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Review of quality issues in legal advice: measuring and costing quality in asylum work

Undertaken by the Information Centre about Asylum and Refugees on behalf of
Refugee and Migrant Justice, in partnership with Asylum Aid and Immigration
Advisory Service

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Executive summary

The quality of legal representation is of paramount importance to asylum seekers whose cases routinely raise issues of life and liberty. The literature review draws on existing evidence to identify the key elements of high quality legal representation in asylum work, drawing these together into a definition that will be used to identify how much high quality legal work costs to deliver.

Whilst it is clear that quality work costs, this review has found evidence that poor quality work costs much more in the longer term both to the public purse and in human terms to individual asylum applicants. The evidence suggests that the LSC's Graduated Fee Scheme (GFS) for legal aid work, combined with the low threshold level of quality at which legal aid providers can enter and operate in the UK market for asylum advice may generate short term savings but cost more in the long term.

All providers who reach a minimum level of quality are currently paid an identical fee under GFS, reducing the incentive to strive for high quality, in effect penalising those firms that do, and forcing the choice between financial survival and responsibility to their clients.

Overall findings of the project literature review

The evidence of this review highlighted three key elements of high quality legal representation. First, professionalism and expertise, which enables, for example, the representative to establish the full factual and evidential basis of the case at the earliest opportunity. Secondly, the quality of the one to one relationship between the representative and client. This helps establish the client's trust and confidence in the representative and encourages early disclosure of the full facts of the case. If a client is confident that the best case had been put forward, they are more likely to be confident in the outcome of the case. The third key element of quality legal representation is that the representative should have sufficient time to present the case and to meet the first two key elements.

The project definition of quality, set out at the end of this section, is derived from these three quality elements. The research demonstrates that adherence to the project definition of quality will improve outcomes for clients and result in more sustainable, cost effective decision making in asylum cases.

The literature review shows that the current fee structure does not offer any reward for quality, indeed it penalises it, while incentivising lower quality work. The levels of fixed fees in asylum and immigration work were set without reference to any reliable historical data, by the LSC's own account. They were intended to incentivise providers to provide best value for money and efficiency. Implicit in this is the fact that, as a result of greater efficiency income would be redistributed from representatives that took the most time per case to those that took the least time. Data from the evaluation of the Solihull Early Legal Advice Pilot shows a correlation between more time spent and better case outcomes. This suggests that, as funds are redistributed toward providers taking less time via the graduated fee, funding will be taken away from the representatives achieving the best results and given to those achieving the worst.

This effect is compounded by the fact that all providers who reach a threshold level of quality are currently paid an identical fixed fee under the GFS. This minimum level is set below the level for high quality asylum legal work as defined by this study.

Evidence shows that an early investment in higher quality may yield longer term savings. The evaluation of the Solihull Early Legal Advice Pilot ("the Solihull Pilot") on the frontloading of legal advice pointed to the potential for substantial cost savings to the public purse as a result of providing higher-than-threshold quality legal work paid at an hourly rate and provided early on in the asylum application process.

By applying the graduated fee, the Legal Services Commission aims to achieve value for money through efficiency gains, reducing time spent on each case and therefore costs. However, this underestimates the potential for high quality legal work to achieve longer term savings. Notably, the LSC has decided not to implement key quality assurance safeguards underpinning Lord Carter's recommendations for legal aid reform, and has not proceeded with its proposal to raise minimum acceptable quality standards. By Lord Carter's reasoning, in so doing it is pursuing a strategy which will put quality in the wider justice system at significant risk.

Despite this and the evidence from the Solihull Pilot, the LSC is pressing ahead with the tender for civil contracts for the next three years on the basis of the graduated fee, with the exception of the Midlands where the Solihull Pilot is being rolled out with initial payments on an hourly rate basis.

In so doing, an opportunity has been missed to delay tendering and gather reliable evidence on which to structure funding arrangements and determine appropriate fee levels. This risks perpetuating flaws in the funding regime that could cause real damage to the provision of quality advice and the cost effectiveness of legal aid.

Methods

The Cost of Quality research has been commissioned by Refugee and Migrant Justice, in partnership with Immigration Advisory Service and Asylum Aid. It is being carried out by the Information Centre for Asylum & Refugees, City University and is supported by The Baring Foundation. Guidance, support and advice is provided to the research project by a steering group with membership from The Law Society, Immigration Law Practitioners' Association, Ministry of Justice, Legal Services Commission, UK Border Agency, Law Centres Federation and AdviceUK. The overall aim of the research is to quantify the cost of providing quality legal advice to asylum applicants in the UK. This is to be achieved through the literature review, an analysis of the costs and quality of work of a number of legal aid providers in three regions of the UK and in-depth interviews with key stakeholders, including refugees and asylum decision makers. It reviews existing evidence from commentators on the likely impact of fixed fees on quality and demonstrates that current rates for the fixed fee were not based on evidence of actual costs to providers. It also examines evidence from the published evaluation of the Solihull Early Legal Advice Pilot.

The research is developing powerful new insights into the relationship between time, cost, and the quality of publicly funded asylum legal work from the perspective of those receiving, delivering, and funding advice. The final results of the research will be available in the first quarter of 2010.

Information for the literature review was drawn from various sources, including government departments and consultations, submissions by professional and representative bodies, academic literature and research by practitioners. The review also incorporates the findings of a series of interviews with refugees conducted by ICAR as part of the Cost of Quality research, which explored their experiences of quality representation.

The literature review provides both the theoretical and practice-informed background to the development of an asylum-specific file review grading scheme designed to determine the hourly rate cost of quality legal aid asylum work. This grading system draws heavily on the Legal Service Commission's Peer Review criteria. However, it has been informed by a wider perspective than that solely of the LSC and the suitability of a provider to hold a contract. Elements of the extensive literature review examining key stakeholder perspectives have been distilled to determine what are considered essential approaches and features of quality legal practice in asylum work.

The project file review grading system is entirely directed towards the purpose of the refugee status determination process, namely to ensure that the relevant facts, evidence, and argument are put before the decision-maker to enable the most accurate assessment of the need for international protection. The project's file grading scheme weights the evaluation of work shown in files towards what we describe as core quality factors, namely interviewing and advising clients, evidence gathering, reviewing evidence and decisions, and drafting of statements.

Under the current LSC Peer Review process time spent on a case is not measured. A key feature of the file review process for this research is that time spent, not only on the case in its entirety but on the different elements of the case, is measured. As a result the element of time can be isolated to enable statistical analysis at a later stage of the research, enabling researchers to analyse the correlation between time and quality and, ultimately, determine the cost of quality asylum legal work.

Detailed findings of the project literature review

Public Services Reform

Changes to the funding for legal aid should be seen against a backdrop of wider public service reforms which have sought to increase value for money by driving down costs and introducing greater competition. Since the late 1980s there has been an increased focus on the management of public services, and continual reforms characterized by:

- The opening up of public service provision to competition between agencies and not for profit bodies.
- Introduction of purchaser and provider distinction.
- Costs being attributed to outputs with outputs being measured by quantitative performance indicators.

The New Economics Foundation has criticised this model, claiming that it does not necessarily offer value for money or efficiency in the long term, particularly where the outputs rewarded are not related to outcomes of wider social value. Short term financial gains may translate into long term financial loss when the 'value' in 'value for money' is assessed in relation to society and the individual service user.

The Graduated Fixed Fee Scheme

The LSC's approach to the funding of legal representation under the GFS can be seen in this same broad context with its focus on efficiency and outputs as a means of securing value for money. The GFS was introduced in October 2007. The payment is given for a unit of advice rather than for quality of the work or outcomes which deliver sustainable decision-making: a client may receive a unit of advice but still not get their case resolved, creating wider social and financial costs.

The Ministry of Justice 'Study of Legal Advice at a Local Level' known as the Bach Review (June 2009), noted the intended benefits of the graduated fixed fee scheme, namely that it:

- Enables the budget for community legal advice to be controlled more effectively
- Creates better value for money by rewarding outputs (cases closed) rather than inputs (hours spent)
- Rewards efficient providers and forces inefficient providers either to change working practices or to exit the market
- Creates an incentive to get to the heart of a case and resolve it quickly, rather than allowing cases to remain open for extended periods.

The GFS transformed the existing funding arrangement under which legal representatives were paid an hourly rate for all work. The basis on which fixed fee levels were set for asylum and immigration legal aid work was much criticised because unlike other categories of law, the LSC did not base GFS levels of payment on reliable historical costs data. By its own account:

"The fees have not been predominantly based on historical case costs as per other schemes. Due to changes in legal aid in 2004/05 and again in 2005/06 we do not have reliable and complete historical average costs and in any event changes in processing mean that historical case costs are largely irrelevant" (LSC, 2006a: 2).

"...we do not have reliable historical data to calculate tailored fees in the immigration category; changing processes and changes in case-mix would in any case make historical data largely irrelevant" (LSC, 2006a: 5).

A crucial element of the GFS – the exceptional cases threshold – which allows providers to recover costs at an hourly rate if the time taken on a case exceeds a certain number of hours, was not modelled on immigration and asylum work:

“The modelling for the exceptional case threshold “was primarily undertaken for TFF [tailored fixed fee] providers, and does not include immigration and asylum cases” (LSC, 2006a: 3)

Commentators have also suggested that the GFS has enabled the LSC to reduce costs by transferring bureaucracy to representatives who are left with the increasingly complex task of managing a financially viable case mix. The trend for the LSC to pass costs on to representatives continues with, for example, the decision to outsource SQM audits and make representatives pay for them.

At the same time, hourly rate levels of payment have barely increased in 10 years, leaving representatives to absorb de-facto year-on-year cuts. The rate payable for Legal Help attendance and preparation in London since 2001 is £57.35 per hour. Had this payment been adjusted in line with the 24% increase in RPI during the intervening period, it would now be paid at £71.08 per hour.

Impact of fee levels on quality

The GFS was introduced in the face of widespread concern among professional and representative bodies and not-for-profit-agencies, with a large number believing the scheme would have an adverse impact on the quality of legal representation. There is no evidence that the GFS and the drive for increased organisational efficiency and measurement of management standards in preparation for best value tendering has both improved the value for money of legal work and positively affected outcomes for clients. Evidence from the project literature review suggests that the reverse may be the case.

Changes made by the LSC to asylum and immigration fees were modelled to be cost neutral against expected spend in 2007/08. The new funding regime was predicated on the theory that inefficient providers took more time per case, while efficient ones less time. It sought to reward efficiency by redistributing income from the former providers to the latter.

However, the findings from the Solihull Pilot suggest a relationship between higher success rates at the initial asylum decision and potential overall cost savings. The average cost for the pilot exceeded what advisers would have received had cases been funded by the equivalent fixed fee and the overall success rate for the pilot was higher than the national average. Data comparing the relative costs and performance of different providers taking part in the pilot shows that firms spending at or below the level of the graduated fixed fees under Solihull conditions were producing a lower overall success rate. Advisers who spent more time preparing a case achieved a better result for their client, but their costs per case were higher. Lower cost firms had much lower success rates. Firms charging less than they would have received had the case been funded by GFS achieved a success rate of 31%. Firms whose spend exceeded the level of the GFS for Legal Help had a success rate of 39%. The success rate of the Solihull Pilot firms that charged in excess of the average cost for the study was 44% compared with 31% for those that charged less.

On-going work in this project will provide an opportunity to validate data from the Solihull Pilot on cost and outcomes. A preliminary analysis of early results from the file review exercise shows a correlation between cost and quality. The forthcoming analysis of the LSC's data for cases closed since the commencement of the new funding regime will examine these matters further.

Evidence from the literature review shows that the GFS benefits legal representatives that spend less time on each case. Such representatives have no incentive to improve their success rates by spending more time on a case because this will simply reduce their financial reward. The LSC has put in place a contract provision to mitigate abuse of the GFS. Under 11 a paragraph 4 of the Unified Contract matter starts may be reduced if a representatives' average graduated fee margin exceeds 80% of the value of the work charged at an hourly rate. In effect, this provision gives suppliers undertaking the least amount of work up to 20% more income.

The evidence suggests that the GFS has the effect of penalising representatives who wish to achieve good results for their clients by compelling them to work more hours than will be recompensed, unless the case takes sufficiently long to attract an hourly rate. The intention of the LSC in introducing graduated fixed fees was to compel firms to work more efficiently or else “to exit the market” (Ministry of Justice, 2009: 45). There is evidence that some firms have indeed left asylum and immigration legal work, and that the full effect of the changes may not yet have been felt due to the long transitional provisions for the implementation of the GFS. The review found that four law centres had ceased work and that unrestricted reserves for remaining centres had been depleted by 70% since the introduction of the GFS.

The LSC committed to reviewing the impact of fixed fee arrangements in all areas of civil law. It undertook this review with a consultative group that included The Law Society and ILPA. Its report, published in April 2009, concluded that it was too soon after the implementation of the graduated fixed fee scheme to fully assess the financial impact on legal representatives, particularly for asylum and immigration cases, given the length of time it takes for those cases to complete.

Quality and value for money

An argument for a new model of funding representation in asylum cases, one which emphasized both value of money and the transformative dimension of quality legal work, emerged in the 1990s. The report “Providing Protection” (July 1997) argued that achieving efficiency savings could be made by frontloading resources for legal representation early on in asylum decision making while at the same time honouring due process. Prior to its replacement by the LSC, the Legal Aid Board was recommending to the Home Office that good quality immigration legal advice, available at the earliest opportunity, would be of benefit throughout the system to clients, to the Legal Aid Board, and to the Home Office (Legal Aid Board, 1999: 2)¹. The argument in favour of financial savings that can be achieved through frontloading has been revisited repeatedly in recent years, for example, by the Law Society, the Legal Action Group and ILPA.

The imperative to provide correct advice as early as possible when sought by a client is echoed by AdviceUK (2008)² in their report on the experiences of not-for-profit organisations that offer advice and representation. Many of these organisations have to manage increasing demand for their services caused by failings in public service provision and the increasing need to appeal decisions. Research by AdviceUK showed that

“much of that demand is ‘failure demand’ – work that should not need doing – caused by failings further back in the system of public administration. These failings are creating unnecessary work and costs within public services as well as in advice organisations” (AdviceUK, 2008: 3)

The Solihull Pilot has demonstrated the potential for significant whole-life savings in NASS, AIT and LSC costs up to completion of the first appeal stage, and the independent evaluation recommended further rollout testing. The interactive nature of the Solihull Pilot package was shown to enable greater engagement in the process by all parties, better overall client care, and more productive one-to-one relationships (Aspden, 2008).

Similar themes have been examined in a broader context by the New Economics Foundation. NEF argues for a model of commissioning and procuring public services that addresses the concept of Social Return on Investment (SROI). This enables decision-making on public services funding in a manner that understands ‘value’ in a broader sense than merely costs and price, and incorporates factors such as individual wellbeing.

The SROI approach extends the argument for frontloading resources in legal representation, the findings of the Solihull Pilot, and current high level interest in issues of wellbeing in public policy and practice. It would enable a monetary figure to be put on the value created by public funding for quality legal representation for asylum applicants, and by better asylum decision-making.

¹ Legal Aid Board, (1999), ‘Access to Quality Services in the Immigration Category, Exclusive Contracting. Recommendations to the Lord Chancellor’.

² AdviceUK, (2008), ‘It’s the System, Stupid! Radically Rethinking Advice’. The report focuses on the operations of the Department for Work and Pensions, HM Revenue and Customs and Housing Benefit Offices.

The LSC's approach to quality

The LSC's quality assurance approach comprises various tools, specifically: Peer Review, the Specialist Quality Mark (SQM), and the Accreditation system.

The LSC's peer review process is developed and managed independently by the Institute of Advanced Legal Studies. Peer reviews are conducted by experienced legal aid practitioners organised in peer review panels by category of law. Peer review measures and assures the quality of advice and representation of a firm or organisation. Not all firms are peer reviewed, the process generally being targeted on those considered to be high risk, (for example where quality profiles give cause for concern).

Following peer review, firms are given a competence rating, Level 1 being the highest and Level 5 the lowest. Level 3 is the minimum standard required for retaining a contract with the LSC.

Throughout the last decade peer review has increasingly been regarded as the best method of quality assurance. In 2005, the LSC described it as "the most accurate and fair assessment process that we have to determine the quality of legal advice work" (LSC 2005a: 5)

Lord Carter embraced peer review as a key quality assurance tool. He recommended an immediate national roll-out of peer review as part of the transition to best value tendering (along with tailored fixed fees), recognising the serious threat to quality posed by moving too quickly

"There is also a serious risk associated with quality; the roll out of peer review taking two to three years, quality assurance mechanisms could not be put in place in time, meaning contracts would need to be awarded on the basis of price and capacity only. There is also the potential for a significant negative impact on the wider justice system as quality is undermined and suppliers left in the legal aid market fail to perform effectively. This could have a particularly negative impact on the running of the courts."
(Lord Carter, 2006: 52)

All Lord Carter's proposals were therefore underpinned by a "strict quality threshold" (ibid: 56). Firms would have to be peer reviewed prior to the tendering of best value contracts and those not meeting the threshold would not be permitted to participate in the tender.

The LSC consulted on a proposal to raise the minimum quality threshold from Level 3 to Level 2. In December 2006, it issued a response to this consultation, noting "the overwhelming support for the use of peer review" (LSC, 2006d: 5) At the same time it published "Legal Aid Reform: The Way Ahead" LSC and DCA, 2006) confirming the plan to roll out peer review and a phased move to higher standards so that no best value contracts would be awarded to representatives assessed below level 2.

However, by the end of 2008, the LSC had decided not to pursue its plan to raise the minimum quality standard to Level 2 and in June 2009 announced that it no longer intended to roll out peer review, so that a peer review assessment at a minimum level would no longer be a pre-condition for tendering for best value contracts. In so doing, it has undermined a key pillar of Lord Carter's recommendations, giving rise by his reasoning to a significant risk to quality and the wider justice system.

The table below shows a comparison of the standard of legal work required at the minimum level required for providers to hold an LSC contract (Peer Review Level 3) with certain features identified in this literature review as essential components of high quality asylum legal work, some of which are required at the higher Peer Review Levels 1 & 2.

Peer review level 3	Elements of high quality legal work at peer review level 1 or level 2
Requires only adequate advice and work	Requires the representative to tailor work to the individual client's circumstances
Provides that work done may not always be extensive	Requires the representative to establish the full and comprehensive evidential basis of a case at the earliest opportunity.
Does not require issues to be progressed comprehensively, appropriately, and efficiently	Requires issues to be progressed comprehensively, appropriately, and efficiently
Does not require that tactics and strategies are employed to achieve the best outcomes for clients	Requires the representative to employ tactics and strategies to ensure the best outcome to the case
It does not require the representative to add value to the case unlike Levels 1 and 2	Requires the representative to add value to the case
Requires only "adequate but limited communication with the client".	Requires the representative to maintain an effective one-to-one relationship with the client

The table shows that the requirements at Level 3 contrast markedly with the findings of this review, which offers evidence of the value to be gained in broader terms of working to the standards required at Levels 1 and 2. This value derives from potential cost savings and reductions in the human cost of poor legal representation in asylum cases.

The Bach Review

A MoJ review, chaired by Lord Bach, published a report on the impact of changes to the funding of civil legal advice in June 2009. The findings echo some of the concerns raised by the advice and not-for-profit sector. The report notes concerns about the perverse incentives created by the GFS, namely that representatives may be less willing to assist asylum seekers with more complex cases, and that it might disincentivise niche providers with a particular specialism in complex and therefore more time consuming and unprofitable work. It also acknowledged concerns that the funding structure may lead to the inappropriate paralegalisation of legally aided work in order to save money, affecting the quality of representation, and it recommends monitoring systems be put in place to examine this.

Key Elements of Quality

The evidence of this review suggests that the following elements are widely considered essential to asylum legal work if denial of justice to asylum seekers in the UK is to be avoided.

Professionalism and expertise

Many commentators cited in the review highlight the overriding requirement of representatives to comply with their professional obligations. ILPA has stated that high quality legal work is that which fulfills ethical requirements “the inability to fulfill which must lead us, in accordance with our professional obligations, to decline conduct of a case” (ILPA 2006:2). Professional standards must therefore be considered as a base-level minimum standard for legal work to be performed.

Bindman & Co have argued that “specialism reduces costs...it does so in positive ways through the identification of legal and evidential issues; the instruction of appropriate experts and advocates. It also does so in negative ways: avoiding delays in preparation and dissatisfaction leading to non co-operation” (Bindman & Co:3).

The project definition of quality in asylum legal work incorporates this element in the following phrase, that the representative, following professional standards **“identifies and gathers all relevant facts, evidence and argument in a timely manner and presents those to the decision maker in the best way” and uses “tactical judgement and explores every reasonable legal avenue”.**

Quality of One to One Relationships

The Effective Lawyer Communication Project (Glasgow Graduate School of Law and others, 2003) offered evidence that ‘rapport’ and ‘information exchange’ were highly valued by standardised clients, trainee lawyers and academic assessors alike.

The Council on Social Action (CoSA, 2008a and 2008b) has shown that

- Information exchange and continuity of relationships between client and advisor are the features of one-to-one relationships that most strongly effect transformation in people’s lives.
- The manner in which these key features are organised and delivered also contributes to successful outcomes. CoSA highlights the value of
 - Early intervention and prevention
 - Goal setting and a time frame (small incremental goals and identifying aspirations)
 - Minimal administrative burden

These findings are consistent with research carried out by ICAR as part of this project, which found that the nature of the one-to-one relationship with representatives was rated as important by asylum-seeking clients, along with four other aspects of legal work

- The **One to One Relationship** between client and representative involves factors such as trust, empathy, mutual respect, and the ability to deal with difficult emotions and situations.
- **Gathering and Presenting Evidence** is about listening to the client and taking all possible steps to present a strong case built on well researched evidence and the use of appropriate witnesses. Allowing the client to read and review their statement of evidence was also mentioned as an element of good quality legal work.
- **Case Management and Conduct of the Case** involves the timely submission of evidence and documents, good handling of appeals at court, regular follow-up with the Home Office, a proactive approach to the case, and the management of client expectations.

- **Communication** is a key area frequently mentioned by respondents. Professional and neutral interpreters were essential so that evidence could be passed to the representative. Clients expected the representative to have excellent listening skills, give their full attention to the client and use appropriate and positive body language.
- **Access** to the representative is an essential part of the process for clients. Representatives should be directly available or respond to clients within a reasonable time frame. Clients appreciated a range of means of contact such as telephone, e-mail and written correspondence as appropriate. Being able to provide timely appointments and not being kept waiting for appointments were also mentioned.

The project definition incorporates this element by stating that the representative should establish **“trust and confidence and a mutually respectful relationship with the client”**, a **“constructive relationship with the decision-maker,”** and ensure **“the client knows the best case has been put forward”**

Sufficient time

The most consistent theme arising from the project literature review is that sufficient time is critical to the ability of representatives to carry out high quality work. This view is shared by practitioners, their representative bodies, academics, parliamentarians, and not-for-profit organisations. It is also a critical factor emerging from research on client expectations by CoSA and, most recently, by ICAR as part of the Cost of Quality research.

This is reflected in the project definition of high quality in the statement that there will be time for **“thorough evidence gathering; exploring every legal avenue; effective communication with client”**

Project definition of high quality asylum legal work

The project definition of high quality is intended to capture the essence of the legal work required to optimise the process of status determination and the manner in which it is carried out from the point of view of the client, the legal representative, and the decision makers. The objective elements of the definition are capable of measurement and costing through a file review exercise.

Looking at a representative sample of cases, evidence of quality legal representation should be clear through success in outcomes, with quality legal representation delivering a higher level of positive outcomes than poor quality legal representation. However, in individual cases, outcomes could never be used as a measure of quality, because high quality legal representation may still result in a negative outcome for an individual client. So to measure the quality of legal representation in individual cases it is necessary to focus on outputs.

High quality legal representation is an essential ingredient for the delivery of justice in asylum cases because it helps the decision-maker to arrive at a sustainable decision. Poor quality representation which does not establish the full evidential basis of the case will often result in injustice in any decision making process. This is particularly true of asylum cases where late disclosure of evidence is frequently used as a reason for a negative decision. However, the quality of legal representation is not the only influence on justice. The broader determination process, which includes the skills of the decision-makers, is also important.

The project definition of quality is derived from the findings of the literature review which incorporates the views of representatives, asylum seekers and other stakeholders.

The definition of quality focuses on those matters within the legal representative's control, identifying key skills and actions needed to deliver the outputs identified at (a) to (c) below. The project file review exercise will examine the measurable aspects of the quality definition and identify how long these elements take, enabling a calculation of the hourly cost of high quality asylum legal work.

The Cost of Quality project definition of high quality asylum legal advice

Quality legal representation in asylum cases is provided when a representative, following professional standards and with sufficient efficiency, technical and personal skills, knowledge, judgment and experience:

- (a) Identifies and gathers all relevant facts, evidence and argument in a timely manner and presents those to the decision maker in the best way;
- (b) exercises tactical judgment and explores every reasonable legal avenue to ensure a full and fair hearing of the case;
- (c) ensures the client knows the best case has been put forward on their behalf consistent with the relevant legal framework.

To do this the representative must establish trust and confidence and a mutually respectful relationship with the client. The representative must also establish a constructive relationship with the decision maker so that the best case is made and the decision maker is able to make an accurate assessment of the case for international protection.

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1 Introduction

The Cost of Quality Legal Advice research project has been commissioned by Refugee & Migrant Justice (RMJ) in partnership with Asylum Aid and Immigration Advisory Service to quantify the cost of the provision of quality legal advice. The research will ask whether the Legal Services Commission (LSC) funding for cases funded under the Graduated Fee Scheme (GFS) and at hourly rates is sufficient to meet the actual costs of high quality legal advice for asylum seekers. The research is being carried out by the Information Centre about Asylum & Refugees (ICAR) and has been funded by The Baring Foundation. Guidance, support and advice is provided to the research project by a steering group with membership from The Law Society, Immigration Law Practitioners' Association, Ministry of Justice, Legal Services Commission, UK Border Agency, Law Centres Federation and AdviceUK.

1.1 Aim of the review

The key aim of the literature review was to establish a normative framework of the crucial elements of quality legal representation for asylum seekers.

Information for the literature review was drawn from the following sources:

- Legislation, policy instructions, evidence to parliamentary committees, submissions and responses to government consultation exercises, European Union Directives, European Commission proposals
- Ministry of Justice, Department for Constitutional Affairs web archive, Home Office, UK Border Agency, Mayor of London, London Councils, Home Office Research Development & Statistics
- Legal Services Commission (LSC), The Law Society, The Bar Council for England and Wales, Solicitors' Regulation Authority, Community Legal Advice, Immigration Law Practitioners' Association, Office of the Immigration Services Commissioner, Legal Aid Practitioners Group, Legal Action Group, Independent Asylum Commission, National Asylum Stakeholders' Forum
- United Nations, Office of the United Nations High Commissioner for Refugees, British Red Cross
- Academic journals
- Research and submissions from not-for-profit and campaigning groups (including Refugee Council, Asylum Aid, Refugee Action, Bail for Immigration Detainees, Joint Council for the Welfare of Immigrants, Refugee and Migrant Justice (RMJ), Advice Services Alliance)
- Specialist research and information centres and portals (including European Council on Refugees and Exiles, Electronic Immigration Network, RefWorld, EurAsylum, Centre on Migration Policy and Society, Information Centre about Asylum and Refugees)

1.2 Structure of this Report

Chapter 2 describes the drivers behind recent legal aid reform in the UK and the introduction of a market-based approach to the provision of legal aid services. The role and nature of the LSC is outlined, alongside the provisions of the GFS for immigration and asylum work. The chapter closes by looking at the next steps in legal aid reform.

Chapter 3 draws together evidence of the impact of financial reform on legal aid in England and Wales, including the introduction of the Graduated Fee Scheme. The evidence is drawn from providers of legal advice in private practice and the not-for-profit sector, barristers' chambers, professional bodies, and campaigning groups. Much of the evidence was originally produced in the form of submissions and responses to government consultation exercises on legal aid reform. The evidence speaks to the impact of GFS including hourly rates and the Unified Contract (Civil) on providers' business models. Other evidence challenges assumptions made by the LSC which lie behind fee levels, case stages, estimates of 'standard' casework time, and the exceptionality threshold. This chapter also notes that hourly rates of payment for legal work have not increased in line with inflation.

Chapter 4 outlines the genesis and development of arguments for the benefit of 'frontloading' in asylum legal advice. Frontloading in this context involves making representatives' time and other resources available early or earlier in the asylum determination process.

Chapter 5 addresses the findings and evaluation of the Early Legal Advice Pilot in Solihull (known as the Solihull Pilot), which was designed to test the proposition that frontloading – in this case the provision of early access to legal representation, funded fact-finding, and the presence of a representative at a new form of interactive asylum interview – would improve the quality of initial asylum decisions taken by the Home Office. An analysis of the data about the relative costs and performance of different providers taking part in the pilot shows that those who spent more time preparing a case achieved a better result for their client, but their costs per case were higher. Firms who spent at or below the GFS fee rate for Legal Help were shown to achieve the lowest grant rates at first decision (30%). Representatives whose spend exceeded that of GFS Legal Help achieved a success rate of 40% at first decision, with the greatest impact being delivered for borderline or 'amber' cases.

In Chapter 6 the development of the efficiency culture in public policy initiatives is examined, with particular reference to the impact this has had on the measurement of quality in service delivery in public services. The chapter unpicks the difference between quality measurement and quality assurance, drawing on theoretical models and examples from various public services where appropriate. The chapter goes on to describe the history of defining and measuring quality in legal advice, and outline the current approach to quality on the part of the LSC. Finally, the chapter points to the more subjective and intuitive elements of good practice in legal advice and the value of these elements to clients, highlighting recent groundbreaking work on the nature of one-to-one relationships in service delivery.

Chapter 7 starts by drawing together four key elements of practice in high quality legal work in asylum cases that are behind the consensus understanding of quality namely a productive one to one relationship between client and advisor, a professional approach on the part of the advisor, sufficient expertise, and as a common thread sufficient funded time to allow for these elements to take place.

Chapter 8 is directed towards collecting together those approaches and features of high quality legal practice, both in terms of substance and delivery, that are outlined in this review and have been identified as important by practitioners, clients, and other stakeholders in the asylum and immigration legal aid system in the UK. These elements are listed in the form of a normative framework for quality legal aid advice and representation. The elements from this normative framework are then distilled into a simple project definition of high quality asylum legal advice. Working from both the normative quality framework and the definition of quality the chapter then goes on to describe the file review scoring system which has been developed to enable statistical determination of the hourly cost of high quality asylum legal advice using data from a file review exercise in the quantitative section of this research.

2 Legal aid reform & the legal advice market

2.1 Legal aid in the UK

Publicly-funded legal representation, designed to ensure access to justice for those of limited means, came into being when the first modest legal aid scheme³ was set up on the recommendation of the Rushcliffe Committee in 1945⁴ (LSC website) and brought into being by the Legal Aid and Advice Act (1949). Legal aid was managed by The Law Society until the Legal Aid Board was set up in 1986 to administer applications and payments to solicitors under the scheme in England and Wales⁵. The Access to Justice Act (1999) created the Legal Services Commission that eventually replaced the Legal Aid Board in April 2000⁶, and provided the legislative vehicle for major changes to the legal aid scheme that have become the *raison d'être* for the LSC in the form of marketisation of legal aid, as it transforms itself from a legal aid administrator to a commissioner and purchaser of legal aid services.

2.2 The LSC & the market based approach to legal aid services

From its inception in 2000, the LSC has operated under a markedly different remit to the Legal Aid Board. "The Legal Services Commission's relationship to providers has fundamentally shifted the focus [the locus even] of control in publicly funded services" (Mackay, 2001: 2). Under its ambitious programme of reforms to the legal aid funding and delivery structure, the LSC explains that it has been tasked to ensure that legal aid is available to all those who need it while budgets remain limited by:

- working only with providers whose commitment and quality we trust
- changing the way we pay providers so we can control our budget
- transforming ourselves to cut administration costs and become more efficient⁷

Source: LSC website

A further process of reform began in April 2004 with a new contract specification for asylum and immigration cases (McClintock, 2008: 7). Cost limits, which could only be exceeded with the LSC's authority, were introduced for most immigration work. Legal Help was withdrawn for attendance at most UKBA interviews. In addition, a Performance Indicator threshold was introduced requiring contract holders to achieve a 40% success rate at appeal in immigration and asylum cases.

3 Early legal aid payments were limited to High Court divorce hearings. Criminal legal aid provisions were introduced between 1952 and 1962 (Department for Constitutional Affairs, 2005: 7).

4 "It was never a general legal service for those who could not afford lawyers. It was simply a way of ensuring individual representation in certain court processes: notably crime, where there always was some kind of service; divorce (increasing in the aftermath of war); and personal injury, where unions already provided legal aid." (Ritchie, 2007: 32).

5 The Scottish Legal Aid Board (SLAB) and the Northern Ireland Legal Services Commission perform broadly the same function for Scotland and Northern Ireland respectively.

6 The LSC is an Executive Non-Departmental Public Body operating under the umbrella of the Ministry of Justice (formerly the DCA). Lord Bach is Under Secretary of State for Justice responsible for Legal Aid.

7 In a public lecture 'Future direction of the Legal Services Commission: key messages', 12th February 2009 City Law School, London, Carolyn Regan (Chief Executive LSC) gave a strong message that there is increasing competition to provide legal advice due to new entrants to the market, an oversupply of young solicitors and barristers, and the habits of the public when seeking out legal information are changing. Taken together, the strong message from the lecture was that fees for legal advice across the spectrum, including asylum and immigration work, will come under significant downward pressure.

In 'A Fairer Deal for Legal Aid' (July 2005) the then Lord Chancellor, Charles Falconer, laid out the Government's long term vision for legal aid in England and Wales, making clear the belief it was possible to improve access to justice for vulnerable and disadvantaged people, deliver criminal justice more swiftly, while at the same time achieving greater cost efficiency. The foundations for this new system were to be block contracting, price competition, and the use of lead suppliers.

Lord Carter of Cole's review of legal aid procurement began on 5 July 2005. The final report of the Carter review, 'Legal Aid: A market-based approach to reform' (13th July 2006) proposed a number of major changes. In particular it recommended a move towards competitive 'best value' tendering (a market model) to distribute contracts for publicly-funded work. The implication of the proposals was that legal representatives would be forced to compete for the delivery of free legal advice (Unite, July 2008).⁸

Immigration and asylum cases were however specifically excluded from the Carter review of legal aid procurement because "their handling has been the subject of detailed recent review" (Carter review, 2006: point 1.16). This recent review refers to the 2004 reforms of immigration and asylum legal aid aimed at improving quality, concentrating on funding meritorious cases and reducing duplication and waste (LSC, letter to Chair of ILPA, 15 September 2006). However, Lord Carter's review did include immigration and asylum work in his procurement strategy going forward to 2010.

A separate and slightly earlier report 'The Legal Aid Market for Solicitors: Summary of New and Published Research' (MoJ, June 2006)⁹ summarised key findings in relation to the market for legal aid services, drawing heavily on research that had been commissioned around the Carter review. Consultants PKF analysed solicitor firms providing both civil and criminal legally aided services¹⁰, and Otterburn Legal Consulting analysed 2005 and 2006 surveys of firms providing *criminal* legal aid¹¹. From this research certain key findings emerged (Ministry of Justice, 2006: 2-6):

1. There are some firms that are able to make reasonable profits from carrying out legal aid work. These firms appear to have a number of common features: higher levels of gearing (ratio of fee earners to equity partners); higher levels of chargeable hours; a relatively low overhead base; and specialized in criminal legal aid.
2. There is a high level of non-productive time within the existing arrangements which provide for inefficiency. The criminal justice process contains many non-value adding elements such as duplication, travel and waiting, court scheduling, the payment regime, legislation and administrative burdens.
3. It is essential to combine business model changes with procurement system changes if market change is to be sustainable. Inappropriate changes solely to the payment regime could lead to a flood of departures from the criminal legal aid market.

In 2006 Matrix Research carried out a study¹² on behalf of the Department of Constitutional Affairs (DCA, now the Ministry of Justice) aimed at defining the size and nature of the civil legal advice sector in England and Wales (see Appendices 1 & 2). Stakeholders identified those issues which act as major drivers of the civil legal advice sector in terms of costs, and the profile of the market nationally, locally, and over time.

8 Unite, (July 2008), 'Legal Services Commission: Unite members are finding their conditions of employment and jobs under major threat due to changes in Legal Services Commission (LSC) funding'. Available at http://www.lawcentres.org.uk/uploads/Unite_on_LSC_funding_July_08.pdf

9 Available at the archived Carter Review website maintained by the Ministry of Justice <http://www.legalaidprocurementreview.gov.uk/docs/lams-summary.pdf>

10 "PKF were asked to analyse expenditure, income, efficiency and productivity by the legal professions in delivering legal aid services. They were also asked to assess how costs are incurred by the professions and how the organisation and practices of the professions determine how efficiently and productively they deliver those services. This work, which was carried out in late 2005, was based on a large-scale survey and detailed analysis of a relatively small number of firms (18)" (Ministry of Justice, 2006: 3).

11 "Otterburn Legal Consulting was commissioned by the Review to extend the [PFK] survey work to include large-scale legal aid providers. They were then asked to carry out an analysis of the data to provide a better understanding of the cost base and revenues of larger publicly funded firms with a view to establishing whether a low cost, sustainable, model currently exists that might form the basis for a new system of publicly funded criminal work" (Ministry of Justice, 2006: 3).

12 Matrix Research and Consulting, (2006), "Estimating the size and nature of the civil legal advice sector in England and Wales". Department of Constitutional Affairs. Available at http://www.dca.gov.uk/research/2006/04_2006a.pdf

Work was also undertaken by Frontier Economics in a study for the DCA and the LSC (2003)¹³ to analyse the nature of legal aid services in England and Wales with reference to issues of supply, demand, contracting, and remuneration as they relate to the procurement of legal aid services. The report flagged up some early issues around the operation of fixed fees, noting that

“Both the differences in demand and supply conditions across localities and the heterogeneity of the supplier base more generally, suggest that a procurement system that sets a fixed price for a given quantity of services is unlikely to provide the best value for money. Moreover, given the extent of the differences across localities and suppliers, it is not clear that introducing variation in remuneration rates – that is, a larger number of fixed prices – could ever reflect the full extent of the heterogeneity. Even given the intensive data collection exercise for this study, it was not possible to collect sufficiently disaggregated data to decide upon a more efficient set of prices (specifically, prices that reflect costs)” (Frontier Economics, 2003: 5)

The Ministry of Justice (MoJ) and the LSC responded to the final Carter report with a joint consultation paper ‘Legal Aid: A Sustainable Future?’ (2006)¹⁴. The paper broadly accepted the recommendations set out in Carter, retaining “the move to a market-based system for legal aid procurement, following a transitional phase in which hourly rates are replaced by fixed and graduated fees” (DCA website).

On 28th November 2006, the DCA and LSC published a command paper ‘Legal Aid Reform: the Way Ahead’ that set out their response to ‘Legal Aid: A Sustainable Future?’ and their resulting plans for reform. The LSC considered the graduated fee scheme and the shape of supply outlined in the consultation paper “to be correct for the immigration and asylum category” and “a basis for moving forward to competition” (2007: 34). In response to concerns raised during the consultation process a revised graduated fee scheme was produced in ‘Legal Aid Reform: Final Immigration and Asylum Fee Schemes’ (March 2007).

Lord Bach’s recent ‘Study of Legal Advice at Local Level’ (Ministry of Justice, 2009) noted the intended benefits of the graduated fee scheme, namely that it

- Enables the budget for community legal advice to be controlled more effectively
- Creates better value for money by rewarding outputs (cases closed) rather than inputs (hours spent)
- Rewards efficient providers and forces inefficient providers either to change working practices or to exit the market
- Creates an incentive to get to the heart of a case and resolve it quickly, rather than allowing cases to remain open for extended periods.

Lord Bach’s report encapsulates the thinking behind the introduction of graduated fixed fees to legal aid in the UK.

“the intention has always been for fixed fees to be part of a managed transition towards competitive pricing in the legal advice market....The current fixed fee scheme is therefore an interim stage. This staged approach is intended to allow providers an opportunity to adjust to the new structure, by continuing to deliver and to improve upon their service, so that when best value tendering is rolled out they will be able to compete with other service providers for contracts” (Ministry of Justice, 2009: 39).

13 Frontier Economics, (December 2003), ‘A market analysis of legal aided services provided by solicitors: A Report prepared for the Department for Constitutional Affairs and the Legal Services Commission’. Available at <http://www.dca.gov.uk/laid/frontier-solicitors-rpt.pdf>

14 The consultation ran between 13 July 2006 and 12 October 2006, and a summary of responses was published on 28 November 2006.

2.3 The Unified Contract (Civil)

Introduced in April 2007, The Unified Contract (Civil) regulates how civil legal aid work is funded¹⁵. The Unified Contract replaced the General Civil Contracts (separate versions for solicitors and not-for-profit organisations) and Mediation Contracts (ditto), so bringing firms of solicitors and not-for-profit organisations together in operating under broadly the same contract terms.

The Unified Contract includes a set of Standard Terms and a Specification that includes the fee package and covers the performance of Contract Work. The Standard Terms for civil legal aid providers came into operation from April 1st 2007. On October 1st 2007 when the new Specification came into force, the Graduated Fee Scheme for publicly funded legal work came into effect for all categories of law, including immigration and asylum work. Long transitional arrangements, particularly for asylum cases meant that it would take some years for the full force of the new provisions to take effect.

2.4 The Graduated Fee Scheme (Immigration and Asylum)

This section outlines the level of fees payable for publicly funded immigration and asylum legal work under the Legal Services Commission's Unified Contract (Civil) Fee Scheme¹⁶, specifically Controlled Work. Within the immigration category of law, immigration and asylum work Controlled Work can be carried out at two levels of service by contracted providers only.

Box 1: Controlled Work levels

Level of work	Scope of work
Legal Help	<ul style="list-style-type: none"> • Advice and assistance on immigration, nationality, asylum, deportation and terms of entry to stay in the UK. • Excluding: <ul style="list-style-type: none"> • Issuing and conducting proceedings in court/tribunal, including advocacy. • Provision of general information about the law and legal services.
Controlled Legal Representation (CLR)	<ul style="list-style-type: none"> • Preparation and advocacy for proceedings before the Asylum and Immigration Tribunal (AIT) including onward appeals. • Representation before the High Court, in relation to applications under s 103A of the Nationality, Immigration and Asylum Act 2002.

Source: Legal Services Commission

In order to undertake legal aid work a firm or organisation must have a contract with the Legal Services Commission and meet the Specialist Quality Mark (see Chapter 6 below). Most work is carried out by lawyers working under a subject-specific contract such as immigration, family, or mental health. A small amount of work may be done within the firm outside the contracted field ("tolerance work") paid at 85% of the standard fee.

¹⁵ There is a parallel Unified Contract (Crime) for criminal matters, the latest of which came into force in July 2008.

¹⁶ For full details refer to "Legal Aid Reform: Final Immigration and Asylum Fee Schemes" (March 2007), LSC/ Community Legal Service. Available at http://www.legalservices.gov.uk/docs/civil_contracting/Legal_Aid_Reform_Final_Immigration_and_asylum_fees.pdf. Accessed 12.02.09

The Graduated Fee Scheme sets fees for the first two levels. There is a single fee for Legal Help and two fees for Controlled Legal Representation, depending on whether the case concludes before the substantive hearing. Additional payments are made for attending certain UKBA interviews and at the appeals stage, the case management review hearing and the substantive hearing, including any adjourned hearings.

As for other but not all categories of law, publicly funded immigration and asylum work is subject to a means test of the client. Work is also subject to merits tests, the first applying to the grant of legal help and the second, more stringent test, to the grant of controlled legal representation.

2.5 Stakeholder reactions to legal aid reform

There has been fairly sustained opposition from representatives (both in private practice and not-for-profit organisations) and their professional bodies, initially to proposed reforms and subsequently to actual reforms to the legal aid system. Opposition has been most vociferous on the grounds that the implementation of legal aid reforms has steadily eroded access to legal aid for vulnerable people, of whom asylum seekers and immigrants are but one group.

In response to the reforms to legal aid proposed in the Lord Chancellor's consultation 'Proposed Changes to Publicly Funded Asylum Work' (August 2003) over 80 organisations (human rights groups, refugee community organisations, support networks, law centres, faith groups and Members of Parliament) came together as the Coalition Against Legal Aid Cuts (CALAC).

The Access to Justice Alliance (AJA)¹⁷ was set up in November 2004, and in November 2006 The Law Society launched its 'What Price Justice?' campaign to raise awareness of the value of legal aid and legal aid lawyers¹⁸. The objective of the campaign was

"to persuade the government to guarantee an adequately funded legal aid system ensuring quality representation and access to justice for all" (Law Society website).

The Law Society had welcomed the Carter Review of Legal Aid Procurement but was concerned that some of the measures recommended could have the effect of eroding access to justice for the most vulnerable members of society.

Socialist Lawyer, the house journal of the Haldane Society of Socialist Lawyers, produced a special edition on 'The Battle for Legal Aid' July 2007 (issue 47).

In an article for Legal Action entitled 'On the edge of the abyss: legal aid from 2010' Mitchell and Pierce (2009) pointed out that the House of Commons Constitutional Affairs Select Committee¹⁹ in 2007 had been particularly scathing in its remarks on the LSC's social welfare law proposals commenting that

"in the light of this uncertainty and the general lack of data, the DCA/LSC's intention of a nationwide imposition of fixed fees followed rapidly by competitive tendering across the entire legal aid system is a breathtaking risk...this risk might be justified where the whole system is in utter crisis but large parts of the system (especially non-family civil legal aid) are stable in cost terms" (Mitchell & Pierce, 2009: 9)

17 Its membership includes Advice UK, Advice Services Alliance, Age Concern England, Action against Medical Accidents, Bail for Immigration Detainees, British Institute for Human Rights, Child Poverty Action Group, Citizens Advice, Citizenship Foundation, Discrimination Law Society, The Haldane Society, Law Centres Federation, Legal Action Group, Legal Aid Practitioners Group, Liberty, One Parent Families, Public Law Project, Rights of Women, Shelter, and Young Legal Aid Lawyers.

18 The campaign was supported by organisations including MIND, Shelter, NSPCC, the Refugee Council, Advice UK, and the Child Poverty Action Group. <http://www.epolitix.com/Resources/epolitix/Forum%20Microsites/Law%20Society/Westminster%20Hall%20debate%2012%20July%202007%20-%20Con%20Affairs%20Committ.pdf>

19 See para. 129 p83 of House of Commons Constitutional Affairs Select Committee report 'Implementation of the Carter Review of Legal Aid. Third Report of Session 2006–07 Volume I. Report, together with formal minutes'. Available at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/223/223i.pdf>

In May 2008 the Bar Council issued a discussion paper 'Legal Aid and the Public Interest: towards an effective public-private partnership' with the intention of re-opening the debate on legal aid, saying "We may be about to face the irreversible consequences of the erosion of legal aid, brought about by a reduction in funding front-line legal services by the Government" (2008: 1).

Lord Bach, Parliamentary Under Secretary of State, spoke at the Advice Services Alliance conference in London on 20th March 2009 on the legal aid reform programme. He acknowledged some of the dominant concerns that have been expressed around fixed fees, saying

"I know too the concerns around the introduction of fixed fees for not for profits (introduced by the Legal Services Commission in October 2007). I hear this. But I know too that fixed fees are an important way to ensure that we are able to help as many people within the legal aid budget. But I know too that some of you are experiencing cash flow issues as a result, and have concerns about the level of the fixed fee and organisations 'cherry picking' cases. So these are issues that the Legal Services Commission are looking into. They're working closely with you through transitional measures to help organisations adapt to the changes" (Ministry of Justice website)

2.6 Legal Aid reform: next steps

In December 2008 the Ministry of Justice announced a study into the funding and provision of local civil legal advice services following the recent legal aid reforms for England and Wales. The report was carried out under the aegis of Lord Bach, Parliamentary Under Secretary for Justice with responsibility for legal aid. The report "Study of Legal Advice at Local Level" (Ministry of Justice, 2009) was published in June 2009.

The Bach Review

A MoJ review, chaired by Lord Bach, published a report on the impact of changes to the funding of civil legal advice in June 2009. The findings echo some of the concerns raised by the advice and not-for-profit sector. The report notes concerns about the perverse incentives created by the GFS, namely that representatives may be less willing to assist asylum seekers with more complex cases and that it might disincentivise niche providers with a particular specialism in complex and therefore more time consuming and unprofitable work. It also acknowledged concerns that the funding structure may lead to the inappropriate paralegalisation of legally aided work in order to save money, affecting the quality of representation, and it recommends monitoring systems be put in place to examine this.

In October 2009 the Ministry of Justice announced a review of delivery and value for money of legal aid in England and Wales, to be conducted by Sir Ian Magee. Sir Ian will assess the delivery and governance arrangements of the legal aid system, both the Community Legal Service (CLS) and Criminal Defence Service (CDS), through consultation with a range of stakeholders and will report back to government in January 2010.

From 2010 Best Value Tendering (BVT) will be the new system for bids and awards of legal aid provider contracts. The LSC consulted on 'Civil Bid Rounds for 2010 Contracts' around the procurement and delivery of legal aid services from 2010 onwards²⁰ under the new Unified Contract (Civil) 2010-2013²¹. It is now proceeding with this tender.

20 At the time of writing the timetable for the award of new contracts is for contracts to be awarded in March 2010 for implementation in October 2010.

21 The consultation invited views from interested parties on the types of service the LSC want to buy, where services are delivered from, how the LSC will invite tenders for new contracts, changes to the scope of funding, including changes to payment for experts, and key amendments to the contract terms.

3 Evidence for the impact of financial reform on asylum & immigration legal work

This chapter draws together evidence of the impact of the financial elements of recent legal aid reforms in England and Wales, including the introduction of the GFS under the new Unified Contract. The evidence comes from solicitors in private practice and not-for-profit providers of legal advice and representation, barristers' chambers, and professional bodies and campaigning groups.

3.1 How were GFS fee levels calculated for immigration and asylum work?

Fixed fee levels for asylum and immigration work under GFS were not based on historical costs data, as distinct from other areas of legal aid funding. In a Freedom of Information request to the Legal Services Commission dated 17th August 2006, ILPA asked for information on the analysis behind the proposed fixed fees for asylum and immigration work²². The Immigration Policy Team at the LSC replied that

"The fees have not been predominantly based on historical case costs as per other schemes. Due to changes in legal aid in 2004/05 and again in 2005/06 we do not have reliable and complete historical average costs and in any event changes in processing mean that historical case costs are largely irrelevant" (LSC, 2006a: 2)²³.

"Furthermore, we do not have reliable historical data to calculate tailored fees in the immigration category; changing processes and changes in case-mix would in any case make historical data largely irrelevant" (ibid: 5).

"As we have stated in the consultation paper "the fees have been calculated by mapping the processes that an immigration or asylum application would routinely follow and the corresponding services that we would expect to be provided in relation to those applications" (ibid: 3).

"The modelling for the exceptional case threshold "was primarily undertaken for TFF [tailored fixed fee] providers, and does not include immigration and asylum cases" (ibid: 3)

Most comments below from practitioners and professional bodies reflect frontline experience of operating under the new fixed fee scheme and various levels of encounter with clients through the asylum determination process. The remainder of this chapter sets out in summary the evidence offered for the financial impact of legal aid reform, and of graduated fixed fees in particular.

3.2 Does legal aid pay for sufficient time for high quality representation?

The LSC itself is mindful of the threat to quality posed by the GFS

"A key risk for the LSC and clients of a procurement system based on fixed fees and ultimately competition is that quality of service and outcomes of some cases may be adversely affected by providers seeking to maximise profits. The LSC will manage this risk by requiring providers to meet quality standards, by monitoring a range of key performance indicators and by taking action where necessary, including terminating contracts" (LSC, 2007h: 22)

²² Reply from the LSC to ILPA, (2006), "How precisely were the proposed fixed fees for asylum and immigration work calculated?"

²³ The LSC also notes that the changes were modelled to be cost neutral against expected spend in 2007/08.

Asylum Aid and Bail for Immigration Detainees have noted in their own research that not all representatives are adversely affected by restrictions on the time available to represent asylum seekers. From their frontline experience, and speaking of the time restrictions introduced in 2004, they note that “firms that are slapdash and unresponsive are largely unaffected by the cuts as they rarely used the time available to do good work for clients under the previous system” (Asylum Aid & BID, 2005: 13).

Data from the Solihull Pilot would suggest, in fact, that such firms will be better off being paid at graduated fixed fee rather than hourly rates of payment. Cases in the Solihull pilot were paid at an hourly rate. Seven out of the twelve firms in the sample charged less than they would have received had cases been charged at the graduated fee rates. However, these firms achieved significantly lower success rates for their clients (see Chapter 5).

The LSC has put in place a contract provision to mitigate abuse of the GFS. Under Section 11A paragraph 4 of the Unified Contract matter starts may be reduced if a representative’s average graduated fee margin exceeds 80% of the value of the work charged at an hourly rate. In effect, the provision gives suppliers undertaking the least amount of work up to 20% more income.

It is widely argued by legal aid practitioners that they are not funded for sufficient time to do adequate work under GFS. Concern was raised in relation to the time restrictions introduced in 2004 and this concern was exacerbated by the implementation of the GFS. In particular practitioners argue that time restrictions place quality at risk:

“Accepting the high level of quality in our work, our data shows that a choice will have to be made between financial imprudence and compromise on quality. However the later is not a genuine option and we cannot continue as a viable business on the basis of the former. Peer review cannot address a halving in time spent on casework” (private practice Category 1 provider, London, cited in ILPA, 2006: 6).

“We will have no choice but to reduce the volume [of immigration and asylum publicly funded work] further, because we are not prepared to compromise on quality” (representative in private practice, London, cited in ILPA, 2006: 6)

For ILPA’s members “doing a case well is a key part of motivation for continuing to work in this very difficult field” (ILPA, 2006: 5). Experienced practitioners are leaving the field altogether “because the changes make it impossible to carry out the standard of work required in the time available”. An accredited caseworker was cited by ILPA as saying “I am not interested in a career involving substandard work for vulnerable people” (ibid: 13).

Asylum cases can be particularly time consuming. Due to the very nature of the work and the consequences for the client of a poor decision

“The work of preparing and presenting the cases of asylum seekers can be lengthy, and for the individual asylum seeker concerned, arduous...sometimes this process is so unbearably painful for them that they are unable to tell us everything straight away” (Routledge & Hanley, 2007: 26).

“Cases of this kind require time and take a great deal of care in preparation and presentation. The Courts expect nothing else. In R v SSHD, ex p Sivakumar the court stated: “it has been said time and time again that asylum cases call for consideration with ‘the most anxious scrutiny’: see, for example, R v SSHD, ex p Bugdaycay. That is not a mantra to which only lip service should be paid. It recognises the fact that what is at stake in these cases is fundamental human rights, including the right to life itself” (ibid: 26).

Dewell’s study for The Law Society in 2003 of solicitors practicing in asylum law²⁴ found that “all of the practitioners reflected a desire to provide a quality service. Adequate time was deemed fundamental in order to reflect this” (Dewell, 2003: 22).

²⁴ Donna Dewell, (2003), “Provision of legal advice to asylum seekers: a study of the perceptions and experiences of immigration solicitors practicing in asylum law”. Strategic Research Unit, The Law Society, London.

"Solicitors reported that it was necessary to spend a great deal of time with clients in order to obtain the full facts of the case. Substantive reports covering, for example, medical and psychological factors from expert witnesses take time to obtain, often longer than the deadlines allow for. A lot of time was needed with clients to develop trust and to access a quality interpreter. With all the solicitors interviewed seeing a combination of up to 25 new or existing clients per week the pressure on time and the intensity of the work was reported as having a direct negative impact on the relationship achievable with clients" (Dewell, 2003: 22).

Refugee Action suggest "that if legal representation and adequate case preparation time were guaranteed at the initial appeal stage it is likely that the majority of cases would be dealt with robustly enough to reduce the number of onward appeals, thereby achieving a more efficient and just process" (2008: 108).

Routledge and Hanley highlight the fundamental importance of taking time to prepare a thorough statement:

"Representatives who prize hurried statements do a tremendous disservice to their clients, because once a decision maker and subsequently the court has assessed that the account simply does not stack up, it is all but impossible for a just outcome to be obtained by any subsequent representative, however much care they might take with preparation" (Routledge & Hanley, 2007: 28).

3.3 Impact on business models: case mix, cherry picking and swings and roundabouts

The LSC suggested in its impact assessment statement produced for the introduction of the GFS that estimates for casework time allowed against each fee stage need to be treated with caution since

"They assume that providers will spend exactly the same amount of time on cases as they did in the past, and that they will conduct exactly the same number and type of cases. Changes to these assumptions would impact on the assessment. It may, for example, be open to providers to increase the numbers of cases undertaken, which would increase their legal aid income overall" (LSC, 2007f: 3).

More than that, from the DCA (now MoJ)/LSC perspective a successful transition to full market competition for publicly funded legal advice via the use of fixed and graduated fees actually relies on this compensatory effect. As the LSC and DCA outline in 'Legal Aid Reform: the way ahead' (2006).

"Fixed and graduated fees revolve around the concept of 'swings and roundabouts' – that is, a case that is more expensive than the standard fee to a firm will be balanced, in the long run, by one that is cheaper" (LSC/ DCA, 2006: 9)

The LSC suggests to suppliers under the Unified Contract that they have a mix of complex and less complex cases so that potential losses under fixed fees for complex cases can be offset by less complex (or at least quicker and easier) cases, where, arguably, suppliers are now being paid more under fixed fees than under an hourly rate system (see e.g. DCA, 2006)²⁵. However, at point 7.13 of its Draft Unified Contract Specification (General) the LSC appears to prohibit suppliers from targeting particular types of client or types of work specifically "in order to have the effect of maximising lower cost work".

There is evidence that cherry picking of cases has been exacerbated by the introduction of the GFS and as a consequence of the introduction of casework time limits in 2004. Asylum Aid and Bail for Immigration Detainees presented a powerful dossier of evidence on those limits. 'Justice Denied: asylum and immigration legal aid – a system in crisis' (2005), presents submissions from practitioners working on the frontline of legal advice and the experiences of asylum seekers. In the report they describe how, even prior to the introduction of GFS, practitioners were more likely to take on cases that were less complex, or to sidestep vulnerable clients such as those with health problems, those whose cases require detailed research, or "where the relevant area of law is unclear or changing" (Asylum Aid & BID, 2005: 13).

²⁵ 'Legal Aid Reform: The way ahead' (DCA, 2006: 9) notes one reason for relying on a swings-and-roundabouts approach, namely that "in order for efficiency to be fully encouraged, the fees must generally be as simple as possible, without an array of 'bolt-ons': if additional payments were available as a matter of course in more expensive cases, there would be far less of an incentive to seek more efficient working practices."

Two practicing solicitors describe the type of clients with complex circumstances that they are currently obliged, due to capacity issues, to turn away from their practice following the introduction of GFS

"Sometimes their circumstances have changed significantly since an initial application to the Home Office was rejected. Sometimes they have suffered from having had poor legal representation in the past...Often these people have previously been turned away by other firms because of lack of capacity. If firms are now placed in a situation in which their very survival seems to depend on minimising the number of complex cases they take on, the problem with access to representation will get even worse" (Routledge and Hanley, 2007: 27).

Indeed, a paper in Solicitors' Journal in 2008 gave practical advice to practitioners on case selection (or 'cherry-picking') for financial survival. The author advises representatives on

"the changes which they will need to make to how they run their legal practices and manage cases to make fixed and graduated fee arrangements work in a profitable manner, considering the range of cases which practices would need to take on and the cases which they could refuse to accept under the Unified Contract Specification Rules" (Ling, 2008: np).

A key problem with the fixed fee approach, according to ILPA, is that "if the fixed fee is set too low to achieve the "swings and roundabouts" effect, then there will be a significant amount of work remunerated only, if at all, through payment of the exceptional fee" (ILPA, 2006: 56).

Routledge and Hanley note

"The obligation on all solicitors to work to adequate professional standards and to act at all times in clients' best interests, suggests that under the new regime firms would have to turn away complex cases and accept only those we could be sure could be properly completed within the time that the fixed fee realistically represents. This represents a great danger for clients with complex cases" (Routledge & Hanley, 2007: 27).

The Unite union reports that "the changes have often skewed the focus of agencies", providing little incentive for basic advice agencies to take on more vulnerable clients requiring greater support, and challenging the ability of those agencies that traditionally have taken on complex casework to survive financially. "This 'cream skimming' effect means that those clients that need support the most are losing out" (Unite, 2008: 3).

"Demand for immigration advice exceeds supply. For most firms this means there is no shortage of work, and little incentive to take on cases that have unclear chances of success, or require further investigation [and] fixed fees have reduced the scope for detailed investigation" (McClintock, 2008: 8).

The House of Commons Constitutional Affairs Committee (HCCAC) in its reports on the implementation of the Carter Review has "expressed serious doubts about the extent to which the LSC could identify and therefore address cherry picking" (Routledge & Hanley, 2007: 27). It found that

"Fee schemes which only provide for relatively flat fixed fees with very little graduation provide economic disincentives to taking on more complex cases. This is likely to disadvantage already vulnerable clients" (HCCAC, 2007 I: 26, para 76).

Lord Bach's 'Review of Legal Advice at Local Level' (June 2009) acknowledges reports from some providers concerning potentially adverse effects on vulnerable clients as a result of cherry picking of easier or less complex cases and clients "in order to take advantages of the "swings and roundabouts" system" (DCA, 2009: 50).

Under the GFS, practitioners are thus faced simultaneously with LSC estimates of 'standard' casework time that are on the face of it inadequate for high quality work, a strategic approach on the part of the LSC that relies on a 'swings and roundabouts' approach, while at the same time prohibiting 'cherry picking' behaviour on the part of providers.

3.4 Access to justice: the supply of quality representation and distribution of asylum and immigration legal advice

The evidence suggests that legal aid reforms, far from weeding out poor quality practitioners may in fact have acted to remove practitioners who do not want to compromise on quality, in the process putting additional pressure on those suppliers who do remain.

This review has found evidence that experienced practitioners have been leaving immigration and asylum work as a result of the impact of legal aid reforms on the nature and funding of practice²⁶, with a subsequent effect on the overall level of supply of immigration and asylum legal advice. The Law Centres Federation has reported the closure of four law centres (NEF Consulting 2009, cited in CoSA 2009: 26)

The House of Commons Constitutional Affairs Select Committee in its report on the implementation of the Carter Review of legal aid warned that

“The introduction of flat fixed fee schemes in ...asylum and immigration may thus have unintended adverse consequences for the ...availability of publicly funded legal services across the country” (House of Commons Constitutional Affairs Select Committee, 2007: 23).

The ILPA annual report for 2007-2008 notes that “many suppliers have scaled back the amount of legal aid work they are doing” (ILPA, 2008: 49), while others such as White Ryland Solicitors in west London announced they were closing. Their business was transferred to Duncan Lewis & Co.

“White Ryland had one of the largest contracts for matter starts in the country and their decision that they could not make the Graduated Fee System pay sent shockwaves around the membership” (ILPA 2008: 49).

A separate but related issue is that of regional deficits in the supply of immigration legal advice, and the emergence of so-called ‘advice deserts’. The most recent statistical information publicly available from the Legal Services Commission shows that even before the introduction of the GFS the number of contracts held in the immigration category declined between March 2006 and March 2007. However, while the number of immigration contracts has declined since October 2007, the number of immigration new matter starts remains broadly static across all sectors. This may point to the regional deficits in the distribution of immigration legal advice, the existence of which can be linked to the practice of dispersal of asylum seekers. The Refugee Council has pointed out that the issue of access to advice is complex:

“The problem is more subtle than a crude shortage – for example in London the LSC cut back on new starts because they say supply is ample. However, our staff and other NGOs say they can never find anyone to represent their clients. The difference lies in where people are at with their claims – as our Leeds office reported recently most people get initial advice OK but then get dropped for their appeal. Others may want to put in a fresh claim but cannot find anybody to do it as it is too time consuming” (Refugee Council cited in McClintock, 2008: 18-19).

Due to the long transitional provisions in the GFS, it is unlikely that the full impact of the changes have yet been felt. A study of the need for immigration advice in England carried out by LawWorks²⁷, confirmed that many asylum seekers and immigrants in England and Wales now struggle to access legal advice, and suggested that

“This trend is likely to continue in the future, with the impact of fixed fees and accreditation still to be fully felt while providers finish cases subject to the old legal aid provisions” (McClintock, 2008: 14)

26 For example, these high street firms have closed their legal aid immigration practices since 2004: Ole Hanssen & Partners, Winstanley Burgess, Wesley Gryk, and Wilkin Chapman (‘News: firm sounds the death knell of immigration advice in Hull Area’. Law Society Gazette, 7 April 2005 and ‘news: Immigration in Crisis as another firm quits’ 8th April 2004. And ‘Bates, Wells and Braithwaite ...has stopped undertaking publicly funded immigration work (although it continues to perform privately funded and pro bono immigration work).

27 Justin McClintock, (2008), “The LawWorks Immigration Report: Assessing the Need for Pro Bono Assistance”, LawWorks, London.

There is evidence that the transitional provisions are masking the true financial impact of the GFS. In addition to reporting the closure of four law centres, the Law Centres Federation has also highlighted the fact that that levels of unrestricted reserves amongst its members have dropped by 70% since the introduction of the GFS. (NEF Consulting 2009 cited in CoSA, 2009: 26).

3.5 The exceptionality threshold for complex and lengthy cases

To mitigate the financial risk to organisations of taking on complex cases under GFS the LSC will now pay an hourly rate fee for exceptional cases (LSC, 2007f: 22). However, "the overall 'logic' ...indicates that those firms which, during the transitional fixed fee period, frequently apply for hourly rates under the 'escape threshold' will not be well placed to compete for contracts under BVT" (Routledge & Hanley, 2007: 27).

Research undertaken by ILPA into the number of hours of work necessary for asylum claims draws attention to the financial risks being forced on firms under the Graduated Fixed Fee scheme

"On average, 11 to 20 hours are spent on an asylum case before the initial Home Office decision, indicating that practitioners are performing several hours of work free on every case they take" (ILPA cited in McClintock, 2008: 8).

"In practice a caseworker spending 11 hours preparing an immigration appeal will fall short of the threshold by one hour – receiving a graduated fee of £250. Were a solicitor to spend just one more hour on the same case they would receive the Exceptional Payment threshold and receive an extra £500 in addition to the £250 graduated fee" (McClintock, 2008: 7).

Initial proposals were that the exceptionality threshold would engage at the point at which the value of the work (when calculated as if paid by an hourly rate) is four times greater than the value of the Graduated Fixed Fee payable (minus additional payments). Following further consultations the LSC reduced the threshold to a multiple of three. White Ryland Solicitors went further to suggest that the exceptionality threshold should engage at a multiple of two.

3.6 Specialist and niche representatives and access to the specialist immigration bar

The recent Bach report (MoJ, 2009) recommends that "further work be done to consider the role of providers who focus on more complex cases or "difficult" client groups, including monitoring the level of claims for "exceptional cases" and the success of such claims" (MoJ, 2009: 8). Representatives canvassed for the study had complained that the GFS doesn't support an "ecology of provision" of legal advice, in which some representatives specialise in shorter cases and others in longer and more complex ones (ibid: 46).

A group of niche civil liberties firms²⁸ working in criminal legal aid made representations to the LSC expressing their concern about the phasing out of a role for specialist or niche representatives under the proposals for legal aid reform following the Carter Review (Bindman & Co et al, 2007). Although their concerns relate to criminal work, the points they make about the remuneration of specialist representatives hold true for civil work, including asylum and immigration work.

The group argued that ceilings on the payment of travel costs combined with geographic areas for bids may exclude specialist firms outside a contract area who may be the most appropriate advisor for a case. They also note that

"as with very high cost cases, specialism reduces costs...it does so in positive ways through the identification of legal and evidential issues; the instruction of appropriate experts and advocates. It also does so in negative ways: avoiding delays in preparation, dissatisfaction leading to non-co-operation...defendants representing themselves; and appeals and miscarriages of justice" (Bindman & Co et al, 2007: 3).

²⁸ Bindmans, Birds, Birnberg Pierce, Christian Khan, Hickman and Rose, Kellys (Brighton), Kieran Clarke (Chesterfield) and Sonn Macmillan Walker.

In a paper written for JUSTICE, the law reform and human rights membership organisation, Roger Smith describes the impact of new LSC contract terms on the ability of not-for-profit law centres to undertake test cases (strategic litigation), and how the balance of work undertaken by law centres may now tend towards volume work or 'bread and butter work'. Under the new bid terms there is great pressure on law centres to do advice work in order to meet their contractual requirements rather than spend time on test cases²⁹.

"An interesting and difficult question for community law centres is whether the development of funding for legal help (advice) and the sheer grind of volume work has led, in effect, to a 'dumbing down' of the law centre movement." (Smith, 2003: 7).

JUSTICE suggests that the LSC "should develop a niche quality mark and contract for agencies that wish to take only a small number of high quality cases" (ibid: 12).

Among practitioners in the immigration bar, consultation of membership organisations on the financial impact of recent legal aid reforms reveals a view that the funding model of the GFS risks eroding the specialist immigration bar by offering a disincentive for counsel to accept instructions and reducing access to those counsel with the most experience and knowledge. Because barristers are self-employed, the LSC's central concept of "swings and roundabouts" allowing for distribution of complex and straightforward cases and associated fees within a firm of solicitors is not transferable to a set of barristers. As ILPA puts it:

"Words fail us at the notion that specialist sets of chambers should expand or re-deploy existing counsel deliberately in such a way as to take on more simple cases than they otherwise would, and that this will somehow mitigate the fact that their more experienced members will be underpaid for the complex cases which may not only benefit the individual client but also develop the law" (ILPA, 2006: 42)

"I will be unable to afford to do immigration work in the future. The fees are already so low that I can already ill-afford it, and am trying to reduce the proportion it represents of my practice" (Barrister, outside London, cited in ILPA, 2006: 7).

Additional fees payable for representation in substantive appeals are considered "dramatically inadequate" by ILPA members (ILPA, 2006: 42), who include both solicitors and barristers. Garden Court Chambers note their strong belief that the fixed fee scheme will lead experienced and committed advocates to leave the immigration and asylum sector, and state that "immigration and asylum advocacy is not a matter that can be wholly assigned to entry-level case workers as the funding model mandates" (Garden Court Chambers, 2007: 22).

3.7 LSC and Ministry of Justice early evaluations of the impact of the new funding scheme

The LSC has been reviewing the operation of Phase 1 of the fixed fee scheme for legal aid in conjunction with key stakeholders in the Civil Contracts Consultative Group, including The Law Society and ILPA. The LSC's report 'Phase 1 Civil Fee Schemes Review' (April 2009), based on the first year of operation of the fixed fee scheme found that overall there had been an increase of 1.84% in the number of new matter starts (LSC, 2009d: 5, point 2.3), and "fees paid generally exceeded profit costs in all categories and regions" (ibid: 5, point 2.11). However, the LSC acknowledged that

"The scope of the report is limited by virtue of the time period under consideration. As it has only been able to look at cases opened and closed since October 2007, the sample of cases does not include the longer cases that occur, particularly in the fields of family and immigration. This means that it has not been possible to evaluate the financial impact on firms at the time of the review on the basis of a full set of data" (LSC, 2009d: 7, point 2.25).

²⁹ Smith makes the distinction between the law centre movement and legal NGOs (often national charities) who are more focused on lobbying and campaigning.

The Ministry of Justice later published a report on the impact of recent changes to the funding of legal aid and the provision of civil legal advice in the UK, especially in light of the current recession (June 2009). The findings of the study, chaired by Lord Bach, Parliamentary Under Secretary of State with responsibility for legal aid, echo some of the concerns given in response or evidence by commercial and not-for-profit providers of legal advice and representation, barristers' chambers, professional bodies and campaigning groups to various recent consultations. These earlier concerns are outlined above in Chapter 2. Lord Bach's study and resulting report offer a recent snapshot of legal aid under fixed fees, albeit one that is not asylum and immigration specific. It notes that

"there does not appear to have been a significant change to the distribution of case costs since the implementation of the fixed fee system and a high proportion of cases fall below the level of the fixed fees" (MoJ, 2009: 48).

Fixed fees were reported by representatives to be creating perverse incentives with resulting disbenefits for vulnerable clients, especially around the number and type of clients helped under legal aid. The report noted representatives' concerns, particularly

Cherry-picking and early-closing

The report noted concerns that some representatives are cherry picking cases that can be dealt with quickly and turning away those cases that are more complex, disadvantaging difficult to serve client groups.

The practice of 'early closing' is described as a variation of cherry-picking. This is defined in the Bach report as managing a case in such a way that it can be closed quickly, "rather than the one which offers the best outcome for the client in the long run" (MoJ, 2009: 51).

Work by the New Economics Foundation on law centres cited in the Bach report found "a large fall in average time spent per case" across all categories of law *except immigration* (MoJ, 2009: 52, emphasis added). The report suggests that this fall in non-immigration work could be due to efficiency, cherry picking, or "greater pragmatism in closing cases" (ibid: 53).

Paralegalisation/ juniorisation

Representatives reported that less qualified members of staff were increasingly being used by firms and organisations in order to keep the cost of cases within or below the fixed fee. The Bach report argues that this might be appropriate in some circumstances and offer the best value for money for the taxpayer. Concerns were noted that delegation of work should be to sufficiently qualified and experienced employees or volunteers.

Case-splitting or cluster-splitting.

It was suggested that cases were being divided into separate legal matters each attracting their own fee. In the context of a capped allocation of cases to each representative, this has the potential to reduce the overall number of individuals who can be given assistance.

Other concerns

The level of fixed fees has been set on the basis of an average of the 2005/06 claim figure for solicitors and not-for-profits. Immigration and asylum fees were modelled to be budget neutral against 2007-08 forecast spend. No allowance has been made for London weighting or for rural area costs, or for the additional costs in serving what the report calls "hard to serve" or "difficult" clients (MoJ, 2009: 8).

Apart from the existence of the exceptionality threshold, the report notes that there is no provision for providers with a high proportion of complex cases. The report recommends that

"further work be done to consider the role of providers who focus on more complex cases or "difficult" client groups, including monitoring the level of claims for "exceptional cases" and the success of such claims" (MoJ, 2009: 48).

The Bach report does not make mention of the impact of Graduated Fixed Fees on quality of work.

The Bach report found little concrete evidence to support these representations to the review however, and what evidence there is, the report suggested, could be characterised as demonstrating both positive and negative effects of the introduction of fixed fees. Lord Bach recommended monitoring to "identity impact of these incentives on services to clients" (MoJ, 2009: 9).

3.8 Hourly rate fees under GFS

Certain legal aid work has continued to be paid at an hourly rate since the introduction of civil contracting in January 2000 and despite the introduction of fixed fees. However, the hourly rates have not been index-linked. The rate currently payable for legal aid attendance and preparation for London-based firms, (£57.35/hour, a rate first introduced in April 2001), would be £71.08/hour if the 2001 hourly rate were to be adjusted to reflect the 24% increase in RPI³⁰ during the intervening period.

When contracting started in 2000 legal aid advice and assistance was remunerated at the hourly rates formerly payable for 'Claim 10' work at a rate first introduced for work done on or after 1st April 1996 (LSC Focus 27, September 1999: 29³¹). Between 1st July 2000 and 2nd Apr 2001 new rates for Legal Help and Help at Court were introduced to reflect whether or not a firm was franchised in, for example, the immigration & nationality category of work (LSC Focus 31, July 2000: 3). The current hourly rates listed in the 2007 Payment Annex of the Unified Contract have been in place since the 2nd April 2001 (LSC Focus 34, 2001: 34). In July 2008 the only set of hourly rates that changed were the hourly rates used to calculate the actual profit costs of GFS cases (which were therefore only paid if the case became exceptional).

Table 1: Changes in legal aid hourly rate fees for asylum & immigration work

	Legal Help (regional/London)	CLR (regional/London)
1 January 2000	Attendance/Prep £45.50/ £48.25 Travel/Waiting £25.50 Letters/Calls £3.55/£3.70	CLR Prep £45.50 CLR Advocacy £57.25
1 July 2000 – 1 April 2001	Attendance/Prep £47.77/ £52.11 Travel/Waiting £26.77/£27.54 Letters/Calls £3.72/£3.99	CLR Prep £54.50 CLR Advocacy £66.25
2 April 2001 – present day <i>(January 2010 publication date)</i>	Attendance/Prep £52.55/ £57.35 Travel/Waiting £29.45/£30.30 Letters/Calls £4.10/£4.40	Prep £57.25/£61.20 Travel/Waiting £29.45/£30.30 Letters/Calls £4.10/£4.40 Advocacy £69.60/£69.60 <i>(For immigration matters not subject to an Order under section 103D NIA 2002)</i>
Current rates if adjusted to reflect increase in RPI (2001–2008)	Attendance/Prep £65.13/£71.08	Advocacy £86.26/£86.26

30 Adjusted to allow for increases in RPI between 2001 and 2008, the most recent year for which annual averages are available. Office for National Statistics, 'Focus on Consumer Price Indices: Data for November 2009' Table 4.1 RPI all items: 1947 to 2009, available at http://www.statistics.gov.uk/downloads/theme_economy/Focus_on_CPI_Nov_09.pdf

31 See Focus newsletter archive at LSC website, available at <http://www.legalservices.gov.uk/archive/9782.asp>

3.9 Financial impact of regulatory change

Many commentators have argued that increased regulation and monitoring has an adverse and unacknowledged impact on the cost of service provision. According to the authors of the NACAB article 'The Quality Mark: A mark of what?' (2001), Andy Benson and Penny Waterhouse

"At this rate the QM requirements of the future will be an amalgam of organisational input justifications, management audits, transaction criteria assessments, peer reviews, case profiling, mystery shopping escapades, client satisfaction ratings and outcome predictors. Feeding this beast will not leave much room for advice work ...Advice services will join the health and teaching professions, measured to death and with similar recruitment problems" (2001: np).

In ILPA's submission to the Carter Review with specific reference to immigration and asylum legal aid work they comment on the Legal Services Commission's own submission to the review that

"absent... is any consideration that increased quality, as a result of the accreditation and other measures adopted by the Commission to drive out the poor and encourage the good supplier, may have increased costs. Good practice takes time, care and a willingness to incur necessary disbursements. If the Commission believes that its quality drive has had a positive effect, then it should surely acknowledge and defend its costs consequences" (ILPA, 2006: 12, original emphasis)

4 Frontloading Legal Advice in Asylum Determination

A strong argument for achieving efficiency savings by frontloading resources early on in asylum decision making while at the same time honouring due process was made in the report 'Providing Protection' published by JUSTICE, ILPA and the Asylum Rights Campaign in July 1997. The report argued that a fair and efficient decision making process relied on claimants having the opportunity to present their claims in full at the start of the process. As the report notes

"This involves front-loading of resources. It also involves a reasonable allocation of time. Concentration on speed and cost-cutting at this stage will tend paradoxically to add to the length and expense of the system as a whole, because poor decisions will automatically, and often successfully, be challenged" (JUSTICE, 1997: 10).

Concentrating the provision of publicly funded legal advice in the earlier stages of the asylum application process also appeared to catch the imagination of the Legal Aid Board at the start of this decade. Prior to its replacement by the LSC it was recommending to the Home Office that good quality immigration legal advice, available at the earliest opportunity, would be of benefit throughout the system to clients, to the Legal Aid Board, and to the Home Office (Legal Aid Board, 1999: 2).

In 2002 the Legal Action Group pointed out that

"The need for high standards of initial advice for asylum seekers is implicitly endorsed by the system of competencies set up by the Office of the Immigration Services Commissioner for different levels of advice activity. ...Only at Level 2 can an adviser undertake asylum casework. The OISC's Guidance to Advisers states (at page 6): "due to the possible severe and irreversible consequences of incorrect advice in the asylum field, work that can be undertaken at level 1 has been limited to truly one-off assistance where the client has not already engaged a higher-level adviser" (LAG, 2002: 3).

A study for the Law Society 'Provision of legal advice to asylum seekers: a study of the perceptions and experiences of immigration solicitors practicing in asylum law' notes

"It is widely acknowledged that the development and promotion of front-loaded services, maximizing provision at the start of any asylum application process, can ensure that future costs and delays are minimized" (Dewell, 2003: v).

The Asylum Rights Campaign (ARC) reiterated its argument for frontloading legal advice in the asylum process in its 2004 report 'Providing Protection in the 21st Century'. ARC continued to recommend the frontloading of legal representation, finding that since its 1997 report 'Providing Protection'

"The government's approach to frontloading has been to put more resources into preventing and penalising arrivals, and fast-tracking claims by making extensive use of detention...The task of deciding substantive issues concerning the application continues, in most cases to be deferred to the appellate process itself, with a consequential loss of the credibility of the Home Office's decision-making" (Baldaccini, 2004: 20).

The Home Office also carried out research into early legal advice in asylum applications prior to the Carter legal aid reforms (see 'The role of early legal advice in asylum applications', Home Office, 2005). Problems with the statistical viability of an aspect of the work limited the findings, which were eventually published in summary form only in 2005. The report notes that at the time of the research some refugee and law organisations as well as the LSC were of the belief that

“ensuring access to legal advice at the initial stages of the asylum process might help to improve... the speed and quality of the determination process and ...the sustainability of initial decisions” (Home Office, 2005: 1).

These views were based on the premise that the quantity and quality of information gathered would be improved and that all information could be taken into account at first decision, enabling better quality and more sustainable decision making. It was seen that early intervention could reduce the likelihood of further evidence emerging at appeal or judicial review.

“The research suggests that good quality legal representation can have a positive impact on the extent and quality of initial information gathering. Legal representatives can ensure that the full claim emerges in a coherent form and that all relevant documentary evidence is, as far as possible, submitted to the Home Office before the initial decision is made. However, legal representatives do not always meet this ideal and, in the extreme, may do nothing on behalf of the applicant or submit irrelevant and/or unverifiable information to the Home Office” (Home Office, 2005: viii).

“The research was not able to determine whether, as a whole, having access to legal advice prior to the initial decision had any impact on the speed, quality or sustainability of the initial decision or on the speed of the end-to-end process of determining asylum applications, including appeals. Neither could it be established whether any benefits that accrue from representation depend on the representative being legally trained” (ibid: viii).

The Department for Constitutional Affairs published ‘Getting earlier, better advice to vulnerable people’ in 2006. The report was proposed in the Command Paper ‘A Fairer Deal for Legal Aid’ (presented to Parliament by the Secretary of State for Constitutional affairs in July 2005), and was to examine the funding and provision of early advice for civil matters without a legal component (DCA, 2006: 4). The report does not come to specific conclusions about front loading legal advice, but does stress the need for ensuring that advice is correct the first time around. This point has also been made by ILPA who have noted that

“Legal aid cuts in the AIT, and in particular the severe effects of the fixed fee regime which are now emerging, also increasingly contribute to the failure to present all relevant evidence first time round” (ILPA, 2008: 15).

The imperative to provide correct advice as early as possible is stressed by AdviceUK (2008)³² in their report on the experience of not-for-profit organisations that offer general advice, legal advice and representation, as they attempt to cope with demand for their services caused by failings in public service provision and the need to appeal decisions. AdviceUK describe how

“much of that demand is ‘failure demand’ – work that should not need doing – caused by failings further back in the system of public administration. These failings are creating unnecessary work and costs within public services as well as in advice organisations” (AdviceUK, 2008: 3).

³² AdviceUK, (2008), ‘It’s the System, Stupid! Radically Rethinking Advice’. The report focuses on the operations of the Department for Work and Pensions, HM Revenue and Customs and Housing Benefit Offices.

5 The Solihull Pilot

The proposal for the Early Legal Advice Pilot in Solihull (the ‘Solihull Pilot’) was set out in the joint Home Office and LSC proposition paper ‘Improving Asylum Decisions through Early and Interactive Advice and Representation’ (2006) produced by the New Asylum Model (NAM) Quality Team³³. The Solihull Pilot was commissioned by the UK Border Agency and the Legal Services Commission, and was designed

“to test the proposition that giving people early access to good legal representation, and thereby ensuring that all the necessary evidence is placed before the UKBA in advance of the first interview with the asylum claimant, will significantly improve the quality of initial decisions taken by the Home Office” (Asylum Aid Annual Report, 2008: 9, emphasis added).

The UNHCR, which works in a supervisory role with the Home Office to improve the quality of first instance asylum decisions through its Quality Initiative project³⁴, welcomed the Solihull Pilot noting that

“[The Solihull Pilot] takes forward a number of concerns previously identified by UNHCR. This includes those situations where testable evidence or information exists that would make the claim stand or fall or which would help decision makers to establish the material facts of a claim, but is neither identified nor sought, or considered appropriately” (UNHCR, 2007: 7)

The operational objectives in the joint proposal give an indication of some of the expectations of high quality representation. The operational objectives of the Home Office and the LSC in the pilot study was on gathering comprehensive evidence, its timely presentation, good client care and a constructive working relationship with the decision maker (see box 2).

Box 2: Operational objectives of the Solihull Pilot

To give all parties an earlier opportunity to identify relevant evidence through a much closer working relationship before the interview and a more interactive role for the representative at the asylum interview itself, including through the early and funded provision of factual claims, country information, documentary evidence and/or expert opinions.

To ensure that most cases are decided within tight time limits but on the overriding understanding that the entire case has been put forward before the initial decision rather than coming to light fully only at the appeal stage. To ensure applicants at the very beginning of the process understand the system they are going through and their rights and responsibilities within it through access to objective and impartial information.

To ensure fast access to quality legal advice immediately upon dispersal and contact between the case owner and legal representative from the moment the file reaches the NAM team.

Source: NAM Quality Team, Home Office.

³³ Available at http://www.legalservices.gov.uk/docs/cls_main/Early_Advice_Proposition.pdf. See also Legal Services Commission, (2006), ‘Information for Applicants: New Asylum Model: Early Legal Advice Pilot in Solihull’. Available at http://www.legalservices.gov.uk/docs/cls_main/InformationForApplicants.pdf

³⁴ The UNHCR Quality Initiative office was invited by the Solihull Pilot Evaluation Group to evaluate the quality of interviews and decisions made during the pilot exercise.

Participating providers were selected through a tender process which imposed quality requirements of a higher order than the normal tender process across several areas, including

- A requirement that the Level 2 accredited advisers in place in the tendering organisation could provide “seamless case ownership” of the asylum application process to first decision, including attendance at the new interactive Home Office interviews (LSC New Asylum Model Early Legal Advice Pilot in Solihull Application form, 2007: 5)
- A requirement that the team of advisers in place in the tendering organisation constituted a “stable, well supervised, well qualified and experienced team of advisers” (ibid: 7).
- a requirement that bidders provide examples of how their organisation had positively impacted on the national or regional asylum debate (ibid: 8).
- A requirement for bidders to explain how their participation in the pilot could assist the qualitative aspect of the evaluation (ibid: 8)

5.1 Evaluation of the Pilot

The Home Office and LSC commissioned an independent evaluation of the Pilot (see Aspden, 2008). The evaluation report described the potential for significant cost savings in Home Office, AIT and LSC costs, and recommended further whole-life costing analysis and more structured statistical analysis to calculate like-for-like savings prior to a wider roll out³⁵.

The Solihull Pilot had three Key Success Indicators (Aspden, 2008: 7):

- Overall cost savings with any rise in the legal aid budget being offset by savings elsewhere
- Case conclusion targets met (integration or removal within 6 months)
- Faster, higher quality and more sustainable asylum decisions

The evaluation found that the case conclusion indicator was met and exceeded in the Solihull Pilot (ibid: 7). On faster, higher quality and sustainable asylum decisions the evaluation found that “taking account of the seven elements in the round this Key Success Indicator was met where the Solihull Pilot procedure was followed³⁶” (ibid: 17).

Qualitative evaluation of the pilot procedure found better overall client care, and a widespread appreciation among Home Office Case Owners and legal representatives of the more engaged and productive working relationships enabled by the pilot procedure, which both stipulated and funded additional time for client-representative meetings.

A report from Evaluation Workshops for participating Case Owners and legal representatives revealed that the allocation of additional funded meeting and fact-finding time in the pilot but within a shortened overall decision-making timescale was found to hinder clear understanding of exactly what the Solihull Pilot was seeking to test. The Evaluation Workshop report recommended that for any further Early Legal Advice Pilot rollout “case completion timescale targets need to be more flexible to allow the interactive process to take place” (Wren, 2008, cited in Aspden, 2008: 6)³⁷

³⁵ The data collection period for the Pilot ran from 23 November 2006 until December 2007.

³⁶ These seven elements are: all material facts and evidence identified and placed into account prior to decision; more focused interviews leading to shorter interview time; faster recognition and integration of refugees; lower appeal allowed rate; more effective conclusion of negative decisions; closer case contact management resulting in fewer absconders; quality of service.

³⁷ See Appendix 3 of Aspden (2008).

It is striking that both the independent evaluation report on the Solihull Pilot and the internal Evaluation Working Group found evidence that the nature of new-style working relationships enabled by the Solihull Pilot procedures met with widespread approval from clients, representatives and decision makers alike. The evaluation report noted that

“The anecdotal evidence was that the overall quality of service to the applicant was thought to be greatly enhanced. Case owners and legal representatives both reported that the applicants benefited from the Solihull Pilot procedure. Overwhelmingly they reported that the applicants felt more engaged with their claim and that they seemed to have a better understanding of what was happening at each stage of their claim” (Aspden, 2008: 17).

The final report of the Evaluation Working Group described how

“the interactive process, building on the NAM Case Owner model, delivered better overall ‘client care’, with Case Owners and Legal Representatives all reporting positive client feedback and a strong impression that negative decisions were better received by the asylum claimants” (Aspden, 2008: 86).

In a submission to a Project Board meeting in October 2008 a key stakeholder³⁸ reports that

“The pilot gave real force and significance to one of the cornerstones of the NAM: the relationship between CO and claimant...The increased engagement between COs and LRs generated mutual understanding and respect. This meant that empathy – towards claimants and towards COs and LRs – began to play a part in the decision-making process” (ibid: 21–22, original emphasis).

These findings point to the importance of the nature of one-to-one relationships in the asylum determination process and the provision of sufficient funded time to enable client-representative engagement with the facts of the case (see Section 7.3, Chapter 7 below)

It is important to note that there were some problems during the pilot process. In particular, the evaluator criticised the different basis on which financial information was gathered for the control sample. As a result there were “too many variable factors to make a like by like cost comparison between the Solihull Pilot and Leeds viable” (Aspden, 2008: 64). As regards the Solihull sample, data was only gathered about costs at the first instance appeal. Legal aid costs further down the process were not considered. The independent evaluation notes however that “the information and statistics available do allow for notional cost implications to be drawn” (ibid: 65). It was on this basis that the evaluator identified the potential of early intervention for large savings.

The evaluator recommended that “the Solihull Pilot procedure and timelines should become the normal procedure adopted for the decision making element of an asylum claim” (Aspden, 2008: 91) and that it should be implemented first in the Solihull region, with a further whole-life costing analysis and more structured statistical analysis to calculate like-for-like savings prior to a wider roll out.

The LSC and UKBA have announced that further “rollout testing” of the Solihull Pilot model, to be known as the Early Legal Advice Project (ELAP) will be undertaken for at least 12 months in one region. This rollout testing will be incorporated into the 2010 contract procurement process, with a separate bid round for ELAP in the selected region (LSC website³⁹).

38 Maurice Wren, Director of Asylum Aid and member of the Solihull Pilot Evaluation Board.

39 See Legal Services Commission website, page ‘Immigration Policy Development’ available at <http://www.legalservices.gov.uk/civil/immigration/5526.asp>. Accessed 14th December 2009.

5.2 The relationship between cost and success rates at initial decision

Notwithstanding the Pilot tender requirements relating to quality and the LSC's existing quality control mechanisms, the evaluation data showed a wide variation in case outcomes of the participating representatives (Aspden, 2008: Annex 14⁴⁰).

The average success rate at initial decision of each of the providers ranged from 19% to 61%. Advisors who spent more time preparing a case achieved a better result for their client, but their costs per case were higher. Lower cost firms had much lower success rates.

Firms involved contracted to work in the pilot undertook 449 cases⁴¹. The average Legal Help Profit costs were £935. The equivalent fee for undertaking a GFS case where representation at interview is permitted is £755. Six firms in the sample (undertaking 208 cases) charged less than they would have received had the case been funded by GFS. The success rate in cases undertaken by these firms was 31%. The success rate for firms charging more than the pilot average of £935 (a sample of 289 cases) was 31%. Asylum claims that fail at initial decision due to poor representation have the potential to incur further costs related to continued support and accommodation, appeals, fresh claims, and High Court applications against removal. The total cost of poor initial representation cannot be known until the final outcome of a case is determined.

The success rate of the Solihull Pilot firms that charged in excess of the average cost for the study of £934 (representing in 160 cases) had a success rate of 44%. Firms whose spend exceeded the level of the GFS for Legal Help (a sample of 289 cases) had a success rate of 39% at initial decision. For a cohort of three participating firms whose data is considered most robust (firms D, I and N), the findings suggest that additional case preparation time has the most significant impact with borderline cases. Skilled and time consuming collection of the individual facts of the case is required in cases where the country evidence is insufficient on its own, as is the case with 'amber' countries⁴².

A file review conducted by a solicitor employed by the LSC (see 5.3 below) cited examples at the initial decision making stage of providers not undertaking important tasks, or saving time by standardizing key aspects of work through use of pro formas etc (ibid: 9, 20, 21, 31 and 40). No examples were cited at the initial decision making stage of providers taking too long over a case.

The findings from the Solihull Pilot suggest that not only is there a relationship between success rates and cost, but firms spending at or below the level of the graduated fixed fees under Solihull conditions will produce a lower overall success rate. The report recommended that providers adhere to seamless case ownership unless operationally impossible (Aspden, 2008: 51), noting that

"A single Caseowner and legal representative for one applicant for the whole of the asylum process is beneficial for all parties. It underpins the end-to-end case management and seamless case ownership which improves the engagement and understanding of Caseowner, legal representative and applicant [at] all stages of the claim" (Aspden, 2008: 51)

5.3 File review of Pilot cases

The LSC prepared a report of its own findings on the Solihull Pilot, attached to the independent evaluator's report at Annex 2 (see Aspden, 2008). As part of its analysis of the pilot, a solicitor employed by the LSC conducted a file review of 55 of the cases conducted under Solihull Pilot conditions. The file reviewer broadly highlighted the benefit of early intervention by high quality legal representatives. On the preparation of the statement prior to the asylum interview, the file reviewer reported

40 Please see Appendix 4 of this document for details.

41 Firms K and L did not hold contracts to undertake Solihull Pilot work.

42 The Home Office and UK Border Agency categorise asylum cases where all appeal rights are exhausted using a measure of removability. Under this traffic-light scheme a 'green' case is a person who is removable on European Union letters; an 'amber' case is a person removable once a travel or identity document has been obtained from the source country; and the 'red' category refers to a person who is currently not removable to the source country due to policy or other considerations (Home Office/House of Commons Committee on Public Accounts, 2006). These distinctions are relevant to legal representatives in that they may add an additional layer of complexity and the need for additional time.

“As an observation it was noted that where an advisor had properly prepared a statement and paid close attention to detail, dates, places events etc, the Home Office would simply agree these matters in the Pro Forma if one had been agreed. In turn this cut down the amount of questions that would be asked in an interview and allowed the Home Office Case Owner to concentrate on clarifying those issues in dispute or those which were not clearly ascertainable from the statement.” (Aspden, 2008: 26)

The file reviewer highlighted the importance of such a statement⁴³ in achieving a positive outcome for the applicant:

“I would go so far as to comment that these files evidence the fact that well produced statements submitted prior to a substantive interview and before a decision is made enhance the client’s chances of a favourable result.” (ibid: 26)

Among the beneficial aspects of the Solihull Pilot process, the file reviewer also pointed to the importance of detailed submissions:

“One provider in particular prepared and submitted detailed submissions routinely prior to the attendance at the interview. Submissions consisted of a combination of case law and country information, with particular attention to the main issues in the client’s case. I felt the preparation of these representations were very beneficial to the case. As an observation it was noted that all cases in the files reviewed for this provider were granted refugee status post interview. It also showed that the provider was simply not churning out standardised documents but concentrating on putting forward the material facts of the case.” (ibid: 32)

5.4 The Solihull Pilot and the Cost of Quality research

The Solihull Pilot tested early and interactive legal intervention, specifically the provision of a legal advisor early on in the asylum determination process. It was implicit in the tender requirements and process that providers would be expected to work to a standard higher than Peer Review Level 3 which is the Threshold Competence level for non-Solihull Pilot or mainstream LSC funded work. The value of this higher standard of work undertaken in the pilot was supported by the LSC’s file review of pilot cases. The file reviewer underlined the importance of comprehensive case preparation, a feature of Peer Review Levels 1 and 2 but not of Peer Review Level 3, in achieving a just, and in Solihull terms, an efficient case outcome.

While the evaluation was not designed to look at the impact of relative levels of quality, data produced in the evaluation enabled this to be analysed to a degree. It revealed a correlation between cost and outcome at the initial decision making stage. Clearly, this supports the assertion, cited elsewhere in this report, that time is an important component of the level of quality of legal work. More importantly, it supports the view that work of a higher standard than Level 3 may prove to be more cost effective over the life of a case, where this can be satisfactorily tested.

It should be noted that the Solihull Pilot did not examine the costs of participating legal providers, only those of the LSC, National Asylum Support Service (NASS), and the Asylum & Immigration Tribunals.

The Cost of Quality research will build on the findings of the Solihull Pilot, looking beyond the potential for cost savings for the Home Office, AIT and the LSC as a result of the Solihull package (early and interactive legal intervention and more funded fact-finding and client time), to determine the actual cost to legal advice providers of providing high quality advice to publicly funded clients under the LSC’s Graduated Fixed Fee scheme.

The Cost of Quality research is designed to enable the isolation of two elements recorded in an asylum case file, specifically cost and time, as well as an asylum-specific evaluation of quality of work through a file review exercise. This level of sample detail is intended to better illuminate the relationship between cost, time and quality in asylum legal work.

⁴³ It should be noted that at the time of writing the NAM is a SEF-less process, with the exception of certain types of case such as unaccompanied asylum-seeking children and trafficking cases.

6 Measuring Quality in Public Policy

The move to the Graduated Fixed Fee in legal aid is just one of many public policy initiatives that is driven by moves towards efficiency in public service reform. This chapter will first explore the context of these changes and the effects that it will have on the measures of quality in public services, focusing on quality in legal aid. The chapter also attempts to broaden the often narrowly defined quality evaluation criteria to draw out more subjective elements of quality. Approaches that examine the interactions between clients and advisors are highlighted. The key criteria that emerge from this chapter are developed in Chapter Seven which sets out the normative framework for quality in publicly funded legal aid for asylum cases.

6.1 Background to quality measurement in public policy

Over the last 25 years successive administrations have embarked on considerable public service reform. Starting in 1980s, successive governments pushed through value for money initiatives such as the tendering out of public services. Value for money remains a key component of public service reform, but has been incorporated into a broader set of goals. The Cabinet Office (2008) summarises these goals as

- Excellent outcomes
- Personalised services that are flexible enough to meet individual needs
- Fairness and equitability for all, no matter what their circumstances
- Accountability to users, and
- Value for money.

These goals have led to the introduction of quasi-markets in service delivery, including the delivery of publicly funded legal aid. Such quasi-markets are characterised by distinctions between the purchaser and the provider and the opening up of public service provision to private and third sector organisations. In order to ensure value for money and high quality outcomes, performance indicators and inspection regimes are embedded into the contracts awarded to public service providers (Clarke and Newman, 1997). Public service reforms in the delivery of healthcare, for example, have separated the purchaser (the primary care trust) from the provider (hospitals, primary care services and so on, including those run by the private sector). Performance indicators are built into these contracts and user accountability is achieved through the publication of hospital league tables (See Mays et al 2000).

There are many differences between health service reforms and those in legal aid. There is already a market in the latter. Nevertheless, policies enacted by the Ministry of Justice and its predecessor departments, as well as the Legal Services Commission have been introduced in an attempt to generate greater value for money as well as promote a better quality service. The introduction of the Unified Contract (Civil) was intended to create a level playing field in the delivery of publicly funded legal aid between the private and third sector. The Graduated Fixed Fee was designed to generate greater value for money.

The recent direction of public service reform has met with criticism from various quarters, including user groups, providers of public services, and academic analysts. Service delivery organisations are obliged to balance financial survival with the maintenance of high quality services as

“Internal management processes are dominated by the twin rubrics of business planning, linked to target setting and performance management, and the building of corporate commitment to a specific organisational mission and purpose, linked to survival in a competitive environment” (Clarke and Newman, 1997: 147).

Some organisations focus on short-term business goals against which targets can be set and measured, rather than the long-term planning of services that meet the needs of the user (New Economics Foundation, 2007). This may not offer value for money or efficiency in the longer term. In fact shorter term financial gains can add to longer term financial loss when whole life quality or value for money is assessed in relation to the service user. The drive for efficiency savings in the awarding of contracts may adversely effect smaller providers and favour big providers. The delivery of public services may be driven by the desire to meet targets, rather than client need, distorting the quality of the service.

Government departments now collect large amounts of data on performance measures to assess the quality of the service they are funding. This data comes from a wide variety of sources including target measurements, output indicators, evaluations of services and peer review in the case of legal aid. The fitness for purpose of this data as a measure of quality may be questioned (Clarke and Newman, 1997). Put simply, if the data used to measure the quality of outcomes in public services is not fit for purpose, then evaluations of quality may be inaccurate.

Many of the critiques of public service reforms have led to the development of alternative policies designed to promote value for money, user accountability and quality provision, particularly in the education and health sectors. The New Economics Foundation argues for a new *“Social Return on Investment”* model which measures the long term success of a service rather than short term gains. The model’s long term view encompasses the economic, social and environmental effects of policy (NEF, 2009).

Harvey and Knight (1996) in a study of quality assurance in higher education usefully suggest five dimensions to quality:

- exceptionality, for example, high standards
- consistency, for example, no defects
- fitness for purpose
- value for money
- transformative for the user.

6.2 Quality Measurement in Legal Aid

The question of quality is clearly relevant to debate on the nature and aims of publicly-funded legal advice and representation. In a climate of audit and assessment, processes geared towards quality measurement and performance management have come to the fore across all sectors. Not least in legal aid work, as publicly funded advice and representation has had to evolve following the legal aid reforms directed towards achieving efficiency and cost savings for the public purse. New financing initiatives have blurred the boundaries between the public, commercial, and not-for-profit spheres across many service provision sectors, including legal aid contracting.

Despite the increasing emphasis on the *measurement* of quality, finding a shared understanding of what is *meant* by quality in legal advice and representation work is a challenge. Many commentators suggest that definitions and understandings of quality in publicly funded legal work in the UK are increasingly narrow, based on limited stakeholder interests, and fuel an increasingly instrumental approach to legal advice and representation with adverse consequences for access to legal aid for those who may not otherwise be able to exercise their rights.

Non-economic aspects of legal advice and representation, such as the nature of the one to one relationship between client and advisor, are increasingly unlikely to feature in quality assurance mechanisms in the legal aid sector as in other publicly funded services, even though there is strong evidence that they are critically important in client evaluations of legal advice (e.g. as shown by Council for Social Action research below).

There are many views about the failings of publicly funded legal advice across all categories of law. But defining what constitutes high quality in legal advice is difficult because any definition of quality is multi-dimensional and will combine a range of factors that cannot all be measured using the same tools. The next section examines some of the current tools that exist for quality measurement.

6.3 Quality management systems

Quality management is a method for ensuring that all the activities necessary to design, develop and implement a product or service are effective and efficient with respect to the system and its performance. Quality management is generally considered to have three main components: quality control, quality assurance, and quality improvement (www.qualityresearchinternational.com).

Box 3: Components of quality management⁴⁴

Quality control	<p>A mechanism for ensuring that an output (product or service) conforms to a predetermined specification.</p> <p>Checking and reviewing work to ensuring services meet or exceed customer requirements.</p> <p>A process of testing outputs</p>
Quality assurance	<p>Formally restricted to establishing whether the explicit or implicit pledge made by an institution or programme has been met.</p> <p>Establishes stakeholder confidence that provision (input, process and outcomes) fulfils expectations or measures up to threshold minimum requirements, demonstrating effectiveness, accountability, and value for money.</p> <p>Assurance is increasingly necessary for publicly-funded institutions to demonstrate accountability and provide confirmation that they are delivering the services for which they are funded, thus ensuring that they are providing value for money.</p> <p>Concepts of ‘fit for purpose’, ‘do it right first time’.</p>
Quality improvement	<p>Improving the process.</p> <p>Establishing behavior patterns which support the achievement of quality.</p>

Source: www.qualityresearchinternational.com

⁴⁴ “Mechanisms for quality assurance, both internal and external to an institution or programme, are so diverse that they overlap with the mechanism and rationales for reviewing and checking quality. Hence it is often difficult to be precise about the dividing line between assuring, evaluating, assessing or auditing quality” (www.qualityresearchinternational.com)

While some quality assurance (QA) approaches employ self-assessment methods, others require external evaluation. Underlying most approaches however are broad themes that suggest quality assurance is widely thought of as a function of inputs, processes and outcomes (Bimrose et al, 2006: 4).

Box 4: Components of quality assurance

Component	Elements	Form
Inputs	E.g. number of service users, number of staff available at various levels of qualification or accreditation, infrastructure, costs including financial resources allocated by government to legal advice.	Typically defined in the form of service level standards for an organisation. e.g. minimum qualification level of staff
Processes	The content of the service provided, the type of activity e.g. signposting, method of delivery, procedures including timeliness.	Typically defined in the form of service level standards for an organisation. e.g. replying to correspondence within a specified timeframe
Outcomes	Can encompass the impact of the intervention on an individual client desired end result obtained progression into another stage or status the level of user satisfaction.	Often defined in the form of set performance targets. e.g. a percentage of client satisfaction rates

Source: various

There are several widely available quality schemes, many of them globally recognised brands. Some grew out of and are more appropriate to the manufacturing sector, others to the provision of services. Schemes may be sector specific while others are more generic, and each has a design objective (to develop staff, to reduce defects, to reduce costs and so on). Certain of these schemes are in use in organisations offering legal advice and representation in the UK, independent of the requirements around quality demanded by the Legal Services Commission contract holders.

Some of the most widely used quality schemes are:

European Foundation for Quality Management Excellence Model – EFQM is a framework for understanding the connections between what an organisation does and the results it is capable of achieving. The method includes a scoring framework for understanding how well an organisation's priorities and processes support its ambitions, and is used to benchmark organisational capability and performance.

Investors in People Standard (IIP) – a business improvement tool designed to enhance the performance of an organisation through the management and development of their people. The standard is based on three principles – plan, do, review.

Kaizen – a Japanese philosophy that focuses on continuous improvement throughout all aspects of life. When applied to the workplace, Kaizen activities – continual aligned small improvements and standardization – yield results in the form of compound productivity improvement.

ISO 9001:2000 – one of a series of international standards for quality systems that can be used for external quality assurance. An ISO certificate must be renewed at regular intervals. The British Standards series equivalent is BS5750.

Balanced Scorecard – consists of the grouping of performance measures in one of four general categories or perspectives (customer perspective, internal process perspective, innovation, and learning perspective) to aid in the selection of the appropriate performance measures for an enterprise.

Six Sigma – a set of practices designed to improve manufacturing process and eliminate defects (anything that could lead to customer dissatisfaction). The method involves continuous efforts to reduce process variation and achieve stable and predictable results⁴⁵.

Total Quality Management (TQM) – TQM addresses two qualities: *quality* of return to satisfy the needs of shareholders, and *quality* of products. TQM places strong focus on process measurement and controls as means of continuous improvement.

UK quality schemes of particular interest to not-for-profit and other organisations working in the field of immigration and asylum advice include

Quality Assurance System for Refugee Organisations (QASRO) – a quality assurance system for voluntary and community organisations working with refugees, launched in 2001 by members of the National Refugee Forum. A non-accredited quality system based on self-assessment of organisational development and delivery of key services. The system can be used to help refugee organisations move towards achieving accreditation standards for the OISC and the Community Legal Service Quality Mark. The system enables organisations to produce a portfolio of evidence on standards and performance for funders and other stakeholders (www.refugeecouncil.org.uk)

Quality Development Initiative (QDI) – this initiative supported advice organisations in some London boroughs and was managed by London Advice Services Alliance (LASA)⁴⁶. Organisations providing services to refugees were a target group for funding. Resources still available online include a guide to quality assurance systems relevant to voluntary advice agencies (www.qdi.org.uk).

The European Commission for Efficiency of Justice (CEPEJ), under the umbrella of the Council of Europe, has recently developed and adopted a model of quality for justice systems. CEPEJ has developed a ‘Checklist for promoting the quality of justice and the courts’ (July 2008), which aims to “give tools to practitioners and policy makers to improve quality within their own remit”⁴⁷. The CEPEJ has

“chosen to highlight the wide range of constituent factors that contribute to quality of justice...considering the various audiences of judicial systems – parties, witnesses, victims, judicial practitioners or citizens do not always have the same expectations vis-à-vis the quality” (CEPEJ website)

In this quality model the CEPEJ structures the measurement of quality around the supply side and the demand side of justice and the courts.

The UNHCR Quality Initiative Project in the UK works alongside UK Border Agency staff to monitor procedures and the application of 1951 Refugee Convention criteria. The UNHCR Quality Initiative Project is based on the supervisory role of the UN High Commissioner for Refugees. So far five reports have been published since 2003, each report concentrating on a separate aspect of refugee determination in the UK⁴⁸. The Quality Initiative has not so far addressed directly the quality of legal aid work carried out for asylum seekers as it relates to the quality of decision making, but it has been involved in evaluating the Solihull Early Advice Pilot (see Chapter 5).

6.4 What is being measured? Proxies for quality

Quality evaluation and assurance in legal practice⁴⁹ usually focuses on four measures or proxies for quality (inputs, structure, process, and outcomes), and ideally will draw on more than one (Paterson, 1999). Surrogates of quality “invariably equate quality with delivery, (that is the achievement of quantitative targets that focus on economy and efficiency)” (Bimrose et al, 2006: 40). A number of indicators can be developed for each measure. For example, the current Quality Framework of the Legal Services Commission incorporates a large number of individual indicators across the various evaluative strands of the framework (see Box 5).

45 The term ‘six sigma process’ comes from the notion that if one has six standard deviations between the process mean and the nearest specification limit, there will be practically no items that fail to meet specifications.

46 The consortium included Law Centres Federation, Refugee Council, CAB, Age Concern, Dial UK and Youth Access.

47 See <http://www.coe.int/cepej> document: CEPEJ(2008)2E

48 See the UNHCR webpage ‘What we do in the UK’ available at <http://www.unhcr.org.uk/what-we-do/Quality-Initiative.html>

49 The same approach has been widely adopted in medical practice notes Paterson (1999).

Paterson (1999) observes in relation to the value and longevity of indicators of quality in legal work, that it is

“likely that Goodhart’s Law⁵⁰ would entail that even reliable proxies for quality would cease to be so once they are articulated and measured. Since 1994⁵¹, therefore, the hunt has been on for new quality proxies” (1999: 8).

Box 5: Proxies for quality in the LSC Quality Framework

Proxies for quality	Features of the proxy	Indicators of the proxy
Inputs	Easy to collect Indirect measurement.	e.g. professional qualifications, accreditation, CPD, status in the community.
Structures	Environment in which performance takes place. These assist efficient practice management, but facilitate quality of performance in other aspects of practice. They do not ensure quality.	e.g. staff development policies, complaints policies, resourcing levels, record keeping
Process²	A more direct focus on behaviour and performance of individual practitioners. Examines compliance with checklists or standards.	e.g. LSC’s Peer Review process against agreed performance criteria such as Peer Review Civil Criteria.
Outcomes	Difficult to set up, complex, controversial. Lawyers argue each case is unique. For asylum and immigration work, at various stages of a case outcomes are subject to the idiosyncrasies of individual UKBA case owners and judicial variation at the AIT. Valuation of final case outcome not intuitively discernable, depends on viewpoint (asylum claimant, Home Office, legal representative etc.).	e.g. statistical approach considering general patterns in aggregate case results (only suitable for large firms who can provide large sample size) common outcome measures <ul style="list-style-type: none"> • case cost • time taken • success rates • client satisfaction all need to be heavily qualified

Source: Paterson (1999: 3-7) and Sherr et al, (1994: 7-8)

50 Charles Goodhart was an economist. His original 1975 formulation was that “any observed statistical regularity will tend to collapse once any pressure is placed upon it for control purposes” (1975). In essence this means that once an indicator or surrogate measure ‘is made a target for the purpose of conducting social or economic policy, then it will lose the information content that would qualify it to play such a role”. Source: Wikipedia. Page available at http://en.wikipedia.org/wiki/Goodhart%27s_law

51 In 1994 Transaction Criteria were introduced to legal aid work in the UK by the Legal Aid Board as part of the voluntary Franchising scheme. The Transaction Criteria for the category ‘Immigration: clients seeking asylum’ (2001) are available on the LSC website at http://www.legalservices.gov.uk/docs/civil_contracting/clients_seeking_asylum.pdf

6.5 Process elements of quality evaluation

The 'process' element of quality evaluation and assurance is arguably the element most related to the behaviour and performance of individual practitioners. A focus on process inevitably foregrounds the question of how to usefully pin down notions of competence, excellence, and professionalism for the purposes of evaluation and quality assurance in a climate of audit and competitive tendering.

Box 6: Practitioners' views on quality in legal work

Speaking as practitioners, what do you think high quality legal work involves?⁵²

Exercising legal judgment
 Probing, "digging around a case", "digging with a sharper spade"
 Questioning
 Identifying the issues
 Joined up thinking
 Taking appropriate action
 Professionalism
 Best practice
 Adding value
 Specialist knowledge e.g. around the asylum claims of women from fragile states
 Sufficient time to do all these things

While inputs and process are instrumental in quality assurance, outcomes are ultimately the most critical, if likely to be the most controversial. Evaluations of outcome depend significantly on perspective.

The multiple stakeholders in the provision of legal advice have differing needs and perspectives on outcomes. Legal advice clients, provider business managers, legal practitioners, the purchaser of the service (here the Legal Services Commission), and policy makers and Government, each have different ideas about what works and what does not work, and what is necessary and what is not. "In this context QA is, therefore, complex and problematic" (Bimrose et al, 2006: 10).

Advice work, including asylum and immigration legal advice, is somewhat open ended, and "judgment of its efficacy is likely to change over time as the future unfolds; how it was valued will depend on when that judgment is made" (Bimrose et al, 2006: 44). They go on to state

"The challenge is...how best to develop differing types of evidence relating to quality that will satisfy the needs of different stakeholders. ...it is the end product that is most critical. That is, has the intervention made a positive and meaningful difference to the client or customer and, if so, at what cost to the organisation?" (Bimrose et al, 2006: 9).

Outcomes can be thought of at several levels for each type of stakeholder in the asylum and immigration system. From the perspective of an asylum applicant

- A positive outcome with immediate impact might be release from detention.
- A positive outcome with intermediate impact might be permission to lodge a judicial review.
- A positive outcome with longer-term impact might be publication of the judgment on a country case that clears the way for other applicants to make a fresh claim.

⁵² This question was asked informally of a group of senior managers from a national not-for-profit organisation that holds an LSC contract for asylum and immigration work (April 2009, London).

- There are also long term outcomes at a macro level, for UK society and the economy that result from sustained widespread better quality interventions at an individual level. These may or may not be closely aligned with current government policy e.g. on removals or integration.

Paterson and Sherr have written widely on the measurement of professional competence in the legal profession (e.g. Sherr et al, (1994); Paterson, (1999); and Moorhead et al, (2003); Sherr, Moorhead and Paterson, (1994)). Paterson has described how the settled view among commentators is that that competence among legal professionals is a relative concept, "that there is a continuum stretching from incompetence through minimal competence to excellence" rather than the view that says lawyers are either competent or they are not (Paterson, 1994: 5).

He goes on to ask

"if situational or economic factors lead to overwork, failures in preparation and reduced standards, can the practitioners involved fairly be described as incompetent? Is a strong sense of professional responsibility a necessary ingredient in legal competence? Are enthusiasm, energy, integrity and wisdom required components of competence, or do they belong more properly to the sphere of excellence?" (Paterson, 1994: 6)

Paterson argues that these questions demonstrate why it has been found to be relatively easy to determine competence in terms of technical skills but less easy to incorporate elements of attitude and motivation. And he goes on to assert that "it is difficult if not impossible to divorce the content of competence from the level of competence under consideration in a *particular context*" (ibid: 6, emphasis added).

Bimrose et al (2006) note that

"Measuring the quality and impact of guidance interventions is... multifaceted and complex. Given that guidance is a human activity, subject to degrees of unpredictability and uncertainty (particularly in relation to individual values, attitudes, beliefs and behaviour), it is unsurprising that its quality assurance and impact are difficult, sometimes impossible, to measure" (2006: 8).

The difficulties associated with *defining* the competence of legal practitioners are generally mirrored in attempts to *measure* competence for the purpose of quality management.

6.6 Professional Obligations

ILPA offered up a definition of good quality in legal work at the beginning of its submission to the DCA's consultation paper 'Legal Aid: A Sustainable Future' (2006)⁵³

"By "quality", here and throughout this submission, we mean no more and no less than work fulfilling ethical requirements, the inability to fulfill which must lead us, in accordance with our professional obligations, to decline conduct of a case" (ILPA, 2006: 2)

This view is illustrated in a submission from Garden Court Chambers, who see the legal aid reforms as inevitably leading to a diminution of quality through limiting case preparation time. They have argued that 'it is legally irrational for the funding level to be set on an assumption that would cause a representative to be professionally negligent' (Garden Court Chambers, 2007: 7). This is reinforced by Routledge & Hanley's point that 'the obligation on all solicitors to work to adequate professional standards and to act at all times in clients' best interests suggests...that firms would have to turn away complex cases.' (2007: 27). Solicitors are subject to strict rules and principles of professional conduct, and have a duty to act in the best interests of the client and to maintain a proper standard of work.⁵⁴

⁵³ The consultation was on the recommendations within Lord Carter's final report on legal aid procurement and the proposed programme of legal aid reform based around a new system of procurement. Responses were published in 'Legal Aid: a sustainable future – analysis of responses', (November 2006). Available at <http://www.dca.gov.uk/consult/legal-aidsf/legal-aid281106.pdf>

⁵⁴ See the Solicitors Regulation Authority Code of Conduct 2007: <http://www.sra.org.uk/solicitors/code-of-conduct.page>

6.7 Best Practice

How does quality relate to best practice? In the field of immigration law a series of highly regarded best practice guides have been produced by ILPA (Immigration Law Practitioners Association)⁵⁵, most written in partnership with organisations such as the Law Society, Refugee Legal Centre (now Refugee and Migrant Justice), Bail for Immigration Detainees, and the Office of the Immigration Services Commissioner (OISC). The ILPA guides provide extensive practical detail but are not linked to any system of quality evaluation or assurance. They are, in essence, lists of recommended activities and approaches to particular types of case from respected practitioners and organisations in the field.

The thinking behind the concept of 'best practice' is that there is a method or process or approach that is more efficient or more effective at delivering a particular outcome than any other, based on tried and tested procedures (See Appendix 3 in which ILPA best practice guidelines for asylum applications are mapped across to the file review process for this project).

6.8 Subjective Aspects of Quality

The organisation of legal aid is a publicly financed service dependent on the supply of services by private lawyers, run as a market, and headed towards best-value tendering from 2010. The LSC's 'Strategic Plan 2008-2011: Transforming Legal Aid' announces that "we will design and implement a system which supports *efficient* providers, and enable them to focus on their core task of delivering good quality advice to clients" (LSC 2008c: 4, emphasis added). The LSC's objectives mirror the drive at government level towards markets, efficiency, and value for money in the commission and purchase of public services.

This emphasis is not without criticism. In a climate of audit and assessment, with an increasing governmental emphasis on quality and performance management and the need to demonstrate Gershon efficiency savings, it is perhaps not realistic to expect subjective measures of quality to feature in the quality management of publicly funded legal aid. However, there is strong evidence to suggest that these more subjective and intuitive elements are essential in the provision of high quality legal advice.

An advisor who does not properly listen to their client's evidence and does not probe for further information when drafting statements is not providing a high quality service for the client despite appearing to do so if assessing processual elements of work. Client satisfaction with their advisor is a key element in their outcomes as demonstrated in the CoSA report.

This is not a straightforward task. Many of the highly valued and appreciated elements that conscientious practitioners are convinced contribute to good outcomes are either not objectively measurable, or have to be measured through proxies and thus melt away as discrete features of quality in their own right. However, many non-economic features of good practice can in fact be monetised, such as credibility in the asylum determination system or the rapport between client and advisor, but they are difficult if not impossible to measure in any systematic way. This section of the review will outline useful approaches to defining productive and effective interactions between clients and advisors. Key features that emerge from this section will feed into Chapter 7.

55 ILPA, (2008), 'The Detained Fast Track Process a Best Practice Guide', ILPA; Jane Coker et al, (2005), "Representation at Immigration Appeals: A Best Practice Guide", ILPA/OISC; Heaven Crawley, (2004), 'Working with children and young people subject to immigration control : Guidelines for best practice', ILPA; Emily Burnham, (2003), 'Challenging Immigration Detention A Best Practice Guide', ILPA/Bail for Immigration Detainees/Law Society; Mark Henderson, (2003), 'Best Practice Guide to Asylum and Human Rights Appeals', ILPA/Refugee Legal Centre; Jane Coker et al, (2002), 'Making An Asylum Application - A Best Practice Guide', ILPA.

6.9 The Council on Social Action and one to one relationships in public service provision

The Council on Social Action (CoSA) has carried out research into the role of one-to-one relationships in volunteering (such as mentoring and befriending) (2008a)⁵⁶, and in public service provision (2008b)⁵⁷. Their work has shown that the features of one-to-one relationships that effect transformation in people's lives are information exchange, long-term relationships, and continuity of relationships. The manner in which these key features are organised and delivered also contributes to successful outcomes, and CoSA highlights the value of

- Early intervention and prevention (rather than crisis management at a later stage)
- Goal setting and a time frame (especially small incremental goals, identifying aspirations)
- A minimal administrative burden

CoSA's work also points to research carried out by the Joseph Rowntree Foundation on what is valued by disabled people in the current turn towards the personalization of services⁵⁸, in which it was found that disabled service users value choice, control, and good relationships in service provision.

The CoSA report on public service provision offers what the Council calls 'humanisation' as an operating logic for public services, rather than the personalisation agenda currently in vogue (cf. traditional hierarchical public services, and New Public Management regimes typically consisting of privatisation, targets, and audit).

In their penultimate report 'Time well-spent: The importance of the one-to-one relationship between advice workers and their clients', (2009)⁵⁹, CoSA draws out the characteristics of productive one-to-one relationships in civil legal advice work, and the benefits to voluntary sector delivery of services to be gained from effective relationships in terms of good quality outcomes and value for money. One chapter of the report draws on interim findings on the quality of client-solicitor relationships from a series of interviews with refugees carried out for the Cost of Quality research and shared with CoSA.

Whilst the Council on Social Action concedes that it can offer no solution to the problem of how to objectively measure the outcomes of one-to-one relationships, the New Economics Foundation (NEF) in its report "Measuring what Matters" challenges the idea that difficulty or complexity in measurement is an excuse for relying on mechanics, or quantitative data alone, suggesting that different kinds of information and evidence can be aggregated in a way that is useful for decision makers" (NEF 2009: 7)

56 Council on Social Action, (2008), 'Side by side: a report setting out the Council on Social Action's work on one-to-one. CoSA paper No. 2'. Available at http://www.cabinetoffice.gov.uk/social_action.aspx

57 Council on Social Action, (2008), 'Side by side and the implications for public service. CoSA Paper No. 3'. Available at http://www.cabinetoffice.gov.uk/social_action.aspx

58 The Joseph Rowntree Foundation's project The Standards We Expect. See their report 'Person-centred support: what service users and practitioners say' (2008). Available at <http://www.jrf.org.uk/sites/files/jrf/2173-person-centred-support.pdf>

59 Council on Social Action, (2009), 'Time Well Spent: The importance of the one-to-one relationship between advice workers and their clients. CoSA Paper No. 10'. Available at <http://www.cabinetoffice.gov.uk/media/309446/time-well-spent.pdf>

6.10 Cost of Quality Refugee Interviews

As part of the Cost of Quality project, ICAR published a report in August 2009 which details findings from 34 refugee interviews

Five areas of the asylum process stood out through the interviews and form the basis of the key findings in this report.

- 1) The **One to One Relationship** with the representative involves factors such as trust, empathy, mutual respect and dealing with difficult emotions and situations.
- 2) **Gathering and Presenting Evidence** is about listening to the client and taking all possible steps to presenting a strong case built on well researched evidence and the use of appropriate witnesses. Allowing the client to read and review their statement of evidence was also mentioned as an element of good quality legal work.
- 3) **Case Management and Conduct of the Case** involves the timely submission of evidence and documents, good handling of appeals at court, regular follow-up with the Home Office, a proactive approach to the case and the management of client expectations.
- 4) **Communication** is a key area frequently mentioned by respondents. Professional and neutral interpreters were essential so that evidence could be passed to the representative. Clients expected the representative to have excellent listening skills, give their full attention to the client and use appropriate (positive) body language.
- 5) **Access** to the representative is also an essential part of high quality work. Representatives should be directly available or respond to clients within a reasonable time frame. Clients also appreciated a range of means of contact such as telephone, e-mail and written correspondence where appropriate. Being able to provide early appointment dates and not being kept waiting for appointment were also valued.

Each area had a number of positive and negative aspects mentioned by clients as key factors in good or poor quality legal representation. These are not presented in order, they were all equally important to the respondents. There are a number of characteristics of both representatives and firms that combine to produce what clients see as high quality legal work and these straddle the five areas.

Box 7: Quality characteristics identified by refugees

High quality representatives have the following characteristics;

Excellent listening skills
 Empathy with the client
 Respect for the client
 A human approach
 Sufficient time to listen, gather evidence and explain the system
 Knowledge of how to handle the court systems and Home Office
 A proactive approach to the case
 Ability to manage the client's expectations
 Excellent communication skills
 Allow the client to review their evidence and make changes to their statement
 Engage with the evidence, and provide additional research and witnesses if needed
 Present the evidence in the best possible way

In addition, high quality firms provide the following for their clients;

Direct access to the representative or a fully briefed colleague
 Timely appointments
 Professional and neutral interpreters

6.11 The Effective Lawyer Communication project

Another perspective on quality that identifies which aspects of a professional encounter are highly valued comes from a project set up to train young lawyers in communication skills (Barton et al, 2006)⁶⁰. The Effective Lawyer-Client Communication (ELCC) project, a partnership between Glasgow Graduate School of Law, Dundee Medical School, and Georgia State University College of Law, draws on research and training work on the communication skills of medical students. During an extensive series of role-play interview encounters, trainee lawyers, their standardised clients and academic assessors were asked to evaluate the encounter for the presence of various elements using a series of factors⁶¹.

Factor analysis showed that there were patterns to the evaluations that could be largely accounted for by a few underlying factors, and that

- What could be glossed as ‘rapport’ and ‘information exchange’ were highly valued by lawyers, clients and assessors.
- Lawyers additionally valued a set of elements that suggested ‘mutual understanding’.
- Assessors additionally valued a factor characterised as ‘what the lawyer would do next’.

The authors report that there is strong evidence from a number of countries that the majority of clients are dissatisfied with the nature of lawyer-client communications, with implications for the exercise of justice. There is an equally broad academic consensus on remedies for this problem, but these have not been widely adopted.

Barton et al point to entrenched working practices on the part of the legal profession, and the lack of any serious academic attempt at cost-benefit analysis as the reasons for this.

“There needs to be evidence that adoption of academic proposals for reform would actually increase client satisfaction and improve the quality of information received and exchanged; and – the demonstrable benefits of adopting reform proposals outweigh their very real costs, primarily measured in terms of increased lawyer time and in communication with clients.” (Barton et al, 2006)

Box 8: Remedies for client dissatisfaction with lawyer-client communication

Lawyers need to let clients tell their stories with minimal interruption or efforts to fit the narrative into pre-existing legal categories, especially at initial interviews;

Lawyers need to give much more information to clients so that they understand the purpose of the lawyer’s questions and gain a basic understanding of the legal significance the lawyer gives to their narrative and the aspects of the legal system that will affect their situation;

Lawyers need to share much greater control with clients over the process by which their cases and other legal concerns are handled as well as the nature of the outcome.

Source: Barton et al (2006)

60 Karen Barton, Clark Cunningham, Gregory Jones and Paul Maharg, (2006), ‘Valuing what clients think’. *Clinical Law Review* 13:1

61 These factors were: 1 (made client feel comfortable), 2 (said things client did not understand), 3 (treated client with respect), 4 (did not understand what was most important), 5 (listened to client), 6 (explain what lawyer would do next), 7 (was interested in client as a person), 8 (asked confusing questions), 9 (was someone client could trust), 10 (understood why client needed legal help), 11 (client able to say everything), 12 (client knows what to do next), 13 (would want the same person again). Source: Barton et al (2006).

6.12 The LSC's approach to quality and its current quality framework

The mechanism of the LSC's quality framework was published in the report 'Assuring and Improving Quality in the Reformed Legal Aid System' (December 2007)⁶². The quality assurance process was laid out in a quality framework composed of various tools, specifically

- Peer Review
- Specialist Quality Mark (SQM)
- Quality profiles
- Accreditation systems.

6.13 Peer review

The LSC's peer review process is developed and managed independently by the Institute of Advanced Legal Studies. Peer reviews are conducted by experienced legal aid practitioners in peer review panels organised by category of law. Peer review measures and assures the quality of advice and representation of a firm or organisation. Not all firms are peer reviewed, the process generally being targeted on those considered to be high risk, (for example where quality profiles give cause for concern).

Quality assurance using LSC peer review criteria focuses on the quality of the *processes* and *outputs* rather than the quality of service to the end user and the eventual quality of the *outcomes* of the case.

Box 9: LSC Peer Review Civil Criteria

A. Communication with client

How well does the advisor appear to have understood the client's problem?

How effective were the advisor's communication and client handling skills?

How effective were the advisor's fact and information gathering skills?

How effectively was the client informed of a) the merits (or not) of the claim, and b) all developments?

B. The advice

How legally correct was the advice given?

How appropriate was the advice to the client's instructions?

How comprehensive was the advice?

Was the advice given in time/at the right time?

C. The work/assistance

If no other work was carried out, was this appropriate?

If any further fact finding work was carried out a) how appropriate and b) how efficiently executed was the work?

How effective in working towards what the client reasonable wanted/needed was any further work carried out?

If no disbursements were incurred was this appropriate?

How appropriate were any disbursements incurred?

Where this is necessary did the adviser consider/advise on/act on an effective referral?

Throughout the file how effectively did the organisation use resources?

Did the advisor or their work in any way prejudice the client?

Source: Legal Services Commission 'Peer Review Civil Criteria' (2008b: 1-2)⁶³

⁶² The report considers both the civil and criminal legal aid systems, and was published alongside 'Best Value Tendering of Criminal Defence Services: a Consultation Paper' (2007).

⁶³ Available at Legal Services Commission website www.legalservices.gov.uk/docs/cls_main/PeerReviewcriteriaformCivil-finalversion-May08.pdf

Following peer review, firms are allocated one of a series of competence levels. The peer review ratings are in Box 20 below. Level 3 is the minimum standard with which it is possible to hold a contract with the LSC, Levels 4 & 5 are below the standard required for holding a contract, and Levels 1 & 2 indicate that the supplier exceeds the minimum standard expected of contract holders.

Box 10: LSC Peer Review ratings

Peer Review Rating	Some indicators of performance
Level 1 Excellence	Level 3 and in addition (+) all issues progressed comprehensively, appropriately, efficiently (+) tactical and strategic
Level 2 Competence Plus	Level 3 and in addition (+) tailored advice (+) proactive approach (+) added value
Level 3 Threshold Competence	Instructions appropriately recorded. Adequate but limited communication with the client. Advice & work adequate but not extensive, may not deal with other linked issues.
Level 4 Below Competence	Less than Threshold competence because - information not recorded or reported accurately - communication with clients sometimes of poor quality - advice and other work inadequate - delays in progressing matters - some lack of reasonable skill, care and diligence
Level 5 Failure in Performance	Less than Threshold Competence because - detrimental service to clients, or no meaningful service at all, or service leading to potential prejudice - communication with clients often of poor quality - general lack of reasonable skill, care and diligence

Source: Legal Services Commission 'Peer Review Civil Criteria' (2008b: 1-2)

The standard of work required at Level 3 contrasts with the higher expectations of quality of asylum seekers themselves, the many commentators cited in this review and the expectations and thinking underlying the Solihull Pilot and frontloading debate. In particular, Level 3

- Only requires "adequate" advice and work and not work which is "tailored to the individual client's circumstances" as required at Levels 1 and 2.
- Provides that such work may not always be extensive
- Does not require issues to be progressed comprehensively, appropriately, as required at Levels 1 and 2
- Fails to require tactics and strategies are employed to achieve the best outcomes for clients as required at Levels 1 and 2.
- Does not require value to be added to the case as required at Levels 1 and 2
- Only requires "adequate but limited communication with the client".

Coming out of the Peer Review process, the LSC has produced a series of 'Improving your Quality' guides for seven categories of law, including immigration, which capture the findings of the various panels' category-specific quality issues. These guides are intended for internal file review or training and supervision and have been accompanied by workshops. See 'Improving your Quality: a guide to the common issues identified through Peer Review: Immigration', (2nd edition), (September 2008).

Box 11: Common quality issues identified by the Immigration Peer Reviewers

Level of performance on these Issues frequently contributes towards lower ratings at peer review

- Advising the client of the merits of the case
- Adequate and correct advice given to the client
- Detailed and comprehensive instructions been taken from the client
- Adequate and appropriate record keeping
- Personal information of client recorded on the file
- Expert reports obtained to assist client's case where necessary
- Counsel instructed properly
- Witness statements taken without error
- Sufficiently experienced advisor handling the case
- Case dealt with without unnecessary delay
- All time limits complied with
- Appeals prepared adequately
- Detained clients specific needs addressed
- Interpreters used where appropriate

Source: Legal Services Commission (2008d)

6.14 Peer Review and Legal Aid Reform

Throughout the last decade peer review has increasingly been regarded as the best method of quality assurance. In 2005, the LSC described it as "the most accurate and fair assessment process that we have to determine the quality of legal advice work" (LSC, 2005a: 5)

Lord Carter embraced peer review as a key quality assurance tool. He recommended an immediate national roll-out of peer review as part of the transition to best value tendering (along with tailored fixed fees), recognising the serious threat to quality posed by moving too quickly

"There is also a serious risk associated with quality; the roll out of peer review taking two to three years, quality assurance mechanisms could not be put in place in time, meaning contracts would need to be awarded on the basis of price and capacity only. There is also the potential for a significant negative impact on the wider justice system as quality is undermined and suppliers left in the legal aid market fail to perform effectively. This could have a particularly negative impact on the running of the courts." (Lord Carter, 2006: 52)

All Lord Carter's proposals were therefore underpinned by a "strict quality threshold" (ibid: 56). Firms would have to be peer reviewed prior to the tendering of best value contracts and those not meeting the threshold would not be permitted to participate in the tender.

The LSC consulted on a proposal to raise the minimum quality threshold from Level 3 to Level 2. In December 2006, it issued a response to this consultation, noting "the overwhelming support for the use of peer review" (LSC, 2006c: 5). At the same time it published "Legal Aid Reform: The Way Ahead" LSC and DCA, 2006b) confirming the plan to roll out peer review and a phased move to higher standards so that no best value contracts would be awarded to representatives assessed below level 2.

In March 2007, the LSC published its 'Plan Linking the Roll Out of Quality Assessment for Preferred Supplier and Best Value Tendering', again confirming that it would only offer best value contracts to providers meeting the level 2 threshold. (2007h: paragraph 2.13).

The LSC intended to introduce best value contracts in 2010/11, however this was postponed to April 2013 as a consequence of the Law Society's successful challenge to the lawfulness of the Unified Contract. In the meantime the LSC announced a tender for a three year contract from 2010 based on the current GFS⁶⁴.

As part of the settlement of the litigation of the Unified Contract the Quality Working Group (QWG) was established in April 2008. It included representatives from the LSC, the Ministry of Justice and the Law Society and other representative bodies. In December 2008, the QWG published a report, 'Assuring and Improving the Quality of Legal Aid Services'. The report stated that the minimum peer review requirement for firms participating in the 2010 bid round would be level 3, but that this requirement would only apply to firms whose work had been peer reviewed.

The QWG's December 2008 report confirmed that the LSC still intended to roll-out peer review prior to the tender for best value contracts. However, it stated that the minimum quality threshold would be set at Level 3. No mention was made of an intention to raise the standard to Level 2. By December 2008, it therefore became clear that the LSC had decided not to proceed with its plan to raise the quality threshold to Level 2 (See LSC 2008e 'Assuring and Improving the Quality of Legal Aid Services').

In June 2009, the LSC published 'Quality in Legal Aid, Outsourcing SQM, A discussion paper'. The paper announced that it would no longer proceed with a national roll out of peer review prior to best value tendering. In so doing, it has undermined a key pillar of Lord Carter's recommendations, giving rise by his reasoning to a significant risk to quality and the wider justice system.

The reason provided was that the minimum quality threshold requirement would preclude new entrants to the competition for contracts, since peer reviews can only be conducted on closed files (LSC, 2009: paragraph 15). Peer review assessments would only be relevant to firms who had been audited, those achieving below level 3 being precluded from tendering. The report noted that 95% of firms reviewed had achieved a rating of 3 or above, showing that "the provider base is operating at an appropriate level of quality" (ibid: paragraph 15).

According to the June 2009 paper, peer review will in future be used on a risk based and random sampling basis, principally on live contracts rather than being incorporated into bid rounds.

6.15 Specialist Quality Mark (SQM)

The Specialist Quality Mark⁶⁵ was launched in April 2000. It is designed for organisations that provide advice and legal help on complex matters in specific areas of law and who carry out the full range of legal services, including representation where this is permitted. The SQM focuses on the organisation, management and supervision of legal services.

SQM assessment is organised around seven key areas: access to service, seamless service, running the organisation, people management, running the service, meeting clients' needs, and commitment to quality. It is a management standard consisting of a number of proxies for quality of work and as such is intended to

"pave the way for the introduction of a future quality standard more focused on the quality of advice and individual adviser competence" (Steve Orchard, Chief Executive, Legal Services Commission, April 2002)⁶⁶.

In an article 'The Quality Mark: A mark of what?', first published in the National Association of Citizens Advice Bureaux (NACAB) magazine 'Advisor' in November 2001, Andy Benson and Penny Waterhouse argued that the Quality Mark (QM) doesn't measure quality of advice or quality of service, but rather undermines what they call 'Real Quality' and access to advice services. They make the following observations about the value of the basic Quality Mark (not the SQM) from a client-centred perspective

64 See <http://www.legalservices.gov.uk/civil/tendering/immigration.asp> for details.

65 There is a General Quality Mark regulating the General Help Standard. This is aimed at organisations whose service incorporates diagnosis of problems, giving information and explaining options, signposting to further action, basic form-filling. A General Help with Casework Standard further incorporates negotiating and advocacy and follow-up work (LSC, Quality Mark: General Help, available at http://www.legalservices.gov.uk/civil/qm/general_help.asp).

66 Introduction to Legal Services Commission, (April 2002), 'Specialist Quality Mark Standard'. Available at http://www.legalservices.gov.uk/docs/criminal_contracting/specialist_quality_mark.pdf

“When a client comes through your door the things they are concerned about are whether they will be dealt with respectfully; whether the advice they get is right, appropriate and useful; whether you give them the support they may ask for; and whether you help them to get the best possible outcome to their problem, including access to other good services.

The Quality Mark does not measure any of these things. What the QM does measure is how clearly your intentions are stated (business plans and suchlike), and how well you are organised (policies, systems and procedures)” (Advisor, 2001: np)

The Legal Aid Practitioners Group (LAPG) as recently as 2008 noted that

“The Specialist Quality Mark has not been revised since it was introduced, unlike its “parents” the ISO 9001 and the Law Society’s Lexcel Standard. If the LSC wishes to adopt the continuous improvement model of Best Value authorities then working with the professional bodies to enhance Quality Standards and Accreditation schemes is the best guarantee of quality” (LAPG cited in LSC, 2008: 28)⁶⁷.

Unsurprisingly there are overlaps between the LSC’s quality framework and other quality assurance systems. This has been acknowledged by the LSC. In an attempt to generate interest in the SQM and reduce bureaucracy in the application of the SQM standards the LSC published ‘Quality Connections: How the Legal Services Commission’s Specialist Quality Mark relates to other quality schemes’ (2003)⁶⁸. In this report and its companion publication ‘Making Quality Connections Work: Some practicalities of how these quality schemes can be used with the Specialist Quality Mark’ (2003)⁶⁹ the LSC outlines its belief that

“If the outcome of this review indicates that one or more particular schemes can add value to the organisation, then the key to success lies in avoiding duplication by maximising the connections between the schemes through carefully planning their fully integrated use. Otherwise each quality scheme becomes a freestanding separate project, which is for some organisations an untenable drain on resources” (LSC, 2003a: 8, emphasis added).

For the Specialist Quality Mark the LSC concedes that “providers may be passported in some of the requirements if they are already accredited with: Lexcel, Year 2000IIP, ISO9001:2000, Charter Mark, EFQM” (LSC website)⁷⁰. See the Quality Assurance Working Group’s ‘Matrix of tools to assess quality’ (2008) for a diagrammatic comparison of LSC and non-LSC quality assessment tools by performance area⁷¹.

Lexcel is the Law Society’s practice management standard. It is a scheme for any type of practice to certify that certain standards have been met following independent assessment every year to ensure they meet required standards of in areas such as client care, case management and risk management. The Lexcel system is designed to be “flexible, only specifying standards, not procedures” and available to be combined with other quality standards.

The Law Society has done a considerable amount of work matching indicators from other quality systems with the requirements of the Lexcel system (see the Law Society website for full details of Lexcel overlaps with the SQM, Investors in People, and ISO 9001:2000)⁷². The Law Society notes that “practices can undergo simultaneous assessment for IIP and ISO during the Lexcel process. This can help reduce the time and cost associated with becoming Lexcel accredited” (Law Society website)⁷³

67 LAPG response cited in LSC, (July 2008), ‘Best Value Tendering of Criminal Defence Services: A reply to consultation’. Available at https://consult.legalservices.gov.uk/inovem/gf2.ti/f/59106/1978277.1/pdf/-/BVTConsultationResponseJuly08_1.pdf

68 Available at http://www.legalservices.gov.uk/docs/quality_mark/quality_connections.pdf

69 Available at http://www.legalservices.gov.uk/docs/quality_mark/making_qual_connections_work.pdf

70 Quality Mark: Specialist Help, available at http://www.legalservices.gov.uk/civil/qm/specialist_help.as

71 Legal Services Commission, (October 2008), ‘Annex C. Quality Assurance Working Group Matrix of tools to assess quality’. Available at http://www.legalservices.gov.uk/docs/cls_main/AnnexC_Matrix_Oct08v2_pdf.pdf

72 Law Society, ‘Lexcel overlaps with the SQM’, January 2008. Available at <http://www.lawsociety.org.uk/documents/downloads/dynamic/lexcelv4overlapswithsqm.pdf>; Law Society, ‘Lexcel overlaps with IIP’, January 2008. Available at <http://www.lawsociety.org.uk/documents/downloads/dynamic/lexcelv4overlapswithiip.pdf>; Law Society, ‘Lexcel overlaps with ISO9001, September 2008 <http://www.lawsociety.org.uk:80/documents/downloads/dynamic/lexcelv4overlapswithISO9001.pdf>

73 <http://www.lawsociety.org.uk/productsandservices/lexcel.page?=#shome>

The Specialist Quality Mark (SQM) is being updated by the LSC to reflect developments in legislation, practice and terminology. Following consultation with representative bodies the new standard is planned to take effect from 1 April 2010. The LSC raised the possibility of outsourcing SQM audits and requiring representatives to pay for them in its June 2009 paper 'Quality in Legal Aid, Outsourcing SQM, A discussion paper'. Despite widespread opposition, it recently announced that it would proceed with this proposal.

6.16 LSC quality profiles and quality profile reports

Quality Profiles⁷⁴ are tailored to each provider and are specific to each category and sometimes sub-category of law. A profile incorporates a set of indicators that reflect case type, case outcomes, and case length. Quality Profiles are built on case information routinely reported by the supplier to the LSC, including Outcome Codes. The case mix of providers is also monitored.

The Quality Profile identifies key risks which act as indicators of competence in client care, advice and case management. Quality Profile reports are produced monthly over a rolling six month period, allowing for direct comparison. Reports classify risk as High, Medium or Low⁷⁵. National Parameters for each indicator specify the proportion cut-off value and can be used to indicate when a supplier is 'out of profile'. These reports are used in conjunction with the Contract Management Review Criteria Report (CMRCR) as part of compliance performance audit.

6.17 Accreditation

Suppliers of publicly funded legal advice in the immigration category of law must be accredited under the Immigration and Asylum Accreditation Scheme (IAAS). The LSC stipulates that firms doing publicly-funded work must have at least one senior level or advanced level caseworker who also holds an additional supervisors certificate (LSC, 2007)⁷⁶.

The Immigration and Asylum Accreditation Scheme (IAAS) was introduced by the Legal Services Commission and the Law Society in April 2004. In June 2007 the Solicitors Regulation Authority (SRA) assumed responsibility from the LSC for the operation of the IAAS for solicitors and their employees⁷⁷. A register of accredited representatives is maintained by the SRA, which also set the standards for assessment and validates and monitors the assessment process. Immigration advisers can apply for accreditation under IAAS at one of four levels: Probationer, Accredited Caseworker, Senior Caseworker, or Advanced Caseworker. For full details of the accreditation scheme see the SRA's 'Standards and Guidance for the Immigration and Asylum Accreditation Scheme' (2007)⁷⁸ which lays out the key skills and knowledge an adviser will need for accreditation at each level. The accreditation standards also identify the depth of information and understanding required for each area at each level of the scheme, namely 'awareness', 'knowledge', and 'understanding'. Accreditation therefore measures an input into quality rather than the more complete practice of "lawyering" which is assessed through peer review.

Immigration advice agencies not regulated by a designated professional body are subject to regulation by the Office of the Information Services Commissioner (OISC). The OISC identifies and manages not-for-profit representatives separately from organisations that charge fees.

74 Administered through the Supplier Management Process of the LSC.

75 High – "a number of concerns about quality". The supplier may only score 4 or 5 at Peer Review. Medium – "some concerns", likely to score 3 at Peer Review. Low – "few or no concerns" and likely to score 1 or 2 at Peer Review. Refer to LSC, "Quality profiles: report guidance" available at http://www.legalservices.gov.uk/docs/civil_contracting/QualityProfilesReportGuidanceFinal.pdf

76 LSC, (2007), 'Immigration and Asylum Accreditation Scheme: Update'. Available at http://www.legalservices.gov.uk/docs/immigration_docs/IAASupdate_1June2007_1.pdf

77 The Solicitors Regulation Authority website outlines how "The Law Society is a "designated professional body" under the provisions of s.86 of the Immigration and Asylum Act 1999 (IAA99) for the purposes of authorising its members to provide advice and other services in connection with immigration and asylum matters. These functions have been delegated by the Council of the Law Society to the Solicitors Regulation Authority (SRA)". Available at <http://www.sra.org.uk/documents/solicitors/accreditation/immigration-and-asylum-guidance.pdf>

78 Solicitors' Regulation Authority, (2007); 'Standards and guidance for the Immigration and Asylum Accreditation Scheme'. Available at <http://www.sra.org.uk/documents/solicitors/accreditation/immigration-and-asylum-accredited-caseworker-guidance.pdf>

7 Key Elements of High Quality Representation in Asylum Work

This report has reviewed evidence around the background of legal aid provision in the UK and the way that quality has been measured in public services in general and legal aid specifically. The review has examined the views of key stakeholders on the differing aspects of quality, including ILPA, the evaluator of the Solihull Pilot, and individual law practices and legal organizations working on the frontline to provide legal advice.

The review has asked why high quality is so vital in asylum work and has identified a number of key themes essential for high quality work which will be brought together in this chapter. The key elements identified in turn feed into a definition of quality that has been developed for this project.

7.1 Quality Elements

Four key elements needed for high quality work in asylum cases emerge from this review. The performance of appropriate work by appropriately qualified representatives, from paralegals up to professional counsel and country and medical experts; the strict adherence to professional standards; a strong emphasis on the one to one relationship with the client which includes the long and difficult process of building a rapport with clients and involving them with the legal process at each step of their claim. All of these are contingent on the abiding theme of time; sufficient time to perform quality work and time as an engine of quality in its own right.

Of course, these ideas are broad, and certainly too broad for the purposes of a file review exercise. Section 2 will therefore show how they can be translated into concrete, quantifiable points of case-by-case measurement.

7.2 Professionalism and Expertise

Expertise, the ability to “go into detail ...know your countries and be aware of all the questions” (Dewell, 2003: 28) as one asylum solicitor in a The Law Society study put it, is the first element of quality that will be discussed here.

Garden Court Chambers have noted that, owing to the great complexity of asylum issues and contemporary refugee law noted earlier, ‘asylum advocacy is not a matter that can be wholly assigned to entry-level case workers, as the funding model mandates’ (2007: 22). Meanwhile, JUSTICE the law reform and human rights organisation, has called for the development of a ‘niche quality mark for agencies that wish to take only a small number of high quality cases’ (Smith, 2003: 12). This would, however, contradict the LSC’s stated goal, mentioned earlier, of dealing with fewer, larger providers of legal services. This they regard as the only means of making legal aid economically viable in a market-based approach. Yet, Bindman & Co et al have argued that “specialism reduces costs...it does so in positive ways through the identification of legal and evidential issues; the instruction of appropriate experts and advocates. It also does so in negative ways: avoiding delays in preparation and dissatisfaction leading to non co-operation” (Bindman & Co, 2007: 3).

The issue of the instruction of appropriate experts has been highlighted by others as both an indicator of quality work, and something that is threatened by reductions in legal aid spending. Asylum Aid and BID (2005) have quoted a number of cases where the provision of expert testimony was both integral to a claimant’s case and obstructed by a lack of time and funds. The commissioning of appropriate expert opinions is considered as a vital mark of quality by both the practitioners quoted in this review and by the LSC’s own peer review process, which lists ‘Expert reports obtained to assist client’s case where necessary’ (LSC, 2008) as being one of the major items that is likely to influence the rating of a file undergoing review.

Evidence from some contributors suggests that a lack of time to perform quality work has endangered the core standards of their profession. One definition of 'quality' legal representation comes from ILPA, who stated simply that 'by "quality"... we mean no more and no less than work fulfilling ethical requirements, the inability to fulfill which must lead us, in accordance with our professional obligations, to decline conduct of a case' (ILPA, 2006: 2).

It would seem from this position that professional standards are a base-level minimum standard for legal work to be performed; and that time is needed in order to deliver it. Several respondents to professional surveys have been noted in this review as concurring with the view that 'a choice will have to be made between financial imprudence and compromise on quality. However, the latter is not a genuine option and we cannot continue as a viable business on the basis of the former' (Private Practice Category 1 provider, London, cited in ILPA, 2006: 6). Indeed, one experienced caseworker who was considering leaving the asylum field was quoted as stating "I am not interested in a career involving substandard work for vulnerable people" (Asylum Aid & BID, 2005: 13) In order to reflect the need for professionalism and expertise in the project definition of quality the following words have been included:

"identifies, gathers and places all relevant facts, evidences and argument in a timely manner and presents those to the decision maker in the best way" and "uses tactical judgment and explores every reasonable legal avenue".

7.3 One to One relationships between representatives and their clients

The Council on Social Action report 'Side by Side: a report setting out the Council on Social Action's work on one-to-one' defines the one-to-one relationship as;

"a transformative relationship sharing knowledge and experience with a significant other who is not family or a close friend" (CoSA 2008:7)

In this review we have shown that the one to one relationship in asylum legal aid is vital in high quality work where a client feels a part of the legal process at each step and trusts their representative to make their case in the best light possible using all available evidence (c.f., Barton et al 2003, Paterson 2007). This is of course not an easy task for asylum claimants who may have suffered many traumatic events prior to their claim point. In short, the development of a good rapport then between client and representative can transform the case both for the well-being of the client and the ultimate quality outcome.

This takes time and a great deal of patience and probing from the representative to build a bond with the client. Such a bond is required if the client is to be able to discuss the basis of their claim accurately and openly and answer questions put to them by both their representative and the Home Office and immigration judiciary.

ICAR's research with refugees for this project also suggests communication skills are important, including the provision of professional and neutral interpreters. Good access to the legal representative is also highly valued, including regular correspondence and telephone and email contact.

Some of the most important aspects of the one to one relationship reported by Sherr et al are "communication skills, attitude, accessibility, willingness to keep in touch and to involve the client [in the case]" (Sherr et al, 1994: 10). Other commentators have taken this final point, as the most crucial, both for the well-being of the client and for the efficiency of the asylum system as a whole. The 'Effective Lawyer-Client Communication Project' at Glasgow Graduate School of Law showed that lawyers need to "share much greater control with clients over the process by which their cases and other legal concerns are handled" and to ensure that clients "understand the purpose of the lawyer's questions and gain a basic understanding of the legal significance the lawyer gives to their narrative" (Barton et al, 2006: 8). It is argued that by doing so representatives can diminish the debilitating lack of agency felt by many asylum seekers.

It would appear, then, that improved client care through the one to one relationship is in the interests of both sides. However a lack of time has been universally cited by practitioners as an impediment to the achievement of this mark of quality. The ILPA assert that "it is certain that rushed work risks missing vital points, especially ...for vulnerable clients" (ILPA, 2006: 40) while Routledge & Hanley have argued that "representatives who prize hurried statements do a tremendous disservice to their clients" (Routledge and Hanley, 2007: 28).

The definition of quality includes the following words to capture these points:

Develops “trust and confidence and a mutually respectful relationship with the client” and also “constructive relationship with the decision-maker” and “ensures the client knows the best case has been put forward.”

7.4 Sufficient time

Time is a critical element of the ability to carry out high quality work. Evidence in this review has clearly shown that a lack of time impedes the quality of work that a representative can do. This was clearly shown in the Solihull Early Advice Pilot where representatives had time with the client prior to the initial decision on their case to present all relevant facts and evidence resulting in a higher proportion of sustainable initial decisions being made. What the Solihull Pilot showed was that time to gather evidence before an initial decision vastly reduces the appeal rates, therefore there is potential to lower costs to the taxpayer in the long term. The fact that the client had been more fully involved as the representative spent more time with them also led to a greater acceptance of negative decisions on the part of the asylum seeker.

The ILPA has argued that “time spent on a case and the quality of service provided are linked. Often one of the reasons that poor providers are poor providers is that they do not acknowledge (or care) that time is required to do a multiplicity of tasks that will lead to the best result for the client” (ILPA 2006: 40).

Further evidence the Solihull Pilot demonstrates this belief in the virtue of spending time on a case. The evaluation of the Solihull Pilot showed that those representatives that spent more time preparing a case achieve better results at the initial decision making process. It showed that these representatives can add value in terms of achieving justice, but also in terms of financial savings.

To reflect the importance of time, the following phrases have been included in the definition of quality: “thorough evidence gathering; exploring every reasonable legal avenue; effective communication with client.”

8 Towards a Framework and Definition of High Quality in asylum work

This final chapter is directed towards collecting together those approaches and features of high quality legal practice and placing them into a framework of quality in asylum work. Working from both the quality framework and the project definition of quality we then describe the file review scoring system which has been developed to enable statistical determination of the hourly cost of high quality asylum legal advice using data from a file review exercise in a later quantitative exercise in this research project. In order to be workable the final selection of file review indicators had to take into account whether or not an indicator is currently measurable or discernible from case files.

While the trajectory of individual asylum applications and the legal steps involved may vary in response to the facts of a case, the four widely accepted proxies for quality in a case (inputs, structure, process and outcomes) will be objectively measurable. Those elements of legal aid advice-giving which are more subjective and less easy to measure (such as the one to one relationship) are not typically included in existing quality frameworks despite the fact that they are crucial for high quality work, as this review has shown.

The quality framework developed by this research includes those elements that the evidence of this review suggests are widely considered essential if denial of justice for asylum seekers in the UK is to be avoided. Elements are included in the quality framework whether or not they are measured by an existing quality scheme mandated by the LSC or operated by any other body, or even whether or not they can be measured in any objective sense.

The following elements have been identified as contributing to high quality legal work:

Inputs

- ✓ Interpreter
- ✓ Travel
- ✓ Waiting time
- ✓ Expert country report
- ✓ Expert medical report

Structure

- ✓ Adequate case management
- ✓ Single case ownership
- ✓ Ratio of Level 2 accredited staff
- ✓ Ratio of legally qualified staff
- ✓ Good ratio of supervisors to caseworkers combined with sufficient time spent on supervision.
- ✓ Hours of CPD per caseworker
- ✓ Number of complaints to the SRA
- ✓ Average tenure of staff and average wages

Process

- ✓ An interview which is adequate to elicit all the relevant material from the applicant and put matters that lack credibility or foundation to the applicant.
- ✓ A review of any documentary evidence provided by the applicant and of any relevant objective material relating to the country of origin.
- ✓ Drafting of a written statement which is appropriately detailed in its treatment of each of the relevant aspects of the claim.
- ✓ Preparation of a bundle of objective material relevant to the client's case.
- ✓ The interviewing of any relevant factual witnesses and the drafting of appropriate statements.
- ✓ The instruction of an independent expert in relation to any matter not adequately supported by the evidence above (e.g. medical expert or country expert).
- ✓ Attendance at the asylum interview and the making of suitable interventions.
- ✓ The drafting of a further representation or statement following the asylum interview as appropriate.
- ✓ The instruction of counsel to appear at appeal (rather than inexperienced advocates)
- ✓ Process time limits complied with, case handled without delay.
- ✓ Billing compliance
- ✓ Appropriate strategy formation and execution
- ✓ Client care (one to one relationship):
 - The merits (or not) of the case, and decisions in the case, are explained clearly to the client.
 - Written confirmation of instructions given to the client.
 - Adequate record keeping
 - Advice given is legally correct, timely, and given in writing.
 - If no further work done this is appropriate and client provided with CW4 form.

Outcomes

- ✓ Success rate at first instance and at appeal (excluding Fast Track and other detained cases)

In addition to considering quality as a function of a series of proxies in the form of objectively measurable inputs, structure, process and outcomes, a valuable exercise is to approach the issues of quality in legal work from the different perspectives of client and advisor. This review has distilled the following client- and advisor-identified features of high quality legal work.

Client-identified features of quality work:

- ✓ Established rapport and trust
- ✓ Treated with respect
- ✓ Communication skills (the advisor lets the client tell his/her story without interruption or trying to fit the narrative into pre-existing legal categories)
- ✓ Accessibility of the advisor by phone
- ✓ Information exchange (in order that clients understand the line of questioning, the legal significance of their narrative, the legal system as it affects their case)
- ✓ Continuity of relationship with advisor (where dispersal allows)
- ✓ Long-term relationship with advisor (where dispersal allows)
- ✓ Transformation in circumstance of client (NB. not exclusively related to winning their case)
- ✓ Clear time frame
- ✓ Advisor recommending options rather than merely presenting options

Advisor-identified features of quality work:

- ✓ Rapport with the client
- ✓ Information exchange
- ✓ Probing, "digging around a case", "digging with a sharper spade"
- ✓ Client provides information in full and in timely manner
- ✓ Identifying the issues
- ✓ Joined up thinking
- ✓ Exercising legal judgment

- ✓ Taking appropriate action
- ✓ Professionalism
- ✓ Best practice
- ✓ Adding value to the case
- ✓ Value of specialist knowledge e.g. around the asylum claims of women from fragile states
- ✓ Early intervention and prevention
- ✓ Minimal administrative burden
- ✓ Transformation in circumstance of client (e.g. enhancement of position, or empowerment)
- ✓ Sufficient time to do a good job

8.1 The project definition of high quality in asylum legal advice

From the Framework of Quality outlined above, a definition of high quality legal advice for asylum cases was developed. This definition is intended to capture the essence of the legal work required to optimise the process of status determination and the manner in which it is carried out from the point of view of the client, the legal representative, and the decision makers. The key elements of the definition are capable of objective measurement and costing through a file review exercise.

Looking at a representative sample of cases, evidence of quality legal representation should be clear through success in outcomes, with quality legal representation delivering a higher level of positive outcomes than poor quality legal representation. However, in individual cases, outcomes could never be used as a measure of quality, because quality legal representation may still result in a negative outcome for an individual client. So to measure quality legal representation in individual cases it is necessary to focus on outputs. The summary definition of quality set out below is designed to capture the key aspects of quality legal representation so that the outputs of quality legal representation can be identified. It is derived from the findings of the literature review and also incorporates findings from interviews with representatives, stakeholders and asylum seekers.

The definition focuses on those matters within the legal representative's control, identifying key skills and actions needed to deliver the three key outputs identified at a) -c). The file review examines the measurable aspects of the quality definition and identifies how long these elements take so that quality can be costed.

Box 12: The Cost of Quality research definition of high quality in asylum legal advice

Quality legal representation in asylum cases is provided when a representative, following professional standards and with sufficient efficiency, technical and personal skills, knowledge, judgment and experience:

Identifies and gathers all relevant facts, evidence and argument in a timely manner and presents those to the decision maker in the best way;

exercises tactical judgment and explores every reasonable legal avenue to ensure a full and fair hearing of the case;

ensures the client knows the best case has been put forward on their behalf consistent with the relevant legal framework.

To do this the representative must establish trust and confidence and a mutually respectful relationship with the client. The representative must also establish a constructive relationship with the decision maker so that the best case is made and the decision maker is able to make an accurate assessment of the case for international protection

8.2 What the definition does not capture

Quality legal representation is an essential ingredient for the delivery of justice in asylum cases because it ensures that all the evidence is available for the decision-maker to consider. However, it is not the only influence on justice. The determination process, including the skills of the decision-makers, is also important.

Whilst it is recognised that specific decision making processes may have an impact on the ability of a legal representative to deliver quality, it is also clear that quality as defined above will have a positive impact in any of the current decision-making processes. The literature has found that quality representation adds particular value to processes which allow the legal representative sufficient time and opportunity to carry out evidence gathering and make a case. In the Solihull pilot, this occurs from the outset of the initial decision making process. Elsewhere, the added value might have less impact on the initial decision but does become apparent at subsequent stages of the case.

Conversely, poor quality representation which does not establish the full evidential basis of the case will often result in injustice in any decision making process. This particularly true of asylum cases where late disclosure of evidence is frequently used as a reason for a negative decision.

8.3 The project file review exercise: determining the hourly cost of quality

Following a first qualitative stage that includes this literature review, the second quantitative stage of this research project will construct an objective measure of costs for the delivery of quality legal advice to legally aided asylum claimants. This will be determined using the findings of a file review exercise carried out by legally qualified file reviewers on a sample of closed asylum case files from a range of legal advice providers in three locations in the UK.

The file review process (which includes a scoring system) that will be used for this exercise has been developed by members of the research team including the legally qualified academic advisor and the file reviewer retained for this work.

The LSC has a well-established file review system in its quality assurance framework, the Peer Review process. The LSC Peer Review Ratings (where 1 denotes Excellence and 5 a Failure in Performance) indicate the standard of a firm or organisation's work relative to the minimum level required to hold a contract with the LSC for each category of law (Level 3). The LSC peer review format is generic and neither addresses the particular issues in asylum cases nor does it assess the amount of time spent on a case. It is not clear from the LSC form how the different specific elements pertinent to asylum cases should relate to the generic criteria. It is however clear that experienced peer reviewers are able to assess quality by reference to shared ideas drawn from wide experience of asylum work. File reviewers work from these more complex ideas of quality to rate the work of firms under review.

The file review criteria and ratings for this project are designed with a different objective in mind. They are not required to evaluate the suitability of organisations to hold LSC contracts on a variety of grounds. Rather, their task is to more objectively define and measure the notion of high quality legal work and weight the evaluation of work shown in files towards what we have described as core Quality Factors. In addition, they are asylum-specific.

A key feature of the project file review process is that time spent, not only on the case in its entirety but on the different elements of a case is measured. As noted above time is not measured under the LSC Peer Review process. In order to achieve the desired outcomes from this Cost of Quality research it is essential that the element of time can be identified separately to enable statistical analysis at a later stage.

8.4 File review scoring system for the Cost of Quality research

A file review structure and scoring system for this project were developed to produce a series of measurable Quality Factors that go beyond the theoretical and the ideal, are rooted in existing, familiar and widely accepted LSC quality assurance tools, and through statistical analysis will deliver one objective of this research which is to determine an asylum-specific hourly cost for high quality legal advice. The development process drew on the following two documents

- The definition of high quality for asylum work that was designed for this project. This draws on evidence emerging from the project literature review.
- The report 'Improving your Quality: A guide to the common issues identified through Peer Review: Immigration' published by the LSC, (2nd edition, September 2008).

Box 13: Quality Factors in the Cost of Quality research file review exercise

Quality factor	Description of factor	Marks available
1	Interviews and advising	15
2	Review of decisions/ evidence	10
3	Drafting of statements	30 (20 on appeal stage)
4	Evidence Gathering	20 (30 on appeal stage)
		(75 out of 100 marks)
5	Witnesses	5
6	Experts	5
7	Post-submission/decision steps	5
8	Communication, administration, timeliness	10
		100 marks

The Quality Factors are those elements of high quality asylum legal work that may reasonably be expected for both the application stage and the appeal stage. The same criteria are used for both stages. Thus, a client will need to be interviewed initially but also upon receiving a refusal decision. There will need to be an initial statement and then further statements upon receiving a refusal decision and at appeal. The two stages are assessed separately according to the quality score for that stage. Each Quality Factor (QF) contains a number of Quality Elements (QE). There will need to be evidence in a file that these Quality Elements have been considered, and if appropriate action is required the quality of that action will be assessed.

Elements 1-4 are core elements of practice. These elements are considered absolutely fundamental to an asylum application and/or appeal. Without these being performed to a competent level the decision-making process is likely to be seriously compromised regardless of what other elements are performed well.

Elements 1-4 are weighted heavily and attract a possible 75 out of 100 total marks. More marks are available for the core elements in total (75) than the non-core elements (25). The weighting is therefore heaviest for the client statements, the interview, and the objective evidence. The Solihull Pilot data has shown that a focus on the statement is highly relevant when measuring quality of work, and the statement therefore features heavily in the project file review criteria.

The weighting given to the elements in the score reflects the greater importance of evidence gathering at the appeal stage as compared to drafting initial statements under the current status determination system. The scoring for each element ranges between 0-10, where '10' is the highest score. Time is to be recorded in minutes, apart from letters which attract the standard six minutes unless timed individually. It will be possible to calculate a simple and objective complexity grade for each file, related to the extent of evidence in files of complicating features related to characteristics of the client and the case such as the use of an interpreter or a case involving a child.

The file review scoring system will be reviewed at an early stage following the completion of a small number of pilot file reviews. This review will include an evaluation of a double-marking exercise to compare asylum-specific project file review scores with the generic LSC Peer Review scores achieved by the same files. The weighting of the project file review scoring may be revised as a result⁷⁹.

For the complete file review scoring system and the grid used by project file reviewers to record scores please refer to Appendix 3⁸⁰.

There may be cases where the quality score is relatively high but there has been some egregious error in the work. Rather than deduct marks that might lead to the conclusion that an acceptable, if lower, level of work was done, the auditor should record a 'red flag' issue on the scoring sheet. The file would be considered poor quality on this basis but the score for the other elements achieved will still be available for data collection purposes.

For the purpose of this file review exercise serious errors are taken to consist of

- Failure to file application or appeal on time leading to loss of substantive rights
- Failure to prove obviously key witness(es)
- Failure to communicate with client or others leading to serious prejudice (e.g. non-attendance at appeal)
- Other serious breaches of professional ethics

79 Double evaluation with both file review systems will not be undertaken with the entire file review sample, but with a small pilot group at the start of the process.

80 Other features of the file review: i) A space is also provided for the file reviewer to enter an overall comment on the file; ii) it should be noted that the experience of the advisor is relevant to quality evaluation but cannot be captured in a file audit; iii) the scope of the project is to look at work up to and including the first appeal in any claim. Appeal-related work will be assessed by the project file reviewer using Quality Factors 1-8; iv) the file review will include cases where the client has had more than one representative over the course of their case (e.g. due to dispersal or detention), but the reviewer will only consider the work of the most recent or final representing firm or organisation.

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Appendix 1:

Major drivers of the civil legal advice sector

Drivers of the advice market for England and Wales	<ul style="list-style-type: none"> Legislative change National policy Availability of funding streams Availability of human resources Number of people seeking advice The economy
Drivers of the cost of advice service provision	<ul style="list-style-type: none"> Mode of delivery Availability of resources (advice givers) Salaries of advice providers The number of people seeking advice Type of advice provided (category of law) Status of advice providers (professional, voluntary, unqualified)
Drivers of the profiles of local advice markets	<ul style="list-style-type: none"> Local policy Availability of local funding streams Availability of national funding streams Availability of financial resources
Drivers of the profiles of local advice markets over time	<ul style="list-style-type: none"> National policy Local policy Availability of human resources Availability of national funding streams Availability of local funding streams Numbers of people seeking advice Changes in economic affluence.

Source: Matrix Research (2006)

Appendix 2:

Providers of publicly funded legal aid advice

Solicitors in private practice*

Law Centres

National independent advice organisations

Organisations providing advocacy

Barristers

Trade unions and employee bodies

Local authority consumer and trading standards departments

Local authority welfare benefits departments

Consumer organisations

Local independent advice centres

Individuals who are accredited advice givers

Financial advisors

Legal Services Commission

*Solicitors in private practice accounted for 25.7% of the mean percentage share of the advice sector by value, local support and resource groups (not for profit and voluntary) 42.7%, national advice providers 20.2% and 11.4% of the value was accounted for by other organisation types

Source: Matrix Research & Consultancy (2006)

Appendix 3:

Quality Legal Advice Project - File Review exercise

A) File Review Quality Factors

1. INTERVIEW & ADVICE

An interview (with an interpreter if needed) which is adequate to elicit all the relevant material from the applicant and to put matters that lack credibility or foundation to the applicant. Advising client of the possible merits and options in their case.

Appeal stage: review of refusal letter, review of evidence, consideration of the merits test. Demonstrate and explain merits test met or not. Advise client accordingly.

2. REVIEW OF EVIDENCE AND/OR REFUSAL DECISION

A careful review of any documentary evidence provided by the applicant, including previous files, and of any relevant objective material relating to the country. Consideration of further steps appropriate for initial application and funding of these.

Appeal Stage: A review and consideration of the strengths and weaknesses of the refusal decision. The drafting of a case-plan with steps to be taken and time required. The requesting of an adjournment of the hearing if appropriate.

3. DRAFTING OF STATEMENTS

The drafting of an initial statement which is detailed in its treatment of each of the relevant aspects of the claim. This must include, where relevant:

- family, social and educational background of the appellant
- history of persecution
- failure of the authorities to offer protection against persecution
- the reason for the persecution and how it falls within the Refugee Convention
- the lack of any internal flight option in the country of origin
- the relevance of background evidence to the position of the applicant
- the appellant's departure arrangements and travel to the UK and any stops en route
- an explanation, if possible, for any matters damaging the credibility of the applicant
- reference to the documentary evidence as appropriate

Appeal stage: drafting of supplementary statement following refusal decision and any further statement for inclusion in appeal bundle.

4. EVIDENCE GATHERING AND PREPARATION OF BUNDLE

Research of the relevant country and legal information. Obtaining other relevant documentary evidence such as medical records or social service reports as appropriate. Submission of such documentary evidence as is appropriate for initial applications e.g. where decision-maker may be unaware of specific risk factors not identified in general publicly available background information.

Appeal stage: Preparation of a relevant and comprehensive bundle of objective material that covers the specific issues of persecution, risk, Convention reason and internal flight in the applicant's case. Recognition of any specific features of the case that call for additional background evidence beyond standard sources. Inclusion of any further statements, witness statements and expert reports obtained. Instructing in-house or external advocate with comprehensive brief that identifies key issues and key evidence.

5. WITNESSES

Consideration of the need to interview or contact any relevant factual witnesses. The drafting of clear, relevant and comprehensive statements where appropriate for inclusion in evidence filed on application or appeal.

6. EXPERTS

Consideration of the need for expert evidence. Instruction of an independent expert in relation to any matter not adequately supported by the evidence at

1-5. This could be a medical expert or a country expert or age assessment expert. Expert evidence on file kept up to date.

7. POST-SUBMISSION / POST-APPEAL STEPS

Attendance at the asylum interview if appropriate and the making of suitable interventions to enable the client's case to be properly considered. The drafting of further representations or statements as appropriate. Discuss positive decision and advise on related issues.

Appeal stage: Review appeal decision. Consideration of application for reconsideration or fresh claim. Advise client accordingly.

8. COMMUNICATION , ADMINISTRATION AND TIMELINESS

Regular and appropriate communication with the client which provides clear and comprehensive advice on all pertinent legal and practical issues. Up to date personal information and other record keeping, time recording and billing. Timely submissions of statements and appeal forms.

Following consultation with legal practitioners ILPA produced a guide to best practice in essential elements of the asylum application process from the point of arrival in the UK of an applicant through to the submission of an appeal (ILPA, 2002). Brief details on appeal preparation were included.

The ILPA best practice guidelines were published in 2002 and have not been revised since to reflect changes in the asylum application process. They were drawn up to reflect an era when a Statement of Evidence Form (SEF) had just been withdrawn from use (currently the asylum application process is entirely SEF-less, with the key exceptions of cases involving unaccompanied asylum seeking minors and cases where trafficking is alleged). However, while the legislative and policy landscape around asylum, legal aid fee schemes, and asylum application timetables have since changed, in broad terms the best practice referred to in ILPA's guide is still relevant to those aspiring to produce quality asylum legal work in 2010. Box 15 maps relevant sections of the ILPA best practice guide to the quality factors of the project file review grading system.

Box 15: ILPA’s Best Practice Guide to Making an Asylum Application and elements of the Cost of Quality File Review Quality Factors

<p>Interviews and advising</p> <p>[A project file review core factor]</p>	<p>‘Assessing whether an application for asylum is appropriate’ (in Chapter 3, page 29).</p> <p>‘The role of the practitioner’ (in Chapter 3, page 30).</p> <p>‘Who is the client?’ (in Chapter 3, page 30).</p> <p>‘Creating the right environment’ (in Chapter 3, page 32).</p> <p>‘Initial instructions on claim’ (in Chapter 3, page 34).</p> <p>‘Respect for your client is wholly compatible with a rigorous interviewing style’ (in Chapter 4, page 44).</p>
<p>Review of decisions and evidence</p> <p>[A project file review core factor]</p>	<p>‘The reasons for refusal letter’ (in Chapter 10, page 86).</p> <p>‘Drafting grounds for appeal’ (in Chapter 10, page 88).</p> <p>‘Preparing for appeal’ (Chapter 14, page 103), including ‘Preparing a bundle of supporting material’ (page 106), ‘Briefing counsel’ (page 108), and ‘Adjournments’ (page 109)</p>
<p>Drafting of statements</p> <p>[A project file review core factor]</p>	<p>‘Statements, statement of evidence forms and one stop notices’ (Chapter 4, page 42), including ‘What to include in the statement’ (page 50).</p>
<p>Evidence gathering</p> <p>[A project file review core factor]</p>	<p>‘The statement’ (in Chapter 4, page 42), including ‘Points to consider when preparing statements’ (page 43), and ‘Building a profile’ (page 46),</p>
<p>Witnesses</p>	<p>‘Additional witness statements’ (in Chapter 10, page 104).</p>
<p>Expert evidence</p>	<p>‘Expert Evidence’ (see Ch. 9, page 79) on assessing need for expert evidence, competence of experts, instructing an expert</p>
<p>Post submission/decision steps</p>	
<p>Communication, administration, timeliness</p>	<p>‘Keeping records’ (in Chapter 3, page 28)</p> <p>‘Confidentiality’ (in Chapter 3, page 31).</p> <p>‘Vulnerable clients’ (in Chapter 5, page 55).</p> <p>‘Interpreters’ (in Chapter 7, page 66).</p> <p>‘Translations’ (in Chapter 7, page 68).</p>

B) Scoring and Administration Grid – pre-pilot draft

PROJECT ADMIN		
Unique Project No		
File reviewer		
Date of review		
Place of review		
RECORDING FILES		
Date file opened		
Gender		
DoB		
Interpreter		
Mental health problem		
Allegation of torture		
Allegedly trafficked		
Nationality		
Previous legal rep		
Other special feature		
OF SCORING		
APPLICATION STAGE	GRADE (1-10)	TIME
Interview and Advice		
Review of Evidence		
Drafting statement		
Evidence gathering		
Witnesses		
Experts		
Post submission steps		
Communication		
Timeliness/Administration		
<i>Application outcome</i>		
<i>APPLICATION SUB-TOTAL QF SCORE</i>		
<i>APPLICATION SUB-TOTAL TIME</i>		0
APPEAL STAGE		
Interview and Advice		
Review of Evidence and Refusal Decision		
Drafting statement		
Evidence gathering		

Witnesses		
Experts		
Post appeal steps		
Communication		
Timeliness/Administration		
<i>Appeal outcome</i>		
<i>APPEAL SUB-TOTAL QF SCORE</i>		
<i>APPEAL SUB-TOTAL TIME</i>		0
TOTAL QF SCORE		
TOTAL TIME		0
RED FLAG		
COMMENT:		

Appendix 4: Solihull Provider Comparison from Aspen 2008 Annex 14

	EAP	A	B	C	D	E	F	G	H	I	J	K	L	M	N
Intake	451	22	27	12	78	20	18	13	32	81	20	1	1	12	114
Proportion	100%	5%	6%	3%	17%	4%	4%	3%	7%	18%	4%	0%	0%	3%	25%
Pre interview	£498.83	£345.57	£230.72	£303.63	£860.24	£373.31	£818.26	£330.02	£476.89	£375.12	£644.63	£0.00	£433.33	£451.07	£390.84
Interview	£331.16	£297.46	£253.38	£364.24	£991.84	£254.39	£376.58	£268.39	£248.93	£268.39	£576.20	£0.00	£236.21	£344.00	£265.72
Post Interview	£146.44	£52.17	£52.59	£25.67	£251.81	£66.13	£180.02	£101.90	£210.89	£125.29	£187.31	£0.00	£12.30	£164.96	£93.27
Profit costs	£934.00	£695.20	£536.70	£693.54	£1,503.89	£693.84	£1,374.86	£700.31	£936.71	£768.80	£1,408.14	£0.00	£681.84	£960.03	£749.83
Interpreters	£415.40	£299.37	£206.92	£318.72	£989.50	£472.80	£541.19	£125.50	£200.21	£148.41	£328.94	£0.00	£0.00	£263.42	£143.60
Allowed	35%	23%	19%	42%	50%	40%	61%	31%	34%	30%	30%	Pending	100%	33%	30%
CLR Rate	55%	25%	66%	17%	40%	18%	66%	78%	67%	34%	64%	N/A	N/A	63%	74%
Red	55%	45%	59%	66%	58%	55%	72%	46%	63%	49%	65%	100%	100%	42%	50%
Amber	37%	50%	37%	17%	36%	30%	17%	31%	31%	46%	30%	0%	0%	50%	40%
Green	8%	5%	4%	17%	6%	15%	11%	23%	6%	5%	5%	0%	0%	8%	10%
AIT Allowed	21%	25%	20%	0%	21%	50%	25%	29%	30%	5%	33%	N/A	N/A	40%	14%
AIT costs	£1,426.15	£1,132.43	£761.49	£441.37	£2,669.42	£405.28	£4,106.39	£920.13	£716.99	£847.91	£3,152.80	N/A	N/A	£414.32	£844.92

AV Costs

- 1 Mechanisms for quality assurance, both internal and external to an institution or programme, are so diverse that they overlap with the mechanism and rationales for reviewing and checking quality. Hence it is often difficult to be precise about the dividing line between assuring, evaluating, assessing or auditing quality" (www.qualitysearchinternational.com)
- 2 Systems that attempt to apply process measures to lawyers can be applied to what Paterson calls "the complete range of lawyering" including "fact gathering, legal analysis, strategy formation and execution, follow through, client handling, interviewing, counselling, negotiation, mediation, litigation, and practice management" (Paterson, 1994: 7).



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