

Affordable Legal Services for Everyone

The Law Society's perspective



Affordable access to legal advice is a basic right for everyone. Justice is at risk when expertise is needed to deal with complex or contested legal issues and the person does not have the resources to pay.

In this document we highlight how recent changes have made it more difficult to get legal help, and suggest some solutions.

These include:

- Improving the way the courts work



- Solicitors working differently



- A proper, supported role for free legal advice



- Appropriate funding for affordable justice



- Incentivising public bodies to make better decisions.





THE IMPACT OF LEGAL AID CUTS AND THE INTRODUCTION OF COURT FEES ON ACCESS TO JUSTICE

Getting legal advice early

Solicitors provide a high level of service and advice that is backed up by:

- Lengthy training
- Strict regulation
- Independent complaints process
- Compulsory professional indemnity insurance, and
- A compensation fund administered by the Law Society.

These provide crucial protections for the public and an assurance that the advice they get will be of a high quality. As for any professional service such advice comes at a cost, but it is a cost that is worthwhile in the long-term.

The costs of using a solicitor to resolve problems early are low compared with the knock-on costs that the taxpayer picks up when problems escalate. In particular, early advice to help people deal with debt or benefits problems is likely to reduce later problems of homelessness or crime. This can avoid additional costs for the NHS, local authorities and other agencies.

Reductions in legal aid and increases in court and tribunal fees have both impacted on affordable access to justice.

Reductions in legal aid

The government's own analysis of the impact of cuts to legal aid shows they have resulted in people having significantly less access to legal advice. 600,000 people have lost access to civil legal aid. Funding shortages are forcing law centres, which use volunteers to provide legal advice, to shut down. As a result, we are seeing a dramatic increase in the number of people having to represent themselves in court (particularly in family cases where public funding for most cases has been taken away). This means it takes longer to resolve disputes, which adds to the costs of the public-funded courts.



The increasing cost of access to justice

Cuts have made lower value and complex cases financially unsustainable for many law firms. This is likely to further reduce the legal advice available to the public. In cases that don't involve personal injury, the small claims limit has now been raised to £10,000. Their legal costs cannot be recovered, even if their case is successful. This means people and small businesses will be unable to obtain good quality legal advice on claims which represent significant sums of money to them.

Fee increases introduced in employment tribunals and in the civil courts impose a financial barrier. This makes access to tribunals and courts unaffordable for many people in a way that may breach their basic rights.



What can be done?

To enable people to enforce the rights they have as part of living in a civilised society. The Law Society recommends that recent changes to the legal system are reconsidered and changed where those changes have caused harm.

We also recommend the development of a joined up approach to civil access to justice by the next government 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 free legal advice
- Appropriate funding for affordable justice
- Incentivising public bodies to make better decisions.

We address each of these issues in turn.



IMPROVING THE WAY THE COURTS WORK

Improving efficiency

There are significant inefficiencies in the way in which the courts work which create costs for everyone. For example, the common practice of listing blocks of cases together results in witnesses, people bringing or defending claims and lawyers all having to wait in court for much longer than is necessary.



What can be done?

We recommend that:

- There is a full review of the process for civil cases, particularly for low value cases
- Judges are trained to use modern case management procedures to ensure that cases progress efficiently and that unnecessary costs are eliminated
- Judges already approved as having appropriate expertise should be scheduled to hear relevant cases. This already happens in the Family Court
- As many administrative hearings as possible should be conducted by telephone, email or videolink, avoiding the need for physical presence in court as often as possible.

Technology and other innovation

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
- E-mail
- Video conferencing
- 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 Law Society understands the potential for new technology to increase accessibility to legal services. City firms, for example, would be able and willing to assist courts with their efforts to make better use of technology.

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).

We believe that technology cannot fully replace face-to-face legal advice, particularly for people who cannot access technology through poverty, age, disability or lack of relevant education and skills.

The development of a personal relationship between a legal adviser and a vulnerable client, such as someone with limited mental capacity, can often be necessary to make progress. A focus on technology risks excluding people who are already marginalised.

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.



What can be done?

There have been recent Civil Justice Council proposals on improving dispute resolution through technology. Effective use of technology could help reduce costs.

The Law Society will be studying the ideas carefully but technological solutions must ensure that:

- The system works to produce legally sound decisions
- An element of human judgement, based on legal knowledge is always included
- The court service is properly funded to deliver any solution
- The nature and importance of the hearing is fully taken into account.





SOLICITORS WORKING DIFFERENTLY

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 make a profit for the firm while taking account of the costs of running a law business.

Following the recent cuts to legal aid, law firms and other organisations are increasingly developing ways to deliver more efficient and affordable services. While these do not fill the significant gap left behind by the cuts, they demonstrate a willingness by solicitors to help people who are unable to pay for comprehensive legal services.

The legal profession has proved very flexible in developing models for reducing costs whilst providing quality legal 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 online forum to ensure effective communication between solicitors
- A 'shared services model' where 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 assistance in marketing and tendering. This helps to maintain 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.



What can be done?

The Law 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 funding available.

Unbundling

Traditionally a solicitor typically deals with the whole issue from initial instructions until the case is concluded. The term unbundling is used to describe dividing the different parts of legal help in relation to a case and giving clients the option to ask for help with only some of these parts.

Increasingly, law firms are introducing some unbundled services as a more affordable alternative.

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
- Checking or drafting documents
- A non-legally qualified person supporting the client in a court hearing (often called a Mackenzie friend).

However, the Law Society does have some concerns for clients and their solicitors using unbundling where:

- Solicitors may not be fully familiar with the whole case, leaving the potential for mistakes, poorer client service and professional negligence claims if mistakes are made
- Solicitors may not be covered by their professional indemnity insurance to work on parts of a case
- A higher number of complaints is possible due to the confusion that clients may have about solicitors taking on parts of a case. In particular clients might expect solicitors to undertake additional work beyond the scope of the work they have been commissioned to do.



What can be done?

The Law Society has published a practice note on unbundling to help solicitors consider the risks and benefits of this approach.

Unbundling, however, is not the whole solution to the problem. It works where those bringing or defending a case are capable of undertaking quite complex work themselves. It is essential that full access to advice and support is available for those unable to represent themselves.





A PROPER, SUPPORTED ROLE FOR FREE LEGAL ADVICE

Pro bono is free legal work carried out, on a voluntary basis, by lawyers, in the public interest. 65 per cent of solicitors undertook some pro bono work last year. This is unprecedented in almost any other business or profession. This work is diverse 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 legal needs.

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 work, the number of cases they can handle is very small.

Pro bono work is based on a willingness to undertake work in individually deserving cases. It is a voluntary charitable act of corporate social responsibility.

Pro bono legal services cannot cover the gap left behind by the legal aid cuts. It is wrong to assume that solicitors with a particular expertise will be willing to undertake a certain level of unpaid work, particularly if the funding and profitability of paid-for work is significantly reduced.

The heavy government emphasis in the past 10 years or so on solicitors in the legal aid world acting as hyper-efficient businesses has reduced the capacity for pro bono work. The firms and solicitors most affected by funding cuts, and with the greatest expertise in the relevant areas, now have the least amount of resources to dedicate to unpaid work.

Pro bono work also depends on there being good infrastructure within which it can be delivered. This is often provided through Law Centres and Citizens Advice Bureaux. 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. In many areas there has been the double impact of reductions in the amount of pro bono work available alongside the legal aid cuts.

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 advice agencies continue to be cut, then there will inevitably be a decline, not a growth, of pro bono provision.



What can be done?

Many firms and individual solicitors have a long history of supporting Law Centres and if the government matched their support this would make a great contribution.

An area where pro bono might work is a system, using pro bono solicitors, which helps clients decide 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 mean people who can't afford, (or think they can't afford) a lawyer could receive initial advice about their legal problem. It would mean they could make an informed decision about whether they can solve their problem without legal support or whether they need expert legal advice.

This might also allow people to determine the likely cost and affordability of further legal advice they might seek.





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:

- No win no fee agreements – where payment is based on the outcome of the case
- Damages based agreements – where the fee is a proportion of the damages awarded
- Third party funding.

These have played a major role in enabling people to establish their rights.

However, there are limitations:

- They tend only to work where there is likely to be a financial outcome – so there is a pot of money from which additional costs can be paid – this is now an issue following the recent increases in civil costs arrangements
- They are not appropriate in many family cases involving children because the concept of winning is wholly inappropriate in cases involving children
- Third party funding is only available for the highest value cases
- Insurance products have also played a part. Car insurance and household buildings and/or contents policies sometimes also include legal advice cover. Car insurance often, but not always, limits cover to motoring issues. Household policies often cover a range of civil and social welfare issues, but usually not crime and family. They sometimes limit what help you can get – perhaps via a telephone helpline, or from a limited number of panel solicitors.





What can be done?

The Law Society believes that these problems need to be addressed. We recommend that:

- The effects of the changes to the civil justice system are reviewed to put the victims of negligence and other civil wrongs back in a position where they can properly enforce their legal rights. Defendants found to have acted wrongly should pay the wronged party's full costs, including any success fees payable under a no win no fee agreement
- Any further increase in the small claims limit in non-personal injury cases be cancelled and active consideration given to reducing the limit back to £5,000 (it is currently £10,000)
- 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 to be properly funded.





INCENTIVISING BETTER DECISION MAKING BY PUBLIC BODIES

Government bodies, local authorities and other organisations sometimes take decisions that are inappropriate or fail to act on their statutory duties. This creates work and costs for the legal system.



What can be done?

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 powers to fine public authorities and others who cause costs to be incurred by the legal aid fund and solicitors
- Public authorities, such as the UK Border Agency, the Department for Work and Pensions, local authorities and others sometimes have their administrative decisions overturned by courts and tribunals. In legally aided cases where costs are not recoverable by the claimant, those authorities should pay those costs to the legal aid fund, together with the surcharge. There could be exceptions where the issue concerned involved a complex area of law. This approach already applies in personal injury cases
- Some public bodies 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 public bodies increase costs. These costs often fall on the legal aid budget. The threshold for making those responsible meet these costs should be lowered so that the legal aid budget is not hit.





CONCLUSION

A strategy for ensuring proper access to justice is essential, particularly in those areas affecting fundamental rights but also where a person simply needs legal advice.

Some of this needs to be funded by the state and we believe that there is a strong economic case for reversing many of the recent 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
- Intelligent use of technology to provide information and assist decision-making while recognising that some cases need a qualified lawyer to provide advice
- Appropriate funding
- Providing incentives for government bodies and local authorities to reach correct decisions first time round.

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 next government do this.

