



The Law Society

Affordable legal services review

May 2015



Introduction

In many areas legal services are readily accessible and competitively priced with a significant number of highly qualified practitioners competing for clients. This applies particularly in areas such as conveyancing, will-writing and probate where the processes involved are relatively standard (even if the issues are not) and there is money to fund the costs of the lawyer. Regrettably, this is not the case in areas where the issues are complex or contested or where considerable expertise or time is required to deal with problems and the client does not have the resources to pay for that. Recent government policy has accentuated the problem.

Solicitors provide a high level of service and advice that is backed up by lengthy training, strict regulation, independent complaints mechanisms, compulsory professional indemnity insurance and a compensation fund administered by the Law Society. These provide crucial protections for the public and an assurance that advice will be of a high quality. Clearly such advice, as for any professional service provider comes at a cost, but it is a cost that is worthwhile in the long term. As we discuss below, solicitors are able to delegate work to other, less qualified, staff, saving costs where this is appropriate.

The costs of using a solicitor at an early stage are low compared with the costs to other parts of society if that advice is not sought. Seeking early advice can prevent a problem from escalating and reduce further legal costs. In particular, early advice to deal with debt problems or in respect of the benefits that are available to individuals are likely to prevent later problems of homelessness or crime and which have knock-on costs for the NHS, local authorities and other agencies. This is the 'fence at the top of the cliff instead of an ambulance at the bottom' approach that needs careful consideration by government.

The reduction in legal aid and the increasing cost of access to justice

Cuts to legal aid introduced in the Legal Aid Sentencing and Punishment of Offenders Act 2012 have resulted in people having significantly less access to legal advice as 600,000 people have lost access to civil legal aid and funding shortages are forcing pro bono advice centres to shut down. As a result, we are seeing a dramatic increase in the number of litigants in person (particularly in family cases where public funding for most private law family cases was removed) which is increasing the costs and time taken to resolve disputes.

The Jackson reforms have made lower-value and complex cases financially unsustainable for many law firms, which is likely to reduce further the legal advice available to the public. In non-personal injury cases the small claims limit has now been raised to £10,000. This means individuals and small businesses will be unable or unwilling to obtain good quality legal advice on claims which for them represent significant sums, as their legal costs cannot be recovered, even if the case is successful.

Court and tribunal fee increases introduced in the employment tribunal and in the civil courts from April impose a financial barrier which will make access to tribunals and courts unaffordable for many people in a way that may breach the European convention on human rights.

In order to enable people to enforce their rights, the Society recommends that recent changes to the legal system be reconsidered and that there be reform where those changes have caused harm. The Law Society also recommends the development of a coherent civil access to justice strategy to be delivered through a variety of channels in addition to legal aid. This should include:

- improving the way the courts work
- solicitors working differently
- a proper, supported role for pro bono work
- appropriate funding for affordable justice
- incentivising better decision making by public bodies

1. Improving the way the courts work

There are significant inefficiencies in civil procedures and in the way in which the administration of the courts work which create costs for the parties. For example, the common practice of listing blocks of cases together, results in witnesses, litigants and lawyers all having to wait in court for much longer than is necessary. We recommend that:

- there be a full review of civil procedure, particularly in respect of low value cases
- judges be trained to use modern case management procedures for ensuring that cases progress efficiently and that unnecessary costs to the parties are eliminated
- ticketing of judges should be carried forward so that judges with appropriate expertise hear cases as happens in the Family Court
- as many administrative hearings as possible being conducted by telephone, email or videolink, avoiding the need for physical presence in court as often as possible

We are also aware of the recent Civil Justice Council proposals on improving dispute resolution through technology. The Society will be studying the ideas carefully but would stress that:

- it is essential that the system works to produce legally sound decisions
- an element of human judgement, based on legal knowledge will be crucial for all such cases
- such a system will be costly to develop and the court service does not have a great record in delivering IT systems

Law firms are increasingly using technology to make their existing services more efficient and accessible. Firms are offering or using online instructions, online document access, online drafting, digital mail encryption, video conferencing, legal expert systems, web-based information systems, practice management and accounting systems, and email and social media. These services potentially reduce the cost of legal services by:

- improving back-office productivity
- providing low cost delivery and communication channels
- delivering better management information

The Society is alert to the potential for new technology to increase accessibility to legal services. However, we do not believe that technology can fully replace face-to-face legal advice and services, particularly for people who are 'digitally excluded' through poverty, age, disability or lack of relevant education and skills. The development of a personal relationship between an adviser and a vulnerable client can often be necessary to progress a matter effectively. Over reliance on technology risks excluding those who are already marginal.

In the legal aid field, the financial constraints imposed on legal aid firms, law centres and advice agencies have also restricted their ability to innovate and to take full advantage of technology. Innovation requires investment and may also involve substantial capital expenditure to develop and deploy new systems.

We agree with Roger Smith (Legal Education Foundation) who states that 'digital delivery can and should play an important role in delivering legal services to the population as a whole but, for the foreseeable future, it will need to be supplemented by traditional, face to face mechanisms ... digital provision which can incorporate individualised or face-to-face options will be more successful than that which does not.' (December 2014).

2. Solicitors working differently

Following the recent cuts to legal aid, law firms and other organisations are increasingly developing initiatives to deliver more efficient and affordable services. Whilst they do not fill the significant gap left behind by the cuts, they indicate a willingness on firms and services to assist people who are unable to pay for comprehensive legal services. However, it must never be forgotten that law firms are small businesses, which have to be economically viable if they are to survive. Services which are affordable to the public must also be profitable for the firm, taking account of the regulatory and business costs inherent in running a law business.

(i) Alternative business models

The profession has proved very flexible in developing models for providing services. Recent ones have included:

- virtual firms - operating almost wholly from a central server with a computerised case management system, a secure intranet, and an on-line forum to ensure effective communication between its members
- a shared services model whereby back-office services for a number of firms are provided by a single management company, allowing firms to reduce their overheads
- a shared model where firms practice under the umbrella of a single firm which provides back office services, insurance and, indeed, assistance in marketing and tendering, while maintaining the independence of firms and the quality of the advice that they give

These models show that law firms are evolving to meet the needs of the market. The Society supports firms taking individual approaches to the way in which they provide services, provided that the basic issues of competence, ethics and standards are not compromised.

In all of this, it needs to be made clear that the profession can only do so much. Law firms are businesses and there is a cost to all legal work. There is a limit to how far efficiencies and changes in practice can provide access to justice if there is no money available.

(ii) Unbundling

Increasingly, law firms are introducing some level of unbundled services as a more affordable alternative to the traditional retainer. The term unbundling is used to describe provision of discrete events of legal assistance in relation to a case under a partial retainer, rather than a traditional full retainer where a solicitor typically deals with all matters from initial instructions until the case is concluded. It is sometimes referred to as 'a la carte' legal services.

Unbundling can operate on several different levels such as:

- providing clients with self-help packs
- providing discrete advice about a specific step or steps in a case or issue on one or more occasion
- checking or drafting documents
- advocacy or provision of a Mackenzie friend in certain circumstances

However, the Law Society does have some concerns regarding firms using unbundling where:

- solicitors may not be fully familiar with a case therefore leaving themselves open to a professional negligence claim if they make mistakes
- solicitors may end up acting outside the terms of their professional indemnity insurance policies and be subsequently accused of professional misconduct by clients, courts or third parties
- a higher number of complaints is possible due to the unrealistic expectations that clients may have about lawyers taking on pieces of a case, and in particular clients expecting lawyers to undertake additional work beyond the scope of the limited retainer

To address these concerns, the Law Society has published an updated practice note on unbundling in family law which will also cover civil law.

Unbundling, however, is not a solution to the problem. It works where the litigants concerned are sophisticated and capable of undertaking what may be quite complex work themselves. Where that does not apply, it is essential that access to full advice and support is available.

3. A proper supported role for free legal advice

When considering the role of pro bono work, it is important to remember that this work is generally only possible where a solicitor is part of a thriving legal business. Although retired solicitors and those on career breaks can undertake pro bono, the amounts involved are very small.

Pro bono is free legal work carried out, on a voluntarily basis, by lawyers, in the public interest. Solicitors do an enormous amount of pro bono work, unprecedented

in almost any other business or profession. This work is diverse in scope, and not limited to areas of law which were, or still are, eligible for legal aid. It covers international pro bono work, advice for charities and social enterprises, as well as work for individuals with domestic legal needs.

Pro bono work is based on a willingness to undertake work in individually deserving cases. Its essence is in voluntary charitable acts. The provision of pro bono legal services cannot cover the gap left behind by the legal aid cuts. It is not appropriate to base an access to justice policy on the assumption that solicitors with a particular expertise will be willing to undertake a certain level of pro bono work, particularly if the funding and profitability of paid-for work in that field is significantly reduced. The heavy government emphasis in the past ten years or so on solicitors in the legal aid world acting as hyper-efficient businesses is incompatible with the delivery of pro bono work. The firms and solicitors most affected by funding cuts, and with the greatest expertise in the relevant areas, have the least amount of resources to dedicate to pro bono work. Moreover, pro bono work depends on there being sufficient infrastructure within which it can be delivered. This is often provided through law centres and CABx. As a result of the cuts to legal aid and local authority funding, these organisations have had to reduce the amount of work they do providing this infrastructure, and therefore there have in many areas been reductions in the amount of pro bono work available alongside the legal aid cuts.

An area where pro bono might work is a triage system, using pro bono solicitors, which help clients to discern what type of legal service they require. This could be done via face-to-face one-off appointments, 'drop-in' clinics, telephone advice lines or through a web-interface. This model would enable people who can't afford, or think they can't afford, a lawyer to receive initial advice about their legal problem. It would enable them to make an informed decision about whether they can solve their problem without legal support or whether they require expert legal advice. This might also allow people to determine the likely cost and 'affordability' of further legal advice they might seek.

Ultimately, pro bono provision cannot exist in a vacuum. It needs to have a space to operate in, and community partners to collaborate with, in order to provide a meaningful service. If the generalist advice sector continues to be cut and to decline, then there will inevitably be a decline, not a growth, of pro bono provision.

4. Appropriate funding for affordable justice

In recent years a number of funding mechanisms have been developed to enable people to manage the cost of litigation. These include conditional fee agreements, damages based agreements and third party funding. Before-the-event and after-the-event insurance products have also played a part. These have played a major role in enabling people to establish their rights. However, there are problems:

- they tend only to work where there is likely to be a financial outcome at the end – so there is a pot of money from which additional costs can be paid – this is particularly the case following the recent reforms to civil costs arrangements
- they are not appropriate in many family cases involving children because of the incentives that they create for lawyers
- third party funding is only available for the highest value cases

- as the small claims limit increases, consumers are prevented from recovering their costs from the other side. This is a disincentive to seeking proper advice at an early stage
- many consumers do not have before the event insurance cover

The Society believes that these problems need to be addressed. It recommends that:

- the effects of the changes to the civil justice system be reviewed with a view to putting the victims of negligence and other civil wrongs back in a position where they can properly enforce their legal rights. For example, success fees in Conditional Fee Agreements should once again (in whole or in part) be recoverable from negligent and wrong-doing defendants
- any further increase in the small claims limit in non-personal injury cases be cancelled and actively consider reducing the limit back to £5,000
- any increase in the small claims limit in personal injury cases beyond the current £1,000 limit be ruled out. Given that even relatively small cases may involve serious injury such as broken bones or serious scarring, it is vital that injured people have clear access to appropriate legal advice
- alternative methods of funding should be encouraged. Frequently consumers may not be able to find the up-front costs of litigation but can do so over time

In addition to existing insurance products, there is scope for loan arrangements to be developed to enable legal services be properly funded.

5. Incentivising better decision-making by public bodies

There are significant bodies and organisations which create work for the legal system and, therefore, costs which are outside of the control of the legal aid system. Such 'polluters' include local authorities and other organisations that take decisions which are inappropriate or fail to act on their statutory duties. Incentives and disincentives need to be built into the system to reduce the number of cases that require legal advice and representation. We recommend that:

- courts use their costs powers to penalise public authorities and others who cause unnecessary costs to be incurred by practitioners and the legal aid fund
- in legally aided cases public authorities, such as the UKBA, local authorities and others whose administrative decisions are overturned by courts and tribunals should be required to pay the costs of the claimant to the legal aid fund, together with a surcharge. This could be rebated where the issue concerned involved a complex area of law. This is akin to the provisions regarding qualified one-way costs shifting in personal injury cases
- the threshold for making wasted cost orders should be lowered. Some agencies need more encouragement to comply with court orders and directions. Cases that are cancelled at the last minute or become ineffective due to non compliance by these agencies increase costs and these costs are often borne out of the legal aid budget. We believe these costs should be met by the agencies responsible for them and that the costs should not fall on the legal aid budget

Conclusion

A strategy for ensuring proper access to justice is essential, particularly in those areas affecting fundamental rights but also where a citizen simply needs advice. Some of this will need to be funded by the State and we believe that there is a strong economic case for reversing many of the LASPO cuts and doing so in a way that will enable citizens to assert their rights. This means:

- early access to legal advice and support provided by qualified and regulated people
- a variety of options available for people who may wish to do some work themselves
- exploration of alternative systems to finance legal action
- exploring polluter pays arrangements to provide incentives for government and local authorities to reach correct decisions first time round
- intelligent use of technology to provide information and assist decision-making while recognising that some cases need a qualified lawyer to provide advice

The Society is keen to assist. Solicitors have a key role to play in the administration of justice and we wish to keep it that way.

Recent changes have meant an erosion in affordable access to justice. The Public Accounts Committee and the Justice Select Committee have identified this problem and recommended that the government take urgent steps to address it. Our recommendations are designed to help the government do this.