



Legal Services Institute

IMPROVING ACCESS TO JUSTICE: SCOPE OF THE REGULATORY OBJECTIVE

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Summary

The notion of 'access to justice' is somewhat totemic. That it should be part of the regulatory objectives in the Legal Services Act 2007 is not surprising. Sir David Clementi in his review of regulation was quite clear that it should be a key objective for any regulator of legal services. It is not contentious (in our view) whether improving access to justice should be an objective; what is more challenging lies in the divergent views that are held over what should fall within the notion of 'access to justice', and how often that notion is cited as justification for an array of different policies.

In some senses, it is often easier to say what access to justice is not rather than what it is, when it has been denied rather than achieved. For example, there seems to be a tendency for some to suggest that a reduction in access to legal services, or to lawyers, or to law firms, will mean that access to justice will necessarily diminish in volume or quality. Or that the closure of rural law firms, or a reduction in funding available to litigants, will inevitably compromise access to justice. This easy equation of other factors with access to justice, or the suggestion of cause and effect, strikes us as tendentious.

While access to legal services, or to lawyers, or to law firms, or to funding, might each or all be great benefits on the route to achieving access to justice, they are not the same. Increasing access to any one of them, or to all of them, will not inevitably achieve access to justice; nor would these increases necessarily be the most cost-effective or beneficial ways to achieve it, when judged from the wider perspective of 'the public interest' rather than the self-interest of the providers of services or consumer-litigants. These elements are certainly part of the broader picture of access to justice, but they are not the only ones; they might be beneficial and even desirable as part of the process of securing justice, but they are not its entirety.

Access to justice is not a zero-sum game. The loss of a provider from an area of the country or from the market, or a reduction in the numbers of lawyers or law firms, or less public money being made available for legal aid, do not of themselves create a worsening of access to justice. For example, providers who close *might* have been incompetent or ineffective; their decision to close *might* have

been driven by being unable to compete as effectively as new entrants to deliver the same quality at an attractive price. Their loss to a location or to the market as a whole is not inevitably bad news for those seeking competent, effective, value-for-money advice and representation in their pursuit of justice.

Such is the elasticity of the concept of access to justice that notions of it have been used to justify the arguments of both advocates and opponents of the same proposition for reform. We believe that, too often, these positions are founded on a selective or partial view of the concept. We start from the assumption that there is no inevitability about either improvement or deterioration in access to justice arising from the Legal Services Act's reforms and liberalisation. Both are possible.

We therefore need a better answer than we seem to have at the moment to the questions, 'What is access to justice?', 'What should it mean in the context of the Act?', and 'How will anyone know and be able to judge whether or not it has been improved?' These are the questions that we seek to address in this paper. We do so from the perspective that the overriding principle must be what is in the public interest¹. The gestation of this paper has been unduly long and challenging. This reflects the current absence of any accepted definition of or consensus about the meaning of 'access to justice', as well as the complexity and interconnectedness of many of the issues that surround it.

As a result of the analysis we set out in this paper, we take a broader view of access to justice than some, and a narrower view than others. Our purpose here is to suggest a meaning of 'access to justice' in the context of the regulatory objective in section 1 of the Legal Services Act 2007 and consequent obligation on the Legal Services Board and other approved regulators to improve it. The nature of this obligation suggests to us that the meaning should be interpreted more narrowly than some might wish, and certainly more narrowly than a colloquial or populist meaning of the expression might lead to.

Our conclusion is that 'justice', strictly speaking, is provided only by courts and by other voluntary processes that resolve a dispute by reference to the parties' legal rights and obligations. On this view, access to justice can be affected only marginally – and often not directly – by regulators. Thus, despite good intentions to influence access to justice on a much wider scale, regulators might be facing a more constrained and ultimately more manageable obligation than at first blush appears to be the case.

One source of these possibly over-ambitious intentions is a conflation, first, of access to legal services and access to justice (which we believe is misplaced) and, second, of the regulatory objective of improving access to justice with other regulatory objectives to promote competition, the rule of law and an independent legal profession, and to increase public understanding of the citizen's legal rights and duties. While these other objectives all have some role to play in securing access to justice, they are not all necessary preconditions to it and nor are they synonymous with it. Unpicking these connections is, to our way of thinking, a necessary part of understanding what 'access to justice' truly is.

¹ Cf. Mayson (2013).

² Legal Services Act 2007, s. 1(1)(c).

1. Introduction

The Legal Services Act 2007 introduces a regulatory objective of ‘improving access to justice’². The language of the objective is, in terms, one of improvement: access to justice in itself is not the objective, nor is ‘considering’, ‘securing’, ‘maintaining’ or ‘increasing’ it. The Legal Services Board (LSB)³ and the approved regulators⁴ are under a statutory duty to promote the regulatory objectives while discharging their functions.

However uncontentious and laudable the regulatory objective might be, it nevertheless begs a fundamental question: what do, or should, we mean by ‘access to justice’? The multi-faceted nature and elasticity of the phrase means that it is often used to support different arguments, and can in fact be used by different parties or stakeholders to support diverse perspectives on the same issue. With this in mind, our objective in this paper is to offer a basis for exploring the various issues that might fall under the umbrella of access to justice.

After considering the history of the regulatory objective, we break it down into its constituent parts. We highlight the most common usages of ‘access to justice’, and also illustrate its less well-recognised aspects. Once the phrase itself has been fully explored, we continue by contemplating the debates that can arise under the broader banner of access to justice, such as whether consumers value more highly fair process or a satisfactory outcome, and therefore which of those should be the focus for any future policies. We also continue a theme from the LSI’s recent work by considering how the public good and consumer protection relate to this regulatory objective⁵.

2. The regulatory objective

2.1 Background

The inclusion of improving access to justice in the Act’s regulatory objectives was first mooted in 2004 in Sir David Clementi’s preliminary report⁶ on the regulation of legal services, and then confirmed in his final report in 2004⁷. However, there were no Parliamentary debates about the actual meaning of the phrase ‘access to justice’. We can only assume that the draftsman or Members felt that providing a definition would be either unnecessary or too difficult to warrant the time spent⁸. Nevertheless, concerns about access to justice were raised in Parliament in relation to the perceived detrimental impact that alternative business structures (ABSs) might have on the availability of legal advice and representation to poorer clients in remote areas.

The evidence provided by the Legal Action Group to the Joint Committee on the Draft Legal Services Bill succinctly outlines these concerns⁹:

Many solicitors firms who do legal aid work subsidise the least profitable areas of social welfare law either from privately paid work, or more profitable legal aid work (such as criminal defence work). We think it is highly likely that there are some areas of legal work that can be commoditised or carried out in high volume with efficiency savings, through ABS. In these circumstances we are concerned that the

² Legal Services Act 2007, s. 1(1)(c).

³ Legal Services Act 2007, s. 3.

⁴ Legal Services Act 2007, s. 28.

⁵ The public good and consumer protection aspects of the public interest were considered at length in Mayson (2011), as well as in relation to the reserved legal activities in two previous LSI papers: see LSI (2010a) and LSI (2011).

⁶ Clementi (2004a), p. 19.

⁷ See Clementi (2004b), p. 16.

⁸ Cf. LSB (2012), para 3.8: there are 150 other Acts of Parliament referring to access to justice without any definition of its meaning.

⁹ Evidence No. 40 provided 14 June 2006 at para 18; available online at:

<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/6061512.htm>.

ABS will effectively cream off the work that currently subsidises legal aid, leaving some high street firms with a core of uneconomic legal aid casework which is unsustainable in the future.

In the Joint Committee Report on the Bill, this issue was discussed at length, alongside the evidence provided by interested parties. Perhaps unsurprisingly, members of the legal professions who foresaw negative consequences for their businesses argued against change and the introduction of ABSs. The Legal Aid Practitioners Group stated¹⁰ that they did

not believe that any benefits to consumers [would] outweigh the undermining [of] the integrity of legal services provision that is likely to result, or the damage that [would] be done to the legal aid network.... [Such] changes are seen as a potentially catastrophic threat to the network of high street solicitors, with the damage to access to justice for ordinary people that this would cause.

However, the then President of the Law Society, Kevin Martin, took the more measured view¹¹ that whether ABSs would improve access to justice in remote areas was 'a question to which none of us, I think, have the answer'.

The Office of Fair Trading expressed a contradictory opinion to that of the Legal Action Group, arguing¹² that 'in relation to rural and isolated consumers, new structures, as well as potentially improving quality of service, can bring innovative ways of getting services to people'. Both the Legal Services Ombudsman and the consumer group Which? took into account the needs of 'MINELAS' consumers (that is, those who are middle income, not eligible for legal aid services¹³), with the Legal Services Ombudsman contending¹⁴ that ABSs could produce a 'very good outcome' for that group if they enabled affordable legal services options to be developed.

Which? went a step further by stating that¹⁵:

We do not think that ABS will have negative impact on access to justice.... [By] enabling competition and lower prices, liberalising the industry is likely to increase access to legal services for those who have effectively been priced out of the market by cuts in legal aid.

It is interesting that the views expressed in opposition to ABS raised concerns about geographical barriers to access, whereas those in favour of ABS were phrased in terms of economic or psychological barriers¹⁶.

The lords sitting on the Joint Committee did not seem totally convinced either way by the evidence before them, but conceded that there could be a negative effect on legal service provision by high street practices in rural areas¹⁷.

Even in the extracts quoted, the equation of access to justice with access to legal services, lawyers and law firms is apparent.

¹⁰ Legal Aid Practitioners Group (2006), para 9.

¹¹ Oral Evidence to the Joint Committee on the Draft Legal Services Bill, 8 June 2006, at Q93.

¹² Office of Fair Trading (2006), para 17.

¹³ Civil Justice Council (2005).

¹⁴ Legal Services Ombudsman (2006), para 5.4.

¹⁵ Which? (2006), para 18.

¹⁶ For a detailed consideration of the various forms of access, see para 4.2 below.

¹⁷ Lords Committee on the Draft Legal Services Bill, day 3 part 2 (23 January 2007). See, for example, Lord Kingsland at col. 1056 and Lord Woolf at cols. 1056-1057.

2.2 Access to justice as a regulatory objective

In the 2007 Act, the regulatory objectives – including that of improving access to justice – form a significant part of the fabric of the new regulatory framework for legal services:

- the LSB and the approved regulators must act in a way which is compatible with the objectives and which are appropriate for the purposes of meeting them (sections 3(2) and 28(2));
- the LSB must produce an annual report setting out the extent to which it believes it has met the objectives (section 6(2)(b)) and how the activities of ABS licensing authorities and ABSs themselves have affected the regulatory objectives (section 110(1));
- if the LSB is satisfied that an act or omission by an approved regulator has had or might have an adverse impact on a regulatory objective, it may –
 - set (or direct an approved regulator to set) a performance target (section 31);
 - direct the regulator to take steps to counter that adverse impact, mitigate its effect or prevent its occurrence or recurrence (section 32);
 - publish a public censure (section 35);
 - give an intervention direction and direct that the regulator's function is to be exercised by the LSB or its nominee (section 41);
 - recommend to the Lord Chancellor that the regulator's designation as an approved regulator or as an ABS licensing authority is cancelled in relation to one or more, or all, of the reserved legal activities for which it holds approval (sections 45 and 76);
- each ABS licensing authority must publish a statement (approved by the LSB) of how, in exercising its functions in relation to ABSs, it will comply with its duty to promote the regulatory objectives (section 82);
- specifically, the approved licensing rules of each licensing authority must contain provisions setting out how the licensing authority, in complying with its duty to consider and promote the regulatory objectives when responding to an application for an ABS licence, should take account of the objective of improving access to justice (section 83(5)(b)¹⁸);
- the LSB may refuse an application for approval as a regulator if it is satisfied that approval would be prejudicial to the regulatory objectives (Schedule 4, paragraph 25(3)(a));
- approval of non-lawyers' holdings of interests in ABSs can be withheld if their holding of an interest would compromise the regulatory objectives (cf. Schedule 13, paragraph 6(1)(a)); and
- an ABS licensing authority can give conditional approval of, or impose conditions on, an investor's holding in an ABS without giving the usual warning notice if it believes that the conditions are necessary or desirable to protect any of the regulatory objectives

¹⁸ We are less than convinced that para 6.1 of the SRA Authorisation Rules for Legal Services Bodies and Licensable Bodies 2011 meets the requirements of this obligation, and requests to the SRA for further detail remain unanswered. We are also intrigued that the Council for Licensed Conveyancers chooses to place the burden on the applicant. Its ABS framework rules state:

4.17 An applicant must be able to demonstrate that licensing the body would improve access to justice i.e. recognition of, and response to potential and actual, consumer needs. This may take the form of provision of a greater range of services and methods of accessing these services, lower prices, extended opening hours, accessibility, online provision, or other factors. It is up to the individual applicant as to how they define access to justice and how they demonstrate they will improve it.

(Schedule 13, paragraphs 28(4) and 33(4)) and may similarly object to the acquisition or holding of an interest (Schedule 13, paragraphs 31(3) and 36(4)).

These objectives therefore impose a significant responsibility on the LSB and approved regulators. In imposing these obligations, we assume that Parliament was purposeful in its intent and mindful of the consequences of the obligations imposed. To interpret these obligations too broadly would increase the responsibility, and we believe that the intention to do this must be very clear.

2.3 Access to justice and other regulatory objectives

Access to justice is one of the regulatory objectives in the Legal Services Act and, for our purposes, must be considered within the context of the other seven regulatory objectives¹⁹ as well as within the wider framework of the Act. For example, there is a clear and fundamental connection between improving access to justice and supporting the constitutional principle of the rule of law²⁰. This has been identified by both Lord Bingham²¹ and the World Justice Project²², who each highlighted the key role that access to justice has to play in maintaining the rule of law. Equally, however, the rule of law is not threatened or undermined if disputes are amicably and voluntarily settled outside the justice system.

We would also hope that access to justice is incontrovertibly seen as an expression of protecting and promoting the public interest²³ in maintaining the fabric of society and enabling the legitimate participation of citizens in it (we explore this further in paragraph 3 below). Even so, as with the rule of law, the fabric of society and legitimate participation are not inevitably threatened if disputes are amicably and voluntarily settled outside the justice system.

There might also be occasions when representation by a person who is appropriately qualified and authorised to advise on legal issues, to institute or resist legal proceedings on a person's behalf and to appear before a court²⁴, and who is strongly, effectively and independently able to do so²⁵, is a necessary element of securing justice. Such representation is not, however, a precondition to securing justice.

Effective competition²⁶ might also be able to drive increased availability and affordability of legal advice and representation, and so enable more people to pursue or defend their rights at proportionate and reasonable cost. This could lead to greater access to justice for more citizens. Nevertheless, competition could also result in a reduction in the number of providers who are able to compete effectively and survive, and some members of the community might lose access to their regular and longstanding legal advisers. They might regard this as detrimental and a potential loss of access to justice. Competition could also lead to providers deciding to concentrate on transactional activities that do not affect contentious or reserved matters that are normally associated with access to justice.

¹⁹ For a consideration of each of the regulatory objectives, see Legal Services Institute (2010a), Section 1.

²⁰ Legal Services Act 2007, s. 1(1)(b).

²¹ See Bingham (2006) and (2010).

²² The World Justice Project stated that 'the rule of law refers to a rules-based system in which ... four universal principles are upheld'; one of those is access to justice 'provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve': see World Justice Project (2011), p. 1.

²³ Legal Services Act 2007, s. 1(1)(a).

²⁴ We support the principle that these rights to conduct litigation and to exercise rights of audience before a court are so important to the public interest that they are rightly 'reserved' to appropriately authorised persons under the Act: see LSI (2011).

²⁵ Cf. Legal Services Act 2007, s. 1(1)(f).

²⁶ Cf. Legal Services Act 2007, s. 1(1)(e) and (2).

Finally, better education and understanding of legal rights and duties among the population²⁷ could increase the incidence of claims and better-informed defence of claims, and so improve access to justice. It might also, of course, lead to a decision not to pursue or defend a claim because of a better understanding of the risks and uncertainty of litigation, even though the claim or defence is otherwise valid.

There are, therefore, a number of links between access to justice and most of the other regulatory objectives. It is highly likely that the achievement of one of those other objectives will have an impact on access to justice – either positively or negatively. But those links are not necessarily causal; nor are they all preconditions to access to justice. We should guard against the temptation to elide one objective with another or, because of a link between access to justice and another objective, to fall into the trap of asserting that an improvement in that other necessarily means an improvement in access to justice.

3. Guiding principles

In our exploration of access to justice, we are influenced by certain guiding principles. As will be seen later, the range of issues that relate to it is extremely broad. It is therefore useful to outline some initial underlying guiding principles in our quest to clarify the scope of the concept.

Improving access to justice is one of eight regulatory objectives in the Legal Services Act. As stated in paragraph 2.3 above, a number of the other seven are also relevant to this analysis. In an earlier paper on the public interest in legal services regulation²⁸, the director of the Legal Services Institute argues that the regulatory objectives should be divided into primary and secondary categories. Although at the time of their introduction, the regulatory objectives were stated not to be in any order of priority, or to be interpreted or applied in such a way that some would have supremacy over the others²⁹, Mayson also suggests that ‘protecting and promoting the public interest’³⁰ should be the predominant objective. He proposes a conception of ‘the public interest’, which is not necessarily restricted to use within the legal field³¹:

The public interest concerns objectives and actions for the collective benefit and good of current and future citizens in achieving and maintaining those fundamentals of society that are regarded by them as essential to their common security and well-being, and to their legitimate participation in society.

This definition incorporates two main components to the public interest: the fabric of society, and the legitimate participation of citizens in society. The fabric of society is secured by issues such as public order; the rule of law and the administration of justice; national defence and security; protection of the natural environment; and a sound economy and effective government. Participation in that society is then promoted by public education, health and welfare; access to justice and respect for fundamental human rights; and reliable personal, commercial and public relationships³².

²⁷ Cf. Legal Services Act 2007, s. 1(1)(g).

²⁸ See Mayson (2013).

²⁹ See Hansard Official Report, HL Deb 9 January 2007 col. 129, Baroness Ashton of Upholland: “The Joint Committee recommended that the Explanatory Notes should make it explicit that the objectives were not listed in order of importance. We agreed with that, and the Explanatory Notes reflect it.” Paragraph 28 of the Explanatory Notes states: ‘The Act does not rank these objectives and principles in order of importance. The Legal Services Board, the Office for Legal Complaints and the approved regulators will be best placed to consider how competing objectives are to be balanced in a particular instance.’

³⁰ The regulatory objective in the Legal Services Act 2007, s. 1(1)(a).

³¹ See Mayson (2013), p. 8.

³² See Mayson (2013), pp. 8-9.

Mayson then proposes that the primary regulatory objectives in the Legal Services Act are: protecting and promoting the public interest, supporting the constitutional principle of the rule of law, improving access to justice, and encouraging independent, strong and effective legal advice and representation. The rule of law is key to the security and well-being of society, and access to justice is a necessary platform to being able to assert one's rights in accordance with the rule of law. We therefore agree with the LSB's characterisation of access to justice as being "the acting out of the rule of law in particular or individual circumstances"³³. Maintaining the rule of law also means that there should be an effective system of administration of justice, and that strong and independent legal advice and representation should exist³⁴, to hold an overbearing State, or other powerful agents, accountable within the law.

Our guiding principle in this study of access to justice, therefore, is the promotion of the public interest as defined above. Accordingly, we adopt the distinction between the primary regulatory objectives that embody the public interest and the subordinate regulatory objectives that help sustain the primary objectives. On this basis, improving access to justice is one of the primary objectives and, as such, we suggest that it should be interpreted first and foremost in a way which promotes the overriding public interest objective and the other primary objectives, and only secondarily in ways that will promote the subordinate objectives.

4. Access to justice: a definition

As has been stated above, there is no existing definition within the Legal Services Act 2007 of 'access to justice'. When they first coined the term in 1978, Cappelletti & Garth proposed that, while its meaning could not easily be defined, it should encompass two distinct elements³⁵:

First, the system must be equally accessible to all, and second, it must lead to results that are individually and socially just.

In current (and past) consideration of this area, the focus has arguably been on the first element (access) at the expense of the second (justice). In order to inform the debate, we believe that proper contemplation of both elements is necessary. We therefore begin by looking at justice: it seems logical that the end goal should be defined before it is possible to suggest how that goal might be reached.

4.1 The meaning of 'justice'

4.1.1 Introduction

Justice is a nebulous concept: we all have a view and (rather like the elephant) although we might struggle to describe it fully and precisely, think we can recognise it when we see it – or, perhaps more accurately, we are certain when we do not see it in actions observed or decisions made.

Many well-respected academics have attempted definitions of the term 'access to justice', none of which has ever been universally accepted. A review of the literature in this field suggests that there are two main lines of thinking: first, that justice can only flow from public decisions made within a state-sponsored legal system; and second, that the term should be construed much more widely

³³ LSB (2010), para 17 and LSB (2012), para 3.4. For our (different) assessment of the implications of this view, see further, para 4.1.5 below.

³⁴ Cf. Napier (2007) who refers to "four component parts of access to justice": (i) access to a legal system underpinned by the rule of law and due process; (ii) access to legal advice; (iii) access to a court; and (iv) access to funding.

³⁵ Cappelletti & Garth (1978), p. 6.

than that, as an umbrella encompassing not only the conventional legal system but also alternative dispute resolution (ADR) and dispute prevention methods. These two views might be respectively characterised as the narrow and the broad, and each will be explored later.

There is, however, a preliminary issue that we wish to explore. It seems to us to be clear that if defendants in criminal trials are effectively represented and receive a fair trial, then they will have experienced justice (even if convicted, and even if at some cost to themselves). Similarly, if only in a vicarious sense, so will the victims of those crimes also have experienced access to justice. In the same way, if the parties to a civil dispute are effectively represented and receive a fair hearing in court, they too will have experienced justice (even if they lose, and again even if at some cost to themselves). We trust that few would argue that such experience of the ultimate expression of 'justice' – at the hands of Her Majesty's judges carrying out their public duty – is not consistent with any intended notion of 'access to justice'.

The court system is part of the fabric of society, and is necessary in the public interest to secure the rule of law. Where citizens transgress the rules of society, or are denied their public or private rights by others, the rule of law and the supporting court system are used to give effect to the idea of a 'just society' – to achieve the public interest of maintaining the fabric of society and ensuring the legitimate participation of citizens in it³⁶. Court-resolved guilt, liability or entitlement are public settlements, that take place within the framework of a just society, and whose outcomes are therefore deemed just (albeit that sometimes, subject to an appeal, the specific outcome might be characterised by some as 'unjust').

The attachment of criminal sanction and stigma is so serious in its consequences that a just society should not support any public interest in that attachment other than through this full expression of 'justice'³⁷. On the spectrum of narrow to broad approaches to justice, this would be at the narrowest end. There might be arguments at the margins about whether the attachment should be made by judge or jury, or through 'on-the-spot' fines, but there is no doubt that the justice that needs to be accessed in the criminal context is that which emanates from the state rather than from or through any private function.

The position is less clear when one turns to civil disputes. We have already suggested that 'justice' is served and delivered when, as with criminal matters, the full force of the state stands behind the process and the adjudication (again, at the narrowest end of the spectrum). However, it is always open to the parties in a civil dispute to settle the matter themselves without any assistance or intervention from others. This would be a private resolution, the outcome is arguably 'just' (because both parties have agreed it³⁸), and we all might wish to see 'a just society' encourage such resolution.

But it could equally be argued that this lies at the broader end of the spectrum and has not, in any public interest sense, involved access to 'justice' (because there has been no formal determination of their legal rights and liabilities, merely a mutually agreed disposition of the dispute). Indeed, it might be more correct to refer to these situations as resulting in a 'fair' outcome: the public interest here lies in the ability of those parties to move beyond the prospect of such a private, mutually agreed, fair outcome to a public structure and process of justice in those circumstances where private resolution is not achieved or implemented.

Even with legal advice and assistance, a settlement might similarly be reached before formal proceedings are issued (albeit perhaps at higher cost). This is also a private resolution, with a fair

³⁶ Cf. Mayson (2013).

³⁷ See also the EU Directive 2012/13 of 22 May 2012 on the right to information in criminal proceedings (available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:EN:PDF>).

³⁸ However, because it is a private agreement, the possibility of imbalances of power or even coercion cannot be dismissed.

outcome, and within the framework of a just society. But again, for the same reasons, it could be suggested that this is still at the broader end of the spectrum and has not involved access to 'justice'.

After proceedings have been issued, a settlement might again be reached – at some point before the hearing, at the door of the court, or during the hearing but before judgement is given. Using the same logic, this would also be a private resolution, with a fair outcome, and within the framework of a just society. In these circumstances, the apparatus of the legal system has been used, though not to a final conclusion. It becomes more contentious to suggest that this does, or does not, involve access to justice. The formality of a public process has been started, and has become part of the context for the settlement: disclosure of relevant facts and strength of argument, positioning this within the history of previous disputes and judgements (the system of precedent), mounting costs, and perhaps even comments from the bench during the hearing, could all have played some part in bringing about a renewed impetus to reach a mutual agreement.

What, then, are the factors that tip the balance firmly in favour of a clear conclusion that something is part of 'justice', or is not? How far through the formal process do the parties have to go in order to be said to have achieved or received 'justice'? How 'formal' does the structure need to be – judicial, tribunal, arbitration, mediation, negotiation, statutory ombudsmen, online dispute resolution, dispute prevention, and so on?

We are clear that 'justice' is a relative, qualitative, concept. Although the public interest supports reliable relationships (cf. Mayson, 2011), the processes of, for example, transferring land (conveyancing) or applying for a grant of probate do not involve elements of access to justice – unless there is some degree of contention that requires a resolution. On this, we differ from the LSB (cf. LSB, 2012).

4.1.2 The narrow view

The first, perhaps more traditional, view of justice is that it flows from adjudication under the formal legal system. Under this conception, the achievement of justice depends on due legal process and public evaluation of a dispute against the external standard of the law. A key proponent of this viewpoint is Professor Dame Hazel Genn. In her influential Hamlyn lectures, she argues that for civil justice to perform its role in society – to 'cast its shadow', as she puts it – there must be adjudication and public promulgation of decisions³⁹. Even though the vast majority of cases settle before reaching the point of judicial determination, nevertheless 'a flow of adjudicated cases is necessary to provide guidance on the law and, most importantly, to create the credible threat of litigation if settlement is not achieved'⁴⁰.

Despite stating her view that mediation is an important supplement to the courts, Genn maintains that justice cannot flow from this type of dispute resolution. Mediation may resolve disputes, but it cannot dispense justice. She reasons that⁴¹:

Success in mediation is a settlement that the parties can live with. The outcome of mediation is not about *just* settlement, it is *just about settlement*.... We may therefore conclude that mediation may be about problem solving, it may be about compromise, it may be about transformation and recognition, it may be about moral growth, it may be about communication, it may be about repairing damaged relationships – but it is not about substantive justice.

Genn would therefore argue that a 'just' outcome is a decision on the merits in relation to the parties' legal rights⁴². Since mediation does not necessarily refer to legal rights, justice in the narrow

³⁹ Genn (2010), p. 21.

⁴⁰ Genn (2010), p. 21.

⁴¹ Genn (2010), p. 117 (emphasis in original).

⁴² We are grateful to Professor Dame Hazel Genn for her comments on this point.

conception does not arise from this form of dispute resolution. Investment in private dispute resolution methods therefore should not be regarded on this view as providing access to justice, because the logic would suggest that such investment would be diverting disputes *away* from justice⁴³.

This view is consistent with Lord Diplock's in *Attorney-General v. Times Newspapers Ltd* [1973] 3 All ER 54 (at pages 71 and 72, emphasis in original):

in any civilised society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another....

The due administration of justice requires *first* that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; *secondly*, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and *thirdly* that, once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law.

He expressed very similar sentiments eight years later in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp* [1981] 1 All ER 289 (at page 295):

Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory.

We think that this final point is important. If one of the parties has a choice whether or not to submit to the resolution of a claim brought by another, that other (these days referred to as the claimant rather than plaintiff) cannot secure access to justice. This implies to us that, ultimately, access to justice requires the authority of the state, through the justice system, to force an unwilling disputant to subject themselves to formal resolution. Without this, there can be no ultimate assurance of justice.

The key characteristics of the narrow view, then, are founded on due process, public adjudication and promulgation, and consistency with the external standard of the law. A 'just outcome' is a decision made on the merits in relation to the parties' legal rights. It is, in a sense, substantive 'justice from above'⁴⁴. In principle, this approach appears to satisfy the Cappelletti & Garth test of being individually and socially just.

The LSB characterises the narrow view as a "dispute centric view on what access to justice means"⁴⁵. We do not disagree with this characterisation. Indeed, it seems to us that the narrow view has to be a minimum view of 'justice'. The more difficult question is whether it should go further.

⁴³ Genn (2010), p. 121.

⁴⁴ See paragraph 4.1.3 below.

⁴⁵ See LSB (2012), para 3.22.

4.1.3 The broad view

The narrow view outlined in paragraph 4.1.2 above inextricably links justice with the law. Whether justice to the average member of the public is simply about formal law is a moot point. Macdonald (1990) clearly differentiates between law and justice by arguing that most professionals ‘hold that in the absence of law there can be no justice’⁴⁶. In describing the narrow view, he writes⁴⁷:

As I read it, mainstream access to justice literature is largely instrumental; it is a literature about access to law, rather than access to justice. In this perspective, whatever else justice might be for philosophers, it is ... fundamentally a product marketed by the state through its dispute processing agencies to which all citizens should have access. Justice is neither an aspiration, nor an ideal which demands engagement by those who pursue it. Rather, like data banks stored by computer systems, justice is a commodity which can be made more accessible by removing interface obstacles. Access to justice is, therefore, really about access to the systemic equivalent of hardware – to the processes and institutions of formalised law.

He goes on to suggest that the access to justice debate should be significantly broadened to include reforms promoting more than access to the formal legal system.

Hyman & Love (2002) refer to justice flowing from a rule-based system (the narrow view) as ‘justice from above’. By contrast, ‘justice from below’ is created when the parties to a dispute shape the outcome themselves, for example during mediation⁴⁸. In his analysis of Hyman & Love’s thinking, Stulberg (2005) has put forward the opposing view to that reached by Genn. He highlights that in a so-called justice from below situation such as mediation, whatever the parties agree is assumed to be a just outcome and no independent standards should be employed to assess that outcome⁴⁹. His reasoning continues⁵⁰:

analyzing justice in terms of party acceptability gains traction by viewing mediation – and justice in or arising from mediation – as a system that Rawls characterizes as one of pure procedural justice. A system of pure procedural justice is one for which there is no independent standard of justice or fairness against which to assess whether a particular process secures or advances that standard.

It is important, however, to emphasise some critical elements of Stulberg’s analysis: that decisions made by both parties are voluntary; that no settlement should violate the relevant jurisdiction’s law; and that agreement is made with full knowledge of the alternatives.

Stulberg reaches a conclusion diametrically opposed to that of Genn: that justice can flow from mediation. It seems reasonable to assume that, if a layperson has been through the mediation process and agreed with the final outcome to their dispute, then they would consider that outcome to have been at least ‘fair’⁵¹. It seems to us that the same logic would hold true for any form of ADR. It also seems defensible to suggest that, in any analysis of access to justice, the opinions of those who seek justice should be borne in mind, in order for the conclusions drawn to be of some practical use. However, we question whether it is correct to conflate what is viewed as a ‘fair outcome’ with ‘justice’ for the purposes of this paper. We view the distinction as being of fundamental importance in the context of a statutory objective to improve access to justice. Even if, colloquially, parties refer to a fair outcome as a just one, we do not inevitably have to conclude that such a mutually agreed, private, fair outcome is, for statutory purposes, to be treated as having delivered justice. Everyday

⁴⁶ Macdonald (1990), p. 304.

⁴⁷ Macdonald (1990), pp. 294-295.

⁴⁸ Hyman & Love (2002), p. 5.

⁴⁹ Stulberg (2005), p. 6.

⁵⁰ Stulberg (2005), p. 11.

⁵¹ We have heard the view expressed that it would be impossible to find anyone totally satisfied with the result of mediation. Whether this is in fact the case would require some empirical research that is beyond the scope of this paper.

conceptions, common parlance and populist notions do not necessarily determine statutory meaning.

It is essential not to oversimplify this debate to one of judicial determination versus ADR. Genn does not view the situation that way; she argues that opposing views on adjudication and mediation are ‘irreconcilable’ because one needs the threat of adjudication to bring parties to mediation’s negotiating table⁵². But she continues⁵³:

The challenge is in understanding that, in civil justice at least, there is an interdependency between the courts as publicisers of rules backed by coercive power, and the practice of ADR and settlement more generally.

What we are aiming to determine here is the processes and outcomes from which ‘justice’ can rightly be said to flow, rather than whether or not we are in favour of the use of ADR.

4.1.4 Developing a definition of justice

4.1.4.1 Introduction

In paragraph 3 above, we set out the guiding principle underpinning this paper, namely that access to justice must be viewed as an element of protecting and promoting the public interest. A key element of the definition of the public interest that we adopt is the ‘collective benefit and good of citizens’. From any form of dispute resolution there can arise either or both of private and public benefits.

Private benefits accrue directly to the parties involved – in the present context, that their dispute has been resolved. For this reason, alternative dispute resolution methods are sometimes also referred to as private dispute resolution, with outcomes being reached without the names of the parties ever entering the public domain. In addition to the main goal of resolving their dispute, in some cases the parties may feel that keeping the matter confidential is of considerable personal or commercial importance to them.

Public benefits can take a number of forms – principally the development of the common law, and the ability of future disputes to be settled based on judicial decisions already made. A well-functioning justice system is likely to be regarded by citizens as fundamental to the rule of law as well as ‘essential to their common security and well-being’⁵⁴, and so it follows that the maintenance of the common law and the smooth and effective administration of justice are in the public interest.

We feel most comfortable with Genn’s notion of a ‘just outcome’ as being based on a decision on the merits of the case in relation to the parties’ legal rights and obligations (cf. paragraph 4.1.2 above). It seems indisputable to us that a judicial determination of a dispute, made on the merits of the case and in accordance with the parties’ legal rights and duties, is by definition a just outcome – indeed, that this *is* a definition of ‘a just outcome’. Further, judicial determination cannot be made on any other basis.

This then begs a fundamental question of whether non-judicial determination can ever be said to represent ‘justice’. In common parlance, of course, it probably could. However, if a decision on the merits in accordance with the parties’ legal rights and duties is a prerequisite for a just outcome, it is hard to see how mediation can be included. No third-party decision is made in a mediated dispute; it is a facilitated negotiation between the participants. There is also a significant danger that terms will be imposed by the stronger, more powerful, better resourced, or more experienced party.

⁵² Genn (2010), pp. 124-125.

⁵³ Genn (2010), p. 125.

⁵⁴ Cf. Mayson (2013).

In considering whether non-judicial determination of disputes can ever amount to ‘justice’ or ‘a just outcome’, we wish to support Genn’s view but then to build on Stulberg’s analysis. We think that it is possible that a resolution that meets Stulberg’s criteria of voluntary and informed participation and consistency with the law provides sound foundations for a just outcome. We would, however, add a further factor that we believe is critical. Stulberg’s criteria require that the terms of the settlement should not violate the relevant jurisdiction’s law, meaning that the settlement should be enforceable (for example, there is a binding contract with sufficient consideration, and an absence of fraud or duress). We believe that the public interest (founded on maintaining the rule of law and securing the *legitimate* participation of citizens in society) requires that ‘a just outcome’ must itself be reached in accordance with the parties’ legal rights and obligations.

We think that a just society would seek these critical elements for the non-judicial determination of disputes. In arbitration, the process is usually entered into voluntarily and by informed participants, and a decision is made on the merits in relation to the participants’ legal rights: the parties to an arbitration pay for an expert to make a private determination of their dispute for them. In this way, a ‘just outcome’ is reached: a decision is made on the merits of the case by an independent third-party adjudicator, consistent with the parties’ legal rights.

However, unlike judicial determination, the benefits of arbitration could be said to be purely private. Despite an arbitration decision having been made on the basis of the parties’ legal rights, the common law cannot develop any further because those decisions are not published⁵⁵. We question whether this public/ private distinction is a valid one. The reality within our legal system is that the vast majority of civil cases in which proceedings are commenced settle, go undefended, or are withdrawn long before they come in front of a judge⁵⁶. Nevertheless, the minority that are judicially determined provide the common law framework for the majority to settle under – as well as for those being decided through arbitration: this is, in Genn’s terms, law ‘casting its shadow’.

That the benefits arising from arbitration are purely private does not necessarily mean in our view that it cannot be said to have provided or promoted the public interest ‘justice’ that is for the collective benefit and good of citizens. For example, it seems reasonable to argue that being able to choose to resolve disputes in a timely and cost-effective manner enhances the collective good of citizens and is a worthy attribute of a just society. Arbitration is a valuable addition to the array of dispute resolution methods that are open to disputants to choose from. Using arbitration also reduces the financial burden on the public purse by avoiding judicial determination in cases where the parties can voluntarily reach agreement without it, and therefore relieves the state from having to maintain a larger system for the administration of justice than might in fact be required.

While we believe that arbitration can, in principle, meet the criteria for reaching a just outcome, we doubt that mediation can, in principle, be regarded necessarily as leading to a just outcome or to justice. We suggest that justice, when viewed as an integral part of the public interest, cannot flow from mediation as it is currently employed in England and Wales. The outcome of mediation simply needs to be agreed: it does not have to be based on the merits of the case or accord with the

⁵⁵ It has been suggested to us that it might be possible to publish arbitration decisions with the names of the parties omitted. It is possible that, if private dispute resolution continues and increases, the law could become unclear in complex areas, which could potentially then lead to more of the litigation that the original promoters of ADR were trying to avoid. If some private decisions were published on an anonymous basis, parties could still choose to arbitrate while also allowing the common law to be continually developed. Whether such an approach to publication would be attractive in practice is open to debate, given that the privacy of arbitration is one of its key attributes. It seems possible that members of tightly-knit industries, for example shipping, might still be able to recognise the parties to a dispute from its facts.

⁵⁶ See Ministry of Justice (2012), p. 6: roughly a fifth of all claims are defended, and only about 3% of civil claims lead to a trial.

parties' legal rights and obligations⁵⁷. Thus, while mediation might provide access to a *fair* outcome and the *closure* of a dispute, it cannot in our view provide access to *justice*.

Further, pressure to submit to mediation is increasingly being applied to parties and raises the risk that participation is neither voluntary nor fully informed⁵⁸. For example, in family proceedings, a pre-application protocol requires that, subject to some exceptions, the parties have attended a mediation information and assessment meeting before applications to the court are made. Granted, this is effectively compulsory *consideration* of mediation rather than compulsory mediation. Nevertheless, the pressure not to pursue a judicial determination is present. The Ministry of Justice is also keen to expand the use of mediation, and it seems inevitable that this compulsion may extend further to other areas of law in the future.

Our preliminary conclusion, therefore, is that 'justice' is provided both by judicial determination, and by forms of non-judicial resolution that (i) are entered into voluntarily and with full knowledge of the alternatives, (ii) are made on the merits of the case and in accordance with the parties' legal rights and obligations, and (iii) do not violate the relevant jurisdiction's law (that is, are themselves enforceable).

4.1.4.2 The public good and consumer protection

The narrow and broad views of justice outlined in paragraphs 4.1.2 and 4.1.3 above could be distinguished from each other in another manner: those who link the narrow view of justice to public adjudication promote the public good created by a well-functioning legal system, whereas those who argue that justice can flow from many different sources seem to be in favour of protecting the consumer's right to choose how to resolve a dispute.

The advocates of justice as a public good see dispute resolution as part of a much wider overall goal. For example, Genn has argued that⁵⁹:

Civil justice ... must be regarded as a public rather than a private benefit.... Within a common law system, the purpose of the civil courts goes beyond dispute resolution.... In effect, the courts reflect, communicate and reinforce society's dominant social and economic values. To this extent the law is a statement of values.

Rather than emphasising the private benefit of having a dispute resolved to the mutual agreement of individual parties involved, from this perspective disputes are seen as an opportunity for the law in that area to develop and evolve to meet the needs of the general public. Luban (1995) has persuasively articulated what he calls the 'public life conception'⁶⁰:

Instead of treating adjudication as a social service that the state provides disputing parties to keep the peace, the public life conception treats disputing parties as ... an occasion for the law to work itself pure... [The] litigants serve as nerve endings registering the aches and pains of the body politic, which the court attempts to treat by refining the law.

It is in this way that the rule of law, and the public interest in it, ultimately asserts itself.

In contrast, the consumer protection arguments focus on providing a range of different options for disputants to choose from. In criminal justice, of course, there is no consumer choice. If the parties to a civil dispute choose to go to mediation or arbitration, then, in the minds of those parties, the

⁵⁷ To borrow from Genn (cf. para 4.1.2 above), it is just about *an* outcome, not necessarily a just outcome.

⁵⁸ Whether the weaker party in a mediated dispute is always aware that they are the weaker party is another question, which is beyond the scope of this paper.

⁵⁹ Genn (2010), pp. 17-19.

⁶⁰ Luban (1995).

processes chosen should dispense the type of outcome they are seeking⁶¹. However, this approach only stands up to scrutiny if consumers are actually making the choice about how to resolve their disputes. Defendants might not always feel that they are faced with a genuine choice and, as stated above, the pressure to submit to mediation has increased in certain areas of law, and might begin to undermine the proposition that the provision of ADR methods is about consumer choice.

Ultimately, we believe that justice must be a public good and not simply a result of consumer choice. The public interest lies in maintaining through the 'justice system' the rule of law, the stability of society, and reliable personal, commercial and public relationships⁶². In our view, when disputes arise, this requires either judicial determination or resolution in accordance with the legal rights and obligations on which the rule of law, stability, and reliability of relationships are founded.

4.1.4.3 Process and outcome

There is a clear division in thinking about the achievement of justice⁶³. On the one hand, some would argue that a consumer who feels that they have been given a 'fair go' – for example, have been given the opportunity to put forward their side of the argument and believe that their opinions have been given proper consideration – will then also feel that they have received justice, even if the outcome is not what they hoped for. On the other hand, others would argue that the parties are really only interested in the outcome of their dispute, and are not so concerned with how that outcome is reached⁶⁴.

Dr Christine Parker, an Australian academic whose ideas have informed the Australian Attorney-General's approach to access to justice, makes the interesting point that while members of the public are more likely to base their assessment of justice on the outcome of a dispute, the legal profession tends to consider the matter in terms of process⁶⁵. This is perhaps why access to justice reforms, which have arguably been dominated by lawyers, have focused so heavily on procedure, courts, and the lawyers needed to navigate the legal system. It is worth noting that while the legal professions may associate justice with due process, the LSB uses the language of outcomes⁶⁶:

We consider that access to justice means more than a traditional sense of access to legal services. Justice is more than the resolution of disputes: it includes 'just' relationships underpinned by law.... Access to justice is the securing of 'just' outcomes rather than the process of dispute resolution.

For the reasons set out in paragraph 4.1.4.1 above, we agree with the LSB that justice is more than the resolution of disputes, though we take a different view of what constitutes a just outcome. We also note that Cappelletti & Garth thought in terms of just results⁶⁷. It might be realistic to conclude that a typical member of the public would not care whether all the procedural requirements relevant to their dispute had been met in reaching a resolution, and would simply want to know whether they or the other side had prevailed. Nevertheless, we would suggest that fair and transparent procedure still has an impact on disputants' overall satisfaction levels, in particular with regard to helping the losing party accept the outcome reached⁶⁸. An unfavourable decision might be more easily tolerated if the party affected understands how and why it was arrived at.

Accordingly, we believe that process is as important as outcome. If justice were only about outcomes, almost any method would suffice. Again, given our assertion that the public interest

⁶¹ Which could be as simple as a timely result at lower cost than going to court.

⁶² Cf. Mayson (2013), p. 8.

⁶³ Ministry of Justice (2009), p. 3.

⁶⁴ For a discussion of the importance of procedure, see Genn (2010), pp. 12-16.

⁶⁵ Parker (1999), p. 29, quoting Mark (1996).

⁶⁶ LSB (2010), para 18.

⁶⁷ See the quotation in para 4 above.

⁶⁸ Genn (2010), p. 14.

requires that justice is part of a larger framework for securing the rule of law, stability and reliable relationships, the nature and quality of the process for achieving that must be a relevant consideration. Access to justice is not merely access to an outcome but also to a legitimate 'system' or process for achieving it, which ultimately rests on the ability to compel⁶⁹.

4.1.4.4 Dispute prevention

If asked, it is likely that most people involved in disputes would say that they would have preferred the dispute never to have arisen, rather than to have the dispute occur but with a more streamlined path to resolution available. This could provide a powerful argument for reducing the general emphasis of access to justice policies on dispute resolution and concentrating more on methods of dispute prevention. Genn has called the dispute resolution versus dispute prevention debate "the central dilemma in the access to justice argument" and contends that either of these aims can be progressed only at the expense of the other⁷⁰:

It is not an answer to say that they should be twin objectives of policy, because they logically conflict. The more that is done to enhance access to the courts, the less the public will be interested in wasting time in possibly fruitless self-help remedies or alternative dispute resolution processes.

On the face of it, this seems quite an uncompromising view to take. However, it is worth remembering (see paragraph 4.1.2 above) that Genn believes that justice cannot flow from ADR methods and therefore draws a clear distinction between the legal resolution of disputes, on the one hand, and dispute prevention and ADR, on the other.

The LSB recognises the difference between a disagreement and a legal dispute, and that to move from one to the other requires some degree of escalation⁷¹. With this in mind, if a divide had to be drawn between resolution and prevention, we would categorise judicial determination and ADR as dispute resolution, and methods designed to prevent consumers having to resort to these forms of resolution as dispute prevention. ADR can undoubtedly be just as valid a way of reaching a conclusion to a dispute as traditional judicial determination. If a disagreement has escalated beyond the point where the parties can resolve it between themselves, it has become a dispute proper. If a situation has advanced so far as to be going through an ADR process, then it is clearly too late to be considering prevention of that same dispute.

Susskind has contended that dispute prevention should be included within the remit of access to justice policies⁷²:

I do not think we should be satisfied that improving dispute resolution will be sufficient to achieve justice under the law. To be wholly or even largely focused on disputes in our pursuit of justice is, I submit, to miss much that we should expect of our legal systems.... Access to justice is as much about *dispute avoidance* as it is about dispute resolution. Just as lawyers are themselves able, because of their training and experience, to recognise and avoid legal pitfalls, in a just society (one in which legal insight is an evenly distributed resource) we should want non-lawyers to be similarly forewarned.

We think that this extends the remit of 'access to justice' too far. In the context of a statutory objective that imposes significant obligations on regulators (and which we assert should be interpreted in the context of the public interest), we believe that 'access to justice' implies the escalation of a dispute to a point where the parties cannot resolve it for themselves. Any negotiation between them (including one facilitated by a mediator) is by definition a form of self-

⁶⁹ See para 4.1.2 above.

⁷⁰ Genn (1999), p. 263.

⁷¹ LSB (2010), para 18.

⁷² Susskind (2010), pp. 230-321 (emphasis in original).

resolution and so not, in our view, 'justice'. In other words, in terms of the statutory objective, access to justice is irrelevant if a dispute is avoided or resolved by mutual agreement.

4.1.5 Our (tentative) definition of 'justice'

For the purposes of the regulatory objective in the Legal Services Act 2007 of improving access to justice, we suggest that the expression 'justice' should be interpreted to refer to:

the resolution of claims or disputes in accordance with the parties' legal rights and duties by either:

- (a) judicial determination; or
- (b) non-judicial determination which (i) is entered into by all parties voluntarily, (ii) with full knowledge of the alternatives, and (iii) is enforceable in the relevant jurisdiction.

Accordingly, we take a broader view of justice than Genn (we include arbitration⁷³) and a narrower view than Stulberg and Susskind (we exclude mediation and dispute prevention).

We certainly agree that 'a just society' will promote dispute prevention and avoidance, but we believe that, in the context of the Legal Services Act, 'access to justice' requires a dispute that the parties themselves cannot resolve and a formal resolution of it in accordance with the parties' legal rights and obligations. We also acknowledged above that ADR can be just as valid a way of resolving a dispute as judicial determination. However, from a public interest perspective, we are not drawn from avoidance, prevention and the achievement of any form of uncoerced resolution to a conclusion that these all represent 'justice'.

We are content to endorse the LSB's statement that access to justice is the acting out of the rule of law in particular or individual circumstances⁷⁴. What follows from this for us, however, is that the rule of law requires the determination of disputes in accordance with the parties' legal rights and obligations (the 'law' part) and, ultimately, the ability to coerce and enforce participation in and implementation of that determination (the 'rule' part).

We accept that dispute avoidance methods act towards the shared good of the general public. In any ADR process, there will be known parties taking part, and so the private benefit of a mutually agreed closure of the dispute will flow to those parties. In comparison, dispute prevention methods will often be aimed towards no such defined recipients but more generally. Susskind suggests distributing legal information through the internet, leaflets, television and newspapers⁷⁵. The very nature of these forms of media means that any member of the population can benefit from them: they are not aimed at 'particular or individual circumstances'.

We are happy to accept that dispute prevention can promote the public good by working towards the collective benefit of citizens as well as enabling their better and legitimate participation in society. It therefore promotes an aspect of the public interest. Dispute prevention techniques can and should form a key part of a just society. For example, Barendrecht (2010) argues strongly in favour of greater emphasis being placed on the provision of legal information to consumers at the expense of such continued high levels of investment in legal aid and, to a lesser extent, accessible courts⁷⁶. However, to our way of thinking, no 'just outcomes' are produced through dispute prevention techniques, and we would therefore maintain that they are still not the same thing as 'access to justice'.

⁷³ We note that in the *Bremer Vulkan* case (cf. para 4.1.2 above), Lord Scarman referred to arbitration as a 'judicial process': [1981] 1 All ER 289, at p. 311.

⁷⁴ Cf. para 3 above.

⁷⁵ Susskind (2010), p. 239.

⁷⁶ Barendrecht (2010).

4.1.6 Conclusion

As suggested earlier, the ‘access to justice’ debate is commonly distorted by it being equated with access to lawyers, law firms, legal advice or the courts. We consider that access to justice requires a ‘just outcome’, that is, a formal decision on the merits of the case in accordance with the parties’ legal rights and obligations. What translates a simple outcome or resolution into the achievement of justice is the engagement of the public interest. For us, this means that the outcome must contribute to achieving and maintaining those public interest elements of society that are regarded by citizens as essential to their common security and well-being⁷⁷. This engages the rule of law, the stability of society, and reliable relationships; it is achieved in part through maintaining civil and criminal justice systems. The resolution of claims and disputes that might otherwise undermine the rule of law, stability or reliability must be made in accordance with the infrastructure of those systems (legal rights and obligations).

We believe that a statutory objective that imposes obligations should be interpreted narrowly. The public interest in justice lies in maintaining the fabric of society (in part through the rule of law) and in facilitating the legitimate participation of citizens in society through reliable and enforceable relationships based on their legal rights and duties. Reliability and enforceability are underpinned by law, and the rule of law ultimately relies on judicial determination – judges are the final arbiters of legitimacy and enforceability. In paragraph 4.1.4.1 above, we expressed our view that few would argue that a decision handed down by judges carrying out their public duty did not constitute justice. Such a decision would be consistent with Genn’s concept of a just outcome, and would promote the public interest in maintaining the fabric of society and ensuring the legitimate participation of citizens in it.

Unlike the outcomes reached through judicial determination, those arrived at through ADR are not public decisions and do not have the force of the state behind them. For this reason, when determining whether justice can be said to flow from ADR, we believe that aspects of the public interest must be engaged. For us, this requires voluntary and informed participation in a process that involves an enforceable resolution of the dispute by a third party (as an adjudicator rather than a facilitator) in accordance with the parties’ legal rights and obligations. Arbitration can fulfil each of these conditions and therefore can, we would argue, lead to ‘justice’ for its participants. Mediation cannot.

That the parties might describe an outcome achieved by many different forms of dispute avoidance or resolution as ‘just’ or providing them with ‘justice’ is not the point. The interpretation of a statutory objective is not to be determined by colloquial usage or common parlance (although it might nonetheless be consistent with it).

4.2 The nature of ‘access’

We believe that discussions about access to justice have too often tended to focus heavily on promoting ‘access’ without reflecting properly on what ‘justice’ means, and therefore what users are actually trying to gain access to. Of the various forms of ‘access’, two seem to have been most widely addressed: geographical access, where the primary concern is the concentration of lawyers in any given area of the country; and financial access, seen as ways to pay for lawyers or legal advice. This appears to us to be drawing the idea of access far too narrowly.

Much of the discussion on access, on closer examination, is really addressing access to legal services, which is not the same thing (even though it can form a distinct part of access to justice). Different experiences of consumers could fall under either heading, or both. To take an everyday example, a

⁷⁷ See para 3 above.

person might access justice by taking their dispute to court to have it decided by a judge. In going to court, that person might choose (but does not have) to engage legal representation, and thus will access a legal service. Equally, that person might choose to appear in court unrepresented. Simply because in this instance they do not have access to a lawyer does not mean they cannot access justice. The two ideas are different, even though there is a distinct area of common ground between them.

Although access to justice cannot be analysed without some consideration of access to legal services, the two should not be conflated. In the following analysis, therefore, we believe that it is important to distinguish clearly between ‘access to justice’, on the one hand, and access to legal services that might lead to the achievement of justice, on the other (including access to legal information, legal advice and representation, legal services, lawyers, law firms, and so on).

In the following paragraphs, we address what we believe to be the most important forms of access.

4.2.1 Geographical access

Arguably, in a proper conception of access to justice, the geographical location at any point within the jurisdiction of a citizen or party to a dispute should be irrelevant. Nevertheless, in his report, Sir David Clementi recognised geography as a distinct dimension to access to justice⁷⁸. In many expositions of access to justice, though, geographical access is concerned not with the location of the person seeking access to justice but rather with the physical distribution of providers within a given area or region. This will clearly be felt more acutely in remote or rural areas where not only are providers likely to be less concentrated than in urban areas, but also less frequent or less extensive public transport might result in some members of the public (particularly the elderly and disabled) being unable or less easily able to reach those providers that do exist.

4.2.1.1 Geographical distribution of providers

The thrust of the connection between geography and access to justice seems to be founded on the current wide geographical distribution of providers of legal advice, and a concern that representation will be compromised, resulting in fewer providers in certain locations and so reduced access for consumers in those locations. This is an argument that directly equates access to justice with access to legal services, and asserts that a reduction in the latter inevitably means a reduction in the former.

During the passage of the Legal Services Bill through Parliament, geographical access was the only form of access considered. As we recorded in paragraph 2.1 above, concerns were raised in relation to ABSs and the possibility that these new types of legal service providers could force smaller law firms out of business, leaving a dearth of legal aid provision in the areas in which they operated⁷⁹. Such an outcome is commonly referred to as an ‘advice desert’. Those firms predicted to be particularly hard hit are the so-called ‘mixed-economy firms’, that is, those undertaking a combination of legally aided and privately funded work. These firms often state that the rates of payment for the legal aid work they perform are so low that it has to be subsidised by more profitable private work.

The argument against ABS runs that, because these new businesses are likely to choose to undertake the most profitable types of work, this will inevitably mean that mixed-economy firms lose the

⁷⁸ Clementi (2004b), p. 18.

⁷⁹ See paragraph 2.1 above for more detail on this point.

income stream from their private work to ABSs⁸⁰. In order to compete with the added competition from ABSs, such firms may no longer be able to support less profitable or even loss-making departments, meaning that they will no longer be able (or choose) to afford to subsidise legal aid work. As mixed-economy firms drop their legal aid work, the client's choice in legal aid providers will decrease. Additionally, legal aid clients in rural areas may be forced to travel longer distances to obtain the service they require⁸¹.

Another view on this situation is that, if these firms are providing a good service at competitive rates, they should not lose business to an ABS that sets up nearby⁸². However, the need to be competitive could be the very reason that legal aid work is dropped; such firms would have to divert money that has been subsidising legal aid work into advertising, innovation, investment in new technology, and growth. So, whilst firms offering a good service should be able to retain their existing private clients, choice in legal aid provision would fall.

However, Clementi argued that there was "no clear reason" why legal aid services should be subsidised by the users of other legal services⁸³. It seems reasonable to argue that one service being subsidised by another must mean that the users of that other service are almost certainly paying more than an efficient, competitive market would charge. This is not necessarily in *those users'* best interests.

It is at this point that the relationship between geographical and financial access becomes linked (cf. paragraph 4.2.4 for our discussion of financial access). We feel that a broader public interest argument could be made for allowing a certain level of market distortion in legal services in order to achieve some access to legal advice and representation, and through that to access to justice. However, we also feel that a binary argument about profitable or not profitable, or about cost or lower cost, is not the real issue: the real issue should be about proportionality of cost.

Clementi addressed similar concerns to those expressed about ABSs and geographical access (in relation to legal disciplinary practices) in his 2004 review⁸⁴:

A further argument made against permitting outside capital into LDPs is that such owners would seek to 'cherry-pick' the best pieces of business, to the detriment of the existing high street solicitor and possibly access to justice. The argument ignores the fact that it is the right of existing legal practices to determine which areas of the law they wish to practise in; and many have become specialist. It should be recognised, also, that 'cherries' generally grow where there are restrictions to free trade, either in terms of who may do a certain type of business or ease of access of capital. For many years the most typical piece of legal work, the 'cherry' for most high street lawyers, was conveyancing. The practice of minimum fixed fees was removed in 1973, and the Law Society monopoly was removed by the setting up of the Council for Licensed Conveyancers, under the Administration of Justice Act 1985. In general it should be expected that the admission of new capital will increase competition and reduce the cost of legal services, to the benefit of the objective of access to justice.

It seems likely that accusations about ABSs leading to advice deserts will be made if law firms begin to go out of business in areas being served by ABSs. This might be compounded in rural areas where it is difficult to sustain a viable business in the face of declining demand or lower rates of legal aid payment. Such deserts might well cause some detriment to those clients of firms that withdraw from the market if they would rather have remained with a lawyer they knew. But can this really be argued to have a negative impact on the public interest, taken as a whole?

⁸⁰ Joint Committee on the Draft Legal Services Bill, *Draft Legal Services Bill Volume I: Report*. HL Paper 1154-I, HC Paper 232-I (London: 2006), para 303.

⁸¹ Clementi (2004b), p. 120.

⁸² Clementi (2004b), p. 50.

⁸³ Clementi (2004b), p. 48.

⁸⁴ Clementi (2004b), p. 45.

If a few providers are lost that are not efficient enough to compete in the new market, there is a strong argument in our view that this is not in itself a denial of, or detrimental to, access to justice. The fundamental issue here is not the loss of suppliers: it is whether there is sufficient good quality provision that consumers can access. As will be discussed in paragraph 4.4.1 below, a mix of the various forms of access is required to allow consumers to choose those that are most appropriate for them. In some situations, remote or virtual access to advice will be sufficient and effective. In others, such as those concerning complex legal matters or consumers for whom English is a second language, face-to-face provision might be better⁸⁵. Even in such cases, a suitable service might still be possible if providers are willing to adopt new working patterns, such as offering home visits to clients.

When determining what level of provision is satisfactory within a given setting, it is also necessary to bear in mind the possibility of advisers being conflicted out of acting in a matter, such as in a family dispute. Granted, this argues for a multiplicity of providers – but it does not necessarily imply a multiplicity of firms of solicitors, only appropriate access to non-conflicted advice and representation.

Within the framework provided by the Legal Services Act, we question whether advice deserts can be effectively regulated against. As discussed in a previous LSI paper⁸⁶, there are certain problems inherent in the legal services market that regulation can tackle effectively, such as information asymmetries and the difficulty for consumers in judging whether or not they have received a quality service. An advice desert, whether in a geographical area or within a certain area of law, might not be a problem that regulation (even if it contributes to it) can resolve, given that the underlying decision made by firms will be one of their competence and capability, economic viability and survival.

We repeat our view that there is a difference between access to justice and access to legal services; except in relation to the distribution and location of courts (cf. paragraph 4.2.1.2 below), geography has a closer relationship with access to legal services. Nevertheless, the right to conduct litigation and to exercise rights of audience are reserved legal activities that are often critical in the pursuit of justice, and for those litigants who do not wish to exercise these rights themselves, access to justice will often not be possible without access to those who are authorised to perform those activities. We cannot (and do not) claim that, given our narrow definition of ‘justice’, there is no connection between access to justice and access to these critical legal services. However, to accept that access to legal services is sometimes a condition precedent to access to justice is not to conclude that the two are the same. Nor does it lead us to the conclusion that, in order to meet their duty to improve access to justice, regulators have an obligation to improve access to lawyers.

It seems to us that there is a very difficult regulatory balancing act to be performed here. We fail to see how any regulator can be expected to improve access to justice by requiring providers (existing or new) to establish themselves in particular geographical locations⁸⁷. Nor do we believe that a regulator should prevent an existing provider from closing or moving from a current location. These are commercial decisions for providers, and not for regulators.

However, we can easily envisage a situation where experience of a particular ABS licence-holder (for, say, reserved instrument activities) shows that the strategy of that business is to open in a particular town and drive competitors out of business through a competition of acquisition, price competition and online services. The licence-holder now applies for the licence to include litigation and advocacy activities. The regulator could reasonably conclude that extending authorisation in this way could

⁸⁵ Griffiths (2011), pp. 6-7.

⁸⁶ Legal Services Institute (2010).

⁸⁷ We do not think that this would be an appropriate use of a condition attached to an ABS licence, for example.

well result in fewer sources of legal advice and representation remaining available to the population of any area in which this ABS chose to offer litigation and advocacy services.

The potential reduction in the number of law firms or other competitors in that location would not, for us, be sufficient for the licensing authority to deny the authorisation. It would have to consider at least: (i) the continuing availability of alternative provision locally (by legal advice centres, direct access to barristers, online, and so on); (ii) the availability of alternative provision by direct competitors within reasonable travelling distance; and (iii) whether the availability of other legal advice and representation was likely to be so constrained that there would be insufficient alternative choice available given the potential for conflicts of interest and the absence of reasonable adviser of their choice for any litigant. In extreme cases, it might be obvious that the authorisation should not be approved because it would be inconsistent with the achievement of another regulatory objective, namely that of promoting competition in the provision of reserved and non-reserved legal services (section 1(1)(e) and (2) of the Legal Services Act). In less obvious cases, the balancing act will almost certainly prove more difficult.

We conclude that geography is a factor that might affect access to justice. This is not inevitable, and we do not subscribe to the view that any reduction in access to legal services necessarily reduces access to justice. Interestingly, the role of regulators in improving access to justice through geographical factors appears to have less to do with positive improvement so much as not acting in ways that lead to geographical deterioration in access to justice.

4.2.1.2 Geographical distribution of courts

Given our definition of ‘justice’ (cf. paragraph 4.1.5 above), the distribution of courts as venues for the formal resolution of disputes and delivery of justice is clearly important. The public interest does not require the provision of a court in every city, town and village in the country; the need to balance efficiency and economics suggest that some travel will be required by litigants and lawyers. The question of what is a ‘fair’ or acceptable distribution of courts, however, is not a regulatory responsibility of the LSB and approved regulators under the Legal Services Act; it is a matter for government (HM Courts & Tribunals Service, as an agency of the Ministry of Justice).

Providers of legal services and their representative bodies might wish to press government ministers for greater numbers of local courts, or against the closure of existing courts; but it seems to us that there is no *necessary* correlation between this and access to justice. Nor does it follow that a balancing of the public interest in access to justice with other public interest considerations (such as cost to the public purse) should inevitably be resolved in favour of access to justice. These are, ultimately, political judgements for the Government in its capacity of ‘transitory arbiter’⁸⁸ of the public interest.

4.2.1.3 Physical access

Physical access refers to the ability to visit somewhere in person. Although it might be considered as a distinct form of access in its own right, it is so closely linked to geographical access that it seems sensible to consider them as part of the same issue.

Physical access implies face-to-face interaction, as opposed to remote or ‘virtual’ interaction (cf. paragraph 4.2.3 below). In addition, it requires physical accessibility at premises. Thus, in this context, the Equality Act 2010 requires that disabled people may not be treated less favourably by reason of their disability. Within legal services as a whole, this obligation covers a wide spectrum,

⁸⁸ Cf. Mayson (2013), p. 9.

from a practitioner meeting a client, to a judge conducting a trial and being tasked with ensuring all participants can adequately see and hear the proceedings.

Given the view of ‘justice’ that we have adopted, and the distinction we then draw between access to justice and access to legal services, the former will be affected only by accessibility to courts and arbitrators (or other venues of justice that meet our definition). On this view, the opening hours of courts, and the sitting times of judges, could impede access to justice given the need of many litigants to be at their places of employment at the only times courts are open. Courts are also often located away from the high street, and could well unintentionally put up barriers to access (difficult transport or parking, difficult to find, security-controlled entrances, and office facilities that are less than welcoming or comfortable). On this view, access to justice might well be improved if these difficulties and barriers did not exist.

Except in relation to accessing courthouses, where it should be ensured that disabled disputants are not discriminated against, it is difficult to argue that these physical issues affect access to justice. Even for courts, the issues are again matters for HM Courts & Tribunals Service, rather than the LSB and the approved regulators. In relation to other sources of justice, it is difficult to see what the LSB and approved regulators might be expected to do to improve physical access, other than to exhort those whom they regulate to comply with broader anti-discrimination legislation and regulation.

We understand the view that substantially the same arguments about physical access can be applied to law firms and other providers of legal services. However, we believe that this concerns ‘access to legal services’ and not ‘access to justice’ as it should be interpreted in the context of a statutory objective.

4.2.1.4 Conclusion

In paragraph 4.1.5 above, we suggested that the idea of access to justice requires a decision made on the merits of a case, according to the parties’ legal rights and obligations. We have no doubt that access to legal services will assist consumers in achieving a satisfactory outcome to a dispute, because a lawyer should be able to advise on their legal rights and suggest appropriate methods of dispute resolution. In our conception, the outcome achieved could be ‘justice’; but it could equally be a mutually agreed resolution that does not amount to justice strictly defined. Both are acceptable in a just society, and lawyers and other providers have a role to play in achieving them. However, as highlighted, justice can also be accessed without resort to a solicitor or barrister.

Geographical access to justice as we have defined it would therefore relate to the distribution and location of courts. These are government policy issues, and not regulatory ones, and are not for the LSB or approved regulators to improve (other than through the use of influence where they believe that is appropriate). It would also relate to the distribution and location of arbitration and other forms of dispute resolution that meet our definition of justice. These are matters of mutual agreement and commercial decision as between the parties and arbitrators.

The distribution and location of providers of legal services, whether of legal advice and representation, or of legal information and support, are not directly relevant to access to justice as strictly defined. We therefore believe that the LSB and approved regulators should not positively intervene in commercial decisions of providers about where they choose to locate or remain. They do, however, have a responsibility to weigh geographical access in the balance when issuing ABS licences – though not simply on the basis that the possible disappearance of one or more existing providers in any given location or region is in itself sufficient to deny a licence.

4.2.2 Financial access

Financial access was expressly recognised by the Clementi review⁸⁹:

Access to justice has a geographic dimension ... but it is critically also an issue about access for those who are disadvantaged and in particular those who cannot afford to pursue their legal rights. The Regulator will be concerned that access is proportionate; it cannot be provided for all issues irrespective of cost. Thus it would be expected that the Regulator would want to work closely with other bodies, such as the 'not-for-profit' sector providers and the Legal Services Commission.

We believe that it is impossible to disconnect the public interest in an appropriate matching of rights and their enforcement from access to justice. As the director of the Institute put it in 2010⁹⁰:

One takes it to be axiomatic that, in a 'decent society', legal rights and protections that are created to improve or safeguard sections of that society should be capable of being pursued. To conclude otherwise would be to make a mockery of the legislative intention, the rule of law, and access to justice – and it is impossible to conceive or maintain a decent society in the absence of those features.

4.2.2.1 Methods of funding

There are a number of routes through which consumers can gain financial access to justice. These include:

- (1) *A client's own financial means.* The cost of funding or defending a civil claim can easily run into thousands of pounds – a figure that increases significantly if the claim is lost and costs are awarded against the individual. This is therefore an option open only to those who have significant disposable income or capital, or who are able to afford loans or to mortgage assets.
- (2) *Acting as a litigant in person* by conducting litigation with no advice or representation. Both tribunals and the small claims track were established with the purpose of allowing people to represent themselves. Relatively simple procedural rules were intended to make these options more accessible to non-lawyers. The small claims track of the county court has arguably achieved this. However, professional representation is now common in some tribunals. Further, those individuals who appear unrepresented must commit a significant amount of time to familiarising themselves with the relevant rules, procedure and legal argument. With this, the aim of simplicity has been lost. As legal costs continue to rise, and legal aid is withdrawn for many, there have been many expressions of concern that litigants-in-person will increasingly 'clog up' the courts, lead to increased time and judicial intervention and, overall, greater costs for those in the system⁹¹.
- (3) *Legal aid.* The legal aid scheme of England and Wales was established by the Legal Aid and Advice Act 1949, and was intended to give legal assistance to people of 'small or moderate means'⁹². There have been many changes to the system since its inception. Originally 80%

⁸⁹ Clementi (2004b), p. 18.

⁹⁰ See Mayson (2010a), p. 5. See also Napier (2007).

⁹¹ Current judicial sentiment, however, appears to be that litigants in person are 'not entitled to extra indulgence': Maurice Kay LJ in the Court of Appeal in *Tinkler v. Elliott* (2012).

⁹² Committee on Legal Aid and Legal Advice in England and Wales, *Report of the Committee on Legal Aid and Legal Advice in England and Wales* (commonly referred to as the Rushcliffe Report), Cmd. 6641 (London: HM Stationery Office, 1945).

of the population was eligible for help⁹³, but this had fallen through 50% in 2000 and to 36% by 2009⁹⁴. The Access to Justice Act 1999 introduced a number of alterations to the scheme, such as replacing the Legal Aid Board with the Legal Services Commission and changing the existing rules on conditional fees. Perhaps most significantly, the AJA 1999 also introduced a cap on overall expenditure on legal aid⁹⁵. More recently, the Government has implemented changes intended to cut the legal aid budget by around 20% through changes to scope and eligibility. Consequently, this form of funding will now be less widely available to support access to justice⁹⁶.

- (4) *Insurance.* Before-the-event (BTE) insurance is typically available to consumers through motor, and home buildings and contents, insurance policies, though it is not as popular or as prevalent in the UK as it is, say, in Germany. Cover may be limited to a certain amount and therefore will exclude some more complex cases. Claimants might not be able to choose the lawyer they wish to use, because insurers will usually specify someone from their own panel. Use of this funding option is obviously limited to those consumers who (are able to) take out insurance, and therefore to those who can afford the premiums. After-the-event (ATE) insurance is often used in conjunction with conditional fee arrangements (see below).
- (5) *Conditional and contingency fees.* Contingency fee arrangements enable a lawyer's fees to be paid from clients' damages. Two forms exist in England and Wales: damages based agreements (DBAs) and conditional fee agreements (CFAs). Under the former, a lawyer will be paid a proportion of the client's damages, whereas the latter allows a lawyer to recover an agreed uplift on their fees if the claim is successful. Claimants using CFAs to fund their case may also take out ATE insurance to protect against costs being awarded against them if the claim is unsuccessful. Under a CFA, the lawyer concerned has a strong interest in the outcome of the case. On the one hand, this might reassure their client, but on the other it can also raise issues of conflict of interest for the lawyer. A number of changes have recently been introduced relating to funding following Lord Justice Jackson's review of costs⁹⁷, and which affect the recoverability of insurance premiums and success fees.
- (6) *Third-party funding.* Under this type of arrangement, a third party (often an investment fund raised for the purpose) will provide all or part of the funding required for a claim to be pursued. In return, the third party will receive an agreed share of the damages if a claim is successful, but will lose their investment in the event of failure. This source of funding is therefore usually only attractive in high-value commercial cases where the chances of success are relatively high. Complex cases seeking minimal amounts are unlikely to attract this type of funding.
- (7) *The legal advice sector,* including Citizen Advice Bureaux, law centres and other not-for-profit agencies (NFPs), provide legal advice and representation for clients. Typically they receive funding from a variety of sources, including local authorities and central government through the legal aid scheme. Some NFPs have been established with a remit beyond simple advice and representation, such as educating people about their legal rights, providing legal education, and campaigning on behalf of their clients. Unfortunately, the continuing uncertainty relating to funding for NFPs and the lack of a statutory duty on local government to fund legal advice, combined with cuts in public spending, are likely to lead to further reduction or closure of services in many areas.

⁹³ Hynes (2010).

⁹⁴ 36% actually constituted a recent rise in eligibility rates: in 2007, only 29% of people in England and Wales were eligible for legal aid, but changes to incomes and capital due to the recession meant this had increased by 2009. See Jackson (2010), p. 68.

⁹⁵ Hynes (2009), p. 6

⁹⁶ Cf. Mayson (2010a).

⁹⁷ See Jackson (2010), ch. 12.

- (8) *Pro bono*. It is common practice for some lawyers to offer their services to clients without charge, in particular in situations where that service would otherwise be unavailable. Lawyers doing pro bono work may support NFPs in the legal advice sector either by giving the organisations themselves commercial advice or by volunteering at such an organisation to advise their clients. Pro bono advice is most effective if volunteer lawyers work within their spheres of expertise, and will be limited by the amount of time individuals, law firms and other providers are willing to make available.

Beyond these existing methods, a key suggestion for future financial access to justice is the creation of a contingency legal aid fund (CLAF)⁹⁸. The basic premise is that the fund would provide backing for litigation, and a successful litigant would be obliged to pay a proportion of their damages back into the fund. Such a fund would aim to avoid the conflict issues that arise with contingency fee arrangements, and could seek to assist in claims that typically would not attract any other forms of financing.

4.2.2.2 Cost-efficient services

As well as the above approaches to funding that seek to help litigants pay their costs as they arise under the current system, financial access could also be considered from a different viewpoint. Rather than paying for existing high costs, a parallel approach would be to work to reduce costs and therefore increase the possibility of litigants being able to afford their own (now lower) legal costs. It seems logical that enhanced use of information technology, adoption of better processes and the 'reengineering' of professional services⁹⁹ should allow more efficient delivery of legal services, which would reduce costs for consumers seeking justice with the help of a lawyer. Susskind has also suggested¹⁰⁰ that techniques such as multi-sourcing and 'de-lawyering' should reduce costs by using lawyers only where they are strictly necessary.

4.2.2.3 Conclusion

The forms of financial access listed in paragraph 4.2.2.1 above are undoubtedly valuable, and can work well for those litigants who are able to take advantage of them. However, it is undeniable that there will still be a significant proportion of the population for whom none of these options will be available. But realistically, it must also be conceded that there is little that the LSB or approved regulators can (or should) be expected to do to ensure or even improve financial access for every potential litigant: Sir David Clementi recognised this in his final report when he wrote that access to justice "cannot be provided for all issues irrespective of cost"¹⁰¹. Options that are dependent on state funding could not be influenced by the regulators as their existence and extent is a policy issue, not a regulatory one. The availability of other forms of funding will also either be policy or market based. The only regulatory dimension that we can see is for regulators to ensure that they do not become an impediment by preventing the growth of new funding options.

⁹⁸ This idea was originally put forward by Justice in 1966, and has been revived on a number of occasions since then. See Robins (2011).

⁹⁹ This amounts to a reinvention of the traditional 'business model' of legal services: cf. Mayson (2010b).

¹⁰⁰ Susskind (2010), p. 246.

¹⁰¹ Clementi (2004b), p. 18: see the quotation at the beginning of para 4.2.2 above.

4.2.3 Technological or virtual access

4.2.3.1 Generally

The ability of technology to provide new avenues for legal services is often advanced as an essential tool in improving access to justice.

Susskind has written widely on this form of access, and argues strongly in favour of e-learning as a method of delivery¹⁰²: “there can be little doubt that a web-cast, or even a simple voice-only podcast, presented by a friendly and articulate person in ordinary language and not legal jargon, will be easier for many citizens to assimilate than inviting them to plough through text”. He also makes a convincing case for the introduction of online legal triage, based on the approaches that are widely used in the healthcare sector¹⁰³. These suggestions would certainly help consumers who are unsure of where to turn or even to help them understand and decide whether the law is relevant to their situation (cf. intellectual access, discussed at paragraph 4.2.4 below). For those who are confident that they have a legal issue, online services are already available to help them.

Again, however, these are all arguments for increasing or improving access to legal services. We do not doubt that technological and virtual provision should be encouraged. However, it strikes us that this is relevant to factors other than improving access to justice as it should be interpreted in the context of a statutory obligation. Improving access to legal advice and services is certainly a good thing (though we believe that the regulation and accreditation of providers will often be appropriate in the public interest¹⁰⁴, we do not necessarily subscribe to the view that permitted providers should be restricted to lawyers and law firms); technology also has a major role to play, in the way Susskind and others encourage, in “increasing public understanding of the citizen’s legal rights and duties” (also a regulatory objective in section 1 of the Legal Services Act, but not the same thing as improving access to justice).

In the context of the delivery of justice by judges and arbitrators, therefore, the scope for the use of technology and virtual access is more limited. Nevertheless, the use of videoconferencing facilities to reduce the constraints of time and distance (and the possible intimidation of witnesses) is a case in point. The availability of telephone¹⁰⁵ and online facilities to help actual or potential litigants and witnesses understand and use court processes is another (the gov.uk and legislation.gov.uk websites are good examples of open-source information provided by the Government to the public). The increased use of electronic discovery in aiding the effectiveness, efficiency and economics of litigation is yet another. Again, however, these are all matters for judges and the courts service rather than for the regulators of those who provide legal services.

Where access to justice could be improved by technology, Susskind addresses the commonly raised objection that not all citizens have access to the internet (a phenomenon known as the ‘digital divide’)¹⁰⁶:

I think the impact of the digital divide on access to justice can be overstated.... In the first instance, when we look at the research more closely, we find relatively lower levels of usage amongst the elderly and the less well-off. The cynical might say we should not be too worried, from an access to justice perspective ... because many of those that are least likely to afford new technology will, by definition, be eligible for legal aid. Whether or not this is convincing, it is unquestionably the case that some Internet-deprived citizens can be described as secondary or proxy users, which means that they do not themselves sit down and put finger to keyboard but have someone else sit in the driving seat on their behalf. They can be said to be indirect beneficiaries of the legal resources on the Web. Many elderly

¹⁰² Susskind (2010), p. 239.

¹⁰³ Susskind (2010), p. 240.

¹⁰⁴ See LSI (2011).

¹⁰⁵ See also the use of the telephone gateway in relation to legal aid: para 4.2.3.3 below.

¹⁰⁶ Susskind (2010), p. 245.

people fall into this category.... Another class of indirect beneficiary, of course, are citizens who are guided by advisers (not least in the third sector) who are themselves productive Internet users. All of which is to say that the number of people who are actually disadvantaged by being non-users is appreciably less than at first blush.

As with physical access, there seems to be relatively little that the LSB and approved regulators can do directly (or, more pertinently, be held accountable for doing or not doing) to improve access to justice through the use of technology.

4.2.3.2 Online dispute resolution

The internet has potential for use in this area beyond provision of information and support. Over the past decade, the use of online dispute resolution (ODR) has increased rapidly. A well-known example is the Community Court on eBay, the online marketplace website with hundreds of millions of registered users. After any transaction is conducted on eBay, both buyer and seller are encouraged to leave feedback on the site regarding the conduct of the other party and the quality of the goods received. Other eBay users deciding whether or not to undertake an online transaction with a certain party can use this feedback to inform their future decision-making. The remote nature of eBay transactions means that feedback is the only way users can build a reputation, and both buyers and sellers alike therefore hold the process in high regard.

In this way, eBay has created its own 'civil justice system' that resolves more than 40 million disputes each year. A key component of this is the Community Court, which resolves feedback disputes. In order to be eligible for 'jury duty', users must have been registered on eBay for a certain length of time and must also have a good record of conduct on the site. When a dispute is referred to the court, both parties have the opportunity to make their case by uploading documents, images and videos. This information is shared with a panel of 21 randomly selected eBay users. Checks are made to ensure that none of the panel have prior links to either of the parties concerned. Panel members have 14 days from receipt of the relevant information to vote on whether the feedback should be removed from the site or not.

The eBay Community Court is based on two main theories: the first is that people like to judge the actions of others; and the second is that justice can be 'crowd-sourced' (that is, that if many people are asked a relatively simple question, they will arrive at a better answer than that of one reasonably well-informed individual)¹⁰⁷. Other major websites utilising ODR include Wikipedia, which has a Mediation Cabal to help users resolve disputes over content on the site¹⁰⁸. The potential of ODR has also been recognised by the United Nations (which in 2010 established a Working Group on its use in cross-border e-commerce transactions¹⁰⁹) and by the United States government¹¹⁰.

We support the use of ODR and see it as a valuable addition to the range of processes through which citizens can resolve disputes. However, ODR does not satisfy our definition of 'justice' (cf. paragraph 4.1.5 above) and so does not, on our view, improve access to justice within the terms of the regulatory objective.

¹⁰⁷ Rule, C (2009).

¹⁰⁸ See http://en.wikipedia.org/wiki/Wikipedia:Mediation_Cabal.

¹⁰⁹ See United Nations Commission on International Trade Law (2010).

¹¹⁰ See http://www.odr.info/nmb/NSF_NMB_Home.htm.

4.2.3.3 Telephone services

The ubiquity of the telephone probably means that few people would regard telephone access and advice as a notable alternative to face-to-face provision. Nevertheless, as a counterpoint to the issue of geographical distribution of suppliers (cf. paragraph 4.2.1 above), the telephone is a significant medium of access to legal services and support for access to justice.

Further, in the context of legal aid, the telephone assumes particular importance as a gateway to financial access. In its consultation in 2010 on the future of legal aid, the Ministry of Justice emphasised that the Community Legal Advice Helpline has shown that telephone advice can provide a valuable service. The consultation paper stated¹¹¹:

The introduction of the Legal Services Community Legal Advice (CLA) helpline has demonstrated that advice delivered via the telephone can be as good quality as, or better than, face to face advice, and is preferred by many vulnerable groups in society. The Community Legal Advice (CLA) Satisfaction Survey demonstrates that client satisfaction with the specialist services provided through the CLA helpline is higher than equivalent face to face service, and that the service is highly regarded among vulnerable clients. For example, 87% of disabled clients and 90% of Black, Asian and Minority Ethnic (BAME) clients said that they would recommend the service to others.

Telephone advice might well be advantageous for some consumers, but it is worth bearing in mind that the current reform of the legal aid system is being driven by the need to save money and not by a desire solely to improve service. In addition, the high satisfaction levels detailed above are recorded from consumers who were able to choose to access telephone advice because they thought it was most appropriate for their situation¹¹².

The key issue with a telephone gateway to advice and assistance is any degree of compulsion to use the helpline. Steve Hynes of the Legal Action Group and Carol Storer of the Legal Aid Practitioners Group summarised the concerns raised about this proposal in a number of responses to the consultation paper¹¹³. Perhaps most significantly, they noted that Shelter, an existing provider of telephone services, did not agree with the Government's proposal¹¹⁴. The situations in which the gateway would be unsuitable were listed as: "urgent cases, complex cases, cases with a large amount of documentation, vulnerable clients, clients who do not speak English or simply those who prefer face-to-face services"¹¹⁵. The Housing Law Practitioners Association response pointed out that some of the most vulnerable members of society might not have access to a telephone or be able to afford to make a call (for example, the homeless). They also highlighted that privacy will be vital to those calling the line but may not be available to some, such as an abused spouse¹¹⁶.

The fundamental difficulty with a telephone gateway lies in it taking away a consumer's choice about how they wish to access legal services. This came over as a major theme in the responses to the consultation paper¹¹⁷. We would argue that consumer choice is a key factor. In paragraph 4.4.1 below, we stress that the different types of access should work together, and none can stand on its own. A telephone gateway provides virtual and possibly financial access (for those who are eligible for legal aid) without necessarily addressing physical or some intellectual access difficulties.

¹¹¹ Ministry of Justice (2010a), para 2.29.

¹¹² ILPA (2011), p. 24.

¹¹³ Legal Action Magazine (2011), pp. 9-12.

¹¹⁴ See Shelter (2011), p. 6.

¹¹⁵ Legal Action Magazine (2011), p. 9.

¹¹⁶ HLPAs (2011), para 94.

¹¹⁷ Legal Action Magazine (2011), p. 10. Justice points to Ontario in Canada as an example of telephone advice being successfully provided on a non-exclusive basis.

4.2.3.4 Conclusion

The LSB has taken a wide view of ‘access’ and includes in its definition virtual delivery through channels such as the internet¹¹⁸. This open attitude allows room for regulated individuals and entities to expand their methods of delivery to fulfil the potential envisaged by the Board. Both traditional providers and new entrants to the market should be encouraged to adopt a similarly broadminded view in order to keep up with consumers’ ever-increasing expectations of services that are provided at a time, place and price to suit them. Increased competition within the legal services market caused by the introduction of ABSs may also force traditional providers to look for new ways to improve their efficiency.

The need for providers – old and new – to embrace new technology is unavoidable, and it is likely that those who lead the way will gain a competitive edge over slower rivals. Providing services and information virtually is a clear way to reach those people who would seek to avoid engaging a solicitor in the traditional manner, or who simply do not have the time, money, inclination or confidence to visit a provider’s offices. In this manner, the collective good of citizens in being better informed about their legal rights and obligations is enhanced.

However, although technology can clearly improve speed and clarity of communication, dissemination and even judicial decision-making, none of the forms of technological or virtual access discussed in this paragraph, in our view, amount directly to access to justice as we have defined justice in paragraph 4.1.5 above. Government can encourage the growth of technological access through initiatives such as wider provision of broadband and electronic submissions to courts. However, as with physical access, it is difficult to see that the LSB or approved regulators can play any identifiable role beyond encouragement and exhortation. The decisions required of regulated individuals and organisations are predominantly commercial ones.

4.2.4 ‘Intellectual’ access (or legal capability)¹¹⁹

Susskind has identified what he calls the ‘paradox of traditional reactive legal service’¹²⁰:

You need to know rather a lot about the law to recognise not just that you need legal help but when best to seek such counsel.... In a society in which there is genuine access to justice, there should be facilities in place to help non-lawyers to recognise, at the most propitious time, that the law impacts on them (whether to empower or inhibit them).

This raises issues of another distinct form of access. Under the heading of legal capability we include the following situations:

- consumers faced with a problem that they are aware the law may be able to help them with, but are unsure which area of law is relevant, what solutions the law may offer, or where they can go for help. Susskind calls this a problem of ‘recognition’¹²¹;
- consumers experiencing an issue with which the law would be of assistance, but they are unaware of this and do not even consider any legal help – the problem of ‘non-recognition’¹²²;

¹¹⁸ LSB (2010), para 19.

¹¹⁹ The term ‘legal capability’ is borrowed from Law for Life, and is defined as “what people need to be and do in order to deal effectively with law related issues”: see *Plenet on legal capability* at <http://www.lawforlife.org.uk/data/files/legal-capability-phenet-2009-147-1-147.pdf>.

¹²⁰ Susskind (2010), p. 233.

¹²¹ Susskind (2010), p. 239.

¹²² Susskind (2010), p. 241.

- consumers who do seek help with a justiciable issue, but after discovering the true complexity of their problem, or the impenetrability of the relevant rules or language, choose not to pursue the matter (we might call this ‘elective disengagement’); and
- consumers who are fully aware they are experiencing a justiciable problem but are too intimidated by the law and its processes to seek any help; this might include people experiencing language barriers when they are not native speakers of their country’s first language (we might call this ‘exclusionary disengagement’).

These issues are closely linked to another of the Act’s regulatory objectives¹²³, that of ‘increasing public understanding of the citizen’s legal rights and duties’. If citizens are aware of their legal rights and duties, and of how to find, instruct and use providers of legal advice and services, there is likely to be greater consumer confidence in accessing legal services, and fewer conflicts and complaints arising between clients and providers. Suppliers should also be encouraged to provide higher quality, and improved access and value¹²⁴.

However, this regulatory objective will be difficult to meet. Research has shown that approximately half of all members of the public who experience a justiciable problem do not achieve any kind of resolution, regardless of whether or not they seek advice¹²⁵. It has also been estimated that approximately one million such problems go unresolved each year, resulting in widespread legal exclusion amongst those affected¹²⁶. A key tool in improving this form of access is effective public legal education (PLE), which has been defined as follows¹²⁷:

PLE provides people with awareness, knowledge and understanding of rights and legal issues, together with the confidence and skills they need to deal with disputes and gain access to justice. Equally important, it helps people recognise when they may need support, what sort of advice is available, and how to go about getting it. PLE has a further key role in helping citizens to better understand everyday life issues, making better decisions and anticipating and avoiding problems.

PLE focuses on the early stages of a legal issue. Ideally, the public will be helped to avoid legal problems, but if issues do arise PLE will also contribute to more timely and effective responses¹²⁸. It is important to note that PLE does not aim to teach people everything they might ever need to know regarding the law. Law for Life: the Foundation for Public Legal Education (formerly the Public Legal Education Network or PLENet) explains that in addition to a basic knowledge about rights and responsibilities in everyday situations, a vital part of PLE is informing people about where to go to find more information and to seek further help¹²⁹. In addition, Law for Life works towards promoting the skills and capabilities required to be ‘legally capable’; these include effective communication, decision-making, confidence and determination¹³⁰.

Susskind has put forward the idea of legal awareness-raising, which he distinguishes from PLE¹³¹. His aim would be to “enable citizens to be sufficiently familiar with the law and the legal system to *recognise* when they need some form of legal help”¹³². By way of contrast, he sees PLE as aiming additionally towards providing some substantive legal knowledge to consumers.

¹²³ Legal Services Act 2007, s. 1(1)(g).

¹²⁴ LSB (2010), p. 13.

¹²⁵ Genn (1999), p. 176.

¹²⁶ PLEAS Task Force (2007), p. 7.

¹²⁷ PLEAS Task Force (2007), p. 9.

¹²⁸ See <http://www.lawforlife.org.uk/what-is-public-legal-education/>.

¹²⁹ Public Legal Education Network (2009), p. 4.

¹³⁰ See Law for Life (2008).

¹³¹ The World Justice Project also counts ‘general awareness of available remedies’ as a vital component of access to justice: see World Justice Project (2011).

¹³² Susskind (2010), p. 238 (emphasis in original).

It seems to us that improving intellectual access to justice will need a multi-faceted approach, which could start in secondary education, and extend to public campaigns mounted and funded by regulators and representative bodies as well as to local and personal ‘education’ carried out by providers in their everyday interactions with actual and potential clients.

Intellectual access relates to public awareness and the ability of members of the public to understand and act. These are issues that would be most effectively addressed through government educational and citizenship policies. The regulatory responsibility for the LSB and approved regulators appears to us to be restricted to the objective of increasing public understanding of the citizen’s rights and duties, that is, broadly to PLE and the possible imposition of obligations on providers to act in a way that contributes to greater understanding among existing and potential consumers of their services. This, however, is a different regulatory objective that will undoubtedly help in enabling access to justice but is not, in itself, an improvement of it.

4.3 Access to justice

Having explored the nature of ‘justice’ and of ‘access’, we can now turn to the composite concept of ‘access to justice’.

4.3.1 The path to justice

4.3.1.1 Judicial determination

We have found it helpful to visualise access to justice as a path, with our definition of justice at the far end. We believe that the parties to a dispute should be free to move off that path at various points, by choosing to access dispute resolution methods that do not provide justice as we have defined it. Judicial determination is positioned at the end point of this hypothetical path. Parties may choose to go straight there, or make any number of stops along the way. In this way, judicial adjudication is available to resolve disputes that cannot be settled by any other method. Justice being met by a public, judicial, determination of a dispute, to us represents the ultimate manifestation of ‘justice’.

Access to this form of justice requires accessible courts and supporting processes, access to advice and representation if one or more of the parties chooses to seek it, and cost-effective provision that the parties are able to fund in a realistic and proportionate way. These dimensions of access to justice are well known and well trodden. We do, however, reiterate Sir David Clementi’s view that access “cannot be provided for all issues irrespective of cost”¹³³: access to justice cannot therefore be pursued as an idealistic goal with no concern for the implications or practicalities of achieving it.

We have suggested (in paragraph 4.2 above) that most of the dimensions of access are matters for policy-makers rather than for regulators. As we see access to justice, it is mainly a policy issue and necessarily should be driven by government. There are some market issues – particularly in relation to funding and competition – to which the response could be greater innovation by providers. In this context, it seems to us that the single greatest benefit that regulators could offer is to ensure that there is no unnecessary regulatory impediment to innovation.

¹³³ Cf. para 4.2.2 above.

4.3.1.2 *Stepping off the path*

While there is clearly a public interest in promoting and protecting access to justice in its ultimate manifestation, there is also a public interest benefit in disputants leaving the path as and when they wish to. Not only is there the possibility that a dispute might be more quickly and amicably resolved, but there is also a reduction in the potential cost to the public purse of hosting all dispute resolution in court.

It is for this reason that we accept that formal arbitration can meet the requirements for access to justice. We defined 'justice' in paragraph 4.1.5 above as:

the resolution of claims or disputes in accordance with the parties' legal rights and duties by either:

- (a) judicial determination; or
- (b) non-judicial determination which (i) is entered into by all parties voluntarily, (ii) with full knowledge of the alternatives, and (iii) is enforceable in the relevant jurisdiction.

Taking a step off the path to judicial determination will still, in our view, represent access to justice in these circumstances; and there is still the prospect of the judicial enforcement of the arbitrated agreement (to which a reluctant party can be forced to submit).

However, we consider that any parties who are *compelled* to step off the path are being denied access to justice. For example, we would take a strong opposing view on any development in civil justice that required the use of, rather than the consideration of, mediation. Any such compulsion would raise conflicting public interest objectives. It seems likely that this type of scheme would be introduced to reduce costs to the state. This is a legitimate aim, but conflicts in our view with improving access to justice. For us, compulsory mediation could not be said to provide access to justice; compulsory consideration of mediation is not a denial of justice, but is in our view an enforced detour on the path to it.

We have set out our view in paragraph 4.1.4 above that the notion of justice cannot be said to flow from most ADR methods as they are currently employed in England and Wales. However, we have also taken pains to stress, firstly, that we believe that consumers faced with a justiciable issue should have as many options open to them as possible when choosing how to resolve their situation and, secondly, that there is a distinction to be drawn between justice and dispute resolution.

As outlined above, we consider a just outcome to be a decision based on the merits of a case in relation to the parties' legal rights and obligations. However, if parties voluntarily choose to employ an ADR method, and accept that in the use of that form of dispute resolution there might be no reference to their legal rights, this should not in principle create any problems for policy-makers. Voluntary and fully informed use of ADR is a perfectly legitimate form of dispute resolution. Our interpretation of this is that the disputants concerned are not seeking justice; they simply want an acceptable outcome to their dispute.

At paragraph 4.1.4.3 above, we differentiated between process and outcome in dispute resolution. Through voluntary use of some forms of ADR, the parties submit to the particular process they have chosen and to whatever result might be reached at its conclusion. Such disputants are choosing not to pursue 'justice', strictly defined. If the parties agree that the outcome of their ADR will be final, and that they will not resort to judicial determination if either party is unhappy with the result, they are in our view also choosing to deny themselves access to justice. We do not believe that policy-makers or regulators should be unduly concerned about this – provided the process chosen is entered into voluntarily and with informed consent, and that the dispute is still resolved in accordance with the parties' legal rights and obligations (cf. paragraph 4.1.5). If it is not, then we believe that one or more of the parties should have the right to be able to move back on to the access to justice path.

Consider for a moment a dispute involving two equally well-informed and resourced parties. Despite previously having agreed that the outcome to their ADR would be final, one party is not happy with the result reached and then seeks judicial determination of the matter. If the agreement on the binding nature of the ADR was voluntarily entered into, it seems reasonable to argue that the agreement should stand. By way of contrast, in different circumstances, there might only be the appearance of voluntariness in an agreement not to proceed to judicial determination. For example, if consumers want to complain to a company about goods or services received, they might be informed that to do so they should register on the company's mediation scheme because this is how all complaints are dealt with. On completion of the mediation, a consumer is still unhappy but is told that signing up to the scheme removed the right later to take the company to court over the same matter. In this situation, a general issue of power imbalance has crystallised to result in the consumer involuntarily relinquishing his or her rights.

The crucial issues here are those of voluntariness and informed consent. If parties use ADR, then it is important that standards for both process and outcome should be set. Judicial determination provides a robust process with an outcome reached according to the law. If ADR is to provide an acceptable alternative to formal justice (and still meet the criteria for providing 'justice'), then in our view the process should be made as equivalent to adjudication as possible in two vital areas¹³⁴, namely, a robust process involving appropriately accredited practitioners, and with a decision based on the parties' legal rights and obligations.

4.3.1.3 Conclusion

To us, 'justice' and 'access to justice' are inextricably linked to the formal resolution of a dispute by reference to the parties' legal rights and obligations. Justice is the rule of law in action and cannot result from an outcome that bears no explicit connection to the law – however acceptable the outcome is to the parties concerned and however cost-effective it is in reducing burdens on the public purse. Access to justice is most needed precisely when the parties cannot reach a mutual resolution of their differences, or where one of the parties is refusing to participate in the quest for a resolution.

Access to criminal justice has elements of involuntariness attached to it. For instance, a defendant cannot choose not to participate in the process of determining guilt or innocence and seek to resolve the issue in some other way. There are choices to be made along the way (such as the plea entered, or being legally represented), but participation in the process is not voluntary. This can be justified on the public interest ground that the maintenance of the rule of law and of the fabric and well-being of society requires that the state must be able to exercise all functions of criminal law and public order, by compulsion if need be.

Access to civil justice, on the other hand, is fundamentally an elective process. A claimant decides whether or not to pursue his or her legal rights and, if so, how far to go along the path to justice that we describe above, and whether or not to suggest or accept detours along the way. Implicit in these choices is how much 'delegation' the claimant is prepared to make in resolving the dispute, up to and including allowing a judge to make the decision. It is right that a claimant should be able to step off the path to justice in order to seek or secure an alternative (voluntary and mutually agreed) resolution. But it is also important that the claimant has the assurance that, if need be, an unwilling defendant can be compelled to submit to the jurisdiction of a court in order to determine the claim: indeed, it is this power of compulsion to participate in a judicial process that is, for us, the ultimate expression of access to justice (cf. paragraph 4.1.2 above).

¹³⁴ We would like to stress here that it is not the methodology used in ADR methods that should be made equivalent to adjudication; indeed in some forms, such as mediation, it is the particular methodology that can be that technique's major strength.

The defendant to a civil claim might not have the same sense of choice in the initial phase of the claim being asserted, but then has the same opportunity to suggest or accept detours to achieve a resolution short of judicial determination. An intransigent claimant determined to have his or her day in court might well drag along an involuntary defendant, but we do not suggest that the ultimate judgement of the court will have been a denial of access to justice for either the claimant or defendant.

It is, however, important that the judicial process should (as Lord Justice Jackson and others have exhorted) be as efficient, cost-effective and proportionate as possible in order to reduce the potential for a claimant or defendant who is overwhelmed by an imbalance in power or inequality of arms 'voluntarily' accepting an alternative, non-judicial, process and outcome. In our view, it is not acceptable to exert undue pressure on the parties to consider or undertake alternatives to judicial determination – especially where the motivation is to emphasise the risk on costs of litigation or savings to the public purse by reducing demand for judicial determination: this is a denial of justice and a reduction in access to justice.

4.3.2 Scope of the regulatory objective

Whatever interpretation is put on the meaning of 'access to justice', it is clear that there are many different factors and influences on it. Indeed, such a view will inevitably lead to people who are not authorised persons playing a part in whether or not access to justice is improved. The regulatory obligation is imposed on the LSB and approved regulators. However, by taking the following stance (which we agree with), the LSB makes itself something of a hostage to fortune in the achievement of the regulatory objective¹³⁵:

We do not define access only in terms of authorised persons but include access provided by the wider legal services industry, related professions and related advice bodies in the public, commercial and third sectors.

In our view, if non-authorised individuals and organisations play a role in the fulfilment of the regulatory objectives in any way, this can only be positive. It would be self-defeating and impractical to insist that only persons regulated by the approved regulators could help to improve access to justice, or promote the public interest, or promote competition, or increase public understanding of legal rights and duties.

However, the challenge for the LSB will arise if its work to improve access to justice is somehow undermined by persons or bodies outside the Act's regulatory reach. This adds a further dimension to the LSB's consideration of legal activities that might in the future be brought within the scope of regulation. As we have previously suggested, though, reservation should only be introduced where regulation, and reservation in particular, is in the public interest; and either other responses are less effective or reservation affords a degree of additional protection to clients by virtue of their purchase of a reserved activity¹³⁶. In addition, this option of reservation is only open to the LSB if the activity concerned is itself a legal activity as defined by section 12(3) of the Act.

On balance, we consider that the duty placed on regulators by the regulatory objective of 'improving access to justice' is unfortunately worded. We believe strongly that a statutory obligation should be narrowly, not broadly, interpreted. It seems to us that, when 'justice' and 'access to justice' are so interpreted, there is little that regulators can do directly to improve access to justice. There is perhaps more that they can do not to impede its improvement.

¹³⁵ LSB (2010), para 19.

¹³⁶ Legal Services Institute (2011), para 2.4.1.

A more suitable and realistic obligation would perhaps (as with some of the other objectives) have been better expressed as ‘having regard to’, ‘promoting and maintaining’, or ‘promoting and protecting’. Nevertheless, for the time being at least, improvement remains the objective.

4.4 Improvement

The full regulatory objective in the Act is ‘improving access to justice’¹³⁷. The final stage in this analysis (despite the reservations expressed in paragraph 4.3.2 above) is therefore to consider the nature and assessment of ‘improvement’. Given our view of the scope of ‘access to justice’, we are inclined to think that there is little that the LSB or approved regulators can do directly to improve access to justice: much of what needs to be done will be the result of government policy and its implementation, or the outcome of market forces. This suggests that the regulatory objective and obligation on the regulators arising from section 1(1)(c) could be far less onerous than a broader interpretation would give rise to. It also suggests that improvement will arise from the influence of the LSB and approved regulators rather than their intervention.

4.4.1 The need for a multi-faceted and multi-agency approach

We believe that access to justice can only be improved indirectly by the LSB and approved regulators, and that this will result from a multi-faceted and multi-agency approach. Of the forms of access identified in paragraph 4.2 above, none should be relied on to stand alone. As noted above, much debate about access to justice focuses on financial or geographical access solely to lawyers and the law. However, if, for example, geographical access is lost to consumers in a certain area, attention should be paid to whether technological access can step in to fill that gap. Equally, technology cannot be relied on to provide for all the justice needs of consumers in a large region, because in some instances face-to-face advice will be the most appropriate course of action. But this is to improve access to legal services, advice and representation *in the hope and expectation that* it will improve access to justice – and this by focusing on only part of the sources of provision.

It is therefore clear that rather than perceiving the different forms of access to legal services discretely, they should be viewed as a matrix designed to allow consumers to choose how they wish to resolve their issue. We therefore agree for the most part with the view expressed by the LSB¹³⁸:

we do not define access in terms of the number of businesses providing a narrowly defined set of services or the number of lawyers regulated because we recognise that demand may be satisfied through other delivery channels or business structures than the traditional law firm.... Our objective is to facilitate a market that improves access to justice. As the market develops, we cannot rule out that in some types of work, for some consumers there may be a reduction in the availability of some types of services. We do not automatically equate that with a reduction in access to justice but will listen to consumers to see if demand is not being met.

Where we disagree with this statement is, first, that in the first sentence it conflates access to legal services and access to justice; and, second, we do not think that it should be the LSB’s objective ‘to facilitate a market’ but rather to regulate providers and activities in such a way that a competitive market can emerge and, as a result of the combination of regulation and market forces, access to justice is improved.

The importance of the various components of the matrix will vary among consumers. For instance, for some, geographical and physical access considerations will probably be of the most significance.

¹³⁷ Legal Services Act 2007, s. 1(1)(c).

¹³⁸ LSB (2010), paras 22-24.

For others, a more balanced combination of approaches will be necessary. Most people in rural areas would not be helped by having close geographical access to advice if their provider has to charge unduly high fees to make operating in that vicinity commercially viable. The stretch of geography, technology and capability could prove too much if courts are physically too remote for litigants and advisers, if court technology and processes are unreliable or obsolescent, or if access to them in the widest sense is compromised for the disabled, the barely literate or the poor. Only by government, the courts service, regulators, professional bodies, providers and advice agencies working effectively together can a meaningful outcome to the quest for access to justice be achieved. As we have noted before, placing a statutory obligation on some, but not all, of these actors is somewhat unfair.

Finally, it could be argued that all other forms of access fall down without sufficient intellectual access or legal capability among consumers. If a member of the public does not know where to turn for help with his or her problem or, more significantly, does not realise that their problem is justiciable, an abundance of all other forms of access would be of little use or value. This seems to provide a strong argument for access to justice policies concentrating more keenly on legal awareness-raising or PLE provision¹³⁹.

However, as discussed above at paragraph 4.2.4, we would not view increased PLE provision as falling within the scope of the definition of 'access to justice'. We would align this with the regulatory objective of increasing public understanding of the citizen's legal rights and duties. This complementary regulatory objective can certainly facilitate access to justice but is not, in itself, an improvement of it. It serves to emphasise, again, the dangers of conflating one regulatory objective with another, as well as the need to adopt a multi-agency approach to the achievement of all of the regulatory objectives.

4.4.2 Measuring improvement

When considering improvements in access to justice, the first question that should be asked is: improvements in what and for whom? In this paper, we are being guided by the need to promote the public interest, and would therefore argue that policies should be assessed on the improvements they make to the fabric of society and the legitimate participation of citizens in it (cf. paragraph 3 above) rather than (for example) monetary savings for the Treasury. Access to justice is important not only to the individual seeking justice, but in a wider sense also to the functioning of a liberal democracy and the promotion of ordered and peaceful coexistence among citizens.

The primary aim of this paper is to conceptualise access to justice within the context of the regulatory objective in the Legal Services Act rather than more generally. We have noted above that improving access to justice often raises policy, rather than regulatory, issues. Accordingly, we think that the scope of improvement (and therefore of measurement), as well as the extent of the obligation on the LSB and approved regulators, is more limited than might initially appear.

The LSB's recent discussion paper on how to measure access to justice for individual consumers adopts a much broader view than ours¹⁴⁰. Whereas our definition of justice is inextricably linked to the resolution of disputes (and to the ultimate compulsion and enforceability of rights and obligations determined in accordance with the rule of law), the LSB's view is that any interaction between one or more individuals to which the law applies, such as the conveyance of property, falls within the scope of 'justice'. This then leads it to propose eighteen indicators to measure all aspects

¹³⁹ Such a strategy is supported, for example, by Barendrecht (2010).

¹⁴⁰ See LSB (2012).

of access to justice, covering the areas of demand, use, perception and cost of legal services; paths to justice; depth, breadth and geography of legal services; and access to courts¹⁴¹.

Without in this paper delving into the detail of these indicators, they are much broader (on our view of access to justice) than would be necessary to measure improvements in access to justice. However, we would agree with the use of such a wide range of indicators to capture aspects of access to legal services, advice and representation. Further, we do agree that “movement in one measure alone cannot be interpreted as change in access to justice – with such a complex concept there is a need for a basket of indicators”¹⁴². For example, a decrease in the number of legal services providers in a certain geographical area will not necessarily mean a corresponding decrease in access to justice for local people (because, for instance, demand has fallen in that area).

It seems unlikely that a definitive suite of appropriate measures of improvement can be developed until there is better agreement on the meaning and scope of the underlying concept. It strikes us as unnecessary – and possibly even unwise – for the LSB and approved regulators to seek to cast their understanding of their regulatory obligations more broadly than it needs to be.

5. Conclusion

Our conclusions can be summarised as follows:

- (1) In the context of a statutory objective that imposes obligations on regulators, we believe that the objective should not be interpreted any more broadly than is necessary to achieve the intention of the Parliamentary language. That intention should also be construed in accordance with the needs of the public interest.
- (2) We therefore adopt a relatively narrow view and define ‘justice’ as:
the resolution of claims or disputes in accordance with the parties’ legal rights and duties by either:
 - (a) judicial determination; or
 - (b) non-judicial determination which (i) is entered into by all parties voluntarily, (ii) with full knowledge of the alternatives, and (iii) is enforceable in the relevant jurisdiction.
- (3) Access to justice can be affected most by government policy and its implementation, and will also be influenced by the activities of unregulated actors in the marketplace for legal services. The imposition of an obligation on regulators who have little or no control or influence over these activities further militates against too broad a construction of that obligation.
- (4) We do not believe that access to justice is synonymous with access to legal services, lawyers, law firms or the courts. While we accept and support the discharge of obligations under one regulatory objective supporting and contributing to the discharge of obligations arising from one or more other objectives, we believe that these objectives and the obligations imposed by them nevertheless remain distinct.
- (5) There are in our view limited opportunities for the LSB and approved regulators to improve directly access to justice.

¹⁴¹ LSB (2012), para 5.2.

¹⁴² LSB (2012), para 5.3.

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