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Justice at Risk: quality and value for money in asylum legal aid **Interim Report**

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

Written by Julie Gibbs

Report by ICAR, City University, London
June 2010

The Baring Foundation





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The quality of legal representation is of paramount importance to asylum seekers whose cases routinely raise issues of life and liberty. This report, part of a research project looking at the costs of providing quality legal representation, outlines new findings that show the present legal aid system acts to disincentivise quality.

This report draws together original research, including interviews with stakeholders and refugees, a preliminary analysis of a file review exercise, together with a review of existing evidence. The report starts by identifying 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. The research then establishes the key role that quality legal representation has to play in a cost effective decision making system. It then argues that the present LSC funding system acts to prevent quality provision.

Executive summary

While 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 LSC's Graduated Fee Scheme pays for legal aid work through a series of fixed fees. The evidence suggests that these fixed fees, 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 be designed to incentivise efficiency but in fact are likely to cost more in the long term.

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The first report in this research project concluded that spending sufficient time to exercise knowledge and expertise and build a good relationship with the client is an essential ingredient to quality¹. It also pointed to evidence that quality work is more likely to achieve early resolution of the case, saving money in the long term.

A preliminary analysis of the file reviews conducted as part of this research shows a correlation between cost and quality and between quality and successful outcomes. Interviews with legal representatives, Home Office and judicial stakeholders suggest that quality appears to be suffering: for example, critical witness statements in adult cases have now become a rarity: it appears that only representatives committed to quality work continue to prepare them.

All providers who reach a minimum level of quality are currently paid an identical fee under the Graduated Fee Scheme, 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.

Methodology

The Cost of Quality research was commissioned by Refugee and Migrant Justice (RMJ), in partnership with Immigration Advisory Service (IAS) and Asylum Aid. It is being carried out by the Information Centre for Asylum and Refugees, City University (ICAR) 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.

This interim report draws on the following pieces of research:

- A literature review
- A report detailing findings of interviews with refugees

Together with preliminary findings from:

- Interviews with decision makers in the asylum process
- Interviews with legal representatives
- A preliminary analysis of a file review exercise of cases undertaken by RMJ and IAS

¹ Trude, A and Gibbs J (2010) 'Review of quality issues in legal advice: measuring and costing quality in asylum work' Refugee and Migrant Justice, London

Information for the literature review drew 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. A separate report on these interviews is available (Trude and Gibbs, 2010b)²

Key stakeholders who were interviewed included Home Office Presenting Officers (1), UK Border Agency asylum caseowners (2) and senior caseowners (1). Two immigration judges and representatives from ten firms providing legal aid advice were also interviewed.

The research gives 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 later in June 2010.

Background to the current funding system

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 characterised 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 (NEF, 2009b). 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 LSC's approach to the funding of legal representation under the Graduated Fee Scheme can be seen in this same broad context with its focus on efficiency and outputs as a means of securing value for money. The Graduated Fee Scheme was introduced in October 2007. It aimed to:

- Ensure the budget for community legal advice could be controlled more effectively
- Create better value for money by rewarding outputs (cases closed) rather than inputs (hours spent)
- Reward efficient providers and force inefficient providers either to change working practices or to exit the market
- Create an incentive to get to the heart of a case and resolve it quickly, rather than allowing cases to remain open for extended periods (Ministry of Justice, 2009).

It transformed the existing funding arrangement under which legal representatives were paid an hourly rate for all work. For most cases the same fee is now given for a unit of advice or representation, regardless of its length or quality. A client may receive advice only, which may take an hour, and will not resolve their case, whilst the same fee will be paid for the time-consuming work needed to prepare evidence, including taking a witness statement, which is an essential piece of evidence needed for a sustainable decision in asylum cases.

Commentators have also suggested that the Graduated Fee Scheme 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 on its costs to representatives has seen the LSC impose a system on the not-for-profit sector in which case stages are paid on completion. Previously payments were made on account. This brought the not-for-profit sector in line with the private sector. Both sectors have argued against payment on completion, particularly in asylum and immigration work because stages can take months and sometimes years to complete often due to delays in UK Border Agency decision making. Except in the case of short units of advice, the closure of stages is therefore outside of the control of legal representatives and so this measure does not reward efficiency but is likely to penalise providers who take on the

² rmj.org.uk

more complex cases that may take longer to resolve. The LSC has declined to introduce a system of periodic billing to alleviate this problem because this would place "a heavy burden on the LSC's and MOJ's cashflow"³. The result has been to transfer the cashflow problem to legal representatives. This affects not-for-profit representatives particularly badly as they do not have large reserves or the ability to get bank loans to finance working capital. It may also threaten smaller specialist legal aid representatives less able to secure loans against a backdrop of reduced income.

A number of recent reports have reviewed the LSC's procurement of legal services. The Justice Select Committee's 8th Report (2009) dealt with family legal aid reform. The Committee found that:

"The Commission is proceeding at speed with inconsistent data, a weak evidence base and a poor understanding of the shape, the cost drivers, other motivating factors, and the structure of its supplier market." (Justice Select Committee, 2009: Para 67)

The National Audit Office has criticised the LSC's procurement of criminal legal aid. In a report published in November 2009, it concluded that the LSC:

"Should do more to understand the market for criminal legal aid to help it make fully informed decisions. In particular, it lacks a firm grasp of the cost structures and profit margins of different types of legal aid firm and how these vary geographically. While it holds good information locally about its suppliers...it does not bring this information together centrally." [National Audit Office, 2009: 5]

The LSC was at a considerable disadvantage when it came to the procurement of legal aid services for asylum and immigration work under the Graduated Fee Scheme. Unlike other categories of law, the LSC did not base the Graduated Fee Scheme 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).

A crucial element of the Graduated Fee Scheme - 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: 6)

The LSC committed to reviewing the impact of fixed fee arrangements in all areas of civil law⁴. It undertook this review with a consultative group that included The Law Society and Immigration Law Practitioners Association. Its report, published in April 2009, concluded that it was too soon after the implementation of the Graduated 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 (LSC, 2009a).

A Ministry of Justice review, chaired by Lord Bach, published a report on the impact of changes to the funding of civil legal advice in June 2009 (Ministry of Justice, 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 Graduated Fee Scheme, 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.

Research findings: key elements of quality

The first stage of this research provided both the theoretical and practice-informed background to the development of a definition of quality representation in asylum work and an asylum-specific file review grading scheme. This grading system draws heavily on the LSC's Peer Review criteria. However, it has been informed by a wider perspective than that 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.

³ Letter from the LSC to immigration and mental health representative bodies, 22nd December 2009

⁴ This research found little evidence of any analysis of quality, time and outcomes by the LSC. In particular, there has been no analysis of value for money in legal representation outside the Solihull Early Legal Advice Pilot.

The evidence highlighted three key elements of high quality legal representation:

- Professionalism and expertise.
- The quality of the one to one relationship between the representative and client.
- Sufficient time to present the case and to meet the first two key elements.

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. The Immigration Law Practitioners Association 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 and Company, a well-known law firm, 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 and Co Solicitors, 2007: 3).

The project definition of quality in asylum legal work incorporates this element in the following phrase, that the representative, following professional standards *"identifies, gathers and places 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 et al., 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

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 this 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."*

Measuring quality

On the basis of the research above, a definition of quality has been drawn up which is designed to capture the key outputs that can be measured in individual cases that are likely to lead to a good outcome in a representative sample of cases.

A good outcome is often a sustainable and timely decision. 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 and delay 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 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.

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.

Our definition of quality

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.

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 arguments 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.

As part of the research a specific file review has been drawn up to measure how much time is needed to deliver quality. The 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. 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, enabling researchers to analyse the correlation between time and quality.

Stakeholder views about 'quality'

Refugees

Interviews with refugees identified the following factors contributing to quality representation:

- 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.

There were examples of what refugees considered to be good practice:

"He gave me the chance to be actively involved in the representation. I didn't participate but he was always wanting to know what I thought, even if they take a decision in my absence they will always tell me we want you to read it and tell us if wherever correction you need to make or tell us what you think about it and we go ahead." (R08)

"[He] has something that, maybe something that comes from a quality that is innate in him. He tried to listen to his client, what they're saying, where they're coming from. He was very professional" (R08)

"She was always welcoming. I could cry any time and she would talk to me in a such a way that at the end I would feel much better. She saw the distress I was in. The way she would make me relax and talk things exactly as they are." (R07)

However, refugees also gave many examples of what they considered to be bad practice:

"I gave him the full story and he kept telling me 'let's make it for after the appeal! I said which appeal? He said let's take it to the court. I said why? My case is straightforward. Why take it up to an appeal? I want to take it to the interview. My case is true; they can find the records in the United Nations.'" (R02).

"Time was too short. I had one and a half to two hours to make the statement without having the chance to make any correction. The solicitor said I was taking a lot of her time because my story was very long. I didn't have time to tell the whole story. She told me to give a summary, not the whole story." (R09)

Decision makers

Interviews with UK Border Agency case owners highlighted professionalism and expertise as the most important characteristics of a good quality representative. Where quality was high, they valued the role of the representative in the fact finding process. Case owners and Immigration Judges suggested that the preparation and submission of a detailed witness statement by the representative, saves their time leading to a more efficient decision making process and better decisions. However, all those interviewed said that witness statements are now a rarity in adult cases and they thought that this was due to time pressures on the representative's side.

"I used to get, when I first started, I used to get a lot more witness statements, now timescales have moved on and I don't think the reps get a chance to get a witness statement" (H001)

Immigration Judges also focussed on professionalism and expertise. They agreed that taking detailed instructions as to the factual basis of a claim and preparing a comprehensive witness statement were key to quality representation. Where no statement is prepared, or where it is of poor quality, the appeal hearing is made more difficult and time consuming;

"If you have got a very poor, very brief statement then effectively what happens is that the hearing becomes a substitute for these sessions, for drafting a statement that didn't happen and there isn't enough time and some judges will be concerned enough to want to identify a good claim that appears to be a bad claim ... and some wont and so the risk of injustice is considerable" (J1)

Legal representatives

Representative interviewed stressed the pressure they were under to remain viable. Some thought that the Graduated Fee Scheme did not represent value for money. This is because representatives could make substantial profits, by rushing cases, but if these cases were poorly handled the LSC would have to pay more for them to be resolved.

"...it just seems as if fixed fee what its doing is providing an absolute minimum to avoid a negligence charge and, and pretty much nothing more then that. It seems like there is no room for individualised quality work specific to each client." (LR01)

Representatives were generally pessimistic about the financial viability of undertaking quality work.

"I don't know what is going to happen in the future. I mean it is so insecure for us, so very insecure. It's only going to get worse for the clients and you know what that means? It means that people are not really going to have access to justice." (LR05)

"I am a huge loss maker. If I was in a firm that was entirely reliant on the Graduated Fee Scheme, I wouldn't be working like this and I would actually not do the job, because I think it's impossible to do a decent job...At some point the demands of the business will probably say, "no more", it's too expensive." (LR08)

"I happen not to have changed my practice, but at some point I'm going to have to. We are going to have to take a very hard decision. Do we carry on or do we bite the bullet? And personally, the day I have to stick to the Graduated Fee Scheme is the day I stop doing this work because I cannot do poor work. I would rather do ten cases pro bono and do a good job and try and recover some other way than work with this scheme in its harsh realities." (LR08)

It should be noted that representatives interviewed for this research were from well known firms who are reputed to provide good quality advice and representation.

Quality, asylum outcomes 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. *Providing Protection* 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 (JUSTICE, ILPA and ARC, 1997). 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)⁵. 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 (Trude and Gibbs, 2010a).

The imperative to provide correct advice as early as possible when sought by a client is echoed by AdviceUK 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)

⁵ Legal Aid Board, (1999), 'Access to Quality Services in the Immigration Category, Exclusive Contracting. Recommendations to the Lord Chancellor.'

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) (NEF, 2009a). 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.

Our research has found no evidence that the Graduated Fee Scheme 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.

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. Firms charging less than they would have received had the case been funded by the Graduated Fee Scheme achieved a success rate of 31 per cent. Firms whose spend exceeded the level of the Graduated Fee Scheme for Legal Help had a success rate of 39 per cent. The success rate of the Solihull Pilot firms that charged in excess of the average cost for the study was 44 per cent compared with 31 per cent for those that charged less.

A preliminary analysis of the file review exercise conducted as part of this research supports evidence on the relationship between cost, quality and outcomes. The exercise was carried out by an independent file reviewer also employed by the LSC as a peer reviewer. It shows a direct correlation between cost (or the time spent on a case) and quality and between quality and outcome.

Through the course of this research a powerful body of evidence has emerged that shows that the Graduated Fee Scheme 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 Graduated Fee Scheme. Under 11a paragraph 4 of the Unified Contract matter starts may be reduced if a representatives' average graduated fee margin exceeds 80 per cent of the value of the work charged at an hourly rate. In effect, this provision gives representatives undertaking the least amount of work up to 20 per cent more income. To date the LSC has conducted no analysis of the success rates of representatives achieving such increases in income.

The evidence suggests that the Graduated Fee Scheme 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 the Graduated Fee Scheme was to compel firms to work more efficiently or else "to exit the market" (Ministry of Justice, 2009: 39).

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 Graduated Fee Scheme. The review found that four law centres had ceased work and that unrestricted reserves for remaining centres had been depleted by 70 per cent since the introduction of the Graduated Fee Scheme. Recent interviews with representatives conducted as part of this research indicate that more may abandon this work.

Discussion: the LSC's approach to quality

Notwithstanding the experience of the Solihull pilot, the LSC has confirmed to RMJ that it does not measure value for money because this is not a contractual requirement

"...there has not been any direct assessment of whether you provide value for money since this is not a specific contract requirement. Whilst the Commission wants to see the best possible outcomes for clients, your outcomes are only taken into account when determining whether you are meeting the KPIs and to inform the [Solihull Pilot] work that is ongoing."⁶

The LSC has no plans to conduct a value for money analysis of representation under the Graduated Fee Scheme:

"...as the recent tender for the Standard Civil Contracts was based on an established fee scheme and payment structure where there is no defined link between case outcomes and payments....any such analysis would be considered largely redundant"⁷

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 2005: 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.

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 (LSC, 2009b). 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.

⁶ Email from Legal Services Commission to Caroline Slocock, 26th April 2010

⁷ Letter from Legal Services Commission to RMJ, 24th May 2010

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.

Conclusions

This research 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.

The Graduated Fee Scheme was 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. A file review of cases undertaken by IAS and RMJ, conducted by an LSC peer reviewer, confirms a statistical correlation between the quality of work in a case and both its cost and outcome. 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 Graduated Fee Scheme, regardless of the time spent on the case. This means that a short unit of advice is paid the same as intensive work to prepare vital evidence on which a substantive decision can be made, including witness statements. Interviews with the Home Office undertaken in this research identify that witness statements in adult cases are now a rarity. This minimum level of quality 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 benefits. The evaluation of the Solihull Early Legal Advice Pilot ("the Solihull Pilot") on the frontloading of legal advice pointed to a number of positive outcomes:

- 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.
- Faster, higher quality, more sustainable UKBA decisions
- UKBA meeting its case completion targets (integration or removal within 6 months).

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 has been pressing ahead with the tender for civil contracts for the next three years on the basis of the Graduated Fee Scheme, with the exception of the Midlands where the Solihull Pilot is being rolled out with initial payments on an hourly rate basis. 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.

In May 2010, the newly-elected coalition Government announced it will carry out "a fundamental review of Legal Aid to make it work more efficiently" (HM Government, 2010). This research suggests the legal aid budget for asylum and immigration could be spent more efficiently and effectively by incentivising quality work that resolves cases early on and saves downstream costs on appeal and benefits. Unless there is such a review, justice in the asylum system is at risk.

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