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ACCESS TO JUSTICE – RIGHTS OR RATIONS? COMPARING EUROPEAN LEGAL AID SYSTEMS IN THE CONTEXT OF A SHRINKING BUDGETARY ENVIRONMENT

Lynne Follett

Abstract

The inspiration for this thesis was derived from a week spent in the family law department of a local solicitor's practice. The UK government's reforms to the legal aid system were about to be implemented and appeared to be affecting the work undertaken as well as the morale of the solicitors working there. The discussion reviews the recent and proposed reforms to legal aid in England and Wales and their effect on access to justice. A comparison is made with other legal aid systems within the EU, examining best practices and the rationale behind implementation of reforms in order to develop an exemplar model which may be used as guidance when assessing or comparing legal aid systems in the future.

Introduction

At a time when the legal aid system in England and Wales is considered to be 'in crisis',¹ and described by the judiciary as "scraped to the bone over the last 10 years,"² this article examines the reasons why the system has been so described, and, if there is such a crisis,³ can neighbouring European Union (EU) countries offer any solutions. Leading academics and government officials agree that expenditure on legal services has spiralled to an unacceptable and unsustainable level.⁴ But the question of how access to justice can be achieved within a more realistic budget appears unresolved.

Generally, EU countries, including England and Wales, are moving away from the ideal of 'equal access for all' to a system which will only aid the very poorest section of society in restricted circumstances, as Vera Baird recently commented:⁵

¹ Robins, J., 'Legal aid in crisis as clients are abandoned,' *The Observer*, 8 October 2006.

² Dyer, C., 'Poor suffering most as legal aid is 'scraped to the bone' say judges', *The Guardian*, 24 April 2006.

³ See Lord Hunt 'There's no crisis,' *The Guardian*, 10 January 2008.

⁴ €3,070,000,000 (approx.£2,296,866,406) European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems*, Edition 2006 (2004 data) Budget allocated to legal aid in 2004, p.28 http://www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2006/CEPEJ_2006_eng.pdf (all websites checked for accessibility 1 November 2008).

⁵ Under Secretary, Ministry of Justice and Legal Aid Minister until 29 June 2007 International Legal Aid Group Conference, Antwerp 2007 <http://www.justice.gov.uk/news/sp060607.htm>

Legal aid is fundamental to underpinning the justice system by enabling justice for those who cannot afford to pay for legal advice and representation. Legal aid forms part of the welfare state and is one of the proudest legacies of the progressive post-war Labour governments.

Calls for a halt to current reforms⁶ and legal challenges to the arbitrary use of governmental power in implementing certain reforms⁷ have strained the relationship between the government and the legal profession (and associated supporters) to breaking point.⁸ As the second wave of Lord Carter's recommendations was being rolled out across the country the move to a 'fixed fee payment'⁹ for services provided heralded the end of small (legal aid) specialist firms and potential closure of legal aid departments in family and other law areas. After digesting the reams of reports, consultations, advice papers, and guidelines, practitioners were left wondering whether work on legally aided cases could be justified financially.¹⁰ If the fears of the profession were to come true, 'advice deserts' would appear¹¹ and those firms left likely to decline cases that would not provide adequate remuneration.¹² While legal aid assistance in relation to criminal law is a fundamental human right guaranteed under Article 6(3) European Convention on Human Rights (ECHR); the right to civil legal aid is not so entrenched. Therefore, if savings are to be made it would appear that this area will be targeted most heavily thus the focus of the discussion relates solely to civil legal aid reforms.

Justifying a European Comparison

The article undertakes a comparison with other countries in Europe to try to predict any likely merits or disadvantages that will be experienced if the domestic reforms are fully completed, the objective being to suggest a possible exemplar model. Three countries are compared; England and Wales, Finland and Germany, due to their differences in respect of welfare systems, population, government structure and measurement of data. Finland and Germany are considered in some detail as both offer practices and alternatives that merit inclusion in the exemplar model. A brief overview of trends and commentary regarding the legal aid

⁶ See generally Access to Justice Alliance, Legal Action Group, The Law Society, Shelter, Association of Lawyers for Children, NSPCC, Advice Services Alliance.

⁷ *R(o/a The Law Society) v Legal Services Commission* [2007] EWCA Civ 1264.

⁸ Latham, R., 'The LSC and publicly funded suppliers action under devolved powers,' *Legal Action*, September 2007.

⁹ Lord Carter's Review of Legal Aid Procurement, *Legal Aid, A market based approach to reform* (July 2006) pp.66-72 <http://www.legalaidprocurementreview.gov.uk/docs/carter-review-p1.pdf>

¹⁰ House of Commons Constitutional Affairs Committee, *Implementation of the Carter Review of Legal Aid*, Third Report of Session 2006-07, Volume 1, HC223-I, p.18.

<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/223/223i.pdf>

¹¹ Levinson, H., 'Legal aid crisis 'in some areas,' *BBC News*, 24 November 2005

<http://news.bbc.co.uk/1/hi/uk/4468440.stm>

¹² Dyer, C., 'Solicitors shunning legal aid work as pay rates fall, survey reveals,' *The Guardian*, 7 January 2008.

systems of France, Ireland, the Netherlands and Sweden is integrated with the aforementioned countries. Finland was selected as research confirmed that recent changes to the legal aid system appeared to be 'swimming against the tide of international reforms,'¹³ which were, and still are, moving towards a 'rationing of access to justice.'¹⁴ Finland's scheme offers access to justice to approximately 75% of the population, making it one of the most accessible in the EU.¹⁵ Germany was chosen because it has the world's third largest economy;¹⁶ the largest population in the EU;¹⁷ and is second only to England and Wales¹⁸ in relation to the annual public budget spent on legal aid. Unusually access to justice is largely at the discretion of the individual citizen through a decision to purchase legal expenses insurance.

1 The Development of Legal Aid within the EU

Legal *aid* in Europe began as funding of legal representation in a court of law for those without the means to afford their own lawyer and was considered a minimum requirement under Article 6(3)c) ECHR to give citizens equal access to the law. A person could not have a 'fair trial' if he had neither the understanding to represent himself or the finances to pay a professional to do so. Legal *advice*, as a separate element, was generally only available if legal professionals or voluntary organisations were prepared to offer their services free of charge. After the Second World War, legal aid systems became more comprehensive with early leaders England and Wales (Legal Aid and Advice Act 1949), and the Netherlands¹⁹ including advice and assistance of lawyers as a pre-requisite to representation in court in both civil and criminal matters. The Netherlands system, described by Cousins as 'remarkable,'²⁰ included many areas of law and encompassed not just representation of the citizen, but also education and information for the population.

¹³ Regan, F., and Johnson, J., 'Are Finland's recent legal services policy reforms swimming against the tide of international reforms?' (2007) *Civil Justice Quarterly*, 26(Jul), 341-57 at p.341

¹⁴ Moorhead, R., and Pleasance, P., *After Universalism Re-engineering Access to Justice*, (2003, London, Blackwell), p.2.

¹⁵ Regan and Johnson, p.347.

¹⁶ *Europa*, Europe at a Glance, European Countries, Germany
http://europa.eu/abc/european_countries/eu_members/germany/index_en.htm

¹⁷ German Census 2007: Bevölkerungsrückgang erwartet
http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Presse/pm/2008/01/PD08_019_12411.templateld=renderPrint.psm

¹⁸ CEPEJ, *European Judicial Systems*, p.28.

¹⁹ The Netherlands system was established in 1957.

²⁰ Cousins, M., 'Civil legal aid in France, Ireland, the Netherlands and the United Kingdom - a comparative study (1993) *Civil Justice Quarterly* 12(Apr), 154-166 at p.155.

Some countries responded much later demonstrating minimal commitment to expanding legal service delivery to the population. Before *Airey v Ireland*²¹ reached the European Court, the Irish government had expressed little interest in legal aid funding which has only recently been placed on a statutory basis,²² though already there are campaigns for improvement of the services available.²³ In Germany, the Nazi government's 1935 Law on Legal Advice Act remained valid. This gave authorised lawyers monopoly rights to provide legal work both in and out of court making the provision of general legal advice services outside the legal profession illegal. The system remained unchanged for nearly 50 years until a "modest"²⁴ legal advice system was enacted.²⁵

Funding Approaches and Eligibility

Legal aid in Europe is provided either by the original mutual-interest approach or its successor, the purchaser-supplier approach which evolved due to the increasing need to contain unlimited spending on legal aid.²⁶ The mutual-interest approach involved the funding body (normally the government) working with providers towards a common goal to deliver legal services to the population. The more popular purchaser-supplier approach, applied in England and Wales, takes into account the change in relationship over time between funder and provider. The funding body, the Legal Services Commission (LSC) determines the identity of service providers and their remuneration according to fixed criteria. The LSC, acting with governmental powers, decides which services will be purchased and the appropriate fee under a set pricing structure²⁷ maintaining greater control over the effectiveness of the system, although Moorhead and Pleasance argue this is often just 'a euphemism for cost containment.'²⁸ This method reduces the number of suppliers in the market tempting those remaining to prioritise, or focus solely, on those legal services producing the greatest level of revenue. This can lead to the eventual collapse of the working relationship between purchaser and supplier. In England and Wales, the breakdown is increasingly obvious, as evidenced in recent court cases challenging the denial of legal

²¹ *Airey v Ireland* (1979-80) 2 EHRR 305.

²² Civil Legal Aid Act 1995 and Civil Legal Aid Regulations 1995

²³ FLAC, Free Legal Advice Centres, Promoting Access to Justice, Legal Aid Campaign
<http://www.flac.ie/campaigns/current/legal-aid-campaign/>

²⁴ Blankenburg, E., 'Comparing Legal Aid Schemes in Europe', (1992) *Civil Justice Quarterly* 11(Apr), 106-114 at p.107.

²⁵ Legal Advice Act 1980 Beratungshilfe-gesetz .

²⁶ See Flood, J., and Whyte, A., 'What's wrong with legal aid? Lessons from outside the UK' (2006) *Civil Justice Quarterly* 25(Jan), 80-98 at p.86; Fleming, D., 'The Purchaser-Supplier Approach in Legal Aid' (2002) http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la6-rr03_a16/index.html

²⁷ Standard Fees for areas such as Employment, Housing and Debt, Graduated Fees for Family, Mental Health and other Public Law *Legal Aid Reform: The Way Ahead* (November 2006) Cmnd 6993 p.55 Annex B Timetable for Reforms

<http://www.official-documents.gov.uk/document/cm69/6993/6993.asp>

²⁸ Moorhead and Pleasance, *After Universalism*, p.3.

aid²⁹ and the legitimacy of the reforms being implemented.³⁰ The reverse is apparent in Finland where the harmonious relationship between government bodies and private/public law offices has been described as 'fundamental to the successful incremental development of Finland's legal aid policy.'³¹

Europe generally has moved towards 'contribution' based funding systems to ease the pressure on the legal aid budget. Such approaches can have the adverse effect of restricting access to justice to all but the very poor depending on the criteria used to quantify the amount of contribution required from applicants. This model is now used as standard in all of the countries reviewed although some also rely on other funding methods. 'Fund' is somewhat misleading as technically the delivery of this type of system is based on the citizen arranging their own legal provision through a third party. In Germany and Sweden the 'legal expenses insurance' (LEI) approach is the predominant method of legal aid delivery where citizens purchase an insurance policy which covers a range of legal matters before or after they occur. The policy is designed to protect the holder against the cost of resolving a legal dispute by either bringing or defending a claim.

In Germany cover is usually purchased as a stand-alone policy where the holder can 'pick and mix' the areas of law covered.³² Alternatively, it can be provided as part of a home or motor vehicle insurance policy, which automatically gives the holder access to justice in specified areas. Such policies do not cover all areas of law: 'wilful crimes' are not covered under German policies,³³ and in Sweden, since the 1980s, defamation and divorce have been excluded because of their unpredictable nature in terms of complexity, length of proceedings and more importantly, cost.³⁴ Due to a lack of awareness or means, LEI will not necessarily be purchased by all of the population and this, in turn, inhibits 'access to justice'.³⁵

²⁹ *R (Southwark Law Centre) v Legal Services Commission* [2007] EWHC 1715 (Admin)

³⁰ *R (on the application of the Law Society) v Legal Services Commission* [2007] EWCA Civ 1264

³¹ Regan, F., and Johnsen, J., 'Does access to lawyers solve the problem of access to justice? An evaluation of Finnish legal aid'. A report to the Finnish Ministry of Justice, March 2004, p.3.

<http://www.coe.int/t/dg1/legalcooperation/cepej/events/EDCJ/Cristal/ProjetFinlandeAid2005.pdf>

³² Kilian, M., 'Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience,' (2003) *Journal of Law and Society*, 30(1), 31-48 at p.34.

³³ *Ibid.*, p.37.

³⁴ Regan, F., 'The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expenses Insurance', (2003) *Journal of Law and Society*, 30(1), 49-65 at p.52.

³⁵ See post

There is great diversity in the tests applied to calculate eligibility for legal aid assistance ranging from 'open to closed, simple to complex.'³⁶ This classification reflects the various criteria used to determine eligibility and whether the test is tailored to an individual's situation or universally applied. The French test is 'simple' requiring only the assessment of an applicant's declared net income and their dependents. More common³⁷ are complex or closed tests calculated on an applicant's expenditure (housing, tax, travel), to reach a disposable income figure together with a threshold of assets held.³⁸ In Germany, applicants can only apply for legal aid on proof that they have 'no other reasonable possibility of obtaining assistance,'³⁹ such as LEI. The percentage of the population that qualify for legal aid varies significantly depending on the factors applied to the eligibility test. It is estimated that in Finland, 75% of the population⁴⁰ are now eligible whereas in England and Wales the comparative figure is estimated at just 30%.⁴¹

Reform of Legal Aid Systems

Countries with more developed and long-standing systems, such as England and Wales, the Netherlands and Sweden, have been the first to commence major reforms largely because of the uncontrolled spiralling costs.⁴² In contrast, reform has been undertaken, or campaigned for, in the remaining countries analysed, to facilitate an expansion of services and to increase access to justice.⁴³ England and Wales began reforms with the Access to Justice Act 1999 after spending on legal aid hit disproportionate levels. The more recent reforms contained primarily in the Carter Review have caused much unrest, not only in the legal profession,⁴⁴ but also from pressure groups which fear the worst for access to justice once the reforms are fully implemented.⁴⁵ In Sweden 'sweeping reforms'⁴⁶ began in 1997⁴⁷

³⁶ Buck, A., and Stark, G, 'Simplicity Versus Fairness in Means Testing: The Case of Civil Legal Aid', (2003), *Fiscal Studies*, 24(4), 427-49 at p.429

³⁷ England and Wales, Finland, Sweden.

³⁸ Only Sweden and France ignore assets, although both have very restricted legal aid provision in terms of funding

³⁹ *European Judicial Network in Civil and Commercial Matters*, Legal Aid, Germany http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ger_en.htm

⁴⁰ Regan and Johnsen, *An Evaluation of Finnish Aid*, p.99.

⁴¹ "We reckon that 70% of the population no longer qualifies for legal aid," says Des Hudson, Chief Executive of the Law Society, cited in Robins, J., 'Demand for Legal Aid Soars as Scheme Faces Cutback', *The Observer*, 17 June 2007.

⁴² Department for Constitutional Affairs (DCA), *A Fairer Deal for Legal Aid* (July 2005) Cmnd 6591, p.11. <http://www.official-documents.gov.uk/document/cm65/6591/6591.pdf>

⁴³ Ohm, F., 'Primary Legal Aid in the Netherlands', Paper prepared for the 2nd European Forum on Access to Justice, 24-26 February 2005, p.3 http://www.justiceinitiative.org/db/resource2?res_id=102839

⁴⁴ *Law Society Website*, 'Law Society to issue second judicial review', *Law Society News*, January 2008 <http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=382948>

⁴⁵ *Law Society Website*, 'Legal Aid: Government Ignores Warnings', 22 June 2007

<http://www.lawsociety.org.uk/newsandevents/pressreleases/view=newsarticle.law?NEWSID=344369>

⁴⁶ Regan, 'Swedish Legal Services,' p.49.

which led to a complete shift from reliance on comprehensive, almost universally available, legal services to private LEI policies, which only offered assistance in certain areas of law.

Finland and the Netherlands stand alone when comparing the reasons behind reforms undertaken. Ohm highlights that the primary objectives in the Netherlands were to raise awareness of availability of legal services as well as increasing usage by the most vulnerable in society.⁴⁸ Similarly, the Finnish Legal Aid Act 2002⁴⁹ was intended to increase the percentage of the population eligible and widen access to justice. In Ireland new regulations have increased income limits and excluded the value of owned property from the eligibility test.⁵⁰

Germany has not fallen foul of the same budgetary pressures as England and Wales. The German legal aid system, always very limited with funding unavailable for legal representation in criminal cases⁵¹ and a strict eligibility test, meant only a small percentage of the population could secure any funding. Yet the German government has the second highest expenditure for legal aid within the EU and is being pressured into extending legal services to allow welfare organisations and certain non-lawyer specialists e.g. architects for construction law, to provide advice alongside legal professionals.

2 Legal Aid Provision in England and Wales

England and Wales: Statistics 2007-2008

Population ⁵²	52,419,916
Area ⁵³	244,101 km ²
Average salary ⁵⁴	€36,900
Annual budget spent on legal aid ⁵⁵	€3,070,000,000
Number of legal aid cases per year ⁵⁶	155,065

⁴⁷ Legal Aid Act 1996 – Rattshjalpslagen (1996:1619).

⁴⁸ Ohm, *Primary Legal Aid in the Netherlands*.

⁴⁹ 257/2002; Oikeusapulaki <http://www.finlex.fi/en/laki/kaannokset/2002/en20020257.pdf>

⁵⁰ Civil Legal Aid Regulations 2006

⁵¹ Only legal advice is available which does not include case preparation.

⁵² *European Judicial Network In Civil and Commercial Matters*, United Kingdom, General Information, 24 March 2008 http://ec.europa.eu/civiljustice/homepage/homepage_uni_en.htm

⁵³ *Ibid.*

⁵⁴ CEPEJ, *European Judicial Systems*, p.14

⁵⁵ *Ibid.* pp.28-29

⁵⁶ This figure represents the total number of funding certificates granted 2006/07, Legal Services Commission, *Statistical Information*, 2006/07, p.4

Number of citizens helped by legal services ⁵⁷	2,000,000
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While criminal legal aid was first made available with the Poor Prisoners Defence Act 1903, civil legal aid was not offered until 1914 and even then was generally not reimbursed by the state. In 1949 the Labour government passed the Legal Aid and Advice Act in response to recommendations made by Lord Rushcliffe's committee to provide a more comprehensive state-funded legal aid system for a wider spectrum of citizens, not just those classed as 'poor'.⁵⁸ The committee recognised that a need to provide access to justice for all should be a fundamental right. The report was viewed as an exemplar by other countries who sought to investigate implementation of its recommendations.⁵⁹ While there was high regard for the committee's work, only a limited number of the recommendations were enacted but it established the basis from which today's legal aid system has been developed. Over the next 30 years, the system, administered by the Law Society, was expanded to cover the majority of law areas, widened to include more of the population and was serviced by an ever-expanding group of legal professionals paid hourly for their work. The number of solicitors in private practice rose together with a dramatic increase in legal aid expenditure.⁶⁰ The Legal Aid Act 1988 transferred responsibility for legal aid administration from the Law Society to the Legal Aid Board resolving the potential conflict of interest the Society had with controlling payment of legal aid funds and representing the profession that received them.

The new Board had three main aims: to manage civil legal aid advice and assistance; monitor and improve the quality of service received by applicants and assist the Lord Chancellor in developing and meeting the system's objectives.⁶¹ By the mid 1990s it was clear the demand-led, exploited system was inefficient and expensive. Although the percentage of the population eligible for legal aid had dropped below 50%,⁶² overall expenditure increased from a modest £6.8m to crisis point rising to over £900m,⁶³ double the budget of some of its European neighbours.⁶⁴ In 1994, a pilot scheme allowed Not-for-Profit (NfP) agencies, such as the Citizens Advice Bureau, to provide legally aided advice and

⁵⁷ Ibid.

⁵⁸ *Report of the Committee on Legal Aid and Legal Advice for poor persons in England and Wales*, Cmnd 6641 (1945).

⁵⁹ Elson, A., 'The Rushcliffe Report', *The University of Chicago Law Review*, February 1946, 13(2), 131-144 at p.135.

⁶⁰ DCA, *A Fairer Deal* pp.7-10.

⁶¹ DCA, (now Ministry of Justice), *Agencies and Associated Offices*
<http://www.dca.gov.uk/deprep9902/repchap9.htm>

⁶² Moorhead and Pleasance, *After Universalism*, p.12.

⁶³ DCA, *A Fairer Deal* pp.8-9.8.

⁶⁴ Blankenburg, E., 'Access to Justice and Alternatives to Courts: European Procedural Justice Compared', (1995) *Civil Justice Quarterly* 14(Jul), 176-189 at p.183.

assistance, which gave broader access to different types of legal problems and a consumer-friendly face to legal services. In the same year, voluntary franchising was piloted which became the precursor to legal aid contracts where firms applied to be quality-approved to undertake legally aided work in specified areas of law.⁶⁵ The scheme allowed the Board to monitor the standards of work supplied by the firm and to fix the number of cases and areas of law the firm could work in.

Destabilisation and the Need for Major Reform

The budget for legal aid was not stabilising and the government moved into a phase of wide-ranging reforms; the Access to Justice Act 1999 abolished the Legal Aid Board replacing it with the Legal Services Commission (LSC) and separated civil and criminal funding. The LSC approved legal aid funding for quality assured firms in the form of contracts and established and maintained the Community Legal Service (CLS) in respect of civil funding. A Funding Code set out eligibility criteria requiring contributions from applicants with adequate means.⁶⁶ In 2000, the percentage of the population eligible for legal aid was 47% but around 30% were now liable to pay a contribution.⁶⁷ The new system gave the LSC greater flexibility to distribute funds using the most cost effective method of securing services and included NfP agencies as an integral part of service provision.

The Act now excluded certain categories of dispute from the scope of legal aid: defamation⁶⁸ including malicious falsehood; boundary disputes; the law of trusts; claims by firms and companies; and most notably personal injury claims.⁶⁹ The excluded categories were considered more suitable for Conditional Fee Arrangements (CFAs), introduced in the Courts and Legal Services Act 1990 but which failed to achieve the level of prominence originally envisaged. CFA coverage was expanded to all civil proceedings except family cases, commonly known as 'no win, no fee' agreements, CFAs are contracts made between solicitor and client where the solicitor's basic and uplift/success fees⁷⁰ are deducted from the damages award to the claimant. The court can order the losing party to pay the uplift and any premium the claimant has paid to insure against losses in the case.⁷¹ Although titled 'Access to Justice', the Act's aim was to reduce reliance on legal aid through state funding

⁶⁵ Legal Services Commission, The Story of Legal Aid, The Legal Aid Timeline http://www.legalservices.gov.uk/public/the_story_of_legal_aid.asp

⁶⁶ ss.8-9.

⁶⁷ Pleasance, P., 'An Introduction to Legal Aid Reform in England and Wales', Pan Pacific Legal Aid Conference, Tokyo, 6-7 December 2001, p.10

⁶⁸ Previously excluded but restated for clarity in s.6 and sch.2.

⁶⁹ Personal injury not caused by negligence and clinical negligence remain within the scope of legal aid.

⁷⁰ s.27

⁷¹ s.29.

and move towards self-education or self-help systems, conceded by the government as exclusion “in practice from access to justice.”⁷² In 2004, a new service called Community Legal Service Direct was introduced to increase access to legal services using telephone and internet communication. In the first nine months it received 205,000 calls and the website received 58,000 visitors, confirming the need for such a service.⁷³ Despite ‘further short-term tinkering’⁷⁴ there was no slowing of expenditure on legal aid.⁷⁵ Spending on criminal matters had increased during the period 1997/98 to 2004/05 by 37%, which made the 24% decrease in civil spending irrelevant in the aggregate figure for legal aid spending overall.⁷⁶

The Future of Legal Aid Services

By 2005, the government had concluded that there was ‘no extra money’ available and that fundamental reform was needed.⁷⁷ The recommendations of Lord Carter’s *Review of Legal Aid Procurement* were published in July 2006 and most recommendations have been implemented.⁷⁸ The key change has been a radical move away from hourly rates and tailored fees to a fixed or graduated fee system. Fixed fees are a temporary measure allowing suppliers to prepare for ‘best value tendering’ due to take effect in 2009 when all suppliers will be required to submit tenders to secure contracts from that date onwards. Unified Contracts replaced the General Civil Contracts from March 2007 allowing the LSC to set a minimum and maximum number of cases that suppliers will need to achieve each year. Contracts run for a three year period and will require suppliers to meet quality and results targets; failure will result in non-renewal or could lead to termination if the breach is sufficiently serious.

These reforms have met considerable opposition from the legal profession which claims they will no longer be adequately remunerated for the services they provide or will have to leave the market all together.⁷⁹ The LSC initially declared that over 30% of suppliers would see a decrease in income,⁸⁰ but now confirms, after phase one of the reforms, that this figure

⁷²DCA, Access to Justice Act 1999, The Access to Justice (Membership Organisations) Regulations 2000 <http://www.dca.gov.uk/atoj2000.htm>

⁷³DCA, *A New Focus for Civil Legal Aid: Encouraging early resolution; discouraging unnecessary litigation*, Part 6, p.85.

⁷⁴DCA, *A Fairer Deal*, p.39.

⁷⁵ Ibid. p.12 Overall spending increased by around £200m between 1999-2000 to 2004-05

⁷⁶ Ibid. p.13.

⁷⁷ Ibid. p.39.

⁷⁸ Lord Carter’s Review of Legal Aid Procurement, *Legal Aid: A Market Based Approach to Reform* (July 2006) <http://www.legalaidprocurementreview.gov.uk/publications.htm>

⁷⁹ HCCAC, *Implementation of the Carter Review* p.23

⁸⁰LSC, CLS, Standard Fee Schemes, Replacing Tailored Fixed Fees http://www.legalservices.gov.uk/civil/remuneration/standard_fee_scheme.asp#replacing

stands at 55% of firms nationally.⁸¹ While of concern to small and specialist legal firms, this was always accepted as being part of the fall out of the proposed Carter reforms.⁸² The Access to Justice Alliance submits that closures will leave communities at risk of becoming 'advice deserts' where the only access to justice will be through non face-to-face services.⁸³ The LSC disagree, claiming the development of new Community Legal Advice Centres (CLACs) and Community Legal Advice Networks (CLANs) in the poorest areas of the country, will ease concerns.⁸⁴

CLACs and CLANs were introduced as pilot schemes designed to enable citizens to obtain advice on a range of legal problems from a single organisation, essentially reducing the number of times citizens are passed to different providers for the same legal issue e.g. welfare or housing problems. CLACs were planned to cater for larger urban areas, preferably in one site, CLANs were envisaged for more rural areas, where multiple providers would form an organisation under a lead supplier. Leicester and Gateshead were the first test areas tendered for in 2006. Gateshead opened in 2007 after a successful joint bid from the Citizens Advice Bureau and the pre-existing legal advice centre.⁸⁵ The opening of the Leicester CLAC was delayed until Spring 2008 as the only offer tendered by the existing law centre was declined.⁸⁶

The LSC has not waited, however, to evaluate the results from the Gateshead CLAC and has pressed on with tendering for centres in a further six areas with the first CLAN proposed to be opened in Cornwall.⁸⁷ There are major concerns for providers of publicly funded services; the tendering system is uncertain and time-delayed and the initial three year contract can be terminated if 'performance standards' are not met. It is difficult to see how organisations can plan with any certainty for future funding. And as Andrew Holroyd, Vice-President of the Law Society, points out, if a bidder misses out in the initial contract

⁸¹ LSC, 'Cumulative Impact Assessment: Legal Aid Reform Programme' (Phase 1) p.64 Table 28. http://www.legalservices.gov.uk/docs/cds_main/LSC_Cum_impact_assess_061207.pdf

⁸² Dyer, 'Solicitors Shunning Legal Aid Work,'.

⁸³ Submission to the Constitutional Affairs Committee Enquiry into the Implementation of the Carter Review <http://www.accesstojusticealliance.org.uk/CACsub.html>

⁸⁴ 12-15 Legal Advice Centres estimated to be open by Spring 2009 http://www.legalservices.gov.uk/civil/transforming_civil_legal_aid.asp

⁸⁵ LSC, Press Releases, Minister launches first ever Community Legal Advice centre http://www.legalservices.gov.uk/aboutus/press_releases_5596.asp

⁸⁶ *Rightsnet*, 'Leicester CLAC pilot put on hold', 12 December 2006 <http://www.rightsnet.org.uk/cgi-bin/publisher/display.cgi?1634-11106-25722+policy>

⁸⁷ Cornwall County Council, Community Legal Advice Network - Cornwall <http://www.cornwall.gov.uk/index.cfm?articleid=39874>

tendering process, they may be unlikely to remain in the market for a further three years to make a second attempt.⁸⁸

Other less reported reforms have included the expansion of telephone resources⁸⁹ and the introduction of online and digital television services.⁹⁰ This has increased the number of acts of 'legal help' (by 12% 2006-7),⁹¹ and arguably expanded access to justice for those who do not qualify for means tested legal aid assistance. Despite a change of name within a relatively short period of its launch,⁹² the Community Legal Advice telephone and online services appear to be part of the more successful elements of the recent reforms. The telephone service alone has helped over 750,000 citizens since its launch in 2004 and the website is now receiving over 3.3 million visitors each year.⁹³

The overall objective was to introduce reforms that would 'sustain a fair, efficient and effective justice system accessible by all.'⁹⁴ It is, perhaps, too early to make an accurate prediction about their success. 2006/07 statistics⁹⁵ show that introduction of fixed and graduated fees have not decreased civil legal aid funding to service suppliers when compared with the previous year's budget. In fact there has been an £11.5m increase in expenditure, although the LSC comment this is due to an allowance in the figures for unpredictable data in the early stages of the system.⁹⁶ The LSC confirms that over half of firms are facing a decrease in funding putting them at risk of either withdrawal from services or potential closure if reliant on legal aid funding.⁹⁷ This raises access to justice issues, especially for firms representing black and ethnic minorities. Representatives of these firms argue that the majority of large suppliers left in the market after the reforms, are staffed by predominantly white lawyers, therefore, ethnic minorities will suffer due to lack of specialism in this area. A High Court case was expected on this issue, but was dropped by the Black Solicitors' Network and Society of Asian Lawyers due to government reassurance to evaluate the impact of the reforms on these clients.⁹⁸ Initial statistics confirm that 63% of

⁸⁸ HCCAC, *Implementation of the Carter Review* p.51

⁸⁹ Community Legal Advice, a low cost and confidential legal advice service
<http://www.communitylegaladvice.org.uk/en/about/telephone.jsp>

⁹⁰ Ibid. Web Service <http://www.communitylegaladvice.org.uk/en/about/website.jsp>
Digital Services <http://www.communitylegaladvice.org.uk/en/about/digitaltv.jsp>

⁹¹ LSC, *Statistical Information*, p.2.

⁹² 12 November 2007 from Community Legal Service Direct to Community Legal Advice
http://www.legalservices.gov.uk/aboutus/press_releases_7003.asp

⁹³ Ibid.

⁹⁴ DCA, *A Fairer Deal*, p.39

⁹⁵ LSC, *Cumulative Impact Assessment*, p.50 Table 17

⁹⁶ Ibid.p.50.

⁹⁷ Ibid.

⁹⁸ Mitchell, B., 'Bodies drop judicial review bid on Carter plan', *Legal Week.com*, July 2007
www.legalweek.com/Articles/1040095/Bodies+drop+judicial+bid+on+Carter+plan.html

Black and Minority Ethnic firms in London and 53% elsewhere have seen a decrease in funding levels.⁹⁹ The LSC responds that ‘white’ owned and controlled firms in the same areas are experiencing similar decreases.¹⁰⁰

If decreases in funding to legal services providers means they are unable to remain in the market it will be restricted. If the CLACs and CLANs are a success, it may counteract this effect as many more citizens will be able to resolve their legal problems without the need to involve solicitors or direct legal aid funding, as will any increase in the support offered by the CLA (telephone, website and digital services). As the Constitutional Affairs Committee concluded there has been a “catastrophic deterioration in the relationship between suppliers, their representative organisations, and the LSC.”¹⁰¹ It appears to be too late to halt the implementation of the current reforms, despite the efforts of the Law Society, Legal Profession, AJA and other agencies. There still may be, however, lessons to be learnt in respect of the experiences of other EU countries

3 Third Party Funding: The German Alternative

Germany: Statistics	
Population ¹⁰²	82,499,000
Area ¹⁰³	357,000 km ²
Average salary ¹⁰⁴	€39,815
Annual budget spent on legal aid ¹⁰⁵	€468,400,000
Number of legal aid cases per year ¹⁰⁶	n/a
Number of citizens helped by legal services ¹⁰⁷	578,835

The primary method of legal aid provision in Germany is through LEI policies, which are needed due to the strict approach to legal aid funding. Germany has the largest legal expenses market;¹⁰⁸ the most developed stand-alone market of any European country¹⁰⁹ and

⁹⁹ LSC, *Statistical Information*, p.30

¹⁰⁰ *Ibid.* p.30

¹⁰¹ HCCAC, *Implementation of the Carter Review* p.88

¹⁰² *European Judicial Network in Civil and Commercial Matters*, Legal Aid, Germany

¹⁰³ *Ibid.*

¹⁰⁴ CEPEJ, *European Judicial Systems*, p.14.

¹⁰⁵ *Ibid.* p.28-29.

¹⁰⁶ Unable to locate research data containing a figure.

¹⁰⁷ *European Judicial Systems*, This figure is an estimate due to the difficulty in collating all the Länder data.

¹⁰⁸ *Public Institute Law Initiative*, p.484.

an emerging market in the 'financing' of legal cases.¹¹⁰ The country appears to be a leader in third party funding of access to justice to avoid draining public funds. German legal aid data is difficult to obtain and analyse as there are 16 autonomous federal states known as the Länder.¹¹¹ Each administrative state controls its own individual legal aid budget and method of delivery which leads to differences between funding and aid available. The states are guided by the Legal Aid Advice Act 1980 and by provisions incorporated into the procedural rules contained in the German Civil Code.¹¹² Descriptions made here are based on information contained in the legislation and commentary on the subject.

Blankenburg comments that Germany has a lack of infrastructure for legal aid, apparently a definite choice made by the government.¹¹³ Legal aid can only be obtained by applicants who do not have a LEI policy, very little means and no other alternative source of advice or assistance such as an employer's trade union. The applicant must also show that their case has a reasonable chance of success, limiting frivolous cases from clogging the system; if they lose they will be liable for the costs of the winning party, which are not covered by legal aid. German law distinguishes three types of legal aid: aid for legal advice outside of court proceedings;¹¹⁴ legal aid given to parties in civil proceedings¹¹⁵ and legal aid given to defendants in criminal proceedings. Legal advice aid is the German equivalent of Legal Help available in England and Wales, but can also cross over into representation if necessary. Legal aid in civil proceedings is generally assistance in court proceedings for matters including employment, administrative and finance law. German law currently prohibits legal services from being provided by any person or organisation except advocates of the Bar. This long-standing law originated from Nazi rule and was designed to exclude Jews from working in the legal profession. Advocates fees are fixed under statute¹¹⁶ and some 90% of assistance they dispense is related to divorce cases in civil law.¹¹⁷

¹⁰⁹ FWD Research, 'The Market for 'BTE' Legal Expenses Insurance', prepared on behalf of the Ministry of Justice, July 2007, 4E 1.4, p.52

<http://www.justice.gov.uk/docs/market-bte-legal-expenses-insurance.pdf>

¹¹⁰ *Prozessfinanzierung*, Coester, M., and Nitzsche, D., 'Alternative Ways to Finance a Lawsuit in Germany', (2005) *Civil Justice Quarterly* 24(Jan), 83-102 at p.87.

¹¹¹ Zeeland, C.M.C., van and Barendrecht, J.M., *Legal Aid Systems Compared: A Comparative Research into Three Legal Aid Systems*, Centre for Liability Law Tilburg University, December 2003, p.3.

¹¹² ss.114-127a German Code on Civil Procedure (*Zivilprozessordnung(ZPO)*); s.140 German Code on Criminal Procedure(*StPO*).

¹¹³ 'Access to Justice and Alternatives to Courts,' p.188.

¹¹⁴ Act on Legal Advice Aid and Representation for Citizens on a Low Income (Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen).

¹¹⁵ Legal aid is regulated by ss.114–127 German Law on Civil Procedure and generally understood as assistance with court costs (*Prozesskostenhilfe*)

¹¹⁶ Legal Profession Act s.49bII

¹¹⁷ Blankenburg, 'Access to Justice,' p.183.

The profession obviously favours its monopoly rights as it is protected from outside competition but for this privileged position receives considerably less remuneration than that received from private clients.¹¹⁸ The drawback, for the citizen, is that it limits the number of service providers and legal advice from clinics, self-help organisations and pro bono working is unobtainable. It is also illegal¹¹⁹ for US style contingency fees or CFAs to be used to fund litigation. Without adequate advice services and the risk of facing high costs if they lose their case, many citizens may be forced to give up their legal rights. Suggested reforms to resolve legal problems outside the courts could further decrease the amount of litigation.¹²⁰ In order to access justice, the majority of citizens are forced to turn to third parties to enable them to obtain advice and resolve disputes.

Third Party Funding

The principles of the different types of third party funding are essentially the same. An agreement, typically LEI, is made between citizen and provider whereby the costs and risks of pursuing a legal matter are covered by the provider for a premium or a share of any potential compensation. The most predominant type of LEI is purchased as a stand-alone policy, offering protection against specified legal disputes or problems before they occur, primarily employment; property; contract law; traffic accidents and family proceedings.¹²¹ If the policy covers the matter in question, the applicant will be relieved of liability for his costs: that of the other party should he lose; lawyer's fees; court fees and the cost of expert witnesses.¹²² Opinion amongst commentators is divided on whether LEI provision encourages policyholders into court. Coester, Nitzsche and Danneman agree that it creates a more litigious society,¹²³ where there is no risk in pursuing a claim as all that the policy holder is required to pay is the excess on their policy. Blankenburg,¹²⁴ supporting government data, disputes these claims. Research indicates that purchasers of LEI policies are more likely to be 'middle-income' earners than lower-income earners¹²⁵ who have an increased chance of qualifying for legal aid funding, but are less aware of this fact and of the availability of LEI insurance.¹²⁶

¹¹⁸ Ibid.p.184

¹¹⁹ Legal Profession Act s.49bII

¹²⁰ Blankenburg, 'Comparing Legal Aid Schemes,' p.114.

¹²¹ Danneman, G., 'Access to Justice: An Anglo-German Comparison', (1996), 2, *European Public Law* 271-292.

¹²² Kilian, 'Alternatives to Public Provision,' p.38

¹²³ Coester and Nitzsche, 'Alternative Ways to Finance a Lawsuit,' pp.83-102; Danneman, 'Access to Justice: An Anglo-German Comparison.'

¹²⁴ 'Access to Justice and Alternatives to Courts, p.185.

¹²⁵ Earning between €3,921 and €5,880 (figures have been converted into Euros).

¹²⁶ Kilian, 'Alternatives to Public Provision,' p.47.

Finance contracts, legal factoring and litigation funding agreements are names used to describe *Prozessfinanzierung*, a more recent phenomenon in German legal service provision. First offered in 1998, this method involves a contract between provider and plaintiff. The financier will cover all the costs of litigation, including those required in advance, in return for a share of the compensation awarded to the plaintiff if the case is successful. The plaintiff is free of litigation risks and can decide which lawyer to use to pursue his case. Such agreements cannot be made directly by lawyers as their fees are fixed by law¹²⁷ and to reserve a percentage of the compensation received by their client could, potentially, exceed this fixed fee figure, it would also be against the legal code they agree to uphold. Financiers such as insurance companies, agencies and corporations make the contracts¹²⁸ as they are not subject to the same rules. They will generally offer contracts to cover employment, building, succession and property law matters.

Acceptance procedures are stringent as the loss to the financier can be great if the case is unsuccessful. Companies require full disclosure of all relevant case details, which may be sent to an expert to evaluate the chances of success. If practical, they will also assess the solvency of the defendant to ensure they have sufficient assets to meet any compensation awarded. Agreed contracts will include the percentage the financier deducts after all expenses have been recovered ranging from 20%-50% depending on the amount of claim. If successful, the plaintiff will be left with a compensation figure, minus all the fees paid by the financier, as well as the stipulated percentage of the award. If unsuccessful, the financier covers the case expenses, including the winning party's fees and compensation awarded.¹²⁹ The advantage to the plaintiff is the lack of risk involved; his main issue will be to secure financing given the strict screening process undertaken. Kilian criticises the method as one of last resort once all other options have been exhausted and advises that a 'certain legal and economic environment' is needed;¹³⁰ i.e. a large number of policyholders to spread the insurance risk. In Germany, this 'risk-pool' has built up over nearly 100 years, which is not the case in all EU countries. According to Coester and Nitzsche, financing has increased in popularity, with large German insurance companies setting up financing arms within their current insurance provision.¹³¹ All agree that the market position is tenuous as the risk of large losses is high and some companies have already become casualties. The similarity between financing and CFAs has created problems in the German market, as these are

¹²⁷ Attorney Remuneration Law 2004, Rechtsanwaltsvergütungsgesetz (RVG)

¹²⁸ Eg. FORIS AG, Allianz AG and D.A.S.

¹²⁹ This paragraph has been summarised from Coester and Nitzsche, 'Alternative Ways to Finance a Lawsuit,' this relatively new concept appears to have little English translated articles at present.

¹³⁰ Kilian, 'Alternatives to Public Provision,' pp.36,48.

¹³¹ Coester and Nitzsche, p.101.

unlawful under statute. Although lawyers do not actually make the contract with the plaintiff, or receive a percentage of the compensation, they do act to enable the arrangement to take place and thus 'circumvent' the law.¹³² At the time of writing, it would appear that the government has not made any formal objection to this process.

LEI cover is more comprehensive and unlike financing, does not impinge on any award made to the policyholder so is likely to be the first method a citizen adopts when seeking access to justice, financing acts as a back up where LEI is unavailable. Such funding systems are vital as legal aid is available to so few of the population. Advice services are particularly restricted due to the monopoly rights of advocates though the Legal Services Act 2008 will allow welfare organisations, such as the Citizens Advice Bureau, to give free legal advice. Non-lawyer specialists will also be able to provide advice for matters connected to their expertise. This is a positive step by the government and it can only be hoped that this will pave the way for a full range of self-help and advice services, which are lacking at present.

4 The Legal Aid Scheme of Finland - An Example to All?

Finland: Statistics	
Population ¹³³	5,236,611
Area ¹³⁴	340,000 km ²
Average salary ¹³⁵	€33,000
Annual budget spent on legal aid ¹³⁶	€52,129,000
Number of legal aid cases per year ¹³⁷	56,000
Number of citizens helped by legal services	n/a ¹³⁸

In comparison to its EU neighbours, Finland stands out as having one of the most accessible legal aid schemes. Contrary to the trend, Finland's reforms were actually intended to make

¹³² Ibid. p.95.

¹³³ *European Judicial Network in Civil and Commercial Matters* Legal Aid Information, Finland, http://ec.europa.eu/civiljustice/legal_aid/legal_aid_fin_en.htm

¹³⁴ Ibid.

¹³⁵ CEPEJ, *European Judicial Systems*, p.14

¹³⁶ Ibid. pp.28-29.

¹³⁷ Finland Ministry of Justice, *Information and Costs of Finnish Legal Aid* <http://www.oikeus.fi/20629.htm>

¹³⁸ Rosti, H., et al., '*Legal Aid and Legal Services in Finland*', National Research Institute of Legal Policy, Helsinki, forthcoming, 2008, p.27

legal aid more inclusive for citizens and not to reduce expenditure, decrease the numbers of lawyers or impose alternative methods of provision. The first major reforms in 1998¹³⁹ introduced a more centrally controlled scheme administered by the Ministry of Justice, similar to the role of the LSC. Provision of legal aid was delivered through legal aid offices and clinics staffed by legally trained jurists as well as administrative staff. Although the law permitted funding to be granted with the applicant making a contribution (known as a deductible¹⁴⁰) to the costs, this was rarely used. The new laws confirmed the responsibility of the applicant to contribute using deductibles,¹⁴¹ and introduced a new fee payable by all applicants, including those who qualified for free legal aid. Critique of the 1998 reforms was somewhat conflicting. Regan and Johnsen expressed concerns about coverage of services in rural areas and staff training, while still commending the reforms as ‘an outstanding success’.¹⁴² Rosti argues that success is ‘difficult to determine’ as the reforms were introduced after a period of recession in the early 1990s that may have distorted the number of cases dealt with.¹⁴³ Overall the reforms do not appear to have negatively impacted on access to justice and were, perhaps, a reorganisation process before a comprehensive review of the legal aid scheme was undertaken.

The second stage of the reforms was introduced by the Finnish Legal Aid Act 2002.¹⁴⁴ The Act was intended to increase eligibility of a scheme already described as ‘generous’ according to Regan and Johnsen’s ‘best policy’ model.¹⁴⁵ The reforms have increased eligibility to an estimated 75% of the population,¹⁴⁶ eligibility in England and Wales was estimated at just 47%.¹⁴⁷ The reforms transformed legal aid from a *right* of those with limited means into a *fundamental civil right*, expanding access to middle-income earners who now received 14% of the funds distributed.¹⁴⁸ Although the changes have not affected the number of cases dealt with, the expansion of the scheme has reduced the number of the population who receive legal aid free of charge by 6%.¹⁴⁹ Despite this decrease, 60% of Finland’s population are still eligible for free legal aid.¹⁵⁰ Regan and Johnsen commend this

¹³⁹ Law on Public Legal Aid (Lag om allmän rättshjälp 104/98); Law on State Legal Aid Offices (Lag om statliga rättshjälpsbyråer 106/1998); amendments of the 1973 Law on Free Private Legal Aid (Lag om fri rättegång 87/1973) and respective Decrees; RP 132/1997

¹⁴⁰ Section 3(1) Legal Aid Act 2002 (257; Oikeusapulaki)

¹⁴¹ RP 132/1997, 21

¹⁴² *An Evaluation of Finnish Legal Aid*, p.26.

¹⁴³ *Legal Aid and Legal Services in Finland*, p.45.

¹⁴⁴ Legal Aid 2002 (257; Oikeusapulaki)

¹⁴⁵ ‘Finland’s Recent Services Policy Reforms,’ p.347.

¹⁴⁶ *Ibid.* p.351.

¹⁴⁷ Pleasance, ‘An Introduction to Legal Aid,’ p.5.

¹⁴⁸ Alasaari, K., and Litmala, M., Follow-up study on the reform of Public Legal Aid Act (2002), part 1, 2004 <http://www.om.fi/optula/uploads/euph7b.pdf>

¹⁴⁹ Rosti, *Legal Aid and Legal Services in Finland*, p.33.

¹⁵⁰ *Ibid.*

as a “reasonably fair balance between the applicant and the public’s responsibility for costs.”¹⁵¹ In 2005, the Council of Europe and European Commission nominated Finland’s legal aid scheme for The Crystal Scales of Justice award. Though not the overall winner the scheme was one of seven honoured projects because of its ‘innovative’ practices introduced to ‘improve the public scheme of justice, particularly for users of the justice.’¹⁵² The nomination highlighted Finland’s scheme as an example to other European Union governments.

Provision of Legal Aid

Legal aid can be provided for almost any litigation including divorce, termination of employment, eviction and debt matters,¹⁵³ but provision of advice services is more limited in scope. A means test calculation determines the funds the applicant has available after deductions. If less than €700, the applicant becomes eligible for free legal aid providing they do not have a relevant LEI policy. If the total falls between €700-€1500 the applicant will be required to make a contribution,¹⁵⁴ available means above this limit excludes applicants. Legal aid will not be granted if the matter is of little legal merit, frivolous, or pursuit would constitute an abuse of process.¹⁵⁵ It also cannot be used to cover the costs of the winning party if the applicant loses their case, even if this figure is more than the cost of the funding received which may dissuade some applicants. Successful applicants qualify to be advised by a public legal aid attorney working in one of the 60 legal aid offices. Administrative staff discuss the case with the applicant in the first instance to try and resolve the matter. If this is not possible the applicant is referred to an attorney or other advice agency.¹⁵⁶ Regan and Johnsen’s research identified that some legal staff were concerned at the ‘quality’ of advice given by administrative staff, outweighed, in their opinion, by the advantage of assisting a greater number of citizens who would otherwise have a substantial wait to be referred to an attorney.¹⁵⁷ There are currently 220 publicly salaried legal aid attorneys¹⁵⁸ with monopoly rights to provide all non-litigation legal services and accept all clients from all areas. For the one in five legal aid cases likely to proceed to court,¹⁵⁹ an applicant has the choice between public and private sectors for their assistance and representation. If a private attorney is chosen, they will be remunerated according to the Government Decree on Legal Aid Fee

¹⁵¹ Regan and Johnsen, ‘Finland’s Recent Services Policy Reforms,’ p.350.

¹⁵² http://www.coe.int/t/dg1/legalcooperation/cepej/events/EDCJ/Cristal/Cristal2005projets7_en.asp

¹⁵³ Ministry of Justice, *Information and Costs of Finnish Legal Aid*.

¹⁵⁴ s.3 Legal Aid Act 2002

¹⁵⁵ s.6 Government Decree on Legal Aid 2002

¹⁵⁶ e.g. Debt Advisory Service or Consumer Council.

¹⁵⁷ *An Evaluation of Finnish Legal Aid*, p.25

¹⁵⁸ Ministry of Justice. *Information and Costs of Finnish Legal Aid*.

¹⁵⁹ Regan and Johnsen, *An Evaluation of Finnish Legal Aid*, p.25

Criteria,¹⁶⁰ which currently allows fixed payments,¹⁶¹ hourly rates¹⁶² or a mixture of the two¹⁶³ depending on the nature of the case. Hourly rates are fixed by the Decree at €91 per hour limited to a maximum of 100 hours in all cases.¹⁶⁴

It is well documented that the relationship between attorneys, government and other stakeholders is a harmonious one,¹⁶⁵ though the scheme is not without conflicts. Although restricting non-litigation assistance to public attorneys creates a professional, quality controlled service, it also restricts the applicant's choice of lawyers and routes available. The Finnish Bar Association has complained that the market conditions are not weighed equally between the public and private sectors. In a survey assessing the 2002 reforms, over half the private attorneys admitted declining legally aided cases as the fees were so low.¹⁶⁶ A more pressing concern, for both the Association and the Ministry of Justice, is the referral made by the European Commission to the European Court of Justice in respect of the payment of VAT on legally aided cases.¹⁶⁷ Currently, if an applicant is eligible to contribute to his legal costs and chooses to be assisted by a public attorney, the services provided are VAT exempt. If he chooses a private attorney, the services are not exempt. Even though the Ministry refunds this cost to the private attorneys, it still leaves them at a competitive disadvantage. At the time of writing, the referral has not reached the European Court of Justice, but when it does, it may mean the Ministry of Justice will have to include a change to VAT requirements when implementing the next phase of legal aid reforms.

Funded assistance given by attorneys is essentially a supplementary part of the legal aid scheme. The primary method of provision is through LEI which is not compulsory, yet some 75% of Finnish households have this type of cover.¹⁶⁸ The policy is generally purchased as an 'add-on' to home, motor or business insurance, if the policy covers the matter at hand, legal aid will be unavailable. Other services are limited and in need of the same generous approach the Ministry of Justice has used for litigation services. In 2004, Regan and Johnsen observed a lack of provision for advice services by telephone or internet.

¹⁶⁰ Government Decree on Legal Aid (388/2002; *Valtioneuvoston Asetus Oikeusavusta*, as amended by 867/2007.

¹⁶¹ Ibid. e.g. preparation for trial in a District Court (civil matter) €545 (plaintiff).

¹⁶² Ibid. e.g. appearing in an oral hearing lasting no more than three hours €327.

¹⁶³ Ibid. ss.4 and 6 e.g. appearing in an oral hearing lasting more than three hours €91 per hour.

¹⁶⁴ Unless it is in the interest of justice to extend this maximum authorised by the Court s5(2) Legal Aid Act 2002 (257/2002; *Oikeusapulaki*)

¹⁶⁵ Regan and Johnsen, *An Evaluation of Finnish Legal Aid*, p.22, Rosti, p.46, Alasaari, p.121.

¹⁶⁶ Alasaari, p.121.

¹⁶⁷ *Europa* Rapid Press Release, Brussels, 31 January 2008, *Commission v Finland 2004/4282* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/139&format=HTML&aged=0&language=en&guiLanguage=en>

¹⁶⁸ Rosti, p.8.

Education and literacy services for both administrative staff and the general population were also highlighted as areas for improvement.¹⁶⁹ The Ministry responded in 2005 with the introduction of the Legal Guidance Phone Service supplemented by website and email advice and incorporating The Legal Aid Directory Service. This has proved to be a popular telephone service albeit recent statistics show that of the 11,468 calls received, only half were answered.¹⁷⁰ A possible solution could be to provide these services from more of the 60 legal aid offices or develop a national legal advice service. A telephone Legal Aid Counselling service is also offered for minor disputes but by referral only.

The Finnish legal aid scheme is undoubtedly a success; accessible by 75% of the population, it has no reported budgetary issues and maintains a harmonious balance between stakeholders. The most impressive feature is the responsiveness of the Ministry of Justice to address shortcomings and expand access to justice. In 2009, new legislation is planned to clarify the deductible calculation and improve payments made to private attorneys.¹⁷¹ The mixed scheme of fixed fees and hourly rates is being replaced by payments based solely on hourly rates and time spent dealing with a case.¹⁷² Regan and Johnsen attribute much of Finland's legal aid success to a 'bottom-up' approach utilised by many Scandinavian researchers.¹⁷³ This method provides a comprehensive review of problems experienced by the whole range of social groups in society rather than focusing solely on those of lower-income earners. While this type of research has also been conducted in countries outside of Scandinavia,¹⁷⁴ the actions taken by the Finnish government in response to the findings is markedly different and is why so many of the features of the Finnish scheme are likely to appear in an exemplar model.

5 An Exemplar Model

The components of the ideal exemplar model are now presented followed, in turn, by their application to the current legal aid system in England and Wales; to test how closely it conforms to the proposed model and, where variations appear, to assess whether improvement can be made to the system in the future.

Ideology

¹⁶⁹ *An Evaluation of Finnish Legal Aid*, p..25.

¹⁷⁰ Rosti,p.23.

¹⁷¹ *Ibid.* pp.39-40

¹⁷² Increased to €100 an hour *ibid.*

¹⁷³ 'Finland's Recent Legal Services Policy Reforms,' p.345

¹⁷⁴ E.g. Genn, H., 'Paths to Justice: 'What People Do and Think about Going to Law' 1999, or Pleasance, P., et al. 'Causes of Action: First Findings of the LSRC Periodic Survey', *Journal of Law and Society*, 30(1), March 2003 pp.11-30

Any government seeking to establish or reform a legal aid system should first consider their responsibilities in providing civil legal aid for their citizens as the ECHR only mandates a legal requirement in respect of criminal legal aid, there is only have a moral obligation to make provision for civil legal aid in association with the social welfare of their citizens. Despite a number of legal challenges¹⁷⁵ the right to obtain civil legal has not been codified as a fundamental right available in all European states,¹⁷⁶ nor declared as such by the European Court.¹⁷⁷ The UK human rights organisation, JUSTICE, views access to justice as a 'right' under the Rule of Law. Their manifesto merits inclusion here, in full, as it forms the basis of the exemplar model. It is fair and inclusive yet concedes that it is not possible to provide free legal services to everyone:

Every person in the UK, however poor or disadvantaged, has the right of access to justice. Legal aid must be available in both civil and criminal cases, at reasonable levels of financial eligibility and acceptable levels of contribution. Civil legal aid needs to be protected from escalating expenditure on crime. Eligibility for, and the scope of, legal aid must be transparent and comprehensible. Civil legal services should have a clear focus and purpose.¹⁷⁸

Access to justice cannot be translated as 'free legal aid for everyone' as budgetary constraints will not cater for such provision.¹⁷⁹ The demand-led period in legal aid expenditure is now confined to history for the majority of countries studied and commentators have generally accepted that those who have the means to afford legal services will need to finance their own legal disputes. Citizens who cannot afford their own legal services should receive funding or be required to contribute in part to the services needed. The difficulty is maintaining a sufficiently high number of eligible citizens without allowing abuse of the system by frivolous claims or cases without merit.

Recommendation 1: A legal aid system that caters for as many of the population as possible with a concession to include a fair, easily understood contribution scale. It should also include a complete range of easily accessible legal services which are free to all in some service areas.

¹⁷⁵ *Airey v Ireland* (1979-80) 2 EHRR 305, *Santambrogio v Italy* 61945/00 21 September 2004, *Steel and Morris v UK* 68416/01 ECHR 2005

¹⁷⁶ Efforts have been made to increase civil legal aid provision e.g. Recommendation (93)1E on effective access to the law and justice for the very poor, 8 January 1993

¹⁷⁷ In fact in *Santambrogio v Italy* 61945/00 21 September 2004, the Court actually declared reluctance to influence means testing for legal aid unless clearly arbitrary or discriminatory

¹⁷⁸ JUSTICE Manifesto for the Rule of Law launched February 2007

<http://www.justice.org.uk/images/pdfs/JUSTICE%20manifesto%20for%20the%20rule%20of%20law%20.pdf>

¹⁷⁹ None of the EU countries researched provide all legal services free to their citizens

The overall objective of the government in England and Wales is to “sustain a fair, efficient and effective justice system accessible by all,” but calls for a halt to the current reforms and recent legal challenges to the arbitrary use of power by the government in implementing those reforms has strained relations between the government and the legal profession to breaking point. This may have a negative effect on the provision of legal aid to the most vulnerable in society.

Advice and Representation Services

Citizens do not always go to court to solve their legal problems, in fact, research has shown it is actually rare for them to do so. The Legal Services Research Centre (LSRC) Periodic Survey confirmed out of the 5,611 respondents to the survey, 35.9% experienced ‘justiciable’¹⁸⁰ problems yet 19% of this group did not take any action to resolve their legal issues.¹⁸¹ Earlier research conducted by Genn reported a similar percentage.¹⁸² Genn’s and the LSRC research assessed citizen’s contact with the law, both confirmed that citizens who do not take any action in respect of their legal problems are those who lack funds, education or awareness of availability of help. Regan and Johnsen concur, adding that this is often because they believe nothing can be done to help them¹⁸³ and are unaware of where they can obtain advice, what legal redress they may be entitled to or how to achieve this. Genn states that her research highlights ‘the profound need for knowledge and advice...for resolving justiciable problems.’¹⁸⁴

Legal services also need to be spread as effectively as possible across all areas of the country. ‘Advice deserts’ should not exist where legal professionals decline cases or have left the market altogether. Provision and monitoring of legal services should be paramount in relation to ethnic minorities to make sure they are not discriminated against due to lack of specialist advice. An information and awareness approach should form part of the infrastructure of any legal aid scheme through a variety of methods: telephone advice and referral processes; website; email and digital television as well as through a support network of connected welfare organisations such as debt counselling or consumer helplines. Giddings and Robertson refer to this approach as ‘self-help’ and also list legal transaction kits; legal coaching; limited legal representation and public education workshops as

¹⁸⁰ Moorhead and Pleasance, *After Universalism*, p.16.

¹⁸¹ Ibid. p.24.

¹⁸² Genn, ‘Paths to Justice,’ p.24, 16%.

¹⁸³ *An Evaluation of Finnish Legal Aid*.

¹⁸⁴ ‘Paths to Justice,’ p.30

alternative services which can expand access to justice to certain groups in society.¹⁸⁵ 'Self-help' legal services have an important role to play in the overall provision of legal services, but concern has been expressed about placing too much reliance on them or substituting these services in place of legal aid. Giddings and Robertson, although studying Australia rather than the EU, gave a general warning that assumptions should not be made about citizens and their ability to understand often complex legal processes and rules. They suggest a combination of 'self-help' services with other legal services,¹⁸⁶ so that the citizen is not left to navigate through the whole process alone.

Recommendation 2: Any legal aid scheme must include all legal services to allow citizens access to solve the more common day-to-day legal problems, not just those that would necessarily proceed to litigation, and all alternative methods of help should be exhausted before litigation assistance is invoked

England and Wales has a fully developed range of face-to-face advice services, which are supported by telephone, web and email. NfP organisations, such as the Citizens Advice Bureau, also form an important part of legal aid provision and add variety of competition into the system. There is a high demand for these low-cost or sometimes free services. Firstly, because access to justice has been expanded to a greater number of the population, but alternatively, because eligibility criteria has been severely restricted so as to leave these services as the only option available to citizens. The LSC should be advised to heed Giddings and Robertson's warning not to over rely on 'self-help' and general advice services. To depend solely on these services would be to the detriment of certain citizens who need a greater level of personal service. The effectiveness of the newly introduced CLACs may offer a satisfactory solution to the this issue, but as the most established CLAC is under a year old and there are not any CLANs at the time of writing, it is too early to assess their effect. Alternative methods such as CFAs, Mediation Helplines, ADR, and LEI are readily available for cases where legal aid is declined. .

Provision of Legal Aid

The purchaser-supplier method is the most popular in the countries studied, although each has its own uniqueness in respect of the identity of suppliers. The ultimate purchaser is the government, generally represented by a body charged with overseeing delivery and maintenance of the legal aid system. The benefit of having a recognised body is to separate

¹⁸⁵ Giddings, J., and Robertson, M., 'Large Scale Map or the A-Z? The place of Self-help Services in Legal Aid' (2003) Volume 30, Number 1, *Journal of Law and Society*, 102-119 at pp.102-103.

¹⁸⁶ *Ibid.* pp.118-119.

the control from governmental power as an outward sign of some independence. The schemes utilised were also unique although adopting some combination of private and public sectors was common practice. In Finland, representation (litigation) services are provided by both sectors, but advice services are restricted to publicly salaried legal professionals. In England and Wales there is soon to be a contract based system where private legal professionals or organisations tender for contracts to provide bundles of advice and representation services. In Germany, legal services are solely delivered by the private sector as the law allows these professionals a monopoly over advice and representation services. There are advantages and disadvantages to all three methods but restricting advice services to legal professionals will narrow access to justice as there is only one channel providing the services. Similarly, restricting a type of service to one sector narrows competition, can lead to complacency and is likely to be lower in remuneration rates if provided by private legal professionals. A contract tendering scheme can control expenditure levels, but also may lead to poorer service quality in certain cases or areas.

Recommendation 3: The method of delivery should be left to individual governments to carefully consider based on resources in the legal sector, or historical factors in the case of established systems.

Legal services are soon to be provided under a “best value tendering” system where contracts are tendered for by single or collaborations of organisations, such as private sector advice companies¹⁸⁷ and law firms. This new system has been designed to enable the LSC to control the costs and quality of work undertaken by the chosen suppliers. The reforms are at an interim stage, where fixed fees have been introduced to the majority of law areas in preparation for the move to “best value tendering”. This is not necessarily an incorrect choice for legal aid provision. Research from Germany and Finland, reveals that legal professionals have objected to low rates of remuneration under their fixed fee schemes and Finland is moving towards hourly rates. The key is to achieve a balance between cost control and adequate remuneration for service providers. The introduction of fixed fees (and proposed “best value tendering”) has been met with much criticism from the legal profession and initial research concludes that suppliers are facing dramatic decreases in income received for legally funded work. Objections and suggestions raised in the various consultation processes¹⁸⁸ have been largely overruled by the government as it continues to push forward the reform process. Initial statistics are less than satisfactory and the LSC has

¹⁸⁷ A4E, Private Sector Training Business, <http://www.a4e.co.uk/PublicLegalAidServices.aspx>

¹⁸⁸ E.g. *Legal Aid Reform: The Way Ahead*, Summary of the reforms and changes from consultation proposals
http://www.legalservices.gov.uk/docs/consultations/Consultation_changes_v3.0.pdf

been unable to confirm that a reduction in civil legal aid spending has been achieved. It is difficult to see how this relationship can be repaired without a period of reflection and complete evaluation of the reforms to date before “best value tendering” is rolled out.

Funding of Legal Aid

Legal aid systems could not be maintained if all services were available free to all citizens. A contribution should be determined as part of a means and merits test used to assess the applicant’s financial resources. Alternative methods of funding should not be overlooked. The funding schemes in Germany, Finland and Sweden offer access to justice to those who would not qualify under a contribution based eligibility test such as LEI. There does not appear to be any major reason to exclude LEI from the exemplar model. Policies are generally comprehensive, covering the major law areas and all risks for the policyholder on commencement of litigation action. It is not, however, recommended that LEI be made compulsory or be used to completely replace legal aid funding especially as lower-income earners often lack the awareness or funds to purchase cover of this nature. There may be difficulties for countries which do not have a developed LEI market as in Germany, it is suggested that countries undertake research into the feasibility of this system before implementation, especially if it becomes a central part of legal aid funding. Financing is a relatively new phenomenon in Germany and research is, so far, inconclusive as to its relative success, until this market is more stable in Germany and accurate evaluations can be made it should be excluded from the exemplar model. Similarly it is difficult to assess the success of CFAs using only England and Wales as an example and for this reason they are not given prominence in the model especially as the collapse of a large personal litigation company exposed unethical behaviour and limited opportunity of recovering the full amount of compensation awarded.¹⁸⁹

Recommendation 4: a contribution based approach should be adopted.

A contribution based approach is used in England and Wales but the eligibility test is restrictive, especially when compared to the system in Finland. The current criterion disqualifies citizens: earning over £2,350 per month; with savings above £8,000; and with a large amount of equity in their home. The test is relatively transparent, but works strictly against those who have savings or equity in their property, even though the overall costs of

¹⁸⁹ Claims Direct, O’Hara, M., ‘Collapse adds insult to injury’, *The Guardian*, 20 July 2002
<http://www.guardian.co.uk/money/2002/jul/20/consumernews.howtocomplain1>

bringing their case may exceed these amounts. The current percentage of the population estimated to be eligible for legal aid in England and Wales is 30%, this is not satisfactory to sustain a “fair and accessible” system, and one effectively “rationed” to only the poorest members of society. Alternative funding methods should be more actively encouraged. LEI in England and Wales is generally purchased (or is included free of charge) as an ‘add-on’ to motor or home insurance policies. This is perhaps why citizens are unaware that their policy has this cover or the benefits it can offer. Recent research suggests if LEI is to become a complementary part of the system efforts must be made to promote the existence and purchase of these policies.

Eligibility for Legal Aid

Regan and Johnsen¹⁹⁰ suggest that a ‘generous’ legal aid scheme would include 50% of the population thereby excluding the legal aid schemes of England and Wales, Germany and Sweden as ‘restrictive’. Finland, on the other hand, has been able to achieve an eligibility level of 75% proving that a higher figure can be attained. Arguably it is not the percentage of the population eligible that reveals how accessible the legal aid system is, but the level of contributions made. In theory 100% of the population could be eligible, but if 99% of them are required to contribute to the cost of their services, the scheme could not be described as ‘generous.’

Recommendation 5: Any scheme should aim for at least a 75% eligibility model

As the German example, illustrates LEI policies can significantly increase eligibility and if utilised more fully in England and Wales it could make a real difference to access to justice.

Kilian concludes that there are two possible obstacles in developing the LEI market in England and Wales: the inability of insurers to assess the cost risk of each case and the size of the risk pool.¹⁹¹ In its research for the Ministry of Justice, FWD concluded that ‘stand-alone’ LEI, which is so prominent in Germany, is unrealistic in England and Wales as insurers could not supply cover at an affordable level. There is currently only one provider of this type of cover¹⁹² and consumer demand does not exist for this product, so it is unlikely that any substantial expansion of this part of the market will take place.

¹⁹⁰ *After Universalism*, p.343.

¹⁹¹ ‘Alternatives to Public Provision,’p.48.

¹⁹² FWD Research, ‘The Market for BTE Legal Expenses Insurance,’ 4E.I.3

The report does not mention Kilian's cost assessment issue¹⁹³ and it can only be assumed that, in relation to 'add-on' LEI, this is not such a barrier and, therefore, there are no substantial reasons why LEI could not become a more prominent method of legal service delivery in England and Wales.

Conclusion

Research has shown that there are valuable lessons for the government of England and Wales to learn from the best practices now contained in the exemplar model. These best practices are drawn from the strengths of the three countries considered highlighting areas in need of attention. In comparing the current legal aid system in England and Wales to the exemplar model, it was found that all the key elements are present. The greatest obstacle in achieving access to justice for all, is the percentage of the population eligible to take advantage of legal funding. The comparison also shows that there is considerable scope to expand alternative methods of legal service delivery for those who are ineligible for legal aid or are able to help themselves through the legal process.

The reform process in England and Wales has put the legal aid system under a considerable strain. There has been a major breakdown in the relationship between stakeholders in the legal aid system and fears are growing that access to justice will suffer as a result. It may be time for a period of reflection for the government, after what can only be described as a series of major reforms which have impacted on all areas of legal service provision. As part of the reflective period, the exemplar model could be used to assist an overall evaluation of the legal aid system. It is also suggested that reference is made back to the Rushcliffe Committee Report in 1945 which considered that providing access to justice was a *right* rather than a *ration*.

¹⁹³ 'Alternatives to Public Provision, p.48