



Legal Services Institute

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CIVIL LEGAL AID: SQUARING THE (VICIOUS) CIRCLE

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1. Introduction

There is no more money available for civil legal aid; there will almost certainly be less. For the system to survive, something has to give.

As legal aid celebrates its 60th anniversary, consider this quotation:

the present position is that a large number of people are not obtaining adequate legal services when they are needed and, for financial reasons, have limited access to the civil courts.... In order that those who receive legal services at public expense should have the same standard of services as those who pay for them, a lawyer undertaking such work should not be expected to do so for less than a reasonable rate of remuneration. The system as a whole should not depend on lawyers working for less than a fair return....

This represents a fair encapsulation of the circle that needs squaring: some people do not receive legal advice and representation when the expectations of a 'decent society' suggest that they should (the challenge of eligibility¹); some lawyers do not receive a 'reasonable rate of remuneration' for legal aid work (the challenge of reward); and the public purse will not stretch to allow for either greater eligibility or greater reward (the challenge of funding). With limits on funding, either or both of the decent society or effective representation could suffer: the circle is indeed vicious.

¹ In 1998, just over half of the population (52%) were eligible for legal aid compared to 29% ten years later. Such figures lend increasing credence to the view that one has to be either very poor or very rich to be able to afford to pursue one's legal rights. Interestingly, Scotland has managed to increase its coverage from almost the same starting point (55%) to 80% in 2009.

But this is not a new problem: the quotation above is about 30 years old, coming as it does from the final report of the (Benson) Royal Commission on Legal Services in 1979². I suggest in this paper that there are three primary ‘fault lines’ in the approach to legal aid. They are: a fragmented and inefficient supplier base; a failure to match rights and funding; and broader systemic shortcomings. Most attempts to square the circle have addressed (at best, and usually separately) only two of them. However, my contention is that the sustainability and success of legal aid depends on a fundamental review and realignment of all three.

This paper is not an attempt to address the absolute detail of legal aid reform but rather to highlight the broader, high-level policy issues that must be resolved if legal aid is to be maintained at the level of quality, economics and efficiency that a modern ‘decent society’ should expect. The principal message of this paper, therefore, is that it is entirely reasonable that Government and the taxpayer should continue to expect greater efficiencies and value for money in the delivery of legal aid. But this must be subject to the further imperative that the supply of funding should not be considered in financial isolation. We must also have due regard to the ‘supply of rights’ to citizens and the quality of service provided, as well as to the significant contextual challenges of maintaining the rule of law and access to justice, the integrity and efficiency of the courts system and any wider consequential costs to society of leaving critical legal rights under-funded and unresolved.

If efficiency savings in legal aid lead to any undermining of the rule of law, or compromise the administration of justice or access to justice, while we might have achieved a degree of fiscal prudence, society will undoubtedly be the poorer for it.

2. A fragmented and inefficient supplier base

2.1 The implications of fragmentation

We have already moved from a time when virtually all law firms carried out some legal aid work³. Nevertheless, there still remains a large number of suppliers for the Legal Services Commission to deal with⁴. This gives rise to a number of important consequences for publicly funded services:

- (1) The Commission’s own ‘transaction costs’ of satisfying itself that suppliers are competent to deal with the work in question, and in the administration of contracts and payments, are necessarily higher than they would be in a more consolidated market.
- (2) Each law firm carries a minimum level of ‘establishment costs’ simply to be in business. In a fragmented market, these costs are replicated across a large

² Cmnd 7648 (Her Majesty’s Stationery Office, London), paras 5.2 and 5.5. The report also traces the history of legal aid to a statute of 1495 (para 10.1), suggesting that our view that legal aid is a modern phenomenon is somewhat romanticised!

³ In 1999-2000, there were 13,561 solicitors’ offices; 10,518 of them were in receipt of legal aid payments of some sort (*Trends in the Solicitors’ Profession: Annual Statistical Report 2000*, The Law Society).

⁴ In the Legal Services Commission’s Annual Report and Accounts 2008/09, the number of offices dealt with on civil matters was 3,585 and on criminal matters was 2,245 (it is not clear whether there were any offices with both civil and criminal contracts).

number of suppliers which, again, lead to higher costs across the market as a whole than would exist with a greater degree of consolidation. Historically, this has created pressure to drive up legal aid rates in order to cover these law firm overheads – or, more recently as legal aid rates have been capped or reduced, has increased the pressure on law firm profitability and resulted in fewer firms offering legal aid services to their clients. The paradox here, of course, is that as firms leave the legal aid market, the degree of fragmentation declines. But the danger is that those who leave are often the more efficient and ambitious, further weakening the (still fragmented) supplier base that remains.

- (3) Smaller firms find it more difficult to invest in efficiencies in working practices – particularly in securing economies of scale (although arguably this is now less true in the case of technology than historically might have been the case). Even larger firms cannot persist with inefficient working practices that burden their overheads and reduce the scope for better profitability.

The result of these factors is that both the overheads of suppliers, and the administrative costs of the Commission, are higher than they might otherwise be. This, in turn, suggests that the best value for money is not being gained from this use of public funds.

2.2 Shifting the balance

Not surprisingly, there have been many attempts to shift this balance more in favour of value for money. Indeed, arguably many of the recent attempts at squaring the circle appear to have focused on this fault line to the exclusion of the others, in the hope that savings here will address enough of the challenges of eligibility and reward. This optimism has now proved misplaced.

The Commission itself has been the subject of changes to secure lower administration costs, and it has also sought (and continues to seek) to deal with fewer but larger suppliers. Cutting fee rates for legal aid work, and the use of fixed fees, are clear and direct initiatives to reduce the costs to public funds (or, at least by cutting the reward for each case, to allow the same amount of money to achieve a net increase in matters handled).

New working practices⁵ and risk-based peer review have been introduced to press for greater efficiency without compromising the quality of the work done. The adoption of volume procurement processes always holds the promise of driving down the Commission's transaction and administration costs, as well as leading to consolidation of structure or procurement⁶. The development of single-source contracting through CLACs and CLANs (Community Legal Advice Centres and Networks) should encourage elements of scale, albeit again sometimes falling short of structural consolidation. The idea of graduated fee schemes, and of 'one case, one fee' to cover both litigation and advocacy, also offers the prospect of savings.

⁵ Some further aspects of working practices are discussed in paragraph 3.1 below.

⁶ The recent embracing by the Bar of volume procurement arrangements ('ProcureCos') to allow barristers to compete directly against solicitors and others for first call on the acquisition and then distribution of legal aid work is an illustration of consolidation of procurement without necessarily extending to consolidation of structures.

The economic arguments are relatively simple and, indeed, irrefutable. A reduction in the administrative costs of legal aid will result either in money becoming available for advice and representation or savings from the overall legal aid budget. In the current climate, either would be preferable. If, through greater efficiencies, providers can supply the requisite quality of advice and service and make the same (or even a larger) profit from the same aggregate level of fees, that too is to be welcomed.

But despite these initiatives, challenges remain. The fragmentation of the supplier base combined with the competition engendered by legal aid procurement processes does not encourage sufficient cooperation or innovation. Arguably, it merely reinforces the current structure and entrenches competition based on independent suppliers who choose to remain small. Further, requiring firms to bid for ‘matter starts’ in different categories does not naturally lead to entrepreneurial or collaborative solutions: this approach to procurement leaves no room for inviting or receiving innovative bids based on alternative structures or creative thinking. Indeed, inefficiencies in the procurement and management of legal aid not only deny value for money for public funds, they also impose additional acquisition and administration costs on law firms (for whom this time is not productive). Inefficiencies therefore have a tendency to proliferate, and reduce further the time and investment potential for creative thinking and new arrangements.

2.3 Funding pressures and quality

It is often suggested that pressures on funding, and the consequent pressure on the profitability of suppliers, will inevitably lead to lower quality of advice and services. There is some force in this view, but it is not as clear-cut as is often claimed.

The quality of legal services is not, and cannot be, just about *technical* quality – the ability to understand and apply technical law. Lawyers have to accept the *service* dimension to quality, too – the experience that clients receive from those who advise them on legal issues. This includes having offices open at times convenient to clients; talking to clients in language they understand; and offering alternative methods of access and communication (through the internet, or by text message). The determinants of service quality are no different for law than they are for many other service businesses. It is not too difficult to work out what they are; it is not even that difficult to embrace them and provide them.

But the other dimension of quality that is often overlooked is what I would describe as the *utility* of the advice and service provided. Do lawyers actually give clients legal advice, wrapped in good service, in a way that is useful to them? Too often, clients (or the legal aid fund) are being asked to pay for something which is not sufficiently useful, because, for instance, lawyers are sitting on the fence or are fanning the flames of a dispute rather than working quickly to resolve it. Legal advice has to relate usefully to a client’s personal circumstances, and help them to make a decision and move forward. Both quality and value are strongly affected by the utility of the service provided.

Lawyers often refer to quality in such a way that implies that ‘high quality’ is an absolute and can only be attained by those who are professionally qualified. In fact, the package of quality – technical, service and utility – is a variable. It is possible to deliver different levels of quality. I accept that there is a level below which the providers of legal services should

not go; but there are levels, beyond that minimum, to which suppliers might aspire. However, if they (for good reason) aspire to provide higher quality – particularly at public expense through legal aid – we have to be absolutely sure that those high levels are justified and valuable.

In all areas of legal aid advice and representation, quality must be appropriate. For me, this suggests that technical quality should never be compromised, and any pressure that results from procurement or funding arrangements that might do so should be resisted. As I shall suggest later (in paragraph 3.1 below), there is some sense in which legal aid procurement currently has the potential to drive down technical quality. This should be reviewed.

It is also difficult to resist the conclusion that service quality and utility (which both take some time and effort to achieve and, therefore, entail some cost to the provider⁷) are also threatened when profitability is difficult to achieve. The question for the Commission is whether the pressures are so great on legal aid providers that there is an unacceptable threat to quality. This should be assessed, not in the context of quality as an absolute, mono-dimensional, concept which is either there or not, but as a composite whose degree is likely to fall below minimum expected standards. But ultimately, if quality – in the total sense – is not high enough to provide useful, technically competent advice and representation, there must inevitably be less advice and representation available out of public funds. This is preferable to more support being available at unacceptable levels of quality (which then becomes part of the fault line of matching rights and funding considered in paragraph 3 below).

2.4 Conclusion

Once we reach a point where there are no further administrative cost-savings to be achieved – because the Commission is efficient in its procurement and running of legal aid – and suppliers are not threatened with less than a truly ‘reasonable rate of remuneration’ (that is, with uneconomic levels of return for the investments made), having consolidated and improved their working practices in order to secure legal aid services of appropriate quality, then this fault line will have been removed. We are not yet at that point, and – as I shall explore in paragraphs 5.2 and 5.3 below – there are some dangers even in striving for it and staying there. However, what is clear – whether viewed from the current position or from a time in the future when this fault line no longer exists – is that relying solely on addressing the fragmentation of the supplier base and its associated economic imperfections will not be sufficient to square the circle.

3. A failure to match rights and funding

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,

⁷ Service quality and utility might also be difficult to provide in a volume or commoditised process, given that both are in the eye of the beholder and, therefore, if delivered effectively will have taken account of a client’s specific expectations and circumstances.

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. The challenge of matching the pursuit of rights with the availability of funding therefore becomes one of the key policy issues for legal aid.

3.1 The pursuit of rights

We have witnessed in recent years a significant increase in the number of legal rights, and many of those new rights have been aimed at the most vulnerable and disadvantaged in society. It almost goes without saying that those people will lack the private ability to finance their pursuit of the rights created.

This gives rise to two public policy issues. First, we must proceed on the basis that those rights are needed (or alternatively, if the current political judgement is that they are not, they should be repealed). Second, if they are needed, then funding must be made available. It does not follow that publicly funded legal aid should be the inevitable or only source of funding, but the decent society, through its government, must somewhere and somehow guarantee the financing. Without such a guarantee, the state-conferred rights in question are hollow and illusory, with the potential for more wide-ranging consequences discussed in paragraph 5 below.

There is a further reason why attempting to square the circle through an unwarranted emphasis on economic efficiency of the type described in paragraph 2 above will not address the underlying challenge. Some of the rights aimed at the vulnerable and disadvantaged are framed within either or both of very complex law or highly contentious circumstances (I have in mind many aspects of housing and social welfare, immigration, and disputes involving child care). Such matters are simply not amenable to a volume or process-driven response. Unfortunately, there has been some evidence in recent years of pressure from the Commission on law firms to provide this type of response where it is not appropriate (for example, in immigration work). Further pressures in this direction would be misguided and dangerous (leading to a serious possibility that a lawyer would be unable to meet his or her duty to the court and obligation to act in the best interests of the client).

That said, the inappropriateness of this type of response for some matters should not be used as a cloak for providers seeking to preserve a level of input and attention in matters where that is not necessary. Much of the ‘excessive’ cost of legal services can be ascribed to working practices that result in work being ‘over-lawyered’ – either because providers “spend more time on cases than is strictly necessary”⁸, or because the seniority or experience of the fee-earner engaged is greater than necessary. In some cases, this reflects an inability or unwillingness to delegate; in others, it might result from a deliberate attempt to drive up the returns on any given case⁹. Neither could be condoned: indeed, when the

⁸ This is the expression used in Lord Carter’s report in 2006, *Legal Aid: A Market-based Approach to Reform* (paragraph 145). The comment was made in relation to not-for-profit agencies, but remains potentially true for all providers.

⁹ These days, this is admittedly more of a theoretical risk, although the Royal Commission on Legal Services in 1979 found “a measure of truth” in judges’ criticisms that counsel in legally aided cases tended to be “more prolix, more willing to pursue bad points and more extravagant in the presentation of the case” (Cmnd. 7648, para 22.72).

work is publicly funded, there is a good argument for suggesting that both must be eradicated¹⁰.

The use of fixed fees is an appropriate mechanism to forestall over-lawyering (or at least to transfer the risk of it from the client or payer to the lawyer). However, where there is no over-lawyering, the efficacy of a fixed fee approach requires certain preconditions to be met:

- (a) the nature of the work in question should be professionally suitable for this approach: the complex or contentious work described above does not readily fit this description;
- (b) work must therefore be offered in sufficient volume to justify the fixed fee approach (both by type of work, and location of work) and the procurement or acquisition process used; and
- (c) the acceptance of fixed fee work by suppliers further assumes a sufficient volume of work in order for them to be able to absorb the effects of the swings and roundabouts that fixed fees inevitably entail.

While there may be legitimate policy reasons for transferring risk from the State to the supplier, the risk in question must be one over which the supplier, rather than the State, has control. This holds true for the risk of over-lawyering, since it is the supplier who determines the staffing and case management responses; it does not hold true for some of the complex work alluded to here or to the 'systemic shortcomings' discussed in paragraph 4 below.

3.2 The availability of funding

Legal aid is an alternative source of funding for those who cannot otherwise afford advice and representation. This is not the place to consider the whole range of possibilities. The essential point, it seems to me, is that if rights are considered to be worth conferring (cf. paragraph 3.1 above), then the State must stand as the ultimate guarantor of funding for the pursuit of those rights. Such a proposition still leaves a potential (and, to some, an unacceptable) degree of open-endedness to the commitment to legal aid. Given the need to reduce public spending, it would not be surprising for other sources of finance to be considered. In the context of the observation in footnote 1 above that the pursuit of rights is increasingly becoming the preserve of only the very rich or the very poor, access to justice requires that alternative sources of funding be seriously considered¹¹.

Now that before-the-event (BTE) insurance, and conditional fee arrangements combined with after-the-event (ATE) insurance, are more available and more active than they were in the earlier years of legal aid¹², there is a question whether the availability of alternative

¹⁰ I do not intend in any way here to deny the value of a senior lawyer's input to 'scope' a client's case effectively, to spot the important issues in it, and to provide the 'guiding hand' that secures a better outcome for the client as well as better value for money.

¹¹ Cf. paragraph 4.2 below in relation to Lord Justice Jackson's review of costs in civil litigation.

¹² Thus, while the number of road traffic accidents has fallen, the number of claims has risen (with the success rate remaining broadly constant): it is on this basis that the proponents of BTE and ATE insurance claim that it has increased access to justice. There is also the question of whether legal expenses insurance becomes an alternative to access to lawyers rather than a mechanism for paying for them.

funding for legal expenses should be taken into account to deny or limit legal aid (i) for certain types of rights, or (ii) up to certain financial limits. For example, should BTE insurance for some legal issues be mandatory, and legal aid then removed or limited?

Once people have paid for insurance, there is also the moral hazard issue of whether insureds will be more inclined to make claims – that is, that legal expenses insurance (LEI) would encourage litigation. Experience in Germany and the Netherlands, where LEI is more extensively used, suggests that the frequency of justiciable problems is indeed marginally higher when there is an insurance policy. This will have some effect on premiums over time.

In the context of civil legal aid, we have long passed the point where it is acceptable to suggest that the provision of public funding should be demand-led¹³. In a demand-led system, eligibility is a given and funding the variable. However, if funding is not to be demand-led, then finance is the given, and eligibility and fees become the variables. Thus, policy must address:

- (a) *rights eligibility*: which rights attract public funding, that is, the nature of the rights eligible for legal aid;
- (b) *financial eligibility*: the extent to which financial support will be available (for example, to cover the entirety of the legal fees and disbursements; up to a certain level – leaving the client at risk of any over-spend; or beyond a certain level – leaving the client to secure alternative funding up to the qualifying level); the approach to this could vary by type of rights, by the availability of reasonable alternatives, or by financial means;
- (c) *fees*: as objectively as possible, what constitutes a reasonable rate of remuneration for the advice and representation in question, bearing in mind that this will vary by complexity (some of which is inherent and not merely created by suppliers' over-engineering) and volume; and
- (d) *timing eligibility*: whether funds are available on a first-come, first-served basis, that is, when those with legitimate rights come forward but funds for the year are exhausted, their claim to funding must be deferred to the following financial year¹⁴.

Even where State legal aid is made available, it would still be possible to explore alternative ways of accumulating a fund that replaces or, more likely, supplements (and therefore reduces) the call on taxpayers. This might result from a Contingent Legal Aid Fund (CLAF), pooling interest on suppliers' client accounts, or third-party funding mechanisms (in effect, a contracting out, or public-private partnership, of legal aid provision).

¹³ A different argument could be made in relation to the availability of criminal legal aid, in that the State's resources for the prosecution of criminal offences can always outweigh those of the defendant and so access to justice requires that financial support must always be available to those charged even if, following a conviction, all or some of that support might be repaid. There is, of course, a much clearer case when the accused does not have (or have access to) sufficient financial means for his or her defence – especially in light of Article 6 of the European Convention on Human Rights.

¹⁴ Such an approach is not immediately attractive, and some rights could become time-barred as a consequence. However, with careful management and some safeguards, it could represent one way of squaring the circle of supporting the pursuit of rights without underwriting an in-year variable financial commitment.

3.3 Conclusion

The fundamental argument of this paragraph is that there must be some way of matching the pursuit of legal rights and the wherewithal to pursue them. Where there is an imbalance, then the match must be sought through one or more of (i) the number of rights being reduced, (ii) public funding increased, or (iii) alternative sources of financing mandated or developed. This question of balance of rights and funding in my view represents the most significant and important of all the public interest issues that are at play in the debate about legal aid and its future.

4. Broader systemic shortcomings

The third fault line relates to elements of the broader system working against the effective provision of good quality and cost-efficient legal aid.

4.1 Reviews of legal aid

First, one of the most disruptive sources of systemic disturbance in recent years has been the seemingly continuous process of reviews of the legal aid scheme. Changes in structure, funding and procurement have led to prolonged periods of uncertainty for law firms and other organisations which provide legal aid services. This has made it very difficult for them to plan strategically, invest in new technology and processes, and to recruit and retain the appropriate staff. Persistent cycles of review and repeated changes of tack will undermine the very stability and investment for quality and value that the legally aided should be entitled to expect, as well as the value for money for the use of public funds that government and the taxpayer should also rightly demand.

I accept that if the current arrangements are shown not to be working or producing sufficient quality or value then we should not continue with an inadequate structure. However, it may be that longer periods of consideration followed by rapid implementation would be more effective than the recent track record of short-term decisions and rapid implementation followed by prolonged periods of resistance and reviews leading to further short-term reactions.

4.2 The administration of justice

As stated above in paragraph 2.2, a persuasive case can be made for volume procurement, consolidation and more cost-effective and efficient responses from providers. However, the second point here is that the underlying economics of such an approach can easily break down for providers when the court system is also buckling under pressure. It is all very well to reduce the fragmentation of supply, and so to reduce the acquisition costs of new legal aid business for providers and administration costs of the Commission. But if the courts which the providers must then cover are geographically dispersed¹⁵, or the cases

¹⁵ The recent Government announcement relating to courts estate will signal an early challenge in balancing the geographical distribution of courts with the cost-effective provision of services, without adding unduly to the travel

inefficiently listed, the economics of volume start to break down. If judges are not available, adjournments are frequent, counsel return briefs at short notice, and court facilities are inadequate for lawyers to work in during their court-imposed 'down time', then the attractions and economic viability of volume work swiftly disappear.

In addition, if lack of funding leads to more self-representation by litigants, or to greater use of inexperienced litigators or advocates, cases will take longer and will be disrupted by inadequate case management or by inevitable interruptions to their efficient disposal¹⁶. The efficiency of the justice system will potentially be compromised – although these issues do, of course, beg an even bigger systemic policy question about whether our adversarial system is the most cost-effective method of deciding disputes (and if not for all cases, then which ones).

There can also be other operational inefficiencies that challenge the generation of a 'reasonable rate of remuneration' for providers. For example, if solicitors are not allowed to take laptop or other mobile computing technology into police cells for meetings with clients, the efficiency of their working methods is hampered by duplicated effort arising from the need to take notes and transfer them later to electronic format.

In the context of reviewing systemic shortcomings, Lord Justice Jackson's recent examination of costs in civil litigation represents a commendable re-conception of an approach to civil litigation that looks at costs as a function of the whole system. His recommendations therefore seek to introduce reforms that are designed to link connected issues together towards a new systemic coherence. As such, it provides a model for the type of inclusive review being suggested in this paper (even if I do not necessarily agree with the remedies proposed in his report).

4.3 Public authorities and the generation of claims

This is a sensitive issue, but an important part of the overall picture of the costs of legal aid. Many legally-aided cases involve disputes with public authorities or appeals against their decisions (for example, in immigration or social welfare cases). Where these cases are the consequence of a public authority's failure to comply with legal or regulatory obligations, or of its lack of resources to apply current law or regulations, the State is in a sense bringing the legal aid burden in such circumstances on itself. The cost of taking action is not 'voluntarily' created by the claimant or appellant. There is, in effect, a shifting of some cost and risk from one part of the public purse (the authority's true cost of compliance, which it should bear) to another (the legal aid fund's burden of the cost of the authority's non-compliance). Such a broader systemic view of compliance needs to be taken to ensure that some parts of State activity and decisions are not avoidably or unreasonably loading cost into the legal aid budget – especially if legal aid funding might then (unfairly) be removed

costs incurred and to logistical difficulties of listing cases with a reasonable prospect of clients and legal representatives being able to attend.

¹⁶ Over time, as self-representation and other challenges to the smooth running of judicial lists increase, we might also expect that the number and quality of applications for judicial office could also decline. Work in Canada which looks to support 'self-helpers' as they navigate their way around the courts system might point to ways in which the overall efficiency (and cost-efficiency) of the system can be promoted.

from otherwise worthy claimants or appellants in an attempt to stem the rising costs of legal aid.

4.4 Conclusion

Merely addressing inefficiencies in the process of procuring or administering legal aid, even along with securing changes to the fragmentation and working practices of providers, will still not achieve the medium- to longer-term balance within the justice system as a whole that will be required to deliver a sustainable legal aid scheme that is fit for purpose and which provides a reasonable rate of remuneration to those providers who choose to serve their publicly funded clients. A broader consideration of the overall 'system' within or from which justiciable issues arise and are resolved is a necessary element of reviewing the public funding of legal aid.

5. Squaring the circle

Let me return to the three challenges identified in paragraph 1 above: eligibility, reward, and funding. It is difficult to address them separately – and, indeed, the thesis of this paper is that the connections among them are such that it is misguided and dangerous to believe that they can be so addressed.

5.1 Eligibility and the public interest

The principal public interest issue in the legal aid debate goes to the heart of what we might hope to mean by a 'decent society', and what we aspire to when we refer to 'the rule of law' and 'access to justice'¹⁷. There must be some irreducible rights that a decent society promotes and supports; and however poor or vulnerable individuals are, there must be a funded route to pursuing entitlements that relate to liberty, health or other human rights. A decent society can provide no less, and funding must be made available.

Beyond this, when the public funds are exhausted (either by financial crisis or political choice), more difficult decisions about eligibility have to be made. Beyond the minimum expected by a decent society, these are largely political decisions. But there are two important points to be made. First, if certain rights are not included within the eligibility criteria and a substantial public consensus disagrees, there will be serious questions about whether society is, in truth, 'decent'. Second, if rights are included but there is not sufficient public funding available to pursue them, the same conclusion might well be reached.

More than this, in both cases there will almost certainly have been a denial of access to justice, and such a failure to support the pursuit of rights is likely to undermine the rule of law itself as well as lead to significant lack of respect for it and for the institutions of State. While the legal aid budget undoubtedly needs to be reduced, if eligibility is compromised in

¹⁷ The Legal Services Institute is just beginning its own project on the meaning of 'access to justice' and aims to produce a strategic discussion paper for publication early in 2011.

ways that do not manifestly support the public interest, and do not have the support of those who are often broadly referred to as ‘right-thinking people’, more than the budget will be at stake.

5.2 Funding and access to justice

We have not yet solved the issue of the Commission’s administrative costs, either in relation to its own operational structure or costs, or in relation to its procurement and administrative costs of dealing with a fragmented provider base. Although there are already considerably fewer providers of legal aid than has historically been the case¹⁸, we have not yet secured ‘optimum consolidation’. Until this further rationalisation has been achieved, there will always be scope for claiming that there remain economic inefficiencies loaded into the legal aid system.

However, the removal of a further significant number of providers, and the concentration of legal aid contracts into the hands and pockets of fewer and larger entities, runs the risk of a handful of market-dominant providers emerging. This will achieve some economies of scale, but it will come at the price of some loss of capacity and geographical coverage. I do not subscribe to the argument that such a concentration will inevitably compromise access to justice and should therefore be resisted. Alternative and innovative forms of provision need to be encouraged, and the access to justice consequences carefully monitored. Nevertheless, we do need to ensure that there is sufficient access to avoid frequent local conflicts of interest that reduce the pool of legal advisers from whom advice and representation can be sought in a reasonably proximate and accessible way.

If former providers are acquired as part of the process of consolidation, and access to justice later proves to have been undermined (either in relation to particular legal services, or parts of the country), it might still be possible to ‘unravel’ some of those organisations. Where former providers have gone out of business and their experienced staff employed elsewhere (and possibly no longer in legal services), the provider base will have been reduced and unravelling would be to no avail. My proposition is that intervention should remain possible until it is clear that there have been, and are unlikely to be, any adverse consequences to justice.

Also on access to justice: the increasing use of measures that encourage providers to contract for litigation and advocacy, while having the laudable objective of generating efficiency, also carries the likelihood that those organisations which control the contract will choose to retain all litigation and advocacy in-house¹⁹. Such combination carries a risk that clients will not be informed of their right to, or will be denied, their lawyer of choice. There is some force in the argument that, where clients are not personally paying the costs of legal services, they cannot expect complete freedom of choice. There is a fine line, however, between this justifiable view and the wholesale removal of choice.

Finally, there might be some residual possibility that providers will consolidate but not achieve greater efficiency. The larger contracting entities (whether law firms, CLACs or

¹⁸ Cf. footnotes 3 and 4 above.

¹⁹ In the future, this could be both solicitors’ firms with their own in-house advocates, and barristers’ ProcureCos that choose to contract in litigation capacity.

CLANs, ProcureCos, or third sector organisations) that might emerge into the market as a response to current policy could nevertheless remain relatively inefficient. What are currently fragmented and higher-than-needed administrative costs borne by the Commission could become costs that are simply transferred to and then dispersed among contractors. This could result in low (or no) profitability that might in turn threaten the economic survival of these larger entities, whose demise and disappearance from the legal aid sector could prove rather more disruptive to clients than the loss of (even several) smaller legal aid firms.

The management of legal aid contracts, and the conditions under which they are procured, awarded and monitored, will remain a significant issue for the Commission. Its administrative and monitoring costs cannot be reduced to near zero.

5.3 The use of public funds

It can be no part of the expectation of legal aid providers that public funds will be used to allow them to maintain inefficient working practices, or levels of remuneration that are above 'reasonable'. There is, of course, considerable scope for argument about what is reasonable!

Recent reforms within legal services (whether driven by the Legal Services Commission in relation to legal aid, or more generally by the Legal Services Act 2007) have carried a significant sub-text about supporting the greater influence of market forces within the sector. As another platform from which to drive better value for money for the use of public funds, it is difficult to argue against the broad thrust of the trend. However, I would wish to sound two notes of caution. First (as I have suggested on many occasions), there are aspects of the legal services 'market' that are not amenable to market forces. These relate to the 'public good' dimensions of legal services where the public interest must always outweigh the consumer or market interests, and include maintaining the rule of law, the effective and efficient administration of justice²⁰, and access to justice. Some elements of legal aid are particularly connected to these public good issues, and market solutions might not be the most suitable in these cases.

Second, if those who control the public purse strings wish to expose the legal services sector (and especially the parts of it that serve those clients who receive legal aid) to market forces and practices, then they must reasonably expect the normal economic rules of supply and demand to play out. In the short term, therefore, they might well be able to drive down fees paid for legal aid work because of a general fragmentation and over-supply in the 'market', especially when combined with some evidence of inefficient working practices. If those market forces do their work, though, the balance will shift over time. This is likely to result in fewer providers being available, and it is not therefore inconceivable that a few dominant providers might be able to 'bid up' prices at some point in the future.

It is certainly time for a radical rethink of the scope and cost of legal aid. We need to consider the idea that government (and therefore public funds) should be focussed on the

²⁰ This expression should not be read in the narrow sense of referring only to 'cost-effective' or 'cost-efficient': this is not simply an economic argument.

things that individuals, organisations or markets cannot or would not do for themselves, if left to normal societal and economic forces, but which a society (and certainly a 'decent' one) still requires. On this basis, activities that require significant national investment must be at the forefront. Defence would provide a good example. So, too, in my view, do the public goods I referred to above – the rule of law, the effective and efficient administration of justice, and access to justice – and this extends to the pursuit of rights to protect liberty and other fundamental entitlements as well as, say, supporting citizens when they are faced with some overwhelming imbalance of power²¹.

Legal aid should not inevitably be made available where there are other, reasonable and accessible, sources of prospective or current financing arrangements available. Civil legal aid should be 'finance of last resort', and this might require lawyers to certify that no other funding is available for the pursuit of rights that a decent society has determined are worthy of public support (broadly, where there is no or little element of personal 'election' or culpability that has led to the legal issue now facing the citizen).

Finally, consideration needs to be given to whether legal aid represents the best use of public funds for helping citizens to resolve legal issues. There is emerging evidence that better education to equip people to understand their rights and the legal process might help them avoid the need for legal advice and representation at public expense²². It is certainly the case that many people have unmet legal needs. This might be because they do not realise that they face a legal problem, or it might be because they have an aversion to seeking legal advice or dealing with lawyers. In either circumstance, the issue (such as debt) can then escalate to a point where the combination and complexity of legal concerns has outstripped the emotional and financial ability of the client to deal with them.

The point just made might be characterised as using legal aid funding on 'a stitch in time' basis. But there is a much more fundamental point. Removing legal aid eligibility or funding will leave some in society with no ability to pursue rights at the most appropriate stage, or at all. These unresolved issues can then result in unemployment, loss of housing, deteriorating health, family breakdown, and many other manifestations of escalating problems. The legal aid budget might have been protected from having to support the client in facing a legal issue, but there will still be a cost to society and the public purse (and possibly an even greater cost overall) arising from these consequential problems. Squaring the legal aid circle is not simply a matter of addressing the costs of legal aid: in a Society considered to be Broken, there are many moving parts which need to be dealt with together, and not simply as part of different and ring-fenced ministerial budgets.

6. Conclusions

The seeming conundrum of legal aid and its funding is not a new one; nor is the UK alone in facing it. There are some fundamental challenges in securing a legal aid system that is in balance with the expectations that need to be met. My contention in this paper is that the balance can be achieved only if the three current fault lines are addressed together: a fragmented and inefficient supplier base that needs further consolidation and innovation to

²¹ Addressing an 'inequality of arms' is one of the most important features of a legal aid scheme.

²² Such an approach is often referred to as 'public legal education' or PLE.

deliver value for money without compromising quality; a failure to match rights and funding that must be re-balanced to meet the legitimate expectations of a decent society in respect of both rights and claims on the public purse; and broader systemic shortcomings that have to be dealt with in order not to undermine or destroy the economies and value created by tackling the first two.

There is a strong argument that the legal aid budget can be cut, since there is scope for further savings on the Commission's costs (relating to procurement, administration, and not micro-managing providers). There is also some scope for consolidation and economies of scale to reduce aggregate payments to providers (which I believe could, with effective management, be achieved without compromising quality or profitability) – but this is not a universal objective that can or should be sought across all aspects of legal aid provision.

There will be undoubted benefits to be derived from consolidated providers, including volume procurement, block funding, economies of scale, and investment by providers in efficiency and quality (especially in information technology, knowledge management, client relationship management, risk and quality management, and training and development). Even so, there will be some risk to the Commission (and possibly the Government generally) arising from the perception of a monopsony funder deliberately seeking to restructure a market – especially where so many legal aid providers serve more than just legal aid clients. Restructuring legal aid provision (which might be regarded as a legitimate financial and political objective in the present economic climate) will have consequences for the broader legal services market. Those consequences will be thought by some to be the province of business choices to be made by providers in a properly performing market rather than the unavoidable side-effect of changes in the public funding and procurement of other work.

Beyond this, further effects of cutting could be felt in one or more of reduced eligibility, poorer quality of advice or service (or both), or further reductions in providers' profitability and their possible exit from the market. Even if funding reductions are accepted as unavoidable, the implications of those reductions must still be dealt with, and therefore decisions about which consequences are more palatable must be informed and deliberate – and, I suggest, clearly made on the basis of policy and principle.

It seems to me that benefit would be derived from an open debate about:

1. The extent to which it is legitimate to expect (or possibly require) those who can afford to fund legal protection by before-the-event membership subscription or legal expenses insurance to do so, and then to remove their eligibility for civil legal aid. There might reasonably be some exceptions to this general approach in relation to, say, mental health issues or claims against public authorities.
2. The removal of civil legal aid in respect of claims for which the market could (and reasonably does) make available conditional or contingent fee arrangements – either separately or as part of a contingency legal aid fund – or third-party funding.
3. The availability and utility of access to information and advice (whether paid-for or *pro bono*), such that it would be possible to confine civil legal aid primarily to advice and representation in contested proceedings.

4. The extent to which simplifying statutory and regulatory obligations, and investing in better resourcing and compliance procedures for public authorities, can reduce the incidence of claims that need to be publicly funded; and how the courts and legal aid system can be improved to enable providers to realise benefits from improved scale and efficiency of provision.
5. The residual – and reduced – role for publicly funded civil legal aid in respect of certain rights for those who cannot be expected to afford before-the-event protection, or for whom other market alternatives are not reasonably available, or where the expectations of a decent society are such that public funding should remain available irrespective of the existence of alternatives (such as mental health, child abduction, or claims against public authorities).
6. The correct level of a ‘reasonable return’ to legal aid providers who have taken steps to improve their scale, efficiency and innovation, given the required level of technical competence and service quality that clients and society should legitimately expect from them.
7. Overall, an assessment of where the ultimate financial risk of financing civil claims should lie – with claimants, defendants, or their legal representatives or insurers – and in which circumstances and to what extent the State, through the legal aid fund, should stand as the final guarantor of funding for the pursuit of legitimate claims.

There would inevitably be much fine detail to be mapped out in such a debate. But it is clear that in the present climate better cost-benefit for legal aid funding must be achieved without increasing cost (and more likely by reducing aggregate cost). This is unlikely to result from indiscriminate cost-cutting. It can be achieved by considering a re-balancing of the whole ‘eco-system’ of legal aid and the broader legal services market. This paper is intended to encourage such a considered and principled approach.