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David Ian Stothard

A Critique of the Technical and Structural Flaws in the  
Legal Aid Scheme; and an Analysis of the Proposals for  
Reform Contained in the Legal Aid Act 1988

Bachelor of Civil Law

1989

ABSTRACT

The critique of the Legal Aid scheme is on two levels. Firstly 'technical' problems are discussed. It is in the nature of these problems that they can be resolved within the present structural arrangement of the scheme. The administrative procedures, use and coverage of the scheme are examined, taking into account the view point of the consumer. Privately paying and legal aid clients are compared in terms of the quality of the service they receive, solicitors' attitudes to them, and the differing nature of the problems of poor people.

The argument then concentrates on the 'structural' defects of the scheme, avoiding the minutiae of its workings. The propriety of a scheme created to provide legal services to poor people through solicitors in private practice is questioned. The legally orientated theory underlying the Legal Aid scheme is contrasted to social and consumer based theories, and to the practical model of the American Neighbourhood Law Firm. Empirical research is used to highlight the deficiency in the distribution of private practice solicitors to meet the needs of the poor; and the compensatory role of advice agencies in providing the relevant legal services to them.

The Legal Aid Act 1988 is subjected to a close analysis with particular emphasis on the Lord Chancellor's powers, and the creation of the Legal Aid Board. The role and agenda of the Board, and future of the Legal Aid scheme are considered by outlining and examining the proposals contained in the preceding White Paper. Conclusions are drawn as to the possible results of the Act, and its value in relation to the previous critique of the Legal Aid scheme.

A Critique of the Technical and Structural  
Flaws in the Legal Aid Scheme; and an Analysis  
of the Proposals for Reform Contained in the  
Legal Aid Act 1988.

David Ian Stothard.

Thesis submitted for the Degree of Bachelor  
of Civil Law.

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University of Durham.

Department of Law

1989



25 JAN 1990

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The author is most grateful to his tutors,  
Bill Rees and Bernard Smythe, for their  
patience and encouragement.

PART 1

Legal Aid : A Question of Suitability

(A) Introduction

When introducing the Bill which was to become the Legal Aid and Advice Act 1949, the then Attorney General Sir Hartley Shawcross said the legal aid system would

"open the doors of the courts freely to all persons who may wish to avail themselves of British justice without regard to their wealth or ability to pay." (1)

The Act was significant in the assistance which it intended to provide for the poor. The underprivileged would no longer have to rely on solicitors' charity to enable them to obtain legal representation. A positive right to free legal representation had been created for the poorest in society, and to those of moderate means a right to assistance towards the cost of litigation had been created. In his retrospective analysis of the legal aid system Wegg-Prosser wrote with reverence on the entrenchment of the principle of equality before the law into the British system of justice. He recognised the importance of placing the poor person on a par with the rich one at the expense of the state. (2)

These remain fine principles, but, as the Hughes Royal Commission noted,

"There is no compelling reason why State support should take only the form of payment to private practitioners." (3)

It is important to be aware that however benevolent the aims of the legal aid system were represented to be, that system was chosen because it was most beneficial to the

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1) Wegg-Prosser, C.F., "Justice Denied II", (1969) 113 Solic.J.825.

2) Wegg-Prosser, C.F., "Justice Denied I-IV", (1969) 113 Solic.J.803

3) Royal Commission on Legal Services in Scotland, Vol.1. (1980) Cmnd.7846. para. 8.14.



most powerful pressure group. In this case the Law Society, the voice of the legal profession, was able to coerce the government into implementing a system tailored to the legal profession's structure and practices<sup>(4)</sup>. While this was not wholly detrimental to the interests of those who were unable to enforce their legal rights because of a lack of representation, it did mean that their requirements were not paramount in deciding how best they should be assisted.

It is proposed to examine the legal aid system, to establish whether it is a suitable method by which to provide legal advice, assistance, and representation, to enable the poorer members of society to lawfully enforce their rights and fulfil their legal obligations in the same way as those individuals and organisations with the advantage of comparative wealth.

The legal aid scheme will be critically examined at two levels. First, in relation to what may be called the 'technical' problems of the scheme and, second, in relation to what may be termed the 'structural' problems. The 'technical' problems are those problems which could be rectified within the present structural arrangements. The subsequent examination of 'structural' problems avoids the minutia of the legal aid scheme and concentrates on asking whether providing the service through private

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4) Abel, R., "Laws Without Politics : Legal Aid Under Advanced Capitalism", (1985) 32 U.C.L.A. Law Review 474; and Alcock, P.C., "Legal Aid : Whose Problem?", (1976) 3 B.J.L.S. 151.

practitioners is the most suitable method to enable the poor to receive the representation necessary to achieve equality before the law. Some issues will require examination under both headings but duplication will be kept to a minimum.

(B) The Technical Problems of Legal Aid

(1) Is Legal Aid too bureaucratic?

"...[I]t's all a question of paying solicitors' costs, that's really all we're doing." (5)

Whatever the view of the professional administrator, legal aid could not be regarded as a simple system in the eyes of the layman. When people are in need of assistance they are likely to be uncertain in two ways. Firstly a lack of knowledge of the structures and institutions both in society as a whole and specifically in the law prevents people from choosing the course of action which is right for them. People are reliant on what they are told by the solicitor, it is a fallacy to suggest that they 'instruct' the solicitor since it is the solicitor, whether wilfully or not, who control the clients' choices. Secondly, when people deal with lawyers they are often concerned with the cost, but unaware of their entitlement to assistance in meeting those costs.

(a) What is legal aid?

Let us briefly look at the form of legal aid and the process of the administration<sup>(6)</sup>.

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5) Shaun Kirby, Secretary of Law Society Legal Aid (Area 8) Office during interview with author.

6) Information from The Solicitors' and Barristers' Directory and Diary, Vol.2. (1985),14.

There are five types of legal aid, which are commonly used each with a separate use and a different procedure:-

(i) Legal advice and assistance, "Green Form". This covers preliminary advice and assistance from a solicitor. It is the solicitor's responsibility to assess the client's financial eligibility. So that an immediate decision can be taken, the financial test is relatively straightforward. The solicitor must assess clients' means, advise them of whether it will be necessary for them to pay any contribution, and if so then to collect that contribution from them. Solicitors are given this relatively large freedom because of the strictly limited financial expenditure they may incur under the green form scheme, i.e. £50 (£90 if drafting a divorce petition) before application for an extension is required.

(ii) Assistance by way of representation, 'A.B.W.O.R.'.

This is very similar to green form but can only be used to represent clients in limited circumstances, for example domestic proceedings in the Magistrates' Court. The procedure is to fill out a green form since the financial eligibility limits are noted thereon. However the solicitors may not automatically proceed to give A.B.W.O.R., but must first obtain the approval of the legal aid Area Director. Therefore once the financial criteria have been satisfied the procedure is to complete a further application form for A.B.W.O.R., sending only that form to the Area Director at the area legal aid office where it will be considered. The solicitor can only proceed when an approval form has been received. Thereafter they are not subject to the green form costs limits.

(iii) Civil Legal Aid. Where costs can become more considerable the solicitor loses the right to take decisions as to client eligibility and any discretion in collecting contributions. For civil legal aid the clients cannot make their own application, the Solicitors' Directory states clearly that the solicitor should 'always' complete the form to avoid inadequate responses which might lead to a refusal of aid. The complexity of the application necessitates providing both written (the 'legal Aid-Applicants Leaflet') and oral explanations to the client. The solicitor cannot undertake work until permission is received from the legal aid office. In theory this will take approximately six weeks from the date of submission but in practice may be longer. This time gap is because processing the application is split into two stages, a 'merits' test where the merits of the case are assessed by the legal aid office; and a 'means' test where an assessment of the client's means is carried out by the independent legal aid assessment offices of the Department of Social Security. Emergency applications can be made if the case is urgent, and a decision can be given immediately, even over the telephone if necessary.

(iv) Criminal Legal Aid. Application is made to the relevant criminal court upon forms supplied by that court. Here again there are two hurdles for the applicant similarly to civil legal aid there is the means test of financial eligibility, but here the other test is not of merit but of the 'interests of justice' for which there are certain guidelines known as the Widgery Criteria<sup>(7)</sup>. Where there

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7) The Widgery Committee on Legal Aid and Criminal Proceedings (Cmd 2934).



is doubt as to whether legal aid should be granted, the Directory suggests this should be resolved in the applicants favour, a further criterion unavailable elsewhere. Appeal against refusal of aid is not to a different court but rather to a criminal legal aid committee who re-consider the application on exactly the same grounds as the court.

(v) The Duty Solicitor Scheme.<sup>(8)</sup> There are two schemes, the magistrates court scheme and the twenty-four hour scheme. These are the simplest schemes from the client's viewpoint, since they are entitled to £50 (unextendable) worth of advice where attending voluntarily, or for a non-arrestable offence, or £90 (extendable retrospectively by Area Office) worth of advice for an arrestable offence, without either a means test or payment of any contribution. Unfortunately the costing has proved unduly complex for the solicitors involved, which has necessitated a considerable number of forms having to be returned and therefore increasing administrative burdens on both the area officers and the solicitors themselves.

(b) How do the legal aid schemes work in practice?

It would not matter if the system of application and provision of legal aid was complex and multifarious if it ran smoothly and was in the interest of the client. As the Benson Commission<sup>(9)</sup> noted, the difference between the simplicity of the green form scheme's administration and the complexity of civil legal aid's administration is,

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8) Information from Law Society Gazette 1289 (30 April, 1986)

9) Royal Commission on Legal Services in England and Wales, (1979) Cmnd. 7648 paras. 13.12-13.14.

it is argued, justified because of the necessity of accurate assessment. Eligibility and contribution rates are such that a minor variation in assessment may have a disproportionate impact on the ability of the applicants to proceed with their cases. Therefore, although the total cost recovered from clients' contributions is relatively small compared to expenditure required to pay the D.S.S. to assess the means of those clients, to the level of accuracy required by the legal aid office, it is felt to be justifiable bureaucracy to ensure accuracy of assessment.

It would be difficult to argue with this principle, it does seem legitimate to have a considerable bureaucracy if it is the best means of protecting the clients' interest. But does the legal aid bureaucracy do as it claims? Is it the clients' interest which is protected by the variety of forms of legal aid and their administration or are the procedures involved suiting either the profession or even the Treasury more than the clients?

How do the clients perceive legal aid before they come into contact with it? Clients have notorious lack of knowledge of their entitlement to legal aid. The work of the Hughes Commission<sup>(10)</sup> was important in showing this. It does not seem unreasonable to assume that when clients enter a solicitor's office they have little or no conception of whether or not they will be entitled to free legal advice, or whether they will have to pay in whole or in part for any of the time given. We must also bear

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10) op.cit., note (3) para.122.

in mind that the clients are probably uncomfortable in the situation in which they find themselves. They have probably overcome psychological fears and barriers of distance to attend at the office<sup>(11)</sup>, they may well have a problem of considerable concern, one which it has been impossible to solve by reference to family and friends. Going to the solicitor is not the first port of call, it is a last refuge for a problem which that client may regard as unsurmountable.

What then can the solicitors do to allay their clients' fears? If the solicitors establish that legal aid will be necessary then they must decide which type is most suitable in this case. If green form is adequate then they can immediately carry out the means test and inform the client of their eligibility for advice and assistance, and what contribution if any they must pay. This scheme is good to the extent that it is quick and simple, and it allows the solicitor to give the necessary advice immediately. Unfortunately complications set in if it becomes necessary to request an extension of the green form. Solicitors can not do this at their own discretion and must send an application for an extension to the Area Director who will consider it. The bureaucracy which is supposed to assist the client makes it necessary for them to wait two or even three months for a decision<sup>(12)</sup>. This is not satisfactory for the clients,

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11) Ibid., Appendix 4, para.108.

12) Ben Hoare (Private practitioner in Sunderland concentrating on legal aid work) during interview with author.

and may cause a conflict of interest for the solicitors who must either wait for a decision and often feel that they have failed in their duty to their clients, or do the work necessary without securing payment and hope that their application will be granted.<sup>(13)</sup>

If the solicitor, having dealt with the client initially under the green form scheme then finds it necessary to apply for civil legal aid, then, as Benson<sup>(14)</sup> noted, it is necessary to put the client through a second means test. In 1986/87 this occurred in approximately 20% of green form cases<sup>(14a)</sup>. Therefore however short the case or however low the contribution it was necessary to duplicate the work already done in completion of the green form, to apply for civil legal aid.

When application is made for civil legal aid further problems are raised. It is difficult for clients to correctly complete or understand the application form, and as stated above, the Directory specifically advises the solicitor to give both oral and written explanations to their clients. This simply serves to exacerbate the problems of the often already confused clients. There is also an inevitable time delay while the Law Society area office processes the claim. Here the delays are longer than for green form, taking three to four months. Often the

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13) Ibid.

14) op.cit., note (9)

14a) Legal Aid, 37th Annual Report of the Law Society (1986/87), (1988) H.M.S.O. para.74. It has been as high as 25% in 1985-86

clients' cases cannot wait that long. For example if there is a personal injury case arising from an accident, the solicitor may have to commence proceedings in the hope that they will succeed and obtain their costs from the insurers<sup>(15)</sup>. Therefore the system can lead to uncertainty for both the clients and their solicitors.

Criminal legal aid has been criticised for the complexity of the application form and more particularly the means test attached to it<sup>(16)</sup>. We have noted above that the solicitors themselves have had some difficulty in completing the new forms used for the duty solicitor scheme. These are all signs of an excessively bureaucratic system, which rather than assisting the clients worsens their situation by delays in confirming grants of their legal aid certificates or extensions; and a complexity of applications and procedures which prevent the clients from comprehending their own best interest.

The administrative arrangements of the scheme do not appear to be in the interests of the client, and we have already seen some evidence that they create difficulties for the solicitor. It is now proposed to explore this latter concept further. Remuneration for solicitors has always been a bone of contention. It has now become a matter of acute concern, with complaints not only about the level of remuneration, but also about the speed of payment of legal aid bills. Taking the former first,

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15) Op.cit., Note (12).

16) Op.cit., Note (1) p.849.

legal aid work has always been paid at a lower rate than private client work, with certain anomalies such as only being able to recover 90% of High Court bills<sup>(16a)</sup>. The situation is such that solicitors are having to subsidize their legal aid work from conveyancing profits<sup>(17)</sup>. David Edwards, the former Law Society's Secretary for Legal Aid, has called the setting of fees:

"far too amateur and far too much a matter of paying the minimum that can be paid without actually stopping the courts from working." (18)

The delays in payment of bills have been described as "truly horrendous" and still increasing from twenty-five to twenty-eight days in April 1987 to a projected seventy-seven to ninety days in April 1988<sup>(19)</sup>. This failure in the working of the administrative bureaucracy has had far reaching effects for both old and new legal aid practices. Welch, Aires and Co., a relatively new practice in Newcastle have relied heavily on the good will of their bank manager since legal aid bills have taken so long to come through that they are currently running about six months behind. Founder partner Jill Welch has said that they certainly could not afford to increase the size of the practice, and they were frequently unable to budget adequately for the payment of wages and other general expenses.<sup>(20)</sup>

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16a) This particular anomaly is to be removed by the Legal Aid Act 1988.

17) Grimes, R.H., and Martin, R.I., "Legal Aid...Some lessons to be learnt", (1981), *Journal of Social Welfare Law* 283.

18) Barley, P., Interview with David Edwards, (1984) 81 *Law Society Gazette* 1509.

19) Anon, Editorial, "Delays in Legal Aid", (1987) 131, *Solic.J.* 203.

20) Jill Welch, interview with the author.

This can be compared to the problems of Hodge, Jones and Allen a reasonably large legal aid firm established for over ten years and of some repute. Henry Hodge described their difficulties with cash flows,

"The story is depressingly repetitive : a lot of work in progress, big bills in the pipeline but delays in payment for legal aid cases leading to temporary difficulty." (21)

This and the wish to help clients has led some solicitors to use emergency applications for legal aid to speed up the process generally rather than for their defined purpose. This has meant that the Law Society have progressed even more slowly with standard applications, and in some cases area offices have had to refuse to answer solicitors' enquiries unless the case is a bona fide emergency.

(c) Can the bureaucracy be justified?

What does this tell us about the administration of the legal aid fund; is it too bureaucratic, and if so, is there any explanation for it? From what we have seen of the major delays in processing and paying of bills, the varying levels of remuneration and the complexity of the systems in operation it must be accepted that the legal aid system is excessively bureaucratic. This manifests itself in a failure to stay abreast of the work which it must do.

Why then is such a bureaucratic system used? The bureaucracy seems to hit the clients and the practitioners

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21) Hodge, H., "A Legal Aid Practice - Ten Years On", (September, 1987), Legal Action 6.

hardest, they must work within the confines of a complex slow moving system. The bureaucracy can not be claimed to be in their interest. The solution to the problem is inherent to both the problems of the system itself and its administration, basically put, it is money. Both Alcock and Abel<sup>(22)</sup> noted that when the legal aid scheme was created it was essentially the result of a power struggle. Although the Law Society succeeded to the extent that a scheme was developed, the government did keep some control over the financing of that scheme. This control itself came under criticism for being over generous. This point was emphasised by Raymond Potter, when speaking to solicitors on behalf of the Lord Chancellor,

"If there is anyone here who seriously believes that the answer to the question "What does the future hold for the legal aid scheme?" can be answered simply "More Government Money" then he is living in a dream world." (23)

It is not by chance that solicitors can only make decisions to give advice and assistance on issues up to £50<sup>(24)</sup>. If the government was going to sign a blank cheque for the total legal aid budget it intended to keep as firm a grasp as possible on the criteria by which legal aid was to be given. The bureaucracy was not created to protect the client but rather to protect the funders. The Treasury did not want solicitors being over generous to applicants, and if the government wanted the particularly rigid eligibility

22) Ibid., note (4)

23) In Morton, J., "Legal Aid on the Slippery Slope", (1987) 131 Solic. J. 1307.

24) or £90 when drafting a divorce petition.



rules to be properly applied it could not trust their administration to the very people who would benefit financially from the grant of a legal aid certificate.

Finance also gives us the key to the problem of why the administration of the system is in such a mess. Although the legal aid budget is open ended, the administrative budget is fixed, and at a level such that it has been impossible for the Law Society to keep pace with the demand for their services. Therefore in this first case the facts support the suggestion that the legal aid scheme is too bureaucratic, and this is not in the interests of the client, or the people providing the service to them.

(2) Is legal aid a second-rate service?

It is important to note that service in this context has two possible meanings. Firstly it can relate to the service provided by the profession. The question is therefore whether the quality of service provided by private practitioners to legal aid clients differs, whether consciously or not, to that which they provide for their privately paying clients. Secondly service in this context could be taken to refer to the broader nature of the legal aid scheme itself. In this case the emphasis of the question is whether the legal aid scheme inherently works in such a way that the service provided is not suitable to the requirements of the people whom it is meant to serve. It is important to bear these distinctions in mind since the former is essentially a technical problem remediable by changes in the working practices of solicitors, but the latter is a structural problem soluble only by fundamental change in the system itself.

(a) Can legal aid clients receive the same services as privately paying clients?

The Society of labour lawyers made a clear statement on their view of the role of modern society's use of the law, they said it has a duty :

"to ensure that its members are enabled to conduct their lives within the law, receive justice when the law is enforced against them, and take advantage of the benefits which the law confers upon them." (25)

Let us look at how far legal aid provides for this. Does legal aid enable people to conduct their lives within the law? Legal aid is largely a responsive system, it comes

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(25) "Justice for All", (1968), Fabian Research Series No.273,p.3.

into use when a person is already in need of legal assistance, in fact it is one of the major complaints levelled at legal aid, to be discussed later, that it does not help overcome ignorance of rights or how to enforce them. Even the Law Society has admitted that,

"...so far as litigation was concerned the legal aid scheme has been highly successful, but many people were unaware of their rights and had an inadequate knowledge of the legal facilities open to them." (26 )

It was for these reasons that green form, advice and assistance was introduced. Figures show<sup>(27)</sup> that since its introduction green form has been, and continues to be, used primarily in traditional areas of advice and assistance. Again people have already come into contact with the law, they do not know how to pre-empt possible problems, rather they are trying to find solutions to more easily remediable difficulties. On the other hand, the paying clients can and do often use solicitors to pre-empt steps which may bring them into unfavourable contact with the law. For example companies use contracts in many situations, such as purchasing goods or employing staff. It is more than likely that the contract used will have been approved or drawn up by a solicitor in such a way as to ensure the contract is within the law, and to maximise the advantages to be derived from the law. The average person has neither the resources nor the cognizance to take

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26) Op.cit., note (2) p.866.

27) Text to notes (44) - (47).

such a step. It would therefore appear that the availability of greater resources makes it easier to conduct your life within the bounds of the law.

Does legal aid allow citizens to receive justice when the law is enforced against them? As was noted above, legal aid is a responsive system and is therefore geared towards helping people when the law is being enforced against them. Theoretically legal aid gives all the advantages of paying privately for a solicitor to represent that person, it entitles them to specialist advice from counsel or expert witnesses, and thereby overcoming any possible disparity in expertise reflected in the size of the practice. However, legal aid is not available in tribunals<sup>(28)</sup>. It has been suggested that this is the most important forum for poorer clients since it tends to be fundamentally linked to their means, particularly the Social Security Appeal Tribunal and Industrial Tribunal.<sup>(29)</sup> A paying client can afford to have legal representation in any situation where it is not prohibited, and this is proven to give a considerably increased chance of success<sup>(30)</sup>. Therefore here we see that although legal aid does cover all courts and therefore fulfils the requirement to some extent it is not available in perhaps the most important arena for the poorer client, and therefore again wealth gives a tangible advantage.

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28) Again a major complaint which shall be discussed later.

29) See note (60)

30) Ibid., and also The President of the Social Security Appeal Tribunal, "Judging in the S.S.A.T", (1987),

The final duty which the Society of Labour Lawyers suggested was the law should allow the citizen to take advantage of the benefits which it has conferred upon him. The problems of legal aid being largely responsive have already been stressed and are again relevant here. The advantages given by money in this situation can best be shown by practical examples of factors which control the income of that person. The poor may depend on welfare and/or unemployment benefits to provide their means. This is an extremely complex area of law and personal experience shows that those providing the benefits are often unwilling to explain entitlements to benefits. Claimants are expected to place themselves completely into the hands of the welfare benefits officers by giving them all the information required to make a claim, without being told how this will affect their claims. Theoretically advice on benefit entitlements is available from solicitors using the green form scheme, but in reality few solicitors have adequate expertise in such fields to be of use<sup>(31)</sup>. This approach also relies too heavily on the clients understanding of the necessity of obtaining advice, rather than providing an explanation as of right.

We can compare this to the use of tax law by companies and wealthy private clients. For such clients it is standard practice, and they would probably be regarded as negligent if they were not to maximise their profits by

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31) Smith, B., "Unmet Need and Private Practice in Southampton", (1980), LAG Bulletin 55.

tax planning, so as to exploit loopholes in the tax laws. This involves a large amount of expenditure of resources and shows that wealth allows maximisation of benefits available whereas poverty removes choice and control over basic means, the exact opposite of allowing people to take advantage of the benefits the law confers upon them.

Therefore while the legal aid scheme purports to create equality before the law it fails to do so to the extent that it only provides a limited responsive service. Legal aid fails to provide the advantages of preventive advice and assistance, rights awareness and to a large extent enforcement. Solicitors are able to provide all of these services to clients able to pay for them. Could this problem be overcome by providing further resources to increase availability and usage of legal aid,<sup>(32)</sup> or are there other latent defects in the scheme?

(b) Solicitors' attitudes to legal aid clients.

The greatest fear of the failure of legal aid as far as solicitors are concerned is that either consciously or sub-consciously they treat legal aid clients differently from those who are paying for their legal services. This has most often been seen in terms of the necessity to standardise legal aid cases. Remuneration for legal aid work is low and therefore it becomes necessary to have a high turnover of cases to remain profitable. This necessitates some standardisation in the advice and alternatives

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32) But see text to note (23).

that solicitors will offer their clients, which may mean a failure to match the correct remedy to the problems of the individual. We shall examine this through the opinions of solicitors themselves, the problem of running a legal aid practice, whether standardisation occurs, and if so whether or not it may have an adverse effect on the advice given to the client.

"Legal aid casework is characterised by a low value, high turnover case-load...The average price for private bills was about £300 and for legal aid cases about £230...The legal aid average in particular is distorted...as we earn something over £50,000 from the green form scheme where the average bill is around £50". (33)

This is Henry Hodge's description of the workload of his private practice and it would seem to fall into Bridges<sup>(34)</sup> description of a legal aid practice. They have to be able to cope with a rapid turnover of cases and there needs to be substantial delegation of the workload to non-professional staff. Problems such as social security or housing which can have complications tend to be left to be dealt with by other agencies while solicitors deal with the more standardized problems.<sup>(35)</sup>

The views of the profession are varied. At one extreme there is the belief that it is never possible to standardize the caseload since the parties to each action are different, even if the question of law is not.<sup>(36)</sup> This can be compared to the view that there will never be

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33) Op.cit., note (21)

34) Bridges, L., "Legal Coverage", (10 July 1975), New Society 76.

35) I am not suggesting that this specifically relates to either Hodge's firm in particular or any other which I may mention hereafter.

36) Op.cit., Note (5)

a proper service for clients while private practice is profit orientated because the private practitioner does not have the necessary time to find the solution to each individual's problems.<sup>(37)</sup>

There does appear to be some central ground which is probably palatable as at least a lowest common denominator of agreement. This would be that there are some firms who may provide a second-rate service, but it is not known what proportion they represent or why they do not provide top quality service. One argument is that only a few firms give a second-rate service, and that is because they are generally poor quality firms, their advice would be bad whoever it is given to, and if it is anyone who gives a second-rate service to legal aid clients it is them<sup>(38)</sup>. The other argument suggests that there certainly are some firms who simply take on legal aid work because they know by processing standardized work they can make profit, but those who are really providing a second-rate service are the inexperienced solicitors, those doing only a small amount of legal aid work, who find themselves faced with areas of the law in which they have no expertise.<sup>(39)</sup> Since the vast majority of practices undertaking legal aid work only do a small amount,<sup>(40)</sup> this type of second-rate service could be very widespread. Therefore, although we have no firm factual evidence as to the extent

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37) Op.cit., note (20)

38) Op.cit., note (12)

39) Andy Cope, Convenor of North East Legal Action Group, interview with the author.

40) Op.cit., note (34)



of solicitors providing a second-rate service, or to the reasons for this, it is accepted among the profession that such service does exist, even David Edwards, former Law Society Secretary for legal aid, has said,

"I think two standards of service would be regrettable...But I am sorry to say that, particularly in the last ten years, there has been increasing evidence that some firms do operate two standards of service."(40a)

It must therefore be accepted that to make legal aid effective, solicitors' attitudes would have to be changed. This may require either better funding, or better training, or both.

(c) How suitable is the legal aid scheme to deal with the problems of the poor?

What then of the proposition that the legal aid scheme itself is second-rate because of the limits of its form? This theory does have support which takes the form that legal aid does not assist in the solution of the problems which it is meant to overcome, i.e., those of the poorest members of society, because it misunderstands those problems. Wexler expressed this idea with great clarity,

"Poor people do not lead settled lives into which the law seldom intrudes; they are constantly involved with the law in its most intrusive forms". (41)

This stresses the weakness of the legal aid scheme because it accepts as its basis the idea that the poor person is like a rich person without the resources to conduct a case. In other words that the problems they face which involve the law are isolated and distinct from the rest of their lives.

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40a) Op.cit., Note (18)

41) Wexler, S., "Practicing Law for Poor People", (1970) 79 Yale Law Journal 1049, 1050.

Wexler points out that this is not the case,<sup>(42)</sup> their basic problems are not individual, rather they are the product of their poverty and therefore common to most poor people. Where legal aid is used it still leaves clients exactly where they were before, except that each client is now reliant on the lawyer's skills to solve their most obvious legal problems. This argument is strongly supported by the figures for usage of legal aid.<sup>(43)</sup>

There is a high proportion of expenditure on matrimonial and criminal law problems compared to the low expenditure on housing, landlord and tenant, welfare law, employment law, race and sex discrimination law, and immigration law problems. This shows that it is not the cause of poverty that legal aid helps solve, i.e., the latter list, but rather the symptoms of it, i.e., marital breakdown and high crime rates.

Therefore there are fundamental technical and structural defects in the legal aid scheme which make it an unsuitable, second-rate service as regards the needs of the poorest members of society. It does not give those people the same advantages as those able to pay for their legal services privately.

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42) Ibid., p.1053.

43) see next section.

(3) Is legal aid suited to providing the services required by the poor?

(a) For what purposes is legal aid used?

A useful position from which to start is an analysis of the actual figures of use of the legal aid scheme. It is interesting to compare the national figures, as represented by the breakdown of use of green form work<sup>(44)</sup>, and the very specific figures of one typical legal aid practice.<sup>(45)</sup> These figures will not be directly compatible since those for the solicitors' practice cover all forms of legal aid work and the minority of private client work which they do. The interest will be in obtaining a rough indication of whether these differences produce any substantial variation in the proportion of work which each case type makes up. We are able to see that the casework undertaken by the legal aid practice does not differ substantially from the general use of green form despite the fact that the practice's figures are not directly compatible. The majority of the work undertaken in both cases relates to divorce and other family matters and criminal work, with small but significant caseload of accident and injury litigation and landlord and tenant work. The private practice differs noticeably only to the extent that no H.P. or debt work is undertaken, while this forms 5.9% of the total number of green form bills.

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44) Legal Aid, 37th Annual Report of the Law Society (1986-87), (1988) H.M.S.O. Appendix 1F, p.42.

45) op.cit., note (21).

GREEN FORM

HODGE JONES & ALLEN<sup>(46)</sup>

Type of Problem	No. of Bills Paid	%age of total	No. of Bills Paid	%age of total
1. Divorce & Judicial Sep.				
(a) Petitioners	205,178	40.6	523	29.2
(b) Respondents	17,778			
2. Other Family Matters	175,111			
3. Crime	226,168	23.1	683	38.0
4. Landlord & Tenant, H/sing.	60,672	6.2	69	3.8
5. Hire Purchase, Debt.	57,529	5.9	--	--
6. Employment	19,924	2.0	--	--
7. Accident & Injury	44,575	4.5	67	3.7
8. Welfare Benefits	28,823	2.9	--	--
9. Immigration & Nationality	7,823	0.8	--	--
10. Consumer Problems	21,138	2.2	--	--
11. Other matters	115,788	11.8	454	25.3
	<u>980,507</u>	<u>100.00</u>	<u>1,796</u>	<u>100.00</u>
TOTAL:				

46) These figures have been adjusted to take account of the fact that conveyancing can not be done under legal aid.

Baldwin and Hill<sup>(47)</sup> noted the trend shown above more generally through all legal aid private practice with the emphasis very strongly on divorce and judicial separation, other family matters, and crime; and they stressed that this predominance had remained surprisingly stable over many years since the commencement of the scheme. They noted that despite the 'spiralling growth' in the scale of the work undertaken, there had been a failure to equalize the emphasis on areas of work particularly relevant to the poor, such as housing, employment, welfare benefits and debt problems, with those areas of work traditionally provided by private practice, i.e., divorce and family related matters, and crime.

(b) Can the pattern of usage be explained?

There are two possible explanations, both of which may use some of the same factual evidence but which are fundamentally different. Geddes said that although divorce and crime dominate the legal aid scheme,

"This is not the fault of the scheme itself, but of public ignorance of its scope, the reluctance of many lawyers to take on cases involving social and welfare law, and the lack of both financial and human resources to bring the service to the people." (48-49)

The question which this analysis begs is that is it not an integral part of the purpose of the scheme to provide for informing the public of its availability and how it may be used. Similarly, should not the scheme have been devised to

47) "Research on the Green Form Scheme...", (1986) 5 Civil Justice Quarterly 247.

48-49) Geddes, D., "How Can Legal Aid Bring Lawyers to the People", (19 Sept., 1975), The Times 8.

take account of the fact that social and welfare law topics are only taught to a very limited extent in either the academic or professional stages of solicitors' training<sup>(50)</sup>, and therefore it is little wonder that solicitors do not always have the relevant skills to deal with these problems? Also, surely it is integral to the proper construction of a scheme that it should make the best use of the financial and human resources which can be provided, rather than to suggest that the legal aid scheme would be workable if only the users were better informed, the providers better educated and the resources more abundant? Therefore Geddes' statement that the legal aid system is sound can not be regarded as valid.

The Society of Labour Lawyers<sup>(51)</sup> came much closer to explaining why legal aid tended to be used only in the more traditional areas of the law. Structurally the scheme depends wholly on the existing network of private practices, and by so doing it does not overcome the problems of the private practitioner failing to locate offices or branch offices in areas where the population tends to be poor, preferring to locate in town centres and often near the business community. Secondly the scheme makes no attempt to overcome the psychological or social problems which hamper contact between solicitors and poor clients. The service was therefore only for those with the "knowledge, resourcefulness and persistence" to seek assistance from the private lawyer. The scheme placed the emphasis wholly

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50) see Geffen, I., "What are Solicitors for?", (1985) 129 Solic. J.626.

51) Op.cit., note (25).

on the initiative of individuals to recognise their problems and seek help. When this is combined with the fact that poorer people tend not to recognise that they have legal problems<sup>(52)</sup> it is not surprising that the upshot is that the scheme is used largely in the most established and well known areas of solicitors' expertise.

(c) What can we conclude from this limited use of legal aid?

The most obvious, and perhaps fundamental result was discussed by Sufrin and Bridges<sup>(53)</sup> when they recognised the same trend of use in Birmingham,

"..if legal advice is being provided to the poor in Birmingham on a wider range of problems [..than matrimonial and family...] then it is not being done under the umbrella of the Statutory Scheme."

This obviously represents a failure in the legal aid scheme to embrace the specific concerns of the poor, their housing and employment rights, their debt problems and in relation to the powers and discretions exercised by the plethora of government agencies upon whom they rely, particularly with regard to the social welfare legislation which makes up the welfare state. Effective advice, assistance and representation in these areas is being provided by independant non-statutory based advice, information and legal centres,<sup>(53a)</sup> which are characterized by under funding, overstretching of staff resources and a poor distribution particularly outside

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52) see Sander, M., "Legal Services for the Community", (1978).

53) Sufrin, B.E., and Bridges, L.T., "Statutory Legal Advice in Birmingham", (1971), 121, N.L.J. 868.

53a) see later.

of urban areas. This is not a satisfactory situation because it means that despite a scheme which is meant to allow people to understand and defend their rights by the use of the law, those rights are still going unenforced, and the scheme is failing in that aim.

From a socio-legal viewpoint, what Ferrari has to say about the Italian legal system<sup>(54)</sup> is of interest in relation to what solution this problem requires. He says that extending the traditional legal aid system for court proceedings, administered through a state run bureaucracy to cover the problems which were mentioned above would be undesirable, since it would redefine what are essentially social problems as purely legal ones. This would result in the provision of legal solutions to individual clients' problems while leaving in place the underlying social or economic problem. He shows the broader ramifications of such a policy, and by doing so he also throws further light on what Abel<sup>(55)</sup> said in relation to the power struggle resulting in creation of the legal aid scheme. Ferrari suggests a government might,

"...under this guise of reforming zeal, advocate the introduction of a legal reform which not only reinforces the status quo but also strengthens it by channelling disputes through it. At the same time such a move may silence those who argue that the system does not recognise genuine grievances."

In which case Ferrari would not support an extension of the

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54) Ferrari, A.V., "Some Sociological Implications Concerning Legal Aid Reform in Italy", (1974), 1 B.J.L.S. 81.

55) Text to note (4).



current legal scheme. It is important to recognise that it is rather the form which such a scheme would take to which he objects, rather than the provision of what he would regard as adequate legal solutions to the problems which reflect socio-economic differences in society<sup>(56)</sup>. Therefore when looking at whether legal aid provides the services required by the poor Ferrari's analysis suggests that the services which are provided should take into account the fact that the poor are economically weak and often socially deprived, rather than presuming that their only problem is lack of financial resources.

(d) What legal services are particularly relevant to the poor, but are not provided by the legal aid system?

There are two main arguments as to why tribunals should be covered by the legal aid scheme. The first is the more establishment position taken by both the Benson<sup>(57)</sup> and Hughes<sup>(58)</sup> Royal Commissions, that tribunals are basically courts, and therefore at some stages they involve legal proceedings and problems which may be beyond the laymans' comprehension. When this is the case and no suitable lay representation is available then legal aid should be available to prevent injustice.

This argument can be contrasted to the client orientated approach taken by Grimes and Martin<sup>(59)</sup>. They say that the failure to provide legal aid for administrative

56) For example he might support the law centre model of provision.

57) Op.cit., note (9) para.15.25.

58) Op.cit., note (3) paras.8.21-22.

59) Op.cit., note (17)

tribunals results in the inability of the poor to protect their fundamental rights, i.e., for loss of livelihood (unfair dismissal before an industrial tribunal); bad housing conditions (proceedings before magistrates courts under s99 Public Health Act 1936); and loss of sole means of income (appeal to Social Security Appeals Tribunal). This viewpoint is also stressed by the Child Poverty Action Group<sup>(60)</sup> (C.P.A.G.) who note that Social Security Appeal Tribunals are the most important part of the legal system in redressing the problems of the poor since welfare benefits are crucial to their family income and wellbeing.

Although both arguments differ as to purpose, their intended results are largely the same, differing only as to the degree of coverage there should be. Benson makes no suggestions as to guidelines for availability of legal aid for tribunals saying only that legal aid should be available in any case when representation is not specifically disallowed. Hughes suggests that only where the client cannot follow the proceedings, i.e. needs help to understand either the tribunal procedure or the law, or where a substantial point of law is likely to arise, should legal aid be available. The C.P.A.G. suggest that where the client cannot follow proceedings, or so that they should know in advance the case against them, and where there is any chance of injustice where representation could make a difference, then legal aid should be available.

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60) C.P.A.G. with Brooke et al., "...Legal Rights for Low Income Families", (1969)

There have been calls for the extension of legal aid in other areas too. Advice and better co-ordination of all advisory services have been particularly stressed<sup>(61)</sup>, and this culminated in an attempt to put some of these matters into the Legal Advice and Assistance Act (1972) Part II<sup>(62)</sup>. As with the suggestions for the extension of legal aid to include tribunals, these have all been shelved due to the suggested extra expenditure they would involve<sup>(63)</sup>.

We have seen how and why legal aid is most used and the possible improvement of this by extension to tribunals has been clearly set out particularly by Grimes and Martin and the C.P.A.G. But these calls for change have been long running and largely fruitless, and this must surely add weight to the structural criticisms of the legal aid system and its ability to provide the legal services which the poor require.

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61) Brooke, R., "Why Not More Legal Help?" (31 March, 1966), New Society 13.

62) Hillyard, S., "Current Developments in Legal Services Part 1 & 2", (1974), 71, Law Society's Gazette 36 and 63.

63) Parry, D.J.T., "Help Legal Aid", (1974), 124 NLJ.415.

(4) Is the means testing of legal aid in the interest of the poor client?

The central dilemma in means testing legal aid was touched on by the Hughes Commission<sup>(64)</sup>,

"We know that many people find means testing abhorrent; but we believe that it is only fair that those who are able should make some contribution to the cost of the legal services they use."

This reflects the dichotomy of feeling in this area, firstly the principle that access to the law is a right and should be available to anyone no matter whether they are rich or poor. But this should be weighed against the public subsidy of legal services which must exist to fulfil this ideal, which can be justified only if the community has to pay as a last resort. This of course necessitates that the means of the individual, their ability to pay, remains a vital consideration in deciding the subsidy they are entitled to<sup>(65)</sup>.

(a) Is it the best way to target resources?

The question we must ask here is whether means testing is a good or bad concept, and whether rather than directing resources to those most in need of them as it purports to, it in some way acts against those same people. Partington's work for the C.P.A.G. is particularly useful in answering this question<sup>(66)</sup>.

In framing the question of the ability of legal aid means tests to direct resources to where they are most

64) Op.cit., note (3), para. 8.16.

65) Partington, M., for C.P.A.G., "The Legal Aid Means-Tests, Time for a Re-Appraisal", (1978).

66) Ibid.

needed it is important to remember a distinguishing fact about legal aid, it is not a service available to all, there is the initial hurdle of an eligibility test, based on income and capital resources, which defines a person as entitled to some assistance from the legal aid fund. It is only after having satisfied these conditions that the applicant will be assessed to decide whether they will have to pay a contribution towards their assistance. (67)

Bearing this in mind we must analyse the attitude that non-means tested benefits direct a certain amount of the help available to those whose need is not as great as others<sup>(68)</sup>. This argument will always be valid to the extent that some people will always have more money than others. But we must ask whether the eligibility test already used by the legal aid scheme does not serve to define those people who require assistance, and the means test beyond that is a method of masking the very small proportion, the exceptionally poor, who are entitled to assistance without paying any contribution at all? As Wild goes on to point out<sup>(69)</sup> there are two components of need, the individual needs of the applicant which have to be met, and the financial resources they have to meet those needs. The means test attempts to deal with both parts at the same time, attempting to balance the amount to be paid with regard to both the individual needs and the family income. As a result Wild suggests that this policy

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67) Ibid.

68) Wild, J., "The Means Testing Trap" in "The Future of Social Security", ed. by Silburn, R., (1985).

69) Ibid.

fails to provide money where it is needed or to take it away where it is not. Wild would suggest that rather than the non-means tested benefit directing resources incorrectly, it is the means tested benefits which are the most inefficient. Wild suggests that by the provision of specifically targeted non-means tested benefits resources can be provided to all those in need. If there is concern about the recipient having further income that can be dealt with through the existing income tax system, thereby ensuring that they do not get more than their share. This system already works for cases such as invalidity benefit.

(b) Does it reduce take up of legal aid by those eligible for it?

The Hughes Commission<sup>(70)</sup> suggested that there was no evidence of means testing dissuading a significant number of people from applying for legal aid. Partington<sup>(71)</sup> highlights the lack of any hard data as to possible applicants' responses to perceived stigmatisation by receiving means tested benefits. Therefore what is used by Hughes to suggest that there is evidence to prove the theory, can conversely suggest that there is no firm evidence to disprove it either.

It is possible to see from work done in relation to take up of means tested benefits the effect on the applicant of

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70) Op.cit., note (64).

71) Op.cit., note (65).

that stage of the process. Benson<sup>(72)</sup> examined the take up figures for legal aid in 1979 and found that 14% of applicants failed to take up legal aid involving a contribution of less than £50, and when the contribution was greater than £50 one third of all offers were not taken up. The report went on to say "this raises a question of general principle whether a contribution should be payable at all, and if so, on what basis." These figures supported Partington's own work on the 1976/77 period.<sup>(73)</sup> These results are obviously serious in themselves, but it is possible that implications can be drawn to cast light on the effect of the means test on potential applicants. Those people who do not take up an offer of means tested legal aid have already overcome one major hurdle in going to see the solicitor, and putting in the legal aid application. However the potential applicants have not even made these tentative steps and are possibly even more likely to be put off by those factors which applicants who drop out at a later stage have overcome. It seems at least arguable then that the legal aid means test does dissuade some people from applying for legal aid in the first place, and it certainly dissuades a considerable proportion from proceeding with their case when they realise the size of the contribution expected from them.

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72) Op.cit., note (9) para. 12.22.

73) Anon, Editorial, "Legal Aid and Means Testing", (1978) 128 N.L.J. 846.

(c) Can means testing be otherwise justified?

There are numerous technical problems related to the use of means testing<sup>(74)</sup>. The financial eligibility limits have been a bone of contention since the inception of the legal aid scheme. The Benson Commission, not noted for its radical proposals, suggested<sup>(75)</sup> these were so onerous as to require abolition. Their effect was said to be,

"...to create unfairness and to expose some individuals to a choice between abandoning their legal rights and accepting the risk of suffering an undue financial burdon."

Also the contribution rules and legal aid charge have been criticised for their harsh effect on those least able to pay. This method is also fraught with administrative problems, some of which we discussed earlier<sup>(76)</sup>. The revenue raised from the contributions retained by the legal aid fund contribute just over 3% of the total legal aid fund income.<sup>(77)</sup>

It is difficult then to accept that the means test for legal aid is in the interest of the poor client, it may in fact dissuade those people from proceeding with their case or even beginning it. It does not seem to be the only, or most efficient way to balance the needs of the client and their income, and there are numerous other technical problems. Even the Benson Commission has suggested the abolition of the means test, at least in relation to

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74) Ibid., Partington provides an in depth analysis of the following issues, I shall therefore only draw an outline, adding further information where I have it.

75) Op.cit., note (9), para. 12.32.

76) See section (i) on the bureaucracy of the scheme.

77) Op.cit., note (44) p.99



initial interviews<sup>(78)</sup>. What then is the purpose of the means test? Partington suggests that it is not for the recipients' benefit, but rather a compromise solution between the Law Society and the government. This has allowed private practice to act as the major outlet for publicly funded legal services and therefore receive legal aid money from the government. If a non-means tested scheme had been chosen it is questionable whether private practice as currently structured would have been allowed to operate such a system, and therefore receive the benefits of it.

This view reflects the problems of the bureaucracy of the legal aid system, suggesting again that it is the treasury rather than the recipients' interests which are best served.

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78) Op.cit., note (9), para. 13.5.

(5) Is it a failing that legal aid prevents poor people from taking group action?

When a company goes to a solicitor for information, advice or representation it is representing the interests of a number of people (managers, shareholders, creditors, employees), but the company has a distinct legal personality and therefore is able to receive legal services. When a number of poor people with a common complaint join together to express that grievance through the courts, they can not receive legal aid as a body but each must individually apply and be assessed, and then each individual may or may not be granted legal aid. It is impossible, even if one solicitor were to co-ordinate all the claims, to take a class action against the offending person or body, or to receive legal aid for that group rather than the individuals who make it up.

We have noted several times that the legal aid system was the result of a power struggle, and due to the success of the Law Society the private practice model was taken as the basis of the system. Those practices deal with private clients on a one to one basis, not on a group basis, so it was not necessary to provide that legal aid should be available to assist groups in any way. If the availability of legal aid for a group of people is significantly different from its availability for individuals, then is it a significant failing in the legal aid system which needs to be corrected?

(a) Why is group action important to the poor?

Perhaps one of the best explanations of the advantages group work has over individual client work came from one of

the least likely sources. The Benson Commission in this respect at least was fully in favour of the idea of groups formed for a common interest or to solve a common problem.

"Such groups may serve a number of useful purposes. Views can be put with greater force. Work in a group causes people to feel more able to help themselves and to influence events. Groups can cope with modern bureaucracy more effectively than most individuals. Such groups often need legal advice in order fully to understand the legal implications of a situation and the legal remedies available. In any event, time and expense can be saved if legal advice and assistance is given to a group rather than its members individually." (79)

There are also other important reasons why group work is necessary, Wexler<sup>(80)</sup> has stressed that the needs of the poor are by definition group problems since they are a direct result of their poverty and therefore are common to all poor people. Also on a similar idea Ferrari<sup>(81)</sup> expressed the need for group solutions to situations which he defined as "essentially problems of social differentials" because only through such solutions would the underlying social and economic problems be dealt with. As we noted above<sup>(82)</sup> to deal with problems on an individual basis strengthens the existing system and structure by solving problems within its terms of reference, thereby ignoring the very factors which cause the problem in the first place.

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79) Op.cit., note (9) para. 12.58.

80) Op.cit., note (41) p.1053.

81) Op.cit., note (54).

82) Text to notes (54) - (56).

(b) How should legal aid be provided to groups of poor people?

The need for reform has been recognised by the establishment. Benson's suggestion was that any group of which two-thirds of the members would be entitled to legal aid without a contribution (a fact which would be established by a statement by the Secretary of the group), would be entitled to free advice and assistance from any solicitor. They did not suggest that representation should also be available since this would necessitate changes in the practice rules of the courts, and therefore fell outside the remit of the Commission.<sup>(83)</sup> More recently, the Law society itself has suggested reform<sup>(84)</sup> on more general lines, relating to class actions as well as group work for poor people, in a draft amendment to the Legal Aid Bill. Their proposals appear more radical than Bensons, suggesting that judges should be able to decide whether a case could be regarded as a class action, and if they did so then legal aid would be available for advice and representation. Also the draft amendment said that legal aid should be available to them without any means test, rather relying completely on the nature of the case not the means of the client to justify free legal assistance. Again the intention was that any solicitor could give the advice and/or representation, and that those individuals who did not wish to be part of action need not be so. This proposal was itself superseded by the Lord Chancellor's own proposed amendment to the Legal Aid Bill<sup>(85)</sup> which provides that

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83) Op.cit., note (9) para. 12.58.

84) Dyer, C., "Easier Path for Disaster Victims", (25 February, 1988) The Guardian 3.

85) Ibid.

the Legal Aid Board may (with the Lord Chancellor's approval) grant a contract to a particular firm of solicitors to handle a multiple claim case on a non-means tested legal aid basis. This is considerably different to the proposal of Benson, and even of the Law Society, with the decision as to the granting of such a contract, and therefore control of expenditure, being kept firmly in the hands of the government, through the Lord Chancellor. This also makes the process for granting it far more bureaucratic, the results of which were criticised in the first section.

The major defect in the proposals as far as the poor are concerned is that they would all be reliant on private practitioners to operate the system. We have seen that private practitioners are used to dealing with private clients on a one to one basis and it is questionable whether they would be able to assist the client group in the way which Benson suggested earlier. The problem is closely intertwined with what we shall see as the difference between the legal and community orientated approach towards self help and independence of the client. The Adamsdown Community and Advice Centre established that group work was not a "technical exercise...nor should it simply be another arrow in the lawyers quiver of solutions".<sup>(86)</sup> The problems inherent to the private practice approach which did not simply translate to group work were posed as questions by L.A.G.<sup>(87)</sup> They asked whether the barrier to solicitors

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86) Adamsdown Community and Advice Centre, "In Praise of Green Form - Sort Of", (1975) Legal Action Group Bulletin 35.

87) Anon, Editorial, "£25 x £120 x 15 Aggrieved Residents = £2,175", (1975) Legal Action Group Bulletin 30.

doing this work was purely financial and clarified this by two further points. Firstly they asked whether it was necessary for the lawyer to be present with the community on a day to day basis rather than simply at the end of the telephone; and secondly whether there was too great a cultural barrier between the middle class lawyer and his poor clients to allow identification of their needs and attitudes?

The answers to these points show why private practice is not suitable to take on group work for poor people. The solicitor must play a tangible part in the group and therefore must be present and be seen to be working with the people not in some remote city office. Also it is not for solicitors to decide unilaterally what is the right move to make, rather they must accept that they are part of a team which involves the community in the decision making process. Therefore the private practice is unable because of its traditional professional activity to contribute fully to a group work approach and to allow people the independent self help which was suggested by the Benson Commission<sup>(88)</sup>.

Therefore despite group work being of particular importance to poor clients, legal aid does not provide for its availability. In theory this is a remediable technical defect but to treat it as such would not deal with it satisfactorily. What we shall see to be structural defects in the legal aid system make private practice an unfavourable medium through which to provide group legal services to the poor.

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88) Op.cit., note (79)

(6) Summary of technical defects

There are five prominent technical problems with the legal aid system which have particular relevance to the poor. Firstly the scheme is bureaucratic to the extent that it prejudices the interests of the clients.

The legal aid scheme is second-rate as far as poor people are concerned. It misunderstands their fundamental problems; it prevents them from receiving the same services as paying clients who may even have compatible problems- and it is feared that the service which some legal aid clients receive is of a poorer quality to that which paying clients receive.

Legal aid is used predominantly for work which is not relevant to the problems of poverty, concentrating on matrimonial, family and criminal work, rather than housing and employment rights, debt problems and welfare rights issues. Also the scheme fails to provide services in some forums which are particularly relevant to the poor, i.e., tribunals.

The means testing necessary to obtain legal aid has disadvantages for those entitled to legal aid. The system used is not necessarily the most efficient in targeting resources, and it results in reduced take up of legal aid by those entitled, both at the stage of calculation of contributions payable and beforehand.

Finally legal aid does not provide assistance for groups of poor clients. This is despite its particular relevance because of the homogeneity of many poor peoples' problems. Although these technical defects, when combined, amount to substantial criticisms of the legal aid scheme it is in their nature that they could be solved to a large extent without altering the method or means of provision of the legal

services to the poor. The bureaucracy and means testing could be made more compatible with the clients' interests. Additional funds could be used to increase the types of work which could be undertaken on legal aid. Retraining could improve solicitors' attitudes to legal aid clients, and their aptitude to solve a broader variety of poor peoples' problems. If these were the only problems which the legal aid system faced the changes mentioned might be sufficient, but there are other defects in the system which are perhaps more significant because they relate to its basic structure.



(C) The Structural Problems with Legal Aid.

(1) Introduction

It was noted earlier that there are various alternative ways to provide subsidised legal services for poor people.<sup>(89)</sup> The numerous technical defects with the legal aid scheme used in the United Kingdom have been outlined. It is now necessary to discuss the structural problems inherent in the scheme chosen. By their nature these problems are not remediable within the bounds of the existing legal aid scheme. To deal with them satisfactorily either the type of services provided, or the method of providing those services, or both, would have to be rethought and restructured. Although prima facie the criticisms will be of the legal aid scheme itself, they are frequently based on a reassessment of the thinking underlying the scheme, and to that extent will include the acceptance of the importance of factors which may not have been contemplated by those originally choosing the scheme.

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89) Op.cit., note (3)

(2) The problems of the poor are social not legal.

It is an accepted fact that there is widespread ignorance among the general public of their legal rights and the means by which these can be enforced. The Law Centres' Federation (L.C.F), has claimed that legal aid does not aim to overcome this problem and consequently fails to assist the public in areas which are central to the rights of citizenship<sup>(90)</sup>. The Law Society's view on the faults of the legal aid system have already been seen<sup>(91)</sup>. The Hughes Commission in attempting to define the limits of legal aid defined what they saw as the purpose of the scheme,

"In civil matters...the State should help a citizen to take legal action to assert or protect his rights". (92)

This reflects in positive terms what the Law Society and L.C.F. said in negative terms, that citizens must be provided with the means by which to acquire knowledge of their rights and duties so that they can make decisions as to when and how they think those rights can be used. Therefore the legal aid system should involve provision of advice and assistance so that legal problems can be prevented rather than merely responded to. The scheme could also be geared towards allowing self help for the user, so that wherever possible they do not become reliant on other peoples' skills. The scheme should also provide the means

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90) Law Centres' Federation, "Response to the Society of Labour Lawyers Discussion Document : Legal Services Under Labour", Undated. p.14. This was an internal document circulated in 1986.

91) Op.cit., text to note (26)

92) Op.cit., note (3) para. 8.17.

by which to overcome ignorance of rights among the public.

(a) The Legal Advice and Assistance Act 1972.

This need was recognised some years ago; in 1966 Brook said,

"People should know where to find legal advice and help as easily as they know how to find a doctor or a hospital." (93)

She stressed the need for comprehensive provision of advice and information either through a national service of salaried lawyers and para-legals, or through the current structure of private practice. As we have seen<sup>(94)</sup>, these ideas were formulated into the Legal Advice and Assistance Act (1972). The comprehensive advice and assistance scheme was moulded onto the existing legal aid scheme, in the guise of green form. However the liaison solicitors who were to promote the scheme, and the Law Society run law centres in certain urban areas to provide further advice and assistance, were less successful. The former was tried on a pilot basis, but there were never more than a handful of such solicitors, and the Law Society run law centres were never tried in practice.

Despite this partial success we have already seen and examined the failure of legal aid and green form in particular to fulfil any more than its role as a limited and responsive advice and information service.<sup>(95)</sup> While

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93) Op.cit., note (61)

94) Text to notes (61) to (63).

95) See section (iii) above.

knowledge of the existence of the legal aid scheme itself remains limited. Hughes proved that those most likely to be in need of legal aid were least likely to know of its existence, or their entitlement to it.<sup>(96)</sup> Hillyard also noted the effect of a relatively minimal television and local press campaign on awareness of legal aid in the North East of England. The pre-campaign survey showed that 1% of respondents would consider using a solicitor, while after the campaign the figure rose to 28%<sup>(97)</sup>

It is not intended to look at alternative methods of providing such services here, but it is important to understand why this failure in the present system has occurred.

(b) The problems with unmet legal need.

The concept of unmet legal need was the central idea upon which the proposals arising from dissatisfaction with the legal aid scheme for failing to provide adequate legal services to the poor were based. It seemed the ideal hook on which to hang the criticisms of legal aid, which was failing to provide legal services to those most likely to be in need of them. However it soon became obvious that the analysis of the problem based on the concept of unmet legal need was no panacea. Leach<sup>(98)</sup> captured the essence of the problem when saying that, "need, like beauty, is in the eyes of the beholder". There was some attempt to come to terms with the theoretical problems seen to be arising from definitional shortcomings of the concept of

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96) Op.cit., note (3), Appendix 4, para.122.

97) Op.cit., note (62).

98) Leach, P., "Legal skills and Public Needs", (1972) 69 Law Soc.Gaz. 958.

unmet legal need. Bradshaw (99) produced perhaps the most clearly formulated breakdown of the various expressions which need could take. He defined need in four distinct forms, normative, felt, expressed and comparative, and suggested that it was for the researcher to choose which was felt to be most appropriate to the work being done, so that at least the values of the researcher did not remain concealed. All of these concepts have subsequently been used, but without the explicit statement as to which was being used, suggesting that the authors have probably been unaware of the preference in their own writing. This failure mirrored the original problems arising from the lack of focus of the concept of need.

The validity of the concept of unmet legal need was significantly weakened by the three pronged attack which it sustained in 1973 from the book "Social Needs and Legal Action".<sup>(100)</sup> Although the contributions therein in no way purported to reflect a cohesive argument against the concept of unmet legal need, in their willingness to question the accepted basis they revealed the relatively simplistic level of analysis involved in it, and the problems which could result from that. The authors accepted that legal aid did not provide adequate legal services for the poor, but they questioned whether the services required were necessarily legal, and whether they were in fact needed.

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99) Bradshaw, J., "The Concept of Need", (13 March 1972) *New Society* 640.

100) Morris, P., White, R., and Lewis, P., "Social Needs and Legal Action", (1973).

(i) Defining poor peoples' problems as legal.

This issue was discussed by all three authors, but Lewis's analysis has been the most quoted. His idea that a person "may choose to get a ladder and not a lawyer"<sup>(101)</sup> went to the heart of the possible problem. By defining the need as legal was rather a reflection of the possible solution to the problem than a statement of fact about the problem itself. Because of the differences in the socio-economic backgrounds poor clients may regard their problem differently to the frequently middle class providers of legal services. This could in turn result in different perspectives as to the most advantageous solutions to their problems. Lewis used the example of a tenant served with a notice to quit, although they have not done anything untoward. It is possible for them to stave off eviction for a short while by enforcing their legal rights, but the problem may be best dealt with by moving house or by joining a tenants or housing association.<sup>(102)</sup> Therefore the definition of the problem as legal may limit the possible action of clients, and perhaps worse, may prevent them from taking the action which is most appropriate to them.

Morris on the same theme noted that this problem did not simply relate to a legal definition of a problem. She suggested that the problem would be defined in the terms of the first organization or agency that deals with it, and this can result in variation in the outcome of the problem and the time taken to resolve it.<sup>(103)</sup> Also White notes.

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101) Ibid., p.79.

102) Ibid., p.81.

103) Ibid., p.52.

that if the lawyer is controlling the definition of the problems this may result in an attempt, whether covert or not, to mould clients' behaviour to the demands of society.<sup>(104)</sup> This is achieved by channelling clients' problems through the system rather than allowing the clients to attempt to change the system if that is their preferred option.

The criticism of regarding the problems as legal in nature shows the importance of allowing clients to define how they can best satisfy their own needs. Clients must not be limited to the use of the law, or to taking action which is legal in nature, when non-legalistic solutions may be equally valid and preferable, perhaps only because they do not involve legal procedures.

(ii) The Concept of Need.

The book also criticizes the concept of need itself. Morris went further than either Leach or Bradshaw in her criticism of need. She regarded the concept as impossible to use in any scientific manner because it was an absolute, it could not be isolated from other social needs.<sup>(105)</sup> This meant that there could be no scientific objectivity in the perception of need, rather it fell into the political sphere of values.<sup>(106)</sup> Therefore the viewpoint which gained broad acceptance was likely to be that of those with the most power and status rather than those who were to receive the service.

Lewis asked whether the clients would need a lawyer

104) Ibid., p.35.

105) Ibid., p.50.

106) Ibid., p.53.

at all. The basis of unmet legal need on the concepts of equality before the law failed to recognise that, despite purported flexibility, the lawyer was not always the relevant person to undertake the job. (107)

Finally White specifically called for a change in emphasis away from the concept of need to rights enforcement. He stressed that this was less patronizing to the recipient, and that it brought into the open the need to examine the underlying values of what was trying to be achieved. (108) Morris too follows this theme stressing that a failure to do so could result in the simple reproduction of the problems already present in the system. (109) In the longer term such marginal piecemeal reforms might obstruct the development of a more relevant re-organization of services. (110)

(iii) The anarcho-marxist perspective.

Bankowski and Mungham's analysis of developments in legal services (111) focused on what they saw as "a crucial part of any future attempt to set up a 'national grid' of legal services aimed at...bringing law and lawyers to the people." They concentrated on the duty solicitor scheme and the establishment of law centres, but their analysis is relevant to the legal aid scheme as a whole.

107) Ibid., p.87.

108) Ibid., p.37.

109) Ibid., p.52.

110) Ibid., p.68.

111) Bankowski, Z., and Mungham, G., "Images of Law", (1976) Chapter 3.



Their stated perspective is Marxist, but there are some elements of anarchism within the work.<sup>(112)</sup> It is perhaps best then to set out their frame of reference rather than to rely on any established viewpoint.

They state that law in the form that it is taught and practiced creates domination, oppression and desolation, and is a hindrance to those wishing to move towards a free society.<sup>(113)</sup> They follow an economic analysis to explain why there has been an increase in interest in the provision of legal services to poor people. They account for practitioners' interest as a reflection of their changing market situation which now provides them with a further market to exploit when traditional business is drying up; and law teachers attempting to show how law can help, based on the assumption that it is the content of law which needs to be changed rather than the form of society (sic.).<sup>(114)</sup> They stress the importance of looking at the social formations which produce the law and accuse lawyers of failing to do this when trying to change the world.<sup>(115)</sup> They go on to say that law in fact emasculates man by providing experts to solve his problems rather than allowing men to deal with their own problems within their own lives, rather than within the bounds of professionalized society.<sup>(116)</sup>

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112) Murgatroyd, S.J., and Rees, W.M., "The Radical Estate", (1977)  
11 Law Teacher 151.

113) Op.cit., note (111) p.xi.

114) Ibid.,

115) Ibid., p.xiii.

116) Ibid., p.xiii.

The validity of their frame of reference can be questioned because the law need not always reflect the situation in which they see it. Legal Aid can be used to change the circumstances of both individuals and groups without being repressive, and to some extent used by the affected people to help themselves. A free society cannot be regarded as one without law since that would not place the weakest in society in a more advantageous position than they have under the present system. Ideally law can be used to safeguard the poor and the disadvantaged. Most importantly Bankowski and Mungham do recognise the necessity to view law within a broader social perspective. Despite the criticisms of their frame of reference, its largest failing is in its extreme stance. At a more basic level its foundations largely mirror those of the authors of "Social Needs and Legal Action". That is, within a social context law is a tool of the strongest in society and therefore is set to prevent those in whose interest it would be to change society from doing so. Bankowski and Mungham state that legal assistance to the poor should not pre-suppose that legal rather than social solutions are most relevant to the poor.<sup>(117)</sup> Any legal assistance to the poor should not increase dependence on lawyers<sup>(118)</sup>, or weaken social action by attempting to enforce rights

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117) Ibid., p.73.

118) Ibid., p.75.

only through legal channels.

Therefore the problems with unmet legal need as a theoretical basis for providing legal services to the poor are clear. They can be concentrated into two fundamental criticisms. Firstly the problems of the poor are not what has traditionally been defined as legal. It is true to say that like other people they require divorces, and commit crimes, but their broader problems are a result of their socio-economic position. Their housing conditions are poor, their health care is sub-standard, they have little job security, their employment rights are minimal, and they often have debt problems. Yet there are legal channels through which re-dress can be sought for many of the resultant problems, and a legal aid system should ensure the ability to use them. But non-legal means to improve their situation cannot and should not be ignored by those purporting to allow the poor to obtain justice.

The second problem with unmet legal need is that the concept of need is too vague. It can not be scientifically defined, and the quantity or quality of the services required by the poor can not be gauged from it.

(c) Legal v consumer response

In practice the division of the unmet legal needs and social analyses can be seen in terms of the legally and consumer orientated responses to the problem. These can be usefully contrasted.

The legally orientated response includes the legal aid model in use in the United Kingdom. It is epitomized by Geddes<sup>(119)</sup>, who responds to the problems of providing

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119) Op.cit., note (49)

legal services for the poor by suggesting how best to bring private practices into deprived areas, and the possibility of solicitors being employed to work in advice centres or providing services free of charge. This can be compared to the consumer approach which faces the same problem in these terms,

"Society has become so complex that the experience of friends and neighbours is no longer enough. Specialist knowledge and skills are needed to cope with an increasingly forbidding bureaucratic apparatus." (120)

The change in emphasis from the need for lawyers to the need for people with specialist knowledge and skills is the important factor.

Perhaps surprisingly Seton Pollock touched on the crux of the issue when he considered the role of the proposed liaison officers<sup>(121)</sup>. He noted that only a relatively small number of the problems of the citizen are legal, and even then they may be such as to be answerable by an experienced person with knowledge of the facilities available for dealing with such problems. Also as has been seen problems may not be simply divisible into those which are legal and non-legal, one problem may necessitate help from several quarters. What this tells us is that lawyers' skills are not necessarily those most relevant to a first port of call advice agency. This is why the consumer orientated approach is more valid than the legally orientated approach. The person coming in off the street does

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120) National Consumer Council, "The Fourth Right of Citizenship, A Review of Local Advice Services", (1977).

121) Seton Pollock, A.F., "The Future of Legal Aid", (March 1969) 66 Law Society Gazette 172.

does not usually need advice from a lawyer, but rather from someone with broad relevant knowledge and experience, someone who has the time to listen, to understand what that persons specific problem is and then help them to choose the most relevant course of action for themselves. This may involve re-directing them to a lawyer but that is a secondary not primary step. Also this specialist advisor is not feared like the lawyer, they are not historically revered members of the community, and therefore many of the preconceptions and fears which lawyers embody for those who are not used to using them are overcome. This is one part of the answer to why private practice was not the correct base from which to attempt to give advice and assistance about the rights of the citizen which could have a preventative result.

As regards self help and independence, Wexler shows why the legal aid system can not provide this.<sup>(122)</sup> The essence of the legal aid system is that a lawyer is provided to come into the scene where the problem has arisen, solve it, and then leave again. Although there are parts of legal aid where this is a valid purpose for example criminal legal aid, on the whole this approach reflects the philosophy that the problems which arise are distinct and unconnected from surrounding circumstances. Wexler supports the social needs approach, saying that in the area where legal aid works, i.e., for the poorer section of society, their problems are the product of that poverty and therefore the lawyer who simply solves a problem will have done

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122) Op.cit., note (41) p.1053.

nothing to change the circumstances of that person, the poor person will simply have become reliant on the lawyers' skills.

The Adamsdown Community and Advice Centre suggests that the approach which is needed to encourage independent action and self help is to involve the community as a whole.<sup>(123)</sup> Legal aid provides for the lawyer to decide the best way to solve the problem, and to do it quickly and on a limited budget. The Community based approach involves an inter-play between the professionals and local people to identify the problem and form an appropriate strategy. This process is not simple and lawyers are only one part of it. The effort must be continuing and may be long term, and funding, or rather the lack of it, can not be allowed to interfere. The form which the legal aid system takes does not allow for this approach, and although in this case the Adamsdown Centre used green forms to its advantage<sup>(124)</sup> it proved that the money obtained from that source, although important, was still only a part of a much broader strategy.

(d) The consumer approach in practice.

It is important to recognise that the consumer orientated approach is an equally orthodox model for the provision of legal services to the poor, as the legally orientated approach, of which legal aid is the archetype. It is of considerable value in this context to look at the American experience of the neighbourhood law firm

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123) "In Praise of Green Form - Sort Of.", (1975), Legal Action Group Bulletin 35.

124) Anon, Editorial, "£25 + £120 x 15 Aggrieved Residents = £2,175", (1975), Legal Action Group Bulletin 30.

(N.L.F.). Although these were the precursor of the law centre model in the United Kingdom the latter is not as satisfactory as a model of the consumer orientated approach. It is not the purpose of this work to compare the law centre model to the N.L.F., but it is suffice to say that the ideology of law centre movement has not been so consistent as was that of the N.L.F. Despite borrowing heavily from the terminology of the American legal services programme the law centres' emphasis has been on a consistency of form, rather than of objectives. The definition of objectives has been left to local centres, and when viewed overall is found to be diverse and inconsistent.

(i) The 'War on Poverty': recognising the social problems of the poor: The essential fact to remember when talking about the American legal services programme was that it was not an isolated policy, it was part of a strategy, the War on Poverty. The basis of this strategy was the Economic Opportunity Act (1964), the ideology behind the Act was clearly stated in s2,

"The United States can achieve its full economic and social potential as a nation only if every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the workings of our society. It is therefore, the policy of the United States to eliminate the paradox of poverty in the midst of plenty in this Nation by opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity. It is the purpose of this Act to strengthen, supplement and co-ordinate efforts in furtherance of that policy." (125).

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125) Quoted in Whitaker, B., "Participation and Poverty", (1968) Fabian Research Series, 272, 5.

This statement shows, as Cahn and Cahn pointed out,<sup>(126)</sup> that there was a recognition of the interrelatedness of the problems of the poor. The problems were not only legal, they also included social, economic, educational, psychological and other problems. The response therefore needed to be concerted and comprehensive to tackle the sources of poverty, and numerous programmes were launched<sup>(127)</sup> primarily in the areas of job training, experience and creation; preparatory, continuing and remedial education; health, legal services, small business, and projects targetted at specific groups such as Indians or migrant workers. Central to all these projects was the "participation by the residents of the area who are poor."<sup>(128)</sup>

Therefore what we have so far are the first two stages of the development of a strategy. The first stage was to define the problem, in this case the problem was clear, poverty, in its broadest multifaceted form. The second stage was then to analyse the possible solutions. Here it was obvious from the nature of the problem that many different solutions would have to be provided simultaneously to deal with those factors which were seen as fundamental causes of poverty. The next stage was to assess strategies most likely to succeed in translating the theoretical solutions into practically successful programmes, and to implement those programmes.

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126) Cahn, E. S., and Cahn, J.C., "The War on Poverty : A Civilian Perspective", (1963-64) 73 Yale Law Journal 1317.

127) Op.cit., note (125) at 11.

128) Economic Opportunity Act §202 as amended in 1966, quoted in Whitaker, op.cit., note (125) at 5.



(ii) The Legal Services Programme: Solving the Problems of the poor. The position of N.L.F.s now becomes much clearer, they were seen as the best means by which to implement a strategy to deal with the legal problems of the poor. N.L.F.s were generally preferred to judicare systems (similar to our legal aid system provided on a case by case basis by private practitioners). This was because, as Bamberger the first Director of the legal services programme said, that system can achieve no other goal than the mere resolution of controversies and the legal services programme had much greater ambitions than that. (129) What the programme did hope to achieve was not simply to provide more services to those who were poor but also to represent organisations of the poor; to define or change the law where it was unclear or detrimental to the interests of the poor; to educate the poor; and to ensure the participation of the poor through representation on a project's board of directors and advisory committees. (130) Judicare systems were not ruled out as a method for implementing the programme, but it was recognised that they would have to adapt to fit the above requirements, and changes to achieve this were insisted upon before federal funds were given to any project. (131)

The theory underlying the legal services programme projects was very largely based on the ideas of Edgar and Jean Cahn, and their role was central to Office of Economic Opportunity

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129) Johnson, Jr., E., "Justice and Reform", (1974), Part II.

130) Tentative Guidelines for Legal Services Proposals to the Office of Economic Opportunity (Spring 1965), quoted in Pye, A.K., "The Role of Legal Services in the Antipoverty Program", (1966) 31 Law and Contemporary Problems 211, at 223.

131) Ibid., at 224.

(O.E.O.), and particularly the legal services programme's development. The N.L.F. was their brainchild and is worth outlining their reasoning behind the proposal<sup>(132)</sup>. While recognising that lawyers did not have a monopoly on the skills of advocacy the Cahns recognised that they were well equipped to deal with the intricacies of social organization. As advocates lawyers were by necessity partisan and should identify with their clients. The Cahns felt that lawyers apart from educators or social workers who by their professional training tended to be mediators. Finally they defined the lawyers role not simply in terms of what were narrowly regarded as being legal problems, but rather in broader terms of obtaining redress by communicating effectively and properly to a person with the power to provide a remedy. This was the crux of the value placed on lawyers' skills by the Cahns, but it would be misleading to understand the lawyers' role simply in terms of representation, the Cahns saw four areas where the lawyers' skills were of value.<sup>(132a)</sup>

(i) Traditional legal assistance in establishing or asserting clearly defined legal rights. The Cahns did not see this simply as an exercise in assertion of rights, they also recognised the need to increase rights awareness generally throughout the community. The traditional lawyers role of providing proactive assistance in defining contractual relationships between companies or paying clients was seen as equally important for the poor community.

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132) Op.cit., note (126) at 1334

132a) The proceeding section sets out a summary of the Cahns' proposals in Op.cit., note (126)

Finally the lawyers should assist individuals acting collectively to create associations and binding legal obligations to form tenants associations or groups of welfare recipients or consumers, and assist them to press their demands.

(2) Legal analysis and representation directed toward reform where the law is vague, uncertain, or destructively complex. The essence of the problem here was that poor people were frequently in contact with official discretion and "low visibility" decisions often couched in terms of benign paternalism.<sup>(133)</sup> Legal representation could lead to clarification, but if used improvidently it could equally produce rigid ill-considered law. The Cahns saw scrutiny of this "urban law" by legal scholars as the means by which to encourage accelerated rationalization of it.

(3) Legal representation where the law appears contrary to the interests of the poor. Where a rule, statute or regulation created a hardship representation might suspend or postpone its operation, or otherwise mitigate that hardship. Structured attacks on a rule could result in slackened enforcement or even a willingness to reconsider the wisdom of the rule. There may be the opportunity to make a direct attack on the validity of a rule or regulation, perhaps through statutory interpretation. This process was recognised as being basically related to the exercise of political or governmental power. Representation

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133) Op.cit., note (41), at 1050.

could gain a fair hearing and political due process for the poor, or perhaps even initiate a decision making process. However, the Cahns felt that the changes this role could effect were likely to be limited.

(4) Legal representation in contexts which appear to be non-legal. Where what is sought is a change in conduct or perception a legal theory used as a form of discourse need not be sufficiently impregnable to obtain court judgement, effective communication can be of significant value in itself. Similarly lawyers' sense of the administrative process can often either secure redress or locate a higher level of appeal for a grievance.

These were the Cahns' theories of the purpose of the legal services programme lawyer. They reflect the broad perspective of the Cahn's views of the role of law and the value of lawyers. It is noticeable that the skills of lawyers are central to each of the proposed roles, and it was these roles which were the touchstones of the OEO legal services programme.

Therefore in this third stage of strategy development there was an initial stage of assessing the strategy most likely to succeed, as provided by the Cahns' model purposes, and a second stage of implementation of actual model programmes. We shall now look at this second process.

The Cahns did provide one possible model for the implementation of these functions, the N.L.F., but as mentioned above other models were not ruled out so long as they undertook to fulfil the Cahn's purpose criteria.<sup>(134)</sup> This openness to numerous models was symptomatic of the feeling within

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134) Text to note (131)

the legal services programme that the support of the organised bar, the American Bar Association (A.B.A.), must be won over despite the inherent contradictions between the ABA's support for traditional judicare systems and the O.E.O.s support for programmes which would have a meaningful impact on the problem of poverty.<sup>(135)</sup> This was a crucial turning point in the function of the programme although at the time the compromises involved seemed to be rather a matter of phraseology than of purpose. Johnson Jr. (the first Deputy Director and second Director of the O.E.O. legal services programme) refers to the "re-phrasing" of goals and methods of the programme to secure A.B.A. support, but Rye<sup>(136)</sup> noted a distinct shift in perspective. Although the eradication of poverty was still central to the programme the use of law reform, community involvement, group organization and representation became secondary methods to the general provision of advice and representation, research, and education of the poor to recognise the aid of the law. This was still a preventive approach but it was no longer an essentially participatory one.<sup>(137)</sup>

This perceived need to have A.B.A. support brought major problems to the implementation stage of the strategy. If O.E.O. grants were to be made to existing legal aid societies then there would often need to be prolonged negotiations to secure fundamental structural changes to that

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135) Op.cit., note (129)

136) Op.cit., note (130), at 227.

137) For the possible repercussions of this see Hazard (1969-70), op.cit., note (142), at 255.

project. If this could not be achieved, then grants would have to be used to create entirely new political entities, often at the expense of alienating powerful people. These factors, combined with the O.E.O. programme's preference for lawyer control of project management boards, increased the chances of project control falling to those who were unsympathetic to the furtherance of the goals of the poor and to advancing their economic position by the use of the law. It has been suggested that over 50% of initial O.E.O. funding was provided for projects whose members were unsympathetic to the aims of the O.E.O. (138)

There were also resultant problems in the determination of project objectives. Important questions needed to be answered as to the relative priority to be given to the pursuance of due process as favoured by the conservative legal aid societies, or the reformist prescriptions supported by the more radical N.L.F. movement. Initially at least the O.E.O. programme avoided the issue, and despite its relatively small budget (139) proposed to deal with the assorted goals of both camps. The failure to set priorities meant that project members felt that they should simultaneously undertake all aspects of the model functions. This in turn led to a tendency for projects to meet the articulated community demands for services, that is the basic individual requirement for advice and representation. Because of this approach many projects became swamped in casework. Also because of the overwhelming demand for this

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138) Generally see op.cit., note (129).

139) \$27.5 million, only the tenth largest O.E.O. programme budget, op.cit., note (125), at 12.

particular programme function the broader progressive and innovative functions requiring long term planning and a more participative approach were neglected. (140)

(iii) The effect of programme ideology on programme orientation.

The situation arising from the lack of priorities was not satisfactory and a pressing need for a choice to be made was obvious. This choice was viewed in terms of the continuation of all model purposes at an equal level, which would be possible only at the expense of the number of clients who could be assisted, or the acceptance of the relative importance of some purpose goals above others. Johnson saw the choice as being essentially in terms of the desire to keep ABA support or to lose it. To turn away many clients would be contrary to the ABA desire to view the O.E.O. legal services programme in terms of due process justice in an attempted compromise the programme became prioritized in terms of a law reform strategy. This would be pursued through test cases, and other practices to change the laws and practices which form the social and economic structure of poverty. It was felt that such a purpose would satisfy both the conservative equal justice supporters, since it had a strong emphasis on the particular skills of lawyers, and had traditional links with lawyers' work for corporate clients; and also satisfy the more radical anti-poverty campaigners by offering the opportunity of social and economic change for many, for example by the result of a single test case, while protecting them from

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140) Op.cit., notes (129), and (130) at 244, and also see Cahn, E.S., and Cahn, J.C. "Power to the People or the Profession? - The Public Interest in Public Interest Law", (1969-70) 79 Yale Law Journal 1005, at 1012.

criticism for attempting to induce community organization or social change. (141)

Even within this prioritized strategy contrasts in the perception of the purpose of the programme, as reflected in the ideologies of the programme directors, were crucial in defining how each project worked. The range of opinion on the value of a law reform strategy varied from a whole-hearted support and radical implementation, to a fear that the policy was fundamentally misguided and should be reversed immediately. It is useful to look at these polarized arguments since in many ways they encapsulate the crux of the debate as to the role of lawyers, the law, and the effect they could have in a legal or consumer orientated approach for the American programme.

It is worth noting that one of the main speakers against the law reform strategy was Hazard. (142) Although the opinions he expressed were not made in his official capacity as Executive Director of the American Bar Foundation, it would be foolish to underestimate the influence of his views on his peers, and on the Bar generally. Hazard viewed the O.E.O. legal services programme in terms of a basic assumption that litigation to enforce the legal rights of poor people would significantly improve their socio-economic problems. (143) He saw the argument in terms

141) Generally see Op.cit., note (129)

142) Hazard Jr., G.C., "Social Justice Through Civil Justice," (1968-69) 36 Uni. of Chicago Law Review 699; and "Law Reforming in the Anti-Poverty Effort." (1969-70) 37 Uni. of Chicago Law Review 242.

143) Hazard (1968-69), at 699. This is obviously far too limited an understanding of the programme theory, if one looks back at the Cahns' proposed lawyer functions, even viewed in terms of law reform strategy, enforcement of rights only forms a small part of many roles. Hazard's basic assumption is therefore incorrect, although as an understanding of the limits of a purely legislative law reform strategy it is more valuable, see Stumpf, H.P., "Community Politics and Legal Services", (1975) at 276.



of an attack on the structural problems of poverty, centred on change in the law itself.<sup>(144)</sup> The substantive rules of law often affected the poor unfairly, and even where rules were formulated in favour of the poor, the legislators failed to recognise that the poor had neither the ability nor the resources to enforce them. The O.E.O. legal services programme would provide the poor with the means to remedy this situation and thereby decrease alienation stemming from feelings of inadequacy and despair in the poverty community. Also there would be a cumulative secondary effect of improving poor people's standard of housing, education and general livelihood.<sup>(145)</sup>

Hazard finds the fault in this argument to be that if those wrongs which are legally remediable are corrected for the poor as a class, the resultant gains will only be short term. This is because the market will adjust to take account of for example improved housing conditions and result in the poor having to pay higher rents. This is because the ability to obtain a fair decision in a particular case (civil justice), does not solve the problem of unequal allocation of community resources (social justice).<sup>(146)</sup> Reallocation of resources can only be achieved by litigation if it is aimed at taxation legislation. Such a strategy is rightly seen by Hazard as uneconomical, and possibly

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144) Hazard, (1968-69), at 701

145) Ibid., at 703. Again Hazard's understanding of the programme's intention is limited. Perhaps the crucial factor that he fails to grasp is the redistribution of power likely to result from the organization of the poor into groups as advocated in the first of the Cahns proposals. Also Hazard ignores the possible work in non-judicial, and non-legal areas, also advocated by the Cahns. Obtaining civil justice is therefore only one factor in the attempt to obtain social justice. Similar criticisms are also relevant (combined with a failure to see the Cahns emphasis on civilian control) Hazard (1969-70), Op.cit., note (142).

146) Hazard (1968-69), Op.cit., note (142), at 707.

unconstitutional since those facing the increased taxation would be unrepresented and therefore unable to put their side of the case.<sup>(147)</sup> Therefore Hazard suggests that the proven record of legal aid to deal with what the public recognise as legal problems, such as criminal accusations, domestic conflict, debt etc., should result in its adoption in place of the existing legal services programme, and so the public would at least know that they would get due process justice. Some redistribution of wealth would be produced simply by providing the lawyers services freely, and also by any settlements obtained for an individual, but the attempt to obtain social justice should not be part of a legal programme, rather it should remain "on the conscience of the community, and its sense of prudence, as expressed in its legislation".<sup>(148)</sup> This ideology would result in a programme providing legal services to individual clients in traditionally legal areas of work. Community organisation or social reform would not be given priority.

The contrasting ideology to the above is one which accepts the law reform role as being fundamental to the anti-poverty programme. The role of the lawyer is not to provide equal justice or due process, but rather to help "poor people to organize themselves to change things so that either no one is poor or (less radically) so that poverty does not entail misery."<sup>(149)</sup> The involvement of law in poor people's lives is seen as being constant and abrasive, since the law which relates to them is often

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147) Ibid., at 709 to 711.

148) Ibid., at 712.

149) Hazard (1968-69), op.cit., note (142), at 707.

that which is the most intrusive into their personal affairs. (150)  
Social justice for the poor is not simply to be achieved by obtaining a fair decision in a particular case (although that is a tactic which should not be ignored, particularly if a favourable decision could have broad ramifications for other poor people). A one to one relationship between lawyer and poor client is seen as either not relevant or is positively harmful to clients because it isolates them from each other. The problems of the poor are not seen as individual in the traditional legal sense, rather their problems are the result of their poverty and therefore are common to all poor people.

This has implications for the methods adopted by the programme lawyers, and central to this is the participatory nature of the work. The lawyers role is to organise poor people, rather than to solve their legal problems, and then, as far as is possible, to teach those groups the skills they require to deal with their problems themselves, so that they do not develop a dependency on the lawyers skills which may be removed. In a programme based on this ideology individual advice and representation will have a very low priority, the emphasis is more likely to be on increasing community rights awareness, producing resource materials for community use and information, teaching traditionally legal skills to lay people, and educating and preparing groups

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150) Ibid., at 1050.

for confrontations with individuals and government officials against whom they have grievances. (151)

Therefore although the O.E.O. legal services programme became prioritized in terms of a law reform strategy, the ideologies behind different projects would play a crucial part in defining the emphasis given to different methods of achieving that aim. It must be remembered as we have stated above, that there was an agreement made by all projects receiving O.E.O. grants that they would undertake to fulfil certain policy objectives. Given that this was the case satisfactory results should have been secured from all projects in their law reform work despite their differing ideologies. The assessment of the achievement of the programme's goal produced results which are central to an understanding of the feasible achievements of the O.E.O. legal services programme, and any comparative model, such as the British law centre movement.

It is useful at this point to set out the stages in the O.E.O. strategy development which we have seen:-

1. Defining the problem.
2. Analysis of possible solutions.
3. Assessment of strategies most likely to solve the problem/s.
4. Implementation of the chosen programme/s.

We have seen that the problem was regarded as being poverty, that numerous solutions would have to be available to meet the various causes of poverty. As far as solving the 'legal'

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151) Generally see, *ibid.*, at 1053 to 1059. A useful perspective on the different views of society inherent in the views of Wexler and Hazard can be obtained by comparison to the continuum drawn in Rees, W.M., "Frames of Reference and the Public Interest", in "Labour Law and the Community", ed. by Lord Wedderburn and T.W. Murphy, (1982) at 129.

problems of the poor were concerned, we have seen that law reform was the chosen strategy, and that this policy would be implemented through a variety of programmes with differing approaches. Finman<sup>(152)</sup> looked at the concept of slippage. This was the question of how far the goal of solving the problem of poverty (number 1. above) was achieved by the programmes implemented (number 4. above). The extent of slippage was obviously central to the success of the O.E.O. legal services programme. If the concentration of a projects resources were directed towards solving individual client problems rather than towards changing the social conditions of poverty, then the slippage would be such that that particular project would be invalid as far as solving the overall problem was concerned. If that project was typical of many in the O.E.O. legal services programme, then the overall programme would be doomed to failure.

Finman found the ideological perspective of the programme promoters to be "a critical and perhaps dominant influence" on the performance of their particular project. In the process of deciding whether to fund a project, the promoters of that programme would submit their outline proposals, and the O.E.O. would review these so that they conformed to the broader programme requirements. Finman found that this process was satisfactory for correcting

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152) Finman, T., "O.E.O. Legal Service Programs and the Pursuit of Social Change : The Relationship Between Program Ideology and Program Performance", (1971) Wisconsin Law Review 1001. The preceding discussion on the importance of ideology is based on Finman's article.

practical matters such as staff numbers, but became meaningless when the O.E.O. insisted on the insertion of the social reform objective. This latter change would be inconsistent with or contrary to the programme promoters ideology if not already included in their proposals, and therefore be unlikely to have any practical impact on the work of the programme. Also where it became obvious to the O.E.O. that no social reform function was being undertaken, and they wished to take remedial action to correct this, Finman showed that the controlling ideology of the programme would have to be changed usually by removal of the programme directors, rather than its stated commitment to social reform work. To do otherwise would be unlikely to result in a new commitment to undertaking social reform work.

Finman identified three types of programme, perhaps most usefully viewed as a continuum. At one end were agencies committed to a social change orientation, accepting all types of work as proper if assisting in the overall aim, and at the other extreme were agencies with a strong traditionally legal individual client orientation, who viewed the social change orientated function as inappropriate and troublesome. Between these extremes there were a number of agencies who undertook to meet individual client needs and basic reform work in approximately equal proportions. Perhaps it was not surprising that these different agencies had differing amounts of success in fulfilling the O.E.O. programme's aim of working to relieve poverty. Those agencies further along the continuum towards the social change orientation were the most active in working for social change, and vice versa. This had direct implications for the

legal services programme since it wanted to fund only those projects which were going to undertake social reform work. Now that the projects had been identified as being of one sort or another it should have been possible to see which factors were responsible for the difference. Finman isolated the pervasiveness of the programme promoter's ideology as of central importance.

As the promoters these people would define the programme image. This in turn would define staff selection, by self selection of applicants who felt their perspective was in line with that of the programme image, and similarly during the employment of the staff by the management. Ideology would define staff performance through a need for approval and acceptance by the staff resulting in their conforming to the programme ideology, despite there usually being no tangible barriers to the various approaches to work. Where no particular approach was demanded by the programme Finman found this to be a sign of an ideology preferring a diverse approach rather than the lack of any ideology. The clients' perspective was also controlled by the programme's image. The poor community would provide the project with the type of work which it saw as being appropriate to it, rather than demanding that it undertake different work. In this case particularly contrary programme intentions and image could have a significant and debilitating effect. Finman also pointed to the effect of ideology in defining workload priorities, defining project response to local and national pressure, and in defining relations with other community based organisations.

The importance of Finman's findings must not be

underestimated. The performance of a programme is basically the product of that programme's ideology, which given the O.E.O. programme approach to funding, was largely that of the programme promoters. Although this approach encouraged diversity among the programmes it also resulted in a failure to ensure that each programme fulfilled the aim for which it was funded. It therefore becomes essential in an attempt to minimise slippage in the broad strategy between the problem definition and programme implementation that the underlying ideology is understood and supported by those purporting to further the aims of the programme. This will not present a varied approach since there are numerous suitable methods for implementing the policy<sup>(153)</sup> which can not all be undertaken simultaneously. Such an approach will ensure that the broader perspective of the aim of the programme is central to the understanding by each agency of its role and therefore its most suitable strategy. It will also provide a more concerted effort to combat the problem which is seen as the justification for the programme, since all the programmes will be working towards the same end.

(e) Conclusion.

It has been seen that the problems of the poor are essentially a result of their socio-economic position. As a result, a traditionally legally orientated response, such as legal aid, which fails to take account of this fact, is

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153) See the various strategies suggested by the Cahns above, see text to notes (132) to (134).



inappropriate to assist the poor. The American experience shows the validity of the alternative approach of providing legal services to the poor based on the principle of consumer participation, and geared towards using the skills of lawyers to obtain redress through legal and non legal methods. The American experience proved that the legal aid or judicare system was incompatible to the consumer or social justice models since its only purpose was to solve the individual problems of poor people. It was shown that compromise between the principles of the two alternative systems to retain A.B.A. support was detrimental to the consumer orientation because of the size of the individual client caseload produced by the legal aid system. Most importantly, Finman established that the success of the consumer approach could be ensured by emphasising the importance of the compatibility of programme ideologies. If all the programmes worked with the same purpose towards the same ends then the poor could obtain assistance so that they could begin to resolve their socio-economic problems through legal and non-legal channels.

(D) Private practice is an inappropriate outlet for the provision of legal services to the poor.

(1) Introduction

This section is intended to establish that private practice, as an outlet for the legal aid system which is provided, is inappropriate. That private practice tends to hinder rather than help poor people to obtain the legal services to which they are entitled.

Firstly the attitudes of both lawyers and clients will be noted. Their differences in perception will be mentioned, as will their lack of empathy with one another, and consequent unease in interaction. The distribution of solicitors will then be examined. The variation in accessibility to both solicitors and their practices will be shown. The nature of the distribution will be seen to be unrelated to the requirements of a uniform system for the provision of legal services to the poor. The likelihood of future redress will be seen to be minimal. Finally a detailed practical view will be taken of the role of advice agencies in compensating for the failings of the legal aid scheme.

By such discussion it is intended to show that for the poor to obtain the legal services which they require an alternative outlet for those services must be provided.

(2) The attitudes of both lawyers and clients are a hindrance to accessibility.

By its nature this problem is not easily quantifiable. Therefore it is not intended to consider the problem in great depth. Here it is intended only to establish that the problem exists. The solution to the problem is inexorably bound to the preference of the poor for using independent advice agencies, rather than lawyers, which shall be seen later. The problem should therefore be borne in mind during the subsequent sections.

Considerable work has been done to prove that both lawyers and clients' attitudes create obstacles to the accessibility of legal services. Carlin and Howard<sup>(154)</sup> noted it was lawyers' role to decide whether their clients' problems were categorised as legal or not. Such lawyers may be unwilling to take on work regarded as less prestigious, or on a purely financial basis they may be reluctant to take cases because of low expectation of financial gain. Hazell<sup>(155)</sup> noted lawyers' preference to establish their practices in city centre locations rather than in close proximity to the poorer sections of the community. This caused problems not only of inaccessibility, but also of intimidation by the nature of the buildings and decor which was directed towards more affluent clientele.

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154) Carlin, J.E., and Howard, J., "Legal Representation and Class Justice," in *Sociology of Law*, ed., Aubert, V., (1969).

155) Hazell, R., "Law and the People", (1976), & 73 *Law Soc. Gazette* 75.

Clients attitudes have also been important factors. The lack of knowledge of the existence of the legal aid system itself has been proven.<sup>(156)</sup> Hughes has pointed out the attitudes of clients which dissuade them from seeing a solicitor despite their awareness of legal aid and their entitlement to it. Fear of cost was the most important factor, but other less obvious factors were also mentioned. The feeling that people of their socio-economic position did not go to lawyers, feeling uncomfortable and ill-at-ease with lawyers, and the position and opening hours of lawyers offices were all mentioned in a significant number of cases.<sup>(157)</sup> Also of importance is the reluctance of poorer people to take legal action. Carlin and Howard<sup>(158)</sup> showed that after car accidents in New York 27% of those from lower socio-economic groups took no action against the offending party, while amongst higher socio-economic groups the percentage fell to 2% taking no action. The people taking no action expressed alienation from the legal process and fear of reprisal as the factors which deterred them from doing so.

This work suggests that the problems involved are largely due to the failings of the legal aid scheme. The scheme does not overcome ignorance of the use of legal aid and it fails to provide the correct advice and information through suitable sources. The barriers of lawyer and client attitudes are a symptom of the failure of the legal aid system to approach the clients' problems from a preventative

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156) Op.cit., note (3), Appendix 4, para. 122.

157) Ibid., para. 108.

158) Op.cit., note (154).

starting point, and to involve clients in the decision making process.

(3) The distribution of solicitors.

There are two broad issues which this sections will note. Firstly the geographical distribution of solicitors will be examined to assess its effect on the ability of the poor to obtain legal services. Secondly the future supply of solicitors with regard to the type of work they wish to undertake will be mentioned.

The most important source of information on the geographical distribution of solicitors is still Foster.<sup>(159)</sup> The Legal Action Group (L.A.G.) have supported the theory that the distribution of solicitors was related to home ownership,<sup>(160)</sup> but Foster's research suggested rather that there was a correlation between the distribution and the level of retail sales. Whatever the explanation for the variation in distribution, Foster's data is sufficient here to show that such variations do occur. The bulk of the ratios for the number of population per solicitor fell between 913:1. Bournemouth, and 9635:1, Gillingham. However there were extreme variations, with some towns having almost nine times the latter ration, eg. 88475:1 in Alridge-Brownhills.

Tables 1(a) and (b), and 2(a) and (b)<sup>(161)</sup> show that such variations are still apparent today in the North East of England. The differences between the district council areas in both the table relating to the ratio of population

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159) Foster, K., "The Location of Solicitors", (1973) 36 M.L.R. 153.

160) Anon., Editorial, "Who Uses Lawyers", (1979) L.A.G. Bulletin 55.

161) See pp. 88- 89 post.

per solicitor, and population per solicitor's office is considerable. It is noticeable that there are also differences between the ratios for all solicitors and offices, and those solicitors and offices offering to undertake legal aid work. In both cases the ratios are greater for the legal aid related figures, suggesting that both legal aid solicitors and offices would be less common. This obviously decreases ease of accessability to legal services for those entitled to legal aid.

It should be noted that the more up-to-date ratios are generally more favourable than Fosters. This is not because the North East is particularly well provided with solicitors, but rather that there has been a general increase in the number of solicitors since the time of Foster's research. Comparative ratios for other areas are also more favourable, for example Gillingham from 9635:1 in 1973 to 5833:1 in 1988.

Even the district variation does not reflect fully the inconsistency of distribution within those regions. Table 3<sup>(162)</sup> shows the advantages of the urban over the rural population in their comparative ease of access to both solicitors and offices. It should be noted in Northumberland, Ashington and Cramlington, as the largest population centres, appear not to exert a disproportionate influence on the situation of solicitors or their offices. However, Morpeth, despite its smaller population, exerts the characteristics of an urban centre perhaps because it is the local government

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162) See p. 90 post.

administrative centre. Bearing this in mind it can be seen that each urban area is disproportionately better served with both solicitors and their offices than the remainder of the county.

This situation is itself worsened by the concentration of the solicitors and practices in the commercial centres of the urban areas. Table 4<sup>(163)</sup> shows a breakdown of Newcastle-Upon-Tyne by postal district and the corresponding spread of solicitors and their offices. The disproportionate number of solicitors and their offices in NE1 can be noted. Also importantly the emphasis on commercial work for many of the solicitors in the central district is shown by the relatively small number who offer to undertake legal aid work.

It was not possible to obtain figures to break down the concentration of work among those firms involved in the legal aid scheme, but David Edwards<sup>(164)</sup> has said that specialisation is on the increase. More than two-thirds of the payments from the legal aid fund now go to about one quarter of the firms which form the profession. More specifically, in relation to Birmingham, Bridges has shown that of the 160 practices in 1972 approximately one in four did a perceptible amount of legal aid work; one in sixteen did a substantial amount; while the ten most prominent legal aid practices dealt with over half of all the civil and criminal cases<sup>(165)</sup>. The Lord Chancellor's Advisory Committee on Legal Aid have commented<sup>(166)</sup> "that the supply and

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163) See p. 91 post.

164) Op.Cit., note (18)

165) Op.Cit., note (34)

166) 26th Legal Aid Annual Report 1975-76, (1976) HMSO.



distribution of solicitors is ill suited to serve many of the poorer sections of the community". The evidence which has been seen above supports this concentration.

Nor does it seem that the position for the future will be any better. Research<sup>(167)</sup> has shown that among Durham University Law Department under graduates over 60% wished to complete their articles with city commercial or large provincial practices, while only 22% expressed any interest in areas of legal aid work. Also the recruitment crisis for article clerks has increased competition among the larger firms to get the best graduates, and this has been marked by considerable salary offers to those undergraduates wishing to move into the City, allowing earnings of more than twice their counterparts working for smaller firms in the provinces. This does not bode well for legal aid since practices tend to be small and salaries close to the Law Society recommended minimum. Recruiting article clerks if already difficult will become more so and can only lead to a decrease in standards in the long term.

Therefore we see that legal aid suffers from a serious deficiency. Basing the system on private practice meant reliance on a system which already had massive variations in geographical coverage of the country, this was accentuated by the concentration of the work in only a small number of firms. Now the low levels of remuneration for

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167) Unpublished undergraduate degree paper, by the author.

legal aid work will prevent legal aid firms from competing for quality article clerks. The possibilities for expansion will therefore be limited and there will not be any possibility of rectifying the unsatisfactory situation which exists at present.

TABLE 1 : Table of Population per Solicitor by District.

<u>Table 1(a)</u>			<u>Table 1(b)</u>		
DISTRICT	Pop.per Solicitor	Relative size.	DISTRICT	Pop.per legal Aid Solicitor	Relative size.
Newcastle	744	100	Newcastle	1443	100
Middlesbrough	1336	179	Middlesbrough	1924	133
Darlington	1600	215	Darlington	2255	156
Wear Valley	2407	324	Hartlepool	3128	217
Alnwick	2483	334	Alnwick	3311	229
Hartlepool	2519	339	Wear Valley	3611	250
Sunderland	2566	345	Sunderland	3721	258
Berwick-Upon-Tweed	2650	356	Chester-le-Street	3814	264
Tyneside	2765	372	Castle Morpeth	4225	293
Castle Morpeth	2817	379	South Tyneside	4755	330
Durham	2870	386	Durham	4783	331
Stockton	2980	401	Sedgefield	4922	341
South Tyneside	3017	406	Stockton	5171	358
North Tyneside	3152	424	Berwick-Upon-Tweed	5300	367
Blyth Valley	3263	439	North Tyneside	5342	370
Chester-le-Street	3338	449	Tynedale	5530	383
Sedgefield	3692	496	Blyth Valley	6023	417
Gateshead	3769	507	Wansbeck	6040	419
Derwentside	3914	526	Teesdale	6200	430
Teesdale	4133	556	Gateshead	6282	435
Wansbeck	4314	580	Langbaurgh	6990	484
Langbaurgh	4318	580	Derwentside	8610	597
Easington	9650	1297	Easington	12063	836

TABLE 2 : Table of Population per Solicitor's Office by District.

<u>Table 2(a)</u>			<u>Table 2(b)</u>		
DISTRICT	Pop. per Office	Relative size		Pop. per legal aid Office.	Relative size
Newcastle	2606	100	Newcastle	2786	100
Middlesbrough	3436	132	Middlesbrough	3700	133
Alnwick	3725	143	Berwick-Upon-Tweed	3786	136
Berwick-Upon-Tweed	3786	145	Alnwick	4257	153
Darlington	4133	159	Wear Valley	4333	156
Castle Morpeth	4225	162	Castle Morpeth	4609	165
Wear Valley	4333	166	Darlington	4960	178
Durham	4783	184	Tynedale	5027	180
Tynedale	5027	193	Wansbeck	5491	197
Wansbeck	5033	193	Durham	5740	206
Sedgefield	5583	213	Chester-le-Street	5933	213
Sunderland	5617	216	Teesdale	6200	223
Gateshead	5923	227	Sunderland	6202	223
Chester-le-Street	5933	228	Sedgefield	6329	227
Teesdale	6200	238	Blyth Valley	6525	234
North Tyneside	6410	246	Gateshead	6910	248
Stockton	6511	250	North Tyneside	7122	256
Blyth Valley	6525	250	Stockton	7643	274
Langbaugh	6990	268	Langbaugh	7726	277
Derwentside	7175	275	Derwentside	7827	281
South Tyneside	7471	287	South Tyneside	7845	282
Hartlepool	8245	316	Hartlepool	8245	296
Easington	12063	463	Easington	13786	495

TABLE 3:

Remainder of County/Urban Area or Centres	%age of total Area/County Population	%age of Solicitors	Population per solic.	%age of legal aid solics.	Population per legal aid solic.	%age of offices	Pop.per office	%age of Legal Aid offices	Pop. per legal aid office
Ashington + Cramlington	18%	15%	3556	17%	5334	18%	4849	19%	4849
Northumberland	82%	85%	2984	83%	5054	82%	4856	81%	5160
TOTAL	100%	100%	---	100%	---	100%	---	100%	---
Morpeth	5%	11%	1317	19%	1317	11%	2070	14%(A1)	1812
Nortumberland	95%	89%	3293	81%	5969	89%	5209	86%	5618
TOTAL	100%	100%	---	100%	---	100%	---	100%	---
Urban T+W (1)	51%	78%	1123	77%	1995	68%	3464	69%	3757
Tyne & Wear	49%	22%	3789	23%	6403	32%	6964	31%	8074
TOTAL	100%	100%	---	100%	---	100%	---	100%	---
Urban(2)	35%	66%	910	65%	1637	54%	2981	56%	3196
Tyne & Wear	65%	34%	3301	35%	5535	46%	6514	44%	7511
TOTAL	100%	100%	---	100%	---	100%	---	100%	---
Newcastle	18%	53%	582	48%	1131	38%	2143	41%	2237
Tyne & Wear	82%	47%	2987	52%	4731	62%	6132	59%	7061
TOTAL	100%	100%	---	100%	---	100%	---	100%	---
Darlington & Durham	21%	47%	1386	46%	2057	40%	3037	37%	3644
Co.Durham	79%	53%	4497	54%	6558	60%	7378	63%	7869
TOTAL	100%	100%	---	100%	---	100%	---	100%	---
Urban (3)	61%	79%	1812	79%	2710	64%	4910	68%	5378
Cleveland	39%	21%	4376	21%	6436	36%	5758	32%	7545
TOTAL	100%	100%	---	100%	---	100%	---	100%	---
Middlesbrough	29%	44%	1533	46%	2184	36%	4088	39%	4428
Cleveland	71%	56%	2994	54%	4930	64%	5856	61%	7110
TOTAL	100%	100%	---	100%	---	100%	---	100%	---

\* A1 I suspect this figure and the ratio of solicitors to population are slightly incorrect since the Regional Directory counted one more legal aid firm than the Diary and Directory had as the total firms.

\* 1 Urban areas in Tyne & Wear with a population above 85,000 i.e., Newcastle, Gateshead, Sunderland and South Shields.

\* 2 Urban areas in Tyne & Wear with a population above 190,000 i.e. Newcastle and Sunderland.

\* 3 Urban areas in Cleveland with a population greater than 85,000, i.e., Middlesbrough, Stockton and Hartlepool.

TABLE 4 : Distribution of solicitors and offices in Newcastle-Upon-Tyne by Postal District.

nb - Newcastle-Upon-Tyne was the only North Eastern city large enough to be divided into numerous postal districts, but this is no reason to suspect that the situation would be otherwise than this elsewhere, it is just much harder and more time consuming to prove, requiring a street by street breakdown.

nb - c = consultant.

Postal District	No. of Solicitors	% of Solicitors	No. of Legal Aid Solic.s	% of Legal Aid Solics.	No. of Offices	% of Offices	No. of Legal Aid Offices	% of Legal Aid Offices.
NE 1	278 + 20c	79%	128	46%	62	65%	61	98%
NE 2	38 + 2c	}----- 21%	32	}----- 72%	8	}----- 35%	8	}----- 91%
NE 3	3		0		3		2	
NE 4	3		1		5		4	
NE 5	2		2		2		1	
NE 6	12		10		7		7	
NE 7	4		2		3		3	
NE 12	8		3		4		4	
NE 15	2		2		1		1	
TOTAL	350		100%		180		---	

(4) The role of independent advice agencies in the provision of legal services. (167A)

The intention of this section was to establish the extent of the role played by independent advice agencies in the North East of England in the provision of legal and advice services to the public.

The advice sector differs substantially from the traditional means of providing legal services through private practice. Advice agencies use a variety of different and largely informal methods for the provision of their services. They are not limited by being controlled by a single professional body, and therefore take various forms and can have significant ideological differences. They are frequently the result of local initiatives, and often have a strong basis in the local community. The advice sector therefore serves to contrast the methods of private practitioners in providing legal services to the poor. It was not the intention of this section to concentrate on the differences in ideology and methods between the advice sector and private practice, but it was recognised that the fact should be noted.

The purpose was rather to look at the physical extent to which an alternative to the legal aid scheme, and particularly the green form, had been created. By so doing, the failing of the legal aid scheme to provide the type of services required by the poor in a form which was

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167A) These were agencies identified as providing advice services in the North East of England. See Appendix B for an explanation of the means by which they were identified and the difficulties of classification.

acceptable to them, would be highlighted.

It was not intended to look at the role of the law centres or Citizens Advice Bureaux (CABX) in the North East of England. There are four law centres in the area<sup>(168)</sup> each of which has an up-to-date annual report detailing the work undertaken and their perceived role. Similarly the North Eastern CABX, while more significant in numbers<sup>(169)</sup> have a role which is well documented. In 1986/87 they dealt with approximately 300,000 enquiries, which fell into the following categories:-<sup>(170)</sup>

Social Security	28.5%
Consumer	20.9%
Housing	11.5%
Employment	10.3%
Family and Personal	7.8%
Administration of Justice	6.7%
Others (individually less than 3%)	14.3%

The advice agencies which it was intended to be studied were a sample of ninety two who provided a variety of services. By contrast to the local law centres and CABX, no information existed on these agencies. Although some produced annual reports, no database of them existed, perhaps because no central body was responsible for their funding or administration. Research was therefore undertaken to generate the information required to establish their value in providing legal services.<sup>(171)</sup>

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168) Gateshead, Newcastle, Middlesbrough and Stockton.

169) There are currently 31 bureaux located throughout the North East. See North East CAB, "Annual Report 1986/87", (1987), at 28.

170) Ibid., at 5.

171) See Appendix B for methodological issues.



(a) Nature of the agencies.

It was attempted to define the agencies with reference to those factors stressed by the organisations themselves to be important to them. Weight was given to any statements made which clarified the organisation's purpose or aims. Also the type of advice offered was considered as of particular importance when categorising the agency. As mentioned later<sup>(172)</sup> it would have been valuable to allow the organisations to define their own role, but as this was not done the categorisations must not be regarded as comprehensive, but rather as appropriate working categories for the agencies dealt with, and on the limited information which they provided. There were four groups:-

1. Group A - General legal advice agencies basically on the CABX model, provided advice and assistance on a variety of subjects to individual clients.
2. Group B - Agencies which catered for a specific clientele rather than the public in general, and had specific legal advice aspect to their work.
3. Group C - Agencies which predominantly provided counselling services, and were likely to view problems as distinct from a legal perspective. This also included those who saw themselves as signposting or referral agencies.
4. Group D - Resource or umbrella organisations.

(b) The distribution of advice agencies.

The next phase was to assess the distribution of agencies. At its most basic level this related to the number of responses per county to see whether the distribution

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172) Ibid.

of agencies was related to the size of population<sup>(173)</sup> (See Table 1, p.115).

The three larger counties had a rough similarity between the relationships of population size and the number of agencies, but these figures can make little sense within themselves. It seems reasonable to point out that the figures are very considerable, and even assuming that each agency was willing to give advice on any subject to anyone who came through the door<sup>(174)</sup>, it would seem impossible for the organisations to even contemplate giving advice to even the smallest proportion of their theoretical quota.

A more useful analysis was obtained by a breakdown of the agencies per county as defined by their type. This gave a picture of the county itself, and by comparison to the other counties any pattern in the types of agencies could be considered.<sup>(175)</sup> (See Table 2, p.115).

The similarity between the breakdown of Durham and Tyne and Wear was noticeable, with each of the general (A), specific issue (B), and counselling orientated advice agencies (C) representing about one third of the agencies. But it could not be seen as any sort of pattern in provision generally, since the breakdown for Cleveland was markedly different. There the emphasis was switched from an even division of agencies to a heavy emphasis on agencies providing legal advice services to a specific clientele (B) type (nearly half all of the agencies) while a much

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173) Population figures from Roope, W.A.C., ed., "The Municipal Yearbook Vol.2", (1988).

174) Which as we have seen from our definitions above is not true.

175) In this situation the response from Northumberland was of little or no use.

smaller percentage of A type agencies provided general advice. To some extent the variations could be the result of the existence of other agencies in the area such as law centres or local council welfare rights units. Also the use of broader areas tends to hide variations within the counties themselves. For example Sunderland in Tyne and Wear had a breakdown of 62% general (Group A) agencies, 23% specific issue agencies (B), 15% counselling advice agencies (C), and no group D resource agencies. Therefore rather than finding a pattern, what seemed to appear was a suggestion of a lack of similarity between the distribution of agencies. From this data it was impossible to say whether if taken as a whole the legal services in an area would have tended to balance out more evenly, but there was some indication that agencies were created to meet the perceived needs of the community at a particular time. This would obviously depend as much on power struggles and the ability of one type of agency to persuade the funding body that it was more suitable, than any other to meet that need. There certainly seemed to be no evidence of a co-ordinated policy to respond to or even avert, the problems which the public faced.

These questions of distribution would be of little value if the agencies were not delimited by County borders, therefore all agencies were asked to define the geographical catchment area covered by themselves. (See Table 3, p.115).

This showed that the assumptions about lack of co-ordination were not affected to any great extent by the catchment areas of the agencies. In each case the majority of agencies covered no more than a borough or district in that county, this even being true for the resource/umbrella

(group D) agencies. This again would seem reflective of the absence of an overall strategy or approach, and would appear to show that agencies were set up to cope with localised or isolated problems. Therefore rather than there being a co-ordinated approach with a specific purpose there was an ad hoc approach with many relatively small areas having agencies of different types with different objectives.

Overall the distribution of advice agencies was very varied, and did not conform to any pattern in relation to the population of the county. Nor did the distribution of agencies within each county seem to match the distribution in the other counties. The emphasis of the agencies was on a local level. This would suggest that there was not an accepted broad based model for co-ordinated advice centre work.

(c) The background of the advice agencies.

To get some idea of the background and future prospects of the advice agencies, questions were asked as to the age and the security of funding which the agencies had. It was hoped that this would raise several factors, the age of the agency when put into context with other agencies would show whether relatively there were more older or younger organisations. An emphasis on the former would reflect a continuing support for agencies created some time ago, but not much current support for the creation of new agencies of that type, and vice versa. Questions regarding security of funding obviously would have serious implications, not only internally for morale of the agency in terms of job security for those employed, but

perhaps more seriously externally in terms of the ability of the agency to plan for the future with certainty. This would be an important factor without which the ability of the agency to develop, to broaden or even change its role, could be seriously impaired. (See Table 4, p.116).

Firstly it should be noted that the numbers of resource or umbrella agencies in group D were such that care should be taken in drawing too firm conclusions from those results.<sup>(176)</sup> In the other groups interesting comparisons were made. The emphasis on the more generally legally orientated group i.e., group A could be placed historically in the mid 1970's with nearly half the agencies dating from around then. That impetus had been lost to some extent, and the numbers of new agencies being created was falling off. However there was still some momentum as reflected by the comparatively reasonable number of agencies created in the last three years. Issue based advice agencies i.e., Group B, were also very much a creation of the mid 1970's, but this group had enjoyed its main boost in the early 1980's when over half of the operating agencies were created. It was perhaps because of this that there had been very few group B agencies created in the very recent past. Counselling advice agencies in group C seemed to reflect the steadiest pattern of development. They had by far the greatest proportion established for over fifteen years, nearly one-third of group C organisations. While

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176) This applies generally hereafter where the breakdown of agencies is by type.

there was a drop in the mid 1970's this was not so severe as to disperse momentum from this type of organisation, and there was a reaffirmation of faith in group C with over a third of agencies being created in the early 1980's. This had again been followed by a drop in the most recent past, but this could be attributable to some cyclical pattern in the creation of C type agencies.

The picture was somewhat different with regard to the future. (see Table 5, p.116). Before discussing the results themselves it is worth mentioning the non-responses to this question. It does seem odd that the responses for particular questions having generally been so good that this question should prove so difficult to answer with approximately one-fifth of each group failing to respond. Obviously this could be attributable to any number of factors but it does not seem unreasonable to credit some part of it to lack of certainty in the immediate future about where funding was to come from. This would suggest that the figures in the second category of funding currently uncertain or lasting for less than one year are if anything slightly lower than they should be.

With regard to the positive responses a surprising situation emerged where one third of A type general advice agencies, nearly half of specific issue (B) and counselling C type agencies, and over three-quarters of the resource (D) type agencies, had no funding or funding which was currently uncertain, or would last them for less than one year. Even if it was satisfactory to have funding security for only three years in advance, and this must be arguable, a considerable number of further agencies would be unable to

claim such security. As mentioned above, the effects of this could be considerable, for example effort would have to be diverted from day to day work to formulate a concerted appeal for continuation of funding; less optimistic members of staff might feel that it would be a suitable time to leave the organisation and so staff change could be precipitated at a difficult time. Funding uncertainty encourages crisis planning which could involve use of very short term aims and objectives, often hoping to do little more than 'hold the fort'. There could also be repercussions on client confidence in the organisation. These are just a few of the possible results of the reliance on short term funding, and they reflect a failure by funders to give long term support even to those agencies who have considerable standing because of their age.

(d) Staffing of agencies.

Again in attempting to gain a background knowledge of these advice agencies several questions were asked about each centre's staffing. It was learnt that the sample agencies had about 1000 staff in total, but this figure tells little about anything but the total number itself, particularly since no comparison is possible to private practise. For example the breakdown of staff within each agency could give pointers to the adequacy of funding of that organisation. (See Table 6, p.117). The results show that in all agencies there was a considerable reliance on part-time and unpaid staff, a factor which shall be dealt with in more detail. General advice (Type A) agencies had the highest percentage of paid staff. This could initially suggest two things, that they were the best

funded agency and therefore could afford to employ more of the full-time staff that they required, and therefore they did not need to rely on voluntary assistance. Alternatively it could suggest that volunteers, because of the nature of the work undertaken could not play as valuable a role as they could in other types of agency. With groups B, specific issue, and C, counselling advice agencies, a much heavier reliance on unpaid staff than in group A can be seen. In groups B and C there were approximately equal proportions of full and part-time paid staff and part-time unpaid staff. It was not as simple to draw conclusions from this as it was from the breakdown of staff within resource agencies (group D), where there is a 75% reliance on unpaid part-time staff. This reflected the expected nature of umbrella or resource type agency where representatives of other groups meet to discuss and/or formulate common policies, while the only permanent staff that were necessary were to service the body and act as a secretariat.

It was thought that further information could be gleaned by comparison between, rather than within, the advice agencies. Table 7 (p.117) shows that the assumption that general advice (A type) agencies were better funded was incorrect. All the agencies employed full-time paid staff in proportion to their relative number in the sample. The same was not true for paid part-time staff with relatively few being employed in A agencies while specific issue (B) and counselling (C) agencies relied more heavily on them. This would suggest either that part-time staff were more useful to B and C type agencies, or that A agencies simply could not afford to employ any more staff, full or



part-time. Since we have seen that each agency employed a proportionate number of full-time staff it would lead to the assumption that they would employ the same proportions of part-time staff. Because this is not the case, and bearing in mind that we do not have any absolute standards against which to compare, the data seems to suggest that A type agencies may be less well funded than B and C type agencies. As suggested above, Table 7 supports the picture of resource (D type) agencies as having small full-time paid staff, but a disproportionately large number of part-time voluntary staff.

With regard to unpaid staff in the other groups, it would be assumed that if A type general advice agencies did not have enough funds to obtain more paid staff then they would have attempted to attract more voluntary staff to meet that gap. Yet A type agencies had a disproportionately small number of voluntary staff. Again it is impossible to say why this is so without further research. Possible factors could be suggested, perhaps voluntary staff were not sufficiently skilled to undertake the work A type agencies required; perhaps because of their generalist nature A type agencies did not attract voluntary staff in the same way that the more specifically targetted issues covered by groups B and C did.

Now that some idea of the staffing in advice agencies has been created the quality of the staff shall be considered. This was based on a question which tried to establish whether the staff in an organisation were regarded as specialist or generalist. The quality of staff was divided into three possible groups, the professionally

qualified advice worker, this could be in many disciplines such as legal, social work, or housing qualifications; the experienced or trained advice worker, this category is important since there are very few courses created specifically for advice workers, so 'in-training' and experience count for a lot; and finally those who were neither trained nor qualified. The results were formulated on the basis that each agency could tick one or more of the boxes provided, and therefore the highest qualified staff in each agency were noted. (See Table 8, p.117).

Overall the quality of the staff appeared to be very good with only 5% of agencies without staff of proven ability. If variations within the agencies were compared it could be seen that general (A) and counselling (C) type advice agencies had broadly similar types of staff with the majority of positive responses falling into the professionally qualified bracket, and a smaller percentage falling into the experienced or trained adviser bracket. C type agencies had a sizeable proportion of agencies without either type of qualification. This could suggest that the work undertaken by them did not necessitate providing advice requiring more than everyday experience. Specific issue related, (B type), organisations had an emphasis on experience and training rather than professional qualification which could suggest that when advice work is more specialised there are not as many specialised training programmes to teach the advisers what to do. As regards the resource and umbrella (group D) organisations, with 60% of agencies not providing information it did not seem reasonable to draw any conclusions.

By assessing the number of paid staff per agency an idea of the sizes of advice agencies could be established. (See Table 9, p.118). This information was very revealing showing that the majority of advice agencies had four or less staff. This put a more realistic perspective on the figures in Table 3 (p.115), showing the catchment areas of the agencies. The ability of a staff of four workers or less must be very limited in the area that it hopes to cover effectively, particularly if advice was offered to any member of the general public who came to the agency. More generally it could be seen that A type general advice agencies were the smallest on the whole, with over three-quarters with a staff of less than five. Although only about half of specific issue (B type) and counselling (C type) advice agencies had a staff of less than five, around three-quarters of both had staffs of less than ten. Although the difference between the two is quite considerable in practical terms it does still give a picture of the agencies as tending to be small rather than comparable to even a medium sized private practice.

As was made clear in the discussion related to Table 6 there was an obvious reliance in all agencies on unpaid voluntary staff. In fact 48% of agencies using paid staff relied on some voluntary assistance to supplement their staff. It has also been seen that the agencies providing general legal advice, i.e., group A agencies, tended to use fewer unpaid staff than the other groups. Table 10, (p.118) shows that of the total agencies the emphasis was towards the use of a small number of volunteers, with sixteen agencies using less than five. It is interesting to

note that at least some of the agencies were using a considerable number of volunteers, 11% had the service of fifteen or more volunteers. There is no data with which to compare this use of unpaid workers, but it does seem a considerable reliance on the voluntary sector which could reflect underfunding. This could result in instability and very rapid turnover of staff, which could prevent the build up of skills and knowledge.

(e) Access to advice agencies.

The question of access to advice was approached by a series of simple questions aimed at establishing how, when and where advice could be obtained, and also attempting to clarify whether those clients with special difficulties would be catered for as well as those without. The means of contact was the first issue, all of the general (A) and specific issue (B) type agencies could be contacted by telephone or by personal visit to the offices of the organisation. 85% of the counselling (Group C) agencies could be contacted by either telephone or visit, while 7.5% could be contacted by telephone only, (7.5% provided no information). Of the resource/umbrella (group D) organisations responding, all could be contacted by either telephone or personal visit.

The next questions related to the times when advice was available to the public. Firstly there was a basic question about opening hours. The results were divided into three categories, full week opening, which was taken as availability between approximately 9 AM and 5 PM between Monday and Friday or the greater percentage thereof; part week opening was taken as less than half of a thirty-five hour week between the hours of 9 AM to 5 PM between Monday

and Friday; and extraordinary opening was defined as availability at any time outside the hours of 9 AM to 5 PM and other than between Monday to Friday. The number of agencies with extraordinary opening is expressed as a percentage of those providing either full or part week opening. These extraordinary opening hours often took the form of Saturday or evening opening either at the normal address of the agency or an outreach session. (See Table 11, p.119).

The fact that resource (D type) agencies represented such a small number of the total agencies and the failure of two of the five agencies to provide any information on this question threw doubt on the value of those responses. This also made the agencies with extraordinary opening hours appear to be considerably more than they actually were. The responses from the general (A), specific issue (B), and counselling (C) advice agencies showed that the vast majority of agencies were open to the public throughout the week. But if the client needed advice outside those times then it would be far more difficult to obtain. This could particularly work against those who are in work, meaning that they could only go to advice sessions by taking time off work or losing pay.

People with special difficulties would have varying degrees of ease or difficulty in obtaining advice. Those who needed advice in an emergency outside the normal opening hours of an organisation might simply find themselves speaking to an answerphone. To some extent the responses in Table 12 (p.119) must have reflected the nature of each agency. The advice given may not be of such a type that it would be required in an emergency. This could perhaps

explain the slightly higher percentage of specific issue of (type B) advice organisations available over a twenty-four hour period. Because of the more specific form of advice offered by them it might have been more likely that people would turn to them in an emergency, because their role is more obvious than those agencies who offer advice generally, or on a number of subjects. It is impossible to judge whether the percentage of organisations offering emergency advice is adequate because of the lack of comparative data. However the effect of the public's perception of the catchment areas of these agencies could have repercussions on the reality of coverage during the twenty four hour period.

Advice services for the housebound were seen as another important issue. Those unable to reach an advice agency could easily be excluded from obtaining advice on subjects which might be more valuable to them than those who could manage to get to a source of assistance. Table 13 (p.119) shows a marked contrast to Table 12 (p.119) with at least groups A, B and C having a majority of between two and three to one agencies providing the service. This could be explained by the ability to provide this service during normal working hours and with the minimum of extra cost or fuss. The fact that the resource agencies did not provide home visits could be due to the fact that the majority of their time is not spent working with the public. Despite that it might still seem a valuable service to offer should the need arise.

Quite separately from the housebound is the issue of the physically disabled clients. They may be willing to

come to the advice centre, but may find when they get there that access is difficult if not impossible and that assistance is necessary. The Law Centres Federation (L.C.F.) have recognised the necessity of providing facilities for the disabled and have drawn up guidelines which are aimed at complementing the legal requirements on this subject. All law centres affiliated to the L.C.F. must abide by these guidelines.<sup>(177)</sup> The question then was how well do advice agencies in general deal with disabled clients? Table 14 (p.120) reflects a generally quite poor response to the problem with less than one-third of specific issue (B), counselling (C) and resource (D) advice agencies having access to disabled people. This adds a rider to the figures relating to the means of contacting the advice agencies it being considerably more difficult to obtain advice by personal visit if the person seeking advice should be disabled. General advice (A type) agencies appear to have adjusted better to this issue than the other agencies. Although nearly two-thirds of them do have disabled access to their premises this should be seen as a good start towards the longer term objective of all agencies having equal access for all their possible clientele.

Finally in relation to access for people with special difficulties is the problem for those people who do not speak English, or for whom English is not their first language, and for those with hearing, speech or sight difficulties, to obtain advice in a form which is easily understandable to them. There is no information from which the precise need for these provisions can be gauged. However it is

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177) L.C.F. Evaluation Framework Research Team, "Questions of Value, Prt.1:The Evaluative Process", (1988) p.5, Case Study D.

worth noting with regard to non-English speaking indigenous cultures that some tend to form homogenous communities, and therefore could be dealt with by agencies specifically targeting their work towards them. Similarly with sense impaired people, if agencies throughout the region are specifically aimed at them they too may appear to be poorly served by advice agencies as a whole but they may be adequately served in reality because some agencies provide adequate facilities for their use. Of course both these possible amendments are subject to there being sufficient provision of targetted services to cater for both these groups, a question again on which no information is available. (See Table 15, p.120). It is also important in relation to this table to note the types of translation or interpretation facilities available, and the frequency with which they were mentioned. The number of agencies providing facilities for each of the following is noted in brackets afterwards. For sense impaired people: hearing impaired (2), speech impaired (1), visually impaired (1). For those with language difficulties: Urdu (5), Punjabi (3), Bengali (2), Hindi (2), Gujerati (1), Chinese (1), Italian (1), Iranian (1), unspecified Asian languages (3), unspecified European languages (1), and one agency had translated documents and leaflets but no staff members who could provide additional information in the same language. Rather surprisingly five agencies claimed to have translation and interpretation facilities but did not know of what sort. Taken together Table 15 and this information suggest that the provision of services for these people is very limited, whether or not it is proportionate to the numbers of such



people.

(f) Services provided by the advice agencies.

Finally from the questionnaire the contribution sample of advice agencies make to legal services provision in the North East shall be examined by looking at the areas of advice and representation offered by them. This information took the form of a list of possible case areas which the agency would like to have referred to it. In retrospect there are two problems with this format. Firstly the list might have encouraged respondents simply to tick as many boxes as possible, and by so doing removes the emphasis from thinking which work was actually done. Secondly the list provided no data as to how much time the agency spent giving advice on that area of work, and so no conclusions could be drawn as to where the emphasis of the work of that agency was. It is impossible to tell the effect of these factors on the final results.

The areas of work offered by the advice agencies can be seen in Table 16 (p.121). There was a division of those offering general and those offering specialist advice. The table can show little more than was concluded in the N.E.L.S.C. report,<sup>(178)</sup> that it "provides solid evidence of the extent to which the voluntary sector has a contribution to make to legal services". Unsurprisingly generalist advice is more widely available than specialist but it is important to note that specialist advice is available on every topic mentioned from some agency or other, except to gay men. This could be the result of a sampling error

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178) See Appendix B on methodology.

rather than a lack of any specialist advice in that area at all. The various types of agency respond very much how one would expect them to. Most A type agencies offered a wide variety of general advice with as many as 19 agencies offering advice on the same subject (i.e. housing and health). This reflects the localised nature of these agencies as shown in Table 3 (p.115). It is interesting to note that there was also a considerable back up of specialist advice given by those organisations. Welfare rights were perhaps exceptional with 15 agencies offering specialist advice, but several topics were offered at a specialist level by five or six agencies i.e., around 20% of all A type agencies.

Group B agencies showed themselves to be more selective in the advice they gave, but they tended to offer specialist advice almost as frequently as generalist. This can be presumed to reflect their concentration on advising on more particular client groups.

The emphasis in Group C narrowed still further and shifted to those types of advice which could possibly be solved or assisted by counselling. While there was less emphasis on problems with more strictly defined points of legal intervention. It is particularly in the former areas that specialist advice was offered by more agencies.

As for the D type agencies, the question was framed in a way which must have appeared particularly unsuitable to them and only three of the five agencies responded to it. Bearing this in mind the responses do show a concentration on a limited number of topics, this could reflect advice on broader issues of common policy in umbrella or

resource agencies.

As well as advice, representation was also researched. Here the results were probably more reflective than in Table 16 of the frames of reference of the different types of advice agencies. Table 17 (p.123) shows that a large majority of A type agencies offered tribunal representation, reflecting their basically legal perception of circumstances. Similarly with Group B agencies a reasonable proportion show the legal system to be central to their operation. This can be contrasted to group C organisation who did not see the legal analysis as central to their role, and therefore although they gave advice which was essentially legal they were unwilling to become involved in the legal process by representation. Tribunal representation was not relevant to agencies in Group D, and therefore it was not surprising that it was not undertaken by these organizations.

A further form which advice and information can take is in the written word. It was thought relevant to ask each agency whether they had any publications. As can be seen in Table 18 (p.123) many forms of publication were produced by a very high percentage of agencies. It is worth noting that B type agencies have the most publications which is likely to be the result of their issue based stance. Although some agencies probably only produced an annual report, which could not be regarded as being for advice purposes, obviously many agencies did produce leaflets, pamphlets or other information specifically aimed at assisting the clientele. This could play a crucial role in explaining rights and thereby increasing rights awareness.

(g) Conclusion

In dealing with advice agencies it has proved impossible to say definitely that they are responding particularly to the needs of the poor. This is because advice agencies tend not to means test their clients. Despite this a presumption that advice agencies do serve poor peoples' needs could be raised. Table 16 (p.121) showed that a number of areas of particular relevance to poor clients, i.e. welfare rights, housing and employment, were central to the role of the more legally orientated advice agencies. Also experience shows that these agencies were often situated in those geographical areas most affected by poverty.

As regards to the extent to which the provision of advice agencies reflects the failure of the legal aid scheme to provide the services required in an acceptable form, it can be accepted as significant. The variety of agencies and their different perspectives has been proven. The advice offered was seen to be broad ranging, covering many of the areas one would expect to be covered by legal aid, and emphasising the importance of others for which legal aid is not available. Also those agencies with a more legally orientated perception of the problems of their clients offered representation at tribunals, catering directly for the failure of legal aid to be provided in that area. Also the importance of increasing rights awareness and educating the poor to understand their rights have been recognised by the advice agencies who produced information specifically related to this. The failure to do this has been seen to be a substantial failing of the legal aid

scheme. The advice agencies were found to be acceptably accessible throughout the week for both the mobile and housebound. This was helped by the availability of advice outside normal working hours. Also importantly the quality of the advisers was proven, with virtually all agencies having some staff with a high level of training or experience.

However the advice agencies did have some problems. These could be largely explained by their lack of resources. The agencies tended to be small, and were unevenly distributed throughout the North East. Despite being well established many advice agencies did not have any secure funding for the future. Also many agencies found it necessary to place a significant reliance on the use of part-time and unpaid staff. Since these problems could be solved by increasing the funding for the advice agencies they in no way weaken the failures in the legal aid system which the necessity for such an advice network highlights. It is arguable that given adequate funding the advice agencies' role would place substantial doubt on the validity of the legal aid system as a means to provide legal services for the poor. As they stand, the advice agencies in the North East play a significant role in attempting to compensate for the failings and inadequacies of the present legal aid scheme.

The Distribution of Advice Agencies:TABLE 1 : The Proportion of Advice Agencies to County Populations.

<u>County</u>	<u>Population</u>	<u>No.of Agencies</u>	<u>Ratio</u>
Tyne & Wear	1,135,600	59	19,248:1
Northumberland	301,000	1	301,000:1
Durham	599,700	17	35,276:1
Cleveland	557,600	15	37,173:1

Table 2: Breakdown of Agencies per County by Type of Agency:

<u>County</u>	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>
Tyne & Wear	32% (19)	34% (20)	27% (16)	7% (4)
Northumberland	0	1	0	0
Durham	36% ( 6)	29% ( 5)	29% ( 5)	6% (1)
Cleveland	13% ( 2)	47% ( 7)	40% ( 6)	0
GRAND TOTAL	29% (27)	36% (33)	29% (27)	6% (5)

Table 3 : The Geographical/Catchment Areas of Advice Agencies:

<u>Area Covered</u>	<u>A</u>	<u>B</u>	<u>C</u>	<u>D</u>
( i) More than one county	4%	21%	33%	20%
(ii) County Wide	7%	15%	7%	20%
(iii)Borough or District Limits	33%	55%	56%	40%
(iv) Limited to Suburb	56%	9%	4%	20%
(v) Not Specified	0	0	0	0
TOTAL	100%	100%	100%	100%

The Background of Advice Agencies.Table 4 : Age of Advice Agencies.

Age of Agency	Type of Agency			
	A	B	C	D
(i) Less than 3 years	11%	3%	18%	20%
(ii) Between 3 & 9 years	26%	55%	37%	0
(iii) Between 10 & 15 yrs.	48%	30%	15%	60%
(iv) Longer than 15 yrs.	7.5%	9%	30%	20%
(v) Not specified	7.5%	3%	0	0
TOTAL	100%	100%	100%	100%

Table 5 : Security of Advice Agencies' Funding.

Security of Funding for	Type of Agency			
	A	B	C	D
(i) No funding at all	0	0	4%	20%
(ii) Currently uncertain /<lyr	33%	46%	44%	60%
(iii) Between 1 and 3 yrs.	26%	21%	11%	0
(iv) Between 4 and 9 yrs.	0	0	4%	0
(v) Longer than 9 yrs.	11%	9%	18.5%	0
(vi) Not specified	30%	24%	18.5%	20%
TOTAL	100%	100%	100%	100%

STAFFING OF AGENCIES:Table 6 : The Comparison of the Distribution of Staff Within the Different Agencies.

Type of Staff		Type of Agency			
		A	B	C	D
Paid	Full Time	64% (107)	29% (120)	31% (106)	23% (11)
	Part Time	24% ( 39)	33% (138)	32% (109)	2% ( 1)
Unpaid	Full Time	2% ( 3)	5% ( 24)	1% ( 2)	0 0
	Part Time	10% ( 17)	33% (138)	36% (125)	75% (36)
TOTAL		100% (166)	100% (420)	100% (342)	100% (48)

Table 7 : The Comparison of the Proportion of Staff Distributed Between the Different Agencies.

Type and %age of agencies	Paid Staff		Unpaid Staff	
	Full-Time	Part-Time	Full-Time	Part-Time
A (29%)	31% (107)	14% (39)	10% (3)	5% (17)
B (36%)	35% (120)	48% (138)	83% (24)	44% (138)
C (29%)	31% (106)	38% (109)	7% (2)	40% (125)
D ( 6%)	3% ( 11)	-- ( 1)	0 0	11% ( 36)
TOTAL	100% (344)	100% (287)	100% (29)	100% (316)

Table 8 : Quality of Staff

Type of Agency	Quality of Staff			
	Profesionally Qualified.	Experienced/ Trained	Neither	No Inf
A (100%)	12 (44%)	10 (37%)	1 (4%)	4 (15%)
B (100%)	13 (39%)	20 (61%)	0 0	0 0
C (100%)	15 (56%)	6 (22%)	4 (15%)	2 ( 7%)
D (100%)	1 (20%)	1 (20%)	0 0	3 (60%)
TOTAL	41 (45%)	37 (40%)	5 ( 5%)	9 (10%)



Table 9 : Size of Advice Agencies in the North East.

No.of Paid Staff	No. of Agencies		Breakdown within agencies			
			A	B	C	D
None	3	- 3%	0	0	7%	20%
1-4	50	- 54%	77%	49%	45%	20%
5-9	17	- 19%	11%	27%	19%	0
10-14	6	- 6.5%	0	9%	7%	20%
15-20	5	- 5.5%	4%	6%	7%	0
>20	6	- 6.5%	4%	6%	11%	0
No Info.	5	- 5.5%	4%	3%	4%	40%
TOTAL	92	- 100%	100%	100%	100%	100%

Table 10 : Numbers of Unpaid Workers used by Advice Agencies

Number of Workers	Number of Agencies	
None	47	51%
1-4	16	17%
5-9	7	8%
10-14	2	2%
15-20	4	4.5%
>20	6	6.5%
No Info.	10	11%
TOTAL	92	100%

ACCESS TO ADVICE AGENCIES:Table 11 : Opening Hours to the Public for Contact by Personal Visit or Telephone.

Opening Hours	Type of Agency			
	A	B	C	D
( i) Full week	74%	85%	78%	40%
( ii) Part week	26%	15%	11%	20%
(iii) Not specified	0	0	11%	40%
( iv) Extraordinary Opening	15%	18%	21%	33%

Table 12 : Advice Agencies with a 24 Hour Contact System (other than an Answerphone).

24 hr. Contact	Type of Agency			
	A	B	C	D
( i) Yes	11%	18%	11%	0
( ii) No	89%	82%	85%	80%
(iii) Not specified	0	0	4%	20%
TOTAL	100%	100%	100%	100%

Table 13 : Advice Agencies offering a Home Visits Service:

Home Visits	Type of Agency			
	A	B	C	D
( i) Yes	74%	79%	59%	0
( ii) No	26%	18%	33%	80%
(iii) Not specified	0	3%	8%	20%
TOTAL	100%	100%	100%	100%

Table 14 : Disabled Access to Advice Agencies Premises.

Disabled Access	Type of Agency			
	A	B	C	D
( i) Yes	63%	39%	30%	20%
( ii) No	30%	61%	56%	40%
(iii) Not specified	7%	0	14%	40%
Total	100%	100%	100%	100%

Table 15 : Advice Agencies with Translation and/or Interpretation Facilities.

Translation or Interpretation Facilities	Type of Agency			
	A	B	C	D
( i) Yes	22%	24%	7%	0
( ii) No	70%	73%	78%	40%
(iii) No Response	8%	3%	15%	60%
Total	100%	100%	100%	100%

Services provided by Advice AgenciesTable 16 : Generalist and Specialist Advice Offered by Advice Agencies in the North East.

Advice Offered	Number and Type of Agencies Offering Advice							
	A		B		C		D	
	Gen.	Spec.	Gen.	Spec.	Gen.	Spec.	Gen.	Spec.
Addictions:								
Alcohol	7	1	3	1	6	6	0	0
Drugs	6	0	4	3	6	6	0	0
Gambling	5	0	3	1	6	4	0	0
Children/ Young People	13	4	7	5	5	4	0	1
Community/ Relations	16	4	8	3	1	1	1	0
Consumer Affairs	13	1	5	2	0	0	1	0
Discrimination								
Racial	11	5	6	0	1	0	1	0
Sexual	11	4	5	1	2	2	1	0
Education	17	2	5	4	2	2	0	1
Elderly	15	6	9	3	7	4	0	0
Employment	16	8	6	4	2	0	1	1
Fuel	18	5	7	4	2	0	0	0
Gay Men	11	0	3	0	3	0	0	0
Handicapped -								
Mentally	12	4	6	6	5	2	0	0
Physically	12	6	7	5	4	1	0	0
Health	19	1	9	5	6	2	1	0
Homelessness	17	6	5	5	1	1	0	0
Housing	19	7	11	7	4	0	1	0
Legal Matters	17	5	8	3	1	1	0	0
Lesbians	13	0	6	2	3	1	1	0
Marriage/ Family	16	1	6	3	6	5	0	0
Offenders/ ex-offenders	12	2	3	1	1	1	0	0
Pregnancy	15	0	3	1	2	4	0	0
Rape	12	0	8	5	2	3	0	0
Social Serv.	17	6	9	6	1	2	1	1
Welfare Rights Social Sec.	15	15	12	11	2	1	1	0

Contd/...

Others:- (one of each unless stated otherwise)

- Group A Generalist Advice in : Tax  
Specialist Advice : None
- Group B Generalist Advice in : Mental Illness; victims of  
crime.  
Specialist Advice in : Victims of Crime (2); debt,  
sexual assault; sexual harras-  
ment; incest; violence against  
women; business counselling;  
patients rights in hospital;  
holidays; elderly owner  
occupiers.
- Group C Generalist Advice in : Tourism; local government;  
loss/bereavement; self  
development; people skills;  
alcohol free lifestyle;  
child sex abuse.  
Specialist Advice in : Tranquilizer withdrawal;  
anxiety management, loss/  
bereavement; self development;  
people skills, AIDS and HIV+;  
mental health issues; child  
sexual abuse; womens health
- Group D Generalist advice in : Womens issues  
Specialist advice in : None

Some agencies did not respond to this question:-

- A 1  
B 0  
C 2  
D 2

Table 17 : Advice Agencies Offering Tribunal Representation

Tribunal Representation	Type of Agency			
	A	B	C	D
( i) Yes	70%	39%	0	0
( ii) No	22%	61%	93%	60%
(iii) No Response	8%	0	7%	40%
TOTAL	100%	100%	100%	100%

Type of Tribunal	Type of Agency	
	A	B
Mental Health Review	2	1
Industrial Tribunal	13	1
Social Security Appeal	17	11
Medical Appeal	3	3
Small Claims Arbitration	2	1
Criminal Injuries Compensation	2	1
Rent Tribunal	1	0
Council Committees	1	0

Table 18 : Advice Agencies Publishing Information

Any Publications	Type of Agency.			
	A	B	C	D
( i) Yes	63%	91%	70%	60%
( ii) No	30%	9%	22%	20%
(iii) No Response	7%	0	8%	20%
TOTAL	100%	100%	100%	100%
Type of Publication	A/27	B/33	C/27	D/5
( i) Leaflet	12	27	17	3
( ii) Pamphlet	7	20	9	0
(iii) Annual Report	8	24	14	1
( iv) Other	2	4	7	1

PART 2

LEGAL AID UNDER REVIEW - THE LEGAL AID ACT 1988

(A) Introduction

We have seen that the legal aid system is fraught with problems, and we have outlined a series of crippling deficiencies which it is necessary to overcome. The Government has recently shown its' interest in the reform of the means of provision of legal aid. It intended to see whether legal aid was being provided efficiently, affectively and that it gave the best possible value for money spent.<sup>(1)</sup> This was the purpose of the Legal Aid : Efficiency Scrutiny Report (hereafter the Efficiency Scrutiny).<sup>(2)</sup> The findings of the Efficiency Scrutiny formed the basis of the Government's White Paper, Legal Aid in England and Wales : A New Framework,<sup>(3)</sup> from which in turn was produced the Legal Aid Act (1988)<sup>(4)</sup>

In this section it is intended to outline both tangible proposals of the Act and the possible sub-agenda of reform implicitly suggested in the White Paper and Efficiency Scrutiny Report. The most prominent fears of commentators will then be drawn together and their intended response to their perception of the situation will be examined. With regard to this latter section particular reference will be made to the response of advice agencies in the North East of England.

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1) Lord Chancellor's Department, "Legal Aid in England and Wales : A New Framework", (1987) Cm 118, para.3.

2) Lord Chancellor's Department, "Legal Aid : Efficiency Scrutiny Report, (1986).

3) Op.cit., Note (1).

4) This section was written using the Legal Aid Bill, HCB 182, as amended by Standing Committee D. This contained the majority of amendments to the Bill as originally published by the House of Commons (HCB 113). Further minor amendments were made in the House of Commons and these were set out in HLB 114. It was this amended Bill which was sent to the House of Lords, and was passed unamended to become the Legal Aid Act 1988, receiving the Royal Assent on 29.7.88.



(B) The Legal Aid Act (1988).

The Legal Aid Act has two main purposes, the first being to create a Legal Aid Board. The Board's functions would be to ensure that advice, assistance and representation were available in accordance with the Act, and to administer the Act.<sup>(5)</sup> The second purpose of the Act was to provide the Lord Chancellor with a considerable array of discretionary powers.<sup>(6)</sup> Each will be examined in turn.

(1) The Legal Aid Board. In line with the research preceding the Act the most important change implemented was in the administration of legal aid. The legal aid scheme itself remained, in structure, very much as it was in the repealed Legal Aid Acts, but with much of the detail of eligibility left to be defined by regulations.

The role of the Board is initially at least envisaged as being similar to that which the Law Society has played. That is, to ensure that the various types of legal aid are being provided without actually providing advice or representation themselves and taking a general administrative role with regard to the implementation of the Act.<sup>(7)</sup> Those areas of work currently part of the administration of legal aid, but which are handled by bodies other than the Law Society, e.g., the determination of client's means by the D.S.S., remain out of the ambit of the Board's role<sup>(8)</sup>

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5) H.C.B. 182, 53(2).

6) Some 56 such powers according to Smith, R., and Arnott, H., "The Legal Aid Bill", (January 1988), Legal Action 6.

7) Op. cit., note (3)s3(c).

8) Ibid., s3(4)

at least initially. In the longer term the Board does have the power to suggest that it should take over those, or any other functions, in relation to the provision of legal aid.<sup>(9)</sup>

As regards the practical work which the Board may undertake in the future, the Act provides little or no clue. There is extensive guidance as to how the Board will arrange its affairs financially<sup>(10)</sup>. However guidance as to all other aspects of the Board's role is avoided by the granting of an exceptionally broad power to do "anything" in relation to making available advice, assistance, and representation, or which is facilitative, incidental or conducive, to the Board's role of ensuring provision of legal aid and administering it.<sup>(11)</sup> The Act does provide for specific powers at the Board's disposal, but stresses that these in no way limit the broadranging powers already conferred.<sup>(12)</sup> These specified powers are related largely to financial matters<sup>(13)</sup>, but also include the power to publicise the Board's function<sup>(14)</sup>, and most importantly a research and development role.

(a) Research and Development. This power points the Board towards a role which has been notoriously badly fulfilled by the Lord Chancellor's Department<sup>(15)</sup> The importance of

9) Ibid., s 4 (8).

10) Ibid., s 4(2 a-d), s 4 (7), s 5 (2), s 6, s 7.

11) Ibid., s 4(1).

12) Ibid., s 4 (2).

13) Ibid., ss (2a) - (2d).

14) Ibid., ss (2e).

15) Legal Action Group, "The Legal Aid Board : Implications for Lawyers and Advisers", (26th March 1988) Conference Papers, para. 11.1.

inquiry and investigation into any of the proposed Board's functions<sup>(16)</sup>, and closely related to that, the power to advise the Lord Chancellor on any appropriate matter relating to advice, assistance, or representation, under the Legal Aid Act,<sup>(17)</sup> is recognised. These powers are the cornerstone of a research and development role for the Board, and must be seen as being of particular importance because of the stress placed upon them in the Act. This view can be supported from other sections, particularly bearing in mind that the Act makes specific separate note of the requirement on the Board to provide the Lord Chancellor with an annual report. This should be similar in purpose to that currently produced by the Law Society, explaining how it has discharged its functions in relation to legal aid.<sup>(18)</sup> The Act places a positive duty on the Board to publish information "as to the discharge of its functions". This relates not only to the provision of advice and representation services, but also to the administrative work associated with that, and more generally "other matters connected therewith."<sup>(19)</sup> This compliments the power to advise the Lord Chancellor by ensuring the publication of analysed data on the current workings of legal aid. Also this duty implicitly encourages the questioning and assessment of all matters relating to the current and

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16) Op.cit., note (5), s 4 (2f)..

17) Ibid., ss (2g).

18) Ibid., s 5 (3).

19) Ibid., s 5 (1).

future provision of those services.

(b) Contracting Power:- The second clearly stated power of the Board may have a more considerable effect on the provision of legal aid. This is the power of the Board to make contracts with, or grants of loans to, other persons or bodies to provide advice, assistance, and representation.<sup>(20)</sup> It is important to note immediately the role which the Lord Chancellor will play in this power. The Board can not exercise the power of its own accord, rather it must be directed by the Lord Chancellor to use its power. Even then it is quite clear that the Lord Chancellor will specifically decide the extent of the contract. This presumably means that the area of legal aid work to be contracted out, the amount of work or geographical area to be covered by the contract, and all financial aspects thereof will be controlled by the Lord Chancellor. The Act goes on to stress again that the Board must not stray from the directions specifically given by the Lord Chancellor himself.<sup>(21)</sup>

This power is typical of the Act in general in that it is vague in its meaning. There is no guidance as to the circumstances when contracts may be deemed suitable for implementation by the Lord Chancellor, and there is seemingly no limit as to the forms of legal aid work which may be contracted out of the general scheme. The Act provides no hint as to how the contracts may work. The possibilities include exclusive contracts, with whoever gains the contract

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20) Ibid., s 4 (4).

21) Ibid., s 4 (4a), s 4 (4b).

being the only source of that advice in that particular area. Alternatively the contracts may cover a specific number of cases which that agency must deal with, while remaining non-exclusive. In the latter case no guidance is given as to the extent that other agencies will still be able to receive payment for advice given in the same area as that in which the contract operates should a client come to them with that particular problem. The Act does provide that the client shall still have the right to select their own solicitor or barrister to provide them with the appropriate advice, assistance or representation,<sup>(22)</sup> (subject in the case of representation to the existence of a contract in civil legal aid cases,<sup>(23)</sup> or regulations in criminal legal aid cases.<sup>(24)</sup>) This might appear to enshrine non-exclusive contracts, but this right is subject to the willingness of the solicitor or barrister to provide the service under the Act. Therefore if there is a contract which excludes other providers from offering advice, assistance and representation then under the Act those 'willing' to provide the service can only be those holding the contract, and therefore consumer choice could be limited.

Also there are no clues as to whether there will be minimum standards of provision imposed on contractors, both as to the quality of the service, and as to the number of clients seen. Once one foresees standards of service as a criterion in contract relationships the question of how

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22) Ibid., s 32 (1).

23) Ibid., s 32 (2).

24) Ibid., s 32 (3).

these standards could be enforced must also be solved. Here again the Act provides no guidance, all that we can presume is that these factors fall to the discretion of the Lord Chancellor.

Therefore we have seen that the Board does have new powers over those which were held by the Law Society when it administered legal aid. The research and development function of the Board is quite clearly formed in the Act, and it is up to the Board to grasp the nettle in assessing the purpose of legal aid as well as day to day business of usage and administration. With regard to the power to contract aspects of legal aid to other persons or bodies the role of the Board is far less clear. Obviously by research the Board should be able to influence the Lord Chancellor's decision as to whether to make contracts and on what conditions. However, ultimately the decision remains with the Lord Chancellor, who, unfettered by limitations in the legislation on his power, may do largely as he sees fit.

(2) The Lord Chancellor's Powers.

Two words are particularly noticeable in the Bill for their persistent recurrence, Lord Chancellor. It is to be expected that the representative of the Government, and, although not directly elected<sup>(25)</sup>, of the people, should retain some measure of control and supervision over legal aid, which constitutes a considerable percentage of his department's total budget. The question which we must ask is whether the powers which the Lord Chancellor will have when the Act comes into force are merely sufficient to allow him to keep an ultimate check on how the Legal Aid Act is put into practice, or whether they could represent an unarticulated desire on the part of the Lord Chancellor to play a more direct and interventionist role in the provision of legal aid. There are five main areas within the Bill where the Lord Chancellor's powers play a central part, we shall now look at these.

(a) The Legal Aid Board:- There are factors inherent in the creation of a centrally controlled Board which mean that inevitably the Lord Chancellor will exercise a large measure of control over it. The creation of the Board obviously involves powers as to the appointment of members<sup>(26)</sup>, and to the size of the Board.<sup>(27)</sup> However the discretion of the Lord Chancellor is given much room for manoeuvre in the size of the Board, the type and skills of the

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25) The Lord Chancellor sits in the House of Lords rather than the House of Commons.

26) Op.cit., note (5), s 3 (5).

27) Ibid., s 3 (6).

people appointed,<sup>(28)</sup> and most importantly the ratios of one particular skill to another on the Board. There are four guaranteed places for legal professionals<sup>(29)</sup>, and none for consumers or interest groups. These factors obviously would not prevent appointments from such bodies as interest groups, but it is important that groups other than the professionals can not be certain of a voice as of right, and they must rely on the Lord Chancellor's good will for their seat.

Similarly given the Board's responsibility for expenditure it is procedurally correct that the Lord Chancellor should have powers to inspect and audit the Board's accounts,<sup>(30)</sup> and also have some control over the use of capital for the purchase and sale of land,<sup>(31)</sup> since he is personally responsible for presenting the annual report of the Board to both Houses of Parliament.<sup>(32)</sup> Essentially the Lord Chancellor's role would be to ensure that the Board was correctly fulfilling its function without straying across the parameters of what it is financially entitled to do. The Lord Chancellor will hold further powers in relation to both the income and expenditure of the Board. As regards expenditure the Board can make payments which are "incurred under the Act",<sup>(33)</sup> which seems reasonable, but the Lord Chancellor is given an additional power to make payments (with Treasury concurrence) for the "purposes of the Act".<sup>(34)</sup>

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28) Ibid., s 3 (9).

29) Ibid., s 3 (7) and (8).

30) Ibid., s 5 (7), s (7).

31) Ibid., s 4 (7).

32) Ibid., s 37.

33) Ibid., s 6 (2a).

34) Ibid., s 6 (2d).



Although the distinction is grammatically slight it's implications could be much broader. The Lord Chancellor does not have to remain within the bounds of what is laid down in the statute, but rather he can use his discretion to decide the broader purpose of the Act. This is an important power, and it is a weakness to the Board that it does not possess it. The Lord Chancellor also has an additional power over that of the Board with regard to income to the legal aid fund. He may (again with Treasury concurrence) determine that other receipts of the Board should be paid into the fund.<sup>(35)</sup> Again it is a marked omission that the Board itself should not have such a power.

The Lord Chancellor also has powers conferred upon him as regards the practical day to day business of the Board. One would expect that the Board would positively desire guidance on some aspects of their work from the Lord Chancellor. The right of the Lord Chancellor to give guidance is covered by the Act,<sup>(36)</sup> and the Board must have regard to it, but it is not bound by it. Of course this could be a matter of semantics because the Lord Chancellor may frame his "guidance" in such a way that the Board has little choice but to act accordingly. The Lord Chancellor may also play a considerable role in defining the research role which the Board can take since the annual report of the Board must deal with all matters

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35) Ibid., s 6 (3f)

36) Ibid., s 5 (5)

Which the Lord Chancellor directs.<sup>(37)</sup> Should the Lord Chancellor wish this section of the Act would allow him to direct the Board to undertake such work that would either leave no time, or no resources to allow them to undertake other research which they would prefer to prioritize.

There are two areas where the Lord Chancellor has particular power to control the Board, and these both relate to the future development and possible changing role of the Board. The powers place the ability of the Board to define it's own development and purpose into jeopardy. Firstly we should note that the Board is given the power to advise the Lord Chancellor that it wishes to take over functions relating to legal aid currently undertaken by bodies other than the Law Society.<sup>(38)</sup> However ultimately it will be the Lord Chancellor who assesses the suitability and readiness of that function to be transferred to the Board's control.<sup>(39)</sup> His decision may be based on many factors which may not include the development of the Board as an independent and respected body as a central purpose. The ability to make contracts for the provision of advice, assistance or representation by other persons or bodies is, as we have seen,<sup>(40)</sup> strictly at the Lord Chancellor's discretion and control. Should the Board decide that contracting with agencies to provide services currently provided under the legal aid scheme is the most desirable way to proceed, then the Lord Chancellor could either oppose such contracts completely or allow only an emasculated form to be put into operation.

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37) Ibid., s 5 (4)

38) Ibid., s 4 (8)

39) Ibid., s 3 (4)

40) Ibid., s 4 (4). See text to notes (20) to (24).

Equally it is possible that against the advice of the Board the Lord Chancellor could direct the Board to implement such a policy.<sup>(41)</sup>

Therefore we have seen that as far as the Lord Chancellor's powers in relation to the Board are concerned, he could exert considerable influence in relation to the financial activities of the Board and in directing its day to day running. He could feasibly exert a controlling influence over the composition of the Board, its research, and both its development plans, and policy. The powers which the Lord Chancellor has in relation to the Board are formidable, they appear to go beyond the powers necessary to keep the Board in check, and they could be seen as giving the Lord Chancellor an intrusive superiority over the Board.

(b) Legal Aid:- The availability of, and payment for advice and assistance (including both green form advice and assistance, and assistance by way of representation), and for representation under civil and criminal legal aid are dealt with in turn by Parts III, IV and V of the Act. Parts IV and V contain the bare practical details of how civil and criminal legal aid can be obtained. Part III relating to advice and assistance contains no details as to where or from whom the client will be able to receive it. There are opportunities for the change or exclusion of such advice and assistance from that which exists as a result of current legislation. Any part or all of the advice and assistance available could be provided

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41) Op.cit., note (5), s 4 (4a).

in a form different from that for which the scant details of the Act provide,<sup>(42)</sup> and advice and assistance under the scheme could be limited to specifically defined groups of people.<sup>(43)</sup> This latter clause would allow delimitation of free legal aid to people receiving income support should the Lord Chancellor so wish, and the former allows for the contracting out of all or part of advice and assistance. For civil legal aid if a contract for representation exists then the client's choice of representative may be limited to those who hold that contract.<sup>(44)</sup> More generally the choice of a solicitor or counsel to provide advice assistance or representation may be limited to those who are members of a particular panel,<sup>(45)</sup> and therefore deemed as experts in that area. These powers are exercisable by the use of regulations by the Lord Chancellor.<sup>(46)</sup>

Although the powers outlined above could prove to be part of a scheme of considerable change they are not immediately the most important powers which the Lord Chancellor holds in relation to legal aid. The areas which the Act deals with are to do with administrative matters, the Act makes no mention of financial matters. For all forms of legal aid the eligibility levels which are defined by the financial resources of the person applying

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42) Ibid., s 8 (3).

43) Ibid., s 8 (4).

44) Ibid., s 15 (5), s 32 (2).

45) Ibid., s 32 (7).

46) Subject to the conditions in s 36 of the Bill.

for legal aid are to be defined by regulations made by the Lord Chancellor.<sup>(47)</sup> The Act makes no mention of a set percentage of the population as an approximate level of eligibility. In fact it does not give any guidance at all as to how many people the Lord Chancellor feels should be entitled to legal aid either freely or paying some contribution, or what criteria he will use to decide these questions. As far as an unchanged demand led scheme of legal aid is concerned this power is the single most important factor in controlling the total expenditure on legal aid. Its control by the Lord Chancellor alone through regulations suggests that the levels will be set according to their financial expediency rather than within a broader framework of improving access to justice for those of small or moderate means.<sup>(48)</sup>

(c) Regulation Making Powers:- Although the Lord Chancellor is provided with regulation making powers throughout the Act. s34 draws together and elaborates on some of these. Basically the Lord Chancellor's power to make regulations is without express bounds. He may make regulations for any purpose when it appears to him to be necessary or desirable, to give effect to the Act or prevent abuse of it.<sup>(49)</sup>

Particularly important regulatory powers include the ability to control eligibility levels according to financial

47) Op.cit., note (4), s9 ss (1) (2) (6) (7), s 15 ss(1) (6) (7), s16, s21 (5), s 23, s 24.

48) Op.cit., note (1), para. 1.

49) Op.cit., note (4), s 34 (1).

resources as mentioned above,<sup>(50)</sup> and the ability to control the remuneration from all legal aid work to solicitors and counsel.<sup>(51)</sup> In this latter area the Lord Chancellor has additional powers to impose penalties and restrictions on the remuneration,<sup>(52)</sup> and also to determine the level of remuneration with reference to set criteria which include not only the quality and quantity of the work undertaken, but also the cost to public funds.<sup>(53)</sup> This suggests a requirement to perform a balancing role between what in reality the work of the solicitor or barrister is worth, and what the government is prepared to pay.<sup>(54)</sup>

The regulatory powers also extend to the ability to fundamentally alter the applicability of the Act itself in terms of the people to whom, and circumstances in which, legal aid is available.<sup>(55)</sup> This again reflects the very broad and wide-ranging power which the Lord Chancellor will receive in the Act. His role will not simply be to monitor and check at the edges the provision of legal aid, leaving the running to the Board, but rather these are powers to permit the structural control and definition of legal aid.

(d) Lord Chancellor's Legal Aid Advisory Committee :- The Lord Chancellor has the power to abolish the Advisory Committee at will,<sup>(56)</sup> without any guarantee that it's function

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50) Ibid., s 34 (2c) and text to notes (47) and (48) above.

51) Ibid., s 34 (2e).

52) Ibid., s 34 (7).

53) Ibid., s 34 (9).

54) It is worth comparing s39 of the Legal Aid Act 1974 and the new s 34 (9) which will take its place. See Legal Aid Bill 1988, Schedule 8, para.3.

55) Ibid., s 34 (3).

56) Ibid., s 35 (6).

will be carried out by any other body of an equally independent nature.

(e) Finance of the Board and Legal Aid Fund:- Here again the Lord Chancellor's powers of control are extensive. The Lord Chancellor will assist in making payments to cover the Board's expenditure in respect of provision of advice, assistance, and representation, and costs, but he shall retain control over the manner and timing of such payments.<sup>(57)</sup> For all other expenditure by the Board, presumably involving administration, research and other expenses not directly incurred in the provision of advice, assistance or representation, the Lord Chancellor can impose such conditions as he sees fit on the provision of those monies.<sup>(58)</sup>

### (3) Conclusion

It does not seem unreasonable to conclude, from what we have seen of the powers which the Lord Chancellor will receive under the Legal Aid Act 1988, that it will be possible for him to control the Legal Aid Board, its work and its development, and define the scope and availability of legal aid. The creation of the Legal Aid Board may be seen as secondary to a redefinition of power and discretion by the Act in favour of the Lord Chancellor. All will in reality depend on the intentions of the Lord Chancellor.

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57). Ibid., s 42 (2a).

58). Ibid., s 42 (2b).

If he desires a strong independent Board then he will appoint one, and vice versa. The only thing that we can say with certainty is that the Board is not assured of independence from the Lord Chancellor. It is therefore the duty of the Board to clarify its perspective and define its purpose. If the Board takes a strong and independent stance as to what it sees as the plan for legal aid then at least the Lord Chancellor's response will bring his own perspective to the fore.



(C) The Lord Chancellor's Perspective.

Although we can not be certain as to what the Lord Chancellor's planned role for the Legal Aid Board or for legal aid in the future is, there is some information which might be of use in giving at least a partial view. The White Paper, *Legal Aid in England and Wales : A New Framework*<sup>(59)</sup> included both the Lord Chancellor's response to the proposals of the Efficiency Scrutiny, and his own proposals for reform of Legal Aid, and as such provides a distillation of the broader perspective of the Lord Chancellor's Department.<sup>(60)</sup> The White Paper<sup>(61)</sup> achieves this in a way that the Efficiency Scrutiny could not since it was made up of members of the Efficiency Unit itself, and Treasury staff as well as members of the Lord Chancellor's Department, and as such held a combined perspective. Therefore we shall look at the White Paper to see what clues are given as to what role the Lord Chancellor expects the Board to take particularly with regard to the provision of legal aid.

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59) Op.cit., note (1)

60) During the production of the Bill there were three different Lord Chancellors in office, Lord Hailsham when the Efficiency Scrutiny and White Paper were produced, Lord Havers during much of the period of preparation of the Bill, and Lord Mackay when the Bill was presented. There does not appear to have been any significant change in the Department's perspective.

61) Loc. cit., note (1).

(1) Problem and Response. It would appear that the problem of legal aid has been viewed as largely one of administrative structure, which has led to inefficiency in both the organisation of, and means of providing, the service. The Lord Chancellor therefore suggested administrative change by the creation of the Board<sup>(62)</sup> which would ensure that one body would be responsible for administering all aspects of legal aid<sup>(63)</sup> while also allowing it to review provision of advice and assistance.<sup>(64)</sup>

This analysis would suggest that the role of the Board as seen by the Lord Chancellor will be an administrative one, rather than an active and creative one. This view can be supported by the different work which the White Paper emphasises as suitable for the Board, and then looking at the work which is regarded as suitable for the Lord Chancellor to undertake. The following are four examples of which are specifically stated as being appropriate for the Board to undertake, and all involve the Board's research role. "As an early task" the Board will be required to consider the most cost effective way of providing advice and assistance,<sup>(65)</sup> and to consider whether there should be further exclusions of areas of work from the green form scheme.<sup>(66)</sup> The Board could also consider whether there should be a single scheme for advice and representation in criminal cases,<sup>(67)</sup> and should monitor

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62) Ibid., para. 15.

63) Ibid., paras. 13 and 18.

64) Ibid., para. 5.

65) Ibid., para. 26.

66) Ibid., para. 28.

67) Ibid., Annex B, Chapter II, Part 1.

the number of applications for a change of solicitor.<sup>(68)</sup> We should note immediately that these would all be duties to enquire into new areas, but not to do anything about them.

When these powers are compared to those suggested as suitable for the Lord Chancellor to exercise the difference in the power distribution envisaged is quite obvious. The Lord Chancellor has removed conveyancing and wills from the work which can be undertaken on green form advice and assistance<sup>(69)</sup>; the opposing party in litigation will be given the right to make representations against the grant of legal aid to the applicant;<sup>(70)</sup> the litigant receiving civil legal aid will have to pay contributions throughout their case rather than for a period of only one year;<sup>(71)</sup> fee rates can be substantially controlled since they will no longer be related in any way to equivalent private fees, and standard fees and payment on account will be introduced on more permanent bases;<sup>(72)</sup> the situation of cases will automatically be reviewed when costs reach £8000 or when the case has been in progress for one year<sup>(73)</sup>; and also judges and magistrates may order solicitors to pay the cost of predictably unnecessary adjournments.<sup>(74)</sup> These are all examples of the substantial controlling powers which the Lord Chancellor has,<sup>(75)</sup> they

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68) *Ibid.*, Annex B, Chapter III, Part 2.

69) *Ibid.*, para. 28.

70) *Ibid.*, Annex B, Chapter II, Part 1.

71) *Ibid.*, Annex B, Chapter II, part 2.

72) *Ibid.*, Annex B, Chapter II, Part 3.

73) *Ibid.*, Annex B, Chapter III, Part 1.

74) *Ibid.*,

75) Other such powers can be seen in paras. 31, 42 and 44, and in Annex B in Chapter III, Parts 2 and 3.

represent an active and influential role within legal aid. The contrast to the role of the Board, as the new administration, can be further emphasised by the types of proposals which the White Paper notes as being areas for discussion with the administration before the Government implements them. These include control over solicitors travelling expenses; a more careful approach to the use of more than one counsel; and a more careful approach to disbursements.<sup>(76)</sup> These are minor issues, at the periphery of expenditure on legal aid, they show that the Lord Chancellor could have proposed discussion of more important issues with the Board, but the reality would appear to be that he wishes to keep the major policy and strategy decisions on legal aid to himself.

Therefore the evidence in the White Paper suggests that the Lord Chancellor sees the way to the production of an effective, efficient and value for money system of legal aid as being through a tightening of the administration of the scheme. The Board is the new broom to sweep clean, and its duties will be administrative rather than in a decision making capacity. The Board's role in consultation on decisions by the Lord Chancellor is also apparently envisaged as being at the margins of the scheme rather than in its centre.

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76) Ibid.

(2) Cost Cutting. The changes to legal aid and its administration proposed by the White Paper had financial implications of about a £10 million per annum saving.<sup>(77)</sup> This is a small saving in comparison to the total expenditure on legal aid which in the year of the White Paper was £365 million.<sup>(78)</sup> The Lord Chancellor could in no way be accused of undertaking an overt cost cutting exercise, but within his perspective could the tangible savings proposed by the White Paper be the thin end of the cost cutting strategy wedge to be implemented when the Board has been set up? Let us look then at how the Lord Chancellor intends to make savings.

(a) Green Form:- Assistance in making wills or in conveyancing will no longer be available under the green form scheme. Although there are no current plans to restrict the scope of green form further, the Lord Chancellor will make one of the early tasks of the Board to see whether further exclusions are appropriate.<sup>(80)</sup>

Whether this policy becomes one of cost cutting may depend on a number of factors, including the perspective and strength of the Board, the savings made by the immediate cuts, and the resources available in the future. What we can see from the statement is an openness to further narrowing of the scope of green form, and eagerness that this should be on the Board's immediate agenda.

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77) Op.cit., note (1), para. 7.

78) Lord Chancellor's Department, "37th Annual Reports of the Law Society 1986-87", (1988), p.86.

(79-80) Op.cit., note (1), para. 28.

(b) Appeal against the grant of legal aid:-<sup>(81)</sup> It is recognised that the grant of legal aid to one party can have a major impact on their opponent, and therefore the opponent will now be given the right to appeal against the grant of legal aid, before it is made. Presumably the criteria for judging whether or not to grant legal aid must largely rest on the merits of the case,<sup>(82)</sup> given that the financial criteria are satisfied. The interests of the opponent are not included as one of the criteria to be borne in mind while making the decision on the grant of criminal legal aid,<sup>(83)</sup> while for civil legal aid the granting of aid must appear reasonable in the circumstances.<sup>(84)</sup> Therefore for civil legal aid the case of the opponent could feasibly be argued solely on the basis of the resource advantage that the grant of legal aid could give to the applicant. However this situation would seem unlikely to arise because if the opponent was to be at such a disadvantage it would appear likely that he or she would also be entitled to legal aid.

Therefore we must assume that a decision on the grant of legal aid after an opponent's appeal would be decided in the light of the chances of success of either party. This situation would prejudice the outcome of the case since an applicant would be unable to proceed if aid was refused.

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81) Ibid., para. 37.

82) The "interests of justice" test for criminal legal aid, see s 21 (2) of the HCB 182, and the "reasonable grounds" test for civil legal aid, see s15 (1), same Bill.

83) Ibid., s22(2).

84) Ibid., s 15 (3a).

Also there would be no certainty that the Board (or other assessor's) judgement of the relative merits of the case would agree with that of the court. What we can be certain of is that the ability of the opponent to make representations can not result in more applicants being granted legal aid. It is likely to result in fewer successful applications, and thereby save legal aid monies. It should be borne in mind that the White Paper does not suggest that the present system is working unfairly against opponents or resulting in litigation which is futile and wasteful to their resources. The only justification for this additional layer of bureaucracy is that granting aid "may have a major impact"<sup>(85)</sup> on the opponent. If the assessment of the merits of the case will define whether legal aid is granted or not, those entitled on both financial and merit grounds to legal aid, will be denied that aid because it is decided that they can not win their case, rather than on the grounds of any disadvantage to their opponent should aid have been granted.

(c) Abolition of Discretionary Allowances<sup>(86)</sup>:- The Lord Chancellor again shows open willingness to cut costs by reducing eligibility for legal aid by looking into the removal of these allowances which allow earmarked funds to be ignored when assessing an applicants financial eligibility. The obvious result of this will be that applicants appear to have greater amounts of capital and income. This will result in a shunting up effect with less people being

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85) Loc.cit., note (81).

86) Op.cit., note (1), para. 42.

entitled to legal aid without any contribution, and more people falling outside the eligibility limits for legal aid altogether. Again this will have financial resource implications resulting in overall savings in legal aid expenditure due to less people being entitled to legal aid, and more of those who are entitled falling into the bracket of those who have to pay contributions.

(d) Continuing Contributions:- A legally aided client in a civil action for whom it is necessary to pay a contribution to the cost of their case will usually be assessed as being able to pay a fixed amount each month. The practice has previously been that the assisted person should pay this monthly instalment for a period of one year only. However in the White Paper the Lord Chancellor expresses his view that if the person can afford a fixed amount each month, then these payments should not last simply for one year, but should continue throughout the case however long that might be. (87)

Taken in abstract and at a theoretical level this proposal could be seen as being simply logical, but that would be to ignore its purpose and its result. The White Paper stresses (88) that the intention of this change is to instill a better sense of the cost of litigation to the legally aided client, not just to the taxpayer but also possibly to themselves. Almost without doubt instilling this sense will result in some people being unwilling to take up offers of civil legal aid with contributions because of the uncertainty of the final cost of the case to them. This

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87) Ibid., para.44.

88) Ibid., paras. 43 and 44.



fact, combined with the extra revenue from the new procedure, will again result in further savings in legal aid expenditure. The proposed change in procedure could also make a change in the perspective of the legal aid contribution, moving away from the idea of aid, and towards a system of payment on account. This can be supported by the statement that the client will not have to pay more than the cost of his or her case<sup>(89)</sup>. This does not rule out the idea that the client may in fact have to pay the total cost of their case, thereby receiving no benefit from the legal aid scheme at all, which would simply act as a guarantor.

(è) Remuneration:- We have seen that in the Legal Aid Act (1988) the Lord Chancellor has taken the power to set the levels of remuneration for all legal aid work, and to do so with particular reference to the cost to the taxpayer.<sup>(90)</sup> These proposals were made in the White Paper, and appear to represent an inclination on the Lord Chancellor's behalf to take a firmer control over lawyers' remuneration. The inclusion of the taxpayers' perspective shifts the emphasis away from simply being fair to the lawyers undertaking the legal aid work. This change may result in a fixing of remuneration at current levels, and thereby introducing a drop in rates in real terms. It seems likely that in the future it will be used as a justification for keeping remuneration for legal aid

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89) Ibid., para. 44.

90) Text to notes (52) to (54).

work even further behind private client work than it was before, despite widespread concern over the current lack of resources available,<sup>(90a)</sup> particularly with regard to criminal legal aid.

The White Paper also shows the Lord Chancellor's interest in introducing more standard fees for work done<sup>(91)</sup>. This is justified on simplified administration grounds, but it would also give the Lord Chancellor the power to control expenditure more rigidly, and it would be reasonable to assume that the standard fee would be set at the lowest average fee point for that type of work, rather than at a more generous point. This could result in lawyers undertaking work paid at standard fee rates having to expect to make a loss on those cases which prove to be more complex and time consuming. Therefore we can foresee cost cutting in various areas relating to remuneration of lawyers undertaking legal aid work.

Overall we have seen that the White Paper shows the willingness to make savings in the expenditure on legal aid at the expense of both consumers and providers of the service by narrowing the scope of the green form scheme; decreasing eligibility levels for legal aid; discouraging take up of legal aid by introducing appeals procedure against grants of aid; proposing to introduce continuing contributions; and finally by placing tighter control on

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90a) For example see Anon, "First Division Association Sounds Alarm on Legal Aid", (18 August 1988), *The Lawyer* 2.

91) Op.cit., note (1), para. 49.

lawyers remuneration. These factors could be seen as the thin end of a cost cutting strategy wedge. In some cases the implications will not be quantifiable until the extent of the Lord Chancellor's will to implement them has been made clear, but we can be sure that the Lord Chancellor is amenable to cuts in legal aid, however small, which are contrary to the interests of the consumers.

(3) Redefining Legal Aid. Legal aid has traditionally been provided by private practitioners who have been paid on a case by case basis. The Legal Aid Act (1988) introduces the possibility of contracting out advice, assistance and representation to other persons or bodies.<sup>(92)</sup> However the proposals in the White Paper relating to this, and other areas, implicitly show the tentative beginnings of a redefinition of legal aid in terms of legal services provision, of which the powers proposed in the Act form only part.

We have noted that this is within the Lord Chancellor's discretion to use the contracting powers in the Act, but that we could not tell to what extent he intended to use them,<sup>(93)</sup> the White Paper sheds light on this. We have seen that the Lord Chancellor will require the Board as an early task to look into the most cost effective way of providing advice and assistance,<sup>(94)</sup> but the positive approach which the Lord Chancellor takes to the result of this work is revealing. The White Paper states that "Once the Board has set up suitable arrangements for contracting..."<sup>(95)</sup> which seems to prejudge that the Board will report that contracting out advice and assistance is more cost effective than the present scheme of provision. Also in the following paragraph<sup>(96)</sup> when talking

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92) See text to notes (20) to (24), and notes (40) to (41).

93) Ibid.

94) Op. cit., note (65).

95) Ibid.

96) Op.cit., note (1), para. 27.

of the implementation of a contract into broader provision the White Paper says that this "will mean..." and "will take place". If the Lord Chancellor had intended to wait for the result of the Board's research before making his decision one would suspect that the terminology used would have been qualified so that it read "would mean..." and "would take place if...". The result is that we can be virtually certain that contracting will take place, and that the Lord Chancellor is particularly keen for it to be with advice agencies. (97)

This commitment to contracting shows dissatisfaction on the Lord Chancellor's part with the current provision of services in the advice and assistance area by traditional private practice, and an eagerness to find alternative means of providing those services. This theory is backed up by other proposals in the White Paper, particularly in relation to the creation of panels of solicitors skilled in particular fields. This is not a new idea, and in fact there are already existing panels for example for child care work, but what is new is that the Lord Chancellor wishes to make their use compulsory. (98) This idea can also be seen in the Act where the Lord Chancellor will have the power through regulations to curtail a persons entitlement to choose their own solicitor by saying they may choose only a solicitor who is a member of a prescribed panel. (99) The repercussions of this power

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97) Ibid., paras. 24, and 26.

98) Ibid., para. 58.

99) HCB 182, s 32 (7).

could be wideranging but we will only be able to tell if and when the Lord Chancellor decides to use his power. What we can conclude is that the Lord Chancellor is interested in limiting the outlets of advice, assistance and representation, by concentrating the work in the hands of those with proven expertise. Working within the present infrastructure of a mass of small private practices, the formation of specialist panels is the best way to draw together those with relevant skills who could not be drawn together in one practice or in the public sector. Because private practitioners have presumably chosen to work in the private rather than in the public sector the creation of specialist panels and delimitation of client choice of solicitor to those on that panel is possibly the closest the Lord Chancellor could come to forming a salaried legal service.

A further sign of the Lord Chancellor's recognition of the benefits of a salaried legal profession can be seen in respect of lawyers' remuneration. A system of payments on account has been in use by the Law Society for some time, but only on a temporary basis. The White Paper recognises that this system is useful, and proposes the creation of a permanent scheme, under the justification of the undesireability of lawyers having to wait a considerable time for payment for work done.<sup>(100)</sup> This is at best only a partial explanation, what it does not mention is that payments on account are a considerable advantage to the Lord Chancellor, particularly when combined with the proposed standard fees. Payments on account on a

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100) Op.cit., note (1), para. 52.

simple case by case model will provide the Lord Chancellor with a much simpler administrative task, but if he should decide to use a more complex model whereby, for example, solicitors were paid on a yearly basis on the understanding that they would undertake a minimum of X cases in any particular field of work, with X being similar to the usual yearly number of cases of that type which that firm undertook, and they would receive a payment on account of X multiplied by the standard fee for that work. Given that the Lord Chancellor does not own the legal practice, the contract would basically be quite similar to him employing someone to do the legal aid work. Again given the present infrastructure this model would be as close as the Lord Chancellor could get to creating a salaried legal profession. As it stands the Lord Chancellor's interest in payments on account is at least a recognition of the problems of a case by case approach to payment, particularly for the Lord Chancellor in his attempt to budget expenditure on legal aid accurately. If a more complex model of the scheme is implemented it could be another significant alteration in the current model of legal aid.

Therefore it would not be accurate to say that the Lord Chancellor intends to drastically shift the emphasis of legal aid as a payment to solicitors for legal services on a broader perspective in the near future, but what we can see is a distinct shift in emphasis with legal aid no longer being seen purely in terms of the private practice. The voluntary sector of advice agencies may now become involved in legal aid, private practitioners may have to become members of specialist panels to obtain legal aid work, and methods

of payment may become more geared towards a standardisation of commitment to legal aid. These are all important possibilities which could be the first tentative steps towards a redefinition of legal aid.



(4) Coverage of the Legal Aid Scheme. The statement of coverage of legal aid contained in the White Paper<sup>(102)</sup> is very carefully worded and should be closely examined. It begins with a statement of eligibility for legal aid, some 70% of households qualify, but it is also stated that this is an estimated figure. No indication is given as to where this figure comes from. Therefore the first sentence gives the impression that eligibility is high without having any actual evidence of this. The second sentence states that there will be no extension of the proportion of the population eligible, what this does is place the emphasis of the sentence on to extending eligibility so that the reader looks back to the proportion of people eligible and notes that 70% of the population does seem satisfactorily high. Of course what the sentence does not do is guarantee that eligibility will remain at current levels, nor does it say that eligibility will not be reduced. The final two sentences refer to the income and capital limits for legal aid, these will not be significantly changed, but they will be kept at an appropriate level. The meaning of this is obscure but shows the possible means justifying decreased eligibility. An appropriate level does not necessarily mean the 70% mentioned earlier in the paragraph, and could be a decreased percentage (we have seen that it will definitely not be increased). If there are no significant changes in the income and capital limits then far from keeping eligibility the same as the negative phrasing of relative non-change

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101-102) Op.cit., note (1), para. 41.

implies, eligibility will fall as inflation raises average capital and income limits above current levels. The paragraph is very carefully constructed but far from being reassuring, it implicitly opens the door to decreasing eligibility for legal aid.

This idea can be supported from two other paragraphs in the White Paper. The subsequent paragraph relating to the civil legal aid means test<sup>(103)</sup> includes the proposal to consider the abolition of discretionary allowances which are discounted when assessing clients income and capital limits.<sup>(104)</sup> This would obviously increase the income or capital which an applicant would appear to have, and therefore make them less likely to qualify for legal aid at all, or it would increase the contributions they would have to make. Therefore we see that as a direct result of the Lord Chancellor's unwillingness to change the income and capital limits, eligibility for legal aid will fall. Also as we have already seen<sup>(105)</sup> the Lord Chancellor will decrease eligibility for advice and assistance under the green form scheme by removing the scheme's applicability to wills and conveyancing. Therefore we can see that the coverage of legal aid, which is already uncertain, is likely to fall in the immediate future, despite the wording of the White Paper which purports to at least maintain the level of eligibility.

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103) Ibid., para. 42.

104) See text to note (86).

105) See text to note (80).

(5) Conclusion. If the Legal Aid Act told us very little about the Lord Chancellor's intentions then the White Paper is the opposite, giving us several insights into his thoughts at that time. We have seen that some of the ideas in the White Paper appeared directly in the Act, but it would be wrong to assume that those which did not are no longer on the agenda. The Lord Chancellor will have very broad regulatory powers under the new Act, and in his response to the Efficiency Scrutiny Report he undertook to implement several proposals which do not appear in the Act.

It appears that the White Paper provides an often clear distillation of the Lord Chancellors' intentions, for example he appears to intend the Board to take a largely administrative vote with some advisory powers, and cost cutting is certainly on the agenda. If the proposals in the Bill are implemented fewer people will be eligible for fewer legal aid services, which may be more difficult to obtain, and they may well have to pay more for them in contributions. Not only will the client suffer but so too might the lawyers who may face reduced remuneration. Other of the Lord Chancellor's intentions are less clear but we have clues that he may be slowly moving away from the traditional means of provision of legal aid, although his motives for this are uncertain, and also we can see that the door is open to reducing eligibility for legal aid further, and tentative moves have been made in this direction, but the extent of his intentions are uncertain. The White Paper has proved to be a very important source of clarification of the thinking behind the bare bones of the Act, much of value can be surmised from it.

(D) Response to the Proposals.

In looking at the response of various agencies and commentators to the proposals for changes in legal aid there are two important factors which must be borne in mind. Firstly in many agencies detailed work was undertaken in response to the Efficiency Scrutiny Report, and in particular concentrated on the proposals therein relating to the abolition of green form advice and assistance scheme.<sup>(106)</sup> The force of the arguments in these documents was recognised by the Lord Chancellor in the White Paper<sup>(107)</sup> and the proposal to abolish green form legal aid completely was dropped. Although some of the problems identified as being likely results of the termination of the green form scheme are equally applicable to the likely results of contracting out of some areas of green form work, the salient features of the Efficiency Scrutiny proposal are removed and therefore the arguments used against the proposal become irrelevant to the new situation. This can be proved by example. It would be true to say of both the abolition of the green form scheme and contracting proposals that they will reduce the number of access points for consumers; they may lead to worsened relations between agencies; consumers may receive a less

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106) e.g. Advice services Alliance Newsletter, "Advice and Legal Services into the 1990s, the need for a National Debate", (Autumn 1986); Law Centres Federation, "Response to the Legal Aid Scrutiny Report", (1986); London Advice Services Alliance, "Response to the Report of the Legal Aid Efficiency Scrutiny", (Undated, presumably 1986); National Consumer Council, "The Reform of Publicly Funded Legal Services in England and Wales", (1986); North Eastern Legal Services Committee, "Submissions on the Scrutiny Report Prepared for the Lord Chancellor's Department", (Undated, presumably 1986); and Sunderland Advice Workers Group. "Response to the Legal Aid Efficiency Scrutiny Report," (1986).

107) Op.cit., note (1), para.23.

flexible and responsive service from the agency offering the advice, and other agencies may not be able to offer such a flexible service; there may be unwillingness to take cases on referral after initial work has already been undertaken on them; and there may also be the possibility of conflicts of interest with one agency representing both parties to a dispute. What these factors have in common is their general nature, but when we look at those factors which were the crux of the proposal to abolish the green form scheme we can see that they are not relevant to the current proposals. There will be no second tier bureaucracy in the form of compulsory attendance at an advice agency before referral to a solicitor, and therefore there will not necessarily be disjointed case development with clients being passed from one agency or solicitor to another. Advice agencies will retain their independence and local character rather than becoming pseudo-government agencies. There will be no need for extensive retraining of advice centre workers to cope with their new role. People with multiple problems should not be passed from one agency to another<sup>(108)</sup>. There will be no requirement for people contacting solicitors direct to pay a £10 fee. Contracts will only cover the areas of work that are applied for and therefore the problem of defining the boundary of work suitable for lawyers and that suitable for advice workers should not arise. All advice agencies will not have to cope with an enormous enforced increase in workload, for those who require alternative remedies, e.g.,

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108) HCB 182, s 8 (5).

through collective action, that should still be available. Therefore it would be inappropriate to look at the responses to the Efficiency Scrutiny in relation to the proposals we are dealing with.

The second factor which should be noted is that the timescale and progress of the Act has meant that comment on it has tended to be of a journalistic rather than analytical nature. Some agencies have concentrated their efforts on attempting to secure changes by Parliamentary briefing and lobbying rather than attempting to publish their analyses to generate debate on the proposals. It is because of these factors that the problems foreseen by commentators will be dealt with relatively briefly.

(1) Independence of the Board. The independence and stature of the Board have rightly been noted as fundamental to obtaining the trust of both the legal profession and its clients for the work it will do.<sup>(109)</sup>

Even before the White Paper was produced fears that the Board would not play as independent a role as the Law Society had done were felt by commentators.<sup>(110)</sup> This resulted in some attempts to influence the Lord Chancellor's decision as to the make up of the Board by suggesting that a wide range of agencies should have nomination rights to the Board,<sup>(111)</sup> but this suggestion was not recognised in the Act. The publication of the Bill also brought some confirmation of the intended position of the Board, and this brought its independence further into question. The control of appointments, lawyers remuneration and the contracting power of the Lord Chancellor rather than the Board were all noted, as was the relative inability of the Board to incur expenditure unauthorised by the Lord Chancellor. The Law Society itself commentated that the Board's independence must be at risk when such a variety of powers were held by the Lord Chancellor<sup>(112)</sup>. This feeling was reinforced by the qualified statements of the Board's independence which the Lord Chancellor made,<sup>(113)</sup> and his decision to keep his Advisory Committee which was seen as

109) Anon, Editorial, "The Bill, the Board and Opren", (April 1988), Legal Action 3.

110) Anon, Editorial, "Focus for Action", (March 1987), Legal Action 3.

111) Anon, "A New Framework", (May 1987), Legal Action 4; Anon, Editorial, "The Legal Aid Board", (June 1987), Legal Action 3.

112) All noted in Smith, R., and Arnott, H., "The Legal Aid Bill", January 1988), Legal Action 6.

113) Ibid., and Smith, R., "Legal Aid's New Guardian", (April 1988) Legal Action 6.

a sign that the Board would not be taking over its independent advisory position.<sup>(114)</sup>

The combination of these factors has lead to a seeming resignation at least in certain circles that the question of the Board's independence is "purely academic" because of the amount of power held by the Lord Chancellor.<sup>(115)</sup> It is in this final analysis that it is possible to take issue with the conclusion. It is certainly correct in the earlier analysis to recognise the substantial powers which we have seen that the Lord Chancellor will hold in relation to the Board, but it does not logically follow that the Board will not be independent. (Although the ability of Board to remain independent in the light of a long term divergence of interest from the Lord Chancellor must be in question).

If we look at the perspective of the Scottish Board we see that it does not regard itself as a "tool of Government", and its Chairman does not see its purpose as being to implement cuts in legal aid expenditure.<sup>(116)</sup> The Legal Action Group (LAG) conference paper<sup>(117)</sup> contained an important analysis of the perspective which they proposed the Board should take, and each member of the Board has been presented with a copy of this.<sup>(118)</sup> Combining this with the background of the newly appointed

114) Smith, R., Ibid.

115) Cape, E., "Legal Aid Proposals : A Practitioners Opinion," (May 1988) Legal Action 6.

116) Grosskurth, A., "LAG Conference", (May 1988), Legal Action 7.

117) Op.cit., note (15).

118) Op.cit., note (114).



Board members,<sup>(119)</sup> who include two former members of the LAG management committee, two solicitors with significant experience of, and commitment to legal aid work, and one barrister of similar experience, it would be unwise to underestimate the independence and perspective which the Board may seek to bring to bear on its broadly defined role in the Act. It will only be when the Board has taken control of legal aid that we shall see how much of a free hand the Lord Chancellor intends to give it, but assuming he does not intend to rule it with a rod of iron the Board could take a positive and independent view of legal aid and its administration.

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119) Anon, Editorial, "Directing the Management", and Anon, "Management at the Helm", both (June 1988) Legal Action 3 and 4 respectively.

(2) The Board's Role and Purpose. We have looked in some depth at what the Act could mean practically in terms of the work of the Board, and at the possible intentions which the Lord Chancellor may have with regard to the Board's role as shown in the White Paper. This theme has also been one of the major areas of concern expressed by commentators.

There have been two particular areas of discussion, the first has been cost cutting. The introduction of the idea of a Board to replace the Law Society in the Efficiency Scrutiny report was immediately picked upon as a sign that the Lord Chancellor intended to place tighter constraints on legal aid finances,<sup>(120)</sup> and in some cases lead to strongly worded rejections of the proposal being made to the Lord Chancellor.<sup>(121)</sup> Several areas of possible cuts or savings by the Lord Chancellor have received comment including the reduced scope of green form,<sup>(122)</sup> and the changed approach to remuneration of lawyers,<sup>(123)</sup> but perhaps the most important comment has related to the effect of the proposal that contributions to civil legal aid should continue throughout a case.<sup>(124)</sup> This is noted as changing the fundamental principle behind contributions for civil legal aid. Contributions will no longer be finite and fixed before the start of a case, and the result of this, it is claimed, could be as drastic as the

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120) Godden, G., "Two Advisers Give a Personal View", (September, 1986) Legal Action 4.

121) See Law Centres Federation (p.30), and North Eastern Legal Services Committee (pages not numbered, fifth sheet of report), op.cit., note (106).

122) Smith, R., "Scrutinising the Scrutiny", (October 1986) Legal Action 4.

123) Anon, "Lawyers Fear for Future of Legal Aid", (1987) 131 Solicitors Journal 1636.

124) Anon, Editorial, "Reviving the Poor Persons Procedure", (May 1987) Legal Action 3.

collapse of the system of contributory legal aid through disuse. This would be a very serious result, and although in reality it may not ultimately lead to the collapse of the legal aid contribution scheme it is likely to have a considerable and widespread result, particularly bearing in mind that more people will probably be liable to pay contributions as a result of the likely abolition of discretionary allowances. (125)

The second area where discussion has focussed has been on eligibility levels, and whether the Lord Chancellor intends to reduce these. There has been some confusion with Smith and Arnott feeling that the Bill gave no clues as to whether cuts were intended. (126) Although this may be the case, we have seen that the Lord Chancellor's intentions as expressed in the White Paper give very clear signs that eligibility levels will fall in real terms in the immediate future. (127) This question has stimulated perhaps two of the most important articles relating to the effects of the Act. Glasser has shown that there has been a massive drop in eligibility for legal aid between 1979 and 1986 and that this has not been improved to date. This fall has been largely disguised by selective redefinition of the concepts by which eligibility is measured, namely in terms of population or household groups. We are now in a situation where Glasser

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125) See text to note (86).

126) Op.cit., note (112).

127) Text to notes (102) to (105).

estimates that just over 50% of the population are entitled to legal aid.<sup>(128)</sup> He sees this decline as irreversible and likely to cut off a substantial part of the population from access to the courts and the legal process.<sup>(129)</sup> These are significant findings considering that the White Paper itself suggested that eligibility was still as high as 70%,<sup>(130)</sup> although this figure related to the number of households covered rather than the total population covered, which one would expect to be considerably less.

Both the areas where we have seen discussion of the proposals in the White Paper and Act have given cause for concern that the Board's purpose may be being mapped out in terms of at least restraint and possibility cuts in legal aid. The response to these possibilities has been positive. LAG in particular have stressed the importance of public debate as a means of influencing the Board's agenda,<sup>(131)</sup> calling for a clear policy framework<sup>(132)</sup> based on strong administration and a broad research and monitoring role.<sup>(133)</sup> Glasser too has looked into influencing the priorities of the Board suggesting reducing bureaucracy, creating more flexible financial conditions, concentrating legal aid work among fewer outlets, and again a research and planning role<sup>(134)</sup>

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128) Glasser, C., "Legal Aid Eligibility", (9 March 1988) Law Society's Gazette 11, at 12.

129) Glasser, C., "Financing Legal Services", (20 April 1988) Law Society's Gazette 11, at 14.

130) Text to note (102).

131) Op.cit., note (114).

132) Op.cit., note (119).

133) Op.cit., note (114).

134) Op.cit., note (128).

for the Board, though noting warily that continued control rests firmly with the Lord Chancellor<sup>(135)</sup>. The most important document has certainly been the above mentioned LAG submission to the Board, reproduced in its conference papers. The paper attempts a clear definition of the Board's purpose with reference to the Bill, White Paper, Efficiency Scrutiny, and comments of the Lord Chancellor in relevant House of Lords debates. This definition stresses the broadest role which the Board could be interpreted as having, noting management as only one segment of a more rounded role which should include a commitment to the provision of adequate services, research and development combined with monitoring and evaluation of both administration and services, a co-ordinating function for both legal and broader advice services, and a questioning attitude to its administrative structure.

The thought behind this action must be seen as logical. We have seen that the Lord Chancellor has sufficient powers to control the Board's actions to a large extent, and that his intentions for the Board's role may include cost cutting and decreasing eligibility levels for legal aid. Therefore the only unknown factor is the amenability of the Board to the Lord Chancellor's perspective, and given the difficult circumstances there seems to be most chance of positive results in attempting to win the Board members over to these alternative perspectives. We have seen above, with regard to the question

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135) Ibid., and op.cit. note (129)

of the Board's independence, that there are likely to be members sympathetic to the LAG perspective. Therefore, it seems logical to attempt to maximise the value of this influence over the Board's perspective before the Lord Chancellor exercises his influence in delimiting the way the Board can think and act.

(3) Contracting Out Advice and Assistance. We have seen that the Lord Chancellor is keen to contract out advice and assistance in some areas of work from the green form scheme<sup>(136)</sup>. Commentators on this have never doubted that the powers relating to contracting will be used, which seems a reasonable conclusion given the viewpoint expressed in the White Paper. Discussion on contracting has centred around two issues, firstly what the form which contracts will take, and secondly the problems which are seen as inherent in any form of contract. We shall look at these in turn.

(a) Contract Models:- We noted earlier that the Bill is cast in very general terms and gives no positive indications as to the form a contract may take, and although the White Paper does provide some clues it does not provide a comprehensive form which a contract might take. It is because of this that there has been speculation among commentators as to how and with whom contracts will be made. There have been several suggestions encompassing both the suspected intentions of the Lord Chancellor and the preferred options of individual commentators or groups.

(i) White Paper Model:-<sup>(137)</sup> This refers to a system involving agencies tendering for a specific area of work, welfare benefits advice being noted in the White Paper, over a specific geographical area, with the area of one of the Board's Area Offices being suggested. These areas of

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136) Text to notes (92) to (97).

137) Op.cit., note (1), para. 26.

work would thereafter be excluded from the green form scheme so that no other solicitor or agency in that geographical area would be paid for advice or assistance given which related to that particular area of work.

There are two riders to this description. Firstly that the form of coverage could vary from one area to another, and secondly that the Government would have to be satisfied that all areas of the country were fully provided for in all types of work. The Lord Chancellor himself has stressed his support for this flexible approach :

"I think the power of the Legal Aid Board to contract out this sort of advice should be preserved in fairly general terms, so that the particular agencies available in each locality could be considered. (138)

(ii) Conditional Tendering:- This model reflects a response to the White Paper model based on the assumption that tendering will be implemented and therefore the only influence an agency can have is to try to impose their own conditions on the contract. This has basically been where the National Association of Citizens Advice Bureaux (NACAB) have expressed their interest, and because of that, where there has been most discussion.

Smith in his response to the White Paper, (139) recognising the likelihood of money being taken from the legal aid budget immediately set a number of priority points. These were relatively general concerns regarding the need for continuing specialist advice, whether directly from solicitors or from support centres on a

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138) Thompson, P., "Lord Mackay talks to the Gazette", (24 February 1988) Law Society's Gazette 10.

139) Smith, R., "Warring Over Welfare", (May 1987) Legal Action 5.



national basis; continuing incentives for solicitors to do social security work; and a period of experimentation with new ideas before full implementation was considered. These ideas were refined when Blake and Beale suggested a particular system which was to become the unofficial basis of the NACAB model tender.<sup>(140)</sup> They took on board the ideas that the policy should be a national co-ordinated approach, and that the money should go towards specialist rather than generalist advice. Additionally they suggested that the money should be for a maximum number of clients (reflecting the number who would have received green form advice) with extra funding over and above that number; they noted the importance of preserving the established independence of the CABx network and therefore rejected means testing as having a detrimental affect on their image; and they recognised the need to placate the legal profession so as to sustain relations with them.

The Blake and Beale scheme would provide no extra money for individual bureaux, infact all the money would be used to set up regional support units for both social security and housing work. These units would provide specialist advice and casework for difficult or test cases, as well as a training role for bureaux in their area.

The response to the proposals has been mixed and NACAB itself has been split even at the most senior levels as to the viability of the proposals. Local feeling among

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140) Blake, A., and Beale, D., "Dear Bureau Manager", December 1987), Legal Action 6.

CABx in the North East of England has basically been behind that expressed by the Chair of NACAB, Sir Kenneth Clucas. He has stressed on separate occasions that the general advice service which CABx see as their basic function is seriously underfunded and is facing a continually increasing level of demand,<sup>(141)</sup> and certainly in the short term NACAB could give no commitment to becoming involved in such a scheme.<sup>(142)</sup> In the longer term he has stated that he is pessimistic about the ability of NACAB to become involved in a specialist service, describing the likelihood of such a scheme as "remote".<sup>(143)</sup> This can be contrasted to what Elizabeth Filkin NACAB Chief Executive Office has said. Expressing particular interest in welfare rights advice on the basis of the Blake and Beale proposals she has said that even on current funding levels she feels that a better service to clients is possible. While paying lip service to general CABx fears she has said that there was no evidence to support them, and with an eye to the future did not rule out the possibility of tendering for green form work.<sup>(144)</sup>

Commentators have taken up the points made by Clucas. In particular Cape has claimed that CABx workers would be unlikely to have the time or level of expertise necessary, while the CABx themselves would not have the worker resources

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141) Clucas, K., Open Letter to the Lord Chancellor, (23 December 1987).

142) Ibid.

143) Clucas, K., Untitled Report, 22 January 1988), The House Magazine 10.

144) Filkin, E., Speaking to the LAG Conference on the Legal Aid Board, (26 March 1988); and also see Grosskurth, A., "LAG Conference", (May 1988), Legal Action 7.

to take over even currently operating schemes. This would all be combined in the case of housing problems with the difficulty in creating a necessary strategy in the approach.<sup>(145)</sup> Therefore conditional tendering while not proving to be universally unpopular is still regarded, even by those most closely associated with it as having inherent problems, which some regard as likely to produce a worse rather than better system than the present one because of the failure to overcome the basic problem of a lack of adequate resources.<sup>(146)</sup>

(iii) Franchising or Bulk Funding:- Although commonly called "franchising" it has been pointed out that such a definition does not emphasise the non-exclusivity of the contracts involved, and therefore bulk or block funding would be more suitable descriptions.<sup>(147)</sup> Non-exclusivity of the contracts in this model are its most important feature, although the degree of non-exclusivity is regarded differently by different commentators, with LAG suggesting that no firm should be excluded from the scheme,<sup>(148)</sup> but Bridges suggesting that to be entitled to a contract a firm or agency would have to prove its commitment to that work by undertaking a minimum amount of that type of work.<sup>(149)</sup> The idea behind this model is that any firm or agency could enter into a contract with the

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145) Cape, E., "Legal Aid Proposals : A Practitioner's Opinion", (May 1988) Legal Action 6.

146) Ibid.

147) Bridges, L., "Legal Aid : A Plea for Realism", (February 1988), Legal Action 8.

148) Anon, "Franchising Legal Aid", (January 1988) Legal Action 5.

149) Op.cit., note (147).

Board to provide particular services with conditions attached as to the quality of the service. LAG have said that the emphasis should be moved away from the idea of the lowest tender getting a contract,<sup>(150)</sup> but Cape has quite correctly noted that there is no evidence from other social service areas which have had contracting of any sort that this would be the case.<sup>(151)</sup>

This system is perhaps the most flexible since it covers any type of work, not just green form, and it is tied up with such ideas as payments on account and fixed fees<sup>(152)</sup> which the Lord Chancellor has shown himself in favour of. The possible problems with it are that although leading to some administrative simplification it is not directly in line with the Lord Chancellor's proposed scheme and therefore it might not be seen to be achieving what the Lord Chancellor sees as his priorities. Particularly the likelihood of any resultant savings in expenditure are remote given the needs for quality control of services, a factor which could be crucial.<sup>(153)</sup>

(iv) Improving Green Form:- Although in reality this is rather an anti-contract model and therefore perhaps least likely to have any effect it has received some support. Bridges<sup>(154)</sup> particularly has suggested that savings in green form could be made by reducing the cost

150) Op.cit., note (148).

151) Op.cit., note (145).

152) See text to notes (100) - (101).

153) Op.cit., note (145)

154) Op.cit., note (147).

to the legal aid fund of the first half-hour advice. In some cases this half-hour could be used as a cut off point for advice such as benefit determination. Savings will be made by solicitors either working at this initially reduced rate, or working at the full rate from the beginning of a case if the client had had an initial diagnostic interview with a CAB. The full rate charged would include a fixed fee to be paid direct to the relevant CAB. LAG have also shown some interest in this area, suggesting that perhaps there could be stricter rules relating to the legal component of advice given. (155)

(b) Contracting's Inherent Problems:- Contracting has been seen not only in terms of the form it might take but also in the problems it might bring. These points have not been used in a coherent attempt to change the Lord Chancellor's view on contracting, rather they have emerged as examples of the possible injustices of such a scheme.

There has been some discussion about the number of outlets for advice under a contracting system. (156) Solicitors point to the legal aid figure and say that they provide 9000 outlets for legal aid and that a contract system would severely diminish client access to justice. In reality considerably fewer firms provide advice on

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155) Anon, Editorial, "Open to Tender", (November 1987), Legal Action 3.

156) Meredith, E., "Two Advisers Give a Personal View", (September 1986), Legal Action 5; and Blake and Beale, op.cit., note (140).

social security matters, and even fewer could profess expertise in that area. The problem is that no one knows how client access will really be affected, taking account of limited lawyer expertise, yet one would expect this question to become central when the Lord Chancellor looks to see whether contracting would provide adequate coverage of an area as he said he would in the White Paper. (157)

The multiple problem case has also raised concern, in that commentators fear that a client will not be able to receive advice and assistance on more than one problem if one of these relates to an area for which a contract exists. The client may not be able to ask the solicitor or agency to give advice on for example a social security problem if their solicitor does not hold the contract for that work. (158) The validity of the points made has had some effect in this case with s8(5) of the Act stating that where a client is already receiving legal aid for representation they can obtain advice and assistance "in connection with" those proceedings without reference to changes imposed by the Board under the Act. The Lord Chancellor has explained the purpose of this specific point, (159) saying that "advice incidental to or arising out of" a major matter being dealt with by a solicitor should also be given by that solicitor. The question of

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157) Op.cit., note (137).

158) See Anon, Editorial, Op.cit., note (155); Cape, op.cit., note (145) Grosskurth, op.cit., note (144); and Smith, op.cit., note (139).

159) Op.cit., note (138).

the fee for this work has not been looked at but legal profession would presumably not accept less than the green form rate, which could cause administrative difficulties for a system working on the basis of standard fees and payments on account since this additional work could not be foreseen when any case started.

A contracting system which transferred work to advice agencies was initially seen as likely to disperse monies intended for legal advice into general advice provision,<sup>(160)</sup> and this could still be the case should advice agencies tender on a purely regional basis. In that case money would go directly to one agency who would simply expand their service of general advice to cope with the increased demand. It was in response to this possible problem that the idea of specialist local legal units was mooted,<sup>(161)</sup> and on which Blake and Beale's Regional Support Units (RSUs) idea was based.<sup>(162)</sup> Blake and Beale noted that to divide the likely contract monies between all CABx would be to spread it too thinly, resulting in a failure to tackle the basic problems of increasing demand for services. They also feared that it might result in an equivalent decrease in funding from the local authorities. The RSUs change the emphasis of the funding increase to new support services and inevitably this is largely in the form of specialist assistance to the

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160) Op.cit., note (139).

161) Op.cit., note (155).

162) Op.cit., note (140).

generalist front-line agencies. We can assume then that if NACAB were to tender on the Blake and Beale conditions then specialist advice would still be available, but should advice agencies individually tender and gain contracts then it seems likely that the specialist advice currently provided by solicitors would no longer be available to the consumer.

Therefore although there is some reassurance with regard to the fears for the multiple problem client, the crucial questions of the access to advice outlets and the continuing availability of specialist legal advice are left largely unanswered, despite their fundamental bearing on the provision of advice in whatever form.

(c) The Response to the Contracting Proposals:- The response in the North East of England was put into motion by a conference organised jointly by the Advice Services Alliance (ASA), and NACAB. The attendance at this meeting was broadranging with independent advice centres, CABx and local authority welfare rights representatives making up the bulk of the numbers but many other more varied agencies were also represented. There were representatives from legally orientated groups such as North Eastern Legal Services Committee (NELSC), and North Eastern Legal Action Group (NELAG), but also representatives of organisations such as the probation service, the community relations council, as well as academics. No private practitioners attended in their own right, although the representatives from NELAG may have been solicitors in that field.

Perhaps because of the make up of the attendance there was a considerable amount of agreement about the



approach to the Act, which resulted in the formulation of a strongly worded resolution which was agreed upon by a sizeable majority of the body.<sup>(163)</sup> This resolution rejected totally the concept of competitive tendering for advice and legal services. Action was recognised as being necessary and a standing committee of all groups representing providers and consumers of legal and advice services was called for. The resolution gave the standing committee specific aims. The first was to formulate and promote opposition to the Bill, and the second was to initiate the production of a development plan for advice and legal services in the North East.<sup>(164)</sup>

The standing committee did not meet until the formulation and implementation of a policy of opposition to the Bill was not a feasible aim,<sup>(165)</sup> and the focus of the committee was therefore changed to the production of a development plan for the region, and to an attempt to create a suitable umbrella agency, such as a North Eastern ASA, to give the standing committee a more permanent basis. These projects are both in progress. It is worth noting that the regional development plan is viewed by the independent advice sector as the alternative to a method of development dictated by contracting. It has been noted that a united advice sector could "forget

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163) Minutes of Legal Aid Conference (23 March 1988).

164) The idea of regional development plans is not new, their purpose and form are described in the Law Centres Federation, "Response to the Legal Aid Scrutiny Report", (1986) 7; and London Advice Services Alliance, "Response to the Report of the Legal Aid Efficiency Scrutiny", (Undated, presumed 1986), Section 3.

165) 7 July 1988.

tendering" and continue to do the work that is being done at present, with the regional development plans being offered as an alternative to legal aid.<sup>(166)</sup> This approach would seem to fall into the block funding model of contracts, an attempt to use the Board's contracting powers for non-competative development. As such the problems outlined with the block funding approach will apply to such plans, and in the North East these will be exacerbated. Despite the unity of the independent advice network, and the disapproval of the local Law Society there is one firm of solicitors who are known to be ready to tender for advice on welfare benefits. Should that firm obtain a contract then it would seem most unlikely that more money would be made available to the area for the development of advice services. Nevertheless the regional development plan is the most positive stance that could be taken by agencies which are strongly opposed to the principle of competative tendering, and in the long term these plans could at least be valuable tools in negotiating with local funders for improved advice and legal services.

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166) Kate Markus, Law Centres Federation Secretary, speaking at the North East Legal Aid Conference (23 March 1988).

(4) Conclusion. The response of agencies to the Legal Aid Act 1988 shows signs of a recognition that the possibility of influencing the Lord Chancellor and Government's view of the requirements of legal aid is minimal and that the response must therefore be in the form of positive proposals to the Legal Aid Board itself.

Whatever the powers of the Lord Chancellor the possibility that the Board will have an independent standpoint is very real, and this must bode well for legal services provision. The intended form of the Board may not be that which agencies may have hoped for, and its agenda has been recognised as possibly involving cost cutting and decreasing eligibility for legal aid. The decision, particularly by LAG, to attempt to take the initiative in setting the Board's agenda, and hopefully pre-empting the Lord Chancellor must be seen as important. This move shows the recognition that the Board could give a valuable mouthpiece to consumers and producers of legal services, and that from now on they will probably have to work through it.

The response to the proposals on contracting out advice and assistance from the green form scheme has been a diverse one. There has been a mixture of confusion as to what the proposals could entail, and objection to the perceived principles on which the proposals are based. While some commentators have felt that contracting is inevitable and therefore the best deal must be struck, others including the advice sector in the North East have refused to become involved even in the discussion of competitive tendering. Again the response has ended

reasonably positively with agencies in the North East attempting to formulate their own ideas as to how advice and legal services should be provided in the area. As with the LAG proposals these too mark a recognition that the Legal Aid Board will in future be the single most important agency administering and providing advice, assistance and representation, and as such it must be approached positively, not simply rejected.

It is recognised that the Legal Aid Act has made changes to the technical operation of the Legal Aid scheme. However the main thrust of the changes were not directed towards solving the technical problems noted in Part 1. The bureaucracy of the scheme will not be reformed. The scheme will continue to emphasise the individual problems of each poor client and ignore their collective poverty, which is often the cause of those problems. The Legal Aid scheme itself may cover less areas of work and fewer people, while it has been shown that many of the most relevant areas of law for the poor clients already fall outside the scope of the pre-Act scheme. Means-testing will remain, and therefore continue to conflict with the clients' interests. An essentially financial frame of reference has been imposed on the reform of the scheme, and as a result the Act has created new and possibly worse technical problems, while failing to deal with those already noted.

However, the problems of what the Legal Aid Act could do to the existing scheme should not divert attention from the still pressing structural problems from which the Legal Aid scheme suffers, and which the Act

failed to deal with. The Act failed to address the issue of the fundamentally social rather than legal nature of the problems of the poor clientele which the scheme is meant to assist. No proposals have been made which aim to improve the often negative attitudes of both lawyers and clients to legal aid work. The failure of private practice to provide the appropriate services, in the proper locations, for those to whom the legal aid scheme is targetted i.e., the poor, as witnessed by the role played by law centres, citizens advice bureaux, local government welfare rights departments, and (as we have particularly seen) independent advice agencies, has only been recognised to a limited extent. The proposals to contract out advice provision to these agencies could result in forced changes in the nature of those agencies who do tender for the work, rather than making use of the proven popularity of the current form of those services. Also contracting could result in competition for funding, with adverse results for the level of funding for advice services as a whole. By failing to solve the structural problems of the Legal Aid scheme, while imposing financial solutions to technical problems, the Legal Aid Act may result in a far greater waste of resources in terms of the true purpose of legal aid, to provide legal services for poor people.

APPENDIX AMethodological issues relating to the number of solicitors and offices in the North East of England.

The methodology used was basically that used by Foster.<sup>(1)</sup> The Law List is now contained in the Solicitors' and Barristers' Directory and Diary Volume 2, 1987 (being the most up to date copy available at that time). Section 4 of the Directory includes a geographical list of solicitors, a geographical breakdown of all solicitors principal and branch offices by town. Each entry included the names of partners, assistant solicitors and consultants, noted at the office at which they were present. All solicitors not in private practice e.g., those in other advice services, public authorities or industry, were listed separately, as were those who had retired. They were therefore easily distinguishable from private practitioners. Those solicitors noted as attending at an office but who did not have a practising certificate were included in the figures. This was because the Directory made it clear that this was simply the situation at 31.12.86, and those solicitors may well have applied or had a certificate granted since that date. Also, since the number was exceptionally small, it seemed sensible to err on the side of generosity.

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1) Foster, K., "The Location of Solicitors", (1973) 36 M.L.R. 153.

Consultants were not counted as solicitors present since by their nature they do not tend to be full-time members of staff.

Certain problems and possible mistakes arose in relation to the information in the Directory. No provision was made for distinguishing between full and part-time members of the staff at any particular office. This meant that, particularly at branch offices, if solicitors were only present for part of the working week, then they would be marked as being there full-time, and double counted at the principal office. Alternatively they would not be counted at the branch office but only at the principal office, thereby reducing the ratio of solicitors to head of population in the branch office areas. These errors would be impossible to correct without personal contact with all firms, which was impossible within the bounds of this work. Therefore all entries were counted as stated in the Directory in the hope that the opposite approaches might cancel each other out.

Double counting could also have been possible where firms failed to provide up-to-date information of the number of solicitors and their status within the practice. For example when partners had moved into their own practices, but their previous practice still listed them as current partners. Again without re-researching the Directory, perfect information could not be obtained. Corrections were made in the limited cases when personal knowledge of the situation was available. Similarly some towns were incorrectly noted in a particular county or district council area. Corrections were again made

wherever possible.

Undercounting of offices was also possible. This was because of the failure in the Directory to properly cross reference every branch office which should have been noted under the principal office of a firm. This meant that no information on that branch office was available since it was only feasible to count those offices noted distinctly.

Foster also noted the difficulty in editing the law list (Directory). He suggested that this could account for further omissions and inaccuracies.<sup>(2)</sup>

All information relating to legal aid solicitors and offices is from the Solicitors' Regional Directory 1987.<sup>(3)</sup> Possible problems with counting could arise here because of solicitors have to make their own returns of information. This may account for the small disparity between numbers of offices noted here, and in the Directory. Some solicitors provided no information about the work of the members of their practice. Although they may have stated that their firm would undertake legal aid work it is impossible to tell how many of their solicitors would actually be involved in that work. This may have lead to some undercounting of the number of solicitors offering to do legal aid work.

County and district population figures are from the Municipal Yearbook Vol.2, 1988.<sup>(4)</sup> For town and parish populations the Census 1981, Index of Place Names, England and Wales,<sup>(5)</sup> was used. Urban areas, urban area sub-

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2) See (1971) 115 Solic. J. 547.

3) Published by the Law Society.

4) Edited by W.A.C.Roope.

5) By the Office of Population Censuses and Surveys (published 1985).



divisions, and parish populations, were all noted but some towns were noted only as localities. These have no legally defined boundary and so it was impossible to produce any population figures for them.<sup>(6)</sup>

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6) Ibid., Explanatory Notes p.V.

APPENDIX BThe compilation of data on advice agencies in the North East of England.

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## A. Introduction

### 1. Research Objectives.

When a member of the public needs advice to solve a problem there are only a limited number of ways of obtaining it. Their choice will be further limited by their knowledge or preconceptions about the agencies offering advice. Some advice providers have a very definite image in the public eye. Solicitors are seen as dealing with very specific legal problems,<sup>(1)</sup> and many people would not use them without having first exhausted every other possible way of solving their problem.<sup>(2)</sup> Law centres have attempted to respond to the local needs of the community which involves some projection of an image, defined by the type of work they will undertake.<sup>(3)</sup> Citizens Advice Bureaux (CABx) project their generalist first port of call advice role which results in a broad cross-section of general advice being given,<sup>(4)</sup> their position is well publicised. However it was recognised that there were a substantial number of other independent agencies offering advice in one form or other on many topics of whom little was known.<sup>(5)</sup>

The purpose of this research was to compile a database of these advice agencies so that the services they provided, where and to whom could begin to be assessed.

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1) See usage figures for legal aid, Lord Chancellor's Department, (37th Annual Reports of the Law Society and Lord Chancellor's Advisory Committee, 1986-87", (1987) p.47 onwards.

2) Curran, B.A., "The Legal Needs of the Public," (1977) p.228.

3) Law Centres Working Group, "Towards Equal Justice," (1974). para. 3.12.

4) N.A.C.A.B. "Annual Report 1986-87", (1987), p.32.

5-6) When the author attempted to obtain information from the (FIAC) Federation of Independent Advice Centres database, he was told that he could only do so at a cost of £15, nor was the information available in local libraries.

It was recognised that the level of lack of information was large, basic information such as a list of addresses of agencies did not exist, and therefore within the time limits inherent in this work only the most basic information could be collected. Certain factors obviously projected themselves as being of importance, a list of addresses of relevant agencies, their opening hours, the type of advice offered and their ability to give that advice. Collection and analysis of this information would be of importance in establishing the role played by these advice agencies in providing advice and legal services to the public, and in comparison to the role of lawyers.

## 2. The legacy of Prior Research.

It has been one of the stated aims of the Legal Services Committees to identify legal needs<sup>(7)</sup> and this has necessarily involved research into advice agencies. The most fruitful work has been undertaken by the North Western Legal Services Committee (N.W.L.S.C.) in the production of its directories of local advice agencies.<sup>(8)</sup> These were also to have been used as a database for analysis of the quality of services and then as the basis of suggestions for supplementation and improvement of services, but to date have remained only in the form of the directories.

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7) North Eastern Legal Services Committee Steering Committee Administrative Group, "Legal Services in the North : Report of the Administrative Group", (1982), Unpublished Paper.

8) Smith, R., "From Manchester to the Lakes : the N.W.L.S.C., " (October, 1987) Legal Action 6.

The North Eastern Legal Services Committee (N.E.L.S.C.) in its attempt to clarify a useful purpose for itself undertook a broad ranging survey of "those people involved either directly or indirectly in the provision of legal services or who by their contact with the public could or might be expected to be aware of any claim by any member of the public of some deficiency or unavailability of any particular legal service".<sup>(10)</sup> This was obviously a considerably broader survey than was intended for the purpose of this work, but the N.E.L.S.C. work provided separate analysis of responses from voluntary groups in the North East which covered a very similar cross-section of groups and organisations to the one which was to be dealt with.<sup>(11)</sup> The questionnaire which the N.E.L.S.C. used contained a considerable number of questions which attempted to clarify regional knowledge of unmet legal needs, improvements which the agencies thought could be made, and innovations which they had been unable to implement because of lack of funding. The results from these questions were perhaps predictably disparate making conclusions hard to draw and resulting in some cases in simple listing of responses. Although the Administrative group did not hesitate to recommend the formation of a legal services committee the basis for this must be somewhat suspect as their conclusions were, as they said, "inevitable"<sup>(12)</sup>

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10) Op.cit., note (7).

11) Although there was a heavy emphasis on Community Associations in the Stockton area which I felt would not produce useful returns since trial questionnaires were returned as inappropriate to such organisations. There were also some anomalies which I attempted to avoid, e.g., the Cleveland Playing Fields Association.

12) Op.cit., note (7) Report pages were not numbered, this information on the third page.

and reflect rather an acknowledgement of there being a variety of problems, rather than a decision that the establishment of such a committee would be the best means to deal with them.

Despite the fact that the questionnaire was, as described by one member of the Administrative Group, "extremely unstructured"<sup>(13)</sup> and the lack of any clear method in definition of groups to whom the questionnaire should be sent,<sup>(14)</sup> it did produce some results of interest, although the report, rather like the questionnaire lacked any cohesive structure or method. These results related to catchment areas, work undertaken, size and age of the groups, and will be used later in comparative form. The greatest failing was the lack of any significant analysis of the data particularly in relation to the differences of the nature of the agencies, it is not satisfactory simply to categorise all agencies as advice agencies when their range is considerable, for example, surely the Child Poverty Action Group and Community Information and Computing Service can not simply be lumped together? Consequently no picture could be built up of what services were available and their quantity, quality, applicability or distribution.

### 3. Coverage of Research.

It was learned from the failure of the N.E.L.S.C. work to define its aims clearly that to fail to do so could result in the generation of data that although

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13) Interview with Anne Galbraith at Newcastle Polytechnic, 24th Nov.1987.

14) Described by Anne Galbraith as "anyone", *ibid.*

interesting could serve little purpose other than as a highlight of one aspect of the whole structure, and if that broader whole is to be brought into perspective it is essential to begin with a clear scheme or plan. This research had six broad objectives.

(i) Nature of Agencies - from the data generated to attempt to formulate the salient features of each agency into general categories of broad applicability.

(ii) Distribution of Agencies - to break down the responses by County to see whether there was any pattern of distribution in relation to the size of the county. Also to breakdown the responses within the counties to assess the distribution of the different types of agencies, and then to compare the breakdown to the other counties to see whether there was any pattern to the distribution. Finally to examine the geographical area covered by each agency, to assess its size and to ask whether this leads to any particular conclusions about the nature of the agency.

(iii) Background of Agencies - in order to obtain an idea of the relative age of the agencies and to see whether new agencies were being created. Also to question the stability of the agency with regard to the future, asking how long they could be certain that they would be a functioning establishment.

(iv) Staffing of agencies - here looking at the quantity and quality of staff, the size of the agencies staff resources, and the reliance on unpaid staff. Also again to compare the breakdown of staff between types of agency to see whether comparison revealed any pattern.

(v) Access to agencies - the practicalities of how the public come to receive advice, the how and when, and how those with special difficulties are assisted.

(vi) Services provided by agencies - the actual areas of advice and representation provided to the consumer and the form which they can expect that to take.

## B. Methodology.

### 1. Survey design and content.

The design of the questionnaire was obviously an important factor since a badly designed questionnaire could result in the production of data which would be of little or no value. The emphasis in this case was on pure factual responses and the questionnaire therefore had to reflect this requirement, there was no room for the more open ended questions. This meant that all the questions had to provide the relevant information to allow the respondent to answer by simply ticking an appropriate box. Although the broad plan of what information was to be collected was not explicitly stated it was obvious from the form of the questions. There was no scope for questions aimed at producing responses explicitly reflecting the attitudes of the agency, but it was hoped that this would be implicit in the responses to the questions establishing the sort of advice they wished to provide. In the light of Finman's work<sup>(15)</sup> this may have

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15) Finman, T., "OEO Legal Service Programs and the Pursuit of Social Change : The Relationship Between Program Ideology and Program Performance", (1971) Wisconsin Law Review 1001.



been a mistake since an explicit statement might have shown more precisely the ideology behind the agency, which in turn might have made classification of agencies into general categories simpler.

The format of the questionnaire was created with the assistance of former questionnaires of a similar nature. As stated above both N.W.L.S.C., and N.E.L.S.C., had undertaken research more or less similar to this work, and also the Law Centres Federation (L.C.F.) had recent work attempting to generate similar factual information.<sup>(16)</sup> Although these were useful in the question formation, their format was very different to that which was felt to be likely to produce the maximum response. The L.C.F. questionnaire totalled twenty-seven A4 pages while the N.W.L.S.C. covered eight A4 pages. The layout of the questionnaire used here was designed with the appearance of brevity in mind, and the four pages of typed A4 questions were reduced to one double sided sheet of A4. The questionnaire was printed on an eye catching colour paper to attempt to create more interest in it and to distinguish it from other documents.

An important lesson was also learnt from the contrast in response rate to the N.E.L.S.C., and L.C.F. questionnaires. The former required the respondent to provide their own envelope and postage to return the

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16) L.C.F. Evaluation Framework Research Project, "Profile of Law Centres", Distributed to Law Centres in March/April 1987, see "Questions of Value" (1988) Ppt.2.

questionnaire, they obtained a 34% response.<sup>(17)</sup> The L.C.F. provided a stamped addressed envelope and obtained an 86% response.<sup>(18)</sup> Although it would be misguided to attribute the whole of the difference to the provision of the prepaid envelope (since this would ignore such factors as the homogeneity of the agencies contacted, the certainty of their physical position, and the applicability of the questionnaire to them), it does not seem unreasonable to attribute some of the difference to this factor. Because of this each questionnaire was accompanied by a prepaid envelope in the hope that this would increase the number of responses.

## 2. Sample Design.

In deciding to whom to send the questionnaires there were very few guidelines, and much was the result of personal educated judgement. There was no comprehensive source of information, and it soon became obvious that even before the questionnaires were sent that the sample could in no way be hoped to be fully comprehensive, nor would there be any way by which to judge just how comprehensive responses would be. Therefore like previous research results this sample could only be regarded as a starting point from which further more detailed information would have to be built up. Inevitably this would involve considerable further effort based on a large amount of speculative work, contacting agencies who

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17) Op.cit., note (7) "Supplementary Report", undated.

18) Op.cit., note (16) p.1.

were not conspicuous by their name or any information that existed on them, as advice agencies of some form.

The sample which was used was built up from a number of sources some more reliable than others. The information collected by the N.E.L.S.C. work was regarded by members of the Administrative Group who compiled it to be "out of date in significant respects".<sup>(19)</sup> This threw doubt on both the addresses and the continuing existence of some of the agencies. Bearing this in mind and the methodological differences mentioned above<sup>(20)</sup> it was decided that direct information should only be used as a general guide to the type of groups who could be contacted, rather than a definitive list of those who should be contacted. The listing was inaccurate in another respect in that it represented the first list of agencies contacted which only produced a 22% response,<sup>(21)</sup> and this compared to the supplementary responses from agencies who were in turn suggested by original agencies which produced a response of twenty-seven from forty-three additional questionnaires (63%).<sup>(22)</sup> There was no indication of who these agencies were or their whereabouts.

The second source of information was a listing of voluntary agencies produced by North East Area N.A.C.A.B. with representatives of local advice agencies in February 1988. This obviously had the considerable advantage of being up to date, but again was by no means perfect.

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19) Interview with John Swann, Sunderland Borough Council, 9.12.87.

20) Op.cit., note (11)

21) Op.cit., note (7).

22) Op.cit., note (17).

Perhaps because of the geographical situation of those involved in compiling the list it was heavily biased towards Tyne & Wear alone with virtually no information at all relating to the other three north eastern counties. Also the terms of reference for the listing were slightly different from that intended to be used here, involving any organisation providing advice and/or representation. This resulted in a high emphasis on CABx and even involved one firm of solicitors. Also the advice agencies appeared to fall into the bracket of those providing generalist advice in the more traditionally recognised legal services areas, and thereby neither taking into account those providing advice and information to specific groups, or those counselling agencies who undertake advice work as a secondary role, or even those agencies who act as a resource for other agencies. With some changes to take account of these problems this listing provided a basis, in Tyne and Wear at least, of the sample organisations.

The final source of information involved the use of the most personal judgement and is therefore perhaps the most suspect as a means of generating a representative listing of agencies. Despite this, the Yellow Pages did prove a very fruitful source of information. There were several sections which produced relevant information, Information Services, Social Service and Welfare Organisations, Charitable and Benevolent Organisations (Clubs and Associations were also troubled but to less fruitful effect). The criteria used to choose agencies were varied, obviously agencies i.e. those emphasising advice, rights

or information in their title were the first choice, followed by those more well known agencies such as low pay units and centres against unemployment. After these the selection process became more subjective and although it was attempted to include as many agencies which were not perhaps so obvious in their role, it is impossible to judge the success in absolute terms. The choice varied between those organisations forming part of a considerable national network who it was suspected, because of this back-up, might well provide advice in some form to their clientele e.g. MIND and MENCAP, to those organisations who by their name suggested a speciality which was thought likely to involve advice work in some form, e.g. 'the Womens' Centre'. (23)

It was from the combination of these sources that the sample was drawn up and to them that the questionnaire was sent. This work was undertaken during April 1988 and in the questionnaire emphasis was placed on a swift response in the hope that it would avoid the common problem of information sitting in an "in-tray" waiting to be dealt with at the last minute, or often simply not at all.

### C. Response

The results obtained from this research were all based on the responses returned. This included all the agencies

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23) The problems inherent in this approach were recognised, but it seemed better in research such as this to try to generate and clarify information on as many organisations as possible, rather than making too many pre-judgements and then finding that the data generated was only on one very specific type of organisation.

providing relevant information but did not include those who were contacted on a trial basis and returned their questionnaires as fundamentally inappropriate to their role.<sup>(24)</sup> For example the meaning of "welfare" in the title of an organisation could be deceptive and no clear cut way of judging in which cases these organisations were basically social clubs and in which they were providers of advice on welfare rights and social services was found. Similarly with residents associations, it was difficult to judge which were biased towards social activity and which were based more on the ideas of a tenants group.

TABLE 1 : Response to Questionnaires.

County	Number sent	Number Returned	Percentage Returned.
Tyne and Wear	94	59	63%
Northumberland	5	1	20%
Durham	22	17	77%
Cleveland	25	15	60%
GRAND TOTAL	146	92	63%

The response was satisfactory and with just under two-thirds of questionnaires being returned it seems to provide a reasonable database from which to draw conclusions about provision in the North East as a whole. The most disappointing response was from Northumberland, it was noted from the N.E.L.S.C. information that that county had very few advice agencies and it could be suggested that response reflects this rather than a

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24) Op.cit., note (11).

failure to make contact with the sources of advice provision in the area. With regard to non-response in general, by their nature it is impossible to say that agencies did not respond. Very few questionnaires were returned through the 'dead-letter' post, only five in total, so one must assume that all other agencies received their questionnaire. Also, it was explicitly stated in the letter accompanying the questionnaire that even if the questionnaire was inappropriate it would be useful to have it returned since this would clarify the situation for the future. Another six questionnaires were returned with this explanation but all were from among the trial questionnaires. Therefore the non-response category must be regarded as a mixture of inappropriate agencies who simply failed to confirm this fact, and appropriate agencies who were either unable, perhaps due to the constraints of time, or unwilling to respond to the questionnaire.

Department of Law,  
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50 North Bailey,  
Durham. DH1 3ET

Dear Madam/Sir,

### **Advice Agencies in the North East**

I am a researcher at Durham University Law Department, looking into the provision of advice and legal services in the North East. The enclosed questionnaire is the basis of an attempt to compile a database on the advice and information services in this area. Such a database would be of considerable value in establishing areas where there is a lack of information and advice, and also in assisting co-ordination among existing agencies.

I have attempted to keep the questionnaire short as I realise your time is valuable, it should not take you more than about fifteen minutes to complete. I would ask you to complete and return it in the pre-paid envelope enclosed as soon as possible. If you cannot return it immediately, it will still be of value if returned at all, and preferably before 30th April, 1988.

Do please feel free to make constructive comments on any part of the questionnaire or any other related issue which you consider important. If you do not feel the questionnaire is particularly suited to your organisation, would you please still return it since this is valuable in clarifying the situation for the future.

I thank you for your co-operation and hope to hear from you soon.



APPENDIX C. Interviews conducted in the course of the research.

My thanks must go to the following people who generously gave their time to be interviewed. They provided valuable information and insight into the provision of legal services in the North East of England.

- David Keating - private practice solicitor and Chair of North Eastern Legal Services Committee.
- Robin Widdison - law and advice centre worker and barrister.
- Jill Welch - former law centre worker, now a solicitor in private practice.
- Ben Hoare - former law centre worker, now a solicitor in private practice.
- Shaun Kirby - Legal Aid Area Director for Area 8.
- Anne Galbraith - lecturer in law at Newcastle Polytechnic, and former chair of Newcastle Citizens Advice Bureau.
- Roger Smith - Legal Action Group Director.
- Richard Jenner - researcher at National Association of Citizens Advice Bureaux central office.
- John Swann - solicitor with Sunderland MDC.
- Anne White - Durham Citizens Advice Bureau Manager.
- Andy Cope - solicitor in private practice, and convenor of North East Legal Action Group.
- Marian Robinson - N.A.C.A.Bx Area Director.
- Jim King - Ford and Pennywell Advice Centre Manager.
- Pat Armstrong - Stockton Law Centre Management Committee Treasurer.
- Jeremy Fish - Stockton Law Centre Solicitor.
- Mary McSorley - Middlesbrough Law Center Administrator.
- Ellen Phethean - Gateshead Law Centre Worker.
- Lyn Evans - Law Centre Federation Administrator.

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