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Legal Workers and paralegals - new avenues for services? Access to Justice and the introduction of the NFP Sector¹

Peter Sanderson and Hilary Sommerlad

Introduction

Access to Justice is a portmanteau term, encompassing issues as diverse as accessibility of court procedures for dispute resolution, 'equality of arms' in criminal justice proceedings, and the development of accessible alternative dispute resolution (ADR) procedures (Parker, 1999, p 30). One of the significant developments of the last decade has been the shift in its meaning away from access to case-by-case delivery through private solicitors towards salaried, often non-legally qualified advisors in advice centres, effectively returning us to the original post war vision of legal aid (Goriely, 1996, p. 224). This shift in emphasis is reinforced in the Ministry of Justice's affirmation of the promotion of ADR, and the use of information and advice as a prophylactic for social problems (Falconer, 2007, p. 16).

In this sense, the entry of advice providers from the Not for Profit (NFP) and Voluntary and Community Organisations (VCO)² Sector can be regarded as an overdue development, as was the initiative to explore alternative methods of advice provision other than face to face case work (Bull and Seargeant, 1996). The perception that the existing system of legal aid provision was failing to meet the needs of a substantial section of the population was given added force by Hazel Genn's 'Paths to Justice' (1999). Published shortly after the Access to Justice Act (AJA) 1999, this revealed simultaneously a considerable amount of 'unmet legal need' and ignorance about the functioning of the legal system and courts (see too Pleasence et al, 2004), and has been followed by detailed accounts which have identified concentrations of civil justice problems in vulnerable groups (Buck et al, 2004; Buck et al, 2005; Moorhead and Robinson, 2006). A thrust of this work, and of the joint papers by the Law Centres Federation (LCF) and the Lord Chancellor's Department and its successor the Department for Constitutional Affairs (DCA/LCF 2004), was that advice had a central role to play in meeting the government's objective of combating social exclusion: through the empowerment of excluded groups and individuals; through increasing the material resources available to these communities; and by providing a counter balance to the discretionary decision making on the part of the State to which these groups are particularly subject.

These developments form the backdrop to the shift of emphasis in legal aid provision heralded by the AJA 1999, as contracts for areas of law like debt, housing and welfare rights were greatly expanded, and contractors from the NFP sector were drawn into publicly funded provision in unprecedented numbers.³ At the same time,

¹ The authors wish to express their gratitude to the DCA for supporting the research which gave rise to this paper and in particular we would like to thank Judith Sidaway, Michelle Diver and Mavis Maclean for their support.

² The term Not for Profit is used to indicate a sector that includes both Voluntary and Community Organizations (VCOs) and Law Centres. The term VCO applies to organizations like the Advice Services Alliance and the Citizen's Advice Bureau, which have both a different legal status and are not subject currently to the same regulatory regime.

³ At the time of the research (2004-5), excluding Law Centres, around 400 NFP agencies had contracts with the LSC to provide legal advice and assistance to eligible clients: the largest provider among these is Citizen's Advice, with approximately 200 Bureaux participating (of which around 80 employ solicitors). Shelter had 40 or so offices with contracts to provide

there has been a substantial decline in the matter starts awarded to solicitors in the areas of consumer, debt, housing, welfare benefits and asylum, in all of which areas the NFP sector saw at least a corresponding increase (HoC, SCCA, 2004, we49, op cit, p 11).

However, recent developments since the Carter Review (2006) can be seen as representing an even more significant shift in emphasis with the declared intention of the Legal Services Commission (LSC) to 'roll out' Community Legal Advice Centres (CLACs), to date being piloted in Leicester and Gateshead, across the country, with the aim of enhancing accessibility in the most deprived urban areas (Explanatory memorandum to The Community Legal Service (Funding) (Amendment) Order 2006 No 2366). These developments have sparked considerable debate in Parliament and amongst stakeholder groups. Whilst 47% of respondents to 'Making Legal Rights a reality' supported the proposals to pilot CLACs and CLANs (LSC, 2006, p. 8), stakeholders from the VCO sector expressed anxiety over: the impact of the contracting process on existing networks, and the business undertaken by VCOs not covered by the contract, such as representation, outreach work and social policy work (ASA 2006, p 3); the impact of the concentration of supply (Citizens Advice, 2006, p 3); the impact on consumer choice (op. cit., p 11).

We do not propose to follow the detail of this debate, but will instead explore the way in which the findings of our own research may illuminate certain aspects of it. We will reflect on our analysis of this data to interrogate the proposition that the engagement of the NFP sector has resulted in new avenues for service delivery, and will suggest that whilst this may be true from the viewpoint of the State as a monopoly purchaser of services, the development of new forms of delivery may close off some avenues, both through the well understood mechanism of restricting scope, and also through the less well understood effects of change on local networks, the internal organization of firms and VCOs, and the relationship between advice tiers. In the section below we briefly describe the research methods used to gather the data on which the paper draws; in the subsequent sections we consider the question of new avenues firstly from the point of view of the added value it was thought that the NFP sector would bring to publicly funded legal services and secondly from the perspective of the effect of contracting on inter and intra-organisational links.

Section 1: Methods

The study was based primarily on the collection of qualitative data through interview and observation, undertaken with a limited number of FP firms and NFP agencies in a region of Northern England. The region included small towns, big cities and rural areas; the firms included some highly specialized legal aid firms, and some medium sized practices with contracts for advice in several specialist areas. NFP agencies included Citizens Advice Bureaux, two housing advice agencies, a Women's Centre and a Law Centre. We interviewed advisers, and observed advice sessions in the specialisms of Housing, Family, Child Care, Community Care, Immigration,

housing advice, while the residue was spread between a number of different specialist advice agencies. Overall the NFP sector contractors start around 115,000 cases annually, 22% of the total acts of assistance (House of Commons Select Committee for Constitutional Affairs (HoC SCCA, 2004, we 48, p. 6), and in 2004-5 the NFP sector were awarded 942 out of a total of 6242 contracts. Between 2003-4 and 2004-5 the number of contracts awarded to the NFP sector rose by 11.3%, while the number of contracts awarded to Solicitors' firms declined by 9.9% (HoC, SCCA, 2004, we49, p 10).

Employment, Civil Litigation, Welfare Benefits, Debt, Personal Injury and Domestic Violence. A total of 64 respondents, working in 12 solicitors' firms, one law centre, seven VCOs and one local authority welfare rights service, were interviewed, several more than once, each interview lasting between one and two hours.

The status of the sample is given in the table below:

Respondent Category	FP Sector	NFP Sector	TOTAL
Senior Partner/Director	10	7	17
Non-partner contract manager Training Manager	3	3	6
Supervisor	2	4	6
Supervisees	10	8	18
Trainees/volunteers	1	3	4
Training Organisations	2	6	8
Committee members		1	1
LSC personnel	4		4
TOTAL	32	32	64

The sample represented a range of front line specialist advisers as well as managers, broadly reflecting those specialisms for which the LSC contracted for most commonly:

Specialism	FP respondents	NFP respondents
Housing	3	8
Welfare Benefits	0	3
Community Care	1	0
Immigration	3	0
Domestic Violence	0	3
Personal Injury	1	0
Family	5	2
Employment	2	1
Civil Litigation	3	0
Debt	0	1
Children	1	0
Women's Advice & Guidance (PIB)	0	3
Asian Women's A & G	0	2

Triangulation of methods included respondent triangulation, where for example accounts of different participants in a Community Legal Service Partnership (CLSP), LSC and agency staff, supervisee and supervisor, or advisor and client, were cross-checked; data triangulation, where for example interview accounts of approaches to advice were cross-checked against observations; and time series triangulation, where agency accounts were checked at more than one point in time.

Section 2: Contracting and the values base of the NfP sector

The 1990s saw the increasing involvement in service delivery by the VCO sector, and, in the early period of the Labour Government, a shift in emphasis towards 'partnership' and a 'compact' (Plowden, 2003). Much of the writing on this development has stressed that the attraction for the State has been the 'added

value' provided by the VCO's resources of social capital, the more reciprocal relationship they enjoy with their user groups and the moral foundation of their 'missions', which form an alternative to the profit-oriented business ethic, and the perception of public services as organized around the interest of producers (see for example Kendall and Knapp 2001).

A combination of these values and expertise based rationales were advanced to support greater NFP involvement in the legal aid; for instance, the sector was viewed as more committed to the cause of socially excluded clients, enjoying better relationships with clients as a result of advisors' superior interpersonal skills and empathy (Stein, 2004), and producing better quality advice both because of its extended experience in areas of law neglected by private practice, and also because of the way in which values and skills combined to produce a greater expenditure of time per client problem.

These perceptions were partially confirmed by Genn's evidence that the socially excluded are difficult to reach through case based work by solicitors (1999, p 101), and by Moorhead et al's research which suggested that the NFP sector was better at dealing with some of the problems associated with social welfare law, and which found greater numbers of NFP agencies performing at higher levels of quality than solicitor contractors⁴ (2001, p. 214).

However, as VCO involvement in service delivery increased, both the rhetoric of partnership and the emphasis on added value have been gradually eclipsed by the need to ensure Value for Money (VFM) in the funding arrangements reached with the NFP sector. The shift in the role of the state in service delivery, towards regulated devolution,⁵ has been felt particularly keenly as the techniques of New Public Management (NPM) have been extended to cover their activities. This has meant that many of the aspects of NFP/VCO provision, which both its members (along with other commentators) believed would provide added value to legal service delivery, are now in tension with the state's desire to limit what it will pay for to a core service, meeting only those aspects of need which have been centrally endorsed. This tension has generated a considerable literature about the appropriate governance of the NFP sector: specifically, whether the approach developed to assure quality of advice in the For Profit (FP) sector is appropriate for all providers.

A key element in the development and maintenance of externally-regulated standards has been the LAFQAS and the subsequent Quality Mark (QM) for the Criminal Defence Service (CDS), the Community Legal Service (CLS) and the Bar. The design and development of these measures was accompanied by extensive research, which included comparisons of the FP and NFP sectors (Moorhead et al 2001). One obvious consequence of the extended role of the LSC in commissioning provision from the NFP sector has been the development of concordance between

⁴ Although Moorhead et al also found that the NFP agencies were slightly more likely to be included in those operating below threshold competence (2001, p 214). Subsequent work by Moorhead et al (2003) explored the issue of distinctions between the kind of contracted work taken on by For Profit (FP) and NFP agencies, testing the proposition that solicitors were more likely to provide quality by taking on 'higher level' work, whilst the NFP sector were more likely to innovate and provide a holistic service. Their findings did not confirm this simplistic set of assumptions, but rather revealed a more confusing picture: in some areas, such as welfare law, solicitors were likely to avoid pursuing more complex claims, while NFP agencies sought adversarial solutions through tribunals.

⁵ Hood (1999); and see Rhodes (1997)

the quality and audit regimes of the NFP sector and QM.⁶ By 2000, this factor, in combination with the policy drive towards large scale inclusion of NFP sector in the CLS, meant that LAFQAS had become a major influence on NFP sector in terms of the redesign of their quality regimes (see for instance the Advice Services Alliance mapping exercises, 2000).

Respondents in management roles were unanimous in attributing considerable benefits to these regimes in terms of enhancing the systems in their organizations, even where they identified gaps, inadequacies or inconsistencies in the process. In several cases they identified the introduction of QM and audits as a means of effecting cultural transformations in staff that they found difficult to shift on their own. The tendency was also noted by the regional manager at the LSC:

lots of Heads of Department say the audit is not a bad thing because it keeps people on their toes. They use it as a whip, though it's very rarely said in public but we do find that if we say we really don't feel we need to audit you this year, that people say, oh could you do a day in such and such a department because they need it.

In one CAB, the contract manager identified the process as helpful with staff who found the idea of supervision unattractive:

I'm very strict about my supervision of them because it's prescribed in the manual what I do and the other staff I manage I like to make sure that they're supervised as regularly as well. A purely personal thing because I think its very easy not to have supervision meetings but if you get into the habit like the rest of it and tick them off and so on, its very easy to let these things sort of go because you always have a waiting room full of clients so that tends to get missed. Some people don't like being supervised, as they have been doing the same job all the time and think 'well I don't need to be supervised' so yes I think some of these things, I would say yes, as a result of the LSC probably more than Citizens Advice. (Contract Manager, CAB)

QM was also commended for bringing greater rigour to the process of file and case management in organizations where previously recording practices had been inconsistent:

Caseworkers in general I think – others are – or tend to be – fairly slap dash (the ones I've met) and keep details about their client in their head. LSC makes you put it all down on paper. Then if you are run over by a bus somebody can carry on. It's a much more ... it makes you put it down , and when I do file reviews I can see what they've done, when they've done it and how much time it's taken, and, yes, I think it makes them look at their work in a different way. (Contract Manager, Urban CAB)

I think that in more cases now, a client will go away with a clear idea of the experience they've had in our office, with a clearer contract of what they can expect from us, and what we should expect from them, so moving away from that very almost kind of woolly ill defined experience that a person will often get when they go to a CAB and

⁶ Although the NFP sector was developing interest in quality prior to introduction of Franchising, this interest was given major impetus by Franchising (see Thornton, 1991; Steele & Bull, 1996)

... speak to an experienced volunteer who will not write up their notes very accurately; we've come a long way from there and we can now safely say that most of - certainly most the cases we do for the LSC will be done to a fairly high standard, include client care letters; include a clear closure procedure on a case, that it won't be arbitrarily closed because somebody in an administration function wants to get rid of all the open cases from last year or whatever. It doesn't happen like that any more, certainly not for the LSC cases. So that has been a good thing there's been - it's driven us towards a better understanding, a better grasping of professional principles as they apply to providing advice and advocacy and I'm very pleased about that. (Specialist Housing Adviser, Housing Advice Charity).

The SQM was also widely recognised as providing a discipline to client care, although this recognition was rather more grudging:

... rolling out the Quality Mark, it was a real difficult process with six area teams and the main anxiety I think was it would get in the way of achieving results, it would slow people down, it would make people do things that were unnecessary and be a bureaucratic approach. I think that when all the hot air's dissipated, I don't think hopefully it's not made a major difference. Opening letters is something that we took on board as good practice a number of years ago anyway. What it probably has meant is that some people who decided to not to bother with opening letters, they've been kind of brought in to line, so it's more consistent use of opening letters, there's more consistent use of closing letter. So it has structured peoples casework, hopefully in a way that's not impacted on what's kind of motivating them which is actually getting results. (Manager, Welfare Rights Advice Service).

Another of the procedural benefits identified in the NFP sector as flowing from LSC contracting was the fact that improvements in file management made it easier to transfer responsibility for a case: reference was made to times in the past where case workers had left leaving files behind with totally inadequate information to enable another caseworker to proceed. Again, weaknesses in recording were highlighted by one housing solicitor as a key failing in the NFP sector:

We've had instances - people coming to us where they've been ill advised. We've then appealed their case and unpicked what's happened and frequently found that where a voluntary sector person has been involved no note has been made of the judgment - we had an instance where we succeeded on appeal purely because no one had any idea of what the judge had said - because no one had taken a note... (Housing specialist)

However other aspects of QM were viewed less positively. In particular, its reliance of on proxy measurements was also felt to erode the NFP's value base because they tended to devalue 'the immeasurable aspects of work ... in favour of the measurable' (Raine, 1993, p 87; and see Power, 1997, p 13). For instance, the 'soft skills' are least easily measured by QA regimes and are yet often regarded as particularly valuable attributes of the NFP sector (Stein, 2004; McAteer, 2000); as a result, several of our informants argued that the LSC approach failed to recognise the added value embodied in important aspects of their work. Social policy work was offered as another example of what was felt to be a failure to support an avenue of service which many organisations (for instance Citizen's Advice and Age Concern) viewed as a key aspect of their mission. This perspective is supported by Jochum et al who

have argued with respect to the relationship between government and the VCO sector generally that despite the rhetoric, insufficient attention has in practice been paid to its 'wider contribution to civil renewal' and that instead the sector has been seen 'primarily as 'delivery agents' promoting choice rather than voice' (2004, p 34)

The sector was also more negative about the effects of the contract, many of which they had not anticipated. These included effects which have been identified by other research and include the way in which funding timeframes may distort priorities, and, where the funding is uncertain, create difficulties in managing the skill-set of the workforce⁷: 'the result is often poor value for money, for both contractor and organisation, financial instability and uncertainty, difficulties in recruitment and retention of staff, a focus on shorter term outputs rather than longer term change and diversion from the business of delivering better services' (Alcock et al, p.27). For instance advice organizations with limited access to alternative funds (such as a Local Authority funding stream) or which were heavily dependent on uncertain recurring grants would find it difficult to maintain a critical mass of advice expertise in any one area, and would therefore be heavily dependent on LSC funding to support specialist work

The standardized and complex nature of contracts between government and VCO organizations has been described by Alcock as revealing a 'one sided and inflexible approach to contracting on the part of statutory agencies that show themselves unreceptive to ideas from VCOs about the specification of services ..' (op cit., pp 29-30). They generally also have a built-in funding deficit, which, coupled with annually renewable contracts creates considerable financial insecurity, transfers high levels of risk onto VCOs and is, some commentators argue, unsustainable, 'particularly in relation to the delivery of non-profit making services to vulnerable groups by non-profit making organisation' (op cit, p 32) Evidence suggests that highly unstable funding relationships also undermine trust between contractors and VCOs (ibid), and this was confirmed by the experiences of some of our NFP respondents.

However the major impact of contracting was felt to be an insidious 'colonisation' of the NFP ethos. Michael Power identifies two extremes of response to audit processes. One is 'decoupling' where the audited organization seeks to manage the process by delegating responsibility for dealing with the audit to a specialized section or sub-set, but:

The other extreme to consider is that the values and practices which make auditing possible penetrate deep into the core of organizational operations, not just in terms of requiring energy and resources to conform to new reporting demands but in the creation over time of new mentalities, new incentives and perceptions of significance. (1997, p 97)

The impact of the LSC contract and associated auditing clearly illustrate the potential of this form of regulation to have a major cultural impact which extends beyond the relative weight of the funding:

They do hold a lot of clout - funders do anyway, but the LSC do hold a remarkable amount of influence for what they actually put into organisations, phenomenal. Out of proportion I would say, and that's quite clever, quite good from their point of view and I do support the Specialist Quality Mark and the impact it has had. I think

⁷ This point is discussed further in Section 2

there are a lot of strengths to that. They need to be aware of that sometimes, because the audit regimes they run are very tough. The amount of influence that they can have for the amount of pounds they are putting in organisations is quite large. The local authority put in a lot more money than the LSC but the LSC, in terms of actual advice and quality, are awful lot more influential than the local authority. (Director, specialist Housing NFP organization).

The evidence from both NFP respondents and the LSC suggested that this process of colonisation was not initially particularly marked, in part because the priority at first was to bring the sector into legal aid work and thereby meet market need:

the NFP agencies we brought into the scheme on a pilot basis where the LSC's initial approach – or the LAB as it was then - was to bring in a relatively small number, – take probably their more confident, judicious auditors / account managers and bring them in .. not treat them with kid gloves, but, you know, very educational – don't blow them out if they're not meeting the standards, help them to meet the standards, get them there. And for a long time – there is a feeling in the Commission that the NFP agencies have probably been pretty indulged .. My instinct says that there will be a greater parity of expectation and it is the case still that in some NFP agencies I think the introduction of the NFP contracts has driven a degree of professionalisation of advice but is not uniformly impacted in the agencies (LSC Regional Manager)

However the very values which were originally viewed as the benefits brought by the sector to publicly funded legal services, such as its commitment to social justice, campaigning and the 'holistic' approach to putting the client first, produce costs and thus, as we noted above, are in potential tension with the emphasis on VFM. Controlling costs through exercising control over the time expended by advisors therefore became a major concern for commissioners of public services, and it appeared that there was an increasing tendency to view the NFP distinctive values base in terms of

a cultural problem .. it just doesn't work in the world as it is now. There are people there whose values are great and who'd do everything for the client but who are still rooted in the politics of the 1980s so they think the organisation has got to be collective and everyone should be consulted on everything and funders are always wrong and the LSC in particular is the devil incarnate – and it's a culture which is still quite powerful within agencies and tends to influence people who come into it – so the 1980s politics still hold some sway and to some extent I think it's a problem with quite a few voluntary agencies which hate us which is an impediment to establishing the partnership, the relationship of trust which the LSC and local authorities want. I think the only way is just to be completely straight and say something like 'look, buy into it, this is the way it is, it's not a grant, it's a contract, and you have to think private sector because that's the way the world is now'. (CLS development worker)

The laxity in terms of control over workers which this values base sometimes produced was also viewed by some as problematic, including by people within the sector:

Other than LSC regulation there is no overall scheme (in the VCO sector). If an advisor were in a solicitor agency then they'd be subject

to Law Society regulation and if they worked in immigration, to the OISC, but otherwise the NFP sector is very lightly regulated and it's very variable – so, for instance there are different quality standards. It's partly a resource issue – apart from the NACAB which has money to audit, most 'regulation' comprises self accreditation systems. But even with the CAB, I would question how effective it is, whether you can term it regulation as they rarely chuck anyone out. (National officer of a major advice consortium).

A further tension between the NFP sector and the LSC centred on specifications of scope, frequently causing compliance problems. For example, the embedded culture of universalism in some areas of social welfare law could mean that advisors found it distasteful to begin an interview with a question about means.

we like to give the same standard of service to all clients so we've not had people ring fenced, we've not had people just doing generalist work, people just doing specialist work or people just doing contract work or people just doing non contract work. We've treated our clients the same, doing that we've had people, or the advice workers just dealing with anybody that comes through the door rather than internal referrals or internal signposting. But when you look at the contract, the contract – my interpretation of the contract – is that you identify people who contribute to the contract and let the commission know, and that really hasn't changed, you know even when they updated the contract in 2003 or whenever it was. But this new Account Manager is under the impression that the commission expects or the commission's expectations through the contract are that people will be ring fenced. But when I read the contract there's no term 'ring fenced' in the contract so I don't know where it comes from - apparently it's a commission term. But this is something that I suppose, from my point of view, needs to be further discussed with our new Account Manager because it can quite drastically change the culture of our work, the way we operate which would have knock on effects with regards to service delivery and contract delivery and all sorts. (Manager, Housing Advice Agency)

The resistance to the erosion of universalism was intensified when the scope of eligible activity was seen as being defined too narrowly. One example below covers means, the other covers the scope of activity:

one of the big problems we have is the capital rule, because the capital rule for eligible work, the actual clients have to meet the capital rule, it's currently something like £1200. Anything above that and you're only allowed to do sort of 45 minutes worth of work with them. Now that capital level is actually below the poverty line benefit level because I think currently disregard on capital for income support is something like £3,000. So it's a poverty line which is even more stringent than the actual poverty benefits themselves and we certainly find that increasingly to be quite a serious problem for us. Particularly as quite a lot of what we do is with the elderly and disabled for some reason. Well I know why in the case of the elderly they've saved for a funeral and the money that they put aside for their own funeral that usually takes them over the capital limit for legal help.

the things they came up with was stuff that our advisors would have gone to the barricades over. It was things like 'you haven't justified you've filled in a DLA form for this customer, you know it's a simple form it doesn't require help'. Well, I mean, as far as our advisor is concerned that's bread and butter welfare rights advice work helping people with forms. Most people need help with forms, most people struggle with forms. It's not something you actually need to justify as being an exception, that's the norm. (Manager Welfare Rights Advice Service).

As respondents from the LSC pointed out to us, the issue of scope was an issue of policy rather than an issue of audit, and was therefore, they argued, not a legitimate topic of complaint for NFP agencies, whereas for the NFP sector, limitations on scope were frequently felt to impact directly on an agency's 'mission', the essential reason that they feel they are in business.

NFP respondents also asserted that the regulatory burden resulting from the contract placed further constraints on the scope of work and the manner in which it could be performed (thereby playing a pivotal role in the 'colonisation' process.⁸

As a result of these tensions between the character of the NFP sector and LSC objectives, there was evidence both from LSC staff and NFP respondents of a shift from the initial partnership approach and this was reflected in the degree of severity with which organizations might be audited. For instance, a CAB director perceived a change in approach from the 2 years prior, and complained that it had not been signalled:

We performed at the same level for the last five years roughly and only for the last two years have did they begin to talk about quantity of hours, so - and I can understand from a use of public money point of view why they want us pay us an amount of money to perform to their contract requirement but if that were the case I think that could have been made clearer from earlier on, rather than a sudden bit of a culture shock when suddenly they're emphasizing quantity.. They are emphasizing quantity and number of hours output and the same time that they are introducing time standards, so it's like a big squeeze from both sides - those things happened right at the same time - last year - last year

The increasing tension between the perception of the NFP sector as providing added value, and the imperative to achieve VFM, is reflected in this LSC Regional Manager's comments:

I've come across what I regard as adviser dependency syndrome; where the adviser does everything they can for the client and says do come back next week if there's anything else - where I think the adviser is almost cleaving to the client rather than being driven by the client's needs or god forbid the 50 other people in the waiting room desperately trying to get in. Then there's the issue of volunteers -

⁸ Power, 1997 Power's point receives support from The Better Regulation Task Force (BRTF) studies which have consistently identified administrative burdens imposed by regulation as hampering business, channelling resources away from more productive uses, and inhibiting innovation and growth (and thus diverting organisations from their primary purpose) 2005, p 4; and see. BRTF, 2005a) specifically on the NFP sector; and Hampton 2005

how assertively can you supervise a volunteer; how do you deal with a volunteer who says I didn't come down here to fill in all these bloody forms for the LSC I came here to help people – so there are all sorts of cultural tensions there

Thus the initial endorsement of the NFP sector's distinctive value and expertise based rationale, and the potential which it was originally envisaged these would create for new types of services, has in practice been constrained as a result of the implementation of measures which effectively curb their enactment. Arguably this stems in large part from the multiple functions which regulation is now expected to fulfil. On the one hand, at the micro-level, it is charged with ensuring that regulated services simultaneously deliver quality, VFM and responsiveness (each of which is not only a contested concept, but may require a different form of regulation). On the other hand, at the macro level, it connects with government concern with the 'dependency culture' exemplified by the targeting of social exclusion 'through non-state bodies' and suggests that in the future 'responsibility for the social sector (will be) handed to voluntary organisations and business' and that 'VCS adopts more business practices'⁹ Bolton has argued that this evolving situation creates tensions because 'as the role of the state has changed from providing public services and utilities directly to ensuring that these are provided, so the focus of regulation has shifted from relatively simple questions of probity to more complex questions of performance' (2002, p2).

In the following section we consider the effect on the sector's potential to support new avenues for legal services through an exploration of some aspects of the relationships in the 'seamless web of advice', between firms and VCOs and between the tiers of advice.

Section 3: the nature of the relationship between the specialist expertise of second tier advisers and the triage function of the first tier advisers

The issue of how to train the workforce for the publicly funded advice sector has yet to be fully explored. Whilst it is possible to overstate the extent of the distinction between the training for the two sectors, the FP sector is dominated by a huge majority of fully qualified solicitors at the apex of the labour market, and the NFP sector by workers who, where they have experienced systematic initial training, have not received nationally recognised qualifications for it. The origins of some of the principal providers such as the CABx lay in a movement concerned to embed the principles of accessibility and universalism, as opposed to the exclusive model of professional expertise. Correspondingly, training in the NFP sector attempts to avoid artificial entry barriers, has a functional bias grounded in a detailed specification of the occupational role, and also places a premium on absorption of organizational values, as well as knowledge and expertise very much focused on client need.

Given these differences in the training base for the two sectors, the question arises of whether advisers in the FP sector are over-trained for publicly funded legal aid, whether NFP workers are under-trained, or whether the 'market' or reservoir of legal need eligible for public funding falls into different sectors requiring differing levels of expertise and training, and if so, what kind of infrastructure should bind these

⁹ BRTF, 2005 a, p 15

sectors together. The concept of CLSPs ¹⁰, which were envisaged as the vehicle for developing the AJA's aim of creating a 'seamless web' of advice services, has achieved uneven results in this regard: CLSP membership at the time of the Matrix evaluation indicated significant under-representation of solicitors in the partnership process (Matrix, 2004, p. 38), and the development of local partnerships as an infrastructure for networking advice provision tended to be correlated with the strength of previous arrangements and local authority commitment to the project. Difficulties in these partnerships at a local level, however, only reflect more widespread problems with the theory and mechanics of partnership between state and voluntary sector at the national level, problems which are reflected in the current debate over the potential impact of CLACs on the broader picture of the delivery of advice services by VCOs.

We wish in this section to pick up a specific issue on which we believe our data sheds some light, namely the importance of articulating first and second tier advice services: this is a crucial issue because of the significance of processes of concentrating and distributing expertise. The development of specialist expertise in welfare law is a defining characteristic in the NfP sector's involvement in legal aid. Whilst traditionally some specialist agencies have, since the 1960s, been able, with the aid of either charitable or local authority funds, to develop the specialist expertise of staff, notably in areas like welfare rights, housing and debt, the AJA 1999 greatly increased the availability of resources for specialist advisers, and for the agencies included in our study, the LSC contract had become the cornerstone of their specialist provision. However, the issue of the optimum approach to developing the relationship between specialist expertise and the gatekeepers represented by general advice workers remains contentious.

Articulation can be inter-agency (say from a CAB or a solicitor to a specialist housing advice service) or intra-agency (for example between general rota advisers at a CAB and specialist advisor funded either through the LSC contract or direct local authority funding). The most obvious mode of articulation is referral, but within agencies it can be effected through a process of case check and review:

*every case sheet, every client that is seen, has their case sheet recorded. Every case sheet is then quality checked by a paid member of staff. Either the – what's called the advice session supervisor who does 2 days a week – or if she doesn't do it whichever one of the three of us has done her 3rd session in the week, so for example I've got a pile still to read from yesterday of the ** (name of town) clients and a couple that we did at the end of yesterday afternoon, 2 or 3 actually that I haven't read. So I will read those, I will check off the advice given, I will check off the information and I will send the feedback – not a feedback form – a follow up note if there's anything that still needs doing, or if they've got anything manifestly incorrect, or if they've not filled in the case sheet correctly, if they've not done it so that I can understand it I'll go back to them and say 'you know you really didn't make sense of this'.*

10 CLSPs were piloted in six areas prior to the AJA, 1999, and formed a formal part of new Legal Aid arrangements from 2000: they were networks of local advice providers, intended to include the LSC, local authorities, local solicitors' firms providing legally aided advice and assistance, CABx, law centres and other advice providers. Their primary role was to carry out an analysis of legal 'need', assess how well current provision met this need, to develop a strategic plan to prioritise the meeting of legal need locally, and to support and encourage the development of local networks and active referral systems. Participation in CLSPs has been voluntary however, which has resulted in a variable degree of effectiveness (Matrix, 2004, pp 38-52).

This process of 100% case review facilitates a check on quality of advice, and the need for training, but also, crucially, whether the full extent of the problem has been identified: however this is post hoc, and has the ultimate aim of improving the efficiency of first line referrals. The gatekeeping function of first line advisers can be seen as analogous to the function of the triage nurse in Accident and Emergency healthcare settings, where cases are categorized and sorted in line with established processes and algorithms with in order to achieve efficient use of specialist expertise, and also in order to develop risk averse systems.

Issues which arose in the course of our research which reflected on this 'triage' function included the personalist character of some referral networks, and the expertise base of referring generalist workers. At a general level, we found some cultural barriers to effective referral between some advice agencies and solicitors' firms. This confirms the findings of Moorhead and Robinson's study of legal 'problem clusters', in which they noted that advisers were not dealing with problems 'seamlessly' and the less expertise the organization possessed, the less likely they were to make the appropriate connections (2006, p 3). This issue of the expertise required to signpost is something we will return to below.

Where systems of referral functioned effectively some of the participants conducted them on the basis of experience and trust. The following CAB manager, asked about the basis for referral, stated that it was dependent on:

*an individual within that firm. Our relationship with, ** will come and do our training or we can ring up and say I've got this chap, he's just walked out or he's just been dismissed or what not, what do you think I should do? - She'll either say send him up or whatever. But that's a relationship that we've built up on a personal basis, its nothing to do with CLSP*

Interviewer: And if that person moves on its gone?

Yes it's gone completely. We have built up relationships with different solicitors over the years and as the solicitors have moved away that relationship has just come to an end.

Without the personal link, the referring agencies shared the problem of information asymmetry commonly identified as that most commonly facing the consumers of professional services:

we pass them on to solicitors with no mechanism for them saying yes this is a good case and so on, partly because of the time involved... We did have one solicitor who would send back a report every so often to say 'you sent me five clients and three we are taking to tribunal, the other two I gave advice' and she eventually stopped because she obviously doesn't have the time either.

Elements of mistrust entered some of the network relationships at some points often based on stereotypical views of each others' expertise and disposition. Solicitors tended to view the legal expertise of NFP workers negatively and to feel that they spent excessive amounts of time over assessing problems without necessarily coming up with the right diagnosis:

*what staggered me, because we also do a free advice clinic linked to CAB, is that you find that people are prepared to sit for three, four or five hours in a CAB to wait for half an hours worth of advice, because they're so frightened of going to the lawyers, and I think we would give better advice and more prompt advice. Because we know what to look for. My wife helps at an Advice Centre in * and the CAB there see*

people and they allow an hour for each visit, and I would hope that we could get to the nub of a problem in half that time, and then they want another hour to be able to write up their notes. Now, you know, I think that we can do that better.

This view was actually echoed by the manager of a housing advice agency in the same town, indicating that there was a genuine cultural difference between the two sectors:

I think solicitors do work very differently from the NfP sector. I did have an issue not that long ago and I was fascinated with how the solicitor dealt with that issue – I know that if someone had come in here – well he did in half an hour what would've taken three or four hours for an advice worker to go through and that's about being very blunt, very direct 'Tell me what happened .. Right .. I'm writing this letter ..' and that's a very focused way of looking at it.

An employment specialist in a firm in a neighbouring town identified a problem as the lack of some of the basic disciplines and case handling skills which tended to be inculcated in solicitors at an early stage of their vocational training:

*I think the quality of advice from the CAB here in * is absolutely dire – well at least in employment – the number of times you have to ring up the woman * .. what's her name .. and say I'm going to be writing to you about these files, you've missed the time limits, you haven't done this .. or you get people who come to you and they've been to the CAB and somebody voluntarily has taken one of their standard letters and actually queered the pitch of the case ..and they don't even write them up .. type them up – what they do is get the proforma, and at the top it's got 'for use for this' and at the bottom it's got all the advice the CAB gives about what you should do, and they send that to the employer ..the employer comes in to see me with one of these and he's almost laughing because it gives the tactics away .. it's just silly .. sloppy*

Whilst it is likely that these kinds of views reflect in part the need for legal professionals to bolster their own sense of worth, the impact on the processes of networking and referral are the same as if they were in every instance justified. The issue of expertise had a more specific significance in terms of one key area of provision in which one of our firms specialized, namely community care and education. The senior partner of this specialist firm defined this area of law as innovative public interest work, where the specialist expertise would often lie in using the Human Rights Act and Judicial Review to place before the courts injustices which were the consequences of administrative discretion by local authorities which would otherwise go unchallenged. Moorhead and Robinson have noted the extent to which the problems of legal need result from the action or inaction of a local authority (2006). The senior partner of this firm was of the view that these administrative decisions in the areas of education and community care are often left unchallenged by NFP agencies because of lack of confidence and a belief that local authorities are unlikely to have made mistakes. He provided one specific example which is worth quoting at length:

so I do child care work and quite often you don't get joined up thinking in childcare, you get – child protection will look at the parent with learning disabilities and say (to the parent?) 'this child is at risk here'. Very rarely do they bring in their learning disability service, and very rarely, in any case, do they consider what – well the parents might have failed – but

there's no suggestion that the local authority, for example, have obligations to get the children statemented earlier, to perhaps provide respite care, to look what services ought to be provided in a joined up way. And we're able to say – I'm able to talk to my colleagues – and say 'well what should they have done in these circumstances', and to try to put a different slant on it. But again, because it's such a very narrow area of law most judges, most barristers, in this area it's a surprise to learn that there is legislation which doesn't just govern under section 47 of National Health Service Community Care Act, creates a mandatory – if you once prepare proper community care plan – that's mandatory upon the local authority to provide it. It's not a target duty. So it is about building specialisms and making sure that we can say 'look we are different' even though we're a relatively small firm, that we can deal with these issues which is why we get referrals now from, as I say, from across the country.

A specialist housing solicitor identified another cultural distinction which he argued affected the capacity of the NfP sector to handle representation roles (and this narrative was related to his objection to bringing the NfP sector into a local duty scheme for housing cases.) This distinction revolved around the ability to claim ownership of the public space in a courtroom or tribunal:

It is my space and I take no nonsense from anyone because I am an officer of the court – so I have as much right as them (the judges) to be there but when the voluntary sector person goes in they feel as if they have no such right and that's true of course. They are there at the grace of the judge and that tempers the way they behave.

Interviewer: What do you mean?

They are over gracious, they don't challenge and that's aside from whether they have the expertise. The thing if you go into court on license then that affects the way that you behave and you can see that because they allow things to happen that we wouldn't allow.

These barriers represent a considerable obstacle to the kind of inter-agency cooperation which CLSPs were originally designed to encourage. Whether the move to a more market driven approach on the one hand, or the highly structured cooperation of CLACs on the other, will exacerbate or ameliorate these tensions is open to debate.

We will now return briefly to the processes of intra-agency referral. Specialist advisers in all the VCO agencies we studied were seen as an important training resource, particularly as training budgets came under strain, the result, it was often argued, of the failure of contracts to recognise the full cost of the delivery of services. In CABx the salaried specialists were an important source of up to date information for volunteer workers, and a means of communicating to volunteers where the limits of their capability lay. This was particularly the case in CABx which operated satellite advice centres in remote areas. Under local authority funding regimes it was argued that specialist workers had opportunities both to make links with regional and national specialist networks and to disseminate their expertise. However, several of the NfP agencies identified elements of the LSC contract as militating against these arrangements: the 'ring-fencing of contract staff' and problems which managers and workers identified in 'making the hours' had led several specialists to withdraw from networks, and to cease any training functions. Some agencies attempted to surmount this problem by distributing a contract between more than one worker: this was however only possible for specialist

agencies (since even quite large CABx might not employ more than one specialist in any area), and in one case, noted above, an agency reported being asked to restrict the contract to a single worker following a critical audit.

In our discussions with agencies concerning the training and skill acquisition of advice workers certain themes recurred. One was the age profile of the workforce and the difficulties in recruitment, partly due to the ceiling on salaries for specialist advisers in the region of around £20,000 per annum. A second was the importance of mentoring and supervision by skilled advisers in the development of new specialists, and the time consuming nature of this form of training.

A specific example was provided by one of the specialist housing agencies involved in the study, which had just received two new CLS contracts: one to open up a centre in a neighbouring town which was regarded as a 'desert' for housing advice, and one to provide representation at County Court. The agency Director argued that the set-up costs of the former had not been fully recognised however, and in the latter case there was a proviso that the agency service the advocacy with their most skilled and experienced advisors. This meant backfilling the posts vacated by these advisors in order to ensure that the standard service did not suffer. The agency Director estimated that the cost of getting these advisors in place, including training up, and diminished case loading during training, were £20,000. Eventually he had managed to obtain £800 from the LSC to cover these costs, but he argued that in addition to the financial loss, the training capability of the agency was diminished because the most skilled workers were no longer able make their expertise available for training up their colleagues.

In this section we have attempted to underscore the significance of the way in which first and second tier advice are articulated, and the importance of the relationships which facilitate that articulation. Most of our respondents argued that effective access to justice depended on the existence of clear routes from initial advice through to specialist expertise, although there was less agreement on the way in which these routes might be constructed. The relationships between the tiers was also seen as crucial to the functions of training and ensuring succession. One perspective identified the unintended consequences of some aspects of contract compliance management for these relationships, indicating that organizational change may indirectly affect quality through processes which are at the moment imperfectly understood.

Conclusion

This paper has approached Access to Justice through discussion of the new avenues for services resulting from the introduction of the NFP sector into the legal aid sector. In many government policy documents, the concepts of 'access to justice' and 'improving the reach of legal services' are used as though they were synonymous, in the same way that the designations of 'citizen' and 'consumer' are often treated as interchangeable. The relationship between the two sets of ideas is more complex and problematic, however. The concept of 'justice' is related in the minds of most people, and most users of the justice system, as related to an outcome to a specific matter. Genn found that of those taking action to pursue a justiciable matter, 51% had a specific objective related to money, goods or property, with smaller proportions (between 5% and 8%) being concerned with achieving outcomes related to jobs, divorce or separation and enforcing rights (1999, p. 183). However other

research indicates that people's sense of justice also relates to the *quality*¹¹ of service provided, their sense of ownership of a case, and being treated with respect (for instance, Tyler and Lind, 1988; Sommerlad and Wall, 1999). Arguably the potential for the NFP sector to realise both these aims was originally fundamental to the partnership with the LSC, since the NFP ethos was concerned at a fundamental level with the sort of democratisation and modernisation of legal services which the LSC hoped to achieve. However the tensions discussed above between this ethos and the countervailing VFM ethos appear to have circumscribed the extent to which the NFP sector has been able to act as a creative new form of legal service. Similarly, the difficulties the contract poses to triage have been accentuated by the market based ideology of LSC policy (see, eg, Frontier Economics, 2003), realised through the introduction of increased competition, and therefore conflicts of interest, between providers, and this is likely to prove dysfunctional for the idea of networking, unless it can be incentivized.

The concept of providing 'legal advice services', however, does not imply any necessary outcome beyond the provision of advice itself. The modality of the advice service and the nature of the problem may combine to result in a just outcome, and in certain forms, this process will be easy to trace (the files recording face to face advice work and outcomes will be susceptible to peer review); in others, it will be less so (as will be the case with telephone advice). The expansion of 'legal services' therefore has no necessary correlation with an increase in just outcomes. However, certain forms of 'legal service provision' (telephone advice, web-based services, some forms of mediation) give the appearance of being cost-efficient and of empowering the stakeholder, and may therefore represent more attractive service avenues than face to face case work, but it would be unwise to directly read from an increase in these services an increase in access to justice.

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¹¹ And clients did not understand quality as 'fit for purpose' but as something far more complex, resonating with dignitarian theory (see Sommerlad and Wall, 1999)

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