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Needs Assessment and the Prioritisation of Legal Services in England and Wales

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Introduction

Glennerster *et al* have broadly described the development of government social spending as being characterised by three phases.[1] The first is associated with the allocation of extremely limited resources, as in the case of nineteenth century health and education spending in the United Kingdom. The second is defined by the provision of extensive services through the public sector, as were developed in the mid-1940s in the United Kingdom.

> "In education and health the beginning of stage two is clearly marked by pieces of legislation: the 1944 Education Act and the 1946 National Health Act. Both services were nationalised, with access becoming universal."[2]

The third occurs when provision strains resources. This leads to a retreat from universality, and an emphasis on targeting services to those most in need. This third phase is marked by the development of increasingly sophisticated and formal mechanisms through which to prioritise expenditure.

Since 1986, when, as the Legal Action Group has observed, legal aid eligibility in England and Wales was first cut in money terms, a principal government concern has been to control the growth of legal aid expenditure.[3] The United Kingdom government has not been alone in this. Increasing concern about cost has been a world-wide phenomenon. Goriely and Paterson have described the many attempts to control legal aid expenditure in Australia, Canada, the USA, the Netherlands and Sweden in the period since 1985.[4]

The development of funding for legal aid services in England and Wales, and across much of developed world has, therefore, now entered Glennerster *et al*'s third phase.

This paper sets out the principal methods used to prioritise the funding of legal services by the Legal Services Commission (LSC), through the Community Legal Service (CLS) Fund.[5] The paper is divided into three sections. The first is concerned

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

2 Ibid., p.37

3 LAG (1992) A Strategy for Justice, London: Legal Action Group.

4 Goriely, T. and Paterson, A. (1996) "Introduction: Resourcing Civil Justice", in Paterson, A. and Goriely, T. (eds.) *A Reader on Resourcing Civil Justice,* Oxford: Oxford University Press.

5 The Legal Services Commission replaced the English and Welsh Legal Aid Board on 3 April 2000. It has an expanded jurisdiction, extending beyond the management and payment of civil and

with the people who are eligible to receive legally aided services, and sets out a brief history of legal aid eligibility in England and Wales.[6] The second is concerned with the types of services that are open to legal aid funding, and introduces the LSC's *Funding Code* for civil cases.[7] The third is concerned with the developing methods of identifying the legal services and suppliers that will most effectively and fairly meet the *legal needs* of the population. It describes the development of a network of local 'Community Legal Service Partnerships' (CLSPs) across England and Wales,[8] and the development of tools designed to map the prevalence of legal need within and between CLSPs.[9] Details of the LSC's contracting and quality assurance programme, which is a central part of the LSC's efforts to ensure that legal aid suppliers provide 'best value', are set out elsewhere.[10]

Financial Eligibility for Legal Aid in England and Wales[11]

From the Middle Ages to the mid-1940s, 'legal aid' was confined to the very poor. Indeed, right up until 1914 legal aid took the form of a charitable scheme available to 'paupers' through the *informa pauperis* procedure, which offered assistance to litigants in the superior courts, but which was, as Sachs has pointed out, "of only occasional use in practice"[12]. Financial eligibility was determined by judges, who authorised assistance where paupers had less then £5. Assistance was provided by lawyers who were willing to act for free, although from the 1780s a rule was introduced which saw litigants who won more than £5 contribute £4 to the cost of their case.

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criminal legal aid service suppliers. The Commission is required under Section 4(1) of the Access to Justice Act 1999 to "establish, maintain and develop a service known as the Community Legal Service for the purpose of promoting the availability to individuals of services of the descriptions specified in subsection (2) and, in particular, for securing (within the resources made available, and priorities set …) that individuals have access to services that effectively meet their needs." Subsection (2) defines the services as "(a) the provision of general information about the law and legal system and the availability of legal services, (b) the provision of help by the giving of advice as to how the law applies in particular circumstances, (c) the provision of help in preventing, or settling, or otherwise resolving, disputes about legal rights and duties, (d) the provision of help in enforcing decisions by which disputes are resolved, and (e) the provision of help in relation to legal proceedings not relating to disputes."

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

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

8 Originally, 6 *Pioneer Partnerships* (Cornwall, Kirklees, Liverpool, Norwich, Nottinghamshire and Southwark) and 40 *Associate Pioneer Partnerships* were launched to help identify best practice and guidance on setting up and running CLS partnerships. New partnerships are now being introduced on an on-going basis. It is hoped that 90% of the population will be covered by the end of 2001. For an analysis of the pilot partnership programme, see Moorhead, R. (2000) *Pioneers in Practice,* London: Lord Chancellor's Department.

9 See, further, Pleasence, P., Buck, A., Goriely, G., Taylor, J., Perkins, H. and Quirk, H. (2001) *Local Legal Need,* London: Legal Services Commission, LSRC Research Paper No.7

10 Orchard, S. (2001) XXX, paper presented at the conference of the International Legal Aid Group, Melbourne, 13-16 June 2001.

11 We are grateful to Tamara Goriely for information she made available on the history of means testing in England and Wales.

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

In 1914, the *informa pauperis* procedure was replaced by the *poor person's procedure* (a phrase thought to carry less stigma), helping people in civil cases under the Rules of the Supreme Court. Again, the *poor person's procedure* assisted only litigants in the superior courts, and again lawyers acted on a charitable basis. From the outset, the *poor persons procedure* was confronted with the problem of rising divorce rates from the time of the first world war, and it became increasingly difficult to locate lawyers willing to act free of charge. In 1919, therefore, a strict income test was applied, and a £5 deposit required of all applicants.[13] In 1925, the Law Society took over the administration of the *poor person's procedure*, but as it was "still squarely based upon charity and catered only for the truly indigent; it did not touch the problem of the many, no less in need, who were neither sufficiently well-off to obtain legal assistance at their own expense nor sufficiently poor to avail themselves of the facilities provided."[14]

By the latter stages of the Second World War, the rise in demand for divorce lawyers had placed such strains on the *poor person's procedure* that the Lord Chancellor established a Committee, chaired by Lord Rushcliffe, to review, against a general social demand for a new inclusive welfare state, the existing legal aid provisions and to make recommendations. In the report, "the Rushcliffe Committee designed a comprehensive scheme, covering county courts (which dealt with most housing matters), tribunals and inquests".[15] The Committee suggested that people should be able to get legal help without being labelled as "poor persons". The Committee also stated that many people of "moderate means" might need legal aid in special circumstances. It was also proposed that lawyers receive remuneration for their services. In order for middle income groups to be included amongst the eligible population, the Rushcliffe Committee recommended that there should be a sliding scale of contributions for people who were to receive legal aid.

The Rushcliffe Committee's report formed the basis of the Legal Aid and Advice Act 1949, which in turn provided the foundations of the present legal aid system. Although the Legal Aid and Advice Act 1949 broadly reflected the Rushcliffe Committee's recommendations, its aspiration of 80% coverage of the population proved difficult to maintain. By 1959 financial eligibility was still dictated by rates originally set in the mid-1940s. The rates were finally uprated in 1960, but then declined again until a 1970 uprating, and then a major 1979 uprating.

In 1986, in response to the increasing cost of the legal aid scheme, and an ideological shift instituted by the Conservative government headed by Margaret Thatcher, "the Lord Chancellor's Department made the first formal reductions in eligibility since the legal-aid scheme was created, down-rating allowances by approximately one-sixth"[16] Coverage decreased to around 60% of the population, and the third phase of development of legal aid funding began. Modifications to the

[13] Goriely, T. (1996), Law for the poor: the relationship between advice agencies and solicitors in the development of poverty law, in *International Journal of the Legal Profession*, Vol. 3, Nos. 1/2, p. 215-248, p.219.

[14] Pollock, S. (1975), *Legal Aid - The First 25 Years*, London: Oyez Publishing, p.13.

[15] Goriely, T. (1996) "Law for the poor: the relationship between advice agencies and solicitors in the development of poverty law", in *International Journal of the Legal Profession*, Vol. 3, Nos. 1/2, p. 215-248, p.224.

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

legal aid scheme in April 1993 then resulted in a noticeable further decrease in eligibility, to around 50% of the population, as disposable income and capital thresholds were reduced. Eligibility is now around 48%.

From October 2001 a new set of rules relating to financial eligibility are to be introduced. These will see harmonisation of the rules relating to different forms of legal aid assistance, an increase in the capital allowance levels, and the introduction of a simpler financial income test, aimed at better targeting people in the lowest income bands, whilst maintaining overall eligibility levels and legal aid expenditure.[17] The aim of reforming means testing is not now to further reduce eligibility, but to ensure that the eligible population is comprised of those persons most in need of legal aid support.

The Scope of Legal Aid

As has been noted, until the reforms that followed the Rushcliffe Committee report, legal aid was available only to litigants in the higher courts. Even on the introduction of the modern legal aid system in England and Wales, however, certain types of civil case, such as claims in respect of defamation, remained outside its scope. However, following a review of the scope of the system, conducted prior to the transfer of responsibility for its administration from the Legal Aid Board to the Legal Services Commission in April 2000, a number of additional types of case are now excluded. Also, an express form of prioritisation as between in-scope case types has been introduced, the considerations involved in the decision making process have been broadened to include public interest benefits, the cost-benefit criteria upon which individual funding decisions are made have been tightened and become more formalised, and a fixed budget for the most expensive cases has been instituted.[18] Details of the new principles applying to legal aid funding are contained in the LSC's *Funding Code.*[19]

There would appear to be three principal reasons for the recent changes that have been made to the scope of legal aid. First, some types of case have been excluded from scope because other funding mechanisms are available. So, personal injury claims can now, for the most part, be brought under conditional fee arrangements.[20] This is possible because personal injury cases are principally aimed at obtaining damages, are invariably brought against institutional defendants, enjoy high and predictable success rates, and involve fairly predictable costs.[21] Nevertheless, not all personal injury claims fit the usual profile, and some – most notably medical negligence claims – can involve significant investigation costs before their legal merits are known (or very high overall costs after their legal merits are known). In recognition of this, the *Funding Code* allows for routine funding of the investigatory

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[17] *Supra.*, n.5. Certain forms of legal aid assistance are available on a universal basis (public law children proceedings).

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

[19] *Supra.,* n.7

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

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

stage of medical negligence cases, and for 'support funding' for claims which involve costs (and thus risks) that are higher than can reasonably be borne by solicitors' firms.[22]

Second, some types of case have been deemed to be inappropriate for legal aid funding by virtue of their nature. So, company and partnership law matters are now excluded from scope, along with other matters arising out of the carrying out of a business. Current policy would seem to be that funding for such cases should not be derived from a system that is focused upon enabling *individuals* to access the law. The Department of Trade and Industry already funds advice services relating to business failure,[23] and is arguably in a better position to address business issues in a comprehensive manner.

Third, the individual, social and political importance of different types of case, and individual cases within types, has been recognised as differing widely. Consequently, civil proceedings in which a person's life or liberty is at stake, along with certain proceedings under the Children's Act 1989, have been designated as 'top priorities'. It is intended that these cases should always be funded. These are then followed by a series of case types which have been designated as 'high priorities', and so receive funding prior to the residual categories of case. These 'high priority' case categories include domestic violence, housing, social welfare, and abuse of power by a public body cases. Also, for the first time within the English and Welsh legal aid system, cases can be funded on the basis of the general public interest. Thus, cases which are "likely to produce real benefits for a significant number of *other* people, or which raise an important new legal issue" can be funded irrespective of the individual benefit that might accrue to the applicant. In general terms, of course, this individual benefit is a principal criterion in the decision making process, and to that end the *Funding Code* has tightened up the guidance on what, taken together, prospects of success and costs-damages ratios are necessary for legal aid funding.[24] This guidance is intended to reflect the historical 'private client' approach to funding decisions. However, a private client approach and simple cost-benefit analysis has been deemed inappropriate in respect of certain types of case. For example, in housing possession cases, it is recognised that those most in need are generally very different in character from private clients with reasonable means. Also, the issues involved often go to the heart of an applicant's general welfare. Therefore, in such cases the *Funding Code* requires proportionality between costs and benefits. Finally, in view of the fact that the most expensive legally aided cases involve a hugely disproportionate amount of civil legal aid expenditure, a fixed budget has been introduced to limit their encroachment on other legally aided cases.[25]

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[22] Support funding is available where (for the investigation of any personal injury case) disbursements exceed £1,000 or overall costs exceed £5,000, or (for the litigation of any personal injury case) disbursements exceed £5,000 or overall costs exceed £20,000.

[23] E.g. Business Debtline, launched in July 2000.

[24] For an examination of the likely impact of the new guidance, see Pleasence, P., Buck, A. and Christie, J. (1999), s*upra.*, n.6

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

The Pattern of Legal Aid Delivery

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

CLSPs were first piloted in 1999, with the aim of bringing together those who fund legal services (e.g. LSC, local authorities, charities, etc.) and supply legal services (e.g. solicitors, law centres, citizens advice bureaux), to promote co-ordination of effort so as to best meet the legal needs of local populations. The LCD's 1999 consultation paper on the CLS summarised the risks of a lack of co-ordination.[26]

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

The LSC is under a statutory duty to inform itself about the need for, and provision of, services that can be provided through CLS Funding and CLSPs.[27] At the local level CLSPs are charged with assessing local need and supply and developing strategies to most effectively match them.

The LSC and CLSPs have adopted a number of strategies to assess legal need. First, the LSC has developed a series of small area legal need models, designed to indicate the relative need for legal services in particular areas of law at ward, local authority and regional levels. Currently, these models are used as a starting point for local analyses of legal need, which inform funding decisions. Ultimately, such models could form the basis of a comprehensive formula funding scheme that would see the fairest possible objective distribution of funds to different geographical areas of the country. Second, the Legal Services Research Centre is undertaking periodic national surveys of people's experience of problems with potential legal solutions. These will enable the models to be empirically tested, the development of an understanding of the prevalence of problems and the behaviour of those people who experience them, and the evaluation of the success of the general reform programme aimed at reducing the incidence of *unmet legal need* in priority problem areas. Third, CLSPs are undertaking local research exercises to enable them build upon the outputs of the LSC's small area models, assess the effectiveness of local services, and determine local advice seeking behaviour patterns. In the rest of this section, each of these strategies is examined in greater detail.

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

[27] Access to Justice Act 1999, Section 4(6)

The LSC's Small Area Models and Formula Funding Methods

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

> *"The variations in legal provision throughout the country are considerable … there is irregular dispersal within towns; an unequal distribution between urban and rural areas, and finally an uneven spread nationally."*[28]

No doubt, there is some link between need and supply patterns, but it is clearly far from perfect, and the product of accident rather than design.[29] This is not a phenomenon unique to legal aid. For example, the pattern of resource distribution in the early years of the United Kingdom National Health Service (NHS) was not linked to the relative need for resources in different geographical areas. Revenue initially distributed through the NHS served in many ways merely to perpetuate the schism in resource provision already in existence when it was set up, as funding went straight to the hospitals already providing services. As Glennerster *et al* have observed:

> "During the early post-war years it was believed that abolishing fee payments and creating universal institutions would be enough to meet the needs of the population. But as the welfare state matured, the realisation grew that geographical differences created different levels of need or potential demand for services."[30]

In the context of the NHS this led to a 1970 Green Paper on NHS reorganisation that included a commitment to new methods of resource allocation. This eventually resulted in a review by the Resource Allocation Working Party, which recommended a funding distribution method based on population, weighted according to healthcare needs and the unavoidable cost of providing healthcare services.[31] A form of *weighted capitation formula* has been used ever since. Funding distribution is not completely tied to the formula. The formula is used to determine each area's *target* share of resources. Actual distribution reflects decisions on the speed at which areas are brought to the targets. It would make no sense to rush to build a whole new set of hospitals, the location of which more accurately reflect healthcare need, if the cost was disproportional to the additional benefit. Instead, funding distribution should allow this to happen over time. Although, as is explained below, the optimal location of services, in terms of access, may not always fully reflect the bare distribution of need.

As it is not possible to directly measure healthcare needs, the NHS weighted capitation formula uses available proxies for healthcare needs. Similarly, the LSC's

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[28] Foster, K. (1973) 'The Location of Solicitors', in 36 *Modern Law Review* 153
[29] See for example the analysis in Pleasence, P. *et al* (2001), *supra.*, n.9
[30] Glennerster *et al*, *supra.*, n.1, p.40
[31] These costs can vary greatly from region to region.

small area legal need models use available proxies. The basic approach in designing them has been to identify the constituent elements of the problems faced by people requiring particular categories of legal service and adopt measures of those elements (or functions thereof) as proxies, or partial proxies, for need for such services. As the Legal Aid Board's Needs Assessment Group put it,

> *"The models identify key factors that are likely to indicate a need for legal help in a particular category of law."*[32]

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

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

However, even with the availability of reliable and up-to-date proxy data, need models will have limitations. First, they measure proxies and not *need* itself. Second, scale effects can affect the nature of model outputs. For example, models cannot always effectively deal with closely proximate needy and non-needy populations. Third, the geographical scales used in predictive models do not always reflect underlying social patterns and local identifications. Fourth, rapid social and economic changes can take place, quickly rendering model outputs out-of-date. This is a particular problem where models make use of infrequently updated data, such as that derived from the national census. Fifth, the same need indicators may not be appropriate for different types of areas (e.g. rural and urban). Sixth, patterns of need *on their own* do not provide a means of identifying the optimum form of service provision to meet need. Consumer behaviour patterns vary dramatically around the country. People in remote rural areas may routinely travel great distances to access basic services. People in urban areas may rarely travel beyond a few miles of their home. Also, generally, people may access services in defined centres (e.g. shopping centres, hospitals, around transport nodes), and so services placed away from such centres may be less accessible than geographically more proximate, but less accessible or recognised, areas.[33]

In the light of the above limitations, at present the LSC's need models provide only a starting point for CLSPs to determine local patterns of legal need. As they become

[32] LAB Needs Assessment Group (1999) *Needs Assessment,* unpublished report.
[33] See for example the analysis in Pleasence, P. *et al* (2001), *supra.*, n.9

more refined and proven, they may provide the basis of a fairer general distribution of funds around England and Wales.[34]

The LSC's Periodic Survey of Legal Need

The first empirical study of legal need was conducted by Clark and Corstvet in the 1930s, in response to a recession at the American Bar. [35] It was in the context of the optimism of the 1960s, however, that the idea of quantifying and surveying legal need really took off. Until the 1970s the approach adopted to empirical studies of legal need changed very little. Survey respondents were presented with a series of problems with potential legal solutions. If they were found to have experienced a problem, but to have not obtained the help of a lawyer in resolving it, they were deemed to have had an unmet legal need. If they had obtained the help of a lawyer in resolving it, they had a met legal need. Unsurprisingly, the typical conclusion that followed such surveys was that there was "a considerable amount of need for legal services which went unmet, and that unmet need was particularly likely to be found among poorer people."[36]

However, in the 1970s it became appreciated that the mere potential of a legal resolution to a problem could not *on its own* warrant a finding of legal need. An individual may, for example, legitimately prefer not to go to law. In such a case, talk of need is otiose. Most importantly, though, even if an individual wishes to go to law, it may be that the law provides an inefficient route to resolution. Famously, Lewis

[34] An example of a formula funding approach in the context of legal services delivery can be found in Australia. As was noted in the preceding chapter, in Australia, each State or Territory runs its own Legal Aid Commission. These Commissions provide legal aid through in-house staff and through private practitioners. Legal aid is mainly available for family and criminal work. Funding is provided through a mix of State and Commonwealth money. Traditionally, the Commonwealth's contribution was based on historical expenditure patterns. However, this process took no account of demographic or social change, even in basic population number terms. In 1996, therefore, the Commonwealth commissioned the design of a more rational funding allocation process. Consequently, a model based on indicators of *expressed need* was designed to form a new basis for funding allocation between States. The design process started from the premise that, other things being equal, funding should be allocated on the basis of population numbers. To ascertain which characteristics of populations should lead to departure from this premise, an analysis of factors strongly associated with existing demand levels was undertaken (Rush Social Research and John Walker Consulting Services (1996) *Legal Assistance Needs: Phase 1: Estimation of Basic Needs Based Planning Model,* Attorney-General's Department, Canberra). The findings of this analysis were different in relation to different subjects. However, in broad terms, there were three groups of *need factors* – demographic, socio-economic and cost. As regards demographic factors, for example, family legal aid is mainly used by women of child-bearing age. As regards socio-economic factors, employment is significant. Cost factors included business overhead costs. As well as an analysis of expressed need, work was also undertaken on *unmet need*. This involved a survey of the low income population, examining occasions on which people thought legal aid should help but it did not. It also involved a survey of *stakeholders*, exploring what services they thought ought to be provided. Not surprisingly, opinions varied between consumers and stakeholders, illustrating once again the subjective nature of much needs analysis. Nevertheless, the outcome of the process was an empirically derived formula funding method.

[35] See Clark, C. and Corstvet, E. (1938) 'The Lawyer and the Public: An A.A.L.S Survey, 47 *Yale Law Journal* 1972-93.

[36] Abel-Smith, B., Zander, M. and Brooke, R. (1973) *Legal Problems and the Citizen: A Study in Three London Boroughs*, London: Heinemann, p.1

asked whether a tenant with a leaking roof really needed a lawyer, or just a ladder.[37] Providing for a need cannot so easily be justified where the cost outweighs the benefit of resolution.

In the 1990s, the assumption that people who received legal services always needed them also started to be challenged, through the concept of 'supplier-induced demand'. A report produced by the Social Market Foundation in 1994 applied an economic analysis to the increase in legal aid expenditure.[38] It assumed that lawyers, like others, behave as economically rational individuals who seek to maximise their income. They do this by exploiting the information asymmetry between themselves and those paying for their services, by supplying services that funders would not consider to be 'needed' were they in possession of the full facts. It was also argued that the problem of information asymmetry was compounded, in the legal aid context, by a 'moral hazard', whereby clients do not care that they are being over-supplied because someone else is paying. It was then shown that the increase in legal aid expenditure is made up partly of increases in the number of cases undertaken and partly of real increases in the price of individual cases. A picture claimed to be 'consistent with the hypothesis of supplier-induced demand. However, as Gray points out, the theory is not proved: these trends are also consistent with many other trends, including changes in social attitude, legislation, and regulation.[39]

Today, arguments over what constitutes legal need have reached far greater levels of sophistication still. It is appreciated that there are many stakeholders in the legal process, and talk of need must be clarified with a description of whose need is being discussed. The functioning of the court process, for example, benefits greatly from the professional representation of those appearing in the courts. So, the institutions of law might themselves have 'needs' relating to the legal assistance that is provided to lay individuals.[40] Also, the complexities of the concept of 'need' are today better understood. Need is essentially functional. It does not exist independently of an associated end. People do not need legal services, they need the ends which legal services can bring about – even if that is a sense of fairness. Out of this two things can immediately be seen. First, the nature of these ends must be clearly understood – and they may not always be clearly connected to the law even in the context of legal services.[41] Second, the extent to which legal services can be needed *as a*

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[37] Lewis, P. (1973) "Unmet Legal Need", in Morris, P., White, R. and Lewis, P. *Social Needs and Legal Action,* Oxford: Martin Robertson, p.94

[38] Bevan, G., Holland, A. and Partington, M. (1994) *Organising Cost-Effective Access to Justice*, London: Social Market Foundation

[39] Gray, A. (1994) 'The Reform of Legal Aid', 10 Oxford Review of Economic Policy 51

[40] Cf. Ericson's concept of 'system rights'. See Ericson, R. (1994) 'The Royal Commission and Criminal Justice System Surveillance', in McConville, M. and Bridges, L. (eds.) *Criminal Justice in Crisis,* Aldershot: Edward Elgar.

[41] For example, in the family law context, the ends most effectively provided for by the provision of legal services may be non-legal. As Bevan, Davis and Pearce have recently noted, in family law "the process of dispute resolution is inevitably messy and emotional … [and] does not fit easily within the normal legal process" (Bevan, G., Davis, G. and Pearce, J. (1999) 'Piloting a Quasi-Market For Family Mediation Amongst Clients Eligible For Legal Aid', in 18 *Civil Justice Quarterly* 239, at p.241. See, also, Davis, G., Cretney, S. and Collins, J. (1995) *Simple Quarrels,* Oxford: Oxford University Press). As a consequence, as Eekelaar, Maclean and Beinart have observed, the family lawyer spends a great deal of time fulfilling the traditional roles of social worker and confidante (Eekelaar, J., Maclean, M. and Beinart, S. (2000) *Family Lawyers: The Divorce Work of Solicitors,* Oxford: Hart). These roles address the emotional needs of clients in crisis, rather than specific emotional needs that are subject to the legal process.

means to an independent end may vary greatly from case to case. What *type and level* of legal service is required is as important a question as whether legal services are required at all.

As a consequence of the developing understanding of the complexities of the concept of 'legal need', more recent empirical studies have sought only to identify those persons who have experienced problems which could potentially involve legal process, and then characterise the problems and explore people's reasons for either going or not going to law. Thus, in the preface of the report of his 1977 study, Curran declared that the study was descriptive rather than prescriptive, and that the many situations 'encompassed by the concept of legal need' did not necessarily *require* the involvement of the legal/judicial system for resolution.[42] Much more recently, Genn introduced the language of 'justiciable problems' to provide a *need* neutral description of problems which have a potential legal solution.

In the context of the CLS, Moorhead has said that "need assessment is an attempt to develop an objective process about potential demand for services which informs choices about the funding of those services."[43] In order to make fully informed choices, information relating to the prevalence and character of different types of problem is necessary. Thus, the LSRC is conducting a periodic 'need' survey, adopting the basic form of Genn's late-1990s survey in England and Wales, to further the general understanding of: the incidence of justiciable problems; people's efforts at resolving them; people's knowledge, use and experience of legal services; advice seeking behaviour; and the obstacles to accessing legal services. This will enable the LSC to most effectively plan and operate a targeted legal aid scheme in the context of a controlled budget. The periodic survey will also act as a means to monitor the impact of the current reform programme in England and Wales.[44]

CLSP Research

Since their introduction, CLSPs have utilised a variety of methods to assess local patterns of legal need, ranging from consultation exercises, through the use of focus groups, to the conduct of local surveys (commonly utilising 'Citizens' Panels'[45]). Those CLSPs that have undertaken need surveys have mostly covered similar topics – such as categories of problems experienced, sources of advice sought, and

[42] American Bar Association (1994), *Report on the Legal Needs of the Low-and Moderate-Income Public: Findings of the Comprehensive Legal Needs Study*, Chicago: ABA

[43] Moorhead, R. (2000), *supra.,* n.XXX, p.145

[44] The periodic survey is being undertaken by the Legal Services Research Centre, in association with Hazel Genn and the National Centre for Social Research. The sample size of the first of the periodic surveys (the *baseline survey*) will be around 4500 households, with a 3 year reference period. On the basis of the *Paths to Justice* survey of legal, the 4500 households should yield in excess of 1,500 respondents, who will have experienced around 5,000 justiciable problems. The survey will be stratified to provide 3 area 'case study' data sets. This will allow for (a) an analysis of local advice-seeking behaviour, (b) linking of local administrative data, and (c) a series of CLS partnership case studies. As noted, the *baseline survey* questionnaire will be based on that used in the *Paths to Justice* survey, although there will be a greater emphasis on the early stages of disputes. Also, to allow for the development of the LSC's models, the questionnaire will be designed so as to include data equivalent to that available from national small-scale data sources (e.g. benefit data). A first follow-up survey will commence in April 2004.

[45] Citizens panels are broadly representative panels of local residents used by local authorities to obtain local information and measure people's attitudes to matters of local concern.

experiences of the advice process – although no standard methodology or form of questionnaire has been adopted. Sensibly, many of the surveys have been based on Genn's work. In April 2000 CLSPs were provided with a guidance pack for use in designing local information gathering exercises, and shortly they will be provided with an updated set of model questions, for use in surveys, based on the LSC's periodic survey.

Additionally, as part of a programme of local performance monitoring, a short questionnaire, based on the periodic survey and specifically designed for inclusion in Citizens' Panel questionnaires, is being developed. This will, if successful, provide basic information on the incidence of justiciable problems in each CLSP area. Furthermore, the information from the areas could be combined to provide a comprehensive overview of people's experience on a frequent basis.

Conclusions

The legal aid system in England and Wales has been radically transformed over recent years. This paper has focused on key new initiatives that are intended to target legal aid expenditure to the most needy individuals and areas. These initiatives embody a range of methods of prioritisation.

As discussed in the first part of the paper, the financial eligibility test works to prioritise funding for those individuals least able to afford legal services from their own resources. Current reform efforts are aimed at improving the transparency of this form of prioritisation. As discussed in the second part of the paper, the scope of legal aid, and particularly the cost-benefit criteria used to determine whether particular cases will be funded, can be adjusted to effect stated priorities. So, in England and Wales, personal injury cases are mostly now excluded from the scope of legal aid, whilst some cases involving a public interest are now included. Also, the general cost-benefit criteria used clearly reflect a policy of focusing resources on those cases that are most likely to secure a return for the legal aid applicant in question, or society as a whole. As discussed in the third part of the paper, geographical prioritisation based on patterns of experienced need is increasingly becoming possible, and through the efforts of the LSC, LSRC and CLSPs an increasingly sophisticated understanding of local need and supply patterns is being developed.

The LSRC's periodic national survey of need will underpin these general efforts, by providing a benchmark of the incidence of justiciable problems, and allowing a detailed analysis of advice seeking behaviour. The survey draws upon the experience of socio-legal researchers reaching back over half a century, and is firmly founded on Genn's pioneering survey conducted in the late 1990s.

Genn's original survey had a great impact on the development of legal aid policy in England and Wales, and was catalytic in increasing focus on services which offer initial advice, and which act as the most common access and exit points of individuals' progressions through 'the justice system'. We hope that the LSRC's periodic survey will have a similarly profound effect.