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# **Training and Regulating those providing Publicly Funded Legal Advice Services**

## **A Case Study of Civil Provision**

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### **Disclaimer**

The views expressed in the report are those of the authors and are not necessarily shared by the Ministry of Justice.

## **Executive Summary**

### **Background to the Study**

This is a report of a qualitative study of the impact of training and regulation on the management and delivery of civil legal advice and representation, the fieldwork for which was conducted from 2005-6.

Since the mid 1990s, but particularly since the reform of legal aid signalled by the Access to Justice Act (AJA) 1999, contracts for the delivery of publicly funded legal advice services have been held not only by private solicitors' firms, also known as the For Profit (FP) sector, but also by a range of Not-for-Profit (NFP) organizations, such as Citizens' Advice Bureaux (CABx), and national VCOs.

However, the FP and NFP sectors are characterised by very different regimes of regulation and training. The FP sector is heavily regulated, and solicitors are subject to lengthy periods of training and extensive assessment before qualification. By contrast, NFP advice workers are not required to possess any formal qualifications, and are subject to a variety of training regimes. They experience the comparatively light regulatory regime overseen by the Charity Commission.

The divergence between the extent and quality of the regulatory and training regimes of the two sectors raises both questions about the respective value of their divergent approaches, and concerns about the levels and consistency of quality in the publicly funded sector as a whole. The introduction of a rigorous quality standard for publicly funded legal advice work, the Specialist Quality Mark (SQM), and the systematic audit and management of contract by the LSC has sought to address some of these concerns. However the impact of this form of performance management on firms and agencies raises issues about the policy objectives of the current regulation of the sector, and the levels of quality and efficacy of the legal advice and representation it is able to deliver.

## Results

Respondents in both the FP and NFP sectors stressed a number of non-regulatory factors which affected their service delivery, and which therefore amount to informal regulation. These included non-economic values, such as commitment to social justice or to their client base. These values, they said, derived either from prior commitment or had been instilled by their vocational training. Other informal aspects of both training and regulation were argued to be significant, such as the ethos of their organization.

All respondents were subject to multiple forms of formal regulation. These included statutory regulation and professional regulation by the Law Society, quasi-regulation (for instance Citizens Advice quality marks), and the contractual regulation which accompanied LSC funded legal advice work. With the exception of the oversight of the Charity Commission, the NFP sector was less likely to be subject to statutory regulation of the kind applying to all practising solicitors.

The majority of respondents considered that in the past many forms of regulation and oversight by funding bodies had lacked rigour, either because audit and inspection was infrequent, or because there was a high threshold for failure. By contrast, their responses indicated that the LSC contract had become the most significant influence on their day to day practice. Respondents in both FP and NFP sectors were unequivocal in their support of the effect of the SQM on their LSC contracted work. Furthermore, they reported that compliance with the SQM had a 'ripple effect' on the functioning of organizations, resulting in better service to clients ineligible for legal aid.

However, practitioners reported spending an undue amount of their time meeting the demands of inspection, reporting and audit, rather than delivering front line services, and some, especially in the NFP sector, felt that this was distorting the culture and mission of their organisation. Respondents were also generally unhappy about contract compliance auditing, the process whereby their performance was judged according to under- or over-performance on the contract. The NFP sector felt that the exclusion of activities which had traditionally been a key part of their work, and the effects of 'ring-fencing' contracted workers, was accentuating the impact which the contract was

already having on their mission and internal organization. The FP sector reported that the gap between legal aid and the private client rate caused internal tensions in mixed practices, as a consequence of the cross-subsidy involved. Respondents from both sectors also expressed doubts about the reliability, objectivity and expertise in legal advice of auditors' judgements in the time standards and contract compliance auditing process.

Respondents in the FP sector regarded their initial training and the current provisions for Continuing Professional Development (CPD) as a necessary but not sufficient guarantee of competence. Many complained about the focus on commercial law and relative neglect of welfare law and skills on the qualifying law degree and Legal Practice Course (LPC). Supervisors and supervisees identified a minimum of two years' closely supervised work-based learning as the most important means of developing and sustaining competence in advice and representation work.

The quality of supervision during the Training Contract period reported in the FP sector was very variable. The supervision requirements of the SQM were seen as a positive benefit, but respondents identified the quality of supervision as more important than the quantity or the formal regularity. Respondents identified a range of skills and qualities which were insufficiently embedded in the existing training of solicitors in the FP sector. Specifically, there were weaknesses in preparing solicitors to work with socially excluded clients, and in preparing all workers to manage the requirements of the LSC contract.

Both FP and NFP sector respondents were concerned about future labour supply, based on the age profile of the current workforce, and difficulties experienced in recruitment and the tightening of resources were held to have an adverse effect on training.

Training in the NFP sector was based to a greater extent on the needs of the organization, and was more tightly defined by the competence demanded in the role, particularly in the highly developed training offered by Citizens Advice. The ladder of training was generally designed to allow progression from volunteer to specialist status, regardless of previous formal educational qualifications. Training was supplied by specialist charities with a national standing, such as Citizens Advice and Shelter, but

specialist NFP advisers also made extensive use of second tier advice services provided by telephone and the internet, and saw these services as training resources.

Another form of training in the NFP sector was the sharing of expertise as a result of inter- and intra-agency networking. Both of these forms of training and sharing of expertise were seen to be at risk from the form of contractual management used by the LSC at the time of the research.

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## List of Abbreviations

|         |  |
|---------|--|
| ACLEC   | Advisory Committee on Legal Education and Conduct            |
| A&G     | Advice and Guidance  |
| AJA     | Access to Justice Act (1999)                                 |
| ABS     | Alternative Business Structure                               |
| ABWOR   | Assistance by way of representation                          |
| A/W     | Advice Worker  |
| ASA     | Advice Services Alliance                                     |
| BME     | Black Minority Ethnic  |
| BRC     | Better Regulation Commission                                 |
| BRTF    | Better Regulation Task Force                                 |
| BSI     | British Standards Institute                                  |
| CAB     | Citizens Advice Bureau                                       |
| CCS     | Consumer Complaints Service                                  |
| CDS     | Criminal Defence Service                                     |
| CLAC    | Community Legal Advice Centre                                |
| CLAN    | Community Legal Advice Network                               |
| CLS     | Community Legal Service                                      |
| CLSP    | Community Legal Service Partnerships                         |
| CLSQM   | Community Legal Service Quality Mark                         |
| CLT     | Central Law Training   |
| CPAG    | Child Poverty Action Group                                   |
| CPD     | Continuing Professional Development                          |
| CPE     | Common Professional Examination                              |
| DCA     | Department of Constitutional Affairs                         |
| DIAL    | Disability Information Advice Line                           |
| DLA     | Disability Living Allowance                                  |
| EAT     | Employment Appeal Tribunal                                   |
| EO      | Equal Opportunities  |
| FENTO   | Further Education National Training Organization             |
| FIAC    | Federation of Information and Advice Centres                 |
| FLR     | Front Line Regulator   |
| FP      | For Profit   |
| FLR     | Front Line Regulator   |
| FSA     | Financial Services Authority                                 |
| HE      | Higher Education   |
| HoCSCCA | House of Commons Select Committee for Constitutional Affairs |
| HRA     | Human Rights Act   |
| I&A     | Information and Advice                                       |
| IDS     | Income Data Services   |
| liP     | Investors in People  |
| ISO     | International Standards Organization                         |
| JR      | Judicial Review  |
| LAA     | Legal Aid Act (1988)   |
| LAB     | Legal Aid Board  |

|            |   |
|------------|---|
| LAG        | Legal Action Group                                    |
| LAFQAS     | Legal Aid Franchising Quality Assurance Scheme        |
| LAPG       | Legal Aid Practitioners Group                         |
| LCF        | Law Centres Federation                                |
| LNTV       | Legal Network Television                              |
| LPC        | Legal Practice Course                                 |
| LSA        | Legal Services Act                                    |
| LSB        | Legal Services Board                                  |
| LSC        | Legal Services Commission                             |
| LSCC       | Legal Services Complaints Commission                  |
| LSF        | Law Society Finals                                    |
| LSO        | Legal Services Ombudsman                              |
| LSRC       | Legal Services Research Centre                        |
| MAT        | Money Advice Trust                                    |
| MoJ        | Ministry of Justice                                   |
| NFP        | Not for Profit  |
| NPM        | New Public Management                                 |
| NOS        | National Occupational Standards                       |
| NOS4Advice | National Occupational Standards for Advice sector     |
| NQF        | National Qualification Framework                      |
| NVQ        | National Vocational Qualifications                    |
| OCN        | Open College Network                                  |
| OECD       | Organization for Economic Cooperation and Development |
| OFT        | Office of Fair Trading                                |
| OISC       | Office of the Immigration Services Commission         |
| OLC        | Office of Legal Complaints                            |
| OSS        | Office for the Supervision of Solicitors              |
| PCT        | Primary Care Trust                                    |
| PgDip      | Postgraduate diploma                                  |
| PI         | Personal Injury                                       |
| PIB        | Partnership Initiative Budget                         |
| PQE        | Post Qualification Experience                         |
| PSC        | Professional Skills Course                            |
| QA         | Quality Assurance                                     |
| QM         | Quality Mark  |
| RIA        | Regulatory Impact Assessment                          |
| SDA        | Service Delivery Agreement                            |
| SLA        | Service Level Agreement                               |
| SME        | Small or Medium Enterprise                            |
| SRA        | Solicitors Regulation Authority                       |
| SQM        | Specialist Quality Mark                               |
| TEC        | Training and Enterprise Council                       |
| TFF        | Tailored Fixed Fees                                   |
| TFR        | Training Framework Review                             |
| TQM        | Total Quality Management                              |
| TFR        | Training Framework Review                             |

VCO Voluntary & Community Organization  
VFM Value for Money  
YIACS Youth Information Advice Counselling and Support Services

## **Acts and Delegated Legislation**

*Access to Justice Act 1999*

*Administration of Justice Act 1985*

*Enterprise Act 2002*

*Financial Services and Markets Act 2000*

*Further and Higher Education Act 1992*

*Human Rights Act 1998*

*Immigration and Asylum Act 1999*

*Legal Aid Act 1988*

*Legal Services Act 2007*

*Master of the Rolls (Appeals and Applications) Regulations 1991*

*Practising Certificate Regulations 1995*

*Proceeds of Crime Act 2002*

*Solicitors Act 1974*

*Solicitors Act (keeping of the Roll) Regulations 1999*

*Solicitors Training Regulations 1990*

# Chapter One Introduction

## 1.1 Background to the study

The significant involvement by the NFP advice sector in the delivery of publicly funded legal advice was initiated in 1997 with the contracting pilots for Advice and Assistance services, previously provided under the Green Form<sup>1</sup> and ABWOR (assistance by way of representation)<sup>2</sup> schemes. As noted four years later, ‘the difference between professional lawyers operating under a judicare, private practice scheme and non-lawyer, NFP advisers is an important area of policy theory and research’ (Moorhead, 2001, p 1). The two sectors appear at first sight to be characterised by a number of fundamental differences. The highly trained, highly regulated FP sector contrasts with a relatively lightly regulated NFP sector which has few formal barriers to entry. The business orientation of the private firm contrasts with the social mission of the NFP sector, and the specific technical focus of the FP sector contrasts with the ‘holistic approach’ of the NFP sector.

However the distinctions between the two sectors may have been overstated, for reasons that we will discuss in the body of the report, and both have been subjected to the discipline of the quality management regimes represented by the Legal Aid Franchising Quality Assurance Scheme (LAFQAS) and its successor, the Quality Mark (QM). Nevertheless, the simple fact of this dual-sector provision continues to raise questions. What kind of training is most appropriate to prepare advisers to provide an appropriate quality of advice to clients? How should advisers be regulated in order to deter them from offering unnecessary or inappropriate advice? Is the advice system organized in such a way as to maximise the social benefit: do advisers take into account the needs of those in the queue for services, as well as those with whom they are face to face? Will the application of contracting and quality assurance models based on an economic interpretation of human agency undermine the ethical foundation of publicly funded legal advice? Is there a tension between the

---

1 Under the Legal Aid Act (LAA) 1988, Part III, the provision of general legal advice by a solicitor, writing letters, negotiating, preparing a case in writing for a tribunal could be undertaken to a maximum of two hours’ work (three hours for divorce and separation petitions) and could be funded as legal advice and assistance, subject to eligibility rules.

2 ABWOR represented an extension to the Green Form scheme, under which solicitors could prepare a case and represent clients in civil proceedings in magistrates’ courts and in front of Mental Health Tribunals, subject to financial eligibility and the tests of legal merit and reasonableness specified in the LAA 1988, s. 125 (2).

regulatory goal of achieving Value for Money (VFM) and training models in both the FP and NFP sectors which are based on achieving the best result for the client?

These questions have already been the focus of a good deal of attention on the part of researchers in the field of legal aid. The current research does not attempt to replicate any of the specialised and expert work undertaken in the development of the schemes. It is rather concerned to use a case study approach to explore how the processes of training and regulation impact on comparability between the FP and NFP sectors.

## **1.2 Access to Justice and the introduction of the NFP Sector**

As Christine Parker has noted, whilst the Access to Justice movement is over 40 years old, and has both influenced research and come to constitute a major element of government rhetoric in the field of justice policy, the term has never been well defined (Parker, 1999). It has been seen as covering issues as diverse as accessibility of court procedures for dispute resolution, 'equality of arms' in criminal justice proceedings, and the development of accessible alternative dispute resolution procedures (Parker, 1999, p 30). Indeed, it is worth noting that, when legal aid was initiated, the policy of delivering advice on a case-by-case delivery through private solicitors was regarded by many as a less desirable option than the adoption of a salaried service, or universalist delivery through advice centres (Goriely, 1996, p. 224).

The entry of advice providers from the NFP Sector can therefore be regarded as in many ways an overdue development, as was the initiative to explore alternative methods of advice provision other than face to face case work (Bull and Seargeant, 1996) The perception that the existing system of legal aid provision was failing to meet the needs of a substantial section of the population was given added force by Hazel Genn's 'Paths to Justice', published shortly after the AJA 1999, which revealed both a considerable amount of 'unmet legal need' and ignorance about the functioning of the legal system and courts (1999).

Genn found that the likelihood of a matter being taken to solicitors in order to seek a resolution was related to the perceived seriousness of the issue, the awareness that it had a legal remedy, and the availability of legal aid (Genn, 1999, p 251). This work has been succeeded by other systematic research in the same vein, such as the

Legal Services Research Centre (LSRC) survey of Justiciable Problems (Pleasence et al, 2004) and detailed accounts which have identified concentrations of civil justice problems in vulnerable groups (Buck et al, 2004; Buck et al, 2005). The implication of this body of work, and of the joint papers by the Law Centres Federation (LCF) and the Lord Chancellor's Department, and its successor the Department for Constitutional Affairs (DCA/LCF, 2001; DCA/LCF 2004), was that advice had a central role to play in meeting the government's objective of combating social exclusion:

- through the empowerment of excluded groups and individuals;
- through increasing the material resources available to these communities;
- by providing a counter balance to the discretionary decision making on the part of the State to which these groups above all others are subject.

These developments form the backdrop to the shift of emphasis in legal aid provision heralded by the AJA 1999, as the numbers of contracts for areas of law like debt, housing and welfare rights were greatly increased, and contractors from the NFP sector were drawn into publicly funded provision in unprecedented numbers. At the time the research was undertaken, around 400 NFP agencies (excluding Law Centres) had contracts with the LSC to provide legal advice and assistance to eligible clients. Of these, the largest provider was Citizen's Advice, with approximately 200 Bureaux participating (of which around 80 employed solicitors). Shelter had around 40 offices with contracts to provide housing advice, while the residue was spread between a number of different specialist advice agencies. Overall the NFP sector contractors started around 115,000 cases annually, 22% of the total acts of assistance (House of Commons Select Committee for Constitutional Affairs (HoC SCCA), 2004, we 48, p. 6), and in 2004-5 the NFP sector was awarded 942 out of a total of 6242 contracts. Between 2003-4 and 2004-5 this figure rose by 11.3%, while the number of contracts awarded to solicitors' firms declined by 9.9% (HoC SCCA, 2004, we49, p 10).

This shift to the use of a wide range of providers, many of which employ non-legally qualified personnel, has inevitably resulted in a legal aid sector which is characterised by an equally varied range of occupational norms. As we will note below, this was hailed at the onset of the 'partnership' between the State and the voluntary sector as a positive aspect of the arrangement: voluntary sector values would bring 'added value' to service delivery. An unresolved issue, however, was

whether the approach designed to assure the quality of advice in the FP sector was appropriate for all providers. A key element in the development and maintenance of externally-regulated standards has been the LAFQAS and the subsequent QM for the Criminal Defence Service (CDS), the CLS and the Bar (LSC, 2002a, b & c). The design and development of these measures was accompanied by extensive research, which included comparisons of the FP and NFP sectors (Moorhead et al, 2001), but there have as yet been few comparative studies of their medium term effect. Alongside the research questions raised by the impact of QM are those raised by the impact of the contract itself. Contractualism is increasingly accepted as a form of regulation on its own account, as a form of 'extended accountability' (Scott, 2000; Moorhead, 2001), and it has impacted on the NFP sector in ways few had anticipated<sup>3</sup>.

In what way might contractualism represent a difficulty for the NFP sector and its social welfare law clients? Genn's evidence suggests that the socially excluded are difficult to reach through case based work by solicitors (1999, p 101), and the evaluation of the Civil Non-Family Advice and Assistance Pilot indicated that the NFP sector was better at dealing with some of the problems associated with social welfare law (Moorhead et al, 2001). Possible explanations for this include:

- the sector's value-base, such as a greater commitment to the cause of socially excluded clients;
- the sector's expertise, for instance its extensive experience in areas of law neglected by private practice, and allegedly superior interpersonal skills and empathy; and finally;
- the way in which the sector's values and skills combine to produce a greater expenditure of time per client problem.

The issue of how to train the workforce for the publicly funded advice sector has also yet to be fully explored. It is possible to overstate the extent of the distinction between the training for the two sectors: the NFP sector employs qualified solicitors, albeit more commonly as experts providing 'second tier advice', developing test cases, and helping to produce training materials than as routine front-line advice workers, and the FP sector uses staff with varying degrees of training (not only qualified legal executives, but also unqualified paralegals) on elements of contracted

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<sup>3</sup> As Jochum et al point out, '*less attention has been paid by the government to the (voluntary) sector's wider contribution to civil renewal ... this is reflected in attitudes towards voluntary and community organizations, seen primarily as "delivery agents", promoting choice rather than voice*' (2004, p 34)

work<sup>4</sup>. However, it is clear that while the FP sector is dominated by fully qualified solicitors, the NFP sector largely comprises workers who, where they have experienced systematic initial training, have not received nationally recognised qualifications for it. This latter fact lies at the root of the project to develop National Occupational Standards for the advice sector (NOS4Advice) within the National Vocational Qualifications (NVQ) framework.

Given these differences in the training base for the FP and NFP sectors, the question arises whether solicitors are over-trained for publicly funded legal advice work, and NFP workers under-trained, or whether the 'market' or reservoir of legal need eligible for public funding falls into different sectors requiring differing levels of expertise and training. If the latter, what kind of infrastructure should bind these sectors together? The Community Legal Service Partnerships (CLSPs),<sup>5</sup> envisaged as the vehicles for developing the AJA's aim of creating a 'seamless web' of advice services, have achieved uneven results in this regard. CLSP membership at the time of the Matrix evaluation indicated significant under-representation of solicitors in the partnership process (Matrix, 2004, p. 38). Instead the development of local partnerships as an infrastructure for networking advice provision tended to be correlated with the strength of previous arrangements and local authority commitment to the project. Difficulties in these partnerships at a local level, however, only reflect more widespread problems with the theory and mechanics of partnership at the national level. The LSC hopes to overcome these with the development of Community Legal Advice Centres (CLACs) and Community Legal Advice Networks (CLANs).

### **1.3 Third Sector Partnerships**

NFP sector involvement in legal advice has been mirrored in other areas of civil society. William Plowden has traced the development of voluntary sector involvement in service delivery in the 1990s, and the subsequent shift in emphasis towards 'partnership' and a 'compact' in the early period of the Labour Government (2003). The enhanced consultation and cooperation heralded by the compact finds

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<sup>4</sup> Although the claim that firms tend to sustain the viability of legal aid work by a reliance on paralegals has been much debated. Sidaway et al (1997) found no evidence that the use of paralegals was associated with involvement in legal aid work, but Williams and Goriely suggested that immigration work in particular appeared to be rely heavily on unqualified or inexperienced staff (2003, p. 15)

<sup>5</sup> CLSPs were piloted in six areas prior to the AJA, 1999, and formed a formal part of new Legal Aid arrangements from 2000: they were networks of local advice providers, intended to include the LSC, local authorities, local solicitors' firms providing legally aided advice and assistance, CABx, law centres and other advice providers. Participation in CLSPs has been voluntary however, which has resulted in a variable degree of effectiveness (Matrix, 2004, pp 38-52).

echoes in the rhetoric of partnership characteristic of the early stages of NFP involvement in franchising, a rhetoric which is potentially in tension with the need to ensure VFM in the funding arrangements reached with the sector.

It is now commonplace that the role of the state in service delivery has shifted from direct intervention towards 'enablement', or regulated devolution, producing the term 'New regulatory state' (Hood, 1991; and see Rhodes, 1997). The impact of the resulting expansion in regulation has been felt most keenly in the NFP sector and small FP organisations involved in public service delivery as the techniques of 'New Public Management' (NPM) (Hood, 1991) have been extended to cover their activities. This has in turn generated a considerable literature about the appropriate governance of these organizations. The main themes include:

- the distinctive contribution that the NFP sector can make, and hence its perceived role in the delivery of legal services and advice;
- the question of resources;
- modern management techniques (Ashby, 1997) and the threat these may pose to the sector's professionalism and values;
- the purpose, optimal extent and impact of regulation; the role of support, advice and training and the inter-relationship between regulation and training.

The extension of the full range of NPM techniques, including contractual regulation and market incentives, into the NFP sector has been supplemented by a 'new' approach designed to engender trust and partnership under the CLS (Moorhead, 2001). Moorhead argues that the CLS represents an example of Morison's 'extended accountability', where synergy between the state and the voluntary sector (Moorhead, 2001, p 546) provides a means of moving beyond the provision of services to the development of a more participative form of citizenship.

#### **1.4 Developments in training and regulation**

The research reported on here is the product of, and has taken place during, a period of rapid change in the policy environment for legal advice. We explore some of these changes in depth in subsequent chapters, but will identify here the principal reforms in order to give a sense of the pressures the sector was subjected during our research.

The DCA's consultation 'In the Public Interest?' (2002) and the subsequent report on competition and regulation in the legal services market (2003) debated the merits of a range of regulatory frameworks for legal services<sup>6</sup> in terms of improving competition, thereby reducing cost and enhancing quality. This produced the Clementi Review of Legal Services, commissioned by the Government (Clementi, 2004), and the subsequent White Paper on the Future of Legal Services (Cm 6679, DCA 2005). The resulting Legal Services Act (LSA 2007) has transformed the overall regulatory environment.

Clementi signalled a move towards concern with the regulation of the economic unit of the legal business rather than individual solicitors (Para 12, p 7). The focus of media and professional attention was the proposal to create the Legal Services Board (LSB) as the meta-regulatory authority, and the loosening of the regulatory conditions in the market to allow Alternative Business Structures (ABSs). The Review, White Paper, and the LSA have also however sought to embed in the regulatory framework policy principles for publicly funded legal advice, such as improving access to justice and increasing public understanding of the citizen's legal rights alongside protecting consumer interest and promoting competition (Cmn 6679, p. 20). In addition the LSA has brought the NFP sector within the regulatory scope of the LSB, through the ABS licensing scheme, where organizations offer reserved services, and the status of group licensing for umbrella organizations in the NFP sector has been affirmed (DCA, 2005, Cmn 6679, p. 50) to approximate to that of a Front Line Regulator (FLR): this closes one of the 'regulatory gaps' identified by Clementi.

The work of Clementi was in part guided by the 'better regulation' movement, whose concern was to reduce the 'drag' on business created by excessive and cumbersome regulation. The Better Regulation Commission (BRC) was the successor body to the Better Regulation Task Force (BRTF)<sup>7</sup>, which produced a number of reports in the first half of the decade influencing the move towards 'lighter touch' regulation, and a 'risk-based' approach to regulation. The latter approach has transformed the LSC's

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<sup>6</sup> The framework consists of the statutes and non-statutory regulations governing conduct and eligibility to practise, the regulatory authorities with responsibility for oversight and enforcement, and the nature of the relationship between regulatory authorities and those they regulate

<sup>7</sup> The BRTF was set up in 1997 to advise the government on action to ensure that regulation and enforcement were proportionate, consistent, transparent and targeted. Members of this independent advisory body were appointed by the Cabinet Office Minister. Following the 2005 Budget, the BRC was set up with a similar brief, but with the added responsibility of vetting new legislation.

cost and contract compliance audit regime from that which obtained at the time of the research reported here.

Alongside the concern with the regulatory framework for legal services in general has been the set of policy developments sparked by the equal concern to restrain the cost of legal aid, whilst maintaining and increasing access. These have transformed the system of funding through the introduction of the block contract, and, most recently, the development of tailored fixed fees (TFFs). These developments have occurred within the framework of a fundamental review of legal aid which has generated the New Focus proposals:

- to simplify eligibility arrangements,
- to restrict the Very High Cost Civil Cases budget in order to ensure improved access for low cost matters,
- to improve cost recovery measures such as the statutory charge, and
- to shift ancillary relief matters towards funding from assets or loans secured against assets (Cmn 6591, DCA, 2005).

More recently, the procurement for Civil Legal Aid was subject to review by Lord Carter, who concluded that a market based system of legal aid would be more efficient to run than an administratively based one. He recommended the gradual introduction of such a best value competition system, based on quality, capacity and price, with fixed and graduated fees leading to a TFF system (Carter, 2006).

In addition, the LSC has developed more sophisticated information management systems which have enabled them to use data returns (quality profiles) from service providers to implement the risk-based approach to cost and quality control identified above. All of these developments have had, or will have, a major impact on the agencies and firms involved in the sector.

The changes in regulation and procurement have been accompanied by developments in the field of education and training for the providers of legal advice services, based on concerns both about the focus of solicitor training, and the absence of recognised formal qualifications in the NFP sector. The first concern has resulted in the development a new, more flexible LPC which will be available from

September 2009 and mandatory from September 2011.<sup>8</sup> The response to the second concern has been the NOS4Advice project, which, through a process of setting standards for the sector, is designed to enhance both individual opportunities for accreditation and sector mobility, and the skill levels for the sector as a whole.

## **1.5 Policy Tensions in the Field**

The publicly funded field is characterised by several tensions which are exemplified by that between the added value the NFP sector was seen as bringing and the need to ensure that VFM is achieved. This tension is paralleled in the need for the LSC to maximise the numbers of cases dealt with and the level / quality of service delivered.

### **1.5.1 Added Value vs. Value For Money**

Much of the writing on 'Third Sector' involvement in the delivery of public services has stressed the following attractions for the State:

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

There was also a widely shared view that, particularly in the areas of welfare law in which NFP organizations specialize, relationships with clients and the quality of advice were better than those offered by private firms. This was partially confirmed by Moorhead et al's research, discussed above (2001).

However, as also noted above, as VCO involvement in service delivery has increased, the emphasis on the sector's capacity to add value has gradually given way to a greater emphasis on its need to deliver VFM. This development appears likely to weaken the distinctive aspects of NFP/VCO provision such as its holistic

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<sup>8</sup> The Law Society's Training Framework Review (TFR) was launched in 2001, and the TFR Group concluded its work in 2007, following three public consultations. Protracted negotiations over the Group's more radical proposals have been resolved with the announcement by the Solicitors Regulatory Authority (SRA) of a new LPC which is more flexible both in terms of courses and delivery mode (see [www.sra.org.uk](http://www.sra.org.uk))

approach to the client, the well developed relationships with user groups and local communities, and a mission which is defined by a local sense of client need.

### **1.5.2 Maximising Numerical Access vs. Maximising Quality**

A consistent theme of both ministerial announcements and policy-oriented research in the area of legal aid has been the limited nature of the Legal Aid budget. Costs limitation necessitates some form of rationing of supply, either by restrictions on the amount of need which can be met, or by a limitation on the unit cost of meeting need. A major criticism of case-based, solicitor sourced legal aid is that instead of rationing decisions being the product of conscious public policy, covert rationing occurs at the supplier level, where discretionary trade offs between access and quality are made by individuals shielded from the public gaze (Moorhead, 1998, p 371). It has been argued that there should instead be a transparent balancing of competing demands within resources declared to be limited, with the goal of maximising access in the sense of ensuring both that the available funds produce the maximum number of acts of assistance and that individual clients receive a service at least as good as that which their adversary might receive. In 1983, Garth explicitly advocated the departure from the ideal of universalism, arguing that this had to be traded against access to justice (1983, p 649; and see Cappelletti and Garth, 1978). Claiming that the importance of a uniform standard of quality had been exaggerated by the profession in the interests of safeguarding its monopoly, Garth argued for the introduction of market forces and the development of differing levels of competence based on cost (1983, p 669). Whilst a consensus around this view now appears to have been reached, namely that the level of quality should be set at 'competence-plus'<sup>9</sup>, it is difficult for any system to specify explicitly what this constitutes. Consequently, some element of discretion and subjectivity is retained, and the tension between access and quality will work its way through the process of decision making.

### **1.5.3 Meeting Unmet Legal Need vs. Supplier Induced Demand**

The revival of interest in the idea of unmet legal need, discussed above, has become a central feature of government rhetoric and the vectors of policy implementation in the CLS. This resulted in the use of detailed indicators of need to set the level of

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<sup>9</sup> Given that the poorest client might 'choose' to employ a barely competent representatives, the concept of 'competence plus', reflecting what is required in order to meet the minimum threshold of professional service, was introduced. The concept is realised in the Transaction Criteria which form the framework for the audit of quality of advice under the SQM.

matter starts to be anticipated locally, even if this level was greater than the actual level of contracted matters in the area for the year before: if the aim of publicly funded legal services is to combat social exclusion then this is clearly a logical approach. However, it is in conflict with the market driven approach exemplified by the Frontier Economics Report (2003; and see Carter, 2006), and with a series of studies which argue that a feature of public services in general, and publicly funded legal services in particular, is supplier-induced demand. According to this model, legal service providers will seek to maximise their returns from public funds by pursuing matters of little merit, or by making decisions as to which matter to pursue based on its profitability (Bevan, 1996). The tension between the objective of seeking out unmet need, and the suspicion that suppliers will exploit this objective for their own ends is, we would argue, realised in some of the local transactions between both FP and NFP suppliers, and the two arms of the LSC, the CLS development arm and the LSC contract management arm.

#### **1.5.4 Access to Justice vs. Access to Services**

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

#### **1.5.5 Markets versus Networks**

Much of the thinking about regulation in the legal services sector has been dominated by the model of private firms competing in a market, and by a concern to avoid distortions (such as information asymmetry) which permit the uncompetitive pricing of services. The thrust of many of the resulting policy documents has therefore been to increase competition between service providers. To some degree,

the position of the CLS in these developments could be seen as anomalous. Firstly, the LSC is able to use its position as a monopoly purchaser of legal aid services to set the price for these below the market rate for legal services, and to exclude some of those already in the market, as well as some others who might wish to enter. Secondly, the CLS's model of weaving together the different specialisms and levels of expertise in publicly funded legal advice, to create the seamless web, is predicated on cooperation between firms and agencies. However the introduction of increased competition, and therefore conflicts of interest, between providers, is likely to undermine networking, unless this can be incentivized.

## **1.6 Structure of the Report**

In Chapter Two, we outline our methodological design of the project, and provide details of the areas in which we conducted our case studies and of the respondents who participated in the study.

In Chapter Three, we delineate the way in which the issues of regulation and training are intertwined in the development of the solicitors' profession, and develop a model for comparing the extent and impact of training and regulation in the FP and NFP sectors.

In Chapter Four we concentrate our discussion on the literature associated with the regulation of legal advice, amongst other public services, and present the results of the research relevant to this topic.

In Chapter Five, the report of our data on training in both sectors is contextualised by discussion of some of the literature concerned with work based learning.

Chapter Six summarises the overall conclusions of the report.

## **Chapter Two Methodology**

### **2.1 Choice of Approach**

The current research fits within the parameters of two research traditions: programme evaluation, and case study research. Each tradition has its strengths and limitations, and in the process of design it is necessary to take these into account. Our approach in this project therefore was to ground our data collection in the interview procedure, but to supplement this with other procedures in order to achieve some data triangulation.

Interviews were conducted with members of firms and NFP agencies at different levels of advice provision, in order to achieve a degree of respondent triangulation in one dimension. Some client interviews were also conducted, though since the investigation of client perceptions of quality has been the subject of dedicated studies (eg Sommerlad & Wall, 1999) they were largely used to triangulate the accounts of advisers about their attitudes, values and practices.

Choosing a method to establish the nature of the skills required to undertake good quality legal advice work was more problematic. The intention was to explore in more detail the processes through which advisers attain standards. We addressed this by supplementing our interview data with observation of adviser/ client transactions, and extended discussion of case files. The aim behind these techniques was to identify not only critical incidents but also key points of decision making in the process, and to interrogate the skills and knowledge underpinning the decision. Details of the procedure are provided below.

### **2.2 Sampling procedure**

The sampling frame for the study was established by reviewing the LSC spreadsheet of contracts with suppliers in the geographical areas in the North of England that we were focusing on, and then discussing with CLS development workers the nature of the local 'markets' and issues relating to legal need. Efforts were made to generate a purposive sample that would enable us to gather data that reflected the level not just of the organization, but also of advice activity in the area. As we noted above, a significant element of the mission of the CLS has been the concept of the 'seamless

web' of advice, and this has been the springboard for the contemporary emphasis on the development CLACs and CLANs. By sampling contrasting areas we hoped to be able to shed light on the regulation and training issues which would affect the functioning of advice networks. Consequently, we included in our sample the following types of locality:

- one major urban area with well developed networking strategies
- one with less well developed networks
- one smaller urban centre with evidence of CLSP activity, and a reasonable supply of advice
- one similar sized authority which was identified by several respondents as an 'advice desert'.

Finally we also sampled providers in a neighbouring rural area. In the following section we will provide thumbnail sketches of these areas

### **2.3 Area case studies**

Respondents were guaranteed complete anonymity and confidentiality, and to reduce the likelihood of providing inadvertent identifiers we have given all the areas a pseudonym. The descriptions of the areas provide a context for the data, and we will comment directly on the way in which locality can both affect the impact of regulation, and represent widely differentiated environments for recruitment and training.

'**Chapelvale**' is a small Metropolitan district with a population of 192,000 spread over quite a wide geographical area resulting a relatively low population density. Almost half of the population lives in the main town in the authority, Linfield, and a feature of the authority is that some of the smaller outlying settlements have been thought to have stronger traditional links with other neighbouring towns and cities than they do with Linfield. Unemployment rates in Linfield were only 0.9% above the national average in 2001, and the service sector, in particular banking, is a major source of employment. The area's geodemographic profile is very diverse: Linfield contains wards with very high concentrations of residents of South Asian origin, while North Linfield is the site of several major post-war public housing developments with high concentrations of low income families. The outlying settlements of Chapelvale include satellite settlements with high concentrations of middle class commuters but also pockets of deprivation. Public transport links between the settlements and

Linfield are patchy. The needs analysis for the area indicated that the supply of specialist CLS Quality Marked legal advice is based in the centre of Linfield, that there was almost no evidence that those in need of advice crossed authority boundaries from the outlying settlements in order to obtain it, but that equally, most outlying residents were reluctant to travel to Linfield to access advice. There was a high level of need in the areas of housing and debt advice which was not fully met by suppliers in the area, and a dearth of provision in North Linfield.

The CLS development worker and some of the providers in the area therefore characterised Chapelvale as an 'advice desert', and identified the absence of a culture of seeking advice as a consequence. This resulted in two further problems: when provision was commissioned from local firms and agencies, it was hard for them to achieve the desired take-up levels (in one year during the study, matter starts were increased from 1200 to 1600 on the basis of needs analysis, but only 1100 matter starts were achieved), and as a result several providers had dropped out of the scheme, particularly in the FP sector.

The major advice providers in Chapelvale are located in Linfield and are the CAB, a large women's advice centre, and a few solicitors' firms. We carried out research in three solicitors' firms, the CAB and the women's centre, and, as this centre represented an umbrella for a wide variety of advice provision, we undertook a substantial in depth study of it. .

**Castleton** is a Metropolitan District adjoining Chapelvale, with a total population of 373,000. The principal town of Hillchester has a population of 154,000, and is surrounded by several other substantial settlements which form part of what is regarded as a major conurbation. The town has a larger commercial centre than Chapelvale and is home to a post-1992 University as well as a college of Further Education. In addition to a large CAB in Hillchester, there is another CAB in North Castleton, and the district is home to two offices of Shelter, as well as other smaller advice centres. Hillchester and the neighbouring town of Carbridge also have a number of medium sized solicitors firms which specialize in specific areas of LSC funded work (Community Care, Education, certificated Personal Injury (PI) work with abuse victims for example). In Castleton we carried out research in three solicitors' firms, the Hilchester CAB and a housing advice centre.

**Weaverton** is a Metropolitan District which, with a district population of 467,600 in the 2001 census is the second largest population centre in the region. It has a university and a college of Further Education. Once a thriving textile centre, it was the focus for large scale immigration from the Asian sub-continent. In 2001 it had a Black and Minority Ethnic (BME) population of 21%; the largest in the region.

Weaverton also has a greater population density than either Castleton or Chapelvale (12.8 people per hectare) and consists of the principal city which gives the district its name (population approximately 290,000) and a series of main settlements along a river valley, linked by a rail line and major road. The area has endured an extended period of economic decline as the textile industry has disappeared but not been replaced by other large scale economic activity. In the 2001 census it had an unemployment rate of 4.4%, the third highest in the region. Fifteen of the wards in the area qualify for Objective 2 European funding.

Partly as a result of the availability of European funding over many years, the area enjoys a greater supply of advice provision and has seen the development of effective network and structured partnership for commissioning services according to agreed criteria. In Weaverton we carried out research in two solicitors' firms, a housing advice centre and a resource centre for local voluntary organizations.

**Boomtown** is a major regional population centre, and a hub for financial and legal services. With a population of 720,000, it is one of the largest metropolitan districts in England, and the third most densely populated in the region. It has a larger number of employees in the professional and managerial sectors than other areas in the region, largely as a result of rapid growth over the past decade in the financial service and business sector. Between 2001-2004 it experienced a rapid growth in job creation, above the figure for the region, and the national average. Unemployment has fallen from 10% in the 1990s to 3.2% in 2004 based on the unemployed claimant rate, and 5.2% on the Labour Force Survey rate.

However, the development of a prosperous core to the city has been based largely on an increase in inward commuting. The city itself retains large areas of residual social housing, and overcrowded and unmodernised properties (it features in the top two areas in the region on both of these indicators). It has a large BME population, and a large population of single parent households with dependent children. In Boomtown we undertook research in a Law Centre, and two solicitors firms.

**North Daeshire** (ND) is a large rural authority with a population of around 570,000 spread across 3,103 square miles. There are only two major population centres, and their combined population is around 114,000. The rest of the population is spread over many small market towns and villages, and access to public services is an issue for many of the more remote areas. The population has a greater than average number of the elderly, and a below average number of young people. There is a very small BME population (of around 1%). Like many rural areas, it contains some areas of considerable prosperity, with popular retirement destinations and dormitory suburbs, but also considerable poverty. We carried out research in two of North Daeshire's market towns, in a CAB and two solicitors' firms.

We also interviewed the director of a local authority funded advice centre in an authority neighbouring Chapelvale.

**Table 2.1 Comparison of research areas by key social indicators (2001 census figures)**

| Indicator                                      | Castleton | Chapelvale | Weaverton | Boomtown | ND   |
|--|-----------|------------|-----------|----------|------|
| Unemployment                                   | 3.4%      | 3.8%       | 4.4%      | 3.3%     | 2%   |
| BME population                                 | 14%       | 7%         | 21%       | 8%       | 1.5% |
| Overcrowding                                   | 7.6%      | 7.0%       | 8.3%      | 7.8%     | 3.7% |
| Households without bath or shower              | 0.4%      | 0.4%       | 0.5%      | 1%       | 0.3% |
| Lone parent households with dependent children | 6.8%      | 6.6%       | 7.4%      | 7%       | 4.2% |

## 2.4 Respondents

The research design specified that we should, in each organization, interview:

- the Director or Senior Partner;
- the LSC contract manager where that position was not held by a senior partner;
- persons in the training partner or manager role where that person was not also the contract manager; and
- at least one supervisor and one supervisee.

In addition, we interviewed senior members of national organizations in the FP and NFP fields with special responsibility for training or regulation, managers and development workers for the regional LSC office and a commercial trainer. A table indicating the number of respondents in each category is given below: although some participants had multiple roles, each respondent is entered only under the category which matches the subject of the interview most closely.

**Table 2: Respondents by sector and status**

| <b>Respondent Category</b>                               | <b>FP Sector</b> | <b>NFP Sector</b> | <b>Other</b> | <b>TOTAL</b> |
|--|------------------|-------------------|--------------|--------------|
| Senior Partner/Director                                  | 10               | 7                 |              | 17           |
| Non-partner Contract<br>Manager &/or Training<br>Manager | 3                | 3                 |              | 6            |
| Supervisor   | 2                | 4                 |              | 6            |
| Supervisees  | 10               | 8                 |              | 18           |
| Trainees/volunteers                                      | 2                | 2                 |              | 4            |
| Training Organisations                                   | 2                | 6                 |              | 8            |
| Committee members  |                  | 1                 |              | 1            |
| LSC personnel  |                  |                   | 4            | 4            |
| <b>TOTAL</b>   | <b>29</b>        | <b>31</b>         | <b>4</b>     | <b>64</b>    |

## **2.5 Specialisms**

While we planned to obtain a balance of advice specialisms in both the FP and NFP sectors in our sample, this proved difficult. Contracts for some specialisms were quite rare, and the organization with the contract was not always willing to cooperate. As a result some specialisms such as housing are represented by a greater number of respondents. This had unanticipated benefits: because the area is so specialised, many of the respondents were known to each other, and as a result we were able to triangulate some accounts of organizational practices. The table below provides a count of the specialisms of case workers: where they undertook more than one specialism they have been double counted.

**Table 2.3 Case worker specialisms**

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

## **2.6 Access issues and response rates**

As explained above in the section on sampling, access to firms was initially negotiated with the regional office of the LSC. The contract managers for firms identified on the sampling frame provided by the LSC's contract list as meeting our criteria were initially contacted by letter and provided with a synopsis explaining the aims of the project. Follow-up telephone calls were then undertaken to establish willingness to consider participation.

In the table below we provide an account of the organizations and individuals contacted for interview. Some of the firms contacted responded immediately by indicating that they were too busy to take part in the research. Some firms initially agreed to participate, but withdrew at a later stage. These withdrawals were for a variety of reasons.

**Table 2.4 Responses to the research contacts**

| <b>Type of Provider</b>  | <b>Number contacted</b> | <b>Number initially agreeing</b> | <b>Number withdrew before end</b> | <b>Total completing</b> |
|--------------------------|-------------------------|----------------------------------|-----------------------------------|-------------------------|
| Solicitors Firms         | 18                      | 13                               | 4                                 | 9                       |
| Law Centres              | 1                       | 1                                | 0                                 | 1                       |
| CABx                     | 3                       | 3                                | 1                                 | 2                       |
| Other advice agencies    | 5                       | 3                                | 0                                 | 3                       |
| Local authority provider | 1                       | 1                                | 1                                 | 0                       |
| <b>Total</b>             | <b>28</b>               | <b>21</b>                        | <b>6</b>                          | <b>15</b>               |

## **2.7 Data Collection Methods**

Each respondent in the main sample was interviewed at their place of work at least once, using an interview schedule which was designed to suit their role in the organization; however all schedules shared questions relating to the impact of regulation on their work, and the extent and value of the training they had undertaken. In several instances, either where the respondent occupied more than one role, or where we wished to discuss issues in more depth, a follow-up interview was arranged. These interviews formed the core of the research. One of our aims was to elicit any unintended consequences of training and regulation, and so the interviews were designed to accommodate discussions on points which we as a research team had not anticipated.

Methods used for the purposes of triangulation included: respondent triangulation, where for example accounts of different participants in a CLSP, LSC and agency staff, supervisee and supervisor, or adviser and client, were cross-checked; data triangulation, where for example interview accounts of approaches to advice were cross-checked against observations; and time series triangulation, where agency accounts were checked at more than one point in time.

Three types of observation were undertaken: observation of adviser client transactions; observations of support and supervision meetings, and observations of training events.

## Chapter Three Regulation and Training – Conceptual Links

### 3.1 Regulated training and the licence to practise

This chapter explores some of the conceptual and practical links between regulation and training as a background to the analysis of the separate findings reported in Chapters Four and Five. Not only do systems of education and training obviously interlock with regulation; they also interact with the market for services and labour in complex and interesting ways. We therefore explore these interactions and the differences between the formal regulatory requirements for training in the FP and NFP sectors. We also identify the ways in which these differences affect debates about quality and the labour supply in the two sectors, before describing a model which delineates the differences in terms of the risk attached to the various approaches. Finally we briefly discuss ways in which the traditional relationship between regulation and training might be combined with the newer forms of performance management to provide an environment which sponsors a culture of competence and quality.

Julia Black's 'de-centred' definition of regulation indicates that regulation and training are virtually indistinguishable in terms of their function:

*Regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard setting, information gathering and behaviour modification (2002, p. 20).*

We identify below the ways in which this convergent definition of regulation and training is exemplified by daily practice in the delivery of legal services, as a result of formal regulatory structures becoming part of the tacit behavioural repertoire of advisers. Education and training interactions, as well as even less formal structures and cultures, powerfully regulate everyday behaviour. The fact that informal cultures can be a more powerful form of regulation than formal ones is a significant element in the discussion of our results. Initially however, we will explore how training and regulation relate as definably separate entities.

The right and obligation to self-regulate has been seen by many commentators as the root of professional claims to moral authority. This independent status is a key element in professionals' role in civil governance overall (Evetts and Dingwall, 2002),

which, in the case of solicitors, entails being gatekeepers to the legal system and mediators of state power (Seneviratne, 1999, p 24). Often described as the regulatory bargain, this justification could be referred to as the 'legitimation' argument for regulation: professionals gain a statutory 'shelter' for their exclusive rights to practise in certain areas, and retain the autonomy that avoids their absorption into the vested interests represented by the State, private capital or organized labour. In return they have a commitment to patrol the behaviour of their members. The incapacity of the market to provide a perfect mechanism for the provision of legal services, as a result of the information asymmetry highlighted by the Scoping Study for the Clementi Review as of such significance, furnishes a further justification for the regulatory bargain.

There is a tension between the 'legitimation' and 'market failure' justifications for regulation. The moral basis of professions' claims to authority has been challenged by a host of writers, largely drawn from the 'market control' critics of the professions (most significantly in the case of the legal profession, Abel, 1988; 2003), who argue that professionals are influenced predominantly by their own financial interests and not by an altruistic commitment to their clients' interests. The logical corollary of this view is that clients can only benefit by the removal of restrictions on the right to practise, and reductions in regulation to the point where it is easy for new actors to enter the market place. Evetts and Dingwall, on the other hand, argue that a redefinition of professionals as purely market actors may '*severely compromise the ability of professions to supply legitimacy to nation states*' (2002, p 165): an independent legal profession can be seen as a guarantor of the Rule of Law. Evetts, amongst others, has argued for a recognition of the significant moral and normative elements in professionalism which may impinge on the relationship between professional and consumer/client (2003, p 410). In other words, whilst altruism cannot be assumed to be an attribute of all professionals to the exclusion of financial motives, it can nevertheless be seen as an essential element in the culture of lawyer client relationships.

The assumed close link between controlling entry and standards of practice (Seneviratne, 1999, p 23) has been the underpinning rationale for what has come to be known as the 'trait' theory of the professions. This argues that the provision of effective legal services to clients is based on expert knowledge of the intricacies of the law which, in turn, necessitates a lengthy period of training and demanding examinations. The achievement of the qualification, and socialization into the

profession's norms and values through the vocational stage should, by this argument, provide the potential consumer with the confidence that the practitioner will perform competently and ethically.

There was no shortage of claims from solicitors in our sample of respondents that lesser training represented a handicap to providing quality legal advice; for instance:

*what I do have problems with and I've always had problems with is people who are brought in and I don't know whether they're meant to be paralegals or pretend legals, and they're given jobs to do that they are neither qualified nor capable of doing. (Civil Litigation Partner, Hillchester firm)*

Another commentator made the more interesting point that professional status was a cultural prerequisite for participation in the courts:

*At Boomtown County Court we have just set up a possession scheme – Duty Reps representing people at possession hearings. And now there's a battle going on about who can be part of that scheme and I am strongly resisting the NFP sector being involved. The reason why is that in the court room it is important that you have people who are qualified ... I have as much right as the Judge and anyone else to be there. It is my space and I take no nonsense from anyone because I am an officer of the court – so I have as much right as them to be there. (Housing Partner, Boomtown firm)*

However, if training, as opposed to status, is to fulfil the function of guaranteeing competence then the standards of pre-entry education and training need to be highly specified, ideally in terms of the competences deemed to be necessary for satisfactory performance, and the avoidance of risk. There are two forms of critique of this model – one theoretical and one technical.

### **3.2 Technical flaws in the licence to practise**

The competent performance guaranteed by the licence to practise will need to be maintained since, whilst some competences are consolidated and enhanced by experience, others are eroded or corrupted, and changing work practices require the practitioner to engage in constant updating. It is difficult for post-entry training or CPD to provide the same guarantee as pre-entry training due to the problems of setting up a system in which qualified practitioners, in practice, 'fail'. Post-entry performance therefore tends to be managed through a complaints and disciplinary system which is a 'last resort' or through labour market 'shake-out'.

Solicitors' firms are actually composed of partners and employees with widely differing levels of training, experience and skill. Many publicly funded clients have their affairs handled for the most part by practice members who are untrained or trained to standards below those demanded for the licence to practise as a solicitor. For the guarantee of competence to be valid, the work of these staff needs to be closely supervised by those who **do** have the licence to practise. The significance of supervision is recognised in both the Law Society's guidance on Training Contracts, and very explicitly in the LSC's SQM, and its efficacy is discussed in Chapter Five.

Similarly, although the licence to practise should guarantee competent performance it cannot guarantee ethical conduct, so it needs to work in tandem with some other regulator of performance (in the case of solicitors this is the disciplinary system). Again, this is normally only brought into play in instances where things have gone seriously wrong, so its effectiveness as a more general regulator of performance lies in its deterrent power.

The licence to practise may therefore be thought of as a necessary but not a sufficient regulatory device to guarantee confidence or competence. This explains the tendency of the State, as a monopoly purchaser of some services, to seek some alternative form of guarantee. In this analysis, therefore, regulation is required both to set the standard required for a licence to practise, and to compensate for the weaknesses of the licence to practise model.

### **3.3 Theoretical flaws in the licence to practise**

Critics of the professions point to the way in which the licence to practise may be said to benefit practitioners at the expense of clients since it artificially inflates the price of legal labour, and the lengthy training creates an information asymmetry which renders it difficult for clients or consumers to make sensible market choices. This difficulty was acknowledged by practitioners in our sample:

*Someone once compared us to dentists. If somebody fills my tooth I have no idea whether they have done a good filling or not but if they are nice to me, they are polite to me and the injection doesn't hurt and they are sympathetic I will go back. Well it is not that much different with law, the average punter does not really know whether they are getting really the best legal advice but they will know how you looked after them as a human being so that is very important... as well as being a good lawyer. (Managing Partner, Hillchester firm)*

Solutions to this problem could involve the removal of the market shelter which prevents others performing the work, or the introduction of some form of price regulation. Regulation may fulfil the function, in this analysis, of removing the artificial barriers to competition produced by the excessive reliance on training and qualification periods created by professional interests. In response to the Bar Council's argument that ensuring suitable qualifications for practitioners should be the basic purpose of regulation (Bar Council, 2004, p 18), Sir David Clementi echoed the view that there were other means of protecting consumers which had less impact on the price of services. The theoretical case for the licence to practise is further challenged by the extent of the provision of legal advice and assistance in the NFP sector (as noted above) and we now explore some of the key differences between the FP and the NFP sector.

### **3.4 Regulation, training and labour markets in the FP and NFP sectors.**

The two sectors of advice providers have radically different training regimes and labour markets. In the FP world of the private firm, initial training costs have been shared. The individual incurs costs in the form of fees and the opportunity costs of extended training; the taxpayer incurs costs in the form of support for exempted degrees; and solicitors' firms incur costs in terms of administering the training contract, employing trainees who in most cases do not generate income rates sufficient to cover the costs of their salary, and fee-earner time for supervision. The exchange for incurring these high costs is the prospect, for the trainee, of salaries maintained by the entry barriers (particularly as there is the potential for an over-supply of solicitors to the labour market), and for the firms, of both maintaining general labour market supply, and of having access to an extended recruitment period during which trainee capability can be assessed and some degree of organizational socialization achieved. Traditionally, the vocational training stage for solicitors has been general in character: this is designed not only to maintain the unitary character of the profession, but also to ensure a degree of labour market flexibility (though as we will note below, unitary approaches to training and employment in legal services are subject to increasing strain).

Apparently more difficult to explain is the detachment of much of the initial education and training from the functional requirements of the work role. Trait theorists would

justify this on the grounds of the requirement for underpinning knowledge and technical expertise, though critics of professional interests would argue that it is precisely the indeterminacy and remoteness of legal training from functional reality that supports the creation of information asymmetries. We will now briefly summarize the form of training required to become a solicitor.

The Training Regulations 1990, made by the Council of the Law Society under Sections 2 and 80 of the Solicitors Act 1974, with the approval of the Lord Chancellor (Law Society, 2004) specify two stages to solicitors' training. The first stage is academic, which is satisfied by either graduating with an Exempting or a Qualifying law degree, or by passing the (post-graduate) Common Professional Examination (CPE), a Diploma in Law (PgDip) or an integrated course. The second stage is vocational, comprising either a combination of the LPC followed by serving a two year Training Contract, or a Training Contract during which the Professional Skills Course (PSC) is undertaken. Qualifying law degrees, which are recognised jointly by the Law Society and the Bar Council (Law Society 2002) are required to include the 'Foundations of Legal Knowledge': Public Law, European Law, Criminal Law, Contract Restitution and Tort, Property Law and Equity and Trusts. The highly specialized areas which together constitute the field of social welfare law, instantiated in often highly complex delegated legislation, do not form one of the foundational subjects.

The LPC, which for the majority of intending solicitors represents the gateway to the training contract, is offered by 33 universities and some commercial providers. Unlike its predecessor the Law Society Finals (LSF), it is not externally examined by the Law Society, but assessed by the providers. Quality assurance is undertaken by means of periodic three day Monitoring Visits by the Law Society and three day Grading. The monitoring regime was reviewed during 2005 and broadly endorsed by a Law Society working party (Law Society 2006, p 4).

At the time of the research, the LPC comprised three mandatory areas. The compulsory subjects include Business Law and Practice, Civil and Criminal Litigation and Property Law and Practice; the Skills subjects include Advocacy, Practical Legal Research, Legal Writing and Drafting and Interviewing and Advising, and the Pervasive Areas are Accounts, Professional Conduct and the Financial and Markets Act, Probate and the Administration of Estates. The social welfare law areas of Employment, Family, Housing and PI feature in a list of electives from which three

can be chosen. Since work-based learning is one of the main areas of discussion in Chapter Five, the content of the training contract is described in greater detail there.

The question raised by the length and detail of this training programme is whether it is necessary for the bulk of publicly funded work, or whether solicitors are over-trained for this work. It is argued that the resulting level of expertise generates a risk that solicitors may be tempted to use it when it is unnecessary (the supplier-induced demand thesis), and that where the market incentives make 'lower level' work unattractive, to 'cherry pick' cases so that they only undertake the certificated work which uses the full range of their skills, and which is therefore also more remunerative (Moorhead, 1998, pp 380-81). Hence the 'over-training' of the profession can be seen as reinforcing the need for increasing regulatory control of the market in order to restrain firms' tendencies to inflate costs. As Moorhead argues: '*A system with scarce resources has difficulty in operating on such a basis unless the discretion of those serving the clients can be significantly restrained.*' (Moorhead, 1998, p 381).

Solicitors (and NFP suppliers) in our sample tended to see the issue differently. Some respondents spoke of the values which they believed should be at the core of the justice system: '*The merits calculation is the one that - I think if something has merit then it should be supported, no matter what it is.*' (Civil Litigation partner, Hillchester firm). However, as we shall see in the discussion of the contracting arrangements, there was also some justification for the cherry-picking argument (this kind of economically rational decision making is of course to be expected in a business).

Nevertheless, the case for the value of the more expensive skills in the struggle against social exclusion was also made powerfully by one respondent, a community care specialist in a firm committed to using the Law innovatively to address social issues. The firm was a frequent user of judicial review (JR) and the Human Rights Act (HRA) 1998 in order to challenge the failure of local authorities to carry out their statutory duties, and, whilst recognising that these actions were expensive, the partner defended the procedure:

*I think that they're wanting to clip the wings of people who go for JR and I think it's entirely wrong..., our experience of local authorities is that they don't readily change. It's very rare for them, when you send a first letter to say 'you're absolutely right, we've made a terrible mistake here'. You know, you have to fight and fight and you find that they're*

*devious. ... So judicial review is an effective means of holding them to account, and so it's the usual tale, the Government want to do certain things, which is getting access to justice, to community care or education law, but they're not prepared to will the means to make it happen. (Senior Partner Hillchester Firm)*

However, the expertise required, for instance, to enforce a right, or to challenge discretionary decision-making on the part of a government agency or local authority is, some respondents argued, only available to lawyers specialising in the field. The following case against a local authority was provided as an example:

*But you've also got to know what you're looking for - because of Castleton changing their policy on foster payments, they have changed their policy on residence allowances. Now residence allowances are paid by the residence order, and quite often where a local authority has identified a carer - a relative as being somebody who might care - that will encourage them to apply for a residence order rather than have the child perhaps become subject to care proceedings, or even be accommodated. So you get, for example, instances (which I've had) of 63-year-old grandfather being contacted at half past seven at night saying 'if you don't come and collect your little girl, a granddaughter, we'll have to apply for a care order'. So he goes over and collects. So we argue that in that case the local authority have 'accommodated' because they've accepted that the parents can't care. Now to be 'accommodated', to be a 'looked after' child, is a technicality under the Children Act, and it's a phraseology that children's lawyers will understand. But Castleton have just changed their policy on payments for residence allowances and they are now only prepared to pay when the child is a 'looked after' child, or has been a 'looked after' child. If the child has been a 'looked after' child people will get anywhere between £30 and £40 per week extra. But if, in their definition, the child hasn't been a 'looked after' child, then people will stay on the same residence allowance which will just be increased by inflation, so they'll get a shortfall. Two people contacted me who've had the letters and the letters said "this child you've got isn't a 'looked after' child". We say that's absolute rubbish. But you've got to be a solicitor to know - and even as a solicitor you've got to be a child care solicitor and you've got to be tuned into the way local authorities work to be able to say 'look don't sign this piece of paper which says 'I understand that the child I have is not a looked after child and therefore I'm only entitled to ....'. Write to Castleton and say 'this isn't right'. (Senior Partner and Community Care Specialist, Hillchester firm)*

The argument made by this solicitor, and by other specialists in Housing and PI, was that they were using their specialist expertise to transcend the individually based judicare model, in order to achieve public interest results. This is clearly accepted as a legitimate goal by the LSC (as the increase in the number of certificates on public interest grounds demonstrates), but the transparency of the decision-making processes governing access to this expertise is an issue.

The solicitor quoted above argued that one of the difficulties with this sort of case was ensuring that clients could secure access to advice that might enable them to resolve it since many NFP advisers, particularly at the General Help level, would, because of their lack of technical expertise, tend to assume that the local authority was in the right (an interesting variation on the theme of information asymmetry). This concern was paralleled in an objection that many solicitor respondents articulated about the increasing participation of the NFP sector in legal aid. There were three grounds for their objection. The first, raised above, was that the level of training for General Help advisers was too low to enable them to do the kind of effective 'triage', or screening, work which would enable a seamless web of advice to work well; the second was that access to the advice 'gateway' in the NFP sector, particularly in terms of waiting times, queuing and unanswered telephones, was erratic and effectively involved a form of covert rationing; the third was that the NFP sector was inefficient in its use of time (thereby producing the conditions that required rationing).

At the same time, solicitors involved in social welfare work expressed anxiety about finding new candidates for the work in their firms and in the sector as a whole, and about their chances of retaining the solicitors they already had, because of the competing pressures of more attractive labour markets:

*most young solicitors tend not to want to be doing legal aid. They come out of a college of law with debts and they're all wanting to work in the major cities, and do commercial work that's going to pay them a high salary. (Senior Partner, Hillchester firm)*

*What we are finding now is that those people who have a degree of enthusiasm and who wanted to change things, and really don't mind putting their heads above the parapet, they are taking the career decision, which is - at 2 years qualified - why on earth would I want to earn £25K with \* when I could be earning £45K doing insolvency ... so I think we have a double problem. The first is people: we're not getting the right calibre of people; [those] who would have come here 20 years ago now are in the commercial sector. Secondly, those that are available prefer to work in a pleasanter environment [than] we can offer. (Senior Partner, Carbridge Firm)*

The relationship between the regulation of the legal services market, training for that market and labour supply, is therefore complex. The solution adopted by these firms was to offer a secure and friendly organizational home to those interested in the work, in an effort to compensate for the poor financial rewards available. They did this either by providing ladders of opportunity for employees at secretarial and paralegal level, or through a strong and supportive occupational culture which

generated loyalty, thereby counteracting the bias in favour of individual human capital inherent in the training of lawyers. This model of a 'learning organization' is one to which we will return to in the discussion of training in Chapter Five. Where these relationships were not forged, retention of staff was more difficult (trainees in two of the firms where the relationships were less successful left, in one case before the end of the training contract).

### **3.5 Expertise and Strategy**

Moorhead et al (2001) explored distinctions between the kind of contracted work taken on by FP and NFP agencies, testing the proposition that solicitors were more likely to provide quality by taking on 'higher level' work, whilst the NFP sector were more likely to innovate and provide a holistic service. Their findings did not confirm this simplistic set of assumptions, but rather revealed a more confusing picture. In some areas, such as welfare law, solicitors were likely to avoid pursuing more complex claims, while NFP agencies sought adversarial solutions through tribunals. Their discussion identifies the complex set of variables influencing these outcomes (for example issues related to rights of audience) and the fact that the levels of remuneration mean that few FP firms are likely to seek contracts in this area of work. This was confirmed by one of our partners:

*we have a brilliant guy doing welfare benefits, but we don't have a welfare benefits franchise simply because we could not make it pay in any way shape or form, and quite often people have problems with benefits and we can't make those things pay and we constantly have to be prepared to take flyers (Senior Partner Hillchester Firm)*

The principal concern raised by the work of Moorhead et al is the fitness for purpose of the training required by regulation: '*there is a question mark over a process of legal education and professional qualification that does not raise the standard of even the poorer quality recruits to a standard as high as that of non-lawyer advisers*' (Moorhead et al, 2003, p. 707). We discuss this concern in Chapter Five.

### **3.6 Links between training and regulation in the NFP sector**

The situation in the NFP sector represents a contrast to that in the FP sector, emanating from the origins of some of the principal providers. For instance the CABx resulted from a movement concerned to embed the principles of accessibility and universalism, as opposed to the exclusive model of professional expertise.

Correspondingly, training in the NFP sector attempts to avoid artificial entry barriers, has a functional bias grounded in a detailed specification of the occupational role, and also places a premium on absorption of organizational values, as well as knowledge and expertise very much focused on client need.

There are very few opportunity costs for the trainee in this approach, but, correspondingly, it appears that there are also reduced benefits in the form of a lack of easily convertible human capital. Whilst the graduate of NFP training remains within a labour market where the main qualification for participation is relevant experience, this does not represent a problem, but it does inhibit movement outside this specialised market. The NOS4Advice project represented the first attempt to introduce any form of nationally accredited qualification for the sector, and its premise is that the development of qualifications based on NOS will raise standards and hence the status of the occupation, as well as enhancing individual mobility. The corresponding drawback is that as labour mobility in the sector is increased, investment in training will not only be a resource burden, but also become more risk laden and less attractive for the individual agency.

The situation of legal advice workers is similar to that of other workers in the public sector, the quality of whose work is regarded as highly significant, but who have not been subject to compulsory training: for instance those involved in social care. Ensuring quality of provision through training in the social care sector is complicated by issues relating to the structure of the market for care (Balloch et al, 2004), and the reluctance, or inability, of employers to contribute to training costs (Scourfield, 2005), a characteristic which is a longer term feature of the training scene in the U.K. (Stevens, 1999).

In view of this, and given the low entry barriers and the shorter period of training, how can we explain the relatively good performance in the NFP sector in terms of quality (Moorhead et al, 2001)? Is it the specialized nature of the training? We found few advisers in the NFP sector who laid claim to more than one area of expertise: housing advisers tended to identify a problem cluster around housing, debt and welfare, and would deal with this through referral, but only one agency (the Chapelvale Women's Centre in Linfield) had the infrastructure to deal with all elements of these clusters in-house, and then only at a low level.

Another possible explanation is that NFP advisers take more time over the work, and this is supported by some of Moorhead et al's findings that, contrary to received wisdom, non-lawyers were more expensive and less accessible (Moorhead et al, p. 798). We found some evidence relating to inaccessibility in our field work, particularly in CABx: telephone calls to open access lines were often busy with messages turning away calls and the doors of one bureau in particular were often closed by 10 am. However, our field observations provided no objective evidence of NFP agencies fulfilling the stereotype of indulging in 'tea and sympathy' interviews. Most of the matters dealt with were elicited swiftly, and clients dealt with efficiently.

Nevertheless, as we discuss in greater detail in Chapter Five, NFP agencies were keen to identify their ability to interview sympathetically and elicit the real nature of the problem from their clients, and the Director of one agency contrasted this with the FP sector approach:

*I was fascinated with the way the solicitor dealt with the issue and I know that if someone had come in here who dealt with that type of issue, he did in half hour what would've taken 3 or 4 hours for an advice worker to go through and that's about being very blunt, very direct, having no touchy feely nice interview, putting anyone at ease or anything like that. (Director, Housing Advice Agency, Hillchester).*

The cost implications of the amount of time expended by advisers is clearly a major concern for commissioners of public services. Control of time is not, however, likely to be achieved either by 'input' regulation (entry standards and pre-service competence guarantees) or 'output' regulation (complaints handling, taxation). It therefore demands a third form of regulation: the management of performance and in particular expenditure of time, through the contract. Quality Assurance (QA) performance measures or contract compliance audit regimes also provide an answer to one of the weaknesses of input measures, namely that initial competence (assuming it has been reliably assessed) is no guarantee of continuing competence. However, like competence based training, audit regimes have been criticised for their reductionism (failing to capture what the activity is 'really' about), the possibility of producing goal displacement (the organization spends too much time on ensuring that they pass the audit, and not enough on front line activities) and the temptation to generate fraudulent evidence of compliance.

As we note below, regulation is, in this 'performance' sense, a form of training, but one that can impact on the behaviour of an organization and a sector, rather than just

an individual. The LSC clearly identifies the process of monitoring the contract as a way of ratcheting up standards and efficiency:

*everyone who is supplying publicly funded legal services now have to jump that hurdle but some can do it effortlessly, can jump far higher than others - we are moving away from saying 'well you either clear the hurdle or you don't', to saying 'well all firms now must clear this hurdle but actually can we now differentiate between our suppliers more subtly and one of the reasons we need to do that is because we may need to make better informed procurement choices' (LSC Regional Manager).*

Specifically, the management of performance has been seen as a way to address the issue of costs in the NFP sector, and the interview data on this reveals the interplay between performance regulation and the state of the market. Similar to the relationship between regulated entry standards and the individual labour market, it is necessary to set the entry standards at a level which enables the labour supply to be secured sufficient to avoid the price of labour becoming prohibitive. The view was expressed in the FP sector that the NFP sector was treated more favourably both in the procurement process and in the process of compliance auditing, and to a degree this was confirmed by the LSC.

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

One of the local CLS development workers confirmed the view that it had been necessary to balance procurement needs against compliance standards:

*In my experience in the NFP sector, the sector is most likely to do Benefit, Debt and Housing work and these are the core categories of welfare law which have got to be targeted if you're seeking to address social exclusion, so the NFP sector is vital because most solicitors don't do this work. So if you want that done and have pressure on it to be effective, efficient and deliver quality, well you can tinker with quality, getting it right, being accessible; what's meant by effective depends on what you want to achieve, but if you think of it as dealing with social exclusion then we can agree on that, but how to make them more efficient, to deliver VFM?*

Achieving a balance between quality and efficiency was seen to be accentuated by the problem of the supply of labour, as serious in the NFP sector as in the FP sector:

*One of the problems is recruitment of volunteer advisers. Nowadays the labour market is very tight and there just aren't that many people available and those that are, tend to have problems themselves – for instance they may be lone parents. So the volunteer base is shrinking. I think this is made worse in some agencies – for instance NACAB set stringent training requirements which is good but is also a resource issue for agencies and volunteers because it takes too long to get onto a course and to complete it.*

This concern that imposing training entry standards on the NFP sector could restrict the workforce supply was echoed by a national representative of the advice sector. Whilst she expressed her support for the workforce development mission of NOS4Advice, she identified scarce resources as a problem. She also argued that a cumbersome and expensive system of mandatory training could deter both the younger entrants that the sector hoped to attract, and the existing older workers with experience and unaccredited training, who might not be prepared to submit to extensive assessment.

### **3.7 Conceptual Links between Training and Regulation – a model**

We are now in a position to clarify some of the conceptual links between training and regulation, which we have attempted in the table below. Further research would be required in order to test some of the propositions this model contains (such as those about the impact of mandatory training on workforce turnover), but it serves the purpose of identifying manifold links between systems of training and regulation.

**Table 3.1 Links between training and regulation – a model**

| <b>Regulated entry barriers</b>        | <b>Effects</b>  | <b>Risks</b>   | <b>Training model</b>   | <b>Performance regulation issues</b>   |
|--|---|--|---|--|
| Regulated Training High Entry Barriers | Filters available labour supply Provides proxy guarantee for starting quality | Expertise may not be matched to occupational requirements. Information Asymmetry. Supplier induced demand Cherry-picking | Funded by the State and the individual Pre-service Education partitioned between academic theoretical and vocational training CPD required for updating expertise | Output regulation needs to be strong Performance regulation needs to keep output costs at competence plus level and covert rationing decisions & to maintain quality |

|  |  |   |  |   |
|--|--|---|--|---|
| Regulated Training<br>Low Entry Barriers | Less restricted access to available labour | Problems maintaining competence<br>Problems capturing knowledge and values base in competence model<br>Qualification requirements may deter volunteer entry   | In-service Competence / standards based on role but with generic currency<br>Functional orientation<br>Individual funding unlikely, organizational support unreliable              | The skills base of the workforce may combine with workforce turnover issues may require enhanced monitoring of performance                            |
| Unregulated No Formal Entry Barriers     | Unrestricted access to available labour    | Client focus may lead adviser to ignore needs of clients 'outside the tent'<br>'Holistic' values may inflate costs<br>'ownership' of clients leads to reluctance to refer<br>Variable output regulation | Either extended traineeship<br>OR<br>Recruitment of experienced labour with in-service training<br>Functional orientation<br>Strong emphasis on organizational culture and loyalty | If turnover increases, recruitment and training costs become a problem for NFP agencies, and stronger performance management regimes may be required. |

### 3.8 Training as Regulation/ Regulation as Training

We will conclude this section with a brief discussion of the functional overlap between training and regulation as a means of promoting particular behaviours. The primary aim of professional training is precisely to regulate behaviour in an enduring form: ensuring a consistency of judgement; inculcating knowledge and skills to manage the transactional elements of the role; and providing an enduring set of values which will equip the recipients to adapt to changing practice environments.

Conversely, regulation can be a powerful form of training, as we noted above. Its power can derive either from the severity of the sanctions for breaching the regulation (removal from the Solicitors' Roll or termination of a contract), or from ownership by the regulated party of the desired framework for behaviour. At one end of the spectrum, the deterrent effect of extreme sanctions can, over time, generate a strong culture of conformity, without the need for direct hands-on inspection and surveillance (so disciplinary actions under Rule 15 are comparatively rare). At the other end of the spectrum, the development of a consistent and regular relationship between an auditor and an organization can provide a supportive environment for quite considerable change, which our evidence suggested was the case with the SQM. The Regional LSC Director described this approach in the following way:

*What made franchising and contracting work was never the quality standard, was never the contract or the Law Society or the LSC; it was the people who went out and the people in the firms who said we want to achieve*

In some public sector areas, the link between the monitoring and the educational functions of audit has been made more explicit. Evidence to the Bristol Royal Infirmary Inquiry identified the way in which, in the NHS, '*audit could form an aspect of research and scientific development. It was also a form of continuing professional education, in that it involved scrutiny of aspects of clinical practice and care*' ([http://www.bristol-inquiry.org.uk/final\\_report/annex\\_a/chapter\\_18\\_4.htm](http://www.bristol-inquiry.org.uk/final_report/annex_a/chapter_18_4.htm)). However, the Inquiry also found that as audit developed, clinicians became concerned about issues of confidentiality and the link with disciplinary procedures. There is clearly therefore a tension between the disciplinary and educational functions of regulatory audit. The most supportive environment for the development of individuals and agencies is one based on mutual trust, which is difficult to encourage when the outcome of a procedure may be the termination of a contract.

There are other conceptual links between regulation and training. Both attempt to specify sets of behaviours and dispositions which they wish to encourage, but frequently have to be satisfied with specifying proxies for these behaviours and dispositions, thereby incurring the risk that they displace the intended outcome with conformity to the proxy demands. The complex cultural systems that drive the behaviour that training and regulation seek to sponsor are sensitive but unpredictable, as some of our discussion of the impact of regulation, in Chapter Four, should demonstrate. 'Light touch' systems of audit, or systems of training which are detached from functional roles, carry the risk of accommodating incompetent or cost-inflating behaviour, while 'heavy touch' audit systems and highly functional training regimes risk obliterating the 'value-added' cultures of commitment and client-centredness which appear to be the basis for much of the 'quality' in the sector.

## Chapter Four                      Issues in Regulating Legal Advice

### 4.1                      Regulation: sources, forms, functions and effects

We will introduce this section with a brief exploration of four different aspects of regulation, and the interplay between them. These are:

- the sources of regulatory authority,
- the forms of regulatory authority,
- the functions of regulatory authority and
- the kinds of intended and unintended effects that regulation can have.

Throughout this chapter we will be referring for the most part to the regulatory regime which obtained at the time of the research, though we will refer in passing to some of the changes brought about by the LSA 2007.

#### 4.1.1                      Sources of Regulatory Authority

The sources of regulatory authority are statutory, self regulation, contractual regulation and elective and voluntary schemes.

##### 4.1.1.1                      Statutory

The primary and delegated legislation which governs solicitors includes:

- regulations covering **general** rights to practise (such as the Solicitors Act 1974, the Practising Certificate Regulations 1995, the Solicitors (Keeping of the Roll) Regulations 1999, the Master of the Rolls (Appeals and Applications) Regulations 1991, the Training Regulations),
- regulations covering rights to practise in **specific** areas of law (such as the Financial Services and Markets Act 2000 or the Immigration and Asylum Act, 1999, Part V which created the Office of the Immigration Services Commission (OISC)) and
- legislation affecting aspects of practice such as client confidentiality (Proceeds of Crime Act 2002).

In addition, prior to the LSA 2007, there existed other forms of regulatory authority relevant to the legal services field, such as Licensing Bodies (e.g. the Council for Licensed Conveyancers established following the Administration of Justice Act 1985)

and the Financial Services Authority (FSA). The work of Economic Regulators also applies to legal services, and has become more relevant with the passage of the LSA 2007, since the Office of Fair Trading (OFT) has specific responsibilities in relation to fulfilling the competition objective of legal services regulation, and ongoing duties to consider regulating provisions once Front Line Regulators (FLRs) have been authorized (LSA 2007, ss 57-61). Under the Enterprise Act 2002 the LSB has taken on the role of an economic regulator, with 'stop now powers', and powers to direct FLRs to behave in such a way as to promote consumer interest .

#### **4.1.1.2 Statutory - rights and protection**

Much of the primary and delegated legislation discussed above confers rights on consumers of legal services, such as those sections of the Solicitors Act 1974 covering professional fees (ss 57, 59-61, 64, 66-71). The sections of the LSA 2007 which create the Office of Legal Complaints (OLC) provide rights of referral to it in the event of failure to resolve a complaint with legal service providers at a local level, and gives it powers of redress, while leaving existing disciplinary responsibilities with the FLRs, under LSB oversight (DCA 2005, p.134: LSA 2007 s. 114).

#### **4.1.1.3 Self-Regulation**

Self-regulation is generally governed by the statutory licence which also guarantees the sheltered market. In the case of the legal profession, the movement has been away from self-regulation towards independent regulation, confirmed in the LSA 2007 with the creation of the OLC, and the development of arrangements for oversight of FLRs by the LSB . As discussed above, the advantages of self-regulation are seen to lie in the professional autonomy to act in the best interests of the client, regardless of potentially conflicting interests of the State or of vested interests. The disadvantages are seen to be the profession's reluctance to discipline its own members, and the use of regulatory powers to develop restrictive practices.

#### **4.1.1.4 Contractual Regulation**

In Chapter Three we identified the significance of the contract in filling the regulatory gap between input measures like initial training and qualification, and output measures such as complaints handling and disciplinary procedures. Contractualism,

entailing supervision and audit, is becoming the dominant mode of operation in the public sector. The Civil Contracts offered by the LSC are clearly ideal types of this regulatory form, but Service Delivery Agreements (SDAs) or Service Level Agreements (SLAs) also incorporate compliance regimes which are far more rigorous than the evaluation regimes characteristic of grant aid. One of the CLS development workers identified the problems which could accompany the transition to the contract compliance culture:

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

Contractual regulation has a number of advantages not shared by other regulatory approaches. It is flexible, offering the capacity to adapt the regulatory content to changing situations and priorities. Correspondingly, it offers the opportunity to specify detailed performance in context, in a way that is impossible for statutory regulation to match. Hence the LSC has been able to regulate performance in fine detail through the use of the Funding Code, SQM and the discretionary elements of compliance auditing whilst maintaining a degree of flexibility in terms of context. A further advantage is that it allows the regulator to withdraw suppliers from the market without explicit or heavy handed intervention. It also offers a form of arms-length 'ownership' of services: as agencies become dependent on the contract to maintain their organization, they may be more willing to adapt to the demands of the purchaser rather than risk losing the reservoir of skill and experience which is funded by the contract.

Suppliers also saw the contract as a means of exporting to them some of the risks and costs associated with providing services, and the justice of this view was in part recognised by the LSC:

*at the moment it's possible for NFP workers to do that extra stuff because of the cross subsidy from the local authority – but if CLACs and CLANs come in then each funder should have their own set of clear objectives so that you can't have this sort of cross funding where the local authority is effectively subsidising the LSC – though equally you could say that in some senses the LSC cross subsidises the local authority as well because it builds the quality of workers and allows for the support of volunteers and actually the money the LSC puts in, it's more generous than the local authorities – but what the LSC really wants is a straightforward contract where they pay for a number of cases and that's what they get. (CLS Development worker)*

LSC managers also argued that, compared to other forms of regulatory authority, they were able to achieve greater independence, since regulation was not their business, and because they were not constrained by a supply shortage:

*I've a friend who's a GP – she said 'I've got to have my accreditation, mind you they're so short of GPs that if I was Harold Shipman they'd only make me re-train'. You know there are limitations on regulatory frameworks – we have the great benefit actually that we have a greater degree of independence than a lot of the other regulatory mechanisms or regulatory agencies (LSC Regional Manager)*

However, contractual regulation can only control the quality of work in the market place for publicly funded services: if there is a private market for advice which can be exploited by non-contracted agencies or individuals, then another form of regulation may need to be introduced (as was the case with immigration advice and the OISC).

#### **4.1.1.5 Elective or voluntary schemes**

Badged membership schemes were introduced into the voluntary sector in order to counteract the widely recognised local variations in operating standards. The most established and well known of these is the Citizen's Advice scheme, which runs its own audit, and which is passported for the SQM. However, doubts about whether the process would ever be used to exclude a 'member' suggest it may be inefficacious in raising standards to a threshold level across the sector:

*Other than LSC regulation there is no overall scheme (in the VCO sector). If an adviser were in a solicitor agency then they'd be subject to Law Society regulation and if they worked in immigration, to the OISC, but otherwise the NFP sector is very lightly regulated and it's very variable – so, for instance there are different quality standards. It's partly a resource issue – apart from NACAB which has money to audit, most 'regulation' comprises self accreditation systems. But even with the CAB, I would question how effective it is, whether you can term it regulation as they rarely chuck anyone out. (National officer of a major advice consortium).*

Commercial certification marks like Investors in People (IiP) and ISO9002 have a dual function for participating organizations. They aim to provide intrinsic benefits: in the case of IiP the aim is to develop the capacity of an organization to invest efficiently in workforce development and provide it with market advantage by guaranteeing certain features of organizations providing services. These marks have a considerable reach, for example, IiP is held by 37,000 organizations in the UK. However, the Scoping Study on Quality in the Legal Services Industry (DCA 2005) is generally critical of them as a means of remedying information asymmetries, since research tends to demonstrate that few consumers notice them at all, and those who do, fail to register their significance. The authors argue that quality marks need to meet the condition of objectivity, and to measure accurately the expertise of the adviser, and that moreover they should not be linked to artificial barriers to market entry, raising the question of whether there is a potential conflict with the move towards preferred suppliers in the publicly funded sector.

## **4.2. Forms of Regulation**

This section excludes formal regulation in the form of licensing and controlling entry which are discussed in chapters Three and Five

### **4.2.1 Informal Regulation versus Formal, ‘Command and Control’ Regulation**

The significance of informal cultures on behaviour is recognised in Baldwin’s 1997 review of the regulation of legal services in the form of the controls exercised on barristers by Chambers, Inns of Court, Circuits, Clerks and Specialist Bar Associations (Baldwin, 1997, p. 13). Our data points to a wide range of informal influences on the actors in the publicly funded legal advice sector. These include:

- training and other mentoring or supervision
- specialist networks
- clients
- district judges
- LSC contract managers
- Other NFP advisers
- Spatial organization of agency (e.g. separate offices or open plan)

- Critical mass of other specialists within organization
- Recruitment procedures

Some of these influences are compatible with Lave and Wenger's model of 'communities of practice' (1991), which represents a useful counterweight to the view that solicitors are individualist 'hired guns'. We will explore in both this Chapter and Chapter Five the powerful effects of organizational cultures.

#### **4.2.2 Formal – Discipline and Complaints handling**

Discipline and complaints handling have tended to be identified by consumer organizations as one of the weak areas of regulation of the FP sector. The arguments delineated in the White Paper were that the current system failed to provide consumers with confidence about its independence, was too slow, lacked clarity about the gateway for complaints, and that because of the professional bodies' capacity to set their own standards, these gateways varied across the sector.

In the FP sector, Rule 15 of the Law Society's practice rules covers the information given to clients about complaints handling procedures within the firm, but does not specify the form these should take or set standards for them. One respondent identified the problems that might result for firms from the looseness of the framework:

*I think the difficulty a lot of solicitors find is that, when you don't find yourself part of all that framework, you see yourself paying for it, you see yourself shackled with all the rules and regulations and you see yourself competing with others that don't comply and it's difficult. In other words, if you are an ethical firm that is well regulated yourself - I'm talking now specifically about Rule 15 and things like that - and if you apply it rigorously and conscientiously and kill these things off, as I think we do, in all but the more meritorious of them, it begs the question of why you need anything beyond it, but that of course involves saying 'what about the firms that don't apply Rule 15 skilfully?' I mean what I've learned over the years is this. If a complaint comes in, you've failed in any event, haven't you? Even if it's unmeritorious – and so you've got to take Rule 15 seriously, and find a solution to it, even in those cases where you think the client is just pulling your leg and my strategy to avoid referrals to the OSS at all costs (Senior Partner & Family specialist, Chapelvale firm)*

Weaknesses in firms' internal systems have been seen as mirrored in the Law Society's complaints handling, which has been frequently criticised by the Consumers' Association and the Legal Services Ombudsman (LSO) (Clementi, 2004,

p. 57), and as we noted above, the system has now been superseded by the OLC. The development of the Consumer Complaints Service (CCS) as a successor to the Office for the Supervision of Solicitors (OSS), and as a quasi-autonomous body, was intended to answer criticisms of its lack of independence and to remedy the slow rate at which it responded to complaints.

Whilst complaints handling in the NFP sector has not attracted the sort of adverse publicity the solicitors' complaints system has received, it nevertheless represents one of the 'regulatory gaps' with which Clementi was concerned. One of the weaknesses identified in the existing system, with its mixture of multiple remote oversight (including the LSO), the Legal Services Complaints Commission (LSCC), the Secretary of State, the Master of the Rolls, the FSA and the OISC) and professional body front line responsibility, was its inability to accommodate new entrants to the market, which publicly funded NFP providers represent. An audit of quality standards for advice work (Advice Services Alliance (ASA), 2000) found that complaints handling was unevenly dealt with by existing standards, despite the fact that many NFP agencies identify client focus and user involvement as key values.

#### **4.2.3 Formal – Quality Control and Management**

In this section we explore the concern with quality in legal services by identifying the origins of the concept in industrial production, its translation to the service sector and to legal services in particular, and the issues raised by current market driven perspectives, and the prevalence of competing quality 'badges'.

In 1979 the British Standards Institute (BSI) developed the kite mark BS5750 in response to the growth of the quality accreditation movement which followed the Second World War. This focused on quality control systems and was revised to comply with the international standard of quality assurance, ISO 9000 (Kirkpatrick and Martinez Lucio, 1995, p 5). Its somewhat limited approach to quality was subsequently deepened in the development of the holistic concept, Total Quality Management (TQM), which focuses on the empowerment and involvement of employees and the elimination of the causes of defects, and which gave rise to the development of a number of certification programmes such as IIP.

In the public sector these developments may be seen as culminating in NPM, the shorthand term for the administrative reforms which, as discussed above and in Chapter 1, centre on the contractualisation of relations between agencies and service providers and between clients and professionals (see Freedland, 1994; Vincent-Jones, 1994), thereby achieving strict cost control (Pollitt, 1993), the generation of explicit performance indicators (see Hood, 1991; Tritter, 1994), delegated budgets and increased accountability through external audit (see Power, 1997). The Law Society has made clear its endorsement of the emphasis on quality control (1989, paras 99-129) as evidenced in the establishment of the Client Care Rule (Law Society, 1991), the introduction in 1993 of the Practice Management guidelines, which played an important part in shaping the first franchising specification (Legal Aid Board, 1998, p 38) and the development of the Lexcel Practice Management Standard, which mirrors many of the features of the SQM.

A combination of factors prepared the ground for the application of NPM to the publicly funded sector of the legal profession. The development of a mass market for legal services, along with rising costs and overheads, made their provision an increasingly expensive item of public funding, whilst for non-legally aided, middle-income clients, the cost of legal advice diminished access to justice (Bevan et al, 1994, p 2) at a time when, arguably, law was colonising increasing areas of social life (Galanter, 1992). At the same time, the increasing sophistication of consumers made the obscurity which shielded professional services from public accountability unacceptable.

Quality initiatives in the form of franchising were applied to the legal aid sector in England and Wales in 1993. As part of the implementation of exclusive contracting, it was proposed that the transaction criteria for civil advice and assistance would be supplemented by outcome indicators, with, 'where appropriate', in depth file review, leading, in exceptional cases, to more detailed inspection and external peer review; and that in addition there might be occasional use of client questionnaires (Legal Aid Board, 1998, pp 39, 44). In essence, the same framework is deployed in LSC 'risk-based auditing': the sophisticated analysis of outcome indicators allows the identification of 'risky' firms or agencies to whom the detailed audit and peer review procedures can be applied.

The development of the transaction criteria into LAFQAS and the QM and SQM standards for both private FP and NFP sectors represented a watershed in the

application of quality techniques to legal service work, and formed the foundation for the QM levels which now obtain. QMs reflected a commitment on the part of the CLS to the development of the advice network as a whole, and recognized the gateway to specialist advice, and therefore access to justice, represented by the 'lower' tiers of advice workers. However, QM came to be seen as over-audited: the initial conduct of annual SQM audits was both a burden on the audited organization and absorbed a considerable amount of the LSC's energies and funds. The transition was described in the following terms by the LSC regional manager:

*it was an audit on everybody, every year, for the purposes of ticking a box and saying they had met the standard. The difficulty for us is that it's very resource intensive and it means that you're not actually able to direct your audit resource to where it's most likely to be efficiently, or effectively, used, so, for instance if we thought we had a particular problem with a firm where we might want to go and audit for a week rather than a day or 2 days, we'd find it difficult to find the resources to do that so the real shift is from a universal annual audit cycle towards the principle that you actually audit on risk – broadly defined as how serious is what might be wrong and is it actually wrong, and is there actually a risk or is there not?*

However, we will note below that the intensive auditing of the early stages may have had a radical effect on internal practices and procedures, and have given the QM a reach which justified the resources expended.

#### **4.2.4 Quality and procurement – extending the influence of the QM**

One obvious consequence of the extended role of the LSC in commissioning provision from the NFP sector has been the development of concordance between the quality and audit regimes of the NFP sector and the QM. By 2000, this factor, in combination with the policy drive towards large scale inclusion of the NFP sector in the CLS, meant that LAFQAS had become major influence on the sector in terms of the redesign of their quality regimes (see for instance the Advice Services Alliance mapping exercises, 2000). By February 2004, the following Quality Standards had been mapped onto the CLSQM:

- Commission for Racial Equality Core Standards
- The Association of Local Government Quality assurance Measures
- Age Concern Quality Standard
- Disability Information Advice Line (DIAL UK) Quality Standard
- Federation of Information and Advice Centre (FIAC) Quality Standards
- Quality Management in Mind Standards

- Practical Quality Assurance for Small Organisations
- Telephone Helplines Association Quality Standard
- Youth Access Quality Standard

At the same time, however, the NFP sector's perception of what represented a standard and how it should be maintained, a product of its distinct history, persisted. Consequently, a slightly different balance of influences pertains in the two sectors, with systematic but informal influences probably more evident in the NFP sector.

### **4.3 Functions of Regulation**

This section is intended to help identify which forms of regulation are most effective in fulfilling which functions. For example, in terms of defining the scope of an activity, or of the range of activities in which an actor may become involved, statutory regulation may provide the furthest reach; disciplinary and disbarring mechanisms may have the strongest effect in outlawing certain performances, whilst contractual regulation may be the most flexible and penetrative form of regulation in specifying both scope and performance on a daily basis.

#### **4.3.1 Specifying scope**

In the market for professional services, defining the scope of services has always been associated with the process of securing market control on the part of the professions. In publicly funded legal advice work, however, the process of defining scope becomes more elaborate, and correspondingly, the specifications involved have become more and more detailed. The Civil Contract and its accompanying Funding Code has to specify which:

- clients are eligible on the basis of means;
- matters are eligible on the basis of general criteria identified in the Guidance on Excluded Work (for example representation at social security tribunals);
- matters are excluded on the basis of assessment of merit or sufficient benefit (for example, where prospects of success are poor or where the cost benefit calculation does not justify pursuing the matter);
- supplier is applying for funding for the matter.

The Funding Code, which defines all these matters, consists of several documents with which regulated agencies need to be familiar, the Criteria (43 pages), the Procedures (55 pages) and the Guidance (352 pages).

For our respondents in the NFP sector, these forms of specification of scope were sometimes seen as problematic and because of counter-cultural issues, caused compliance problems. For example, the embedded culture of universalism in some areas of social welfare advice could mean that advisers found it distasteful to begin an interview with a question about means:

*One of the big problems we have is the capital rule, because... for eligible work, the actual clients have to meet the capital rule. It's currently something like £1200. Anything above that and you're only allowed to do 45 minutes worth of work with them. Now that capital level is actually below the poverty line benefit level, because I think currently disregard on capital for income support is something like £3,000. So it's a poverty line which is even more stringent than the actual poverty benefits and we certainly find that increasingly to be quite a serious problem for us. (Manager of a welfare rights service)*

Respondents from the LSC argued that since scope was an issue of policy rather than audit, it was not a legitimate topic of complaint for NFP agencies. However two other aspects of scope raised by respondents may be viewed as legitimate matters for debate. The first is the impact which limiting scope has on an NFP agency's 'mission', the essential reason for which they feel they are in business. The second concerns areas which are perhaps not as clear cut as those responsible for audit would argue. One example is the Disability Living Allowance (DLA) form. This lengthy form contains questions designed to establish the degree of capacity a disabled person has to carry out the daily tasks necessary to live independently. Practitioners argued that many clients failed to understand both the need to be exact about their capacities, and that failure to establish dependence will mean refusal. Several of the cases observed or commented on involved DLA appeals, where the adviser was attempting to remedy the failure to establish dependence at the initial application. Further examples are discussed below.

#### **4.3.2 Specifying price**

Economic regulators fulfil the function of setting the competitive boundaries for the provision of goods and services, of ensuring the functioning of a competitive market, and, increasingly as the service sector has accumulated a large number of privatized

utilities with different degrees of monopoly, setting prices so as to balance the interests of consumers and companies. Where services are publicly funded, the market is a curious one, controlled by one monopoly purchaser without a direct interest in the outcome of the transaction between supplier and client. In these circumstances a mechanism has to be found to counteract the natural tendency for those not paying for a service to make unreasonable demands on it. This function has to be fulfilled in certain instances by the 'reasonable paying private client' test (Funding Code Guidance 3C-035), but in other circumstances by using the contract to set the price.

These mechanisms might be expected to produce complaints from suppliers, and we shall detail a number of these below in the section on the effects of the contract. In general the respondents in the FP sector emphasised the differential between the returns for legally aided and private client work in order to highlight the economic impact of deciding to persist with a contract, whilst respondents in the NFP sector identified cost compliance auditing as placing unreasonable demands on advisers in terms of the ability to meet the contract. There were however also respondents in each sector who found the specification of costs reasonable if not generous, though their calculations included elements of cross-subsidy from other funders and from private client work respectively. The following comment from an adviser from a local authority welfare rights service demonstrates this:

*Well the money's very good for us I have to say because it's block funding. So for every post that they fund we get about £50,000. Now given that our overheads are already public funded through the funding that we get from other public funding, that money, we use it to employ an extra member of staff. But that leaves us about 20 grand in profit and even after we've employed an additional member of staff. So we've put that to quite good use, it initially created quite a surplus for us because with three posts we're funding three members of staff and we must have had about 30 to 40 grand spare.*

As a caveat, however, the manager of this service stated that as they had had to perform more exactly to contract specifications, this 'surplus' had disappeared, which suggests that initially they had not fully understood the terms of the contract.

The following partner in a high street practice in Weaverton found the costs specification tough but identified what appeared to him to be penalties in the TFF system for efficient firms:

*now the beef at the moment is firms who are saying 'well why am I being paid £150 to do the same job as my neighbour next door who is*

*getting £300 because he over-egged his pudding over the last 12 months?’ So there is a beef at the moment between those two standpoints. I think in (Weaverton) we’ve been offered the lowest, so efficient solicitors could be penalized and I think they will be, because we’ve been offered – it’s ranged from between £297 to £160 for the same piece of work – we’ve been offered £160 but I’m happy with that – it’s right, the figures are there; I’ve got Excel spread sheets which show that that is what my average was, and I’m still making money out of that so I don’t understand what the other firms have been doing, to be honest (Senior Partner, Weaverton legal aid practice)*

### **4.3.3 Specifying performance: assuring quality?**

We will now briefly summarise some of the main issues which have been raised in the debate over quality initiatives in legal service work. The issues most frequently identified as problematic include:

- the ambiguous character of some of the key concepts of quality discourse (Sommerlad & Wall, 1999)
- the complexity and intangibility of the core aspects of professional services
- the consequent difficulty in the setting and assessment of standards
- the resulting danger that too much reliance will be placed on proxy measurable indicators which may then displace the immeasurable aspects of quality (Raine & Wilson, 1993, p 87; and see Gorz, 1989; Power, 1997, p 13).

Travers has argued that sole reliance on process measures is insufficient, and that they should be supplemented by outcome measures. However he also points to the multiplicity of variables which may affect an outcome, such as, in addition to the lawyer’s skill and tactics, *‘the strength of the opponent’s case, the legal issues involved and the tactics of the other side’* (1994, p 184). As a result he suggests that the variables of process and outcome should be isolated, and the causal relationship between them identified (Travers, 1994, p 181; and see Wood, 1997)

The architects of the Transaction Criteria acknowledged their limitations as quality indicators; for instance, conceding Travers’ argument, they noted that *‘strategy is inherently a matter for subjective discretion. Indeed, it is in the very nature of legal work that there is rarely a correct answer to the handling and outcome of a case ...’* (Sherr et al 1994, p194). As a result they proposed the use of a further mechanism to supplement existing quality measures. Amongst other approaches, they have trialled

and advocated a 'mystery shopper' and peer review methodology to measure the real quality of advice (Moorhead et al, 2001).<sup>10</sup>

These concerns are related to the problem, identified above, that most quality measures rely on proxy measurements. For instance, the 'soft skills' are least easily measured by QA regimes, and since these are often regarded as the special expertise of the NFP sector, this may account for the wariness with which it approaches quality. Several of our informants argued that the LSC approach suffered from a general failure to recognise the added value they brought to their work, such as the social policy work which is a key aspect of the mission of Citizen's Advice and Age Concern.

However, in spite of reservations from both sectors about the capacity of the SQM or contract compliance audit to capture the quality of advice (of which more below), it was widely regarded as providing a reasonably reliable guide to the baseline that organizations should seek to reach. The regional manager of the LSC expressed confidence in the way in which, by use of proxy measures, genuine issues of quality could be identified:

*there are two things we audit against, fundamentally, there's the requirements of the Quality Standard and the requirements of the contract – they come down effectively to clauses and rules so you may say 'well we haven't got any specific quality concerns but the information we have says that this firm is likely to be breaching the contract or this particular requirement of the contract' .. so you go and audit it and find out what the facts are because any kind of proxy information is only indicative it's never definitive – because the information on the profile is just that, proxy. The audit will say, 'let's have a look at the facts' – you have information that a high percentage of certificate applications are being refused on merit grounds - you want to go out and find out why ..*

He then went on to describe a case which he claimed illustrated the way in which proxy indicators (for example, above average time per case or inactivity on file) threw up problems of quality of advice, and, crucially, of supervision:

*I went to an interesting case where someone came to a supplier and said 'the house next door to me burned down, and there's a massive amount of damage to all the goods in my house and I want to sue'. So they said, 'ok we'll sue the landlord; how did it burn down?'. 'It was set fire to actually, it was arson.' So the adviser then – and this is over the course of 18 months - writes to the landlord and says 'tell us who your insurers are because you're liable for all the damage to our client's property.' Landlord writes back and*

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<sup>10</sup> Originally Sherr et al rejected client and peer review on the basis of lack of knowledge and self-interest respectively, contending that case evaluation was probably not capable of sufficiently objective evaluation and proposing outcome measures as a solution (1994, p 195, & 197).

*says 'we're not liable, it was arson'. So the adviser, leaving it weeks in between, talks to the client 'no that's not acceptable'; writes again, gets the landlord's insurers, itemises all the stuff, writes to the insurers and they say 'we're not liable, it was arson'. The adviser then goes to supervisor who says 'the landlord isn't liable - it's arson.'*

As he noted, peer review wasn't necessary to identify the flaws in the handling of this case. He emphasised the importance of supervision, since many of the risk indicators, such as certificate refusals, and departure from the standards from completing cases, would be picked up by good internal supervision systems.

#### **4.4 Effects of regulation**

The increase in regulation of the publicly funded sector in recent years has produced the term 'regulatory burden'. The LSC contract has been seen as having a particularly significant impact, which could be described in terms of Power's concept of 'colonization' (Power, 1997).

##### **4.4.1 Regulatory burden**

The BRTF/BRC has consistently identified administrative burdens imposed by regulation as hampering business, channelling resources away from more productive uses, and inhibiting innovation and growth (2005b, p 4). More recently it has reported on the burden that regulation imposes on the voluntary sector, including those organizations in our NFP sample (BRTF, 2005a). Consequently it recommended the adoption of the Standard Cost model for estimating regulatory burden, and a target of a 25% reduction in the burden over four years, overseen by an independent public body which would evaluate the costs implicit in all new regulation (BRTF, 2004).

The theme of 'less is more' has been taken up in a number of other reports, commissioned by the government and by other stakeholders in the regulation process, such as VCOs and small businesses.

The Hampton Report (Hampton, 2005) found that the systems of inspection and audit operated by government as a whole were uncoordinated and good practice was not uniform. Hampton also identified overlaps in regulators' responsibilities and enforcement activities, a proliferation of forms, and excessive duplication of requests for information. Echoing other commentators in arguing that risk assessment -

*'though widely recognised as fundamental to effectiveness – is not implemented as thoroughly and comprehensively as it should be'* (2005, p1), he recommended that:

- comprehensive risk assessment should be the foundation of all regulators' enforcement programmes;
- there should be no inspections without a reason;
- resources released from unnecessary inspections should be redirected towards advice to improve compliance;
- data requirements, including the design of forms, should be coordinated across regulators.

His report emphasises the need to *'streamline and modernise the regulatory system in order to deliver reduced administrative burdens'* (2005, p2) and also to release resources for advice:

*Overall the level of inspections in parts of the regulatory system seems higher than is necessary to achieve regulatory outcomes. Inspection is a high cost activity and inflexible inspection programmes, in inspecting businesses unnecessarily, take resources away from advice services, where there are serious unmet needs* (2005, p. 26).

Other independent commentators, including academics, tend to endorse the view that regulation has been burdensome, especially for small businesses and organisations (which most legal aid law practices and NFP offices are), and, with regard to the NFP sector, potentially destructive of the very characteristics which were cited as primary reasons for devolving service delivery to it in the first place. However, whilst the literature emanating from the LSC and Ministry of Justice (MoJ) stresses the objective of building a publicly funded legal service which is holistic, creative and based on relationships of trust, it also continues to emphasise the need for 'tight management controls'.

Arguably a major reason for the tensions which emerge from commentaries on regulation of VCOs and SMEs relates to the multiple functions which that regulation is now expected to fulfil, an issue which we have touched on in the Introduction and in Section 4.3 above. On the one hand, at the micro-level, it is charged with ensuring that regulated services simultaneously deliver quality, VFM and responsiveness (each of which is not only a contested concept, but may require a different form of regulation). On the other hand, at the macro level, it connects with government concern with the *'dependency culture'* exemplified by the targeting of social exclusion through non-state bodies and suggests that in the future *'responsibility for*

*the social sector (will be) handed to voluntary organisations and business'* and that the '*VCS adopts more business practices'* ( BRTF, 2005a, p 15). This evolving situation creates tensions because, as Bolton argues, '*as the role of the state has changed from providing public services and utilities directly to ensuring that these are provided, so the focus of regulation has shifted from relatively simple questions of probity to more complex questions of performance'* (M. Bolton, 2002, p 2).

#### **4.4.2 Contractual burdens for the NFP sector**

Observers of VCOs and NFP organizations increasingly suggest that the construction of the contract between the state and VCOs acts as a powerful form of regulatory authority over agency behaviour. For many organizations, contracted funding represents a departure from the practices associated with project-based funding, which is predicated on greater freedom to define goals and working practices.

Research by Alcock and his colleagues identifies the difficulties VCOs face as a result of the contracting process. These include the way in which funding timeframes may distort priorities, and, where the funding is uncertain, create difficulties in managing the skillset of the workforce: '*for small organisations this could become the focus of their work for a time .. (and this is) exacerbated by annually renewable contracts'*. (Alcock et al, 2004, p 26). They go on to argue that: '*the result is often poor value for money, for both contractor and organisation, financial instability and uncertainty, difficulties in recruitment and retention of staff, a focus on shorter term outputs rather than longer term change and diversion from the business of delivering better services'* (2004, p. 27). In our sample these criticisms were borne out in a number of ways in the NFP sector. Advice organizations with limited access to alternative funds (for example from a local authority funding stream) or which were heavily dependent on uncertain recurring grants would find it difficult to maintain a critical mass of advice expertise in any one area, and would therefore rely on LSC funding to support specialist work. Correspondingly, it would be more difficult for single advice specialists to manage the contract, particularly if demand was unpredictable. They would therefore tend to work in isolation from other advice tiers, and this would have a number of ripple effects: Their expertise would be less likely to 'trickle down' to General Help level advisers, which might in turn adversely affect the process. A similar problem could result from the short term nature of some of the funding. One of the CAB Managers identified the Specialist Support Service

Contract as an important element in her strategy both for upgrading the skill levels of her own specialist and general advice staff and for meeting diverse need in a rural area with access problems and insufficient volume of business to sustain a contract. The subsequent premature termination of this contract represented an unexpected blow,<sup>11</sup> as it had been seen to generate expectations of levels of service which could not then be met. A similar point was made by the Chapelvale Women's Centre in Linfield, which had received LSC funding for advice to victims of domestic violence, had established that there was a need, stimulated demand, and then had the funding withdrawn.

According to Alcock et al, the standardized and complex nature of contracts between government and VCOs reveals a '*one sided and inflexible approach to contracting on the part of statutory agencies that show themselves unreceptive to ideas from VCOs about the specification of services ..*' (2004, pp 29-30), a point illustrated by the examples given above and echoed by several of our respondents.

The contracting process rarely allows for full cost recovery: commissioning organizations are generally reluctant to pay their appropriate proportion of overheads and management costs, and, as we explore further in Chapter Five, very little attention is given to the costs of reproducing the labour force, either in terms of the direct and indirect costs of training, or the inevitable inefficiencies which result from slow start-up (the length of time it takes a new worker to take on a 'normal' case load). This built-in funding deficit, coupled with annually renewable contracts, creates considerable financial insecurity, transfers high levels of risk onto VCOs and is, some commentators argue, unsustainable, particularly in relation to the delivery of non-profit making services to vulnerable groups. Evidence suggests that highly unstable funding relationships also undermine trust between contractors and VCOs (Alcock et al, 2004, p. 32), and this was confirmed by the experiences of some of our NFP respondents

#### **4.4.3 Colonization**

Michael Power identifies two extremes of response to audit processes (1997). One is 'decoupling' where the audited organization seeks to manage the process by delegating responsibility for dealing with the audit to a specialized section or sub-set:

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<sup>11</sup> Following representations, this service was restored and continues to be regarded as a valuable support to the NFP sector.

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

The impact of the LSC contract and associated auditing illustrates Power's argument that this form of regulation can have a major cultural impact which extends beyond the relative weight of the funding and can amount to a form of colonization:

*They do hold a lot of clout - funders do anyway, but the LSC do hold a remarkable amount of influence - for what they actually put into organisations, phenomenal. Out of proportion I would say, and that's quite clever, quite good from their point of view and I do support the Specialist Quality Mark and the impact it has had. I think there are a lot of strengths to that. They need to be aware of that sometimes, because the audit regimes they run are very tough. The local authority put in a lot more money than the LSC but the LSC, in terms of actual advice and quality, are awful lot more influential than the local authority. (Director, specialist Housing NFP organization).*

One respondent complained about how auditing appeared to be spreading, but seemed uncertain about the impact it was having:

*In the last 3 years we've had a fantastic growth (in auditing) and in this sort of performance measurement/management that's gone on at the County Council level. As to how that actually impacts on the Service I'm not really sure. Some of it seems its things that we've got to be seen to be doing. We have these performance measurements some of which we've come up with ourselves... (Director, Local Authority Welfare Rights Advice Service).*

However other responses suggested that the intended and unintended consequences of auditing's 'colonizing effect' on NFP organizations could in some areas be quite substantial; we explore these responses in greater detail below.

#### **4.5 Benefits of the contract and audit**

The contract and audit were viewed, especially by managers, as having some very positive effects especially in relation to management systems and procedures both of which were perceived as improving client care, business planning and making practitioners sensitive to the costs and benefits of cases.

#### 4.5.1 Improving management systems

Respondents in management roles often took a positive view of aspects of the cultural transformation produced by QM and audits, and in particular the improvements in their organizations' systems, even where they identified gaps, inadequacies or inconsistencies in the process. In several cases they were also positive about the effect on staff who they found difficult to shift on their own. For instance a CAB contract manager identified the process as facilitating supervision of recalcitrant staff:

*I'm very strict about my supervision of them because it's prescribed in the manual what I do and the other staff I manage I like to make sure that they're supervised as regularly as well.... Some people don't like being supervised, as they have been doing the same job all the time and think 'well I don't need to be supervised'. (Contract Manager, Hillchester CAB)*

The following positive comment from the senior partner of a firm specializing in education and community care was typical of the views of the management stratum in the FP sector:

*I think it's transformed our firm. We were reasonably well managed but, in general terms, we think it's been all to the good. It's made us have standard files; it's meant that papers are in place, that proper notes are kept. Generally speaking, although it was traumatic to begin with for us all just to simply make sure we were ready, it's been a real benefit to the firm.*

This respondent then went on to point to the benefits this improvement in management systems had brought to clients:

*and I think it's been a real benefit to clients, and we strive to keep to the standards. (Senior Partner, Hillchester Firm)*

The overwhelming majority of respondents endorsed this view that the improvement the contract had made in management systems had led to the development of practices which resulted in a greater focus on the needs of the clients.

#### 4.5.2 Procedural benefits

Several respondents emphasised the role played by the SQM and the transaction criteria in bringing about a major improvement in client care:

*On the delivery of service as a whole, yes, (the LSC has been) hugely significant in that if one is honest prior to LAFQAS you had no guarantee that a legal aid client would receive any letter of advice. First of all, no guarantee of meeting with you confirmed in writing, no guarantee as to when he would get that letter, no guarantee as to whether you'd agree an*

*action plan with him, no set target dates and that's just been an impossible regime to operate under LAFQAS, and that is the huge gain for the client under what's happened in the last few years - in that we are accountable as we always should've been, and must be. There will be people not able to make that transition. (Senior Partner, Carbridge firm)*

As we will note below, several (though not all) respondents from the FP sector contrasted the rigour of the practice management QA under the SQM with the inspection and audit regimes of other QMs. In the NFP sector too, the SQM was widely recognised as providing a discipline to client care;

*I think that in more cases now, a client will go away with a clear idea of the experience they've had in our office, with a clearer contract of what they can expect from us, and what we should expect from them, so moving away from that very kind of woolly, ill defined experience that a person will often get when they go to a CAB and speak to an experienced volunteer who will not write up their notes very accurately; we've come a long way from there and we can now safely say that most of the cases we do for the LSC will be done to a fairly high standard, include client care letters; include a clear closure procedure on a case, that it won't be arbitrarily closed because somebody in an administration function wants to get rid of all the open cases from last year or whatever. It doesn't happen like that any more, certainly not for the LSC cases. So that has been a good thing – it's driven us towards a better understanding of professional principles as they apply to providing advice and advocacy and I'm very pleased about that. (Specialist Housing Adviser, Castleton Housing Advice Charity).*

Other respondents' evaluation of the benefits the QM produced was more qualified:

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

Some respondents stated that they wished to move beyond the threshold or benchmark represented by the QM to an even greater focus on clients. No one referred favourably to the regime of client care which pertained in pre-LAFQAS legally aided work. Several respondents stated that because of the procedural benefits the QM produced, it had subsequently been rolled out across their organization, and Lexcel adopted for those areas of firms which undertook solely private client work. This development was seen to be particularly important in areas where complex procedural rules or time limits entailed risk:

*I think if you do public funded work, you automatically have organised files and you accept that you should do confirmation letters, properly communicate with your client, be able to find everything on a file, and that's the contrast between people who do public funded work and expect to have to do that and people who have **not** been trained in that way,.... I don't think that's true of some of the new people and bigger firms because I think they'll see that it's good risk management (Family Ancillary Relief specialist, Carbridge)*

### **4.5.3 Continuity of care within the organisation**

The mandatory nature of file recording and review was also identified as a particular strength of the QM regime by several respondents (and this issue will be discussed more fully in the section on training). Weaknesses in recording practices were highlighted by one housing solicitor as a key failing in the NFP sector:

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

It was not surprising, therefore, to find that NPM managers in particular emphasised this aspect of the cultural change brought about by the contract, noting that improvements in file management made it easier to transfer responsibility for a case:

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

However, as we discuss below, many respondents in the NFP sector considered that the contract and compliance system could adversely affect continuity of care by severing relationships between the tiers of advice.

### **4.5.4 Business planning**

Some respondents in the FP sector identified the stable cash flows and secure business planning which resulted from contracting as significant benefits and several considered that the (TFF) regime would improve this situation further. One partner

with a mixed crime and family practice described how, with the support of a consultant, he had developed a system which enabled him to give the same kind of detailed scrutiny to his costs and charges that the LSC could give, enabling him to continue to operate as a 70% legal aid practice, even though, as he put it, '*the pay's rubbish*':

*Everybody was up in arms, including myself: 'why should we accept £173 for each case when we may be doing far more?' And the LSC said 'it's swings and roundabouts, some you're going to gain on and some you're going to lose on' and no one believed them including myself. We then get to a position where I now have this spreadsheet and I've now got 5 years worth of data on there – every single bill I do, and at the moment the average is that I'm beating fixed fees by 14 ½ %, so we are doing better under fixed fees than we would if we claimed under the old rules by 14 ½% (Senior Partner, Weaverton firm)*

#### **4.5.5 A sense of the costs and merits of cases**

One of the aims of the regulatory system for publicly funded legal services might be to encourage advisers to internalize a sense of the cost benefit calculations which inform decision making at the national level about the disposition of resources.

Regulatory control over the pricing of services is an alternative approach to managing behaviour, but may have the undesired effect of encouraging firms and agencies to turn away work which is meritorious but unremunerative. This danger was exemplified by a firm specialising in immigration work which, as a result of their experience of changes to its funding, withdrew from the contract in the initial stages of the research:

*it's not been working very well because we had to get this extension (on the prescribed 5 hour limit) from London and they're obviously trying to get their heads round it as well ... when you think that in the past we have probably spent 20 or 30 hours doing this work, 5 hours is not a lot of time with a person who does not speak any English and who doesn't understand what is going on, it can take you 5 hours just to explain it to him really. Basically you know we just have to send them away (Contract Manager, Hillchester firm)*

There was however evidence that firms and NFP agencies were assimilating the role of custodians of public disbursements, and thinking of ways in which the cost benefit calculation could work practically. This welfare adviser had attended training on the sufficient benefit test:

*I think something along the lines of the sufficient benefit test is a good idea because I don't want to waste my time taking appeals that haven't got a cat in hell's chance, I want to know that they've got a case that's worth taking. (Welfare Adviser, Linfield CAB)*

One housing solicitor however argued that the policy drive towards encouraging mediation and early settlement was not only having an adverse effect on the social justice side of his work, but also preventing him from obtaining costs from the other side and thus saving public money:

*if the other side makes an offer and it's a walk away settlement then there's no order for costs and instead we send our bill to the LSC. And if we don't accept an offer, they report it to the LSC who then gets onto us and asks why we're not accepting the settlement because they don't want us to take cases unnecessarily to court. I'm undermined by the LSC in this approach because the LSC is all about compromise / settlement which undermines the culture I'm trying to create (Housing Partner, Boomtown Firm).*

#### **4.6 Multiple Regulation**

One of the concerns raised at the time of the Clementi Review was the issue of the burden imposed by multiple regulation. We discussed with respondents the number of other regulators that affected their practice, and how they experienced the regulatory process. The greater formal regulation of the FP sector through statutory bodies and professional organizations was regarded by respondents as an unfair handicap in a commercial environment:

*I think as a profession we are probably over-regulated; over the 20 odd years I have been in practice we've evolved from being a profession into a business but we're a business that's competing at a professional disadvantage because we are hamstrung with all the old regulatory stuff that applies to the professions, but competing with businesses that don't have those handicaps – so I think we are probably over-regulated (Senior Partner, Chapelvale firm)*

On the other hand several respondents expressed the view that the influence of the Law Society on day to day practice was negligible, including the site inspections, and the following respondent expressed a desire for more directive monitoring:

*The Law Society is, in my view, wholly ineffective. Unless you are dipping into your client account, they're really not bothered. We had a monitoring visit 2 weeks ago from the Law Society and the lady who came said 'if I'm honest, the reason I'm here is we've got to justify our existence' and she spent all day trawling through files, client ledger balances, and whatever they do with every firm, and it was a clean bill of health but you know, I didn't understand the purpose .. I can pick up a file – any file - and find fault with it – a technical fault or a client care fault, complaints procedures not being adhered to. I think you could find faults like that in any practice. Yet her assessment was that our client care was excellent... Now of course I'm happy with that finding and I think it probably was correct, yet there probably are areas we could tighten up on and it would have perhaps been helpful to be guided ... (Senior Partner, Weaverton firm)*

Some NFP respondents similarly identified as a weakness the relatively light evaluation entailed in some alternative funding sources as a result of the lack of systematic quality measurement. For instance one respondent, a manager of a rural CAB in North Daeshire which had lost its LSC contract for General Help and was mainly funded by the local authority and the Primary Care Trust (PCT), noted the absence of performance auditing on the part of these other funders: the PCT audited the number of recorded cases and enquiries, but not processes or outcomes, and the local authority undertook no auditing at all.

On the other hand, other respondents from the NFP sector felt that because the regulation to which they were subjected was associated with several funding streams, they were probably subject to more intrusive demands:

*It's difficult on several levels: firstly we are subject to financial reporting requirements which across the eight funders are different for everyone, so a timetable exists which shows when the financial reports and the project reports are due - actually we're still developing this. That's a very practical juggling act that we have to do. Secondly, all funders require these reports at different times; so some want quarterly reports - some even want them monthly / twice monthly – and of course all the different projects have different start dates and therefore times of reporting; so juggling that lot is another stress. Thirdly, the actual output and outcomes monitoring and evaluation / information keeping - what is required as information - all differs from project to project. Some funders are very light touch; for instance Lloyds TSB – you apply to them to get money and they require you to report 12 months later. They don't monitor in between (Director, Women's Centre, Chapelvale)*

#### **4.6.1 Benefits of other regulators and certification bodies**

In both sectors, organizations had sought other forms of elective regulation, through generic or specialized QA or quality marks. Some of these compared the QM unfavourably to these marks, arguing that there were aspects of practice management which they covered more effectively. Thus those (several) organisations which had IIP, ISO 9002, and, in particular, ISO 9000, had found the development of the LAFQAS and QM less burdensome.

The Director of the Women's Centre in Chapelvale had applied for IIP for strategic reasons, but also identified contingent benefits for the organization:

*We have Investors in People; we went for that because we were aware that it is increasingly important to have evidence that we are a quality organisation and as voluntary sector organisation applying for funding it gives us the edge because few small and medium sized voluntary sector agencies have it. And it **has** given us the edge – it has helped us get*

*funding. ... We got it in 2000 and since then our income has risen by 600% - we have grown hugely. Our income is now about half a million pounds whereas it was £30,000 per annum.*

The impact of these other regulators was unclear since it could be evaluated on two dimensions. Firstly, it was difficult to assess their immediate impact. Thus, it was unclear whether they were able to influence the fine details of the way that people went about their business by virtue of regular inspection, the possession of sanctions that could be applied administratively, or the sense of ownership that organizations felt over the procedures and processes that they were promoting. The second dimension was the authority of the alternative regulator. This dimension accounts for the degree to which the regulator can have a profound impact on the whole of an organization's business, even though it may be remote from the day to day transactions. This would normally be associated with some form of catastrophic sanction, involving the withdrawal of the organization from the market for its services (so the Charity Commission could redefine an organization's status, and loss of specialist panel accreditation could mean temporary or permanent withdrawal from the publicly funded market). The dimensions of the impact of these alternative regulators is summarised in the below typology based on our respondents' comments:

**Table 4.1 Alternative regulators and their impact**

| <b>Sector</b> | <b>Regulators</b>            | <b>Impact</b> | <b>Authority</b> |
|---------------|------------------------------|---------------|------------------|
| <b>FP</b>     | Law Society                  | Low           | High             |
|               | Law Soc Accreditation Panels | Medium        | Medium           |
|               | Lexcel                       | Medium        | Medium           |
|               | Lawnet                       | Medium        | Low              |
|               | OISC                         | Medium        | High             |
|               | ISO9002                      | Medium        | Low              |
| <b>NFP</b>    | Charity Commission           | Low           | High             |
|               | liP                          | Medium        | Low              |
|               | Citizen's Advice             | Medium        | Medium           |

#### **4.7 Regulation: negative effects and unintended consequences**

As noted in the earlier discussion, much of the recent literature on regulation has been concerned with the concept of regulatory burden, or, more precisely, the cost of compliance with regulatory demands. In their literature review, Chittenden and his colleagues (2004) identified a number of different dimensions to the concept of cost (see pp11-12). These dimensions (which include direct and indirect costs, operating and administrative, internal and external costs, fixed and variable costs, and

recurring and one-off costs) do not constitute a mutually exclusive or exhaustive set of categories, but provide different ways of understanding cost, and also help to illuminate costs which may often be overlooked.

One Senior Partner gave the following description of the cost of compliance:

*one of our partners went from being a fee earner firstly to starting doing 2 days a week managing the contract and then became a full time managing partner while – alright we had other parts of the firm to manage – but the LSC contract becomes a very high part of it. So you could be arguing that in partner time it's £30 to 40,000 and we've now got to fulfil everything over at legal aid... we have two people doing the legal aid bills, we're going to have a new practice manager costing us approximately £40,000 a year, and an assistant at £23,000 a year. Now admittedly again, that's for the whole firm, but disproportionately a lot of it is because of what's required by the LSC. (Hillchester firm)*

We asked some of our sample to attempt to give us an estimate of the cost to them of maintaining their LSC contract, and provided a prompt sheet with a simplified version of the Chittenden definitions. The responding CAB identified the cost as 5.7% of a contract worth £86,500, a solicitor's firm in Castleton estimated it as 3% of a contract worth £1.5 million, while the local authority welfare rights service in the study identified it as 1% of a £100,000 contract, arguing that most of the costs involved procedures that would have been applied anyway. Two agencies were unable even to attempt to estimate a figure. Some of the divergence here may be explained by actual differences in investment (some firms engaged an external consultant to support the contract, while none of the NFP agencies did), and some by a simple failure to identify costs. However, this failure probably means that the costs were being absorbed by the organization, either through a cross-subsidy from other work or funding sources, or through individual workers absorbing some of the costs themselves. This cannot be in the long term interests of the organization or, ultimately, the LSC, as was pointed out by the Scoping Study for the Clementi Review (Baldwin et al, 2003, p.96).

#### **4.7.1 Adverse effects of colonization**

Whilst the cultural impact of the contract was perceived as producing the benefits discussed above, it was also perceived as producing adverse effects. We have tried briefly to summarize the data on these in the below table

**Table 4.2 Perceived adverse effects of contract compliance**

|  |  |
|--|--|
| <b>Displacement of effort</b>  | Time spent on preparing for and undergoing the audit, which some respondents felt would be better spent delivering front line advice<br>A typical comment concerned the attention which ticking boxes required, reducing time available to concentrate on the quality of advice or client care.  |
| <b>Displacement of mission</b>   | Restrictions on scope, engineering a fundamental shift in the way the NFP organization worked with clients. Restrictions most commonly mentioned were those on tribunal representation, on time so that a diminished service or no service was offered to clients previously served, or means testing, undermining a universalist principle which was held to characterise a service.<br>Several FP firms identified those cases as ones that they would service in any event pro bono, for a mixture of social and commercial reasons.  |
| <b>Distortion in internal organisation of workforce</b>                          | In the FP sector this might involve the partitioning of the firm so that the commercial arm and the legal aid arm were managed differently, leading to some internal pressures on publicly funded work.<br>In the NFP sector the most common complaint was about the effect of ring-fencing workers, negating the model of the 'learning organization' which the sector aspired to, and depriving lower tier workers of scarce and valuable expertise.<br>The 'ring-fenced worker' also experienced stress in relation to the pressure to meet the hours.<br>Specialist multiple or dual funded organizations advocated the alternative approach of allowing more than one worker to contribute to a contract. |
| <b>Displacement of trust-based relationships and feelings of intrinsic worth</b> | A third of respondents spoke of a corrosive effect of procedures on the sense of partnership and trust which the LSC have stated they wish to build with the NFP sector. They claimed that the work that they did out of goodwill was never recognized, whilst their time claims were minutely scrutinised.  |

Respondents also specifically identified the way in which the QM audit failed sufficiently to differentiate between the quality of lower level legal help work and certificated work, noting that this could be a particular problem in areas with tight labour markets, and where staff turnover was therefore likely to be high:

*when we were doing legal aid work in some volume, when we were recruiting someone it would take a long time, using an agency, for someone to be found, and then there would be a shortlist of one .. I think it's just hard to recruit in rural areas ... then quite often, when the LSC did their audit they would find a problem with them and it was just a nightmare really in the sense that I was not making money out of doing legal aid work, supervising assistant solicitors etc was taking up my valuable fee earning time in respect of my private clients .. and every time the LSC came in the auditors would find great fault with somebody and in some cases that led to them being dismissed and us having to spend more money on trying to recruit*

*someone new - I mean it's not an inexpensive exercise going through a recruitment agency. (Partner, North Daeshire firm)*

*This office has a legal help contract and that's £80,000 a year and that work is low level divorce and injunction work done by low level fee earners. And so to do the high quality public law complex children stuff that we do in the firm, which is probably a quarter of a million pounds worth of turnover, we have be audited on the work that's at the bottom. Like an inverted triangle - I've got all my high quality work which is dependent on what's going on at the bottom. Now I don't mind it being judged on what's going up here, anyone can come and look at my files. I don't have a problem with anyone looking at the lower end either. But what I do have a problem with is if there's an unacceptable level of compliance down here at that bottom level, which will be through work done by my cheaper people, then the whole thing goes because you lose your contract, lose your ability to do the certified work without anybody looking at what you're actually doing. (Senior Partner, Carbridge Firm)*

For the NFP sector, probably the most serious distortion was that produced by the exclusion of tribunal representation from scope. For welfare advice services in general, and CABx in particular, tribunal representation was identified as their major role in combating social exclusion, and several respondents expressed incomprehension at its exclusion:

*I mean my biggest thing is about the whole 'access to justice' thing and not being able to claim time for going to tribunals. That is the biggest thing - I think it just makes access to justice a laugh really because when you ask the question, well 'who's going to go to tribunal?' and in our case we are talking about social security tribunals, which are quite formal occasions and are quite terrifying for clients who are questioned by three people in suits, usually, and they find it difficult to speak for themselves and that's why they come to the bureau in the first place, because they are unable to speak for themselves and so therefore being expected to go with a 'friend' in inverted commas to the tribunal, and not need the help of their representative seems ridiculous. And it's the same in the employment tribunal. So that to me is a huge hole in access to justice because it prevents people getting the justice they deserve. We cover it by going to tribunal and covering the hours by whatever way we can so we have a large lot of none-claimable hours because our Caseworker goes to a lot of tribunals with clients.*

#### **4.7.2 Managing the audit process**

The LSC has had, as we noted above, a complex task in attempting to move the advice sector in the direction of greater appreciation of the demands of quality, and the need to manage publicly funded advice and representation work efficiently and responsibly. Audit has fulfilled a dual role in this process. It has been used explicitly as an educational tool, monitoring the use of the Commission's procedures,

processes and instruments in practice, and supporting agencies in adjusting their practices where they fell outside the acceptable range. It has also, however, been used as a disciplinary tool, to rein in and retrieve costs from the recalcitrant. The balancing act between education and discipline is a difficult one: the emphasis in the first process is on partnership, whereas in the second process, the seniority of the Commission in the partnership can be in no doubt.

### 4.7.3 Issues in Contracting and Auditing – Ambiguity and Consistency

As we have noted earlier in the report, a key issue in relation to regulatory burden is the clarity and consistency of regulatory frameworks. The Mandelkern Group (1995) identified simplicity as one of seven ‘common principles’ of regulatory quality, and the OECD, in producing a ten point checklist for regulatory decision making, asked (at No. 8) *‘Is the regulation clear, consistent comprehensive and accessible to users?’* (OECD, 1995). The Hampton Report identified knowledge and understanding of regulation as a significant factor in the likelihood of self-regulated compliance (Hampton, 2005, p. 56). The BRTF’s Report on regulation of the VCS reiterated the five principles of good regulation, which included the following:

- regulators should clearly explain how and why final decisions have been reached;
- regulation should be predictable in order to give stability and certainty to those being regulated;
- regulations should be clear and simple.

(BRTF, 2005, pp. 64-5)

It has been argued that the failure to observe some of these principles accounts for the demoralizing impact of regulation and inspection reported by some VCOs. The respondents in Margaret Bolton’s study identified the problems raised by inconsistencies in inspection teams’ interpretations of audit frameworks and criteria (Bolton, 2003, p. 15). Similarly, the Matrix research into the CLS found that *‘the differing levels of flexibility the regional offices are willing to offer, particularly around managing contracts, have been problematic for national provider organizations’* (Matrix, 2004, p 21). This finding was difficult for us to evaluate, since our research covered only two regional offices, but respondents did comment on issues of consistency **within** offices: changes in the regional directorate, or even the contract manager, could result in shifts over time in interpretation of what was acceptable

practice. Among the examples supplied was the fact that in one region, what was perceived as an ideological opposition to contracting with local authority services ceased with a change of Regional Director, and then reverted back to the original position after a disagreement over some peer review judgements. Another example given was the question of whether contracted staff needed to be ring-fenced (discussed above), or whether contributions to a contract could be made by a number of different staff in dual or multiple funded organizations. Instances were given of cases where the LSC view appeared to change with the contract manager:

*we like to give the same standard of service to all clients so we've not had people ring fenced, we've not had people just doing generalist work, or just specialist work or just contract work or just non contract work. But when you look at the contract, my interpretation is that you identify people who contribute to it and let the Commission know. But this new Account Manager is under the impression that the Commission's expectations through the contract are that people will be ring fenced. But when I read the contract there's no term 'ring fenced' so I don't know where it comes from - apparently it's a Commission term. But this is something that needs to be further discussed with our new Account Manager because it can quite drastically change the culture of our work, the way we operate which would have knock on effects with regard to service delivery and contract delivery and all sorts. (Manager, Weaverton Housing Advice Agency)*

Issues of consistency are exacerbated where the inspecting team fails to adopt the consultative and developmental approach to regulation recommended by a number of commentators (see for example Bolton, 2003, p 23). Conflict between organizational mission and the imperatives of inspection can lead to confusion and loss of morale in the organization being audited or inspected: according to the 'Chittenden' model this is in itself a major regulatory cost, since it interferes with the productivity of individual workers and teams.

However, achieving consistency and clarity can be difficult since the objectives of regulation contain a tension between two polar imperatives. On the one hand the imperative to achieve clarity requires that the process of judgement is standardized and reliable through ever more minute specification of standards and criteria, and that these criteria are applied rigorously no matter what the context. On the other hand it is necessary to avoid a framework for audit judgements which is so rigid as to stifle the capacity for innovation and flexibility which is regarded as one of the strengths of VCOs (see BRTF, 2005, p. 17).

There are therefore a number of features of the LSC's contracting and auditing regime which suggest that it may not always be either clear or consistent. The

features which have been most widely discussed are those relating to the costs arising from contract compliance auditing. Some firms and agencies reported few instances of disagreement with auditors, and where this was the case, tended to attribute this to their own skills in managing the contract and evidencing their claims. By contrast, where there were difficulties and the LSC had disagreed with claims or had initiated cost recovery, respondents tended to attribute this to unreasonableness, either in the construction of the criteria, or in auditors' application of them. Whilst both the criteria for assessing cost and performance are intended to be objective, a detailed case study which we report below indicates the existence of a considerable discretionary element in the process.

#### **4.7.4 'Keephome' Case Study**

This case study follows the introduction of the risk-based approach to audit, where the LSC identified 'problem' agencies by using risk indicators (such as under- or over-performance on a contract or substantial deviation from average time per case or from their own previous profile) and designated 'Quality Profiles'. It demonstrates firstly that not all suppliers were familiar with the significance of the new approach, and what it might mean for their office procedures and for the training of their junior staff; and secondly that the process suggested to the supplier the existence of considerable differences in interpretation between the regional office and the specialist audit team who were sent in from Nottingham.

Keephome is a housing and welfare rights advice service with offices at three sites in the Weaverton Metropolitan District Area. It has been in existence since the 1980s, when it was established with local authority funding. It first became involved with the LSC in 1997 with a pilot franchise. It had chosen to operate its contract with the LSC so as to allow all four of its supervised advisers to contribute to the hours:

This arrangement was only possible because of the dual funding streams: local authority and LSC. The manager took the view that if the LSC funding were to be withdrawn, it would be difficult if not impossible to maintain the advice service, because the LSC only supported eligible work, and the organization needed to maintain a profile of non-eligible work in order to obtain access to that work. At the initial interview, the manager of the K office expressed considerable satisfaction with the contract, the auditing process and the constructive relationship with the LSC which he felt had helped to enhance the agency's work on a range of fronts. These

included improving file management and the information base which in turn helped Keephome develop its social policy and strategic planning role within the local authority by identifying trends and issues emerging from the case data. He also supported the view that organizations' procedures and processes were good proxies for quality.

Keephome was working in such a way as to pre-figure the model of CLACs and CLANs; its innovative approach to providing social welfare law exemplified one of the principal rationales for the involvement of the NFP sector in publicly funded work:

*We work quite closely with what I would call our partners, the CAB, in delivering the umbrella of social welfare law. If it's something we can't deal with we would pass it on, and likewise the expectation would be that they would pass on housing, certainly complex housing and complex welfare, to us. Which they do and it works quite well. Now perhaps it works well because the two agencies are located quite closely. If we had to make a referral to S the client might never get to S because they don't want to go to S, which is a worry. There's nobody who undertakes immigration advice up to specialist level in B, or there wasn't until the Immigration Advice Service tried to do a surgery and advice office there. So we liaised with the \* (Weaverton) Law Centre recognising that people who wanted immigration advice had to travel to \* (Weaverton), which was a bit unfair, so could we try and encourage them to do a surgery in B and if premises were a problem we would make our accommodation available here free of charge, which is what we did and we've got a surgery running from this office.*

Furthermore, the agency appeared enthusiastic about embracing change and accepting the new environment for their work. Experiences of audit with their local LSC office had been positive, and their educational audit had resulted in a verdict that they were highly compliant. The manager was particularly pleased with two aspects of their performance, believing, firstly, that they only claimed for eligible work with clients, allowing the other work to be supported by the local authority funding stream, and, secondly, that they had consistently out-performed their contract whilst many other NFP agencies were under-performing.

In November 2005 the agency was singled out for an audit by the specialist compliance team at Nottingham LSC:

*We did have an audit in November which didn't go as planned, but as a consequence we were issued with a number of non compliances, so there was a recommendation from the Audit Team which came down from the Nottingham Office to actually re-audit in July 06 which was fine, we accepted that and we had to just satisfy that we were no longer non-compliant in these areas. But what's happened is that because it was the office in Nottingham as opposed to previously the office in \* (Boomtown), where we've got caught up is the inconsistencies in the interpretation of the contract specification and the SQM. Whereas we've been doing quite*

*well with previous audits conducted by the team in \* (Boomtown), we've not done near as well with the audit conducted by Nottingham.*

The manager was prepared to accept that staff might have been non-compliant, but felt that the fault lay at least in part in a system that had failed to provide clarity. One example given was a non-compliance covering proof of income, a requirement for demonstrating the client's financial eligibility:

*we were quite categorically told at the audit that you cannot have a 'satisfactory' if you ring up the DWP (Department of Work and Pensions) and get confirmation that a person is on a benefit and get details of the amount and the type of benefit - that is not acceptable as proof of income. But when you read the contract it states that you **can** accept a telephone call to the DWP in lieu of a hard copy, which threw us a bit. Previously we've been actually told by the office in \* (Boomtown) that if you want to speed things up or you're having problems getting a hard copy from your client that you can, in lieu of that, actually get confirmation on the phone.*

There were several other instances where the agency felt that ambiguity and poor guidance from the Boomtown regional office had given rise to non-compliances for which they were being punished. Another example was that of Concluding Matter Codes for cases with more than one problem. The manager argued that it was ironic that they had been picked up as suppliers out of profile because of two of the factors which they were proud of: namely, restricting the amount of LSC time claimed on a dual funded matter, and out-performing their contract. One aspect of the experience which had caused confusion was the refusal of the Boomtown office to accept that any of their advice was in conflict with the Nottingham judgement. The manager described the process as leading to a destruction of the relationship of trust that had been built up:

*I thought it was always a partnership, but you now learn that when there's a slight problem or disagreement it's not really a partnership, you know – 'this is what you have to do and if you don't do it we'll terminate your contract', or 'we'll vary your contract'. You'd have expected a bit more of a partnership exercise to overcome or help us over some of the problems that they've actually identified. It's quite difficult actually, I'd never have believed, you know last year, that they could act in this manner because from my point of view the relationship has been there for 8/9 years, ever since we took up the franchise contract, so you'd have expected better communication, which I perceived we always had until they've identified a slight problem and it's as if they've washed their hands of you to an extent.*

Follow up interviews with other NFP agencies revealed a similar erosion of trust and sense of partnership. It became apparent that the details of Keephome's experience had been recounted throughout the sector in the region, with negative consequences

for the image of the LSC, and also that other agencies were beginning to lose trust as a result of their own experiences.

#### **4.7.5 Ambivalence in the LSC's relationships with the NFP sector**

There was some evidence from our interviews with LSC staff that shifts in policy, and perceptions of the advice field, might indeed, however indirectly, be affecting the degree of severity with which organizations were audited. The tension between the view of the NFP sector as providing added value, and the imperative to achieve VFM, is reflected in this LSC Regional Manager's comments:

*I've come across what I regard as adviser dependency syndrome,; where the adviser does everything they can for the client and says 'do come back next week if there's anything else' – where I think the adviser is almost cleaving to the client rather than being driven by the client's needs or god forbid the 50 other people in the waiting room desperately trying to get in. Then there's the issue of volunteers – how assertively can you supervise a volunteer? there are all sorts of cultural tensions there.*

These comments tend to support the view expressed by some NFP respondents that there had been a change in approach to the sector from the LSC in the two years prior to the research, but that it had not been signalled:

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

#### **4.8 Impact of Audit – Cost compliance and time standards auditing**

Opinions concerning the LSC audit regime varied across the sector. In spite of the examples of ambiguity identified by some of the respondents and commented on above, it is not easy to evaluate whether this variation is the result of the way in which different organizational cultures react to change, or whether it derives from a fundamental inconsistency in the audit process itself. Some agencies felt that the regime could be sensitive to the context in which legal advice was delivered, whilst others felt that the approach could be pedantic and insensitive. The Director of a local authority Welfare Rights Advice Service felt that their audit

*was friendly, it was an educational one.... the things they came up with was stuff that our advisers would have gone to the barricades over. It was things like 'you haven't justified - you've filled in a DLA form for this customer, you know it's a simple form it doesn't require help'. Well, I mean, as far as our adviser is concerned that's bread and butter welfare rights advice work, helping people with forms. Most people need help with forms, most people struggle with forms. It's not something you actually need to justify as being an exception, that's the norm. But they took a different view of that and it would have got very messy if they'd tried to do something, like use the audit findings to actually take some money off us. We wouldn't have been happy with that at all. But they seem to have backed off from that anyway.*

However, few others had this positive view of time standards auditing. Generally the standards were regarded as unrealistic, neglecting many of the time consuming activities which might accompany a task, particularly in organizations which were not resourced with support staff to the same degree as the FP sector. The main criticisms were that:

- the nature of the audit expressed a lack of trust in NFP agencies and a sense that advisers were likely to inflate their claims;
- auditors were inexperienced in many instances, and unfamiliar with the reality of delivering front line advice and as a result could be unrealistic about what could be achieved within a given timescale;
- auditors were searching for non-compliance and hence pedantic and critical; as a result the process of undergoing audit could be demoralising and oppressive;
- audit standards were applied inconsistently: over time (audit during the 2003-4 period was seen as having been more harsh); between regions (some teams were seen as more critical than others, or to be applying specific rules in different ways), and between organizations (some organizations were seen as achieving a privileged status, because they undertook a specialism in short supply).
- the rigid and (perceived) inappropriate application of time standards produced distortions within the sector.

This last criticism exemplifies Power's argument that audit can 'colonise' an organization: some respondents claimed that the LSC cost rules had led them to undertake some tasks simply because they could be claimed for and, correspondingly, to cease doing others because they could not be claimed for. As a result, it was argued, what constituted advice work had changed. Some advisers

also doubted that the LSC appreciated the extent to which quite ordinary clients might be difficult to manage. These doubts sometimes appeared to stem from a failure to understand what could be achieved with careful evidencing of reasons for exceeding time norms. However there were also occasions where advisers' concerns that it would be impossible reasonably to support a claim for the time actually spent appeared well founded. We will briefly explore the reasons for this in the next section.

#### **4.8.1 Departing from the script – 'difficult' clients**

One argument consistently made by both the FP and the NFP sector was that much of the performance and cost compliance auditing was based on a standardized model of transaction with the client, where the 'script' was predictable, and where the client would respond rationally and informatively to the questions that the adviser needed answering in order to progress the matter. Respondents reported however that many of the clients eligible for assisted advice did not or could not conform to this model. This was due to factors ranging from communication difficulties associated with mental health or language problems, through to problems resulting from 'clusters' of social exclusion issues, to the difficulties clients have in reconciling their own case 'story' with the technical shape of the case as it appears to a legal adviser. Many of these factors were identified by Moorhead et al (2001).

We observed one example of a case which was taking far longer to conclude than an outside auditor would have believed possible, as a result of the characteristics of the clients (a very elderly woman and her son who was himself in his 70s). The solicitor provided the following account of the case prior to our observation:

*I have no issue with the fact that the client has been wronged but their instructions are conflicting in that they each give different versions of events and one of the things we are going to be talking about today is the fact that they've already given instructions for a defence which was approved before Christmas but they've now changed their mind as to the content and I saw them a few weeks ago because we received a request through from the other side which was quite extensive. I spent 2 hours with the clients and only got half way through because they were still arguing, so I sent them away to have another look at it, having already given it them in advance of the last interview and it's taken them the best part of 3 weeks to get back to me but they phone me every day with a query, they sort of need their hands held and it's very frustrating because I've given them the papers because I can't tell them the answers.*

The subsequent observation of the interview not only revealed the clients to be even more difficult than the solicitor had suggested, but also established that evidencing the problem would be extremely difficult since it stemmed in part from the way in which they interacted with each other as well as with their solicitor. They constantly interrupted and spoke over each other, were unable to keep to the subject no matter how skilfully steered by their solicitor, and arrived with a carrier bag of both relevant and irrelevant supporting documents which they then 'sorted' in front of her. These were two clients without any of the recognized factors such as learning difficulties, but who exhibited many of the characteristics common to other socially excluded clients: namely, extreme anxiety, poor understanding of the processes of law and administrative justice, and inarticulacy.

#### **4.8.2 Externalizing Risk?**

Some respondents expressed the view that the LSC appeared to be externalizing the risks and costs (and see **Section 4.1.1.4**) resulting from cyclical funding through rigid and unduly strict application of time standards. Consequently, organizations were undertaking some work pro bono. An example was offered by an NFP adviser:

*I personally can touch type and I can probably do a 4 page letter, working from a draft, in less than 30 minute - we rarely get away with claiming 6 minutes per page of that letter. So I'm under claiming by something like 20/30 minutes on a complex letter, but other colleagues with poor typing skills may be under claiming by as much as an hour and a half. Over a period of time, given that our work relies a lot on letter writing, that's an enormous loss*

However it was the failure of the LSC and most other funding agencies to contribute to the cost of reproducing the workforce which most respondents felt was most significant. This issue is discussed in the chapter on training.

#### **4.9 Summary**

In this chapter, we have analysed those elements of the data primarily concerned with the impact of regulation on the delivery of front line services. The findings are complex, and it must be borne in mind that they are shaped by the extent of the changes which the sector was undergoing at the time. This is particularly relevant when considering the impact of innovations such as Quality Profiles: while agencies are accustoming themselves to the demands of meeting these performance targets, they will appear more burdensome than when they have adapted their structures and

practices. However this fact underscores the desirability of enhancing training related to regulatory requirements, an issue to which we return in the subsequent chapter. The converse of this point is that the apparent low profile for some practitioners enjoyed by some regulatory influences (such as the front line regulatory role of the Law Society) may be a function of long familiarity: the standards demanded are so firmly embedded in the cultural life of organizations that their day to day impact becomes almost invisible.

The key aspect of our data appears to be the way in which the apparently weak impact of regulatory devices such as discipline and complaints procedures contrasts with the strong impact of contractualism, and its accompanying mechanisms of audit and inspection. As a means of influencing the behaviour of firms, agencies and the people who work in them, contractualism has a powerful effect and a detailed reach, and has been recognized by actors in both FP and NFP sectors, particularly those in management positions, as beneficial, not simply to the provision which is covered by the terms of the Civil Contract, but also in terms of ratcheting up the general performance of the firm or agency.

However, as is to be expected of such an effective, and intrusive, mechanism, respondents also perceive it as entailing some considerable disbenefits. Some of these are associated with the fact that, although auditing is to a degree considered by the LSC and its contractors to be an educational process, it also has a punitive side, which involves organizations in financial loss (and a sense of humiliation). The conflict between the educational and financial control aspects of audit can lead firms and NFP agencies to feel on the receiving end of conflicting messages about the nature of the partnership in which they are involved. In addition, although the LSC naturally would argue that judgements, both about the awarding of contracts and audit, are objective and consistent, the element of discretion which is necessarily present in many of the processes means that they can therefore be experienced by agencies and firms as erratic and unreliable. Even more damaging was the sense that some of the time standards decisions were pedantic and failed to take into account the nature of complex work with difficult clients in under-resourced agencies.

Many of these points have been acknowledged and acted upon by the LSC and its staff at regional level, with promising initiatives such as the programmes introduced to train contractors in the application of the Civil Contract, discussed further in Chapter Five. Initiatives which build on the educative function of audit and reduce

the sense of its punitive dimension would raise levels of trust and partnership between the LSC and its contractors. As we note consistently throughout this report, there is an inextricable link between processes of training and regulation, and an emphasis on the ameliorative, as opposed to retributive, aspects of regulation is a positive aspect to any system.

Two further findings deserve mention at this point. Firstly, contractual processes have the capacity to affect the internal organization of NFP agencies in unanticipated ways, which may reduce the benefits which the public derive from the contract. If, in the interest of cost control, the activities of advisers supported by the contract are too heavily restricted to purely contracted, face to face work, then the valuable resource that their expertise represents for the agencies and the sector as a whole may be prevented from fulfilling its potential. For instance, ring fencing prevents them from training colleagues and volunteers, and advisers' skills base may erode due to a decline in the opportunities to learn from colleagues or undertake formal training. In the rapidly changing social and policy environment confronting advice agencies, their capacity to function as 'learning organizations' is a crucial aspect of their effectiveness. For this reason, we recommend that Regulatory Impact Assessments (RIAs) are undertaken to evaluate the impact of the LSC contractual terms on contracted organizations with a view to encouraging positive uses of contractualism, and reducing negative impacts.

Secondly, many of our respondents were concerned about the cost of contractual conditions (such as supervision requirements) and audit, and who should bear these. In both sectors, managers argued that LSC work was subsidised: by private client work in the FP sector, and by other funding streams in the NFP sector. Respondents argued that necessary overheads, particularly those associated with staff turnover, training and supervision were not met by the LSC's funding model. We were not able to gather useful evidence to substantiate this point, and suggest that it should form the basis of further research.

In the following chapter we look at the processes which are more generally recognized as constituting training, whilst also continuing to take account of the impact of the contract and informal process on adviser behaviour.

## Chapter Five Issues In The Training Of Legal Advice Workers

### 5.1 Introduction

LSC contracting has resulted in an overlap of roles between the FP and NFP sectors. As discussed above, it also seeks to produce similar levels of VFM and quality by requiring NFP agencies (that is, those parts involved in the contract) to adopt some of the cultural and structural changes effected in publicly funded law firms. The transformation of public sector professional roles, through centralized specification of their primary features and functions, is seen as key to realising these cultural and structural changes. This transformation is, in turn, linked to and supported by radical changes which have taken place in education and training in recent years.

Policy statements on education and training over the past two decades have increasingly linked the maintenance of economic competitiveness with the creation of a 'learning society' (Ball, 1992; Edwards, 1997). This has resulted in the development of National Occupational Standards (NOS) and partnership with employers, shifting the focus of training towards (specialised) outcomes. NOS are designed to assist employers in fulfilling a range of workforce development functions, including the formulation of appropriate recruitment practices and appraisal systems and analysis of training needs. This approach to training uses accredited work based learning<sup>12</sup> deploying a structured reflective practice model (Kolb, 1984; Schon, 1983; Boud & Walker, 1998); student focused and flexible learning strategies aimed at increasing workforce diversity; and an emphasis on pervasive skills and competences.<sup>13</sup> In this climate, the structuring of professional training around an academic, 'fixed menu' (Chalmers et al, 2001) appeared anachronistic<sup>14</sup> and the training literature began to question '*the accepted boundaries of professional roles*' (Richardson & Maynard, 1995).

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12 Described as the linkage of learning to a work role: Cox, 2005, 460; and see Seagraves and Boyd, 1996

13 Following criticism, the concept of competence was modified to recognise both that consistent performance required underpinning theoretical knowledge, and that it is specific to the context in which it takes place.

14 Shifting the focus of training for the professions towards outcomes and pervasive skills was a specific recommendation of the Dearing Report, resulting in the development of National Standards in a range of professions e.g. FENTO standards. The 'Fitness for Practice' curriculum for nurses is illustrative of this model of training (UKCC, 1999); see too Swanwick, 2005 on the links between managerialism and competency frameworks in GP education, and Ayers & Smith, 1998.

Before examining our respondents' views on training, we outline the current systems which pertain in the FP and NFP sectors.

## 5.2 Current Training for Solicitors and Advice Workers

As we noted in Chapter Three, in many cases the NFP training model is congruent with the shift in educational thinking described above, in that it is structured around occupational role, with accreditation sought by mapping the occupationally determined requirements against National Qualification Framework (NQF) level descriptors, and with low or non-existent educational entry barriers (some Citizens' Advice training is offered at NQF Level 2).

However, since solicitors' claim to exclusive rights is based on the 'knowledge mandate' which postulates expertise as the property of individuals rather than systems, their training has traditionally been concerned with the accreditation of individuals who are given a general licence to practise. Consequently, legal education has primarily comprised individualised, 'formal learning'<sup>15</sup> of the broad sweep of doctrinal law rather than occupationally determined competencies and, from entry level onwards, represents a barrier to entry and progression (Abel, 2003, pp 108-11).

On the other hand, a frequent charge has been that law is taught as a vocational subject rather than a liberal art (Twining, 1967), its curriculum shaped by the needs of the profession. As a result, the late 1970s onwards has seen not only various attempts to reform vocational training<sup>16</sup> but also the emergence of a 'skills movement', linked originally to the 'clinical' law movement, stimulated by the Marre Report<sup>17</sup> and welcomed by employers. The emphasis on the need to develop applied legal skills such as drafting and research therefore informed the re-design of

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<sup>15</sup> That is, it takes place in an institution through instruction aimed at producing mental activity (Resnick 1987)

<sup>16</sup> Arguably modernisation of legal education began in 1963 when the Law Society reduced articles to 2 years and streamlined the examination system, followed in 1967 by the Ormerod Committee's investigation of legal education and the access barrier posed by the premium payable for articles. The 1979 Benson Commission resulted in further modernisation: supervised practice replaced articles; the LSF was introduced to relate the vocational stage to work based learning using core materials, case studies and standard forms, and, in 1985, a minimum salary was instituted for articled clerks who, in 1989, became known as trainee solicitors

<sup>17</sup> The Marre Report advocated modernisation of vocational teaching and examining methods and a reduction in substantive law in favour of practical skills, resulting in new Training Regulations in 1990 and the replacement of the LSF by the LPC. This aimed to develop professional skills through work based learning. In 1993 Articles were replaced by a formal training contract and the firms had to be authorised as Training Establishments. Continuing dissatisfaction with legal education led to further and 2 reports (ACLEC, 1996, and ACLEC 1997). Continuing debates about curriculum and access led in 2001 to the Training Framework Review (TFR)

vocational training in HE, from the LSF into the LPC, and the Training Framework Review (TFR) proposals centred on work based learning through, inter alia, personal development plans and portfolio compilation.<sup>18</sup>

The rejection of the TFR's modernising proposals<sup>19</sup> left intact a training regime which was in many ways formal, individualised, doctrinal and inflexible: virtually all solicitors must have completed a qualifying Law degree and an LPC - whose core is the same regardless which sector and specialism the trainee solicitor may wish to practise in - and served a two year training contract (see Chapter 3). The current LPC is therefore largely geared towards general practice, business and property law and the private or corporate client rather than the specialist practices of the legal aid lawyer.<sup>20</sup> Whilst the College of Law has designed the legal aid orientated Public Legal Services Pathway, this is an adaptation of the standard LPC, with new modules, and the TFR proposals may be distinguished from those adopted in other professions in that they did not encompass niche training for the specialist sectors which now characterise the profession.<sup>21</sup> However, since the research for this report was conducted, agreement has been reached on the shape of the reforms to legal training. What will be termed LPC 3 will be characterised by far greater flexibility which appears likely to give scope for more training in areas relevant to legal aid practice.

Our data suggests not only that the original rationale for reviewing legal training remains, but also that the professional role of publicly funded solicitors is now so distinct from that of their corporate colleagues, there is a strong case for aligning their

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18 In its second consultation paper on a new training framework for solicitors (2003), the Law Society suggested that there was no 'evidence that the current scheme was failing in any significant way to achieve its objectives of preparing solicitors for practice' (p 5). Nevertheless, it proposed to move to an outcomes based model, specifying an end-point standard and allowing for different access points and routes through to the qualifying standard, including different patterns and combinations of initial degree, work-based experience and vocational training, and thereby sought to address issues of quality and standards and the balance and flexibility of the current combinations of qualifications and access to a training contract (identified by Abel as the key mechanism for controlling the 'production of producers', thereby restricting the diversification of the profession (2003)).

19 These proposals included the launch of a Diversity Access Scheme in 2003, and the TFR (The Law Society 2005) which, at the time the research was being undertaken, represented the Law Society's latest response to the modernising developments in training described above; its rejection left legal training out of step with other professional approaches. One interviewee suggested that the Law Society had abandoned the attempt to modernise and render more flexible professional training in favour of demonstrating an overriding concern with standards. However the issue has been resolved with the development of LPC3.

20 Dissatisfaction with the generalist provision caused large commercial firms to call for a 'City LPC'

21 It appears clear that the reluctance to abandon common provision is linked to the commitment to an undivided profession; in practice the ongoing polarisation of the profession means that in the words a Law Society Moderator '*legal aid firms now exist in a parallel universe, they are on the fringe, of no concern*'

training more closely to the demands of that role.<sup>22</sup> Today's legal aid lawyer serves a clientele that is generally distinctive both in its nature and problems; moreover, as discussed above, it does this within a strict regulatory framework, subject to tight financial constraints, and generally without the support infrastructure available in the corporate sector.

On the other hand, as an LSC spokesperson pointed out, the main publicly funded specialisms - matrimonial and children law - also make up the bulk of mainstream private client work in High Street firms and many of the skills practitioners need for this sort of work are ones most practitioners should be trained in. He commented that: *'anything that raises the profile of legal aid in a positive sense has to be good, so we welcome courses (like the Public Legal Services Pathway) which make legal aid seem like a good career'*, but said that the LSC would not welcome an LPC specifically designed to train publicly funded practitioners since this would specialise trainees too early in their careers, therefore foreclosing trainees' career options<sup>23</sup> and potentially deterring people from choosing legal aid work<sup>24</sup>: *'we've always been concerned that we didn't want to create a situation where legal aid is different because in fact the main difference is how it's funded'*.

Given the overlap between supervision and training, the following discussion of the data will deal with these topics together. We will report first on the views and experiences of trainee and solicitor respondents, before reporting on the NFP sector. We will conclude the chapter with a discussion of the indications which the data provides for the skills required in publicly funded work, leading into recommendations for the training for publicly funded practitioners.

### **5.3 Solicitors' Training: the LPC**

Most respondents made favourable comments about their LPC; nevertheless there was a consensus that in its current form it did not adequately equip people for publicly funded practice. Respondents gave several (inter-related and reinforcing) reasons for this view, including the absence of training on LSC requirements, poor

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<sup>22</sup> The need to develop a sector-specific training pathway for solicitors and legal executives, grounded in occupational standards which are common to all publicly funded practitioners (including those in the NFP sector) is currently being addressed by the NOS4Advice and Foundation Degree projects; see [www.nos4advice.org.uk](http://www.nos4advice.org.uk)

<sup>23</sup> LSC Press Release 13 May 2004: *The Pathway to become a legal aid solicitor – new LPC and Training Grants*

<sup>24</sup> That this is a real danger is supported by evidence in Williams & Goriely, 2003, pp 7-8; see too Sommerlad, 2001

coverage of publicly funded subject areas and skills, and the deployment of teaching methods which were not always sufficiently interactive or practical.

Whilst negative evaluations may in part result from the ‘performance’ aspect of interviews and the tendency to critique rather than praise, we nevertheless concentrate on this data given its importance for suggesting ways of adapting the LPC to the needs of legal aid practice<sup>25</sup> and since the positive comments were particular rather than general.

### 5.3.1 The theory – practice gap<sup>26</sup>

All trainees stated that the LPC was too theoretical or academic. Some recognised that this was to a degree inevitable without a clinical law element:

*To a certain extent it's always going to be contrived; they're never going to give you a complete nutter, but here we get completely random and awful people in because that's what happens in real life so, regardless of what you do on the LPC, we didn't get in drunk, aggressive or abusive people. (Civil Litigation specialist, Hillchester firm)*

But, as another newly qualified solicitor commented, the result was that ‘*on the LPC you don't know why you're being told all these things, none of it makes sense*’.

Similar criticisms were levelled at the post-LPC PSC.

The comments of a recently qualified lawyer homed in on the disjuncture between the ‘ideal type’ approach which governs both LPC training and the LSC construction of legal practice, in which both lawyer and client follow a script and problems are neatly compartmentalised:

*It feels as if there are boxes they have to tick so they'll say ‘we'll do a client care matter and you can do an interview where you tell the client all about costs’ but in practice you deal with all sorts of queries as they get thrown up, so you can compartmentalise the training but it doesn't happen like that in real life.. (Civil litigation specialist, Hillchester firm)*

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<sup>25</sup> Much of the criticism we report has surfaced elsewhere, including ‘*the relevance and sequencing of the core subjects and the volume and focus of doctrinal coverage*’ (Boon & Webb, 2002), the need for more innovative pedagogy and the weak skills training.

<sup>26</sup> Williams & Goriely found that employers made similar complaints (2003, p 32); the theory- practice gap has provoked concern across a range of vocational training courses, reinforcing the need to shift emphasis to work-based learning (Hughes, 2004, 273)

### 5.3.2 Alternative approaches to developing competence

It was suggested that placements or a clinical law module would solve the weakness identified in the quotations above.<sup>27</sup> Failing this, trainees advocated greater use of case studies; for instance, one suggested that substantive and procedural law should be taught together, through realistic case studies which progressed throughout a module, and which involved more work on skills:

*We did do some things like witness statements and filling in forms, letters to clients and so on .. but it was always very theoretical .. it was 'you've got this form, you do this form'. If we had had a case running throughout a module so it was a vehicle for learning the law as you go along, then the first lecture could introduce the facts and procedure and law relevant to the case study and then it could be like 'someone comes to see you and tells you this, we're going to build it up through the course'. (Trainee Solicitor, Boomtown North Law Centre).*

A commercial trainer endorsed these views: *'the PSC is dry and academic and boring and it needs to be practically situated in experiences drawn from real life'*; he went on to suggest that it should also be moulded by the work based competency approach: *'it should limit itself to maybe the 6 key functions people actually use ..'*

Another recently qualified solicitor argued that both the PSC and LPC should have included more practical advice and exercises which encouraged the sort of 'thinking on the spot' commonly involved in advocacy. The comments of a trainee on the PSC supports the view that a well designed advocacy course could help with this problem: *'there was a mock judge .. he would ask questions, they had no answers for him ..'* (Assistant Solicitor, Weaverston firm).

A second complaint concerned the extensive coverage of business and private client law.<sup>28</sup> for instance: *'the largest part was business and company law so if you don't want to go into that, a lot of the course is useless..'*; (Solicitor, Boomtown North Law Centre) and: *'there was too much business law, I really resented all the time we had to spend on that'* (Housing Specialist, Boomtown firm).

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<sup>27</sup> The College of Law's Public Legal Services Pathway LPC offers the opportunity to participate in the College's legal advice clinic and pro bono activities, and also includes 'legal aid 'master classes' by experienced practitioners' ( LSC 2005)

<sup>28</sup> The concern that the compulsory core of the LPC is over-prescribed is noted by Boon & Webb (2002); it comprises the following compulsory subjects and skills: Business Law & Practice; Civil & Criminal Litigation; Property Law & Practice; Advocacy, Practical Legal Research, Legal Writing and Drafting; Interviewing & Advising; the pervasive areas are: Accounts; Professional Conduct and Financial Services and Markets and Probate & Administration of Estates. The Business Law and Practice component has been increased to twice the weighting it was initially given.

The comments of others suggested that this focus could be interpreted as a devaluation by the profession of legal aid law;<sup>29</sup> the remarks of one respondent points to the disjuncture in ethos between the two sectors, and irritation at what she perceived as an attempt to persuade students of the superiority of the commercial sector: *'they got someone in to talk us round – some practitioner from a commercial firm and he said things like 'I do contract work with a big firm and make loads of money and have a nice wife' – I think he was implying he had a sexy life ..'*. (Housing Specialist, Boomtown firm). For others, their resentment was accentuated by the high fees (and hence the large debts they were accumulating) for a course which was in part irrelevant to the work they would be doing in an increasingly poorly remunerated sector.

Unsurprisingly, students expressed equal concern about the corresponding neglect of both the substantive and procedural elements of certain publicly funded law specialisms. A trainee with a Law Centre argued for the vital importance of specialist knowledge (and of course this has long been the view of the LSC too) but claimed that he had: *'had to learn a lot of the law myself, on my own'*. (Trainee Solicitor, Boomtown Law Centre). He went on to link this problem to the current structure of the post graduate route into law (either PgDip or CPE) which, as short courses, are unable to offer subjects beyond the core; as a result, he could not fully benefit from those legal aid specialisms which the LPC does offer:

*I hadn't studied the modules that we did on the LPC before, like Family, Employment and Housing because I'd done the PgDip, and if you haven't studied employment law for example, there's no point in telling you the practice of it if you don't know the theory behind it.* (Trainee Solicitor, Boomtown Law Centre).

Insufficient training in the procedural law of legal aid specialisms was repeatedly identified as a particular weakness. The need for some training in time management was also mentioned and the trainee just quoted linked this with legal knowledge,

*because it's about knowing within the first 15 minutes of an interview whether you can help the person in front of you. Knowing which form to fill in, if, for instance, you want to make an application to court to suspend a warrant. I'd never even heard of that in the Housing Law module – there was lots of theory but in practice there's never an argument in court over whether an order for possession can be granted .. in practice you're negotiating beforehand.* (Trainee Solicitor, Boomtown Law Centre).

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<sup>29</sup> Respondents to Williams & Goriely study also expressed this view (2003, p p4-5)

Employers/ partners were divided over the LPC content, and in particular the focus on skills. One Managing Partner argued that the profession was ‘*dumbing down - we seem to get applications for jobs from people with the most extraordinarily low qualifications*’ (Senior Partner and Head of Family Department, Chapelvale firm). In his subsequent argument he reflects on the paradigm shift that has occurred throughout the profession (making a competency training model increasingly logical), so that the current norm is solicitor as specialist employee rather than independent generalist:

*The profession probably is becoming more skills than knowledge based - I think that is reflected in the changes we've already seen on the LPC ..I've certainly noticed with new trainees that their levels of knowledge are not as broad as they might have been at the time I qualified<sup>30</sup> and maybe the answer is they honestly don't need to be ..but I think (the breadth of knowledge) does make me a better solicitor because you have a much wider perspective on legal problems than someone who is just a specialist in one area.*

To a great extent people's views on this issue appeared to turn on whether they were continuing to try to offer a generalist service;<sup>31</sup> the comments of some echoed the perspective of the respondent just cited and argued further that training which provided breadth of knowledge was a pre-requisite of the LSC objective of providing a seamless web and holistic service.<sup>32</sup> Another senior partner said ‘*we don't want to specialise trainees in narrow areas because we're not that sort of firm and so, in effect, we're funding somebody else's future fee-earner*’ (Carbridge firm).

However the (female) Training Principal in another High Street general practice had a completely different perspective on the benefits of skills versus knowledge, which questioned the traditional approach both to training and quality:

*What makes a good solicitor? Some intelligence, down to earth, good social skills, able to talk to clients, organised. It wouldn't be a bad thing if legal training was more about skills, but whilst the profession's still riddled with the old boy network, Oxbridge sort of attitude that's not likely; here we've got a really good paralegal and then we've had a really bad solicitor who's also a Deputy District Judge - I mean I went to LSE but does that make me a better lawyer? we need to look at our legal training ..* (Employment specialist and training partner, Chapelvale firm)

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<sup>30</sup> Boon & Webb noted that this concern has commonly been expressed (2002)

<sup>31</sup> Whether a firm was continuing to try to function as a generalist practice tended to relate to its location; thus in our sample it was those firms located in smaller provincial towns that were generally able to do this.

<sup>32</sup> Specialisation has of course been central to the reform of legal aid; on the other hand, it is arguable that the emphasis on holistic service introduces some ambivalence into the policy.

Trainees and junior solicitors also thought there had been too little training in skills, especially in those associated with legal aid specialisms. The relative neglect of advocacy was a particular complaint (and was reiterated by some advisers in the NFP sector); the following comments were typical: *'we only did one practical in advocacy and in a High Street firm that's the main part of your work; in practice the job's probably 85% advocacy'*; (trainee in Family seat, Chapelvale firm) and, *'the advocacy on the LPC was rubbish'*; (Trainee, Weaverston general practice).

One trainee was doing a Mental Health seat which had involved him in representing patients in tribunals within three weeks of starting his training contract, he said: *'top of the priority would be advocacy .. it can be intimidating .. there are questions .. which in the initial stages I wouldn't have asked (of the doctors)'*. (Mental health trainee, Boomtown firm).

The need for confidence was emphasised by many. Others also realised that: *'showing you're confident is an essential skill'*, and it was suggested that this in turn entailed some knowledge of *'the right body language'*. Another spoke of needing to learn: *'the official language of the court .. I spent a lot of time preparing my language'* (Civil litigation, Castleton firm). These dimensions to learning to be a successful advocate are brought together in the observations of a one recently qualified (female) Housing solicitor:

*I needed to become more authoritative ..you have to convey that at court hearings, so you sort of march down there, you know - very brisk, busy important person walk .. it's all about body language, tone of voice and conveying confidence.*<sup>33</sup> (Assistant housing solicitor, housing, Boomtown firm).

Respondents also tended to complain about the quality of training in interviewing skills. One respondent who had worked as an adviser in the NFP sector for years, commended the training she had received there and said:

*I know that some people feel very daunted when they start here as trainee solicitors about seeing clients – so the LPC should have far more training in that and in client skills generally – on talking to them and taking instructions.* (Housing Partner and supervisor, Boomtown firm)

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<sup>33</sup> A medical educator has expressed this point thus: *'the task of the newcomer is not to learn from talk, but to learn to talk .. and walk the walk – taking up the professional behaviours .. are important staging posts on the road to full participation'*. (Swanwick, 2005, p 863)

Others argued that they needed preparation tailored to interviewing legal aid clients, who might have learning difficulties or for whom English might not be their first language, or who could be experiencing extreme stress.

### 5.3.3 Specialist Training

The above observations suggest a need for specialist training in the sensitive and distressing issues, such as domestic violence, child abuse, drug and alcohol problems, associated with social welfare and family law, of which trainees may have little knowledge and/ or personal experience.<sup>34</sup> One trainee said:

*The one thing we did have at S\* that was really useful was, I did Family Law as an elective and we had the representative from S\* Police who came in to talk us about domestic violence and her talking to us about how she dealt with victims and liaising with victim support was really useful because it's a different aspect and different people.*

At the same time, there was general agreement that the understanding that such knowledge would develop needed to be balanced by training in how to maintain some detachment. For instance all junior fee-earners working in Family Law spoke of their lack of preparedness for the emotional and often disturbing nature of some of their work: *'it would be useful .. because I get upset when someone else is upset ..'* and *'you need to be warned about the need to disassociate'*; and: *'when I first started I used to take a lot of stuff home with me because I was shadowing partners who did a lot of child abuse [cases]'*. (Family solicitor, Castleton firm).

This point is further illustrated by the comments of a newly qualified solicitor who specialised in domestic violence: *'you've got to be careful that you're not too cold, too clinical .. it's a balance'*, and an experienced Family paralegal stressed the need to learn *'to be able to cope with pressure, get on with your clients and strike a balance between being sympathetic but not being rail-roaded and letting them run the case'*<sup>35</sup> (Family paralegal, Chapelvale firm).

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34 The importance of some specific training in the problems associated with social deprivation is supported by the following research studies: Sommerlad & Wall (1995), and Stein (2004). A Consumers' Association survey of 4 groups found that private practice solicitors were viewed as *'.. having little in common with most disadvantaged clients'*, and as *'just going through the motions'*. By contrast, NFP advisers were viewed *'extremely positively'*, as *'street-wise'*, empathetic and having a *'clear knowledge and understanding of the respondents' communities and specific needs'* (McAteer 2000)

35 The complexity of this aspect of the role is acknowledged in the College of Law Public Legal Services Route: *'a sense of balance – many publicly funded clients are undergoing acutely stressful experiences. You must guide them effectively but without taking their anguish upon yourself'* <http://www.colleg-of-law.co.uk> Legal Aid Firms – Publicly Funded Work, p 2

### 5.3.4 Communication in plain English

Some respondents advocated training in expressing complex ideas in plain English.<sup>36</sup> This longstanding concern with legal training (for instance NCC 1989) is addressed in current LPC teaching, however, there is no focus on the specific needs which many publicly funded clients may have,<sup>37</sup> as described by a commercial trainer and consultant:

*I've only seen one firm with excellent files ..the best client care I've ever seen is work he does communicating complex legal issues to 11, 12 year old kids – and that's fundamental to good communication. I'd say a basic peer review training point is that you should write most of your letters to clients as if you were writing them to a 12 year old child – that's probably the average reading age of the population – especially the average legal aid client and especially when you are trying to convey something complex like a legal point .. when you start talking about decree absolute and decree nisi you've lost them – they may well act as if they understand .. but it's gone.*

### 5.3.5 Administrative skills

Several respondents argued for training in

*case management – simple things like sorting your correspondence and keeping correspondence between you and the client separate from correspondence with, say, the landlord. Cases tend to balloon so it's getting a sense of the different boxes so you can maintain some order under pressure.*<sup>38</sup> (Trainee solicitor, Boomtown North Law Centre).

A complaint that '*there was nothing to help you with, say, file management or anything to do with any of the things you have to do when doing publicly funded work*' (Housing Solicitor, Boomtown firm) suggests that it would be useful to train in a methodology of file and case management that corresponds to the audit of LSC forms.

### 5.3.6 Training in Legal Aid codes and procedures

As discussed in the previous chapter, the need to be able to work under pressure is accentuated by the inclusion in legal aid practice of a great deal of (unremunerated)

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<sup>36</sup> Boon & Webb's responses included a concern with the need for 'plain English' drafting (2002)

<sup>37</sup> See Webb et al (2005) pp 28-57; however this text does not address the needs of poorly educated clients.

<sup>38</sup> Again, the especial importance of this is acknowledged in the Public Legal Services Pathway developed by the College of Law; for example skills required include '*Personal Organisation – you will be constantly required to work on several issues at any one time*' <http://www.colleg-of-law.co.uk> *Legal Aid Firms – Publicly Funded Work*, p 2

administrative work which must be done both accurately and yet as quickly as possible. The comments of a recently qualified solicitor points up the vital importance of knowing how to do this work:

*As a trainee, an assistant, you end up doing the legal aid because the solicitor fee earner wouldn't be bothered filling in all the forms – you would just take the file and fill in the forms and do the statement out of the fee earner's notes justifying the application for funding. I found it very difficult when I started and didn't appreciate that if you get a legal aid application rejected you get a black mark against the franchisee; when I was at \* I used to get quite a few rejected because I hadn't dealt with something - for instance in an ancillary relief case if you don't say an asset is the subject matter of a dispute then it's treated as an asset .. it was the LSC that picked it up. (Assistant solicitor, civil litigation, Hillchester).*

Others echoed this complaint: *'there's nothing on the LPC to prepare you for legal aid work and in my training contract it was very much 'you learn on the job'; and, 'we should have done much more on the Legal Aid forms, your application to incur disbursements and things like that – your application for legal aid – we didn't do any of that'.* The commercial consultant and trainer cited above argued that this preparation could take the form of training for file review, starting off with

*basic understanding of SQM – because you can't go through a file and say you've met all the client care requirements if you don't understand for instance precisely what's required with regard to cost advice e.g. when you have to give it and how often you need to update that advice; you've also got to understand the general civil contract under which you work .. for instance about assessment of means .. and then you've got to be conversant with file management procedures .as per LSC requirements ..*

The difficulties this training deficit caused for individual trainees and newly qualified solicitors, their firms and the efficient operation of the contract have been recognised and as a result, towards the end of the research, regional LSCs had begun to run short courses designed to familiarize contractors with standard procedures.

However the LSC opposition to a dedicated legal aid LPC on the grounds that it would make legal aid too unattractive a career option, apparently extends to training in legal aid procedures on the LPC. It was argued that this should instead be done by firms, during the Training Contract; however, our data (see below) suggests that many employers are too stretched to give adequate training and supervision.

Finally, a common complaint was the intensity of the LPC. The following views are typical: *'Everything in one year - you're doing it under too much pressure.'* The work

overload<sup>39</sup> was linked back to the fact that the course focused on subjects which were not part of the legal aid practice.

## 5.4 Training Contract and Supervision

Since the training contract and supervision are both forms of work based learning, and their governance overlaps, we will discuss them together.

### 5.4.1 The Law Society Regulation of the Training Contract

The Law Society (Education and Training Unit, 2005) stipulates that firms can only take trainees if they are authorised as training establishments. This requires them to have a Training Principal who *'agrees to take overall responsibility for training'* (Law Society, 2005, p. 3). It further requires that the trainee be given specific induction, close supervision with experienced staff and assessment procedures that include regular feedback and formal appraisal.

The regulations require the trainee to be *'guided and tutored in professional conduct, ethics and client care'*; *'the level and complexity of their work to be increased gradually; and supervised properly and their performance reviewed and appraised regularly'* (Law Society, 2005, p. 9). The components of the various skills in which trainees should be trained and the activities which will enable them to acquire these are then broken down and the regulations stipulate that *'to develop these skills, trainees should work on larger cases or transactions as members of a team, or be given smaller transactions to run themselves, under close supervision'* (Law Society, 2005, p 10). Similar breakdowns are set out for client care and practice support, communication skills, dispute resolution, drafting, interviewing and advising, legal research, and negotiation, again with an explicit emphasis on the need for gradual introductions to each area and skill and close supervision.

Many of the training requirements are reiterated in the section on supervising trainees; for instance, supervisors' responsibilities include allocating *'work and tasks of an appropriate level, gradually increasing the level and the complexity of the work over time'*; monitoring *'the trainee's workload to ensure they have a sufficient but not*

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39 Providers have expressed dissatisfaction with the 'overloaded curriculum' and concern that it inhibits *'deep learning'* (Boon and Webb, 2002); *'the LPC struggles to meet in 9 months the divergent practical concerns that the modern solicitors' profession encompasses'* (UKCLE: 2005, p 1)

*excessive amount of work', 'review(ing) the training contract record regularly to ensure that an appropriate balance of work and skills is struck' and giving 'regular feedback to trainees regarding their performance' (Law Society, 2005, p.16).*

The regulation carries weak enforcement mechanisms, however. Echoing the account quoted in the previous chapter of the extremely light touch inspections conducted by the Law Society generally, monitoring of the training contract consists of questionnaires to be completed by training principals and trainees, following which the '*Society might ..select the organisation for a monitoring visit*' (p. 19; our emphasis). The evidence from our respondents, both trainees, newly qualified solicitors and more senior fee earners, suggests that in some firms there is a wide gulf between these requirements and actual practice. According to one respondent, a Law Society Quality Monitoring Assessor,

*There does need to be regulation to ensure there is proper training and supervision and that's a problem for High Street and Legal Aid firms because they are very stretched. In fact you wonder how some of them can really train / supervise people properly at all because that obviously takes fee earning money and at the same time the trainee has got to do enough to earn their wage. When you think that the big firms say that it costs them around £100,000 to train a trainee then how can these smaller firms do it properly?*

In Chapters 3 and 4, we identified the way in which regulation – in particular audit - represent a form of training which is effectively competence based. In terms of requirements to supervise less experienced staff, the SQM Guidance specifies, *inter alia*, that cases be allocated to ensure that both in volume and complexity they correspond to practitioners' competence. The provision of 'effective' systems of supervision including '*induction, training, testing, file review and appraisal records*', and '*regular supervisory sessions to discuss new cases taken, progress in existing cases, tactics, options, use of undertakings, and content of complex case plans where necessary, outcomes of cases completed since the last session and training needs and professional development*' (LSC, 2002). This therefore provides some indirect control. Firms are also required to conduct regular appraisals at which training needs must be identified.

Despite this regulation, workplace legal education is not governed by rigorous QA processes. As is revealed by the data discussed below, this lack means there is currently no mechanism for ensuring comparability of the trainee experience.

#### 5.4.2 Compliant or ‘sink or swim’ training?

The accounts of their training contract and subsequent work experience provided by trainees and newly qualified solicitors revealed two broad approaches to training and supervision. Sometimes both approaches were to be found within the same firm, in different departments, but generally one was relied upon at the expense of the other, corresponding to the culture and resources of the firm. Respondents described these two approaches as, on the one hand, the ‘*sink or swim*’ / ‘*in the deep end*’ approach and, on the other, an approach which largely corresponded to the Law Society and LSC requirements in that it involved matching competence and experience to the volume and complexity of casework, and a structured, gradualist introduction to practice, generally through shadowing and delegation of (initially) small tasks on a file, building up to a caseload. These polar approaches represent the extremes of a spectrum of processes which have been identified as together comprising the deep learning of a professional role. That is to say, at one end, repeated exposure to a range of practice settings which can involve formal, informal and ‘incidental’ learning,<sup>40</sup> and, at the other, a structured approach offering support, feedback and formal training.<sup>41</sup> In theory, both approaches continue to incorporate the traditional apprenticeship model whereby learning is achieved through modelling, as the trainee observes the behaviours of her Principal or supervisor and other experienced practitioners, and reproduces these behaviours (Bandura, 1977).

Low remuneration levels clearly provide a strong economic incentive to use trainees in order to obtain a return on investment.<sup>42</sup> Many firms said that trainees were an absolute cost to the firm, even in the latter stages of training, because of the opportunity costs incurred by fee earners involved in their training. As a result, as one Training Principal admitted, ‘*the needs of the firm (can) override (trainees’ needs and preferences)*’ and ‘*trainees could get ‘stuck in a department which needed them for far longer than originally planned*’. (Employment specialist and supervisor, Chapelvale firm). However, although much of our data recounts this form of training,

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40 Formal learning is that which results from instruction, generally as an individual, cognitive process; informal learning is ‘characteristically collaborative .. leading to context specific forms of knowledge and skills .. incidental learning .. or implicit learning (is) a descriptor for the acquisition of knowledge independently of any conscious strategy on the part of either the trainer or trainee’ (Swanwick, 2005, p 860, and see Marsick & Watkins 1990)

41 See for example Dreyfus & Dreyfus 1986; Ericsson et al 1993; Argyris, 1982.

42 Rolfe & Anderson’s (2002) study found that some recruiters thought ‘*trainees were a cost-effective staffing solution because they could often do the work of a newly qualified solicitor while being paid a lower salary*’ (p 11) and expected them ‘*to cover their costs soon after starting the training contract*’ (p 93)

respondents' accounts indicated a variety of experiences, in the sense of the extent to which the sink or swim method was used and the stage at which it was introduced; some trainees in firms which strictly observed LSC rules tended to enjoy closer supervision in the publicly funded departments than in, for instance, conveyancing: *'Family was better because that was a lot of publicly funded work so they had audits, so by the nature of the department they were generally more compliant anyway'*. (Civil Litigation and Family Assistant Solicitor, Hillchester).

It must be stressed that many employers attempted to combine the 'sink or swim' approach with some system and structure and that two firms in particular were rigorous about adopting a gradualist, well supervised form of training, and were commended by the trainees and junior fee earners for their training and supervision.

### **5.4.3 Sink or Swim: the employers' view**

It appeared that to some extent the sink or swim approach correlated with the resources of the firm or organization, and within firms, the specific department. Clearly the more stretched the organization, the greater the incentive to set the trainee to work on fee-earning business. However this approach may also be a product of 'cultural lag'. The idea that 'articles' should follow a planned, formal training structure is relatively recent, and the bureaucracy which has resulted from the Law Society Requirements appears to be resented by some older senior partners. By contrast, the traditional apprenticeship method entails the trainee learning by direct or remote observation in combination with 'doing': as one senior partner put it: *'the actual practical training then was deficient because it was quite autocratic - very little monitoring; nobody taught me'*. (Senior Partner, mental health specialist and supervisor, Boomtown firm).

Nevertheless, asked to describe **his** training regime, this partner (a Mental Health specialist from a Category 1 firm) said the ideal was to *'just ease people in, but the practice is totally different'*. Asked to elaborate, he said: *'well I'm terrible really - I mean in some respects I'm a bit of the sink or swim school - I'm afraid the theory is fabulous, but ...'*

He went on to justify his traditional approach by reference to the low level of legal aid fees: *'it's £57.25 an hour, it's ridiculous, an insult'*.

Other solicitors with some years' PQE saw positive advantages in the sink or swim method; for instance:

*My personal experience was that I arrived at the firm and within days had my own caseload and off I went and I just thought that was the way it was and I'm grateful for it in some ways because I was in court doing trials within a couple of weeks of joining the firm .. that's what got me into advocacy – being thrown into the deep end ..if you do (the training) in a formal way you're going to get the sort of lawyer who's different to the sort of lawyer who is produced if they don't have a great deal of back up and support. (Children Act specialist, rural sole practice, North Daeshire).*

His subsequent comments indicate that he was unhappy about the dependency which, in common with several of the other older solicitors, he considered greater support tended to produce. His account indicates how the disjuncture between the expectations of his generation and those of today's lawyers, revealed in trainees' and junior solicitors' accounts, may cause tension:

*I did find that if they ran into the slightest bit of difficulty their response was, 'will you do it?' So I got myself into the position where I had all the difficult clients, all the difficult cases and all the hassle of supervision. I expected that assistant solicitors would have been trained already and so they would need someone to talk through cases with that were difficult and I was happy to do that, and I've always been very keen on books, so I always had a very good library, access to Lexis through the internet. But his attitude was so different to the attitude that I'd expected of a trainee that it was very difficult – for example going to court on a first occasion - I mean you can never predict what's going to happen in even the simplest of court hearings, but I will take a very simple application for someone to go along to as their first occasion, such as an adjournment or something of that nature .. and that would be weeks in advance, after they'd been a couple of months with me. So when even the simplest of applications goes wrong - the judge had asked them a question and they hadn't felt able to answer it and so the response was 'it's not my file I don't know anything about it' – and of course that's no good - and there was no attempt made to telephone me from the court. But when we discussed it afterwards, the attitude was 'well I wasn't trained to do this – you didn't tell me that that might happen!' (Senior Partner, North Daeshire firm).*

The consequences of the difficulty in achieving the right balance between experiential learning and support were accentuated for this partner by the regulation associated with legal aid and resource issues:

*I was therefore reluctant to give them any work that was part of the legal aid contract for fear that they wouldn't have their files kept in a way the LSC expected. So I could only give them a couple of files; it took too much supervision because I couldn't rely on them to correctly copy the date of a marriage from a marriage certificate and put it in a divorce petition – it was that kind of lack of care – because the attitude was 'well I'm only earning £15000 p/a and I'm here to get a training contract'.*

#### 5.4.4 Reluctance to give training contracts

As a result of the factors discussed above, and because of the generally tight finances of legal aid firms or of the publicly funded departments within firms, we found that some practitioners, like the partner last cited, were increasingly disinclined to take trainees, or at least trainees to do publicly funded work,<sup>43</sup> especially in view of the potentially disastrous consequences which could flow from mistakes in this work. The following comments by another Family lawyer on the difficulties in recruiting in rural areas also points up the interconnections between the need to supervise closely (and consequent cost) and other disincentives:

*It's a huge hassle to try and take someone on; for example when we were doing legal aid in some volume, recruiting someone would take a long time using an agency, for someone to be found; then there would be a shortlist of one; then often when the LSC did their audit, they'd find a problem with them and it was just a nightmare really... supervising assistant solicitors was taking up my valuable fee earning time in respect of my private clients, and every time the LSC came in the auditors would find great fault with somebody and in some cases that led to them being dismissed. (High Street Firm, North Daleshire)*

Other employers also complained about the cost of trainees, both direct and indirect, for instance:

*You've got to pay them ridiculous sums, and their attitude, they all think they're worth every penny (they cost us) a fortune; we pay them £12-15 grand then there's national insurance and so on, and course fees and things like that, and then there's our time, even if they only come in for 15 minutes a day .. (Mental Health specialist, Boomtown firm)*

Another reason commonly put forward for not giving training contracts, which connected to the cost of training trainees, was that trainees tended to leave once they were qualified. and as a result of this, one partner said: *'I have a subconscious preference for local people .. because they're committed to the local community'*. This (commonly expressed) attitude was grounded in experience of the effects of the increasingly sharp segmentation of the profession: *'they're here just for the ride for 2 years, to suck out their trainee payments for and then go and get a job at \* Commercial Lawyers in \* (Boomtown)'* (Criminal Specialist, Chapelvale).

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<sup>43</sup> See Williams & Goriely, 2003. It appears however that the LSC Training Contract Grants 2004 Scheme is, to some extent, countering firms' reluctance; it was noticeable that several of the firms / agencies in our sample that had trainees under this scheme.

#### 5.4.5 Sink or swim: the trainees' perspective

The ambivalence in the evaluations by trainees and recently qualified solicitors of the sink or swim approach to training illustrates the vital importance of experiential learning. Most of those who were qualified or nearing the end of their training, considered the approach to be of some value. A common comment was that it had been a steep (and effective) learning curve. The following account suggests the value of incidental learning:

*The most useful thing I found in the training - and I was scared at the time - was when you had to cover people coming into reception with queries and no one else wants to deal with them so they send the trainee and you don't know what to expect and you have to deal with people there and obviously you don't always know the answer and when you're a trainee you're not confident enough to say you know the answer even if you suspect you're right, so it's good skill development in being able to deal with people and say 'well look I don't know the answer straightaway' and just in dealing with more people. (Civil litigation specialist, Hillchester firm)*

However it was generally the survivors of this approach who gave it a qualified endorsement; as one newly qualified solicitor commented: 'you've got to be careful with this sink or swim idea that people have with training – it's not always the best way. It depends on your nature; a lot of people won't be able to deal with the stress'.

On the other hand some junior fee earners found that a **lack** of hands on work undermined their confidence. Most Family departments appeared to be especially reluctant to give trainees responsibility, partly because of the extreme pressure they were under and also because of the potential damage errors could cause. The following account depicts a department which appears to be the antithesis of a learning organisation: <sup>44</sup>

*It was an absolute nightmare in Family, where I started. They don't want to give you a caseload until they think you can do something but then when I asked the Training Principal if I could sit in, she said 'well I think that's for a bit further down the line' and I thought 'well what on earth am I supposed to do at the bottom – do I carry on making tea because I've got nothing else to do?' and I wasn't even downstairs in the Department, I was upstairs sharing a room with a legal exec, miles away from them and I had to keep going upstairs and downstairs, so they put me in a room with the Managing Partner who for years has been incredibly stressed .. and they were too busy to train me .. if you tried to talk to the Training Partner about a case it was very hard to get her to go through it with you, and that's what you need and it sort of led to a complete loss of*

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<sup>44</sup> A learning organization has a culture which encourages staff to feel secure in their role and status and space and time for continuing support and education; see for instance Billett, 1999

*confidence where I was absolutely crap at doing anything.. (Housing specialist, Boomtown firm)*

This trainee was then moved to Housing where, although an equally busy department, she was given both more responsibility and more supervision.

Other respondents also recognised that some skills and forms of knowledge can only be acquired by repeated 'doing'; another trainee said that in some ways he liked the huge amount of responsibility he'd been given from the word go '*because I feel I've achieved something when I do it*'. He went on, however, to qualify this endorsement, saying that in other ways it was too much because '*if I **can't** do something the consequences of it are so very serious*'. This support for the need to balance experiential learning with formal guidance, by, for instance, ensuring that there is the incremental and synchronised approach to training across the firm required by the Law Society is also illustrated in the following account by a Training Principal:

*We got to a point in the year when (name trainee) hadn't done any negotiation or advocacy skills so I had to go and talk to the person (in the Family department) and they went 'ooh he's not ready for that' and I said 'well last time he was in employment he did that. In fact he ran a whole case and settled it'. Because you've got to encourage people, make sure they do things; they weren't sure about letting him out of their sight, let alone out of the building to go and represent people.*

The importance of local or contextual knowledge also surfaced repeatedly in people's accounts; for instance '*you need to know the Judges and their idiosyncrasies*'.

On the other hand the sink or swim experience of a trainee in one NFP organisation was clearly not calibrated to his level of expertise; he thought that if he had not had some previous experience of interviewing from working in a Job Centre, he would have found it very difficult to cope. Interviewed in his fourth week into the training contract, he gave the following account:

*The whole thing's been a bit hectic to be honest; what I expected to be a few days of not so much settling in as being told what my role was going to be and also sitting in with \* seeing how cases are dealt with in practice .. it was pretty much straight in the deep end. There was a case which hadn't been dealt with, an employment case. So there was the case file to be managed .. there was a lot of it .. all the documents had to be sorted .. it was a real mess and it needed the witnesses to come forward, so \* said to do that and we also had to prepare a brief for Counsel and negotiate a settlement; I don't think I'd really learned anything about case management on the LPC .. dealing with the witnesses and the client to make the statement was tricky .. they asked lots of questions .. it was quite nerve wracking .. it was just 'such and such is coming in, find out*

*what he knows'. I'd seen the file on the afternoon of the first day and this was the next morning.. . (Trainee Solicitor, Boomtown North Law Centre)*

The account by a Housing paralegal of her supervision (in a Category 1 Boomtown firm) was similarly troubled; her motivation for coming to the firm was rooted in 'the master as role model' form of learning: *'I came here (from a CAB) to work with \* (name solicitor) as he's one of the best solicitors dealing with housing in \*.'* But this traditional apprenticeship form of learning failed because: *'he had no time to supervise me .. I got a whole bunch of cases . .and I'd inch them along not having that overview of what was going on .. I got an incredible case load – about 200'*. The situation ended in a crisis when it was found that she was *'missing legal issues'* as a result of which all her cases were taken from her and she was just delegated work on her supervisor's cases. Despite these problems, she received no formal training: *'I've only done 3 training courses in the whole time (7 years) I've been here'*, and, unsurprisingly, she continued to

*feel scared .. because the work has huge consequences and the system that's supposed to be in place isn't really .. the reality is that if someone comes in and it's a question of an imminent eviction then I have to draw up the application for an injunction.*

Her subsequent difficulties highlight the weakness of NFP training in the law and its application, and underlines the importance of both ensuring the match between competence and complexity of work, and tailoring supervision to individual needs:

*The thing is, without legal training you can't always look things up easily. I need help interpreting it and putting that interpretation onto the client's situation, applying it; I mean 'I know what it says on the page, but what do I do? My worst ever nightmare was \* (name supervisor) being on holiday and just before he went we got this couple facing possession proceedings with anti-social behaviour and there being an injunction against the partner and he was in prison and \* (supervisor) says 'go to prison, get him to sign the legal aid forms for possession proceedings and to purge his contempt; get her in and get her instructions too'. So I did all that and then it became apparent that the guy had incredibly severe mental health problems and shouldn't have been in prison and his health was deteriorating and I waited for \* to come back from his holiday, and while I waited this guy, when I next went to see him, he's got a bandage over his eye, the guards were 'poisoning' his food .. it's all getting totally out of control, I don't know what I'm doing .. I didn't know how to set about doing an application for somebody to purge their contempt – the sheer practicalities. I went to see my client and then asked to see the Governor to get him to sign his bit and he actually came down and said 'what are you doing? Why are you doing this if you don't know?' That was awful for me. It was 2 years ago but I've never forgotten; knowing that if he'd been in the hands of a competent solicitor he would have been out of there in 2 days.*

She subsequently left this firm and returned to the NFP sector.

#### 5.4.6 'Open Door'

This form of training which, in combination with checks on incoming and outgoing mail, underpins the traditional apprenticeship system, depends on the accessibility of the 'master';<sup>45</sup> for instance: *'yes his door is always open – whether he's there or not is a different matter'*. And a solicitor said of her Principal at the previous firm where she had undertaken her traineeship:

*He just didn't physically have the time to sit down and go through things with you so it's a case of you're left to get on with it and unless you had a question, you **did** get on with it ..so though they have an open door policy so that you can pop in and ask anything any time, in practice actually tracking down people was very difficult. (Civil litigation, assistant solicitor, Hillchester firm)*

Research into work place learning demonstrates that in addition to accessibility there must be an equitable organizational ethos where staff feel valued and secure (Barnett, 1999). However the data indicated that this might be relatively rare, in which case the efficacy of the open door model could be diminished; for instance: *'I don't know if it's a personality thing but I find it quite difficult to ask him a question without feeling I'm pestering him or am really stupid'*, and an experienced paralegal said: *'the trainee will ask questions, but she tries to go round people in here so she's not bugging one person too much and she always apologises for asking. She's not comfortable'*. (Family paralegal, Chapelvale firm)

On the other hand, the open door policy clearly can play an invaluable role in training and supervision if the context is a culture which genuinely does encourage communication and if there is a structured training / supervisory scheme: *'it's a small outfit this, and it's daily supervision, hourly supervision; by the minute the shout comes from next door 'what shall I do with this?'* (Civil Litigation Partner, Hillchester) Subsequent interviews with newly qualified solicitors at the firm not only endorsed his claims but pointed to an interactive and supportive form of supervision, based on collaborative problem-solving, suggesting that his firm fitted the description of a learning organisation:

*We are directly next door to each other and we're passing each other all day every day .. it's ongoing .. so here it's a reality (unlike where she had trained), because though he's very busy .. I know that if I go in and*

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<sup>45</sup> LSC spokespeople tended to be very cynical about claims that supervision was being conducted through open door, and Williams & Goriely found that whilst Partners often said their firms were open and informal, this view was not shared by other staff (2003, p23)

*say 'I need to speak to you about this' then he will drop everything and talk to me .. and I'll say 'this is what's happening' and he'll say 'right so what do you think?' and then I'll come out with 'well I thought about this .. but ' and he'll say 'right, let's get the book' he says 'well I don't know the answer myself' but I think it's more that he wants to give me the chance and confidence to think it through.*

The other trainee at this firm said *'they never make you feel stupid if you go and ask something; everyone just sort of wanders in and out of each other's rooms'*.

Another firm illustrated the way in which a genuine culture of accessibility could become a durable feature of firms' working and training practices. The importance assigned to training by this Carbridge firm was signified by the fact that the Training Partner was the Senior Partner. 'L', a qualified ancillary relief specialist, argued that his open door approach, which continued in his supervision of her, was more effective than their formally arranged supervision sessions, partly because it was easier to keep in touch with someone's performance if virtually continual but informal contact was maintained, as opposed to scheduled meetings. The formal supervision and appraisal occasions L regarded as a consolidation of the ongoing learning and monitoring processes, rather than the substance of the processes. For similar reasons, she believed in maintaining continuous supervision over her own trainee:

*He's with me most of the time. I expect to know where he is and what he's doing at any time, and he's growing resigned to it. ...it's not the model that every fee earner here would use but that's why I end up with them because I think that's the right way to train. If you're going to train you should train, so that means that you check all the letters, tell them what they're doing wrong, give them work to do and check it all, and it's definitely more trouble, but...*

Her trainee identified the importance of this close supervision in bridging the gap between substantive knowledge of the Law on the one hand and its application to real life cases on the other, and further, the importance of absorbing the interrelationship between the Law and procedural detail:

*It has been three years since I did the LPC, so it's extremely important that you have this reassurance over and over again, from someone who's experienced the law for five or six years about how the law operates substantively, and also she gives me insight into the procedural side of it.*

An ancillary relief matter provided him with an example of this process:

*We thought it was just going to be a general divorce ancillary relief matter, basic assets involved may be a house, but it turned out that in this particular instance there was an issue with dissipating the assets from the other side so it transpired that we had no option but to make an application under Section 37 of the Matrimonial Causes Act 1973 to prevent the other side from disposing of assets and I'd absolutely no idea of the procedure involved to go about that and L took me through the stages, and through the*

*public funded side of it and I went to court and got the initial order.. that's what a traineeship is all about really, you're going to come across these scenarios which you wouldn't ordinarily come across before, but then once you come across it once then you can do it twice and it's only a matter of practice isn't it; just get better at it all the time.*

This view of the effectiveness of open door training was echoed by a specialist in child abuse in the same firm who had qualified four years previously:

*Personally I think it's better because I can't think of anything worse than – especially when you're training – thinking you've got a problem, and you don't know the answer, and that for somebody else it's probably not a problem at all.*

We will return to this issue of the creation of an organizational learning culture and learning environment below.

#### **5.4.7 Discrepancies between accounts of supervisees and supervisors**

There was some discrepancy between the respective accounts of some supervisees and supervisors of the training and supervision regime in their organization, and it appeared that supervisors might be recounting ideal practice rather than describing reality. This was most marked in the account by the supervisor of the trainee solicitor in an NFP agency who had been given casework on his second day and who had said he would have liked to have begun by shadowing and being given small tasks on files. His supervisor's account of his first week diverged significantly: *'he spent a couple of weeks shadowing me, looking at my files, talking to me about cases, going to court, one to one training about legal aid and stuff'*, (Solicitor and supervisor, Boomtown North Law Centre).

Comments from other respondents suggest that the discrepancy in accounts may be due to supervisors' desire to give more time than is possible.<sup>46</sup> With the exception of two firms where the legal aid work appeared to be supported by more profitable work, this depiction of legal aid firms or departments being simply too stretched to enable supervisors to comply with LSC supervision and Law Society Training Contract requirements surfaced repeatedly in supervisees' accounts.

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<sup>46</sup> The pressure on time was clearly related to the low level of fees for publicly funded work which was leading some partners in some firms to argue that their firm should give up publicly funded work altogether; for instance a Housing Partner in what was once one of the most reputable legal aid practices in Boomtown said: *'one of the Partners has been saying why didn't Housing make any money and he actually came up one afternoon and ended up spending an hour talking about how we did things ..looking at axing my job – that's the gist of it'*

It was also striking how, in the course of the interview, many supervisors shifted to an acknowledgement that too much exposure to practice, and at too early a stage, was not always ideal; following this admission, one proceeded to describe how he would prefer to train / supervise:

*I would have formal supervisions and more often than at the end of the month .. you need to spend – even when they can partly do their own cases – at least an hour a day with them, going through problem files, talking through things – but there's no time. (Solicitor and supervisor, North Boomtown Law Centre)*

#### **5.4.8 The low status of the Training Principal**

Our research found that the job of Training Principal was generally viewed as undesirable; in the words of one solicitor: '*I'm the general dogsbody or rather Training Principal*' (Training Partner and employment specialist, Chapelvale firm). Another solicitor said she did the job '*because no one else would*' (Training Partner, Hillchester Firm); yet another recently qualified solicitor describing training at her previous firm said of the Principal: '*he got given the job because nobody else wanted it .. he didn't really do anything*'.

There was general agreement that the Training Principal should have more status and time and also receive some form of training. In practice we found none who had had a reduction in targets to reflect their training work, and none had been trained for the position. It was also noticeable that, with only two exceptions, all the Training Principals were women, suggesting a possible relationship between women's frequently lower status in firms and the low status of the position.

#### **5.4.9 Views on ideal training and supervision**

The view that shadowing should be a regular, compulsory and frequent component of training was widely articulated. One trainee's reflections on how his training could have been improved support the assertion that learning is produced by a synchronised and balanced mix of theory and practice,<sup>47</sup> tracked and supported through a record / learning log and regular supervisions (for instance Argyris 1982; Schon 1984):

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<sup>47</sup> This is a crude simplification of a complex and heterogeneous concept: various forms of learning have been identified, and are discussed more fully below

*I was interviewing at the end of the first week .. I would have liked to have sat in more, to have seen a variety of cases. .. a training plan with set cases, a selection so I would have got a spread and so I could have seen exactly what had happened where and why and diagnose what was going to happen ..it's all been a bit haphazard . I would have liked to have been given specified tasks on files ..what outcome we would want .. what sort of procedure we'd use ..I mean (name Principal) says things like 'phone this person and speak to them', but I don't always know why ... (trainee, Boomtown North Law Centre)*

We observed this trainee, in his fourth week into his contract, conduct one of these appointments which had been booked into his diary without any prior warning or indication of what the matter involved. Some way through the process of completing the legal help form, it transpired that the client was neither new to the Centre and nor was the matter a new one, and that he had therefore already completed a legal help form and had a file. The embarrassing position this placed the trainee in made it difficult for him to give a convincing impression of control and expertise and to establish a relationship of trust with the client and clearly dented his confidence.

There was also a consensus that training should have more structure. Similarly, virtually all trainees and supervisees said they would have liked to have had regular supervisions in which they could discuss cases. These preferences, which the Law Society and LSC requirements enshrine, were being followed by one Training Principal:

*We're watching the practice skills in each area in which he receives training. There's a loose thing about skills from the Law Society and you need a record of what they've done and what skills they've attained – so I thought 'let's start off with this .. I do find it useful because I can cross check that we are doing things. (Employment specialist, and training partner, Chapelvale firm)*

#### **5.4.10 LSC Supervision and File reviews**

All firms and agencies tended to rely on traditional supervisory checks on incoming (and sometimes outgoing) post and open door policy, together with file reviews, and the efficacy of these appeared to mirror that of the rest of their training regimes. For instance, those firms with an effective open door policy (such as the one described above) also had well developed systems for cross checking and supporting practitioners' work. What was most striking, however, was the approach to file

review undertaken by one of these firms, which generated constructive feedback thereby facilitating reflection<sup>48</sup> on the part of the supervisee:

*My supervisor in Family reviews my files every month for both compliance and content; they read the file from start to finish – they do 6 at random every month, and it's a total cross section, could be 3 private, 2 legal help, one substantive certificate and then give feedback; partners exchange files as well and then we can discuss law and courses we've been on at the weekly team meetings; and on a day to day basis I can and do ask \* or \* about my cases. (Civil litigation specialist, Hillchester firm).*

The other recently qualified solicitor at this firm said:

*It's so much more organised (than my old firm) and the file reviews cover everything - they've taken the guidance from the LSC and applied it to all files ..if anything is not satisfactory, there's advice why not and a date by when it has to be rectified and it's not just the administrative things and the LSC things, there's also a box 'is the legal advice satisfactory?' (Civil litigation and Family, Hillchester firm).*

This firm was also distinct in that not only did it hold 6 monthly appraisals, it had also, in an apparent exemplification of the learning organisation, been decided that the partners needed training in how to conduct these.

Other firms were less rigorous or reflexive. The responses of one Training Principal suggested that whilst she took both training and supervision very seriously she was constrained by the prevailing culture which did not appear to accept that professional learning needed to be engaged in by all practitioners:

*Solicitors don't like supervision yet they need that however long they've been qualified .. we need to incorporate more supervision – more regular supervision, really looking at the files, talking about difficulties we've had .. at the moment it's very impromptu and ad hoc; it's the same with appraisals .. staff development is very ad hoc here. (Employment specialist Chapelvale firm)*

A legal executive (Family specialist) with over 16 years' experience said of her firm:

*There isn't enough supervision for less experienced people .. they get virtually none. OK, their files are reviewed, but you need to review files carefully to make sure that someone is going down the right track and that the advice they are giving is right .. but the files that are picked are all Legal Help ones and they are not the most complicated and they are only reviewed to ensure they comply, from a procedural point of view – .... And the big ones on my desk, that have gone onto a legal aid certificate, which would indicate how good your strategy is, how good your advice, they're not looked at. (Legal Executive, Family, Chapelvale firm)*

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<sup>48</sup> Reflection has long been regarded as key to developing a personal framework of understanding and hence learning (Schon, 1983)

This critique was endorsed by the commercial trainer:

*If you're called a supervisor you have to take responsibility in the sense that every file in that area is your file .. we bang the gong about file reviews because they don't do it – in fact no one does it properly. We now say to solicitors, only ever look at closed files so you can look at them from cradle to grave. Lots of people will pick out files that are 3 weeks old so that they can quickly go down it and just tick the sheet and then they've done it. I'm now in favour of doing it face to face at least 50% of the time, which is now mandatory in crime. I'd also incorporate the criteria for peer review into the substantive element of the file review so that the reviewer/supervisor would go through the whole thing, not just looking at whether the forms had been filled in correctly but also including the quality of advice and everything - the management intent behind it is that they've got to aim for excellence.*

Only two firms appeared actually to implement the regular supervisory sessions as required by the LSC, although the requirement to cascade information to supervised staff, through circulation of texts, discussion in departmental meetings and arranging in-house training, did appear to be more commonly observed.

However the potential of the LSC's detailed risk profiling to pinpoint weak supervisory control, whilst it will not remedy the problem of lack of time and resources to train and supervise, should, especially in conjunction with Peer Review, lead to a strengthening and deepening of existing training and supervisory systems. As a result peer review was generally supported, including by the Legal Aid Practitioner Group (LAPG) representative who thought that *'its reports (would) act as a form of training'*. It also has clear implications for CPD, and is therefore further discussed below.

## **5.5 Continuing Professional Development (CPD)**

One function of training is, like regulation, to provide confidence in the service provider. If training is to fulfil this function, then not only must standards of pre-entry education and training be highly specified, ideally in terms of the competences deemed to be necessary for satisfactory performance; there must also be maintenance and evidence of maintenance of competence. As a result, the Dearing Report (1997) argued that learning must be a lifelong process. CPD is therefore key to the Government's vision of creating a learning society, and hence to effecting a sustained and ongoing improvement of services (Audit Commission 2001).

The following sections will focus primarily on CPD for the novice practitioner, as part of their ongoing process of professionalization, and much of the data echoes that discussed in the preceding sections. However, whilst some competences are consolidated and enhanced by experience, others are eroded or corrupted, and changing work practices require updating so that not only novices but also experienced practitioners need to engage in CPD (Spouse, 2001, 16; and see Hales et al, 1998). We will also, therefore, touch on senior practitioners' approach to their own CPD, given too the significance of this for good performance of the 'master as role model' approach as well as for promoting a learning organisation.

### 5.5.1 Regulation and CPD provision<sup>49</sup>

The number of CPD hours the Law Society requires practitioners to undertake correlates with their experience;<sup>50</sup> for the first 4 years following qualification, s/he must undertake 16 hours of CPD for each year in practice. In addition the SQM guidance specifies that the annual appraisal must be able to identify training needs and development opportunities, that these should be identified throughout the year and documented in an individual's training record, and that, as part of the supervisory requirements, legal knowledge be maintained and updated through training.

At least 25% of CPD must be met by undertaking courses offered by authorised providers; however beyond that, a wide range of activities can comprise CPD including participating in accredited or unaccredited courses, in '*courses offered by an authorised provider delivered by audio / visual means*', and even work shadowing.<sup>51</sup> A variety of organisations offer CPD training, from HE institutions, national NFP agencies such as Shelter and Citizens Advice and local law societies; the main providers are commercial trainers BPP and CLT. The practitioner must keep a training record detailing training activity, date undertaken, number of hours credit and comments on the activity.

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49 The Law Society has been running a scheme for post-qualifying education since 1985; in 1992 its scope was extended to apply to all solicitors who had entered the profession from November 1982 onwards; the current regulations governing CPD are contained in Law Society (n.d) *A Guide to the Law Society's CPD Scheme*

50 Senior solicitors are required to do 48 hours CPD over a 3 year period; at least 12 hours must be based on attendance at approved courses (Hales et al, 1998, p 3)

51 in November 2005 it was announced that '*The Law Society's Standards Board has approved a proposal to allow solicitors to claim CPD 'hours' for undertaking certain types of work shadowing*' ([www.lawsociety.org.uk](http://www.lawsociety.org.uk))

Respondents identified various weaknesses in the current system including inadequate resources to undertake training; relative paucity of provision tailored to legal aid practice, and weak monitoring which also meant that CPD was not necessarily linked with either the occupational needs of the individual practitioner or of the organisation.

### 5.5.2 Monitoring – issues of rigour

Meaningful participation in CPD should entail more than '*clocking up of time engaged in formal learning*'; and rather engagement in a '*system based on annual appraisal with the personal development plan*' (Swanwick 2005, p 859): just as caseload should correspond to practitioners' competence, similarly, CPD should match practitioners' learning needs, as identified in, for instance, supervisions and appraisals. Further, CPD can only provide the same guarantee as pre-entry training if it is possible for practitioners to 'fail'. However, whilst the LSC may pick up on inadequate CPD activity through the audit processes and Peer Review (discussed further below), the Law Society has no rigorous verification systems in place, causing a Law Society Quality Monitoring Assessor to comment: '*it's very uncontrolled – people can basically do anything – and it's self monitored; the requirements have no clout*'.<sup>52</sup> As a result, she worried that training could be inappropriate, and its trigger ad hoc:

*There's reliance on firms' appraisal systems to ensure that the CPD is relevant but the reality is that often people go on anything to get their points rather than something related to the demands of the practice.*

Her concern was echoed by a supervisor who also implied that he would like to see an assessment element built into the courses:

*I suspect some of my staff see it as a day out when they go to some of these CPD things. They come back and they've got the points but you're not tested; nobody knows whether you've taken it in or if you've even been listening. I have it on reliable authority that one lad I used to employ, he slept all the way through the session he went to.*

A related issue is the desirability of ensuring that CPD is strategic; that is, if a firm is to function as a learning organisation its training regime should not just operate to improve personal knowledge and occupational performance but should also be capable of being shared and utilised by the organisation as a whole.

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<sup>52</sup> Her fears are supported by Hales et al's finding that (for senior solicitors) there was no indication of CPD compliance being monitored within firms (1998, p 46)

### 5.5.3 CPD: Provision and publicly funded practice

There is a free market in providers of CPD for the legal profession, subject to approval by the Law Society, and a considerable degree of flexibility in how practitioners obtain the points required by Law Society regulations. However, as with the LPC, the majority of the courses address private client or corporate law issues; and although agencies like Shelter and Child Poverty Action Group (CPAG) run specialist welfare law courses, these tend to be located in London or other large urban centres, with the result that in practice provision for the publicly funded practitioner may be limited.<sup>53</sup> This caused the Law Society Quality Monitoring Assessor to argue that CPD was *'even more likely to be ad hoc if they are doing publicly funded work for which there are so few courses, which may also mean that practitioners have to travel long distances to attend them.'*

She considered that a further reason CPD tended to be random was because *'most legal aid / High Street firms have none of the technical / admin. support, none of the dedicated training managers / staff who help people find the right courses and book them onto them'*.<sup>54</sup> Our data tends to support this argument; one of the striking aspects about one supervisee's account is the infrastructure her firm had in place:

*The General Office will arrange the session for videos to be played and if you want to go on a course your Head of Department ticks the box which approves it and then it goes off to be booked, and you're given a sheet to record all the courses that you've been on and the Office Manager's got a central log of all the CPD points that we're getting.*  
(Employment specialist, Hillchester firm)

This firm also had very good systems for the training contract and supervision generally. However, some of the other firms did not enjoy the same kind of support systems. This fact together with a general lack of resources meant that some supervisees were not attending as many courses as they would like or at a point when they needed them; for instance:

*The appraisal identifies training needs as it should but nothing happens and recently there's budgetary constraints both from the point of view of*

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<sup>53</sup> Although as we have noted above during the research the local LSC began putting on subsidised courses

<sup>54</sup> Until recently no full list of accredited providers existed, making finding the right training a very time consuming process; as a result a website was launched (January 2006) to help solicitors access information on available training courses. Its founders were motivated by the fact that *'plenty of firms are too small to justify a dedicated training manager', and as a result fee earners are often simply told 'make sure you do 16 hours CPD'* (Cooper, 2006, p. 40)

*the cost of courses and of releasing people. It's difficult enough booking your holidays ... (Housing specialist, Boomtown firm)*

This complaint was subsequently confirmed at a team meeting we observed, where the solicitor's Departmental Head told staff: *'you shouldn't be booking yourselves on courses because there isn't any money in the Training budget'* (Partner and Head of Housing Department, Boomtown firm)

Lack of money was put forward by several other employers as a constraint on training; one supervisor spoke of the importance of the LSC move to put on courses, both because it increased the local availability of CPD for public funded specialisms and also because *'they are cheap, so we can afford to go on them'* (Solicitor, North Boomtown Law Centre).

#### **5.5.4 The design of CPD provision**

Much CPD provision appears to be traditional in terms of following a model of individualised, formal learning, and a concern with updates in substantive law, rather than training in skills. The welfare law courses run by NFP specialist providers, some of which are organised by the regional LSCs, also focus on updates, but tend to employ interactive and case-study based methods. Most firms in the sample also engaged in various forms of in-house training / updating.

Those firms which had good systems for the training contract and supervision also took CPD very seriously and undertook it in a variety of ways:

*We've got the LNTV videos here where you can sign up for various things so it's basically a video and lecture notes from the College of Law – so we all watch the video – they can be done as CPD points if there's more than one of you doing it so that you are able to have a discussion afterwards. ... you can go to the session and then every month we've got our departmental meeting anyway so as a matter of course (Head of Department) reviews the training needs and asks if anyone has been on any interesting courses and if they have then he arranges for them to be de-briefed or, you know, 'are there any courses anyone wants to go on?' so all the literature for the external courses is circulated as well .. so if I said I wasn't very happy with – whatever – (Head of Department) will go 'fine, get the literature and we'll find out what courses there are and let's book them. (Civil litigation solicitor, Hillchester firm).*

This supervisee was booked onto several courses which were entirely relevant to her work. This firm also obtained regular updates in employment law *'2 or 3 a day – this has been decided in this EAT decision, this has been decided in that employment tribunal in Hull; and I use IDS brief'* (Senior Partner, Civil Litigation).

### 5.5.5 The potential for CPD in supervision

There is an argument to be made for introducing mandatory CPD training in supervision for all supervisors. The commercial trainer cited above argued:

*I agree with the LSC that the quality of the work will always be directly proportionate to the quality of the supervision, which isn't a departmental meeting once a month, it isn't a distribution of files every morning, it's a multi-faceted process that requires you to develop new skills. So, for instance, we train in a dozen techniques, some of them are control measures, some are support measures - 'find what suits you and your staff and then get on with it.' They must learn support, input mechanisms to assist supervisees, but in addition they must have a series of control measures to spot mistakes..*

One of these measures was a weekly or monthly inactivity report on all files for which a supervisor was responsible.

His description of how he dealt with the issue of TFFs in his training sessions illustrates how self-regulation is necessarily the ultimate objective of training and supervision:

*I do a routine which is, 'look Legal Aid clients can't have what private clients have – they can't have the cup of tea, the nice box of tissues – you've got to train your staff in the motto of the legal aid family lawyer (which) nowadays must be 'shut up snivelling, give me your instructions – you've only got another 15 minutes' – in other words impressing on them the need to train / supervise in the business imperative behind break even practice on Legal help even though clients tend to be more difficult, more demanding and you've got to get across complex things in simple language, you've got to do it so your file looks excellent or competent plus, and you've got to keep up with all the unremunerated administration that the LSC imposes .. so they must be trained in how to supervise so supervisees can do all that for £50 an hour ..*

He went on to make similar comments with regard to the need for supervisors to be trained in file review, linking this with the need to be trained in an understanding of LSC requirements of, for instance, the SQM and the contract.

### 5.5.6 CPD training on legal aid

The popularity of a regional LSC course on legal aid, which, whilst targeted at trainees, was largely attended by solicitors, some of whom had several years' post-qualification experience (PQE), supports this suggestion of the need for training in how to comply with LSC requirements, side by side with, or as part of, the (weakly

monitored) Law Society CPD. That such a need exists is also indicated by the popularity of the courses in LSC regulation offered by this commercial trainer, who had formerly worked for the LSC. At the time of the research, he was being contracted to deliver training to the entire staff of legal aid practices (or departments) in the preferred supplier and peer review schemes. Describing his Preferred Supplier CPD course, he explained how this involved training partners to produce a:

*clearly thought through business plan. In the past you could get past your annual audit by simply taking last year's plan, blowing the dust off, changing the date in the footer and passing it off as a forward plan. Now the LSC will want to see a thorough assessment of business performance over the previous period; you will impress them if you include a statistical analysis of their performance indicators .. if you're doing things like monitoring average costs ..identifying efficiency savings, how you tie your business plan into your overall strategy for training and developing your staff.*

The objective of self-regulation revealed in this explanation recalls our argument in Chapter Three that regulation, especially of the particularly penetrative type represented by the LSC contract, can amount to a powerful form of training. Peer review represents a significant development in this process because it moves beyond concern with file management to file review and therefore effectively represents ongoing regulation / CPD training in substantive work. Furthermore, given that its assessment utilises National Benchmarks, peer review conforms to the competence model of training and learning. These points were illustrated for us by our observation of a training session the trainer ran on peer review in which he again emphasised the importance of internalising LSC requirements. After a brief introduction delineating the history of legal aid franchising and contracting, he outlined the scheme, which he termed '*less formalistic Transaction Criteria by peer review*', described the process, its outcomes and impact and what could be done to prepare for it. The response of participants (and of other respondents) was ambivalent; on the one hand, the fact that work would be judged by people with indisputable insight into what it involved was welcomed; on the other hand, doubts, which may be related to professional autonomy, were expressed that because there was always more than one solution to a case, the appropriateness of the one chosen was largely dependent on context.

### **5.5.7 Specialist accreditation**

Specialist accreditation represents a further development of training and regulation. Experienced solicitors and legal executives can apply for membership of a specialist group like the Solicitors' Family Law Association. A higher level of specialisation is demonstrated by membership of one of the Law Society's specialist panels, such as the Children Panel and the

Mental Health Review Panel. Evaluation of suitability for membership comprises a mixture of minimum number of years PQE, (compulsory) attendance at an approved training course, and peer review. This last form of evaluation entails grading by independent practitioners of a submission to the Law Society of an application covering all aspects of the relevant area of practice and interview. Accreditation is for a limited period, generally 5 years, after which the member must re-apply. Membership of the advanced panels requires the member to '*achieve and constantly maintain the level of knowledge and expertise*' in the specialism and therefore commitment to '*extensive, appropriate training activities*'.<sup>55</sup> Just over half of the supervisors in our sample were accredited.

## 5.6 NFP Training

Training in the NFP sector tends to be tailored to the needs of the organisation and tightly defined by the competence demanded by the role. It is therefore quite varied in form; nevertheless it is possible to talk of a distinctive ethos and approach. We therefore begin by discussing this ethos, primarily in relation to CABx because of their numerical significance in the provision of publicly funded legal advice, before moving onto specific issues such as the process and focus of NFP training, the LSC contract as a form of training, NFP supervision, CPD and NOS4Advice.

### 5.6.1 The NFP ethos and approach to training

The objective of the NFP advice sector has been to provide a service that is uniformly available, without means testing. However it saw its primary clientele as the poor and disadvantaged, and so, from its inception at the onset of the Second World War, the CAB movement was explicitly concerned to define a body of poor people's law.<sup>56</sup> Goriely notes that, in order to provide information to the new Bureaux, the National Council of Social Service produced a 150 page volume of Citizen's Advice Notes, representing a pioneering compendium of poor people's law (Goriely, 1996, p 221). At the same time, however, the Access to Justice movement, of which the NFP sector forms a central component, has looked to an idea of justice beyond the juridical model. The point was illustrated by a solicitor in the course of her account of why she had re-trained to be a lawyer:

*When I was in the CAB they'd use complaints procedures and negotiate whereas I would tend to look at an Act and say 'look you're not doing this*

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<sup>55</sup> [www.lawsociety.org.uk/professional/accreditationpanels/](http://www.lawsociety.org.uk/professional/accreditationpanels/) lawpaneladvanced.law p 2

<sup>56</sup> As we noted in Chapter 1: Parker, 1999, pp 35-8

*properly because of this law' - but the CAB method often obtained better results frankly . (Housing specialist, Boomtown firm).*

The concern with offering accessible advice rather than narrowly legalistic solutions and, correspondingly, a democratic model of working, required an approach to training which would not jeopardise this by demanding lengthy qualification periods for advisers. As a result, as we have discussed in earlier chapters, training in the NFP sector, unlike that for legal practice, is characterised by loose control over the 'entry' input factor. This was one reason for the controversy aroused by the advent of CABx, and although at the time there was collaboration with friendly solicitors and voluntary schemes, the relationship between the CAB movement (and subsequently other NFP agencies) and the legal profession was in general somewhat problematic.

The movement has, by and large, retained its commitment to a non-professional volunteer workforce as the bedrock of its work, and to the provision of functional training in the law both to volunteers and the general public, and hence to the active involvement of the community and especially specific user groups. Unless an agency is seeking paid specialists, access to work is through volunteering and therefore effectively has no accredited input measures; instead the focus is on induction processes, motivation and organizational ethos.

Once the volunteer has undergone the initial training programme, there is a strong commitment to offering further and ongoing training, so that the adviser may thereby move up into second tier advice work. Therefore much of this training embeds highly specialised expertise with the result that it now has a substantial history as qualifying CPD for solicitors; however in some ways accreditation can be viewed as antithetical to the NFP ethos of inclusivity and there was originally little interest in it.

This situation persisted until the Further and Higher Education Act of 1992 stimulated a move to support the incorporation of varied instances and forms of training by mapping the occupationally determined requirements against NQF level descriptors; for instance NACAB has used Open College Network accreditation for its advice worker training.<sup>57</sup> Nevertheless, accreditation of training in the sector as a whole remains patchy, although it would clearly bring benefits given the diversity of the sector (both in terms of types of organizations serving a range of clienteles and variously staffed by specialist advisers, who range in experience and

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<sup>57</sup> This approach has the benefit of providing specialised training in advice sector work in a flexible mode while also going some way towards achieving individual portability. However the diversity of NFP training impedes efforts to improve the quality of advice and labour mobility within the sector and provides the rationale for developing NOS4 Advice and Foundation Degrees, which will develop sectoral training into a systematically accredited system.

credentials, and generalists, most of whom are volunteers, and in terms of its range of training regimes). Some agencies are too poor to do in-house training at all; thus an Open College informant observed: *'there's a real need for training out there – especially by the small community agencies (whereas) the big, national agencies like the CABx often have very good in-house training'*. The type and provision of this training varies, however, according to the remit of the agency, whether the adviser is voluntary or paid, and the level of service delivered. For instance Shelter's provision ranges from 'front line' advice and help to specialist back up for other agencies. Whilst therefore the common route and provision makes it possible to describe and critique solicitors' training, it is more difficult to do this when discussing the NFP sector.

Nevertheless, it is possible to speak of an NFP approach to training and to discern a synergy with current educational thinking in that it is generally work based, focused on competences and skills including relational skills (for instance Age Concern emphasises body language), and characterised by experiential and reflexive styles of learning, and co-operative learning and working. The sector has also incorporated the CAB emphasis from recruitment onwards on community involvement and accessibility. The following description of the Shelter model exemplifies this approach: *'The best housing aid services are those which take steps to allow and actively encourage a work style and culture in which ad hoc and day to day discussion of casework between advisers is the norm; in addition, advice services should develop informal networks of support both locally and beyond so that more difficult problems can be talked through with other practitioners'* (Shelter, 2003, p. 35).

The table below compares training in the NFP and FP sectors across a range of key factors. It is divided into two sections. The data for the FP sector is generally easy to tabulate, with the exception of paralegal workers for whom the training picture remains relatively opaque. However, as we have just observed, NFP sector training options are less standardised, particularly in those agencies which represent a loose affiliation scheme, rather than a more tightly controlled membership.<sup>58</sup>

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<sup>58</sup> Not all training providers are listed in the table: some agencies do not just advise / inform etc, but also provide training

**Table 5.1 A comparison of NFP training requirements**

| <b>Advice Sector</b>      | <b>Accreditor regulator</b>  | <b>Providers</b>  | <b>Initial Training requirements</b>   | <b>Length of Training</b> | <b>CPD Requirements</b>  | <b>Mode Of Assessment</b>   | <b>Issues</b>   |
|---------------------------|--|---|--|---------------------------|--|---|---|
| CABx Advice workers (A/w) | NACAB<br>LSC   | NACAB<br><br>OISC<br><br>Open College NVQ<br><br>Shelter (also provision of specialist backup by National Homelessness Advice Service)<br><br>LAG | CAB Certificate in Generalist Advice Work<br>CAB specialist  | Flexible                  | Trainer Adviser (RL4) – progression through stages of interview observations; assessed interview; solo interviews; self assessment, interleaved with courses, manuals & supervisions | Approach to training, in common with other NFP agencies contrasts with lawyer training: skills through case studies requiring holistic solutions; work shadowing; reflexive learning; attention to EO issues, social policy issues, ethos of CAB, client empowerment<br>Peer review | Resources to develop training; ring fencing of CLS employees; Need to match LSC requirements may reduce social policy role, CAB ethos |
| Shelter A/w               | Shelter - not a membership organisation, & no internal accreditation | Shelter<br>OISC<br>Open College NVQ<br>Advice Services Alliance   | Induction & individual training plans tailored to job specification for post / individual skills & knowledge; e.g. a/w with less than 6 months experience has reduced caseload | Flexible                  | Minimum 6 hours training per annum of which 50% must be on a housing law subject. Shelter offers public training   | Formative assessment; appraisals & file review; casework supervision; Peer assessment of  | Co-operative model of working<br>Techniques: case conference; work shadowing;   |

|   |   |   |   |  |  |  |  |
|---|---|---|---|--|--|--|--|
|   | <p>processes &amp; audits using own auditors.</p> <p>But does require that Housing Advice Services comply with its quality assurance</p> <p>LSC</p> |   | <p>&amp; high level of supervision, which may include: working alongside another caseworker, checks on correspondence, independent file review of all or most new cases.</p>  |  | <p>courses. Managers briefed to recognise that CPD courses may be supplemented by work shadowing, local tuition, personal study, work experience.</p>  | <p>files; process based peer review</p>  | <p>applied, reflexive practitioner; social policy, EO issues; client focus.</p>  |
| <p>Age Concern A/w Paid &amp; Volunteers providing I &amp; A (may be in CABx etc)</p> | <p>Age Concern England (1998 Information &amp; Advice (I &amp; A) Strategy - Age Concern Standards)</p> <p>LSC</p>                                  | <p>Age Concern England Advice UK CPAG, LAG, CAB</p> | <p>Induction Procedures based on I&amp; A Induction Training Pack, mentoring &amp; regular topic training sessions</p> <p>Quality of service offered by agency as whole self assessed by 'Assessing the Quality of Advice – a model for technical audit' (Waterhouse &amp; Benson)</p> <p>Co-operation with other NFP agencies for supervision of I&amp;A Manager</p> | <p>Variable; also depends on level</p> | <p>No formal but ongoing training built in through supervision, file reviews, team meetings, appraisals – training &amp; development plan, updates</p> | <p>Supervision / monitoring; information bulletins; incoming post; independent file reviews</p> <p>Currently piloting Peer Review system of advice and information</p> | <p>See CAB note; ad hoc development of I &amp; A services resulted in different models; view that this diversity may contribute to user choice &amp; that agencies will self censor services that don't fit LSC levels</p> |
| <p>DIAL UK A/w</p>  | <p>DIAL UK</p>  | <p>DIAL UK</p>                                      | <p>Induction; individual training plans</p>   | <p>Flexible</p>                        | <p>Appraisals; supervision meetings; updates; case</p>   | <p>Appraisal &amp; supervision procedure</p>   | <p>The local DIAL produces reports of training</p>   |

|                               |  |   |   |          |          |  |  |
|-------------------------------|--|---|---|----------|----------|--|--|
|                               |  |   |   |          | meetings |  | undertaken & evaluates individual & organisational impact ; EO training  |
| Youth Access A/w              | Youth Access UK – but no membership scheme<br><br>LSC      | At present no access to an accredited training programme; therefore draw on other providers; a bid just put into National Youth Training Advice Programme<br>OISC<br>Shelter Advice UK<br>CPAG, LAG<br>Advice Services Alliance | Most paid staff qualified Youth Workers<br>Induction in line with training needs and occupational role (BAC accredited training) but must include EO training<br>Encouraged to acquire legal skills | Flexible |          |  | Ethos which emphasises informality & cultural accessibility. This & ad hoc development & root in Youth Work resulted in informal approach to training & regulation; workers tend not to regard work in terms of legal services |
| Advice UK A/w (formerly FIAC) | No detailed regulation by umbrella organisation<br><br>LSC | OISC<br>Advice UK<br>London Region is approved NVQ assessment centre<br>Advice  | Varies from agency<br><br>Operates NVQ in advice accredited training  | Flexible |          |  | From basic Welfare Rights to file Review & supervision, learning to advise   |

|   |  |  |  |          |   |   |  |
|---|--|--|--|----------|---|---|--|
|   |  | Services Alliance                        |  |          |   |   |  |
| Money Advice Trust A/w (some in specialist agencies; others in, e.g., CABx); MAT also runs National Debt Line                       | Money Advice Trust National body to which agencies can affiliate – commitment to general quality standards but no organisational audit   | Money Advice Trust                       | Formal process though not accredited; training route: Volunteers – generalist level training up to specialist level; Paid - Learning Map | Flexible |   | Peer Review of open & closed case files                                       | MAT sees formalisation of role and of links with CLS as way forward; currently involved with DCA project to co-ordinate training & accreditation of money advisers |
| MIND:<br>1) Legal adviser 2) telephone help line worker 3) information line adviser contracted out to Broadcasting Support Services | MIND – Umbrella organisation which runs 2 lines: 1) legal advice line staffed by legally trained advisers & supervised unqualified advisers (generally Law / LPC graduates) - subject to Law Society & LSC quality standards (LSC Specialist Support Contract) 2) Telephone Helplines Association Standard | MIND Advice UK Accredited Providers CPAG | Induction / initial & ongoing training based on analysis of need   | Flexible | Individual training records & annual appraisals – targets set & monitored | Supervision of varying levels depending on experience; file review; feedback. | Emphasis on co-operative & experiential learning   |

## 5.6.2 Issues or weaknesses in the NFP training model

As this table indicates, there is some commonality across the sector in terms of shared issues, and some of these replicate those revealed by our data from the FP sector.

As with all work based training, comparability and quality assurance are a concern, and this is compounded by the diversity of the sector; for instance, our data indicated that the aim of close supervision is not always realised. On the other hand, a major objective for the sector is the maintenance of its distinctive ethos, and training is one of the primary mechanisms for embedding and sustaining this. One concern therefore was that the dissonance between this ethos and the LSC contract pushing '*NFP agencies towards the business model of solicitors firms*' (HoCSCCA, 2004, p 14), and, correspondingly, that a uniform approach to quality could jeopardise the NFP sector's distinctive values and innovative, flexible approach.

However the primary concern was the lack of resources / insecure funding of agencies which obviously had a deleterious effect on the extent that training could be made available to workers (and see BRTF 2005, p 28). This connected with a further concern that the impact of LSC regulation on resources (both in terms of time and money), was exacerbating the pre-existing problems. This complex of obstacles to meeting the chronic need for training is summarised by YIACS (Youth Access):

*Many voluntary sector services have developed on an ad hoc basis with histories of uncertain and often short-term funding; the quality available has also been subject to similar ad hoc standards. These difficulties were further compounded by the more general lack of professional regulation in the fields of advice and counselling. It is only in the past few years that nationally accredited training in advice and counselling has become available. However, the qualification structures are only slowly becoming available to providers in the sector. Few agencies are able to attract funding that allows them to make a substantial investment in training and developing staff; a situation which must be remedied if services are to offer consistent levels of help. (Youth Access, 2001, p 2)*

### 5.6.3 Entry into the Sector

The most common route to becoming a specialised caseworker begins with volunteering. As discussed above and in Chapter Three, this involves no formal entry barriers aside from an interview process and, according to the manager of one CAB, *'we turn down very few who come to interview'*.<sup>59</sup> Her further comments point to the potential QA issues endemic to loose entry: *'we try not to say to people 'you're hopeless, go away.' It's better they decide themselves that it is not for them. Sometimes they don't'*. (CAB manager North Daeshire)

The sector's accessibility appears to stem in part from the view of volunteers as clients as well as workers: their adviser role fulfils the important function of both empowering them as individuals and building social capital in the sense of maintaining the direct links with the community the agency seeks to serve. This was most explicit in the Women's Centre in Chapelvale where clients were encouraged to, and frequently did, become volunteers as part of their 'therapy'.

*As a women's centre we encourage women to come in and have their needs met and then perhaps to go on courses, to build their confidence, to come and work here as volunteers, or then maybe as sessional workers. (Manager of Advice & Guidance Team)*

The diminution in volunteers represents another disincentive to tighten up entry barriers. Echoing the views of one legal aid solicitor, who bemoaned the erosion of 'social commitment', one CAB manager said:

*There's this tension ... whether there should be more paid workers because really volunteering is – despite the government attempt to pump it up again – a bit of a thing of the past (Contract manager, Hillchester CAB)*

This trend was reflected in the age profile of our respondent sample: the youngest respondent was in her early thirties, and the mean age was around 45. As a result, some managers expressed concern about whether it was going to be possible to replace the current generation of workers as they began to retire. Many of the younger volunteers were seen to be using experience in the NFP sector as a stepping stone to a permanent job in the private sector:

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<sup>59</sup> see *Home Volunteer volunteering FAQs*, questions 1-3; this also sets out the initial volunteering / training process

*We have an ever renewing pool of youth, which is lovely; it makes a huge difference to the atmosphere. It doesn't feel like a middle-aged bureau because we have them - but they're only here in order to get a paid job .. they wouldn't say that if asked that, but that's because you don't say that when coming into a voluntary organisation. You don't say 'well actually I'd just like you to give me a reference and a paid job', but that is what most of them do. Most of them go on to get a paid job from here. It could be something to do with advice work or something completely different (Contract Manager, Hillchester CAB).*

Another said:

*Some of them say 'I'm really interested in this, can I go and do that' or 'I'd really like to ... I'm looking for employment', you know 'can I go and do all the debt worker courses'. So you go and do money debts and the county court possession procedure.... Then you know that if a money advice worker job comes up in \*, you'll have all those on your CV to say you've done all those trainings now give me a job. That's the way the bureau gets its people into paid posts. (Manager, North Daeshire CAB).*

Apart from working up towards specialist status by volunteering and undertaking training, the other route into specialist paid casework tends to be via another agency. The various routes were exemplified by our respondents whose previous experience were in the advice or related fields, and included local advice services, local authority housing departments, volunteer experience, or administrative work in the agency they were actually employed or volunteering in. Some had experience in social welfare fields other than the one they were currently working in, for example in an advice agency for Asian women with Mental Health Problems, or in a Youth Offending Team.

NFP training does not divide easily into the stages which characterise legal education; instead, from induction on there is effectively a continuous process / interchange of various forms of work based learning through initial training, supervision and CPD and this has shaped our treatment of the data. In the discussion below we focus primarily on CAB training, both because the CAB is the major contractor with the LSC and also because it provided the majority of our NFP respondents; however we also draw on our interviews with, and observations of in-house training provided by, the Women's Centre and two Housing Advice agencies. Nevertheless it is inevitable that, at certain points, we will be generalising from a slim

evidence base, although, as we have already argued, there are significant commonalities between the main NFP agencies

#### **5.6.4 The volunteer training process: CABx**

The first stage of CAB training, scheduled to last from 6 to 12 months, and based on the volunteer working at least 3 sessions a week, consists of a 'comprehensive, free training programme' involving 'observation, working through self-study packs, and a 5 day course run by Citizens Advice'. The modelling aspect of work based learning is fundamental to the training process:

*They have a lot of time sitting in with experienced advisors during their training period and we try to give them as many opportunities to see different advisers ..because there's no right or wrong way to advise, just as long as you interact with the client and find out what the problem is and try and solve it with them', supplemented by simulations: 'they also have a lot of practice (in interviewing) on the course in L\* offering a safe environment with other people who are training. (Contract manager, Hillchester CAB)*

The self-study packs are designed to develop skills and impart some technical / procedural knowledge through case studies requiring holistic solutions, which are then self assessed and at certain points also evaluated by a supervisor. In addition, the volunteer is regularly supervised. These training mechanisms together with the requirement to compile a portfolio and keep a record of learning aim to produce a reflective and reflexive practitioner. Further, the rhetoric of the training literature depicts a learning organisation which provides ideal conditions for work based, experiential learning based on 'collaborative relationships' (Waddington & Marsh, 1999; Barnett, 1999): for example: 'you need to be open minded, non-judgemental, able to listen, learn and work in a team. Bureaux are learning environments and volunteering gives you the chance to learn new skills and build on existing ones' (Manager, North Daleshire CAB).

Both the literature and training programme place an equally strong emphasis on the other aspects of CAB ethos such as Equal Opportunity (EO) and social policy issues, and client empowerment. The first workbook for the CAB Certificate in Generalist Advice Work sets out CAB aims which place an equal stress on 'individual service and social policy work; its four

*principles of free service, confidential work, independence and impartiality and two of its policies: community involvement and equal opportunities'* (Citizens Advice, 2002). The salience of this ethos was underlined by one manager who explained that it meant everyone had to undergo the training, whatever their qualifications: *'just because they have a law degree; they can't just go and advise, they have to do the training as well'*. (Contract Manager, Hillchester CAB).

The intensive preparation for practice, with its combination of shadowing, graded tasks and self study, also contrasts with the experience recounted by some of our trainee solicitors: *'the great thing is people are not let loose on the public until they're deemed to be competent to a certain degree'*. (Senior Adviser and supervisor, Housing Advice Agency, Hillchester). Furthermore, experiential learning is not seen as a *'quick fix'* (Gregory, 1994); once the volunteer is deemed competent to advise s/he will do this under supervision and, even when more experienced, there is: *'always an advice session supervisor on duty so that volunteers are never left to make the decision themselves'* (Housing Adviser and supervisee, Hillchester Housing Advice agency).

However, the data from some respondents cast doubt on whether supervision is always this thorough, especially as people progress to more independent work; for instance, a solicitor who had been a supervisor in a CAB said she had never felt *'equal to the task of supervising volunteers'*. She attributed this partly to *'the huge range of queries people came with'*, and partly to people's *'personalities - some volunteers for whatever reason would just go off and do what they thought'*, lending support to the concern expressed by the LSC Regional Manager about volunteers' involvement in contract work: *'how do you deal with a volunteer who says 'I didn't come down here to fill in all these bloody forms for the LSC, I came here to help people'?''*

Satisfactory completion of the workbooks (which generally takes around 12 months) qualifies someone to be a general rota adviser, after which they can train themselves up further in particular specialisms. A CAB manager described the process:

*They're trained in all the areas at a superficial level they're likely to come up with and then they start advising; they then go on to developmental areas so they can build on what they've learned in the first instance – on debt or benefits or employment or so on. (Contract Manager, Hillchester CAB)*

Again, the data suggested that both the availability, and quality, of this further training could be patchy, dependent on both resources and the interests of the CAB manager, with the result that the knowledge and skills of both volunteers and paid caseworkers could be sub-standard; this is discussed further below.

### **5.6.5 Focus of CAB training: soft skills**

The main emphasis of the Generalist training is on ethos and interpersonal skills (the two are related) and the general view was that this was done very well:

*The CAB training is very good because .. actually the whole thing that they teach you about empathy, which you get sick of because it is a bit touchy feely but all of that leads up to the fact that if the client feels they can talk to you then you'll get the information provided you use the right questions and the right phrases . (Housing solicitor, former CAB worker, Boomtown firm)*

The CAB workbooks on advice set out a process which combines communication skills and knowledge. The skills are approached through a four stage model: exploration, options, action and conclusion. Grounded in the CAB ethos, these stages train the adviser to explore clients' situation through active listening (adopting appropriate body language, giving them time to talk, acknowledging their feelings and, most importantly, looking beyond the presenting problem); outlining the options so that they can make informed choices and empowering them to do this (Citizens Advice, 1999, p 8). The solicitor just quoted said she still looked back to her CAB training because *'it was very useful in that I was used to interviewing, looking at the whole problem rather than just the surface, presenting issue'*. Similarly, a CAB manager said:

*We train people to look at the bigger picture and not just presenting problems. Yes J and L are essentially a debt case worker and welfare benefits case worker but they will take into consideration the other problems the client has ..so it's a*

*different ethos from going to a solicitor. (Contract Manager, Hillchester CAB).*

Evidently this skill is central to the government's social exclusion agenda and to the emphasis on holistic service; it is also vindicated by the findings of the Needs Surveys that problems tend to cluster. However it makes it more likely that case workers will do more for the client than the LSC considers necessary.

Solicitors who worked in the same areas as NFP caseworkers argued that the emphasis on interpersonal skills could represent a problem; for instance a Housing solicitor who had originally worked in the NFP sector which he referred to as 'a wishy-washy world', described his paralegal assistant, whose background was CAB volunteering, as a 'Mother Teresa'. He went on to say:

*One of the problems with CAB workers is that there are boundary issues to do with their willingness to help people... she can't give people bad news, and she sometimes writes people's letters for them .. she'll help them and not even give them legal advice. (Manager Housing Dept, Boomtown firm).*

There was also concern that other skills, most notably advocacy, were neglected in CAB training; this is discussed further below under technical skills.

### **5.6.6 Training in smaller organisations: the Women's Centre**

Training is of course more problematic in organizations which lack the national resources of the CAB and depend on obtaining external funding (BRTF, 2005, P 45). The Women's Centre, with QM contracts in Advice and Guidance and Domestic Violence Advice and Support, was a member of the Open College Network and ran its own volunteer training programme supported by funding from the Learning and Skills Council. The programme aimed to '*develop participants' awareness of prejudice, social injustice, inequality and women's issues*', and like the CAB model, comprised a:

*progression of volunteering: as people join the Centre, usually as generic Level 2 volunteers – they're the people who would actually work with women, and therefore they would be trained with the volunteer training programme which is a 6 month*

*programme which involves a mixture of shadowing, competence assessment through workbooks and portfolio compilation and compulsory attendance of a 2 day intensive course (Centre Manager).<sup>60</sup>*

The 2 day (14 hours) course component of the programme, run by the Centre's own training team, comprised a core induction in the Centre's structure, history and ethos, policies, procedures, Health and Safety, confidentiality and equal opportunities, and some training in administrative and interpersonal skills. In addition the volunteer was required to do 6 hours of private study, which included keeping a personal journal, and to attend follow on sessions totalling 6 hours, followed by a further 6 hours minimum private study.

We attended the second day's training which largely focused on confronting prejudices and developing interpersonal skills such as active listening. Despite the emphasis on empathy, one volunteer recommended more training in what was involved for women to come to the Centre, and how they could be helped to open up. Echoing criticisms of the LPC, she commented that the training had been too academic:

*I don't know any training that was done at the basic human interaction level – you know, the buzzer goes, this person walks through the door, what do you say to her? I'm thinking here of a volunteer who has actually said to me things like 'what do you say when people first come in?' Because you know when you open that door you have to react and you also have to work out quickly whether you should leave them there, or bring them into the main room which might be quite full, whether they're going to burst into tears or what. We could do with telling about that and training in how to do it. (Volunteer in Advice and Guidance Team, Chapelvale Women's Centre).*

She also argued that volunteer advisers needed training in acquiring an appearance of confidence (Goffman, 1978), because '*women are coming to you for professional advice and they need reassurance - you can't say 'oh this is the first time I've done this..'*'

An Asian paid worker who had also attended the programme was rather more critical, particularly of the exercise on prejudice. Her comments suggest that if agencies are genuinely to function as learning organisations,

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<sup>60</sup> Accreditation was being sought for the course because it was seen as increasingly important in the competition for funding since it was evidence of '*competence / being up with training*' (Centre Manager)

they need to ensure that they instil reflective practice into their systems, especially when their user community has traditionally been drawn from one ethnic group:

*There was no investigation of whether there was any truth in people's views or what you might do about prejudice. Especially with so much Islamaphobia about – it needs to be addressed. I also thought a lot of the training was very basic. (Domestic violence adviser, Chapelvale Women's Centre).*

A further difficulty was caused by the fact that the course could only be run a few times a year, with the result that some volunteers had to be allowed to work in the drop-in area prior to attending it. The Centre Manager explained that in order to overcome difficulties this might cause, the volunteer would be inducted and would then be part of a *'team made up of at least one or possibly 2 very experienced volunteers and a member of staff who is on call'*. However this was not how some supervisees described the reality of practice. For instance, a woman who had been volunteering for 18 months said: *'There was very little induction'* although she largely attributed this to the Centre's recent relocation. She was nevertheless doubtful that it had since been formalised. Her comments point to the limitations of formal occupational training, underlining the inevitability and value of experiential learning and, consequently, the need for close supervision while this takes place:

*The thing is you can't imagine what will happen until it happens, when you start to think 'oh my god, what do I do here?' So it doesn't matter how much information you're given, how much training occurs as things crop up you need to know there and then what to do. (Chapelvale Women's Centre).*

She went on, however, to depict the familiar tension between the rhetoric underpinning supervision systems and the reality when under resourced organizations comes under the sort of pressure to which all NFP organisations, serving a needy clientele, are subject. Asked what the team did if a difficult issue arose in the drop in area, she replied *'you ring up the paid team, or the volunteer co-ordinator'* but then said that this did not always work. She also thought there were *'a lot of training gaps; for me, I had already acquired a lot of the skills you need, like confidence building, assertiveness, counselling; but there should be more of all that in the volunteer training, especially for the younger volunteers.'*

Completion of the volunteer training programme depended on being assessed 'as appropriate' and though it was possible to be assessed as 'not appropriate' because, for instance, of 'ongoing personal issues or ability problems', the Centre still had 'an open door and we have the option of level 1 volunteering'. This option exemplified the NFP commitment to its client base:

*The thing is for us every woman who volunteers is a client of ours' .. we would be supporting her – working out boundaries .. we understand there will be conflict, potentially between her as client and her as volunteer ..(Centre Manager)*

As a result the Centre did not insist that volunteers took up accreditation:

*They still have to do the course and if you do all the training and are assessed to have completed it all, then you can be certificated through an in-house certification process. But to be accredited, accreditation is a whole process of portfolio building, continuous assessment leading to a qualification – level 2 Open College Network.*

However it was recognised that the entwined goals of empowering clients / encouraging volunteers and providing quality training, could lead to tensions, especially as the external environment became increasingly competitive and concerned with professionalism:

*This does mean there's a conflict; on the one hand there is accreditation, formal regulation and so on and these are very important to because they help establish our credibility with funders and yet in other ways we are all about inclusivity, open door and that world of formal qualifications can be quite excluding – so there are different pulls – we occupy a space between different worlds. (Manager, Women's Centre, Chapelvale).*

Another manifestation of the continuing strength of the NFP ethos and the related focus on organisational need was expressed in the manager's reservations about the individual nature of accreditation; 'the idea of individual training, ongoing professional development can be at odds with our holistic approach.'

Once volunteers had completed the programme they could progress to Level 3, by volunteering within a particular team at General Help level where they could receive further training. Training was triggered by both organisational and individual need. The manager's account of how this worked fitted the learning organisation model, and recognised the

importance of informal, experiential learning as well as formal work based training:

*Training is done in a team and incorporated into the day to day work. Team managers can coach and are available in a much better way than tutors. But beyond that, each team manager will be identifying what their training needs are and then on top of that people's training needs are also assessed in appraisals and supervisions.*

Sources of training included both the team and the in-house trainers who ran courses on, for example, assertiveness, and also:

*some college courses but it's much more likely to be a variety of voluntary sector training like social service training and networking with other NFP agencies – for instance we are going over to \* Women's Centre which runs a specialist service so we can explore the issues around eating disorders.*

Some training was 'mandatory – for instance the courses on domestic violence and child protection', but a major training issue for the Centre was the lack of courses designed to meet their specific needs because their approach crossed different occupational / specialist boundaries: *'there's a real vacuum in training – nothing exactly fits what we do and we'd like to try and develop and ring fence a qualification'* (Centre Manager).

However the major issue was the lack of resources. One volunteer had decided to do a certificate in counselling at her own expense, because she regarded these skills as *'absolutely vital'*. An outreach caseworker with one of the LSC contract teams, who was located in a town some miles away from the Centre, stressed the need for particular training *'in Welfare Benefits – it's ever changing so I need constant updates in that – it's essential'*, but said that it was difficult both because of the Centre's lack of money and also because she was only paid for 7 hours a week and *'my work already goes way beyond my paid hours'*.

This worker went on to describe the training which was available as patchy: *'it's the funding. Quite often there will be training such as the Maternity Alliance and everybody in the team ought to go but there's only enough money for 2 people'*. Since such CPD is viewed as primarily related to occupational need, those who had attended would then feed back to the

rest of the team, but, as this respondent explained, this was often ineffective because:

*We nearly all started off as volunteers and we don't actually have enough know how to bring back what we've learned and feed it back appropriately – I can't do it – it's a very skilled thing – so people don't really talk about the content, it's just like the discussion we've just had in the team meeting about the drugs course which \* went on – you just get 'oh it was good' or 'oh I didn't like it'. Nothing about the technical bits, what it was actually about, because cascading down is a skill and we haven't been taught it - and then the other thing is we're not paid to do it either – we're not paid to attend the meetings and feed back (Outreach worker, Chapelvale Women's Centre).*

### **5.6.7 Training in specialist agencies**

The route into, and training within, specialist agencies differs from that just described. The two housing agencies in our sample articulated a distinct ethos which was described as holistic and characterised by a strong commitment to the homeless client which involved giving both support and specialist advice. Thus the Senior Adviser of the Hillchester agency said that they sought to combine the empathic approach of 1<sup>st</sup> tier work with the '*more sophisticated follow up work*'. However, despite this strong ethos, both agencies nevertheless preferred '*to build upon what someone already knows rather than start afresh (with volunteers)*'. The Hillchester manager explained this on the grounds that

*You need skills and knowledge to be able to adequately understand someone's holistic problems and to have somebody who's less qualified, less trained, less experienced at the initial stages, quite often is disabling for a client, so we try and avoid that.*

Lack of resources and the need to get people quickly up to the level required by the LSC contract were put forward as further reasons for not taking volunteers:

*We had someone from the Job Centre, a Path Trainee, unemployed but with a law degree, but didn't have any particular experience in advice and was a large burden on my time. Also, it's all to do with reaching the specialist standard under the LSC. The preference is that \* wants to build upon what someone already knows rather than start afresh. (Weavertown Caseworker).*

Instead most caseworkers had come from an advice background; for instance the supervisor in one agency had come from a local authority Housing Benefit Department.

As with other specialist caseworkers, the lack of formal legal training appeared to result in possibly greater commitment to ongoing work based training, supervision and CPD than is to be found in most of the respondent law firms. For instance, one agency manager said that the whole system depended on

*The advice workers undertaking a minimum level of accredited training in their area of work. It also relies on the supervisor undertaking external training which is accredited and the same supervisor undertaking a minimum level of advice work. Now that's supported by the structures, by the file reviews ..* (Manager, Weavertown Housing Advice Agency).

Describing her training in the Hillchester agency, a supervisee with a background in generalist advice said:

*They begin by sending you on Part A and Part B of the Housing Aid, the Shelter one, and that's fantastic, because you need that really from basics to work your way up. But the only thing was I did Part A and then there was about a two day gap and then I did Part B, and that was a hell of a lot to take in - it was four days so it was really intense. So I'd put it as a suggestion that any other advisers coming in would need a bit of a breather between the two sessions to absorb it all ... you just train yourself up and go on sufficient training, but I think it's mainly experience that makes you wiser.* (Housing Adviser, Hillchester Housing Advice Agency).

The Weavertown Housing Agency also started everyone off with the Shelter course together with 'some form of Welfare Benefit Course' (supervisor).

Following this formal induction, the training comprises a mixture of experiential learning and modelling; the accounts of respondents indicated a greater resemblance to the training contract than to the CAB model:

*The rest of your training is sort of, a lot of its on the job learning, you know, open door and sort of being thrown in at the deep end during an advice session and then you just pick it up.* (Adviser, Weavertown Housing Advice agency).

However the comments of the Hillchester adviser indicated a gradualist approach to exposure to practice, and an open, equitable environment:

*So within the year the first year you're picking up the first hand experience because you're shadowing - any adviser that comes in doesn't go interviewing straight away, they do sort of take it steady. So you shadow colleagues and go and observe in court as well. But we don't push the court too much at the moment because of the way things are... you don't obviously have your full duty session. The interviewing wasn't a problem for me anyway because of the advice background. The key is - what I always tell advisers is 'just ask'. I probably was a pest, but I'm just one of those that would rather double check that I'm giving the correct advice rather than just guessing, and I still do that now, although I've had nearly five years' experience, I'll still run it past him, because he's been doing the job longer than myself. (Housing adviser, Hillchester Housing Agency).*

Also this sink or swim approach in both agencies was supplemented by checks on work and fortnightly supervisions (both gradually decreasing in frequency):

*When you first start, nearly all your work, every file you open, will be checked .. and now .. we look at the client register and Casetrak and say to people 'you've seen 6 people and opened one file ..?' (Advice Manager, Weavertown).*

As discussed above, these agencies combined an emphasis on technical knowledge with soft skills (such as interviewing and listening skills). A supervisor delineated other skills:

*A big part of the job is being able to control an advice session and deal with a good number of people who come in ..there's also drawing the information out of your client, knowing what you've got to satisfy and then prove on the form, always making an attempt to satisfy the criteria.*

This respondent went on to emphasise the importance of legal research skills, but also being trained to recognise one's limits. His insight into the unevenness of his learning supports research into the processes of learning 'in action' (for instance Eraut, 2004): *'as time goes on and you learn more you realise that the way you thought about things in your first month to 6 months, you now see things differently'* and as a result he considered that the six month training period should perhaps last a year, or even two. He managed his own learning, in part through observation, discussing cases with colleagues both informally and at the monthly team meetings which also provided a forum for dissemination of courses, and reading all the journals and other materials the agency stocked. He had come to recognise, however, that learning the law in this way was a skill in itself:

*'when you go on training courses like Case Law updates for both housing and welfare, they're useful because they're not really updates .. they're really about the important cases'*, and also that many skills and forms of knowledge could only be acquired on the job.

Overall however the commitment to training manifested in both agencies meant that caseworkers were able to participate in regular courses including those which did not carry CPD points, for example, Advice Service Alliance training on the contract.

### **5.6.8 CAB training in technical skills and knowledge**

In addition to the interpersonal skills, the CAB workbooks also deal with technical skills including using the information process and case recording, written skills<sup>61</sup> and the process (such as key facts needed) involved in advising in the main enquiry areas. The tensions discussed in Chapter 3 between LSC regulation and the NFP ethos which is embedded in CAB training are exemplified by the directions in the workbook on the Main Enquiry Areas; for instance, in the section on Benefits, in direct contradiction of the LSC stricture that contracted workers should not complete forms for clients, the volunteer is instructed that *'the adviser must always (help with filling in claim forms)'* and *'attendance allowance and disability living allowance claim forms are complex to fill in'* (Citizens Advice, 2004, p 7). The need to spend time with the client is also emphasised.<sup>62</sup>

The CAB Certificate in Generalist Advice Work also provides some training in substantive law relevant to the main enquiry areas: debt, housing and employment, through detailed workbooks for each specialism which work towards competences. This foundation is then supplemented by further courses many of which are CAB run (for instance, Contract Actions in Employment Law and updates), some of which, however, are only held in London or other large cities. As a result the manager of one provincial CAB

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61 These workbooks include a jargon-buster list as demystification of the language is seen as a key support for advisers in the early stage

62 For instance, Section 2 on Debt states that the *'adviser may need to talk to the client at length in order to get an overall picture of client's situation'* Citizens Advice, 2004, p 14)

said 'we have to go externally for a lot of the training now .. we get a lot of training from their support unit in (Boomtown)', and spoke of the strain this could impose on bureau resources.

Although solicitors whose work brought them into contact with NFP advisers generally lauded their expertise in welfare benefits and debt work, there was also a consensus that their knowledge of other areas, notably housing and employment, could be very poor; for instance a Chaplevale solicitor specialising in employment said:

*The quality of advice from the CAB here in \* is absolutely dire – well at least in employment; the number of times you have to ring up the manager .. and say 'I'm going to be writing to you about this file, you've missed the time limits, you haven't done this'.*

Her subsequent comments also cast some doubt on the efficacy of volunteer training and / or supervision:

*You get people who've come to you and they've been to the CAB and some volunteer has taken one of their standard letters and actually queered the pitch of the case .. they don't even type them up, they just get the proforma and at the top it's got 'use for ...' and at the bottom all the advice the CAB gives and they send that to the employer!*

Her criticisms were echoed in comments the Housing Solicitor cited in 5.6.5 made about his CAB trained paralegal:<sup>63</sup> 'her knowledge is limited and that causes real problems. There's lots of things she just doesn't understand which come up'. Asked for an example, he said:

*Estoppel. She hasn't the faintest idea .. she advised a client to start paying off rent arrears when in fact this woman had acted to her detriment and paying could have undermined her defence (Partner and manager Housing Department, Boomtown firm).*

He further considered that lack of training in advocacy combined with poor legal knowledge meant that NFP workers were not equipped to act in Housing matters:

*Their possession cases never become disrepair counterclaims and they always settle, they under-settle their claims – it's because they're nervous or don't understand the mechanisms, the law - and they don't understand mortgage possession hearings. Basically they have no real*

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<sup>63</sup> This paralegal's perspective on her limited legal knowledge is recounted on p 97

*idea of how to conduct a case. We've had people coming to us where they've been ill advised. We've then appealed their case and unpicked what's happened and frequently found that where a NFP person's been involved no note has been made of the judgement.*

This concern was largely vindicated by the following account by the Hillchester Housing caseworker who had come from a generalist agency:

*I'll tell you I was petrified when I was doing court work because I didn't have a clue what it entailed - how hard it would be, but my supervisor he sort of did mini-coaching sessions and I went on a training for possession .. in the court work I don't think you ever are confident. I mean in the first year I think I was in a total panic, but I did it*

However further points made by the Housing solicitor at the Boomtown firm about the consequences of a lack of training go beyond the resulting inadequacies in the knowledge and skills of level 2 workers, and represent perhaps the most telling criticisms of the use of the NFP sector for more complex and particularly court based matters. His following explanation for his resistance to NFP involvement in a County Court Possession Scheme is grounded in the Rule of Law:

*In the court room it is important that you have people who are qualified .. the voluntary sector person feels as if they have no .. right (to be there) and that's true. They are there at the grace of the judge and that tempers how they behave .. they are over gracious, they don't challenge, and that's aside from whether they have the expertise. The thing is if you go into court on licence that affects the way you behave .. they are uncomfortable about confronting the judge.*

### **5.6.9 Training and networking**

For the NFP sector, networking, both within a (learning) organisation and across a region, is a fundamental value both for their way of working, and also as a solution to the scarcity of resources for training and staff development.

One worker spoke of the learning that took place as a result of working in a team and being able to '*shout across the desk to \* what do you think about this?*' However CLSP informants in the regional LSC office noted the problems in resourcing this form of 'learning net', both because of the ring fencing of CLS contracted workers and because Learning and Skills

Councils are only mandated to fund award-bearing courses, rather than coordinating roles. A CAB manager said that her specialist case workers tended not to mix with the rest of the bureau any more because *'they are so focused on the contract they don't go to as many meetings'* (Welfare Rights adviser, Chapelvale CAB). This was regarded as extremely unfortunate since, as we have noted above and in earlier chapters, mixing is viewed as beneficial to bureau volunteers and advisers as well as forming part of the CAB ethos.

Networking within the agency was not only hampered by ring fencing, but also by the fact that there is no funding for the reproduction of the workforce:

*What I would like to see in the contract is an allowance for specialist workers to be able to train up volunteers and so on, because at the moment there is this huge jump between being a volunteer adviser and becoming a skilled case worker which often means working for the LSC and if you don't have a mentor who can give you the time and the training to do it, then you never reach that and that's why there's a huge deficit of advice specialist case workers. We are all just chasing the same few case workers (Contract Manager, Hillchester CAB).*

Respondents also claimed that networking with other agencies in a region had long played a valuable part in the training of NFP advisers and is a further aspect of the NFP community ethos: *'we built up a network with other workers in the same field'* (CAB caseworker). The key role played by such networks in the provision of training, by enabling agencies to form a learning net, is illustrated by the following account of the Women's Centre Manager; she also emphasises the need for funding to support the net:

*In order to manage the difficult balance between generic skills and having some specialisms in house ideally you really do need to build networks .. in the Centre we've actually taken a leading role in the development of VOICE – Voluntary Organisations involved in Community Education – which includes all aspects of training provision.. Each area has a distinct forum for learning and training which the Learning and Skills Council set up as part of a model of joined up working but it's very flawed because it rests on good will. It involved an incredible amount of partnership work and has no resources .. so we are currently fighting for, again through the Learning and Skills Council, a funded post attached to VOICE .. we are also tapped in regionally into \* learning consortium which helps provide opportunities for the workforce .. anything that goes on regionally we get emails about and how to apply for*

*grants for specialist training. There's Business Link too (formerly the TEC) which we again link into for work force development (Chapelvale Women's Centre Manager).*

A supervisor from one of the Housing Agencies described networking as the most useful form of training in which he had been involved. Other advisers, however, said that they no longer had time to network:

*This (the contract) gets in the way. .. it's a big downside especially in this job because I'm not part of a team, I'm very isolated. And you do actually need that facility. (Welfare Rights advisor, Chapelvale CAB).*

It also appeared that competition introduced as a result of LSC contracts could disrupt pre-existing networks: for instance, a Welfare Rights Advice Service had found that the good relations it had previously enjoyed with the local CAB seemed to have been disrupted because it had been '*opposed to us getting a contract and so .. we've not had anyone to talk to about how you work ..*' However, although a representative of one of the national advice agencies agreed that contracting had introduced competition into the sector, she also asserted that there '*had always been competition between networks and agencies: it's easy to talk about the sector in rather utopian terms.*'

On the other hand, networking is clearly consonant with the CLS emphasis on the seamless web, and one of the CLSPs in the sample had worked with the Resource Centre in Weavertown to form an Advice Centres Group, the main objective of which was to provide a forum for sharing information and establishing a collective training programme. As a result the Volunteer Advice Skills Training Programme was launched and, through a successful lottery application, had obtained funding for a training Officer. However, this initiative was relatively rare and the links between the NFP agencies in Weavertown contrast sharply with the situation in Linfield.

Some agencies recounted how relationships with solicitors could involve a degree of training. Similarly, the specialist telephone service offered through the Specialist Support Schedule by, for instance, the CPAG was regarded as an invaluable form of training by all NFP advisers, but most particularly by those in relatively isolated communities. The decision to end this service (subsequently rescinded following representations) was greeted

with general dismay; as a national representative of another advice agency group said *'the contract was a very valuable service – many of our members relied on it.'*

### **5.6.10 The LSC contract as a form of training**

In Chapter Three, we noted the overlap between regulation and training, and also identified the ways in which various forms of regulation could fulfil a training function: this is particularly so with contractual regulation of the type represented by the LSC Contract. The consensus suggested that the contract had entailed a steep (not necessarily swift) learning curve for the NFP. One CAB supervisor commented:

*The LSC contract concentrates the mind and so caseworkers are much more focused because some in the old days were all over the place; now we know how many cases they have, who they are and at what stage they're at and all that. It's great. (Director, Chapelvale CAB).*

For similar reasons, the Manager of a housing agency considered that contracting had improved supervision:

*when it comes to the supervision of files which we do on a monthly basis it's quite easy for the reviewer to monitor the quality of advice that's actually been given .. whereas before, because we didn't have the notes to support that it was quite difficult unless the person volunteered that they had a training issue. Now it's quite easy because we've got the documentary evidence. (Senior Case Worker, Weaverston Housing Advice agency).*

A CAB manager also thought that the LSC contract had made her more rigorous about supervision. Some managers commented on the potentially educative role of the LSC audit: *'I'm in favour of quality audits providing it is done in a way which is supporting the organisation to develop itself, rather than just a policing type of thing'* (Director, Chapelvale CAB).

The data indicated a training need in skills congruent with LSC needs, such as file management, filling in forms; obtaining statements of means and so on; that is, in complying with the LSC administrative and regulatory requirements which (as discussed above) solicitors struggle with too, and which the LSC Trainee Solicitor Events are designed to address. For

instance a CAB Benefits adviser said that she found the sufficient benefits test

*An absolute nightmare. I don't even know what it means. I went on a course on this earlier this year and about 15 of us on this course and we all had a completely different interpretation. (Welfare Rights adviser, Hillchester CAB).*

However, for NFP workers their difficulties also stem from the dissonance between these demands and the NFP ethos. This dissonance is revealed too in the account of a Welfare Rights Adviser's reported difficulty in learning how to construct the sort of narrative acceptable to the LSC:

*I've always said the main part of my job is to be a good listener .. there's no recognition of that on the LSC format and I think the first 12 to 18 months I literally spent an hour and a half to two hours with someone, wrote a couple of sides of that and claimed my 120 minutes. But they won't allow 120 minutes for that if you've only written 2 sides .. I've had to learn to write an essay ..I've had to fabricate essays like nothing on earth, to justify my time. (Welfare Rights Adviser, Hillchester CAB).*

One newly qualified solicitor who had worked in CABx for years reflected on the difficulty for CAB advisers: *'Poor old CAB contract workers are stuck in this horrible situation, they're neither legally qualified nor proper CAB workers'*. She proceeded to argue that this disjuncture had been exacerbated by a *'shift in CAB training from a very fact based approach, geared to particular specialisms such as housing and debt, in the 1980s, to a strong emphasis on empathy.'* Apparently contradicting the idea that the contract is, as discussed in Chapter 4, colonising CAB culture, and producing convergence between the NFP and FP sectors, she concluded: *'as a result I think they're out of synch with what the LSC wants.'*

Her subsequent comments, however, underline the need for all NFP workers, both volunteers and paid staff, to be trained in the LSC model:

*Also there's only a very limited number of people who do paid work .. it's still very volunteer based .. but this contrast between what the LSC want to do and what the CAB wants to do – you see CAB workers usually describe themselves as delivering a holistic service .. whereas a housing caseworker on the franchise as it was then .. it was narrowed down and narrowed down .. at first you could apply for grants from charities to reduce or wipe out people's rent arrears then you had to identify what the legal issue was consistently so .. there's a lot less creativity there .. that's the effect the LSC has*

*had - if you're a worker at the CAB relying on LSC money you now have to identify what the legal issue is and show that in your case notes at the start. (Housing solicitor, Boomtown firm).*

### **5.6.11 NFP Supervision**

As in the FP sector, the NFP sector relies heavily on the open door system for supervision. However the sector also has a tradition of formal supervision, similar to the system in social work. As a result, supervision appeared to be taken more seriously in our NFP sample than in many of our respondent law firms. One Housing Agency manager said that supervisions were held regularly and followed a proforma check list that covered work load, file review and progress of cases. A supervisor in the same agency said he had found the transition from advice worker to supervisor very difficult; his approach was both reflective and reflexive and suggestive of a supportive learning environment (Barnett 1999):

*Changing your priorities- it took a long, long time to sort of set my mind properly and change my daily habits. I mean advice giving isn't an exact skill and one thing I fed into the file review process is I provide them with a sheet where they can confirm any corrective action that I've asked them to take on the files and also give me feedback – you know sort of like a carrot for them to disagree with me because sometimes we do disagree and it's important to discuss. (Senior case worker, Weaverston Housing Agency).*

Supervision is maintained for all levels of workers in the CAB; so the volunteer is further checked / trained by the process of completing case sheets at the end of each transaction which a supervisor then reviews at the end of each day. Asked to describe what supervision entailed, one CAB supervisor said:

*It's an opportunity for them to take seriously any problem they may have. The hours are discussed, where they're at, the case load .. the training - they have to do a certain amount of training for the contract for which the hours don't count – another bone of contention – and a general discussion of about 2 or 3 cases, those that are interesting or not interesting but they just bring them in, so it can last 45 minutes, but not longer than that usually .. and we have them every 2 months.*

However the supervisee in this case expressed a need to use the session to go through difficult cases, especially since she did not work in a team, and said that supervision did not fulfil this need because (unlike in the

Housing Agency) *'the supervisors are not caseworkers – she hasn't got the benefits background to say 'have you tried this?' I just tell her what I'm doing and why. Whereas in my previous jobs my manager was a caseworker'.*

As we noted above, the data indicated that contracting had produced improvements in supervision: *'The requirements to supervise and carry out file reviews are very good .. some agencies did lack those sorts of systems or at least they weren't set out formally.'* However the subsequent comments by this national representative address the recurring theme of the tension between top down quality assurance and the community based flexibility and creativity which the NFP sector enshrines:

*On the other hand, it's important to have things that work for the particular agency and some agencies did conduct supervision but not in the formal way required by the contract and the view of some of them is that it doesn't quite work for them; they needed that flexibility .hopefully preferred supplier / peer review will address this (National Officer of a national advice agency).*

Finally, some recognised that supervision is a skill for which, ideally, one should be trained: *'just because you're elevated to a certain position doesn't mean you know instinctively how to do it'* (Housing Agency Manager).

### **5.6.12 NFP CPD**

CPD is required by the LSC to ensure that the specialist case worker is kept up to date; a common complaint however was that the training days did not count towards the contract hours. The data suggested that, as we found with many in our FP sample, CPD training tended to be rather ad hoc; again largely because of a combination of paucity of provision and lack of resources: *'we can't really make strategic decisions about training. The training usually depends on what's on offer, especially in debt. Benefits is easy – always something to go on for benefits ..'* However the ad hoc nature of CPD is illustrated by a CAB debt worker who had previously worked for local government as a benefits adviser, where, despite the fact that she *'always had this problem with widow's benefits and maternity*

*benefits, in the 9 years I was there I didn't go on one course on (those) benefits'.*

A supervisor in one of the specialist Housing Agencies expressed doubts about the agency's approach to CPD reminiscent of those voiced by some solicitors: *'I think a lot of CPD is just doing it to get your 6 hours in rather than .. you know it could be a lot more focused, there could be a lot more strategy behind it'* and his subsequent comments point to the need for training in context specific knowledge: *'we could do with a lot more in-house stuff as well, tailoring courses specifically for our needs ..'* (Senior case worker, Weaverton Housing Advice agency).

### **5.6.13 NOS4Advice**

The lack of uniformity and comparability across training regimes and standards in the NFP sector is addressed by the NOS4Advice Project. This draws on the NQF, which underpins the universality of qualifications, providing a 5 level structure into which qualifications can be dropped. The NOS have been defined as descriptors of performance – *'what individuals are expected to do in their daily work. They are practical statements of levels and types of individual competence that workers should meet'* and now incorporate *'under-pinning knowledge'* and *'context through range'* statements, and these are evident in the NOS4Advice standards.

As the literature on assessment makes clear, a major difficulty with the use of 'standards' in training and quality assessment is that the term standard is not unambiguous. Occupational tasks, particularly in the professional sphere, are not susceptible to objective description and therefore generally require some form of normative qualifier when defined (such as **'appropriate'** level of inter-personal skills). This normative element in the specification demands verification of local judgements, and verification in turn demands the presence of material evidence which can be inspected by the verifier. This has led to the criticism, analogous to that levelled against quality regimes (see for example, Benson & Waterhouse, 2001), that the education and training process begins to focus narrowly on the production of evidence, rather than on the real object of the education or training.

A national representative of one agency expressed concern about the detail of the units and their lack of flexibility: *'I worry whether they are flexible enough to recognise the different values volunteers bring .. because the NFP sector is very diverse, has such a range of people in it, and that's one of it's strengths'*. Another national representative said:

*I'm very sceptical that NOS4Advice will do what they say – a lot of money has been poured into it but for me what's come out is a list of what an adviser does which doesn't address what it actually takes to be a good adviser so they've listed all the functions but I think there's something about aptitude – it's not that you can't learn things but there's also inherent ability and what these standards do, they reduce everything to functions and sub-functions and don't get to the nub of what makes a good adviser; in many ways they read like the QM which suffers from the same problems. And I think if you were an inexperienced adviser and faced with this massive pile of papers and huge list of things to do it would just be daunting and get in the way; they're not packaged in a way that's useful to someone already under a lot of pressure which advisers are.*

On the other hand others welcomed the impetus the standards would give to the systematic development (and recognition) of skills in the NFP sector. An Open College spokesperson saw *'NOS4Advice as positive in that it's developing a framework which will benefit the sector in the long term'*.

However in the short term she saw it as an obstacle because:

*The only way it will work, in my view, is with new entrants to the sector who can be told 'take this pathway, take this placement' and get it funded through a student loan, for example, for a Foundation Degree.*

Her views were largely echoed by another national spokesperson who

*Welcomed the workforce development side of the project .. I think if NOS did develop something like the foundation degree then that could help (draw people into the sector) .. but I don't know whether we could address any of this without significant funding, like debt forgiveness.*

This concern with funding difficulties recurred in discussions of NOS4Advice, echoing the general concern in the sector with resources for training:

*Some of our members would argue that it's for the agencies and trainers to turn (the standards) into training material but at the moment there's no money for that .In the early days the hope was it would provide transferability of qualifications*

*but at the moment there's no one in place to develop an overarching qualification.*

Concern was expressed that the resource implications of NOS4Advice would affect smaller agencies particularly badly.

## **5.7 Personal Mastery and Organizational Learning**

The data discussed above indicates various lessons for the training of practitioners in publicly funded law and advice. It also suggests a need for further research into how organizational learning takes place. The following represents a brief set of reflections on some of the learning / training issues raised by the data.

Earlier we discussed the possibility of distinguishing the NFP and FP sectors on the basis of whether their training models are based on an individual human capital acquisition model, or a strategic organizational capital development model. That discussion can be developed further by using concepts from studies of expert knowledge and organizational learning. Senge argues that the *sine qua non* of organizational learning is individual learning, leading towards '*personal mastery*' (1990, p 139). The evidence from our respondents from both sectors suggests that personal mastery is achieved through a combination of formal and experiential learning, although a true sense of mastery is only acquired through the latter. In the NFP sector, the entry level experience bar appeared to be set at two years, which of course is also the length of the solicitors' training contract.

This represents a formidable investment in the human capital available to the organization, since, as many senior partners in the FP sector observed, not only is the productivity of workers very low during this period, but they absorb a considerable amount of the time of supervisors and colleagues. The investment is also risky, since there can be no guarantee that the worker will ever achieve quality or productivity which will repay the investment, and there is also the risk that, having achieved the necessary skills and experience, the worker will sell them in the open market to

another organization – a possibility which is likely to be increased by the development of NOS4Advice.

The implications of this analysis are manifold. Firstly, an organization acting in accordance with economic logic will attempt to reduce the level of risk by employing staff trained by someone else. Secondly, organizations will attempt to employ staff who are less mobile, where that is possible. Thirdly, training which in the NFP sector is generally very organization specific will reduce the mobility of labour. Fourthly, organizations should seek to ensure that staff are embedded in a system where expensively acquired skills can be made available as widely as possible.

One of our respondents, a senior advice worker in a housing advice agency, produced the following description of the knowledge and skills required to perform effectively in the role:

*There's technical knowledge - by which I mean the content with some overlap on procedure. I'm talking about maybe the actual legal knowledge that a person is going to need of a particular field, it's the actual technical content .. for instance, to illustrate the point, if you are advising somebody on their rights as a homeless person you need to know what's in the legislation, what's in the policy or case law etc and I mean more or less the same thing - it could cover any particular domain of knowledge within the housing field. (Senior Adviser, Hillchester Housing Advice Agency).*

This emphasis on the importance of knowledge of doctrinal law was seen as distinct from the processes whereby legal knowledge was applied to the circumstances of particular legal problems:

*When I talk about procedural, what I normally mean by that is the way in which we may actually approach a problem that that person's come to us with – how to put together the technical content of the field, organising it into some kind of principle of advocacy and how we might be able to move that person's case forward. So rather than just knowing the case law it's how you might use it and it's also how you may be able to use it in an actual formal process like a court of law. So it's not just about knowing the case law that applies to mortgage cases, it's how you actually use that in the tactical way in court and knowing what the limitations are that the courts apply, for instance, in procedure in the courts.. the distinction is slightly artificial because the two generate each other to some extent. So that's technical and procedural and then there's skills ...*

His subsequent definition of skills matched the description most respondents gave of the 'soft skills' necessary to fulfil the role of an adviser, though incorporating an index of efficiency which was more commonly found in the FP sector:

*(Skills) can be anything from a simple understanding and application of listening skills so that you can conduct an effective interview with the client, and this has all kinds of implications: whether or not you can actually get the knowledge that you need to be able to understand that person's circumstances in a legal framework, to how you could actually limit the length and scope of an interview in a way which is cost effective, given the implications of working within the LSC kind of regime .. we do now have to think more carefully about the way in which we conduct our interviews to make sure they don't go on too long.*

As our preceding discussion of the data showed, several respondents, in both sectors, regarded the sorts of soft skills identified above as central to the fulfilment of the legal advice role, in that successful collection of the relevant information at the initial stage of a legal problem was key to its successful resolution. A housing solicitor working in the FP sector with previous experience as a CAB worker, related rapport to diagnosis and commended CAB training for developing the ability to achieve this:

*The CAB training they do is very good because (they tell you that) you should isolate what the problem is and take it from there and 'this is how you isolate the problem' and they explain that if the client feels they can talk to you then you'll get that information provided you use the right questions and the right phrases .. but if the client doesn't feel any kind of connection with you at all then your chances of getting it are a lot less (Housing solicitor, Boomtown firm).*

These descriptions of the skills needed to do publicly funded work can be developed still further to include knowledge and awareness of features which might be described as contextual:<sup>64</sup> knowledge of local agencies and their personnel (such as the local housing officers responsible for managing arrears and evictions), or of the functioning of the courts. This point was made to us by several respondents in relation to District Judges, but was expressed most eloquently by the same Senior Housing Adviser cited earlier; as he says, there are clear implications for NFP training:

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<sup>64</sup> This skill / form of knowledge surfaced repeatedly in respondents' accounts and is supported by the BRTF finding that 'local knowledge, direct experience, empathy and trust enable them to be innovative and effective in meeting local needs' (2005, p 19; Sanderson & Sommerlad, 2002)

*Courts have their own cultures and unless you're quite robust in your own knowledge and in your advocacy skills the court culture will tend to make you go along with whatever the judge has perceived to be the done thing. So let me give you a classic illustration of this, if I go to Hillchester County Court, I know that in most cases where there is rent arrears, in spite of good practice, any case law to the contrary, most of those district judges will make a suspended possession order quite regardless of the implications for the defendant because that's their culture, it's easy, 'that's our take' the judges would probably say 'on the principles of justice and equity as they apply to rent arrears cases'. Whereas when I go to Chapelvale the court culture is to give general adjournments wherever that's deemed to be reasonable. A general adjournment is the exception in Hillchester County Court unless you've got a good knowledge of the law' and the confidence to speak with a sense of entitlement that solicitors are trained to have<sup>65</sup>. But the chances are that you will just go along with what the court has as its prevailing culture. So there is a great need for more resources and training to go into this area for people to be able to play their part in a way that doesn't simply just condone what the judges are doing or seem to be doing. (Senior Housing adviser, Hillchester Housing Advice Agency).*

There is a considerable level of complexity in all the skill domains identified by this respondent. The literature on expert knowledge attempts to provide a structure for understanding this complexity through a number of conceptual frameworks. Donald Schon writes of the 'repertoire' of the skilled professional, noting that skills and knowledge are deployed in an ensemble rather than singly (1983). The question arises as to whether the skills in this repertoire can be learned singly, and then 'reassembled' in practice, or whether they have to be learned as an ensemble (Eraut, 2004), and if the latter, what the optimal conditions for learning are. One key focus for many writers on expert professional learning has been the fact that such knowledge is most often applied to processes of rapid decision making. Approaches to decision making can be divided into two classes: algorithmic, where decision makers follow strict rules and procedures to reach decisions, and heuristic, where decision makers use knowledge which is often described as 'intuitive' (Eraut, 2004) or 'tacit' (Polanyi, 1968).

The prescriptive certainty of algorithmic decision making holds attractions for novice decision makers and for those wishing to harness standardized

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<sup>65</sup> His subsequent points reinforce the comments, cited above in Section 5.6.8, by a Housing solicitor on NFP workers' sense of inferiority in court

knowledge models for educational, work management or software generation purposes. It is generally held to produce slow outcomes, however, and other writers on expert knowledge (for example Dreyfus and Dreyfus, 1986) suggest a progression from rule-based to intuitive decision making as people become more expert. This enables them to make swifter decisions, and also to cope with situations for which rules have not yet been generated. The capacity to use the law creatively to develop new avenues in social welfare law (exemplified by the Hillchester lawyer cited above) would be one example, but the ability to meet the challenge of the kind of variation in court cultures cited by our housing adviser in this section would be a more mundane example.

The TFR proposals and, though perhaps to a lesser extent, NOS4Advice addressed many of the training issues delineated above. At the same time, however, it is important to note the continuing relevance of criticisms of instrumental competence based training, and in particular the argument that NOS4Advice does *'not get to the heart of what makes a good adviser'* (spokesperson for a national umbrella advice organization). Similarly it was argued that the TFR proposals did not address the concept of what it is to be a professional:

*Professional identity is reduced to demonstrating a series of abilities. Important though these are for the success of a solicitor's business they provide little guarantee that entrants to the profession have been part of a collective enterprise where they have learnt with and from others the significance of the power and influence that such knowledge brings (UKCLE, 2005, p2).*

## **Chapter Six      Conclusion**

In this concluding chapter, we will briefly summarize some of the key findings arising from the research, and relate them to the essential policy aims which we take to be at the heart of training and regulation systems. We will then explore some potential avenues for developing the relationship between regulation and training and will also identify areas which would benefit from further research.

Regulation is a powerful means of influencing the culture of organizations and the behaviour of individual advisers. It produces the internalization of values and rules which can be beneficial to organizational management and the relationships with clients. Regulation can also be the only means of ensuring that individuals and organizations make the necessary investment in training. However, restricting rights to practise in such a way as to provide this incentive runs the risk of constricting the labour supply and inflating its price. The delicate balance to be struck in this equation is illustrated in part by the contrast in regulation and training regimes across the sector: in the FP sector, which still has a high demand from potential entrants, there is heavy regulation and high investment in initial training and CPD, whilst in the NFP sector, which is dependent on volunteers and specialist advisers who often graduate from the ranks of volunteers, entry barriers are low, and investment in training is patchy and subject to financial pressure from funding bodies, which are on the whole reluctant to meet the full economic cost of providing a workforce for the projects they fund or the services they purchase.

There has been an increasing recognition that a minority of complex legal problems require specialist advice, while the majority of problems may only require help from advisers with a more general level of knowledge and expertise. Striking the balance between the needs of specialist and generalist advisers is complex, as our research demonstrates. Specialists have a wider role than simply working on cases: they provide advice agencies with the means of keeping abreast of technical details in rapidly changing areas of law and policy, and they represent a valuable resource in terms of their capacity to train and improve the skills of other advisers.

Strictly drawn contracts which attempt to focus on case work may have a harmful effect on the firm or advice agency as a whole. Similarly, although it is wasteful to train general help workers to high levels of specialism, they do need to be trained sufficiently to fulfil their vital role in signposting and referral.

The issue of training resources becomes even more significant when considering our respondents' views on staff turnover and future labour supply. In both the FP and NFP sectors anxiety was expressed about the increasing turnover of staff, the age profile of the workforce, the commitment of applicants, and the attrition seen as likely to result from the increasing debt burden on the young workforce and the downward pressure on salaries. Both sectors required at least two years' previous training or experience before appointment (and clearly the bar is set much higher for solicitors), and the pool of labour with this experience, and which is willing to enter the sector, was assumed to be shrinking. Lowering entry requirements might increase the supply, but also risks compromising quality. An alternative approach would be to incentivize training for organizations and individuals.

Our respondents were largely unanimous in identifying the fact that the nature of publicly funded legal advice work, and the specific clientele in need of this advice, demanded special skills and knowledge, and equally therefore, specialized training. In the NFP agencies that we studied, such training was generally available, although it could not be funded in the breadth and depth that respondents thought desirable. In the FP sector however, the initial training provided by the LPC was regarded as too heavily biased in favour of commercial practice and generally felt to address inadequately the demands of this kind of work. In spite of the cogent arguments against a 'legal aid' LPC, the fitness for purpose of the training is an issue which needs to be addressed. It appears that the introduction of LPC 3 may provide a solution; nevertheless the general adequacy of the training, including preparation for sustaining a contract with the LSC, is an issue which has received insufficient attention and is an area we would recommend as being suitable for further research.

Our results have reinforced the many other studies which have suggested that training and formal retrospective regulation of the kind represented by discipline and complaints procedures are necessary, but not sufficient, conditions for guaranteeing effective and competent performance in the publicly funded legal advice sector. The profound impact of contractual regulation, as represented by the operation of the Civil Contract by the LSC, was recognized by all our respondents, as were the positive benefits in terms of agency and firm organization, case management procedures, client care and public confidence. Some of the reservations expressed about the operation of contractualism (in particular over the time standards auditing characteristic of the audit regime in place at the time of the study) were the result of poor understanding of the accounting processes. This is in itself a cause for concern, and indicates that organizations need more support than they currently receive in ensuring that their staff are trained in the details of the Funding Code. Of equal concern is the perception on the part of some respondents that audit judgements and contracting decisions were not always driven by reliable and objective criteria. In order for the relationship of trust between the LSC and its providers to be maintained, these perceptions need to be addressed.

The reason that contractual regulation is so effective in transforming adviser behaviour is the extent to which it penetrates all levels of an organization. Whilst other public sector funding bodies may be catching up with the LSC through the introduction of measures such as SLAs, our respondents identified the LSC as exercising an influence over their work which seemed to many of them disproportionate to the amount of financial support they received and which was not regarded as uniformly positive. For instance, there was a widely held perception that the contractual relationship was distorting an important aspect of the NFP mission (for example the CAB's commitment to universalism, the key significance attached to tribunal advocacy and to an 'holistic' approach). The potentially corrosive impact of such perceptions may need to be addressed, together with the way in which the terms of a contract may have ripple effects on the internal organization of some agencies (isolating specialist workers). We would recommend that the LSC consider some form of RIA in relation to the Civil Contract and Funding Code and the NFP sector.

A final point concerns the limitations of even such a powerful regulatory mechanism as the contract. In spite of the increasing sophistication of the tools with which the LSC can measure performance (such as Quality Profiles and peer review of files), and the strength of the sanction of terminating a contract, it is our observation that formal compliance neither guarantees the quality of advice and nor does non-compliance necessarily signal bad advice. The Category One firms which we studied, and the compliant NFP agencies, appeared to us to share the characteristic of a strong service ethic, and powerful cultures where quality was maintained through the capacity of the organization to learn and adapt internally by the use of effective mentoring, role modelling, fluent informal communication systems and the sharing of expertise. At its best, this approach also functioned between organizations in the way intended by the original CLSPs, to provide the local networks of advice that are also the objective of CLACs and CLANs. Where these cultures do not exist, however, a punitive approach to audit and contract management is unlikely to bring them about, and we would recommend the development of, firstly, infrastructural support in terms of resources and training, and secondly a more gradual educational approach to audit, which sees performance management in terms of improving supplier performance as the primary objective, rather than threatening to withdraw those who are non-compliant from the market. We observed a high level of value commitment in the sector which contributes to the 'added value' which recipients of publicly funded legal advice often receive. Our respondents (as one might expect them to) expressed the view that poor quality suppliers had, by and large, been eliminated from the market place but that there was a risk that the persistent downward pressure on costs, and a decline in trust and confidence in the relationship between the LSC and its suppliers, might have an adverse long-term impact on the ability of the sector to fulfil its ambition to meet legal need.

The functioning of effective learning and support networks in good quality FP firms and NFP agencies was a phenomenon which our research design was not fully able to illuminate. This is an area we would recommend as being suitable for further research. Similarly, the extent to which the costs of operating a contract are fully met could not be determined on the basis of our sample. It is nevertheless a key aspect of the willingness of agencies

to continue in the field effectively as providers of a quality service, and further research in this area is desirable. Finally, many of the policy developments in the field, such as CLACs and CLANs, depend on relationships of trust and confidence within and between suppliers of legal advice, particularly with regard to the issue of matching client and level of specialist advice. Further research into which kind of environment most encourages these relations of trust and confidence would provide a valuable resource in support of the construction of local webs of advice.

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