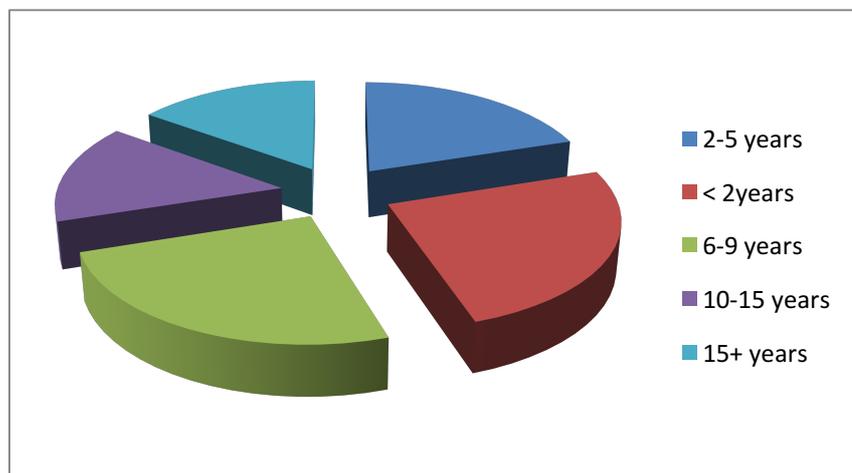


Figure 2: *Distribution of respondents' by level of experience within the legal profession*

There does not seem to be available statistical information on the distribution of construction lawyers by size of firm or level of experience within the legal profession in England and Wales, so it is difficult to discern whether the sample frame is representative of the population. Undoubtedly, it was much easier to obtain email addresses of construction lawyers employed in larger firms than in the smaller ones. This might explain, relative to their representation in the population and the sample frame, why there are a high proportion of respondents working in larger firms as compared to those employed in small firms or as sole traders. There are no reliable demographic data on the distribution of Construction Lawyers in England and Wales, so it is also difficult to ascertain whether the sample is representative of the population from a statistical point of view. There are however, some studies that indicate that those who participate in web-based questionnaire surveys tend to be experienced internet user and predominantly young males (Andrew et al, 2003)

## Lawyers Referral Practices and Views of Mediation

One of the aims of the exploratory study was to capture empirical data on construction lawyer's views and attitudes relative to mediation. According to Janoff (1991) there are 2 direct measures of lawyers familiarity with mediation; the first being their mediation education which has the potential to shape attitudes to the process; and second their experiences of mediation either as mediators themselves or as legal counsel.

### *Mediation Training*

It would seem that of the total, 78%, of respondents had received some form of training in mediation with 24% of those having attended external courses on the process and 12% had attended in-house training sessions.

The results also show that only about one-fifth, 21%, were trained as accredited mediators and the same proportion of respondents, 19 %, having some exposure to mediation during their tertiary education. These figures resonate with the findings of a 2010 study of Scottish construction lawyers commercial lawyers, in which around 20 % of respondents indicated that they had any exposure to mediation at Law School (Agapiou & Clark, 2011).

### *Client representation in mediation*

Interestingly, In terms of those respondents who had working experience of mediation over the past 2 years (60% of the total number of respondents), 80% had reported representing at least 1 party in a mediation in the last two years preceding the questionnaire survey. This figure is a positive sign that lawyers are at least willing to represent clients in mediation cases. Nevertheless, less positive seems to be the relatively lower proportion of respondents who reported their willingness to mediate a case in more than 5 cases over the last 2 year period. The results of the survey indicate that only 44% of respondents mediated 3 or more cases and 5 % 11 or more cases. Figure 3 presents a breakdown of the number of Cases Mediated over the previous 2 years.

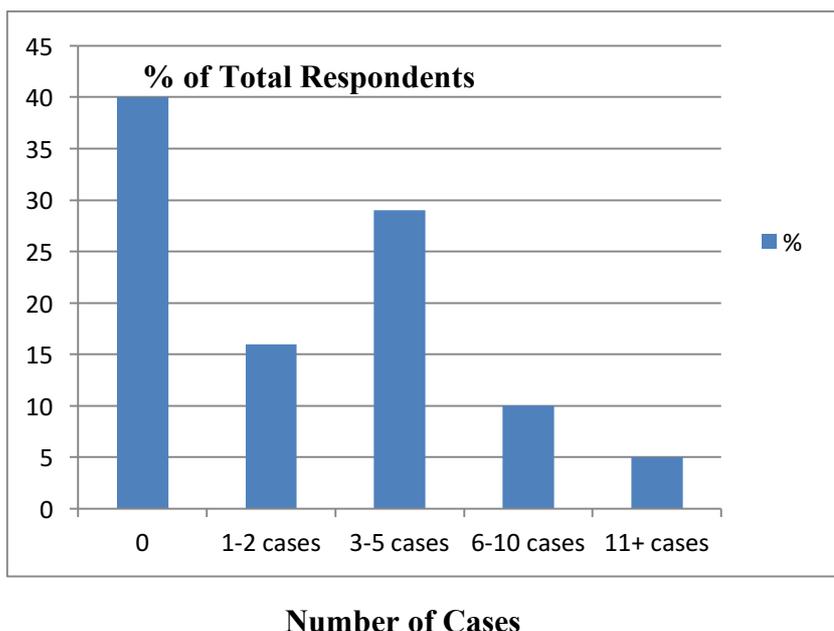


Figure 3: Number of Cases Mediated in Previous 2 years

The mean number of cases in which construction lawyers used mediation is illustrated in Table 1. It would seem that the more experienced practitioners reported using mediation within the preceding 2 years, than less experienced lawyers. This finding is consistent with Gilson and Mnookin's (1994) proposition that more experienced lawyers are able to develop a more 'co-operative reputation' as a function of their repeat professional encounters than less experienced lawyers. They attribute the difference in the ability to gain a cooperative reputation to the growth in the size of the legal profession. The assumption being that more experienced practitioners would have a greater chance of gaining a 'cooperative reputation' in a smaller-sized legal jurisdiction as compared to successive generations of lawyers who would find it more difficult within a growing legal fraternity. This explanation may have some merit for the English & Welsh context, where there have been sharp increases in the number of legal professionals of late, due mainly to the proliferation of Law School programmes. However, there is little to explain the results for those who had been in practice for 10-15 years. The discrepancy may be the result of coverage error, incidental or indeed the result of an undetectable bias in the process of data collection. Indeed, no discernible characteristics e.g. practice size, level & types of mediation training, of those practitioners who had practiced law between 11 and 15 years and mediated cases were identified, as compared to the remainder of the sample frame.

*Table 1: Mean number of cases mediated in preceding 2 years by years of experience*

Years practising in the legal profession	N	Mean	Median	Standard Deviation
<2	28	2.03	1.5	1.45
2-5	21	4.15	4	4.83
6-9	28	5.22	4	4.65
10-15	17	3.64	4	4.05
15+	17	7.46	4	7.48
Total	111	4.34	4	4.91

[Note: the numerical values of the means are the median of the range of cases presented in the optional answers to the questionnaire survey. The responses were codes so that each option is coded as the mean of the median of the range: 0 cases mediated = 0; 1-2 cases = 1.5; 3-5 cases = 4; 6-9 cases = 7.5; 10-15 cases = 12.5; over 15 cases = 20]

Overall the results, to a greater or lesser extent, indicate that construction lawyers do use mediation but not whether they wanted to use it or compelled to do so in some way. The results indicate that construction lawyers do not initiate discussion of mediation neither on a regular or voluntary basis, on the whole. Indeed, of those lawyers who have reportedly discussed mediation with clients, only 15% of respondents indicated that they often discussed the possibility with their clients without being compelled to do so in some way by the courts. Whereas, around 48% of survey respondents reported that they never or rarely discussed mediation with their clients under similar circumstances. The results also indicate that a similar proportion reportedly discussed using mediation with their clients only sometimes.

It would be interesting to establish ‘who most commonly suggests using mediation’ at this point as this may provide some explanation for the above responses. Figure 5 provides a breakdown of the party/parties who most commonly suggest using mediation. The results indicate the centrality of the courts in the initiation of mediation.

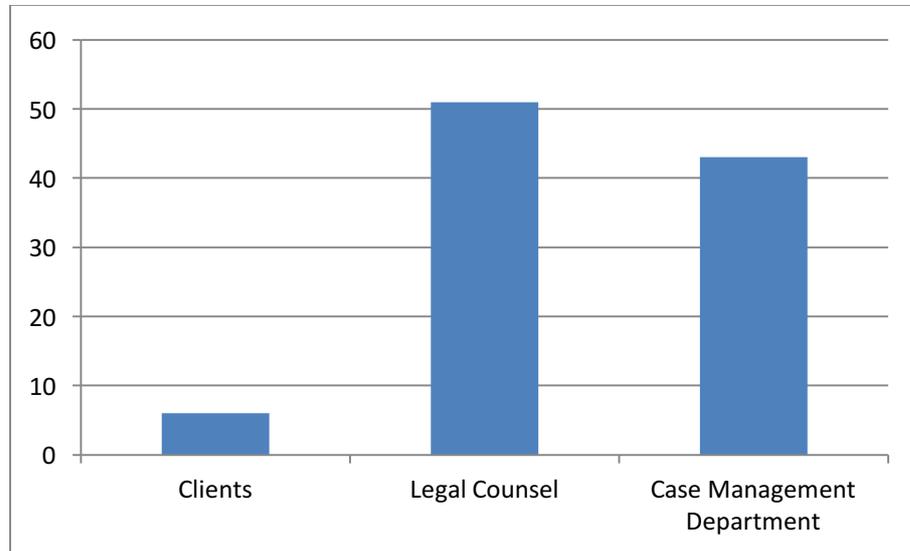
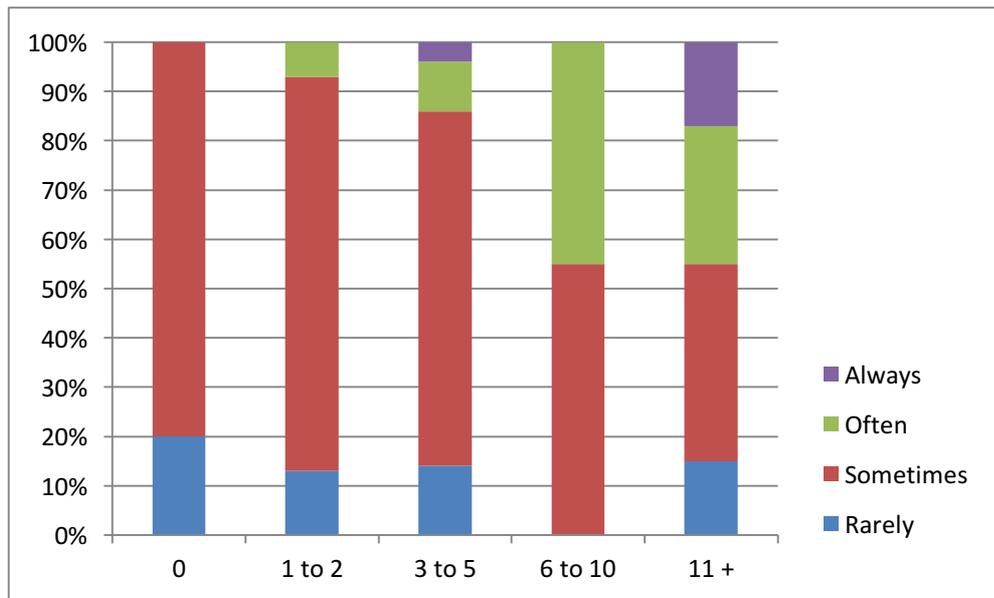


Figure 4: *The party most commonly suggesting using mediation*

### **Familiarity & likelihood of using mediation**

The results of the survey indicate that lawyers’ familiarity with mediation, whether by means of training, client representation, express favourable views of the efficacy of the process. The results indicate that around two-thirds (64%) of respondents sometimes found mediation an effective means to resolve construction cases. While 20% often & 3.5% always found it effective respectively. The results indicate that only 8% considered it rarely effective and only 2% of respondents believed it was never effective. The results also indicate that mediation training and experience of representing a client in the process were both positively and independently correlated with more favourable view of the effectiveness of the process. Wissler (2003) suggests that there is indeed a relationship between lawyers’ exposure to mediation and the propensity for them to recommend the process to their clients. Such correlations have been found in other studies undertaken elsewhere in the UK, e.g. Scotland (Clark and Dawson, 2006). The results also support Riskin’s (2003) central argument regarding lawyers’ mediation experience and the increased utility of the process. While it is also noteworthy that there was only a marginally significant correlation between views of the efficacy and use of the process, the number of cases mediated was significantly correlated with those particularly views. Figure 6 illustrates that lawyers who mediated more cases, express more favourable opinions on its effectiveness.



Chi-Square test  $p = 0.042$ ; linear by linear association = 4.630;  $df = 1$  (N=213)

Note: No pattern was detected in the correlations but this may be indicative of the small number of respondents who have not used mediation (N=20)

*Figure 5: Correlation between number of cases mediated and view of the effectiveness of the process.*

### **The inclusion of mediation clauses in contracts**

The sample of construction lawyers were asked to express their views on the inclusion of mediation clauses in construction contracts. It could be argued that lawyers, who express favourable views on the effectiveness of the process, would be more inclined to include mediation clauses in contracts at the drafting stage. Of those who had experience of drafting contracts a majority, 80%, would be reluctant to include such clauses in contracts. Indeed, 49% of respondents said they would never include a mediation clause in a contract, with only 20% of the sample indicating they would do so. Notwithstanding the existence of a causal relationship, it is difficult to discern from the results exactly in which direction it operates. As such, while more experienced lawyers had more experience of the process; it is no surprise that they expressed more favourable views on the effectiveness of mediation. The lack of support for the voluntary inclusion of mediation may suggest that lawyers are in some way influenced by their clients' opinion on the matter; however in all probability given the role of lawyers in decision-making, the above responses are more indicative of lawyers' views. Certainly, there is a notable shift for those with greater experience within the legal profession, towards lawyers who sometimes included a mediation clause within a construction contract; 19% to 32%. It is possible to ascertain additional insights into construction lawyers more general views of mediation from the factors that influence the decision not to use the process. This analysis is presented below.

### **Barriers to lawyers' discussion and use of mediation**

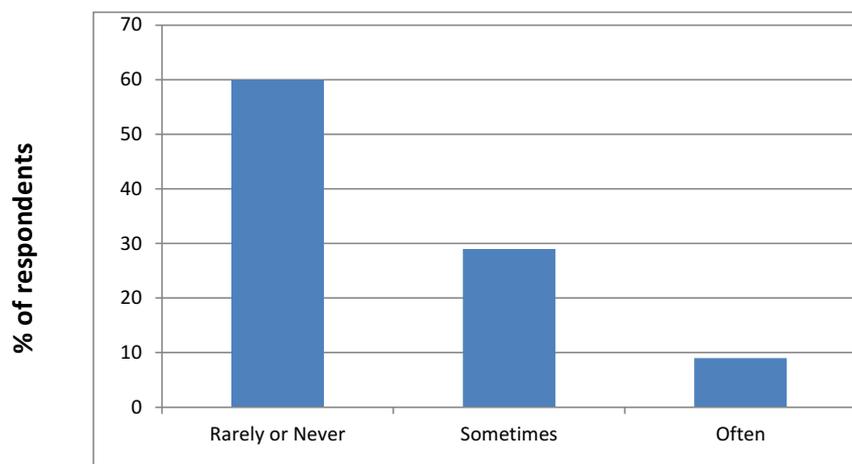
The analysis herein is based on a number of questions in which construction lawyers were asked to rate the frequency at which different factors had influenced their decision not to use mediation.

### ***Client refusal to use mediation***

It is well-understood that lawyers provide a service to their clients. It may be possible that a real barrier to the use of mediation is the unwillingness of clients to use the process. However, there is no conclusive, empirical evidence to support such a proposition within the Construction Arena (Agapiou & Clark, 2013). Indeed, there is some evidence to suggest that End-users have very little knowledge of the available options for the resolution of Construction Disputes (Agapiou & Clark, 2013). The proponents of Court-Annexed Mediation assume that the demand for mediation services will increase through concerted efforts to educate the client body. The results of the survey, however, do not support such an explicit assumption. It seems that only one-third (32%) of respondents reported client refusal as a factor often militating against the use of mediation, where 48% reported that clients never or rarely refuse to use the process. This finding is important; it is indicative that disputants more often than not do not act as barriers to the use of mediation after it has been proposed by opposing counsel. There must be something else or some other factors that militate against the use of mediation, so far undetected?

### ***The absence of good mediators***

The professional level of mediation has often been considered, at least anecdotally, as a significant barrier to the use of mediation in the Construction Context. It could be argued that if the level of professional mediation services is low, then this might impede the adoption of the process. This assumption however is not borne out by the results of the questionnaire survey. Indeed, the data reveal that around two-thirds (65%) of the construction lawyers who responded to the survey rarely or never considered the professional level of mediation services as a significant factor in their decision not to use mediation. Only 4% of respondents often considered the absence of good mediators a significant factor in their decision not refer cases to mediation.



*Figure 6: Absence of mediators influenced the decision not to refer cases to mediation*

### **The influence of the legal and judicial system**

There is anecdotal evidence that the judicial system in England and Wales may also impede the development and adoption of mediation in the Construction Field. Nevertheless, the results reveal that on the whole, construction lawyers who had experience of mediation do not view the position of the courts as having a negative effect on the decision to refer cases to mediation. If on the one hand, mediation agreements create uncertainty compared to court decisions, then this may be perceived as a significant barrier to the use of mediation. Indeed, 85% of respondents agreed that it rarely or never influenced their decision not to use mediation. Similarly, the inability to create enforceable precedents from mediation did not act as a deterrent to the adoption of mediation. It also seems that the sample frame were conclusive in their opinion that the courts do not act as a deterrent to the referral of cases to mediation. Indeed, 92% of respondents were rarely or never influenced not to use mediation because of the position of the courts relative to the process.

### **Prior negative experience of the process**

Anecdotal evidence points to lawyers' dissatisfaction with mediation services as a major contributing factor for the low take-up of the process in the Construction Field. Interestingly, over three-quarters (78%) of respondents who reported negative experiences with mediation concluded that this had little or no effect on their decision not to refer a case to mediation. Indeed, only 2% said that it greatly affected their decision and 18% indicated that it had influence them somewhat. It maybe their dissatisfaction and reluctance to refer cases to mediation is rooted in other, so far undetected factors? It is noteworthy that respondents' views on the effects of negative experience are not correlated in any way to the extent they had used it, or whether it had been used at all as a means of resolving a dispute. Nevertheless there would seem to be a significant correlation between respondents' views on the effect of negative experience on mediation's effectiveness. It seems that the more favourable views were on the effectiveness of mediation, the less prior negative experience had influenced the decision not to refer a case to mediation. While the results do not establish causality, they are indicative of the overall impression of lawyers' mediation experience relative to its perceived effectiveness.

### **Preference for alternative forms of dispute resolution**

The writings indicate that lawyers would consider amongst other things the compatibility of the process to the dispute at hand in addition to the desirability of alternative means of dispute resolution. Around one -quarter of respondents (26%) often and sometimes (48%) would not use mediation because the case at hand was not suitable as a means of dispute resolution. Arguably, if some cases are indeed not suitable for mediation it would be useful to establish why lawyers identify some cases as suitable while others less so. The writings suggest that construction lawyers have a pre-disposition to adjudication, particularly given the centrality of the process in the dispute resolution process (Agapiou & Clark, 2011). It seems that the respondents did not express a general preference for adjudication per se. The view accords with the mainly anecdotal concerns espoused over costs, the complexities and the quality of adjudication decisions. It would seem that the decision not to refer a case to mediation was influenced by the prospect of adjudicatory settlement.

Indeed, the overwhelming majority of the sample frame (80%) said that their personal preference for adjudication had little or no effect on their decision not to refer a case to mediation; only 6% and 11% said it influenced them greatly and somewhat respectively. The finding in itself is encouraging for the wider adoption of alternative means of dispute resolution in England and Wales. Interestingly, the fact that a mediator is not empowered to decide a case, unlike a judge or an arbitrator, did not have a significant influence on lawyers' decision not to refer a case to mediation. Indeed, only 3.5% of respondents indicated that a mediator's lack of coercive power generally influenced their decision not to propose mediation to a client. On the other hand, an overwhelming 70% of respondents reported that the lack of coercive power had little or no effect on their decision to refer a case to mediation. Around 25% of the sample frame said that it somewhat influenced them.

### Time and Money Factors

It could be argued that lawyers' potential financial gains from mediation as compared to other forms of dispute resolution could affect views and attitudes of the process. The writings indicate that there are 2 major factors that can affect lawyers' financial gains. This includes the time a lawyer invests in a case; and also the profits they can accrue.

#### Time Factors

According to Sela (2009) it is possible to divide time, as a resource, into 3 different categories: the time investment to conclude a case; and the time that the lawyer and the client invest in the case. The results of the survey indicate the overwhelming majority of the respondents that mediation required less time to conclude (71.4%), as compared to adjudication. The respondents also believed that they would invest less time working on the case (58%). Around one-half of the respondents (48.3%) believed that clients would also invest less time in mediation, as compared to adjudication.



Figure 7: Time invested in Mediation as compared to Adjudication

There would seem to a noticeable difference in the number of respondents who reported that it takes less time to conclude a mediated case, and the rate they believed they would invest less time in the process.

Naturally, lawyers would invest less time in a process that arguably takes less time to complete generally. In comparison with adjudication, mediation is much less onerous in terms of paperwork, while being much less lucrative financially as a consequence from the lawyers' perspective. The self-reported personal experiences of respondents, biases, reluctance to admit to a smaller workload in mediation and associated financial implications, may well explain the reported differences observed in Figure 9. Mediation is widely considered to be a principal-focused process, yet the results seem far from conclusive. It seems that 17% of respondents believed that clients would need to invest more time in mediation in comparison to adjudication. This finding is in itself interesting from the point of view of the clients' involvement in the mediation process. The results seem to indicate that lawyers either remain central figures in mediated cases, or arguably that even the most highly-involved clients invest much less time in the process as compared to a court trial setting. There is a widely-held belief that the perceived shorter time required to conclude a mediated case can affect different aspects of a lawyers' interaction with the process.

One of these aspects is their potential to generate profits, as a product of the fee-billing model utilized. If, for instance, a lawyer's fee is calculated on the basis of hourly rate, then less time spent on a case would affect their immediate profits. Alternatively, if a lawyer is paid a fee conditional on a positive outcome, then less time spent on a case would translate into greater accrued profits. Interestingly, Riskin (2003) notes the potential for a financial loss for lawyers from the use of a conditional fee approach within mediation, particularly in a situation where as disputants trade-off monetary undertakings for the preservation of the business relationship as part of the settlement. In this respect, Gilson and Mnookin (2009) also note the possible divergent interests of lawyers' working on a case and their firm's organisational policies. On the one hand, lawyers may well be compelled to consider short-term interests to maximise their billable hours as part of an organisational quota, whereas their firm may be more concerned with long-term profit potential and client retention. According to Klein (2008) the potential for a conflict of interest is not limited to conditional fee-award cases, although it could be more marked in such cases. Burns (2011) suggests that fee arrangements entail the potential for conflict of interest, in particular as lawyers' financial self-interest is consistent with their client's goals in the representation. There was no discernible data to provide an insight into this issue, although in general there does not seem to be any indication that firms do not consider mediation at legitimate tool to resolve disputes with English legal circles.

### ***Money Factors: Short & Long-term profits***

Riskin (2003) posits that 'referral [of a case] to mediation would cost lawyers all or part of their fees'. The results of the questionnaire would seem to support this assertion, but only up to a point. It seems that around 35% of the survey respondents reported that lower profits from mediation compared to adjudication, when questioned about short-and long-term profit generating potential. It would also appear that around 33% of the lawyers surveyed earned similar amounts whether they were engaged in mediation or adjudication, with approximately 17% reporting more if they were involved in mediated case. It would seem from the results that there was no existence of a statistical significant difference in the distribution of responses between lawyers surveyors relative to their firm's size or their experience within the legal profession.

It was noteworthy however that a statistical variation exists between the views of lawyers relative to their experience within the profession and their views of on long-term profit potential in respect of mediation as compared to litigation. In general, those with greater than 6 years in practice expressed more favourable views as to the long-term profits potential with respect to mediation as compared to those with less than 6 years' experience within the profession. Table 2 illustrates the observed difference in the views of construction lawyers' long-term profit potential relative to mediation as compared to interaction with litigation by level of experience.

Profit Potential	Practical Experience	
	<6yrs.	6>yrs.
Less	55	31
Same	32	42
More	9	27
Total (%)	100	100

Chi-square test df = 2, p =0.058; likelihood ratio LR =5.67

Table 2: Differences in the views of construction lawyers' long-term profit potential relative to mediation as compared to interaction with litigation proceedings by level of experience

Nevertheless, the proponents of court-annexed mediation would be heartened by the fact that a majority of the survey respondents with recent experience of mediation reported more favourable views of mediation relative to the potential to amass profits in the long-term (see Figure 8).

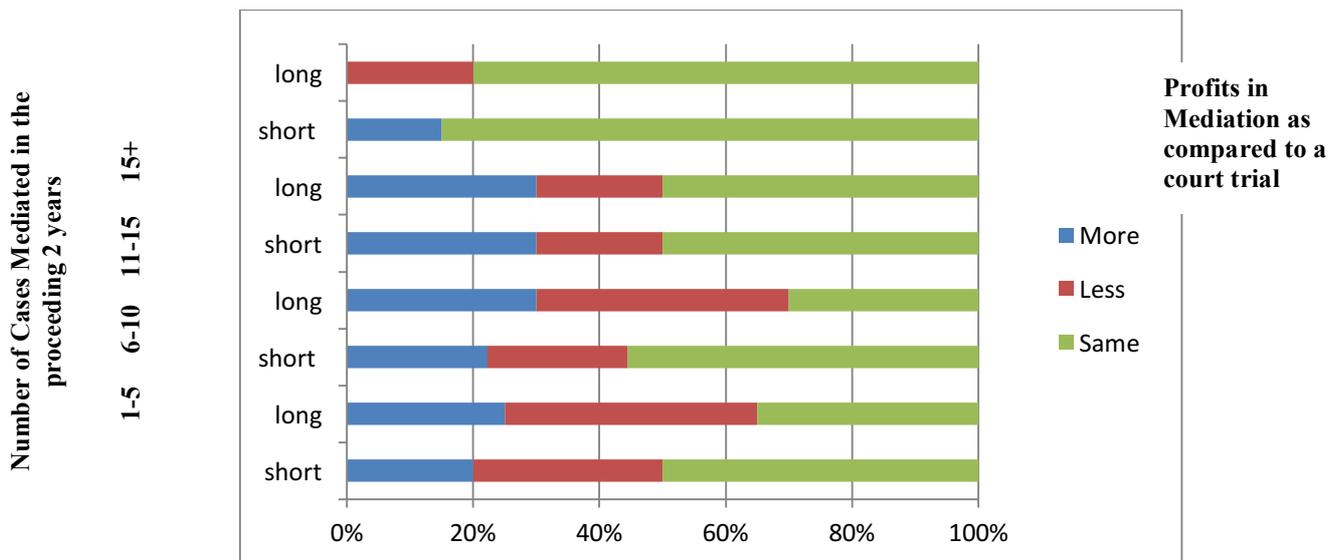


Figure 8 Views of short-term and long-term profits in mediation as compared to adjudication by experience of the mediation process

Interestingly, although the lawyers surveyed reported diminished income from their involvement in mediation as to adjudication, an overwhelming majority of the respondents, 85%, indicated that this has little effect on their decision not to refer a case to mediation. The results of the survey indicate that the potential for the reduction in profits as a consequence of lawyers' involvement in mediation as compared to litigation. While the sample frame expressed the view that this factor would not necessarily effect their decision to use mediation to resolve a Dispute, there are reasons to be sceptical about the survey results in this context. Clearly, the reduction in profits can be mitigated if the ambiguity associated with appropriate mediation fee levels or scales could be addressed and minimized in some way. This would require the establishment of a standardised approach to setting fee scales for mediation advocacy and counsel as a means to facilitate the process among both lawyers and their clients.

### **Conclusion**

The research has found that Construction Lawyers increasingly hold positive perceptions regarding the benefits of using mediation, seeing it as a well-established part of their professional *modus operandi*. It would seem that the lack of experience in mediation, and litigation more generally, may act as a deterrent to using the mediation process. The findings would seem to suggest that self-reported financial interests do not, on the whole, deter Lawyers from referring cases to mediation, rather it may be more to do with the growing dominance of 'repeat players' within the construction field who seemingly monopolize the dispute resolution market thereby restricting less experienced practitioners from gaining expertise to counsel to their clients on the intricacies of the process. While there is a need to develop more enhanced mechanisms to more clearly define the role of the lawyer within mediation settings & disseminate the appropriate use of the process within the construction field to all legal practitioners as consumers of dispute resolution tools, there is also a requirement to reform the 'market monopoly', niche service provision characteristic of the dispute resolution marketplace within the Construction Field. This would provide less experienced construction lawyers with an opportunity to encounter mediation in increasing numbers, and ultimately to utilise it to a greater degree in the future.

The research also indicates that the majority of construction lawyers do not report having less influence on their clients in mediation. It could be possible that many of the respondents are unclear how to operate in a mediation setting. This ambiguity may well manifest itself as a reluctance to engage in the process, whether it is an inability to provide counsel on the intricacies of mediation or as an expression of lawyers' own personal preferences. A clearer definition of the role of the lawyer in mediation would help to overcome the perceived barrier to the use of the process in this sense. The survey results also indicate the inability to create enforceable precedents from mediation or the courts do not act as deterrents to the referral of cases to mediation.

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## **Introduction**

On international standards the Finnish legal aid system has been considered comprehensive and generous.<sup>1</sup> Regan and Johnsen (2007) showed that reforms made in Finnish legal aid system in early 21<sup>st</sup> century were quite different from what other countries had implemented in publicly funded legal aid services as these reforms concentrating making the legal aid almost a quasi-universal. But since that article, legal aid in Finland has been under rapid change. The tightening financial situation and changes in the fabric of society have had their effects on legal aid system as well. In general, the alterations have not focused on the definition or eligibility of legal aid but to the actual physical structures of the system. These structural reforms have already have had an effect on the availability of legal aid making it in some cases more accessible and in some cases building more barriers. Overall, in global academic discussion Finnish legal scheme is not very well know. This papers purpose is to give a closer look to Finnish legal aid and evaluate the latest structural reforms in it as well as speculate on its future. Paper leans on empirical research made by the National Research Institute of Legal Policy<sup>2</sup> and to the current theoretical and empirical discussion around public legal aid services and access to justice.

## **Short introduction on Finnish legal aid**

Finland has a unique dual system where both public legal aid attorneys as well as private attorneys provide legal aid services. The main reason to sustain this type of dual feature is to guarantee the legal aid services throughout the whole country. Within the system public legal aid (PLA) officers and private practitioners handle all type of legal matters, with an exception that PLA officers have a monopoly to out-of-court proceedings such as will drafting.<sup>3</sup> The private attorneys are mostly private advocates who represent legal aid clients in the court proceedings and are paid with state

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<sup>1</sup> Regan & Johsen 2007; Rosti et al. 2008.

<sup>2</sup> Rissanen & Rantala 2013; Lasola & Rissanen; Rissanen 2013 & Lasola 2014. These studies are based on latest statistical data on legal aid as well as interviews of the all three sectors (PLA, Private practitioners and Insurance companies).

<sup>3</sup> In case of litigation, customer eligible to legal aid whether to use PLA office services or a private lawyer.

funds. Legal aid is provided either for free or against a deductible.<sup>4</sup> This is decided by means/merits-testing. The income and expenses of the applicant, as well as her assets and liabilities, are to be accounted for by way of receipts or other documentation. Legal aid is usually not granted if the applicant has legal expenses insurance that covers the matter at hand. Legal aid is also not available to companies or corporations.<sup>5</sup> The funding of legal aid comes wholly from the state budget via the MoJ.

## **Current situation**

The public legal aid services in Finland have undergone rapid structural changes in the past years. The number of public legal aid offices has dropped from over 60 to 29 in a relatively short period. Cutting down the number of offices has also had an impact on legal aid personnel. Person-years of public legal aid attorneys and legal aid secretaries have decreased from 445 to 391 in last five years.<sup>6</sup> Decision makers defend these changes by saying that the smaller number of legal aid offices decreases the vulnerability of smaller offices, helps streamline administrative work and increases possibilities to re-organize work duties. To patch these reductions MoJ is introducing new technological innovations such as video links between lawyers and customers and electronic application processes. Overall, the legal aid reform is closely linked to a bigger re-organization inside the Finnish judicial system, which also includes decreasing the number of district courts.

Since the beginning of the structural reform the number of cases in PLA offices has been steadily decreasing, decreasing from 52 000 (2008) to around 44 000 (2013) in five years.<sup>7</sup> At the same time the number of legal aid cases handled by private attorneys has stayed pretty much the same. Overall, in 2013 little less than 70 000 legal aid decisions were granted, of which one third were granted to private attorneys. Over half of all the legal aid cases handled in PLA offices are family and inheritance issues whereas legal aid issues handed by private practitioners are mostly criminal cases.

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<sup>4</sup> Depending on client's means and merits, the deductible is 20 %, 30 %, 40 %, 55 %, 75 % or 100 % of the attorney's bill.

<sup>5</sup> Finnish legal aid system with more detail: <http://www.oikeus.fi/8852.htm>.

<sup>6</sup> Majority of all the personnel cuts have happened through retirement or other natural attrition of employees.

<sup>7</sup> Rissanen & Rantala 2013.

In addition to the downward trend in PLA offices, the customer waiting times to see the PLA attorney have gone up. Waiting time means the period of time that elapses from point at which the client first contacts the office to make an appointment and an actual meeting with an attorney. In 2008, the average waiting time for the whole country was 11 days and in 2012 it was 14 days.<sup>8</sup> Increase in waiting times also indicates that the actual number of people in need of legal aid has not decreased but rather increasingly scarce resources filter out more people. This trend indicates that public legal aid system has become harder to enter when it comes to PLA offices.

Since the state-funded legal aid is mainly targeted to low-income and part of the middle-income people, the most common tool to tackle legal problems for Finns is the Legal Expenses Insurance (LEI). It is estimated that around 85 percent of Finns are covered with it. Its high prevalence is explained by the fact that LEI is basically an add-on insurance to household or vehicle insurance policy. However, LEIs recent development has not in fact extended the legal protection of its owners because many insurance companies are tightening the policy conditions (especially disputes related to family and children). LEI does not also cover any type legal advising. Although LEI is primary to the public legal aid<sup>9</sup> they cannot not be considered as overlapping systems since LEI is more of like a tailored tool to cover certain types of legal problems with predetermined value.<sup>10</sup>

### **The Field of Legal aid: Public versus Private**

In general the Finns have a great trust towards the welfare state and the services it provides.<sup>11</sup> In case of legal aid this means that PLA offices are often seen as a low threshold service where people can have their legal problems handled in a holistic manner. This also means that it is solely in the responsibility of PLA to offer legal advising and document drafting, which are often seen as everyday legal services. The existence of PLA offices within the legal aid system guarantees the message that legal services are not only for people having serious legal problems involving litigation.

The Ministry of Justice (which operates PLA offices) and private practitioners have long been in a silent semi-understanding how the legal aid services should be provided. But in recent years the

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<sup>8</sup> Longest waiting times are in the Helsinki region; 20, 4 days in 2012. This was also already mentioned by Regan & Johnsen (2007) as well.

<sup>9</sup> When applying legal aid, PLA offices checks first if the applicant has LEI and if the problem is covered with it.

<sup>10</sup> see Kilian and Regan (2004) about similarities and dissimilarities of PLA and LEI.

<sup>11</sup> Saari 2010.

tones from the private side have started to demand more radical changes. The current discussion around legal aid focuses mainly on whether the legal aid system should be given completely to the responsibility of private attorneys whereas the role of PLA offices would be to give simple legal counselling and legal advice only. This is something that the Finnish Bar Association (FBA) has been strongly advocating. One reason behind the demands are the new demographics in lawyer employment; many young lawyers are more eager to start their career as a junior associate in a big law firm working in corporate law than say, to establish a own practice in a smaller town to handle civil and criminal justice issues. At the moment, especially in many rural areas, the average age for lawyers is high and there are no successors in sight. The FBA says this is in part due to the current remuneration<sup>12</sup> which does not tempt graduates to this type of field of law.<sup>13</sup> Overall, the remuneration discussion is something which has been under a hard debate in many legal aid systems around the Europe. Finland is actually a lone soul in increasing the hourly fee in legal aid cases whereas other countries have rather had strong pressures to reduce the fees. The target of fee criticism lays in the fact the normal hourly fees of lawyers and attorneys have risen much faster than fees paid from legal aid cases.

The situation of PLA offices in this current state of economy and discussion is difficult. In a way they are between the devil and the deep sea: The current structural reforms have compressed their resources and this trend will most likely to continue in the coming years. On the other hand, strong voices from private side are demanding that PLA offices role should be reduced to act only as a legal advice office. In fact, due to the capacity problems, PLA office have been forced to deliberately transfer some time consuming court cases to private practitioners. It is understandable that this type of situation can have effects on quality and quantity of PLA offices services.<sup>14</sup> In this heated discussion it should be remembered that if the legal aid system wishes to implement its core values, it's most fundamental objective would be to stay customer-orientated and easily approached, whether it's about criminal, family, debt or application issues. PLA services as well as many other state provided commodities are more and more under the influence of economic activity and the search for more effective operating modes has often revolved around who can offer the package

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<sup>12</sup> Private lawyers who handle legal aid cases are paid 110 euros per hour. Before 2014 the fee was 100€. The median hourly fee for private lawyers in 2012 was 170-200€.

<sup>13</sup> Sandefur (2001) also tackled this issue saying that one reason for this development is that many lawyers value corporate law more prestige than civil disputes. The classic values of professionalism such as service, expert autonomy, and intellectual challenge are of secondary importance. Client type is the salient divisive principle both of prestige and of work because lawyers value service to wealth.

<sup>14</sup> In a survey made by the FBA lawyers working in PLA offices were above the average unsatisfied with their work conditions (e.g. work engagement and workload).

with best economic efficiency. That is why the discussion about service providing models needs to be fair and balanced and it must not be carried by voice of market mechanism only.

### **Access to Justice from the point of view of those entitled to Legal Aid**

From legal aid customer point of view the direct threat attached to current legal aid reforms is that if the centralization of PLA continues and there are no private lawyers to patch the deficit, it is only the most mobile and assertive clients who even make it to the next step in the screening process.<sup>15</sup> There is also a well-founded danger that unofficial ways to solve legal problems become more common among those who are left outside. If access to legal services is experienced too problematic to get (i.e. financial, geographical, juridical reasons) people can make desperate and extreme choices to protect what they see is right. A concrete example of this could be a parent taking his/her child abroad in a custody dispute since the legal aid was not reachable.<sup>16</sup>

Nevertheless, it must be emphasized that there have been no changes in case criteria to receive legal aid. However, it can be seen that the current legal aid system practices somewhat contradictory purposes regarding access to justice: firstly, the priority of Finnish legal aid system (and LEI) is to assist people when they experience legal problems involving litigation. In best case scenario person with a matter involving court room presence can have her case covered by either PLA office, private lawyer or LEI, and this does not even demand much effort from the client herself. Only in the second, the system is concentrated on preventing legal problems from escalating and promoting common legal health. This task is almost solely left to the responsibility of PLA offices.<sup>17</sup> One problem in this type prioritizing is that it often creates greater risk of client dependency. Putting more resources to the proactive legal services and pointing that their role is crucial could also change public attitudes to a more preventative direction. All in all, the new and inevitable changes in legal information and legal aid system alter the concept of equal access to justice in the welfare state. This also changes the role of the traditional service providers: more effectively with smaller resources type of thinking places more responsibility on individuals themselves on their rights.

What is clear is that the current legal aid reforms challenge the traditional definitions of equal justice: The new technology orientated trend encourages people to be more open-minded and independent when seeking help for their legal issues and signs are clear that very soon this help may

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<sup>15</sup> Newman 2007.

<sup>16</sup> Jarnila 2010; Cookson 2013.

<sup>17</sup> Legal advices face-to-face or by telephone hotlines cover 34 % of all the work that PLA offices do.

not become concrete through traditional legal services providers. The more individualistic approach on access to justice presupposes that many individuals have a level of existing competence when it comes to finding and understanding information.<sup>18</sup> In this type of thinking the ideal legal aid customer is someone with adequate IT-skills and ability to understand the information she receives. But it should be remembered that new technological innovations are not one-size-fits-all solutions. Especially those with lower level education and insufficient cognitive skills still need to have proper routes to get their problems solved. But As Galanter (1981) has stated for many legal aid as well as access to justice is not just a matter of bringing cases to a front of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.

## **Conclusion**

According to the European Commission's newest Eurobarometer, Finnish people's trust on their justice system is the highest among EU countries.<sup>19</sup> But when asked how to find a lawyer Finns are below the EU average. A rough conclusion can be drawn from these results that the system works well for those who are able enter it, but it does not necessarily help conquer the most difficult part in obtaining legal aid: when and where legal aid can and should be found? The new reforms where PLA office network is compressed and small law firms are also vanishing from rural areas does not seem to improve citizens' legal knowledge. New technological innovations are a great possibility to develop the system but it is good to remember that for some people a stronger reliance on self-help means abandoning, not empowerment.

Overall, Finnish legal aid system has to be credited for its comprehensive coverage when it comes to the financial criteria to receive legal aid. This degree of eligibility guarantees that system can compensate people without stigma. This, as Titmuss (1987) has argued, is vital for the credibility and functionality of the welfare state. Overall, the long-lasting problem for legal aid systems in welfare societies has been that there are tools to cover the most serious legal problems, but at the same time there are now new innovations or guidelines in trying to prevent them in the first place.<sup>20</sup> However, there are now voices among the decision makers who are stating that the legal aids' first priority is to provide assistance in common and relatively uncomplicated legal problems of everyday life and only to the second assist people when they are involved in litigation. As we know,

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<sup>18</sup> Denvir et al. 2013

<sup>19</sup> European Commission 2013.

<sup>20</sup> This is something that Johnsen and Regan have emphasized when studying legal aid systems in Finland, Norway and Sweden.

many legal aid systems have prioritized these tasks traditionally the other way around.<sup>21</sup> In Finland this is closely linked to a broader access to justice discussion which has lagged behind on international standards. The discussion has mainly focused on the principles of justice process and to the legislative objectives and guarantees. To accompany the research on traditional institutions and paragraphs of law, the AJ2 discussion in Finland needs more empirical research on citizens' legal problems and needs, and how the system responds to them.<sup>22</sup> In a world where more and more of our everyday life is hedged about by law and where the legal structure is thick but the resources are thin, it is important to emphasize the right timing and quality in legal services.<sup>23</sup>

The current structural reforms of Finnish legal aid system are characterized by neo-liberal thinking where the aim is to create more efficiency with fewer resources. These changes do not emphasize the legal protection of disadvantage people as strongly as in the 1970s, the golden age of the welfare state.<sup>24</sup> As the welfare state is already in a kind of turning point, more and more people are doubtful about their living conditions, education, income, health and employment. The structures of welfare state are even more in a state of instability if the list continues with common uncertainty against legal protection. Overall, the increase in subjective experience of uncertainty has a great effect on our lives. In practice it means that different forms of uncertainty and risks are more dominant when individuals act in their everyday life.<sup>25</sup>

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<sup>21</sup> See also Genn 1999; Johnsen & Regan 2004; Regan & Johnsen 2007.

<sup>22</sup> See for example MacDonald 2010.

<sup>23</sup> Friedman 1994; Hadfield 2010.

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## **Maximising value through strategic advocacy**

**UCL International Conference on Access to Justice and Legal Services**

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## Introduction

As the Australian legal aid system has evolved since its formal establishment in the 1970s, so too has our appreciation of legal need and the most effective ways to address it.

As VLA has modernised, so too have our methods. Individual services are increasingly being complemented with approaches that seek to tackle injustice or problems unfairly affecting many people, at their source. This is partly fuelled by financial imperatives, but also by the innate desire of staff to make an enduring difference.

When it is well conducted, strategic advocacy can positively shape the development, implementation and application of laws and practices to prevent or minimise the impact of legal problems. This benefits clients and the broader community.

This paper outlines the role of legal aid commissions in contributing to improvements to the law. It provides an overview of key considerations in undertaking strategic advocacy work, with reference to the practical experiences of VLA lawyers who undertake this work on a daily basis.

## Context

The extent to which lawyers should proactively seek to shape the law, as opposed to assisting individuals with an individual legal problem, is a debate that occurs in cycles.

There is debate about what publicly funded legal aid lawyers should and shouldn't do with taxpayer's money, not unlike debates about the propriety of judicial activism, as compared to the strict application of the principles of statutory interpretation. What we know from both is that reasonable minds can and do differ.

Competing priorities for limited funding, greater complexity of the law and burgeoning activity in parts of the justice system have brought these divergent views to the fore. One view is that, diminished funds place an even greater imperative to ensure they are directed at tangible services, rather than more esoteric efforts at improving or changing laws. This mindset necessarily views strategic advocacy as non-essential, afforded only when times are good.

For example, when explaining new funding guidelines limiting community legal centres (CLCs) from undertaking 'lobbying activities', former New South Wales State Attorney-General, Greg Smith, said:

*"In tight financial times we need to make sure the money goes to where it is most needed – to give advice and representation to people who cannot otherwise afford it..."<sup>1</sup>.*

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<sup>1</sup> Smith, Greg, 2012. *Greater Access to Justice for Disadvantaged*, NSW Government, 20 December, accessed on 8 April via

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This view is mirrored by the current Federal Attorney-General, Senator George Brandis QC, who has said:

*“...increasingly over recent years an increasing percentage of the legal assistance dollar has been spent on what is called advocacy work or policy work, which is not directed to helping specific clients with specific needs but in participating in—as it were—society’s discussion about various areas of potential law reform or identifying gaps in the legal system.*

*Now, that is a good thing to do but in my view—and I hold this view very strongly—where resources are limited, I would rather see that money spent helping individual people in need who cannot afford a lawyer rather than spent on policy development.”<sup>2</sup>*

An alternative view is to acknowledge that a purely individualised service model can be expensive and benefit only the lucky few who actually receive a service. Upon this view, strategic advocacy is a way to maximise the benefits of existing funding:

Rich noted in her 2008 report on community legal centres (CLCs) that:

*“Individual legal assistance alone cannot address the underlying causes of various legal problems that disadvantaged people present to legal services with. Further, continuing to undertake individual casework without a broader change focus can have negative, not just neutral, consequences, if CLCs simply assist an unjust system to process the cases which are put before it.”<sup>3</sup>*

In a recent submission to the Australian Productivity Commission,<sup>4</sup> VLA articulated the view that:

*“A highly individualised service model weighted towards the acute end of the legal spectrum is arguably inequitable and an inefficient use of the Legal Aid Fund. VLA must use its knowledge of the client experience and their problems to develop holistic and innovative approaches to the prevention and early resolution of legal problems.*

*VLA is achieving this through a process of service reweighting, geared towards prevention and early intervention. While often construed as secondary or optional, community legal*

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[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll\\_corporate.nsf/vwFiles/201212\\_MR\\_Access\\_to\\_justice\\_disadvantaged.pdf/\\$file/201212\\_MR\\_Access\\_to\\_justice\\_disadvantaged.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/201212_MR_Access_to_justice_disadvantaged.pdf/$file/201212_MR_Access_to_justice_disadvantaged.pdf).

<sup>2</sup> Legal and Constitutional Affairs Legislation Committee, 2014. Transcript, Senate Estimates, 20 February, The Committee, accessed on 8 April 2014 via

[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=priority,doc\\_date\\_rev;page=0;query=Dataset%3Aestimate%20george%20brandis;rec=14;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=priority,doc_date_rev;page=0;query=Dataset%3Aestimate%20george%20brandis;rec=14;resCount=Default).

<sup>3</sup> Rich, Nicole, 2008. *Reclaiming Community Legal Centres: Maximising our potential so we can help our clients realise theirs*, Final Report, Consumer Action Law Centre/Victoria Law Foundation CLC Fellowship Report, December 2008, p.13, accessed on 8 May 2014 via <http://www.victorialawfoundation.org.au/images/stories/files/Grants/CLC-report-08.pdf>.

<sup>4</sup> The Productivity Commission is a publicly funded research and advisory agency, which offers policy advice on a range of economic, social and environmental issues. For further information, particularly in relation to its current Review of Access to Justice Arrangements in Australia, visit [www.pc.gov.au](http://www.pc.gov.au).

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*education, information and strategic advocacy are statutory functions and rightly form part of core business.*

*Our experience demonstrates that modest investment in these areas ensures our services are still accessible to those most in need whilst reducing pressure on our other more resource and cost intensive services.*<sup>5</sup>

The importance of advocacy forming part of the core work of legal aid commissions was endorsed by the Productivity Commission in its draft report into Access to Justice in Australia, released in April 2014, where it noted:

*“Strategic advocacy can benefit those people affected by a systemic issue, it can also benefit the community more broadly and improve access to justice.”*<sup>6</sup>

Further, the Productivity Commission confirmed its view that strategic advocacy:

*“...should be a core activity for legal aid commissions.”*<sup>7</sup>

## **What is strategic advocacy?**

The defining characteristic of strategic advocacy is that its ambition is for far-reaching beneficial impacts. Strategic advocacy seeks change with wider community, not just individual, application.

Rather than judging success with reference to the value of services for the relatively small number of clients who actually get help, the success of strategic advocacy can be judged with reference to its beneficial effect on the broader community, including those persons who may never seek assistance and/or who may not be eligible to obtain a service. It takes account of the number and type of legal problems that were prevented as well as those that were actually responded to.

Strategic advocacy includes focused casework, law and policy reform and communication with stakeholders *and the community* to improve laws. It may involve litigation to obtain a binding precedent, or submissions to law reform inquiries tasked with reviewing the operation of legislation. It can include liaison with government departments on the design of laws and entitlement based decision-making frameworks. Increasingly, strategic advocacy will involve the use of the media to engage the community in understanding how to obtain the protection of the law or to hold other government agencies or private interests to public account.

At its highest, strategic advocacy includes and can facilitate advanced citizenry.<sup>8</sup>

Successful strategic advocacy requires clear thinking around which individuals and organisations are best placed to perform certain tasks. It requires clarity of purpose about what is being sought from those individuals, organisations or legislative processes that are targeted for influence.

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<sup>5</sup> Victoria Legal Aid, 2013. *Submission to Productivity Commission*, November, VLA. Note that parts of this paper have been drawn from this submission, which is available on the Productivity Commission’s site, accessed 7 May 2014 via <<http://www.pc.gov.au/projects/inquiry/access-justice>>.

<sup>6</sup> Productivity Commission, 2014. *Access to Justice Arrangements*, Draft Report, The Commission, April at p623 accessed on 1 May 2014 via <<http://pc.gov.au/projects/inquiry/access-justice/draft>>.

<sup>7</sup> Ibid, at p.625.

<sup>8</sup> Further information on the corollary to active citizenship, open government, can be found at the Open Government Guide, accessed 16 May 2014 via <<http://www.opengovguide.com/about-this-guide/>>.

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For public funds or effort to be applied to strategic advocacy, its purpose or objective must be publicly disclosed. It must withstand criticism from opponents as well as garner support from those of a similar view. It is not enough to be in fierce agreement with the like-minded if beneficial change is what is sought. Overcoming resistance to change through persuasive evidence-based reasoning requires extensive preparation and a sophisticated understanding of alternate views.

### **An extension of social justice lawyering**

Strategic advocacy is often thought of as public interest litigation in appellate courts. Of course, strategic advocacy includes refined legal argument, but it is not limited to this important work.

VLA lawyers in their day-to-day work bring judicial attention to anomalies in the law, alert regulatory bodies to poor practices and persuade decision-makers to adopt pragmatic interpretations of the law that properly reflect the needs and circumstances of their clients. These actions all have a systemic impact.<sup>9</sup> To do a good job before a tribunal or judicial setting, effort must be expended to understand the whole person and their antecedents. As Justice Sackville noted, "... the poor are not simply rich people without money but are persons with distinctive problems."<sup>10</sup>

Social justice lawyering views clients within a broader context rather than the narrow focus of the presenting individual legal problem. O'Brien has described social justice lawyers as those who are interested in changing the systemic conditions that contribute to legal problems.<sup>11</sup>

Strategic advocacy is not new, it is social justice lawyering by another name. Both seek to identify and respond to the underlying source of unfairness to achieve beneficial change.

### **Applying limited resources purposefully**

No one would argue that legal aid commissions should not work with child welfare authorities on sensible protocols for the management of the safety of children or with courts and prosecuting agencies on the processes supporting fair hearings and the conduct of criminal trials. It is a given that legal aid lawyers support the work of busy local courts to work fairly, effectively and at least cost. However, high profile 'test cases' or 'inappropriate' media comment, may raise eyebrows. So what is appropriate and what isn't, and why?

Choosing to advocate for reform or to shape the law requires decisions about which issues to pursue amongst a myriad of injustices that affect clients. Of course, a lot of decision-making relates purely to legal matters, including legal merit. But, it also requires a decision on *which* injustice or failing of the law to proactively pursue and highlight at the expense of others.

Planning our strategic advocacy requires us to identify priority issues and to pursue them intentionally. This involves deliberative consideration of the priority issues and intended objectives, similar to that which we go through when deciding how to allocate scarce resources across different legal services and problem types.

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<sup>9</sup> O'Brien, Paula, 2011. "Changing public interest law: Overcoming the law's barriers to social change lawyering", *Alternative Law Journal*, Vol 36, No. 2, 2011 at p.82.

<sup>10</sup> Sackville, Ronald, 1974. *Legal Aid in Australia: Discussion Paper*, Commissioner for Law and Poverty, November, at p.336.

<sup>11</sup> *Ibid*, at pp.84-85.

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For legal aid commissions, priority issues must be those injustices or outcomes that are having an unfair and disproportionate impact on acutely vulnerable people. Linked to those priorities must be clearly defined objectives to ameliorate, remedy or raise awareness of these impacts.

If reasonable minds can differ, then who determines which change is beneficial? Does beneficial change lay in the subjective eye of the beholder or can its objectives be clearly stated to engender debate and in so doing, add to civil society?

Every day, legal aid commissions make value judgements about legal need and disadvantage in making choices about the availability and intensity of different forms of publicly funded assistance. The subjective eye of the beholder can be cast on almost all decisions legal aid commissions make.

Which persons to help, with what form of assistance and at what cost; given that funds spent on one person won't be spent on another, involves balancing the relative need of individuals on the one hand, with service design or limitations on the other to achieve the best mix of services that serves the greatest public good.

Some liken this 'rationing exercise' undertaken by the independent statutory board as a moral quandary. What it shouldn't be is an exercise of purely personal, political, value judgements. What it should include is an articulation of priority need and how that need can be best addressed to balance the needs of the individual with the overall public good.

In essence, the value judgements or choices made to pursue particular forms of strategic advocacy can be viewed as a simple and legitimate extension of the moral quandaries that lie at the heart of the independent statutory board's eligibility or guideline setting role. Statutory boards exist precisely to make or sanction these choices.

## The case for strategic advocacy

### Legal need outstrips legal services

The reality in Australia is that the demand for individualised legal services is far greater than we are able to provide.<sup>12</sup> For better or worse, there is acceptance from all sides of Australian politics that publicly funded legal services can generally only extend to the poor.<sup>13</sup> When deciding how we allocate our resources, we know that for every person we are able to assist, there will be others that miss out. As we cannot help everyone who seeks assistance with intensive services, a focus on strategic advocacy is a means to increase our reach and minimise the need for legal services in the community.

This view has been acknowledged in the draft findings of the Productivity Commission, which has noted: "[Strategic] Advocacy can also be an efficient use of limited resources" and "...can be an important part of a strategy for maximising the impact of LAC [legal aid commission] and CLC [community legal centre] work."<sup>14</sup>

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<sup>12</sup> Coumarelos, Christine, et al, 2012. *Legal Australia-Wide Survey: legal need in Australia*, Law and Justice Foundation of NSW, Sydney.

<sup>13</sup> Note for example that 25% of VLA clients have no income and 55% are on Government benefits, Victoria Legal Aid, *Annual Report 2012-13*, accessed 15 April via <<http://ar2013.vla.vic.gov.au/our-clients>>.

<sup>14</sup> Productivity Commission, 2014 at p.623.

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## Prevention is better than cure

It is generally accepted amongst lawyers and policy makers that priority should be given to the avoidance of legal problems and their resolution at an early stage, rather than waiting to react to legal need when it becomes acute.<sup>15</sup>

When done effectively, strategic advocacy can save money not simply for the legal assistance sector, but for other agencies as well. Better primary decision making or providing government with cost savings that flow from getting a decision right the first time, is but one example.

Sometimes, strategic advocacy can prevent disputes from arising at all. The case study below demonstrates how VLA used strategic litigation to benefit our client and others in a similar situation. In this case, our actions in highlighting the unfairness of retrospective legislation prevented many costly criminal prosecutions from continuing or being commenced.

### Case study – Kelli Keating

Ms Keating, was charged with the criminal offence of welfare fraud under backdated legislation introduced by the then Federal Government in July 2011. She had received an alleged overpayment of \$6,942 from the agency responsible for welfare payments, due to what that agency said was a failure to declare her income.

The backdated or retrospective legislation was passed to improve the prospects of ‘tough on welfare cheat’ criminal prosecutions being successful, despite civil and administrative processes for recovering legitimate overpayments being available.

VLA is of the view that retrospective criminal legislation should only ever be used sparingly, if at all. In light of this, VLA engaged extensively with popular media about this issue and (with consent) Ms Keating’s circumstances, which can be characterised as her having made an ‘honest mistake’ or ‘a failure to do something she wasn’t aware of’.

VLA elevated Ms Keating’s case to the High Court (Australia’s superior court of appeal) to determine whether this retrospective legislation was constitutional. It also sought much needed clarity on the prosecution of offences on the basis of omissions (which, VLA argued, could result in criminal prosecutions in circumstances where people made honest mistakes or did not understand their reporting obligations).

On 8 May 2013, the High Court handed down its unanimous decision *in Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20.

The decision has far reaching implications for the conduct of social security fraud prosecutions in Australia. It is estimated that this decision has or will alter around 15,000 previous prosecutions where people had been charged with welfare fraud, because they mistakenly omitted to tell authorities of a change in circumstances, as these matters are now arguably unsound on the basis of the High Court’s decision.

In response to the High Court decision in *Keating*, the Federal Director of Public Prosecutions (CDPP) has adopted a national policy of not prosecuting on the basis of omissions and has withdrawn prosecutions on foot that are based solely on omissions.

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<sup>15</sup> This has informed the principles underpinning the *National Partnership Agreement on Legal Assistance Services* and is a guiding principle in modern service delivery in the legal assistance sector.

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The Court's judgment also provided clarity around the impact of notices sent by authorities to welfare recipients asking them to report changes in their circumstances. The Court recognised that sending a notice does not necessarily mean that the intended recipient has done the wrong thing if they don't respond. A notice sent may not have been received or understood.

For VLA, this means up to 100 matters are no longer proceeding in Victoria with savings of approximately \$84,000 in case expenditure alone.<sup>16</sup> However, the benefits of this case were Australia-wide following the national decision to not proceed on any purely omission cases.

Taking on Ms Keating's case was part of our commitment to better primary decision making and improving government compliance with administrative law principles. More generally, preserving a person's income is of key concern to VLA, as welfare payment recipients include the most vulnerable and socially excluded members of our community. In addition to the obvious human benefit for the persons concerned, getting these decisions right the first time saves the community money within government agencies; on legal and compliance costs, and by preventing other problems such as homelessness and family breakdown.

In this instance, our advocacy also shed light on laws that are bringing people into contact with the criminal justice system unnecessarily. Other recovery options were available and denunciation and punishment through the criminal law, was arguably unnecessary in Ms Keating's case.

Legal aid commissions know well that interaction with the criminal justice system is often a manifestation of disadvantage and the law can operate unfairly in the face of vulnerabilities, such as mental illness or disability. We have advocated for policy reform which would reduce the number of people brought into the criminal justice system for failure to pay fines where their vulnerabilities are relevant to their breach.

### **Case study – Fines or infringements reform**

Government is increasingly opting for larger and larger monetary fines as a sanction for low level offending, including in parking and traffic matters. Some people are accruing a large number of infringement notices that together, add up to large sums of money that they have difficulty re-paying. Failure to make payment can, and does, result in custodial sentences when certain court orders are breached.

Some people are able to expiate their fines by payment within the relevant timeframe, whereas others have circumstances that make compliance more difficult – such as financial hardship, mental illness and disability. Some of these people are being imprisoned for circumstances stemming from their disadvantage, who arguably shouldn't be.

For almost three years, VLA has been active in drawing attention to some of the unjust consequences of the current fines system. We have supported measures to address the underlying characteristics and circumstances that increase the vulnerability of people to imprisonment for non-payment of fines. We have also advocated directly with the Victorian Government, as well as its Sentencing Advisory Council, for improvements to the fines system.

Amongst the issues we identified were:

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<sup>16</sup> Note that this saving does not take into account matters that were withdrawn prior to *Keating* being handed down or those pending the *Keating* decision where charges had not been laid. In addition, since *Keating* there have also been cases where people who were previously found guilty have had their matters "re-opened" and then struck out with the active co-operation of the Commonwealth Director of Public Prosecutions.

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- vulnerable people were not being diverted away from the system at the earliest opportunity;
  - internal review processes were complex and inconsistent;
  - people who were too poor to pay their fines were vulnerable to strong enforcement action, including imprisonment;
  - the system did not facilitate sufficient access to support to address underlying issues that may contribute to offending conduct; and
  - the processes and outcomes of the system were inflexible and do not accommodate the particular needs of vulnerable people.

Rather than simply continuing to deal with each individual as they presented, on a case by case basis, VLA has persistently advocated for beneficial changes to the infringements system.

One component of our advocacy was the deliberate decision to pursue judicial review, in the case of *Victorian Toll & Anor v Taha and Anor; State of Victoria v Brookes & Anor [2013] VSCA 37*, which resulted in important safeguards being incorporated into magistrates' obligations when dealing with breach matters involving non-payment of fines (see below).

Another component was a comprehensive set of proposals put to the Victorian Sentencing Advisory Council in October 2013 as part of its examination of fines as a sentencing option in Victoria.<sup>17</sup> Our well publicised proposals supported the early exit of vulnerable people from the fines system – either through diversion to support services or through discharge of fines due to special circumstances, with a view to alleviating some of the intensity of support and enforcement activity required for this cohort, at later stages of the process.

In May 2014, the Fines Reform Bill 2014 was introduced into Parliament with many of our proposals adopted. That Bill makes provision for discharge of fines through work programs or through medical, drug and alcohol treatment in some circumstances. We will continue to advocate for, and to work with the Government to achieve a fairer infringements system.

### **Strategic advocacy can promote a fairer legal system**

When concerted efforts are made to identify dysfunctional – or systematically unfair – aspects of the justice system, legal aid commissions can take targeted steps to promote the rights of those directly affected by their operation. This may be through submission writing and liaison with government departments and/or through litigation, with a view to spotlighting the operation of the law for government or through the creation of favourable precedent.

The *Taha* case below demonstrates how the legal system itself was used address a systemic problem in the operation of infringements law, which was impacting disproportionately on already vulnerable and disadvantaged members of our community.

Extremely busy lawyers don't always have the time to analyse trends and pursue systemic problems. However, as the *Taha* case demonstrates, when the opportunity presents itself, the rewards can be great.

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<sup>17</sup> Victoria Legal Aid, 2013. *Submission to Sentencing Advisory Council on Infringements*, VLA, Melbourne, accessed 10 May via <<http://www.legalaid.vic.gov.au/about-us/justice-and-law-reform/vulnerable-people-and-fines>>.

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## Case study – Casework triggering legislative reform to infringements law

Mr Taha has an intellectual disability and had accumulated fines totalling \$11,000. At the time of sentence, the magistrate was unaware of his intellectual disability and sentenced him to 80 days jail for failure to pay. Even when the disability was subsequently identified, the absence of an appeal right in the legislation prohibited the magistrate from being able to revisit the client's circumstances and review the decision.

Given the constraints of the infringements legislation, an application for judicial review was made to the Supreme Court. In *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor [2013] VSCA 37*, the Court of Appeal subsequently upheld the initial Supreme Court ruling that a magistrate is under a duty to inquire into the circumstances of an infringement offender, including whether they have a disability or other special circumstances, before making an imprisonment order against them for a failure to pay fines under the *Infringements Act 2006*.

Importantly, for Mr Taha, the case was remitted to the Magistrates' Court and the remaining fines were discharged. More broadly, the effect of the decision is to impose a duty on magistrates to inquire about the circumstances of all people appearing before them.

The Victorian Parliament has now passed reforms which will allow a limited rehearing right, through its *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013*. Introducing the amendments to Parliament, Victorian Attorney-General, Robert Clark, said the reforms responded to issues brought to light by two test cases in which VLA represented people with disabilities who faced jail for unpaid fines.

## Why should legal aid commissions do strategic advocacy?

### Statutory mandate

VLA considers strategic advocacy to be core business and this is reflected in our enabling legislation. The *Legal Aid Act 1978* (the Act) expressly requires VLA to look beyond individual clients to determine how we can have a bigger impact on the operation of the justice system. Specifically, the Act requires VLA to:

- provide legal aid in the most effective, economic and efficient manner (s4(a));
- pursue innovative means of providing legal aid directed at minimising the need for individual legal services in the community (s4(d)); and
- make recommendations to or through the Attorney-General with respect to any reforms of the law the desirability for which has come to its attention in the course of performing its functions (s6(2)(c)).

As we noted when appearing before a parliamentary committee investigating legislation which criminalised the transportation of asylum seekers to Australia – referred to as “people smuggling”:

*“It is really about our role and statutory function. It is really important that people understand that Victoria Legal Aid can and must do things that governments do not like or wish to hear. That is our statutory role. Like this committee, we have a role in helping make governments*

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*accountable. Of course we do this through the conduct of individual cases and appeals, and through the provision of advice about the desirability of changes to the law.”<sup>18</sup>*

Despite this, strategic advocacy has not always been a key focus for the organisation. After all, the job of busy lawyers is to think about resolving the specific issues facing the clients immediately before them. Supporting efforts to spot patterns and to work ‘on the system’ as well as ‘in the system’ has required a clear cultural intent to shift the organisation’s mindset over time and remains a work in progress.

## **The right incentives and a broad outlook**

The private legal profession alone has neither the infrastructure nor the incentive to prevent legal problems from arising. While free information and community legal education are cost effective ways to reduce demand for justice services, they also reduce demand for the services offered by private practitioners. Publicly funded legal services do not have a profit motive, and are well placed to pursue an agenda of minimising legal disputes in the community.

As the Productivity Commission noted:

*“Strategic advocacy is an area where there are few incentives for private lawyers to act. Private lawyers are focused mainly on achieving outcomes for individual clients. They are less interested in achieving broad based reforms that could result in positive outcomes for the wider community. There are good reasons for this. Where individuals are the principal beneficiaries of services, lawyers can charge for the work that they undertake.”<sup>19</sup>*

A private lawyer’s business model is not geared towards lasting, systemic reform within the justice system. In contrast, legal aid commissions have a unique opportunity to identify systemic issues and tackle them with a broader lens where this promotes the interests of our clients and the community.

### **Case study – Bulk Debt Project**

VLA and Legal Aid NSW joined with the community legal sector to assist people in long term financial hardship struggling with debt. The National Bulk Debt Project involves negotiating with selected debt collectors and credit providers for bulk waivers of debt incurred by people with no or virtually no capacity to pay. Waiving the unrecoverable debts has made sense for creditors, who have little likelihood of recovering the debt, and it is also fairer on vulnerable people with low or no incomes. Negotiating in bulk was far more efficient and cost effective for all involved, compared to simply assisting each individual client in isolation.

Financial counsellors, State Trustees and lawyers refer debts of eligible people through the project website (National Bulk Debt Project). Eligible people must be dependent on social security benefits or have no income at all; have no assets; have no prospect of employment in the short to medium term and be unable to repay the debt.

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<sup>18</sup> Warner, Bevan, 2011. Victoria Legal Aid, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Detering People Smuggling Bill 2011*, public hearing transcript, 11 November 2011 at p.19, accessed 20 May via <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed%20Inquiries/2010-13/deteringpeoplesmugglingbill2011/hearings/~media/wopapub/hansard/senate/commtee/s442.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20Inquiries/2010-13/deteringpeoplesmugglingbill2011/hearings/~media/wopapub/hansard/senate/commtee/s442.ashx)>.

<sup>19</sup> Productivity Commission, 2014 at p.622.

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To date, the project has negotiated waiver or closure of debts worth over \$20 million with creditors such as major banks, insurance companies, credit providers, debt collectors and utility service providers.

Clearing these debts gives people breathing space from what can seem like a crushing burden and ensures they can use their limited income for food, housing and other necessities.

Legal aid commissions and community legal centres are working with the Australian Bankers' Association and Financial Counselling Australia to clarify what constitutes good industry practice for unrecoverable debts.

Throughout the project, we have adopted a collaborative approach to our advocacy, applying specialist legal skills while avoiding the courtroom. Collaboration with industry as part of this project has led to strong outcomes for both our current clients involved and more broadly for disadvantaged and vulnerable consumers, through lasting systemic change.

### **We offer a well informed and evidence based perspective**

VLA is the largest provider of legal services to vulnerable people, in Australia's second most populous state. The number and breadth of legal disputes that we deal with creates knowledge and enlivens our capacity to inform public policy.

Government policy makers have specialist expertise but are not always attuned to the practical reality of how laws play out in practice. Independent think tanks and other non-government commentators offer valuable analysis and impartial insights, but also do not see laws in operation. In contrast, our commentary is backed up by direct observations of the way in which legal policy, court procedure or administrative practices affect the general community and our clients every day.

Unlike many other commentators, we generally do not need to rely on theoretical predictions of how a proposed change might work or play out. We see it through the experiences of our clients and the practice wisdom that accrues in our staff. The fact that we also operate a legal information and advice telephone call centre and monitor traffic to our legal information website, makes us well placed to spot the latest trend or unscrupulous practice in the general community, who may freely access these non-means tested services.

On one view, legal aid commissions operate like a representative body for vulnerable and disadvantaged consumers of the law and legal services. As unions represent the views of their members and business peak bodies represent the views of industry, legal aid commissions give voice to our constituents, the poor and marginalised – those who cannot afford private legal representation.

That does not mean that we are the only ones who use poverty law practice experience to inform strategic advocacy. Community legal centres are smaller and play a different role that is further from government. Because of these characteristics, they can sometimes be responsive and flexible in a way that legal aid commissions cannot. Working in tandem allows local initiatives first piloted by community legal centres, to be scaled up later by legal aid commissions, as happened with the development of a free education kit about common legal problems that people newly arrived to Australia may encounter called "What's the law"<sup>20</sup>.

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<sup>20</sup> 'What's the law' had its genesis in research undertaken by the Footscray Community Legal Centre in 2009, which showed that many of the legal issues encountered by new arrivals in the first few years of settlement are preventable.

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Because of their ‘coal face’ exposure, legal aid commissions are well placed to advocate for change where change is needed. This is particularly important in areas where there is limited involvement of the private profession or other agencies in assisting a particular client group or legal problem type.

### **Case study – Involuntary patients**

In recent years, VLA has deliberately shifted attention and resources to better assist persons facing unwanted medical treatment and involuntary detention in closed psychiatric facilities.

Persons facing unwanted medical treatment are able to challenge their treatment regime before a three person tribunal comprised of a lay person, a legal member and a non-treating psychiatrist.

Part of VLA’s motivation for increased attention and resources for this particular jurisdiction was the degree of patient vulnerability and the low rates of access by persons to legal advice and assistance. Only seven per cent of persons, who appeared before the tribunal, did so with a lawyer, despite lawyer involvement making it four times more likely that a client would receive an outcome they were happy with. This acutely vulnerable, high impact, low coverage scenario remains a concern to VLA.

The nature of the jurisdiction means that it is not commercially attractive to the private market and highlights the necessity for publicly funded civil law practices of sufficient size and expertise to work ‘on the system’ as well as ‘in the system’. We don’t expect to ever be able to all patients and need to progress our work in such a way as to strengthen compliance with the law - irrespective of whether a patient is a VLA client or not. Although we have lifted access rates to approximately twelve per cent of persons with a legal proceeding, we still see troubling patterns of the legal rights of this vulnerable client group not being upheld. We are spotlighting and challenging medico (and hospital) behaviour in new and more public ways, as the following de-identified case demonstrates:

‘Our client (WB) was admitted to a hospital as an involuntary patient under the *Mental Health Act 1986*. Eight days later the tribunal reviewed her involuntary treatment order. The tribunal accepted that our client did not meet the criteria necessary for involuntary treatment and ordered that she be discharged. The decision did not depend on her remaining in the hospital as a voluntary patient. Within three hours, WB sought to leave the hospital and WB’s treating doctor made a new recommendation for involuntary treatment. The reason appeared to be that WB’s treating doctor and psychiatrist did not agree with the Board’s decision. WB’s situation was a continuation of a concerning pattern noted by us, that hospital psychiatrists did not appear to be respecting tribunal decisions. We sought an urgent Supreme Court injunction to release the client, which was abandoned after WB was discharged at an

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VLA worked with other legal aid commissions on a national strategy, adapting Footscray’s work to create an education kit. It has since been endorsed by the Federal Department of Immigration and Citizenship, with over 16,000 kits distributed nationally. ‘What’s the law’ was one of three finalists in the recent Australian Migration Settlement Awards, run by the Migration Council of Australia. The resources are available online via <<http://www.vla.vic.gov.au/about-us/community-education/resources-for-educators/whats-law-australian-law-for-new-arrivals-kit>>.

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emergency tribunal hearing three days after the new order was made. The defendant hospital sought to have the substantive proceeding struck out but was unsuccessful and argument in open court about this conduct is still pending.’

The Mental Health Review Board plays a crucial role protecting the rights of people caught up in the mental health system. It is the only way of challenging involuntary psychiatric treatment decisions. This case, which is ongoing, has the potential to help thousands of Victorians who are ordered into involuntary psychiatric treatment every year when the serious step is taken to detain or treat them against their will.

Decision makers and the community should be informed about how laws affect people in practice and strategic advocacy can inform public discourse and contribute to this awareness.

### **Case study – People smuggling**

In February 2011, the Australian Federal Police commenced charging boat crew of vessels carrying asylum seekers on route to Australia with the offence of aggravated people smuggling. This carries a 5 year mandatory minimum term of imprisonment, with a 3 year non-parole period. By 2012 over 350 people had been charged. Cases against alleged people smugglers were distributed throughout Australian states and territories, with 66 boat crew being prosecuted in Victoria.

The legal processing and incarceration costs for those found guilty and sentenced to a five year term across all States and Territories would exceed \$175 million. The sheer number of trials would also have a significant impact on the operation of State courts and add to delay in the finalisation of other cases.

The accused persons had been demonised in the popular, political press as ‘evil’, notwithstanding our investigations revealing them to be low-level operatives rather than organisers.<sup>21</sup> Those charged were poor, illiterate Indonesian fishermen who were either tricked or promised a paltry sum to transport passengers. Many were unaware they would be travelling to Australia or transporting a human cargo until they were already at sea and had no choice but to continue to their nominated destination, that happened to be in Australia’s territorial waters. In short, their moral culpability was low<sup>22</sup> and the justice to be meted out was disproportionate to their level of offending.

In responding to the needs of our clients, VLA decided to make their circumstances known to the general community and to the media by participating in public hearings before Senate Legal and Constitutional Affairs Committee.<sup>23</sup> Our lawyers travelled to Indonesia to gather evidence, we hosted a legal symposium for practitioners defending boat crew to discuss defence strategy and we spoke to the media on matters of fact.

These facts helped distinguish the role of the ‘true organisers’; who were not on the boats, from the ‘expendable Indonesian boat crew’; whom the criminal enterprise considered pawns in their

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<sup>21</sup> Victoria Legal Aid, 2012. *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, VLA, Melbourne, accessed 20 May 2014 via <http://www.legalaid.vic.gov.au/about-us/justice-and-law-reform/other-activities#People-smuggling>.

<sup>22</sup> Victoria Legal Aid, 2011. *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Deterring People Smuggling Bill 2011*, VLA, Melbourne at pp.7-9.

<sup>23</sup> Victoria Legal Aid, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, public hearing transcript, 11 November 2011.

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enterprise, and who needed to get caught for the enterprise to succeed. These facts gradually altered the tone of the accompanying media debate as our clients' circumstances were humanised.

We subsequently made a submission to the Australian Human Rights Commission's inquiry into the treatment of individuals suspected of people smuggling offences who say they are children,<sup>24</sup> and were successful in having charges dropped against a number of juvenile clients who had been prosecuted as adults on the basis of unreliable evidence.

Before the Victorian Court of Appeal, we submitted that the prosecutions must fail because boat passengers have a lawful right to enter Australia. This caused the Government to introduce retrospective legislation to prevent any chance of a successful appeal.

Our submission to the Senate Inquiry into the *Deterring People Smuggling Bill 2011*<sup>25</sup> focused on the moral culpability of those involved in people smuggling offences, and the inappropriateness of retrospective criminality. The evidence given by VLA's senior leaders to the Senate Committee was supported by real life scenarios based on our clients' experiences. We noted:

*"Prospective operation of the law would clearly be better, as would an enhancement to the sentencing regime that produced fairer outcomes that recognise the difference in degree of criminality between true organisers and boat crew. This would achieve what the parliament is intending to achieve."*<sup>26</sup>

The cumulative impact of this advocacy resulted in a Directive by the then Attorney-General in August 2012 that low-culpability offenders be charged with an offence that did not carry a mandatory minimum sentence. Soon after, those accused of people smuggling offences were either sent home to Indonesia after prosecutions were discontinued or pleaded guilty and were sentenced to the time they had already spent in custody before being sent home.

Beyond alleviating the human suffering to our clients and their loved ones, it is estimated that over \$2 million in Victoria was saved in defence costs alone as a result of the change in policy, with a total estimated saving upwards of \$33 million in Victoria arising from saved prosecution, courts and incarceration costs.

On 4 March 2014, the current Attorney-General revoked the August 2012 Directive, thereby reintroducing prosecutorial discretion to pursue the aggravated offence (and therefore mandatory

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<sup>24</sup> Victoria Legal Aid, 2012. *Submission to Australian Human Rights Commission inquiry into the treatment of individuals suspected of people smuggling offences who say they are children*, VLA, Melbourne, accessed 10 May 2014 via <<http://www.legalaid.vic.gov.au/about-us/justice-and-law-reform/other-activities#People-smuggling>>.

<sup>25</sup> Victoria Legal Aid, 2011. *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Deterring People Smuggling Bill 2011*, VLA, Melbourne accessed 10 May 2014 via link above. Victoria Legal Aid, 2011. *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Deterring People Smuggling Bill 2011*, VLA, Melbourne accessed 10 May 2014 via link above. See also Karlsen, Elibritt et al, 2011. *Deterring People Smuggling Bill 2011*, *Senate Bills Digest* no. 82 2011–12, 21 November 2011, accessed 20 May 2014 via <[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1112a/12bd082#\\_ftn39](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1112a/12bd082#_ftn39)>.

<sup>26</sup> Warner, Bevan, 2011. Victoria Legal Aid, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, public hearing transcript, 11 November 2011 at p.17, accessed 20 May via <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed%20Inquiries/2010-13/deterringpeoplesmugglingbill2011/hearings/~/\\_media/wopapub/hansard/senate/commtee/s442.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20Inquiries/2010-13/deterringpeoplesmugglingbill2011/hearings/~/_media/wopapub/hansard/senate/commtee/s442.ashx)>.

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minimum sentences) for low culpability conduct.<sup>27</sup> Notwithstanding this, VLA is not aware of low-culpability persons having been prosecuted in Australia for aggravated people smuggling offences since the March revocation.

In relation to people smuggling, we were able to use our 'on the ground' knowledge to challenge misconceptions which had been influential in shaping policy and community sentiment - unfairly.

Our public advocacy exposed some of the misleading rhetoric about the culpability of the accused individuals and demonstrates the benefits of having the knowledge of those directly involved in service delivery in the public domain.

## **Potential (and avoidable) pitfalls in strategic advocacy work**

While many of the benefits of well-executed strategic advocacy are documented and well understood, some of the risks and pitfalls are often less explored or acknowledged. This is notwithstanding the fact that poorly executed strategic advocacy can lead to poor outcomes for clients, the entrenchment of bad law, the prompt legislative reversal of a hard fought win or lead to aggrieved taxpayers questioning why their dollars are being invested in frivolous or unmeritorious legal action. More broadly, this undermines the reputation of strategic advocacy and the agencies undertaking it.

Adopting an unhurried and deliberative approach, within the context of a coordinated and committed organisational framework, can ameliorate but not extinguish these risks. Outlined below is an overview of key considerations when undertaking strategic advocacy work.

### **Choose the right client as your vehicle**

The most important aspect to selecting a client as a test case is ensuring a client's circumstances are sufficiently general and common to maximise the value of the strategic advocacy effort. A client with niche or specific circumstances can be easily distinguished as an exception or anomalous case, greatly limiting the impact of the strategic advocacy action and its utility for others.

Having a sympathetic or relatable client can be important in certain circumstances, but is not always essential. It is beneficial in circumstances where the success of the strategic advocacy activity hinges on recasting community perceptions of misunderstood or unpopular client groups, where your client will publicly 'champion' a particular reform or where a relatable client story can be used to powerful effect. In those circumstances, choosing an unsympathetic client in those instances can be counterproductive, in reinforcing stereotypes or providing ammunition for inaction. In extreme cases, having a particularly notorious client as a vehicle for strategic change can trigger detrimental intervention, buoyed by community concerns or outrage, which may have been averted with a less divisive client.

### **Don't forget your client is a person**

VLA is unashamedly striving to involve clients more directly in telling their stories as a basis for our strategic advocacy. We believe that highlighting the client experience is the most powerful way to illustrate failures in the law.

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<sup>27</sup> Director of Public Prosecutions—Attorney-General's Instrument of Revocation 2014, accessed on 29 May 2014 via: <http://www.comlaw.gov.au/Details/C2014G00412>.

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In the quest to achieve a strategic outcome, it is important to ensure the individual client is aware, informed and prepared to be a vehicle for strategic advocacy. While it can be an empowering experience,<sup>28</sup> being the face of a strategic advocacy initiative can come at the cost of privacy and speedy resolution of a legal matter, which requires a degree of personal resilience. Litigation can also raise the stakes and carry greater legal risks for clients, such as adverse costs orders which may or may not be indemnified by a legal service provider. It can also lead to a poorer or unexpected outcome.

The following case study gives an example of how VLA is using client stories to illustrate the legal problems of our clients.

### **Case study – Telling stories about pregnancy discrimination**

In contributing to the Australian Human Rights Commission Pregnancy and Return to Work National Review, VLA contacted clients from its Equality Law Service, seeking consent and participation of clients to describe their experience of pregnancy discrimination in a de-identified way, in their own words. Take Julie's story as an example:

“ I worked as a full time sales consultant for about three years. I told my manager that I was pregnant early on because I was so sick that I thought he needed to know. When I told him I was pregnant, he asked me in a disparaging way if I would keep it. I replied ‘of course’.

My pregnancy was very rough. I was sick from day one with nausea, dizziness, hot flushes and vomiting. My ‘morning sickness’ actually lasted all day. Sometimes I was vomiting 10 times a day. My boss got angry because I took frequent toilet breaks. Even though he knew I had morning sickness, he’d text me while I was vomiting and tell me to get back onto the floor immediately. I had bad back and leg pain, but I wasn’t allowed to sit down. If I did, he’d click his fingers at me like I was a dog and tell me to stand up.

My doctor gave me a medical certificate saying that I should reduce my hours. My boss refused. He said that I was employed full time so they didn’t have to accommodate my request for part time work. I said ‘I’ve got no choice do I?’ He said ‘not really’. I was left with an ultimatum: resign or work full time hours, which I couldn’t keep doing because I was so sick and uncomfortable. He left me with no choice but to resign.

I’m not on Centrelink, and after I pay rent I’ve got no money for food let alone stuff for the baby. I can’t afford to pay my bills and I’ve maxed out my credit cards. I’m on the verge of having my car repossessed and my utilities cut off. I’ve got nobody who can loan me money so I could even lose the roof over my head. I’m so stressed I can hardly breathe.”<sup>29</sup>

Personal stories such as these not only highlighted the serious impact of discriminatory practices on our clients, but powerfully demonstrated the important role the law plays in ameliorating discrimination by ensuring employment practices reasonably accommodate pregnancy and parenthood.

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<sup>28</sup> Ball, Rachel, 2013. *When I tell my story, I'm in charge: Ethical and effective storytelling in advocacy*, Human Rights Law Centre/ Victoria Law Foundation CLC Fellowship Report 2013, accessed on 10 April 2014 via: <<http://www.victorialawfoundation.org.au/grants/fellowship/2012-13-fellow>>.

<sup>29</sup> Victoria Legal Aid, 2014, Submission to Australian Human Rights Commission Pregnancy and Return to Work National Review, VLA, accessible via <<http://www.legalaid.vic.gov.au/about-us/justice-and-law-reform/other-activities>>.

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While practitioners are mindful of their obligations to their clients, client selection is particularly important, given the vulnerable nature of legally aided client groups. Client care must come first, notwithstanding the occasional disappointment with a lost opportunity to spotlight an injustice for a highly meritorious and deserving client.

Not all clients will or can remain de-identified in the face of court proceedings and their informed wishes should remain paramount. However, not inviting informed consent from appropriate clients to tell their stories, risks disempowering them<sup>30</sup> and VLA has chosen not to 'protect all clients' by maintaining a default setting of 'hiding them', but to work with selected clients, to ascertain if they wish to be involved in explaining their circumstances and if so, on what terms.

### **Think the strategy through from beginning to end**

Thoughtful planning is the critical factor for successful strategic advocacy, but perhaps more importantly, for avoiding tactical missteps that can act to further entrench or affirm an injustice or unfairness in the law.

Key factors to consider include the purpose and objective (including a common definition of success), and the means to achieve the objective (policy submissions, stakeholder and community engagement, litigation or a combination). It requires stepping through the permutations of each of the pathways the strategic advocacy action can take (success/failure in court, recommendations accepted/ignored, positive/hostile responses from decision-makers, significant/inadequate media traction), how those will further or hinder the objective and what level of preparedness is required for each step.<sup>31</sup>

### **Patience can be a virtue**

The temptation to hit the ground running, particularly in the face of a perfect client, can be overwhelming; however, one can pay dearly for poor timing or being oblivious to context. A single judicial member with an unfavourable interpretation or a quick clarificatory legislative amendment from government can quickly remove a previous discretionary grey zone susceptible to persuasion, and put beyond doubt an unjust outcome. A strong backlash from stakeholders or the community can quickly take a reform opportunity off the government agenda in the short to medium term.

Injustice can often be ameliorated gradually over time through persuasive legal argument on a case by case basis that creates good precedent. Changes to the composition of appellate benches or governments and their reform agendas, can alter the odds of an argument being successful. The development of an evidence base over time may provide greater ammunition to prove the need for change than a single effort would achieve. It is sometimes important to wait until the timing is favourable for the outcome sought to be achieved. This is ultimately an exercise of judgement that balances virtue with patience.

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<sup>30</sup> Ball, Rachel, 2013. *When I tell my story, I'm in charge: Ethical and effective storytelling in advocacy*, Human Rights Law Centre/ Victoria Law Foundation CLC Fellowship Report 2013, accessed on 10 April 2014 via: <  
<http://www.victorialawfoundation.org.au/grants/fellowship/2012-13-fellow>>

<sup>31</sup> For a useful planning framework, see 'Seven steps to effective advocacy', *SVA Consulting Quarterly*, Issue 5, 2003. Accessed on 8 May 2014 via <<http://svaconsultingquarterly.com/2013/09/01/seven-steps-to-effective-advocacy/>>.

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## Consider context

Practical considerations of expertise, resources and the broader policy landscape should also play an important role in shaping the issues that are prioritised for strategic advocacy.

This includes taking into account not only the values that underpin prioritisation, but also practical considerations, including skills and expertise and the strength of the evidence base, such as data and case studies. It involves looking externally to consider whether other agencies may be better placed to lead particular issues, owing to their expertise, priorities or constituency. Analysis of the current policy context, including the stated priorities of government, also informs the issues that are likely to attract the interest and attention of decision-makers in the short to medium term.

## Create a coordinated infrastructure to support good strategic outcomes

Strategic advocacy will likely fail when internal communication is poor. At best, the benefits derived from good ideas and innovation being piloted in discrete pockets of the organisation risk not being maximised. At worst, strategic advocacy efforts get undertaken in a confused and uncoordinated fashion, without necessary planning and organisational readiness, leading to poor outcomes.

An excellent strategic litigation outcome does not count for much if no one is aware of it or knows how to apply it. Media releases unsupported by a foundation of empirical evidence can ring hollow and be interpreted as sloganeering. Representations to government in the form of submissions can easily slide into wastepaper baskets if they aren't accompanied by direct engagement, which keeps the issue at the forefront of policy minds.

Good strategic advocacy employs different tools and communication methods to achieve the same ends, albeit to various degrees. Some issues require amplification through the media and communication channels to leverage connections to the community we serve and who contribute their taxes to our endeavours, while others are best resolved in the courtroom, with policy and media work playing a supporting role.

Having a clear understanding of which tools are required and employing them in combination to maximum effect is critical.

## Our approach to strategic advocacy

### We continue to learn and improve

The lessons above have in some instances been borne of bitter experience. The case of *Magee* taught VLA a number of the valuable lessons described above.

#### **Lessons learned – *Magee v Delaney [2012] VSC 407***

Mr Magee was charged with the offence of damaging property after using water soluble paint to paint over an advertisement in a bus shelter near the County Court and affixing a 'wet paint' sign as a form of protest. He had some previous convictions for similar conduct.

Mr Magee's solicitor contended that the facts supported a lesser charge attracting a non-custodial penalty but the most serious of charges, on the same set of acts, was preferred by police prosecutors that when admitted or proven would almost certainly result in a gaol term, which would be a disproportionate and costly way of dealing with his pattern of offending. The wider benefit in exploring judicial review was to examine the appropriate use of police prosecutorial discretion and

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the impact the laying of charges has on the ultimate outcome, given the separate and distinct role afforded police and the judiciary.

Mr Magee made full admissions in interview, but characterised his actions as ‘a simple non-violent protest against the practice of advertising’ designed to stimulate public debate, consistent with rights to freedom of expression under the Victorian *Charter for Human Rights and Responsibilities Act 2006* (the Charter).<sup>32</sup> Ultimately, Mr Magee sought to demonstrate that he should be excused from criminal liability on the basis of ‘lawful excuse’, in light of the protected right to freedom of expression. These arguments were unsuccessful, with the Court finding that the right to freedom of expression does not extend to all forms of expressive conduct, including damage to a third party’s property or a threat of such damage. However, the judgment went on to be highly critical of the arguments put forward in the case, noting the premise on which the appeal was brought as “fundamentally flawed” and “...had no realistic prospect of success”. The Court made a costs order against Mr Magee. Many legal commentators interpreted the case as one which acted to confine the interpretation of the right to freedom of expression, with a ‘substantial chilling effect’.<sup>33</sup>

Subsequent to the decision, VLA was subject to stakeholder criticism for funding the action, particularly in the context of budgetary pressures and changes to eligibility requirements in a range of service areas.

The case review illuminated deficiencies in our authorising processes and internal communication in relation to this particular case. This extended to the legal team pursuing legal arguments that were not approved as part of the original grant of aid, that were subsequently approved by an independent reviewer over which VLA appropriately has no control.<sup>34</sup> It extended to also not making the primary argument challenging the use of police prosecutorial discretion, which formed the basis for the action in the first place, as it was considered at late notice that these arguments had a limited chance of success. It was further compromised by an unpreparedness and inability to communicate the purpose and public interest associated with the matter to stakeholders and the wider community. Inadequate internal communication compounded these issues.

## **Making strategic advocacy a genuine priority**

While strategic advocacy has always been part of VLA’s remit, in the past few years VLA has made a conscious decision to try to do it better and to elevate the importance and awareness of strategic advocacy opportunities within the organisation. This includes greater recognition and support of the systemic outcomes achieved through our lawyers in their day-to-day advocacy and providing support and resources to help try and improve the law for vulnerable people.

The establishment of the Strategic Advocacy Advisory Group (SAAG) within VLA, comprised of senior representatives from across the organisation (including the civil, criminal and family law programs, VLA Chambers as well as corporate support areas), was established in late 2012 as a means to better coordinate and test the rigour of proposed strategic advocacy work. Its cross-organisational nature means that it is able to reflect a diversity of perspectives and breadth of

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<sup>32</sup> Section 15(2) of the Charter provides that “Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria”.

<sup>33</sup> Purdue, Emma, 2012. Case note, Human Rights Law Centre, accessed on 1 May 2014 via <<http://hrlc.org.au/victorian-supreme-court-reads-down-the-right-to-freedom-of-expression/>>.

<sup>34</sup> *Legal Aid Act 1976*, s.36.

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practice experience. Its primary responsibility is to monitor, oversee and embed good strategic advocacy practice in the organisation.

It fulfils this function by scrutinising and offering contestable advice on applications for legal aid decided by the Managing Director,<sup>35</sup> developing annual strategic advocacy priorities<sup>36</sup> to be endorsed by the VLA Board, considering and scrutinising strategic advocacy plans and supporting and empowering staff to work towards positive, systemic changes to the law. This forum acts as a sounding board to test ideas, strategy and share information. It provides staff lawyers, who attend by invitation, with the opportunity to participate in deliberative decision-making at a senior level.

While there is undoubtedly some way to go to fully embed SAAG within the organisation, it has ensured strategic advocacy is prioritised and valued.

### **The public doesn't value what it doesn't understand – embracing the media**

The law is out of reach and arguably out of touch for many in the community.

The public can't be expected to value what it doesn't understand. Elected representatives are responsive to community consciousness, and in the face of other worthy competing priorities on the public purse, increased investment in publicly funded legal assistance programs is most unlikely to arrive by itself or be achieved solely by rational argument behind closed doors.

Just as access to information can help people resolve their own legal problems, so it can help to expand community consciousness about the civic value of our work. A taxpayer embracing the civic value of legal assistance programs, without expectation of needing or receiving a service, strengthens the scheme. Increasingly, we are doing our work out in the open for the *entire community* to see. Promoting our work and why we do it has high purpose. It can be corrective, empowering and the source for community understanding and support.

Increasingly we are looking to engage mainstream media in carrying our message, to solve unfairness, and to integrate our work through multi-disciplinary teams. The partnerships between our staff to support strategic advocacy symbolises a broader change of approach to media relations at VLA in recent years.

Traditionally, legal aid commissions in Australia, bound by legislation which protects client confidentiality, have been reticent to engage with the media. In Victoria, section 43 of the *Legal Aid Act 1978* generally prohibits VLA from revealing any information about an applicant for legal assistance.

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<sup>35</sup> Such as applications for legal aid pursuant to the Public Interest and Strategic Litigation guideline (Accessible via < <http://handbook.vla.vic.gov.au/handbook/212.htm> > and the guideline for appeals to the High Court (Accessible via < <http://handbook.vla.vic.gov.au/handbook/195.htm>>).

<sup>36</sup> For information on VLA's current strategic advocacy priorities, visit < <http://vla.vic.gov.au/about-us/justice-and-law-reform> >.

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However, in *Keating, Taha* and the people smuggling matters<sup>37</sup>, our lawyers obtained client consent to communicate publicly about their cases and the important issues underpinning them. Our lawyers worked closely with our communications specialists to develop proactive responses targeting print, online and broadcast media. The aim was not to garner attention for VLA, but to assist the community; that contribute their taxes to our work, to understand the harsh impact of unfair laws, made out in their name. This approach was a turning point for VLA that had previously engaged with the media only in a tentative way – usually to invoke confidentiality.

Since taking a more proactive approach to media our level of engagement has grown dramatically. Before 2010, we engaged with the media on only a handful of occasions each year, but by the end of 2010–11 we had 222 contacts with the media, which resulted in 161 media items. Two years later in 2012–13 this grew to 389 substantive contacts resulting in 210 media items.

Since 2011, 25 of our key staff have undergone media training and many have given interviews on a diverse range of topics from ‘sexting’ and pregnancy discrimination to family violence and criminal appeals. We now receive requests and engage with outlets that are not the traditional followers of legal aid issues – such as the *Australian Women’s Weekly* and *Marie Claire* magazines.

Our media approach has created opportunities and challenges. A raised profile allows us to advocate more effectively on the issues that affect our clients, but has also opened us up to more scrutiny. It has also, in some instances, created an expectation that we will release confidential client information on cases beyond those with a strategic advocacy focus.

However, the benefits outweigh the challenges. If we did not support our legal efforts with strategic communications, important legal gains would remain in court transcripts without adding to the community’s understanding of the many injustices that impact and are perpetuated on disadvantaged and vulnerable people, in their name.

## Celebrating our successes

The nature of being an organisation promoting the rights of vulnerable people within the justice system is that our work is never done. In an organisation where staff are driven by the never-ending pursuit of achieving fairness in the law, it is important to ensure there are opportunities to collectively reflect and celebrate success.

Whether it be a well crafted negotiated outcome, a hard-fought win in court, or a noticeable change in practice and procedure arising from our actions – we need to remind ourselves and each other of the significance of the work that we do. Every day, legal aid commissions are ensuring that some of the most acutely vulnerable and overlooked members of our community are treated with dignity, respect and fairness in their interactions with the law and that their experiences are understood and reflected in the design and operation of our justice system.

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<sup>37</sup> Between June 2011 and July 2012 we had 150 contacts with the media over the people smuggling matters – both proactive and reactive – resulting in more than 50 media items, including prominent coverage in Melbourne daily newspaper *The Age* and on flagship Australian Broadcasting Corporation radio and television programs such as *AM*, *PM* and *The 7.30 Report*.

More than 90 per cent of the media reporting was positive despite the controversial nature of people smuggling. There was a strong uptake of our key messages around the impoverished background of the accused and the unfairness of mandatory sentencing.

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The importance of the role of legal aid was recognised by the Chair of the Senate Legal and Constitutional Affairs Committee in the context of VLA's appearance before the Committee for oral hearings as part of its inquiry into the Deterring People Smuggling Bill 2011, in which the Chair noted:

*"...I do not think this committee, under previous governments or under this government, would be as successful as it is in suggesting sound amendments to legislation if it were not for people like those in your organisation putting forward submissions and being prepared to answer our questions. So you do play a valuable role in our deliberations. Don't ever forget that."<sup>38</sup>*

## Conclusion

The purpose of this paper has been to demonstrate that austerity imperatives should not serve to diminish the commitment of legal aid commissions to undertake strategic advocacy, but should in fact, affirm it. VLA has elevated strategic advocacy as a key priority for the organisation and is working to consolidate it in daily practice. While strategic advocacy requires a degree of organisational investment and carries risks, if done thoughtfully with a close nexus to practice wisdom, it can achieve positive results for clients and the community at large. Not only is effective strategic advocacy cost-effective, it is also a powerful way to shape positive changes to the law.

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<sup>38</sup> Crossin, Trish, 2011. Victoria Legal Aid, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Deterring People Smuggling Bill 2011*, public hearing transcript, 11 November 2011 at p.19, accessed 20 May via <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed%20inquiries/2010-13/deterringpeoplesmugglingbill2011/hearings/~//media/wopapub/hansard/senate/commtee/s442.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/deterringpeoplesmugglingbill2011/hearings/~//media/wopapub/hansard/senate/commtee/s442.ashx)>.

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## Appendix 1 - About Victoria Legal Aid

Victoria Legal Aid (VLA) administers a mixed model of legal aid delivered through a staff practice, community legal centres (CLCs) and private practitioners. These services include legal representation through grants of legal assistance and duty lawyers, community legal education, legal advice, information and referrals in person and by telephone, all designed to improve the effectiveness and fairness of the justice system. All Australian states and territories operate on a similar mixed model with varying proportions of the work being done by the different elements or components of the model.

Victoria Legal Aid (VLA) is an independent statutory authority set up to provide legal aid in the most effective, economic and efficient manner.

VLA is one of the biggest legal services in the country, providing legal information, education and advice for all Victorians.

Our clients are often people who are socially and economically disadvantaged; people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds and those who live in remote areas.

VLA helps people with legal problems about criminal matters, family breakdown, child protection, family violence, fines, social security, mental health, immigration, discrimination, guardianship and administration, tenancy and debt.

VLA also works to address the barriers that prevent people from accessing the justice system by participating in law reform, influencing the efficient running of the justice system and ensuring the actions of government agencies are held to account. We take on important cases and advocate for reforms that improve the law and make it fairer for all Victorians.

In 2012–13 VLA assisted over 86,800 unique clients with:

- 89,463 information services;
- 51,598 legal advice and minor assistance;
- 65,303 duty lawyer services; and
- 39,782 grants of legal assistance.

In addition, we distributed over 615,500 publications, held 350 community legal education sessions attended by over 12,700 participants and made over 71,000 external referrals.

In 2013-14, VLA's strategic advocacy priorities are:

- Access to justice for people with mental illness and disability;
- Appropriate interventions for children and young people;
- Better administrative decision making; and
- Vulnerable people and fines.

Further information about our services can be found on our [website](#) and [Twitter](#) account.

## **Modelling participation for court users**

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Empirical work on tribunal reform in Northern Ireland has led to a series of reports and publications by the author reviewing the experiences of tribunal users and their support needs, and conceptualising these experiences as different forms of participation.<sup>1</sup> This conceptualisation led to the development of a theoretical model of participation, based on Arnstein's seminal work which categorised citizen participation in political decision making as rungs on a ladder of participation, which was adapted to create a ladder of legal participation for tribunal users. This paper considers whether that theoretical model can be expanded to understand the participative experiences of court users. The premise of this remodelling is that an improved understanding of participation could improve the court user experience – an improvement which would itself constitute an improvement in access to justice. The paper sets out the background to and development of the tribunal model of participation, and then reviews the potential barriers to developing a court model of participation, before providing a preliminary sketch of a potential methodological approach to gathering the empirical data needed to develop the proposed model.

### **Part 1: the tribunal model of participation**

The empirical evidence has demonstrated the barriers faced by tribunal users in navigating, accessing and participating in dispute resolution procedures.<sup>2</sup> For tribunal users, these barriers existed throughout the life of their legal dispute and the different stages of dispute resolution each impacted on the participative experience. The nature or quality of this participative experience could vary as the user went through the different dispute resolution stages. These barriers were categorised as intellectual, practical and emotional.

Intellectual barriers exist where individuals have difficulty in understanding how dispute resolution processes work. These individuals struggle with understanding what is required of them and how they can progress their case within an unfamiliar system. The intellectual barriers can begin with the initial process used by decision makers to gather information, particularly in relation to social security claim forms, and social security appellants attribute the complexity of claim forms to their reasons for ending up at an appeal tribunal. Navigating through the internal departmental dispute process can also present intellectual barriers, particularly where individuals do not understand the

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<sup>1</sup> See G McKeever and B Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland*, 2010: Law Centre (NI); G McKeever *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland*, 2011: Law Centre (NI); G McKeever "A Ladder of Legal Participation for Tribunal Users" (2013) *Public Law* 575-598. The analysis, and the model of participation that results, is published in *Public Law* (ibid) but is provided here as background to the potential development of a model of participation for court users.

<sup>2</sup> See for example M Adler and J Gulland, *Tribunal Users' Experiences, Perceptions and Limitations: A Literature Review* (2003) Council on Tribunals; H Genn, B Lever and L Gray, *Tribunals for Diverse Users* (2006) Department for Constitutional Affairs; H Genn, *Paths to Justice* (1999) Hart; R Moorhead, M Sefton and L Scanlan *Just Satisfaction? What drives public and participant satisfaction with courts and tribunals?* (2008) Ministry of Justice Research Series 5/08; C Denvir, NJ Balmer and A Buck, "Informed Citizens? Knowledge of rights and the resolution of civil justice problems" (2012) *Journal of Social Policy* 591; and the Northern Ireland tribunal studies, ibid.

reason/s for the initial decision. The research indicates that those who dispute administrative decisions are often unaware that the dispute raises legal as well as factual issues and where this is the case individuals tend not to seek assistance with the legal issues, which can reduce their ability to participate in the legal arguments that are under dispute. The intellectual barriers at tribunal hearing can mimic those of the decision making process: the language used, the formality of proceedings, the need to address certain issues and disregard others. Different forms of assistance have been developed to help users overcome these intellectual barriers, of which the most successful tend to be individualised support. Written information is not universally useful, and (in general) the more dense, technical and voluminous the information, the less likely it is to be able to break down intellectual barriers. Overall, however, where intellectual barriers are reduced, the more participative the dispute resolution process is for the user.

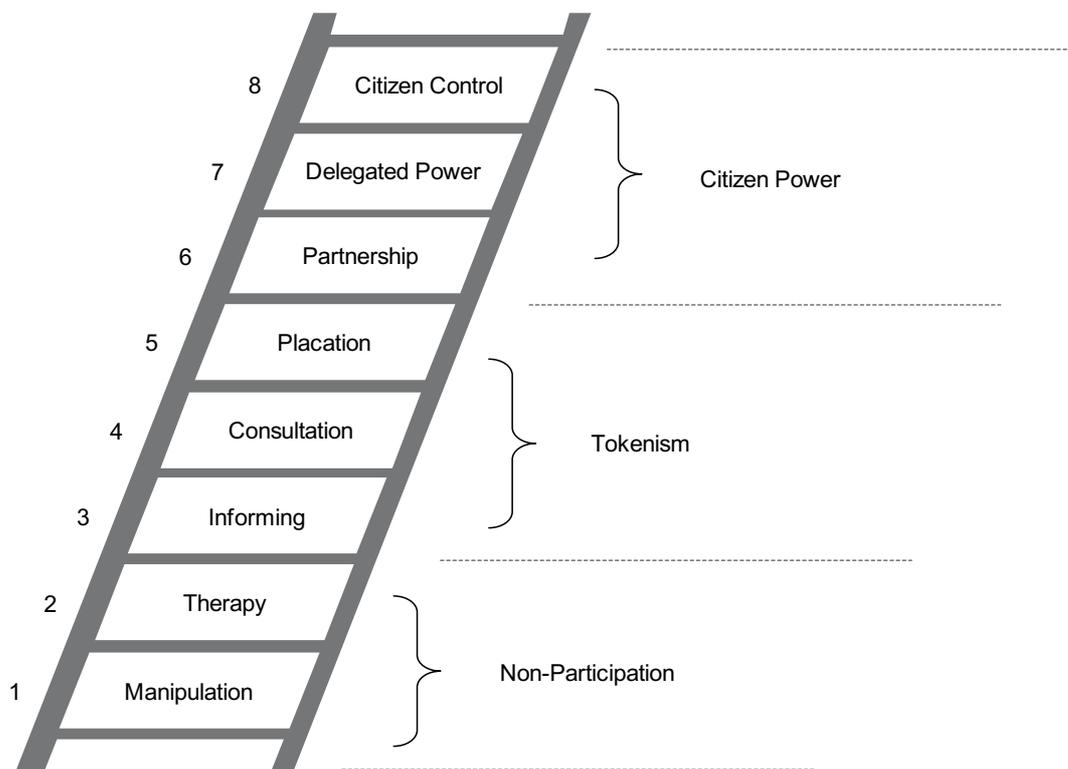
Practical barriers are those faced by individuals in accessing practical help in resolving their disputes. Where practical support is available, the effect is often to reduce or overcome intellectual and emotional barriers. This practical support is required at each of the different stages of the dispute resolution process, beginning with the initial information required by decision makers and continuing through to the tribunal hearing. Practical barriers can take the form of financial barriers: in securing independent evidence to corroborate claims, and accessing specialist advice and assistance. The success or failure of an appeal can turn on the evidence used to substantiate a claim, but the costs of obtaining this may be prohibitive. Specialist advice and assistance can also be inaccessible, creating an inequality of arms between legally unassisted individuals and legally assisted decision makers. Dispute resolution, including the tribunal experience, is intended to be informal and to avoid the need to rely on legal advice, but the reality for individuals is often that the process is not informal, and that they are disadvantaged by the lack of legal or specialist assistance. The absence of assistance can deter individuals from progressing their disputes but may also assist users to resolve disputes informally rather than at tribunal. Perversely, practical barriers may also arise where legal assistance becomes the problem: where the user is unable to participate in the tribunal hearing because the lawyers have taken over. Overall, however, the research suggests that practical barriers can be overcome with specialist (but not necessarily legal) advice and assistance, where the user remains central to the process.

Emotional barriers are connected to the basic fact that, for most individuals, the issue under dispute is likely to be one of fundamental importance in their lives, but the barriers go beyond this and become an aspect of the dispute resolution process itself. Individuals have described their experiences of different stages of dispute resolution as inducing fear, helplessness, nausea, anger and stress leading to an absence of trust in decision makers, and reducing the likelihood that individuals will be able to participate effectively in the resolution of their dispute. Levels of need vary but a common theme in the research is a desire by individuals for some support: someone to guide them through the process. Where support is available individuals describe feelings of relief as anxieties are dissipated, and a consequent increase in confidence that enables them to engage fully with decision makers.

Taking Leggatt's vision of the role of participation in ensuring an enabling and accessible tribunal experience for users as a legitimate objective, it made sense to try to conceptualise what the idea of participation might mean. Central to the idea of participation is power, and within this analysis the extent to which power is shared or withheld will impact on the participative nature of the user

experience: the more that power is shared the more participative the user experience can be; the more that power is withheld the less participative the user experience can be. The dispute resolution procedures, from the initial decision through to the tribunal hearing, will each have different opportunities for users to participate, but the existence of these opportunities does not guarantee a participative experience. So in understanding the participative experience it is not sufficient to look at what the opportunities for participation are; there is a need to understand (and measure) the extent to which those opportunities translate in participative outcomes.

The development of many different models of participation take as their starting point Arnstein's model of political participation. Writing in 1969, and reflecting on a range of practices that purported to enable participation by community groups and individuals in decisions made by power holders, Arnstein conceptualised the different types of participative experiences as a ladder of participation. The ladder depicted a hierarchical progression of participative experiences, with different 'rungs' (or levels) of participation ranging from 'manipulation' as the least participatory, to tokenistic forms of participation such as 'placation' and 'consultation', through to 'citizen control' as the most participatory and empowering experience (see Figure 1).



**Figure 1: Arnstein's ladder of participation**

Arnstein's ladder depicts her view of different forms of political participation, where the end objective is to move the locus of power from the decision maker to the participant, putting the citizen in control of decision making. While this is a potential aspiration for democratic, political participation, such a conceptualisation seems inappropriate for legal decision making where the focus is on determining whether legal criteria have been correctly applied and in identifying a remedy where this has not been the case. Where legal participation has the potential to be more expansive is in the realm of rule development – and for legal decision making this may include the

rules governing legal criteria on entitlement and the circumstances under which challenges may be brought.<sup>3</sup> Nonetheless, in the assessment of the existing rules governing decision making, and in recognition of the limits of the potential for expanding legal participation – primarily that legal decision making power will always rest with the judiciary and not the citizen – it is possible to utilise some of Arnstein’s conceptualisation of political participation to construct a ladder of legal participation for tribunal users. This is possible not least because tribunals themselves constitute a hybrid form of power – political in relation to the challenge being brought against the decisions of government agencies and legal in relation to the arena of challenge, the formal guarantees of equality, and the independence of legal decision makers from political decision making.

### **The ladder of legal participation**

The ladder of legal participation departs from Arnstein’s ladder in a number of ways. First, the tribunal model departs from Arnstein’s hierarchical arrangement. Tribunal user research testifies to the diversity of experiences that exist, and while some of this diversity may be attributable to good, bad or indifferent dispute resolution processes, some of the diversity is attributable to the tribunal users themselves. The ability of users to participate in legal processes is not uniform, and what constitutes a participative experience for one user may be an exclusionary experience for another. The processes of dealing with disputes must always be kept under review, and systematic problems dealt with, but the model must also take account of the inability or unwillingness of tribunal users to engage. Not all users want to participate, and a model of participation must defer to this entirely legitimate position. Consequently, the model of participation developed from Arnstein’s ladder is not hierarchical.

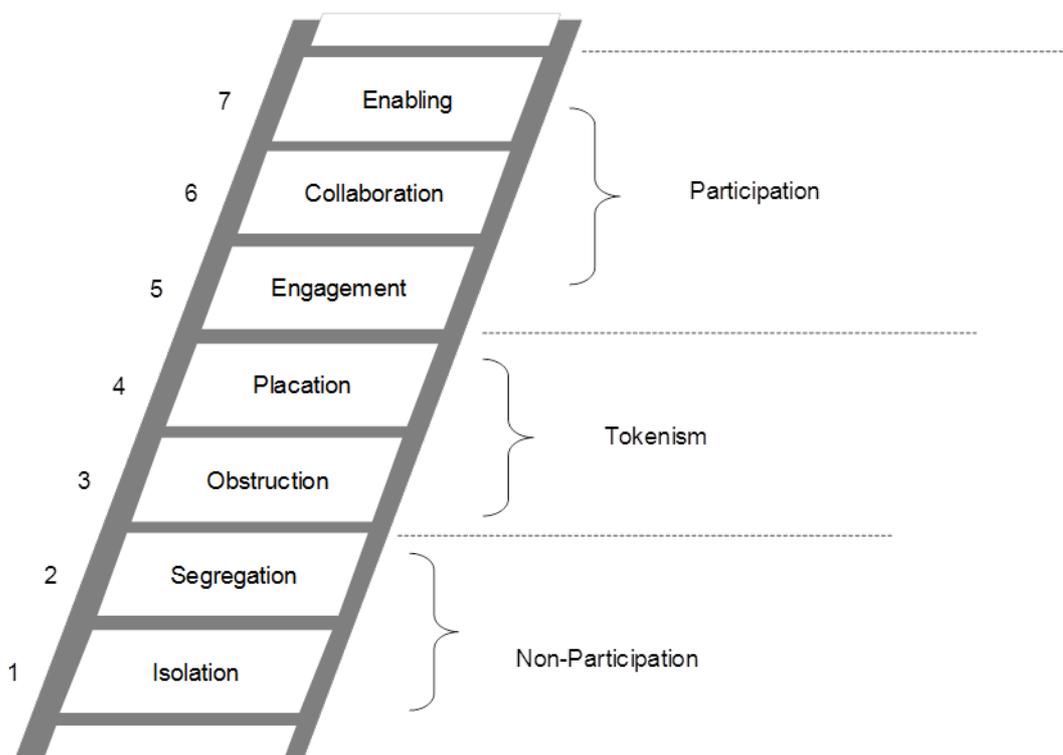
Significantly, the ladder of legal participation for tribunal users does not aim to vest control of the dispute resolution process in the tribunal user and so differs from Arnstein’s ambition for the ultimate form of participative practice. As noted above, this limitation may be a reflection of the limitations of law, and the lack of participative practice in the process of rule development in particular but, for tribunal users, participation is concerned more with access than control: access to the processes through which a neutral third party determines legal entitlement, with the tribunal user having an effective voice as a necessary element of the process.

Finally, the nature of the participative experiences of tribunal users dictated that the individual rungs would be different. Mapping these experiences into 3 different categories of ‘non-participation’, ‘tokenism’ and ‘participation’ enabled the individual levels of participation to be identified. Non-participative experiences can be understood as ‘isolation’ and ‘segregation. Tokenistic experiences are those where the user faces ‘obstruction’ or ‘placation’. Participative experiences are defined as ‘engagement’, ‘collaboration’ and ‘enabling’ (see Figure 2).

These categories – and their operational indicators – are briefly explored below.

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<sup>3</sup> See Mashaw, “Administrative Due Process: the Quest for a Dignitary Theory”, *Boston Uni LR* 1989, p903



**Figure 2: a ladder of legal participation for tribunal users**

*Isolation*

This represents tribunal users who are most excluded from the dispute resolution process and unable to engage with any aspect of the process. This can include language barriers, geographical barriers and may be self-imposed by users who do not want to participate. The operational indicators for isolation may include where users see the tribunal as lacking independence; are unable to talk to anyone about their case; feel unable to speak out; are unable to engage with decision makers; and are unaware that the information they have from decision makers may be inaccurate.

*Segregation*

Users here feel that they are segregated from an official process or secondary within it, since the process is designed for the ease of decision makers and power holders. Operationally, this is indicated, *inter alia*, where users lack awareness that a legal issue is under dispute or of the basic procedural aspects of lodging a dispute; a lack of awareness that there is a legal right to challenge a decision; and where the ability to challenge a decision is reliant on economic support, particularly where decision makers have access to additional support.

*Obstruction*

Tokenistic forms of participation include where the user continues through the administrative system but his/her progress is obstructed at different points. This can take the form of referral fatigue; inaccurate or incomplete information by decision makers which inhibits or obstructs the user's knowledge; or through delays in resolving the dispute. Operationally, obstruction is evident

where users are continually referred without resolution, where the user is intimidated by the language of the tribunal, or where there are delays in obtaining a tribunal hearing.

### *Placation*

Placation occurs where decision makers provide assistance that does not fully assist users and where decision makers have access to informal dispute resolution processes but do not utilise these informal procedures reliably. Placation can also occur where users have access to advice and/or representation that is of poor quality, and that masks the intellectual, practical and emotional barriers to participation that may remain. This type of placation can occur where users are unaware of the poor quality of support they are receiving, or where decision makers erroneously believe that the support is of sufficient quality to enable user participation. Where users are provided with high volumes of information, or information that does not meet 'Plain English' standards, or where there is a policy but no practice of informal dispute resolution these can be operational indicators of placation.

### *Engagement*

Engagement as a form of participation indicates that users are able to engage with the dispute resolution processes and with the people within these processes. This can include passive engagement, where users have access to good information, whether written or audio/visual information, or as passive observers of decision making processes. Engagement indicators can include users getting clear information which takes account of low levels of knowledge, and being able to witness other tribunal hearings.

### *Collaboration*

Collaborative user experiences exist where users are supported in their efforts to collaborate with decision makers in a co-operative venture. Collaboration results from accessible and informal tribunal hearings, where user understanding is taken as the starting point and user difficulties are dealt with as they arise. This is partnership-working, where there is a defined and necessary role for users. This role can include users identifying the best forms of support for themselves. It can also include public legal education. Operationally it may be indicated through informal hearings without judicial trappings and decision makers working with users to identify useful forms of, and access to, support.

### *Enabling*

The means by which tribunal users are enabled range from the clarification of minor issues by administrative agency staff to the skill with which tribunal members enable users to present their case. Users describe the ability to talk to someone about their case as enabling. The ability to enable users exists at all levels of the dispute resolution process, but the experiences of tribunal users indicates that access to early and good advice is effective in dealing with the intellectual, practical and emotional barriers to participation. Good representation would also appear to have a privileged position as a form of participation, since this is not just about ensuring a successful outcome of the user's dispute, but about ensuring that the user has an effective voice within the dispute resolution process. Telling the users story in a way that reassures the user that this has been heard is a participative experience, and the research indicates that user satisfaction derived from this type of

participation can offset or reduce the ‘outcome effect’ whereby the user rates the experience on whether their appeal has been successful or not. The operational indicators include tribunal staff clarifying user queries; users knowing where to go for advice; tribunal members enabling users in setting out their case; users being put at ease; access to early and good advice; access to good representation; and users able to talk to someone about their case.

The model is clearly based on Arnstein’s ladder, but some further remodelling is intended, and the ladder is likely to be reconceived as an alternative configuration – to date a pie chart, a wheel and a spectrum have been proposed – though the same categorisations for tribunal users will likely remain. The challenge set out in this paper, however, is not focused on the figurate remodelling but rather on whether there can be a conceptual remodelling to encompass the participative experiences of court users.

## **Part 2: barriers to developing a court model of participation**

The central idea of this paper is to review the court user experience from the perspective of participation, and to make use of the tribunal-based ladder of legal participation in order to do so. There are some practical and conceptual issues that need to be addressed to assess just how plausible the proposal is.

First, the tribunal model of participation is derived from the hybrid form of participation that tribunals represent, that is to say: part political, part legal. The majority of tribunals deal with regulatory disputes between citizens and government agencies, where the issue of political participation is slightly more pronounced than it might be in co-citizen disputes, particularly if we accept Prosser’s view of tribunals as a mask for political decision making.<sup>4</sup> Nonetheless there are exceptions to this general rule: employment tribunals tend to be citizen v citizen disputes, although they will also include citizen v state disputes where the employer in question is a state body. Similarly, (civil) court disputes tend to be characterised as predominantly citizen v citizen disputes, though they can also include citizen v state disputes. Additionally, while courts are less likely to face a Prosser-type accusation of being a judicial mask it can be argued that those who control the legal process are also power-holders and that at least some of this control rests with the judicial actors. Nonetheless, the ‘political’ participation for tribunal users is not defined solely by the character of the respondent in the case, but relates more broadly to a power imbalance between the appellant (or claimant) and the respondent where issues of control and empowerment may figure. Such power imbalances may exist to the same extent for (some) court users, where relatively powerless individual litigants seek to challenge, or are challenged by, decisions of private (as well as state) power holders. Equally, the tribunal model’s dilution of a control-oriented, ‘political’ form of participation to include an access/process-oriented, legal form of participation would seem to be something that could resonate within a court-based model of participation. In effect, an element of political participation may be more or less present in both court and tribunal based models and – whether more or less present – will still require to be diluted to accommodate legal participation. Part of the investigation proposed by this paper will be to determine the extent to which a participative model for court users can be derived from a political discourse of participation, a point that will require further theorisation and empirical data.

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<sup>4</sup> T Prosser “Poverty, ideology and Legality” (1977) 4 *Journal of Law and Society* 39

Flowing from this conceptual difficulty over the extent to which court-based participation aligns to a discourse of political participation is the related conceptual question over the extent to which the terminology of the tribunal based model might apply to court users. The tribunal model categorises the different stages of a participative process, the categorisations deriving from the empirical evidence of the tribunal user experience. The extent to which these categorisations mirror or fit the experiences of court users is not yet known, and may be an iterative process as the empirical evidence might indicate that the categorisations do not fit and should be adapted. The proposal is to begin with the tribunal based categorisations and associated terminology, but to use the emerging evidence of court-user experiences as the basis for any necessary revisions. The potential need to revise the terminology may be indicated by Gaze & Hunter's research examining the different adjudicative experiences of federal anti-discrimination claimants in Australia.<sup>5</sup> Complainants alleging discrimination under Australian federal law were able to bring their complaints to the Australian Human Rights and Equal Opportunities Commission (HEROC) – the predecessor body to the Australian Human Rights Commission (AHRC) – through a relatively informal tribunal hearing where HEROC would make an adjudicative determination. However, the implications of an Australian High Court decision in *Brandy v Human Rights and Equal Opportunity Commission* meant that HEROC was judicially defined as an administrative tribunal, and thus unable to make binding decisions on federal anti-discrimination matters.<sup>6</sup> The solution to this disempowerment of the tribunal was to shift the adjudication of federal anti-discrimination matters from HREOC to the federal courts, the consequence of which was an increase in the formal and intellectual barriers to resolving the dispute, indicating a significant difference in the adjudicative experience between the tribunal and the court. For the purposes of this proposal it may be, therefore, that the language of the tribunal model is too close to the language of 'care and compassion' and does not provide an adequate reach into formalism, notwithstanding the evidence of formal procedures as barriers to participation for tribunal users.

Perhaps the most obvious conceptual barrier to transposing a tribunal based participative model onto a court based experience is the division between the tribunal as investigatory and the court as adversarial. In effect, the proposal may be seeking to compare apples with oranges. The question that arises is whether the adversarial court system distorts the participative potential in a way that the inquisitorial system does not. To some extent this question rests on an assumption that the courts and tribunals are different beasts – an assumption which the evidence does not necessarily bear out. Employment related tribunals are often seen as highly adversarial and 'court like', while small claims courts are often regarded as more like tribunals due to their relative informality and inquisitorial approach. The presumed distinction between the tribunal beast and the court creature may therefore not be valid and the extent to which it holds true is a core part of the proposed investigation which seeks to shed light on what the difference is between a court and a tribunal. The difficulty is that the investigation has a 'chicken and egg' flavour to it: is the level of participation a result of the adversarial nature of the hearing or might it be that we can assess how adversarial the hearing is as a result of how participative it is? Perhaps the best approach is to hypothesise that the court will be less participative than the tribunal, measuring the impact of an adversarial approach,

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<sup>5</sup> Beth Gaze and Rosemary Hunter, "Access to justice for discrimination complainants: courts and legal representation" (2009) *UNSW Law Journal* 699.

<sup>6</sup> *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

using the empirical evidence to establish a level of participation that may prove or disprove that hypothesis.

Allied to the adversarial nature of court (legal) proceedings is the availability and role of legal representation. Legal aid is not available for tribunal proceedings, the rationale for which is often disputed by tribunal participants, particularly in employment-related tribunals where proceedings can be highly adversarial, legally technical and formal. In England and Wales the provision of assistance under legal aid has been significantly reduced as a result of the Legal Aid, Punishment and Sentencing of Offenders (LAPSO) Act 2012, which removes a considerable range of legal issues from the scope of legal aid. The relevant provisions enacting this reduction do not apply to Northern Ireland, where justice is now a devolved issue. One of the first decisions by the Northern Ireland Justice Minister was to commission an Access to Justice Review to determine how the Department of Justice might meet legal need in Northern Ireland and this first-principles Review was published in September 2012. In effect, however, the Access to Justice Review Report was a Plan A approach, based on the idea that if Plan A did not produce sufficient savings a Plan B would be needed. The Department of Justice is now commissioning Plan B, and it seems inevitable that the scope of legal aid becomes be a central part of Plan B, though many will hope that the reduction in scope does not mirror that under the LAPSO Act 2012. The evidence to date of the impact of the LAPSO Act 2012 in England and Wales is that the level of unmet legal need has increased and there has been a corresponding increase in the numbers of litigants-in-person (LIPs).<sup>7</sup> For the purposes of this paper, part of the consideration must be the impact of (a lack of) availability of legal assistance on the court users' ability to participate in court proceedings. Intuitively, and from evidence submitted to the Justice Committee on the impact of LAPSO, it would seem that the greater the availability of legal assistance the greater the ability to participate. The tribunal model, however, challenges this assumption since the empirical evidence demonstrates that legal assistance can both facilitate and preclude participation. At its best legal assistance is specialised, focused and enabling, translating the users' case from a personal story to a legally relevant account that the tribunal can adjudicate. At its worst, legal assistance focuses on the technical legal issues to the exclusion of the users' personal story, so that the users' voice is lost in the proceedings and their participation is denied.

Of course the users' participation does not simply begin and end with the legal hearing. The tribunal model demonstrates that the legal dispute is a process that begins with the original claim of entitlement and finishes when the final determination on entitlement is made, whether as a final appeal or because the user withdraws from the dispute. Where legal assistance may be most significant is at the pre-hearing stage, particularly when the advised user is further facilitated by an enabling tribunal. The impact of the LAPSO Act 2012 may therefore be more significant at the pre-hearing stage, so that the issue is not simply the adversarial and technical nature of court proceedings but the absence of any filtering or educative function that would advise users on how they might proceed with their dispute. A further dimension of this is to look beyond 'legal' advice to 'specialist' advice, which can be from non-legally qualified advisors. In the tribunal arena, specialist advice – whether from legally qualified or non-legally qualified advisors – is generally more highly valued than non-specialist legal advice. Nonetheless, the funding for specialist advice tends to be met by the state, and while such advice centres have tended to specialise in social welfare issues

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<sup>7</sup> The Justice Gap, "Justice Select Committee evidence on LAPSO impacts" 17 May 2014, available at <http://thejusticegap.com/2014/05/justice-select-committee-evidence-laspo-impacts/>

that are dealt with by tribunals, leaving court users to access legal assistance through legal aid funded advice from solicitors, there is a degree of overlap between the two. In housing assistance, for example, a specialist housing advice centre can offer assistance on court proceedings regarding repossession, using non-legally qualified specialised advisors alongside solicitors who have rights of audience at County Court and High Court level. The tribunal model has pointed to the participative value added by specialist advisors in state funded advice agencies, which might suggest that where funding is withdrawn the participative potential may be reduced. It would seem, therefore, that an investigation into the participatory nature of court proceedings post-LAPSO, and in the face of the Northern Ireland Department of Justice's Plan B, is timely as a way to determine the impact of specialist/legal advice or its absence on the court users' ability to participate in court proceedings.

The barriers that have been identified in developing a court based model of participation from the tribunal based model are not insignificant, but nor are they insurmountable. In addition, there are a number of potential advantages in developing a similar model of participation for court users. The most obvious advantage perhaps is to enable a comparative analysis of courts and tribunals, to establish the extent to which similar or different participative experiences exist as for tribunal users, which in turn may illuminate the differences between courts and tribunals. Part of the comparison will be to establish if the 'formalism' of the courts is substantively different to the 'informalism' of the tribunal, and thus to shed light on what is meant by 'informal' in the tribunal context. The potential also exists to see if there is good participative practice that could be transferred from one venue to another, and to develop this practical insight by examining if the operational indicators of participation are similar for each venue in order to identify participative gaps – including identifying the early stages where participation might be improved to help resolve the dispute – and ultimately to assess whether addressing the participative gaps would be likely to improve the user experience and (sense of) access to justice.

### **Part 3: methodology**

The methodological approach for the Northern Ireland tribunal studies was to focus on the two tribunals with the largest caseloads as well as a tribunal with a small caseload, to assess a mix of experiences within different tribunals. Semi-structured interviews were conducted with tribunal users, specialist advisers and representatives, tribunal judges, tribunal staff and departmental officials, alongside focus groups with specialist advice organisations and an online survey completed by tribunal representatives. The methodological issues for this study are (a) which courts might be selected to establish the participative experiences of court users, and (b) how the experiences of these court users might be accessed. Taking as a starting point the fact that any empirical work will include the Northern Ireland courts, the structure of the Northern Ireland courts is set out below (see Figure 3), although ultimately it is hoped that the jurisdictional focus for this study will expand beyond Northern Ireland.

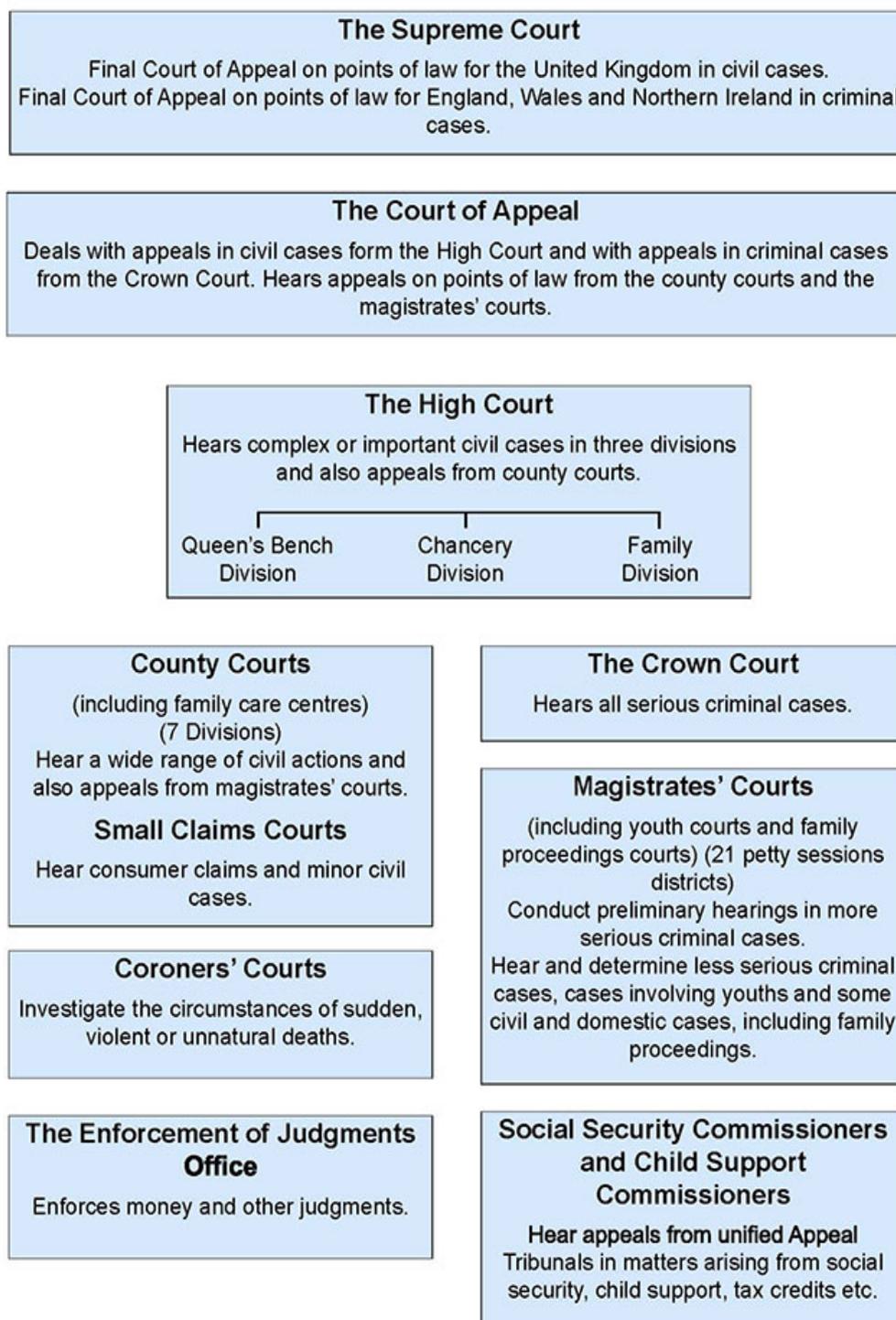


Figure 3: the Northern Ireland Court Structure

In a hierarchical court structure the immediate question is which court tier is likely to be the best focus to assess the participative experiences of its users, bearing in mind the objective is also to create a comparative model of participation that will help identify the differences between courts and tribunals. If some comparison with tribunals is to be made, it may make sense to access courts where there is a relatively low level of formality and a greater potential for individuals to (a) have access to affordable legal advice (affordability being determined in part by a reasonably brief engagement of legal services) and (b) have a greater potential for participation (whether through the voice of legal representatives or through the individual voice of the LIP). If this criteria is used for selection it would suggest that the highest courts are not appropriate comparators since the higher the court the greater the requirement for extensive legal representation. In effect, there seems little sense in measuring the participative experiences of a social security tribunal user – where the venue is designed to be informal and accessible without legal assistance, notwithstanding the complex area of law that is examined – against the experience of an appellant at the Court of Appeal – where the court processes are focused on the consideration of significant points of law rather than the weighing of facts. The Supreme Court and Court of Appeal are therefore relatively easy to discount.

There is some attraction in including the High Court, particularly given its jurisdiction over judicial review, which has strong parallels to the combined elements of political and legal participation that tribunal adjudication has. Access to judicial review proceedings is, however, likely to be relatively limited as indicated by the volume of cases, with only 90 applications for judicial review disposed of in Northern Ireland in 2012.<sup>8</sup> The High Court's jurisdiction in Northern Ireland is almost entirely on civil law cases and litigants wishing to bring a case must petition the High Court, a process that requires carefully worded pleadings. This may be a further distinction from tribunal proceedings which are more formulaic and straightforward in application, with the possible exception of Industrial and Fair Employment Tribunals which require the legal issue to be correctly identified from the outset so that claimants are not time-barred in bringing their action. In addition, the most obvious comparator to the High Court in the tribunal system is the Upper Tribunal in Britain (the Social Security Commissioner in Northern Ireland) rather than the First-tier Tribunal, suggesting that the focus should be on the lower courts. That leaves the County Courts and the Magistrates Courts.

The County Courts include the Small Claims Court, a part of the court system often regarded as the most tribunal-like due to its inquisitorial approach and promotion of self-representation in preference to legal representation, though the reality is that many users are legally represented. It would therefore seem to be a suitable comparator to trial an assessment of participative experiences. Beyond the Small Claims Court, there are a wide variety of cases heard at County Court level, and cases are brought before the County Courts by way of a Civil Bill. This is a device peculiar to the Irish jurisdiction, which is not curtailed by a necessity to adhere carefully to the wordings of its pleadings in the same way as a petition to the High Court is. The Northern Ireland Courts and Tribunals Service identify the most common types of County Court cases as: landlord and tenant disputes, for example, possession (eviction), rent arrears, repairs; consumer disputes, for example, faulty goods or services; personal injury claims (injuries caused by negligence), for example, traffic accidents, falling into holes in the pavement, accidents at work; undefended divorce cases; some

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<sup>8</sup> NICTS, *Judicial Statistics*, 2012, p 39

domestic violence cases, but these may also be heard in the magistrates court; race and sex discrimination cases; debt problems, for example, a creditor seeking payment; and employment problems, for example, wages or salary owing or pay in lieu of notice.<sup>9</sup> A comparative approach does not require that the comparators are identical, but that there are sufficient similarities to ensure that the comparisons are valid. At its most basic this indicates that the courts and cases selected will need to focus on civil cases rather than criminal – so employment or housing disputes rather than domestic violence cases – but it would seem that the range of cases covered in the County Courts in Northern Ireland present sufficient opportunity to make relevant comparisons with the nature of the legal issues disputed at tribunal. While the precise selection requires some additional consideration the volume of cases is also likely to provide sufficient case numbers, with disposals of Ordinary Civil Bills,<sup>10</sup> for example, reaching 10,216 cases in 2012.<sup>11</sup> For Small Claims Courts in Belfast there were 852 cases disposed of in 2012.<sup>12</sup>

The Magistrates Courts deal primarily with summary criminal offences, including youth offenders, as well as a limited number of civil and matrimonial cases. The civil cases include some civil debts (income tax/national insurance/VAT/rates arrears); licences, for example, granting, renewing or taking away licences for pubs and clubs; and some family law cases. In Belfast there were 1,703 civil and family cases disposed of in the Magistrates Courts in 2012. It is possible, therefore, that some civil (regulatory) cases heard at Magistrates level will also provide a reasonable comparator to tribunal cases.

While the final decision on what cases to focus on has yet to be made, the balance would seem to tip towards the County Court cases, purely for their range, numbers of cases, and potential accessibility of claimants and plaintiffs. The Magistrates Court offers what is often referred to as ‘cattle market’ justice – a high volume of cases that are processed swiftly in an often perfunctory manner. The reflective capacity that such interactions may generate might not be optimum. In County Courts, cases take longer, are more involved in the sense of generating more interaction between claimant, plaintiff and the other court actors. Many cases are lawyer-led but there are an increasing number of LIPs; while the Small Claims Court offers the potential for a middle-ground exploration of formality and adversarial process.

Like the Northern Ireland tribunal studies, it is proposed that a court based study of participation will focus on the perceptions of participation by court users. This will include empirical evidence be sought from plaintiffs<sup>13</sup> and defendants, but will also include evidence from advisers – solicitors, barristers and specialist advisers – and, ideally, from the Court Clerks and the judiciary. Access to these individuals has not been sought, but at this stage it is anticipated that a number of avenues will be explored to try to secure access. In particular: through the Northern Ireland Law Society and Bar Council; through individual solicitor firms and barristers who are instructed by these firms; through the Northern Ireland Courts and Tribunals Service; and through the Office of the Lord Chief

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<sup>9</sup> NICTS, *Judicial Statistics 2012*, p 57

<sup>10</sup> A civil bill is the document that is required to start proceedings in a county court for claims above £3,000 and under £15,000 (although for claims concerning matrimonial property or compensation for criminal injuries or criminal damage to property, there is no financial limit).

<sup>11</sup> NICTS, *Judicial Statistics 2012*, p 59

<sup>12</sup> NICTS, *Judicial Statistics 2012*, p 72

<sup>13</sup> Referred to as ‘claimants’ in Britain

Justice. In addition, it is anticipated that claimants and plaintiffs will be approached directly during their time at the County Courts in Belfast. This indicates an initial jurisdictional focus on Northern Ireland – and within that a likely dominant focus on Belfast – but this is a pragmatic approach rather than a methodological necessity. The consideration of how this project might work with court users in Britain is likely to be developed further as the methodological focus takes firmer shape.

## **Conclusion**

The assessment of the participative experiences of court users is not dependent on a pre-existing model of participation for tribunal users, and should not be bound by it. Nonetheless, given the preliminary work that has been done here it would seem to make sense to capitalise on this effort and to take the tribunal model as a starting point for assessing court user participation. The question of what makes a court different from a tribunal is a perennial one and the potential for developing the focus of this question in a slightly different direction is, arguably, worthwhile. The focus on rules of procedure, configurations of rooms, judicial attire or formal language can only take us so far in answering this question, and user participation offers the chance to re-evaluate the relative differences from a user perspective. The hope is that this will in turn identify the types of participation that court users experience and can expect, with a further focus on improving the participative experience to help address any alienation from justice that users may otherwise feel. An ability to participate in the proceedings in which individual litigants are involved would seem to be a basic facet of access to justice, and one that may not depend entirely on a high level of resources. As such it offers some potential to improve the user experience of justice at a time when traditional means of supporting access to justice are increasingly restricted.

**Think of it like a pizza: the promise and pitfalls of telephone advice**

**UCL International Conference on Access to Justice, June 2014**

**Helen Carr, Caroline Hunter and Ed Kirton-Darling**

**Introduction**

In recent years in the UK there has been a modernisation agenda for government funded legal services to be delivered less through face-to-face and at the initial stages at least using more innovative forms of delivery – whether through websites or telephone advice agencies (Balmer et al, 2012, Smith et al, 2013). Concerns have been raised in particular about the limitations of telephone advice services compared to face-to-face advice. There is a growing literature, particularly in relation to housing and family advice in the UK which looks at administrative data to compare the efficacy of telephone versus face-to-face advice (Balmer et al, 2012, Smith et al, 2013). This has focused on either more quantitative data about the demographic differences between those who use telephone advice as opposed to face-to-face (Balmer et al, 2012, Smith et al, 2013), quantitative differences in outcomes between face-to-face and telephone advice (Balmer et al, 2012) and advisors' experiences (Patel and Smith, 2013).

In this paper we take a different approach to looking at advice giving by focusing on the advice itself. Balmer et al (2012;80 ) recognise that “[f]uture research may need to be directed to a more depth analysis of the content of advice provided”. Our work with LEASE provided such an opportunity. . LEASE, the Leasehold Advisory Service, is a Government-funded advice service offering free legal advice on the complex and technical law governing the ownership of leasehold properties in England and Wales. In 2013 the authors were commissioned by LEASE to carry out an audit of their advice service aimed at ensuring the quality of their advice and improving their public service. We were requested to assess the accuracy and legal correctness of the advice<sup>i</sup>. As part of that audit we examined 36 advices, of which 15 were telephone advice, 15 were written responses to e-mail queries and 6 were fact-to-face interviews.

In order to do this we were given access not only to the written records kept on each case, but also to the telephone recordings of the interactions between callers and advisers. The telephone calls lasted between just under seven and a half minutes and just over twenty seven and a half minutes. The calls and written enquiries were identified by a method which focused on those which provide the bulk of enquiries (from leaseholders in connection with service charges and lease extensions) randomly picked over the preceding 12 months from the audit. The face-to-face cases arose from one of the researchers sitting in advice sessions held at the London Property Tribunal.

We want to be clear from the outset that our evaluation of the advice provided by LEASE was positive. We considered that the overwhelming majority of advice provided by the organisation was either good or excellent, and that advisors generally explained difficult legal issues in a clear and helpful manner. We considered that LEASE provide a valuable service for those with clear questions, but does not always effectively meet the needs of those with inchoate and cross border problems, from complex social issues around debt and poverty to legal jurisdictional questions over company law responsibilities or probate. However, this paper is not intended as a critique of LEASE, who we

consider do a difficult job well, but rather as an analysis of the ambiguities, ambitions and limitations of the form of advice LEASE, and other organisations, provide.

In this paper using the analytical tool of surround, field and frame developed by Hawkins (2003) to give a naturalistic explanation of how decisions are made, we argue that there are ambiguities about the nature of “legal advice” and that the constraints on the service are more important in framing the nature of the advice given far more than the delivery mechanism.

### **Analytical tool**

We use the approach of Keith Hawkins in *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Hawkins, 2003) as our analytical tool – a theoretical perspective based on concepts of surround, field and frame – to provide a naturalistic analysis of systemic decision making at LEASE.

Hawkins examines the systems of decision making at the Health and Safety Executive, developing an holistic analysis which includes recognition of the role played by typification (wherein a ‘normal’ way of deciding cases arises through repetitive decision making). He argues (2003; 48) that

“legal decisions, are made ... in a much broader setting (their ‘surround’), and within a context, or ‘field’ defined by the legal and organisational mandate. Decision ‘frames’, the interpretative and classificatory devices operating in particular instances, are influenced by both surround and field. ... Framing is a means by which factors are selected and their meaning in decision-making organised.”

Thus, for Hawkins, an analysis of the surround, the field and the frame gives a naturalist explanation of how decisions are made. For our purposes the tools of surround/field/frame allow us to analyse the system of advice provision LEASE has developed. The frame is the way in which advisors interpret their role and the information they are given by the callers, which then determines how they advise the caller to proceed. The frame is determined by the field, which can be seen as both the legal areas upon which LEASE provides advice, and the institutional structure of LEASE, as well as the surround, which is the broad political and economic environment.

Framing here is a classificatory process, where advisors interpret and shape the scenario in the call through their knowledge, experience and values – is the call about a lease extension, reasonableness of service charges or the rules for applying to the tribunal? In addition, analysis of framing highlights the ambiguous position of the advisors at LEASE, and the way in which their knowledge, experience and values as lawyers means they look to the technical, the specific and the jurisdictional, whilst the impact of the field in which they work pulls them toward the general, the self-directed, and the potentially irrelevant.

We firstly set out some details of the surround and field, but the substance of this paper is in three subsequent sections; firstly examining how the initial classificatory question of framing is evident in advice provision at LEASE, and how that classification can be affected by aspects of the field in which the advisors operate. Secondly, the paper explores how the advice provided by the lawyers employed by LEASE might be seen as non-legal, as a result of the field in which they operate and their interpretation of their role, specifically the way such advice tended towards the general and simplified, and advisors took issues at face value, avoiding interrogation of the facts presented to

them. In the third section we look at the contrary tension, and the way in which the advisors erect and maintain borders which maintain their identity, and LEASE's identity, as legal advisors.

### **Surround and Field**

The UK is now unusual in the common law world in still using the long leasehold as a form of ownership of residential properties. For properties with communal areas (primarily but not always flats) other countries have developed forms of ownership such as the condominium or strata title. Although an alternative form of tenure was introduced in England in 2002 (the commonhold) this has not taken off, and the leasehold continues to predominate as the primary form of ownership of flats.

Leasehold ownership throws up a number of problems and issues, which have led to numerous reports and piecemeal reforms over the last 50 years or so. (For a history of the current reforms and earlier failed attempts, see Davey 2006). There are at least five relevant pieces of major legislation: the Leasehold Reform Act 1967, the Landlord and Tenant Act 1985, the Landlord and Tenant Act 1987, the Leasehold Reform, Housing and Urban Development Act 1993, and the Commonhold and Leasehold Reform Act 2002.

Sir Nicholas Browne-Wilkinson VC in *Denetower Ltd v Troop* [1991] 1 WLR 945 at 952G said in relation to one of the many pieces of legislation which regulate the relationship between leaseholders and freeholders of residential property that it was "ill-drafted, complicated and confused". His views might be relevant not only to the Landlord and Tenant Act 1987 to which it was particularly directed, but all the legal measures which have sought to change the balance of power between leaseholders and freeholder. Just to give a flavour of the complexity of the law the leading practitioner text on just one aspect of the law (Hague on Leasehold Enfranchisement) runs to 35 chapters.

Enforcement of the different rights under the legislation was initially placed in the county courts, but over the last 20 years it has been increasingly transferred into the Tribunal system – initially the Leasehold Valuation Tribunal, now the First Tier Tribunal (Property Chamber) (FTT(PC)). The move to the tribunal as the focus of disputes resolution means that disputes are not eligible for legal aid. This is because the Tribunal is intended to be a more user-friendly environment for parties than the courts. Despite this reforms to tribunals over the last 10 years have in fact moved them much more towards a court model of greater formality – see e.g. the new rules of the FTT(PC) which include for the first time powers to strike out parties for failing to comply with directions.

Given the proportionately relatively small number of residential properties held on long leases it is clear that there is a strong political will for leasehold reform. This can in part be explained by the value of some leasehold properties (contrasting from the occupier's point of view e.g. with those in the short-term rented sector) and also the number of properties in London which contains many marginal seats. In 1996 the London Evening Standard campaigned for further reforms to the existing legislation introduced by the Housing Act 1996 (Blandy and Robinson, 2001). In more recent years many of the complaints have come from purchases of flats under the right to buy – a group which governments have been very ready to heed (Carr, 2011).

Given this complexity of law, together with the relative strength of the lobby, following the enactment of legislation in 1993 the government also funded an advice service (LEASE). Initially it

was funded for three years under a special grants programme “in the belief that growing familiarity with the provisions of the 1993 Act would mean that demand for advice would decline” (*Encyclopaedia of Housing Law*, para. 1-3467). That belief proved sadly mistaken and the Housing Act 1996 gave the Secretary of State “the power to provide financial support to an advice service dealing with landlord and tenant issues on a more permanent footing” (per Mr Clappison (Parliamentary Under-Secretary of State for the Environment), *Hansard*, (HC), Third Reading, April 30 1996, Vol 276, col 915).

In legal terms LEASE is a NDPB. It is governed by a Board appointed by the Secretary of State in accordance with the relevant governing documents and guidance issued by the Commissioner for Public Appointments. Its activities are almost entirely paid for by government grants, with less than 10% of income being generated by commercial activities.

LEASE provides a range of services for both landlords and tenants, including advice booklets, on-line webinars, and training – some of which are not free. At its core, however is the free telephone advice service it provides to both landlords and tenants. In addition it deals with written/e-mail queries and provides a regular advice service at the London Property Tribunal. The service is limited in terms that it is advice only and cases are not taken beyond this to enable representation \*whether by way of dealing with the other party in the case or at any hearing before the tribunal, or simply garnering further information to provide more detail beyond the initial advice. This is in contrast to many advice services, e.g. around debt, where further information may be sought in order to provide detailed guidance on debt management and there may be correspondence with creditors or detailed advice as to how to deal with creditors (Patel and Smith, 2013).

It is also limited in terms of the areas on which advice will be given. As stated on its website, LEASE provides advice:

“on the law affecting residential leasehold property in England and Wales.

Whether you are a leaseholder, a freeholder or a property professional, the Leasehold Advisory Service is here to help. We advise on issues including service charges, extending your lease, buying the freehold, right to manage and applying to the First-tier Tribunal (Property Chamber).”

In 2012-13 LEASE received over 31,000 telephone enquiries. To deal with these it employs 16 advisers in London (2 job sharing) and one in Wales all do face to face, written and telephone advice. They were divided into two teams and managed by two senior advisers, who sit with their teams, oversee telephone calls and allocate incoming post/emails.

At the time of our research all the advisers were qualified solicitors and had practising certificates. LEASE’s status is thus somewhat akin to other advice agencies such as CABx and Law Centres. They do not under the Legal Services Act 2007, s.12 carry out a regulated activity. Rather for the regulatory purposes of the Solicitor’s Regulatory Authority (SRA) LEASE is an organisation which employs “in-house” lawyers. Particularly when providing advice to the public lawyers such as those at LEASE and the organisations which employ them are obliged to comply with some parts of the Solicitor’s Code of Conduct (Law Society, 2013).

The regulatory position is also particularly complex for a NDPB such as LEASE which deals with the public, since in addition to the SRA regulation it is also subject to the regulatory structures of government, including falling within the jurisdiction of the Parliamentary and Health Services Ombudsman. Thus potentially complaints about the service could be made to that ombudsman and to the Legal Services Ombudsman, creating confusion and complexity for callers, advisors and the organisation. This confusion and complexity is mirrored in the ambiguous position the advisors find themselves in. We will come to analyse this ambiguity in the following sections, after we have discussed the role of instruction taking and framing, which arises at the very beginning of every telephone call made to LEASE.

### **Jumping to a Frame: Typification and Telephone Advice**

Turning then to the initial process of engaging with the client, we see here a process which because the field is one where the telephone call must be dealt with swiftly (given the volume of calls) and where, unlike with other agencies, there is no further follow up. We start by examining in detail one call.

The caller called with what he said was a simple question, but one which he said had been confusing other people. He was filling out the application to the tribunal, and

Caller: I have got to the box which asks me to name the respondent or respondents plural-

Advisor (interrupting): Yeah, that will be your landlords

Caller (pause): No, it isn't the landlord, let me just explain very quickly

He went on to explain that there had been a change of managing agents, and that the real problem he had was with the previous agents. The advisor did not ask what the application was in relation to, but taking the caller on his own terms, explained that managing agents would not usually be named on the form as they acted on the landlord's behalf. The caller pushed back against this advice, saying that another person had applied and in the proceedings the landlord had been named as second respondent but had "very quickly dropped off." The advisor put the caller on hold, and when he returned, he advised the client that he had spoken to a colleague who had done some research on the issue, and that the caller could put the current managing agent as second respondent. The caller said that would mean that the "perpetrators" – the company he had all the problems with – would not be named on the form in that case,

Advisor: Well why don't you name them as respondent and have three respondents in that case?

Caller: Yes, well, I could do, no, I was just wondering if-

Advisor: My personal view is an agent is an agent, it is like taking an employee to court, you don't, you go for the principal and let him sort out and give orders to them, that is just my view,

Caller: Yes, I do understand that, I've got that and I'll register that, but my specific query that I've phoned about is that the managing agent who resided [sic] over all the problems has only just, in the last 3 or 4 months, disappeared from the equation

The advisor looked at the application form for the tribunal, and advised that there is no requirement for a managing agent,

Advisor: there is only space for a management company, that is something different, a managing company would be set up under the terms of the lease. We call those tripartite leases.

Caller: To me as a punter, there is no difference between a management company and managing agent, maybe I am using the wrong terminology

Advisor: Ok, it could be, if it is a management company set up under the terms of the lease or appointed by the landlord under the terms of the lease

Caller: That is how it was, how it started-

Advisor: Ok, well, in that case, an agent is someone employed by a landlord to manage his affairs, in the same way an actor would appoint an agent to get him work [and he went on to explain again that a management company is set up under the terms of the lease]

Caller: Well, both are true, as a punter, both apply to these circumstances

The advisor went on to talk further about the difference, and then said

Advisor: To be honest, I don't know what sort of lease you've got, I don't know whether you've got a, if you are talking managing agents, we are obviously talking at cross purposes [talked further about role of agents, then management companies] ... but if there is an error with it, the tribunal will let you know pretty quickly

Caller: Yeah, I just didn't want to hold things up by getting the details wrong

The call continued, and the caller confirmed that previous applications have referred to the managing company "or agent" as named respondent

Advisor: in that case, that is what you follow

But, the caller persisted, what about the previous company?

Advisor: They have gone, they may not even exist, they may not be able to make restitution.

The call ended with the advisor reiterating that the previous company should not be included on the form, before he returned to the question of agent/management company, ending the call with a joke; "and never use the word agent again, it just confuses us poor lawyers." The call demonstrated that the advisor had been thrown off track by the use of the word agent by the caller. Whilst all practising lawyers will have experience of the potential for confusion when technical terms are used inaccurately by clients, the confusion was not caused solely by the caller's legally inaccurate language but by the advisor jumping to an interpretation of the question, without taking full instructions from the caller.

This interpretation of the question was an exercise in framing by the advisor, as influenced by the field in which he answered the call. The field is one in which telephone calls must be dealt with

swiftly where possible and without follow up, unlike some other telephone advice lines as discussed above. The frame adopted by the advisor, drawing on his experience and knowledge, was that this was a simple question which could be quickly dealt with, as the landlord is generally the respondent to proceedings brought by a leaseholder.

When the question was explained further, the advisor focused on the caller's use of the word 'agent' to interpret the problem. As the concept of agent had been introduced, the possibility of a tripartite lease was organised out of the scenario. Even where the caller alluded to the right answer, by referring to another case in which the landlord had "very quickly dropped off" the advisor's framing of the question remained unchanged. Thus because of this initial confusion, the advice given failed to focus on the caller's question, except for an unsatisfactory end to the call in which the advisor briefly stated that the new company would have taken on the old company's liabilities, before returning to the agent/managing company question. The correct framing – what is the liability of the old managing agent? – was thus lost, due to the advisor's jumping to an incorrect frame and then failing to shift his focus.

The call is an example of a process of typification. The institutional field in which LEASE advisors operate, in which they provide advice-only on the telephone in a small range of areas, makes it likely that advisors will adopt a process of typification, treating familiar and routine cases in the same way. Such an approach is evident in this example in particular, as the advisor interrupts the caller right at the outset to answer the apparently straightforward question. Thus, as well as the institutional field of LEASE preferring swift resolution of calls, the routinisation of problems tends to move towards quicker responses to calls. In this case, the demands of typification and the field to swiftly resolve the call led to the advisor missing the point about the management company, and then failing to properly do justice to the question once it had been brought to his attention.

Typification is part of the process of repetitive advice provision (Hawkins 2003; 35), and as the job of the advisor is to "reduce unique human experience [in]to ritualised formal accounts amenable to the application of legal and organisational understanding and handling" (Hawkins 2003; 53), typification can swiftly and efficiently classify the question asked. As LEASE advisors deal with specific and discrete areas of law – as we discuss further below – routinisation means the advisors deal regularly with the same issues, so bracket the calls into silos; enfranchisement, service charge disputes or the right to manage, and as the advisor states in this example in response to doubt from the caller about the existence of leases which name a management company, "we call them tripartite leases, I see them every day."

Some aspects of typification and classification may have taken place before the call is answered as, while waiting on hold, callers are directed to LEASE's website. The website directs users to advice guides, which provide advice on the discrete areas LEASE focuses on; applying to the tribunal, lease extensions and service charges amongst others. More innovatively, where email questions are submitted, the website operates a system of automated responses in which key words are identified and users are directed to potentially relevant advice guides on the website. Thus the system encourages specific questions, enabling the more able potential caller to start to channel their inquiry before they get to the point of speaking to an advisor.

Where a caller has a specific question and can explain it clearly, advisors provided quick, clear and effective advice. In other calls we listened to, forensic questioning by advisors resulted in an

accurate framing of the problem, with advisors repeating back the caller's instructions to ensure they were clear on the issues. Similarly, where a caller had a specific question, but took some time to explain it, we also witnessed examples of advisors giving callers this time to talk. For example, in one call, the caller wished to extend their lease, and the landlord was refusing to negotiate. The advisor stated that the caller could oblige the landlord grant an extension through a statutory procedure. The caller, who self-identified as disabled, was distressed at the possible cost, and the advisor spent time going through the online calculator with the caller. The call ended with the caller expressing grateful thanks to the advisor for taking the time to help him.

However, in the few cases we identified where information gathering advice was not as effective as this instance, including the managing company/agent example, a common feature was typification of the scenario early in the call, and a failure to reconsider the frame adopted when facts changed. Crucially, as Hawkins states (2003; 53), facts and frames have a reflexive relationship; "facts narrow the potential frame while the frame provisionally applied may cause some facts to be discarded or disabled, others to be reintroduced, and yet others to be reinterpreted." We found that one feature of this field in which decisions are made swiftly without complete information, and advice must be dispensed in the same call, is that classifying the particular call immediately can result in inflexibility when changing facts do not fit with the interpretation selected by the advisor. In the agent/managing company example, jumping to a frame led to the advisor failing to properly deal with the question the caller was raising – whether to include the former managing company as respondent – and instead focussing for the majority of the call on a different question established by the caller's inaccurate use of legal language.

However, in other calls, flexibility of framing was evident, and interrupting the caller had the opposite effect. In one instance, a caller stated the length of her lease was approximately 80 years and wanted to know how to go about extending it. The advisor proceeded on the basis of her estimate, until details in her answers arose which challenged this. The caller was confused and started explaining dates of when she had moved into the property. The advisor interrupted her, asking the apparently irrelevant question of whether the lease mentioned the 1985 Housing Act. The caller, sounding somewhat startled, confirmed it did, and the advisor was then able to explain that she therefore had a Right to Buy lease, and it would have a statutory limit of 125 years. Here, the advisor's experience and knowledge permitted him to identify the key issues, rather than relying on the caller's unclear account of what the lease said and what she had been told by her solicitor on purchase.

### **From Law to Pizza: a disconnect between legal advice and advising on the law**

We have outlined above how framing work is undertaken at instruction taking. The process of typification starts advisors on the track to quite a generalist approach to the problems which are presented, as advisors can move from framing a case as being about lease extensions, to explaining everything about the law relating to lease extensions, irrespective of relevance to the particular call. Similarly, as discussed above, both typification and the institutional field implicitly require that telephone advice is given swiftly – and without documents being available. Thus problems could be framed around rather simple issues of broad legal problems rather than being very specific to the individual caller. In what is a very complex area of law, this also enabled advisors to simplify their

explanations rather than always delve into the often very difficult complexities that the calls threw up.

Sometimes this was illustrated through the language that was used. Callers came with very different levels of knowledge and experience and with different needs. Yet it did not always seem to be the case that advisers were clearly listening to the client to pitch the response appropriately. One clear example of this was a conversation which involved a caller who had contacted LEASE previously. The query related to a lease extension on a property which appeared to have an intermediate and a superior landlord as well as a management company owned by the residents who managed the services as well as collecting the ground rents. In particular the conversation touched on what would be the rights of the intermediate lessee in this context. It is worth considering this conversation in some detail, as it exemplifies many of the difficulties faced by advisers, both in responding appropriately to what was a difficult and not entirely clear problem and working in the dark without the necessary paper work in front of them.

Having given an example of a hypothetical set up (which was much simplified from that described by the caller) the conversation continued:

Advisor: Is this sort of making any sense.

Caller: Kind of, yeah.

Advisor: You see it's a bit like having a pizza. Let's say I own the whole pizza, and I give you six slices and your brother comes along and says to you I'm really hungry I want to buy eight slices of pizza.

Caller: Can we, sorry.

Advisor: You don't own eight slices of pizza in that scenario. Do you understand that?

Caller: Well we've got a management company that's got a direct contract with the lessee....

It was unclear how this analogy had assisted the caller at all or moved the advice forward. One of the problems at this stage of the conversation was that in fact the factual position had not been clearly established. At this point the caller started to refer to the management company having an interest in the intermediate lease, and the call reverted to trying to establish the legal makeup. The caller had a copy of the leases (his lease, to which the management company was apparently a party, together with the original developer and the head lease to which the original developer and the freeholders were party). The conversation then moved to a discussion of what could be charged for an extension of the lease and its relationship to the ground rents payable. There is a conversation about whether the management company are paying some form of rent – which is not properly resolved. Having described what the landlord's valuer was saying about the management company continuing to pay ground rent or the freeholder potentially paying them a lump sum when leases are extended the conversation continued:

Caller: That's the bit I'm a bit confused with

Advisor: I'm not surprised you're confused. That is confusing. It does sound like it's outside of the legislation.

Caller: But he's quoting legislation...He's saying the legislation provides for the on-going payment of rent by the management company to the freeholder.

Adviser: I wouldn't have said that would be the legislation. That would be the lease.

So here we are back again at the importance of the contents of the lease which the adviser has no access to. The caller reads out part of the head lease to which the adviser says "I dunno about that, but I suspect what the head lease requires..."

At this stage in the conversation which has already been going for about 12 minutes, the adviser does a very good job of trying to summarise the position and ensure he and the caller are "on the same page". In fact this enables the conversation to become much clearer and for a mutual understanding of the issues to develop. But having got to this point some 7 or 8 minutes later the adviser says:

"But I haven't seen the leases and there is a fair amount of assumptions being made"

In the end sensible advice about how to respond to the landlord is given, but sight of the lease would have made it very much easier to have got there. Similarly, in the three cases discussed in the preceding section, the advice was provided without a lease. In the Right to Buy case, details in the lease would prove key to the shift in understanding of the call, but this did not take place until most of the call had been wasted in dealing with what subsequently proved to be irrelevancies. In the management company/agent call, the caller confirmed that the lease stated there was a management company at the end of the call, and it is evident that had the adviser had this in front of him, he would not have been distracted by the agent/managing company question, and the advice given might have dealt more appropriately with the caller's question.

As all these cases illustrate, perhaps the difficulty of giving telephone advice most clearly arose when the issue related to the construction of the lease. Leases are notoriously long and dry legal instruments, which even for experts in the area are not easy to read.

The lack of leases also resulted in advice which was more likely to be general and less likely to be particularised to the problem. It was not only in the telephone example above that this was an issue, but also in one face to face interview and in a written response to an e-mail. On the other hand where the lease was available to the advisor the advice could be far more accurate and specific.

This tendency toward overly general advice was not only evident in cases where an advisor did not have a lease to consider, and a number of calls exemplified the tension between giving general advice and tailoring it to the individual circumstances of the caller. For example advice was given in a particular case that it would be advisable to apply to the Tribunal in relation to a case that was already on-going. Raising a new issue would need to be handled carefully and if it was going to be done successfully the caller needed more detailed advice about timing. Another example related to a lease extension. Here one of the crucial issues is always the costs of the extension. General advice was given to contact the caller's landlord or instruct a surveyor or valuer. But in fact what was most important was that there should be an independent view on the value and that an independent valuer was instructed. In a face to face interview a client was advised that they might have arguments they could make on the levels of service charges and directed to an Advice Guide, but not advised on whether those arguments might apply to their situation.

The tendency to advise without a lease, towards general answers and towards oversimplification indicate the impact of the field requirements on the approach of the advisors, but their framing of their own role also has an impact on their advice provision. As suggested in the introduction, the advisors hold themselves out as lawyers, but at the same time are constrained by their role as advisors, and limit themselves accordingly.

One example of this is a tendency to advise on the terms the caller presents. The example in the preceding section demonstrates the problems this can cause when the caller misunderstands or misrepresents their legal position, but there were also examples of where problems were implicit in what was being said but not then interrogated. An example of this is a leaseholder client selling her flat who asked for information about helping a buyer prepare for a lease extension when the property had been sold, and the adviser answered the specific questions raised, but did not advise the client about the requirement for ownership for 2 years prior to entitlement to apply for a statutory lease extension.

In another example, a lessee emailed LEASE to say that the freeholder had disappeared with £8000 of lessees' money, and then asked the question as to whether it would be possible for her to apply to the Tribunal for the appointment of a manager, whether it would be necessary to get the support of the other lessees in the building and whether she required a solicitor to do this. The reply was clearly a standard reply to those questions. There was no engagement with the loss of £8,000; not even a suggestion that talking to a solicitor about this would be productive.

Similarly, it became clear from listening to the calls that advising on county court proceedings in relation to forfeiture fell outside of what the advisors were prepared to do. So for instance in one call the lessee's sole concern was the affordability of the payments towards major works. The advisor was desperate to tell the caller about all the technical rules she could deploy to avoid liability, at one point saying, 'let me tell you my little bit of law'. She did not listen to the caller saying, no I am happy to pay the money but not at a rate I cannot afford I am just ringing because I am worried about possible county court proceedings especially forfeiture and how I persuade the landlord that I cannot pay any more. She was advised to use the Government's Money Advice Service and told that LEASE could not do anything for her. It seems unlikely that any other agency could advise on forfeiture proceedings. Moreover it would be counter-intuitive to a caller to expect LEASE to operate a border dependent upon the forum in which the dispute is resolved.

This example particularly highlights the tensions which pull at the advisors – keen to demonstrate their expertise, but unwilling to stray beyond their institutional boundaries. We therefore turn in the final section to explore other ways in which this tension plays out, and in particular on the ways in which LEASE advisors emphasise their legal essence.

### **Frames as Borders: Technical arguments and establishing a legal identity**

In this section we consider the tactics deployed by the advisors to frame their advice in order to maintain borders, primarily professional borders, and to establish themselves as lawyers, in the face of the countervailing pressure caused by the way in which the engagement with the caller is set up as discussed above. We start by considering the role that the technical arguments, which frequently arise when legislation is complex, are handled by the advisors. In the context of leasehold advice the technical arguments relate to the requirement to demand service charges via a demand that

includes the statutorily prescribed information, the requirement that lessees are informed of service charges within 18 months of them being incurred and the requirement that the identity of the landlord is made clear on the demand.

In one case written advice was provided in connection with an administration charge made by the managing agent for arranging insurance. The advice was that the amount was not payable as it had not been demanded using the correct format. In another case, throughout the course of a long telephone advice a number of technical defences to demands for payments made by solicitors representing the freeholder were explained to the caller. It is understandable why technical defences are attractive to lawyers. They demonstrate the knowledge and skills of the lawyer, and appear to offer a 'get out of jail' card to the caller. However there are problems with technical defences; frequently they can be put right by the freeholder, or a Tribunal may decide that for instance a very minor defect in statutorily required wording does not render the demand defective. Only in the second case did the advisor refer to the possibility of putting right the technical defects, and then only in the context of ground rents. Nor did he mention that any information given by the freeholder about service charges incurred provided within the 18 month period would suffice. Perhaps more seriously in neither case did the advisor respond to the more substantive issue of reasonableness of the charges demanded, despite both enquirers making it clear they considered that what was being asked for was overly expensive and the second caller specifically mentioned having quotes from other insurance providers.

There are two conclusions we draw from this. First there are real problems in providing legal advice when your role is limited to advising. Most lawyers are aware of the weight given by adjudicators to technical defects because they represent their clients in court and know how decision makers respond. Those lawyers develop the broader skills required to resolve the disputes because they understand the practical ramifications of taking technical arguments and are able to weight up those arguments against the broader merits of the case. The limited remit of the LEASE advisors means that they in effect skew their framing of the problem to one that suits their technical knowledge but ignores the realities of adjudication. The advisors achieve something that is important to them, they achieve an identity as lawyers. For instance in the second case referred to here the lawyer emphasised to the caller, without her displaying any concern, that she could be confident when she rang that she would speak to a solicitor and therefore someone familiar with the issues.

The second conclusion is inter-related. In the first case charging £100 for arranging insurance is prima facie unreasonable, and in the second case there seemed to be at least some argument about the reasonableness of the insurance charges. Tribunals are always more likely to be convinced by arguments relating to reasonableness than technical arguments, and in the long term the lessee will be more protected by findings of reasonableness. It may be that discussion of reasonableness is less attractive to the LEASE advisors because it does not require legal expertise, albeit that it is at the heart of the statutory protections offered to leaseholders. This failure to discuss reasonableness did not only mean that leaseholders were deprived of the possibility of pursuing substantive arguments, they were also deprived of advice relating to the need to provide good evidence of reasonableness. Tribunals will not decide that a charge is unreasonable simply on the assertion of a lessee; they require for instance that like for like quotations are provided in connection with insurance costs. Advice about this is much more significant to the eventual outcome of the case than what seems like an overemphasis on technical rules.

The need to identify themselves as lawyers provides an explanation for another surprising characteristic of the advice giving, the emphasis on avoiding conflicts of interest. The emphasis clearly derives from professional conduct rules, but does not seem appropriate here. This is because the advice given is general. Conflict of interests apply when advice is tactical. If you provide the same explanation of the law regardless of the status of the person you are talking to, then there is no conflict of interest. Nonetheless the advisors go to great lengths to ensure that, if they have spoken to a tenant, then they do not advise the landlord, and vice versa.

Finally there was a tendency to get distracted by technical law, which was not relevant to the concerns of the caller. That was most evident in a call from someone whose freeholder was in dispute with his brother about the validity of the will which had left him the freehold. The caller wanted to know how he could acquire the freehold. The advisor said that he required probate advice before he could proceed further. The advisor suggested various routes such as applying to the County Court for an acquisition order, applying to the LVT for the appointment of a manager, but this was all preceded by a requirement that he check the grant of probate.

### **Conclusion**

Taking this theoretical approach to our analysis of the advice gives us not only an awareness of the limits of LEASE but also tells us a great deal about the richness of less constrained legal advice, and many of the elements we have discussed in this paper come together in one further example. In this instance, a caller called with a question about the enforceability of a mediation agreement. The mediation had been carried out at the tribunal, and the advisor initially stated that

Advisor: “well, that is going to be your problem because you did the mediation at the [tribunal], you really need to go and talk to the people at the [tribunal] who did the mediation, now the general rule is that mediation is not binding in that it is not a court order, it is not an arbitration agreement under the Arbitration Act, it is a privately negotiated agreement.”

Caller (speaking slowly) “it is not an arbitration...”

Advisor: “well yeah, an arbitration is something different, it is not an arbitration, that can be enforced or relied on, a mediation is a structured negotiation between parties, now if it is not something signed under seal, like a deal, and is not a contract, because you haven’t exchanged anything of value...”

Caller (speaking slowly) “It is not ... Sorry, the reason is I need to write this [explained she needed to understand the legality of the mediation] obviously the [tribunal] have said it is legally binding-”

Advisor “Oh well the [tribunal] have told you it is legally binding, well if you-

Caller: “but they have also said that I could apply again, they don’t guarantee that my application would be-” (Advisor interrupts: “successful”)

They went on to discuss a possible argument to the tribunal on grounds of good faith, then

Caller: “ok, but want to understand ... in terms of legally, you said it is not legally binding, [then read out section of agreement signed – can be enforced through the courts but otherwise confidential]

Advisor “hang on, so the agreement says, this can be enforced through the courts?”

Caller “yes”

Advisor “that is what the agreement says?”

Caller “it says, ... this agreement may be enforced through the courts”

The caller stated she would like to come in and see someone and show them the mediation agreement. The advisor stated she could send it in as a written inquiry, and an advisor would look at it, but

Advisor: “if there is an express provision, it is going to stand. Once you have a put a provision that it is legally enforceable, you would be prevented from going back and litigating on it. I have never seen an LVT mediation agreement, if you want to, you can send a copy into this office, and perhaps we can raise issues with the LVT directly. ... I personally have never seen a mediation agreement, but of course it is confidential, but we are lawyers so we treat it as confidential.

The advisor also stated twice that he was a trained mediator, and he had done mediations for LEASE, and that those mediations were not binding. As well as being a trained mediator, he emphasised his role as a lawyer with the responsibilities of a lawyer, and an expert on the law. He gave the caller detailed but general advice about the difference between the scenario the caller was presenting and other scenarios, explaining that the mediation agreement was not an arbitration, not a contract, not signed under seal. However, this advice on the technicalities did not address the caller’s concerns, which were specific and were grounded in the mediation agreement she had signed which the advisor had not had sight of.

Was this legal advice, and more broadly, is what LEASE provides legal advice? LEASE hold out their advisors as legally qualified, but because of the nature of their work they are not regulated as stringently as most professional legal advisors, and the advice given is often very general, not tailored to a specific issue in the case of the caller. Advisors do not always give out their names, advice can be given on partial information, either without a lease and based on the client’s account, or before full instructions are taken. All of this is contra-indicative of “legal advice” and it is perhaps for this reason that LEASE’s home page states that they provide “free advice on the law.”

On the other hand, the “About Us” page states that they provide “free legal advice” and their legally qualified advisors adopt many typical lawyerly attributes, including the use of technical arguments, and there is a clear policy on conflicts, which is suggestive of a lawyer/client relationship. As we have discussed, the typification work carried out by advisors can lead to swift and inappropriate imposition of frames in cases, driven by the need to deliver advice as quickly as possible, and while this might be seen as a feature of legal advice in other high volume areas – straightforward cases run under Legal Help contracts are the most obvious example – the traditional lawyer/client relationship, as well as financial imperatives, impose a strategic obligation on the lawyer to think

beyond the initial advice. Such an obligation is less evident in the advice given by LEASE, and as such, LEASE's model raises questions over the border between advice and legal advice.

All this emphasises the need for evaluations of advice services, whatever their mechanism for delivery of advice, to consider carefully the nature of the service given. What are the constraints in relation to providing the service? These may frame the nature of the advice given far more than the delivery mechanism.

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<sup>i</sup> Our qualifications for doing so are that two of us sit as part time judges hearing appeals to what is now the First-tier Tribunal (Property Chamber) on the matters on which LEASE provides advice. The third has recent experience as a solicitor in private practice

# What happened to Norway's new scheme for short legal advice?

Jon T. Johnsen<sup>1</sup>

UCL INTERNATIONAL CONFERENCE ON ACCESS TO JUSTICE AND LEGAL SERVICES  
LONDON 19TH - 20TH JUNE 2014

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## 1 INTRODUCTION

### 1.1 Topic

In June 2009 the Norwegian Parliament passed a plan proposed by government on important reforms in legal aid. (Parliamentary Policy Report no 26 2008-2009)<sup>2</sup> Report 26 contains a range of proposals that concerns different aspects of legal aid in Norway. It proposes some extension in the types of problems covered a significant liberalisation of the means test and new measures for quality assurance. A proposal of a *free first line service* is by far the most innovative and ambitious reform forwarded in the report.

My presentation describes and analyses the first line service reform so far. It has two major parts. First I describe the overall motivation and the specific reasons that the Norwegian Ministry of Justice has given in Report 26 for its proposal. Then I turn to the development and outcome of the implementation process so far.<sup>3</sup>

Norwegian policy reports usually are short and limit themselves to outlining the main policy principles to the Parliament for acceptance. They presuppose further analysis and concretization before the proposals can be implemented. The proposals on the new legal first line are no exception.

### 1.2 Overview of legal service and legal aid in Norway<sup>4</sup>

Like in most societies, the market is the main instrument for providing legal services to the population in Norway. Licensed advocates enjoy an extensive monopoly both on commercial legal service and also on other legal service of some significance. Norway with a population of 5 mill has approximately 8 000 lawyers in private

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<sup>2</sup> St. meld.nr. 26 (2008-2009) "Om offentlig rettshjelp. Rett til hjelp". (On public legal aid. Entitlement to aid) Abridged: *Report 26*. Downloadable (in Norwegian) from <http://www.regjeringen.no/nb/dep/jd/dok/regpubl/stmeld/2008-2009/stmeld-nr-26-2008-2009-.html?id=554306>

<sup>3</sup> My paper builds on two previous papers; see Jon T. Johnsen (2010) "Development of a universal scheme for short legal advice in Norway". 8<sup>th</sup> LSRC International Research Conference Cambridge 2010 and Jon T. Johnsen (2011) "A new scheme for short legal advice in Norway". Legal Aid Group Conference Helsinki 2011. (Link to ILAG website to be added.)

<sup>4</sup> See Jon T. Johnsen 2009 "Hva kan vi lære av finsk rettshjelp? En sammenlikning av rettshjelpordningene i Norge og Finland." Særskilt vedlegg til St. meld. nr 26 (2008-2009) Justis og politidepartementet p 23-24. (Johnsen 2009 a) Downloadable (in Norwegian) from: <http://www.regjeringen.no/nb/dep/jd/dok/regpubl/stmeld/2008-2009/stmeld-nr-26-2008-2009-.html?id=554306>. Summary Report in English "Might Norway learn from Finnish legal aid?" can be downloaded from [http://www.ilagnet.org/conf\\_2009/conf\\_papers.htm](http://www.ilagnet.org/conf_2009/conf_papers.htm)

practice. Norway now allows commercial legal service except in court cases from jurists without a lawyer's license and has approximately one hundred practicing.

Norway relies almost solely on *judicare* in legal aid delivery and only has two salaried offices, one in Oslo and a small one in the main Sami area in Northern Norway, with less than ten full time posts altogether. The two public legal aid offices are restricted to legal service outside the courts, while lawyers in private practice are the main providers of legal aid both in court cases and in other matters.

Norway specifies in considerable detail the types of problems that qualify under the civil schemes. The Norwegian Legal Aid Act<sup>5</sup> makes a major distinction between litigation aid and aid for other legal problems. The list contains eleven major categories for legal assistance outside the courts and fifteen for legal representation before the courts and some other judicial bodies, although the categories overlap to a great extent.<sup>6</sup> The provisions leave limited space for discretion. Other categories of problems are excluded from legal aid unless the circumstances appear extraordinary.

In addition to the general, national schemes, a range of other, more specialized schemes exist. Such non commercial schemes operate both in the public and in the private sector. The providers are:

- public enterprises – distinguishing between ombudsmen and other public providers;
- membership organizations – organizations within trade and labour or other interest organizations
- volunteer organizations – organizations especially for deprived and vulnerable groups and include both interest organizations, NGOs, grassroots organizations and charity.<sup>7</sup>

Among the public enterprises we find several ombudsmen that handle complaints from the public against public administration and hospitals and over discrimination and consumer issues. We also find important schemes for legal service from public administration, in consumer matters, student clinics, counselling of crime victims and debt refurbishing.

The membership organizations provide legal service to farmers, homeowners, tenants, car owners, taxpayers, consumers etc, and the unions have extensive services in employment matters.

A wide range of voluntarily schemes also exists. The local divisions of the Norwegian Bar Association offer short, free advice according to rota schemes at several locations, and the organizations for the poor and deprived have a broad spectre of schemes. The organizations for the handicapped have schemes and so do organizations for immigrants, refugees, prostitutes, raped and battered women, victims of incest, gay and lesbians, debt victims and consumers.

Norway, like the other Nordic countries, also has extensive LEI-coverage. Many membership organizations have arrangements for covering legal costs for their members when using lawyers in private practice; mainly in matters that fall within the working area of the organization.

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<sup>5</sup> Lov 13. juni 1980 nr 35 om fri rettshjelp (Rettshjelpsloven).

<sup>6</sup> Norwegian Legal Aid Act §§ 11, 12, 17

<sup>7</sup> The criterion for counting a non commercial legal service enterprise as a legal aid scheme is that the enterprise provides at least some services itself. Pure financial arrangements, like legal expense insurance (LEI) and unions that only pay their members' bills for using private lawyers, are not included. See Johnsen 2009 p 25-29

## **2 THE FIRST LINE ADVICE SERVICE IN REPORT 26**

### **2.1 Motivation<sup>8</sup>**

Report 26 justified the new advice service by pointing to the importance of easy access to a wide spectre of information on common legal issues and problems and also on the different judicial mechanisms for solving legal conflicts. Early solutions of legal conflicts would reduce the costs and stress for the parties involved. A larger share of the money spent on legal aid should be allocated to advice and assistance at the pre trial stage – on problems that are not yet on the track to the courts. A vehicle was to establish a free, first line service for all that could contribute to a more effective utilization of the legal aid schemes and to better coordinate legal aid with other advice and conflict solution services.

Additionally Report 26 pointed to research that showed that a widespread uncertainty and helplessness existed in legal matters. People were not sufficiently aware of the legal aspects of their problems and lacked a proper understanding of how to handle them.

The expected gains from a new first line service were summarized as follows:

- The advice service would lower the threshold for accessing legal aid – especially for people who were reluctant to see private lawyers
- Many problems that fall outside the present scheme would be solved either by the new service itself or through referrals. Coverage, especially of the vulnerable groups, would improve.
- The first line should clarify whether legal service would be of help and contribute to more rational and less resource consuming problem solving processes. The capacity of the legal service system should be more effectively utilized.
- Non legal problems would be more effectively channelled to the right problem solving instances.
- A first line legal advice service could be used as a tool for mapping unmet legal needs. Registering the calls would provide a deeper understanding of peoples' problems and help in the continuous work of evaluating and improving legal services.

### **2.2 Previous tests with short legal advice**

#### **2.2.1 THE 2002 MUNICIPALITY SERVICE TEST SCHEME<sup>9</sup>**

The new advice scheme proposed in Report 26 had some predecessors. Norway has a system with Municipality Service Centres (MSC) that provides general advice on municipality services and administration. 292 or 72 percent of Norway's 403 municipalities had MSCs in 2007 and another 10 percent had plans for establishing such services.<sup>10</sup>

In 2002 the Ministry of Justice organized a test project that added a service on short legal advice to the MSCs. Report 26 pointed to these experiences as a major inspiration for the proposals on the new first line service. At the start 5 municipalities participated and in 2008 the number had grown to 24 municipalities. The idea was to try out whether easily available short time legal advice might prevent legal conflicts from materializing and help in finding solutions early in the their development, keeping stress and costs down.

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<sup>8</sup> Report 26 p 25-26, 40-41

<sup>9</sup> Report 26 p 37-38

<sup>10</sup> Forum for offentlige servicekontor (FOSK) 2007 "Spørreundersøkelse om servicekontor/-torg og forholdet til NAV" table 3 and 2 p 5-6

The added legal service had a limit of one hour of service and comprehended substantive advice on simple matters and a qualified evaluation of whether the case might be pursued further combined with advice on how to proceed in more complicated matters. The scheme included all sorts of legal problems without any means or merit's test.

The municipalities were free to organize the added service according to the local resources. Each municipality had to make contracts on delivery with one to three lawyers in private practice.

In some municipalities people who wanted legal advice reported to the local MSC that made an appointment with the lawyers on set days once or twice a week or the lawyer provided "back up services" and came on call when needed.

Most lawyers were provided with an office at the MSC and saw their advice clients there. Then their office hours usually were announced in local media and on the Internet and clients might also "drop in" or queue for service.

In some municipalities the lawyers provided the advice from their permanent offices.

If a case could not be solved within the one hour limit and the lawyer advised on further steps, the lawyer was free to offer the further service suggested on market terms or as a legal aid case if the client qualified. Clients were, however, free to choose another lawyer or helper or handle the case on their own. They should be made aware of these options. The system meant that lawyers could use their participation in the scheme as a vehicle for commercial client recruitment, but not without paying some respect to the principles of fair competition and clients' free choice of lawyer.

A report from 2004<sup>11</sup> at an early stage of the test project showed that almost half of the advices delivered concerned family and inheritance matters. Real property, housing, debt, employment, consumer, compensation and administrative cases also were significant categories of problems. Average reported income from the clients was lower than the total average for the municipality residents. Most cases were solved within 30 minutes and two third were solved within the maximum frame of one hour without any need for further referrals. Approximately half of the clients reported that they would not have chosen to see a lawyer if the MSC legal advice service had not existed.

A self evaluation requested from the Ministry of Justice after four years in 2006, confirmed most of the findings in the 2004 study. The municipalities involved reported that:

- The collaboration between the municipalities and the private lawyers that delivered the service worked well.
- Administration was uncomplicated.
- Family, inheritance and housing constituted the main matters.
- Most cases were solved during the consultation.
- Many would not have called upon a lawyer if the MSC service had not existed.
- The service was especially popular among low income residents.
- No negative experiences had been reported due to the fact that lawyers gave advice from offices belonging to the municipality also in matters that concerned the municipality itself.

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<sup>11</sup> Statskonsult "Fri rettsjelp i offentlige servicekontorer" Notat 2004:04

The 2002 test project functioned as a pilot project for the reform proposed in Report 26 and formed a main model for the new service. Report 26 also proposed the 2002 scheme to be continued and developed as part of the new service.

### 2.2.2 OTHER MODELS<sup>12</sup>

Report 26 also pointed to other experiences as possible models for the new service. The two existing legal aid offices in Oslo and in the Sami area in Inner Finnmark in Northern Norway are both mentioned as viable models. Both offices solved a significant share of the problems forwarded through simple advice during a single consultation. The Oslo office covered problems that are overrepresented in Oslo and connected to urban poverty – like family, immigration, tenant, debt, welfare and health. Significant shares of the problems handled fell outside the range of problems covered by the rather narrow limitations of the legal aid scheme. Also the Sami office handled problems outside the legal aid scheme. Ethnic differences between Norwegians and Sami constituted a significant factor in many of the problems. These experiences contributed to the Ministry's assessment that the scope of problems covered by the existing scheme was too narrow.

Norway also had a short legal advice service established by the local bar associations.<sup>13</sup> The service was delivered free by the members of the local bar according to a rota scheme. Clients were served on a drop-in basis on set opening hours once or twice a month and they received up to half an hour of service. The Oslo service reported that the lawyers solved approximately 70 percent of the problems received. Clients also came because they wanted to know if they had a case that they might pursue further. A test from the Norwegian consumer council did, however, raise some questions about the quality of the advice.

The ministry also considered some models from abroad. The advice services delivered by telephone from the Finnish legal aid offices was paid some attention and pointed to as a possible model for inclusion into the new advice service. Short descriptions also were given of advice services in Sweden, Denmark and Holland, but without any comments on their usefulness as models for the new Norwegian service.

## 2.3 Main proposals<sup>14</sup>

A personal consultation with a legal adviser was the essential service in the Ministry's proposal. Clients should receive an analysis of their legal positions or status and advice on how to use it. Simple problems should be solved at the spot. For more complicated problems, the advisers should inform on how to proceed if the problem substantiated further action. Such advice might comprehend

- evaluation of the prospects of the case;
- referrals to other non commercial legal services;
- evaluation of the client's entitlement to legal aid;
- whether a contribution will apply and its seize;
- whether commercial legal service from a private practitioner was the sole possibility.

A main idea with the service was to help people *sorting out* the legal aspects of their problems and provide them a precise understanding of the options they had. People should be encouraged to call also when they felt uncertain whether their

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<sup>12</sup> Report 26 p 38-40

<sup>13</sup> See section 1.2

<sup>14</sup> Report 26 p 41-44

problems had legal aspects or what the aspects were. Therefore the scheme should cover a wide spectre of problems. The legal advice service should refer problems to a competent helper when other services than legal services seemed appropriate, which meant that the advisers also should possess some insights into general advice.

Problems that related to criminal prosecution should be kept outside the scheme. The existing schemes for defenders and lawyers for victims of crime were not under scrutiny in the reform. Also problems developing from economic activity – including farming, fishing, forestry and craftsmanship – should be kept outside the advice scheme. Public administration had a wide responsibility to inform citizens about their substantive and procedural rights both in general and especially as parties during administrative case handling. Neither should the new advice service function as a substitute for public administration's obligation to provide reliable and sufficient information and advice to parties and the public.

Report 26 also suggested that consultations with the first line service should become an obligatory requirement for further support from legal aid. Obligatory first line advice might solve many problems and contribute to a more rational and effective problem solving process for other problems and thereby reduce the need for additional support from legal aid. Such a requirement could be combined with authority for the advisers to decide applications on further legal aid and contribute to a more efficient and less costly administration of the legal aid schemes.

However, some exceptions might be made. Obligatory first line advice might lead to unnecessary consultations and delay when the case notwithstanding qualified for additional legal aid – for example when clients were sued and in need of a trial lawyer or a deadline demanded fast legal action.

Report 29 pointed out some alternatives for delivery. One was to build on the legal advice services connected to the MSCs. Another was to contract lawyers in private practice to deliver legal advice under the scheme directly from their own offices without any referral from a MSC. Larger cities might test delivery models adapted to the special challenges of that particular city.

Adviser independence received significant attention in Report 26 – mainly due to arguments from the Norwegian Bar Association. Localisation together with welfare agencies was considered, but rejected because it might lead to a less independent image.

Private lawyers who served as first line advisers might refer clients to their own private practice for further service, unless the client would be better served by another lawyer due to better competence or when other circumstances made self-referrals less desirable.

Report 26 concluded that a gradual expansion of the 2002 legal advice service connected to the MSCs – with local adjustments when substantiated – would be the most viable model for most of the country, while the largest cities might organize their services otherwise if they so prefer. Participation in the scheme should be voluntary for the municipalities, not obligatory, but the incentives should be set in a way that encouraged participation. However, Report 26 did not suggest a nationwide implementation of the preferred model. Instead it proposed that the most promising of the existing models should be subject to further testing with systematic evaluation for a trial period of 2-3 years; combined with a gradual expansion of the scheme when justified from the evaluations. Budgetary considerations were important to the proposal. A gradual expansion would distribute the increased costs on several budgets and also offer a mechanism for controlling them.

## 2.4 Implementation conference<sup>15</sup>

Report 26 passed Parliament in June 2009 at the end of its four year term and further work was put on hold until the results of the elections in September 2009 were known. The sitting government survived and so did the Minister of Justice. Then the Ministry began the implementation process by cooperating with the University of Oslo on organizing a conference on the challenges involved in the establishment of the new advice service. The conference took place in January 2010.

The main point with the conference was to map the existing knowledge on short legal advice among experienced practitioners in Norway and to get a better understanding of their viewpoints and ideas about the challenges they saw in the implementation of the proposals in Report 26. The sixty participants had experience from legal aid delivery in private practice, from the two salaried offices and from a variety of non commercial providers outside the schemes of the Norwegian legal aid act. The idea was both to conduct a sort of brainstorming about how to go on with the implementation and to get a better idea about how the main actors – especially the lawyers with an interest in legal aid work – would react to different ways of implementing the reform.

A conference report<sup>16</sup> sums up the discussions of a range of issues and contains a wide spectre of ideas and proposals.<sup>17</sup> A range of questions and challenges was considered during the conference. Several of them reveal significant differences in opinion about how to implement the reform. They concerned the following major issues:

- The substance of the advice and the types of services provided – like oral advice, drafting of legal documents and representation against counterparts.
- Access – localization, opening hours, satellite offices and the users' freedom to choose which service to use.
- Interaction with other legal service providers – information about, referrals to and collaboration with other non commercial legal services and second line legal aid providers.
- Alternatives and supplements to personal, face to face advice – help to self help, telephone advice, e-mail advice, instructions on Internet use, legal information campaigns directed at potential users and the space for impact work.
- Priorities for client intake and outreach.
- Vehicles for quality assurance:
  - o quality standards and control systems, rules for professional conduct;
  - o competence, education, specialization, supervision, support systems;

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<sup>15</sup> Jon T. Johnsen, Olaf Halvorsen Rønning, Ida Gundersby Rognlien *Ny juridisk rådgivningstjeneste. Rapport fra "Ekspertseminar om førstelinjetjenesten»* 19.-20. januar 2010. Justisdepartementets rapportserie. p 6-5, 9-10, 15 (A new legal advice service. Report from "Expert seminar on the first line service") January 19-20, 2010). Published June 17, 2010 by the Norwegian Ministry of Justice. Internet link for downloading (in Norwegian) (*Johnsen et al 2010*)

[http://www.regjeringen.no/nb/dep/jd/dok/rapporter\\_planer/rapporter/2010/ny-juridisk-radgivningstjeneste.html?id=614204](http://www.regjeringen.no/nb/dep/jd/dok/rapporter_planer/rapporter/2010/ny-juridisk-radgivningstjeneste.html?id=614204)

<sup>16</sup> Johnsen et al 2010

<sup>17</sup> Johnsen et al 2010 p 11-15

- client loyalty, independence, conflicts of interest, confidentiality, liability.
- Organisation and management – recruitment, contracting, tendering, seize of the advice delivery units, internal division of labour between the advisers and other employees. Municipality-, county- or national level of organisation? Funding, budgets, cost control and cost effectiveness.
- Information and communication technology (ICT) – ICT assistance for the advisers, administrators, information and problems solving systems for clients as a supplement or alternative to personal advice, electronic communication through Internet and e-mail, distance advice through video conferencing and SKYPE.
- Design of the trial project – the choice of models for testing, duration of the test period, main issues for the evaluation, design of the evaluation, the additional tasks for the advisers during the trial period.<sup>18</sup>

### **3 IMPLEMENTATION OF THE FIRST LINE TEST PROGRAM**

#### **3.1 Program structure**

After reviewing the outcome of the conference, the Ministry of Justice established the test program in two of Norway's 20 counties – Buskerud and Rogaland. In addition a similar test program based on inter municipality collaboration in the Lindesnes region became included. All projects were located in Southern Norway. Altogether 40 municipalities participated.

As mentioned the Report 26 program used 2002 test program at the MSCs as the main model and the Ministry of Justice mainly organized it the same way, see section 2.2. It was left to the municipalities in the three test areas whether they wanted to participate and they also were responsible for organizing the service according to general instructions from the Ministry.

Simultaneously the 2002 test program covering more than 20 municipalities were prolonged. A telephone service for answering legal questions was considered but not included in the test program.

Both the 2002 test program and the Report 26 program have as their major aim to improve legal service for the population in municipalities selected. Especially in the 2002 program, model development was a secondary and not very important goal.

In the Report 26 program, model development was significantly more important and the outcomes were meant to form the basis for a government decision on whether to implement the service model nationwide. More emphasis was therefore put on structuring the service models applied and on collecting data on the development of the service in a systematic way

After the end of the test program in 2012 a final evaluation was carried out.<sup>19</sup> I will summarise the main findings and discuss and compare them to the ambitions of the test project.<sup>20</sup>

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<sup>18</sup> An extensive summary from the conference can be found in Johnsen 2011 p. 7-14.

<sup>19</sup> The Ministry commissioned the study from Oxford Research AS – a Nordic, commercial company doing applied research commissioned by political and strategic actors. They specialize in commercial and regional development, research and education and welfare policy, see [www.oxford.no](http://www.oxford.no) .

<sup>20</sup> Oxford Research and professor Kristian Andenæs: Evaluering av pilotprosjekt om førstelinjerettshjelp. (Evaluation of first line legal services) Oxford Research 2013. Downloadable from <http://www.oxford.no> (Visited May 16, 2014). *Oxford Research 2013*

In Rogaland County 19 out of 26 municipalities participated, covering 88 percent of the population. In Buskerud 16 out of 25 municipalities, covering 72 percent of the population took part. Some populous municipalities were missing in this county. In the Lindesnes region all municipalities participated.<sup>21</sup>

### **3.2 Provision**

Clients could bring forward any legal question except criminal cases and cases concerning business activity. One of the issues in the test was the duration of the service. Municipalities used maximums of 30, 45 and 60 minutes for service duration. The idea was to find out how variations in maximums on advice time influenced the share of problems that could be fully solved within the advice session.<sup>22</sup>

Some municipalities restricted individual use to once a year; others accept unlimited number of calls during the year.

Municipalities also could choose between delivering service at the MSC localities (*Municipality Service Centre model MSC*) or at the participating lawyers' offices (*Law Office Model LO*). Appointments with LOs still had to be made at the MSCs. In some municipalities the MSCs also issued vouchers for LOs and left it to the client to make the appointment.

Municipalities advertised the service and service hours at their web sites and in media. Clients might call the MSC for an appointment at a set time or drop in during service hours. Waiting time should not exceed four weeks. Emergency cases should be handled outside queuing.

The Ministry established a website for the service that recommended clients to prepare questions for the lawyer, put up a list of major events of the case and bring with them all documents they thought of importance. The website also told about how to call upon the service and outlined issues as confidentiality, lawyer responsibility, ethics and complaint procedures.

The main measure for quality assurance was that all advisers hired had to be lawyers in private practise with some experience. Paralegals were not used.

Hiring was left to the municipalities. Advisers were paid for a set number of service hours independent of the number of clients they received or whether slots without any clients occurred. The hourly fee for judicare work was used – amounting to 113 euro.

### **3.3 Outcome**

#### **3.3.1 DATA**

Both advisers and clients filled in questionnaires. Main issues in the lawyer questionnaire were:

- Information about the municipality where delivery took place and model (MSC/LO)
- Client information
- Case information
- Coverage from the existing legal aid scheme
- Type of service delivered (Oral advice, phone calls, completing forms, wills, contracts, and letters and debt instruments)
- Did the client receive incomplete advice from public administration?
- Might the adviser have solved the case with twice as much time available?
- Did the adviser suggest applying for further assistance over legal aid?
- Duration of the advice session in minutes

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<sup>21</sup> Oxford Research 2013 p 13

<sup>22</sup> Oxford Research 2013 p 39

Clients were asked several questions about their impression of the service, its quality, their confidence in the lawyer, the usefulness of the advice, further referrals and whether the time allocated was sufficient. Other questions concerned travel distance and channels for information about the service.

Information on costs was gathered from budgets and accounts.

Both the test program and the questionnaires were designed by the Ministry and contained some compromises between bureaucratic and political needs and research methodology. Oxford Research was hired for the analysis of the data but had limited influence on data gathering. Some problems appeared from inconsistency of the data, but with limited bearing on the results discussed in this paper.<sup>23</sup> Oxford Research also designed and conducted additional qualitative interviews with clients and lawyers.<sup>24</sup>

### 3.3.2 CLIENTS

Overall the test project had a yearly rate of 5,5 users per 1000 inhabitant. The call rate was significantly less than the Ministry's goal of 15 users per 1000 inhabitant which was comparable to the call rate of 12 per 1000 in the Finnish public legal aid bureaus. The call rates were significantly under the average in the first two months of the test project and also in July and December. Oxford Research believes that the call rate would increase if the test projects became permanent, introduced countrywide and announced better.<sup>25</sup>

Less populated municipalities had a far higher call rate than populous municipalities, and municipalities without private practitioners had significantly higher call rates than municipalities with lawyers practicing.<sup>26</sup> Studies have shown a strong connection between densely populated, urbanized areas and lawyer location in Norway.<sup>27</sup>

Overall gender showed 55 percent women and 45 percent men. Men were overrepresented among the married and women among the singles, while men and women were almost equally represented among the unmarried cohabitants. The age groups over 40 were overrepresented among the clients and so were people with higher education. However, median income was a bit below the median for all inhabitants in the test areas. Clients born outside Norway were strongly overrepresented in the two largest cities Stavanger and Drammen.<sup>28</sup> Clients born in third world countries appeared significantly poorer than the rest.<sup>29</sup>

Roughly clients represented an average selection of the Norwegian population.

### 3.3.3 PROBLEMS AND SERVICE

Problems were distributed over a large spectre of types. However, the main problem areas were "inheritance", "real property and housing" and "family" with 61 percent of the calls. All other areas, like labour, debt, contracts, taxes, welfare law, social security and immigration had less than five percent each.<sup>30</sup>

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<sup>23</sup> Oxford Research 2013 p. 18

<sup>24</sup> Oxford Research 2013 p. 21-22

<sup>25</sup> Oxford Research 2013 p. 23

<sup>26</sup> Oxford Research 2013 p. 24

<sup>27</sup> Oxford Research 2013 p. 18, Jon T. Johnsen (1987) Retten til juridisk bistand Oslo Tano s 424-425

<sup>28</sup> Oxford Research p. 28

<sup>29</sup> Oxford Research p. 33

<sup>30</sup> Oxford Research p. 32

Oral advice was the only type of service in 86 percent of the cases. In the rest the lawyer also did calls, assisted with filling in forms, and drafting letters, contracts, wills, etc. to the extent the time limits allowed.<sup>31</sup> Referrals were given in 37 percent of the cases. 80 percent of the referrals was to further consultations with private practitioners with three fourth to the adviser's own firm.<sup>32</sup> Other referrals covered a wide spectre of instances, with no one receiving more than 3 percent.

Overall the lawyers said that they fully solved the essential issues in over 60 percent of the cases. The 60 minutes consultations had a higher success rate (66 percent) than the 30 minutes consultations (59 percent).<sup>33</sup> Client satisfaction with the service was very high. Almost everyone said they had been helped by the service. They also commended the easy access to the service, and of course that it was free.<sup>34</sup> No significant difference in client satisfaction between 30 minutes and 60 minutes consultations was observed.<sup>35</sup>

## 4 POLICY ASPECTS

### 4.1 The Ministry's questions.

Looking at the Ministry's ambitions, see section 2.1, and need for information about the functioning of the first line model, we might sum up the main outcomes:

*Firstly* the Ministry wanted to know if a first line service would lower the threshold for accessing legal aid – especially for people who were reluctant to see private practitioners.

Between 6 and 7 per 1000 used the service per year, which obviously is a great improvement from no use at all. It is also a significant improvement from the coverage of the existing legal aid schemes that have practically no space for simple advice at all. So the threshold obviously was lowered. On the other hand the call rate is lower compared to other test projects in Norway and other countries, so other models might have achieved a better turn out.

*A second* Ministry question was whether the coverage of problems that fall outside the existing judicare schemes would improve by establishing a first line service either by being solved or through referrals. The answer is a resounding yes. Overlaps with the existing judicare scheme appeared limited. Lawyers estimated that 14 percent of the calls would have been covered by the existing judicare scheme had the client applied. Almost all problems fell outside either due to the means and merits test.<sup>36</sup> The test project therefore mainly covered unmet legal needs that did not qualify for the judicare scheme. The message is very clear. The present merits test does not correspond to the problems most people think are the most important to them.

*A third* question was whether coverage especially of the vulnerable groups, would improve. This answer is less clear. People with gross incomes below NOK 200 000 (euro 25 000) per year were increasingly underrepresented the poorer they were. Still these groups also received a significantly improved service although not to

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<sup>31</sup> Oxford Research 2013 p. 46-47

<sup>32</sup> Oxford Research 2013 p. 47

<sup>33</sup> Oxford Research 2013 p. 27-31, 39-41. Income for clients was self-reported during the advice session, while income for all inhabitants came from tax returns, which is a source of error.

<sup>34</sup> Oxford Research 2013 p. 34-35, 42

<sup>35</sup> Oxford Research 2013 p. 42

<sup>36</sup> Oxford Research 2013 p. 55

the same extent as the better off. Therefore the model does not appear as especially effective in covering the legal needs of underprivileged and vulnerable groups.<sup>37</sup>

*A fourth* question related to the referral service. The first line should clarify whether legal service would be of help and contribute to more rational and less resource consuming problem solving processes. The capacity of the legal service system should be more effectively utilized.

With a consultation limit of one hour, two third of the problems were solved. Especially the MSC model with strict structuring of time use per client proved effective. It seems beyond doubt that the model can deliver effective advice on a range of problems within a limited time span.

*A fifth* question was whether the first line would help in channelling non legal problems to the right problem solving instances. Five percent of the calls were referred to non-legal instances for handling. It therefore seems that almost all problems received had legal components that could be advised upon, and that clients usually knew that their problems was of a legal nature or at least of a type that lawyers handled. The same impression appears from the problem structure. The bulk of cases consisted of legal problems that the middle class is used to forward to lawyers.

*The last* major question was whether a first line legal advice service could be used as a tool for mapping unmet legal needs. The Ministry hoped that registering the calls would provide a deeper understanding of peoples' problems and help in the continuous work of evaluating and improving legal services.

The model truly can be helpful for manifest middle class problems like inheritance property and family. However, when it comes to problems with legal components that people are less aware of – for example immigration, welfare and poverty law – the usefulness of the first line model seems limited. When staffed with lawyers, it is to be expected that people come with what they think are “lawyer problems”. If the first line service shall attract other less manifest problems, outreach and different marketing strategies seems necessary.

## **4.2 Comments**

To my evaluation, the models tested had a number of flaws. It did not build upon and utilize previous experiences with first line services in Norway about how to approach vulnerable groups and the research report could have discussed alternative delivery models more thoroughly. No separate testing of the existing salaried offices in Oslo and in the Sami area in Northern Norway took place and hardly any comparisons were made to them in the evaluation research.

Also the sole use of private practitioners as advisers might be questioned. The use of jurists without a lawyer's licence and perhaps law students might have been a viable alternative worth testing. Also advisers without a master's degree in law, but with special competence for example in welfare law, social security or consumer law might have been tried out.

The first line test had, however, one principled feature that deserves attention. Contrary to the judicare schemes, the first line did not select clients according to the type of problem they had. The test project did not prioritize some types of legal problems over others. The criterion was an unsolved legal problem of some importance to the client.

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<sup>37</sup> Oxford Research 2013 p. 31

The approach is in accordance with human rights ideology. According to the case law of the European Court of Human Rights, individuals are entitled to legal aid when they possess a legal position of importance to them and they cannot afford to protect it at the courts. The *type* of legal position does not matter as long as it qualifies as a civil right or obligation or a criminal charge.

#### **4.3 Fate of the first line model**

The test period ended in 2012 and the final evaluation report was published in April 2013. However, the original idea of gradually turning the test projects into permanent institutions did not find its way into the justice budget for 2013. The reason might well have been that the evaluation study was not ready when the budget was decided upon. It meant however that all first line services had to close down unless the involved municipalities were willing to undertake the costs.

Oxford Research calculated the price of implementing the test models nationwide to be in the area of euro 12 million per year with a user frequency of 15 per 1000 inhabitant or twice the frequency registered in the test project. However, the 2014 budget did not contain any means for continuation either. Looking at the total Norwegian legal aid budget in the area of 150 mill euro,<sup>38</sup> such a sum is of course significant, but less than ten percent of the total. It is not outside the space for realistic prioritization.

A new government took office in the fall of 2013. Their revised 2014 budget did not contain any means for a permanent first line either. It remains to be seen whether the first line will become a permanent feature of Norwegian legal aid or just another failed reform of the traditional judicare scheme.

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<sup>38</sup> European judicial systems Edition 2010 (data 2008) European Commission for the Efficiency of Justice Council of Europe Publishing Strasbourg October 2010 table 2.1 p 16. Usually Norway does not publish figures on costs for the whole legal aid system, because legal aid in criminal cases is covered as part of the court costs.

**Democratization of the access to Justice in Brazil:  
The Itinerant Courts of Amapá and Rio de Janeiro**

Leslie S. Ferraz<sup>1</sup>

**1. Introduction**

In the beginning of years 1990, an original modality of jurisdictional provision was created: the Itinerant Courts, movable courts adapted in vehicles (buses, vans and vessels) which visit remote areas or areas that are not serviced by the Judicial Power.

The purpose of this article is to evaluate the Itinerant Courts' potentiality to carry out the access to Justice by underprivileged sections of the population<sup>2</sup>. For such purpose, two case studies will be presented: Complexo do Alemão shantytown (Rio de Janeiro) and Bailique Archipelago (Amapá).

The choice is justified due to the high degree of institutionalization of the programs; because they serve a low-income and low-education population, which gravitates around the margin of State services; and, last but not least, because of their contrast: the Amapá project is targeted to an isolated community, which lives on the banks of Amazonas River, whereas the Rio de Janeiro project operates in a heavily populated neighbourhood, jammed in the second largest city of the country. Notwithstanding this fact, the programs rely on a common element: a recent history of systematic absence of the State.

In the first place, I describe the main obstacles for access to Justice and draw a general scenario of itinerancy in Brazil. Then, I will present case studies, which contemplate a description of the site and of the itinerancy program, followed by the evaluation of their potentiality to promote access to Justice, by means of the overcoming of their own obstacles. At the end, I present short conclusive thoughts.

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<sup>2</sup> We will use the provisional regional reports of the research “Democratisation of the access to Justice and implementation of rights: Itinerant Justice in Brazil”, conducted under my coordination, with the funding of Ipea Proredes. The report of the Southeast region was prepared by Eduardo Caetano da Silva; and that of the Northern region, by Juliana Pedro, Michelly Rodrigues and Sônia Ribeiro.

## 2. Obstacles to the access to Justice in Brazil

The access to Justice evidences the tension existing between the legal and formal equality and the social and economic inequalities<sup>3</sup> and point out the importance of making effective – and not merely proclaiming – citizens' rights. In this context, the detection of obstacles to the access and the review of mechanisms fit to overcome them is a quite efficient method to give grounds to the policies of inclusion and effectiveness of rights.

In Brazil, the most obvious challenges for access to Justice are the huge geographical dimensions and the deep economic disparities. It is not by chance that the distribution of lawsuits is concentrated in large urban centres and, moreover, among several litigators (such as banks, telephone companies and governmental entities), which resort to Justice in a strategic manner<sup>4</sup>, benefitting, by the way, from its delay<sup>5</sup>.

It is necessary, however, to increase the spectrum of the review: besides the territorial and financial obstacles, we may also point out barriers of political, procedural and psychological-cultural nature.

The obstacles of *political* nature concern the absence of an appropriate organisation of the justice system by the Courts<sup>6</sup>. Many cities do not have even courts of Public Defence Officer Department, the body responsible for free legal assistance in the country.

Ironically enough, the *process* itself is an obstacle for access to justice – by virtue of the technical language, excess of formality and incomprehensible procedural mechanisms – in particular for the lay public<sup>7</sup>.

The Judicial Power's inability to give responses appropriate for the several kinds of conflicts presented (such as small claims courts and collective matters) also

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<sup>3</sup> Boaventura de Sousa Santos, *Pela mão de Alice: o social e o político na pós-modernidade*, 3 ed., São Paulo: Cortez, p. 168-171.

<sup>4</sup> *Relatório 100 maiores litigantes [Report of the 100 principal litigators]*. Conselho Nacional de Justiça [National Council of Justice], Departamento de Pesquisas Judiciárias [Department of Judicial Researches] (DPJ), Brasília: 2012, p. 08. Available at: [http://www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/100\\_maiores\\_litigantes.pdf](http://www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/100_maiores_litigantes.pdf). Last access: 22/June/2013.

<sup>5</sup> Marc Galanter, Why the 'haves' come out ahead: speculations on the limits of legal change. *Law and society review*, v. 9, n. 1, p. 95-160, 1974.

<sup>6</sup> FIX-FIERRO, Héctor. *Courts, Justice and Efficiency: a socio-legal study of economic rationality in adjudication*. Oxford and Portland, Oregon: Hart Publishing, 2003, p. 211.

<sup>7</sup> E. Johnson Jr.. Promising institutions: a synthesis essay. In: Mauro Cappelletti; J. Wesner (ed.), *Access to justice*, v. 2: Promising institutions, t. 2, p. 878.

represents an important obstacle. Moreover, thanks to the growth of number of demands<sup>8</sup> and of the inability to settle them, Brazilian justice, besides having an outdated procedural model and a swollen appeal system, is more and more congested<sup>9</sup>, slow<sup>10</sup> and inefficient.

The increase of the number of lawsuits does not mean that previously excluded persons are accessing the system: as already informed, in Brazil, the distribution of lawsuits is concentrated only in a few institutions, such as large companies and governmental entities<sup>11</sup>.

As regards the *psychological-cultural* aspect, the mere idea of going to the Courts scares many people<sup>12</sup>. The lower the economic class of a person, the higher is his/her distance from the justice system – due to insecurity, fear of reprisals until the full ignorance of the material law or of the form of claiming it<sup>13</sup>.

As regards Brazil, this problem is even more severe, as a large portion of its population gravitates around the margin of State services. Social exclusion expresses itself in indifference, on the part of the excluded persons themselves, towards the justice system. This separation, justified by centuries of abandonment of the “subcitizens”, jeopardizes the creation of the Nation’s identity: not only the oppressors, but the persons themselves (slaves, poor, ethnical minorities) had and still have a derisory view of themselves<sup>14</sup>.

Therefore, despite the growing number of lawsuits in Brazil, there are still many citizens excluded from the Judicial Power – due to waiver, ignorance of the right or incapacity of fighting for it. Not only does the legal system reproduce but also

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<sup>8</sup> In 2011, 26,241,166 lawsuits were filed before Brazilian justice (at the State, federal and labour levels); in 2011, the number was of 28,215,812 – an increase of 7.5%. National Council of Justice. Justice in Numbers 2013: base-year 2012. Brasilia: CNJ, 2013, p. 15. Available at [http://www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/relatorio\\_jn2013.pdf](http://www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/relatorio_jn2013.pdf). Access: 18/December/2013 and National Council of Justice. Justice in Numbers 2012: base-year 2011. Brasilia: CNJ, 2012. Available at [http://www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/rel\\_completo\\_estadual.pdf](http://www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/rel_completo_estadual.pdf). Access: 30/Aug/2013.

<sup>9</sup> The rates of congestion of Brazilian Justice are extremely high: 47% (Labour Justice), 65% (Federal Justice) and 73% (State Justice). Source: Justice in Numbers 2013: base-year 2012, op. cit., p. 314-326-331.

<sup>10</sup> A judicial lawsuit judged at all levels may take more than ten years to be concluded.

<sup>11</sup> *Relatório 100 maiores litigantes [Report of the 100 principal litigators]*, op. cit., p. 08.

<sup>12</sup> Héctor Fix-Fierro, *Courts...*, cit., p. 05.

<sup>13</sup> Boaventura de Sousa Santos, *Pela mão de Alice...*, cit., p. 168-171.

<sup>14</sup> Orlando Villas Bôas Filho. *Uma abordagem sistêmica do direito no contexto da modernidade brasileira*, 2006. Tese (Doutorado em Direito), Faculdade de Direito da Universidade de São Paulo, São Paulo, p. 332-42.

increments the intense social gaps: the vulnerable groups from the social standpoint are also, in Brazil, those *legally* weak and underprivileged<sup>15</sup>.

### 3. Itinerant Courts in Brazil: short scenario

The first informal experiences of itinerancy would have been developed in 1992, on boats, upon the individual initiatives of judges from Amapá and Rondônia, concerned with the isolation of riverside populations. After their institutionalisation by the Court of Justice of Amapá, in 1996, several other State Courts have created their own programs, inspired by their good results.

In 2004, Constitutional Amendment No. 45 determined all Brazilian Courts to create itinerancy projects and the ordinary legislation resolved on the creation of Special Courts, both in the federal and State levels. Though the federal and labour levels have not observed the constitutional principle, virtually all State Courts in Brazil have created itinerancy programs, presented in table 1, as follows:

Table 1: Modalities of Itinerant Courts / State Courts – Brazil

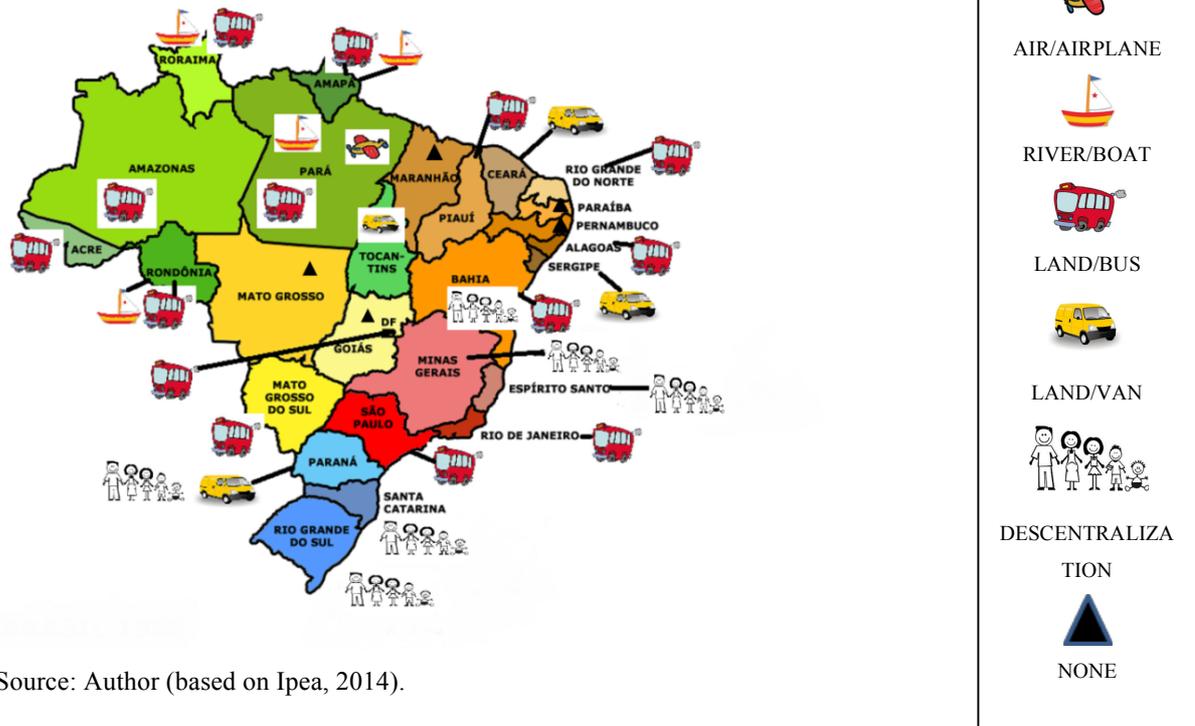
Modality	Features	States
Land/bus (15)	Adapted <b>buses</b> circulate in poor, rural areas and/or areas far from main centres	Acre, Amapá, Acre, Alagoas, Amazonas, Bahia, Distrito Federal, Mato Grosso do Sul, Pará, Piauí, Rondônia, Roraima, Rio de Janeiro, Rio Grande do Norte and São Paulo
Land/van (4)	Adapted <b>vans</b> provided services exclusively to conflicts resulting from traffic accidents with no casualties	Ceará, Paraná, Sergipe and Tocantins
River/boat (4)	Adapted <b>boats</b> provide services to isolated populations, including Indian villages and riverside communities	Amapá, Pará, Rondônia and Roraima
Air/airplane (1)	The purpose of the plane is to transport teams to remote places of the State	Pará
Decentralization of Justice (6)	There are no vehicles: the Justice is <b>decentralized</b> (Citizenship Houses, Rights Counter) or there are <b>team displacements</b> (Neighbourhood Justice, Community Justice)	Bahia, Espírito Santo, Minas Gerais, Paraná, Santa Catarina and Rio Grande do Sul
No programs (5)	States that do not rely on active programs	Goiás, Maranhão, Mato Grosso, Pernambuco and Paraíba

Source: Author (based on Ipea, 2014).

<sup>15</sup> Mauro Cappelletti; Bryant Garth. Access to justice and the welfare state: an introduction. In: CAPPELLETTI, Mauro (ed.). *Access to justice and the welfare state*. Alphen aan den Rijn: Sijthoff; Bruxelles: Bruylant; Firenze: Le Monnier; Stuttgart: Klett-Cotta, 1981, p. 03.

Map 1 illustrates the data presented in the table above and evidences that, with the exception of five States, all of them rely on itinerancy programs. Some Courts have more than one program, aiming at maximizing their reach (Amapá, Bahia, Pará, Paraná, Rondônia and Roraima).

Map 1: Modalities of itinerancy – State Courts of Justice



Source: Author (based on Ipea, 2014).

#### 4. Case study: the land Itinerant Justice program of Complexo do Alemão shantytown / Rio de Janeiro

##### 4.1. The Complexo do Alemão shantytown

The Complexo do Alemão shantytown is located in the Northern Area of Rio de Janeiro (the second largest metropolis in the country), with a population of 60,555 inhabitants. Comprised by a set of hills with precarious urbanisation, the district became one of the most violent areas in town, as of 1990. Drug trafficking and organised crime remained in command of the district until 2010, when it was triggered the process of

installation of Pacifying Police Units (UPP)<sup>16</sup>, with the repossession of the territory by the government with the help of the National Army.



Photo 1: Panoramic view of Complexo do Alemão<sup>17</sup>

Quite ironically, the Complexo do Alemão shantytown, with its uncontrolled and problematic urbanisation, is one of the first views tourists may see when they arrive at Galeão international airport. Under the pretext of functioning as an acoustic barrier for the dwellers and/or protect passers from burglary, a large portion of the community is surrounded by acrylic walls with drawings that hinder the visibility of the site<sup>18</sup>.

The ruling of organised crime prevented the State from establishing its presence in the place during decades. Services such as garbage collection and electricity supply have always been limited and, even today, are still more restricted than in the City of Rio de Janeiro.

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<sup>16</sup> UPP is a small force unit of Military Police that works with principles of neighbourhood police and has its strategy based on the partnership between the population and the public safety institutions. Available at: [http://www.upprj.com/index.php/o\\_que\\_e\\_upp](http://www.upprj.com/index.php/o_que_e_upp). Accessed on: 22/May/2014.

<sup>17</sup> <http://www.cliqueseguro.com/passeio-complexo-do-alemao-p190>. Accessed on: 22/May/2014.

<sup>18</sup> <http://apatrulhadalama.blogspot.com.br/2010/03/rio-de-janeiro-barreiras-acusticas-sao.html> Accessed on: 22/May/2014.

Table 2 – Social indicators: Complexo do Alemão x Rio de Janeiro

Indicator	Complexo do Alemão	Rio de Janeiro
Population	60,555	6,320,446
Population density	341.9	110.7
Proper garbage collection	91.8%	99.3%
Power distributed with meter by an electricity supply company	54.3%	92.6%
Electricity supply from other sources	8.6%	1.4%
Illiteracy among adults over 15 years old	7.7%	2.9%
Income – up to 1/8 minimum wage <sup>19</sup>	1.4%	0.5%
Income – 1/8 to 1/4 minimum wage	7.1%	2.8%
Income – ¼ to ½ minimum wage	23.8%	10.8%
Income – ½ to 1 minimum wage	39.1%	23.6%
Income – 1 to 2 minimum wages	19.3%	23.7%
Income – over 2 minimum wages	2.6%	34.1%

Source: Instituto Pereira Passos<sup>20</sup>

Besides being poor (almost 70% of its inhabitants live with an income lower than one minimum wage) and populous (341.9 inhabitants/m<sup>2</sup>, exceeding three times the indexes of the city of Rio de Janeiro), the neighbourhood has high illiteracy levels within the adult population (7.7% among adults over 15 years old) and presents the worst HDI (Human Development Index) of the city of Rio de Janeiro. 0.711 (126<sup>th</sup> position)<sup>21</sup>.

#### 4.2. Itinerant Justice in Complexo do Alemão shantytown

The land Itinerant Justice of the State of Rio de Janeiro has been working since 2004 with the circulation of seven buses, which take turns in nineteen locations. The vehicles, adapted for the Justice activities, are divided into five small sections: waiting room, notary, court room, kitchen and toilette. The regularity of the project in each location is, as a general rule, weekly (fortnightly in some cases).

<sup>19</sup> The national minimum wage in force for year 2014 is of R\$ 724.00. equivalent to US\$ 326.32 or € 239.45 (official rate of 23/May/2014).

<sup>20</sup> <http://www.uppsocial.org/wp-content/uploads/2014/01/1-Panorama-dos-Territórios-UPPs-Complexo-do-Alemão1.pdf>, Accessed on: 20/May/2014

<sup>21</sup> Instituto Pereira Passos, Prefeitura do Rio de Janeiro. Available at: Armazemdedados.rio.rj.gov.br – 1172\_indicadedesenvolvimentohumanomunicipal\_2010. Accessed on: 10/March/2014.

With observance of the policy of penetration of the State in areas taken by the traffic, the UPPs of Complexo do Alemão shantytown were installed in 2010. Giving continuity to this policy, the Itinerant Justice program started operating in July 2011 – functioning every Fridays, from 9:00 a.m. to 3:00 p.m., always in the same place.



Photo 2: Side view of the bus of the Itinerant Justice of Rio de Janeiro<sup>22</sup>/ Photo 03: Initial assistance.

On the right outer side of the vehicle, plastic tables and chairs are placed under a retractable awning, where the Public Defence Office of Rio de Janeiro offers pre-litigation guidance and legal assistance. The hearings, chaired by the judged, are held inside the vehicle.

The bus parks at Tim Lopes School, a quite central area, accessible by bus regular lines. Despite the offer of services in the vicinity (markets, cafeterias), there is not a structure of its own which offers a minimum level of comfort for the reception of the users, who remain standing during hours around the bus, exposed to weather.

With the exception of two clerks, which act exclusively in the Complexo do Alemão shantytown, the Itinerant Justice team (including the judge) is shared with the closest Court – which reduces the costs of the project<sup>23</sup>. The judges, who dedicate one day of the week to itinerancy, are selected by the coordination according to their appropriate profile and interest in taking part in the program. The processing of the lawsuit is made separately from the other ones, in the so-called “base-court”.

The Itinerant Justice program of Rio de Janeiro is very well structure: it has existed for ten years and has been consolidating and expanding itself; it has a

<sup>22</sup> <http://www.tjrj.jus.br/web/guest/home/-/noticias/visualizar/97204> . Accessed on: 10/April/2014.

<sup>23</sup> R\$ 4,280,280.36, one of the highest in Brazil, but which represents an insignificant part of the general budget of the TJRJ (R\$ 3,348,899,356.00): 0.13% only.

coordination and budget of its own; it offers weekly assistance, with fixed days for such assistance. The yearly calendar is widely broadcasted, by means of billboards and on the institution site. It covers fifteen locations in the capital and in the metropolitan area of Rio de Janeiro and four in other cities of the State. It relies, also, on a solid partnership with the Public Defence Office, responsible for the initial guidance and follow-up of the whole judicial proceeding.

On the other hand, the physical structure made available to the population is quite frail. There is no guarantee of privacy in the first assistance: users may be heard by anyone who is also in the site. This problem is even more serious when we take into account that, in general, the persons benefited by the program reside in a same community and know each other. There is no minimum structure made available by the itinerancy; the persons are not offered shelter, chairs to seat on, toilettes or water.

Regarding the accessibility for people with disabilities, the vehicles do not offer any kind of adaptation. The access to the bus is made through a staircase with large steps and the strict dimensions render unfeasible the free circulation through the site. When asked how they would provide assistance to a wheelchair users, the clerks reported that, in extreme cases, the judges or clerks are those who displace themselves to the bus outer area in order to provide assistance.

### *Services*

The Public Defence Office of Rio de Janeiro makes available information, guidance and legal assistance services during the whole judicial progress. Judicial services made available by the Itinerant Justice, as well as legal assistance, are fully free of charge. In the latter case, the user's income is a limiting factor for the service.

### *Material competence*

The Itinerant Justice of Rio de Janeiro provides services in the following cases:

- Family law;
- Civil records (birth, marriage, death etc.)
- Consumers' rights;

- Civil case in general;
- Civil Special Courts<sup>24</sup>.

The Itinerant Justice carry out, moreover, marriages (both individual and collective) and supplies, on a free-of-charge basis, duplicate copies of documents<sup>25</sup>.

### *Productivity*

Since its creation, the Itinerant Justice program of Complexo do Alemão shantytown had its number of services considerably increased: from 2012 to 2013, the number of services virtually doubled, reaching the number of 6,421 – equivalent to more than 10% of the local population.

Table 3: Productivity of the itinerancy program of Complexo do Alemão

<b>Nature of the proceeding</b>	<b>2011*</b>	<b>2012</b>	<b>2013</b>
Duplicate copies of documents	894	1287	1753
Family	182	378	916
JEC (Civil Special Court)	38	199	825
Civil Records	16	91	741
Conversion of steady unions into marriages	-	200	496
Childhood	0	0	117
Civil	8	5	04
JECrim (Criminal Special Court)	0	0	0
Domestic violence	-	0	0
Information/guidance	484	1.200	1569
Servicing (total)	1.622	3.360	6.421

Source: Ipea, 2014<sup>26</sup>

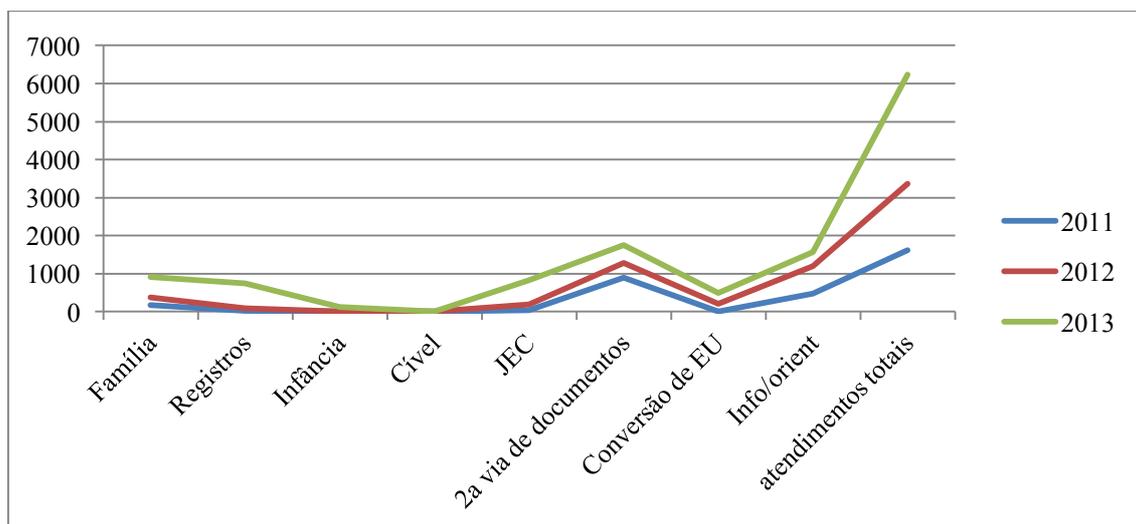
<sup>24</sup> It encompasses cases with lower complexity or value, limited to 40 minimum wages (approximately US\$ 13,000.00 or € 9,500). The amounts converted in this article were based on the exchange rate of 23/May/2014.

<sup>25</sup> There are also records of cases under the jurisdiction of the Criminal Special Court and domestic violence, but these cases are not precisely prosecuted by the Itinerant Justice, which merely provides information/guidance and refers the party to the appropriate body.

<sup>26</sup> 2011: since July. <https://portaltj.tjrj.jus.br/web/guest/institucional/dir-gerais/dgjur/deinp/deinp/div-jus-itinerante-aces-just>. Accessed on: 10/May/2014.

The most sought services concern the issue of duplicate copies of documents (27.3%), family cases (14.3%) and Civil Special Courts (12.8%). The volume of civil records is also relevant<sup>27</sup>.

Graph 1 – Evolution of demands – Complexo do Alemão (2011 to 2013)



Source: Author, based on Ipea, 2014<sup>28</sup>.

#### 4.3. Overcoming barriers for access to Justice

##### *Territorial obstacles*

In Complexo do Alemão shantytown, the seclusion resulting from large distances is not a problem, since the community is located in the City of Rio de Janeiro. The isolation, on the contrary, results from the difficulty of penetration of the State services during two decades, by virtue of the control of the area by organised crime. In this regard, the installation of Itinerant Justice programs since 2011, allied to a policy of penetration of the State in the site (UPP) is, without any doubt, a quite efficient tool in order to overcome the area seclusion.

<sup>27</sup> In 2013, it is worth pointing out the high number of childhood & youth cases, which did not appear in previous years. Despite the fact that these cases are not prosecuted by the Itinerant Justice, the Defence Office made the due referral of the cases to the competent bodies.

<sup>28</sup> *Idem, ibidem.*

### *Financial obstacles*

As seen above (table 02), the population residing in Complexo do Alemão shantytown has a low income: approximately 70% of its dwellers lives with a maximum of one minimum salary per month (equivalent to US\$ 326.00 or € 239.45), out of which 8.5% do not earn more than 1/4 of this amount (US\$ 81.58 or € 59.86).

Concentrating its scarce earnings in necessity goods (food and lodging), the population does not avail of resources to bear pre-litigation guidance, hiring of lawyers or procedural costs. Even expenses to follow up the lawsuit (transportation, food, loss of workdays) represent an impediment for the access to Justice.

Therefore, by providing such services on a free-of-charge basis, with the displacement to the community, the Itinerant Justice program of Rio de Janeiro has been proving able to overcome the economic obstacles for the access to it.

### *Political obstacles*

All criteria employed in the selection of the locations benefited by the Itinerant Justice of Rio de Janeiro tend to reduce the blanks in the jurisdictional provision and, therefore, the political obstacles to the access: (i) new cities that do not have courts; (ii) districts with large territory; (iii) districts heavily populated and with a low HDI; pacified communities (as a reinforcement of the UPP program of pacification and penetration of the State in the former “favelas”).

### *Procedural obstacles*

Lawsuits prosecuted in the Itinerant Justice comply with the same rules of the Brazilian traditional procedure, characterised by its excessive formality and numberless appeals. Demands involving lower complexity and amounts follow the more informal, simplified procedure of Civil Special Courts.

Despite the fact that settlements sometimes may take place between the parties, there is not a specialised nucleus in this kind of solution of controversies. Therefore, it may be stated that the solution offered by the Itinerant Justice is basically procedural.

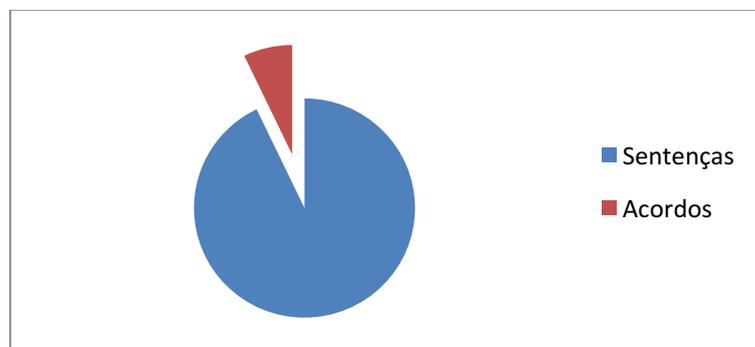
Table 4: Form of solution of disputes – itinerancy program of Complexo do Alemão

Year	New lawsuits	Decisions	Settlements
2011	408	389	20
2012	659	507	39

Source: Ipea, 2014.

The Itinerant Justice of Rio de Janeiro does not concentrate efforts in alternative manners to resolve the conflict, in particular conciliation. The scarce data collected indicate that settlements are an exceptional measure: in 2011, out of the 408 new suits filed, only 20 (4.9%) were resolved by means of settlements; in 2012, the index was a bit higher: 39 settlements (5.9%), as evidenced by graph 2 below:

Graph 2: Form of solution of conflicts – itinerancy program of Complexo do Alemão



Source: Author, based on Ipea, 2014.

On the whole, the procedure, as well as the hearings, do not have many substantial differences in relation to the ordinary lawsuit existing in the Courts. On the other hand, it is worth pointing out that, in field visits, one may observe the concern, on the part of the attendants, with a communication appropriate for the profile of the public serviced and, moreover, with the procedural flexibility, so patent in the attempts of adapting legal rituals and practices to the conditions of each site.

### *Psychological/cultural obstacles*

The Complexo do Alemão shantytown has the worst human development index of the city of Rio de Janeiro. The population, illiterate and uninformed in their majority, is unaware of their civil rights: an empirical research made in the metropolitan area of Rio de Janeiro evidenced that the interviewees were not able to quote at least three of

them. Besides this finding, it was assessed that the marginalized population missed Justice, but did not make use of it due to ignorance or to the absence of a participative political culture<sup>29</sup>.

In the case of Complexo do Alemão, there was an additional factor: due to fear of violence, court officials refused to enforce judicial orders in that place and the traffic leaders prohibited the population from invoking Justice, meaning that a true parallel power was in force.

Therefore, the presence of Justice in the site, allied to the availability of clarification and legal guidance services prior to the filing of the lawsuit is an efficient measure to help the process of empowerment and awareness of the local population regarding their rights, as well as the manner how to fight for them.

As regards the difficulty seeking the Judicial Power to resolve their legal problems, the Itinerant Justice seems to be fit, step by step, to revert this scenario. The growing number of services provided and filings of lawsuits in general suggests the success of the program. The wide search for the issue of duplicate copies of documents and civil records indicates a wish of regularising their papers, the first step for the individuals to become citizens and be entitled to receive social benefits from the government.

Interviews with the users indicate that the program has an excellent acceptance: most of them sought the Justice due to positive recommendations from friends and relatives and the current news in the community is that the services are more effective and speedy than those of the ordinary Justice.

It is curious that one of the most sensitive aspects of the program – its precarious structure – does not bother users, and it seems, up to a certain extent, that it makes them closer to Justice, stripped of sumptuous palaces, which ultimately inhibit the public.

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<sup>29</sup> Dulce Chaves Pandolfi. Percepção dos direitos e participação social. In: Dulce Chaves Pandolfi [*et al*]. (orgs). *Cidadania, justiça e violência*. Rio de Janeiro: Ed. Fundação Getulio Vargas, 1999, p. 61-76. Available at: <[www.cdpdc.fgv.br](http://www.cdpdc.fgv.br)>. Accessed on: 10/Feb/2014, pp. 45-58.

## 5. Case study: the fluvial Itinerant Justice program of the archipelago of Bailique, State of Amapá

### 5.1. The archipelago of Bailique



Photos 4 and 5: Archipelago of Bailique<sup>30</sup>

The archipelago of Bailique is composed of eight islands and approximately 40 communities. Located in the far north of Brazil, it is 170 km away from Macapá, the capital of the State, with exclusive access through the Amazonas River<sup>31</sup>. The riverside population lives, basically, from fishing and cultivation of açaí and heart of palm. By reason of their isolation, there are no data assessed on the population's profile; one does not even know for sure the number of inhabitants of the archipelago, estimated between 7,000 and 15,000 persons.

During a long time, the riverside communities of Bailique remained forgotten, without an effective presence of the State. This scenario started changing in 1992, when the first experiences of Fluvial Justice took place, developed by initiatives of local judges and eventually officialised by the Court (1996). There was, in this case, a curious process: the presence of the State did not occur upon the initiative of the Executive Power, but, rather, from the Judicial Power, which signed partnerships in order to make available, besides the jurisdictional provision, other services to the population, such as medical and dental assistance.

<sup>30</sup> All photographs with no reference to authorship were taken by Leslie Ferraz.

<sup>31</sup> [http://pt.wikipedia.org/wiki/Arquip%C3%A9lago\\_do\\_Bailique](http://pt.wikipedia.org/wiki/Arquip%C3%A9lago_do_Bailique). Accessed on: 13/May/2014.

## 5.2. The Itinerant Justice in the archipelago of Bailique

With the boat “Tribuna: a Justiça vem a bordo” [*Tribune: Justice comes on board*], donated by Banco do Brasil Foundation, Justice reaches the riverside population of the archipelago of Bailique, practically isolated from the capital Macapá, to which it belongs. The boat “Tribuna” – a typical construction of the Amazonian region – has two floors and capacity for 70 persons. The crew sleeps on hammocks which, during the day, give place to tables, chairs, printers and portable computers, transforming the boat into a floating Court.



Photo 06: *Tribuna: a Justiça vem a bordo*

The boat sparks at predetermined locations, being accessed by the population on foot or with small vessels. The access to the Justice vehicle is difficult, as it is necessary to jump its side or walk on a narrow and unstable board. It is interesting pointing out that the users of the area, including the elderly and children, seem to be used to this kind of access, since vessels of this kind make part of their everyday – as a matter of fact, there is no registration of complaints on this matter. The space used inside the boat to provide services to users is small, causing a circulation difficulty. Again, though the accessibility is a critical point of the project, users declare not to bother with this fact.

From 1996 to 2006, the program was coordinated by the same judge, Ms. Sueli Pini, extremely devoted to the function. She tells she was contacted in her office by a tired, starving man, who had been travelling for two days from Bailique in order to seek Justice. Impressed with the fact, she committed itself personally in the institutionalisation of the program, under the allegation that the judge cannot remain locked in his/her office.

Her role in the consolidation of the project is crucial. During the period she was coordinating it, she was extremely proactive: she spent hours talking to the riverside population in their houses, schools, residents association and, mainly, on the streets of the villages. She knew practically all inhabitants, not only by their names, but also by their personal history as, in most cases, she was responsible for the registrations, marriages, separations, alimonies, problems with neighbours, retirements and probate proceedings of those human beings who, little by little, started becoming citizens.

However, by virtue of political persecutions, the judge was withdrawn from the function without any reason in 2005, and the project was undertaken by a Court's servant. Since then, there is not anymore an exclusive judge for the program; at each journey, a different judge is called, selected among the freshmen in the career.

The mandatory call and rotation of judges jeopardizes the proper functioning of the Itinerant Justice, as it disregards the need of making their profile compatible with this so peculiar modality of jurisdictional provision. Furthermore, the judges are beginners and do not have sufficient life experience in the career. In order to face the peculiarities of Bailique, it is necessary to undress the formalities, clothing and comfort of their offices.

In the program visited in 2013, the replacement judge (which took part in the Itinerant Justice for the first time) demonstrated not to have interest in the case. Some clerks complained of her behaviour as, instead of rendering decisions in the hearings, she opted for scheduling them at the Macapá offices. The judge often raised her voice with users as a manner of imposing respect. She informally declared that, by her own will, she would not take part in this kind of project. She complained from the installations and work conditions, expressing her despondency and physical fatigue in the last days, which naturally reflected on the Journey's productivity.

Today, the fluvial itinerancy project – which came to be suspended in a few periods – is currently working, however on a precarious basis. The boat is scrapped and the Court leases a commercial vessel, which does not rely on the adaptations required.

As regards the processing of the lawsuits, the cases derived from the journeys, when they are returned to the district of Macapá, are treated jointly with all other proceedings of the Court, which impairs the progress of the cases.

### *Services*

The Public Defence Office of Amapá makes available free services of pre-proceeding guidance, as well as full assistance in the filing and follow-up of judicial lawsuits. The processing of the lawsuit is also free of charge; the party is exempted from the payment of any costs or procedural burdens.

Furthermore, since its creation, the Itinerant Justice has always attempted to sign agreements with partner institutions, in order to ensure additional services to the population, such as:

- Issue of identity documents, regularisation of general and election documents;
- Medical and dental services;
- Distribution of medications;
- Supply of kits for purification of water collected from Amazonas River;
- Lectures on cares with health and guidance for treatment of consumed water;
- Magic case project, aiming at encouraging the reading of children's books;
- Exhibition of films (exhibited on bed sheets);
- Collective marriages.

With the weakening of the program, after the exit of judge Sueli Pini, the additional services were suspended, under the groundless allegation of lack of funds.



Photo 7: Aggregated services – exhibition of a kids movie on a bed sheet



Photo 8: Dental assistance in a makeshift office

*Material competence*

The itinerancy program of Amapá has a wide and unrestricted jurisdiction. With the exception of international adoption cases, it may conciliate, prosecute and judge all demands of civil, criminal, childhood & youth, and family nature, as well as public records incumbent upon the State Justice.

*Productivity*

There are no precise data on the program's productivity, there being merely occasional reports regarding a few journeys, which prevents the review of its historic behaviour. In 2012, the five journeys carried out produced the following results:

Table 5: Productivity of the itinerancy program of Bailique (main cases) in 2012

<b>Nature of the case</b>	<b>2012</b>
Family	96
Civil	86
Criminal Special Court	79
Certificates/ Duplicate copies of documents	21
Civil records	06
Probate proceedings	02
Adoption	01

Source: TJAP/Ipea, 2014

The greatest demand consists, similar to what occurs in Rio de Janeiro, of family law cases (alimony, custody of children, separation etc.) and civil demands, followed by petty conflicts of criminal nature, processed under the simplified ritual of the Courts.

As verified in interviews with system operators, in the first years of functioning of the program, the main demand was for services of records and issue of documents, as there were many inhabitants who did not even have a birth certificate – which would make unfeasible any other rights and the receipt of social benefits. With the

regularisation of the riverside population's documents, the demand profile has changed and is now focused on family and civil matters.

### **5.3. Overcoming barriers for access to Justice**

#### *Territorial obstacles*

The archipelago of Bailique is one of the greatest examples of isolation resulting from large territorial distances: the riverside population can only have access to the capital of the State, Macapá, to which it belongs, by river. Local vessels take, in average, 13 hours to make the 180 km route through the Amazonas River. Until 2011, the location did not even rely on a regular boat line from and to Macapá.

Therefore, the presence of Justice at the site since 1994, by means of itinerancy, is, without any doubt, an extremely efficient tool to overcome the riverside population's isolation.

#### *Financial obstacles*

Though there are no data on the social and economic profile of Bailique population, it is feasible to state that it is an extremely low-income population, which lives, basically, from primary activities (fishing, cultivation of açaí and heart of palm), and income transfer programs of the State and federal governments.

Therefore, expenses with the hiring of lawyers and displacement until Macapá or the payment of judicial fees would make unfeasible any possibility of judicial solution for their conflicts.

Thus, by making Justice services available free of charge, displacing them to the community, the Itinerant Justice program of Amapá is an important instrument to reduce the economic hindrances for access to justice.

It is worth pointing out that the community strongly felt the impact of the suspension of the itinerancy program in 2011. Dona Maria do Carmo waited for months for the arrival of Tribuna boat. Because the Justice did not come, she gathered her savings and went to Macapá to apply for her retirement – she spent R\$ 70.00 in the

return ticket of the regular boat and R\$ 50.00 with food. But it was all in vain. The INSS (National Institute of Social Security) required her to return with two witnesses to grant her the benefit – which would imply an expense of, at least, R\$ 360.00. Dona Maria do Carmo eventually waived her right due to her impossibility of bearing displacement expenses.

### *Political obstacles*

In Amapá, the political obstacles do not concern merely the lack of presence of the State in the Bailique area: they also refer to battles between the Executive Power (responsible for the Justice budget allocation) and the Judicial Power, besides internal disputes for power within the Court itself.

In 2011, when six itinerancies were scheduled, the program was suspended by the Court of Justice under the allegation of lack of funds. The news broadcasted on the press indicate a political motivation in the decision: the Court would have used itinerancy (which relies on the strong support of local population) as a factor of pressure so that the government would allocate more funds to Justice<sup>32</sup>.

Services such as health & dental services, issue of documents, culture, education and water treatment, which have always followed Justice, were likewise suppressed from the project – also under the argument of budget scarcity.

As regards the internal disputes of power, it is worth pointing out the attempt to neutralise the person of the judge who conceived and coordinated the project for almost one decade, by means of her removal and replacement by newly appointed judges, who act under a rotation system.

### *Procedural obstacles*

Curiously (and because of the absence of a specific legislation), the procedural model applied by the Itinerant Justice in the archipelago of Bailique is exactly the same as the one in force in all Brazilian Courts.

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<sup>32</sup> Available at: <http://www.youtube.com/watch?v=ZVmbthDmM7k>. Accessed on: 30/Aug/2011.

It may be noticed, however, a striking procedural flexibility with the purpose of maximizing the service provided. For instance, services of process and subpoenas are given on the same day of the hearings. Such acts are performed by an *ad hoc* court official, which accesses the location with a small motorised vessel. If the party is found, he/she is taken to the hearing and brought back home. The purpose, whenever possible, is to resolve the disputes on the same day they were filed.



Photos 9 and 10: persons taken to hearings

There are also records of flexibility in the review of evidences: in 2005, Seu Manoel, aged almost 70, who had worked during his whole life in fishing and farming, did not have any document. He sought Justice in order to earn his retirement. Based on the testimony and on the expert examination (made by the physician who made part of the team), besides the examination of the worker's hands, judge Sueli Pini immediately rendered the decision of late settlement, determining the issue of the necessary documents.

Currently, however, one may perceive a radical change in the functioning of the program: in the last two itinerancies visited (2011 and 2013), conducted by recently appointed judges, there was a strict observance of the traditional procedural model, without room for flexibility or reduction of unnecessary formalities.

Finally, despite the profile of the population of Bailique and the nature of the cases, there is no specific focus on conciliatory solutions.

*Psychological/cultural obstacles*

Bailique has undergone an intense process of transformation. In my first visit, in 2005, the community was extremely needy, with small villages precariously structured: little stores, very modest dwellings, some of them without furniture or even walls, large families and absence of essential services, such as electricity, basic sanitation, health care and police. The transportation to the capital was not rarely made in canoes – as the regular boat line still did not exist.

In this context of abandonment, the arrival of boat Tribuna was much expected by the inhabitants – who wished to exercise their right to have “one day at the Justice”. The most common cases involved regularisation of documents, neighbour disputes, custody of children, collection and possession lawsuits. By virtue of financial difficulties, most of the collection lawsuits were extinguished due to the absence of debtors’ goods. I remember having accompanied a procedural step in a house inhabited by a family with six children. There were only saucepans and hammocks. The children stood in line and gazed us with scared and hungry eyes. There was nothing to be seized.



Photo 11: Family house inhabited by parents and six children (2005)

Photo 12: small store (2005)

Six years later, in August 2011, I returned to the project of Fluvial Justice on Amazonas River. At first sight, the transformation of Bailique is striking, in particular in the main community, Vila Progresso, which became entitled to have such a name: bridges and cemented piers, health centres, public telephones, a post office, many clothing stores, drugstores, butcher shops, furniture shops, a great food and household market and even a bank branch (Nossa Caixa). A daily boat line to Macapá was created

– though the ticket fee, R\$ 35.00, is still prohibitive for most of the dwellers of the archipelago.



Photos 13 and 14: Vila Progresso (2011)

The evident financial improvement of Vila Progresso is certainly connected with the governmental income transference programs. But we must not forget that, prior to the Itinerant Justice, the large majority of the population of Bailique did not have even birth records. The work of over one decade of effective promotion of access to Justice, with the regularisation of the inhabitants' documents – now entitled to earn benefits – and, above all, of awareness of their rights, has a crucial importance in the village development.

It was noticed also the strengthening of community leaderships and a change in the profile of the cases: if, in the beginning, claims of document regularisation prevailed, now civil claims have considerably grown.

On the other hand, it is worrying the high number of criminal lawsuits (please refer to table 5 above). As assessed, the regular boat line did not bring exclusively improvements to Bailique: drug traffic would have been established in the area, and fights of gangs have become regular. The settlement of new dwellers in the villages would also be creating unease on the part of the older inhabitants, resulting into body fights.

## 6. Short reflections

The case studies of the Itinerant Justice of Complexo do Alemão shantytown and of Bailique evidence the potentiality of the program in promoting access to Justice by socially and economically unprivileged populations.

As a matter of fact, the review pointed out that, by displacing itself to marginalised populations, the Itinerant Justice is capable of overcoming territorial, financial, political and even psychological and cultural obstacles to the access. It also demonstrated, in the case of Bailique, its potential to leverage the economic development itself of the area.

The most sensitive aspect of the program, however, seems to reside in its incapability of supplying an appropriate institutional answer for the profile of both population and demands. As a matter of fact, the only solution made available is the traditional proceeding – excessively formal and inappropriate for the assisted locations.

In this regard, the Itinerant Justice should provide a different jurisdictional service, simpler, more informal and quicker, based preferably on conciliation. One could think, furthermore, about other less combative forms of settlement, based on the local experience itself, with the involvement of community leaders.

This would not mean the creation of a *second class* justice, as some people say, but, rather, of a *specialized justice*, appropriate to the profile of the population serviced and their actual needs.

# The Impact of Legal Aid Reforms on the Provision of Advice & Representation in Housing Repossession Cases<sup>1</sup>

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## Introduction

In 2013 there were more than 220,000 claims for possession issued in England and Wales, approximately 66% by landlords and 33% by mortgagees.<sup>2</sup> Figures for the first quarter of 2014 indicate that possession claims by landlords are rising and are the highest for over a decade.<sup>3</sup> Although not all of these claims result in orders for possession being made,<sup>4</sup> the trauma involved with losing a home means that enormous stress and anxiety is triggered as soon as the possession process begins.<sup>5</sup>

The demands of justice in this context require that appropriate levels of support and objective advice are available throughout the process,<sup>6</sup> and that this support should begin early on, even *before* litigants decide to issue or defend claims.<sup>7</sup> Justice also requires that the judge makes the most appropriate decision, in accordance with the law, and this can occur only if the judge receives information as to all relevant facts. In housing cases this can mean not only information supplied on forms served, the case for the claimant, money owed etc, but also may require the judge to understand the wider context of the occupier's circumstances and to consider any defences to the claim.

In this paper we examine the support available to occupiers (defendants) in these cases, drawing on a recently completed research project,<sup>8</sup> and consider the extent to which the principles of effective access to justice are met in housing possession cases as well as the impact of legal aid reforms. This empirical research was carried out during 2012 and 2013, before the recent changes to legal aid. We did however invite those who responded to the surveys to comment on whether structural and legal

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<sup>1</sup> The research team gratefully acknowledges the assistance of the respondents and interviewees in providing the data on which this paper is based. We would like also to thank HMCTS and the Judicial Office for their assistance in gaining access to delivery managers and district judges. The research team gratefully acknowledges financial support from the John Fell OUP Research Fund, the University of Oxford Law Faculty Research Support Fund and the University of Hull Law School.

<sup>2</sup> Ministry of Justice, *Mortgage and Landlord Possession Statistics Quarterly*, October to December 2013, 3, <<http://perma.cc/6HES-L2FN>>.

<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/309672/mortgage-and-landlord-possession-statistics-quarterly-jan-mar-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309672/mortgage-and-landlord-possession-statistics-quarterly-jan-mar-2014.pdf). Mortgage figures are the lowest quarterly figure for over a decade, and the number of mortgagee claims is about one quarter of the landlord claims.

<sup>4</sup> Around 70% of claims do result in an order for possession, and approximately 20% eventually lead to repossession, see Ministry of Justice, n 2.

<sup>5</sup> S Blandy, C Hunter, D Lister, L Naylor and J Nixon, 'Housing Possession Cases in the County Court: Perceptions and Experiences of Black and Minority Ethnic Defendants', Department for Constitutional Affairs 11/02 (2002), 34-36.

<sup>6</sup> Civil Justice Council, 'Access to Justice for Litigants in Person (or Self-Represented Litigants)', November 2011, para. 20.

<sup>7</sup> N Madge, 'Entering the Ring (Judicial Skills with Litigants in Person)' (2002) 15 *Judicial Studies Board Journal*, available at <<http://perma.cc/X75F-45WT>>.

<sup>8</sup> For a full account of the research project and its findings see S Bright and L Whitehouse, *Information, Advice & Representation in Housing Possession Cases*, April 2014, available at <http://perma.cc/U2KC-H8FQ>.

changes since the survey had affected their work, and we draw on their responses in this paper. Even before the cuts, a tiny minority of defendants received legal advice prior to the court hearing, not many completed defence forms, and fewer than half attended the hearing. These are surprising facts. After all, it is the home that is at stake. It may be that the absence of early advice explains partially why the level of participation by defendants is so low.

There are no statistics available on the proportion of defendants who file defence forms; from our research it appears that considerably fewer than half do, and in one court that had monitored this over a three month period the figure was close to only 1 in 10 defendants filing a defence form with the court. Nor are there any statistics available on the numbers of defendants who attend the hearing, but again it is clear from our research that fewer than 50% attend, and that the numbers may be considerably lower than this. Low participation rates inevitably mean that many cases are undefended and that judges are unlikely to learn much about the defendant's circumstances.

For those defendants that do attend, the overwhelming majority turn up as 'litigants-in-person' (LiPs), that is, without legal representation. Again, no statistics are kept on this,<sup>9</sup> but Moorhead and Sefton collected data from four first instance courts during 2002 and 2003 and found that 92% of defendants in mortgage arrears cases were unrepresented and 97% in rent arrears cases.<sup>10</sup> For the majority of these LiPs, there is emergency legal advice available through the housing possession court duty scheme (HPCDS) and it is clear that these schemes provide significant help both to those threatened with the loss of their home and to the court system more generally. So although most defendants who do attend will arrive at court without legal representation, many take up the opportunity to receive legal help on the day. However, the support that the HPCDS can offer is inevitably constrained by time pressures on the day, so there will be no opportunity to research the defendant's case thoroughly, and often the defendant will have arrived without the supporting evidence needed. Further, our research discovered that the HPCDS service is not available in all courts.

The legal aid cuts in 2013 are, perhaps, unlikely to have as significant an impact on housing possession as in other areas. Lady Justice Black remarked recently that the task of everyone involved in children law cases has been made 'infinitely more difficult' now that most cases are heard without legal representation.<sup>11</sup> The Judicial Executive Board's recent written statement to MPs says that in the family law courts private law appointments are now taking 'in the region of 50% longer' and that back to back listing has become impossible.<sup>12</sup> In housing cases none of this is new; as already mentioned, most defendants were previously without full legal representation in any event. Even taking account of the importance of loss of the home, involving a fundamental human right, it has been standard practice for many years to 'block-list' around 20 or more possession cases in one

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<sup>9</sup> The Judicial Working Paper notes an acute lack of data on current numbers of litigants in person, Judicial Working Group on Litigants in Person: Report, July 2013, para 2.3, available at <http://perma.cc/CH97-Y3KS>.

<sup>10</sup> R Moorhead and M Sefton, 'Litigants in Person: Unrepresented Litigants in First Instance Proceedings', *Department for Constitutional Affairs Research Series 2/05*, March 2005, 36.

<sup>11</sup> *Re R (A Child)* [2014] EWCA Civ 597 para [9]. See also her remarks in *Re OA (CHILDREN)* (2014) CA (Civ Div) (Patten LJ, Black LJ) 04/04/2014, summary available on lawtel.

<sup>12</sup> Written evidence from the Judicial Executive Board (MSC 84), available at <http://perma.cc/MB4A-E2VU>, paras 5.4 and 5.5.

session, which means that they are back to back and on average each case lasts only 5-6 minutes.<sup>13</sup> The legal aid changes will, however, have some bite. They will affect the amount of pre-hearing advice that is available, not simply relating to the possession claim itself but more generally in relation to debt advice. Coupled with changes to the welfare system and rising rents, this will generate more possession claims by landlords, as we are now beginning to see. Reduction in Ministry of Justice funding has led to less support being available by court staff on the day of the hearing. Furthermore, it is no longer possible to get legal aid funding for full representation to defend cases with (only) a borderline chance of success.

As we evaluate the likely impact of legal aid reforms on the support available to defendants through the housing possession process we must therefore set it within the context of a system that was already seriously stretched, and where households could end up losing their homes without the support necessary in order to have an effective legal voice.

## Our research

Our research project was designed to examine the extent to which non-financial considerations (such as the welfare of children, exacerbation of health problems, loss of community networks, etc.) are taken into account in possession cases. In order to understand how this information is made known to decision-makers, in particular judges, we designed a mixed methods research project to examine the opportunities available to occupiers to 'tell their stories'. We carried out surveys in late 2012-early 2013 involving representatives of HPCDS in England, and County Court Delivery Managers (DMs)<sup>14</sup> in England and Wales, in order to obtain detailed information about case management and the amount of advice and support available to defendants at court premises. In addition we conducted legal analysis and analysis of pro-forma court forms and published statistics, interviewed 23 elite actors and decision-makers involved in housing possession cases, and observed court possession days and court duty advice schemes.

## Opportunities for Advice and Representation

A study by Blandy et al confirms that access to effective legal advice and support is essential to ensure a just outcome in legal proceedings but when investigating housing possession cases it found a 'range of practical difficulties and barriers which can effectively prevent people from accessing appropriate help and advice'.<sup>15</sup> Research in 1996 similarly found that many of the defendants who attended court were unlikely to have received advice before then.<sup>16</sup> Although our research did not investigate the position prior to the hearing comments by HPCDS respondents suggest that this is unchanged:

Most defendants that attend the court do not have a clue as to how the court works and as a result do not know how to present their case in court and cannot afford to engage the service of a solicitor or they leave it too late and not seek help with their case. (HPCDSQ 6)

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<sup>13</sup> As with earlier studies, our research shows that 5-6 minutes is usually allocated to each case, Bright and Whitehouse, n 8, 41-43.

<sup>14</sup> Previously known as Court Managers but changed to Delivery Managers from April 2012 as part of a management restructuring initiative.

<sup>15</sup> Blandy et al, n 5, 45.

<sup>16</sup> J Nixon, C Hunter, Y Smith, and B Wishart, 'Housing Cases in County Courts' (The Policy Press, 1996), p. 17.

Lord Woolf's interim report on Access to Justice emphasised the important role played by court staff, including court desk staff and ushers, given that they tend to be the first port of call for court users. It stated that court assistance should be 'an invariable obligation of the courts.'<sup>17</sup> This view has been reiterated by the Civil Justice Council (CJC) who note that 'it is hard to overstate the importance of the role of ushers, counter staff and clerks when self-represented litigants are involved.'<sup>18</sup> However, the hours of opening of court desks have been reduced in many county courts as part of the general cuts that have had to be made within HMCTS, which suggests that LiPs will find it more difficult to access help. From September 2013 most court desks operate 10.00-14.00 hours whilst others run on an appointments only basis. Respondents to our delivery manager questionnaire (DMQ) indicated that non-urgent matters are dealt with via correspondence or telephone, with occupiers directed to online services in order to obtain court forms. (In response to this finding, HMCTS noted that courts should be making hard copies of the most common court forms and leaflets available outside of the counter and they should provide a hard copy if customers cannot use online services.)

The services offered by the court desk apply equally to both claimants and defendants but our focus here is on how defendants access information, advice and representation on the day of the hearing. After the survey was completed, we invited HPCDS respondents to provide an update on their responses. One respondent commented that the shorter opening times of court offices means that things are proving more difficult for clients.

This means that for most occupiers who attend court, the HPCDS provides their first opportunity to receive legal advice. There is no centrally recorded data about HPCDS and so we cannot be sure how many courts are able to offer this form of emergency legal advice, but based on the responses from our DMQ around 85% of courts appear to have a scheme providing legal advice on possession days.<sup>19</sup> Of those who were aware of a HPCDS in their court, 15% suggested that it was not made available on every possession day. In particular, one DM stated that no advice was available for private tenants or mortgagors. The majority of schemes are funded under the legal aid system, but not all.<sup>20</sup> Eighty per cent of our HPCDS respondents were funded by the Legal Services Commission (LSC),<sup>21</sup> 13% by the local authority and 7% by the Department for Communities and Local Government. One scheme had no funding and all participants were volunteers. The service is not means tested but HPCDS do assess whether clients would have been eligible for legal aid.

Figures regarding the number of defendants receiving advice and representation from HPCDS are not available through any formal centralised source. From responses to our HPCDS survey, the majority of schemes see 5-9 defendants during a typical possession list. There was a wide variation

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<sup>17</sup> Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1995), Chapter 17, para. 16.

<sup>18</sup> Civil Justice Council, n 6, para 105. See also para 107(8).

<sup>19</sup> The Ministry of Justice publishes details of all LAA funded HPCDS on its website but not all HPCDS are funded by the LAA, see <http://www.justice.gov.uk/legal-aid/areas-of-work/civil/social-welfare-law>.

<sup>20</sup> According to the Legal Aid Agency, independent schemes operate in Reigate, Exeter, Chelmsford, Ipswich, Reading, Milton Keynes, Willesden and Wigan. No scheme of any kind operates in Mayor's and City of London County Court as a result of the small number of possession claims. See Legal Aid Agency, 'Housing Possession Court Duty Scheme: Guidance for Service Providers', April 2013, 11. The Legal Aid Agency (LAA), which funds the majority of the schemes, published a list in January 2014 showing 115 LAA funded schemes: see <http://perma.cc/CZ48-3ZMH>.

<sup>21</sup> Replaced in April 2013 by the Legal Aid Agency.

as to the percentage of clients that typically fell within different housing categories, with some schemes seeing more tenants than mortgagees, and vice versa. What was almost always the case, however, was that they advised fewer private tenants than other defendant types. One scheme stated that it did not cover mortgages.

Most schemes (80%) indicated that in the majority of cases (75%) they spend time negotiating with the claimant (e.g. the mortgage lender, landlord, etc.) and that the agreement they reach tends to be reflected in the order made by the judge (in over 75% of such cases).

The majority of defendants that consult the scheme are offered representation at the hearing.<sup>22</sup> Perhaps surprisingly, some occupiers refuse the offer of representation. The reasons given include lack of knowledge of the legal process, a preference for self-representation and a belief that it might prolong the proceedings. The most common reason, however, was that an agreement had already been reached with the claimant, a matter of concern for the reason that, as discussed below, some occupiers might agree to repayment schemes that they cannot really afford.

Our survey showed that the most common amount of time spent advising clients was 10-14 minutes but that this was not always considered adequate:

Discretion tends to be exercised benignly, wisely or harshly according to the judge's outlook. If the judge is of a harsh disposition, a detailed and well prepared case is imperative, and this requires more work than can be given in the heat of a busy morning with multiple clients and, often, little in the way of privacy in which to discuss confidential personal matters. (HPCDSQ 1)

## Why Advice and Representation Matters

In this section we focus on the difference that advice and representation makes to the question of whether or not a possession order is made. There are all sorts of other reasons why it is important that legal advice should be available, including being guided and supported through a difficult and distressing time, but most significantly because it appears that a more favourable outcome is likely if the defendant is represented at the hearing or attends in person. Research conducted in 1996 found that:

active participation by defendants in the possession process had a significant impact on the initial and long-term outcome of cases. Those who did not attend hearings were at greater risk of eviction than those who were represented or attending hearings in person.<sup>23</sup>

The importance of attending was confirmed by our research. One judge interviewed said:

[REDACTED]

(Judge, DJ7)

And a housing adviser explained:

**Comment [o1]:** Embargoed until interviewee agrees to quote being used.

<sup>22</sup> One respondent made it clear that it is not technically 'representation' but rather the advisor putting forward the occupier's case if they are not able to themselves.

<sup>23</sup> Nixon, et al, n 16, vi.

[I]f people don't attend there's an order going to be made and that's going to be a possession order, so they're going to have an outright order. Whereas, if they attend and there's something wrong with it then you may be able to get it struck out or you might be able to get an adjournment or you might be able to get a suspended order on reasonable terms or you can look into all other issues. If they don't then it's black and white and there's going to be an order. (HPCDS rep, DDS2)

Further research needs to be done to understand why it is that attendance and representation are so important. Previous research in rent arrears cases shows that the outcome of a case is affected by what is known by the judge about the defendant's circumstances.<sup>24</sup> Given that the only opportunities that exist for the defendant's story to be made known are through completion of the defence form and attendance, and that few defence forms are filed, it may be simply that attendance and representation mean that the facts can be made known. If they do attend, the speed at which hearings take place, and the unfamiliarity of defendants with the setting, mean that a defendant who is not supported in court by someone with experience of the possession process is unlikely to take the opportunity to disclose much relevant information to the court. Alternatively there may be other reasons as to why attendance matters so much, such as the much more affective explanation that it is harder for a judge to evict someone from the home when that person is standing in front of him or her.

Although our findings suggest that attendance rates are low, there were enormous variations in perceptions of both actual numbers and trends. Respondents to the HPCDS survey estimated that between 30% and 45% defendants attend, with mortgagee attendance rates highest; however, there was a large variation in the responses given. In our interviews no-one stated that more than 50% attend.

We asked HPCDS respondents what they considered to be the barriers to court attendance. For this question we suggested categories that were drawn up in an earlier study of HPCDS by the LSC.<sup>25</sup> All categories were still seen as significant and were rated in the following order:

1. burying of heads in the sand,
2. little point attending as nothing could be done,
3. landlords and housing officers told defendants there was no need to attend,
4. fear or misunderstanding of the legal system,
5. the cost and difficulty of attending,
6. general apathy, and
7. the acceptance of what is perceived as an unfair system.

Other reasons also featured strongly, particularly where agreements had been reached with the claimant in the past, and mortgage companies had discouraged defendants from attending court.

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<sup>24</sup> C Hunter, S Blandy, D Cowan, J Nixon, E Hitchings, C Pantazis & S Parr, *The Exercise of Judicial Discretion in Rent Arrears Cases*, (London: Department for Constitutional Affairs, 2005), see especially Ch 6.

<sup>25</sup> Legal Services Commission, *Improving access to advice in the Community Legal Service, Report on Evaluation Research on Alternative Methods of Delivery*, July 2004, 43.

Given how important attendance is on the outcome of the hearing, early advice would provide the opportunity to explain to defendants why it is important that they attend the hearing and to correct many of these misapprehensions.

Most defendants who attend court are able to access free emergency legal advice and representation through the HPCDS. Earlier research has found HPCDS to provide a 'valuable emergency service' for occupiers but they also brought benefits to courts and functioned as gateways to other legal resources.<sup>26</sup> In particular, it was found that outright possession orders were granted in only 8% of cases that were assisted by the HPCDS, while Shelter suggest that HPCDS have been able to prevent immediate repossession in up to 85% of cases.<sup>27</sup> Respondents to our HPCDS survey also consider that representation affects the outcome of the case. In particular, it was frequently stated that it can ensure that better results are achieved for the defendant. As one housing adviser put it:

Representation nearly always produces a positive outcome for the clients. (HPCDSQ Update 5)

Many respondents commented on the fact that defendants will arrive at court without prior legal representation and under enormous stress. Unaware of what issues are important and relevant to their case defendants are likely to agree to unaffordable and unrealistic arrangements with the claimant:

[L]egal knowledge and expertise is crucial in matters of possession. Without this knowledge, clients could find themselves being pressured into agreeing to something they cannot afford or don't understand. (HPCDSQ 18)

...in mortgage cases, the defendants are usually willing to offer more than they can afford to try and keep their home but, after input from the solicitor, we are usually able to negotiate a more realistic amount that the client can really afford. (HPCDSQ 27)

One HPCDS respondent reported that in more than 75% of cases the client either retains the accommodation or homelessness is delayed, and that in a significant number of both mortgage and local authority cases the figure for repayment of arrears was reduced to affordable levels. Others also mentioned that outright possession is less likely, with adjournment or suspension on (better) terms resulting. Two respondents commented that whereas mortgage lenders may press for payment over a relatively short period, the adviser is able to argue for the remaining term of the mortgage (the '*Norgan* principle'<sup>28</sup>) to be followed, giving a longer time for payment.

It was made clear in the responses to the HPCDSQ that where a HPCDS representative is able to negotiate a repayment scheme with the claimant prior to entering the hearing room, it is extremely likely that the judge will implement that agreement (90% of HPCDSQ respondents indicated that a negotiated agreement will be reflected in the order made by the judge in over 75% of cases).

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<sup>26</sup> Ibid, 5.

<sup>27</sup> 'Help for struggling homeowners' (Shelter), available at <<http://perma.cc/VH2S-LD6R>> (Shelter's source is not provided).

<sup>28</sup> The Court of Appeal held that when assessing a 'reasonable period' for the purposes of s.36 of the Administration of Justice Act 1970, it was appropriate for the court to take account of the whole of the remaining part of the original term of the mortgage, see *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 All ER 449.

## What changes have been made to Legal Aid in the Housing Possession Context?

In April 2013 LASPO introduced major changes to legal aid provision that have been described as, ‘a particular challenge for traditional legal aid practice’<sup>29</sup> and in less conciliatory terms as ‘catastrophic’<sup>30</sup> and ‘a denial of justice.’<sup>31</sup> LASPO removed several areas from the scope of legal aid, including family work not involving domestic violence, welfare benefits, employment, and housing law disrepair.<sup>32</sup> Although there is little direct impact on the availability of funding for representation in housing possession cases, the indirect consequences of the legal aid cuts are significant, as discussed below. These also need to be considered alongside the changes that have been made to welfare benefits, in particular the under-occupation penalty (commonly known as the ‘bedroom tax’), which has reduced housing benefit payments available to those households who are deemed to have spare rooms according to specified conditions.

The changes introduced by LASPO do not affect the funding of HPCDS and the provision of emergency legal advice and representation on the day of the possession hearing. This is not the case however in relation to more complex housing cases that may require full legal representation. The provisions relating to the funding of legal aid for housing issues are contained in Part 1, Schedule 1 of the Act and make clear that households threatened with the loss of home will continue to be eligible to apply for legal aid for full representation.<sup>33</sup> In order to qualify, however, there is both a financial eligibility test and a merits test. The latter has proven particularly controversial. As initially enacted in the Civil Legal Aid (Merits Criteria) Regulations 2013 it was necessary for the prospects of success to be ‘very good, good, moderate or borderline’. Borderline meant not more than a 50% chance of success: in 2011/12 there had been 41 housing possession cases funded on this basis. Following consultation this ‘prospects of success’ test was removed at the start of 2014.<sup>34</sup> The Government’s concern was that borderline cases do not warrant public funding. The consequence of the removal of this test is that cases will qualify for funding only if the prospects of success are ‘very good, good or moderate’.

It is additionally possible to apply to the Legal Aid Agency for ‘exceptional funding’.<sup>35</sup> In order to succeed there must be an ‘exceptional case determination’. This will not be made unless a failure to make the determination would be a breach of the individual’s Convention rights, which includes Article 8 right to respect for the home that is engaged if there is a threat to the loss of home.<sup>36</sup> The inclusion of this provision was greeted with suspicion by some within the legal profession who ‘suspected that the ECF funding scheme was a way of batting off criticism of the narrow scope of

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<sup>29</sup> P Pleasence, N Balmer, and R Moorhead, ‘A Time of Change: Solicitors’ Firms in England and Wales’ (Law Society: London, 2012), i.

<sup>30</sup> M Cleghorn, ‘LASPO 2012 and Housing Law’, Garden Court North Chambers, Housing law resources, 17 December 2012, available at [http://www.gcnchambers.co.uk/areas\\_of\\_specialisation/areas/housing/housing\\_law\\_bulletin/a\\_quick\\_guide\\_to\\_laspo\\_2012\\_for\\_housing\\_law](http://www.gcnchambers.co.uk/areas_of_specialisation/areas/housing/housing_law_bulletin/a_quick_guide_to_laspo_2012_for_housing_law).

<sup>31</sup> Civil Justice Council, n 6, para. 19.

<sup>32</sup> LASPO, Sch. 1, Part 1 and Part 2.

<sup>33</sup> LASPO, Sch. 1, Part 1, para. 33(1).

<sup>34</sup> The Civil Legal Aid (Merits Criteria) Amendment Regulations 2014, as from 27 January 2014.

<sup>35</sup> LASPO, s. 10.

<sup>36</sup> LASPO, s. 10(3).

LASPO and would not result in very many exceptional cases being granted funding.<sup>37</sup> Further, the Government has made clear that for a case to qualify for exceptional funding the relevant merits criteria must still be met, which means that borderline cases cannot receive exceptional funding.<sup>38</sup> From the Impact Assessments that accompanied the green paper preceding LASPO, it was anticipated that there would be around 300 housing cases per year funded through the exceptional funding gateway.<sup>39</sup> Figures published by the Ministry of Justice give credence to the earlier suspicions as only one of the 65 ECF applications made in respect of housing between April and December 2013 has been approved.<sup>40</sup>

### What are the legal aid changes likely to mean in the context of housing possession cases?

While those threatened with the immediate loss of home remain eligible to apply for legal aid, there are indications that the wider changes that have been made to legal aid, court resources, and welfare benefits are having a significant impact on access to justice, even in 'run of the mill' possession cases.

Morris and Barr anticipated that 'the charitable sector will be heavily hit by these reforms', with an estimated 92% reduction in legal aid income,<sup>41</sup> but the effects have been much wider. It is not only voluntary agencies that are struggling to cope. Evidence to the Justice Select Committee on the impact of LASPO reports that in the first year since LASPO was implemented nine Law Centres have closed, and there has been downsizing of solicitor's firms doing legal aid work.<sup>42</sup> Evidence from Garden Court Chambers (with one of the largest specialist housing law teams in the country), reports that a number of specialist legal aid practitioners have either closed or moved away, and barristers are also shifting areas of practice, leading to a loss of experience and expertise.<sup>43</sup> There is a large unmet need for specialist advice, particularly amongst vulnerable groups.<sup>44</sup> More specifically in the housing context, the inability to obtain early advice on debt and welfare problems means that legal help can only be given where the case is very urgent. In its report in January 2014 on a strategy for access to advice and legal support, the Low Commission urged the Government to revisit the issue of whether housing benefit advice should be covered by the legal aid scheme:

A good number of practitioners pointed out to the Commission that they cannot give clients advice on housing benefit, but have to say to them that if the problem with their benefit claim

<sup>37</sup> D Douglas, 'Just one housing case granted "exceptional" legal aid funding', *Inside Housing*, 19 March 2014, p. 2.

<sup>38</sup> Ministry of Justice, *Government response to the Joint Committee on Human Rights: The implications for access to justice of the Government's proposals to reform legal aid*, Feb 2014, 26.

<sup>39</sup> Written evidence from Garden Court Chambers Housing Team (LAS 49), available at <http://perma.cc/46PZ-2NHC>, para 17.

<sup>40</sup> *Legal Aid Exceptional Case Funding Application and Determination Statistics 1 April to 31 December 2013*, Ministry of Justice, March 2014, 5, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/289183/exceptional-case-funding-statistics-apr-13-dec-13.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/289183/exceptional-case-funding-statistics-apr-13-dec-13.pdf).

<sup>41</sup> D Morris, and W Barr, 'The Impact of Cuts in Legal Aid Funding on Charities' (2013) 35:1 *Journal of Social Welfare & Family Law* 79-94, at 81.

<sup>42</sup> J Sandbach, *Justice Select Committee evidence on LASPO impacts*, Legal Voice 16 May 2014, available at <http://perma.cc/V5ZC-WCGU>.

<sup>43</sup> Garden Court Chambers Housing Team, n 39.

<sup>44</sup> Sandbach, n 42.

leads to them being at risk of losing their home they can return for advice and representation. This seems us to be a very clear example of where the state should be paying for early advice to avoid incurring greater costs, specifically those of court proceedings, further down the line.<sup>45</sup>

Given the fall in the number of lawyers able to undertake housing law, and their inability to get legal aid for advisory work, it might have been expected that not for profit (NfP) agencies would take their place. This has not been the case and is unlikely to be so in the future. This is due in part to the specialised nature of some of the legal advice required which is more appropriately provided by legally qualified staff. It may be due also to the lack of resources available to such institutions. In a recent research report on NfP advice services in England, Nick Hurd, the Minister for Civil Society, made clear that such services will have to do more with less, 'the current economic climate has led to a reduction in public funding but an increase in demand. This means that we must consider how advice services can adapt to the new environment; achieve more through collaboration, early intervention and exploitation of remote channels; and deliver high-quality services that are sustainable in an environment of reduced funding.'<sup>46</sup>

Even if NfP agencies were able to step into the gap caused by a fall in the number of solicitors' firms doing legal aid work (and there is no sign of this), this would, in itself, raise concerns in relation to the quality of service. Housing law is technically difficult and as commented on in our interviews:

... I mean, housing law is so complex that I don't think you can really leave it to lay advisors because we do pick up cases that have been through the hands of well meaning advice agencies that just haven't spotted the potential legal defences that are in there (HPCDS rep, DDS1)

Housing is not a very straightforward area, it does need people who are experienced housing lawyers ...And that's why you need lawyers to do it, and that's what we don't have, or it's very, very limited. That is a problem in all sorts of areas, and what it does mean is that, for a start, people aren't getting the benefit of legal advice they should have, they don't know whether they have a defence or not, and even if they do have a defence, then they may not be able to follow through, because it's not something they, themselves, can easily do, especially with [human rights and public law] - those sorts of arguments, you need to be represented (Judge, DJ2)

The overwhelming majority of possession claims in tenancy cases are brought on the ground of rent arrears, and many of these will be related to problems with housing benefit.<sup>47</sup> The fact that benefit issues are not being sorted out early on means that judges have to adjourn cases to allow time to sort out housing benefit problems, but there is no funding to help tenants to do this.<sup>48</sup> This causes inevitable frustration:

Many housing advice providers can, through legal aid or other funding, help to raise a defence to a possession claim, but they do not have the resources to resolve the underlying problems. Some

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<sup>45</sup> Low Commission, *Report of the Low Commission on the future of advice and legal support. Tackling the Advice Deficit: a strategy for access to advice and legal support on social welfare law in England and Wales*, January 2014, 1.26, available at <http://perma.cc/6Z7K-PJC7>.

<sup>46</sup> Cabinet Office, 'Not-for-Profit Advice Services in England', (Cabinet Office: London, 2012), p. 3.

<sup>47</sup> A postal survey of social landlords in 2002/3 found that almost 98% of actions entered in court were due to rent arrears, see H Pawson, F Sosenko, D Cowan, J Croft, M Cole and C Hunter, *The Use of Possession Actions and Evictions by Social Landlords* (ODPM, London 2005) 40 and 279. See also J Neuberger, *House Keeping: Preventing homelessness through tackling rent arrears in social housing* (Shelter: London, 2003) 12.

<sup>48</sup> Garden Court Chambers Housing Team, n 39, para. 4.

judges are therefore becoming frustrated by repeat adjournments, by an increase in litigants in person, and by the inability of defendants to access help before they attend court. (HPCDSQ Update 3)

Eventually this can lead to the loss of a home and also a waste of court resources.<sup>49</sup>

There has also been an increase in the number of possession claims brought by landlords. This in turn leads to an increase in pressure on courts and as there is 'less time to explore issues during hearings...[this] creates a risk of injustice'.<sup>50</sup> Given the findings from our surveys that each case took on average only 5-6 minutes, any potential reduction in time available for each case is worrying.

The cuts do not appear, at least yet, to have affected the number of HPCDS. Nonetheless, it is impacting upon their work:

[T]he court lists going ahead seem to be a lot busier and we are seeing more people at the schemes over the past 12 months, it's very frustrating that there are people with complex problems who cannot find specialist advice and are dealing with volunteers who are giving it their best efforts but lack the experience and knowledge of the law to deal with them more comprehensively. (HPCDSQ Update 2)

As noted above, the position in relation to funding for full legal representation is complex. In the context of this paper, the fact that only one application for exceptional funding had been approved in a housing case by December 2013 is not necessarily significant, although it is surprising that this was itself an eviction case.<sup>51</sup> The real difficulty created by the legal aid reforms is in relation to the removal of the 'borderline' cases from the merits test. These cases may well involve key points of law, as is illustrated by the *Pinnock* story.<sup>52</sup>

For the decade after the implementation of the Human Rights Act 1998 the scope of the Article 8 right to respect for the home generated an unusual amount of judicial activity seeking to tease out how it impacted on the right to recover possession of residential property, including three cases before the House of Lords. Whereas the English judiciary resisted the idea that Article 8 could disturb the established order of property rights, the European Court of Human Rights in Strasbourg showed no such hesitancy, repeatedly asserting that any person at risk of interference with his home should be able to have the proportionality of the measure determined by an independent tribunal.<sup>53</sup> It was not until 2010 that the Supreme Court in *Pinnock* departed from the earlier decisions of the House of Lords and agreed that, at least where a local authority is seeking possession of a person's home, 'the court must have the power to assess the proportionality of making the order and, in making that assessment, to resolve any relevant dispute of fact'.<sup>54</sup> The implications of this decision are still being worked out. It remains unclear, for example, whether the same approach should be taken if the landowner seeking recovery of possession is a private individual, and how proportionality will play out when a landlord (social or private) seeks possession relying on Ground 8

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<sup>49</sup> Ibid, para 4.

<sup>50</sup> Ibid, para 12.

<sup>51</sup> According to Douglas, n 37, this case involved a schizophrenic tenant facing eviction and was granted only after a threat of judicial review following initial refusal.

<sup>52</sup> *Manchester CC v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.

<sup>53</sup> *McCann v United Kingdom* App no 19009/04 (2008) 47 EHRR 40 [50].

<sup>54</sup> *Manchester CC v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, [46], [50].

which provides for mandatory possession on the basis of two months' rent arrears, or even how it would apply to a mortgage case involving exceptional facts. The *Pinnock* case itself followed on from three preceding House of Lords cases which were all legally aided.<sup>55</sup> It is questionable, particularly after the first of these was decided by the House of Lords, whether they would have been funded under the 'very good, good or moderate' prospects of success test. As Lord Bach commented in Parliamentary debate,

This series of cases on a matter of great public importance was possible because of legal aid. I suggest that if these regulations had been in force then, it is unlikely that those cases, which have both clarified and moved the law on, would ever have reached the courts. As the organisation Justice has said, "borderline" does not mean without merit. These are not unclear cases which we are talking about, where further information is necessary before the success criteria of the means test can be determined. These are cases where there is a different legal opinion about issues of importance—and any legal system, I argue, that does not allow them to be determined is surely defective.<sup>56</sup>

Given our findings, these changes to the provision of legal aid for full representation in housing cases are significant for the reason that they undermine the likelihood that occupiers will make use of defences that may otherwise be available to them. In practice, few occupiers obtain legal advice when their home is threatened with possession. Given this and the complexity of the law in this area, it is unlikely that households with an arguable defence to possession (for example under Article 8) will be aware of it or how to raise it. For those occupiers who attend the court hearing, legal advice and representation may be available at which point the HPCDS representative may identify that a defence is available and raise it with the judge. The judge is only able to consider such a defence if the occupier or their representative raises it<sup>57</sup> and it is sufficiently particularised to show that it reaches the high threshold of being seriously arguable.<sup>58</sup>

Given the limited amount of time that HPCDS representatives have to discuss a case with a client and the very short amount of time allocated to possession hearings, it will rarely be possible to deal with the defence issue during the hearing. At this point, the judge is likely to adjourn the case in order to give the occupier time to apply for legal aid in order to obtain the advice and representation needed to present an adequate defence. Obviously, if the prospects of success are not 'very good, good or moderate' then the occupier will not be able to obtain legal aid for full representation and the chances of obtaining exceptional funding appear to be minimal. The implication must be that a significant number of occupiers are not taking advantage of defences available to them as result of a lack of accessible and informed legal advice.

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<sup>55</sup> *London Borough of Harrow v Qazi* [2003] UKHL 43; *Kay v London Borough of Lambeth* [2006] UKHL 10; and *Doherty v Birmingham City Council* [2008] UKHL 57.

<sup>56</sup> Lord Bach (Lab) on 20 Jan 2014, available at <http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140120-0003.htm#1401213000169>.

<sup>57</sup> *Manchester CC v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, [61].

<sup>58</sup> *Thurrock Borough Council v West* [2012] EWCA Civ 1435.

## Concluding Thoughts

The CJC states that the basic principles for achieving effective access to justice include the availability of objective advice and the demystification of the legal process, noting that technology and written materials are no substitute for personal support.<sup>59</sup> In considering the potential impact of legal aid reforms on the ability of those facing the prospect of losing their home to obtain support, advice and representation, this paper has drawn upon empirical research into the legal process.<sup>60</sup> The findings of that research suggest that the LASPO reforms will impact significantly, and adversely, on the extent to which the current system of handling housing possession cases offers those at risk of eviction simple and effective access to justice.

While we do not have data regarding the impact of welfare and legal aid reforms on the number of possession cases, the assumption must be that the removal of several areas from the scope of legal aid will lead to fewer households accessing debt and other advice services prior to court action. Coupled with the wider financial pressures, including the threat of an increase in mortgage interest rates and the reduction in welfare benefits, more occupiers are likely to fall into arrears and be threatened with possession. This will lead to greater pressure on already busy court possession lists. Further, the restrictions placed on the funding of borderline cases will make it much more difficult to run effective defences, particularly in areas of evolving law such as Article 8.

Within this context of change and uncertainty, important questions are raised regarding the ability of the court system and HPCDS to handle the likely increase in demand placed on their services. It is difficult and daunting for occupiers threatened with the loss of home to access the information, advice and representation they need to assist them in navigating the complex legal terrain associated with housing possession. Following the changes made to legal aid, specialist housing and debt advice is dwindling, which makes it much harder for occupiers to receive help early on and to be advised of the crucial importance of attending the court hearing. For those who do attend court, HPCDS may be the only source of advice for occupiers but for some this will be 'too little, too late'. For others, our findings suggest that they may arrive at court to discover that there is no HPCDS available to them. The inconsistent provision of HPCDS is of particular concern given that representation by a duty solicitor can have a significant and beneficial impact on the outcome of their case. While it seems undeniable that HPCDS are of great benefit to both occupiers and the courts, however, there is the potential for such schemes to be used by government as a 'fig leaf' to hide the lack of more substantial and expensive legal advice and representation.

One implication arising out of these findings is that the predicted increase in the burden placed on court resources and HPCDS could be addressed by an increase in the availability of specialist housing advice prior to court action, a proposal that runs counter to the current trend within legal aid provision but one that should be considered if effective access to justice is to be achieved within housing possession cases.

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<sup>59</sup> Civil Justice Council, n 6, para. 20.

<sup>60</sup> For a full account of the research project and its findings see Bright and Whitehouse, n 8.

# Place and the development of social welfare legal aid

Marie Burton  
PhD student  
funded by ESRC

# Overview

## 1. Why place?

- Remote services – next phase in place and legal aid
- Power of place to define and exclude

## 2. Role of place in social welfare law legal aid

- Establishing law centres in deprived communities increased provision

## 3. Research – voices from the frontline

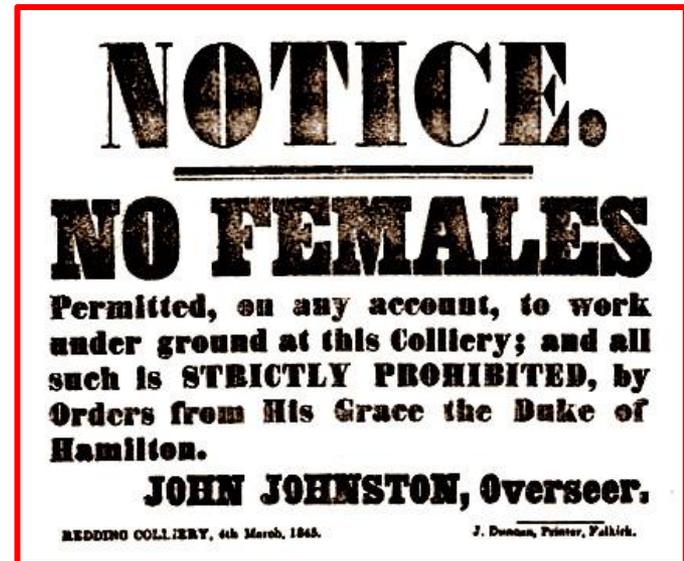
# 1. Why place?

# Why place?

- Comparing telephone and face-to-face advice
  - Site of interaction is fundamental difference
- Development of social welfare law
  - where services have been provided has been key to improving access
- Telephone-only advice
  - the next stage in the story of social welfare law legal aid and place
- So, what can what happened before tell us?

# Place (1)

- Not neutral - power to control and shape social relations (Blomley, 2003)
- Women – excluded from work – excluded from power (Massey, 1994)



# Place (2)

- Traditionally, place rarely explicitly recognised in legal academic studies
- Once you consider issues from perspective of place, its influence becomes apparent
- Eg, the development of social welfare law

## 2. Development of social welfare law

# Legal aid - 1960s

- Legal aid for advice available from 1959
- Most work was family or crime
- Very little social welfare law
- Concern on both sides of the political divide about unmet need for advice



# Place: lawyers' offices and legal aid(1)

Place a major contributing factor to low take-up:

- Lawyers were not based in deprived communities that needed advice
- Clients in need of advice did not feel welcome in solicitors' offices

# Place: lawyers' offices and legal aid (2)

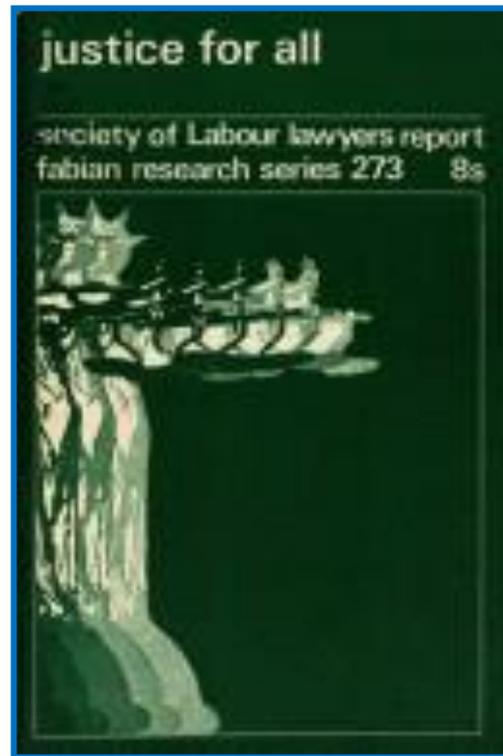
Reasons:

- Professional 'project' of solicitors
  - Maintain respectability (Macdonald, 1995)
- Financial considerations



# Place: lawyers' offices and legal aid (3)

Distribution of solicitors' firms did not change when legal aid made it possible for lawyers to be paid to deal with social welfare law problems



Solutions proposed by both left and right were associated with place

- Different approaches but both about putting legal aid services into deprived areas

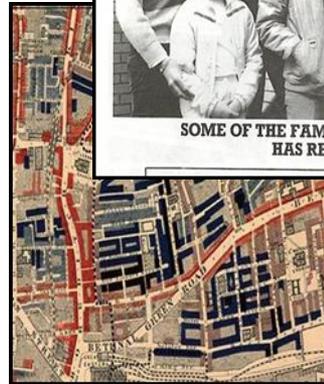
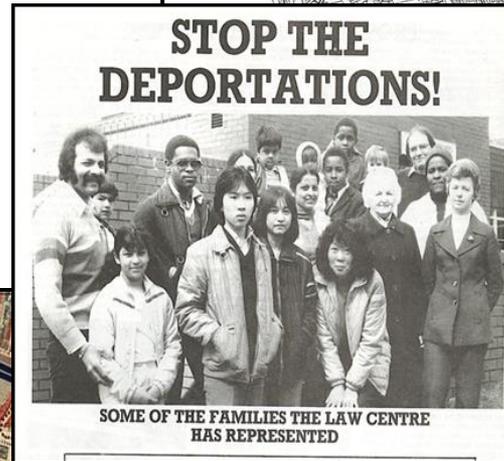
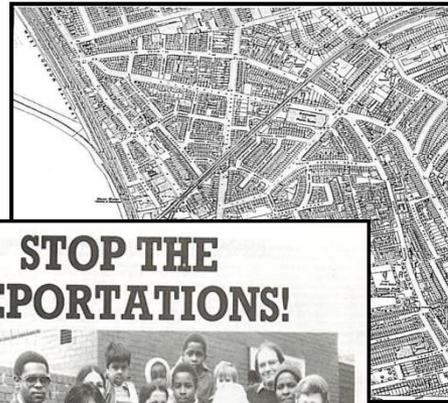
# Law Centres

- Legal activists in the UK set up 'neighbourhood Law Centres' in deprived communities
- To break down barriers to access needed local services



# Law Centres and place (1)

- Physical site within the community
- Geographic catchment area
- Governance structures



- Type of work
- Duty schemes and outreach
- Local networks

# Law Centres and place (2)



- Inclusive atmosphere: 'Loons and cheese-cloths' (Goriely, 1996)
- Symbolic value

# Success

- Increase in provision of social welfare law legal aid
- ‘The impact of law centres has been out of all proportion to their size’ (Royal Commission on Legal Services Final Report, 1979)
- Expansion of private practice into social welfare law



# Place and social welfare law (1)

- Law Centre model – not perfect

BUT

- Subversion of traditional model led to greater access



# 3. Voices from the front line

# Lawyers/advisers

Value of local knowledge:

‘I do think it slows down the initial kind of information gathering when you haven’t got local knowledge, even if it is just knowing who to speak to.’

‘They [local offices] will know the housing officer...that goes to possession hearings... whereas for us...we’re...relying on having to do representations... I think having that local knowledge just gives you that edge’

# Clients

Value of going out to meet people to get help:

‘It’s been brilliant...What’s a good thing is that...you have to go out, you have to get on a bus...you have to deal and talk and tell people ...your problems.’

‘...the more I stay in home, the less chance I’ve got of getting out...Not only that, I wouldn’t be socially interacting with other people, then, would I?’

# Overview

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## 3. Research – voices from the frontline

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**UCL International Conference on  
Access to Justice and Legal Services**

**19<sup>th</sup> – 20<sup>th</sup> June 2014  
London**

***Insights from Australian mediators about  
mediation and access to justice***

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# *Insights from Australian mediators about mediation and access to justice*

## **Introduction**

A critical claim of the integration of mediation into the civil justice system is to enhance access to justice. However, the connection between institutionalisation of mediation and improved access to justice remains unproven, particularly, when access to justice is conceived as including increased opportunity to gain entry into the justice system and obtaining fair outcomes.<sup>1</sup>

In a recent research project we interviewed 21 experienced and expert mediators to harness their wisdom and views on issues of mediation and justice. We presented five hypothetical scenarios to the mediators and sought their reactions to potential practical and ethical issues that raised concerns about justice in mediations. The mediators' responses indicate that despite a common set of standards and the agreed critical value of self-determination in mediation, mediators have varying moral compasses which lead to a variety of responses. However interviewees agreed a proper intake process plays a critical role in ensuring procedural fairness in mediation as well as the parties' ability to access legal advice and information. Most interviewees stated they would have avoided the specific challenges raised in the scenarios by conducting a thorough intake process.

In this paper we argue that if mediation is to improve access to justice, it must at least have proper intake processes and parties must be able to access legal advice and information. Consequently, the resource and practical implications of mandating mediation in the civil justice system must be heeded. We focus on mediation in civil justice system excluding family law.<sup>2</sup>

We detail the context to the research; outline the research methodology; and discuss the intake process and the concept of legal advice and informed decision-making in the mediation process. We briefly discuss legal assistance available in civil law areas. We conclude if mediation is to increase access to justice for parties within the civil justice system, government needs to ensure resources are available for providers of dispute resolution to design and administer a proper intake process, access legal advice and ensure the principle of informed decision-making permeates mediation processes.

## **Context of research: Access to Justice and Mediation**

In the 1960s and 1970s concern to improve access to justice came from a realisation by many in the legal arena that the liberal claim of a justice system that ensured 'equality before the law' was a

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<sup>1</sup>In this paper, we adopt the former National Alternative Dispute Resolution Advisory Council (NADRAC)'s definition of mediation: a process where the participants, with the assistance of an independent person as mediator, identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement. The mediator is usually regarded as having a facilitative role and will not provide advice on the matters in dispute. See *Alternative Dispute Resolution*, Austl. Govt. Att'y-Gen.'s Dep't. 15-16, available at <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx> (last visited May 20, 2014).

<sup>2</sup> In Family Law disputes, primary dispute resolution (mediation) is provided by range of legal assistance and Family Relationship organisations. See recent evaluation .....

mere formal right with little substance and practical effect.<sup>3</sup> Cappelletti and Garth surveyed access to justice developments across many western industrialised countries and identified three waves in the access to justice movement. The first addressed economic matters and sought to provide citizens with legal means to seek justice through legal aid schemes.<sup>4</sup> The second wave focussed on organisational matters that facilitated standing in a representative capacity and class actions. The third wave was procedural and includes the development of a range of alternative dispute resolution (ADR) processes.<sup>5</sup> Since then, many nations have identified and attempted reforms to their civil justice systems.<sup>6</sup> Problems identified in the operation of civil justice systems include high costs, delay, uncertainty, fragmentation and the adversarial nature of litigation.<sup>7</sup> An aspect of the Access to Justice movement was the establishment of dispute resolution institutions such as ombudsmen services, specialist tribunals and community/neighbourhood justice centres.<sup>8</sup>

In the Australian context in 1994, the Access to Justice Advisory Committee (AJAC) recommended 'resort to ADR and continued development of ADR programs' as one solution to improving access to justice.<sup>9</sup> The Committee identified the advantages of ADR to include provision of broader remedies, less-costly and less-formal processes.<sup>10</sup> In the two decades since that report, ADR processes including mediation, have become an accepted part of the civil justice system in Australia<sup>11</sup> and legislation reinforces this approach to ADR.<sup>12</sup> The object of the *Civil Dispute Resolution Act 2011* (Cth) is to ensure that people take genuine steps to resolve disputes before instituting civil

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<sup>3</sup> Mauro Cappelletti and Bryant Garth, 'Access to Justice: the World-wide Movement to Make Rights Effective' in Mauro Cappelletti and Bryant Garth (eds), *Access to Justice: a World Survey* (Sitjhoff & Noordhoff, 1978) 5.

<sup>4</sup> For a discussion of the Australian legal aid system from 1970s to date see Mary Anne Noone and Stephen Tomsen, *Lawyers in Conflict: Australian Legal Aid and the Legal Profession* (Federation Press, 2006).

<sup>5</sup> Cappelletti and Garth above n **Error! Bookmark not defined.** See also Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 *The Modern Law Review* 282; G Howells and R James, 'Litigation in the Consumer Interest' (2002) 9(1) *ILSA Journal of International and Comparative Law* 1, 3-4; More recently Parker identified a fourth wave, competition policy reform of legal service provision Christine Parker, *Just Lawyers* (Oxford University Press, 1999) 32: ADR refers to various non-court processes used for resolution of disputes and, more particularly, non-determinative processes such as mediation.

<sup>6</sup> Most notable of these is the reforms in the UK initiated by Lord Woolf. See Lord Woolf, *Final Report: Access to Justice* (HMSO, 1996). In the UK, expansion of ADR processes (including increased community education about ADR and providing legal aid funding for ADR) was identified as a large part of the solution to the problems of the civil justice system in the UK. Reforms to the civil justice systems in Australia have followed similar paths to the UK, attempting to improve accessibility, affordability, proportionality, timelines and the ability to get to the truth quickly and easily. For a critical assessment of these reforms see Hazel Genn, 'What is Civil Justice For? Reform, ADR, and Access to Justice (2012) 24 *Yale Journal of Law and the Humanities* 397

<sup>7</sup> Michael King et al, *Non-Adversarial Justice* (The Federation Press, 2009) 10-11.

<sup>8</sup> Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice*, (2009) 19.

<sup>9</sup> Access to Justice Advisory Committee, *ACCESS TO JUSTICE: AN ACTION PLAN* (Commonwealth of Australia, 1994) at 279 and 300.; ADR refers to various non-court processes used for resolution of disputes and, more particularly, non-determinative processes such as mediation. The former National Alternative Dispute Resolution Advisory Council (NADRAC) distinguished between facilitative, determinative, and advisory processes of dispute resolution. See *Alternative Dispute Resolution*, AUSTRALIAN GOVERNMENT ATTORNEY-GENERAL'S DEPARTMENT, 5, available at <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx> (last visited May 20, 2014).

<sup>10</sup> Id 278. In particular 'ADR can make a very positive contribution to access to justice because it offers, in its various forms, an inexpensive, informal and speedy means of resolving disputes ... the outcomes are those which the parties themselves have decided and are not imposed on them'.

<sup>11</sup> Australia has a federal system of government: the Commonwealth Parliament (based in Canberra), and a separate parliament in each of the seven states and territories. The *Commonwealth of Australia Act, 1900* and state constitutions, for example the *Constitution Act 1975* (Vic) (Austl.), set out each parliament's respective powers.

<sup>12</sup> *Civil Dispute Resolution Act 2011* (Cth); *Civil Procedure Act 2010* (Vic).

proceedings.<sup>13</sup> Similarly, the purpose of the *Civil Procedure Act 2010* (Vic) was to ‘facilitate the just, efficient, timely and cost- effective resolution of the real issues in dispute’.<sup>14</sup>

This policy and legislative reform is couched in aspirations to improve access to justice.<sup>15</sup> In addition to the private practice of mediation, the process is now being used in relation to family disputes, consumer and credit finance matters, tenancy, and majority of small claims before courts and tribunals at all levels.<sup>16</sup> Courts and tribunals may require parties to use ADR processes as a result of a court order or as a condition for accessing the courts. Court-annexed dispute resolution schemes dominate the dispute resolution landscape.<sup>17</sup> ADR occurs within the civil justice system with a focus, at the federal level, on accessibility, appropriateness, equity, efficiency and effectiveness with the overall aim of ‘maintaining and supporting the rule of law.’<sup>18</sup>

Most recently, the Australian Productivity Commission’s Draft Report on *Access to Justice Arrangements*<sup>19</sup> also endorsed further development of alternative dispute resolution processes within the civil justice system.<sup>20</sup>

*Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.*

The Commission stated that while ADR has proved effective in some circumstances, it is not an appropriate mechanism for resolving all disputes and its use must be accompanied by safeguards that allow for litigation if settlement cannot be reached.<sup>21</sup>

As noted by the Productivity Commission, “[c]ivil disputes are relatively common”<sup>22</sup>. The Law Australia Wide survey of legal need, undertaken by the Law and Justice Foundation in 2008, found close to half of respondents experienced one or more civil legal problems (including family law matters) over a 12 month period. The most prevalent problems related to consumer matters, housing and dealings with government. By comparison, around 15 per cent of respondents experienced a criminal problem.<sup>23</sup>

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<sup>13</sup> Ibid.

<sup>14</sup> *Civil Procedure Act 2010* (Vic) s 7(1).

<sup>15</sup> In 2009 Federal Attorney-General Robert McClelland stated access to justice is ‘central to the rule of law and integral to the enjoyment of basic human rights. It is an essential precondition to social inclusion and a critical element of a well-functioning democracy’. See Access to Justice Taskforce, Attorney General’s Department (Cth), above n 5 ix.

<sup>16</sup> National Alternative Dispute Resolution Council, MAINTAINING AND ENHANCING THE INTEGRITY OF ADR PROCESSES: FROM PRINCIPLES TO PRACTICE THROUGH PEOPLE February 2011 at 23.

<sup>17</sup> David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials*, Thomson Reuters, 2009); Arie Frieberg, ‘Non-adversarial Approaches to Criminal Justice’ (2007) 16(4) *Journal of Judicial Administration*, 205.

<sup>18</sup> Access to Justice Taskforce, Attorney General’s Department (Cth), above n **Error! Bookmark not defined.**, 62-63.

<sup>19</sup> Productivity Commission 2014, *Access to Justice Arrangements*, Draft Report, Canberra.

<sup>20</sup> Draft Recommendation 8.1 IBID

<sup>21</sup> Productivity Commission p 5

<sup>22</sup> Productivity Commission p 5

<sup>23</sup> Christine Coumeralous et al, Law and Justice Foundation, *Legal Australia-Wide Survey: Legal Need in Australia Law* (2012)

Although a stated aim for the increase in the use and institutionalisation of ADR is to address systemic issues within the civil justice system, the connection between increasing ADR processes and improved access to justice is debatable.<sup>24</sup> Hyman & Love argue that 'justice seeking' is a central component of mediation and the role of the mediator is to enhance justice and avoid injustice, while honouring the primacy of the parties making their own decisions. On the other hand, Bogdanoski argues that the mediator should do more to enhance party self-determination:

*'By failing to intervene on behalf of a party who is being disadvantaged by the mediation process, it can be said that the mediator participates in an unjust and exploitative process as the mediator fails to promote that party's self-determination.'*<sup>25</sup>

Some commentators propose parties cannot exercise self-determination if they are uninformed about their legal rights. Nolan-Haley<sup>26</sup> raises this in connection with unrepresented parties and points out that in practice, it may be difficult for them to get legal advice. She argues outcomes of court-connected mediations should be measured by legal standards as parties in a court-connected mediation are entitled to expect 'equivalency justice', which she maintains has both procedural and substantive components.<sup>27</sup> Similarly, Maute contends mediators should refuse to finalise an agreement where it 'is so unfair that it would be a miscarriage of justice, or where the mediator believes it would not receive court approval.'<sup>28</sup>

The responses to these sorts of criticisms often focus on the extent to which mediators should intervene to ensure a fair settlement. Some of the responses suggested are: more emphasis on intake and screening in recognition that some disputes are not suitable for mediation; rethinking how neutrality works in practice; and finally the expansion of ethical standards to incorporate some accountability for fair outcomes.<sup>29</sup>

*'There is no such thing as a level playing field, and as a result, mediators always have an impact, which is not neutral, on the process and the outcome. ... The challenge is to be conscious, transparent, strategic, and wise in using our power to promote an ethical and constructive conflict engagement process.'*<sup>30</sup>

Practitioners, proponents and critics of mediation in Australia are concerned about the justice of mediated outcomes. These concerns include the principle of party autonomy or self-determination and the ability of the mediator to address power imbalance; the principle of neutrality and the appropriateness of the mediator raising concerns about the justness of outcomes; and the provision of relevant information and/or advice to the parties. Other commentators have raised concern over

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<sup>24</sup> For an overview of the debate, Lola Akin Ojelabi, 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' (2012) 31(3) *Civil Justice Quarterly* 318, 320; Mary Anne Noone, 'ADR, Public Interest and Access to Justice' (2011) 37(1) *Monash University Law Review* 57; Mary Anne Noone & Lola Akin Ojelabi, (2014) 'Ensuring Access to Justice in Mediation within the Civil Justice System' 42(2) *Monash University Law Review* (forthcoming).

<sup>25</sup> Bogdanoski, 2009, p.38 – citing Astor & Chinkin, 2002, p.163; Astor, 2000, Part I, p.81; Astor, 2000, Part II, p.145-6; Douglas, S, 2008, p.139

<sup>26</sup> Nolan-Haley, J. M. (1996). "Court mediation and the search for justice through law." *WASHINGTON UNIVERSITY LAW QUARTERLY* 74: 47-102.

<sup>27</sup> *Id* at 51.

<sup>28</sup> Maute, J. L. (1990). "Mediator accountability: responding to fairness concerns." *JOURNAL OF DISPUTE RESOLUTION* 1990: 347-369 at 348

<sup>30</sup> Mayer, 2012, p.860

the use of mandatory mediation especially for unrepresented litigants. Issues include whether unrepresented litigants can make an informed choice about agreements proposed; and whether pressure is exerted on parties in a mediation process to settle. There is, in addition, an issue relating to the extent to which the level of knowledge of mediators of the subject matter of the dispute, and the legal rights of the parties may affect the quality of justice of the outcome.<sup>31</sup> Where the mediator actively promotes settlement without regard to, or inconsistently with, the legal rights of the parties/a party, the outcome of the mediation may be unjust. It is widely accepted that one of mediation's goals is promotion of fairness and mediators generally agree that they are responsible for ensuring procedural fairness. They have a clear duty to the parties to provide a process where all parties are treated with respect and dignity, and given the opportunity to make their views known and potentially reach an agreement without coercion.

Research conducted on the views of Community Legal Centres (CLCs) on ADR as a means of improving access to justice revealed that CLCs are concerned about the fairness of the mediation process and outcomes when disadvantaged parties, who form a core of their clientele, have to use mediation as a mandatory dispute resolution process sometimes without legal representation. The CLC staff voiced concern about how the goals of saving costs, managing the courts' lists may mean that their clients are being directed to ADR processes, including mediation, which have the potential for unfair outcomes, defined as outcomes which ignore their clients legal rights. To ensure that their clients have access to justice in ADR processes, CLCs emphasised the importance of ensuring mediation parties are aware of their rights prior to commencement of the process.<sup>32</sup>

## The Research: Goals, Methodology and Interviewees

The foregoing indicates a range of the issues pertinent to an exploration of the connection between mediation and access to justice. With an increased use of mandatory mediation in the civil justice system, the research discussed in this paper was motivated to discover how those currently working in the mediation responded to aspects of mediations that could negatively impact on access to justice.

International and Australian research has found consistently that disadvantaged members of the community experience more barriers to access to justice than others.<sup>33</sup> The authors were interested to find out how mediators sought to guard against perpetuating disadvantage in mediation and thus improve access to justice. Despite the development of standards and accreditation processes for Australian mediators, there is little material available that provides practical guidance to mediators about how to ensure justice and ethical issues are addressed in mediations. Waldman addressed this void for north American mediators in her book *Mediation Ethics: Cases and Commentaries* where

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<sup>31</sup> Delgado R., Dunn C., Brown P., Lee H. & Hubbert D., 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' (1985) WISCONSIN LAW REVIEW 1359; Gunning I. 'Know justice know peace: Further reflections on justice, equality and impartiality in settlement oriented and transformative mediations' (2004) 5 CARDOZO JOURNAL OF CONFLICT RESOLUTION 87; Gunning I "Diversity Issues in Mediation: Controlling Negative Cultural Myths, (1995) JOURNAL OF DISPUTE RESOLUTION 55

<sup>32</sup> Akin Ojelabi, Lola, "Community Legal Centres' Views on ADR as a Means of Improving Access to Justice – Part I" *Australasian Dispute Resolution Journal*, Volume 22/2 2011, 111 at 113-115.

<sup>33</sup> Christine Coumervalous et al, Law and Justice Foundation, *Legal Australia-Wide Survey: Legal Need in Australia Law* (2012) 5-6, 16; Pascoe Pleasence et al, Legal Services Research Centre, *Causes of Action: Civil Law and Social Justice* (Legal Services Research Centre, 2<sup>nd</sup> ed, 2006) 4; Alexy Buck et al, 'Social Exclusion and Civil Law: Experience of Civil justice Problems among Vulnerable Groups' (2005) 39 (3) *Social Policy and Administration* 302.

she developed case studies and sought commentary from mediation specialists.<sup>34</sup> Our project draws on Waldman's approach and seeks out the views of Australian mediation practitioners in order to develop contextualised guides to ethical and practical dilemmas.

The semi structured interviews in this research were centred around five hypothetical scenarios ( see summaries in Appendix)<sup>35</sup> that raised issues of party awareness of legal rights, confidentiality, cultural sensitivity, conflicts of interest, party capacity, reporting of systemic misbehaviour and lawyer conduct. The interviewees were asked to identify potential ethical and practical dilemmas contained in the scenarios; how they would respond? What strategies and safeguards would they use to satisfy your ethical responsibilities as a mediator? And are there any factors that would make them decide to end the mediation?

Twenty-one (21) experts and experienced mediators, including practitioners and practising academics, lawyers and non-lawyers were interviewed.<sup>36</sup> All interviewees are accredited mediators under the National Mediator Accreditation System (NMAS)<sup>37</sup>. In this paper we do not focus on responses to a particular scenario, instead we draw out the implications of the responses for provision of legal assistance services. In particular, we discuss strategies identified as critical to improving access to justice for parties in mediation: having an intake process and ensuring that parties make informed decisions.

## Overview of Research findings

Twenty-one mediators were interviewed; 19 described themselves as facilitative mediators, while two were transformative mediators.<sup>38</sup> Among the facilitative mediators, seven said they were flexible in their process, adapting the process to suit the needs of the parties, and bringing in elements of transformative or narrative mediation as needed. In their responses to the scenarios there were some significant commonalities as well as key differences. All the interviewees were of the view that a proper Intake process plays a critical role in mediation. Intake is an opportunity to assess whether the matter is suitable for mediation, as well as assessing whether the parties have particular needs, e.g. they may need an advocate or support person. It is also a chance to encourage the parties to obtain information or advice before the mediation, and to discuss who should attend the mediation and what their roles are. Second, although party self-determination was seen as an

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<sup>34</sup> Waldman,

<sup>35</sup> Copies of scenarios available from authors.

<sup>36</sup> Interviews were semi-structured. The interviews were transcribed and responses thematically analysed using NVIVO software see [http://www.qsrinternational.com/products\\_nvivo.aspx](http://www.qsrinternational.com/products_nvivo.aspx)

<sup>37</sup> The NMAS is a voluntary industry system under which organisations qualify as Recognised Mediator Accreditation Bodies (RMABs) that may accredit mediators. For more detail see <http://www.msb.org.au/mediator-standards/national-mediator-accreditation-system-nmas> accessed January 2014.

<sup>38</sup> There are four main models of mediation: facilitative, settlement, transformative, and evaluative. The NMAS, endorses a facilitative model. "In facilitative mediation, the mediator conducts the mediation along strict procedural lines in order to define problems comprehensively, focus on parties' needs and interests, and attempt to develop creative solutions that the parties can apply to the problem. In transformative mediation, the mediator assists parties to deal with the underlying causes of their conflict, with a view to the parties engaging in dialogue and being able to 'transform' the way they relate to each other as a basis for resolving the dispute. In evaluative mediation, the mediator guides and advises the parties on the basis of his or her expertise, with a view to their reaching a settlement which accords with their legal rights and obligations, industry norms, or other objective social standards. In settlement mediation, the mediator encourages the parties to reach a point of compromise somewhere between their positional claims through various forms of persuasion, doubt creation, and pressure, without any significant emphasis on the process of decision-making." LAURENCE BOULLE & NADJA ALEXANDER, *MEDIATION SKILLS AND TECHNIQUES* (2d ed. 2012). at 15.

important element of mediation, informed decision-making was considered critical to just outcomes. Parties need to be fully informed in order to participate and make a decision about settlement. This may include receiving legal or financial advice, or even counselling.

Furthermore, all interviewees were of the view that the mediator's role is to help the parties get the best outcome they can. To achieve this, the mediator is to help the parties to fully explore their options and understand the consequences of their decisions. Reality testing<sup>39</sup> or asking questions in private sessions was the most significant tool used by the mediators in ensuring parties were making an informed decision. It was clear that the sorts of questions the mediators would ask and the degree to which they would 'push' particular parties was informed to a certain extent by a sense of fairness, as well as other factors such as whether they had a legal background. Mediators should pay particular attention to significant power imbalances and continue to do so throughout the mediation as this can affect a party's ability to make an autonomous decisions.

While there was agreement amongst the interviewees on the need for parties to make informed decisions, and on the fact that the mediator had some responsibilities towards this, there were differences on the extent to which a mediator should intervene and the type of information a mediator should provide to the parties. A minority of mediators were willing to give parties information of a general nature, including publicly available information about other cases or contact information for organisations that may be able to help them.

A minority of the mediators felt responsible for the justice of the outcome. However, if mediators believed that the party had fully thought through the consequences of their decision, they were less likely to deviate from the principle of party self-determination and withdraw from or terminate the mediation due to concerns about substantive justice. Similarly if mediators saw one party as being too vulnerable or the power imbalance too great, such as to lead to an unconscionable agreement, they were more likely to withdraw or terminate the mediation. However, they tended to describe this as being an issue of procedural fairness rather than substantive fairness.

The varying responses highlights the competing values in mediation, for example, between party self-determination and fairness, and informed decision-making versus ethical justification for the mediator to provide information to parties for the purpose of improving their capacity to make informed-decisions.

### **Underlying values of mediation**

Interviewees were asked what they considered to be the underlying values of mediation. The responses showed some overlap as well as differences between their views and values articulated by mediation bodies.

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<sup>39</sup> Reality testing involves the mediator putting a series of questions to the parties in order to test the veracity of options generated and usually occurs during private sessions. TANIA SOURDIN, *ALTERNATIVE DISPUTE RESOLUTION* 82 (2nd ed. 2005) p 239

The table below represents the values expressed:

<b>Value</b>	<b>How many said it</b>
<ul style="list-style-type: none"> <li>Party self-determination or empowerment – parties have a say in the outcome / control the outcome / party autonomy over decision-making</li> </ul>	12 (12)
<ul style="list-style-type: none"> <li>Parties participate in an informed way – make informed choices / equal access to information</li> </ul>	5 (5)
<ul style="list-style-type: none"> <li>Equal opportunity to participate / opportunity to speak and be respected / letting parties have their say (like a day in court)</li> <li>An enabling process that takes into account parties' capacities</li> </ul>	4 1 (5)
<ul style="list-style-type: none"> <li>Respect and dignity / mutual concern for parties / communitarian values – acceptance of difference; inclusivity, respect, kindness, consideration etc</li> <li>The process should do no harm</li> </ul>	9 1 (10)
<ul style="list-style-type: none"> <li>Fairness</li> <li>Fair from parties' point of view – both process and outcome</li> <li>Procedural fairness</li> <li>Sense of justice</li> <li>Procedural justice – process that meets emotional and psychological needs as well as substantive needs; having voice; being validated</li> <li>Justice – holistic approach in terms of people's honour, relationships, integrity, transparency</li> </ul>	1 1 1 1 1 1 (6)
<ul style="list-style-type: none"> <li>Peacemaking / managing conflict to generate understanding and empathy / compassion for people in conflict / non adversarial</li> <li>Open, safe and sharing environment</li> <li>Working with parties towards a resolution</li> <li>Creating hope – how to manage two laws in respectful way</li> </ul>	4 1 1 1 (7)
<p>Mediator qualities:</p> <ul style="list-style-type: none"> <li>Leadership</li> <li>Stubbornness, persistence</li> <li>Impartial third party – act fairly between the parties / don't advantage one over the other, don't impose own views</li> <li>Mediator integrity</li> <li>Mediator honesty about their own biases / honest and transparent about potential conflicts of interest and role as mediator</li> </ul>	1 1 2 1 2 (7)
<ul style="list-style-type: none"> <li>Confidentiality</li> </ul>	3 (3)
<ul style="list-style-type: none"> <li>Parties come in good faith</li> </ul>	1 (1)
<ul style="list-style-type: none"> <li>Sustainability of agreements</li> <li>Being realistic about what's workable – not going for settlement at all costs</li> <li>Having a conversation – not necessarily about settlement</li> </ul>	1 1 1 (3)

Mediators' responses to scenarios were to a large extent dependent on the weight placed on certain values over others, and what strategies they would employ to ensure that mediation improved access to justice for parties. As stated above, mediators were consistent in their view of the intake process as a way of ensuring the justice quality of the mediation.

### The intake process

The intake process or initial assessment was identified by most interviewees as a key factor in quality and, in particular, justice quality, in mediation practice.<sup>40</sup> Objectives of the intake process include determination of appropriateness of the dispute for mediation, assisting parties to prepare, provision of information about roles in mediation, checking whether exchange of information is required, and settlement of procedural issues.

Interviewees agreed a proper intake process plays a critical role in mediation. Most interviewees stated they would have avoided the specific challenges raised in the scenarios by conducting a thorough intake process. Intake is an opportunity to assess whether the matter is suitable for mediation, as well as assessing whether the parties have particular needs, e.g. they may need an advocate or support person. It is also a chance to encourage the parties to obtain information or advice before the mediation, and to discuss who should attend the mediation and what their roles are. The interviewees contended that a good and thorough intake process could avoid the range of ethical dilemmas contained in the scenarios.

*I think the significance and importance really of intake has been overlooked. And I think particularly with a centre like ours, none of these would have got to mediation in the way that they're being presented to us in these scenarios. We would have done a lot more work with the parties to ensure that they're coming fully informed and in a position really to make some decisions and to participate on a more equal footing. I think a lot of these scenarios one of the participants is disadvantaged either through lack of knowledge or through lack of support.*

Despite the agreed importance of the intake process to ensuring that mediation does not perpetuate disadvantage, intake processes vary considerably between organisations and mediators. There are no standard criteria on how to conduct intake<sup>41</sup> although the National Mediator Practice Standards provide the 'mediator will ensure that the interviewees have been provided with an explanation of the process and have had an opportunity to reach agreement about the way in which the process is to be conducted'.<sup>42</sup> The Standards are not prescriptive in relation to intake.<sup>43</sup>

*That would have come out in the private session I have in the beginning of the mediation, which is even better because then I can say well you haven't had any legal advice. And I can be up front because we do it at DSCV in our intake and assessment, we say before you come to the mediation gather all your info, get some legal advice and then call us back and we'll have another chat about mediation, and whether it's the process or you. So the financial*

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<sup>40</sup> This has been reinforced in recent evaluations of mediations in Victorian Magistrates Courts: Wallace & Lauritsen, COMPULSORY COURT-ANNEXED MEDIATION IN THE MAGISTRATES COURT OF VICTORIA – CRUCIAL ELEMENTS FOR SUCCESSFUL PROGRAMS 2010 para 38

<sup>41</sup> National Mediator Practice Standards, above n **Error! Bookmark not defined.** r 3(1).

<sup>42</sup> Ibid r 3(2).

<sup>43</sup> Tania Sourdin, *Alternative Dispute Resolution*, (Thomson Reuters, 4<sup>th</sup> ed, 2012) 215.

*counsellor and solicitor can say I advise you to do this, that was wrong within the law = I can't say that, but other people can. An the Financial counsellor and solicitor might say to Frank well actually the contract was legal and this was legal and if you went to court you'll probably have to, so you're better off mediating.*

Although the Dispute Settlement Centre of Victoria (DSCV) has a very detailed intake process for every case this is not uniform across mediation providers. The Dispute Assessment Officers are required to assess the behaviour of parties to determine the balance of power and suitability of mediation.<sup>44</sup> Generally the intake process is regarded by mediation service providers as an information gathering and assessment exercise. Assessment or intake officers are expected to identify issues that may lead to unsuitability of the mediation process or issues that mediators are required to address in mediation. Where required, referral is provided, but intake officers (who may also be the mediator) are not expected to give advice during the process although some do.

In a related study, mediators commented:

*At intake you might advise somebody of the existence of social security payments or worker's compensation but it is not the general part of the mediator's job – Principal Mediator*

*... the key part to addressing disadvantage in mediation is doing an initial assessment and preparing the parties properly for the mediations before you start. I have a feeling many mediations are entered into without proper intake procedure and preparation of the parties. If that is not done you cannot identify it and you cannot address it and you will go into a mediation and find they are either both disadvantaged or one is disadvantaged against the other. In private mediations I always do an intake to establish those things – Barrister/Mediator<sup>45</sup>*

Interviewees were in agreement that disadvantage results in gross power imbalance and that this can limit the ability of a disadvantaged party to use or engage in the mediation process effectively. Without measures to address disadvantage, the outcome of the mediation process may be unjust. In order to identify and address disadvantage in mediation practice, several processes are used by mediators to ensure that disadvantages are identified. For example, mediators ask parties a series of questions in the intake process for the purpose of identifying, among other things, any disadvantage or other issues which may necessitate adjustments to the process, provision of information or a recommendation to the party affected to seek legal advice. Where it is in the power of the mediator or the organisation to do so, referrals are provided or support sought for the parties. However, the quality of intake may vary across organisations and/or practitioners and as a result disadvantage may not be uniformly identified or addressed. This can lead to outcomes that are unjust for parties.<sup>46</sup>

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<sup>44</sup> Noone M.A. & Akin Ojelabi, L., (2013) (2013) *Justice Quality and Accountability in Mediation Practice: a Report* La Trobe University Melbourne Australia page 31

<sup>45</sup> Noone M.A. & Akin Ojelabi, L., (2013) (2013) *Justice Quality and Accountability in Mediation Practice: a Report* La Trobe University Melbourne Australia page 32

<sup>46</sup> Noone M.A. & Akin Ojelabi, L., (2013) (2013) *Justice Quality and Accountability in Mediation Practice: a Report* La Trobe University Melbourne Australia page 43

## Informed decision making

Interviewees viewed informed decision-making as crucial element of self-determination. Parties need to be fully informed in order to participate and make a decision about settlement. This includes having access to legal advice or financial advice.

*I think it's justice in access to information and options. So I might disagree with the outcome, but I would be comfortable with the outcome as long as I felt that the interviewees came to that outcome with all the information available to them. And not that they came to that decision because they felt that was the only outcome available to them.*

*Under the National Mediation Standards I can't give advice, and the mediator's hand must not be seen in any agreement, but I do think it's absolutely my responsibility to ensure that people have had an opportunity to be informed.*

In a consumer scenario where one party had received no advice, the interviewees were willing to adjourn the mediation to give him time to get legal advice. They all felt a responsibility to raise the issue with the party and would actively encourage him to go away and get advice. The extent of information they would give a party varied. Some interviewees would give specific details of agencies he could approach; some would only give him general information about the availability of free legal services and consumer organisations. One interviewee said she would give him information about the legal system, and another said he would be willing to inform him as a general statement that sometimes people who sign contracts can get out of them on the basis of their lack of information and advice before signing. Both drew the distinction between giving this kind of information (objective), and giving advice which is seen as inappropriate. Two other interviewees said they would give advice on negotiating strategy and on process. This distinction between information and advice is often unclear and the responses indicate variability in understanding amongst mediators.

It is clear, whether or not justice quality is ensured depends on a number of factors including robustness of intake processes, the skills, knowledge and experience of the mediator and the quality of support available to parties in mediation.<sup>47</sup> However ready access to legal information and advice is not available.

## Legal assistance in civil law and mediation

As the Productivity Commission comments:

*Civil law matters are the poor cousin in the legal assistance family. Australia's most disadvantaged people are particularly vulnerable to civil law problems and adverse consequences resulting from the escalation of such disputes<sup>48</sup>.*

In Legal Aid Commissions (the primary provider of legal assistance in Australia), more than 60 per cent of legal aid approvals in 2012-13 were for crime matters. In stark contrast only 3 per cent of aid granted was for civil matters compared with 34 per cent for family matters, including family

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<sup>47</sup> Noone M.A. & Akin Ojelabi, L., (2014) 'Ensuring Access to Justice in Mediation within the Civil Justice System' 42(2) *Monash University Law Review* (forthcoming)

<sup>48</sup> Productivity Commission p 609

dispute resolution (FDR) services<sup>49</sup>. For those with civil law problems, the main source of assistance are Community Legal Centres (CLCs). In 2011-12, around 60 per cent of clients visited CLCs for civil matters, 33 per cent for family matters, and 8 per cent for criminal matters.<sup>50</sup>

In recent submissions to the Productivity Commission, both National Legal Aid<sup>51</sup> and the National Association of Community Legal Centres<sup>52</sup> indicated they are supportive of ADR as a way to avoid or have early resolution of civil disputes, where this is appropriate for the people and situation involved. They note it is important the parties to mediation are supported, as necessary, to understand the legal issues involved and the consequences of agreements they make as part of ADR.

In the experience of legal assistance providers there is not necessarily equity of access to avenues of civil dispute resolution for many individuals. The capacity of an individual to seek justice through any number of forums will vary, for example, according to their level of literacy, understanding of the English language, age or level of education.<sup>53</sup> Legal assistant providers see mediation is only a 'safe' option if a party has access to free legal advice and assistance.

The NACLCL submission contains examples of injustices occurring because literacy and language barriers were not considered before or during the ADR process or the process did not cater for the needs of people with disability.<sup>54</sup> Legal assistant providers recognise that mediation can promote access to justice on the condition that parties have access to legal assistance before, and sometimes during, the ADR process. They argue:

*[I]f increased reliance on ADR is to provide better access to justice, State and Commonwealth governments must fund legal aid commissions, specialist Aboriginal and Torres Strait Islander legal services and community legal centres to provide assistance of this kind. Increasing use of ADR will also increase public demand for other important support services, such as interpreting services and cross-cultural liaison, and these too must be funded adequately. Targeted funding of this kind is the best way to ensure that ADR delivers substantive access to justice for all Australians.<sup>55</sup>*

These views coincide with the interviewees in our research project who stressed the importance of a good intake process as well as party access to information and advice.

## Conclusion

When examining mediation practice, whether or not access to justice is enhanced for the disadvantaged and justice quality ensured depends on a number of factors including robustness of

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<sup>49</sup> Productivity Commission p 585; Discussion of mediation in this paper does not include family dispute resolution. For details of the services provided by Victoria Legal Aid in the civil justice see latest Annual Report 2012-2013 at <http://ar2013.vla.vic.gov.au/civil-justice-services-facts-and-figures> accessed 5/6/14

<sup>50</sup> Productivity Commission p 586

<sup>51</sup> National Legal Aid (NLA) represents the Directors of each of the eight State and Territory legal aid commissions in Australia. <http://www.nationallegalaid.org/> accessed 5/6/14

<sup>52</sup> <http://www.naclc.org.au/> accessed 5/6/14

<sup>53</sup> National Legal Aid *Submission to the Productivity Commission Inquiry into Access to Justice Arrangements* November 2013 pp25-26

<sup>54</sup> "For example, CLCs in NSW have had instances where they have had to step in to assist parents in child protection matters who have signed up to legally binding agreements that they cannot possibly meet, because they were not provided with free legal advice prior to participating in ADR mechanisms" National Association of Community Legal Centres *Early Intervention Measures and Alternative Dispute Resolution Submission To the Productivity Commission* November 2013 p 7

<sup>55</sup> National Association of Community Legal Centres *Early Intervention Measures and Alternative Dispute Resolution Submission To the Productivity Commission* November 2013 p 13

intake processes, the skills, knowledge and experience of the mediator and the quality of support available to parties in mediation. The content and context of the mediation also has a bearing on the assessment of justice.<sup>56</sup>

If mediation is to be an active agent of improved access to justice, the views of experienced mediators (as detailed in our research) and those in the legal assistance sector (recent submissions) need to be heeded. At a minimum, if mediation is to improve access to justice, it must have proper intake processes and parties must be able to access legal advice and information in order to be able to make informed decisions. Quality mediation requires adequate resourcing both for thorough intake processes and readily available legal information and advice from legal assistance providers. The resource and practical implications of mandating mediation in the civil justice system must be addressed otherwise the barriers faced by the poor and disadvantaged in accessing justice will be perpetuated in the increased use of mediation.

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<sup>56</sup> Noone M.A. & Akin Ojelabi, L., (2014) 'Ensuring Access to Justice in Mediation within the Civil Justice System' *Monash University Law Review* (forthcoming)

APPENDIX A

Scenario 1 is typical of the sorts of consumer matters dealt with by the Victorian Civil and Administrative Tribunal (VCAT). Commonly with these matters one party is an unrepresented consumer, while the other party is quite familiar with consumer law and with VCAT processes. The potential ethical issues for the mediators in this scenario were: Power imbalance; Informed decision-making (awareness of legal rights); Language difficulties; Party autonomy/party values; Substantive fairness; Unrepresented parties; and Public interest versus party autonomy.

Scenario 2 is typical of the sort of sexual harassment case that might be dealt with by the Victorian Civil and Administrative Tribunal (VCAT) under the Victorian *Equal Opportunity Act 2010*. The responses reflect a sometimes uneasy tension between considerations of party autonomy, public interest, the mediator's role to protect parties from feeling bullied, and the primacy of the lawyer/client relationship.

Scenario 3 is a situation where one party at the mediation reveals information that potentially might affect the health of others, although it is not completely clear-cut. Because the chemicals mentioned in the scenario may pose a public health risk the mediator here also has to decide whether they have a responsibility to disclose the information themselves and whether they are allowed to disclose the information. If so, who can they disclose to? The potential ethical issues for the mediators in this scenario were: Conflict of interest; Confidentiality; Misrepresentation; Public interest; and Interests of others who are not in the room.

Scenario 4 is a classic neighbourhood dispute: there are several different issues to be discussed in the mediation, there are family groups on either side who are not in complete agreement between themselves about how it should be resolved, there is a continuing neighbour relationship to be negotiated, and there are strong emotions involved. The potential ethical issues for the mediators in this scenario were: Capacity; Strong emotions; Confidentiality; and Illegal activity/misrepresentation

Scenario 5 is a dispute about an arranged marriage. The situation is very much at odds with the dominant values in Australian society, where young women are free to choose for themselves who they want to marry. Is this a situation where a mediator's own personal values collide with mediation principles such as impartiality and party self-determination? The potential ethical issues for the mediators in this scenario were: Cultural differences; Power imbalance; Informed decision-making (awareness of legal rights) ; Substantive fairness; and Mediator's personal values

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Access to Justice and Access to Law : the changing Role of Lawyers

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## 1. Background

This paper draws on work in progress with John Eekelaar on the changing delivery of family justice . We are carrying out a small qualitative research project which includes content analysis of 40 solicitor websites drawn from the membership of Resolution, 40 internet divorce advice services accessed via Google, and interviews and observations over the last 12 months with 14 solicitors working mainly as lawyers but also trained and in some cases practising as mediators , and 10 mediators 8 of whom who were not lawyers and 2 who had trained as lawyers but were practising only as mediators . We are more than grateful to these individuals who offered to help us understand how the current changes are working in practice. Even the description of this small purposive sample indicates the complexity of the current state of play in the provision of divorce related services.... it is no longer possible to simply compare the work of solicitors and mediators . Solicitors are often trained as mediators, some do a little mediation and would like to do more but are not finding it easy to find participants. They may offer the service as an addition to their portfolio, or offer sessions in another legal practice to avoid conflict of interest . They are also linked with mediation services to provide additional items of work not available in mediation including negotiation with third parties, such as mortgage companies and banks, as well as preparing consent orders. The non lawyer mediators may work in a not for profit service sometimes alongside other services such as child counselling, they may work from home, or they may offer sessions in a legal practice. The two legally trained but not practising mediators were offering mediation in a law office.

I have also sat with lawyers working as a lawyer in the morning and a mediator in the afternoon, sometimes in the same office. One gentleman was famous for keeping two ties in the office, one for each role.

This study builds on our earlier small empirical studies into the work of the legal profession family solicitors (see “ Family Lawyers: the divorce work of family solicitors” with Sarah Beinart ,Hart, Oxford, 2000) the family bar ( “Family Law Advocacy: How Barristers help victims of family failure”, Hart, Oxford, 2009) and the judiciary in the lower courts (“ Family Justice : the work of family judges in uncertain times” ,Hart, Oxford, 2014) . The common theme has been an attempt to describe what people are doing, why and how. All the studies are limited by the constraints of small scale qualitative design. We cannot say how the world is, we leave this to Professor Pleasence and colleagues to consider. We can do no more than describe and comment on what we have observed. But at a time of such rapid change, we felt that we should try to act quickly to produce at least a sketch of the direction of change.

## 2. The changing role of family lawyers

This paper will comment on the response of the solicitors to the combined pressures of the economic crisis and the removal of almost all private family work from the scope of legal aid through the Legal Aid Punishment and Sentencing of Offenders Act which came into effect in 2013. Further changes , of course, follow the passing of the Children and Families Act 2014, in particular the requirement for applicants to the family court ( with some limited exceptions ) to attend a Mediation Information and Assessment Meeting or MIAM to be told about mediation and be assessed for suitability for the process and for entitlement to public funding for mediation . (A fuller account is in press with Hart/Bloomsbury as chapter 5 in the forthcoming volume on the Transformation of the Legal Profession from the Cepler Centre in Birmingham edited by Hilary Sommerlad).

### 2.1 Websites and services offered

What are family solicitors offering on their websites? There are some highly sophisticated offerings, complete with videos. The large sometimes multinational firms offer a range of additions to the traditional menu, including advocacy, arbitration, early neutral evaluation , forensic accountancy, tax management, as well as in house ADR including mediations and collaborative law ( light and not light)and help with funding the process. At the other end of the scale there are sole practitioners working from home, sometimes in groups to spread the risk of setting a fixed price for a package of work and to be able to cover a wide range of specialist input, offering non adversarial family law with a holistic approach and even life coaching .

On interview, it was clear that demand for “unbundling”, or doing specific tasks rather than total client care,( or “ the full legal “) is now coming not only from low income clients seeking to cut costs, but is also being found among high income clients who are used to accessing information via the internet and want to keep control of their case, turning to the professional for drafting or procedural technicalities. There are parallels in access to medical information. Some solicitors have expressed concerns to us about the difficulty of handling a case when “you don’t know what you don’t know . “.

In interview with high income client practices , international work was frequently referred to as the growth area. While in low income practice we saw a great deal of interest in making clever use of IT to cut down the need for administrative support. There are apps for making appointments, Dragon Voice for dictating notes to a smart phone which can then be printed remotely or emailed, free introductory sessions followed by packages of work are carefully designed to make it possible for former legal aid clients or those close to former eligibility to be helped.

With regard to charging, payment can now be taken by hand held card machine at interview, with no further billing required. The small firms which were doing well had other kinds of work, as well as family work, conveyancing being the traditional partner . Those who had cut their costs and fees to a minimum seemed to be doing better than those who had tried to cope by moving up market in fees and service. For those offering mediation or legal help, the fee per hour remained the same, the difference for the lawyer being a higher rate of no shows for mediation appointments, higher than for former legal aid legal clients as there are two parties .The rate was sometimes quoted as up to 40%. Making good use of the time freed up was important, and made working in the office or at home preferable to session outside. Mediation Services had similar difficulty and would sometimes charge in advance and take a cancellation fee . But whatever the service the first point of contact remained important, and a good telephone manner in encouraging and supporting continuing participation was valued.

New forms of service are emerging, the best known being Cooperative Legal Services , which is marked out by the explicitly modular approach. If the divorce pack offered with document checking is not enough, the client can move easily through a progression of packages with varying degrees of lawyer input and additional help paid per item for specific issues. The quality of legal advisers is high.... when Christina Blacklaws ( now an independent consultant) came to Oxford and spoke to the law students about the Coop vision their enthusiasm was enormous. It is to be hoped that the current issues facing the Coop as a whole will not threaten this impressive service. The London office currently contains 40 solicitors who currently earn between £150 and £175 per hour and paralegals.

## 2.2 The latest addition to the market: the web based services.

We are grateful to Roger Smith and Alan Paterson who reported their findings in “ Face to Face Legal Services and their Alternatives ” earlier this year. Earlier last year Family Law published a summary of the results of a YouGov survey on use of these services pre LASPO, see Family Law August 2013.

We simply googled on the terms DIY Divorce, Divorce Advice, Divorce Forms and Papers, and Online Divorce in May last year (and will repeat the process shortly ). Excluding current media stories, we identified 41 entries which we grouped into 6 categories. There were 9 solicitors advertising their services ( including CLS) . There were 4 independent advice services including CAB, Mumsnet and Netmums, and Money Advice Service. 2 government websites offered forms . 3 non legal practitioners offered counselling, and 1 offered mediation. 3 commercial services appeared, including WH Smith offering a rather good pack . And finally we found a group of 6 which we categorised as New Specialist Providers. The two most visible were Quickie Divorce and Divorce Online . What is on offer? How can the consumer make a rational choice and feel confident in the quality of what is on offer? How are lawyers involved ? Grand claims are made for the number of users, for example Quickie Divorce claims to have been used by 15,000 people in 2012, which

amounts to 18% of all divorces in England and Wales for that period. Divorce On Line appears with the tag “official” and a phone number, saying “get started on your divorce today!” But beside this appears a notice from Wikivorce, a not for profit well regarded source of advice, saying “Online divorce? Are you sure? Why risk it? Our solicitor-managed divorce costs less than a divorce on line !” We followed up the online phone numbers where given , and attempted to find out what exactly was meant by lawyer supported divorce, or solicitor managed divorce or lawyer assisted mediation as offered in t he various packages. Given that the term lawyer has no precise meaning in this jurisdiction , unless the lawyer is accredited to the profession of solicitor or barrister, and that the range of reserved activities which are restricted to a legal professional is so limited, it may be hard for a potential user to discover what is being offered. For example, there is no requirement for a lawyer to be accredited to offer legal advice, or help prepare documents . But where there is no accreditation, there is no regulation or access to redress for bad advice. On calling and asking “Are you lawyers?” The replies ranged from a straightforward “no, we just handle documents for you” to “ Yes... no... we are lawyers but not working as lawyers” to “ we are legal executives, trained to do this work “. The most interesting response came from Wikivorce, who replied that a firm of lawyers do the legal work for them. In a later part of the study we spoke to this firm who do indeed handle the legal supervision of uncontested cases and offer to take on the additional work which can arise in a number of cases where difficulties emerge during the course of the case. Charges are reasonable , and clear indications of the total cost are given. It seems an effective collaboration between a skilled not for profit website , packaged legal work for non contentious work simply managing the process of divorce, and access to skilled professional legal help where needed. ( Wikivorce Package prices in May last year were £179 divorce only, £139 financial settlement and £279 for both managed by a solicitor).

### 3. Law and Mediation

Finally , when solicitors are working as lawyers and as mediators, without the change of tie, how would the observer spot the difference? And within mediation, how would an observer spot the difference between a mediator with or without legal training ?

A lawyer traditionally has a supportive relationship with the individual client , even when the limits of the work to be done are defined by unbundling or a package. This will begin by giving the client an idea of where he stands, ... what the possible outcomes might be... and offering a reality check including the cost of legal services as management of change or as a contest. The lawyer will negotiate with the client to bring them into a position which a court would find acceptable while working hard to avoid any contested court hearing . In a limited service matter, the lawyer will brief the client on how to approach third parties or a court to best effect. The lawyer will also often have a cooperative and ongoing relationship with any lawyer for the other party . On financial matters the lawyer will deal with matters related to third parties, particularly banks and mortgage companies . The aim will be a fair and informed settlement which looks to the future and seeks to avoid the development of future disputes , as well as dealing with immediate issues. Charges will be by the package or for time spent and items of service. Face to face meetings are less frequent, and shorter ( 30 minutes) than in mediation ( 90 minutes) . Email is widely used. Billing will be discussed in advance, regular, predictable, and the method ranges from Pay As You Go schemes with scale rates

linked to income, to loans arranged to the client but handled by the solicitor who draws down monthly as required. Rates per hour are usually the same for lawyering or mediating, but mediation sessions tend to last longer ( 90 minutes) and 2 clients pay rather than one. Lawyering tends to involve more complex recording and document handling and work with third parties . Hourly rates vary widely , but nb an advertisement of the Solicitors Gazette from a locum family solicitor offering services at £25 an hour.

A lawyer mediating will see both parties together and will not have contact with third parties . Appointments can be handled directly by the solicitor-mediator, but the work of encouraging the other party to participate, and arranging meetings between two reluctant parties is often handled by a sympathetic receptionist. But there will be no follow up calls to the sol-med from anxious participants , as there would be with a legal client . Recording in mediation is largely limited to summarising what has been covered in a session , getting this approved by the participant, and also setting the agenda for the next meeting and identifying the preparation which the participants need to make , eg collecting financial information. During the session information from both parties is usually accessible, though it is not independently verified. For example it is good practice in mediation to require bank statements for a 3 month period from each party in a financial matter, but there is no power to require disclosure of accounts. Sessions can become emotionally charged and difficult to handle . Lawyer mediators have the advantage of their professional knowledge about managing financial arrangements, and do make suggestions in the meeting about possible outcomes and about how each participant might go about collecting the financial information needed to proceed. There is often acknowledgment of the ways in which the couple's lives may develop, and a need to think about what will happen on remarriage or retirement ( easily interpreted as stirring up trouble, but intended to avoid i t) .Lawyer mediators are able to suggest the questions to be put to third parties such as mortgage companies , and to explain the answers. Although any consent order must be drafted outside the meeting, the lawyer mediators can help substantially with preparation. Any legal information verging on advice given in the session would be covered by the lawyers professional insurance. Solicitor mediators dealing with children matters have the Family Law Act welfare paramountcy principle in their blood stream and make frequent reference to the best interests of the children . Charges range from £120 upwards per hour.

A non lawyer mediator will of course also see both parties, will not engage with third parties, and will charge by the hour . Charges commonly range from £90 to £250, with the possibility of charges of up to £400 an hour for complex financial mediation . Sessions last for usually 90 minutes, and 3 to 5 sessions would be expected. A wide range of practice has been observed, among our very small sample , and I can do no more than raise questions . But great skill in enabling parties to resolve a specific dispute was amply demonstrated. What might be useful to consider in financial matters is the potential value of a longer term perspective, and in children matters of a clear focus on welfare paramountcy when considering a possible set of parenting arrangements. Both these approaches are part of the long term considerations which under pin the practice of family law, which provides a framework for managing changes in family structures, seeking the best possible outcome for children and making the best use of the resources on the table, as well as dealing with specific current disputes.

4. The direction of travel:

We are waiting to see the impact of the Children and Families Act on the take up of mediation by lawyer and non lawyer mediators. Given the determination of the family lawyers to serve the population now excluded from legal aid, and their energy and flexibility in responding to the new post LASPO world, it may be that mediation will gradually move from becoming a stand alone service to being one of a number of services provided mainly by the legal profession.

We are seeing a rapid expansion of consumer choice in divorce services, but this choice is constrained by the availability of resources. We are seeing marketisation , less deference to the professionals, and regulatory machinery struggling to keep pace with developments .

We need to look now for the cheapest and most effective way of helping people through the often painful transition away from marriage or cohabitation while protecting the key third parties.. children and taxpayers.

The current position does not seem ideal.

I will close with a solution from the Basque Country, which admittedly has not been used for some centuries. While at the Onati IISL last week I was told about a highly effective way of getting disputes handled expeditiously and cheaply without limiting access to justice: known as Jumping like Frogs. . it is said that when the Count of Onati sat hearing his subjects presenting their cases before him, he saved a great deal of time ( to go hunting or feasting? ) by requiring each petitioner in turn to stand on a white flagstone and jump on and off the adjacent black flagstone while speaking..... shortness of breath did the trick.It sounds even more effective than the current French policy for acceleration of family justice in court. But Jumping has the benefit of exercise thrown in.... a potentially healthy alternative to MIAMs? Perhaps not, but we may need to be more radical in our policy thinking that we have been for some time.



## **PUBLIC TRUST IN DISPUTE RESOLUTION OUTSIDE OF COURTS: EMPIRICAL LEGITIMACY OF OMBUDSMEN IN EUROPE.**

Naomi Creutzfeldt

### **Abstract**

Attitudes towards the justice system based on theories of procedural justice have been explored extensively in the criminal justice system. This has provided considerable empirical evidence of trust and legitimacy of the analyzed context. Not enough attention has been paid to attitudes towards institutions of the civil justice system (besides the courts). This paper takes a closer look at the theory of procedural justice and poses the question of whether it applies to the alternative dispute resolution (ADR) context. A preliminary conceptual framework is suggested, modeled on the existing body of literature in social psychology and criminology, by which to analyze people's perceptions of ombudsman procedures (ADR).

### **INTRODUCTION**

This exploratory paper presents the core theoretical research puzzle posed at the beginning of my three-year project on impact and legitimacy of ombudsmen in Europe.<sup>1</sup> I am interested in identifying whether the well-established theory of procedural justice applies to the alternative dispute resolution (ADR) context. Therefore, users' perceptions of an ombudsman procedure, as an example of an established ADR model, provide the unit of analysis for my research. Despite the significance of ombudsmen to our constitutional and civil justice landscapes, there is little known about users' perceptions of the fairness of procedures and the significance of these perceptions for levels of public trust and legitimacy in the ombudsman office.

The research is timely, given the current emphasis in government on saving money in the administration of justice – specifically by avoiding the courts and focusing on alternative pathways to increase the effectiveness of public services and policy delivery. EU level requirements for member states to have ADR bodies in place to ensure consumer protection (ADR directive<sup>2</sup> and ODR regulation<sup>3</sup>) are a high priority. Therefore, this study will inform the current debate and help understand different ombudsman systems and their users.

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<sup>2</sup> Directive 2013/11 O.J. 2013 L 165/63 and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) O.J. 2009 L 110/30.

<sup>3</sup> Regulation (EU) 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) O.J. L 165/1.

The growth of interest in ombudsmen within socio-legal studies has matched the growth of the institution of the ombudsman itself. Although ombudsmen have traditionally received much less research attention than the courts or tribunals<sup>4</sup>, important recent work has begun to emerge.<sup>5</sup> However, despite the importance and promise of this work, the question of how procedural justice is perceived by ombudsmen users - and the significance of these perceptions for levels of trust - remains unexplored within diverse political systems and cultural settings. This is a curious omission given, first, the significance of ombudsmen for our legal systems and, second, the attention from socio-legal scholars on other dispute resolution institutions exploring procedural justice in relation to the courts<sup>6</sup> and tribunals<sup>7</sup>. A significant gap, then, exists in relation both to ombudsman research and procedural justice research. This paper provides the theoretical context by which to examine the ombudsman – procedural justice context.

Originally a feature of constitutional accountability systems<sup>8</sup>, ombudsmen are now also firmly part of the private civil justice realm.<sup>9</sup> As such, they perform an important independent complaints-handling function. This positions the ombudsman as a significant alternative dispute resolution pathway, outside of the courts. The rapid expansion of the *ombudsman enterprise*<sup>10</sup> across the public and private sectors (what Harlow and Rawlings have termed *ombudsmania*<sup>11</sup>) has brought with it a blossoming variety of institutional and jurisdictional arrangements, operational styles and decision-making processes. Although this poses some challenges in being able to conceptualize a unified ombudsman institution, it offers distinct advantages for the study of the relationship between decision-making practices on the part of ombudsmen and perceptions of procedural justice and levels of trust on the part of users.

This paper is divided into the following parts: 1) the research puzzle; 2) the theory of procedural justice; 3) legitimacy as an empirical concept; 4) trust in justice; 5) some data on trust and legitimacy; and 6) next steps.

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<sup>4</sup> Halliday, S. and Scott, C. (2010) 'Administrative Justice' in Cane P. and Kritzer, H. (eds) *The Oxford Handbook of Empirical Legal Research* Oxford: Oxford University Press.

<sup>5</sup> Public sector ombudsmen: Hertogh, M. (2001) Coercion, cooperation, and control: Understanding the policy impact of administrative courts and the ombudsman in the Netherlands. *Law Policy* 23, 47–67; Seneviratne, Mary. (2002) *Ombudsmen: Public Services and Administrative Justice*. London: Butterworths LexisNexis; Buck, Trevor, Richard Kirkham, and Brian Thompson. (2010) *The Ombudsman Enterprise and Administrative Justice*. Burlington, VT: Ashgate Pub.; Gill, Chris. "Right First Time: The Role of Ombudsmen in Influencing Administrative Decision-Making." *Journal of Social Welfare and Family Law* 33, no. 2 (June 2011): 181–92.

<sup>6</sup> Tyler, T (2006) *Why People Obey the Law*, Princeton University Press.

<sup>7</sup> Genn, H. Lever, B. & Gray, L. (2006) *Tribunals for Diverse Users* London: Department for Constitutional Affairs.

<sup>8</sup> Seneviratne, Mary. (2002) *Ombudsmen: Public Services and Administrative Justice*. London: Butterworths LexisNexis.

<sup>9</sup> Hodges, C Benoehr, I and Creutzfeldt-Banda, N. (2012) *Consumer ADR in Europe*, Hart Publishing Oxford.

<sup>10</sup> Buck, T. Kirkham, R & Thompson (2010) *The Ombudsman Enterprise and Administrative Justice*, Aldershot Ashgate.

<sup>11</sup> Harlow, C & Rawlings (2009) *Law and Administration*, 3<sup>rd</sup>edn Cambridge Cambridge University Press.

## 1. THE RESEARCH PUZZLE & METHOD

When trying to measure people's perceptions of an ombudsman procedure, fairness and trust are significant indicators. The theory of procedural justice, as described by Tyler and others, is the theoretical starting point for this study. Tyler found empirical evidence for people accepting an adverse outcome of their case if the procedure was experienced as fair. This experience of acceptance contributes to people attributing trust and legitimacy to that institution.

As far as I can tell from my preliminary (secondary) data search, this theory does not completely map onto the ADR setting (public and private sector). The majority of people cannot see the fairness of procedure independently of the received outcome. The outcome typically determines the perception of the procedure.

Why? (I aim to support my theory empirically through the data I will be collecting between September 2014 and March 2015). The following are some initial hypotheses as to why there might be differences in perceptions of an ombudsman model as opposed to the dispute resolution procedures that have, so far, been subject to the procedural justice analysis (courts, police, and tribunals):

- a. *Initial motivation/reason to contact an ombudsman* (user involvement) – for themselves or for the greater good (differences in public / private)?
- b. *Managing expectations* – do users expect too much from an ombudsman? Are those expectations not managed well enough from the beginning?
- c. *Impact on personal life* – what influence does the consequence of the complaint have?
- d. *Duration* – are users willing to wait longer depending on what they are complaining about (ex. telecoms vs council care home)?
- e. *Type of contact/personal treatment* – is a phone call more effective than an email or letter?
- f. *Type of complaint* – are perceptions different depending on the problem complained about?
- g. *Complaint-behavior* – Is there a cultural specific disputing pattern?

To address these hypotheses I developed a survey. It will be distributed to users of public and private ombudsmen in different countries at the same time. The survey is based on concepts of procedural fairness as applied by scholars of procedural justice, with some context specific additions. These will be followed up with in-depth interviews of ombudsmen as well as a representative user group.

The next sections of this paper provide an overview of the theoretical models of procedural justice as well as an attempt to deconstruct the key ingredient of fairness and the by-products - trust and legitimacy - to provide an empirical framework to measure these perceptions in the context of an ADR procedure.

## 2. PROCEDURAL JUSTICE

The theory of procedural justice, in a nutshell, seeks to explain what motivates people to obey the law.<sup>12</sup> This body of literature originates from the field of experimental social psychology investigating the influence of evaluations of how decisions are made. Supplementing concepts from sociology, economics and political science Tyler (1990) produced the widely accepted argument that people comply with the law out of more than just fear of punishment or self-interested motives. Procedural justice theory has been applied to and tested most comprehensively in policing<sup>13</sup>, courts<sup>14</sup> and organizational settings<sup>15</sup>.

The main focus of this work has been to discover why people comply willingly with these authorities and what criteria they use to assess the fairness of a procedure.<sup>16</sup> Compliance is explained by the values of law being incorporated into people's value systems, therefore according law legitimacy. In other words, procedural fairness and how the individual is treated by an authority are essential to its legitimacy. People's values of law are formed not only through their experience with an authority but also through longstanding and conditioned learning.

As such, we all have a concept of a justice system, with the courts and police as a significant part of it. Furthermore, we all have an understanding and acceptance of these institutions as representative of legal authority. This attitude of acceptance and conditioning does not seem to apply to an ombudsman, although the model has been a longstanding part of justice systems around the world. There is generally a low level of awareness and use of the ombudsman system. This raises questions as to where an ombudsman is situated within the value system/legitimacy of the people. Furthermore, does the type of procedure have an impact on people's perceptions and if so, why?<sup>17</sup>

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<sup>12</sup> Jackson, Jonathan and Bradford, Ben and Hough, Mike and Myhill, Andy and Quinton, Paul and Tyler, Tom, Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions (February 5, 2012). *British Journal of Criminology*, Vol. 52, No. 6, pp. 1051-1071, 2012; Tyler, T (2006) *Why people obey the Law*, Princeton University Press.

<sup>13</sup> Tyler, Tom R, and Yuen J Huo. (2002) *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*. New York: Russell Sage Foundation; Jackson, Jonathan, Ben Bradford, Mike Hough, JouniKuha, Sally Stares, Sally Widdop, Rory Fitzgerald, Maria Yordanova, and TodorGalev. *Trust in Justice: Notes on the Development of European Social Indicators*. Rochester, NY: Social Science Research Network, November 30, 2010; Tyler, T. R., & Folger, R. (1980). Distributional and procedural aspects of satisfaction with citizen-police encounters. *Basic and Applied Social Psychology*, 1, 281-292.

<sup>14</sup> Lind, E. A., Kurtz, S., Musante, L., Walker, L., & Thibaut, J. (1980). Procedure and outcome effects on reactions to adjudicated resolution of conflicts of interests. *Journal of Personality and Social Psychology*, 39, 643-653.

<sup>15</sup> Greenberg, J., & Folger, R. (1983). Procedural justice participation and the pair process effect in groups and organizations. In P. B. Paulus (Ed.), *Basic group processes* (pp. 235-256). New York: Springer-Verlag; Hofstede, G. (1980). *Culture's consequences- International differences in work-related values*. Beverly Hills, CA: Sage.

<sup>16</sup> Tyler, Tom R. (1988) "What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures." *Law and Society Review*, 103-35.

<sup>17</sup> Leung, K & Lind, A (1986) Procedural Justice and Culture: Effects of culture, gender, and investigator status on procedural preferences. *Journal of Personality and Social Psychology*, Vol 50, No 6, 1134-1140.

The key concepts of procedural justice, when applied to the ombudsman setting, can help detect the importance of procedural fairness in the context of a procedure that is aimed at settlement. There has been some research applying procedural justice theory to different techniques of ADR.<sup>18</sup> This research found that there are some preferences for the authoritative procedures of adjudication and arbitration over mediation and negotiation.

Why do people sometimes prefer formal over informal procedures? Is this related to the nature of the conflict, the ritual of a formal hearing, or case-specific factors giving rise to judgments of procedural justice? Is procedural justice more important for people who lose their case? Further questions remain about the meaning of procedural fairness for different types of procedures. Is there a difference in the perception of fairness relating to a procedure that is aimed to settle and compromise rather than judge and determine?

## 2.1 Procedural justice research in the dispute resolution setting

In the context of dispute resolution<sup>19</sup>, it is found that litigants' satisfaction with decisions would be influenced by their judgments about the fairness of the dispute resolution process. This was widely supported by subsequent studies in different settings<sup>20</sup>: on legal trial procedures<sup>21</sup>, non-trial procedures<sup>22</sup>, mediation<sup>23</sup>, organizational settings<sup>24</sup>, political<sup>25</sup>, interpersonal<sup>26</sup>, and educational<sup>27</sup>. There is widespread suggestion that those affected by the decisions of third parties in both formal and informal settings react to the procedural justice of the decision-making process at least as much, and often more, than they react to the decision itself.<sup>28</sup>

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<sup>18</sup> See for a summary: Vidmar, N. (1992) Procedural Justice and Alternative Dispute Resolution. *Psychological Science*, Vol. 3, No. 4, pp. 224-228.

<sup>19</sup> Thibaut, J & Walker, L. (1975) *Procedural Justice: A Psychological Analysis*. Lawrence Erlbaum Associates, Inc.

<sup>20</sup> Lind, E. Allan, and P. Christopher Earley. (April 1992) "Procedural Justice and Culture." *International Journal of Psychology* 27, no. 2: 227-42; Lind, E. Allan, and Tom R. Tyler. *The Social Psychology of Procedural Justice*. Springer, 1988.

<sup>21</sup> Lind, E. A., Kurtz, S., Musante, L., Walker, L., & Thibaut, J. (1980). Procedure and outcome effects on reactions to adjudicated resolution of conflicts of interests. *Journal of Personality and Social Psychology*, 39, 643-653.

<sup>22</sup> Casper, J.D., Tyler, T.R. & Fisher, B. (1988). Procedural justice in felony cases. *Law and Society Review*, 22, 483-507.

<sup>23</sup> Lind, E.A., MacCoun, R.J., Ebener, P.A., Felstiner, W.L.F., Hensler, D.R., Resnik, J. & Tyler, T.R. (1990). In the eye of the beholder: Tort litigants' evaluations of civil justice system experiences. *Law and Society Review*, 24, 953 -996.

<sup>24</sup> Greenberg, J. & Tyler, T.R. (1987). Why study procedural justice in organizations? *Social Justice Research*, 1, 127-142. Tyler, T.R. (1986). Procedural justice in organizations. In R. Lewicki, M. Bazerman, and B. Sheppard (Eds.), *Research On Negotiation In Organizations* (Vol. 1). Greenwich, CT: JAI Press, pp. 7-23.

<sup>25</sup> Tyler, T.R. & Caine, A. (1981). The role of distributional and procedural fairness in the endorsement of formal leaders. *Journal of Personality and Social Psychology*, 41, 642-655

<sup>26</sup> Barrett-Howard, E. & Tyler, T.R. (1986). Procedural justice as a criterion in allocation decisions. *Journal of Personality and Social Psychology*, 50, 296-304.

<sup>27</sup> Tyler, T.R. & Caine, A. (1981). The role of distributional and procedural fairness in the endorsement of formal leaders. *Journal of Personality and Social Psychology*, 41, 642-655.

<sup>28</sup> Lind, E.A. & Tyler, T.R. (1988). *The social psychology of procedural justice*. N.Y.: Plenum.; Tyler,

Much of procedural justice research has focused on translating Tyler's model to different settings - groups of people in different regulatory contexts and countries. The model focuses on non-instrumental aspects of procedural justice, in which process fairness and respectful treatment is presented as more important than outcome favorability for improving perceptions of legitimacy and subsequent cooperation with the authority. Some more recent studies in the field of criminal justice and organizational settings propose additions to Tyler's original model (see below).

Following Tyler's model, we can assume that procedural justice will prove important and be applicable to the context of other dispute resolution settings. This means we can assume that if people perceive ombudsman procedures to be fair, this will build legitimacy of the institution. Correspondingly, people are more likely to trust the institution. Several questions arise from this proposition.

Does the model of procedural justice extend to a procedure that is inquisitorial by nature and aims for a settlement as outcome rather than a judgment; a model that is not bound by formal rules, is more flexible and informal?<sup>29</sup> Can the findings from the late 1980s American setting ADR – *'disputants have feelings of control and fairness, perceive the procedures and solutions to have greater legitimacy, and are more likely to comply with the terms of the conflict resolution decision'*<sup>30</sup> - apply to the European model of ADR (ombudsmen)?

The next section presents possible avenues to conceptualize and measure procedural justice in the ombudsman setting. For this purpose the core concept of this approach - that of fairness - has to be deconstructed.

## **2.2 Exploring the meaning of procedural justice in different contexts and settings (How do ombudsman users evaluate a fair procedure, how important is it in relation to the outcome of their case?)**

The objectives are twofold. Firstly, the importance of procedural fairness is tested for an ombudsman decision-making procedure. Does it matter?

Secondly, Tyler *et al*<sup>31</sup> findings about the relationship of procedural fairness and outcome fairness will be put to the test on the ombudsman procedure. Do people really separate judgments about fairness of procedures from the outcomes they receive? Or is the fairness of procedures in ombudsman decision-making always in the shadow of the outcome? If so, why?

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Tom R. (1996) "The Relationship of the Outcome and Procedural Fairness: How Does Knowing the Outcome Influence Judgments about the Procedure?" *Social Justice Research* 9, no. 4: 311-25.

<sup>29</sup> Bercovitch, J & Houston, A. (1984) Toward Another View of Legal Negotiation: The Structure of Problem-Solving" 31 *UCLA Law Review* 754-842.

<sup>31</sup> '...prior knowledge about the outcome does not change the way people define the meaning of the fairness of a procedure.' Tyler, Tom R. (1996) "The Relationship of the Outcome and Procedural Fairness: How Does Knowing the Outcome Influence Judgments about the Procedure?" *Social Justice Research* 9, no. 4: 311-25.

An initial review of secondary data of ombudsmen consumer satisfaction surveys in both private (Ombudsman Services, Legal Ombudsman) and public (Local Government Ombudsman) sectors suggest that there is no clear indication that the outcome is seen independent of the procedure. In some cases, the outcome heavily determines the perception of the procedure.<sup>32</sup>

#### OS<sup>33</sup> 2011 customer satisfaction survey:

*'Key drivers of satisfaction were the overall level of service, aspects of the report's recommendations and comprehensiveness of information. This suggests that the key driver of satisfaction is to receive a fair hearing for the complaint and balanced recommendations for this. However, the actual outcome itself was not key - suggesting respondents are capable of scoring OS: Communications highly where an outcome goes against them and vice versa.'*

*'In 2011 we asked about satisfaction with various aspects of the provisional conclusion report. Satisfaction with the accuracy of contact, the readability and the report's recommendations increased in 2011. The quality of the report's recommendations appears to be a key area in driving satisfaction, regardless of outcome. Again this is driven by the knowledge of Investigation Officers.'*

#### Legal Ombudsman annual report 2012/13:

*'However, detailed analysis of survey results has shown that, as is to be expected, satisfaction levels with elements of our service (including advocacy) are heavily influenced by complainants' satisfaction with the outcome of our investigations.'*<sup>34</sup>

#### Local Government Ombudsman (LGO):

A report on customer satisfaction by IPSOS MORI<sup>35</sup> in 2010 found that the procedure couldn't be separated from the outcome.

*2007: 'The role of the final outcome is also important, but is a driver of dissatisfaction, not delight. In other words, while not getting the desired outcome can lead to dissatisfaction with the service received, getting the expected outcome does not in its own right make a customer delighted. Instead, it is the overall service received from the LGO that results in delighted customers; in particular, it is those who feel they have received a fair and prompt investigation with effective communication who are the happiest with the service received.'*

*2010: '...the complaint outcome undoubtedly colours their perception of the service; those who receive a negative decision from the LGO are unlikely to express satisfaction with other elements of the service.'*

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<sup>32</sup> It is important to note that this is just a snapshot; I am not suggesting any particular trends. The methodology of collecting the data differs significantly throughout the ombudsman schemes; to be able to draw valid conclusions I have to wait for the result of my surveys.

<sup>33</sup> In an interview in 2013 with OS I was told that the outcome of a complaint does matter to the complainant and typically overshadows the perceived procedure, this leads me to believe it is only possible to determine if the procedure can be perceived independently from the outcome through primary and consistent data collection.

<sup>34</sup> <http://www.legalombudsman.org.uk/downloads/documents/publications/Annual-Report-2012-13.pdf>

<sup>35</sup> <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADMAMQAwAHwAfABGAGEAbABzAGUAfAB8ADAAfAA1>

The research showed that the quality of service (perceived fairness) can make a difference, but that the role of the final outcome cannot be ignored. This leaves us with the question of how important the distinction between perceived procedural fairness and outcome fairness truly is.

To explore the relationship between procedural justice criteria and identify the connection between procedural fairness and outcome fairness we have to consider the universality of the measures: is the degree of fairness always judged by the same criteria? What standard is fairness measured by? To be able to answer the research questions, the concepts of fairness, trust and legitimacy have to be clarified in this context.

Benefiting from procedural justice research in the field of criminal justice, and building on existing concepts and definitions, I will next start to unpack the concepts of fairness, legitimacy and trust, in order to empirically conceptualize and measure them.

### ***The concept of procedural fairness and outcome fairness – different models***

The effects of procedural justice have been theorized from various angles. Early theories have an instrumental approach and see a fair procedure as important because they lead to fair outcomes.<sup>36</sup> People evaluate fairness of a procedure in relation to the perceived fairness of the outcome. Thus, if the procedure is perceived as fair, the decision is more likely to be accepted as fair.

In contrast to this, relational, social-identity and group-value based models describe that fair procedures have implications for social identity and membership in a social group or relationship with the group authorities.<sup>37</sup> These approaches argue that procedural fairness is important for relational reasons, independent of the fairness of outcomes. Fairness heuristic and uncertainty models focus on the role that a fair procedure plays in the development of fairness judgments and how interactions with authorities are managed<sup>38</sup>, highlighting the importance of fair procedures relative to fair outcomes.<sup>39</sup>

Social psychology of procedural justice has shown that procedural justice matters, and has tested its effects. The research concluded that the importance of procedural justice criteria varies depending on the situation or the procedures

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<sup>36</sup> Thibaut and Walker, 1975; Leventhal, G. S. (1980). What should be done with equity theory? In K. J. Gergen, M. S. Greenberg, & R. H. Willis (Eds.), *Social exchange: Advances in theory and research*. New York: Plenum.

<sup>37</sup> Tyler, T.R. (1989). The quality of dispute resolution processes and outcomes: Measurement problems and possibilities. *Denver University Law Review*, 66, 419 – 436; Lind, E.A. & Tyler, T.R. (1988). *The social psychology of procedural justice*. N.Y.: Plenum.

<sup>38</sup> Lind, E. A. (1994). Procedural justice and culture: Evidence for ubiquitous process concerns. *Zeitschrift für Rechtssoziologie*, 15, 24-36.

<sup>39</sup> Lind, E.A. (1995). *Social conflict and social justice: Some lessons from the social psychology of justice*. Leiden, the Netherlands: Leiden University Press.

social context. The following are several approaches to contextualize and measure procedural / outcome fairness:

- Thibaut and Walker (1975) describe four factors that affect preference for dispute resolution procedures: 1. nature of the conflict, 2. time available, 3. existence of a standard, and 4. outcome correspondence.
- Lind (1995) found that uncertainty about the outcome justice may increase the importance of procedural fairness in evaluating outcome justice because procedural evaluation serves as a shortcut for making more complex outcome judgments.
- The social identity based model (Tyler & Smith 1999) states that people place more importance on the quality of treatment when they identify themselves more strongly with the social group that the authority represents.
- The uncertainty management model put forward by (*Van den Bos and Lind 2002*<sup>40</sup>) supports the thesis that fairness of a procedure matters more in situations where people have less information about the trustworthiness of the interacting authority.
- Bayles (1990) normative theory of procedural justice argues that decisions of authorities could be distinguished as 1. Burden-imposing, 2. Benefit-conferring 3. Benefit-terminating or 4. Burden-relieving decisions; he further argued that procedural justice is more important for 1 & 3 than for 2 & 4.

Building on the theories and models above, this paper will identify whether people who use an ombudsman procedure are able to separate the perception of the procedure from the outcome. It hypothesizes that a user of an ombudsman (ADR) procedure typically does not separate the perceived outcome fairness from the procedural fairness. If this is the case, what does that mean in relation to the trust and legitimacy of ombudsmen?

The following section will lay the foundation of how the concepts of trust and legitimacy are applied in this study.

### **2.3 Theoretical framework and testing the empirical reality in everyday lives: measuring public trust (in justice) and institutional legitimacy<sup>41</sup>**

Borrowed from recent procedural justice literature on policing, we can say that the need for justice institutions [ombudsmen] to produce fair and respectful

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<sup>40</sup> Van den Bos, K. & Lind, A. (2002) Uncertainty management by means of fairness judgments, *Advances in Experimental Social Psychology*, Volume 34, Pages 1–60.

<sup>41</sup>Hawdon, J. (2008). Legitimacy, trust, social capital, and policing styles: A theoretical statement. *Police Quarterly*, 11(2), 182-201. P. 186: "The role is legitimate; the individual is trusted."

procedures – in contrast to their outcomes – is the safest strategy for building trust in justice and thus institutional legitimacy and compliance with the law.<sup>42</sup>

Subsequent, procedural justice and moral alignment are the most critical factors in fostering or retaining institutional legitimacy, albeit with perceived obligation and consent to legal authority also playing a role – winning the ‘hearts and minds’ is central to the effective use of authority’.<sup>43</sup>

The concepts of legitimacy and trust provide the connections between the citizens and the social systems.<sup>44</sup> The distinctions between the two concepts are adopted from the FIDUCIA report<sup>45</sup> on comparative public attitudes towards legal authorities. *Legitimacy*: a belief in the moral right of legal authorities to possess and exercise power and influence. *Trust*: a belief in how individual actors working for the institutions perform their role.<sup>46</sup> Following this definition, the measures of those concepts are proposed as follows:

To measure *legitimacy* should focus on judgments of the right to power to prescribe behavior and enforce laws that emanate from the role and institution.<sup>47</sup>

To measure *trust* should focus on the intentions and capabilities of specific actors.<sup>48</sup>

The next section will explain how legitimacy and trust have been approached and measured in other studies on public attitudes to date, in order to contextualize those discussions in this study.

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<sup>42</sup> Hough, Mike, Jonathan Jackson, and Ben Bradford. (2013) *Legitimacy, Trust and Compliance: An Empirical Test of Procedural Justice Theory Using the European Social Survey*. Yale University Press.

[http://www.researchgate.net/publication/235983477\\_Legitimacy\\_Trust\\_and\\_Compliance\\_An\\_Empirical\\_Test\\_of\\_Procedural\\_Justice\\_Theory\\_using\\_the\\_European\\_Social\\_Survey/file/60b7d5152faadc6082.pdf](http://www.researchgate.net/publication/235983477_Legitimacy_Trust_and_Compliance_An_Empirical_Test_of_Procedural_Justice_Theory_using_the_European_Social_Survey/file/60b7d5152faadc6082.pdf).

<sup>43</sup> Jackson, J., B. Bradford, M. Hough, J. Kuha, S. Stares, S. Widdop, R. Fitzgerald, M. Yordanova, and T. Galev. (2011) “Developing European Indicators of Trust in Justice.” *European Journal of Criminology* 8, no. 4.

<sup>44</sup> Jackson, Jonathan, Ben Bradford, Mike Hough, Jouni Kuha, Sally Stares, Sally Widdop, Rory Fitzgerald, Maria Yordanova, and Todor Galev (2010) *Trust in Justice: Notes on the Development of European Social Indicators*. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network. An ombudsman institution is part of that democratic system, operating within the rule of law; acting effectively and fairly within commonly accepted norms.

<sup>45</sup> Jackson, Jonathan and Kuha, Jouni and Hough, Mike and Bradford, Ben and Hohl, Katrin and Gerber, Monica M. (June 1, 2013) *Trust and Legitimacy Across Europe: A FIDUCIA Report on Comparative Public Attitudes Towards Legal Authority*.

<sup>46</sup> Ibid.

<sup>47</sup> Applied to the ombudsman context: Authority of the institution; individuals (representing the ombudsman) moral validity?

<sup>48</sup> Applied to the ombudsman context: can the procedure be trusted to fulfill functions of fairness, effectiveness and dependable?

### 3. LEGITIMACY AS AN EMPIRICAL CONCEPT<sup>49</sup>

Tyler differentiates between instrumental and normative models of compliance with the law. The *normative model*<sup>50</sup> is based on personal morality and legitimacy; detailed in the model of process-based regulation.<sup>51</sup> Here, procedural elements are measured by the quality of decision-making and the quality of treatment. According to this approach, described in the context of policing, the fairness of procedures that people experience have both immediate and long-term effects on their behaviors and perceptions.<sup>52</sup> Following, people's evaluations about the legitimacy of an institution are affected by the fairness of the procedures - more specifically, the quality of interpersonal treatment and the quality of decision-making. If people feel that the institution is legitimate they are more inclined to feel an obligation and responsibility to cooperate with that authority.

Within this concept, Tyler emphasizes the importance of procedural rather than outcome justice in shaping institutional legitimacy. In other words, perceptions of procedural justice and legitimacy result in everyday compliance with the law.

Following Tyler's argument, legitimacy is won and lost partly through the experience of procedural justice and injustice. Other scholars have described conditions that need to be met for an authority to have legitimacy. These are, according to Beetham<sup>53</sup>: 1. the obligation to obey; 2. legality; and 3. moral alignment. Jackson and colleagues state that procedural justice and moral alignment are the most critical factors in fostering or retaining institutional legitimacy. However, felt obligation and consent to legal authority also play a role. Hough *et al* found that fairness and effectiveness are preconditions of empirical legitimacy.

An amalgamation then, of the above describes institutional legitimacy as the right to rule and the recognition by the ruled of that right.<sup>54</sup>

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<sup>49</sup> Tyler &Huo (2002) 'when people see the [legal] system and its representatives as having the right to exist, set appropriate standards of conduct and to enforce those standards.' (Jackson et al 2011 & 2012) 'Legitimacy is also a psychological state of normative justifiability of the possession of power.'

<sup>50</sup> Hinsch, W. (2008) 'Legitimacy and Justice.' In, *Political Legitimation without Morality?* edited by J. Kuhnelt. London: Springer. Hinsch distinguishes between normative (or objective) legitimacy and empirical (or subjective) legitimacy. This study is interested in public's perceptions and therefore focuses on the empirical concept of legitimacy.

<sup>51</sup> Tyler and Huo (2002); Tom R. Tyler (2003) *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284; Bottoms, Anthony, and Justice Tankebe. (2012) "Criminology beyond procedural justice: a dialogic approach to legitimacy in criminal justice." *J. Crim. L. & Criminology* 102: 119-1323.

<sup>52</sup> Tyler, Tom R. (January 1, 2003) "Procedural Justice, Legitimacy, and the Effective Rule of Law." *Crime and Justice* 30: 283-357.

<sup>53</sup> Beetham, David. *The Legitimation of Power*. Basingstoke: Palgrave Macmillan, 1991.

<sup>54</sup> Ibid; Jean-Marc Coicaud, J-M (2002) *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility*, Cambridge University Press; Tyler, Tom R. *Why People Obey the Law*. Princeton, N.J.: Princeton University Press, 2006; Bottoms, Anthony, and Justice Tankebe. (2012) "Criminology: Beyond procedural Justice a dialogic approach to legitimacy in criminal justice." *J. Crim. L. & Criminology* 102: 119-132.

1. The 'governed' offer their willing consent to defer to the authority, this is grounded on;
2. The authorities conformity to standards of legality (acting according to the law);
3. And on a degree of 'moral alignment' between power holders and the governed, reflecting shared moral values.

Building on the concepts above, Tankebe (2012) defined legitimacy - in the context of policing - as made up of:

1. public perceptions of procedural fairness;
2. distributive fairness (or outcome justice);
3. effectiveness;
4. lawfulness (or legality).

In summary, the development of understanding how legitimacy is empirically defined has many layers. As a starting point for the purpose of this study, legitimacy is empirically measured by the experience of procedural justice and injustice through the concepts identified by Beetham and Tankebe above. After analyzing the survey data however there might be a need to modify these concepts specifically for an ADR procedure.

This leads to the final concept to discuss - that of trust. If authorities are seen by their users to be unfair and disrespectful it damages trust in them.

#### **4. TRUST IN JUSTICE**

Trust in the procedural fairness of an institution turns the focus onto the ways in which institutions exercise their authority.<sup>55</sup> Do ombudsmen treat people with dignity and respect? Do they make fair, transparent and accountable decisions? Trust relates to assumptions and beliefs about intentions (do ombudsmen want to be fair?) and competence (are they able to be fair?). Trust is about both present and future behavior. This might be the distinction between the concepts of legitimacy and trust - where legitimacy is focused on the present, trust tends to be future oriented and may be defined as a 'positive feeling of expectation regarding another's future actions'.

Tyler & Huo<sup>56</sup> described this in their concept of 'motive-based trust'. People are more willing to defer voluntarily to authorities whose motives they trust. Tyler and Huo<sup>57</sup> found that the influence of trust is independent of the favorability or desirability of the decisions the authority makes. They measured trust through the following indicators: the authority considered my views / tried hard to do the right thing by me / cared about my concerns / tried to take my needs into

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<sup>55</sup> Tyler, Tom R. (2006) *Why People Obey the Law*. Princeton, N.J.: Princeton University Press.

<sup>56</sup> Tyler, Tom R, and Yuen J Huo. (2002) *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*. New York: Russell Sage Foundation.

<sup>57</sup> Ibid.

account / is someone I trust. These scales were used to measure trust in institutions that people already have an opinion about and experiences with. Institutional trust has been described as to be thought of as 'system-level' public attitude. It is likely to reflect orientations towards organizations that are fairly stable. People's views on the police or courts, for example, are not in a state of constant review.<sup>58</sup> This is very different for the ombudsman institution. We know that most people are not aware of the institution. How can institutional trust be built and measured in a developing institution?

Summing up, to measure people's perceptions of trust and legitimacy in ombudsmen, I will start from the criteria applied in the European Social Survey (ESS)<sup>59</sup> (a combination of Tyler and Beetham<sup>60</sup>) as follows:

- a) Trust in justice institutions (effectiveness, procedural fairness, distributive fairness)
- b) Perceived legitimacy (sense of obligation to obey, moral alignment, perceived legality).

The next section will briefly put some figures to the theoretical concepts discussed above. Due to the present lack of ombudsmen specific data, available secondary datasets are used to demonstrate general trends.

## **5. SOME AVAILABLE DATA ON TRUST AND LEGITIMACY IN JUSTICE SYSTEMS**

Although the Ombudsman is an established element of justice systems in many countries, we have no conclusive data about their use, trust in them and their legitimacy. Ombudsmen attract millions of claims per year by addressing grievances citizens have against government institutions (public sector) and grievances consumers have in relation to specific businesses (i.e.: banking and insurance – private sector). In the UK and Ireland alone, there are 25 ombudsmen across public and private sectors (Ombudsman Association members). They deal with between 16,341 complaints in relation to the provision of NHS health services (Parliamentary and Health Service Ombudsman, 2013) and over 1 million cases and enquiries per year in relation to financial services (Financial Ombudsman Services, 2013).

What do we know about trust in the justice system? The ESS is recent research in the context of the criminal justice system and policing. The following will provide an overview of findings on measured perceptions of trust and legitimacy of justice systems. These will feed into my study by providing a point of comparison as to whether overall perceptions match ombudsman specific perceptions. (I have listed the counties that I will be looking at as case studies below.)

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<sup>58</sup> Bradford, Ben, and Jonathan Jackson. (2010) *Trust and Confidence in the Police: A Conceptual Review*. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network.

<sup>59</sup> European Social Survey <http://www.europeansocialsurvey.org/data/themes.html?t=justice>

<sup>60</sup> Beetham, David. (1991) *The Legitimation of Power*. Basingstoke: Palgrave Macmillan.

The following table was created based on the Trust in Justice module from ESS Round 5.<sup>61</sup>

(Measured on a scale 1-10; 1= no trust at all 10= complete trust)

	Trust in the legal system	Trust in countries parliament	Trust in the police	Trust in the EP
<b>UK</b>	<b>4,6</b>	<b>3,4</b>	<b>4,6</b>	<b>4,5</b>
Germany	5,9	5,8	5,9	6,1
France	3,4	3,7	3,3	3,7
Poland	3,3	3,3	3,3	3,4

The data provides a starting point to compare how these findings map onto the perceptions of ombudsmen in the various countries. The levels of trust and legitimacy vary between countries. It will be interesting to see from my dataset how the ombudsman model scores in levels of trust and legitimacy and what that tells us about its place in relative national justice systems.

## 6. NEXT STEPS

This paper has outlined my conceptual path by deconstructing the elements of procedural justice that will be measured as part of my research project. As a result, a multitude of questions need to be addressed in the context of measuring the procedural fairness of ombudsman procedures.

Why does it matter? We know hardly anything about people's perceptions of ADR procedures. In light of recent EU legislation that requires all EU member states to have comprehensive ADR coverage for consumer complaints, it is important to tease out the motivations and behavior patterns of users of these systems. This in turn will allow to make suggestions for development, thereby improving access to justice.

Furthermore, it is important not to look at the ombudsman institution (ADR) in isolation – it is a part of the justice system and needs to be considered in relation to other institutions of that system. Looking at important studies about pathways to justice, it is necessary to consider people's attitudes towards courts and tribunals, for example. Genn<sup>62</sup> found that attitudes towards the courts influence people's propensity to use courts. Does this also apply to the ADR context? Will perceived trust and legitimacy of an ombudsman create a propensity to comply with decisions?

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<sup>61</sup> ESS trust in justice module refers to two important, interrelated, but conceptually distinct phenomena– trust and legitimacy.

<sup>62</sup> Genn, Hazel, and Sarah Beinart. (1999) *Paths to Justice: What People Do and Think about Going to Law*. Oxford, England; Portland, Or.: Hart Pub., p 228.

# Access to Justice: A Contest between Legal Skill and Technology?

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## **Abstract**

A current burning debate in legal practice today appears to be the man-made fight for superiority between the skills of legal practitioner and the legal artificial intelligence skill provided by Information and Communication Technology (ICT) loosely tagged as “legal technology.” The essence of the debate is that technology legal can replace legal practitioners’ role. The debate so much irked some conservative legal practitioners to the extent that they detest the mention of ICT or technology. The debate has stratified legal practitioners into four groups. In group one are lawyers that perceive the legal profession as purely the exclusive preserve of strict legal skills of the black letter only. To the group there is nothing legal in legal technology. The second group is that of lawyers who perceive legal technology as the solution to all legal problem and therefore less legal skill is required to practice as legal technology can provide virtually all the legal skills needed. The third group comprises lawyers who perceive legal technology as a tool to enhance legal skill of lawyers and nothing more. The fourth group has lawyers who are undecided as to the role of legal technology. They are mere spectators or all comers. This paper systematically analyses the positions of each of the formulated approaches and relate them to the role of legal technology in the paramount issue of access to justice in the modern world. The paper considers historical trends of the legal practice and the tools of the trade and brings legal technology into perspective particularly with a view to concluding on its role whether as an “end of lawyering” or “enhancement of lawyering.”

**Keywords:** legal skill, technology, access to justice

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<sup>1</sup> This topic derives from a debate that is on-going amongst practitioners and paralegal personnel but which literatures are rare. Most of the argument appears to occur orally and in informal occasions. I acknowledge the contributions of members of e-legal group on *LinkedIn* of which I am one especially on a discussion initiated by Amy Thomson entitled “Should law practice management and legal tech courses be added to the law school curriculum?” available at: [http://www.linkedin.com/groupItem?seeMore=&split\\_page=5&type=member&item=5791911068112539648&gid=1320117&trk=groups\\_item\\_detail-grp-b-scroll](http://www.linkedin.com/groupItem?seeMore=&split_page=5&type=member&item=5791911068112539648&gid=1320117&trk=groups_item_detail-grp-b-scroll) accessed 8 February, 2014.

## Introduction

Long before Susskind's insightful works<sup>2</sup> that predicted the "end of lawyering" sequel to the advent of Information and Communication Technology (ICT) in legal practice, there had been some traces of technology in the court room after the 2<sup>nd</sup> world war.<sup>3</sup> However, Susskind's publications appeared to have exploded the impact of ICT in legal practice when he warned that unless lawyers come out of their traditional and conservative approach to legal practice and embrace ICT, legal practitioners might become irrelevant in the scheme of things in the coming centuries. Because his argument seemed too advanced at the time, his warnings were very irritating to legal scholars and practitioners. It would appear that it is an understatement to say that Susskind's postulations have been vindicated today. Susskind was not the only proponent of embracing legal technology for legal practice. Professors Greenleaf and Mowbray as far back as 1995 had collaboratively done extensive application of ICT to legal practice through AustLII which provides public access to legal information and e-law report of Australian Court judgments.<sup>4</sup> Paliwala (2010) highlighted the early proponents of legal technology though he preferred to call it "legal informatics."<sup>5</sup>

According to him, legal technology can be traced to Hans Baade's *Jurimetrics* (1964) and subsequently its journal which was concerned with the application of mathematical techniques to solving law. Baade's contemporaries included Glendon Schubert and Layman Allen.<sup>6</sup> Others include John Horty, Tom Bruce and the Cornell's Legal Information Institute. In the US and Canada were Russell Burris, Robert Keeton, Roger Park and Don Trauman, Ron Staudt and John Mayer. In the United Kingdom and Europe were pioneers including Colin Tapper, Judith Reid, Jon Bing and Richard Susskind, Perte Seipel (Sweden), Vittorio Novelli (Italy), Maxmillan Herberger (German), Daniele Bourcier (France) and Paliwala himself. But there are many others that have in the last decade or two researched and contributed to this aspect including Robin Widdison, Justice Dory Reiling, Merc Jenkins, Erwin Rooze and several others.

## What is legal technology?

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<sup>2</sup>*Expert Systems in Law* (OUP, 1987), *The Future of Law* (OUP, 1996), *Transforming the Law* (OUP, 2000), *The Susskind Interviews: Legal Experts in Changing Times* (Sweet & Maxwell, 2005), *The End of Lawyers? Rethinking the Nature of Legal Services* (OUP, 2008) and *Tomorrow's Lawyers* (2013).

<sup>3</sup> A.D. Reiling (2009), *Technology for Justice: How Information Technology Can Support Judicial Reform*, Leiden University Press, p. 47; Radlmaier, Steffen (ed.) 2005. *Het proces van Neurenberg* (The Nuremberg Trial). Amsterdam. W. Hansen en Uitgeverij Cossee BV, p. 64.

<sup>4</sup> See Chief Justice Murray Gleeson AC, "The State of the Judicature" in *The Australian Law Journal*, Vol. 76 January 2002 Number 1 p. 26.

<sup>5</sup> See Abdul Paliwala (2010) "A History of Legal Informatics" in *European Journal of Law and Technology* Vol. 1, No. 1, 2010 published online on <http://ejlt.org/article/view/21/38> and accessed on 2/1/14

<sup>666</sup> See <http://scholarship.law.duke.edu/lcp/vol28/iss1/> accessed 8January 2014

There was really no term as “legal technology” until the incursion of ICT into the legal sphere. As the name suggests, ICT is a tool created by scientists/technologists for the purpose of driving all spheres of human endeavor in a more efficient and effective platform for optimum results and minimal effort. This description seems to aptly capture the generally acceptable description of ICT as any technology that conveys, manipulates and stores data by electronic means and through which processed data can easily be retrieved.<sup>7</sup> It is the application of these technological tools or devices that have become what is tagged “legal technology.”<sup>8</sup> Ironically, technology and law in its traditional form are opposites. Technology is dynamic whereas law in its original form is conservative. The term legal technology is therefore a paradox that reflects a new culture of law in contemporary world. All spheres of human endeavor are today driven by ICT. Banking, marketing, advertising, commercial activities, teaching, medical practice, surveying, transportation, media, agriculture, weather forecast, cartography, film shoot, publishing, editing, and virtually all human interactions are mediated or driven by ICT. Its major advantage and popularity is its dynamic and unending capacity to enhance the objectives of the respective professions by demystifying the functions required by each profession and filling the gap with extremely more efficient, effective, precise and cheaper output.

### **Effect of ICT on the Legal Profession**

ICT has achieved the fit through three means: dematerialization, omnipresence and malleability.<sup>9</sup> It converts the functions from physical to intangible artificial intelligence program which makes it present at all places at the same time and very flexible to use in different circumstances. ICT therefore succeeds in commoditization of all functions of the respective professions and to some extent part of their skills. The result of ICT impact on the legal profession in these regard can be illustrated thus: the materials used by lawyers and the courts are laws, books and precedents. These materials are today converted to intangible data made available by electronic means. Also, legal information which usually is the exclusive preserve of the lawyer is now easily accessible by non-lawyers. Drafting of documents have been reduced to saleable

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<sup>7</sup> See

[http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=38&cad=rja&ved=0CFAQFjAHOB4&url=http%3A%2F%2Fopenlearn.open.ac.uk%2Ffile.php%2F1666%2F!via%2Foucontent%2Fcourse%2F155%2Falternatives%2Fx-t175\\_2.doc&ei=O2S4UNi2BYb4sga6oYHIBQ&usg=AFQjCNHnJuvQ6LgOay\\_30XcqSnPoakOVQ](http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=38&cad=rja&ved=0CFAQFjAHOB4&url=http%3A%2F%2Fopenlearn.open.ac.uk%2Ffile.php%2F1666%2F!via%2Foucontent%2Fcourse%2F155%2Falternatives%2Fx-t175_2.doc&ei=O2S4UNi2BYb4sga6oYHIBQ&usg=AFQjCNHnJuvQ6LgOay_30XcqSnPoakOVQ) accessed on 13/2/12;

<sup>8</sup> See Erwin Rooze’s response to the researcher’s quest on April 2, 2012 Available at:

[http://www.linkedin.com/groupAnswers?viewQuestionAndAnswers=&discussionID=104894843&gid=1855037&commentID=75987276&trk=view\\_disc&ut=0Wc5k2-UJ4G5k1](http://www.linkedin.com/groupAnswers?viewQuestionAndAnswers=&discussionID=104894843&gid=1855037&commentID=75987276&trk=view_disc&ut=0Wc5k2-UJ4G5k1)

<sup>9</sup> See Widdison R. (1997) “Electronic Law Practice: An Exercise in Legal Futurology” in *Modern Law Review*, vol. 60 No. 2 143 at 144. Available at: <http://onlinelibrary.wiley.com/doi/10.1111/mlr.1997.60.issue-2/issuetoc>. [Accessed 17 March 2012. See also Nweze C. C. (2006) *Contentious Issues and Responses in Contemporary Evidence Law in Nigeria*, Vol. 2 Enugu, Institute for Development Studies, 2006 p.209

commodities by electronic means. Any person can log onto the internet to obtain a sample of precedents for deeds of numerous types, Wills and codicils, contracts, memoranda of understanding, intellectual property agreements, partnership agreements, power of attorney of various types, hire purchase agreements, maritime documents, etc.<sup>10</sup> Even advocacy can be simulated through the legal information available electronically. There is e-discovery which can be for both forensic and case simulation purposes.

E-discovery for case simulation purpose enables legal practitioners to conduct pre-trial test of their cases and thereby find from the outset the merits and demerits of their clients cases based on legal authorities. It affords the parties the opportunity to narrow down their cases and see prospects of settlement without proceeding to litigation or arbitration.<sup>11</sup> For the justice system there now exist e-court procedures. A court action may be commenced by e-filing (electronic means of filing court processes); it may be served by means of e-service; the trial may be conducted electronic means, i.e., e-trial (electronic trial by means of video-conferencing); e-judgment which translates to e-report of the decision of the Court.

### **Responses to the Introduction of ICT to Legal Practice**

The introduction of ICT to legal practice has been embraced with four different responses which we have classified in this paper.<sup>12</sup> The first group comprises legal practitioners who hold strictly to the conservative legal culture of black letter. This group would rather stay out of any incursion of ICT into the legal profession as ICT is perceived as diametrically opposed to what legal profession stands for. To the group, legal practice is a noble profession that carries the conservative method of ancient and determined approach to study of law, the precedents well researched and formulated

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<sup>10</sup> Granted that these samples are not strictly narrowed to the individual circumstances of the persons using them which therefore necessitates the user to still consult a legal practitioner for advice. This is analogous to advertisement caveats on drugs to be taken as advertised but with doctor's prescription. Each person has some peculiar response to the average general drugs for different ailments.

<sup>11</sup> These details have been set out to show the extent to which legal technology has gone in demystifying the work of a legal practitioner and to certain extent give parties direct access to legal information and consequently give them some advantage in minimizing costs.

<sup>12</sup> Interestingly, Coker, C. A. (2014) "The Use of Information and Communication Technologies (ICTs) among Legal Practitioners in Ibadan Metropolis," in *Journal of Computer Sciences and Applications*, 2014, Vol. 2, No. 1, pp. 1-5 available at <http://global-4-lvs-colossus.opera-mini.net/hs39-01/14560/0/-1/pubs.sciepub.com/436928525/jcsa-2-1-1.pdf> accessed on 11 April, 2014, recently carried out some empirical study of the response of Nigerian legal practitioners to ICT facilities. She found that ICT lawyers in Ibadan region of Nigeria have grossly underutilised ICT and are predominantly restricted in use of ICT to mobile phones and computers only. In appraising the responses of some selected 300 lawyers, she classified lawyers into two groups; the old and the young. She concluded that '... young legal practitioners embraced ICTs more than the older lawyers. In addition, about 75.2% of the respondents strongly agreed that the application of ICTs in the legal profession would go a long way in improving the efficiency and effectiveness of the profession. The major problems and constraints identified to the use of ICTs among lawyers are the unfavorable economic situation of the country, excessive cost of procurement of ICTs facilities and inadequate infrastructure such as telecommunication and electric supply...' Ibadan is presumably the largest city in West Africa and the centre of the Old Western Region politics in Nigeria.

with utmost caution and diligence. Such profession is shrouded in the mystery of legal tutelage, scholarship and protected culture not permissive to the uninitiated. These legal practitioners charge their clients by hours of industrious research, count of words used in legal advocacy and advice, experience of the practitioner at the bar and the status of the practitioner in the legal profession. To them, conversion of legal works and skills is an aberration. Such converted legal work and skill is no law but artificial law. They prefer to work with materials directly obtained from sources that are credible, not the dematerialized works that could easily be manipulated and therefore corrupt. They cannot trust the material subjected to electronic processes as the law of evidence had classified all photographs or documents produced by digital means as hearsay and therefore not admissible in law. A majority of members in this class are the old generation legal practitioners with little or no knowledge of ICT. For some of them, ICT facilities are meant to boost status and for mere word processing and other limited functions.

The second group comprises legal practitioners who perceive ICT in law as the magic wand long awaited for to take care of all challenges posed by the labour and toiling of a legal practitioner. They very much welcome the ICT entrance into legal practice but as the solution to all. They would rather leave everything to ICT. They would rather ICT would also take care of every skill of the legal practitioner. A majority of this group are new generation of legal practitioners, inexperienced in legal skills but conversant with ICT applications. They acquire all sorts of ICT gadgets and explore all possible areas of use of the gadgets in legal practice yet in many cases do not want to read deeply for legal understanding and depth.

In the third group are legal practitioners who are of above average legal practice experience but who merely perceive ICT in law as a tool for boosting or complementing the functions and skills of the legal profession. They have a balanced understanding of the purpose of ICT in driving the profession and still believe that their skills must be further enhanced if they must excel in the profession. They are aware of the creativity aspect of the practice which ICT may not provide for.

The fourth group is the undecided or confused ones. They are not bothered by the debate because they are at loss as to what ICT offers. In certain circumstances they think ICT has taken over legal practice in some other cases they conclude that legal practitioners remain in charge.

### **The Challenges of ICT to Legal Practice**

ICT has marked the development of the legal practice regardless of the responses it has been faced with. Some of these benefits include: enhancement of lawyer

communications with other lawyers and with clients; easier access to information; ability to multitask and handle different cases at the same time; and better documentation.

Albeit these benefits, ICT is continuously faced with several challenges in legal practice which make its functioning rather difficult. Some of the challenges faced are:

- 1) It is yet to be fully accepted by legal practitioners, as evidenced by one of the responses of its introduction into legal practice. It has the effect of making it underutilized and affects its development.
- 2) It suffers insufficient fund allocation which stunts its expected growth rate in the area.
- 3) The cost of importing hardware, software and other ICT accessories is sometimes outrageous and discourages a higher influx into the legal practice.
- 4) Lack of proper training of legal practitioners on ICT and how to properly and maximally use and enjoy it in making work easier, faster and more effective.
- 5) Inadequate ICT infrastructure; many legal practitioners do not have personal computers. There is also the lack of proper functioning internet facilities in many work places and the internet may be classified as an intangible infrastructure.

### **Has Technology taken over Legal Skill of the Legal Practitioner?**

A cursory understanding of legal technology and its relationship with legal skills of legal practitioners from the discussion so far show that legal technology has only emerged to complement legal skill. A deep understanding of the discussion would reveal that notwithstanding dematerialization, commoditization and omnipresence of legal materials and certain skills, e-discovery and all the e-legal and e-justice programs and systems, the legal skill of the trained legal practitioner remains the mainstay of the legal system. Legal technology is the catalyst for applying the skills. Richard Susskind's warning as to possible end of lawyering is for those legal practitioners that are ICT-phobic or hostile and who see it as a treat and those who are ignorant of the advantage of legal technology and therefore failing to key into the new vehicle for legal skill. The warning is that they will lose the new legal market because they cannot drive their legal skill no matter how deep in a locomotive vehicle when the trend today is driven in supersonic vehicles.

There has not been a takeover of the legal skill in legal practice by technology. What is obtainable, rather, is an enhancement of legal skill and a means to make legal skill more efficient and effective through its supplementation by technology and ICT.

### **Conclusion**

Legal technology is not an end to lawyering but an enhancement to lawyering. Programmers in legal technology would only excel, become relevant and competitive where they are able to receive best practice instructions from well-grounded legal practitioners, for there lies the efficiency and effectiveness of the programs they develop for legal technology in a keenly contested legal technology market.

Technology quickens access to judicial decisions, cases and authorities and as such, can work to quicken the delivery of justice. ICT is thus, a way of expediting justice and making it readily available; faster and better.

Legal practitioners, especially those that wholly embrace ICT should, however, be wary of attempting to replace completely, legal skill with technology. The skill of the lawyer is indispensable to his lawyering abilities, ergo, technology cannot replace that skill, it can only make the deliverables better.

Finally, I see no contest between technology and legal skill, rather, a symbiotic relationship which can benefit the lawyer if so applied. I submit, in this light, that the ongoing debate about the superiority of either should cease, and focus should be laid on the enhancement of legal practice through the use of both legal skill and technology.

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## **Face to Face Legal Services and Their Alternatives: Global Lessons from the Digital Revolution**

**Roger Smith and Alan Paterson**

*This paper is based on a study with the same name as the title which is published at [http://www.strath.ac.uk/media/faculties/hass/law/cpls/Face\\_to\\_Face.pdf](http://www.strath.ac.uk/media/faculties/hass/law/cpls/Face_to_Face.pdf). This was the result of a study funded by the Nuffield Foundation to which we express our gratitude. This paper is based on the last chapter of our report. The project used the network of contacts built up by the International Legal Aid Group and had an international advisory group from among its members to whom we also express our thanks.*

The project began with the following bold objectives: to produce an assessment of the latest general research on the use of telephone and internet access to advice generally; Assess the role that technology has played in new business models from retail services and how this could enhance the delivery of high quality legal advice; Compile a comprehensive assessment of the current use of hotline and internet legal advice and information projects around the world and how this might evolve in the near future; Evaluate the strengths and weaknesses of various forms of delivery in relation to the needs and capacities of those on low incomes and identify the crucial factors which are associated with successful schemes; Put forward the criteria by which innovative means of delivery of services should be evaluated; Seek to identify the cost differentials of phone advice at different stages of the case; Make specific practical recommendations to the Ministry of Justice in the light of how it is developing its proposals throughout the lifetime of the project; Make general recommendations for the delivery of services, applicable both here and overseas, aimed at legal aid commissions and policymakers in the field.

Despite the rapidity of change since the goals were formulated, our research suggests that they remain pertinent. There have been major technological advances - or, more accurately, greater deployment of existing advances. Some development would be expected. The goals were formulated some three years ago. That allows for two cycles of Moore's 'law' that computers double their speed every 18 months.<sup>1</sup> It is clearer now that the major driver of change is the internet rather than the telephone, although the two are increasingly merging. Telephone hotlines are still the Ministry of Justice's choice for triage and initial assessment but mobile phones are already providing the link with the internet and e-advice. Time has also facilitated a conflation of two other previously separate technologies, namely automated document assembly and video communication. Best practice, such as the Rechtwijzer<sup>2</sup> and LawAccess Online,<sup>3</sup> is already showing us the advantages to be derived from linking the internet with telephone advice.

Commercial players have had time to adapt and to link use of digital technology to the emergence of new forms of practice. This has been particularly so in England and Wales where there has been a major relaxation of rules about third party ownership of law firms. We appear likely to be in the middle of a major reshaping of that part of the commercial

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<sup>1</sup> The 'law' began with a specification of a two year cycle which was then accelerated to 18 months by Intel executive David House. It began technically as a reference to the number of transistors that can be placed on an integrated circuit. Its expression in the text seems an acceptable simplification.

<sup>2</sup> A world-leading Dutch website-based provision

<sup>3</sup> In New South Wales

marketplace formerly dominated by 'High Street practice'. And, public funding in countries like the US, The Netherlands and Australia has also been specifically directed to use of the possibilities of new technology.

### **Limitations of the study**

There are three major and unavoidable limitations on this project in addition to the obvious restriction of finite resources. First, it was not possible for us to undertake primary research on the efficacy of different forms of provision: we were dependent on others. And there is a real need for studies that compare like with like and which really test effectiveness with dummy questions and expert assessors. This is very evident in relation to reports on telephone hotlines. These consistently get high ratings from customers but there is remarkably little assessment of their substantive value. Studies, like that in Australia or in England and Wales by the Legal Services Research Centre, which do evaluate the level of service are greatly to be prized. Second, Google Translator is a wonderful thing but still pretty rudimentary: it makes assessment of written provision in other languages than English very difficult. Language remains a barrier in learning of developments in non-English speaking countries. Thirdly, it is almost impossible to make any sensible observation about cost. There are just too many variables. Too much domestic reporting does not compare like with like. Of course, a limited hours hotline staffed by unqualified call centre personnel will be cheaper than face to face assistance by trained legal aid practitioners. But that tells you nothing of value about the relative benefits. There are interesting hints that the rigorous comparison of cost can give rise to surprising and counter-intuitive results. This certainly comes out of the LSRC's research published shortly before it was closed down: it suggested that phone advice might take longer than that given face to face and, therefore, if costs of the adviser were the same, be more expensive. Furthermore, much technology requires high investment up front with a reducing cost per transaction according to the numbers serviced. Hopefully, the research on the Dutch Legal Aid Board's Rechtwijzer due later this year should have the capacity to raise discussion of cost of internet provision to another level.

### **Technology and new business models**

Technology is changing the commercial legal market just as surely as it is changing retail grocery. At least within the UK, local corner grocery stores are being supplanted by outlets of the big retailers. Developments are likely to be similar - if not identical - in the law. As it was with Starbucks in coffee, as it is with Tesco's in retail, so it will be with Quality Solicitors and Co-op Legal Services. Serious outside capital is betting that major change is coming.

This raises the issue of how much there is in Susskind's idea of a 'latent legal market'. Can a combination of new technology and new business structures reduce prices - at least for some types of case - to a level which meets a need for legal services that will otherwise be unmet? This is likely to happen - though unevenly. Three particular groups are likely to benefit: those with enough literacy and education to be able to handle the share of the work that comes with 'unbundling'; those with problems in areas shared by wealthier clients - particularly perhaps cases relating to relationship breakdown, road traffic accidents, some employment and immigration cases- where private providers may be willing to provide free assistance as a loss leader; and finally those with enough

disposable resources to make them of commercial interest, the true representatives of the latent legal market.

Even for those within the categories which might benefit from the enterprise of the private market, the state - as Susskind impliedly indicated - retains a role in ensuring that people are assisted to handle their own affairs. For example, law needs to be accessible both in the sense of, for example, readable statutes but also clear substantive provisions and (something he perhaps did not cover) effective enforcement. Among Susskind's 'building blocks' for access to justice are a duty on states to provide easily accessible primary sources and an enlightened policy on public sector information. These need to be stressed rather than just taken as desirable in the way of motherhood and apple pie. Susskind points to the value of the BAILII free database of cases and statutory material which has had limited Government support. Lord Neuberger has also recently drawn attention to the importance of accessible legislation at a time when more and more citizens will need to consult it without intermediaries:

The Government's freely accessible [www.legislation.gov.uk/ukpga](http://www.legislation.gov.uk/ukpga) website has all statutes and [statutory instruments]. But the incorporation of insertions, amendments, repeals is often very slow, which is unacceptable because there are many such changes, and a significant proportion of them are quite radical in their effect. It seems to me self-evident that any changes to legislation must be easily and promptly available to everyone. Despite the welter of legislation ... it would not cost very much money to keep the statutes and SIs promptly updated: even in an age of austerity, I believe that serious consideration should be given to making this improvement.<sup>4</sup>

There is a general point here. Governments understand that austerity means the cutting of expenditure. They are perhaps less willing to accept that, beyond a point, austerity demands greater clarity about the essential role of the state. And savings in one place may need, as Lord Neuberger suggests, to be balanced by expenditure (even if less than the savings made) to deal with their consequences.

There is an even more difficult challenge to be addressed if citizens are really to be left much more to their own devices. The law must be predictable. Take away the opportunity for poor citizens to go to court or have lawyers and one consequence is that the law must be more predictable for all citizens, rich and poor. Governments have to grasp this nettle, as that of The Netherlands is trying to do. But, it means, at the extreme, that cuts to legal aid may require changes to substantive law. For example, the distribution of assets on a divorce - for all - may need to be sufficiently predictable to reduce to a workable algorithm in a computer programme for those struggling to understand the system without specialist advice. Importantly, legislative assumptions may have to change. So, for example, it may be necessary to limit judicial discretion in favour of statutory certainty. It will also be necessary to retain the appropriate degree of judicial steel in the pursuit of the unwilling or the unlawful. And, since the law is universal, these developments will have to affect the rich as well as the poor. It cannot be satisfactory, for example and at an extreme, that the UK legal system delivers exquisitely bespoke adjudications for divorcing Russian oligarchs

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<sup>4</sup> Lord Neuberger *Tom Sargeant Memorial Lecture* October 2013, [www.justice.org.uk](http://www.justice.org.uk)

-such as Mr and Mrs Slutsker - but something entirely different for its own citizens of lesser means.<sup>5</sup>

As legal businesses are driven more and more to low cost, high volume legal services at the less affluent element of the market, issues of quality will arise. Fees are being driven down to meet what quite poor people can afford. In the US, legislation against the unauthorised practice of law retains professional control over 'legal advice' - for all that a generous definition of 'information' seems to have emerged. In England and Wales, no such restriction applies. The majority of current providers will be regulated by the Legal Services Board but there will be increasing numbers of others who are not. What happens if advice on a website or from a hotline is wrong or misleading? The framework of negligence may not prove enough. We need to ramp up the debate about regulation in this area or look for some less intrusive approach, such as the voluntarily kite-marking of sites that reach specific standards of accessibility and accuracy.

There are a variety of organisations that might be appropriate to run such a kitemarking scheme from the Legal Services Board to various NGOs: it might be logical to begin with a voluntary kite-marking carrot before reverting to a regulatory, compulsory stick. Quality assurance provides a very good reason for the engagement of the third voluntary sector as a major provider of information which is not related to a drive for funding and which is backed by the reputation of major voluntary organisations such as, in the UK, the CAB service.

For countries like The Netherlands and the jurisdictions of the UK, the area of matrimonial disputes and relationship breakdown provides one of the major areas of tension over legal aid policy making. Traditional assistance by lawyers for those unable to afford them has been funded by legal aid, albeit on an increasingly more restricted basis. This explains the interest of the Dutch and English and Welsh Governments in this area. Indeed, some part of a lawyer's traditional work in this area has been problem-solving rather than 'legal' at a high level. Both governments have high hopes of mediation and of encouraging parties away from courts and disputes, although initial findings suggest that referrals to mediation have declined rather than increased since the start of April 2013 and the legal aid cutbacks. Reduction of unit case costs may allow some parties to hire a lawyer for parts of the case that require it or to give them an overall understanding. However, considerable numbers will be on minimum benefit levels and unable to afford such assistance. Still others will face parties who are as uncooperative as was allegedly Mr Slutsker in sharing their assets.<sup>6</sup> It is by no means not only billionaires who seek to evade their family responsibilities: For women (as it generally is) in such circumstances, DIY provides little assistance. There may well be a need to resume traditional assistance in cases of stubborn resistance to accede to a court order.

There is a theoretical point here as well as a practical one. As we have seen, much of the theory behind reduction of unit price has been that 'unbundling' will provide cheaper services. However, it is important to recognise that 'unbundling' was never presented as simply DIY. Its essence is better described as 'limited service' or 'discrete task representation'. As Woody Mosten commented in an early English description (in a project creditably also funded by the Nuffield Foundation) of his approach:

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<sup>5</sup> See, as to the pursuit of Russian oligarchs, [Slutsker v Haron Investments Ltd & Anor \[2013\] EWCA Civ 430](#)

<sup>6</sup> See above

The lawyer's hourly rate may not differ in discrete task representation but the cost to the client will be more controlled and generally far less.<sup>7</sup>

Thus, 'unbundling' is not, on its own, likely to be answer for a clientele that has no money just as much as it will not help those who have not got the skills to do their share of the work. The combination means that, though the private sector can play a major role in delivering legal services to those of low income, the state cannot avoid its responsibility for funding appropriate resources.

### **The strengths and weakness of delivery**

The unavoidable paradox of digitally based delivery of legal services is a combination of universal accessibility (as with the internet) with implicit selectivity. The internet, exactly like the Ritz, is open to all. And the potential barriers to access are three: physical access to such things as operational terminals (probably low - particularly in the age of the smartphone);<sup>8</sup> access to the appropriate skills and experience (research around the world suggests less access for exactly those groups that should be prioritised - lower social groups, older age, less skills, immigrant background); and cultural (as in the reluctance identified in some remote rural communities for people to use very visible means of video communication or in the apparent reluctance of young people actually to use the internet most effectively). This last barrier is counter-intuitive – at least in the case of young persons – and indicates that there are indeed substantial numbers of individuals who will need substantial support to reveal their problems and ask for assistance.<sup>9</sup>

As a result, research suggests that we cannot yet expect digital delivery to be a complete or even nearly complete substitute for face to face services. We are just not at that point. Put starkly, clients will be lost if consulting rooms are closed and people are expected to use the phone or the internet. It is difficult, if not impossible, to quantify the size of the problem. Government experiments (such as in the UK) with the attempted transfer of benefits to the internet may give us more insight into what we might term 'channel swap fallout'. The drop out rate may vary over time. Intuitively, if people get used to it through benefit claims, then that may operate to shift culture. However, if we took official government figures it would seem that we can quantify the drop out at around 20 per cent of the overall population in relation to the internet: that might amount to, say, 40 per cent of the targeted population. We need more research to know better and we need that research to be repeated over time.

Research - and practice - around the world consistently indicates that the effectiveness of digital delivery can be enormously enhanced by supplementary provision of individual assistance - not necessarily face to face but personal. That is the lesson of telephone hotlines as researched and practiced in the US; the practice of commercial providers who are offering personal checks on document self-assembly; and implicit in the mixed delivery

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<sup>7</sup> W Mosten 'The Unbundling of Legal Services' at p49, R Smith (ed) *The Shape of the Future: new directions in legal services* LAG 1995,

<sup>8</sup> See e.g. Survey: *New US Smartphone Growth by Age and Income*, Nielsen Wire, February 2012.

<sup>9</sup> See James Kenrick, 'Online advice services and the myth of the tech-savvy generation' Legal Voice blog 11<sup>th</sup> October 2013.

models implicit in the New South Wales model or incorporated within the Dutch Legal Aid Board's provision.

The need for 'warm bodies' to supplement cold technology is comforting to us as human beings. The lesson is not, however, 'business as usual'. All is changed, changed utterly by new technology. In particular, the fact that some clients will need traditional face to face lawyers and bespoke legal services does not equate with the argument that this form of delivery should continue to be the unique, or even main, form of delivery. Indeed if interactive video systems continue to improve at the current rate it may soon be possible to provide such a lifelike image of a warm body to one who is seeking advice as to be indistinguishable from the real thing.<sup>10</sup>

We can see emerging a new balance within what in the legal services world might be dubbed as a new version of the 'complex, planned, mixed model of delivery'. The logical pattern of provision may well become internet led with freely available advice on the internet; linked to telephone / interactive video assistance for those that need it; and individualised services for those clients or those cases which require it. The internet should be developed, as it is in commercial provision like Co-operative Legal Services or Quality Solicitors, as a first tier of provision, albeit on a non-exclusive basis: there need to be other channels as well. This is the new pattern which can be observed evolving in The Netherlands, New South Wales and elsewhere. Traditional practitioners are maintained in the delivery mix but they do not need to be the first port of call, unless those needing assistance fall within the groups significantly affected by the access barriers identified above.

The universality of the internet has an interesting consequence: it is more difficult to limit web-based to any specific group in the same way as face to face advice can be restricted. The medium is inherently universal. Governments would be well advised to make the most of this and to proclaim a commitment to greater transparency and assistance for all.

### **Telephone Hotlines**

The following ten conclusions about hotline provision emerge out of the research and experience. The most important lesson is that hotlines need to be linked to individual assistance at a personal level by experts capable of resolving the problem in its entirety. It might be argued that a hotline giving first-tier general advice is 'better than nothing'. But, if telephones are to be used in the serious resolution of people's problems, then they need to filter people through to individual assistance aimed at that resolution.

1. Most clients, but not all, rate hotlines as helpful. This does not, however, necessarily correlate with usefulness.
2. The benefit of the hotline expands with the depth of services offered. The best results are obtained when the hotline is the 'front end' of a system that can extend through assistance to full representation.
3. Follow up letters confirming advice and later contact to check on action increase effectiveness. In particular, the clients with the following characteristics should be

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<sup>10</sup> This is an area for future research. We cannot assume without testing that empathy can jump the ether divide through interactive video, although the success of confidential telephone support services such as the Samaritans strongly indicates that it can – though possibly not in every case.

called back: (a) The recommended action is one where clients are less likely to obtain a favourable outcome: they are representing themselves in court; dealing with a government agency; or obtaining legal assistance from another provider. (b) The client is less likely to obtain a favourable outcome because of their characteristics or the nature of the problem.

4. Hotlines work best for better educated, more settled clients and worst for those who have complex problems, communication difficulties, mental problems or are otherwise vulnerable or lead unsettled lives.
5. Telephone advice will not necessarily be shorter than face to face advice and may, when compared in similar circumstances, even take longer.
6. Clients tend to prefer face to face services. Some may not follow telephone advice that is given to them.
7. A good hotline is likely to have certain characteristics eg good supervision and management, good technique (eg asking client to repeat advice), follow up written information, follow up calls, effective call back system and technology, ability to review documentation, 'warm body' advisers capable of advising on the resolution of smaller problems, adequate training of advisers and effective ways of dealing with conflicts between clients.
8. To obtain good coverage a hotline must be well promoted.
9. Take up may be unpredictable – either lower than expected due to barriers or overwhelming as new demand is identified or users become repeat callers.
10. We need more research that uses objective assessment of quality and level.

## Websites

A comparison of websites around the world in the field of legal advice and information suggests that the following are the key elements of successful provision (though debate on this would be welcomed):

### 1. Design

The standard for websites is set by commercial provision. This becomes what users expect and provision at a lesser standard can be difficult to accept, particularly by those whom are not a captive audience but whose attention it is required to attract. In the UK, Co-op Legal Services' website has raised the bar in terms of its presentation, use of colour and graphics, and transparency over costs. A site of this kind requires initial investment in design but also continuing upgrades to hit standards of ever higher quality. Much public provision can very easily become 'worthy but dull' and the continuing investment can be hard to fund.

### 2. A User perspective

Website content has to be reconceptualised from the perspective of a user. For example, guidance on anything to do with an accident must begin with encouragement to make a statement and identify witnesses rather than relegating that to later. The site needs to follow the path that a user would actually take.

### 3. Content which is specific, relevant and detailed

A site which is actually maximising the potential of the internet has to begin with the general and move to the specific with as much particularity as is possible if it is to be of much use as basic assistance.

### 4. Based dynamically on the 'journey' of a client seeking to solve a problem

Websites have tended to be seen as 'static' as providing information in response to a query but provision which is assisting someone with a problem has to be able to follow

their progress through to its resolution. That is what is so exciting about the potential of the Rechtwijzer site.

5. Integration with individualised assistance

The lesson from experience so far is the same as from telephones. You get maximum effectiveness from a website where you can link it through a 'chat', or email or telephone facility with personal assistance.

6. Some form of validation of independence and authority.

The inherently anarchic nature of the internet requires that users need to be able to trust a website. This come most easily from the reputation of the body whose website it is. Thus, information from solicitors or other regulated legal entity is likely to be trusted. So too is information from well-established and respected NGOs, like the Citizens Advice Bureaux in the UK. Government websites have the authority of government but are likely to encounter a degree of reservation (rightly or wrongly) as lacking independence from government policy. So, for example, they may not entirely be trusted as giving the whole story on matters that involve engagement with government such as benefit claims or immigration matters. The authority of websites from quasi government bodies such as legal aid authorities of varying degrees of independence probably varies according to different cultures and jurisdictions.

These six attributes are so universal that ILAG or some other internationally oriented institutions might beneficially seek to stimulate further innovation by marking sites against these - or other pre-agreed, criteria in order to promote examples of best practice around the world.

## **Effectiveness**

The effectiveness of different channels of delivery must be assessed against explicit criteria of the policy objective of an access to justice policy. Governments are remarkably shy of doing this but it becomes increasingly critical as lower spending forces prioritisation of resources. The purpose of access to justice policy amounts to a minefield of different political and constitutional understandings through which many have trodden with varying degrees of persuasion, particularly in the 1970s when the issue was raised by the escalating political interest in legal aid and its alternatives.<sup>11</sup>

For the operational purposes of this research, let us dodge some semantic and political issues by adopting the assertion of the Lord Chancellor of England and Wales in announcing his cuts package that 'access to justice is the hallmark of a civilised society'<sup>12</sup> and distill from that a basic constitutional concern to uphold the notion of 'equal justice under law' (the words engraved on the outside of the US Supreme Court). Governments need to do what they can to ensure their citizens are - and feel - included within the framework of the law and the rule of law.

If governments accept a constitutional duty to provide access to justice for their citizens, they need to know how well they are doing. As the use of technology expands, they urgently need confirmation of what works. Accordingly, there is a real importance to the kind of independent studies produced by the Legal Services Research Centre or those

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<sup>11</sup> See, for a discussion A Paterson and T Goriely *Resourcing Civil Justice* OUP, 1996

<sup>12</sup> Para 1.2 *Proposals for the Reform of Legal Aid in England and Wales* CP 12/10, November 2010 and widely repeated by Ken Clarke.

from the researchers in Australia, the US and elsewhere quoted in this report. We need the rigorous testing of the quality of the provision. This means mystery shopping or dummy clients; external evaluation and other techniques to supplement self-certification by those using or providing these services. The findings of research from the University of Twente on the Rechtwijzer project will be crucial to decisions on how it may be developed.

The issue of research becomes very clear if we try to formulate the kind of questions to ascertain how well a government is doing in its access to justice policy. They would follow the pattern of 'paths to justice' research around the world and compare the number and resolution of 'justiciable problems' that people resolved.<sup>13</sup> How able did citizens feel to resolve their own problems with the resources available to them? Which worked best? We need to maintain the kind of linear studies that the LSRC has conducted in England and Wales to show progress over time. Above all, we need to disentangle the suppression of demand from its satisfaction. Experience around the world indicates, for example, that you can reduce pressure on a telephone hotline simply by not publicising its number: that does not mean that the demand which its previous use indicated has been met. Government, in this area as well as elsewhere, need to know what works for the public.

### **Governments in an age of austerity**

Governments certainly need to ensure that they meet their constitutional obligations - including those imposed by binding international treaties such as the European Convention on Human Rights - something which has clearly been a constraint in England and Wales.

Governments must, in addition, retain a general responsibility to ensure that their citizens have access to law and dispute resolution. This, as the 'access to justice' evangelists of the 1970s pointed out, does not immediately equate to funding lawyers and legal aid.<sup>14</sup> Governments should acknowledge at least seven approaches to meeting their goals. First, they should ensure that information and assistance of self help through the kind of measures suggested above. Second, they should encourage the private sector to meet what need it can and assisting in that through such measures as accessible court and tribunal access procedures. Third, they should also encourage a third sector, as recognised by Susskind, which has a valuable and broad value of support. Fourth, they can maximise their 'soft power' at no or minimal expense. President Obama and Vice President Biden have shown a willingness to associated themselves with discussions on the future of technology in the delivery of legal services in the US.<sup>15</sup> Fifth, public funders can seek ways of leverage their spend. The Legal Services Corporation has made a little go a long way with its Technology Initiative Grants. Many organisations use awards and recognitions of excellence as a way of fostering initiative. Governments need to make the best of this kind of opportunity. Ministers, for example, can associate themselves with leading developments without having to fund them directly as would happen, for example, if a Minister of Justice awarded a range of annual awards for innovation in delivery. Sixth, there is a real benefit to funding 'hubs' within the NGO sector and academia to encourage

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<sup>13</sup> H Genn and S Beinart *Paths to Justice: what people do and think about going to law* Hart 1999 which spawned a series of further research in various countries, including Scotland, and served as a model for ground breaking longitudinal studies by the Legal Service Research Centre

<sup>14</sup> See eg M Cappelletti and B Garth *Access to Justice: volume 1* Sitjthoff and Noordhof, 1978

<sup>15</sup> Both have attended recent seminars on this topic in the White House.

new developments as, for example, at the University of Tilburg or Chicago-Kent University in the States. The UK has no equivalent and this would be a very useful development, whether funded publicly or privately. Seventh, there needs to be the kind of integrated multi-channel model of provision discussed above.

## **Research**

A constant refrain of our report has been the need for more research of the thorough kind that the Legal Services Corporation commissioned on hotlines that was published just over a decade ago. To the extent that the current frontier is the internet, it makes a lot of sense for this research to be international in scope. A lot rides on the research commissioned by the Dutch Legal Aid Board from the University of Twente on the *Rechtwijzer*. This should raise problems relevant to almost every jurisdiction and it is to be hoped that the traditional internationalism of the Dutch temperament will encourage it to build international discussion of its findings. First, in terms of its general application, we have identified the barriers to use of the internet as three: access to the technology; the skills to use it; the culture to accept its use. These barriers are likely to be malleable and to change over time: we need to be able to plot that. A working hypothesis would be that some of legal aid's hardest to serve clients will be disproportionately represented in the excluded groups: the non-English speaking; illiterate; old; young; those, in general, with more marginalised lifestyles. Technology may bring access to a wider group in society overall but may simply underline the exclusion of those already the most marginal. In that case, technology needs supplementation with specialist 'outreach' provision of one kind or another. Second, some cases for all clients will need individual assistance. We need research into the irreducible minimum of face to face provision and its obverse: just how far technology can go in delivering mass services of the kind traditionally delivered face to face by lawyers in traditional ways. And, the measure of this research has to be based on solid legal outcomes which will require qualitative assessment of the different results attained by different dispute resolution strategies. Only with the benefit of such work can serious work be done on the issue of cost effectiveness.

Separate from the need for research is the need for reportage. In a fast moving world, we need to know what is happening. In particular, we need to follow developments in the commercial world. It is there that, for example, the boundaries of what might be possible in the development of automatic document assembly programmes will be explored. In each jurisdiction, there will be groups exploring this very issue. In England and Wales, for example, it would be *Legal Futures*.<sup>16</sup> We need groups like ILAG to be a conduit for international dissemination. Within jurisdictions, legal aid administrations need to keep an eye on the private market for innovation which they might follow or which might allow the private market to meet some of their responsibilities.

## **Recommendations for one country**

We committed ourselves in our original project proposal to making recommendations for the Ministry of Justice in England and Wales. We should acknowledge the difficulty of limiting ourselves to issues about the delivery of legal services in the context of a major retrenchment of scope and eligibility beyond what either author would regard as

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<sup>16</sup> [www.legalfutures.co.uk](http://www.legalfutures.co.uk)

acceptable in meeting the needs of the most marginalised in society. We cannot forbear to note that policy for England and Wales has diverged dramatically from that in Scotland where wholesale cuts of scope and eligibility have not, at least as yet, been regarded as justifiable. However, we set out below a set of recommendations which concern themselves with delivery and which we regard as compatible with existing policy.

1. The Ministry of Justice must continue to support free access to internet versions of statutes and cases. Indeed, it should ensure that free versions of statutes as amended should be easily available to all.
2. Like the Dutch, the Ministry of Justice should explicitly commit to policy to encouraging citizens to deal with their own problems through self-help, simplified legislation, 'unbundling' where possible and other mechanisms. The Ministry should foster innovation in the delivery of legal services through a range of low or no-cost measures such as annual awards and the engagement of its ministers in recognition of achievement.
3. The Ministry should consult on the methodology for the research promised on the use of the telephone gateways to advice in 2015 and should certainly include techniques such as 'dummy shoppers' and qualitative evaluation of advice given.
4. The Ministry should continue to assist financially the use of the internet to provide legal advice and information in various different ways and foster developments by way of awards or kite-marking.
5. The Ministry should ensure that it follows developments in other jurisdictions, particularly (but not only) Australia, New Zealand, The Netherlands, the US and Canada to keep abreast of best practice. We would very much encourage continuing contact with the Dutch Legal Aid Board to follow the progress of its work.
6. The Ministry must review the position of self-help litigants, drawing on the experience of existing court-based advice in the UK and elsewhere. Consideration should be given to increased funding for the equivalent to the self-help centres in US courts such as in California. The domestic equivalent would presumably be an extension of initiatives like the Royal Courts of Justice CAB.
7. The Ministry should monitor the effectiveness of self-help and unbundling in the private sector. It might consider supporting awards in this field or, for example, in collaboration with the Law Society annual excellence awards.
8. The Ministry must test the effectiveness of its hotline provision through independent research using dummy clients and qualitative assessment of advice given. It must ensure that the hotline is given adequate publicity to meet its goals and the temptation to ration delivery through lack of publicity should be resisted. The essential issue will be to identify who falls through the safety net of the telephone gateway: the particular issue is the fate of those groups noted above for whom telephone advice has proved unsuitable. More testing will be required of the follow up measures which US experience suggests are essential to make full use of provision

9. The Ministry should consider how the LawAccess model in New South Wales of integrated internet and telephone advice might be adapted to England and Wales.

### **And a final warning**

Judgement of current developments unavoidably becomes a delicate balancing act. On the one hand, there is the genuine excitement to be taken from innovation as can be seen from the private sector in England and Wales and publicly funded developments in the US, Australia and, above all, The Netherlands. On the other hand, there is the depressing nature of cuts to scope and entitlement (let alone remuneration) currently dominating domestic debate. It is fitting that we balance the positiveness of our opening with a final warning. The fate of NHS Direct (now wound up as the result of a political decision following a change of government) stands as a silent ghost spoiling the banquet of anyone celebrating the wonderful future predicted by new technology. A world leader in medical assistance was signed away by a government driven by a change of political priorities. The result is likely to be part of a major crisis in emergency medical care. It happened in medicine: it could happen in law. It is the job of evidence-based research to ensure that it measures a continued striving to meet the overall (if unobtainable) goal of equal justice for all.

## Online Services

### Emancipation for those who cannot access mediation and legal services

#### Presenter

Stephen G Anderson

#### Introduction to ODR

- An overview look at the online services market
- What the Legal Aid Agency says about mediating online The Daily Telegraph launched the UK's first online newspaper in 1994. Tesco first offered online grocery shopping in 1997. The first UK internet bank service was provided by Egg in 1998. [Amazon.co.uk](http://Amazon.co.uk) was launched the same year. Apple's iTunes has been selling music online since 2003, and BBC's iPlayer has been around since 2007.

There can be few people in the UK who do not have access to a computer, tablet or smartphone who have not used one of these services. 20% of the UK adult population are "Millennials" born between the early 1980s and early 2000s - young people who have grown up with computers, and will expect more of the services they want to buy to be provided online.

- £1.5 billion online dating industry
- 33% US marriages since 2007 between people who met online
- 20% divorces in England & Wales conducted online

#### Yet legal and mediation services are still primarily offered only in-person

What does this mean for the 10m permanently or temporarily disabled adults in the UK? What about shift workers; those couples where there is domestic abuse or power imbalance that makes one of them feel unsafe; those who don't live proximate to a service provider; those who don't live proximate to each other; those who want a cheaper service; and those who simply want the convenience of working online?

#### Existing online legal and mediation services

- Types of Online Dispute Resolution

- adjudicated v consensual
- automated v assisted
- asynchronised v synchronised

### **Who might prefer online services?**

- 9m with hearing difficulties;
- 5m anxiety sufferers in the UK (a symptom of anxiety is agoraphobia);
- 2m suffering from sight loss;
- 750k wheelchair users;
- 420k profoundly deaf; or
- 360k registered blind?

48% of disabled adults are employed

29% disabled people find some buildings inaccessible.

20% feel they do not frequently have control over their daily lives

So how are these people accessing justice? How are they accessing mediation or coaching or psychotherapy services?

With the 2013 EU Directive for the provision of Online Dispute Resolution services in all EU member states, legal practices will not want to overlook the many opportunities to supply online dispute resolution services to businesses and consumers across the EU community. But where are the online legal, mediation and other dispute resolution services in the UK? My firm is one of two that I know of that markets online family mediation. I know of one small claims mediator too. But my trawl of many law firms' and mediators' websites has largely drawn a blank. It seems that most practices do not want to save their clients the time and expense of physical meetings.

North America has, in SmartSettle, Modria, Wevorce and CyberSettle, some pioneering online dispute resolution services. Modria - born out of Ebay's dispute resolution process - has more recently created a presence in Europe. While CyberSettle and Modria mainly target businesses and the insurance claims market, SmartSettle also targets small claims and family disputes. Wevorce is firmly aiming for the divorce market.

### **What equipment is needed?**

- Hardware
- Software

## **The Low Commission**

**By Steve Hynes, Legal Action Group<sup>i</sup>**

### **Introduction**

The Legal Action Group (LAG) is a self-financing educational charity which aims to provide greater knowledge of the law through its programme of publications and training for lawyers and advisors. LAG also undertakes policy research on access to justice issues particularly the public funding of legal services.

In the autumn of 2012 LAG established an independent commission of ten people with expertise in public services, including legal and advice services. The remit of the Commission was to develop a strategy for the future provision of advice and legal support for social welfare law (SWL) to the general public in England and Wales. SWL is the term adopted to refer to areas of civil law which most commonly impact on poor and marginalised communities.

The investigation was prompted by the UK government's decision to withdraw or, to severely restrict the scope of civil legal aid for housing, employment, welfare benefits, debt, and immigration law cases. This paper discusses the background to the Commission, the report and its strategy in the run-up to the general election in the UK, which is due to be held in May 2015.

### **Austerity Cuts to Civil Legal Aid**

For a few days after the election on 6<sup>th</sup> May the people of the UK experienced the novelty of not knowing who their government might be as the Conservatives, who had won the most seats in the House of Commons, but not sufficient to form a majority, entered into talks with the Liberal Democrat party to put together a government. An agreement was eventually thrashed out between the two parties to form a coalition government- the first since the Second World War in the UK. What became clear very quickly before the ink was dry on the coalition agreement was that the overarching theme of the government was to be an austerity program to reduce the public spending deficit.

As part of the reductions in public expenditure the Ministry of Justice (MoJ) was set a target in October 2010 to reduce its budget from £8.9 billion to £7.3 billion (a cut of 23%)<sup>ii</sup>. In these early days of the government it looked like expenditure on prisons, which is the largest item in the MoJ's budget, might be significantly reduced. This though proved unacceptable to the right of the Conservative Party<sup>iii</sup> and left the then Secretary of State for Justice, Kenneth Clark, with few other options other than substantially cutting the legal aid budget.

Prior to the cuts around £2.1 billion was spent on legal aid making it the next biggest ticket item in the MoJ's budget. The Government outlined its proposals to reduce this by £350m in November 2010.<sup>iv</sup> Their plans remained relatively unchanged from the initial consultation on them to the passing of the Legal Aid Sentencing and Punishment of Offenders (LASPO) Act in May 2012. The government's policy was to "refocus legal aid on those who needed it most" taking into account their legal obligations, including those under the European Convention of Human Rights (ECHR).<sup>v</sup> Due to the risk of falling foul of the ECHR the scope of criminal legal aid was left intact, though fees were reduced for criminal legal aid work. The bulk of the cuts, £279m, fell on civil legal aid. These were made-up of a 10% cut in fees and big reductions in the scope of the legal aid scheme.

The government's equalities impact assessments (EAS) published with the consultation on the Bill starkly illustrated the disproportionate impact the changes to scope would have on people protected by discrimination law. The EAS updated in June 2012 for example shows that disabled people make up 19% of the population, but form 54% of the client group who are from April 2013 are no-longer receiving help funded by legal aid with benefits problems<sup>vi</sup>.

According to the government's estimate 623,000 people are missing out on help with civil legal problems due to the LASPO Act cuts.<sup>vii</sup> Over a third of these, 232,500, are private law family cases including divorce and disputes over contact with children after a relationship has broken down. The next biggest category cut from scope is welfare benefits with 135,000 people who previously received help funded by legal aid now missing out.

In November 2011 LAG published revised figures for the estimated reductions in funding and cases in SWL<sup>viii</sup> -

	Legal Help	Cases	Civil Representation	Cases
Debt	£20m	105000		50
Education	£0.50	2800	£0.5m	70
Employment	£5m	24000	£0.5m	70
Housing	£10m	52000	£3m	1200
Welfare Benefits	£25m	135000		
Immigration	£20m	53000	£1m	290
	£81	371800	£5m	1680

Legal help cases involve initial advice and assistance to a client. Some cases go onto civil representation, but the bulk of cases in SWL remained at the legal help level. For example in 2012/13 there were 81,944 new matters started for legal help with debt problems, but only 353 cases went on to the next level, civil representation.<sup>ix</sup>

LAG estimated that around half of then 2000 firms undertaking civil legal aid work, mainly in family law, would cease to do so after April 2013. We believed that a larger proportion, of the then just under 300 not for profit organisations with legal aid contracts, would leave the system as their contracts were almost entirely in SWL.<sup>x</sup> LAG's concerns regarding the reductions in the scope of civil legal aid and its impact on clients led to the establishment of the Low Commission. We were also motivated to set-up the Commission by the wider context of public funding cuts in local government and elsewhere affecting the sustainability of advice organisations,

### **The Low Commission**

Much of the political debate on legal aid is dominated by the providers of services on the one side and the government on the other. What little public discourse there is on legal aid tends to be framed around the issue of remuneration for the lawyers/advisors who provide the service and the overall cost of legal aid compared to other countries<sup>xi</sup>, rather than the needs of the public for advice and representation. It was felt by LAG that for the Commission's findings to be credible with both the

government and providers, it would have to be independent of lawyer and advice giving organisations, consumer pressure groups, as well as from the political parties.

Lord Colin Low, who sits as a cross-bench (non-party political) peer in the House of Lords, chairs the Commission. His Vice-Chair is Amanda Findlay, a respected former senior civil servant in the MoJ. Like Lord Low she is someone who is seen as both politically neutral and independent from provider interests. The other Commissioners were appointed for their expertise in public services and access to justice policy. They include Bob Chapman, the former head of the Legal Services Commission<sup>xii</sup> in Wales, who was given responsibility for ensuring the final report reflected the needs and concerns of Wales, as while legal aid policy is not devolved to the Welsh assembly, the planning of advice services is a policy area of interest to it.<sup>xiii</sup>

The remit of the Commission was to develop a strategy for the future provision of advice and legal support on SWL in England and Wales, which:

*“Meets the need for the public, particularly the poor and marginalised, to have access to good quality independent advice and legal support;*

*Is informed by an analysis of the impact of funding changes and by an assessment of what can realistically be delivered and supported in the future; and*

*Influences the thinking and manifestos of the political parties in the run-up to the general election in the UK and the 2016 election in Wales.<sup>xiv</sup>”*

The Commission heard evidence from interested parties at its meetings and also held some meetings around the country to hear evidence. For example a hearing of the Commission was held in Stroud, where one of the Commissioners, David Hagg, is the Chief executive of the local council. It also received written submissions from a wide range individuals and organisations including charities, community and legal interests groups, public services experts and representative bodies.<sup>xv</sup>

## **The Report**

In January 2014 the Commission’s final report was launched. It discusses the patchwork of provision in both the voluntary and legal services sectors which has developed in the UK over the last forty or so years to provide the public with advice on SWL. It also looks at the strategic implications for different government departments and agencies which are involved in commissioning advice and legal support services, as well as in making decisions on the provision of benefits and services to people. The report details the high level of cuts these services in SWL have suffered, which include an estimated £40-60m cut in local government cash for advice services, in addition to the cuts to legal aid described above.

An example of an agency badly hit by the reductions in public funding for SWL is Birmingham Citizens Advice Bureau (CAB) service. Birmingham CAB is one of the largest in the country. Its grant from Birmingham City Council was cut from £590,000 to £265,000 in 2012/13. Due to the changes in legal aid from April 2013 it lost £700,000 in contracts for advice on SWL.<sup>xvi</sup>

The Commission heard much compelling evidence to indicate that the demand for advice is rising. Sutton CAB for example report that requests for advice on benefit appeals has tripled in the last three years and due to poverty clients are increasingly

reliant on food banks. A good deal of the evidence on the problems people are facing is anecdotal, as the government is not collecting statistical information on this.<sup>xvii</sup>

A project which influenced the Commission's thinking was the Systems Thinking Programme in Nottingham. This found that 30% of the demand for advice was the result of "preventable failures in public services." Close collaboration between the advice sector and Nottingham City Council's Housing and Council Tax Benefits services have led to improvements in decision making on entitlement to benefits<sup>xviii</sup>.

While the Commission recognised that the report is written in a time of austerity, they have emphasized that they also see this as a time of innovation and rapidly moving change in the provision of advice and legal services, and in dispute resolution. New providers are moving into the market as a result of the Legal Services Act<sup>xix</sup> which has introduced new models of ownership for law firms to further open-up the market for legal services. There are also opportunities for new technologies to assist in delivering public legal education and advice services, and the Commission identifies the best of these and how they can be utilised.

Although the public funding landscape remains highly precarious and uncertain for the social welfare law sector the Commission reckons that there are nevertheless opportunities from some areas of public services reform. The changing health and social care landscape for example is placing an ever higher premium on independent information, advocacy and advice, and in the financial services sector the innovation of the levy-funded Money Advice Service is an interesting new approach to funding debt advice which could be extended more widely.

## **Recommendations**

While acknowledging the valuable work that the previous legal aid system undertook, the Commission believes that given the current economic context it is not something which can be simply reinstated. It proposes a "fresh approach" which harnesses a wider range of funders and cost-effective approaches, including early intervention and action to resolve problems,

*"We view legal aid as part of a continuum including public legal education, informal and formal information, generalist advice, specialist advice, legal help and legal representation; the more we do at the education, information and advice end of the spectrum, the less we may need to do at the other end, where there will be less money available."<sup>xx</sup>*

Commissioners took the view while finalising the report that they should produce a comprehensive set of proposals covering every aspect of the provision of SWL services rather than concentrating on a few headline ones. There are 100 recommendations made and these are broken down by audience in appendix 3 of the report.<sup>xxi</sup>

Fourteen recommendations are made to providers, which include the suggestion that there should be better passporting between the various quality standards that apply in the sector. The Commission also suggests that the sector should develop a common outcomes framework.<sup>xxii</sup>

Most of the recommendations (forty two in total) are aimed at the government, departments of state and other government institutions. A major recommendation is the call for the Government to establish a 10 year National Advice and Legal Support Fund, £50m of which would be administered by the Big Lottery (the body which

distributes proceeds from the UK's national lottery). 90% of the fund would be spent on local advice services with 10% of the fund going to national initiatives.

An additional amount of £50m for local advice services, suggests the Commission, would come from statutory, voluntary and commercial funders, including NHS clinical commissioning groups, housing associations and trusts and foundations. Commercial funders would include pay day lenders and firms of solicitors, which would contribute the money they earn in interest from holding funds on behalf of clients.

A local planning process to distribute the funds is suggested. Local government working in conjunction with the local advice sector would be expected to commission advice services through grant programs rather than competitive tenders.<sup>xxiii</sup> The Commission sees potential for the development of local advice and legal support plans genuinely co-produced between local authorities and their local advice networks.

A minister with responsibility for Advice and Legal Support, the Commission believes, would assist in co-ordinating the provision and procurement of advice services across government and would be responsible for developing a National Strategy for Advice and Legal Support in England to cover the period 2015-20. A separate strategy would be developed by the Welsh Government. The Commission suggests that the Minister could also encourage innovation in the delivery of services and following the systems thinking approach, provide the necessary leadership to ensure feedback from advice agencies leads to improvements in services, which in turn reduce preventable demand.

Some changes to the Legal Aid system are suggested, for example the Commission believes that the operation of the exceptional funding rule in section 10 of the LASPO Act should be reviewed. It was created by Parliament to ensure a human rights safety net to catch those cases which would otherwise be excluded from receiving support from legal aid. Despite the government estimating 5-7,000 such cases in the first year, only a handful have made it through the system. The Commission believes the reluctance of lawyers to assist clients with such cases and an obstructive decision making process are combining to exclude the public from bringing cases.

The government had retained scope for housing matters for people at risk of losing their home. Many representations to the Commission made the point that it did not make sense to exclude housing benefit from legal aid, as a problem with a claim for this could escalate quickly into an eviction. For this reason they are asking the government to consider restoring advice on housing benefit cases to the legal aid system.

Some of the Commission's recommendations around technology were influenced by a seminar it hosted to discuss the use of technology to improve advice services,

*"Instead of seeing technology as a challenge to face to face delivery, we view technology as a tool to improve advice services."<sup>xxiv</sup>*

Innovations supported by the Commission include the use of online peer to peer communities to share information and the use of online tools such as "CourtNav." CourtNav has been developed by the Royal Courts of Justice Advice Bureau and the law firm Freshfields Bruckhaus Derringer LLP to assist litigants in person in family cases. The program uses the answers from the user to complete court forms.<sup>xxv</sup> And the Commission also makes some suggestions, based around best practice examples, about how advice bodies can work more collaboratively both locally and

nationally and share their resources in ways that can benefit both clients and the agencies themselves.

Recommendations around Public Legal Education include a call for the MoJ to work with the Department for Education to integrate information on legal rights into the national curriculum and for the training for local community volunteers to act as problem noticers as part of a planned local service..<sup>xxvi</sup> The Commission, recognising the experience of other countries which have been hit by cuts in publicly funded legal services, also recommends that the UK government establishes helplines which are integrated with website support.<sup>xxvii</sup>

## **Future Plans**

The work of the Commission has sparked much interest. In total over 250 organisations and individuals gave evidence and the meetings held around the country were attended by over 400 people. The Commission's work has received coverage in newspapers, broadcast media and in the specialist press. The launch of the report on 13<sup>th</sup> January 2014 sparked another round of media coverage for the Commission and extensive coverage in the legal and charity press. So far the report has been welcomed by the main political parties.

Lord Low initiated a debate on the Commission's report which took place in the House of Lords on 25<sup>th</sup> January. A number of peers spoke in the debate and their speeches reflected the positive reaction the report and its recommendations have been receiving. A series of follow-up meetings with the MoJ and other government departments is on-going.

The Commission took the decision to continue its work for a further two years to try to ensure that its recommendations are implemented. This new phase in the Commission's work, dubbed the Low Implementation Project (LIP) will have two main tasks-

1. Collating and disseminating evidence on the impact of the cut-backs in public funding for advice and legal support services;
2. Campaigning to ensure the political parties and government adopt the recommendations in the report.

A series of "Low Commission- Evidence Reports" will also be published. These reports would be used as centre pieces in the Commission's communications and public affairs work. A report, which is intended to be the first in this series, written by the economist, Dr Graham Cookson of Sussex University is due to be published this month (June). Dr Cookson will be reporting on the economic case for advice and legal support.

In the run-up to the general election the Commission will be looking to further raise its profile and build support for its recommendations. Activities planned include holding fringe meetings at the three main party political conferences this autumn, as well as extensive series of meetings with politicians and other policy makers.

Lord Low and his fellow Commissioners recognise that, challenging as it was to put together its report in just over a year, the really difficult part of the Commissioner's work is before it- persuading the policy makers to adopt its recommendations.

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<sup>i</sup> Steve Hynes has been the Director of LAG since August 2007. Prior to joining LAG Steve was the Director of the Law Centres Federation. He is also a member of the Low Commission.

Steve writes on legal aid and access to justice policy. He is the author of Austerity Justice, published by LAG. The book describes the development of civil legal advice services in England and Wales, as well as the background to what became the Legal Aid Sentencing and Punishment of Offenders (LASPO) Act (2012).

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/203826/Spending\\_review\\_2010.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/203826/Spending_review_2010.pdf) page 55

<sup>iii</sup> P98 Austerity Justice, Steve Hynes, pub LAG December 2012

<sup>iv</sup> Proposals for the reform of Legal Aid in England and Wales, Consultation Paper CP12/10 pub MoJ , Nov 2010.

<sup>v</sup> Reform of Legal Aid in England and Wales: the Government Response, pub MoJ June 2011 p11

<sup>vi</sup> See Reform of Legal Aid in England and Wales: equality impact assessment, June 2012 p127

<sup>vii</sup> Reform of legal aid impact assessment

<sup>viii</sup> <http://www.lag.org.uk/policy-campaigns/revised-figures-for-cuts-in-social-welfare-law.aspx>

<sup>ix</sup> Legal Aid Statistics in England and Wales 2012-13, published June 2013

<sup>x</sup> See p 6 Legal Services Commission Annual Report and Accounts

<sup>xi</sup> The following article is perhaps a typical example- <http://www.telegraph.co.uk/news/uknews/law-and-order/9553871/Legal-aid-in-England-five-times-as-generous-as-rest-of-Europe.html>

<sup>xii</sup> The Legal Services Commission administered legal aid until it was abolished from April 2013 under the LASPO Act 2012.

<sup>xiii</sup> <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf> See page 109 for a full list of Commissioners

<sup>xiv</sup> Tackling the advice deficit- A strategy for access to advice and legal support on social welfare law in England and Wales

<sup>xv</sup> <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf> See pages 110-114

<sup>xvi</sup> See P8 of the report

<sup>xvii</sup> See P15

<sup>xviii</sup> See p35

<sup>xix</sup> <http://www.legislation.gov.uk/ukpga/2007/29/contents>

<sup>xx</sup> P25

<sup>xxi</sup> See p114-123

<sup>xxii</sup> P67

<sup>xxiii</sup> P77

<sup>xxiv</sup> P49

<sup>xxv</sup> P50

<sup>xxvi</sup> P54

<sup>xxvii</sup> P57

## *Cliff-top Politics – Fence or Ambulance?*<sup>1</sup>

Suzie Forell

Law and Justice Foundation of New South Wales

The analogy to be tortured here, of a preventative fence at the top of a cliff being preferable to an expensive fleet of ambulances at the bottom<sup>2</sup>, has been employed in a range of sectors to describe the relative place of prevention and early intervention strategies. Richard Susskind (2010 p.231) can be credited with employing it in reference to legal assistance, arguing for a shift towards intervening early to prevent legal problems from forming and escalating, in preference to strategies that mop up the problem once the crisis has struck.

In recent years, the notion of ‘early intervention’ (together with prevention) has become increasingly prevalent in key Australian policy and strategy documents, and shaped the delivery of public legal service accordingly.<sup>3</sup> The 2010 *National Partnership Agreement on Legal Assistance Services*, which provides Federal Government funding for civil and family law assistance, specified as a desired outcome, a ‘30% increase in early intervention services’. In this agreement, early intervention services were defined as:

*legal services provided by legal aid commissions to assist people to resolve their problem before it escalates,” with further indication then given of the type of services that early intervention constitutes: “...legal advice, minor assistance and advocacy other than advocacy provided under a grant of legal assistance.*

‘Preventative’ legal services were defined as:

*...legal services provided by legal aid commissions that inform and build individual and community resilience through community legal education, legal information and referral.*

The concept has also featured heavily in access to justice policy discussion in Canada, where strategies have been proposed to “help most people in the most efficient, effective and just way at the earliest point in the process” (Canadian National Action Committee on Access to Justice in Civil and Family Matters, 2013, p.11).

Figure 1 illustrates the place of early resolution strategies, relative to a) the formal justice system and b) the volume of legal problems experienced. It also describes the types of strategies commonly implemented as the prevention or early intervention ‘fence’ in the legal assistance sector, indicating they are services that are provided early in the progress of a legal issue, ideally prior to the formal legal processes. These strategies also tend to be less intensive but

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<sup>1</sup> This paper is modified from Chapter 5 of Pleasence, Coumarelos, Forell & McDonald, 2014 *Reshaping Legal Assistance Services: Building on the Evidence Base*. Sydney, Law and Justice Foundation of NSW. *Reshaping legal services* is a discussion paper which, building on the substantial body of existing legal needs and access to justice research and the experiences and expertise of those consulted during the field work, suggests directions for future research, policy and practice in the provision of services to address unmet legal need.

<sup>2</sup> Drawn from a poem by Joseph Malins (1895) *A Fence or an Ambulance* (also cited as *The Ambulance down in the Valley*).

<sup>3</sup> See Commonwealth Attorney-General’s Access to Justice Taskforce 2009 *Strategic Framework for Access to Justice in the Federal Civil Justice System*, p.63; p. 144. Subsequent documents include the Commonwealth *Community Legal Services Program Guidelines* (Attorney General’s Department, Social Inclusion Division 2010); *National Partnership Agreement for Legal Assistance Services* (NPALAS) (COAG 2010), the *National Legal Aid Strategic Plan 2011-2013* (National Legal Aid 2011), The Review of the National Partnership Agreement on Legal Assistance Services (Allen Consulting Group, 2014).

widely available at the earliest stages, in order to 'catch' potential problems in the net as they are forming.<sup>4</sup> On the diagram below, these strategies are collectively conceptualised as an 'Early Resolution Services Sector'.

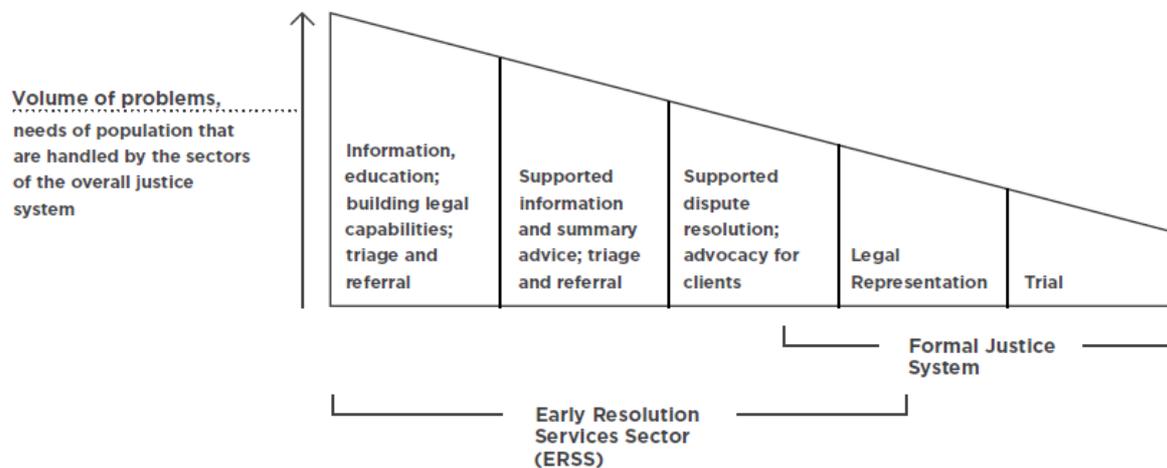


Figure 1: Involvement of the ERSS and formal justice system in the overall volume of legal problems (from Canadian National Action Committee on Access to Justice in Civil and Family Matters, 2013, p.11)<sup>5</sup>

Our work at the Law and Justice Foundation of NSW has involved the evaluation of a number of 'early intervention' strategies. Initially, I was personally very drawn to the logical appeal of early intervention – and particularly, the opportunity to translate this concept from other human service sectors, to the legal assistance sector.

But in the work we have done since, we have found - as is often the case - that the picture is more complex, particularly when considering the needs of disadvantaged clients. Noting some of the ways in which the concept has been interpreted and applied, we have been prompted to think more deeply about what is meant by early intervention in the legal assistance sector – what is the 'early', what is the 'intervention' and for whom? We have asked: 'for whom does the fence prevent the fall?' 'How high and how long does a fence need to be?' 'Can it really replace the ambulance?'

In more recent work (Plesence et al (2014), work from which this paper is largely drawn, we have finally considered how notions of timeliness may sit within a broader conceptual framework for the delivery of assistance to address unmet legal need.

This is the territory to be covered in today's paper.

<sup>4</sup> This interpretation of early intervention, as early but often *broad-based and less intensive assistance*, fundamentally differs from its antecedent concept, where, in child development, early intervention tends to describe *targeted intensive assistance* for specific children in need (e.g. Valentine & Katz, 2007).

<sup>5</sup> This diagram represents response to legal problems rather than the experience of legal issues. Relevant to the discussion below is the observation that a sizable proportion of legal issues do not even make it onto the diagram, because no action is taken for those issues or these issues are handled (formally or informally) outside the mechanisms described here (see Coumarelos et al. 2012).

## Leaning on the fence: the promise of early intervention

A central rationale of 'early intervention' in the legal assistance sector is a view that earlier assistance may ameliorate the need for more intensive and expensive intervention later on. This perspective is informed by an understanding that as legal matters progress, they can become more complicated, can trigger further legal problems and potentially require the more intensive ambulance to bring matters to resolution:

*An unresolved legal problem can trigger further legal problems, resulting in the experience of multiple simultaneous or sequential problems. Thus, early intervention strategies could be used to resolve legal problems before they reach crisis point, by minimising escalation, preventing flow-on effects and reducing the need for expensive court resolution (Coumarelos et al, 2012, p. 13).*

The Canadian National Action Committee on Access to Justice in Civil and Family Law (2013, p.9) flesh this out:

*... the range of services in the ERSS is intentionally designed to facilitate early resolution. Well-designed outreach programs for youth and adults help to build legal capabilities that prevent disputes from becoming problems. PLEI provides information that helps people resolve matters on their own or avoid unnecessary court involvement. Similarly, conflict or dispute resolution projects provide early resolution. Avoiding problems or the escalation of problems, and/or early resolution of problems is generally cheaper and less disruptive than resolution using the courts. To borrow Richard Susskind's observation, "it is much less expensive to build a fence at the top of a cliff than to have need of an expensive ambulance at the bottom".<sup>6</sup>*

Bolstered by the possibility of stemming the flow of legal problems into the legal system, a second key appeal of early intervention lies in the perceived opportunities to broaden the reach of legal assistance services beyond 'the most essential legal needs of the most vulnerable populations' (Canadian Bar Association 2013a, p. 2) and 'to find solutions that will best alleviate the unmet legal needs of the *most* people possible'. (Canadian Bar Association 2013a, p. 7 see also Trebilcock, Duggan and Sossin 2012; Middle Income Access to Civil Justice Steering Committee 2011). This approach responds to a concern that:

*Cuts to public funding for legal aid have resulted in continually decreasing financial eligibility levels and increasingly limited services offered by legal aid plans, so even many low income and people living in poverty are now ineligible for the services they need (Canadian Bar Association 2013a, p.2; see also Centre for Innovative Justice 2013).*

The roll out of early intervention services is seen as important because:

*They help to bridge the gap between no assistance and full representation and allow legal aid programs to assist a greater number of people facing a greater variety of legal problems (Buckley 2010, p. 77).*

Thus the appeal of early intervention is twofold. It first lies in the prospects of early intervention preventing the escalation of matters through the legal system. In the pursuit of this goal, it is secondly anticipated to provide cost-effective justice options for a greater range of clients and issues.

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<sup>6</sup> The recent draft report of the Productivity Commission (2014) *Access to Justice Arrangements* discusses a range of early intervention strategies in these terms.

## Is it too good to be true?

Before we turn to the question of whether the fence may provide more cost-effective justice than the ambulance, we need to revisit a prior question of ‘who do public legal assistance services seek to serve or prioritise’?

### The context: a focus on the most disadvantaged

Legal needs surveys, both in Australia and overseas, have established a clear inequality in the experience of legal problems, with some groups being more exposed to the circumstances that can give rise to problems and/or less able to avoid or mitigate problems (Pleasence et al, 2014). As further observed by Pleasence et al (2014, p. 5):

*This inequality of experience links to ‘social disadvantage’, with legal problems having been described as often existing “at the intersection of [law] and everyday adversity” (Sandefur 2007, p.113).*

The extent of inequity in the experience of legal problems is encapsulated in the finding from the Law and Justice Foundation’s LAW Survey<sup>7</sup>, that just 9% of LAW Survey respondents accounted for 65% of reported legal problems (Coumarelos et al, 2012). Income, distance, personal capability and the manner in which services are made available were all found to impact on people’s use of legal and other services; with personal capability linking to the utility of different forms of assistance.

These LAW survey findings, previous legal needs surveys and associated access to justice research have strongly influenced a position where in policy and front-line practice, the needs of the most disadvantaged are a priority. In Australia, this is articulated in the objective of the 2010 National Partnership Agreement on Legal Assistance Services, to develop:

*A national system of legal assistance that is integrated, efficient and cost-effective, and focused on providing services for disadvantaged Australians in accordance with access to justice principles of accessibility, appropriateness, equity, efficiency and effectiveness. (COAG, 2010 p. 4)*

This focus on the most disadvantaged has been confirmed in a recent review of this agreement, which goes further – to recommend that Government more clearly articulate who it is that they expect public legal assistance services to serve – and to prioritise these clients in service delivery, recognising both the nature of their legal problems and their capability to address these problems (Allen Consulting Group, 2014, p.21, see also Productivity Commission, 2014).

### How does early intervention sit with disadvantage?

Central to the promise of early intervention is the notion that early assistance will prevent the escalation of issues, and in doing so, will reduce dependence on more formal justice mechanisms. To achieve this, early intervention strategies need to reach clients ‘early’ and provide assistance that makes a difference to those clients.

To then be a cost-effective justice option these strategies need to be inclusive: reaching and addressing the needs of vulnerable and disadvantaged people who experience the disproportionate amount of legal need. The fence needs to be high and long enough to contain these ‘priority clients’ who have the bulk of legal problems and prevent *this group* from falling from the cliff.

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<sup>7</sup> The Legal Australia-Wide Survey (LAW Survey) provides a comprehensive quantitative assessment across Australia of an extensive range of legal needs on a representative sample of the population (20,716 respondents). It examines the nature of legal problems, the pathways to their resolution, and the demographic groups that struggle with the weight of their legal problems.

This is a significant challenge, because, as the legal needs research discussed above has indicated, disadvantaged people are also more likely to have certain characteristics that affect their ability to engage with services and address their legal needs: multiple and intersecting legal and other issues (see Pleasence et al, 2014, Chapter 2) and low personal and legal capability (Pleasence et al, 2014, Chapter 6).<sup>8</sup>

## Who Do Fences Contain?

One assumption underpinning many early intervention strategies is that if people *are* informed that their problems are legal problems and *are* signposted to legal help, assistance can be provided early:

*There are a large proportion of people who either do not recognize their problem as having a legal component or do not know where to go for help. They do not obtain timely and effective advice that could help them manage their legal problems early on. As a result, a proportion of these problems move from problems that could be resolved relatively easily at the early stages to ones that require expensive legal services and court time. (Canadian National Action Committee on Access to Justice in Civil and Family Law (2013, p. 4)*

For some people this may well hold true and they are contained behind the early intervention fence.

However, evidence from legal needs and access to justice research has consistently identified the complexity of reasons why many people, particularly those facing social disadvantage, do not necessarily seek out assistance for their legal problems in a timely way. These range from shame, insufficient power, fear, gratitude and frustrated resignation, to having other immediate priorities which take precedence over legal issues, feelings of hopelessness and despair, not recognising or believing the law can work in their interests and simple denial (e.g. Genn 1999, Forell, McCarron and Schetzer 2005, Pleasence 2006, Sandefur 2007, Balmer et al 2010, Allison, Cuneen, Schwartz and Behrendt, 2012; Pleasence et al, 2014). As a result, individuals and communities can be quite disconnected from the law *as tool for resolving issues*. As was described by a provider of Indigenous services in Pleasence et al (2014):

*Aboriginal people, because of the history, honestly, don't trust that they're going to get a fair shake of the stick.*<sup>9</sup>

New analyses from the Foundation's LAW survey have also explored reasons provided by respondents for taking no action about legal issues they identify, including the reason that they 'didn't know what to do'. The analysis indicates that not knowing what to do was rarely reported as the *only* reason for inaction.<sup>10</sup> McDonald and People (forthcoming) conclude "the overlap of reasons for taking no action for legal problems suggests that some people are constrained from acting in multiple ways". They further observe, following an analysis of

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<sup>8</sup> Legal capability refers to the personal characteristics or competencies necessary for an individual to resolve legal problems effectively (Coumarelos et al 2012).

<sup>9</sup> Similar observations were made by agencies working closely with newly arrived communities in urban Sydney, where one service provider described a 'cultural disconnect' which, together with limited language capacity and awareness of the system, further distances people from conceiving the law as a tool at their disposal (Pleasence et al, 2014).

<sup>10</sup> The analysis focused on only three of the full list of reasons provided for not taking action: 'didn't know what to do', 'it would be too stressful' and because 'it would cost too much'. The data indicates that of those who gave any of the above three reasons for taking no action, only 7.6% gave 'didn't know what to do' as their *only* reason for inaction. Further analysis will be undertaken of the impact of disadvantage on the number of reasons offered for inaction.

differences by demographic characteristics, that “particular types of people are more likely to be constrained from taking action”.

Importantly some of these barriers go beyond the legal domain – and beyond what can be reasonably expected of legal sector strategies that are used to encourage people to seek assistance. For instance, community legal education may not influence someone who is more immediately concerned for the safety of their children than managing a fine debt. Legal advice will not address an underlying mental health issue.

The impact of this range of factors is that, as Forell et al. (2005, p. xx) observed of homeless people, “when ... people finally do contact a legal service (if at all), the issue has usually already reached crisis point: the eviction is imminent; their benefits have been cut off; the court case is tomorrow.”

Across a range of service sectors, research and practitioner experience has also pointed to the impetus of crisis in prompting help-seeking behaviour (Evans & Delfabbro 2005; Hall and Partners, Open Mind 2012; Coumarelos 2012, p.30), noting that the ‘tipping point’ for seeking help is later for some groups than others and that the disadvantaged are over represented in this latter group. This was strongly expressed by practitioners in the fieldwork for Pleasence et al (2014), particularly by frontline workers supporting clients with complex needs. For instance:

*... we do get a lot of clientele come in in crisis mode (Aboriginal services worker, rural area)*

*... when the proverbial hits the fan you come in ... (Rural community service provider)*

In these consultations, a number of providers also noted that clients commonly come to the attention of legal services with multiple legal issues. One provider likened seeking legal help to seeking help from a doctor: where people may wait until they have several problems to report, or until one problem becomes too painful to bear, before they finally seek help. Another noted:

*sometimes people have just reached a point where ‘oh, I had better do something about this, now I have two or three things going on, I will call and find out what I should do, Here’s what I have got ... a restitution order, plus I have got this traffic matter coming up, plus I have been sued. There might be three totally unrelated problems but they could be related in that they maybe got suddenly got ill, or lost their job (Statewide legal service provider).*

Practitioners further suggested that it is not only an issue of when people seek help, but when people are *ready to act* on the issue. As noted by a financial counsellor in Pleasence et al (2014):

*... we do get them at crisis point. It does mean we can talk to them at a very strong point in terms of getting action because there is a crisis. So the beauty of a crisis is the client is likely to do something...*

A public legal service lawyer described this as ‘timely crisis management’.

As the insights above suggest, early assistance may be less effective for some people, because they are not ready to address problems.<sup>11</sup> There is a risk that if assistance is offered before the client is ready for assistance, it may not be taken as offered, used to full advantage or have the impact expected.

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<sup>11</sup> Similar notions are described in relation health behaviour management as a model of ‘stages of change’ or ‘readiness to change’ (e.g. Prochaska, DiClemente and Norcross 1992, DiClemente & Prochaska 1998).

The implication of this is that service delivery focused on *early* intervention - service provision *before* the crisis hits - risks missing those clients who just don't come in early (Forell and Cain, 2012) or who are not ready for help. As socially disadvantaged people feature among this group, it is they who also may not be well served by interventions directed to these earlier stages. Added to this, by the time crisis hits, the legal matter is generally more complex, requiring assistance that goes beyond the forms commonly envisioned for early intervention.

Returning to our analogy: for much of the time people may be teetering, but not close to the edge of the cliff. When they do get close they may be too distraught, too distracted or too deeply in denial to notice. They don't heed the signs, don't see the fence and fall swiftly to where we hope is a waiting ambulance.

Important also for disadvantaged people, legal problems do not exist in isolation, but often as closely interwoven with other legal (Pleasence, 2006; Currie, 2007; Coumarelos, 2012) and non-legal issues (Forell et al, 2005; Karras et al, 2006). In this context, 'early' cannot necessarily be understood in terms of a single presenting legal issue. Rather, for these clients, the timing of assistance may need to account for a very complex set of considerations such as health issues (including mental health stability), other legal processes (e.g. criminal and family law), other priority issues such as personal and family safety, and the motivation of the individual to address the issue. Many of these issues transcend the presenting legal issue, and may stretch beyond the domain of legal services more broadly. Timing needs to account for factors beyond the presenting legal issue that may affect a person's readiness and capability to act, and in turn, the potential impact of any assistance provided.

A financial counsellor consulted in Pleasence et al (2014) explained how this complexity affected her service provision:

*...If I have a client that I know can't deal with [the financial problem] at the moment or they need ... more mental health support, we will refer them on and we'll follow up ... with their support worker and just say, look, are they attending appointments or are they ready to return to financial counsellor? ... I don't close their file off until I know that they either don't want my assistance any more or they've either left town or they're still in having treatment or whatever.*

Thus, just as complex issues are contextual, so too should be the timing of any individual services provided. This raises the question: on what dimension is 'early' meaningful in the provision of legal assistance services?

## When is Early?

To discuss the issue of 'early' for clients with complex needs, I take you to a case study from our evaluation of an extended duty lawyer scheme in the Family Court complex in Western Sydney.

*Early afternoon, a young mother arrived at the Family Court distraught, and was sent up to the duty service by reception. She had been given a spa treatment package by her partner for Mother's Day and returned home to find her partner, her infant and their belongings gone. A relative of his informed her that the father and infant were at the airport, leaving the country. Within hours of her arrival at court, the duty solicitor had filed documents, appeared before the Federal Magistrate and received orders putting the child on the airport watch list and to recover the child if still in the country (including Australian airspace). Unfortunately, it was too late and the child had been removed to a non-Hague country. Over the following four days the duty lawyers appeared several more times and managed to get the family member who had assisted the father in removing the child (and who intended to join them overseas) onto the airport watch list. This barrier to the family member leaving the country assisted the duty solicitor in negotiating with the father (by phone) to return with the child. The child was returned to the mother within seven days of removal. (Forell and Cain, 2012)*

There are multiple features of this case study which illustrate the discussion points today. There are issues about what is meant by 'early'. And there are features of this intervention that made it possible to recover the child, in what were extremely difficult circumstances.

But starting with the question of 'early'.

Early intervention is commonly conceptualised as a stage in the legal process, usually prior to formal court processes commencing (COAG, 2010). One example is legal advice provided after the issue of a default notice but prior to the receipt of a statement of claim in a mortgage hardship situation<sup>12</sup> (Forell and Cain 2011).

However, as the example above illustrates, not all legal issues and processes are so linear, with clear early periods and late periods. In the family law context for instance, there are defined steps leading to separation and divorce, but within this, legal processes may start, stop, falter and re-emerge at any point up to, during and following this initial process (see Forell and Cain, 2012 pp. 34-35). In the above case study, there had been legal issues prior to the abduction of the child, including domestic violence. An AVO had been taken out, but the couple had reunited.

Equally, some problems – such as the abduction of the child, are sudden and cannot necessarily be anticipated, at least by the parties involved (Other examples include: retrenchment, arrest, crime victimisation, breaches of orders)<sup>13</sup> leaving 'late' intervention in the court as the earliest, perhaps the only and potentially the most efficient and effective intervention available:

*For a contravention application to be brought means that there's been proceedings, there's been orders, but I don't think you'd find it hard to argue that [when a] client comes in having been served — so they've responded in the contravention application — they've been served with it and they come and see us the next day. That's early (Solicitor quoted in Forell and Cain, 2012 pp. 34-35).*

The point is that the value and impact of an intervention is not necessarily linked, or only linked, to its timing *in the legal process*. In the evaluation of the Legal Aid NSW Family Law EIU Duty Lawyer Scheme, critical assistance was provided to clients at a variety of different points in the legal process. As one of the duty lawyers in this program commented:

*I still see us as early intervention, even when we come in at a really late stage, because for that client it's the earliest intervention that they've had (in Forell and Cain, 2012, p.34).*

In Pleasence et al (2014) we argued that a more inclusive framework may better take this approach – and focus on the timeliness of assistance *relative to the experience of the client* rather than defining the effectiveness of service delivery (as is the case in the NPALAS) in terms of what may be an arbitrary point in a legal process. While a focus on *timeliness* may well involve intervening 'early' in problems or processes where this is possible and appropriate, it may also take account of:

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<sup>12</sup> In an evaluation of a program which aimed, during the global financial crisis to provide early assistance to people at risk of losing their homes, six 'stages of enforcement' were identified (no default notice, default notice, statement of claim, notice to vacate, post-repossession, post-sale of home). 'Early' was defined as the period prior to the issue of a statement of claim. 'Late' was after this point.

<sup>13</sup> That noted, while some problems are sudden and may not be anticipated by the individual(s) involved, the LAW Survey, together with other legal needs research does provide valuable insight into who may be vulnerable to legal problems, the types of problems they are vulnerable to and how the legal problems cluster together. As will be discussed later in this chapter, this information can inform the targeting of service provision such that 'early' identification of issues may be a reality.

- how legal issues are experienced by the client (including when timing must take account of complex needs, beyond the presenting legal issue)
- how help is sought (the common experience of crisis driven help seeking, particularly among that core group of priority clients).

There are of course other ways in which the early intervention fence can be conceptualised. 'Early' intervention in the legal assistance sector at times refers to assistance provided early in the formation of a problem before it formally enters the legal domain. Advice about separation and divorce to people who are unhappy in their relationship or experiencing domestic violence is one example:

*Early intervention, as I see it ... is a large part of our work, which is being that first point of contact and which is making those appropriate referrals and giving appropriate, very general, very understandable advice (Solicitor quoted in Forell and Cain, 2012 p. 34).*

Here 'early' refers to a stage within a *social* process, with the 'intervention' timed at a point where the issue *could* escalate into the legal domain for resolution.<sup>14</sup> Intervention at this point may steer people towards alternative sectors (counselling, financial counselling, housing) or to early resolution options (such as mediation, negotiation) or, where necessary, direct them further into the system (self-help with divorce, legal assistance). However, for very disadvantaged people, problems themselves may have long and complex histories (not to mention somewhat unpredictable futures), making it difficult both to identify 'early' and to disentangle legal from other related issues. Locating the point at which it was early for legal services to intervene in the deepening dysfunction of our example couple illustrates the issue. It is also a reminder that meaningful assistance prior to the issue becoming a legal problem potentially takes legal services beyond their own remit and resource capacity and into the realm of other sectors.

Looking beyond the legal assistance sector, 'early intervention' has yet a broader interpretation, where it refers to intervention early in a life course, to reduce the severity of impact of existing problems, and to protect other problems from occurring (Sharp and Filmer-Sankey 2010). In the child development field, for instance, it commonly takes the form of targeted and intensive assistance provided to vulnerable individuals (e.g., children with disability), as early as possible following diagnosis or identification (e.g. McLachlan, Gilfillan & Gordon 2013, p. 105; Oono, Honey and McConachie 2013). Understood in these terms, early intervention is less of a fence than an air ambulance, called purposefully to the top of the cliff.

Developmental crime prevention strategies similarly aim to intervene early in the lives of 'at risk' children, to prevent later offending. Of particular interest is a focus on 'transition points' in children's lives (National Crime Prevention, 1999, Homel et al, 2006; Manning, Homel and Smith, 2006). Manning et al (2006, p. 4) stated:

*Rather than a fixed 'trajectory', an individual faces a series of life-phases or transition points. Transition points mark a time when things often go wrong, but they are also the times when interventions are most effective, particularly for children and families from disadvantaged backgrounds.*

This observation has resonance with a range of findings in legal needs and access to justice research.

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<sup>14</sup> Or escalate from one legal domain to another. As one public legal assistance lawyer noted in consultations for Pleasence et al (2014): "...civil law is the basis of criminal law because basically if you've got no money, you've got nowhere to live, you tend to do silly things to survive".

First, the statement parallels broad observations that people are more vulnerable to different legal issues at different times of life. Thus, while younger people are more vulnerable to problems related to criminal activity, accidents personal injury and rented housing, people in their late 20s and 30s were more vulnerable to credit and debt and issues related to owning or renting housing. Family related legal issues peak in the 35-44 years age group, while, as might be expected, issues with wills and estates tended to peak at the 45-64 age group (Coumarelos et al, 2012 pp. 168-173).

It secondly reflects findings relating to how legal needs commonly co-occur or 'cluster' (Coumarelos, 2006; Currie, 2007; Pleasence, Balmer, Buck, O'Grady & Genn 2004, 2010, Pleasence 2006) and how some problems may 'trigger' others (Currie, 2007; Genn, 1999; Pleasence, 2006). In summarising previous research, Coumarelos et al (2012) observe "Although results across studies are not identical, relationship, injury and employment problems tend to emerge as likely trigger problems" (p. 14).

Most relevant perhaps, Manning et al's (2006) comment reflects observations made in qualitative legal needs studies about legal issues surrounding key transition points in people's lives such as family breakdown (Forell et al, 2005 pp. 65-74), sudden incarceration (Grunseit, Forell & McCarron, 2008) and sudden illness or disability (Karras et al, 2006 re mental illness). Broadly echoing the theme in a working paper on deep and persistent disadvantage in Australia, McLachlan et al (2013, p. 21) stated:

*Events such as relationship and family breakdowns or the death of a partner can also trigger disadvantage (conversely, the formation of a relationship can be a pathway out of disadvantage). This is particularly the case when a key source of income is lost. Relationship and family breakdowns are the leading trigger for the first instance of homelessness. Young people seeking assistance from specialist homelessness services commonly cite family breakdown and family violence as reasons for seeking help.*

Recognition of legal need occurring around transition points is also reflected in current examples legal service practices which aim to reach and assist disadvantaged clients at critical times (see Insert).

#### **Legal service strategies that respond to transition points in people's lives**

- A strategy of Legal Aid NSW and NSW Consumer Credit Legal Centre's Mortgage Hardship Service, to target those at particular risk of mortgage hardship following retrenchment and to locate services in mortgage hardship 'hotspots'(Forell & Cain, 2011)
- Bushfire and other disaster response, providing a range of legal and other assistance services on site to people following natural disasters (Victoria Legal Aid, 2010)
- The Cancer Council NSW's Legal Referral Service, providing legal and financial planning referrals to people diagnosed with cancer (Cancer Council NSW, 2013; Boyes & Zucca, 2012).
- Legal Aid NSW, Family Law Early Intervention Unit's family law outreach to local courts on Apprehended Violence Order list days, and expanded duty service in the Family Law Courts (Forell & Cain, 2012 p.1). Community legal education provided to newly arrived migrants participating in Adult Migrant English Programs

**These services are framed around times and places where the assistance is needed.**

Thus, the idea of 'transition' points in a life course, or even the life of a problem, adds another dimension to the discussion on 'timeliness' of legal assistance. Such approaches allow for:

- responsive and timely assistance at the time and in a place it is useful and ready to be used
- account to be taken of other legal issues likely to cluster with or follow the crisis.

Notably, a court or tribunal hearing may itself indicate a time of 'transition': for people facing criminal proceedings, family law matters, tenancy or employment issues and the like. As such, courts and tribunals can be sites for 'just in time' assistance matched to the immediate needs of the client (Owen, Staudt & Pedwell, 2002, pp. 127-129). Urban legal service providers interviewed in Pleasence et al (2014) described what they saw as the benefit of timely and responsive assistance, in the form of a tribunal based duty lawyer scheme:

*... in terms of bang for your buck advice, to be able to see a lawyer before your hearing at NCAT [NSW Civil and Administrative Tribunal] and for the lawyer to be able to assist you in articulating exactly what your legal need is, giving you advice on what documents you need to support that and in some cases telling you well actually you don't have a claim at all. We think that's really targeted advice, and timely. (Urban legal service provider)*

Having considered the notion of 'early' we turn to the idea of 'intervention', and in particular, the question of what types of interventions which may be necessary to prevent the escalation of issues, including for the core group of the most disadvantaged people who are a priority for public legal assistance.

## **What assistance is provided as early intervention?**

For early intervention to be viable as a policy objective in legal service delivery, the services offered early need not only to 'catch' legal issues as they are forming, but also be appropriate to the task of resolving or at least preventing the escalation of the problem. Returning to the earlier example, the assistance provided by the duty lawyers was characterised by its intensity. This was not a situation resolved by information, advice or even minor assistance. The recovery of the child involved highly skilled legal advocacy, made available at the time and the place it was most needed. It necessarily involved the use of the court.

### **Types of services offered as 'Early Intervention' services**

As currently defined and implemented, early intervention services in the legal assistance sector tend to involve services, such as 'legal advice, minor assistance and advocacy other than advocacy provided under a grant of legal assistance'. Prevention services refer to information and education strategies, with the aim of 'increasing community resilience' (COAG, 2010, p. 3). Notably, as Buckley (2010 p. 77) observes, early intervention strategies are often offered in an unbundled form:<sup>15</sup>

*The main trend in service delivery is clearly toward providing limited assistance and representation services which place a substantial onus on the individual litigant (or, in a growing number of cases, accused) to navigate the justice system on their own.*

With a focus on service delivery community-wide, this may be both necessary and sensible. It may be necessary because the 'fence' needs to stretch far enough to prevent yet to be identified clients from falling off the cliff. It may be sensible, because for a proportion of the population, 'the fence' is sufficient to prevent the fall.

However, more of a challenge is providing assistance which is appropriate or intensive enough to in fact resolve issues, particularly for the core client groups who have more, and more complex issues, but lower personal and legal capability:

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<sup>15</sup> where assistance is provided for particular tasks but clients generally retain carriage of their matters.

*One of the most serious concerns is that self-help services, even if facilitated, are inappropriate for individuals who face one or more barriers to access to justice. These clients may include: low-income individuals, clients who have experienced systemic discrimination; victims of trauma; clients with literacy or language issues; clients with physical, developmental or mental health disabilities; and individuals suffering from isolation (University of Toronto 2011, p. 32).<sup>16</sup>*

Services also need to be accessible and culturally appropriate to disadvantaged clients. For instance, Ralph (2011) noted the reported underutilisation by Indigenous people of early dispute resolution services in family law (such as Family Relationship Centres). He suggests as one explanation that “such services are not accessible or culturally appropriate in responding to the needs of Aboriginal people”, many lacking Indigenous staff, and in particular, Indigenous dispute resolution practitioners (p. 51; see also NADRAC (2006).

In the examination of the above duty lawyer service, Forell and Cain (2012, p.35) note:

*These are clients who may require more intensive support than information or advice only – at whatever point they are up to. If early intervention services focus on providing less intensive services early, is there a risk that these services will not be enough to prevent the escalation of issues for disadvantaged clients and later services will also be required by this target group.*

Importantly, if the assistance provided cannot, for whatever reason, resolve the issue, it becomes not a replacement for later assistance, but an adjunct to it. If the fence only prevents some from falling, and less of those who you actually seek to assist – the need for the ambulance remains.

The question of just what types of help are necessary to prevent the escalation of legal issues is complex. How high and wide does the fence need to be, and how much of a fence is within budget? Does the low fence we can actually afford (to make it stretch further) risk making little difference to those who would not fall in any case, but not be high enough to stop those heading blindly for the cliff?

At an individual level, the assistance required to prevent the proverbial fall will be both issue specific (type and urgency) *and* client specific (relating to personal and legal capability). It may also involve a mix of services (e.g. information which leads to advice, which then involves minor assistance). So, while unbundled legal services offered through websites, telephone hotlines and self-help kits may suit some clients with certain problems, these service types may not match the needs and/or capabilities of others, typically the most disadvantaged minority with high legal need and lower capability. These types of assistance may not provide enough of a fence to prevent the need for the ambulance.

Important also, the types of assistance required and the options for resolution may not just be legal solutions. However, it may take personalised legal assistance to ‘rule the law out’ as the solution. For instance, in a duty lawyers program in the family law courts, solicitors reported that:

*Sometimes clients think that coming to court is the best way. But really, what they need perhaps is some therapeutic counselling, or they need mediation or some other support services to help them cope with the dynamics of whatever is happening to them. (EIU duty lawyer 3) (Forell and Cain, 2012 p. 22).*

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<sup>16</sup> See Chapter 6 of Pleasence et al (2014) for literature on the appropriateness of unbundled legal services for clients with lower personal and legal capability.

As this example suggests, for some clients and some issues, access to professional and personalised legal advice and assistance (early or late) may in fact be the most efficient and effective way to resolve an issue and prevent its (further) escalation (see Pleasence et al, 2014 for a discussion of the role of triage in early intervention).

## **The place of legal services in prevention and early intervention – who builds the fence?**

The purpose of the legal system is to provide ‘solutions to certain problems and disputes within social and economic life’ (Canadian Bar Association 1992, p. 53). It is a separate and reactive instrument, with the formal court process a tool of last resort. It is at the ambulance end of the spectrum for disputes that are not resolved. And yet these legal problems have their roots in the arrangements and agreements of everyday life: in family, employment, housing, consumer or contractual relationships to name a few. For disadvantaged people in particular, a range of further underlying issues such as mental health, disability, low or a sudden loss of income, family violence and/or a coalescence of legal and other needs may be relevant to these disputes. As has been observed elsewhere:

*The so-called “legal” problem of the poor is often an unidentified strand in a complex of social, economic, psychological, and psychiatric problems (in New York City Bar Association, Committee on Professional Responsibility, 2013, p. 4).*

A central challenge to prevention and early intervention *as a public legal service delivery framework* is that some of the activities required to prevent the escalation of legal issues for socially disadvantaged people fall well outside the legal domain, and it is work ‘beyond the law’ which may best prevent legal problems from occurring or prevent problems from escalating. So, for instance, the most effective way to assist a homeless person to focus on and address their legal problem may not be signposting to legal assistance, but providing a place to live:

*I am sick of turning up to places run down and filthy dirty, sick from not eating, I just don’t have the energy to do it. I want to help myself but I don’t have the energy to help myself. I need somewhere I can settle in for a week and put my affairs in order (homeless respondent in Forell et al, 2005 p. 115).*

It is also the case that only a small proportion of public expenditure is allocated to the legal assistance sector, relative to the main human services programs (such as health and welfare), which have primary responsibility for a range of issues facing disadvantaged people (and which may progress to the legal sphere). To illustrate, the four main legal assistance providers in Australia (Legal Aid Commissions in each state and territory, community legal centres, Aboriginal legal services and family violence prevention legal services) received around \$730 million in government funding in 2012-13, for both criminal and civil matters. This represented around 0.14 per cent of total government spending in Australia (Productivity Commission, 2014 p. 29).

Thus the scope of public legal service delivery is constrained both by funding but also the understanding that legal services need to work within their mandate and their expertise. So while legal services may work as part of a holistic response to client needs (Forell et al, 2013), it is beyond their remit and capacity to themselves resolve clients’ issues beyond the legal. This assumption underpins interest in joined-up services (see Pleasence et al, Chapter 4) and is central to the practice of referral.

*Systemic prevention – the key role of law reform and strategic litigation*

Given the complex genesis of legal issues for the most disadvantaged people, the capacity of legal assistance services to directly *prevent problems* from occurring at the individual level may be limited. Involved in this complexity are:

*a set of 'wicked social problems' — experienced by many individuals and groups identified as being disadvantaged and socially excluded — [which] are difficult to deal with because they have unclear underlying structures or causes, or raise matters involving competing priorities (Bridgman and Davis, 2004: 43–44). (Nheu and McDonald, 2010 p. 14)*

However, an important way that the legal assistance sector may prevent (escalating) legal need for disadvantaged people is through its systemic work: strategic litigation (Curran, 2013) and facilitating law and policy reforms to prevent or alleviate legal problems that particularly impact on disadvantaged people (Nheu and McDonald, 2010). With few areas of social, public or economic life not now affected by some form of legislation (Gleeson, 2008 p.3), and the lives of the most disadvantaged particularly regulated (Nheu and McDonald, 2010, Forell et al, 2005):

*Systemic advocacy to reform laws, regulations and institutions is often the only effective way to eliminate recurring problems because they address the root causes that give rise to repeated and often routine legal issues (Buckley 2011 in Canadian Bar Association 2013, p.8).*

### **Law reform advocacy and changes to fine enforcement**

In 2006, the Public Interest Advocacy Centre drew upon examples facing its clients of the Homeless Persons Legal Clinic to demonstrate that:

*...the fines system in New South Wales impacts disproportionately on people living in poverty, children and young people, and people who are otherwise socially or economically disadvantaged (Galtos & Golledge, 2006 p. 1).*

These and similar findings made by the NSW Sentencing Council (2006) and the NSW Legislative Council Standing Committee on Law and Justice (2006) built upon a growing concern about and contributed to a body of evidence to support changes to the Fines Act, 1996. The resulting Fines Further Amendment Act, 2008 sought to “address these concerns and mitigate the impact of the fines and penalty notice system on vulnerable groups” (NSW Department of Attorney-General and Justice, 2011 p.15).

One of the strategies proposed to mitigate the impact of fines was the Work and Development order scheme, which enables vulnerable clients to clear fine debt through unpaid work, courses or treatment under the supervision of an approved organisation or registered health practitioner (NSW Department of Attorney-General and Justice 2011, p. 6). The scheme was made permanent following its two year pilot (NSW Department of Attorney-General and Justice 2011).

More recent legislative change has seen a reduction, for young people in remote NSW, to the number of learner driver hours required to receive a provisional (P1) licence (from 120 to 50 hours). As was discussed at a regional CLSD meeting attended as part of our consultations across NSW, this change is in response to the particular challenges faced by young people in remote areas in building up learner driver hours, and the disproportionate impact on them of not having a driver licence.

Through their day to day work with disadvantaged clients, witnessing the legal issues which most impact on their lives, legal assistance services are in a strong position to take the lived experience of their clients to the law reform process and to advocate for law reform which can

make a meaningful difference not just to one client but to many. One example of a law reform advocacy which has seen changes to address hardship disproportionately experienced by disadvantaged people, is in the area of fines enforcement and the interaction between fine debt and driver licences.<sup>17</sup>

Similar benefits may be accrued through strategic litigation and related education. Curran (2013 p. 12) cites example of the Kleenmaid action related to linked credit, as work which “can create a precedent to compensate other consumers, prevent poor practices and inform other debtors”. Curran (2013) also describes how cases run by Footscray CLC exposed systematic problems relating to ‘taxi clubs’ failing to indemnify their own members and drivers (pp. 37-39).

These examples point to the value of funding and supporting strategic advocacy and law reform work by front line legal services that work with disadvantaged clients. It is these services that see the sometimes unintended impact of the law on their clients and who, informed by this, can identify and advocate for change to improve the position, not just of individual clients, but disadvantaged people more broadly.

### **Early intervention as a cost-effective justice option**

A central driver to the ongoing interest in early intervention service has been the prospect of this as a framework for cost-effective justice. However, as the broad discussion above has highlighted, there are several challenges to the assumptions underpinning the fence (lighter services early) as early intervention which challenge the prospect of ‘cheaper’ justice.

The first issue relates to who is best served by these early intervention strategies, and a concern that while early intervention services may broaden the availability of legal assistance, they may not capture the commensurate proportion of legal need. This is because, as the LAW Survey and other research has indicated, a higher proportion of legal problems are experienced by a disadvantaged few (Coumarelos et al, 2012), and it these few who, *if services are not targeted and appropriate*, may not be well served by early intervention strategies.

Further, if early intervention strategies *systematically* miss the residualised few, with a disproportionate number of the legal problems and lower capabilities, it is this group who may seek assistance when the crisis inevitably hits. The result of this is that support at this later point - the ambulance- remains critical.

The remainder of the population are less disadvantaged people with potentially less, and less complex legal problems and potentially more capability to deal with these problems. As we are also looking at *potential* problems at this point (problems to be prevented), whole sections of the fence may be redundant, catering for a percentage of people with no or few current legal problems, people who are not ready to address their problems and people who may resolve their issues with no assistance.

A consequence of prevention and early intervention strategies potentially missing more disadvantaged clients (and thereby a relatively high proportion of legal problems) is that early intervention strategies must be considered *in addition* to more intensive assistance, rather than, as an alternative way of spending this pool of resources:

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<sup>17</sup> Research based on a sample of 300 Indigenous people from urban, regional and remote locations in NSW reported that 52 per cent indicated that their licence had been suspended and/or cancelled at some point in the past, and 60 per cent of those due to unpaid fines or outstanding SDRO debt. (Elliot & Shanahan Research, 2008). In October 2013 Victoria Legal Aid published a submission to a Sentencing Advisory Council enquiry (Victoria Legal Aid, 2013a), which “has drawn upon our substantial experience in helping people who struggle within a complex and often unfair fines system” (Victoria Legal Aid, 2013b).

*Access to information, basic advice and community legal education services is generally made available to all members of the community. In contrast, eligibility for individualised services, such as case work, tend to be targeted at vulnerable and disadvantaged individuals, as well as those with special needs. (Productivity Commission, 2014 p. 578)*

Care needs to be taken that, within the reality of limited resources, an increased focus on serving the broader population may be at the cost of more intensive service provision for the highly disadvantaged few:

*While most of the innovative strategies have proven beneficial, they have had a tendency to shift the energy and focus away from the need for actual legal representation as part of the legal aid spectrum (Buckley 2010 p.77-78).*

Equally, if the assistance provided is not enough, or is actually beyond the scope and capacity of the legal assistance sector to prevent the escalation of matters, matters may continue to consume as much (and indeed additional) resources.

Finally, at a wider level, public sector resource use may *increase* if early intervention strategies are successful at promote awareness of legal rights and remedies, which in turn leads to greater use of legal services. This may become a concern if, the primary group for whom these strategies are effective are the less disadvantaged and more capable – as, through a process of net widening, it may further stretch already stressed resources (University of Toronto, 2011 p. 32). As the Canadian Bar Association (2013a, p.7) cautioned:

*While [early intervention is] certainly a laudable objective ... efforts to address the legal needs of this significant majority must not obscure or detract from the need and public responsibility to find comprehensive solutions that will also properly address the legal needs of the most vulnerable and marginalized populations.*

## Conclusion

In developing strategies to address unmet legal need, it sensible to ask what types of 'intervention' could make a difference and at what points those interventions may be most cost effective. Placing these questions in a service context, a community service lawyer said in Pleasence et al (2014):

*... with someone [who] might have a cultural disconnect and where their language capacity is limited and their awareness of the system is limited it ... obviously it takes more time, more resources. Then the question becomes, what do you do? Do you plough more resources into helping fewer people more, or do you help more, less? I think that is the biggest challenge actually for the legal service: where do you strike that balance?*

This paper has argued, firstly, that such questions must be asked with a clear and shared understanding of whom such services aim to assist.

The cascade of evidence provided by legal needs research worldwide indicates the value of addressing the legal needs of the most disadvantaged. It is among these groups of people that most legal need resides. It is also among these groups that capability is lowest, leading to unresolved legal issues that contribute ongoing and persistent disadvantage. If, as recent reviews of access to justice arrangements in Australia seem to confirm they are (ACG, 2103; Productivity Commission, 2014), the needs of the most disadvantaged are paramount, then service delivery needs to be designed around these groups.

It is through this lens that this paper has approached the question whether the fence rather than the ambulance is preferable in the legal assistance sector.

We have noted that early intervention is commonly conceptualised as a point in the legal process. However, for disadvantaged clients in particular, there is no single 'early', nor is there a clear cut off point when the intervention is suddenly late. Due to factors outside the law, the earliest and most effective legal assistance that can be provided to some clients may in fact be 'late' in a legal process. It is also evident that for clients with complex needs, the timing of legal assistance cannot be considered uni-dimensionally – early or late in the progress of a single legal issue or process - but relative to a range of other influencing factors. Together, these observations suggest that a framework that focuses on the timeliness of services, relative to experiences of the client, may offer a more inclusive model. A focus on the timeliness takes account of how legal issues are experienced by the client and how help is sought - recognising the common experience of crisis driven help seeking, particularly among that core group of priority clients.

Thinking of early intervention in terms of the client's experience also offers opportunities to operationalise timeliness relative to significant 'transition' points in client's life course, or even the life of a problem. Transition points offer opportunities for assistance when and where it is ready to be used. Legal problems themselves are often sites of transition (think criminal conviction, family breakdown, loss of employment to name a few) – where a legal crisis offers a chance to address the immediate and potentially related issues. This is one area we have identified for further evaluation and research.

We have discussed the types of services included under the prevention and early intervention banners, and noted the need for services which are appropriate to client capability and legal need. Pleasence et al (2014) describe in more detail the key role of triage and targeting, in directing resources to those who most need and will benefit from this assistance, and the value of tailoring services by need *and* capability.

However, recognising the complex genesis of legal need among the most disadvantaged, we have also noted that prevention and early intervention strategies risk taking legal services beyond the legal domain, as many of the factors which contribute to the development of legal problems lie outside the law. As disadvantaged clients of public legal services are often, and more immediately, the clients of other services, this suggests the importance of situating legal assistance in a broader social context. Further, as clients' needs may well stretch beyond the legal, legal services need to be connected: working as part of a broader service network in order to (together) provide holistic client centred responses. Frontline legal services have a role in defining the boundaries of legal assistance work in this complex space.

We finally questioned the assumption that early intervention is a panacea for cheaper and better justice, noting that if early intervention services are not best suited to those with the most need, these services become an adjunct to rather than a replacement of crisis response services, further stretching already limited resources.<sup>18</sup>

It may well be the case that, for certain clients, assistance provided early in the life of a problem can 'nip it in the bud' and prevent the escalating costs associated with ongoing disputes. However, this paper, and the discussion paper from which it is drawn, has argued that for those disadvantaged clients with a disproportionate proportion of legal need but lower capability to address that need, assistance may be most effective if it is responsive to their legal problem(s),

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<sup>18</sup> In its recent draft report on *Access to Justice Arrangements*, the Productivity Commission (2014 p.684) observed: "... strategies such as CLE have some limitations as standalone responses to complex problems or for those individuals with complex needs (chapter 5). Hence, greater use of early intervention strategies needs to be well-targeted and based on evidence about what works."

appropriate to their capability, and provided at a time and place where it can and is most likely to be used.

So let me finally put the analogy to bed. Simply, I don't think the solutions required can be dichotomised as fences or ambulances. Nor, I suspect, is there even a neat and single cliff edge. Across the community we have a range of clients, with varying need and variable capability to address that need. In particular, we have a concentration of legal need among a core group of clients with complex lives and lower capability, arriving on the legal doorstep at differing points in the progress of multiple legal problems. We have a broad range of human services dealing with these same issues as they move into the legal space. Strategies need to respond to this complex reality. As we argued in Pleasence et al (2014) strategies need to be: targeted for impact and sustainability; linked in with other services to provide depth and breadth; timely to ensure responsiveness and appropriate to need and capability in order to make a difference.

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## Research into the impact of interventions on clients, the early impact of alternative business structures (ABSs) and other SRA research on access to justice

- 1 The Solicitors Regulation Authority (SRA) is largest regulator of legal services in England and Wales. The rationale for our regulation is based on two core reasons. First, we want to ensure that consumers are properly protected; and that our protections are proportionate to their different needs. Second, we seek to ensure that the rule of law and proper administration of justice are secure.
- 2 Understanding factors that prevent access to justice is therefore an important requirement for us. This paper outlines our current research related to this topic.

### Impact of interventions on clients

- 3 We have commissioned research to look into the impact on clients when we exercise our regulatory power to close down a law firm to protect the interests of clients and the public (an intervention).
- 4 The fieldwork for this research involved a survey of over 800 previous clients of firms where we have intervened. Data analysis and report writing is being carried out by Dr Nigel Balmer, Professor Pascoe Pleasance and Professor Richard Moorhead.

### Research aims

- 5 The aims of the research are:
  - **To understand the impact of an intervention on the clients who are directly involved.** A key issue for us to understand is whether there is an impact on access to justice. To achieve this the research will take a practical approach and look at what happened next for clients of intervened firms, for example:
    - Were they able to find another suitable firm?
    - Were they able to resolve their legal matter?
    - Do clients feel the intervention had any impact on them or the legal matter they were dealing with?
  - **To discover what we can learn from clients' experience of interventions.** The research will look to identify lessons we can learn from to improve operations in the future and deliver better client protection. Again, a practical approach will be needed to obtain useful information, for example:
    - Did they know what was happening or why it was happening?

- What did the agent do that was useful / supportive?
  - What was perceived as unhelpful?
  - Did they have any specific needs and were these met – e.g. translation requirements?
- **To identify any differences in the experiences of different ‘groups’ of clients.** This element of the research will play an important role in building our understanding of whether there are any disproportionate impacts resulting for any type of client group.

### Challenges

- 6 To avoid cultural barriers to clients wishing to participate in research, the market research agency used multiple languages in the letters they sent out to explain we were carrying out this work. Interviews were carried out by telephone and translation services were available to enable participation from a wide range of minority ethnic groups.
- 7 We know that an intervention, no matter how well handled, will often be a difficult experience for a client. We have avoided delivering a ‘satisfaction survey’ and have focused on gathering information that will allow us to understand how well we are protecting the public when we exercise the power to intervene.

### The sample profile of firms and clients

- 8 Data was provided by 831 clients of 40 solicitors’ firms closed down, for a variety of reasons, as a result of an intervention by the SRA. Seven ‘intervention agents’ were involved.
- 9 Most firms in the sample had a mixed practice, with property related work most common among firms. However, one consumer credit firm accounted for over one-third of clients. Results in the final report will be presented including and excluding this firm.
- 10 Twenty percent of respondents reported that they had used their solicitors’ firms more than once prior to the intervention. Respondents most often chose their solicitors’ firm through recommendation.
- 11 Slightly fewer than half of the respondents met their solicitor face-to-face and eighty-four percent of respondents reported that they had paid for the services of their solicitor themselves. At the time of intervention, 80% of respondents reported further case-work was necessary, and 19% indicated ‘very urgent’ work was required.

### Next steps

- 12 The research paper on the 'impact of interventions on clients' will be published Autumn 2014.

### **Research on alternative business structures**

- 13 We have recently published two reports on alternative business structures (ABSs), which give an insight into:
- how ABSs are "doing things differently", and how this may lead to future impacts on the legal services sector
  - the experience of firms which have applied for an ABS licence from the SRA.
- 14 One of the reports makes a qualitative assessment of ABSs, while the other is based on survey results and available data. These reports can be accessed at:

<http://www.sra.org.uk/sra/how-we-work/reports/research-abs-executive-report.page>

### Early impacts of ABSs

- 15 The research shows the real diversity of firms with ABS status. Data on the characteristics of these firms shows a range of different sizes and varied geographical focus, from local to international. This diversity highlights the limitations of commenting on ABSs as a coherent and homogenous sub-segment of the legal services sector. In many cases, their legal status as an ABS is the only shared characteristic of these firms.
- 16 ABSs are active in most legal services sectors, but some sectors stand out as having higher concentration of ABSs operating within them. Our data shows that around a third of the turnover in the Personal Injury market is generated by ABSs. There are also relatively high concentrations of ABSs in the mental health, consumer and social welfare sectors. It is these areas of law where we may be most likely to start to see ABSs having a real impact on the experience of consumers.
- 17 Access to investment is shown to be a key motivator for many ABSs. It appears that this investment is typically being used in three distinct ways:
- technology
  - marketing
  - delivering legal services in new ways.
- 18 It is still too early to understand how this trend will affect the development of the wider legal services market and further research and monitoring is needed to explore the extent that ABSs will deliver benefits in terms of access to justice

and the affordability of legal services. More research is also needed to understand whether ABSs are driving new innovations in the delivery of legal services.

### **Research into the quality of legal services for asylum seekers**

- 19 In partnership with the Legal Ombudsman (LeO) and Unbound Philanthropy we have commissioned research to assess the quality of legal advice available to asylum seekers. The research is being carried out by MigrationWork CIC, Refugee Action and Asylum Research Consultancy.

#### Research aims

- 20 This research has been commissioned to look at
- the legal services market for asylum seekers
  - the barriers to effective use of legal services for asylum seekers, their access to redress, and whether these restrict their access to justice
  - what constitutes good and poor practice and whether these are associated with certain aspects or types of legal cases
- 21 Asylum seekers are often vulnerable consumers, who may not understand the legal system, have access to adequate information, or be able to exercise effective choice of provider. The research will be used to improve regulation and access to redress, as well as promote good practice in the legal profession.
- 22 The research comes at a time when legal services generally have been affected by significant change, especially in relation to legal aid, and so also offers an opportunity to assess some of the impact of this.

#### Next steps

- 23 The research will involve face to face interviews with asylum seekers in four locations. It will also interview people providing them with advice and other support. The project will also include a review of a sample of asylum cases.
- 24 The research will be published in early 2015.

## The impact of loss of legal aid in the charity sector and the involvement of Law Students

**Tony Wragg#**

A hundred years ago the judge Sir James Mathew quipped that 'in England, justice is open to all – like the Ritz hotel'. These days legal aid funds law centres and high-street firms up and down the country, so that justice is not only dispensed from the swanky hostelrys of Chancery Lane. However, thanks to the latest wave of budget cuts access to the law looks set to become an inaccessible luxury for many.

Legal aid was first introduced in 1949, as a principal pillar of the welfare state.(1) Originally, its reach was almost universal with 80% of British people eligible. But as the years went by legal aid went the way of free dentistry, with eligibility dropping steadily, down to 29% pre-recession in 2008. Rounds of cuts in 2004, 2007 and 2010 introduced fixed fees for certain types of cases, and led to many providers pulling out of more complex legally aided areas like immigration and asylum. But the 2013 Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) is far more far-reaching. It made cuts to the system that slashed the yearly legal aid budget by £320m from 2014, and are expected to cull another £220m each year by 2018.

LASPO is part of the government's plans to cut the national deficit – which also involve substantial cuts to welfare, culture, local government and higher education spending. It's been championed by Justice Secretary Chris Grayling, whose stint as Lord Chancellor has been controversial from the start. He was the first appointee since 1672 who's not a lawyer and his legal aid proposals have received widespread criticism from within the profession for being unworkable and inhumane. In response he's argued that the civil and criminal law systems are wasteful, not commercial enough and too expensive, and that the legal profession is in need of modernisation. (2)

One often-cited argument for reform is that Britain's £2bn legal aid system is one of the most expensive in the world. However, opponents to cuts argue that this is partly because other EU countries use an inquisitorial system instead of the UK's common law, meaning that their outlay is skewed towards courts and prosecutors, and fewer cases come to trial. The pro-cuts brigade, supported by scare-stories in the press, also points to fat cat barristers on six-figure salaries, but legal aid lawyer are keen to stress that the average salary in the sector is £25,000, compared with a nurses' £29,500, GPs' £56,000 and MPs'£65,000. There's not much hope of campaigners winning these more ideological arguments, but under consultation with the Law Society, and under fire from the overwhelming majority of the legal profession, Grayling has [substantially softened his more impractical plans for reform](#) but only in respect of Criminal legal aid

The removal of legal aid in Family matters and reforms in relation to criminal legal aid have had wide media coverage.

Judgment in the landmark *R v Crawley and Others* case at Southwark Crown Court is being heralded as a wake-up call signposting the reality of the legal aid cuts. The unprecedented decision to stay proceedings in the so-called "Operation Cotton", a complex land banking fraud with a value of £4.5m, raises concern that legal aid cuts could leave defendants unrepresented in high profile cases.

In marking that an arm of the state had brought the prosecution, the judge noted that the state must provide adequate representation at public expense, but that the Public Defence Service wouldn't have the resources to do so.

The judge ruled the defendants could not thus receive a fair trial. He stated he was compelled to take the exceptional decision to stay the whole case. It was a violation of the court's process to allow the state to seek an adjournment to put right its failure to provide the necessary resources for a fair trial.(3)

“It is certainly a rare and vivid illustration of the crisis in publicly funded law that is being played out off stage, in family courts where divorcing couples represent themselves, or in criminal ones where witnesses go uncalled. Even worse are the cases that should happen but don't – cases where benefits wrongly withheld go unchallenged for lack of advice, or housing cases where there's no support to compel a landlord to make repairs. The important point about the prime minister's brother (4) firing a broadside at government policy is not in the theatre of Cain and Abel, it is in the demonstration of the old truth that where rights are not protected, there are no rights at all.”(5)

But they are not the only areas of law affected

“Other issues proposed for removal from the scope of the legal aid scheme include debt, education, employment, housing, immigration and welfare benefits (except where there is a risk to anyone's safety or liberty or a risk of homelessness), where in many cases the issues at stake are not necessarily of a legal nature but require other forms of expert advice to resolve.”(6)

These areas of law have been traditionally dealt with by Law Centres and Citizens Advice Bureaux.

Citizens Advice Bureaux were formed in 1939 at the outbreak of war and deliver advice services from over 3,300 community locations in England and Wales, run by 338 registered charities. The advice and information provided by bureaux is free, independent, confidential and impartial.

CAB advisers can write letters and make phone calls to service providers on their clients' behalf. They can help people prioritise debts and negotiate with creditors. They can also refer clients to specialist case workers, who are able to represent people at court and tribunals.

During 2012/13 bureaux nationally advised clients on almost 6.6 million new problems, including debt problems, issues with benefits and tax credits and employment problems.

Citizens Advice Bureaux receive money from local authorities, Lottery funds, primary care trusts, charitable trusts, companies and individuals.

Law Centres have existed since the 1970s and work within their communities to defend the rights of local people especially in the areas of social welfare law

Law Centres offer legal advice, casework and representation to individuals and groups. Spotting local trends and issues in the course of their work, they highlight them to bring about necessary policy changes and to prevent future problems. Law Centres also help build capacity within local communities by training and supporting local groups and educating people about the law and their rights.

All Law Centres are independent and operate on a not-for-profit basis. They are also accountable to their communities, with local people acting on their management committees.

Law Centres have been particularly badly hit so far, as they are less able to diversify. Eight Law Centres across the country have already been forced to close its doors as have the Immigration Advisory Service and young peoples' law specialists Streetwise. The Cabinet Office and the Big Lottery have made £67m available to help centres navigate the transition to new ways of working and diversify their sources of funding..

For example, the Derby Law Centre received substantial funding from Legal Services Commission (now known as the Legal Aid Agency) for its work in Immigration, Employment, Welfare Benefits and debt. All of these areas were cut in 2012, a reduction of 65% of its funding resulting in large numbers of redundancies in the Centre staff.

There remained some residual funding from the LAA to enable the Centre to close its existing Immigration Files but recently it has imposed conditions requiring full time supervision of the cases by a qualified lawyer which made the contract uneconomic. As a Board of Trustees we were unable to sanction such a contract and all Immigration work has been taken away.

The reasons given by the Ministry of Justice for excluding these areas makes interesting reading.

### **Debt**

“we [the Ministry] consider that legal aid for the vast majority of debt issues is not justified because they are not of relatively high enough importance, and we note that there are other ways for individuals to obtain help and advice. We therefore propose to exclude all legal aid for debt issues, including cases relating to insolvency loans, credit card debts, overdrafts, utility bills, court fines, or hire purchase debts. We will however retain legal aid for debt cases where, as a result of rent or mortgage arrears, the client’s home is at immediate risk of repossession”

In the experience of the Derby Law Centre there is a need for legal advice for people in debt. The implications of Bankruptcy, for example, and the need to prioritise debts are important and not always understood by lay clients.

### **Employment**

“We recognise that recipients value advice on employment matters, but because these cases are generally concerned with monetary damages or earning potential, given the need to reduce legal aid expenditure, we do not consider that they are sufficiently important to merit support from legal aid. In our view, the issues at stake in cases which are primarily financial are not of the same order of importance in comparison with, for example, those concerning safety or liberty.

We do not consider that those bringing these claims are generally likely to be particularly vulnerable, or that they will be unable to present the case themselves. In respect of advice concerning proceedings before the Employment Tribunal, we also consider that appellants are able to present their case themselves because of the easily accessible and user-friendly procedure of the tribunal”. Caseworkers have described the Employment Tribunal as anything but “user friendly” and the procedures have been changed since the legal aid reforms. Whereas before the process was free, applicants now have to pay a court fee of £250 to commence a claim and £950 if the case goes to a hearing. There is no provision for a refund of these fees and with no access to advice as to the merits of their case £250 could easily be wasted. On the other hand that amount of money could be a disincentive to pursue a winnable claim

### **Immigration**

“On balance, the Government does not consider that immigration issues are of sufficiently high importance in general to justify continued legal aid funding. We recognise that there will be cases in which important issues arise, such as the right to a family life. However, individuals will generally be able to represent themselves (with the assistance of an interpreter where necessary) in tribunals that are designed to be simple to navigate. We do not consider therefore that the routine provision of legal aid is justified in these cases, since we need to focus our limited resources on higher priority areas for funding”.

Again it was the experience of our caseworkers that although the Tribunals were fair in the hearing of cases, the process of getting to the Tribunal was fraught with difficulties. The evidence required by the UK Border Agency is quite demanding: the fees can amount to £1200 depending on the number of dependants included and there is no refund if the application is thrown out. Nor is there any appeal: the applicant simply has to start again and pay a fresh lot of fees.

### **Welfare Benefits**

“Legal aid currently funds legal advice in relation to decisions about benefits such as Disability Living or Attendance Allowance, Incapacity Benefit, Income Support and Housing Benefit. This includes advice (but not advocacy) for appeals to the First-tier (Social Security) Tribunal. These appeals concern, for example, cases where a benefit has been refused, or cases dealing with overpayments. Legal aid is not currently available for onward appeals to the Upper Tribunal. The vast majority of legal aid funding in this area of law is spent on Legal Help, rather than Legal Representation.

We consider that these issues are of lower objective importance (because they are essentially about financial entitlement), than, for example, fundamental issues concerning safety or liberty. While we

recognise that the class of individuals bringing these cases is more likely to report being ill or disabled in comparison with the civil legal aid client base as a whole, we have also taken into account the fact that the accessible, inquisitorial, and user-friendly nature of the tribunal means that appellants can generally present their case without assistance”.

In the absence of legal assistance, an applicant can only take advice from Welfare Benefit Officers themselves, the very people who have assessed them in the first place!

Although Derby has received some of the National Lottery funds to give advice and assistance in mental health issues it is now heavily dependent on Derby City Council who fund the Citizens Advice Bureau part of the organisation and partners the Law Centre for welfare benefits advice. Recently the Council have announced a cut in voluntary sector spending of an average of 44%. This does not affect the Centre this year but bodes ill for 2015 when we know further cuts will be made.

In the meantime the University Clinic students continue to provide support to the work of the Centre and other voluntary organisations.

As a result of legal aid cuts in the area of Immigration, the Law School was approached by the British Red Cross for help with their clients who needed assistance with family reunion applications. We provided 4 clinic students who have conducted 8 cases so far under my supervision. The conduct of the cases have gone well but continued changes in Home Office rules mean some of the clients are unlikely to meet the new criteria. For example, clients have to prove they can support their families financially and to do so have to prove an income of £18,000. Most of the clients are either on benefits or earning the minimum wage, which is well short of £18,000.

Another charity we collaborate with is the Pathway Project in Lichfield, Staffordshire. They run a refuge for and give advice and support to victims of domestic violence. This charity has never had legal aid funding but the removal of legal aid from family matters has meant the service users have limited access to lawyers. Legal Aid in Family Proceedings to victims of domestic violence is available providing they can produce evidence. That evidence includes involving the police or producing medical evidence of abuse. (7)Obtaining reports have a cost which many victims cannot afford and many will not involve the police for a variety of reasons. Certainly this is the case with the service users of the Project.

Here we have helped by providing Law students to give advice and apply for non- molestation injunctions in appropriate cases. This is an injunction to restrain the perpetrator from contacting the victim in any way or anywhere. The students also go to court in support of their application as McKenzie friends. Most recently the project has undertaken divorce proceedings for their service users in straight forward cases and again our students have prepared the documentation.

A similar problem has affected the Derby Child Contact Centre, a charity with minimal funding but nowhere to refer their clients to for advice and assistance about contact and residence with their children. We have 2 students who are undertaking advice and support and the charity expect this work to grow in the coming year.

## **Conclusion**

I chair a Board of Trustees who are collectively angry and frustrated that we have to turn away clients because we have no funding. Hundreds of citizens of Derby now find themselves without access to justice. The Citizens Advice and Law Centre itself faces an uncertain future. If it were to close there would be nothing to take its place and the limited advice services we still offer would disappear altogether.

From an academic's point of view the Law School is able to assist some of the disadvantaged through our Clinic programme. We are not the only school. The Clinical Legal Education Organisation in the UK has over 100 members representing about 70 Universities and each of these are undertaking some form of pro bono activity. There is educational value to the students and obvious benefits to

citizens who would not be able to get assistance elsewhere. But I personally have reservations: in meeting the so called “unmet need” from the reductions in legal aid in this sector are we not supporting the government policies to which many academics are opposed?

(1) Legal Advice and Assistance Act 1949

(2) Transforming Legal Aid: Ministry of Justice 2011

(3) [www.thelawyer.com/analysis/opinion/fair-trials-and-the-real-cost-of-the-legal-aid-cuts/3020145.article](http://www.thelawyer.com/analysis/opinion/fair-trials-and-the-real-cost-of-the-legal-aid-cuts/3020145.article)

(4) Alexander Cameron represented the Defendants on a pro bono basis

(5) [www.theguardian.com/commentisfree/2014/may/02/legal-aid-criminal-justice](http://www.theguardian.com/commentisfree/2014/may/02/legal-aid-criminal-justice)

(6) Proposals for Reform of Legal Aid: Ministry of Justice 2011

(7) The Civil Legal Aid (Procedure) Regulations 2012

# I am a University Principal Tutor, Law and am responsible for the Law School's Clinic programme. The Clinic module is an assessed final year module for LLB students and involves 100 hours on work placement, spread over 12 weeks. The placements are all with voluntary sector organisations. Our original contact was with Derby Law Centre and the number of placements has increased over the years from 5 to 15 currently.

As part of that collaboration I was appointed to the Board of Trustees of Derby Law Centre and was elected Chair in 2004. In 2007 the Law centre merged with Citizens Advice Bureau and I chaired the new organisation until 2010. I remained a Trustee and was re-elected Chair in September 2013.

## Empirical research on judicial review: impact on law reform in the UK and the importance of accessible data

Varda Bondy (De Montfort University)<sup>1</sup> and Maurice Sunkin (University of Essex)

Judicial review is a remedy of last resort for challenging the lawfulness of decisions made by government and others exercising public functions, and a key method for ensuring that public authorities comply with their human rights obligations. In England and Wales the procedure for obtaining judicial review is based in the Administrative Court, within the Queen's Bench Division of the High Court. The process consists of two basic stages. First, claimants must obtain the permission of the court to have a judicial review. Permission is normally decided on the basis of papers filed by the parties, and is granted if a claimant with standing makes an arguable case within the time limits when other remedies have been exhausted.<sup>2</sup> If permission is granted, the substance of the claim will be heard at a later stage. Judicial review gives practical effect to the rule of law and access is therefore a matter of practical and constitutional significance.

During 2013-14, the government embarked on a programme of reforms designed to curtail what it claimed to be the excessive use of judicial review. The essential aims of the reforms have been to reduce burdens on public bodies and to free up public decision-making in the interests of economic recovery.<sup>3</sup> Two consultation papers containing proposed changes were issued: *Judicial Review: proposals for reform* (December 2012)<sup>4</sup> and *Judicial Review: proposals for further reform* (September 2013)<sup>5</sup>. A further consultation on changes to legal aid *Transforming Legal Aid: delivering a more credible and efficient system* was issued in April 2013.<sup>6</sup>

Despite wide ranging objections, the government implemented many of the proposals contained in these three consultations<sup>7</sup>, resulting in significant restrictions on the ability to challenge public bodies. A highly contentious proposal to narrow the standing requirement

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<sup>1</sup> Research Director at the Public Law Project until December 2014

<sup>2</sup> Senior Courts Act 1981 S. 31; CPR Pt 54.

<sup>3</sup> The reform programme was announced by the Prime Minister in a speech to the Confederation of British Industries in November 2012 <http://www.cbi.org.uk/media-centre/news-articles/2012/11/david-cameron-sets-out-plans-to-slash-red-tape-at-cbi-annual-conference/>. The Prime Minister said that the UK was in the "economic equivalent of war" and that he would restrict the use of "time-wasting" judicial review applications..

<sup>4</sup> [https://consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting\\_documents/judicialreviewreform.pdf](https://consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting_documents/judicialreviewreform.pdf)

<sup>5</sup> [https://consult.justice.gov.uk/digital-communications/judicial-review/supporting\\_documents/Judicialreviewproposalsforfurtherreform.pdf](https://consult.justice.gov.uk/digital-communications/judicial-review/supporting_documents/Judicialreviewproposalsforfurtherreform.pdf)

<sup>6</sup> [https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting\\_documents/transforminglegalaid.pdf](https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf)

<sup>7</sup> Including the removal of the right to oral consideration of a refusal of permission to bring JR where the case is assessed by a judge as 'totally without merit'; the introduction of a new fee for oral renewals of claims for permission; provision that legal aid costs would only be paid to lawyers acting for claimants where permission has been granted; restrictions on the use protective costs orders; and making third party interveners bear their own costs.

was dropped following widespread criticism. A further controversial proposal is contained in Clause 50 of the Courts and Criminal Justice Bill currently before Parliament. If enacted this will allow public bodies to avoid being subjected to a judicial review where they can persuade the court that it is 'highly likely' that their decisions would have been the same had they acted lawfully.

Here we do not intend to discuss these reforms as such. Our concern is rather with what the reform programme reveals about the use of evidence and the availability of information about the workings of judicial review.

### **The evidence base for reform programme in outline**

From the outset, the need for reforms was said to be principally based on twin claims: that there has been a marked increase in the use of judicial review to challenge government, and that much of this increase has been the consequence of claimants abusing the legal system so as to delay public administration and/or to achieve political ends.

As researchers with particular interest in empirical research on judicial review, it was gratifying to see statistical evidence on its use placed centre-stage in a high level public discussion of the appropriateness or otherwise of reform, not least because this suggests that government accepts the need for such reform to be evidence-based. However, it was clear that the data relied on by the government were limited and the interpretation of the figures was at best misleading.

In support of the first of their claims, the government cited the Judicial and Court Statistics (official statistics) as showing that in 1974 there were only 160 applications for judicial review, that by 2000 this number had grown to nearly 4,250 and by 2011 to over 11,000.<sup>8</sup> The claim was repeated in the government's second consultation paper<sup>9</sup>, despite clear evidence to the contrary having been set out by many respondents to the earlier consultation.

Indeed, the official statistics themselves clearly show that, once immigration and asylum claims are placed to one side, there has been little change in the volume of claims and that since the mid-1990s the volume of non-immigration/asylum cases has remained fairly stable at just over the 2,000 per annum mark, a surprisingly low level of claims especially given the scale of government decision making and such developments as the enactment of the Human Rights Act 1998.

The second claim, that the growth in judicial review has been significantly driven by abuse, was principally based on figures indicating the high failure rate of applications for permission to seek judicial review.

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<sup>8</sup> *Judicial Review Proposals for Reform*, Ministry of Justice, June 2012, para 28. Judicial and Court Statistics 2011, Table 7.12.

<sup>9</sup> <https://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response.pdf>, (para 9)

'In the majority of applications considered by the courts, permission to bring Judicial Review proceedings is refused. Of the 7,600 applications for permission considered by the Court in 2011, only around one in six (or 1,200) was granted.'<sup>10</sup>

These figures were said to be drawn from Administrative Court Office management information. This appears to be a reference to information contained in the Administrative Court IT system, known as COINS<sup>11</sup>. This stores information about each case and it is possible to run queries on various aspects of the process. The accuracy of the resulting data is inevitably determined by the nature of the query and the quality of the information recorded. As will be seen below, knowing the number of cases considered and their judicial outcomes means little without more detailed knowledge of the nature of the claims and their progress through the court process.

### **The limited nature of the data drawn upon**

Empirical research on judicial review has been undertaken since at least the 1970s.<sup>12</sup> From the outset, this work has been motivated by concern that an empirically based understanding of the use and operation of the judicial review process demands more information than that given in the official statistics, which are intended to provide a snap shot of the general scale of the caseload and the number of decisions taken by the court at the formal stages of the process rather than a detailed resource for analytical purposes. Leaving aside qualitative issues which are beyond the scope of official court statistics (such as how claimants and lawyers view and respond to the process), the official figures say nothing about who seeks judicial review and against which public bodies; nor (apart from very general categories) do they tell us about the types of cases brought and what sort of government decisions they concern. Furthermore, they provide no insight into matters such as the nature of settlements and when and why these occur.

The limitations of the official statistics were recognised by the findings of the first published study on the trends in the use of judicial review.<sup>13</sup> Even in the late 1970s and 1980s there had been concern over the growth of judicial review. This seemed to be confirmed by the official statistics covering the period, included some which, as we have mentioned, were referred to by the current government. However following analysis of the court records, the early research showed that the growth in caseload was attributable to the numbers of immigration claims, which were not then separately identified in the official statistics. Once these claims were placed to one side, the trends in the use of judicial review in other subject areas were essentially static. In other words, then as now, the perceived growth in the use of

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<sup>10</sup> Ibid para 31

<sup>11</sup> Crown Office Information Network System. This a name retained from the time before 2000 when the Administrative Court was called the Crown Office

<sup>12</sup> Principally funded by the ESRC and the Nuffield Foundation and much of it the product of collaboration between the University of Essex and the Public Law Project (PLP), an independent, national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers.

<sup>13</sup> Maurice Sunkin, 'What is Happening to Applications for Judicial Review?' (2007) *Modern Law Review*, 432-467.

judicial review in general was exaggerated by its particular use in the context of immigration related matters.

Those outside government can only speculate about why the government chose to rely so heavily on official figures which were vulnerable to criticism. It is, of course, possible that ministers did so because the figures enabled them to make a simple and headline-grabbing point about the growth of judicial review which fitted a narrative about their intention to reduce red tape and the interference of Europe, human rights, and judges. Such a narrative was likely to be addressed to a wider public considered unlikely to be influenced by technical arguments.

Our work provided one of the few sources of relevant empirical information available to lawyers, professional bodies and NGOs and was cited by a large number of respondents to the consultations to challenge various of the government's claims.<sup>14</sup> By coincidence when the reform programme was announced we were undertaking fieldwork for a Nuffield Foundation funded study of the effects of judicial review. This work had not been designed to deal with the issues raised in the reforms. Nonetheless, the emerging findings were relevant. Moreover, data we collected for other purposes turned out to be useful in a new context, and prompted us to undertake analysis not previously contemplated. We were able to use old and new research data and findings to respond in real time to the reform programme as it evolved. Our response included the publication of two blogs that questioned the government's statistical case, put alternative data into the public domain, and drew wider attention to previous relevant research.<sup>15</sup>

Our main concerns in challenging the government's statistics were to unpack the figures relating to the numbers of issued claims and to offer an explanation of the failure rates at various stages that was informed by research.

The latter was based on our earlier work<sup>16</sup> on the permission stage which tracked 1500 claims from issue to conclusion prior to final hearing. It showed the percentage of cases settling at each stage of the process, and that 34 per cent of cases were settled/withdrawn before being considered by a judge for permission, often following a resolution favourable to the claimant. Altogether, less than 10 per cent of issued cases reached final hearing.

In their second consultation the government appeared to acknowledge the findings of the research and presented an analysis which unpacked the statistics to reveal a more nuanced picture than that initially presented.

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<sup>14</sup> Including by The Equality and Human Rights Commission, the Advice Services Alliance, the Bingham Centre for the Rule of Law, Reprieve, Garden Court Barristers Chambers, the Constitutional and Administrative Law Bar Association, and the Education Law Association.

<sup>15</sup> V. Bondy and M. Sunkin, 'Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse.' UK Const. L. Blog (10th January 2013) (available at <http://ukconstitutionallaw.org>); V. Bondy and M. Sunkin, 'How Many JRs are too many? An evidence based response to 'Judicial Review: Proposals for Further Reform'' UK Const. L. Blog (26th October 2013) (available at <http://ukconstitutionallaw.org>)

<sup>16</sup> V Bondy , M Sunkin '*The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*' Public Law Project 2009

After stating that:

'The data suggests that the majority of applications that are considered by the court are refused permission at the first consideration on the papers. For cases lodged in 2012, only 1 in 6 that reached this stage were granted permission to proceed'<sup>17</sup>

The government went on to say:

'However, the data also shows that a large proportion of judicial review applications are withdrawn before any decision on permission is made. For cases lodged in 2012, over 40% of all applications ended by being withdrawn before consideration of permission by the court. Although the reasons for withdrawal are not recorded, there is some evidence that suggests that many of these cases may be settled on terms favourable to the claimant.'

But then, the data were questioned:

'Whilst this may be because the applicant has a legitimate grievance the Government wants to be sure that there are not also cases where the respondent concedes simply because they are unwilling to face the delays and costs that a prolonged legal battle can involve'<sup>18</sup>.

It is likely that such cases exist, but no evidence was produced to show their number, or their characteristics, or whether the proposed reforms aimed at curtailing challenges would have any material effect on this aspect.

In other words, the government proceeded with reforms essentially on the basis of anecdotal impressions and their untested hunch. This approach resulted in Chris Grayling MP, the Lord Chancellor and Secretary of State for Justice, being subject to strong questioning by the House of Lords Constitution Committee:<sup>19</sup>

Q4 Lord Hart of Chilton: [...] what do you perceive to be the problem that you are seeking to solve by the Criminal Justice and Courts Bill?

Chris Grayling MP: [...] My belief is that, to a degree that I find unacceptable, the use of judicial review is being used to delay, to make a campaigning point or to try to challenge with a campaigning view, as opposed to an injustice view, a legitimate decision taken by government and endorsed by Parliament. [...]

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<sup>17</sup> Proposals for Further Reforms, [https://consult.justice.gov.uk/digital-communications/judicial-review/supporting\\_documents/Judicialreviewproposalsforfurtherreform.pdf](https://consult.justice.gov.uk/digital-communications/judicial-review/supporting_documents/Judicialreviewproposalsforfurtherreform.pdf) at para 11

<sup>18</sup> Citing Bondy, V. & Sunkin, M. (2009). The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing, which, incidentally, does set out the reasons and outcomes of withdrawals/settlements.

<sup>19</sup> Evidence of Rt Hon Chris Grayling MP, 26 March 2014: <http://www.parliament.uk/documents/lords-committees/constitution/annual%20oral%20evidence%20sessions%202013-2014/ucCONST260314ev1Grayling.pdf>

Lord Hart of Chilton: I understand that. If I may say, many of your examples appear to be anecdotal. Where is the substantive body of evidence to support what you are saying? I am sure you have seen the graph of the rise of judicial review applications; you have seen that by miles the numbers are to do with immigration and asylum...The rest show tiny increases in numbers. I am just curious to know, apart from anecdotes, where is the substantive body of evidence to show what you are saying is correct?

Chris Grayling MP: There has been an increase of about 20% in recent years in the number of non-immigration judicial reviews.

Lord Hart of Chilton: That is 21% since 2000 but only 3% since 2007.

...

Lord Hart of Chilton: By what proportion do you think that your proposals are going to lead to a decline in the number of judicial reviews? What is the percentage at which it is now going to stop?

Chris Grayling MP: I do not know the answer to that. [...]

The Government also failed to convince the Joint Committee on Human Rights that their reforms have been based on an adequate evidence base. The Committee said:

“... The number of judicial reviews has remained remarkably steady when the increase in the number of immigration judicial reviews is disregarded. We therefore do not consider the Government to have demonstrated by clear evidence that non-immigration related judicial review has “expanded massively” in recent years as the Lord Chancellor claims, that there are real abuses of the process taking place, or that the current powers of the courts to deal with such abuse are inadequate”<sup>20</sup>

### **The need to improve the quality of information on judicial review**

Despite the bullish approach taken by the Lord Chancellor to justify and explain the reforms, the weakness of the evidence base is likely to have damaged the government’s credibility and standing amongst informed stakeholders and in Parliament. The government’s use of statistics appears to have done little to assist their case and may have made their task more difficult. Overall it remains unclear whether the process of reform has been informed by the best evidence, and in particular, no evidence has been available in relation to the likely consequences of the changes.

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<sup>20</sup> The implications for access to justice of the Government's proposals to reform judicial review Thirteenth Report of Session 2013–14 (April 2014), Summary. See further: M. Elliott: <http://ukconstitutionallaw.org/2014/05/01/mark-elliott-judicial-review-reform-the-report-of-the-joint-committee-on-human-rights/>

As we have indicated, the inadequacy of routinely and publicly available information on the workings of judicial review is not a new problem. Over the years much of the basic information we now have about the working of the system has only come to light due to what might be termed 'accidents of research'. The following are examples:

- Research has provided basic information about the geographical distribution of judicial review claims<sup>21</sup> to reveal the historical concentration of judicial review litigation in London and the South East.<sup>22</sup> These findings were recognised by the Law Commission in 1994<sup>23</sup> and by the Review of the Crown Office List in 2000 (the Bowman Committee)<sup>24</sup>. The findings gave rise to concern that there were structural problems with accessing judicial review outside London and this reinforced the case for establishing 'regional' centres for handling judicial review in Birmingham, Cardiff, Manchester and Leeds.<sup>25</sup>
- Work on the dynamics of judicial review litigation revealed information about the working of the permission stage. While much of this work was qualitative in nature, looking, for example, at how practitioners engage and experience the system, some elements of the research concerned basic details including the various stages at which cases are withdrawn, the number of renewed applications and their outcomes, a detailed breakdown of outcomes according to subject matter<sup>26</sup> and levels of (in) consistency of judicial decision-making at the permission stage.
- The research on the dynamics of judicial review was cited by Lord Gill's *Review of the Scottish Civil Courts* to support recommendations that a permission requirement be introduced in Scotland, and subsequently the Scottish Government has included a permission requirement in the Draft Courts Reform (Scotland) Bill.<sup>27</sup>
- Research findings on settlement rates prior to the permission stage also informed Lord Justice Jackson's 2009 report on Costs in Civil Litigation, in particular in relation

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<sup>21</sup> *Judicial Review in Perspective* (M. Sunkin, L. Bridges, and G. Meszaros, 2<sup>nd</sup> edn. Cavendish, 1995, ISBN 1-85941-203-3, 223 pp plus i-xi); V. Bondy and M. Sunkin 'Accessing Judicial Review' [2008] *Public Law* 647-667; 'Mapping the use of Judicial Review to Challenge Local Authorities in England and Wales', (M. Sunkin; K Calvo; L Platt; and T Landman) [2007] *Public Law* 545-567.

<sup>22</sup> In his Foreword to *Judicial Review in Perspective*, Sir Henry Brooke (former Lord Justice of Appeal and chairman of the Law Commission), noted that the "new edition throws up a series of worrying questions. Why, for instance, did only 2% of legal aid applicants in a three month period come from that great expanse of England between Leeds and Bradford in the south and Newcastle in the north?". See more recently 'Mapping the use of Judicial Review to Challenge Local Authorities in England and Wales', M. Sunkin, K Calvo, L Platt, and T Landman [2007] *Public Law* 545-567.

<sup>23</sup> Paras 2.20 and 2.28.

<sup>24</sup> Lord Chancellor's Department in 2000, Chap 6 para 21.

<sup>25</sup> See S. Nason and M. Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) *Modern Law Review* 76(2) pp 223-253

<sup>26</sup> beyond the traditional presentation of cases according to Immigration/Asylum, housing and other

<sup>27</sup> See

[http://www.scottish.parliament.uk/S4\\_Bills/Courts%20Reform%20\(Scotland\)%20Bill/b46s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Courts%20Reform%20(Scotland)%20Bill/b46s4-introd.pdf) section 85

to the appropriate costs regime in cases where it is shown that earlier resolution could have been achieved.<sup>28</sup>

Independent legal research is vital but such research is not sufficient and it should not be relied on as a primary source of basic data for understanding the system and assessing the possible effects of reforms. There are several practical reasons why legal research is limited. These include the following: individual projects may provide valuable information and insights but unless care is taken, methodological variations in data collection can detract from the creation of consistent data over time; research may stimulate reform, but the relationship between the timing and/or focus of deliberation over proposed reform and current research is likely to be a matter of coincidence; the availability of basic information about the court system should not depend on the vagaries of research, including whether researchers are able to secure funding for their work and access to court records and other sources of information.

The point is not simply about making the lives of researchers easier and saving research time. It is that all stakeholders should have better ways of accessing key information about judicial review, and this includes those within government.

Over the past decade the quality of information collected by the Administrative Court on the COINS system has improved significantly. These data could offer a significant resource, and thought should be given to ways of making the information available for analytical purposes by researchers and other stakeholders, subject of course to confidentiality safeguards.

### **The need to strengthen links between the research and practitioner communities**

The reform programme illustrates the need for better information about judicial review. But it also indicates that key policy makers may also be unaware of relevant research. While use has been made of research by law reform bodies, it is striking that government appeared largely unaware of this body of work when they first embarked on the reforms. Had this not been so, the case for reform may have been better informed, more convincingly presented, and less vulnerable to criticisms such as that made by Joint Committee on Human Rights.

There is need to strengthen the relationships between the research communities and other stakeholders, including government. This is particularly important where a programme of reform is being developed and implemented relatively rapidly as it was in this case. Here, the timetable appeared to be driven by ministers, and our impression was that officials were having to quickly work themselves into the field and the relevant data; and other stakeholders were inevitably having to react within tight deadlines. In such a situation, established networks of stakeholders and expert researchers are extremely valuable. The strong link between the University of Essex and the Public Law Project, for example, was

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<sup>28</sup> <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> at para 3.21, p.309 and para 5.2, p.352. Arguments based on the research were also accepted by the Court of Appeal in *Bahta v SSHD* [2011] EWCA Civ 895 where the UK Border Agency was ordered to pay the costs having belatedly granted relief in immigration applications by means of consent orders. The *Bahta* decision has led to a review of principles concerning costs orders in cases that conclude prior to final hearing with a view to incentivising defendant authorities to settle cases early rather than at the door of the court.

important especially in relation to dissemination of targeted data and analysis amongst user groups.

It is in part in order to build such networks that the Nuffield Foundation is to establish a virtual hub for linking the research, policy and practice communities in the field of administrative justice. Recent experience of judicial review reform underlines the importance of this initiative.