RUNNYMEDE

Final Report

Justice at Risk

Quality and Value for Money in Asylum Legal Aid

Julie Gibbs and Deri Hughes-Roberts

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Julie Gibbs and Deri Hughes-Roberts, November 2012

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JUSTICE AT RISK

‘Quality and value for money in asylum legal aid’

Julie Gibbs and Deri Hughes-Roberts, November 2012

Final project report

This report aims to help policy makers, practitioners and others consider how best to ensure value for money in civil legal aid. It focuses on experience in the asylum legal sector; brings together the results of research undertaken earlier in this project, some of which has already been published; and seeks to draw out the lessons.

This report was commissioned in 2009 by Refugee and Migrant Justice, in partnership with Asylum Aid and the Immigration Advisory Service. Since that time, both Refugee and Migrant Justice and the Immigration Advisory Service have entered administration. In June 2011, the Runnymede Trust was given permission to publish the outstanding reports, including this one. Asylum Aid remains a partner in the final report, together with the Law Centres Network (formerly the Law Centres Federation). The project has been funded throughout by the Baring Foundation.

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Introduction

Representation of asylum seekers is particularly challenging. Unlike other areas of law, there is rarely any official documentation of a case or witnesses, and the factual basis of a claim can often span several years. For these reasons, asylum cases require a much more extensive fact-finding exercise, frequently with a client who has been traumatised. Because of the absence of other evidence, most cases will ultimately turn on whether the asylum seeker is to be believed. The assessment of credibility is a complex task and the presentation of the case requires skill and care on the part of the representative.

The law imposes a particularly high standard for the asylum decision-making process. This is not surprising given the matters at stake.

> *"It has been said time and time again that asylum cases call for consideration with 'the most anxious scrutiny': R v SSHD, ex p Budaycay. That is not a mantra to which only lip service should be paid. It recognises the fact that what is at stake in these cases is fundamental human rights, including the right to life itself."* [1]

The quality of legal representation is therefore of paramount importance to asylum seekers whose cases routinely raise issues of life and liberty. This report suggests that quality is also an essential component of value for money in legal services for asylum seekers. However, the quality benchmark is set too low. Value for money cannot be achieved when poor work is paid the same as work which helps ensure decisions are right first time.

Evidence – much of it from government sources – indicates that a decision-making process based on early, quality legal intervention could deliver better outcomes and overall cost savings, making early investment in quality worthwhile. This was demonstrated by a pilot of a system known as the Early Legal Advice Project (ELAP), in which early quality legal representation was integrated into the asylum decision-making process to deliver better outcomes with faster and more sustainable decisions. This pilot project was evaluated by the Legal Services Commission (LSC) and UK Border Agency (UKBA). And, reflecting on lessons from this and other research, Justice at Risk suggests ways in which ELAP could inform thinking on how legal services for asylum cases – as well as other areas of law – could be commissioned to provide better value for money.

Justice at Risk is especially timely as ELAP is now being evaluated across a whole UKBA region, with a decision expected in 2012 on whether to extend it further. The LSC recognises that paying the standard system of fixed fees was not appropriate for the ELAP process because of the need to invest more legal time early on – to considerably varying degrees, depending on the complexity of the case. Instead of fixed fees, payments have been made for hours of work. Ministers therefore need to decide on the payment system for future provision.

The report also looks forward to the possible introduction of best-value tendering. It underlines the need to consider raising the quality threshold for legal aid representation now to ensure that cost-effective, quality representation is not priced out of the market.

As well as being directly relevant to the future of asylum legal aid, this research also reflects on the wider lessons for government thinking on commissioning for outcomes rather than outputs.

The research project

The project has used a wide range of methods including a literature review considering government and other sources, in-depth interviews, file reviews of legal aid cases, and an examination of legal aid data. It was designed to provide a holistic view of what high-quality legal aid representation looks like and how it contributes to cost-effective decision making.

The project received guidance and support from a steering group. For the first part of the project, this group comprised members from the Law Society, Immigration Law Practitioners' Association, Ministry of Justice, Legal Services Commission, UK Border Agency, Law Centres Network, Asylum Aid and AdviceUK. For the completion of the project, the group included members from the Law Centres Network, the Institute of Advanced Legal Studies, the Baring Foundation, Civil Exchange, Asylum Aid and the Ministry of Justice. All steering group members acted in an advisory capacity only, and their membership did not imply any endorsement of the project findings.

The benefits of investing in early, quality legal advice

The literature review, undertaken as part of this project, found a significant body of research that

suggests early, quality legal intervention results in faster, better quality, more sustainable asylum decisions. This included evidence from the evaluation of the joint UKBA/LSC pilot of the Early Legal Advice Process (ELAP) in Solihull, mentioned above. Following this, the UKBA and LSC are now evaluating the process in a whole UKBA region, with the possibility of rolling it out further (Aspden, 2008:17).

The ELAP pilot examined the impact of early, quality representation on the efficiency of the asylum decision-making process. One of its main aims was to ensure the full factual and evidential basis of a case was put before decision makers at the earliest opportunity in the form of a witness statement and supporting evidence (Ibid: 5). To facilitate this, cases were paid at an hourly rate rather than by fixed fee.

The evaluation found that the ELAP process had the potential to deliver considerable overall costs savings (Ibid: 9). This required additional investment in quality from the outset. The average fee income for legal advice at the initial decision-making stage was £977, and the fixed fee for the same work would have been £755. However, the pilot delivered high success rates, saving costs of unnecessary appeals at a conservative estimate of over £4,000 per case (Ibid: 67, and Annex 14).[2]

Definition of quality

Section 7 of the report describes the definition of quality formulated through this research project. Elements of the extensive project literature review, which examined key stakeholder perspectives, were distilled to determine which were the approaches and features essential to quality legal practice in asylum work. This definition was also informed by results from primary research with refugees.

As in ELAP, the *Justice at Risk* definition of quality aims to ensure the full factual and evidential basis of a case is placed promptly before decision makers in the form of a witness statement and supporting evidence.

While the definition stresses that legal representatives must be efficient, it allows for representatives to take sufficient time to prepare the case in order to meet the key requirements. Representatives must also foster good one-to-one relationships with clients.

The relationship between time and quality

The value of allowing for sufficient time in the delivery of quality is supported by primary and secondary quantitative research:

- The case file review – undertaken in this project and published for the first time in this document – found a 'strong and positive correlation between quality and the amount of time spent giving advice' (see Section 10).
- LSC research into quality and cost showed a 'significant independent relationship' between advice time, quality and outcomes (LSC, 2001: 185). Details of this research are set out in Section 2 of this report.

Definition of quality

Representatives provide quality legal representation in asylum cases when they carry out the following, while adhering to professional standards and practising with sufficient efficiency, technical and personal skill, knowledge, judgment and experience:

(1) Identifying and gathering all relevant facts, evidence and arguments in a timely manner, and presenting those to the decision maker in the best way

(2) Exercising tactical judgment and exploring every reasonable legal avenue to ensure a full and fair hearing of the case

(3) Ensuring the client knows the best case has been put forward on their behalf, consistent with the relevant legal framework

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

- Further evidence of the relationship between time, quality and outcomes arose from the ELAP pilot evaluation (Section 9).

Fixed fees reward those who spend less time

A fixed fee scheme is one in which the same fee is charged regardless of the length, quality or outcome of a piece of work. In the absence of effective quality controls, the research notes that this can incentivise work of poor quality.

Paying a fixed fee does not incentivise representatives to carry out the detailed and time-consuming evidence gathering that is essential to asylum cases – and was also required in the ELAP Solihull pilot. In fact, interviews undertaken as part of this research suggest that UKBA decision makers now rarely receive witness statements in fixed fee cases (see section 3.3). Interviews with legal advice providers and other stakeholders suggest that some representatives are cutting corners and turning away vulnerable clients with more complex cases – namely, those cases that take longer to prepare (section 3.4).

A Ministry of Justice review instigated by Lord Bach detailed concerns over possible abuse of the fixed fee system, including some providers 'cherry picking' easier cases and providing short units of advice (Ministry of Justice, 2009).The review also highlighted potential difficulties for specialist providers. Section 3 looks at evidence that supports these concerns, obtained from the LSC and through interviews with stakeholders.

It is likely that many of these cases are not brought to a conclusion. Further legal intervention and repeat fees would be required, driving up overall costs. Indeed, In 2009/10, 29% of suppliers were in breach of a key performance indicator (KPI) designed to prevent abuse of the fixed fee scheme. They breached this KPI by spending little time on their cases on average while collecting the full fee (see Section 3.2). The findings also showed that 27.3% of asylum fixed fee cases earned more than twice what they would have been paid at an hourly rate. The LSC research predicted that representatives would be twice as likely to be unaware of the outcome of a case if it was paid by fixed fees (44% of cases) compared to an hourly rate (22% of cases) (See Section 3.1 and LSC, 2001: 72). This suggests that, most often, the case was closed by the provider without it being concluded.

While this data does not allow for a quality comparison between providers, other aspects of the research suggest a correlation between time and quality. Taking this together, there appears to be scope to spend resources more effectively and achieve greater value for money within the same budget limit, provided that effective quality standards are enforced.

Measuring quality

Peer review is currently held to be the most accurate and fair assessment process of quality. Once reviewed, firms are given a competence rating. Level 1 is the highest rating and Level 5 the lowest. Level 3 is the minimum standard required for retaining a legal aid contract (LSC, 2005: 5).

Significantly, this Level 3 competence threshold does not reach the same quality level for quality asylum legal work defined in this project. It requires work to be adequate, but not always extensive; it requires adequate but limited communication with the client; and it only requires a representative to deal with the presenting issue, not linked issues. This Level 3 threshold contrasts sharply with the Level 2 standard, which requires:

- work to be tailored to the client's individual circumstances
- issues to be progressed comprehensively, appropriately and efficiently
- the client to be advised correctly and in full
- the representative to employ tactics and strategies to ensure the best outcome for the case
- the supplier to be proactive and add value to the case (Ibid: 11)

These differences help explain how representatives are able to standardise work and cut corners in casework. The Level 3 threshold does not meet the expectations of representation in the ELAP process. It seems inconsistent with the special demands asylum cases place on legal representatives, where a client's witness statement is essential to an effective decision-making process.

The minimum peer review standard is set too low to ensure value for money in asylum cases. It should be raised to Level 2.

Value for money

One of the insights provided by this research is the absence of effective systems for monitoring value for money in asylum legal aid. There are no value-for-money key performance indicators for the great

majority of asylum work. Currently, the only context in which the LSC has looked systematically at cost and outcome is in ELAP. The evaluator of the ELAP pilot was clearly impressed with the way value for money data was collated:

> *"It would appear to be crucial that the LSC should employ such a special reporting mechanism to ensure effective monitoring of the cost effectiveness at each stage of the process by all providers."* (Aspden, 2008: 72)

The LSC has yet to adopt this recommendation beyond ELAP.

Commissioning legal services

Public policy on commissioning public services is increasingly expanding from a focus on outputs only toward creating incentives for outcomes and the delivery of 'social value'. The ELAP process can be viewed in this same broad context, and this report indicates how it might inform thinking on commissioning legal services to provide better value for money.

ELAP evaluation findings present a challenge to the current, output-based fee structure. When the pilot was designed, it was recognised that the fixed fee system was not appropriate for the process and so payments were based instead on hours of work. Considering our experience from the limited rollout of ELAP, a fundamental decision must be made on what payment system to use in future so it ensures quality, value for money and better outcomes for clients.

ELAP should be rolled out nationally in line with the five funding principles set out below.

Recommendations and funding principles

A new approach to funding asylum representation could enable the decision-making process to deliver sustainable, fair, faster and more cost-effective decisions. This would require a move away from a payment structure linked solely to outputs, towards one which seeks to incentivise behaviour that leads to good outcomes. This structural and cultural shift is also essential as a safeguard against abuse of a system that should ultimately guarantee all people access to representation, including the most vulnerable.

Five principles for reform

Lessons from this research suggest that the new approach should include the following five principles:

- Funding should incentivise early, sustainable, fair decisions and provide clear value for money. A 'full life' assessment of value for money should include potential savings at the end of the decision making process for the Home Office, the Ministry of Justice and other public bodies. Value should include social value.
- Legal aid payments should reward quality and good client relationships. It must be sufficient to enable the representative to establish the full factual and evidential basis for the case, and submit it to UKBA in a witness statement with supporting documents.
- Funding should be sufficient to meet legitimate needs at all stages of the case.
- All clients should receive a level of advice that corresponds with the complexity of their case, which means that some clients with more complex cases will need a greater investment in legal support.
- The scheme should incentivise representatives who bring cases to completion. Short pieces of advice may add value to a case, but should be paid less than full representation.

Other points to consider

In the light of research considered in this report, the following more specific points of design might also be considered:

- **Enforcing higher quality thresholds.** An outcome-focused quality threshold ought to be applied, set at a level that ensures these principles are enforced. Firstly, there should be a step increase in the number of peer reviews to eradicate performance at Levels 4 and 5. The peer review threshold should be raised to Level 2 in asylum cases to reflect the special nature of the work. All representatives should be peer reviewed, within a specified timeframe and prior to any move towards best-value tendering.
- **Introducing value for money indicators.** Value for money should be assured through the development of specific performance indicators over and above the ones currently in use. The LSC should consider indicators that link cost with outcomes. The LSC should report annually on the overall performance of suppliers against

KPIs. A value for money monitoring system should be adopted by which representatives report on cost and outcomes, as recommended for wider use in the ELAP pilot evaluation.

- **Robust monitoring.** There should be robust monitoring of supplier performance, with particular emphasis on value for money. Monitoring should scrutinise suppliers that earn more from fixes fees cases than hourly rate work. Suppliers should be prioritised for peer review on the basis of performance. Feedback loops should ensure prompt learning and action on both good and bad practice.
- **Payments reflecting higher costs and complex cases.** More complex work that requires representatives to be accredited at Level 2 of the Immigration and Asylum Accreditation Scheme should be paid at a higher rate. The legal aid scheme should incentivise appropriate time being spent on client group cases that typically take longer to prepare, such as those relating to children and fast-track detainees.

The ELAP approach of paying for cases on an hourly rate is both straightforward and relatively free of the risk of unintended consequences. It is tried and tested – not only as part of the ELAP pilot, but also for the ongoing funding of cases relating to children and fast-track detainees. One of the main concerns from a funding perspective would be to ensure that representatives do not spend more time than is necessary on a case. Since 2004, this risk has been managed by imposing an advice time limit on each case that can only be extended with prior authority.

The move to best-value tendering will pose a particular challenge to quality representation. Price competition based on the current low quality threshold will force quality providers out of the market. Tendering on a higher quality threshold will safeguard and promote quality legal advice, secure better outcomes for asylum seekers and value for money for government.

1. Introduction

Representation of asylum seekers is particularly challenging. Unlike other areas of law, there is rarely any official documentation of a case or witnesses, and the factual basis of the claim can often span several years. For these reasons, asylum cases require a much more extensive fact-finding exercise, frequently with a client who has been traumatised. Because of the absence of other evidence, most cases will ultimately turn on whether the asylum seeker is to be believed. The assessment of credibility is a complex task and the presentation of the case requires skill and care on the part of the representative.

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The quality of legal representation is therefore of paramount importance to asylum seekers whose cases routinely raise issues of life and liberty. This report suggests that quality is also an essential component of value for money in legal services for asylum seekers. However, the quality benchmark is set too low. Value for money cannot be achieved when poor work is paid the same as work which helps ensure decisions are right first time.

As part of this research, we have devised a definition of quality, set out below. The definition focuses in particular on the need for a representative to establish quickly the full evidential basis of a case and to communicate this to the decision maker in the form of a witness statement and supporting evidence. It satisfies the requirement for the 'most anxious scrutiny' of asylum cases and the need for representatives to provide the LSC with value for money. The objective elements of the definition can be measured and costed through a file review exercise.

The definition is discussed in detail in Section 7 of this report. The outcome of the file review exercise developed from the definition is examined in Section 10.

This project was commissioned by Refugee and Migrant Justice in 2009. The bulk of the research was undertaken prior to June 2010, when Refugee and Migrant Justice went into administration. Much of it, therefore, predates the Government announcement of £350 million of economies to the civil legal aid budget. In particular much of the research predates the 10% cut in legal aid fees introduced in October 2011, and the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which makes further cuts – for example, by removing many areas of law, including immigration advice, from the scope of legal aid[4].

This report draws together the results from a number of research stages carried out as part of this project – some of which have already been published – and

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

updates it in light of the present context, including the further legal aid cuts. Based on an analysis of this material, it includes some final reflections on ways in which quality and value for money can be incentivised.

The project has utilised a wide range of methods including a literature review that considers Government and other sources, in-depth interviews, file reviews of legal aid cases, and an examination of legal aid data. It was designed to provide a holistic view of what high-quality legal aid representation looks like and how it contributes to cost-effective decision making.

The project received guidance and support from a steering group. For the first part of the project, this group comprised members from the Law Society, Immigration Law Practitioners' Association, Ministry of Justice, Legal Services Commission, UK Border Agency, Law Centres Network, Asylum Aid and AdviceUK. For the completion of the project, the group included members from the Law Centres Network, the Institute of Advanced Legal Studies, the Baring Foundation, Civil Exchange, Asylum Aid and the Ministry of Justice. All steering group members acted in an advisory capacity only, and their membership did not imply any endorsement of the project findings.

This is the final report in a series published as part this research. A number of publications resulting from the project are available and are summarised below.

1.1 Literature review

Published in March 2010, the project literature review (Trude and Gibbs, 2010a) draws on existing evidence to examine how quality legal representation contributes to an efficient asylum process and identifies the key elements of high-quality legal representation in asylum work. It draws these together into a definition that can be used to identify how much high-quality legal work costs to deliver.

Among other sources, the literature review examined the following:

- Two major government studies, looking at cost, quality and outcomes in the provision of legal aid: Cost and Quality (LSC, 2001), which found a correlation between cost, quality and outcomes in legal aid work; and a pilot of the Early Legal Advice Project in Solihull, which looked at the positive impact of early, quality legal interventions on efficient decision making in asylum cases (Aspden, 2008).
- Academic and government literature on commissioning public services – for example, 'Excellence and Fairness: Achieving world class public services', which highlighted the need to incentivise excellent outcomes and provide a personalised service that meets individual needs, fairness and value for money (Cabinet Office, 2008).
- Government studies into legal aid reform, such as Lord Carter's review of legal aid procurement, which recommended reform underpinned by a strict and robustly monitored quality threshold (Lord Carter, 2006).
- Reputable research into longer-term cost savings that can be achieved through early advice interventions – for example, 'It's the System, Stupid! Radically Rethinking Advice' (AdviceUK, 2008).
- Views of professionals and representative bodies on fixed fees and their adverse impact on quality representation – for example, the Immigration Law Practitioners Association's response to the fixed fee proposals (ILPA, 2006).
- Early reviews of the impact of payment by fixed fees, such as Lord Bach's 'Study of Legal Advice at a Local Level' (Ministry of Justice, 2009).
- Academic literature on quality services, particularly relating to legal aid and peer review – for example, 'Lawyers - The Quality Agenda, Volume 1. Assessing and developing competence and quality in legal aid' (Sherr, et al, 1994).
- Primary research, conducted as part of this project, into refugees' views on quality and its importance to effective and fair decision making.
- LSC publications on the organisation's evolving position on quality, the quality threshold and peer review (described in Section 5 of this report).

The above sources are supported by evidence from practitioner and refugee organisations such as Asylum Aid, Bail for Immigration Detainees, Refugee Council and Refugee Action.

Below, we list some of the key points noted in the literature review.

In 2007, a system of fixed fees was introduced for the majority of asylum cases, with exceptions for some particularly time-consuming cases – this replaced payments for each hour of work undertaken. The new fixed fee was based on an assumption about the average length of time a case would take. However, unlike in other categories of law, the LSC did not have any reliable historical costs data on which to base levels of payment for

asylum cases (LSC, 2006a). The underlying process had changed and so there was no historical information on how long each element of the process would take on average in the new system. So, assumptions had to be made to set the level of fixed fee for various stages of the case and as well as the threshold for exceptional cases.

The aim of the move to fixed fees was to achieve better value for money. However, some of the evidence from the literature review suggests that the fixed fee system, combined with the low threshold level of competence at which legal aid providers can enter and operate in the UK asylum advice market, may generate short-term savings but could cost more in the long term – both to the public purse and in human terms to individual asylum applicants.

All providers that reach a minimum level of competence are currently paid an identical fee for different stages of the work, reducing the incentive to strive for quality. This minimum level of quality, Peer Review Level 3, is the same for all civil legal aid cases. It requires work to be adequate, but not always extensive; it requires adequate but limited communication with the client; and it only requires representatives to deal with the presenting issue, not linked issues. This Level 3 threshold contrasts sharply with the Level 2 standard, which requires:

- work to be tailored to the client's individual circumstances
- issues to be progressed comprehensively, appropriately and efficiently
- the client to be advised correctly and in full
- for the supplier to be proactive and add value to the case (LSC, 2005: 11)

The minimum threshold of competence is set below the level for quality asylum legal work defined by this study, which is closely aligned to Peer Review Level 2. The project definition of quality and the standard at Peer Review Level 2 focus in particular on the need for representatives to establish quickly the full evidential basis of a case and to communicate this to the decision maker in the form of a witness statement and supporting evidence. This process is particularly important in an asylum case, where the client's testimony can span events over several years and because, by its nature, an asylum case is seldom supported by witnesses or official documentation.

The literature review found a significant body of research that suggests early, quality legal intervention results in faster, better quality, more sustainable asylum decisions. This included evidence from the evaluation of the UKBA and LSC Early Legal Advice Project (ELAP) pilot in Solihull. Following this, the UKBA and LSC are now evaluating the new process in a whole UKBA region, with the possibility of rolling it out further (Aspden, 2008: 17).

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The literature review surveyed a wide range of evidence on quality legal representation relating to asylum, including lawyers' codes of professional conduct, a report by the government-sponsored Council on Social Action, and the results from the ELAP Pilot. It also drew evidence from the interviews with refugees discussed below.

The review highlighted the key elements of quality legal representation. Firstly, professionalism and expertise, which enables, for example, the representative to establish the full factual and evidential basis of the case at the earliest opportunity. Secondly, the quality of the one-to-one relationship between the representative and client, which helps establish the client's trust and confidence in the representative and encourages early disclosure of the full facts of the case. If a client is confident that the best case had been put forward, they are more likely to be confident in the outcome of the case. The review highlighted the fact that the representative, working efficiently, must take sufficient time to present the case and meet the two elements listed above. These elements were drawn together in the project definition of quality in asylum representation, set out in Section 7 of this report.

The final definition of quality is highly consistent with the process pursued in the ELAP pilot. In particular, it requires thorough evidence to be compiled to bring out the full facts of the case at the earliest opportunity. This suggests adherence to the project definition of quality will improve outcomes for clients and result in more sustainable, cost-effective decision making in asylum cases.

1.2 Refugee interviews

Published in March 2010, the Refugee Interviews report documents 32 interviews with refugees (Trude A and Gibbs J, 2010b).

The interviewees represent a broad sample in terms of the nature of their application, their countries of origin and gender, though there is a London bias (27 lived in London, 7 outside). Half of the interviewees had had more than one legal representative, which meant their comments were based on experience of a wider base of legal providers (further details of the methodology are provided in Appendix 1). Only individuals whose cases had been concluded positively were chosen, in order to remove the possibility that a negative decision on their case might have coloured their perception of quality.

Because of the time lapse, none of the refugees in the sample went through the legal system under the fixed fee regime. However, their observations on which aspects of the work of legal representatives were most valuable to them were made independently of any payment system. Their unique perspectives on what constitutes quality legal advice were fed into the project's definition of quality. The results of the interviews – particularly relating to the importance of a one-to-one relationship, good communication skills and the underlying need for sufficient time – are remarkably consistent with the range of other 'unequivocal' evidence from primary and secondary sources, described in 'Time Well Spent', research by the Council on Social Action (CoSA) and published by the Cabinet Office (CoSA, 2009). In addition to looking at this piece of research and conducting its own primary research, the report examined other research including work undertaken by the New Economics Foundation, the Law Centres Network and Youth Access. Additional consistent evidence, much of it relating specifically to the representation of asylum seekers, is set out in Section 7 of the project literature review (Trude A and Gibbs J, 2010a).

Through the interviews, five areas of the asylum process stood out as important, helping to form some of the key findings in this report. These are:

- The quality of the one-to-one relationship with a representative, which includes factors like trust, empathy, mutual respect and dealing with difficult emotions and situations.
- Gathering and presenting evidence, listening to the client, and taking all possible steps to present a strong case built on well-researched evidence and the use of appropriate witnesses.
- Case management and conduct of the case, which involves the timely submission of evidence and documents, good handling of appeals at court, regular follow-up with the Home Office, a proactive approach to the case and the management of client expectations.
- The importance of communication. Professional and neutral interpreters were essential so that evidence could be passed to the representative. Clients expected the representative to have excellent listening skills, give their full attention to the client and use appropriate (positive) body language.
- Access to the representative. Representatives should be directly available or respond to clients within a reasonable time frame.

A more detailed summary of the research findings is set out in Section 8 of this report.

1.3 Stakeholder interviews

In 2010, Information Centre about Asylum and Refugees (ICAR) staff interviewed four UKBA decision makers and two immigration judges to gain their views on what constitutes high-quality work from a legal representative and how this aids the decision-making process. The UKBA officials comprised two case owners, one senior case worker and one presenting officer. Details of the methodology are set out in Appendix 1.

ICAR also carried out 10 face to face interviews with providers of legal aid advice in London firms specialising in asylum and immigration. The providers were from a mix of not-for-profit and private firms.

A full report of these interviews will be published alongside this final report.

Although the project budget meant that the sample size of interviewees was necessarily small, there was clear consistency between stakeholders relating to the key constituent elements of quality legal representation and its positive contribution to cost-effective decision making. Views were also consistent with evidence documented in the project literature review, the project refugee interviews and research by CoSA, referred to in 1.2 above.

Stakeholders emphasised the quality of the one-to-one relationship with the client, together with comprehensive evidence gathering, professionalism and expertise. Underlying all contributions was the need for sufficient time. These views find particular support from a variety of sources set out in the project literature review, including evidence from representatives and decision makers involved in the Solihull pilot (Aspden, 2008).

It was noteworthy that UKBA decision makers and immigration judges agreed with the concept of frontloading – namely, improving the cost efficiency of the decision-making process by integrating quality legal representation from its outset. All interviewees stressed the importance of witness statements in setting out the full facts of a case – a fundamental requirement of the ELAP pilot in Solihull. All those interviewed believed quality representation was being damaged by funding pressures and thought this was having an adverse impact on efficient decision making. As well as reporting a significant threat to the financial viability of their work, representatives cited the high personal cost (e.g. stress and unsustainable working hours) of trying to deliver quality representation under the fixed fee scheme.

Clear evidence was presented to show that many legal providers seek to survive, not just by cutting corners, but by dispensing with basic functions of representation like preparing witness statements – now a rarity in fixed fee cases (See Section 8.2.2 below). There is also evidence to show that some representatives are choosing not to assist particularly vulnerable asylum seekers, such as detainees, who present with more complex and time-consuming cases which are seen as financially unsustainable for already stretched providers (See Section 3.4 below).

A more detailed summary of the research findings is set out in Section 8 of this report.

1.4 Justice at Risk – interim report

Preliminary findings from the project were published in June 2010 (Gibbs J, 2010). This report drew together findings of the literature review and refugee interviews, together with preliminary findings from stakeholder interviews and the project file review.

1.5 Justice at Risk – the final report

This is the final report in the research series. It brings together the research elements that were previously published and outlined above, and the research completed subsequently but not yet published. It then sets these in the current context, which includes further changes to legal aid, together with reflections on the way forward.

The new research results included in this report are:

- Quantitative work completed by City University, devising a quality criterion and examining the costs of quality based on a number of file reviews
- The consideration of data disclosed under a Freedom of Information Act request and Parliamentary Questions

2. The Fixed Fee Scheme

The literature review described the background to the fixed fee scheme for asylum cases in some detail (Trude and Gibbs, 2010a:15 et seq).

2.1 Fixed fees

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

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

The funding of legal representation by fixed fees can be seen in the same broad context of public service reform, with its focus on efficiency and outputs as a means of securing value for money. The fixed fee scheme was introduced in October 2007. According to the Ministry of Justice's 'Study of Legal Advice at a Local Level', it aimed to:

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

It transformed the existing funding arrangement, under which legal representatives were paid an hourly rate for all work. For most cases the same fee is now given for a unit of advice or representation, regardless of its length, quality or outcome.

Asylum cases are paid a fixed sum for each case stage. A 'Legal Help' fee is paid at the initial decision-making stage. A 'Controlled Legal Representation' (CLR) fee is paid if the client is represented at appeal. A lower 'CLR 2a' fee is paid if the case completes before hearing (for example, because the UKBA concedes the case), and a higher 'CLR 2b' fee is paid if the appeal is taken to hearing.

In addition to these stage fees, additional payments are given for representing a client at a UKBA interview and at an appeal hearing.

Some of the most complex and time-consuming cases – those for unaccompanied children and detainees in the fast track decision-making process – were excluded from the fixed fee scheme and continue to be paid at an hourly rate. Other such cases were not excluded – for example, those involving victims of trafficking, most detainees, or clients with mental health problems.

Under the 'exceptional cases' provision, a fixed fee case can be paid at an hourly rate if the value of advice given exceeds three times the value of the fixed fee payable.

The LSC was at a considerable disadvantage when it came to the procurement of legal aid services for asylum and immigration work under the fixed fee scheme. Unlike other categories of law, the LSC did not base the fixed fee levels of payment on reliable historical costs data. By its own account:

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

The exceptional cases threshold was not modelled on immigration and asylum work:

> *"The modelling for the exceptional case threshold was primarily undertaken for TFF [tailored fixed fee] providers, and does not include immigration and asylum cases."* (Ibid: 6)

The fixed fee scheme has been met with sustained opposition from legal representatives and their professional bodies, non-governmental

organisations (NGOs) and community groups, who suggested it would impact on quality and drive representatives committed to quality out of business (Trude and Gibbs, 2010a: Section 3).

2.2 Costs, profit margins and market drivers

A study by international consultancy firm Deloittes on the challenges of 'payment by results' noted the importance of commissioning bodies that understand the market. They noted that the central challenge of 'payment by results' is to create a functioning, transparent, widely-understood marketplace. But this is 'an extraordinarily complex task' (Deloittes, 2011).

A number of reports have questioned whether the speed of reform is conducive to a proper understanding of its impact on the market. The Justice Select Committee's 8th Report (2009) dealt with family legal aid reform. The committee found that:

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

Similar concerns have been expressed by the National Audit Office in relation to the procurement of criminal legal aid. It suggested the LSC:

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

2.3 LSC research into cost and quality

Fixed fees were introduced in spite of an earlier major piece of research by the LSC that explored the effect of different funding models on services provided to clients. It covered all civil areas of law except family. The research involved 100 solicitors offices and 43 not-for-profit agencies and looked at more than 80,000 closed cases, carrying out peer reviews on over 700 of these cases. Immigration and asylum cases constituted 5% of the sample.

The research tested four experimental groups. The first three groups comprised solicitors firms and the fourth group was made up of not-for-profit agencies. Group One solicitors were paid a piece rate against hours worked. Group Two were paid a fixed sum per annum and were asked to provide the level of service they felt gave the best balance of access and value for money. Group Three were given a fixed sum per annum for a specified minimum number of cases during the year. Group Four not-for-profit agencies were paid for a certain number of hours irrespective of the number of cases.

Group One funding was based on payment under the Green Form Scheme, in existence before the introduction of civil contracting in 2001. Cases were paid by the hour to a two or three hour cap, depending on the area of law. An application could be made to the Legal Aid Board (as the LSC was then called) for additional funded time if it was required in the circumstances of the case. Group One cases were therefore funded in a similar way to the present system of hourly rate funding, although the cap was set at a much lower level than is now allowed for hourly asylum work.

Funding for Group Three was similar to that under the fixed fee scheme.

The main differences between Group Four cases and the present hourly rate system was that there was no case volume target and no cap on the amount of time that could be spent on a case beyond which LSC authority is required.

Findings

The research identified a number of factors as predictors of quality. In particular, these were:

- Positive case results
- Spending more time on matters
- The appropriate experience level of adviser handling the case (LSC, 2001: xi)

Positive case results

The presence of positive results correlated with both peer review scores and client satisfaction. Cases with positive results were significantly more likely to get higher marks on peer review and give rise to higher levels of client satisfaction (LSC, 2001: 220).

Time
The research found a significant correlation between advice time and case outcomes:

> *"The significant independent relationship between outcomes and time does not demonstrate that simply spending more time on cases is likely to increase the outcome. However, the relationship does suggest that more time does need to be spent on cases which are to produce outcomes under contract."* (Ibid: 185)

Peer review and outcome measures indicated relationships between time spent on a matter and the quality of work on that matter. In individual cases, an increase in the amount of time spent per case had a positive impact on the peer reviewer's assessment of quality.

In welfare benefits and employment cases, the time spent on a matter appeared to have an impact on the incidence of positive financial results. In housing, the likelihood of property being retained or recovered also increased for each contract hour spent on the matter. Similar, but small, effects were found where beneficial third party action was achieved for the client in housing and debt (Ibid: 220).

The research highlights the 'essential dilemma' in terms of contracting and controlling contracted work:

> *"The Commission has to be able to plan and manage the funding of the [legal aid] under contracts and yet, promotion of quality would probably be facilitated by allowing (or even encouraging) more time to be spent on certain contracted cases."* (Ibid: 221)

Experience level of the adviser
The experience level of an adviser had 'an important bearing on the quality of the work and/or peer review assessment of the file' (Ibid: 114). Cases that were handled by advisers at a 'trainee solicitor' level or equivalent were more likely to be judged below the competence threshold.

Quality comparison of providers
Not-for-profit agencies performed significantly better in terms of quality than solicitor participants. These agencies took much longer than solicitors to carry out their work. Various factors, including clients with disability, medical and/or psychological problems, consistently raised the amount of time spent by not-for-profit advisers.

Solicitors in Group Three, whose cases were funded in a similar way to the fixed fee scheme, performed worse in the three areas of quality, as measured by peer review, client satisfaction and outcomes:

> *"Group 3 was significantly poorer at giving advice at the right time than Group 1 (about 10% of cases were poorer). They were also less likely to incur disbursements where disbursements were actually appropriate than Groups 1 and 2. Group 3's failure to carry out other work was felt to be inappropriate in a greater proportion of cases than Group 2. This may provide an indication of how the constraints of contracting work against Group 3; discouraging disbursements and the carrying out of appropriate work."* (Ibid: 112)

The report concludes:

> *"Group 3 performed more poorly on nearly all outcome indicators than the other two solicitor groups."*

Significantly, the research found that advisers in Group Three were much less likely to know the outcome of their cases than advisers in other groups (Ibid: 72).

Outcome profiles
The report recommended that the LSC considers developing outcome profiles as a quality measure and trigger for peer review (Ibid: xii).

3. Impact of fixed fees

The literature review carried out under this project shows that early examination of the impact of the fixed fee scheme was inconclusive. The LSC undertook a review with a consultative group that included The Law Society and Immigration Law Practitioners Association. Its report, published in April 2009, concluded that it was too soon after the implementation of the fixed fee scheme to fully assess the financial impact on legal representatives, particularly for asylum and immigration cases, given the length of time it takes for those cases to complete (LSC, 2009a).

A Ministry of Justice review, chaired by Lord Bach, published a report on the impact of changes to the funding of civil legal advice in June 2009 – named 'the Bach Review' (Ministry of Justice, 2009). The Bach Review notes concerns about the perverse incentives created by the fixed fee scheme:

- Fixed fees may encourage representatives to 'cherry pick' cases that can be dealt with quickly
- They may encourage 'early closing', the practice of managing cases so they can be closed quickly 'rather than the one which offers the best outcome for the client in the long run'
- Representatives may be less willing to assist vulnerable asylum seekers with more complex cases. Funding arrangements disadvantage niche providers with a particular specialism in complex and therefore more time consuming and unprofitable work, and the exceptional cases threshold is set too high to mitigate this problem
- The funding structure may lead to the inappropriate paralegalisation of legally aided work in order to save money, affecting the quality of representation

The Bach Review recommended that monitoring systems are put in place to examine the extent to which these concerns impact on representatives and access to representation.

We have identified further evidence supporting the concerns raised in the Bach Review. It is set out in the remainder of this section, together with other findings about the impact of fixed fees.

3.1 Payment by fixed fee

One of the problems with fixed fees is that the full fee is paid in respect of advice that may take only an hour and does not bring the case to a conclusion. A second fee may then have to be paid to a second legal representative to complete the case, driving up costs per client.

The LSC's research into cost and quality lends weight to this concern. It found that Group Three advisers, in effect paid by fixed fee, were significantly less likely to bring a case to conclusion:

> *"One point of note was that, the adviser was far less likely to know the outcome of the matter if they were in Group 3 (44%) than in Group 1 (22%), or Group 2 (19%), reflecting the lower level of completion of matters under the contract."* (LSC, 2001: 72)

The research project found that quick pieces of advice are given in a high number of fixed fee cases. Draft data disclosed under the Freedom of Information Act by the LSC to Refugee and Migrant Justice (RMJ) on 30th April 2010 shows that 27.3% of asylum and immigration fixed fee cases earned over twice as much as they would have been paid at an hourly rate.[6]

In addition to the LSC paying the full fixed fee for high volumes of cases on which relatively little time is spent, there must be a serious possibility that many of these cases are not brought to a conclusion, requiring further legal intervention and repeat fees.

Another problem with the single fixed fee is that it does not support what the Ministry of Justice review called the 'ecology of service provision'. This is where some organisations specialise in more difficult and longer cases, while others deal with shorter less complex ones. Perversely, the specialists receive the same standard fixed fee per case as the generalists. In effect, the specialists, who spend more time on their cases, are paid less.

3.2 Sacrificing quality and outcomes to maximise profit?

The LSC acknowledged the threat to quality and value for money posed by the fixed fee system:

"A key risk for the LSC and clients of a procurement system based on fixed fees and ultimately competition is that quality of service and outcomes for some cases may be adversely affected by providers seeking to maximise profits."
(LSC, 2007: 20)

The research revealed evidence that some legal representatives may be abusing the fixed fee scheme to maximise profits. The LSC put in place a key performance indicator (KPI) to identify and prevent abuse of the scheme. The indicator provides for the investigation of a supplier whose average fixed fee income exceeds 20% of the value of income it would have received had work been paid at an hourly rate. It is one of the LSC's two 'value for money' key performance indicators (see Section 5).

On the face of it, the KPI gives providers who spend the least amount of time per case a fee rise of up to 20%. However, draft data disclosed by the LSC to RMJ under the Freedom of Information Act on 1st June 2010 shows that, for many, profits have exceeded 20%. For the year ended 31st March 2010, 29% of providers were in breach of the 20% fixed fee margin.

Further data on the fixed fee margin was provided in response to two Parliamentary Questions (PQs) tabled by Lord Avebury. The first PQ[7] in October 2010 established the market share of providers in breach of the fixed fee margin for the year ended 31st March 2010.

- 64 providers were in breach of the fixed fee margin in asylum cases in 2009/10. They were contracted to undertake 12,461 matter starts. They received £3,010,000 in fees from fixed fee cases, 20% of the fixed fee asylum budget of £14,880,000.
- 53 providers were in breach of the fixed fee margin in immigration cases in 2009/10. They were contracted to undertake 14,242 matter starts. They received £3,970,000 in fees from fixed fee cases, 29% of the fixed fee immigration budget of £13,700,000.

A second PQ[8] in June 2011 detailed how many of these providers were awarded contracts in the 2010 bid round.

- 39 providers with 7,863 starts who were in breach of the margin for their asylum cases.
- 33 providers with 7,678 starts who were in breach of the margin for their immigration cases.

A high number of providers in breach of the fixed fee margin in 2009-10 therefore went on to be awarded new contracts in the 2010 bid round. The reasons why some providers in breach of the fixed fee margin were not awarded new contracts are unclear. As with other KPIs, performance against the fixed fee margin was not taken into account in the tender exercise.

Figures indicating the high number of providers in breach of the fixed fee margin may well indicate that the concerns recorded in the Bach Review about cherry picking and early closure are well founded.

Stakeholder interviews with legal aid providers, UKBA decision makers and immigration judges, conducted as part of this research, provide further evidence of concerns about quality, value for money and access to representation. A separate report describing the outcome of these interviews has been published alongside this report (Gibbs J and Dolan G, 2012). It should be noted that these interviews were conducted prior to the two largest suppliers of advice to asylum seekers, RMJ and IAS, going into administration, and to the Government's announcement that it intended to remove almost all immigration law from the scope of legal aid and cut all civil legal aid fees by 10%. It should also be noted that the representatives interviewed were more likely to be committed to quality work (see Appendix 1).

3.3 Cutting corners

Stakeholders interviewed for this study talked of providers cutting corners and a move towards standardisation of advice as a means of making fixed fees pay. The quality mark was said to encourage a tick box approach to quality. Representatives described a 'production line mentality', with one stating: "You know it's like being a sausage factory!" (Gibbs and Dolan, 2012: Legal Provider 09)

Another stated:

"I think the main thing is standardising things. I know the bigger firms have standardised a lot of letters and they have work flows and I mean literally it is a tick-box exercise, so you've done this, you've done that and that helps for good management and it helps to be SQM compliant but what caseworkers aren't doing is going beyond that tick box exercise and making it more specific to the client, so from that perspective that's how a lot of firms have dealt with [the fixed fee scheme], by making it more standardised and more tick box."(Ibid: Legal Provider 10)

These comments echo concerns expressed by Andy Benson and Penny Waterhouse that the quality mark incentivises adherence to process rather than measures the quality of advice (Benson and Waterhouse, 2001).

Representatives considered the one-to-one relationship with their clients, many of whom will be expected to disclose traumatic events, as being critical to quality. They reported that they were finding it increasingly difficult to provide an appropriate level of client care under the fixed fee scheme, making a good working relationship more and more difficult to achieve:

"I mean the way I practice...I'm not used to taking a statement straight off. I wanted that first attendance to get to know the client …"
(Gibbs and Dolan, 2012: Legal Provider 10)

It is clear that many firms have had to limit contact with their clients due to financial restraints and lack of funding:

"We don't write any more than the minimum number of required letters to a client; there's no translation of statements [to allow the client to check for accuracy]…So we try and limit disbursements to the bare essentials."
(Ibid: Legal Provider 06)

The UKBA case owners stated that witness statements are now a rarity in adult cases[9] and that they thought this was due to time pressures on the representative's side:

"I used to get, when I first started, I used to get a lot more witness statements, now timescales have moved on and I don't think the reps get a chance to get a witness statement."(Gibbs and Dolan, 2012: Home Office Case Owner 01)

Where previously representatives stated they would have researched into the client's background and gathered comprehensive relevant evidence from experts, there is simply not the financial incentive to do so in fixed fee cases. Expert reports frequently needed at the pre-decision stage are often refused funding by the LSC at this point due to them being seen as 'unnecessary':

"I think it's becoming more and more difficult to get expert reports for your decision."
(Ibid: Legal Provider 09)

Having to spend time fighting for funding for expert reports and evidence was constantly mentioned as a huge problem in providing quality legal advice, with one representative stating:

"Something I find incredibly annoying, that the LSC have a better idea of what is necessary in your case in terms of a country report for example than you do, and some of them have absolutely no knowledge of asylum work ... I mean I have some ridiculous responses from them in terms of refusing psychiatric evidence, psychiatric reports or a country report … and then you have to spend a huge amount of time fighting with them about it."
(Ibid: Legal Provider 10)

UKBA decision makers and immigration judges referred to a number of examples of poor conduct by representatives, including vague witness statements and the late submission and poor presentation of evidence. The findings of these interviews would suggest that such conduct is likely to be exacerbated by the move to fixed fee funding. Some representatives are choosing not to do vital work and those that do not have unrealistic case loads and work unsustainable hours.

These comments are not surprising, given the concerns about possible early case closure cited in Lord Bach's review. They are also consistent with the data from the Freedom of Information requests and Parliamentary Questions – for example, showing the high incidence of providers making excessive profits in breach of the fixed fee margin (see 3.2 above). The same can be said for evidence of cherry picking described below.

3.4 Cherry picking

The fixed fee scheme is built on the principle that shorter cases will pay for longer ones. As the LSC and Department for Constitutional Affairs (DCA) – now the Ministry of Justice (MoJ) – outlined in 'Legal Aid Reform: the way ahead' (2006):

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

Evidence from our interviews with representatives suggests this approach is unrealistic:

"There are few enough [cases] that come in on the limit let alone ones that actually make up for others."
(Gibbs and Dolan, 2012: Legal provider 09)

There were comments stating that some less scrupulous firms are taking on clients to receive the fixed fee and then dropping them with little notice at the more complex appeals stage, having picked up part the appeals fee. These clients are particularly

disadvantaged in the legal aid scheme and are being used for monetary gain. One interviewee explained that some representatives are:

"… taking a client on and then ditching them after you get the payment for the [legal help] and then merits failing them when they have two weeks to find another rep for the appeal, so they collect the fee… the additional payment and then they cut clients off and they're left stranded and they've done that to collect the money from the fixed fee." (Ibid: Legal Provider 10)

Evidence from the legal provider interviews also suggests that some legal aid firms are refusing to take on clients with more time consuming cases. This is particularly true for those with fresh claims because of the time-consuming nature of case familiarisation and finding and submitting new evidence:

"Fresh asylum cases we have to read more, you know or the previous decision stays. It's so much work involved and … we refuse quite a lot of fresh asylum cases."(Ibid: Legal Provider 09)

This is particularly relevant to the questions examined by this project, since fresh claims can often arise from deficiencies in the decision-making process, including poor initial representation.

People who have been detained are also at risk of not having any representation. This is in part due to the low level of the fixed fee for this time-consuming work. It is also due to the fact that the significant time spent travelling and waiting to see these detainees is paid at a much lower, uneconomic rate than for time spent in the office:

"At present we are taking getting so many referrals from detainees; which I refuse to take on because … they are expecting legal aid, but going to detention centres and … the payment we are getting under the graduated fee, considering all these things, it's not worth it to take those cases. I had to refuse; we have to refuse quite a lot of cases at the moment."(Ibid: Legal Provider 01)

"I think one of the saddest things about it…a lot of our work was detained clients and those are often the most needy, they are the most affected by the fixed fee scheme because travel and wait is billed at a lower rate and so you can't make your hourly rate target with lots of travel and wait and also you are spending a lot of time travelling, waiting at places getting in to see clients and its incredibly difficult then to meet… targets you might have in terms of matter starts."(Ibid: Legal Provider 10)[10]

The exceptional cases threshold was intended to mitigate loss in complex cases. Under this provision, where the cost of time spent on a case exceeds three times the value of the fixed fee, it may be charged at an hourly rate. Research undertaken by the Immigration Law Practitioners' Association (ILPA) suggested that the threshold was set too high to make a difference (ILPA cited in McClintock, 2008: 9).This view was echoed by stakeholders:

"[The scheme] is clever: when you work out what you need for it to be exceptional it means a huge amount of work. And sods law is that you'll come in at two or two and a half times [the threshold[11]]." (Gibbs and Dolan, 2012: Legal Provider 03)

An additional threat to accessing representation is the continuing drain of quality representatives from the field. Unsustainable financial losses, the lack of time and resources to conduct quality work, and personal stress has led to some providers leaving asylum legal aid work altogether, and others were not sanguine about the future of asylum work for their firm:

"I just don't know what's going to happen in the future, simply don't know. I mean it's so insecure for us… it's only going to get worse for the clients and… what does that mean? It means that people are not going to really have access to justice, it means that a lot of people will go underground or to underground advisors, to those who aren't OISC registered or SRA regulated you know, and it does mean that people pay loads of money to you know, thieves." (Ibid: Legal Provider 05)

3.5 Imbalance in the funding scheme

In Section 2, we noted the lack of reliable historical data on which fixed fees could be set in asylum cases. We have found evidence of a differential impact between providers, with some providers – perhaps those able to take the less complicated cases or willing to cut corners – making a profit, compared to hourly rate payments, and others a loss. The problem appears to be worse at the legal help stage, with relative underfunding of work on appeal.

The Freedom of Information data disclosed to RMJ on 30th April 2010 provides details of those providers that were gaining and those that were losing under the fixed fee scheme. It was always implicit that the fixed fee scheme would redistribute legal aid income from providers that spent more time on cases to those that spent less. The data shows that the majority of legal representatives were

earning more for fixed fee cases than they would if those cases were paid at an hourly rate. However, a proportion also made a loss because they were taking more time than the fixed fee remunerated:

- 153 legal aid providers (73%) made more money from their asylum fixed fee legal help cases[12] than they would have had those cases been paid at an hourly rate. 72 (27%) providers made a loss. No indication is given of the volume of work undertaken by these providers.

The Freedom of Information response includes a second set of data broken down not by provider but by case stages. This data suggests an imbalance in payment rates for different stages of work, but the same pattern of the majority of cases – producing, on average, a gain, with a proportion making a loss:

- 46% of 'full appeal' cases and 51% of 'partial appeal'[13] earned more than the hourly rate equivalent. Losses are greatest in 'partial appeal' cases, with 18% losing between 1.5 and 2 times the value of the work paid at an hourly rate. The equivalent percentage is 10% for 'partial appeal' cases and 2% for legal help.

It appears that legal help work is significantly better paid than representation at appeal, but in both cases a significant proportion of providers are making a loss. It should be noted here the LSC expects work at the appeals stage to be conducted by representatives with a higher level of expertise, and therefore at greater cost[14].

More research would be needed to establish whether there was a correlation between providers that make a loss and the quality of their service. However, research undertaken in this project establishes separately a link between quality, time taken and case outcomes.

3.6 Viability of quality legal services

As can be seen from the Freedom of Information data, 27% of providers are making a loss under the fixed fee scheme because they are spending on average more time on their cases than is covered by the fees. Many of the representatives interviewed stated that the financial losses their firms are making under the fixed fee are substantial and unsustainable. Many firms were able to subsidise losses incurred by engaging in private practice or other areas of legal aid work that are better suited to the fixed fee scheme.

When we conducted interviews with representatives, some firms were still relying on pre-2007 cases, which are still billed at hourly rates, to survive. Although this offered a short-term solution, it is unsustainable in the long term, particularly alongside the fact that the hourly rate has not changed since 2002.

Many firms have therefore had to take on more private work to subsidise their fixed fee cases, meaning that their capacity for new legal aid clients is significantly reduced:

> *"In order to be enabled to continue doing that work which I love so much and is so important, I have to take on more higher paid work to balance it out, so that's at risk or you know, certificate work or private work. Which means that I have less capacity significantly less capacity."*
> (Gibbs and Dolan, 2012: Legal Provider 05)

The project literature review documented evidence of providers going out of business and of the financial pressure experienced by those still undertaking legal aid work (Trude and Gibbs, 2010a: Section 3.4). One of the more disturbing pieces of evidence was that the unrestricted reserves of Law Centres had been reduced by 70% since the introduction of the fixed fee scheme (NEF, 2009c).

3.7 Cash flow

Alongside the fixed fee scheme, the LSC introduced a system for the not-for-profit sector in which case stages are paid on completion. Previously, payments were made on account. This brought the not-for-profit sector in line with the private sector.

Both sectors have argued against payment on completion, particularly in asylum and immigration work, because stages can take months and sometimes years to complete – often due to delays in UKBA decision making. Except in the case of short units of advice, the closure of stages is therefore outside of the control of legal representatives. It means this measure does not reward efficiency; instead it is likely to penalise providers taking on more complex cases that may take longer to resolve.

It is possible that some of the high incidence of short cases and corner cutting might be incentivised by the cash flow problem. It is likely that part of the 70% reduction in Law Centres' unrestricted reserves has been used to fund working capital, so that centres can pay staff and other costs while they are awaiting payment for their cases.

3.8 Hourly rate cases

More complex work, for children and detainees in the fast track decision-making process, was excluded from the fixed fee scheme. It does not follow from the exclusion of this work that payment rates have not been subject to financial pressure. Hourly rate levels of payment have barely increased since 2001, leaving representatives to absorb de facto year-on-year cuts. Adding October 2011's 10% cut in fees to previous years' retail prices index (RPI) figures, we have seen a real terms reduction of asylum fees of over 40% in the last decade.

What seems likely, given the LSC data shown above, is that, for many providers able to reduce the average time they spend on fixed fee cases, those fixed fee cases will be substantially more profitable than more complex hourly rate cases – a fact that commentators have overlooked.

If a provider is not committed to quality, it can respond to the 10% reduction in fixed fee income by cutting more corners to spend less time on cases. For such a provider, the cut is cost neutral. Clearly, however, this will introduce more inefficiency into the decision-making process. As regards hourly rate work, the 10% reduction is not cost neutral. The only response is for the provider to reduce overheads further.

Given evidence of 'cherry picking' in fixed fee cases, it must be a concern that some representatives might turn away more complex hourly rate work, with its higher requirement of expertise.

4. Further legal aid reform

The trends indentified in Section 3 of this report are likely to become worse. After most of the project stakeholder interviews were completed in 2009, the Government announced £350 million of economies to the civil legal aid budget. From 3rd October 2011, all legal aid fees were reduced by 10%. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 makes further cuts – in particular, by removing many areas of law, including immigration advice, from the scope of legal aid[15].

Judges, practitioners and commentators have suggested that these legal aid cuts may restrict access to justice and add delay and costs in the longer term. Lord Hope of Craighead, deputy president of the Supreme Court, said:

> *"It doesn't affect us [in the supreme court] but lower down the system it has a major effect. I well understand the huge concern about public expense but people who take these decisions must understand that narrowing legal aid has a cost implication on the system and its efficiency and quality."*[16]

Concern has been expressed about the speed and pace of this reform. It echoes previous concerns about the risk arising from the LSC's limited understanding of the market for legal services (see Section 2.1.3 above). In February 2011, for example, prior to the introduction of the Bill, the chair of the LSC, Sir Bill Callaghan, wrote to the Lord Chancellor warning that the scope and speed of the reform process risked substantial problems, including 'market failure' as providers vacate the market:

> *"Evidence on provider viability is limited; nevertheless we have concerns that fee cuts may result in market failure and premature exits from the market where, for example, a firm or not-for-profit organisation becomes insolvent."*[17]

These concerns, taken together with the evidence of this research on provider viability (see, for example, Section 3.6 above), must give rise to a serious possibility that quality providers of asylum advice, losing their immigration business, will become financially unviable.

A further threat lies ahead with the possible introduction of best value tendering. As we suggest below, a tender based on the current low quality threshold is likely to price good-quality, cost-effective representation out of the market.

5. The LSC's approach to quality

Section 6 of the literature review provided details of the LSC's approach to quality. Details have been updated in this report – in particular relating to data produced in response to Freedom of Information requests and Parliamentary Questions (see Section 3 of this report).

As has been seen, the fixed fee scheme pays for outputs rather than outcomes. Value for money is sought by setting quality at an appropriate threshold and by quality assurance.

The LSC uses a variety of methods to assure quality. The Specialist Quality Mark, the accreditation of advisers and quality profiling, offers proxies for the quality of advice. Peer review provides a direct measure of quality.

5.1 Key performance indicators

The LSC completes quarterly quality profiles for each provider, looking at performance against key performance indicators (KPIs). KPIs were incorporated into the standard contract terms in October 2010. Quality profiles are important because poor performance against the profile is one of the main triggers of peer review. The KPIs, used in quality profiling, are said to look at three 'critical aspects' of performance under the Civil Contract. These are access, quality and value for money (LSC, 2010: 2).

Access
Under access, suppliers are required to undertake at least 85% of the number of cases they are contracted to take on.

Quality
There are two quality indicators. The first requires a representative to achieve a successful outcome in at least 15% of the cases at the initial decision-making stage. The second indicator requires the representative to achieve a successful outcome in 40% of their appeals cases. In practice, both of these indicators are an unreliable indicator of quality.

For the purposes of the 15% quality indicator, a case is won if the client is granted permission to stay in the UK – for example, because they are granted refugee status. A case is lost if permission to stay is refused, or if the representative is unaware of its outcome. Because the indicator includes cases where the outcome is unknown, it is set at a much lower level (15%) than the UKBA's overall grant rate (30%).

The fact that the outcome of a case is unknown may be an indicator of poor quality (the client is dissatisfied with their representatives and instructs a new one) or not (UKBA may have dispersed the client to another region where he will have to find a new representative). It is, however, an indicator of poor value for money, since, for whatever reason, the provider will have picked up the full fee without bringing the case to its conclusion.

In reality, the quality indicator conflates the separate issues of quality and value for money. As a result, it might actually conceal poor performance.[18]

It would be better if the quality indicator looked at cases where the outcome was known, and if cases where the outcome was unknown were monitored separately as an indicator of poor value for money.

The second quality indicator provides that a representative should achieve a 40% success rate at appeal. It is questionable whether this measure looks at quality at all, since outcomes at appeal are linked so strongly to how a representative applies the merits test for granting legal aid at this stage.[19] A provider achieving 40%, or a significantly higher success rate, may have done so by refusing to take on all but the most meritorious of cases at appeal. Logically, there should be an upper limit for success rate at appeal, as this might capture representatives who are denying access to representation in too many cases. But, this upper limit does not exist. Research undertaken by Devon Law Centre found that representatives had wrongly refused to grant legal aid for appeal in almost 80% of cases it examined (Devon Law Centre, 2010).This suggests that the 40% KPI might be having the reverse of its intended effect by driving down quality.

Value for money
For fixed fee cases, there are two value for money KPIs: 'the fixed fee margin' and 'the exceptional cases assessment reduction'. The fixed fee margin is described in Section 3.2 above. As we have seen, a high number of suppliers have been found to be in breach of the fixed fee margin (29% in the year ended 31st March 2010). The exceptional cases assessment reduction provides that, on audit, fees should be reduced by no more than 10%.[20]

The two value for money indicators focus on what should be extreme cases, where representatives

may have abused the system by spending very little time or an inordinate amount of time on their cases. There are no value for money indicators for what should be the great majority of work between these two extremes, representing the bulk of the LSC's expenditure on asylum legal aid.

There are no value for money indicators at all for hourly rate work excluded from the fixed fee scheme: the representation of children and detainees in the fast track decision-making process.

The LSC does not normally monitor cost (case length) against outcomes. Up to the time of the Freedom of Information requests, at least, it had not examined outcomes in respect of short cases, or for suppliers in breach of the fixed fee margin. The only context in which it has looked systematically at cost and outcome was in the ELAP pilot in Solihull. As we shall see in Section 9, the evaluator was clearly impressed with the method for monitoring value for money used in the pilot:

> *"It would be appear to be crucial that the LSC should employ such a special reporting mechanism to ensure effective monitoring of the cost effectiveness at each stage of the process by all providers."* (Aspden, 2008: 72)

The LSC has yet to adopt this recommendation beyond ELAP.

5.2 Peer review

Independent peer review was originally developed by researchers at the Institute of Advanced Legal Studies (IALS). Its use as a method of quality assurance was one of the main recommendations of the LSC 2001 research. Through this and further pilot work, IALS continued the development of peer review as an assessment tool for use with legal aid suppliers.

In 2005, the LSC described it as 'the most accurate and fair assessment process that we have to determine the quality of legal advice work' (LSC 2005: 5).

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

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

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

Peer reviews are conducted by experienced legal aid practitioners who are fully trained and organised in monitored peer review panels by category of law. Peer review measures and assures the quality of advice and representation of a firm or organisation. Not all firms are peer reviewed; rather, the process is generally targeted those considered to be high risk – for example, where quality profiles give cause for concern.

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

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

However, by the end of 2008, the LSC had decided not to pursue its plan to raise the minimum quality standard to Level 2, and in June 2009 announced that it no longer intended to implement Lord Carter's recommendation to roll out peer review. This meant that a peer review assessment at a minimum level would no longer be a pre-condition for tendering for best value contracts (LSC, 2009b).

The table below compares the minimum level and higher level standards of legal work required for providers to hold an LSC contract.

Significantly, the Level 3 competence threshold is set below the level for quality asylum legal work as defined in this project. It requires work to be adequate, but not always extensive; it requires

The table below compares the minimum level and higher level standards of legal work required for providers to hold an LSC contract.

Peer review level 3	**Elements of high-quality legal work at peer review level 1 or level 2**
Requires only adequate advice and work	Requires issues to be progressed comprehensively, appropriately and efficiently
Provides that work completed may not always be extensive	Requires the representative to tailor work to the individual client's circumstances
Requires 'adequate but limited communication with the client'	Requires the client to be advised correctly and in full
	Requires the representative to employ tactics and strategies to ensure the best outcome of the case
	Requires the representative to add value to the case

LSC (2005) 'Independent Peer Review Process' Legal Services Commission, London: 11)

adequate but limited communication with the client; and it only requires representatives to deal with presenting issues, not linked issues. This Level 3 threshold contrasts sharply with the Level 2 standard, which requires:

- work to be tailored to the client's individual circumstances
- issues to be progressed comprehensively, appropriately and efficiently
- the client to be advised correctly and in full
- for the representative to employ tactics and strategies to ensure the best outcome of the case
- for the supplier to be proactive and add value to the case (LSC, 2005: 11)

In the following sections we set out evidence that points to the value of a new outcome-focused approach to legal aid funding, based on early quality legal intervention. In Section 7 we discus our definition of quality, which highlights the following key elements:

- Professionalism and expertise, which enables, inter alia, the representative to establish the full factual and evidential basis of the case at the earliest opportunity and present it to the decision maker in the best way
- The quality of the one-to-one relationship between the representative and client, helping establish the client's trust and confidence in the representative, and encouraging early full disclosure of the facts of the case.

We show the importance of the one-to-one relationship and establishing the full evidential basis of the case to an outcome-based approach to legal aid funding, and how these factors are closely aligned to the higher standard at peer review Level 2.

We make the case that better value for money can be achieved by raising the minimum threshold of competence to reflect this higher standard.

6. A new approach?

The argument for a new model of funding representation in asylum cases – one that emphasised both value of money and the transformative dimension of quality legal work – emerged in the 1990s. 'Providing Protection' argued that efficiency savings could be made by frontloading resources for quality legal representation early on in the asylum decision-making process (JUSTICE, ILPA and ARC, 1997).

Prior to its replacement by the LSC, the Legal Aid Board recommended to the Home Office that good quality immigration legal advice, provided at the earliest opportunity, would be of benefit throughout the system – to clients, to the Legal Aid Board and to the Home Office (Legal Aid Board, 1999).In 2002, Steve Orchard, then Chief Executive of the LSC, put it this way:

> *"Access to early, good quality legal advice plays a key part in the effective and fair operation of the asylum system. If the asylum seeker's case is properly put forward this in turn allows the immigration services to make the best decision on that case. This has advantages not only for the particular client, but also for the system as a whole by reducing unnecessary appeals and uncertainty."* (ILPA, 2002)

The argument in favour of the financial savings that can be achieved through frontloading has been revisited repeatedly in recent years – for example, by the Law Society, the Legal Action Group and the Immigration Law Practitioners' Association (ILPA) (Trude and Gibbs, 2010a). More recently, this argument is supported by several compelling and consistent pieces of research.

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

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

Citizens Advice has described how adverse consequences associated with civil justice problems and the downstream costs for other public services can be mitigated by advice. It recommends an approach based on a cost benefits analysis of legal aid funding, and calculates that for every £1 of legal aid expenditure spent on benefits advice, the state potentially saves £8.80 (Citizens Advice, 2011).

Similar themes have been examined in a broader context by the New Economics Foundation (NEF). NEF argues for a model of commissioning and procuring public services that addresses the concept of social return on investment (SROI) (NEF, 2009a).This enables decision making on public services funding in a manner that understands 'value' in a broader sense than merely costs and price, and incorporates factors such as individual wellbeing.

The NEF undertook a short piece of research to examine the socio-economic value of the impacts of Law Centres' work. The estimates of socio-economic benefits from the reviewed case studies demonstrated the significant socio-economic value that Law Centres provide to the individuals they assist, as well as other stakeholders affected by the intervention. For example, a welfare benefits case study suggested that every £1 invested generated benefits in excess of £10 (NEF, 2008).

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

JustRights provides an illustration of this wider social value in its report 'Not Seen and Not Heard', which reveals the link between civil legal problems and crime rates, in addition to emotional and mental health problems. The report warns that legal aid cuts could cost the government more in the long run if crucial free support and assistance is taken away from Britain's youth (JustRights, 2011).

The Public Services (Social Value) Act 2012 requires public authorities to consider 'social value' when commissioning services. The authority should consider how a service could be procured to improve economic, social and environmental

wellbeing and, where appropriate, write that social value into the contract.

The Government is also moving increasingly toward creating incentives for outcomes and the delivery of 'social value' rather than outputs. There are a number of different strands to this thinking:

- That it is more cost-effective for public services to be paid by results rather than outputs. This is leading to experiments in how to incentivise outcomes. Payment By Results is one of the five key recommendations of the Open Public Services White Paper (HM Government, 2011).The Government is currently testing this approach through the Work Programme in the Department of Work and Pensions (DWP) and through a number of large-scale pilots – for example, on the rehabilitation of offenders and drug recovery. Concerns have been raised by various aspects of these experiments, including the dangers of 'cherry picking' and the difficulties for the voluntary sector in managing delayed payments.[21]
- That early quality interventions save money in the longer term – for example, more effective measures to prevent re-offending.
- The idea that commissioning needs to build in measures of value, including the concept of 'social value'.

Value for money remains a key component of public service reform, but has been incorporated into a broader set of goals. The Cabinet Office (2008) summarises these goals as:

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

These ideas are also being fully evaluated by the LSC and UKBA in a UKBA region through the Early Legal Advice Project, (ELAP) which arose after a successful ELAP pilot in Solihull. Greater investment is made in early quality legal representation to deliver better outcomes, faster and more sustainable decisions (see Section 9, below).

The findings of 'Justice at Risk' chime with these emerging trends.

7. Key elements of quality

The first stage of this research project, the literature review, provided both the theoretical and practice-informed background to the development of a definition of quality representation in asylum work. It was also informed by the interviews with refugees.

The project definition of quality highlights the following the key elements:

- Professionalism and expertise, which enables, inter alia, the representative to establish the full factual and evidential basis of the case at the earliest opportunity and present it to the decision maker in the best way
- The quality of the one-to-one relationship between the representative and client, helping establish the client's trust and confidence in the representative, and encouraging early full disclosure of the facts of the case.

A consistent theme in the research was that representatives must take sufficient time to prepare the case in order to meet the key elements. The definition also highlights the importance of efficiency.

One of the main goals of these elements is to ensure the full factual and evidential basis of the case is placed promptly before the decision maker in the form of a witness statement and supporting documentary evidence.

The following sections set out the key features of the definition. In many respects, these key features are unsurprising. Not only are they consistent with literature on the matter, interviews with stakeholders and refugees, and the aims of the ELAP pilot in Solihull, they also reflect some of the unique features and challenges of working with asylum seekers.

Unlike other areas of law, there is rarely any official documentation of a case or witnesses, and the factual basis of the claim can often span several years. For these reasons, asylum cases require a much more extensive fact-finding exercise, frequently with a client who has been traumatised. Because of the absence of other evidence, most cases will ultimately turn on whether the asylum seeker is to be believed. The assessment of credibility is a complex task and the presentation of the case requires skill and care on the part of the representative.

The law imposes a particularly high standard for the asylum decision-making process. This is not surprising given the matters at stake:

> *"It has been said time and time again that asylum cases call for consideration with 'the most anxious scrutiny': R v SSHD, ex p Budaycay. That is not a mantra to which only lip service should be paid. It recognises the fact that what is at stake in these cases is fundamental human rights, including the right to life itself."*[22]

7.1 Professionalism and expertise

Commentators cited in the literature review highlight the overriding requirement of representatives to comply with their professional obligations. The Immigration Law Practitioners Association has stated that quality legal work is that which fulfils ethical requirements, 'the inability to fulfil which must lead us, in accordance with our professional obligations, to decline conduct of a case' (ILPA 2006: 2).

Professional standards must therefore be considered as a base-level minimum standard for legal work to be performed. Solicitors are required to act in the client's 'best interests', to exercise 'competence, skill and diligence', and to take 'into account the individual needs and circumstances of each client' (Solicitors Regulation Authority, 2011). In the context of asylum, the need for 'most anxious scrutiny' must be read into these standards.

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

7.2 Quality of one-to-one relationships

The Effective Lawyer Communication Project offered evidence that 'rapport' and 'information exchange' were highly valued by standardised clients, trainee lawyers and academic assessors alike (Glasgow Graduate School of Law et al. 2003). Some of the most important aspects of the one-to-one relationship reported by Sherr et al were 'communication skills, attitude, accessibility, willingness to keep in touch, and to involve the client [in the case]' (Sherr et al, 1994: 10).

Research undertaken by Council on Social Action (CoSA, 2008a, 2008b), and published by the Cabinet office, has shown that:

- Exchanging information and the continuity of relationships between client and advisor are the features of one-to-one relationships that most strongly effect transformation in people's lives
- The manner in which these key features are organised and delivered also contributes to successful outcomes. CoSA highlights the value of: early intervention and prevention; setting goals and timeframes (small incremental goals and identifying aspirations); and minimal administrative burdens

In 2009, the Cabinet Office published further research by CoSA providing *'unequivocal evidence'* of the importance of the relationship between advisor and client, which goes *'further than just an understandable desire to be treated well – the relationship is instrumental to the quality of work advisors do'.* (CoSA, 2009)

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

7.3 Sufficient time

The most consistent theme arising from the project literature review is that sufficient time is critical to the ability of representatives to carry out quality work. This view is shared by practitioners, their representative bodies, academics and not-for-profit organisations. It is also a critical factor emerging from research on client expectations by the Council on Social Action (CoSA) (ibid); and, most recently, by the Information Centre about Asylum and Refugees (ICAR) as part of this research. Refugees, UKBA decision makers, immigration judges and representatives interviewed as part of this project all stressed the importance of sufficient time.

The significant correlation between advice time, quality and outcomes was identified in LSC's research into cost and quality (see Section 2 above). The project file review found a 'strong and positive correlation between quality and the amount of time spent giving advice' (see Section 10). Further evidence of the relationship between time, quality and outcomes arose from the ELAP pilot in Solihull and is currently being tested further in the Early Legal Advice Project (see Section 9 below).

The significance of time is reflected in the project definition of quality by the statement that there will be time for 'thorough evidence gathering; exploring every legal avenue; effective communication with client'.

However, this does not mean unlimited time. The definition notes the importance of efficiency.

7.4 Our definition of quality

On the basis of the literature review, and with advice from the project steering group, a definition of quality was drawn up which was designed to capture the key measurable outputs in individual cases that are likely to lead to a good outcome in a representative sample of cases.

The definition of quality focuses on those matters within the legal representative's control, identifying key skills and actions needed to deliver the outputs identified at (a) to (c) below. The objective elements of the definition are capable of measurement and costing through a file review exercise (see Section 10 below).

Representatives provide quality legal representation in asylum cases when they carry out the following, while adhering to professional standards and practising with sufficient efficiency, technical and personal skills, knowledge, judgment and experience:

(1) Identifing and gathering all relevant facts, evidence and arguments in a timely manner and presenting those to the decision maker in the best way

(b) Exercising tactical judgment and exploring every reasonable legal avenue to ensure a full and fair hearing of the case

(c) Ensuring the client knows the best case has been put forward on their behalf, consistent with the relevant legal framework.

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

8. Stakeholder views about quality

ICAR interviewed a wide range of stakeholders in the asylum process, from UKBA decision makers to refugees who have been through the process, as well as immigration judges. All stakeholders were asked for their views on what they thought constituted quality legal advice.

Even though each group represented quite different parts of the process, they were consistent in their descriptions of quality legal representation and what an important place it has in the decision-making process. In particular, the interviews support the idea that a one-to-one relationship between the client and representative is important. There was also a particular focus on the importance of comprehensive fact finding and preparing witness statements and supporting documentation.

This section summarises the key findings from the different interviews.

8.1 Refugees

Published in March 2010, the Refugee Interviews report documents 32 interviews with refugees. (Trude and Gibbs, 2010b)

The interviewees represented a broad sample in terms of the nature of their application, their countries of origin and gender, although there was a London bias (27 lived in London, 7 outside). Half of the interviewees had had more than one legal representative, which meant their comments were based on experience of a wider base of legal providers (further details of the methodology are provided in Appendix 1). Professional interpreters were used for eight of the interviews. Only individuals whose cases had been concluded positively were chosen, in order to remove the possibility that a negative decision on their case might have coloured their perception of quality.

Because of the time lapse, none of the refugees in the sample went through the legal system under the fixed fee regime. However, their observations on which aspects of the work of legal representatives were most valuable to them were made independently of any payment system. Their unique perspectives on what constitutes quality legal advice were fed into the project's definition of quality. The results of the interviews – particularly relating to the importance of the one-to-one relationship, good communication skills and the underlying need for sufficient time – are remarkably consistent with the range of other 'unequivocal' evidence from primary and secondary sources, described in 'Time Well Spent', research by the Council on Social Action (CoSA) and published by the Cabinet Office (CoSA, 2009). In addition to looking at this piece of research and conducting its own primary research, the report examined other research including work undertaken by the New Economics Foundation, the Law Centres Network and Youth Access. Additional consistent evidence, much of it relating specifically to the representation of asylum seekers is set out in Section 7 the project literature review (Trude and Gibbs, 2010a).

Interviews with refugees identified the following factors that contribute to quality representation.

8.1.1 The one-to-one relationship

The one-to-one relationship between client and representative includes such as trust, empathy, mutual respect, and the ability to deal with difficult emotions and situations.

Empathy and what was characterised as 'a human approach' to clients was widely mentioned as a positive aspect of working relationships between client and representative. A caring, empathetic approach allows clients to relax and speak freely, with implications for the eventual accuracy of statements and issues of credibility:

> *"She was always welcoming. I could cry any time and she would talk to me in a such a way that at the end I would feel much better. She saw the distress I was in. The way she would make me relax and talk things exactly as they are."*
> (Trude and Gibbs, 2010b: R07)

However, a lack of empathy and a disbelieving attitude on the part of representatives were reported by many respondents as being negative aspects of their experience of publicly-funded legal representation.

Lack of respect for clients was mentioned by some respondents specifically, but negative aspects more widely manifest themselves in other areas of the client/representative encounter, such as poor body language, poor access to representatives, or representatives not responding to client calls.

8.1.2 Gathering and presenting evidence

This is about listening to the client and taking all possible steps to present a strong case built on comprehensive fact finding, well researched evidence and the use of appropriate witnesses.

Allowing the client to read and review their statement of evidence was also mentioned as an element of good-quality legal work.

A large number of respondents mentioned the importance of having sufficient time with a representative to allow for the full details of their claim to emerge gradually, preferably over more than one session, and to allow for adequate additional research and gathering of documentary evidence. Good evidence gathering practice was also described as allowing sufficient time and funds for the translation of all relevant documentary evidence.

Several respondents reported that their representatives had carried out what they felt was an insufficient amount of evidence gathering. This may be related to having insufficient time to spend with each client and high caseloads, but it also speaks to carelessness and a lack of thoroughness and rigor:

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

8.1.3 Case management and conduct of the case

This involves the timely submission of evidence and documents, good handling of appeals at court, regular follow-up with the Home Office, a proactive approach to the case, and the management of client expectations.

Quality case management is about a representative handling a client's expectations of their outcome as much as it is them working hard for the client. When handled correctly, a client will leave the system, whatever the outcome, feeling that the representative did everything they could to manage the case with the interests of the client at the heart of the process. Respondents appreciated that the representative had explored every possibility in their case, expressed as 'working hard' or 'doing their best' for the client:

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

A reactive approach – the feeling that the representative was doing insufficient work (especially on the statement) and leaving the burden of work for the client – was frequently mentioned. Often, such factors resulted in a 'thin' or inadequate statement. For some, this reactive approach meant an apparent lack of follow-up with the Home Office, while other clients reported that taking the full details of their claim appeared to be automatically deferred until appeal:

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

8.1.4 Communication

This is a key area frequently mentioned by respondents. Professional and neutral interpreters were essential in the process of passing evidence to the representative. Clients expected the representative to have excellent listening skills, give their full attention to the client and use appropriate and positive body language.

By far the most important positive aspect of personal communication was a sense that the representative was listening to the client properly. Giving the impression of attentive and active listening relates to a representative having sufficient time and to them giving their undivided attention. Beyond that, though, it is also a personal skill or attribute.

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

Poor listening was mentioned in connection with insufficient time and a feeling of being hurried to give information for a statement. An unpleasant, disbelieving or threatening manner was reported by some respondents who expected their representatives to be 'on their side'.

8.1.5 Access to the representative

Access is an essential part of the process for clients. Representatives should be directly available or respond to clients within a reasonable timeframe. Clients appreciated a range of means of contact such as telephone, email and written correspondence. Being able to provide timely appointments and not being kept waiting for appointments were also mentioned.

QUALITY CHARACTERISTICS IDENTIFIED BY REFUGEES

High quality representatives have the following characteristics:

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

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

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

8.1.6 Summary

Clients mentioned positive and negative aspects – key factors in good or poor-quality legal representation – in each area. These are listed in no particular order of importance in the box below, detailing characteristics of both representatives and firms. Straddling five key areas, these elements combine to produce what clients see as high-quality legal work.

8.2 Decision makers and representatives

In 2010, Information Centre about Asylum and Refugees (ICAR) staff interviewed four UKBA) decision makers and two immigration judges to gain their views on what constitutes high-quality work from a legal representative and how this aids the decision-making process. The UKBA officials comprised two case owners, one senior case worker and one presenting officer. Details of the methodology are set out in Appendix 1.

ICAR also carried out 10 face-to-face interviews with providers of legal aid advice in London firms specialising in asylum and immigration. The providers were from a mix of not-for-profit and private firms.

A full report of these interviews has been published alongside the final report in March 2012 (Gibbs and Dolan, 2012).

Although the project budget meant that the sample size of interviewees was necessarily small, there was clear consistency between these stakeholders on the key constituent elements of quality legal representation and its positive contribution to cost-effective decision making. Views were also consistent with evidence documented in the project literature review, the project refugee interviews and research by the Council on Social Action (CoSA), referred to in 1.2 above.

Stakeholders emphasised the quality of the one-to-one relationship with the client, together with

comprehensive evidence gathering, professionalism and expertise. Underlying all contributions was the need for sufficient time. These views find particular support from a variety of sources set out in the project literature review, including evidence from representatives and decision makers involved in the ELAP pilot in Solihull (Aspden, 2008).

8.2.1 The importance of the one-to-one relationship

Legal providers agreed that a good one-to-one relationship between the client and representative was one of the most important aspects of quality representation. Representatives who take the time to establish the trust and confidence of the client are most likely to achieve a successful outcome in the case, as this legal advisor stated:

> *"[If] you do succeed in building up a relationship of trust, and even better if you have a rapport with that. I mean often the two go together because you probably will get more information about a client's life, that's your material, that's what you need to work with and if people don't trust you they are probably not going to tell you a lot."* (Gibbs and Dolan, 2012: Legal Provider 02)

Key features of the one-to-one relationship, according to the stakeholders interviewed, include spending time with the client, over several meetings, to build up trust and empathy so that they can put across the full facts of their case. This leads to evidence being collected and presented at the earliest opportunity, enabling the representative to deal effectively with UKBA case owners.

8.2.2 Comprehensive evidence gathering, professionalism and expertise

Representatives, UKBA decision makers and immigration judges stressed the need for thorough case-specific evidence gathering and its presentation to the UKBA in the form of a carefully prepared witness statement, supported, as the case demands, by other evidence – including country research and expert reports, which were fundamental requirements of the Solihull pilot. They highlighted the importance of 'frontloading' advice to cost-effective decision making. One of the legal representatives put it this way:

> *"What I always think is that if a case is prepared well enough before a decision, meaning perhaps expert evidence, medical evidence, good reports that support a case, you have a much better chance of not going into appeal. It makes sense to do it then and if you go to appeal you've already got the stuff anyway."* (Ibid: Legal Provider 02)

Conversely, one of the immigration judges explained the adverse impact of poor representation on the efficiency and fairness of the decision-making process:

> *"Well, poor quality leaves most of the burden with the decision maker or the judge. And the danger there is that the poor-quality representation leads to less robust decisions. There's a greater chance that something important will be overlooked. There's a greater chance that something will not be understood, an aspect of the appellant's case … all of that adds to the length, it adds to the resources you need to make a decision … decisions having to be reviewed, as well as the injustice of somebody who should win losing".* (Ibid: Immigration Judge 1)

All those interviewed stressed that the importance of witness statements to efficient and sound decision making, both at the initial decision-making stage and appeal. Where statements do not exist or they are poor quality, the decision-making process can be more difficult and time consuming. One of the immigration judges said:

> *"If you have got a very poor, very brief statement then effectively what happens is that the hearing becomes a substitute for these sessions, for drafting a statement that didn't happen and there isn't enough time and some judges will be concerned enough to want to identify a good claim that appears to be a bad claim … and some won't and so the risk of injustice is considerable."* (Ibid: Immigration Judge 1)

However, all those interviewed said that witness statements are now a rarity in adult cases and they thought that this was due to time pressures on the representative's side.

> *"I used to get, when I first started, I used to get a lot more witness statements, now timescales have moved on and I don't think the reps get a chance to get a witness statement."* (Ibid: Case Owner 01)

Case owners, immigration judges and representatives all highlighted the importance of gathering and presenting case-specific evidence in addition to the client's statement in good time before the UKBA's decision. Case owners and immigration judges stressed the usefulness of expert reports that are tailored to the specific case.

Narrowing down the issues was frequently mentioned as being a key part of an efficient decision-making process, both at the initial decision

making stage and at appeal. It was a factor highlighted by case owners, immigration judges and representatives. However, this contrasted with representatives' concerns that constant changes to the ownership of a case meant they often do not know who is dealing with it.

8.2.3 Sufficient time to present the case

Time has been a consistent theme throughout these interviews and has had an unprecedented effect on all of the areas outlined in the key findings. It is clear that the introduction of the fixed fee scheme has led to a cut in the amount of time that representatives interviewed by ICAR spend on cases. Representatives interviewed felt that they often rush their clients – something they feel is detrimental to the quality of their service, leaving them feeling guilty:

"We're all under more pressure, we have to see more clients each day, we have to handle more cases. They get less of us than they used to. So it's a less holistic service, definitely." (ibid: Legal Provider 06)

"Time is a big factor, if you've got time and the client feels that you are not rushing them, then they're getting quality advice and we're going to feel that we are giving quality advice. If everything is rushed, you feel that you've done half a job and they will probably feel that they have got half a job." (Ibid: Legal Provider 10)

Representatives did not feel it was possible to do a case justice within the time allowed under the fixed fee scheme:

"You cannot do an asylum case with any chance of success in the hours that are given under the [fixed fee scheme]." (Ibid: Legal Provider 02)

Time is a critical factor in a cost-effective decision making process:

"[To] reach good, robust findings, a really good assessment of an asylum claim takes a lot of time. It actually takes a lot more time than we're willing or able in a publicly funded system to give. And that's the reality of it, it's a very, very time consuming process. So what we're engaged in most of the time is Home Office officials who haven't got enough time or enough resources to really do a full detailed assessment that would be ideal. Then we've got lawyers, or advisors, who haven't really got enough time to do the really full job of representation, preparation for appeals, gathering evidence; and we've got judges and appeal system who haven't really got enough time, within the confines of time and the amount of cases we have to get through."[1] (Ibid: Immigration Judge 02)

Representatives did not see the exceptional cases provision as a realistic answer to these problems:

"[The scheme] is clever: when you work out what you need for it to be exceptional it means a huge amount of work. And sods law is that you'll come in at two or two and a half times [the threshold[23]]." (Gibbs and Dolan, 2012: Legal Provider 03)

9. The Early Legal Advice Project (ELAP)

9.1 The ELAP pilot in Solihull

The forerunner to ELAP was the smaller-scale Solihull pilot, a joint LSC and UKBA initiative which ran for a year. The pilot transformed the existing approach to legal representation for asylum cases. Quality legal representation was integrated fully into the asylum making process.

The pilot was founded on quality representation. Its approach to quality was consistent with this research, placing emphasis on comprehensive fact finding:

> *"One of the main aims of the pilot was to ensure that all material facts and all relevant evidence were in front of the decision maker at the time they made the decision."* (Aspden, 2008: 5)

It was designed to ensure the full factual and evidential basis of the case was established early and placed before the decision maker in the form of a witness statement and relevant supporting documentary evidence.

The pilot also recognised the importance of the representative's one-to-one relationship with the client. It built in time at the outset of the case so the representative could meet the client, gather evidence and prepare a witness statement. To facilitate the client-focused process, cases were paid at an hourly rate rather than the standard fixed fee, under the same system that applies to cases excluded from the fixed fee scheme.[24] Under this system, the time a representative can spend on a case at the initial decision-making stage is capped at 16 hours. This cap can be exceeded, but only with prior authority of the LSC.

While all parties acted to a demanding decision-making timetable, there was a provision for time limits to be extended in more time-consuming cases, if this was necessary to ensure all relevant facts and evidence were placed before the decision maker.

The whole process was outcome focused. It was designed to secure faster, higher-quality and therefore fairer and more sustainable decisions, with any initial costs in the legal aid budget offset by savings later in the process or elsewhere.

9.2 Evaluation of the pilot

During the pilot, extensive data was collected for the first time on how much time was spent inside and outside the pilot for a range of client groups, at the initial and later stages of a case. Drawing on this data, an independent evaluation of the pilot found:

- It produced faster, higher-quality and more sustainable asylum decisions, taking the following indicators in the round:
  - All material facts and relevant evidence identified and placed into account prior to decision
  - More focused interviews and shorter interview times
  - Faster recognition and integration of refugees
  - More sustainable negative decisions, with lower appeal allowed rate
  - More effective conclusion of negative decisions
  - Closer case contact management, resulting in fewer absconders
  - And improved overall quality of service provided by the system
- It enabled the UKBA to exceed its target for completing cases (defined as either integrating or removing the applicant within six months)
- It showed the potential to deliver substantial overall costs savings

According to the evaluation, this pilot showed the 'tremendous potential for savings' (Aspden, 2008: 67)." However, the evaluator's calculations did not include the cost of the UKBA representing itself at appeal. Moreover, these potential savings were only considered up to the completion of the first appeal stage. They therefore did not look at 'full life' savings, which inevitably would have been greater.[25] The evaluation also did not look at social value.

Average legal aid fee income per case at the initial decision making stage was £977. The equivalent fixed fee would have been £755. The higher cost of legal aid in ELAP should be compared to the wasted cost of an unnecessary successful appeal, which can be estimated at over £4,000, comprising welfare support, tribunal and legal aid costs at appeal (Apsden 2008: 67, and Annex 14) [26] [27].

There were problems with the pilot – in particular, with establishing a proper control (Aspden, 2008, Annex 2: 18). There were also operational problems that reduced its effectiveness in the early stages, leading to an underestimate of likely savings. For example, there was a substantial delay in the process bedding in. In fact, the pilot only became 'properly operational' in the second six months (Ibid: 81).This explained the 'significant and sustained improvement' in refugee grant rates[28] over the four quarters of the pilot: 26%, 32%, 44% and 58% (the equivalent grant rates in the control were 21%, 24%, 25% and 34%). The rise in grant rate is of obvious significance because it results in less wasted cost at appeal.

There was a similar improvement in case conclusion rates.[29] The Public Service Agreement target for the period in which the pilot operated was for 40% of cases to be concluded within six months. The conclusion rate for each of the four quarters of the pilot was 29%, 34%, 58% and 58% (the equivalent rates for the control were 32%, 35%, 35%, 33%). Overall, the pilot concluded 44% of cases within six months, compared with 34% for the control.

The process met with widespread approval from clients, decision makers and representatives alike:

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

The LSC prepared a report of its own findings on the Solihull pilot, attached to the evaluator's report at Annex 2. As part of its analysis of the pilot, an LSC solicitor conducted a file review of 55 of the cases conducted under the pilot.

The file reviewer broadly highlighted the benefit of early intervention by legal representatives who provide a quality service. On the preparation of the statement prior to the asylum interview, the file reviewer reported:

> *"As an observation it was noted that where an advisor had properly prepared a statement and paid close attention to detail, dates, places events etc, the Home Office would simply agree these matters in the Pro Forma if one had been agreed. In turn, this cut down the amount of questions that would be asked in an interview and allowed the Home Office Case Owner to concentrate on clarifying those issues in dispute or those which were not clearly ascertainable from the statement."* (Ibid: Annex 2: 26)

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

> *"I would go so far as to comment that these files evidence the fact that well-produced statements submitted prior to a substantive interview and before a decision is made enhance the client's chances of a favourable result."* (Ibid: 26)

The file review found that the two providers who scored best in the file review also achieved the best outcomes:

> *"Overall I felt that the quality of advice on the files that I reviewed to be of a good standard with two providers consistently achieving ratings of 1- 2 excellence and competence plus. Needless to say these were also the providers whose clients were granted refugee status."* (Ibid: 17)

9.3 Further consideration of Solihull data

The evaluation report included data on cost and success rates at the initial decision-making stage, broken down by representative (see Appendix 2). It did not examine this data in any detail, but did make some observations about individual providers where the sample size of their cases was sufficient to do so.

We have, however, considered the data as part of this research. It is interesting in so far as it describes a relationship between cost, time and outcome, over and above the broad findings of the evaluation, worthy of more robust statistical investigation with the larger, controlled data set collected in the Early Legal Advice Project. It is significant that this relationship is consistent with the LSC's research into cost and quality (LSC, 2001) and the substantial body of evidence cited in this report.

Firms whose fee income exceeded the level of the fixed fee scheme for Legal Help (at the time, £755)

had an average success rate of 39%[30]. Taken as a whole, the seven firms that charged less than they would have received had the case been funded by the fixed fee scheme achieved an overall average success rate of 31%.

These findings are consistent with those of the LSC's file reviewer, quoted above. While the evaluator did not consider the cost and outcome data in any detail, she was clearly impressed with its potential as a tool for measuring value for money:

> *"It would be appear to be crucial that the LSC should employ such a special reporting mechanism to ensure effective monitoring of the cost effectiveness at each stage of the process by all providers."*(Aspden, 2008: 72)

She recommended:

> *"The LSC should introduce the reporting template designed for statistical analysis underpinning any new contracts with providers. Funding will be subject to a robust monitoring system linked to key performance indicators."*(ibid: 75)

To date, this recommendation has not been implemented outside ELAP.

9.4 ELAP

The outcome of the pilot was sufficient to persuade ministers to roll out the process to a whole UKBA region[31], allowing for further testing and evaluation, with a decision in 2013 about whether or not to roll out the process to all areas.

The outcome of ELAP should inform not only the future of asylum legal aid, but also feed into an understanding of how different outcome-based approaches can improve value-for-money services. A national rollout of ELAP could help the Government to shape the future of legal aid in all categories of law and may have implications beyond.

The evidence suggests that the quality of legal representation is a significant factor in achieving value for money in ELAP. We therefore recommend that a rolled-out process should be underpinned by a more rigorous quality standard, commensurate with the process' expectations of legal representatives.

10. Project file review

The final stage of the project's research aimed to explore the relationship between time and quality by undertaking file reviews.

As explained in previous chapters – on the basis of the above research, and with advice from the project steering group – a definition of quality was drawn up which was designed to capture the key outputs that can be measured in individual cases in order to ensure a likely good outcome in a representative sample of cases (see Section 7.4).

The project definition of quality is intended to capture the essence of the legal work required to optimise the process of status determination and the manner in which it is carried out from the point of view of the client, the legal representative and the decision maker. The objective elements of the definition can be measured and costed by a file review exercise.

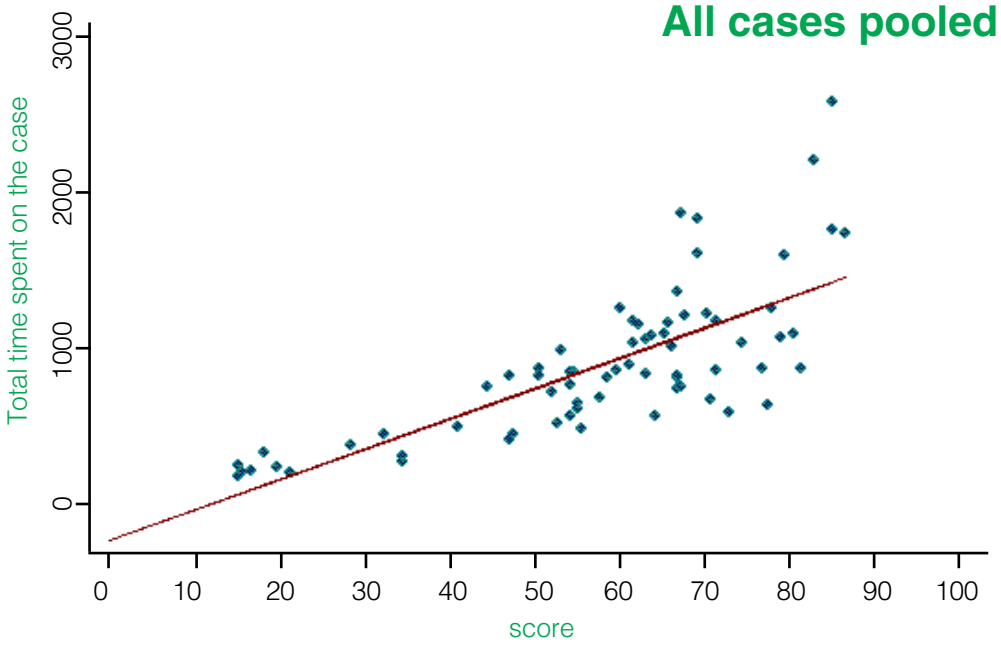
The definition was used to develop a grading system to assess files in the project file review. The project file review examined the measurable aspects of the quality definition and identified how long these elements took.

The Information Centre about Asylum and Refugees (ICAR) developed a model to describe mathematically the relationship between time and quality. 46 asylum case files for clients represented by Refugee and Migrant Justice (RMJ) and the Immigration Advisory Service (IAS) were reviewed by an independent file reviewer, who was also employed for several years by the LSC as a peer reviewer. Each file was analysed on nine features that were considered important; each feature was scored on a scale from 1 to 10, with 10 indicating the highest quality. The nine features were weighted by importance and then combined into one score for each file. A file with a higher score was considered to have received higher quality legal advice when compared to a file with a lower score.[32]

We only reviewed files where the representative had been instructed throughout the initial decision-making stage, the appeal stage, or both. In relation to each stage, therefore, the representative had an opportunity to score on all of the quality factors. Where the representative was instructed in both stages, each was scored separately and not added together. Since the same quality factors were used for the decision-making and the appeals stages, we were able to compare the results for both by plotting them onto the same graph, as well as showing them separately.

The conclusion that can be drawn from this test is that there is a strong and positive correlation between the score each reviewed file received and the amount of time spent on providing legal advice. This regression model clearly links time spent on a file with quality, and it supports the findings of LSC's 2001 research into cost and quality, and the findings of the Solihull pilot. This finding does not identify the point in a given case beyond which further time delivers insufficient quality returns. It does however illustrate the danger of a funding system which incentivises providers who spend less time and penalises those who spend more.

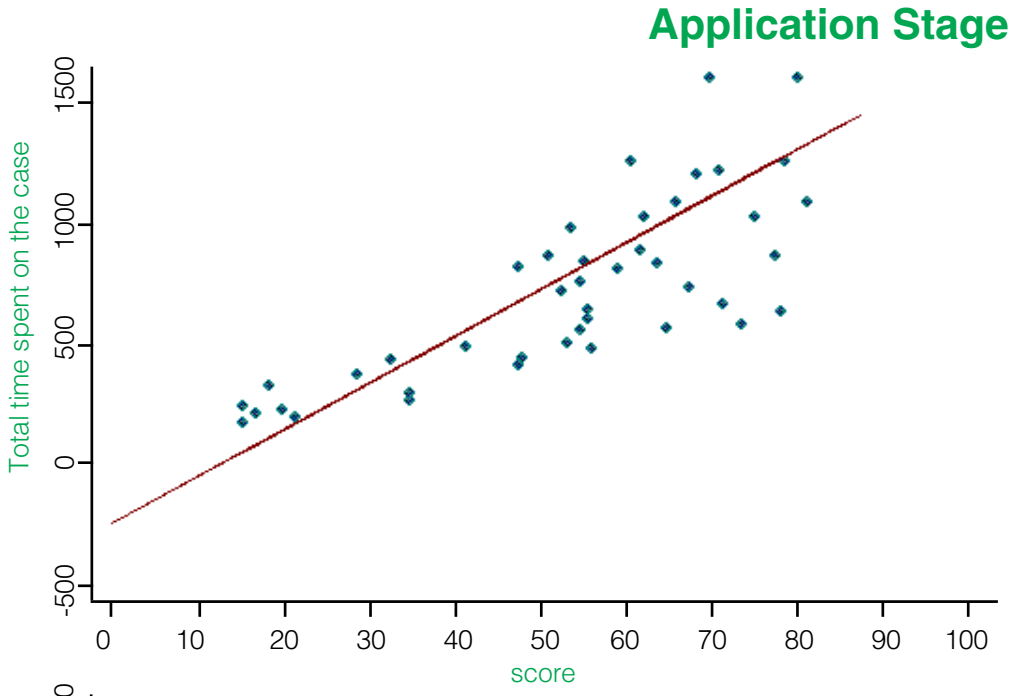
The following graph plots the estimated line against the actual score and time for all decision-making and appeals stages of the reviewed files. A further analysis of the subgroups, application and appeal stage follows.

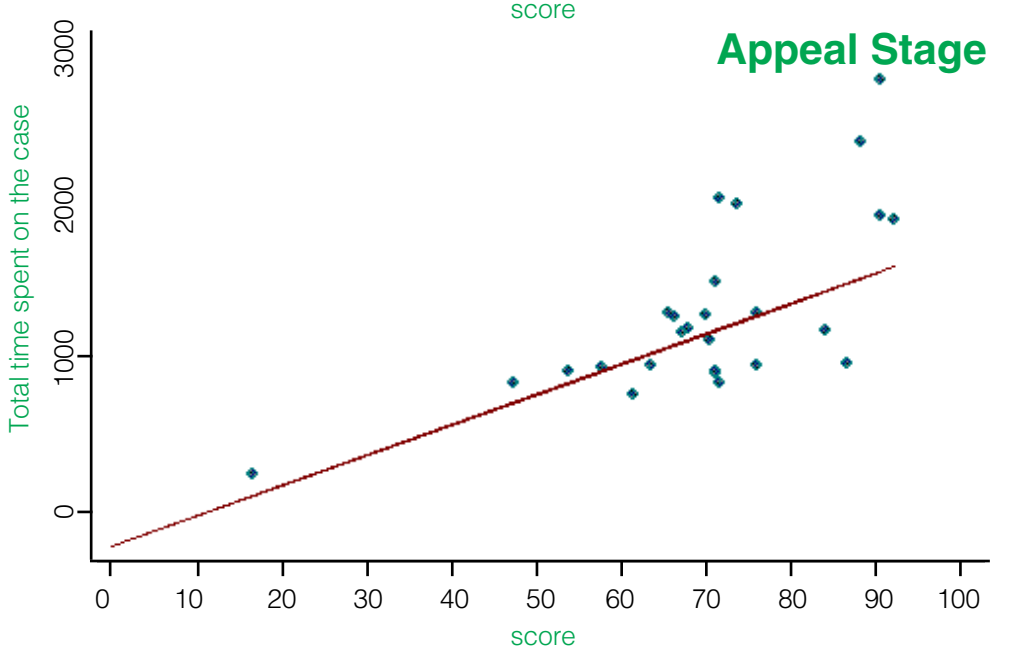


For low to moderate scores of 20 to 50, the relationship between score of quality legal advice and time spent on the file is well accounted for by the linear regression model. However, as the score increases, there is larger variation in time spent on the case for a given score. This arises because other factors can lead to increased time that may not be directly related to the score a file receives. These factors might include the complexity of the asylum case, or whether the client needed an interpreter or had mental health difficulties. Complexity of case, as well as other complicating factors, would require greater time, regardless of score.

In order to evaluate the model further, the data was then divided into two groups, where the overall fit of the model was then assessed. The groups were sorted into the initial decision-making and appeal stages.

The model again performs very well when the score is compared with actual time spent on the file. What is clear from the application stage is that the score is directly related to time spent on the file. A low score on quality legal advice is directly associated with the reduced time spent on the file at application. A similar pattern can be observed for reviewed files that went to the appeals stage. Here again, a low score, which is interpreted as poor quality advice, is directly associated with reduced legal time. A high score, or good quality of legal advice, is directly associated increased legal time. And again, as the score increases, there is a larger variation in time spent on the case for a given score, due to factors such as those listed above.





11. Conclusions

11.1 The benefits of investing in early, quality advice

The research reviewed in this final report of the Justice at Risk project indicates that early, quality legal intervention in asylum cases will result in faster, fairer, more sustainable – and therefore more cost-effective – decision making, provided a proper quality threshold is met. Representatives must establish the full factual and evidential basis of the case and place it before the decision maker in the form of a witness statement and supporting documentary evidence that is tailored to the individual client's circumstances.

Quality of legal advice is especially important in asylum cases. The law imposes a particularly high standard for decision making in the asylum process. This is not surprising, given the matters at stake:

> *"It has been said time and time again that asylum cases call for consideration with 'the most anxious scrutiny': R v SSHD, ex p Budaycay. That is not a mantra to which only lip service should be paid. It recognises the fact that what is at stake in these cases is fundamental human rights, including the right to life itself"*[33].

Unlike other areas of law, there is rarely any official documentation of a case or witnesses. The claim must be established from the client's personal testimony and the factual basis of the claim can often span several years. For these reasons, asylum cases require a much more extensive fact-finding exercise than in other legal aid cases, frequently with a client who has been traumatised. Because of the absence of other evidence, most cases will ultimately turn on whether the asylum seeker is to be believed. The assessment of credibility is a complex task and the presentation of the case requires skill and care on the part of the representative.

This report looks at the evidence of whether the current system for paying legal providers on asylum cases delivers quality and value for money, and concludes that it does not, suggesting ways in which the system could be improved, based on the available research.

11.2 The benefits of investing in early, quality legal

The literature review, undertaken as part of this project, found a significant body of research that suggests early, quality legal intervention results in faster, better quality, more sustainable asylum decisions. This includes evidence from the evaluation of the joint UKBA/LSC pilot of the Early Legal Advice Process (ELAP), following which ministers are now evaluating the process in a whole UKBA region, with the possibility of rolling it out further (Aspden, 2008: 17).

The ELAP pilot examined the impact of early, quality representation on the efficiency of the asylum decision-making process. One of its main aims was to ensure the full factual and evidential basis of the case was put before decision makers at the earliest opportunity in the form of a witness statement and supporting evidence (Ibid: 5). To facilitate this, cases were paid at an hourly rate rather than by fixed fee.

The evaluation found that the ELAP process had the potential to deliver considerable overall costs savings (Ibid: 9). This required additional investment in quality from the outset. The average fee income for legal advice at the initial decision-making stage was £977; the fixed fee for the same work would have been £755. However, the pilot delivered high success rates, saving the cost of unnecessary appeals at a conservative estimate of over £4,000 per case (Ibid: 67, and Annex 14).

11.3 Definition of quality

Section 7 of the report describes the definition of quality formulated through this research project. Elements of the extensive project literature review, which examined key stakeholder perspectives, were distilled to determine which approaches and features were essential to quality legal practice in asylum work. This definition was also informed by the results of primary research with refugees.

The definition of quality highlights the following the key elements:

- Professionalism and expertise, tactical awareness and judgment, which enables, inter alia, the representative to establish the full factual and evidential basis of the case at the earliest opportunity and present it to the decision maker in the best way.
- The quality of the one-to-one relationship between representative and client, helping to establish the client's trust and confidence in their representative, and encouraging early full disclosure of the facts of the case.

As in ELAP, the Justice at Risk definition of quality aims to ensure the full factual and evidential basis of a case is placed promptly before decision makers in the form of a witness statement and supporting evidence.

While stressing that legal representatives must be efficient, the definition allows for representatives to take sufficient time to prepare the case in order to meet the key elements, plus they must also foster a good one-to-one relationship with the client.

11.4 The relationship between time and quality

The value of allowing sufficient time to deliver a quality service is supported by primary and secondary quantitative research:

- The case file review undertaken in this project was developed from the objective elements of project definition of quality. The outcome of the file review, published in this document for the first time, found a 'strong and positive correlation between quality and the amount of time spent giving advice' (see Section 10).
- LSC research into quality and cost showed a 'significant independent relationship' between advice time, quality and outcomes (LSC, 2001: 185). Details of this research are set out in Section 2 of this report.
- Further evidence of the relationship between time, quality and outcomes arose from the ELAP pilot evaluation (Section 9).

11.5 Fixed fees reward those who spend less time

A fixed fee scheme is one where the same fee is charged, regardless of the length, quality or outcome of a piece of work. In the absence of effective quality controls, the research notes that this can incentivise work of poor quality.

For example, paying a fixed fee does not incentivise representatives to undertake the detailed and time-consuming evidence gathering that is essential to asylum cases and required in the ELAP Solihull pilot. In fact, interviews undertaken in this research suggest that UKBA decision makers now rarely receive witness statements in fixed fee cases (see section 3.3). Interviews with legal advice providers and other stakeholders suggest that some representatives are cutting corners and turning away vulnerable clients with more complex cases – cases which therefore take longer to prepare (section 3.4).

A Ministry of Justice review, instigated by Lord Bach, detailed concerns over possible abuse of the fixed fee system, including representatives 'cherry picking' easier cases and providing short units of advice (Ministry of Justice, 2009). The review also highlighted potential difficulties for specialist providers. Section 3 looks at evidence that supports these concerns, obtained from the LSC and through interviews with stakeholders.

In 2009/10, 29% of suppliers were in breach of a key performance indicator (KPI) designed to prevent abuse of the fixed fee scheme. They breached this KPI by spending little time on their cases on average while collecting the full fee (see Section 3.2). Other findings showed that 27.3% of asylum fixed fee cases earned over twice as much as they would have been paid at an hourly rate.

It is likely that many of these cases are not brought to a conclusion. Further legal intervention and repeat fees would be required, driving up overall costs. The LSC's research predicted that representatives would be twice as likely to be unaware of the outcome of a case paid by fixed fees (44% of cases) compared to an hourly rate (22% of cases) (See Section 3.1 and LSC, 2001: 72). This suggests that, most often, the case was closed by the provider without it being concluded.

While this data does not allow for a quality comparison between providers, other aspects of the research suggest a correlation between time and quality. Taking this together, there appears to be scope to spend resources more effectively to achieve value for money within the same budget limit, provided that effective quality standards are enforced.

11.6 Measuring quality

Peer review is currently held to be the most accurate and fair assessment process of quality. Once reviewed, firms are given a competence rating. Level 1 is the highest and Level 5 the lowest. Level 3 as the minimum standard required for retaining a legal aid contract (LSC 2005: 5).

Significantly, the Level 3 competence threshold is set below the level for quality asylum legal work as defined in this project. It requires work to be adequate, but not always extensive; it requires adequate but limited communication with the client; and it only requires representatives to deal with the presenting issue, not linked issues. This Level 3 threshold contrasts sharply with the Level 2 standard, which requires:

- work to be tailored to the client's individual circumstances
- issues to be progressed comprehensively, appropriately and efficiently
- the client to be advised correctly and in full
- the representative to employ tactics and strategies to ensure the best outcome of the case
- the supplier to be proactive and add value to the case (Ibid: 11).

These differences help explain how representatives are able to standardise and cut corners in casework. It does not meet with the expectations of representation in the ELAP process. The Level 3 standard seems inconsistent with the special demands placed on legal representatives by asylum cases, where a client's witness statement is essential to an effective decision-making process.

The minimum peer review standard is set to low to ensure value for money in asylum cases. It should be raised to Level 2.

11.7 Value for money

One of the insights provided by this research is the absence of effective systems for monitoring value for money in asylum legal aid. There are no value-for-money key performance indicators (KPI) for the great majority of asylum work. Currently, the only context in which the LSC has looked systematically at cost and outcome is in ELAP. The evaluator of the ELAP pilot was clearly impressed with the way value for money data was collated:

> *"It would be appear to be crucial that the LSC should employ such a special reporting mechanism to ensure effective monitoring of the cost effectiveness at each stage of the process by all providers."* (Aspden, 2008: 72)

The LSC should adopt this recommendation beyond ELAP.

11.8 Commissioning legal services

Public policy on commissioning public services is increasingly expanding from a focus on outputs only toward creating incentives for outcomes and the delivery of 'social value'. The ELAP process can be viewed in this same broad context, and this report indicates how it might inform thinking on commissioning legal services to provide better value for money.

ELAP evaluation findings present a challenge to the current, output-based fee structure. When the pilot was designed, it was recognised that the fixed fee system was not appropriate for this process and so payments were based instead on hours of work. Considering our experience from the limited rollout of ELAP, a fundamental decision must be made on what payment system to use in the future so that it ensures quality, value for money and better outcomes for clients.

ELAP should be rolled out nationally in line with the five funding principles set out in 11.9, and it should be underpinned by a quality standard commensurate with the work expected of legal representatives in the process.

11.9 Recommendations and funding principles for reform

A new approach to the funding of asylum representation could enable the decision-making process to deliver sustainable, fair, faster and more cost-effective decisions. This would require a move away from a payment structure linked solely to outputs, towards one which seeks to incentivise behaviour that leads to good outcomes. This structural and cultural shift is also essential as a safeguard against abuse of the system that should ultimately guarantee all people access to representation, including the most vulnerable.

We recommend the following:

Five principles for reform

Lessons from this research suggest the new approach should include the following five principles:

- Funding should incentivise early, sustainable, fair decisions and provide clear value for money. A 'full life' assessment of value for money should include potential savings to the end of the decision-making process for the Home Office, the Ministry of Justice and other public bodies. Value should include social value.
- Legal aid payments should reward quality and good client relationships. It must be sufficient to enable the representative to establish the full factual and evidential basis for the case, and submit it to UKBA in a witness statement with supporting documents.
- Funding should be sufficient to meet legitimate needs at all stages of the case.
- All clients should receive advice that corresponds with the complexity of their case, which means that some clients with more complex cases will need a greater investment in legal support.
- The scheme should incentivise representatives who bring cases to completion. Short pieces of advice may add value to a case, but should be paid less than full representation.

Other points to consider

In the light of research considered in this report, the following more specific points of design might also be considered:

- **Higher quality thresholds.** An outcome-focused quality threshold ought to be applied, set at a level which secures these principles are enforced. Firstly, there should be a step increase in the number of peer reviews to eradicate performance at Levels 4 and 5. The peer review threshold should be raised to Level 2 in asylum cases to reflect the special nature of the work. All representatives should be peer reviewed, within a specified time frame and prior to any move to best-value tendering.
- **Introduction of value for money indicators.** Value for money should be assured through the development of specific performance indicators beyond the ones currently in use. We should consider indicators that link cost with outcomes. The LSC should report annually on overall performance of suppliers against KPIs. A value for money monitoring system should be adopted by which representatives report on cost and outcomes, as recommended for wider use in the Solihull pilot evaluation.
- **Robust monitoring.** There should be robust monitoring of supplier performance, with a particular emphasis on value for money. The monitoring system used in ELAP should be rolled out for all cases. Monitoring should scrutinise suppliers that earn more from fixed fees than hourly rate work. Suppliers should be prioritised for peer review on the basis of performance. Feedback loops should ensure prompt learning and action on both good and bad practice.
- **Payments reflecting higher costs and complex cases.** More complex work that requires representatives to be accredited at Level 2 of the Immigration and Asylum Accreditation Scheme should be paid at a higher rate. The legal aid system should incentivise appropriate time being spent on client group cases that typically take longer to prepare, such as those relating to children and fast-track detainees.

The ELAP approach of paying for cases on an hourly rate is both straightforward and relatively free of the risk of unintended consequences. It is tried and tested – not only in ELAP, but also for the ongoing funding of the cases of children and fast-track detainees. One of the main concerns from a funding perspective would be to ensure that representatives do not spend more time than is necessary on a case. Since 2004, this risk has been managed by imposing an advice time limit on each case that can only be extended with the LSC's prior authority.

The move to best-value tendering will pose a particular challenge to quality representation. Price competition based on the current low quality threshold will force quality providers out of the market. Tendering on a higher quality threshold will safeguard and promote quality legal advice, secure better outcomes for asylum seekers and value for money for government.

Appendix 1

Methodology

History of the project

The project started in January 2009 when Refugee and Migrant Justice (RMJ), funded through the Baring Foundation, commissioned the Information Centre about Asylum and Refugees (ICAR) to undertake the work.

ICAR carried out all qualitative work, drafted the reports and managed the wider research team, drawn from academics from City University. Two members of staff from the Economics Department carried out the statistical data analysis and created the models needed to do so, and a Senior Lecturer from the Law Department was responsible for the file reviews. ICAR was supported in this endeavour by a steering group chaired by RMJ, which consisted of individuals from a wide range of backgrounds.

This complex project used a wide range of methods, including a literature review, in-depth interviews, file reviews of legal aid cases and statistical modelling. It was designed to provide a holistic view of what high-quality legal aid representation looks like, and its contribution to cost effective decision making. The qualitative work informed the project definition of quality and the work on the file reviews. The quantitative work was intended to inform a cost that could be applied to providing quality work.

In July 2010, RMJ went into administration. At the same time, ICAR moved from City University to the Runnymede Trust. The research was incomplete at that point but could not, in any event, be published as its intellectual property resided with the administrators of RMJ. The Runnymede Trust agreed to take on the project and publish two outstanding pieces of work, the stakeholder interviews and the final report. After a long negotiation with the RMJ administrators, permission was granted to go ahead with the work in September 2011.

Literature review

A literature review was carried out by ICAR at the start of the research to inform the project definition of quality and the scoring system for the project file review. The key aim of the literature review was to establish a normative framework of the crucial elements of quality legal representation for asylum seekers.

For the purpose of the review, government reports were identified first. We then scanned out for further reports, relying in particular on bibliographic databases held by City University – as such databases are universally used by researchers to source reliable academic papers. Although the review sourced a wide range of documents, therefore, it relied mostly on government and academic sources. Among the all the sources, the literature review looked at:

- Two major Government studies examining cost, quality and outcomes in the provision of legal aid: 'Cost and Quality' (LSC, 2001), which found a correlation between cost quality and outcomes in legal aid work; and a pilot of the Early Legal Advice Project in Solihull, which examined the positive impact of early, quality legal interventions on efficient decision making in asylum cases (Aspden, 2008)
- Academic and government literature on commissioning public services – for example, 'Excellence and Fairness: Achieving world class public services', which highlights the need to incentivise excellent outcomes, for a personalised service meeting individual needs, and fairness and value for money (Cabinet Office, 2008)
- Government studies into legal aid reform, such as Lord Carter's review of legal aid procurement, which recommended reform underpinned by a strict and robustly-monitored quality threshold (Lord Carter of Coles, 2006)
- Reputable research into longer-term cost savings that can be achieved through early advice interventions – for example, 'It's the System, Stupid! Radically Rethinking Advice' (AdviceUK, 2008)
- Views of professionals and representative bodies on fixed fees and its adverse impact on quality representation – for example, the Immigration Law Practitioners Association's response to the fixed fee proposals (ILPA, 2006)
- Early reviews on the impact of payment by fixed fees, such as Lord Bach's 'Study of Legal Advice at a Local Level' (Ministry of Justice, 2009)

- Academic literature on quality services, particularly relating to legal aid and peer review, such as 'Lawyers - The Quality Agenda, Volume 1. Assessing and developing competence and quality in legal aid' (Sherr et al, 1994)
- Primary research conducted as part of this project into refugees' views on quality and its importance to effective and fair decision making (Trude and Gibbs, 2010b)
- LSC publications on its evolving position on quality, the quality threshold and peer review (described in Section 5 of this report)

The above was supported by evidence from practitioner and refugee organisations such as Asylum Aid, Bail for Immigration Detainees, Refugee Council and Refugee Action.

The review, available as a separate report, was presented at the steering group and then approved for publication in March 2010.

Qualitative research

The qualitative part of the project was designed to complement the quantitative work by providing a human perspective to the asylum legal aid process from asylum applicants, decision makers and legal representatives.

Interviews followed a topic guide and were tape recorded where allowed or noted where the respondent did not want to be recorded. They were then transcribed by the research team. Data was entered into the NVivo analysis software and a process of inductive coding was used, drawing themes out of the data.

All stages of the qualitative work were approved by the City University Research Ethics Committee.

Refugee interviews

ICAR carried out 34 interviews with refugees in July and August 2009. We interviewed refugees rather than asylum seekers because they had been through the whole system and could see it from a complete perspective. Because of the time lapse, refugees in the sample had not been through the legal system under the fixed fee regime. However, their observations on which aspects of the work of legal representatives were most valuable to them were made independently of any payment system. Their unique perspectives on what constitutes quality legal advice were fed into the project's definition of quality.

Respondents were recruited in three ways;

- Refugee support agencies and community organisations known to ICAR (17 people)
- Refugee & Migrant Justice (11 former clients)
- Immigration Advisory Service (6 former clients)

Respondents had arrived in the UK within the last ten years (i.e. since January 1999) and had been granted refugee status, humanitarian protection or discretionary leave within the last two years. 7 respondents (20%) had received refugee status at first decision stage, and a further 4 respondents were successful under the legacy programme, having been refused at first decision. 20 respondents had received some form of leave to remain on successfully appealing a first refusal. 1 respondent had been successful at first decision in a fresh claim, and two respondents had fresh claims outstanding. 2 of the respondents interviewed had their initial asylum application considered under the detained fast track and their case later continued out of detention.

Respondents were from a range of countries: Afghanistan, Burundi, Cameroon, China (2), Cote D'Ivoire, Democratic Republic of Congo, Eritrea, Ethiopia (4), Iran (6), Iraq (3), Jamaica, Kuwait, Malawi, Nigeria, Somalia (2), Turkey and Zimbabwe (5). Professional interpreters were used for eight of the interviews.

All respondents were over twenty 20 years old. 27 were living in London, 7 outside London. 12 were women, 22 were men. Respondents presented with a range of asylum application – for example, single person application, family application, port application and in country application. Half of the respondents (17) had used more than one legal advice firm or organisation during the course of their asylum claim.

Where possible, interviews were carried out face-to-face by a member of the ICAR research team in a location suitable for research interviews and convenient to the respondent. Seven interviews were carried out by telephone. Respondents were given a £20 voucher in appreciation of their time directly after the interview. A topic guide was used for all interviews.

Decision maker interviews

ICAR staff interviewed 4 Home Office decision makers and 2 immigration judges to gain their views on what constitutes quality work from a legal representative and how this aids the decision-

making process. This included 2 case owners, 1 senior case worker and 1 presenting officer. All worked for the Home Office in London.

Access was gained through a contact in the Home Office (on the steering group for the project) and participation was voluntary. Participants did not get paid for their time; and all interviews were carried out on Home Office premises during working hours.

One of the researchers, an immigration judge, identified 2 immigration judges for interview. The immigration judges were interviewed by telephone and were working in the London tribunal.

Provider interviews

ICAR carried out 10 face-to-face interviews with providers of legal aid advice in London firms specialising in asylum and immigration. A list was drawn up of all firms offering legal aid advice to asylum clients in Central London – using the ILPA member's directory – and they were sent a letter to invite them to participate in the research.

ICAR then followed up these letters with a telephone call to encourage participation. The providers were from a mix of not-for-profit and private firms. The participants were mixed in terms of the length of time they had worked as a representative and their seniority in the firm.

Quantitative research

Regression model, relating quality legal advice and time

Here, the project derives a statistical relationship between quality legal advice and the time that would be required to achieve such quality. The significant contributor to this end, and perhaps the most complex factor involved in building this relationship, is how to fashion the measure of quality legal advice.

ICAR, which was located at City University at the time of the research, was able to draw on faculty members with a vast array of experience and expertise in asylum law, including an academic who also sits as an immigration judge. Using this expertise, a unified scoring model was developed by combining the following ingredients: a file review scoring system, quality factors and scoring elements. Each of these components will be further discussed to explain their contribution to the development of an overall score of quality legal advice. The purpose of this scoring procedure would be to ensure that it is reflective of overall quality legal advice.

a) File review scoring system

In devising a file review scoring system we drew on a thorough literature review. Thus, the ICAR team considered a range of sources relating to refugee law and practice, applicable guidelines from practitioners and other experts, generic standards on legal advice, and discussion with Legal Service Commission peer reviewers. The aim was to set out a framework for assessing objectively the quality of work carried out on asylum cases and the time taken to achieve this level of quality. Our goal was to construct a model that viewed asylum cases as a series of objective outputs that contributed significantly, in a positive manner, towards the decision-making process. We thus sought to link the file review system directly to the definition of quality set out in the literature review.

b) The quality factors and quality elements

The quality factors were those elements of quality refugee legal work that we concluded were objectively important in both the application stage and the appeal stages. Each quality factor contains a number of quality elements. The same quality are used for both stages, but the quality elements differed between stages. Thus, for example, a client must be interviewed initially, but also on receiving a refusal decision. The nature of the interview will, however, be different, hence the quality elements are different. There must be an initial statement drafted at the application stage and then a further statement on a refusal decision at appeal. The two stages are assessed separately according to the quality score for each stage. We set a different weighting to some quality factors to reflect the relative greater or lesser importance at application or appeal stage. The scoring for each quality factor is between 0 and 10.

c) The scoring system and core elements of asylum work

We started with the idea that there were 'core elements' of practice. These elements are considered absolutely fundamental to an asylum application and/or appeal. Without these being performed to a competent level, the decision-making process was likely to be seriously compromised, regardless of whether other elements are performed well. As a result, the elements 1 to 4 (see below) were weighted heavily and attracted a possible 75 out of 100 total marks. Non-core elements were considered less important and scored only 25. The weighting was therefore heavy on the client statements, the interview and the objective evidence gathered.

QUALITY FACTOR	DESCRIPTION OF FACTOR		MARKS AVAILABLE
1	Interviews and advising	CORE FACTORS	15
2	Review of decisions/evidence		10
3	Drafting of statements		30 (20 on appeal stage)
4	Evidence gathering		20 (30 on appeal stage)
			(75 out of 100 marks)
5	Witnesses		5
6	Experts		5
7	Post-submission/decision steps		5
8	Communication, administration, timeliness		10
			100 marks

QLA LEVEL Benchmark

1. INTERVIEW & ADVICE

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

Appeal stage: review of refusal letter, review of evidence, consideration of the merits test. Demonstrating and explaining whether merits test is met or not. Advising the client accordingly.

2. REVIEW OF EVIDENCE AND/OR REFUSAL DECISION

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

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

3. DRAFTING OF STATEMENTS

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

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

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

QLA LEVEL Benchmark	
	4. EVIDENCE GATHERING AND PREPARATION OF BUNDLE Research of the relevant country and legal information. Obtaining other relevant documentary evidence such as medical records or social service reports as appropriate. Submission of such documentary evidence as is appropriate for initial applications e.g. where decision-maker may be unaware of specific risk factors not identified in general publicly available background information. Appeal stage: Preparation of a relevant and comprehensive bundle of objective material that covers the specific issues of persecution, risk, Convention reason and internal flight in the applicant's case. Recognition of any specific features of the case that call for additional background evidence beyond standard sources. Inclusion of any further statements, witness statements and expert reports obtained. Instructing in-house or external advocate with comprehensive brief that identifies key issues and key evidence. **5. WITNESSES** Consideration of the need to interview or contact any relevant factual witnesses. The drafting of clear, relevant and comprehensive statements where appropriate for inclusion in evidence filed on application or appeal. **6. EXPERTS** Consideration of the need for expert evidence. Instruction of an independent expert in relation to any matter not adequately supported by the evidence at 1-5. This could be a medical expert or a country expert or age assessment expert. Expert evidence on file kept up to date. **7. POST-SUBMISSION / POST-APPEAL STEPS** Attendance at the asylum interview if appropriate and the making of suitable interventions to enable the client's case to be properly considered. The drafting of further representations or statements as appropriate. Discuss positive decision and advise on related issues. Appeal stage: Review appeal decision. Consideration of application for reconsideration or fresh claim. Advise client accordingly. **8. COMMUNICATION** Regular and appropriate communication with the client which provides clear and comprehensive advice on all pertinent legal and practical issues. **9. ADMINISTRATION AND TIMELINESS** Up to date personal information and other record keeping, time recording and billing. Timely submissions of statements and appeal forms.

d) The file reviewer and the file sample reviewed

The file reviewer was an experienced asylum and immigration solicitor and LSC peer reviewer. The files were drawn from completed files held by Refugee and Migrant Justice (RMJ) and Immigration Advisory Service (IAS). At the time, these were the two largest providers of asylum advice, representing a high proportion of all asylum seekers. The files were obtained by writing to all clients whose files had closed between certain dates, enclosing consent forms which would allow their files to be reviewed. Clients who returned their consent forms and gave consent were included in the study. For unknown reasons, there was a low response rate and a system of payment was introduced so that £10 was given to each person bringing in their consent form. In the end, consents were obtained for 63 files. Because these clients were all still in the UK and at their last known address, it is possible that they represent a group with an average rate of success in their asylum cases (compared to all those written to). There is however no data on how often different client groups move between addresses, so this is speculative. The files were ones that had all been conducted under the old system of payment by hourly rates, which was then in force. The file reviewer was sent the files and asked to read them and score them against a scoring grid, which is set out in an appendix. She was also asked to record time spent on each quality factor. The time is recorded in minutes – apart from letters, which attract the standard six minutes, unless timed individually.

We only reviewed files where the representative had been instructed throughout the initial decision-making stage, the appeal stage, or both. In relation to each stage, therefore, the representative had an opportunity to score on all of the quality factors. Where the representative was instructed in both stages, each was scored separately and not added together. Since the same quality factors were used for the decision-making and appeals stages, we were able to compare the results for both by plotting them onto the same graph, as well as showing them separately.

e) Overall assessment of the file review process

The file reviewer who used the system generally found that it worked well and was relatively straightforward to operate. The reviewer was able to map the criteria set by the system onto the actual files she looked at, and was also able to score the elements of practice in a manner that she found relatively clear. Some elements were found hard to assess, largely because they are not objectively noted on the files. One example would be the quality of the interviews with the advisor. Nevertheless, most elements were objectively measurable for both quality and time.

f) Suggested changes to the weighting in the scoring system

On the basis of our research conducted with decision makers and lawyers, along with the file reviewer's comments, we concluded that the weighting of the system should be changed to reflect their contributions. We considered that some quality factors were viewed relatively more important to the decision-making process than we had initially concluded from our literature review. Other factors were less important or harder to measure objectively. Great importance was given by decision makers to the initial statement, for example. The details of the proposed changes are set out below.

QUALITY FACTOR	DESCRIPTION OF FACTOR		MARKS AVAILABLE
1	Interviews and advising	CORE FACTORS	15 (change to 10 on initial application)
2	Review of decisions/evidence		10 (change to 5 on application)
3	Drafting of statements		30 (change to 50 on application) (20 on appeal stage)
4	Evidence gathering		20 (change to 10 on application and 30 on appeal stage)
			(75 out of 100 marks)
5	Witnesses		5
6	Experts		5
7	Post-submission/decision steps		5
8	Communication		5
9	Administration and timeliness		5

g) Effect of changing the weighting, as suggested
We have performed the statistical analysis again using the new proposed weighting and it has not significantly changed the results. This suggests that the relationship between time and quality is robust to changes in the scoring system.

h) Conclusion
The scoring system was easy to use and matched well with the steps that actually occur in asylum cases. It captures most of the work that firms do or should do. It provided a good insight into what level of quality is being performed at each stage and how long this took. It proved to be consistent with the opinions of decision makers as to which factors should be more, or less, heavily weighted in order to assist in the decision-making process. We were able to give further or lesser weight to those factors without distorting the results obtained under the initial weighting.

Linear regression model

We reviewed 46 asylum case files to ascertain whether quality legal advice had been provided. Each file was analyzed on nine features that were considered important. Each feature was scored on a scale of 1 to 10, with 10 indicating the highest quality. The nine features were weighted by importance and then combined into one score for each file. A file with a higher score was considered to have received higher-quality legal advice when compared to a file with a lower score. Using this score as the independent variable and time recorded for each case to reach first decision or appeal as the dependent variable, the following linear regression model was estimated:

$$\text{Time} = ß_0 + ß_1 \text{Score} + Ɛ$$

The estimated version of this regression model is:

$$\underset{\text{(se)}}{\text{Estimated Time}} = \underset{(128)}{-240} + \underset{(2.14)}{20}$$

The t-statistic for the test of statistical significance of the slope parameter is 9, which is far larger than the critical value associated with a significance level of 5%.

The conclusion that can be drawn from this test is that there is a strong and positive relationship between the score each reviewed file received and the amount of time spent on providing legal advice. This regression model clearly links time spent on a file with quality. Moreover, the correlation between the score and time is 0.75.

These results were not controlled for factors, other than quality, that might have increased time – for example, clients who require an interpreter or those with mental health difficulties.

Solihull Provider Comparison from Aspen 2008
Annex 14

		EAP	A	B	C	D	E	F	G	H	I	J	K	L	M	N
	Intake	**451**	22	27	12	78	20	18	13	32	81	20	1	1	12	114
	Proportion	**100%**	5%	6%	3%	17%	4%	4%	3%	7%	18%	4%	0%	0%	3%	25%
Av costs	Pre Interview	**£498.83**	£345.57	£230.72	£303.63	£860.24	£373.31	£818.26	£330.02	£476.89	£375.12	£644.63	£0.00	£433.33	£451.07	£390.84
Av costs	Interview	**£331.16**	£297.46	£253.38	£364.24	£391.84	£254.39	£376.58	£268.39	£248.93	£268.39	£576.20	£0.00	£236.21	£344.00	£265.72
Av costs	Post Interview	**£146.44**	£52.17	£52.59	£25.67	£251.81	£66.13	£180.02	£101.90	£210.89	£125.29	£187.31	£0.00	£12.30	£164.96	£93.27
Av costs	Profit costs	**£934.00**	£695.20	£536.70	£693.54	£1,503.89	£693.84	£1,374.86	£700.31	£936.71	£768.80	£1,408.14	£0.00	£681.84	£960.03	£749.83
Av costs	Interpreters	**£415.40**	£299.37	£206.92	£318.72	£989.50	£472.80	£541.19	£125.50	£200.21	£148.41	£328.94	£0.00	£0.00	£263.42	£143.60
	Allowed	**35%**	23%	19%	42%	50%	40%	61%	31%	34%	30%	30%	Pending	100%	33%	30%
	CLR Rate	**55%**	25%	66%	17%	40%	18%	66%	78%	67%	34%	64%	N/A	N/A	63%	74%
	Red	**55%**	45%	59%	66%	58%	55%	72%	46%	63%	49%	65%	100%	100%	42%	50%
	Amber	**37%**	50%	37%	17%	36%	30%	17%	31%	31%	46%	30%	0%	0%	50%	40%
	Green	**8%**	5%	4%	17%	6%	15%	11%	23%	6%	5%	5%	0%	0%	8%	10%
	AIT Allowed	**21%**	25%	20%	0%	21%	50%	25%	29%	30%	5%	33%	N/A	N/A	40%	14%
	AIT costs	**£1,426.15**	£1,132.43	£761.49	£441.37	£2,669.42	£405.28	£4,106.39	£920.13	£716.99	£847.91	£3,152.80	N/A	N/A	£414.32	£844.92

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

2 Systems that attempt to apply process measures to lawyers can be applied to what Paterson calls "the complete range of lawyering" including "fact gathering, legal analysis, strategy formation and execution, follow through, client handling, interviewing, counselling, negotiation, mediation, litigation, and practice management" (Paterson, 1994: 7).

Notes

[1] R. v Secretary of State for the Home Department Ex p. Sivakumar (FC) [2001] EWCA Civ 1196
[2] Over 10,000 asylum appeals were determined in 2011
[3] R. v Secretary of State for the Home Department Ex p. Sivakumar (FC) [2001] EWCA Civ 1196
[4] See http://www.legalservices.gov.uk/civil/legal_aid_reform.asp for further details
[5] Over 10,000 asylum appeals were determined in 2011: http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-brief-q4-2011/asylum
[6] The draft data is taken from cases started after the introduction of the Fixed Fee Scheme and closed in the year ending 30th September 2009
[7] http://www.theyworkforyou.com/wrans/?id=2010-10-26a.274.0
[8] http://www.theyworkforyou.com/wrans/?id=2011-06-16a.215.4
[9] Children's cases are still paid at an hourly rate
[10] Legal aid is paid at a higher rate for face-to-face work with a client. If the representative has to travel to see the client – for example, because they are detained – a lower rate is paid for the time spent travelling and waiting for the appointment.
[11] A case will be treated as exceptional and paid at an hourly rate, if the time spent on it exceeds three times the notional time allowed under the fixed fee
[12] Cases at the initial decision-making stage are paid by legal help.
[13] Appeals work is paid by Controlled Legal Representation, or CLR. Full appeal (CLR 2b) cases, which are those that proceed to appeal, receive a higher payment than partial appeal (CLR 2a) cases, which complete prior to appeal (for example, because they are conceded by the UKBA).
[14] Under the mandatory accreditation scheme for immigration advice, representatives are not entitled to undertake appeals work unless they are successfully assessed at a higher level
[15] See http://www.legalservices.gov.uk/civil/legal_aid_reform.asp for further details
[16] Guardian, 25th October 2011
[17] Law Society Gazette 14th July 2011
[18] A provider sees 1,000 clients, 180 cases are granted asylum, 770 are refused and the outcome is unknown: success rate would have been 18%, suggesting work was of sufficient quality. However, of the cases where the outcome is known, it would only have won 23% – 7% less than the UKBA's overall grant rate of 30% – raising the real possibility that its work was poor
[19] Broadly, representatives are required to assess the merits of a case and only grant legal aid for representation at appeal for cases that have at least a 51% chance of success.
[20] Exceptional fixed fee cases are all subject to an LSC costs audit.
[21] Many schemes only provide for payment at completion of a matter when its outcome is known.
[22] R. v Secretary of State for the Home Department Ex p. Sivakumar (FC) [2001] EWCA Civ 1196
[23] A case will be treated as exceptional and paid at an hourly rate, if the time spent on it exceeds three times the notional time allowed under the fixed fee.
[24] The cases of children and fast track detainees were excluded from the fixed fee scheme on grounds of their complexity.
[25] A full life approach would have included potential wasted cost at the second tier appeal stage and any litigation and fresh claims.
[26] The £4,000 sum represents support and accommodation costs of £1,253, tribunal costs of £1,477, and legal aid appeal costs of £1,426.
As with the evaluator's calculation, this wasted cost is only calculated up to a first appeal and does not represent a 'full life' approach.
[27] Over 10,000 asylum appeals were determined in 2011: http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-brief-q4-2011/asylum
[28] Where cases were successful and asylum seekers were given permission to stay in the UK.
[29] Where asylum seekers were either given permission to stay, or refused asylum and removed from the UK within six months.
[30] Here, we are only looking at the success rate where the outcome of the case is known, unlike the LSC 15% quality indicator (see Section 5.1).
[31] The UKBA is organised into five geographical areas.
[32] The full methodology for the exercise is set out in Appendix 1.
[33] R. v Secretary of State for the Home Department Ex p. Sivakumar (FC) [2001] EWCA Civ 1196

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