

**THE TRANSFORMATION OF ACCESS TO LAW AND JUSTICE IN
ENGLAND AND WALES**

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During the height of the Second World War the British government earnestly considered how Britain should be rebuilt at the end of the war. It asked William Beveridge, former director of the London School of Economics, to enquire into this topic and in 1942 he produced the *Report to the Parliament on Social Insurance and Allied Services* which recommended that the government should find ways of fighting the five ‘Giant Evils’ of Want (poverty), Disease, Ignorance, Squalor and Idleness (unemployment) (Beveridge 1942: 6). His report fathered the modern welfare state as we know it (Open Learn n.d.). These movements were followed by the Rushcliffe Committee of 1945—and the UN 1948 Universal Declaration of Human Rights—whose recommendations led to the Legal Aid and Legal Advice Act 1949 (Lawcentres.org.uk n.d.). One significant cause of the new approach to legal aid was the boom in divorces in the immediate post-war period with a peak of 60,300 divorces (Legalaid60.org.uk n.d.). This was in part due to the return of men from the war, and the effective emancipation of women as a result of war work and (state endorsed) movement into the public sphere to keep essential services operating and munitions being produced by female factory workers.

Legal aid is now enjoying its 60th birthday in the UK (Robins 2009). So, the question is: does it still have a vibrant “third age” ahead or is it ready to be pensioned off? This paper will explore the tension inherent in this question by looking at the recent history of legal aid and access to justice, and also the new developments occurring within the system.

There is an interesting contrast between the provision of health by the National Health Service (NHS) and the provision of legal aid in the UK. Both institutions were formed at the same time with the rise of the post-war welfare state in Europe. One significant difference is the way the services would be distributed to their constituencies: health would be provided by a set of state-run and funded hospitals with additional services supplied by the private sector. Essentially all doctors would become state employees unless they chose to opt out. Health became a state industry (Greengross et al 1999; Rivett n.d.).

Law, however, took a different route. No lawyer wished to become a state employee nor did government see virtue in implementing a state-run legal service. Instead it decided to make the legal profession itself responsible for the distribution of legal aid funds. In essence, it outsourced the provision of legal services to the profession. Government would grant the money and assist the Law Society in devising tests of eligibility and financial limits, but the actual distribution and management of funds would be handled by lawyers themselves. Law remained in the private sector, i.e., the “judicare” model. Indeed, Lord Bach, currently the minister responsible for legal aid, noted that “legal aid is the biggest ticket of public expenditure delivered exclusively through the private and not for profit sectors” (Bach 2009). For the last 20 years third-party institutions have mediated the legal aid relationship between government and the legal profession. First, it was the Legal Aid Board (LAB) established in 1989 taking over control of legal aid from the Law Society (the legal profession’s representative body). Second, in 2000 the Legal Services Commission took over from the LAB and now handles contracts and payments to lawyers (LSC website).

There is an enormous difference in the two budgets. In the last several years government has been increasing spending on health at a vigorous rate. At today’s value the 1948 budget of the NHS was £9 billion; the present budget is more than £90 billion (NHS website). Targets have been set that resolutely insist a patient is diagnosed and treated within an 18-week period. And just recently our health ministry has stated that failure to

provide this will mean that patients will have the right to go to private hospitals for treatment, at public expense (PharmaTimes 2009).

If we examine the legal aid budget a different story emerges. In 1988, at today's prices, the legal aid budget was £835 million (Bach 2009) and by 1997 the legal aid budget had risen to £1.5 billion per year (Cook 2007) and by 2006, with the publication of Lord Carter's legal aid procurement review, the budget had risen to £2 billion where it has remained (Carter 2006). Now government, in the light of the financial crisis, wants to halve the budget if possible through efficiency savings (Gibb 2009a).

An important feature of the legal aid budget is its division into criminal and civil legal aid. Government takes the view that criminal legal aid is a compulsory spend to meet the right to a fair trial required by article 6 of the ECHR such that £1.2 billion of the current budget is allocated to criminal work. And of that £100 million is spent on a small number of complex criminal cases (Carter 2006:83). The remainder (£0.8 billion) is spent on civil legal aid with the majority going to family and a smaller amount to social welfare matters such as debt, housing and employment (Bach 2009). Civil legal aid is in the situation of being at the mercy of expenditure on criminal legal aid. The greater the demand for criminal legal aid, the less there is to allocate to the civil side.

Although the legal aid budget has risen, the coverage of the civil legal aid scheme has shrunk. In 1997 with the advent of New Labour, eligibility for legal aid meant 52% of people could claim some assistance but by 2009 that coverage had fallen to 29% (Robins 2009). The use of means and merits tests enabled these adjustments to be made. According to the Legal Action Group (LAG) there is now a palpable "justice" gap (Hynes 2009). In terms of *realpolitik* legal aid does not capture the same votes as health and nor does it cover so many as the NHS and is therefore considered dispensable.

The structure of this paper is as follows. First I examine the infrastructure of legal aid in England and Wales, which will entail analyzing recent government policy that has been restricting the coverage of legal aid. Second, I look at ways of supplementing access to justice in areas that have been denied access to legal aid, such as personal injury. Third, I examine suppliers of legal services which involves both the for profit and not for profit sectors. This also includes the use of state salaried lawyers for some work. Finally, I look at new forms of justice services that serve as alternatives to the mainstream. These include the rise in mediation services and institutions such as ombudsmen.

1. Legal Aid Infrastructure

Legal aid expenditure is considerably higher in England and Wales than any other country in Europe or elsewhere for which statistics are available, both in terms of volume and on a per capita basis (Carter 2006; Bowles & Perry 2009). It is hard to discover the reason for this, although some may be adduced. According to Bowles & Perry (2009) expenditure on legal aid is higher in richer countries. While this is not necessarily a startling finding, it places justice within the remit of the welfare state suggesting that rights are justiciable and bureaucratic states need decision making procedures that will test the efficacy of their measures and processes. A system of courts and other decision-making forums are one means of satisfying these conditions which fits within Llewellyn's idea of the role of law jobs (Twining 2000:77). According to Llewellyn we are all members of groups, whether small-scale like clubs or large like nation states which require certain jobs to be done in order for them to function in an orderly way. These

include the tasks of administration, constitution formation, and resolving trouble-cases in the community.

The figures (1 & 2) below, taken from Bowles & Perry (2009:19-20), show the relationship between legal aid spend, criminal and civil, and per capita income and GDP per capita. The spend for England and Wales far exceeds that of the other countries listed in the figures. Even in countries which match England and Wales in GDP the expenditure on legal aid is still lower. Countries with higher per capita incomes such as Liechtenstein and Norway spend less than England and Wales.

Figures 1 and 2

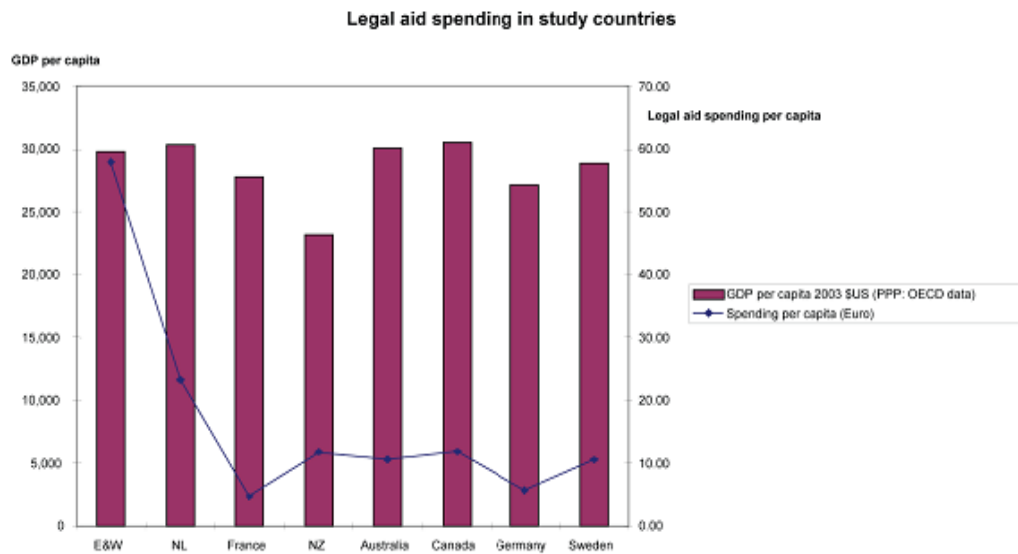


Figure 5.2 Legal aid spending and GDP in study countries

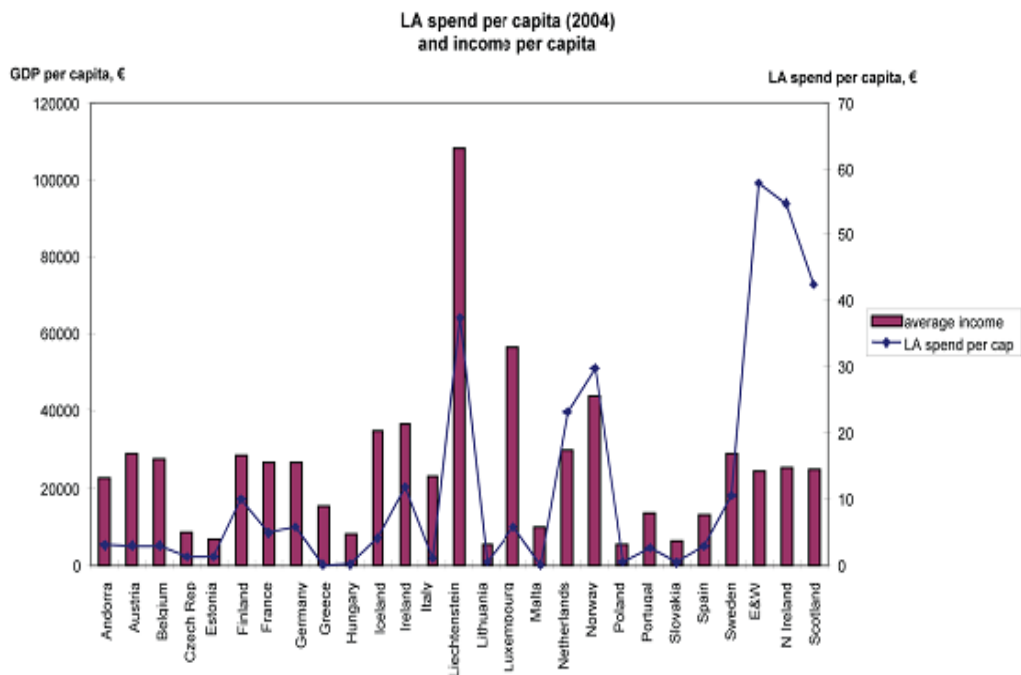


Figure 5.1 EU legal spending and GDP

The figures show that legal aid expenditure per capita (on 2004 figures) runs at about €58 (roughly equivalent to about £38 in 2009) (MoJ 2009a:7). According to Bowles & Perry the reasons for England and Wales greater spend is largely due to greater volume of support. More cases per capita are supported than elsewhere, and in the civil sphere there is also higher spending per case. Bowles & Perry (2009:22) use CEPEJ (European Commission for the Efficiency of Justice) data to demonstrate these differences, as shown in their table 1 below.

Table 1

Table 6.1 Legal aid volumes, costs and spending in study countries

	E&W	NL	FR	NZ	AUS	CAN	GERM	SWED
Criminal cases supported per 10,000 population	298	79	57	102	51	79	n.a.	n.a.
Spending per case supported, €	1,108	1,118	350	613	n.a.	776	n.a.	n.a.
Spending per capita, €	33.5	8.8		6.3	n.a.	6.2	n.a.	n.a.
Non-criminal cases supported per 10,000 population	161	131	77	48	26	n.a.	70	n.a.
Spending per case supported, €	1,542	1,092	350	1,169	n.a.	794	657	n.a.
Spending per capita, €	23.8	14.3	2.7	6.0	n.a.	5.7	4.6	n.a.

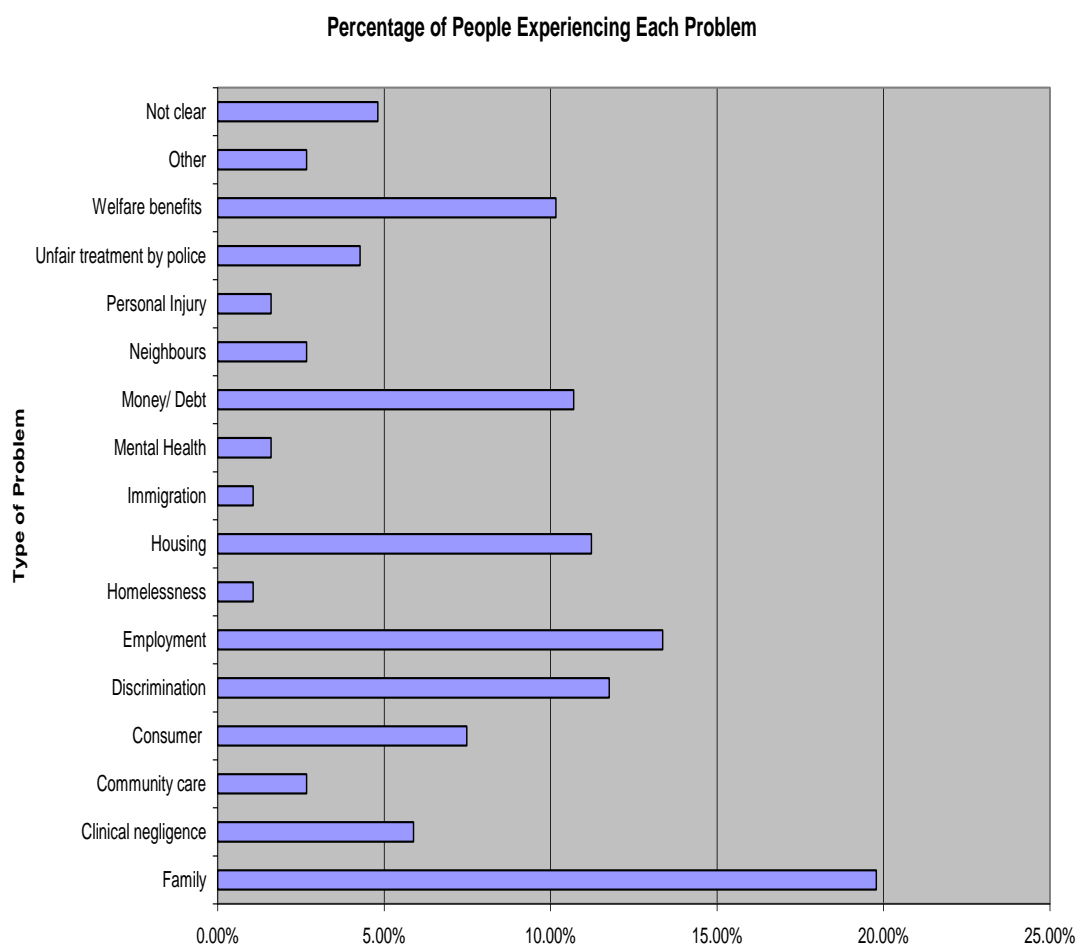
Source: CEPEJ Report (2006), tables 4 & 9

Only the Netherlands has a higher spend per criminal case. In all other categories England and Wales is significantly higher. The researchers were not able to establish definitively what the drivers for the higher numbers were. They did find, however, that a greater proportion of cases were brought to court than in other countries which could increase the demand for legal aid (Bowles & Perry 2009: 32).

In civil the number of cases supported was higher and the average cost per case ranged from €1,092, in the case of the Netherlands, to €350, in the case of France. As family matters take up the bulk of the civil legal aid budget, the researchers found that there was a close link between the volume of cases supported and the number of divorce petitions filed (Bowles & Perry 2009:30). All other cases fell dramatically in volume—especially in personal injury—which had the effect of pushing up the average cost per case.

Focusing on the UK we can get a clearer idea of the civil law area from a survey carried out by LAG and the Access to Justice Alliance (AJA) in 2008 (LAG 2008). The survey looked at the range of problems people sought help with as figure 3 below shows (LAG 2008:3):

Figure 3



In addition to family the next most significant problems were employment, housing, money/debt, and welfare benefits. Often these problems occurred in clusters thereby intensifying the difficulties of clients who frequently were not able to articulate the full range of their problems and also creating difficulties for advisers who were not always capable of discerning the full range of problems (Moorhead & Robinson 2006). All of these are features of the financial crisis and its effects.

As I mentioned earlier legal aid has been demand-led with modifications to eligibility limits as the form of control over numbers. While it has had the effect of removing more and more middle-class people from access to legal aid, demand has remained high. Government's response was to apply the principles of "new public management" (Moorhead 1998). This saw the old Legal Aid Board (LAB) replaced by the Legal Services Commission (LSC) under the Access to Justice Act 1999. The consequence of this change was that funding of legal aid was brought within the remit of the UK Treasury (it now had the power to cap expenditure), which had before been under the control of the LAB (See s.5 of Access to Justice Act 1999) (Hynes 2009: 6).

The act brought in other changes to the system. It introduced new funding rules and new services to augment and in some cases replace the old ways of handling legal aid. A new

category of “excluded services” in civil law was raised and included negligence claims (except for medical negligence), property transfers, wills, defamation claims, boundary disputes, and business law (Hynes 2009). In effect this left family, some employment law, judicial review and social welfare law issues, to be covered by civil legal aid.

In addition to the changes in funding, new institutions were created along with the LSC. The Criminal Defence Service (CDS) would take over criminal legal aid. The Community Legal Service (CLS) would coordinate existing civil legal aid and advice. The CDS needed law firms to sign up to contracts, but there was a battle over the payments which required the government to increase the amounts involved in order to persuade sufficient numbers of firms to sign up. As Hynes puts it, “The new CDS consisted mainly of repackaging existing suppliers into a rebranded service...” (2009:7).

The CLS was a qualitatively different affair to the CDS. It consisted of disparate groups including law firms, law centres, not for profit agencies, and Citizens Advice Bureaux.¹ The CLS would provide a coordinated structure that would target legal aid “as a tool to help poor people solve social welfare problems by gaining access to the justice system” (Hynes 2009:6). It would replace the legal aid fund.² Under the Labour government the number of franchises held by not for profit agencies grew from 42 to over 400 thereby making them an integral part of the system (id.).³

Inherent in the success of both of these services was the continued use of specialist quality marks (SQM) as a requirement for obtaining franchise contracts. The purpose of the SQM is to ensure that the organizations offering complex legal services under funding from the LSC would operate according to certain standards including good client care. The main standards are:

- an efficient organization
- well-managed
- connected to other services which might be necessary so that it can manage clients’ cases (LSC 2009:5).

Some groups, such as LAG and the Advice Services Alliance ASA, held the requirements were overly-prescriptive and bureaucratic, which fitted in with the new public management ethos. One other effect of the CLS and SQM was the capping of budgets. When suppliers formed their contracts they were capped on the amounts of work they could do. Once they reach their limits they have to turn away clients (Hynes 2009:7).

Despite the changes introduced in the Access to Justice Act 1999, the problem of legal aid funding has continued to vex government and this led to the setting up of Lord Carter’s review of legal aid procurement in 2005.⁴ Carter’s brief was to find ways of

¹ See www.legalaid60.org.uk for history of legal aid and its main institutions such as Citizens Advice Bureaux and neighbourhood law centres.

² Certain public interest cases, e.g. lung disease in miners, are still funded. See source at n.1. And Very High Cost Criminal Cases also have their own unit to monitor them.

³ Franchises are long term contracts awarded to legal services providers for specific areas of work provided they meet certain quality standards.

⁴ In the interests of openness, my colleagues and I were commissioned to undertake some research for Lord Carter’s review. See Research into criminal defence services in other jurisdictions: <http://www.legalaidprocurementreview.gov.uk/publications.htm>. Report available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349853.

improving procurement so money could be saved. His main finding was to introduce more competition into the legal aid market, “A healthy legal services market should be driven by best value competition based on quality, capacity and price” (Carter 2006:3). He placed emphasis on fixed pricing for legal work except for where the cases became complex when variable pricing could be used. This would all be underpinned by “best value tendering” (BVT), otherwise known as a “reverse auction” of the contracts.

Best value tendering has been one of the most controversial approaches to legal aid fund management. The LSC carried out a consultation on BVT across the entire criminal justice system in 2007 but it met with universal opposition from the legal profession (Law Society 2009). The result was that the LSC waited until 2009 to carry out a second consultation on a more limited BVT scheme that would cover “lower crime work in police stations and the Magistrates’ Courts (id.) The Law Society claimed a reverse auction scheme would lead to over 2,000 law firms losing out with 800 of them going out of business as a result of losing contracts (Gibb 2009b). Lawyers’ representatives further claimed that black and other ethnic minority law firms would be disproportionately represented among the losers. Indeed, research commissioned by the LSC showed that black and minority ethnic (BME) lawyers and law firms were over-represented in criminal defence provision, both within London and outside (MDA 2006). In London, for example, “46% of criminal legal aid contractors are BME owned firms compared with 42% of firms that are White owned” (id.:80). The original scheme envisioned BVT rolling out in 2010 but because of consistent opposition, and the threat of a new government not supporting the measures, plans have been postponed. However, two pilot schemes are to run in Greater Manchester and Avon and Somerset in 2010 (Gibb 2009c).

Clearly legal aid funding is under attack. The response to new proposed fees in family work gives a flavour of the strength of feeling among the legal profession.⁵ The number of firms engaging in family work has dropped from 4,500 in 2000 to 2,800 in 2006. And the new rates are said to amount to a cut in 40% of hourly rates:

Lawyers say that, for a simple child contact case taking 14 hours, a legal aid firm now earns £960 on the basis of an hourly rate. The new fixed fee would be £471, a cut of more than 50 per cent. Similarly, a legal aid firm that is handling a straightforward divorce dispute over money which goes to a full hearing would receive £2,106. Under the fixed-fee regime, that would fall to £1,299, a cut of almost 40 per cent (Gibb 2009d).

The present government wants to achieve efficiencies in the Ministry of Justice budget of £1 billion which will affect legal aid (Ministry of Justice 2009:3). When cuts to the budget are posited it usually means that civil legal aid will suffer. But we might be entering a new era where the criminal legal aid budget undergoes similar treatment. Some argue that, despite Carter’s claim that complex cases take £100 million a year; the figure is much higher at £680 million a year. And this is where considerable savings could be made, both on prosecution and defence sides (Gibb 2009e). The debate, accelerated because of the financial crisis, is set to run for some considerable time.

2. Supplementing Access to Justice

⁵ For example, see the response to the family legal aid funding consultation by the LSC and MoJ in October 2009 (Solicitor.info Blog 2009).

Part of the problem with the funding of access to justice in the UK is the issue of costs. The UK operates a civil costs or fee-shifting rule where the loser pays the legal fees of the winner. The purpose of this rule is that in a money damages case, the defendant can make a payment into a court (a settlement offer) which the judge does not see. If the trial verdict is less than the payment or the claimant loses, the loser must pay costs. Ultimately it is a drive towards settlement away from trial. There is at present a large-scale study of the costs of litigation being undertaken in the UK by Lord Justice Jackson (see Civil Litigation Costs Review website). Jackson paints a picture of publicly-funded civil cases or claims (by the LSC) that were concluded with the LSC having to pay costs, in 2007/08, totalling 18,087 at a total cost to the LSC of nearly £75 million (Jackson 2009:55). Taking medical negligence claims as an exemplar of the trajectory of an LSC-funded claim, there were—in the period—2,837 claims in total. Of these 2,184 were settled or dropped before issue. A further group of 525 were settled or dropped between issue and trial. Finally, 128 claims went to trial, under 5% of the total number of claims for which legal aid certificates were issued (Jackson 2009:57).

The cases where the LSC recovered its costs totalled 4,964 of which medical negligence amounted to 1,526 claims. Of these 73 were settled or dropped before issue. A further 905 were concluded after issue but before trial and 211 were concluded at trial or on appeal (14% of total) (Jackson 2009:60). As Jackson puts it:

The majority of weak clinical negligence claims were dropped or settled before issue. In the case of strong clinical negligence claims...the majority proceeded beyond the stage of issue but were settled in favour of the claimant before trial (id.).

How then are claims funded in a time when legal aid is being decreasingly funded as shown above? Perhaps the main source of financial support now comes from the insurance industry. It is worth comparing the situation with Germany because it relies heavily on legal expenses insurance (Flood & Whyte 2006). Legal aid in England and Wales accounts for 13% of funding for litigation as compared to 8% in Germany. However, funding from insurance and other non-state sources amounts to 35% of funding for litigation in Germany compared to 4% in England and Wales (Booth 2009). We can see the scale of support insurance offers even though the figures are in dispute. In 2006 there were between 258,309 and 518,821 personal injury claims arising out of road traffic accidents, the majority of which are settled between insurers before issue (Jackson 2009:61).

Personal injury claims are one of the main categories of claim in civil justice but since 2000 under the Access to Justice Act 1999 they have been excluded from legal aid. The answer has been found in conditional fee arrangements, otherwise known as “no win, no fee”. The essence of the arrangement is that if a claimant loses then he does not have to pay his lawyer’s fees, but he still may have to pay his opponent’s costs. If the claimant wins then the opponent will pay the lawyer’s fees plus an uplift which could be as much as 100% of the fee (Yarrow 2001). In order to cope with the potential for loss, insurers have stepped in with “after the event” insurances (ATE), which itself can be a recoverable cost. Often the ATE is financed through a loan agreement, which in itself is an extra burden on claimants (id.). And, interestingly, in the case of medical negligence, Jackson’s figures show us that half of claims are supported by legal aid while the others are supported through conditional fee arrangements (CFA).

The problem with CFAs has been the bewildering amount of documentation and rules accompanying them. Most clients have been unable to understand the commitments they are asked to take on, especially loan agreements for ATE insurance, and consequently have found themselves in difficult situations (Yarrow & Abrams 1999). Lawyers are not the only culprits when it comes to exploiting CFAs. A number of intermediate claims handlers have emerged that advertise heavily in the press and on TV in order to get clients. They all promise “no win, no fee” agreements and attempt to settle all cases. Until recently they have not been regulated and have caused extensive misery to clients who were unaware of the nature of the agreements they were signing so that the Compensation Act 2006 has introduced a Claims Management Regulation Unit which can cancel the authorisations of rogue companies. And since 2007 one hundred authorisations have been cancelled (MoJ 2009b).

CFAs, although under review for personal injury and defamation claims, are now being used in commercial litigation, again for which there is no legal aid. But the major development is in third-party funding where financial services or insurance companies create funds to enable litigation actions if the returns seem worthwhile. At present most funders seek cases where the damages range from £500,000 to £2 million minimum (Langdon-Down 2009). Lord Justice Jackson sees a future for third-party funding as a means of increasing access to justice, but at present there is a ban on its use in personal injury and death claims. Nevertheless, third-party funding has enjoyed success in Australia, the US, and Germany (Booth 2009).

Although ATEs are tied up with the funding of litigation and its aftermath, another means of funding is before the event insurance (BTE also known as legal expenses insurance). This is commonly used in countries like Germany and Sweden, but much less so in the UK, and is usually sold with house, car insurance, and credit cards. It is also sometimes offered as a fringe benefit in employment. It has limits in that it will cover lawyers and court fees but not compensation payments if the case is lost. Moreover, BTE is subject to the insurance company wanting to take on the case, which cannot be guaranteed. The insurance company can effectively subrogate the claim and direct the outcome in a way most suitable for it rather than the claimant (Community Legal Service Direct 2006).

Recent research for the Ministry of Justice (FWD Research 2007) showed a marked lack of understanding of both BTE and ATE by consumers although market penetration in BTE grew by nearly 10% from 50% to 59% in the year before the report. This is probably because insurers are making it a mandatory element in their household policies. However, this does not mean consumers know they have legal expenses insurance cover as most fail to read their policies. Indeed, one problem is that consumers do not know what legal expenses insurance actually means and so its name might have to be changed to reflect its true purpose (*id.*). One fear generated by insurance cover has been that increased access to justice via insurance might raise litigation rates and over-burden courts. As FWD Research note this has been over-emphasized and appears not to occur. Other forms of access to justice cover are offered by trades unions to their members for employment, injury and other claims.

3. Suppliers of Legal Services

The range of suppliers of legal services has grown enormously in the past several years and now encompasses the commercial, not for profit, and the voluntary sectors. But as the LAG-AJA survey on availability of advice showed legal advice is not always easy to

come by, especially after the LSC introduced fixed fees for most civil legal problems in 2007 (LAG 2008). The survey referred to “advice deserts” in part because the numbers of law firms offering civil legal aid have declined from 5,000 to 3,000 in the last 10 years (Pleasance et al 2006). It goes on to say that this loss has been compensated for by the rise in not for profit organisations contracting with the LSC to provide civil legal aid. As mentioned above over the last 10 years the number has grown from approximately 40 to over 400 organisations (Hynes 2009).

The LSC, through the Community Legal Service, has created a portal similar to NHS Direct website, which attempts to provide an information and advice service across the most common areas including family, debt, employment, housing, education, benefits, immigration, health, and government. Community Legal Advice (CLA) offers free general telephone legal advice (but only specialist advice if eligible under their financial limits) and calculations on eligibility for legal aid. According to Lord Bach the CLA helped over 333,000 people in 2008-09 through 560,000 telephone calls (Bach 2009). It also makes referrals to specialist organisations if necessary (CLA website). For example, the CLA website is linked to the Trades Union Congress website, Worksmart (see website), for pay and contract of employment issues. Below in figure 4 is the CLA referral list:

Figure 4



Who we work with

Below is a list of some of the organisations we have either active referral arrangements with, or we are working with to raise awareness of CLA and promote to their customers:

- | | |
|---|---|
| <ul style="list-style-type: none"> Citizens Advice Bureaux Child Maintenance & Enforcement Commission Her Majesty's Court Service ACAS Job Centre Plus/DWP Consumer Direct Tribunals Service Coop Legal Services HMRC Tax Credits Helpline Victim Support Helpline Equalities and Human Rights Commission (CEHR) Parent Know How Consumer Credit Counselling Service Shelter Helpline Financial Service Authority Civil Justice Council Age Concern England Local Authorities through England and Wales | <ul style="list-style-type: none"> NHS services including GPs and PCTs MIND Stonewall Connexions Public Guardianship Office Post Office National Debt Line/Business Debt line Benefits Enquiry Line Veterans Refuge/Women's Aid Turn to Us DCSF Youth Justice Board NACRO Prisoners Advice Service Homeless Link Help the Aged |
|---|---|

The CLA also works in conjunction with community legal advice centres and networks.⁶ These are centres that are composed of mixed groups of suppliers and are viewed by some commentators (e.g. Hynes 2007) as the privatisation of legal aid because they include for profit legal services suppliers in their composition. They are redolent of the original *judicare* philosophy of legal aid. For example, the Gateshead Community Legal Advice Centre (CLAC) is formed of the Gateshead Citizens Advice Bureau and additionally, as subcontractors, three private law firms that provide specialist advice, and is funded by the Gateshead local authority and the LSC. Another CLAC in Derby is run by Access2Law, a community interest company that subcontracts to a citizens advice and law centre, Derbyshire Housing Aid (voluntary sector), and two solicitors' firms. The centre is jointly funded by Derby City Council and the Legal Services Commission. But as Sommerlad & Sanderson emphasised, the "quality of advice networks in local areas was heavily dependent on relationships between tiers of advice within an organisation, and between organisations, which were based on trust and confidence" (2009:i).

Despite the different forms of supply of legal advice and services there is a question as to whether services are reaching their target audiences. In the case of BME clients and others, including Gypsies and travellers, refugees, and sexual minorities, they are more likely to suffer legal problems than others, especially as these groups are vulnerable to social exclusion. They are likely to be discriminated against by legal service providers and therefore received lower-grade advice and assistance (Mason et al 2009).

Yet when government chose to target certain areas such as debt, the results could be marked. In 2004 government set out a strategy, "Tackling over-indebtedness: action plan 2004", which included extra funding for debt advice especially face-to-face advice. The key findings were that debt levels fell considerably and raised avoidance of legal actions occurring including actions by bailiffs (William & Sansom 2007). But the results failed to remain buoyant over a course of 12 months because the debtors did not receive a continued course of counselling (id.).

Goriely's research (1997) showed that mixed delivery schemes do offer a range of satisfactory solutions to the provision of legal aid and that there is a consensus on this. She looked at schemes where delivery was made by *judicare* and salaried lawyers and found that success or otherwise depended on the culture and politics of the community. There is doubt, however, over the success of contracting as a mode of delivery, but more research is needed in this area (cf Genn 1999).

4. Alternative Justice Systems

Government has been aware that "justiciable causes" can be unmet by lying below the official statistics (see Felstiner et al 1980) and that they also represent a danger to the system if they become apparent and people pursue claims. Courts are not able to handle very large volumes of claims, nor are they the most efficient forums at disposing of claims. To this end government has been promoting the use of alternative means. These mainly consist of using complaints procedures where available, especially in the context of complaints against local authorities and consumer complaints. If these avenues should fail, then the use of mediation and ombudsmen is being encouraged (Civil Justice Directgov).

⁶ There is currently a research project, funded by the LSC, underway evaluating these.

One aspect of these types of services is that they are usually free to users/complainants but not to those complained against. Another aspect is that they take place within the shadow of the law: they are designed to be ancillary to the legal system and function without the intercession of lawyers. But they do not exclude the use of the legal system at a later stage. Until recently we did not know how many such bodies existed. The Research Programme in Comparative Civil Justice Systems at Oxford has undertaken a preliminary mapping exercise of these ADR institutions and so far identified over 100 of them (Tulibacka n.d.; Hodges & Tulibacka 2009). These institutions now constitute the largest group of civil dispute handlers in the UK, far outstripping the courts' caseload.⁷

The Financial Ombudsman Service provides a clear example of how this alternative operates (FOS website). The FOS manages complaints involving banking, mortgages, pensions, savings and credit cards, among others. In its review for 2008-09 it handled 789,877 initial complaints from consumers that turned into 127,471 cases of which 113,949 were resolved (FOS 2009). There are three modes of resolution:

1. informal resolution through mediation and settlement—51%
2. resolution by adjudication as an intermediate step—41%
3. resolution by ombudsman making a final decision—8%

The FOS both investigates and adjudicates matters as a free service. These numbers make the FOS the largest dispute resolver in the UK. Other ombudsmen exist in areas such as housing, local authorities, and internet provision. Most are financed by their respective industries rather than the state.

This is an area that is set to develop and grow. For government it reduces costs and effectively outsources the problem to other providers. It also keeps the dispute resolution process closer to the source of the problem (Genn 2008).

5. Conclusions

Legal aid as a means of access to justice is being severely curtailed by government. The scale of provision is being reduced, the level of resource is set to decline, and there is a concerted effort to outsource more of the supply of legal aid services to the private sector. In this respect, after 60 years of existence legal aid is being radically transformed. But are we seeing a new golden age of access to justice? The focus is not clear yet (Citizens Advice Bureau 2009). Many of these changes were initiated before the present financial crisis, which has intensified the depth and scale of problems suffered by ordinary people. And as was pointed out (Flood & Whyte 2006), these problems are separate from a range of others that include health and education, but in a society where, through the welfare state, the concept of rights has become entrenched, government will not completely escape its responsibility in this area. What we can say is that access to justice has moved away from the paternalism of the welfare state to the regulation of a market of legal services/dispute resolution handlers.

⁷ The list devised by Tulibacka (n.d.) is attached as Appendix 1.

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APPENDIX 1

(Tulibacka n.d.)

Civil Justice in England and Wales – beyond the courts. Mapping out non-judicial civil justice mechanisms.

List of schemes and mechanisms:

1. *GENERAL AND SECTORAL ADVISORY AND INTERMEDIARY BODIES:*
 - 1.1 GENERAL ADVICE PROVIDERS
 - 1.2 CONSUMER ADVICE PROVIDERS
 - 1.3 SMALL CLAIMS ADVICE PROVIDERS
 - 1.4 SPECIFIC – SECTORAL ADVICE PROVIDERS
2. *BODIES PROVIDING ADR SERVICES:*
 - 2.1 GENERAL ADR
 - 2.2 SECTORAL ADR PROVIDERS
3. *DISPUTE RESOLUTION AND REDRESS MECHANISMS BY THEME/AREA:*
 - 3.1 FINANCE, PENSIONS AND TAX
 - 3.2 UTILITIES (GAS, ENERGY, WATER, TRANSPORT, RAIL)
 - 3.3 HOUSING: LETTING AGENTS, ESTATE AGENTS, SURVEYORS, HOUSING DEPOSITS
 - 3.4 LAND
 - 3.5 PUBLIC SERVICES – LOCAL AND CENTRAL GOVERNMENT
 - 3.6 EMPLOYMENT
 - 3.7 ASYLUM AND IMMIGRATION
 - 3.8 SECURITY AND TERRORISM
 - 3.9 CARE AND MENTAL HEALTH
 - 3.10 SOCIAL SECURITY, CHILD SUPPORT
 - 3.11 SPECIAL NEEDS, DISABILITY, GENDER RECOGNITION
 - 3.12 COMPENSATION FOR CRIME
 - 3.13 PRISONS AND PROBATION
 - 3.14 LEGAL AND JUDICIAL COMPLAINTS
 - 3.15 HEALTH SERVICE, MEDICINES AND PHARMACIES
 - 3.16 TRAVEL, HOLIDAYS, AVIATION, WATERWAYS
 - 3.17 MEDIA: TV, RADIO, PRESS, INTERNET, TELECOMMUNICATIONS
 - 3.18 POSTAL SERVICES
 - 3.19 VEHICLES – NEW AND REPAIRS
 - 3.20 MOTOR INSURANCE
 - 3.21 HOME AND FURNISHING: CARPETS, REMOVALS, DOUBLE GLAZING AND CONSERVATORY
 - 3.22 DIRECT SELLING
 - 3.23 GAMBLING

1. GENERAL AND SECTORAL ADVISORY AND INTERMEDIARY BODIES:

1.1 GENERAL ADVICE PROVIDERS

Citizens Advice Bureau
National Mediation Helpline
Advice Services Alliance
Law Centres Federation

1.2 CONSUMER ADVICE PROVIDERS

Consumer Focus
Consumer Direct
Which?

1.3 SMALL CLAIMS ADVICE PROVIDERS

The Small Claims Mediation Service

1.4 SPECIFIC – SECTORAL ADVICE PROVIDERS

Independent Complaints Advocacy Service (NHS)
Legal Action Group
Advice UK
Age Concern England
DIAL UK (the disability information and advice service)
Shelter
Shelter Cymru
Youth Access
Child Poverty Action Group
Contracted Advice Agencies Network
Environmental Law Foundation
Law for All
Legal Action Group
Liberty
London Advice Services Alliance
London Lesbian and Gay Switchboard
National Debtline
Refugee Council
Resource Information Service
Royal National Institute for the Blind
The Leasehold Advisory Service
Family Law:

- Resolution

2. BODIES PROVIDING ADR SERVICES:

2.1 GENERAL ADR

The Ombudsman Service Ltd.
Civil Mediation Council
Chartered Institute of Arbitrators
IDRS
CEDR
The Academy of Experts
Law Works
Law Centres

2.2 SECTORAL ADR PROVIDERS

Pensions Advisory Service
ACAS (Employment)
Maritime Solicitors Mediation Service

CENTRES ADMINISTERED BY HER MAJESTY'S COURT SERVICE

Family Law:

1. Alternative Family Law
2. Amicable Divorce

3. DISPUTE RESOLUTION AND REDRESS MECHANISMS BY THEME/AREA:

FINANCE, PENSIONS AND TAX

Financial Standards Authority
Financial Services Ombudsman
Financial Services Compensation Scheme
Finance and Tax Tribunals:
 Financial Services and Markets Tribunal
 Pensions Regulator Tribunal
 Claims Management Services Tribunal
 General Commissioners of Income Tax
Pensions Regulator
Pensions Ombudsman
The Pension Protection Fund
Pension Protection Fund Ombudsman
Consumer Credit Appeals Tribunal

UTILITIES (GAS, ENERGY, WATER, TRANSPORT, RAIL)

Energy Ombudsman
Ofgem
Transport Tribunal
Office of Rail Regulator

**HOUSING: LETTING AGENTS, ESTATE AGENTS, SURVEYORS,
HOUSING DEPOSITS**

The Housing Ombudsman Service
Ombudsman for Estate Agents
Estate Agents Appeal Panel
Surveyors Ombudsman Service
Residential Property Tribunals Service
Valuation Tribunals Service
Schemes for Resolving Tenancy Deposit Disputes
Letting Agents Schemes
Estate Agents Schemes

LAND

Adjudicator to HM Land Registry
Lands Tribunal

PUBLIC SERVICES – LOCAL AND CENTRAL GOVERNMENT

Parliamentary and Health Services Ombudsman
Local Government Ombudsman
Public Services Ombudsman for Wales

EMPLOYMENT

Employment Tribunals
Employment Appeal Tribunal

ASYLUM AND IMMIGRATION

Asylum and Immigration Tribunal
Asylum Support Tribunal
Immigration Services Tribunal
Special Immigration Services Commission

SECURITY AND TERRORISM

Proscribed Organisations Appeal Commission

CARE AND MENTAL HEALTH

Care and Mental Health Tribunal

CHARITY

Charity Tribunal

SOCIAL SECURITY, CHILD SUPPORT, WAR PENSIONS

Social Security, Child Support and War Pensions Tribunals

SPECIAL NEEDS, DISABILITY, GENDER RECOGNITION

Special Educational Needs and Disability Tribunal
Gender Recognition Panel

COMPENSATION FOR CRIME

Criminal Injuries Compensation Appeals Panel

PRISONS AND PROBATION

Prisons and Probation Ombudsman

LEGAL AND JUDICIAL COMPLAINTS

Judicial Appointments and Conduct Ombudsman

Office of Legal Complaints Ombudsman

Solicitors' Compensation Fund

Legal Complaints Service

HEALTH SERVICE, MEDICINES AND PHARMACIES

Parliamentary and Health Services Ombudsman (2x)

Care and Mental Health Tribunals (2x)

NHS Compensation and Redress Scheme (Proposed)

NHS Litigation Authority

NHS Pharmacy Complaints

Prescription Medicines Code of Practice Authority

Codes of Association of British Healthcare Industries

British Healthcare Trades Association

TRAVEL, HOLIDAYS, AVIATION, WATERWAYS

Civil Aviation Authority

Association of British Travel Agents (ABTA)

British Waterways

The Waterways Ombudsman

MEDIA: TV, RADIO, PRESS, INTERNET, TELECOMMUNICATIONS

Information Tribunal

Office of Communications (Ofcom)

CISAS (Communications and Internet Services Adjudication Scheme)

OTELO (Office of the Telecommunications Ombudsman)

Advertising Standards Authority

Press Complaints Commission

POSTAL SERVICES

POSTCOMM – Postal Services Commission

Postal Redress Service

VEHICLES – NEW AND REPAIRS

Retail Motor Industry Federation

Service and Repairs Code of Conduct

The Society of Motor Manufacturers and Traders, New Car Code Conciliation Service

Robert Bosch Ltd (Car Repair and Servicing) Code of Practice

MOTOR INSURANCE

Motor Insurers Bureau

Mechanical Breakdown Insurance Scheme

**HOME AND FURNISHING: CARPETS, REMOVALS, DOUBLE GLAZING
AND CONSERVATORY**

The Furniture Ombudsman

Double Glazing and Conservatory Ombudsman

The Removals Ombudsman

Carpet Foundation Code of Practice

The British Association of Removers (BAR) Code of Practice

FAIR TRADE, DIRECT SELLING

Office of Fair Trading

Direct Selling Association (DSA) Code of Practice

GAMBLING

Gambling Appeals Tribunal