

# **Access to Justice: Learning from long term experiences in the personal injury legal services market**

**Final report for the Legal Services Board**



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## Executive summary

This report seeks to understand the impact of regulatory and legislative changes in the personal injury (PI) legal services market on access to justice, with a view to drawing lessons from the findings for the regulation of other legal services market segments. It covers the period from 1999 to 2013, prior to the implementation of significant recent reforms.<sup>1</sup> The report also seeks to better understand changes in access to justice over time.

The scope of the research is broad since the PI legal services market has undergone a large number of regulatory and legislative changes over at least the past 15 years<sup>2</sup>. Further, the concept of access to justice is defined widely<sup>3</sup> such that the potential number of impacts to consider is very large.

To provide focus, the starting point for the research has been empirical. A large number of information sources<sup>4</sup> on the functioning of the market for PI legal services that indicate developments in access to justice were analysed. Indeed, a key contribution of the research is to track access to justice indicators over time across a series of cross-sectional surveys. These access to justice indicators are then analysed with respect to regulatory changes within the market for PI legal services.

However, in carrying out the abovementioned analysis, a key challenge has been that access to justice indicators do not fully capture all aspects of the concept, as indicators are available for some aspects of access to justice but not others. For instance, it may be possible to develop an

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<sup>1</sup> The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 introduced major changes to legal aid funding and the regulation of personal injury legal services. These changes took effect from 1<sup>st</sup> April 2013 and their impacts are therefore outside the scope of the historical survey data used in this analysis. For more information see Lord Justice Jackson's paper for the CJC conference on 21<sup>st</sup> March 2014, available at <http://www.judiciary.gov.uk/publications/review-of-civil-litigation-costs/>

<sup>2</sup> The Conditional Fee Agreements Order of 1995 that introduced conditional fee agreements for personal injury cases in a context in which legal aid was available for personal injury claims

The Access to Justice Act of 1999 that removed legal aid for personal injury cases, other than clinical negligence; introduced after-the-event insurance (which protects the claimant from having to pay the defendant's legal cost if the claim is unsuccessful) and allowed success fees (fees charged by the lawyer only if the case is successful) to be recovered from unsuccessful claimants; and liberalised advertising rules

The liberalisation of the use of referral fees in 2004, which allowed solicitors to pay referral fees to introducers in exchange for referring cases on to them

The Legal Services Act of 2007, which introduced Alternative Business Structures (ABS), although the first ABS was not licensed until October 2011

The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 described in footnote 1

<sup>3</sup> Legal Services Board (2012a)

<sup>4</sup> The Civil and Social Justice Survey of 2001, 2004, 2006-8, 2010 and 2011

The Benchmarking Legal Services Survey of 2012

The Legal Services Consumer Panel of 2011, 2012, 2013 and 2014

The Department for Work and Pensions Compensation Recovery Unit (CRU) personal injury claims statistics

The Department for Work and Pensions STATS19 database road traffic accident statistics

The Law Society (TLS) Survey of Solicitor Firms

The Claims Management Regulatory annual report statistics on claims management company number and turnover

The Solicitors Regulation Authority (SRA) alternative business structures statistics

understanding of how the *costs* of legal services faced by individuals have evolved in response to regulatory changes but not the *quality* of legal services, which gives rise to uncertainty with regard to the overall impact on access to justice. In light of this, the empirical findings are interpreted cautiously and it is noted that the present evidence base is limited in what it does and does not allow to be measured directly.

To understand the impact of the regulatory and legislative treatment of PI legal services on access to justice more fully, a second contribution of the research is to introduce a simple economic framework for capturing how regulatory and legislative changes affect the incentives faced by parties in the market for PI legal services and in turn how these might give rise to regulatory risks influencing access to justice outcomes that cannot be measured.

The abovementioned framework is also used to work through the extent to which the lessons learned on the PI market may be transferrable to other market segments – that is, to develop regulatory lessons.

The remainder of this summary provides an overview of the research findings with regard to: a) whether the regulatory and legislative treatment of the PI legal services market has affected access to justice and whether regulatory risks have arisen as a result; and, b) to what extent the lessons learned from the PI legal services market may be transferrable to other market segments.

## Regulatory context and approach

Personal injury legal services have seen significant regulatory and legislative change since 1999:

- Between 1999 and 2004 there was a period of regulatory and legislative liberalisation: The Access to Justice Act expanded the use of conditional fee agreements ('no-win no-fee') and allowed providers to widely advertise their legal services; and, from 2004 solicitors were able to pay 'introducers' for referring cases to them, which allowed introducers such as insurers and claims management companies to perform a significant amount of pre-litigation work.
- In 2011 the variety of legal services providers was extended further by the introduction of Alternative Business Structures, which allow solicitors to set up businesses with insurers or claims managers.
- More recently, there has been a period of regulatory and legislative tightening. The 2012 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act repealed many of the reforms of the regulatory and legislative liberalisation from 1999 to 2004; it reduced the scope of conditional fee agreements and banned the use of referral fees. This came into effect from 1<sup>st</sup> April 2013, meaning its impacts are not yet visible in the data used in this analysis.

This report examines the impact of these regulatory and legislative changes on access to justice. The main focus is on the demand for legal services, the ways people use legal services, the costs they face and their attitudes to justice. The groups interviewed as part of this investigation tended to focus on supply side issues.

To understand the effects of regulatory and legislative changes in legal markets it is necessary to understand the incentives that determine the actions of each of the agents in the market. To this end, the report develops a simple economic framework for access to justice.

The framework identifies a number of important parameters that influence how regulatory and legislative changes affect access to justice, including the following:

- the financial risks faced by the individual;
- the expected size of damages;
- how solicitors' costs are paid;
- the time and legal costs required to settle a claim;
- the likelihood that the defendant will dispute the claim; and,
- the likelihood that the claim will be successful if it is disputed.

For each key regulatory and legislative change, the report develops a number of hypotheses about how each of these changes could have affected access to justice. It then presents evidence from a variety of data sources to assess whether these effects can be identified in practice.

Consumer surveys are used to evaluate, where possible, changes in access to justice indicators for personal injury services over time.

## **Assessment of the effects of regulatory and legislative changes on access to justice in the personal injury market**

### **Conditional Fee Agreements**

Conditional fee agreements (CFAs) were introduced in 1995 and were significantly expanded by the 1999 Access to Justice Act to allow success fees and after the event insurance premiums to be recovered from the defendant in successful cases.

CFAs allow legal service providers to offer fees that vary depending on the success of the claim, thereby allowing providers to offer their customer the promise that 'if you don't win the case, you don't have to pay'. CFAs reduced the financial risk to the individual in making a claim, and therefore could have increased access to justice. However, there are a number of important issues to highlight:

- the 1999 Access to Justice Act also withdrew legal aid for personal injury cases, which considered alone would have reduced access to justice as historically legal aid funded a large number of cases;
- there may have been changes in the extent to which different groups of individuals obtained access to justice insofar as those who would previously have qualified for legal aid did not start accessing legal services through conditional fee agreements;
- there may have been effects on the quality of legal services because conditional fee agreements alter the incentives of legal service providers;
- effects on access to justice may have varied by the types of claims, if some claims proved more attractive to legal service providers than others.

The evidence on whether CFAs did increase access to justice is mixed. Motor personal injury claims more than doubled between 2005 and 2013 despite the number of recorded road traffic accidents falling during this period. However, there was no comparable growth for other personal injury claims despite the expansion in scope of CFAs.

This fact suggests the effect of CFAs may have been different for motor claims than for other types of personal injury. The potential reasons for this reflect features of motor claims that were

identified as relevant in our framework for access to justice. For example, motor claims have a low likelihood of being disputed and a high likelihood of success relative to other personal injury claims, and may therefore have been more profitable for solicitors to take on through CFAs.

In conclusion, CFAs may have increased access to justice in the area of motor claims, but may have had a lesser effect on other personal injury claims.

### The liberalisation of advertising rules

Increased advertising for personal injury legal services could have increased access to justice if it led to an increased awareness of legal rights and of available legal services. However, potentially, it could also have reduced access to justice if it directed individuals to low quality<sup>5</sup> or higher cost legal services.

Available evidence suggests there was little change in the way individuals responded to personal injury legal needs over the period under consideration, suggesting advertising had little effect: Potential reasons that advertising might have had a limited effect are that individuals were already well informed of their legal rights and behavioural biases – for example, individuals frame personal injury as a ‘legal’ problem and may be predisposed to deal with it as such regardless of advertising. Indeed, recent additional analysis of the Civil and Social Justice Surveys shows that how people characterise problems has a significant bearing on whether they use a lawyer or not, but not whether they sought advice at all.<sup>6</sup> On that basis, it seems the effect of advertising may have been to shift existing demand to different channels, as opposed to generating new demand.

### The liberalisation of the use of referral fees

Referral fees could have increased access to justice by encouraging the growth of introducers, such as claims management companies, thereby increasing the range of providers of legal services, and the types of services available to individuals.

Referral fees could also have increased the efficiency of personal injury legal services by increasing competition between introducers and between solicitors for referrals.

However, following discussions with a range of stakeholders the Jackson Review<sup>7</sup> concluded that referral fees reduced the quality of personal injury legal services because they encouraged solicitors to under-invest in cases in order to afford higher referral fees. Lord Justice Jackson concluded “*Referral fees add to the costs of litigation, without adding any real value to it*”<sup>8</sup>.

On the other hand, an investigation by Charles River Associates<sup>9</sup> found no evidence that referral fees reduced the quality of legal services, highlighting two pieces of evidence. Firstly, the success rate of motor claims remained constant over the period that referral fees were permitted. This

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<sup>5</sup> In an input-based remuneration arrangement – that is, remuneration payment by the hour – the incentive is to increase quality to the level that minimises the risk to the provider, but not necessarily delivers the right combination of quality and costs to the purchaser

<sup>6</sup> Pleasence and Balmer (2014)

<sup>7</sup> Jackson (2010)

<sup>8</sup> *Ibid.* paragraph 2.5

<sup>9</sup> Charles River Associates (2010)



fact suggests that referral fees did not necessarily lead to a reduction in the quality of legal services, assuming the quality of legal services may be reflected in the success rate of claims made.

Secondly, the size of damages for standard claims has not changed since the introduction of referral fees. This evidence lends further support to the view that the quality of legal services has not changed, as claims supported by lower quality legal services may be expected to result in smaller or less frequent settlements.

Referral fees do seem to have played an important role in encouraging the growth of claims management companies. With the exception of the growth in motor claims, there is little evidence that they have had a strong impact either way on access to justice<sup>10</sup>.

### **The introduction of Alternative Business Structures**

There has been a rapid growth in the number of ABS in the personal injury legal service market since they began to be registered in 2012. This can be partly explained by existing suppliers changing their business structure to become ABS. LSB analysis from 2013 suggests around half of ABS firms who undertake work in personal injury were existing solicitor firms changing structure. Over the 2010/11 – 2012/13 period the total value of solicitors turnover stayed broadly constant, as did the number of providers.<sup>11</sup> However, the growth of ABS also represents the entry of new legal services providers.

Whilst it is too early to fully assess their role in increasing access to justice, ABS could have had positive effects on access to justice, for example by increasing the number and types of legal providers and reducing costs through vertical integration. The entry of ABS could also have generated negative effects, for example, by reducing the transparency of contracting between non-reserved and reserved providers of legal services. A lack of transparency of referral fees was highlighted in a 2010 investigation<sup>12</sup> – before ABS were permitted. What is clear is that this new form of permitted business structure has allowed providers of legal services in the PI market greater flexibility in responding to recent legislative changes, such as the banning of referral fees, whilst ensuring they are subject to regulation by the Solicitors Regulation Authority.

### **The regulatory and legislative tightening of the LASPO Act**

Due mainly to concerns about the overall costs of personal injury litigation raised in the Jackson Review, the LASPO Act reversed many of the earlier liberalising reforms, including the end of the recoverability of success fees from the defendant, and banning of referral fees in personal injury. These reforms came into effect on the 1<sup>st</sup> April 2013, and therefore it is still too early to understand the full extent of their effects.

However, insofar as previous reforms increased access to justice, the groups interviewed forecast that the LASPO Act will have the opposite effect.

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<sup>10</sup> The impact of referral fees on fraudulent claims is addressed below

<sup>11</sup> Legal Services Board (2013a)

<sup>12</sup> Charles River Associates (2010)

Responses to a recent call for evidence from the Civil Justice Council highlight early anecdotal evidence from provider representative groups that the LASPO Act has reduced access to justice for a number of reasons:

- Since there has been a reduction in the financial returns to legal service providers from taking on particular types of cases, in particular riskier and low-value cases, there is likely to have been a reduction in the availability of these services.<sup>13</sup>
- There may be a closure of solicitors' firms due to a reduction in case numbers.<sup>14</sup>
- For some consumers, personal injury legal services may no longer be financially risk-free since they have to pay for after-the-event (ATE) insurance to cover the costs of legal services if the case is unsuccessful.<sup>15</sup>
- There may have been a reduction in the quality of legal services due to solicitors' firms reducing costs by pushing case work to the lowest fee earner, shifting towards more complex cases for which they have less experience<sup>16</sup>, or an increase in litigation in person<sup>17</sup> with potential consequences for the efficiency of the court system.

However, it is important to note that currently evidence of a reduction in access to justice, as defined in these terms, is anecdotal.

The table below summarises the evidence in relation to the discussion above.

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<sup>13</sup> See evidence from APIL (2014), Law Society (2014) and Bar Council (2014)

<sup>14</sup> Law Society (2014)

<sup>15</sup> *Ibid.*

<sup>16</sup> APIL (2014)

<sup>17</sup> PIBA (2014)

Table 1: Overview of analysis of access to justice indicators

Regulatory and legislative change	Hypotheses	Evidence	Assessment
Expansion of conditional fee agreements (1999)	The introduction and reform of Conditional Fee Agreements increased access to justice by reducing the financial risk of claiming to the individual.	<ul style="list-style-type: none"> <li>■ The rapid growth of CMCs between 1999 and 2011 seems to have been driven partly by the introduction of CFAs.</li> <li>■ Motor personal injury claims doubled from 2005 to 2013.</li> <li>■ There was no comparable increase for other personal injury claims.</li> <li>■ Solicitors' services are provided free to a high (and possibly increasing) proportion of individuals.</li> <li>■ Conditional fee agreements are the source of subsidy for only around 30% of these cases, with insurers more likely to be the source of funding.</li> </ul>	<ul style="list-style-type: none"> <li>■ There was an increase in access to justice in the sense of being able to make motor claims.</li> <li>■ There may also have been an increase in access to justice through an increasing proportion of individuals being able to access legal services free of charge.</li> <li>■ Increases in access to justice do not appear to have been matched for other types of personal injury.</li> </ul>
Liberalisation of advertising rules (1999)	The liberalisation of advertising rules led to an increase in access to justice through increasing individuals' awareness of their legal rights and of the services available to them.	<ul style="list-style-type: none"> <li>■ No significant change in the proportion of people seeking legal advice following personal injury between 2001 and 2011.</li> <li>■ Evidence from the Legal Services Consumer Panel suggests some claimants were influenced by marketing to pursue a claim.</li> <li>■ 80% of those with PI problems see it as a 'legal problem', meaning advertising may have little impact on whether they pursue a claim or not.</li> </ul>	<ul style="list-style-type: none"> <li>■ Personal injury is an area in which individuals are relatively well informed about their legal rights, and they see PI as a 'legal' problem.</li> <li>■ However, there is little evidence that an increase in advertising has significantly shifted the ways that individuals respond to personal injury legal needs.</li> </ul>
Liberalisation of the use of referral fees (2004)	The reforms to Conditional Fee Agreements and the liberalisation of referral fees led to an increase in the range of providers of legal services and thereby increased access to	<ul style="list-style-type: none"> <li>■ The rapid growth of CMCs between 1999 and 2011 seems to have been driven partly by the liberalisation of referral fees.</li> <li>■ In 2012 Legal Needs Survey, only 4% of respondents with a personal injury said a CMC</li> </ul>	<ul style="list-style-type: none"> <li>■ Both the liberalisation of conditional fee agreements and the liberalisation of referral fees appear to have encouraged the growth of CMCs.</li> <li>■ However, there is little evidence that the</li> </ul>

**Table 1: Overview of analysis of access to justice indicators**

Regulatory and legislative change	Hypotheses	Evidence	Assessment
	justice	was their main legal service provider.	growth of CMCs has shifted the ways that individuals access legal services.
Introduction of Alternative Business Structures (legislation passed 2007; began to be registered 2011)	The introduction of Alternative Business Structures has further led to an increase in access to justice through increasing the number and types of providers of legal services.	<ul style="list-style-type: none"> <li>■ ABS accounted for a third of turnover of personal injury firms regulated by the SRA in 2012-13, demonstrating rapid growth.</li> </ul>	<ul style="list-style-type: none"> <li>■ There has been a rapid growth of ABS in the personal injury market, demonstrating that they are seen to be profitable.</li> <li>■ Nevertheless, it is too early to assess the impact on access to justice.</li> </ul>
LASPO reforms (2012): <ul style="list-style-type: none"> <li>■ Ceasing of recoverability of success fee and after the event insurance</li> <li>■ Banning of the use of referral fees</li> <li>■ A reduced fixed fee for solicitor's services</li> </ul>	The regulatory and legislative tightening of the LASPO Act might reduce access to justice by increasing the financial risk of making claims and reducing the returns to companies active in personal injury.	<ul style="list-style-type: none"> <li>■ The number of CMCs declined between 2012 and 2013, as did their reported total turnover from personal injury.</li> <li>■ There is some anecdotal evidence of non-transparent processes to get around the referral fee ban.</li> </ul>	<ul style="list-style-type: none"> <li>■ It is too early to assess the full impact of access to justice in terms of the quantity, price and quality.</li> <li>■ One important effect is that access to justice in the sense of being able to claim the full amount of compensation has been reduced.</li> </ul>

## Regulatory lessons

What regulatory lessons can be drawn for legal services markets (other than for PI legal services) based on the analysis of regulation in the personal injury legal services market?

Regulatory objectives reflect a number of principles including supporting the constitutional principle of the rule of law, improving access to justice, promoting competition, and increasing public understanding of rights and duties. In addition, the provision of ‘value for money’ legal services is key because this allows individuals to make economically efficient judgements and balance the costs of making a claim with the likely benefits.

In order to focus the lessons from the analysis, the Legal Services Board identified a series of questions relevant to regulating legal services markets with regard to access to justice, across the following topics:

- demand side issues;
- supply side issues;
- managing regulatory risks; and,
- developing an evidence base for regulation.

### Demand side issues

The framework for access to justice used in this research highlights the importance of the financial costs of legal services to individuals' willingness to use legal services.

However, perceptions of non-financial costs of legal services are also important. As legal process outcomes are uncertain, individuals face psychological issues (e.g., stress) that may prevent them from addressing legal needs. The Legal Needs Survey for instance shows that people do not address legal needs because they feel "nothing could be done to resolve their problem" or "it would involve too much hassle". Understanding these aspects of demand more deeply is important to focusing regulation on the consumer.

Further research is therefore recommended into what regulatory actions may be required to overcome non-financial costs that individuals face, with broad areas of interest being whether there is a role for better information provision (that is, whether individuals would respond more positively than they do presently if they were better informed) or overcoming *behavioural biases* to encourage individuals to pursue appropriate resolution to their legal problems (for instance, through advertising to change people's perceptions of what problems they frame as being 'legal' in nature). Research that has already been conducted on these issues provides useful reference points for further work.<sup>18</sup> Recent reports published by the LSB explore these areas in greater depth.<sup>19</sup>

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<sup>18</sup> Maule (2013) and Pleasence, Balmer and Reimers (2010a)

<sup>19</sup> See Pleasence and Balmer (2014) and Maule (2013), available at <https://research.legalservicesboard.org.uk/>

This is especially important given, as has been observed in the case of PI legal services, that reforms targeted at changing the nature of supply may have had limited effects on the demand for legal services.

From a regulators' perspective, analysis of the personal injury market shows that a model that allows consumers free-at-the-point-of-use legal services is effective at increasing access to justice, because it completely removes the financial risk to consumers of making a claim. The lesson is that a continuing focus on value for money for individuals is essential to support access to justice. However, it is important to note that ensuring legal services are free-at-the-point-of-use may have wider public interest impacts. The associated regulatory risks are discussed further below.

### Supply side issues

Improving access to justice requires that supply, as well as demand, side issues are addressed.

The regulatory and legislative experience in PI legal services has shown that transferring financial risks to suppliers through the introduction of conditional fee agreements had to be complemented by measures to compensate suppliers for this risk transfer such as the introduction of recoverability of success fees and liberalisation of referral fees.

A lesson for regulation is that bringing forward demand cannot be achieved without also creating the enabling conditions for supply. In today's complex legal services markets, enabling conditions for supply requires consideration of the incentives faced by introducers as well as solicitors (and claimants and defendants) and the framework set out for the analysis of the personal injury legal services market can be used for this purpose.

However, it may be more difficult for regulators to encourage legal service providers to take on financial risks in other legal markets, including for other types of personal injury cases. For example, CFAs are more attractive to firms for motor personal injury claims than more complex, unpredictable claims such as clinical negligence. This logic can also be applied beyond the personal injury market.

A second lesson, therefore, is that the regulation required to incentivise firms to take on risks is not the same across legal markets. In particular, for cases where there is significant uncertainty over the chance of success, it is likely to be more difficult to encourage firms to take on financial risks.

With the abovementioned lessons in mind, a number of potential benefits can arise. Foremost is that establishing new market conditions is likely to spur supply-side innovation - in the form of a variety of business models and offerings to potential clients. This is essential because it ensures that the entire gamut of legal needs is catered for within a given market for legal services.

However, it is important for market developments, as a result of new market conditions, to be monitored. In this regard, the analysis of PI legal services brings forth a number of further lessons that may be useful in monitoring other legal services markets.

### Managing regulatory risks

#### ***Risks of limited access to justice for specific groups or for specific types of claims***

The main risk that the introduction of conditional fee agreements were intended to address in 1995 was the existence of an access to justice ‘gap’. This gap was thought to occur for those whose income was above the threshold for legal aid but was small enough that aversion towards potential financial losses put them off making a claim. CFAs were intended to address this gap by allowing such individuals to access legal services without incurring any upfront costs.

However, one interesting change in the nature of this regulatory risk is that there is now a concern that CFAs may have led to a growth of motor claims but no comparative growth of other personal injury claims.

The above discussion raises an issue in that alternative regulatory structures may lead to access to justice gaps of different kinds. Under the pre-1995 system of legal aid and no conditional fee agreements there was concern about access to justice for *income groups*; under the current system there may be lower access to justice for certain *types of claims*.

A lesson in regard to responding to the changing nature of risks and the trade-offs between them is that it may be favourable to introduce complementary policies to support those already in place rather than to seek their reversal. This point is elaborated in the context of the risk of ‘too much’ access to justice below.

#### ***Risk of ‘too much’ access to justice?***

One point of view that was expressed during consultations with stakeholders is that the regulatory and legislative liberalisation may have led to ‘too much’ access to justice, in particular relating to motor claims. The argument is that because it became easy for individuals to make claims, a ‘compensation culture’ developed and there was an increase in fraudulent claims.

This claim highlights another potential trade-off between increasing access to justice and reducing the number of illegitimate claims – it may be difficult to increase the number of legitimate claims without also increasing the absolute number of illegitimate/fraudulent claims. However, if the number of legitimate claims increases at a faster rate than illegitimate/fraudulent claims, supporting greater access to justice may be viewed as a net benefit from a wider public policy perspective.

The same lesson as outlined above – the potential to introduce complementary policies to support those already in place rather than to seek their reversal – is relevant in this context. In order to reduce the number of illegitimate claims through alternative regulations whilst still supporting access to justice for legitimate claims, stricter rules for whiplash claims to be taken forward may be considered (for example, around medical assessment if feasible).

#### ***Risks of allowing a range of providers into the market***

Regulatory and legislative changes since 1999 have been associated with significant changes in the nature of supply in the personal injury legal market, most recently the introduction of ABS. This diversification of the supply side may have brought benefits, but it may also have brought risks.

The recent creation of ABS may have generated regulatory risks due to reduced transparency of the contracting between introducers and solicitors. The arrangement between introducers and solicitors when referral fees were allowed was found to lack transparency in a 2010 investigation<sup>20</sup> – before ABS were permitted. This risk remains in ABS organisations where they shift pre-litigation work from solicitors to other individuals without a clear contracting method – with this work potentially taking place within the same organisation. This form of vertical integration has the potential to reduce overall costs. The lesson with regard to regulation is the need to consider how larger more complex firms could be regulated in a proportionate way.

### Developing an evidence base for regulation

A number of the abovementioned lessons require a better evidence base – indeed, capturing the impact of regulatory change is a key aspect of evidence-based regulation. With this in mind, three areas are suggested in which the evidence base on access to justice in legal services markets could be developed.<sup>21</sup>

Firstly, lack of evidence on potential demand for legal services is a key barrier to identifying the impact of regulatory and legislative change. It is difficult to make inferences about access to justice based on the relationship between the number of personal injury cases (say) and regulatory and legislative changes because there may also be changes in the underlying potential demand for legal services. It is therefore recommended that consumer surveys be further developed to capture potential demand through representative samples of the population.

Secondly, consumer surveys should be linked more closely to regulatory questions. Within the economic domain, for example, Eurostat - the statistical office of the European Union - carries out occasional surveys on specific issues to complement its regular surveys. Going forward, regular standardised consumer surveys provide vital time series data, however:

- (i) the access to justice questions in these surveys should be consistent to allow developments to be tracked reliably over time; and,
- (ii) these regular surveys could be complemented to a greater extent with consumer surveys more closely linked to regulatory questions.

Such data collection efforts should build on the existing Civil and Social Justice surveys, and the Legal Services Consumer Panel tracker surveys.

### Concluding remarks

Whilst there are some limitations to how effectively indicators for access to justice can be tracked using data available for the period, there were a number of important regulatory lessons drawn that are re-iterated briefly below.

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<sup>20</sup> Charles River Associates (2010)

<sup>21</sup> Many of the problems relating to consumer surveys have already been addressed in full or in part in the Legal Needs Survey. For example, the Legal Needs Survey provides a larger sample size for personal injury problems than was available in the Civil and Social Justice surveys and the Legal Needs Survey distinguishes motor claims from other types of personal injury



- Firstly, the effects of regulatory and legislative changes depend largely on the features of the markets in which they are implemented. Therefore, there is a need for regulation to be tailored to individual markets.

The framework for access to justice developed provides one approach for considering the features of markets most salient to how stakeholders will be affected by regulatory and legislative changes.

- Secondly, even within markets, the effects of regulatory and legislative changes are not the same for all individuals and for all types of claims. Trade-offs frequently exist meaning that addressing one sort of access to justice gap may lead to a reduction of access to justice for other people or in different areas.

For example, the regulatory and legislative liberalisation in the personal injury market appears to have affected motor claims very differently to other types of personal injury claim.

- In this context, there is a need for regulation to encourage a variety of business models to match the variety of potential claims. For example, in the personal injury market some stakeholders suggested there may have been too much of a focus by legal service providers on low-value, low-risk claims, potentially at the expense of more complex claims. The resolution to this issue may not necessarily involve a reversal of regulatory and legislative measures already in place. It may need complementary policies to support them.
- Reforms targeted at changing the nature of supply may have limited effects on the demand for legal services. There may be a need to further consider the drivers of behavioural change among legal service consumers.
- A final lesson from this report draws on the limitations in the data that mean that only tentative conclusions about changes in access to justice can be drawn. For example, there is a need to ensure the consistency of data collected across time, including the consistency questions, to improve the data available for future evaluations, for example to assess the full effects of the LASPO Act once they have taken shape.



# 1 Introduction

Personal injury legal services have seen significant regulatory and legislative change since 1999:

- Between 1999 and 2004 there was a period of regulatory and legislative liberalisation: the Access to Justice Act expanded the use of conditional fee agreements ('no-win no-fee') and allowed providers to widely advertise their legal services; from 2004 solicitors were able to pay 'introducers' for referring cases to them, which allowed introducers such as insurers and claims management companies to perform a significant amount of pre-litigation work.
- In 2011 the range of permitted business models was extended further by the introduction of Alternative Business Structures, which allow solicitors to set up businesses with insurers or claims managers.
- More recently, there has been a period of regulatory and legislative tightening. The 2012 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act repealed many of the reforms of the regulatory and legislative liberalisation from 1999 to 2004; it reduced the scope of conditional fee agreements and banned the use of referral fees.

The LASPO Act came into effect from 1<sup>st</sup> April 2013, meaning its impacts are not yet visible in the data used in this analysis.

This report examines the impact of these regulatory and legislative changes on access to justice. Improving access to justice is a regulatory objective given to the LSB, the legal ombudsman and each of the approved regulators<sup>22</sup> by the LSA 2007.

Access to justice is a broad concept, and this report makes use of a number of access to justice indicators developed by the Legal Services Board<sup>23</sup> to examine changes in access to justice over time. For the purposes of this study, the main access to justice indicators of interest relate to:

- knowledge of legal rights and legal services available;
- the demand for legal services;
- the costs faced by individuals in accessing legal services, both when the claim is successful and unsuccessful; and,
- the quality of legal services provided.

Further information about the definition of access to justice and application of access to justice indicators in this report is provided in Annex 1.

The report develops a series of hypotheses about how each regulatory and legislative reform could have affected access to justice, and then considers evidence on access to justice indicators (and related intermediate market outcomes, where access to justice indicators are not available) to

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<sup>22</sup> The Law Society, General Council of the Bar, Council for Licensed Conveyancers, The Institute of Legal Executives, The Chartered Institute of Patent Attorneys, The Institute of Trade Mark Attorneys, Association of Cost Lawyers, Master of the Faculties

<sup>23</sup> Legal Services Board (2012a)

assess whether regulatory and legislative reforms have been relevant to access to justice in practice.

The study uses the following approaches to examine evidence in support and against the hypotheses developed.<sup>24</sup>

- Reviews of consumer surveys, including the Civil and Social Justice Surveys, the Legal Needs Survey and the Legal Services Consumer Panel, which provide data on access to justice indicators from 2001 to 2012, are used to assess changes in access to justice indicators over time and following regulatory and legislative changes.
- Analysis of a range of other data sources are used to assess changes in intermediate market outcomes and to understand the mechanisms through which regulatory and legislative changes affect access to justice.
- Consideration of the outcomes from a stakeholder consultation to develop hypotheses and consider a broad range of views on the effects of regulatory and legislative changes.<sup>25</sup>
- Bearing in mind the limitations of the data available, a framework is also developed to consider the key factors that affect the incentives of each agent in the personal injury legal services market, to give a deeper understanding of how regulatory and legislative changes may affect access to justice.

The remainder of this report is structured as follows:

- chapter 2 provides an overview of the key features of the personal injury market;
- chapter 3 lists the key regulatory and legislative changes that have taken place in the personal injury market since 1999;
- chapter 4 describes a framework for measuring access to justice for personal injury legal services;
- chapter 5 provides an assessment of the impacts of regulatory and legislative changes on access to justice in the personal injury market;
- chapter 6 considers the relevance of lessons learned from the analysis of the effects of regulatory and legislative changes in the personal injury market to other legal markets; and,
- chapter 7 concludes.

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<sup>24</sup> Details of the approach are provided in Annex 1

<sup>25</sup> Nine institutions were consulted including government bodies, regulators, regulated firms, associations and academic institutions

## 2 Overview of the legal services in the Personal Injury market

Individuals access personal injury legal services through a variety of providers, including solicitors and barristers, insurers, claims management companies, trade unions, and more recently Alternative Business Structures. Insurers, claims management companies and trade unions often act as ‘introducers’, managing claims and referring on to solicitors when required. However, many personal injury claims are also settled without legal action.<sup>26</sup>

This section first provides an overview of the personal injury legal services market, and then examines some differences between different types of personal injury cases.

### 2.1 Reserved legal services

The regulation of legal services is based on six reserved activities, which can only be supplied to members of the public for profit by individuals or entities authorised by one of the approved frontline regulators. The most important reserved activity for personal injury cases is the conduct of litigation.

Whilst managing a personal injury claim is not a reserved activity, and introducers frequently provide a significant level of legal services including pre-litigation work, if litigation is required the case would have to be passed on to a solicitor. The majority of personal injury cases are settled before legal proceedings are issued: The Law Society (2010) found that, of the 783,000 personal injury claims registered in 2008, only 20% involved proceedings being issued.

### 2.2 Supply of legal services in personal injury

Some but not all users of personal injury legal services do not access services directly, but rather through an ‘introducer’ – that is, another institution which refers the claim on to a solicitor (see Figure 1). Research suggests the proportion of personal injury business that comes through the direct channel fell between 2000 and 2010.<sup>27</sup> The most important introducers are insurance companies, claims management companies and trade unions.

From 2004, solicitors were able to pay referral fees to introducers in exchange for referring cases on to them, where the size of referral fee is related to the amount of pre-litigation work performed by the introducer.<sup>28</sup> Referral fees were banned in the 2012 LASPO Act. The roles of the different types of introducer are explained as follows.

- Insurers’ role as introducer is mainly dependent on their role as the provider of insurance to the claimant, most frequently in personal injury cases. They generally do not seek to directly attract personal injury customers.<sup>29 30</sup>

<sup>26</sup> Law Society (2010)

<sup>27</sup> Charles River Associates (2010)

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> There may be exceptions such as third party capture

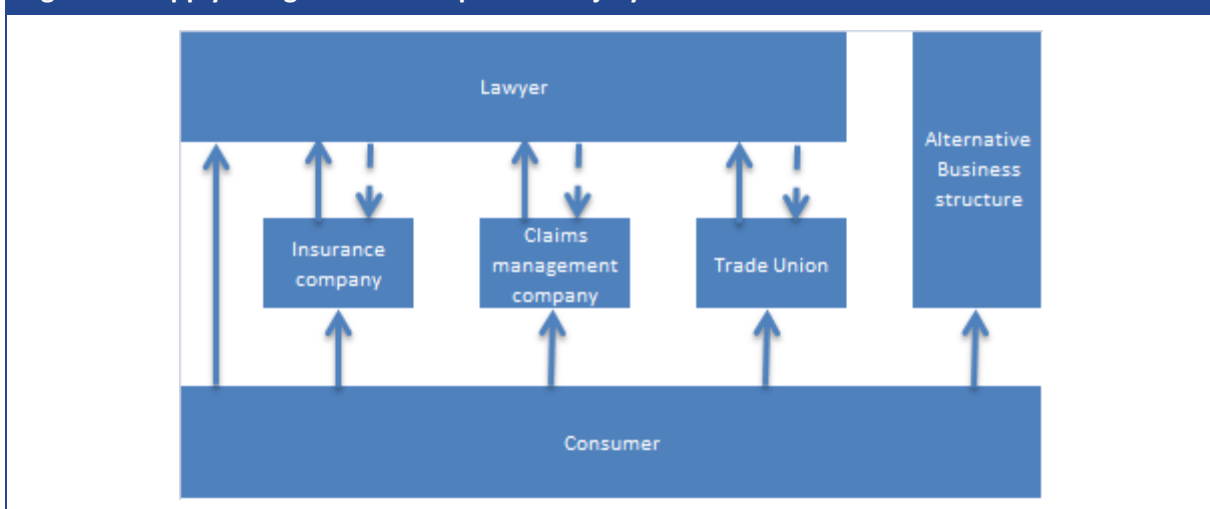
- Claims Management Companies (CMCs) play a role in marketing legal services and handling claims before referring on to solicitors. When referral fees were allowed, CMCs varied in the amount of pre-litigation work they performed: some introducers provided a pure referral arrangement in which they simply passed contact details of the client to a solicitor and some performed nearly all pre-litigation work themselves to make the case 'oven-ready' before passing it on to the solicitor.

Some CMCs also offered additional services such as vehicle repair and credit hire, offering to arrange medical experts and compiling accident reports.<sup>31</sup>

LSB analysis<sup>32</sup> in 2012 found that solicitors firms' turnover from personal injury work was £2bn in 2010/11, whilst CMCs' turnover from personal injury work was £377m.

- Trade Unions play an important role in providing their members services in relation to employment conditions, and hence they frequently act as introducers to solicitors' services for employer-liability personal injury cases.
- Alternative Business Structures (ABS) were introduced through the Legal Services Act in 2007 and began to be registered in 2012. They allow the formation of companies consisting of a mix of solicitors, claims managers and others, and can carry out reserved and unreserved activities. The key change is permitting non-lawyer ownership of organisations undertaking reserved legal activities. They provide increased flexibility for company structure in providing personal injury services and may effectively play the role of both introducer and lawyer. ABS are discussed further in section 5.2.

**Figure 1: Supply of legal services in personal injury**



Notes: Solid lines represent access to services; dashed lines represent referral fees, which were allowed between 2004 and 2012. Alternative Business Structures were allowed by the 2007 Access to Justice Act, but the first to be registered was in 2012.

Source: Charles River Associates (2010), updated by London Economics to reflect the increasing importance of Alternative Business Structures

<sup>31</sup> Charles River Associates (2010)

<sup>32</sup> Legal Services Board (2012b)

## 2.3 The role of insurers in personal injury cases

A key point on the role of insurers in personal injury claims is that frequently the decision of whether or not a defendant will contest a claim is ultimately made by an insurance company. Consequently, in ninety percent of personal injury cases ‘the real defendants are insurance companies’<sup>33</sup>, and are especially likely to be the defendant in motor personal injury claims. In the remainder of cases the defendant is typically a large self-insured organisation or public body; as Lewis (2005) states, ‘it is extremely rare for an uninsured individual to be the real defendant’.

This role of insurers is important because, as Lewis argues,

*‘insurers determine how the defence is to be conducted and, for example, commonly take admissions without the consent of the insured, and settle cases in spite of the policyholder’s objection... It is unusual for insurers to contest liability’.*<sup>34</sup>

The issue of how the nature of the defendant and their action can affect access to justice is addressed further in the framework set out below (chapter 4).

## 2.4 Types of personal injury

It is useful to distinguish between types of personal injury because the functioning of the market and the effects of regulatory and legislative changes may be different in each case. The four main types of personal injury considered here are motor, employer-liability, public-liability and clinical negligence.

Important differences between the functioning of markets in these different personal injury cases are highlighted throughout the report, but it is also worth highlighting some key differences here.

- **The value of damages claimed** – Personal injury generally has been characterised as ‘high-volume, low-value’; that is, there are a number of low value claims for damages. Of the four types of personal injury, this is most true for motor claims.<sup>35</sup>
- **The nature of the defendant** – Who the defendant is can have an important influence on the size and success of claims. Insurers are nearly always the real defendant for motor claims; that is, it is the insurer that decides whether or not to contest a claim.

In contrast, the defendant for employer-liability claims may be an employer or the employer’s insurer, whilst the defendant for public-liability and clinical negligence claims is nearly always a public body (such as the NHS litigation authority for clinical negligence claims).

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<sup>33</sup> Lewis (2005)

<sup>34</sup> *Ibid.*

<sup>35</sup> Lewis and Morris (2012)

- **The ease with which liability can be proven** – Another way in which motor claims may differ from other personal injury claims is that liability for the incident is often established relatively easily, making the focus of the dispute on the level of harm suffered. In contrast, establishing fault in other personal injury cases, such as clinical negligence, is often more difficult.
- **Likelihood of involving litigation** – A consequence of the above point on the ease with which liability can be proven for motor claims may be that motor claims are particularly likely to be resolved without involving litigation.

These features of the different types of personal injury cases are relevant to access to justice because regulatory and legislative changes may affect types of personal injury cases differently. For example, one reported effect of the Access to Justice Act 1999 has been to make low value claims more profitable and thereby encourage legal service providers to take these cases on, where they would have previously not pursued these claims. The present analysis would suggest that this effect would be strong for motor claims, since they are frequently low value.

Many of the above considerations suggest that motor claims have distinct features to other types of personal injury. This will be returned to in section 5.1.1 as trends in motor claims appear to have diverged from trends in other personal injury claims since 2005.

Understanding the abovementioned aspects of the personal injury legal market is important to understanding how regulatory and legislative changes affect access to justice. The next section provides an overview of the key regulatory and legislative changes that have taken place in the personal injury market since 1995.



### 3 Key regulatory and legislative changes in the personal injury market 1999 to 2013

Table 2 outlines the key regulatory and legislative reforms that have affected the personal injury market dating back to the introduction of conditional fee agreements in 1995.

Table 2: Key regulatory and legislative changes in the personal injury market 1995 to 2014	
1995	Conditional Fee Agreements Order <ul style="list-style-type: none"> <li>■ Introduction of conditional fee agreements for personal injury cases</li> <li>■ Legal aid was still available for personal injury claims at this time</li> </ul>
1999	Access to Justice Act <ul style="list-style-type: none"> <li>■ Removal of legal aid for personal injury cases, other than clinical negligence</li> <li>■ Introduction of After the Event insurance, and allowed success fees to be recovered from the unsuccessful claimant</li> <li>■ Liberalisation of advertising rules</li> </ul>
2004	Liberalisation of the use of referral fees <ul style="list-style-type: none"> <li>■ Allowed solicitors to pay referral fees to introducers in exchange for referring cases on to them</li> </ul>
2007	Legal Services Act <ul style="list-style-type: none"> <li>■ Introduction of Alternative Business Structures, although the first ABS was not licensed until October 2011 for conveyancing, and March 2012 for personal injury</li> </ul>
2012	Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) (implemented from April 2013) <ul style="list-style-type: none"> <li>■ Banned the use of referral fees</li> <li>■ Success fees and after the event insurance no longer recoverable from the losing party</li> <li>■ Success fees have to be taken from damages, and are capped at 25%</li> <li>■ Implementation of a fixed fee for solicitor services</li> </ul>

Source: London Economics

Each regulatory and legislative change is discussed in more detail in the sections that analyse their impacts on access to justice: Section 5.1.1 examines the impact of the liberalising reforms from 1995 to 2004, focussing on the Access to Justice Act and the liberalisation of referral fees; section 5.2 examines the impact of the introduction of Alternative Business Structures through the Legal Services Act; and, section 5.3 examines the impact of the LASPO Act.

In order to understand and the impact of regulatory and legislative changes, a simple economic framework, which is used to analyse how these types of changes affect the incentives of each agent in the legal services market and thereby access to justice, is set out in the next chapter.

## 4 A framework to analyse the personal injury legal services market

When considering the effects of regulatory and legislative changes on access to justice, it is important to understand how they affect the incentives of each agent that plays a role in the market. This is especially the case when data on access to justice are incomplete and incentives must be considered regarding the likely impact of regulatory and legislative changes on access to justice.

For example, for an individual to make a successful claim, it is not sufficient for the individual to be motivated to make a claim and to be willing accept any financial risk they face. There must also be an introducer and/or solicitor willing to take on the claim, which generally requires it to be profitable for them to do so.

This chapter provides a framework to consider the factors that influence the actions of the key agents in the personal injury market: individuals with legal needs; introducers; solicitors; and, the defendant or real defendant<sup>36</sup>. Importantly, the action of each agent is likely to influence the actions of other agents. For example, if the defendant is unlikely to fight a claim, the individual and the solicitor may be especially likely to make a claim.

Figure 2 describes the key decision to be made by each agent in the personal injury legal services market that determines whether a claim will be made, and the key factors that influence each of these decisions.

This figure does not capture all features of the market relevant to access to justice, and the following caveats need to be borne in mind.

- Access to justice involves a broader range of services than being able to make a claim, including being informed about legal rights and being able to access legal advice.
- Individuals may contact solicitors directly rather than going through an introducer, and other individuals' claims may be settled without them having any contact with a solicitor. LSB analysis of solicitors' firms in 2013 suggests a greater prevalence of referrals for firms undertaking PI work compared to other legal services.<sup>37</sup>

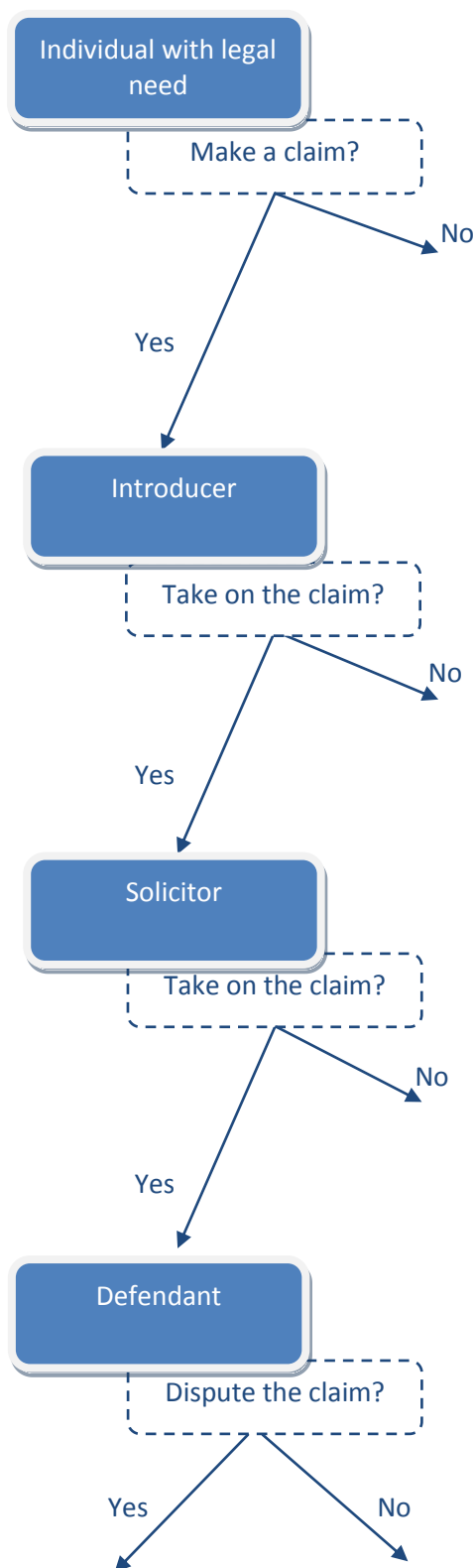
Nevertheless, Figure 2 does highlight the factors that shape the incentives of each of the agents and those that are common to different agents. These factors are discussed below.

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<sup>36</sup> As shown by the discussion in section 2.3 of the work by Lewis (2005), it is important to consider who the 'real' defendant is, that is the agent that faces the financial costs of damages and legal expenses payments. For example, for motor personal injury claims, the defendant may be an individual, but the real defendant is normally an insurance company

<sup>37</sup> Legal Services Board (2013a)

Figure 2: A framework for access to justice through personal injury legal services



Factors that affect the individual's decision:

- Knowledge of the option of claiming and how to go about making a claim
- Expected likelihood of success
- Expected size of damages payments
- Expected financial costs if claim is successful/ unsuccessful
- Risk aversion towards financial costs
- Time and effort required to make a claim
- Emotional costs and benefits in making a claim

Factors that affect the introducer's decision:

- Revenue from referral or other fees paid by solicitor
- Any fees paid by the claimant
- Costs and time required for any claims management and pre-litigation work carried out

Factors that affect the solicitor's decision:

- Expected likelihood of success, which depends on how efficiently 'good' claims can be sifted from 'bad'
- Expected payout if the claim is successful/ unsuccessful
- Costs and time required for pre-litigation and litigation work
- The ability to recover success fees and legal costs from the other side

Factors that affect the defendant's decision:

- The size of legal costs necessary to dispute a claim relative to the size of damages payments
- The likelihood that disputing the claim will be successful
- Possibility of deterring future claims
- Emotional costs and benefits if the defendant is an individual

Source: London Economics

## 4.1 Will the individual make a claim?

An individual who requires access to legal services, needs to have knowledge of their ability to make a claim, how to make a claim and feel that the benefits of making a claim outweigh the costs.

Some of the primary factors affecting the decision to make a claim are likely to be the expected financial benefits and costs. The benefits and costs include the expected size of the damages the claimant receives, and the legal costs they would face if the claim is successful or unsuccessful. These expected benefits and costs are also affected by the likelihood that the defendant will dispute the claim, and the likelihood the claim will be successful if it is disputed.

However, there are likely to be many more factors that influence individual's decisions: how much time and effort is required for the individual to make a claim; whether they have any relevant personal relationships, for example with the defendant, that could be damaged by making a claim; the perceived cultural acceptability of making a claim; and, the extent to which the problem is seen as a 'legal' problem.

The Legal Needs Survey provides some information on the most important factors that determine individuals' choice of whether or not to use legal services, as those deciding not to seek legal advice were asked their main reason.

For those with a personal injury problem that chose to deal with the problem alone, over 40% said this was because they thought it would not be difficult to resolve, that they were confident they could handle it alone or that they had successfully handled similar problems alone before. There were a variety of other answers, with the next most popular being that they thought using legal services would cost too much (13%), that they were waiting to see what would happen (7%) and that they thought it would take too long to resolve (6%).

For those who chose to do nothing to resolve the legal problem, the most popular reason given was that they thought nothing could be done (29%), whilst there were also concerns about the costs (5%) and the hassle (6%) involved in making a claim.

In all, the Legal Needs Survey does not show any overwhelmingly important factor that currently deters individuals from accessing personal injury legal services. There is some evidence that both financial and non-financial costs can deter some individuals.

It is also important to note that the Legal Needs Survey was conducted in 2012 so CFAs were available. Therefore, it is likely that if CFAs were not available the number of individuals deterred from accessing legal services due to the expected costs involved would be higher.

It is also important to remember that individuals also need to be able to find a legal service provider that is willing to take on their claim on financial terms suitable to both the individual and the provider.

## 4.2 Will the introducer and/or solicitor take on the claim?

For legal service providers, including both introducers and solicitors, the key factor influencing their decision of whether or not to take on a claim is the expected profitability of the claim.

Sources of revenue for the introducer include any claims handling fee charged to the individual and any fees paid by the solicitor, including referral fees for the period that they were allowed. Their costs include the costs of handling a claim and performing any pre-litigation work undertaken.

Sources of revenue for the solicitor depend on the nature of the contract between the individual and the solicitor, and features of the regulatory environment, such as if legal costs are recoverable from the defendant if the case is successful.

Under conditional fee agreements, solicitors bear financial risks as they face losses if the claim is unsuccessful. Therefore, they will most likely take on claims that have a low chance of being disputed or a high chance of success if they are disputed, and claims for which they generate high revenues relative to their costs if they are successful.

### 4.3 Key parameters

From the above discussion, it is clear some key factors come into play in two or more of the agents' decision:

- the regulatory environment determining the financial risks faced by the individual, including whether legal aid or conditional fee agreements are available;
- the expected size of damages payments;
- the regulatory environment determining how solicitors' costs are paid, including whether these are recoverable from the defendant;
- the time and legal costs required to settle a claim;
- the likelihood that the defendant will dispute the claim; and,
- the likelihood that the claim will be successful if it is disputed.

How these combine has an impact on whether individuals eventually achieve access to justice, in the sense of their overall engagement with legal services (from being able to access services through to receiving services of an appropriate quality).

## 5 Assessment of the impacts of regulatory and legislative changes in the personal injury market on access to justice

This chapter considers the impacts of the regulatory and legislative changes in the personal injury market on access to justice, in three sections:

- the 1999 Access to Justice Act and the liberalisation of the use of referral fees in 2004;
- the introduction of Alternative Business Structures by the Legal Services Act in 2007 (although the first ABS was not registered until 2012); and,
- the LASPO Act of 2012 - this came into effect from 1<sup>st</sup> April 2013, meaning its impacts are not yet visible in the data used in this analysis. .

The main focus is on the first section, the regulatory and legislative liberalisation that took place in the personal injury legal market between 1999 and 2004, because it is possible to identify any changes in access to justice that have taken place even allowing for lags in effects of regulatory and legislative changes being felt by individuals (discussed in Annex A1.1.5).

As the introduction of ABS and the LASPO Act were much more recent, the focus on ABS and the LASPO Act is on any initial and potential impacts.

Each section follows a common format. First, hypotheses about how regulatory and legislative reforms may have affected access to justice – both positively and negatively – are developed. Second, concerns about regulatory risks that could have been generated by reforms are discussed, such as increased overall costs or fraudulent behaviour. Third, evidence from consumer surveys and other data sources is presented to assess changes in intermediate market outcomes and access to justice indicators. Finally, theory and evidence is brought together to assess how far they support each hypothesis.

## 5.1 The 1999 Access to Justice Act and the liberalisation of the use of referral fees in 2004

This section considers the impacts of the Access to Justice Act alongside the liberalisation of the use of referral fees.

The Access to Justice Act in 1999 introduced three important legislative changes to the personal injury market:

- it withdrew legal aid for personal injury cases other than clinical negligence;
- for conditional fee agreements, it allowed success fees and after the event insurance premiums to be recovered from the defendant in successful cases, thereby allowing individuals to gain the full extent of damages payments under conditional fee agreements; and,
- it liberalised advertising rules, allowing solicitors and claims management companies to advertise widely to attract personal injury claimants.

A second important legislative change was the liberalisation of referral fees in 2004, which allowed solicitors to pay referral fees to introducers for passing claims on to them.

The Access to Justice Act and the liberalisation of referral fees could have had both positive and negative effects on access to justice. They may have increased access to justice in three main ways.

- By expanding conditional fee agreements, the financial risk to individuals making a claim was significantly reduced. However, legal aid was also withdrawn for all personal injury cases other than clinical negligence which may have countered this effect to some extent.
- The liberalisation of advertising rules may have led to individuals being better informed about their legal rights and how to make a claim.
- The reforms made the role of introducers more profitable and may have thereby increased the number and variety of legal service providers, making it easier for individuals to make claims.

On the other hand, the reforms may also have had negative effects on access to justice. One particular concern, raised by respondents to the Jackson Review, is that the use of referral fees may have led to solicitors' firms reducing the time spent on personal injury cases, and thereby the quality of legal services, to be able to pay higher referral fees to introducers.<sup>38</sup> Although it is important to note that a study by Charles River Associates<sup>39</sup> found no evidence that referral fees had reduced the quality of personal injury legal services.

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<sup>38</sup> Argument made by Lord Justice Jackson (2009)

<sup>39</sup> Charles River Associates (2010)

A second potentially negative effect of the reforms on access to justice is that they could have made specific types of personal injury claims particularly attractive to legal services providers and thereby made it more difficult to make other personal injury claims.

The Access to Justice Act and the liberalisation of the use of referral fees may also have led to regulatory risks. Particular concerns have been raised about the creation of a compensation culture, an increase in fraudulent activity, and an increase in the overall cost of legal services. Concerns about the cost of legal services in the personal injury market were raised by the Jackson Review, many of the proposals of which fed in to the 2012 LASPO Act.

The evidence on whether there was an increase in access to justice following the 1999 Access to Justice Act and the liberalisation of the use of referral fees in 2004 is mixed.

There was a substantial increase in motor claims from 2005 onwards, consistent with an increase in access to justice in terms of the ease with which individuals could make a claim.

However, there was no comparable increase for other personal injury claims. While this may suggest that access to justice may not have increased in all areas of PI legal services, it is difficult to make this inference with confidence as data on changes in the number of potential claims across motor accidents and other personal injuries is not available. It may be that there has been an increase in motor claims relative to other PI claims because the underlying level of potential motor claims has risen relative to other PI claims.

The most surprising result is perhaps that there was little change in the proportion of people seeking legal advice in response to personal injury problems between 2001 and 2012. One potential conclusion is that regulatory and legislative changes may have affected the channels through which individuals accessed legal services but did not have a large effect on the overall proportion of people using legal services. However, it is also important to note that there are limitations to the data that mean this conclusion can only be considered a tentative one.

It should also be highlighted that assessing the number of claims does not give an indication of the quality of legal services. The quality of legal services is also an important part of access to justice, has a number of different dimensions, and is much more difficult to measure.

Consumer surveys do provide some evidence of an upwards trend in the proportion of cases in which legal services are provided to the individual free of charge, suggesting an increase in access to justice in terms of a reduced price of legal services. It should be borne in mind this may be driven by the increasing proportion of claims that are made for road traffic accidents, in which the costs are disproportionately likely to be covered by insurers.



### 5.1.1 Hypotheses

In light of the framework outlined in chapter 4, this section develops hypotheses for how the 1999 Access to Justice Act and the liberalisation of referral fees may have affected access to justice in the personal injury legal services market. Particular focus is given to how the reforms affected the incentives of the each agent in the personal injury market.

#### ***The expansion of conditional fee agreements***

Conditional fee agreements were introduced in 1995 by the Conditional Fee Agreements Order, and allow legal service providers to offer fees that vary depending on the success of the claim. Often termed ‘No Win No Fee’ claims, they allow legal service providers to offer their customer the promise that ‘if you don’t win the case, you don’t have to pay’.

The use of conditional fee agreements was significantly expanded by the 1999 Access to Justice Act by allowing success fees and after the event insurance premiums to be recovered from the defendant in successful cases. The recoverability of success fees meant that, in successful cases, the claimant’s lawyer could recover legal fees from the defendant. After the event insurance covers the policyholder against possible costs in the event of losing the case. Following the Access to Justice Act, in successful cases the insurance premium could also be recovered from the other side, so claimants would not have to pay for after the event insurance if they won either.

The main impact of the introduction of conditional fee agreements and their expansion through the 1999 Access to Justice Act from the perspective of individuals was to significantly reduce the risks of making a personal injury claim, since they would not face legal costs if they were to lose. Meanwhile, they could still receive the full amount of damages, since the costs would fall on the defendant. As the Claims Management Regulator states, *‘This materially changed the cost/benefit calculation’*.<sup>40</sup>

One way the Access to Justice Act may have increased access to justice is by allowing those that are most concerned about the downside risks of solicitors’ fees to make personal injury claims. Since those on low incomes face a larger potential impact from financial losses, access to justice amongst this group may have been especially improved.

**Hypothesis 1: The introduction and reform of Conditional Fee Agreements increased access to justice by reducing the financial risk of claiming to the individual.**

However, there are a number of important caveats that should be taken into consideration in assessing whether or not the introduction and expansion of conditional fee agreements would have been expected to increase access to justice. These caveats are described below.

- The effects of the expansion of conditional fee agreements must be considered in light of the fact that the Access to Justice Act also withdrew legal aid for personal injury cases other than clinical negligence cases. This withdrawal of legal aid would be expected to

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<sup>40</sup> Boleat (2010)

have reduced access to legal services for those previously eligible for legal aid. Therefore, it is important to consider whether the expansion of conditional fee agreements was sufficient to offset the negative impact of the removal of legal aid.

The shift in funding from legal aid to conditional fee agreements may also have had distributional consequences, for example if those on lower incomes who would have previously been eligible for legal aid were reluctant to take up conditional fee agreements.

- If conditional fee agreements did make it easier to make personal injury claims, this effect may not have been felt by all individuals and for all types of claims. As noted in the framework laid out in chapter 4, for individuals with legal needs to be able to make claims, they need legal service providers to be willing to take them on.
- One issue raised during discussion with stakeholders was that the reforms may have changed the types of claims that are attractive to legal services providers, leading to them being more willing to take on certain claims than others.

One particular concern is that the reforms made it more profitable for legal service providers to take on low-value claims for motor personal injuries, and that this could have diverted attention from other personal injury cases. A consequence is that legitimate claims that have more of a chance of being disputed may be left aside by legal service providers in favour of easier-to-settle claims.

- Moreover, the fact that it is easier to make a claim does not tell us about the quality of legal services available to the individual in terms of the outcome achieved. There is a potential risk that the increase in access to justice through it being easier to make a claim could be offset by a reduction in the quality of legal services available.

One mechanism through which a reduction in quality could occur is if the reform encouraged legal service providers to take on certain types of claim, but only if they under-invest in these cases, thereby reducing the quality of the legal service provided. For example, the recoverability of success fees may have allowed solicitors to take on cases that had previously been marginally unprofitable, but only by reducing the time they invested in the case. However, it is also possible that the altered incentives for legal service providers could increase the quality of legal service provided for other cases.

It should be noted here that the Jackson Review raised concerns that the recoverability of success fees and after-the-event insurance premiums led to high overall costs of personal injury legal services. In this report, the overall costs of legal services are considered relevant to access to justice insofar as they affect the costs faced by the individual. Nevertheless, it is important to highlight that there may be a trade-off between increasing access to justice and reducing the overall costs of legal services, as Jackson states:

*'It must be acknowledged that one of the benefits of the current CFA regime is that it is geared towards ensuring that claimants receive proper compensation.'*

*This, however, comes at a heavy price for defendants, who often have to bear a disproportionate costs burden.<sup>41</sup>*

### **Liberalisation of advertising rules**

An important part of access to justice is individuals' knowledge of legal rights and of how to claim. Liberalisation of advertising rules allowed solicitors and other providers to advertise their services and actively reach out to individuals that have personal injury problems. Claims management companies may have had a particularly important role in advertising because it is typically larger firms that are able to advertise due to the fixed costs involved.<sup>42</sup>

The increased advertising of personal injury services could have increased access to justice through individuals with legal needs having more awareness of their legal rights and of the services available to them.

**Hypothesis 2: The liberalisation of advertising rules led to an increase in access to justice through increasing individuals' awareness of their legal rights and of the services available to them.**

Whether or not the liberalisation of advertising rules would have led to an increase in access to justice depends on the quality of information provided by advertisers in relation to other advice available to those with legal needs. For example, we would expect advertising to have a limited effect on access to justice if existing sources of information prior to the liberalisation of advertising rules had done a good job of informing individuals of their legal rights and of how to make a claim.

Additionally, benefits of advertising for awareness of legal rights may also be limited in that legal service providers are likely to advertise for services that are most profitable to them. This could lead to an increase in awareness of legal rights only in the areas of personal injury that are most profitable to legal service providers.

The extent to which advertising affects individuals' responses to legal services may also be affected by behavioural biases. For example, for problems that are viewed as 'legal', individuals may be predisposed to respond to them primarily through legal routes, and consequently advertising would have a limited effect.

### **Liberalisation of the use of referral fees**

The liberalisation of the use of referral fees in 2004 allowed solicitors to pay introducers for referring personal injury claims on to them. Referral fees could have affected access to justice in a number of ways.

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<sup>41</sup> Lord Justice Jackson (2009)

<sup>42</sup> Charles River Associates (2010)

One way that referral fees may have increased access to justice is by making it more profitable for introducers to take on personal injury claims, increasing competition amongst introducers to attract customers with legal needs and thereby increasing the range of services available.

An additional potential benefit of referral fees was outlined by the Office of Fair Trading (OFT) in correspondence for the Jackson Review. The OFT argue that referral fees may improve the efficiency of a market by reducing information asymmetries between individuals and legal service providers, thereby improving the quality of legal services. They argue that,

*‘referrers may develop a good understanding about the services on offer and the service providers. They are therefore in a better position than some clients to identify high quality service providers for relative good value and to use their bargaining power in order to negotiate better services and better value. On that basis a referral fee arrangement is likely to minimise the effects of information asymmetry in the legal services market between lawyers and clients, and a prohibition on referral fees would prevent such benefit.’<sup>43</sup>*

Finally, referral fees may improve the efficiency of the personal injury legal services market by allowing a significant amount of pre-litigation work to be performed by introducers rather than solicitors.

Research conducted using a survey of solicitors firms from 2012 corroborates the view that the regulatory and legislative liberalisation as a whole improved the efficiency of the personal injury market:

*‘Personal injury practice is benefiting from increased case volumes. In general, personal injury firms appear to be advertising, growing, and becoming more productive. This growth predates the implementation of Lord Justice Jackson’s reforms which are predicted to inhibit or reverse these trends and accelerate the evolution of ABSs in personal injury.’<sup>44</sup>*

During the period when referral fees were permitted, claims management companies frequently performed a significant amount of pre-litigation work before referring on to solicitors for referral fees of up to £1000<sup>45</sup>. However, whilst this demonstrates that solicitors valued the work performed by introducers, it is not clear if pre-litigation work would have been performed at a lower cost by introducers than solicitors.

**Hypothesis 3: The reforms to Conditional Fee Agreements and the liberalisation of referral fees led to an increase in the range of providers of legal services and thereby increased access to justice**

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<sup>43</sup> Lord Justice Jackson (2010)

<sup>44</sup> Pleasence, Balmer and Moorhead (2012)

<sup>45</sup> Charles River Associates (2010), prior to the LASPO reforms which banned referral fees

It is important to highlight that Lord Justice Jackson strongly argued that in practice referral fees for personal injury claims did not improve access to justice by improving competition between solicitors as argued by the OFT.

Lord Justice Jackson argued that because legal costs were reclaimed from the defendant, competition for referrals did not improve the quality of legal services. In practice referrals were simply made to the highest bidder, and consequently ‘in no sense matching case to solicitor or remedying the information asymmetry’<sup>46</sup>. Lord Justice Jackson argued that referral fees may even reduced access to justice by reducing the quality of legal services as solicitors tried to handle cases as cheaply as possible to be able to pay higher referral fees.

However, work by Charles River Associates found no evidence that referral fees had led to a reduction in the quality of legal services, highlighting two pieces of evidence: firstly, success ratios for motor claims remained constant over time; and, secondly, the size of damages for standard claims is widely available and so solicitors were not under-settling to save on costs.<sup>47</sup>

### 5.1.2 Regulatory risks

There have been significant concerns raised about the effects of the Access to Justice Act and the liberalisation of the use of referral fees, raising the issue that there might be a trade-off between increasing access to justice and a number of other regulatory risks.

This section discusses the relationship between the regulatory and legislative liberalisation and three main regulatory risks: the creation of a ‘compensation culture’; an increase in the number of fraudulent claims; and, an increase in the costs of legal services.

#### ***Compensation culture***

One of the prime concerns about the regulatory and legislative liberalisation of the personal injury market is that it led to a compensation culture, whereby individuals without legitimate claims feel they can ‘have a go’ at making a claim.<sup>48</sup>

One piece of evidence that has led to the belief that there is a compensation culture is the growth in the number of personal injury claims from 2005 onwards, discussed further in section 5.1.4. At this point it should be noted that, whilst there has been an increase in the number of motor claims, there has been no comparable increase in other personal injury claims, suggesting that if there has been a creation of a compensation culture for motor claims this is not matched in other personal injury claims.

As noted by Lord Dyson<sup>49</sup>, one of the issues with assessing the extent to which there is a compensation culture is that the term itself is vague. Dyson describes the idea of a compensation culture as follows.

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<sup>46</sup> Lord Justice Jackson (2010)

<sup>47</sup> Charles River Associates (2010)

<sup>48</sup> Morris and Lewis (2005)

*‘Compensation culture encapsulates the idea that for every accident, for every injury or loss suffered someone other than the individual who suffers the loss is to blame and to borrow the phrase, where there’s blame there is a claim – and there’s always blame. Compensation is being sought improperly because the claims do not rest on the application of any legal principles, such as the need to establish a duty of care, negligence or causation. On the contrary they rest on the idea that all an individual need do is rush to litigation irrespective of the legal merits of a claim and riches will follow.’*

Lewis, Morris and Oliphant<sup>50</sup> examined the issue of a compensation culture in 2006, and found no evidence to suggest its existence. However, their evidence came mainly from the number of claims and as shown in Figure 4 below the number of motor claims only began to increase from 2006 onwards. There is, then, the possibility that a compensation culture has come to exist since 2006.

It is important to note, however, that an increase in the number of claims by itself does not imply the existence of a compensation culture, since it does not give an indication of whether the increase in the number of claims is due to an increase in meritorious or unmeritorious claims. In addition, it is only for motor claims that there has been a significant increase in the number of claims suggesting that if there are concerns about a compensation culture, these should be limited to motor personal injury.

Another piece of evidence that has been highlighted by those arguing that there is a compensation culture is that the ratio of third party injury claims to third party damages claims is rising.<sup>51</sup>

In addition, there are some reasons to think the market structure for motor claims may be more likely to allow unmeritorious cases, due to the role of insurers as the ‘real defendants’<sup>52</sup> in nearly all motor claims. As Lewis (2005) has highlighted, ‘it is unusual for insurers to contest liability’ because legal costs often exceed the costs of settling. It is possible, then, that conditional fee agreements have led to the existence of compensation culture for motor claims to some extent, but there is little hard evidence that it has done so.

Lastly, when Lord Dyson examined the issue of a compensation culture for personal injury legal services, he concluded *‘there have been no developments in our substantive law which can be said to encourage a compensation culture.’*<sup>53</sup>

### ***Increase in fraudulent claims***

Related to the issue of the creation of a compensation culture is the possibility that the Access to Justice Act and growth of claims management companies has led to an increase in fraudulent claims. One particular issue that has been highlighted has been the increase in the number of

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<sup>49</sup> Dyson (2013)

<sup>50</sup> Lewis, Morris and Oliphant (2006)

<sup>51</sup> Institute and Faculty of Actuaries (2011)

<sup>52</sup> Lewis (2005)

<sup>53</sup> Dyson (2013)

whiplash claims<sup>54</sup>, which are difficult to prove medically and therefore there is concern that this could have been driven by unmeritorious claims.

However, just as it is difficult to prove in individual cases whether a claim is fraudulent, it is difficult to know whether trends in whiplash claims represent an increase in the number of meritorious or fraudulent claims.

The potential increase in the number of fraudulent claims raises the issue of a potential trade-off between increasing access to justice and controlling fraudulent claims. However, it is important to consider that fraudulent claims could be tackled through further regulation whilst still keeping in place a regulatory framework that allows access to justice.

For example, in 2013 the Ministry of Justice announced plans to introduce a series of measures, including introducing independent medical panels, to reduce the number of fraudulent whiplash claims.<sup>55</sup>

### ***Increased cost of legal services***

Another possible risk of the regulatory and legislative liberalisation is that it has led to an increase in the overall costs of personal injury legal services. This was a key issue raised by the Jackson report, which argued:

*‘Conditional fee agreements (“CFAs”), of which “no win, no fee” agreements are the most common species, have been the major contributor to disproportionate costs in civil litigation in England and Wales.’*

Lord Justice Jackson argued that the key driver of the increase in the overall costs of personal injury legal services was the recoverability of success fees and after-the-event insurance premiums from the defendant. The recoverability of legal costs meant that individuals were not concerned about the costs of legal services and there was therefore no incentive for legal services providers to limit their costs. Referral fees may also have increased the overall costs of legal services by increasing the legal fees charged by solicitors.

Evidence from the Legal Services Consumer Panel found that those proceeding on a no-win-no-fee basis did not care about costs since they would be passed on to the other party, whilst the price of legal services does not play a strong role in the selection of a legal services provider<sup>56</sup>. The recoverability of legal fees on overall legal costs may also have been exacerbated by the fact that the defendant in personal injury cases is normally an insurer, and they frequently decide to settle because legal fees outweigh damages.<sup>57</sup> The Jackson Review analysed 699 personal injury cases

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<sup>54</sup> Institute and Faculty of Actuaries (2011)

<sup>55</sup> Ministry of Justice (2013)

<sup>56</sup> Charles River Associates (2010)

<sup>57</sup> Lewis (2005)

from the District Judges' Survey and found that '*in CFA cases the total costs paid to claimants were on average 158% of the damages paid to claimants*'<sup>58</sup>.

In addition, the liberalisation of the use of referral fees may have increased overall legal costs because solicitors have to pay referral fees to introducers as well as cover their own costs. A study conducted in 2010 showed that there was a significant increase in referral fees from 2004 to 2010.<sup>59</sup> It also found that '*competitive pressures between lawyers and introducers whereby competition between law firms to gain access to introducer panels bids up the referral fees*'<sup>60</sup>.

However, it could be argued that, if the market for introducers is highly competitive – which judging by the number of CMCs it appear to be – referral fees would not have increased legal costs because they would simply allow pre-litigation work that would otherwise be performed by solicitors to be carried out by CMCs, thereby reducing solicitors' costs. This view is supported by a study by Charles River Associates, which found:

*'There was no evidence that increases in referral fees had led to an increase in the price of legal services. Price does not play a strong role in personal injury cases because of the prevalence of "no-win-no-fee" agreements, but the majority of motor cases go through prescribed cost and fast track regimes in which legal fees are regulated.'*<sup>61</sup>

Nevertheless, there are a number of pieces of evidence that legal costs for personal injury cases did increase following the Access to Justice Act:

- there has been an increase over time in the ratio of legal costs to damages payments<sup>62</sup>;
- the growth in number and turnover of CMCs (see Figure 3) suggests that the role of CMCs became profitable following the Access to Justice Act and the liberalisation of referral fees;
- there has been an increase in the cost of motor insurance premiums<sup>63</sup>; and,
- there has been an increase in the legal costs paid per case by the NHS litigation authority<sup>64</sup>.

A consideration of Guideline Hourly Rates (GHRs) may cast doubt on whether regulatory and legislative changes have been a key factor driving up the costs of legal services. GHRs influence the legal fees paid by the losing side in civil litigation cases<sup>65</sup>, and for personal injury and clinical

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<sup>58</sup> Lord Justice Jackson (2009)

<sup>59</sup> Vanilla Research (2010)

<sup>60</sup> *Ibid.*

<sup>61</sup> Charles River Associates (2010)

<sup>62</sup> Lord Justice Jackson (2009)

<sup>63</sup> Institute and Faculty of Actuaries (2011)

<sup>64</sup> NHS Litigation Authority (2013)

<sup>65</sup> Mr Justice Foskett (2013)



negligence cases legal fees charged by claimants' solicitors are generally close to the existing GHRs<sup>66</sup>.

Research by the Legal Services Board shows that GHRs increased faster than the rate of inflation every year from 2006/7 to 2010/11.<sup>67</sup> This fact may suggest that without any changes in the regulatory and legislative environment, legal costs for solicitors' services in personal injury would have increased anyway.

However, it is important to note that the process by which GHRs were set, until recently, relied on information from district judges and solicitors.<sup>68</sup> Therefore, it may be the case that information provided by personal injury solicitors contributed to the inflation in GHRs, so they may be a poor guide as to whether personal injury solicitors' legal costs were reasonable.

In all, it seems likely that legal costs did increase following the Access to Justice Act and the liberalisation of the use of referral fees. A side-effect of the reforms aimed at increasing access to justice in the sense of making it easier to claim may have been an increase in the overall costs of legal services.

The following two sections analyse evidence which may support or go against the hypotheses developed above. The next section examines intermediate market outcomes – these are outcomes relating to the nature of supply in the market that may not affect access to justice. The following section examines evidence on changes in access to justice indicators, whilst the section after that makes an assessment of the hypotheses in light of the evidence presented.

### 5.1.3 Analysis – intermediate market outcomes

#### *Claims management companies*

The clearest impact of the Access to Justice Act and the liberalisation of referral fees on the structure of the personal injury services market structure is the growth of claims management companies.

Before 2007 there is no record of the exact number of personal injury claims management companies in operation in the UK. However, it is likely that there were no more than 353 CMCs active in PI in 1999.<sup>69</sup> The number of CMCs in 2007, when they were first required to register with the Claims Management Regulator, was 1,128. This demonstrates a significant increase in the number of CMCs following the Access to Justice Act and the liberalisation of the use of referral fees. Figure 3 shows that this growth continued between 2007 and 2011. The average turnover of CMCs was £168,000 in 2007, and fell to £100,000 in 2010, before rising again to £186,000 in 2013.

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<sup>66</sup> Legal Services Board (2011)

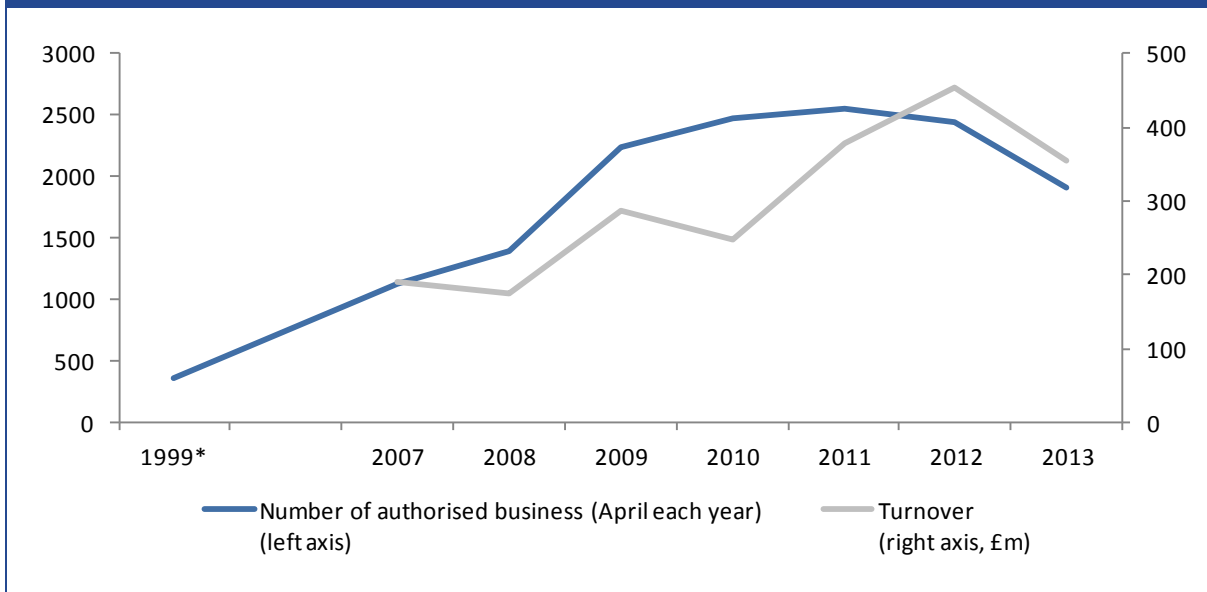
<sup>67</sup> Legal Services Board (2012a)

<sup>68</sup> Mr Justice Foskett (2013)

<sup>69</sup> Boleat (2010) estimates that there were around 500 claims management companies in total in 1999. If the same proportion of CMCs were active in PI in 1999 as in 2013, there would have been 353 CMCs active in PI in 1999. However, it is likely that the proportion of CMCs that are active in PI increased following the Access to Justice Act; therefore, 353 is considered as an upper bound for the number of PI CMCs in 1999

Personal injury accounted for 35% of all CMC turnover in 2012/13, compared to 64% from financial services in the same year. CMCs operate over a range of sectors not just within legal services.<sup>70</sup>

**Figure 3: The number and turnover of Claims Management Companies**



Note: \* The value for 1999 is an estimate, based on the Claims Management Regulator's estimated number of 500 Claims Management Companies in total in 1999, multiplied by the proportion of CMCs active in PI in 2013.

Source: *Claims Management Regulator Annual Reports and Claims Management Regulator (Impact of Regulation, Third Year Assessment)*

Given the lack of data on the number of CMCs prior to 2007, it is difficult to separately identify the effects of the Access to Justice Act and the liberalisation of the use of referral fees on the number of CMCs.

There is some evidence that referral fees played an important role. Firstly, Charles River Associates found evidence that the growing role of CMCs in motor claims was '*facilitated by motor referral fees*'.<sup>71</sup> An additional piece of evidence is that since the banning of referral fees through the LASPO Act in 2012 there has been a reduction in the number of CMCs.

However, it is likely that both reforms played an important role in encouraging the growth of CMCs. Conditional fee agreements gave CMCs a contract structure by which to attract individuals, whilst the liberalisation of advertising rules allowed them to effectively market their activities. Meanwhile, referral fees made CMCs' activities more profitable and enabled many to perform a significant role in the market by performing pre-litigation work to make cases 'oven-ready' before passing them on to solicitors for higher referral fees.

The growth of CMCs may have increased access to justice through increasing the number and scope of suppliers of personal injury legal services, thereby making it easier for individuals to access legal services, as outlined in section 5.1.1, hypothesis 3. On the other hand, CMCs may have

<sup>70</sup> Claims Management Regulator (2013)

<sup>71</sup> Charles River Associates (2010)

had negative effects on access to justice, for example if solicitors under-invest in cases to afford to compete over referral fees, as was argued in the Jackson Review<sup>72</sup>.

The next section turns to an analysis of changes in access to justice indicators.

#### 5.1.4 Analysis – access to justice indicators

##### *The underlying demand for legal services*

Trends in the number of personal injury claims can be examined through the Department for Work and Pension's Compensation Recovery Unit (CRU) records. All compensators are required to notify the CRU of any claim for personal injury made against them. Hence, these records are '*the most comprehensive and reliable data on the number of current personal injury claims*'<sup>73</sup>.

Figure 4 shows the number of personal injury claims, by type, registered with the CRU in each year from 2001 to 2013. The data reveal some important trends, detailed below.

- Motor personal injury claims were roughly stable between 2001 and 2005, but they more than doubled between 2005 and 2013.
- There has been no comparable increase in the number of claims for other types of personal injury. One exception is that the number of clinical negligence cases increased by 55% from 2010 to 2013; although there had been no sign of an increasing trend between 2001 and 2010.
- There has been a fall in the number of employer-liability personal injury claims, from a peak of 291,000 in 2004 to 91,000 in 2013. However, the high levels of employer-liability claims in 2004 and 2005 reflect a high number of claims made by former miners for health compensation dating as far back as 1954.<sup>74</sup>
- Public liability cases have not increased notably through the period. There were 96,000 cases in 2001 compared to 103,000 in 2013.

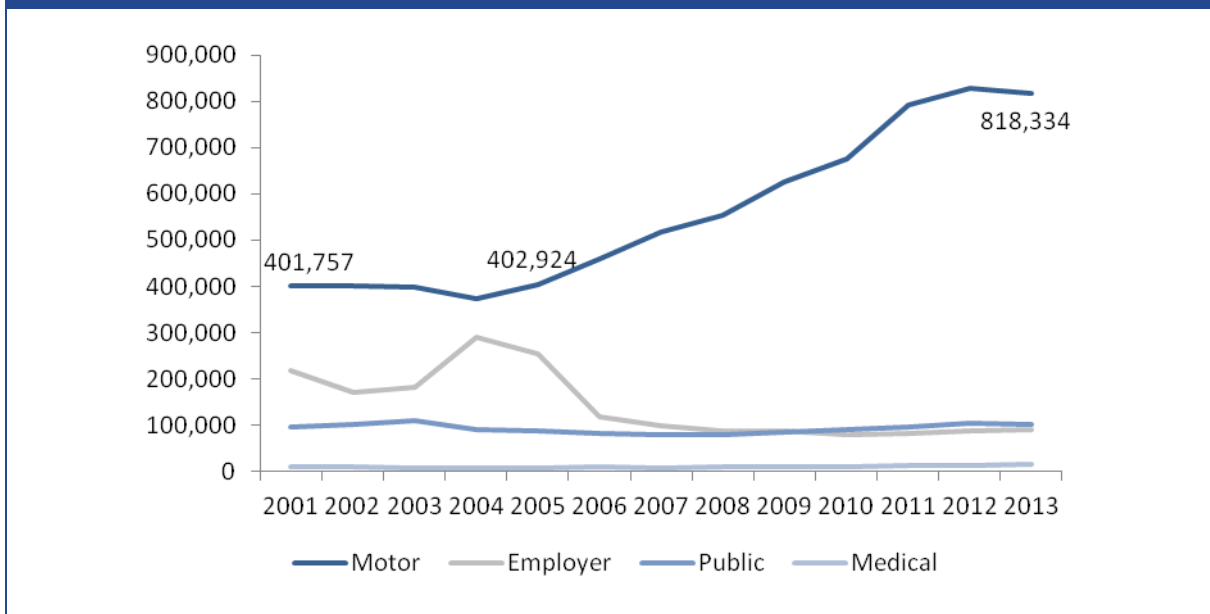
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<sup>72</sup> Lord Justice Jackson (2009)

<sup>73</sup> Lewis, Morris and Oliphant (2005)

<sup>74</sup> Lewis and Morris (2011)

Figure 4: Number of personal injury claims by type



Source: Department for Work and Pensions Claims Recovery Unit

An important question is whether the trends in the number of claims reflect changes in the number of potential claims – that is, the number of personal injuries that could potentially result in a claim.

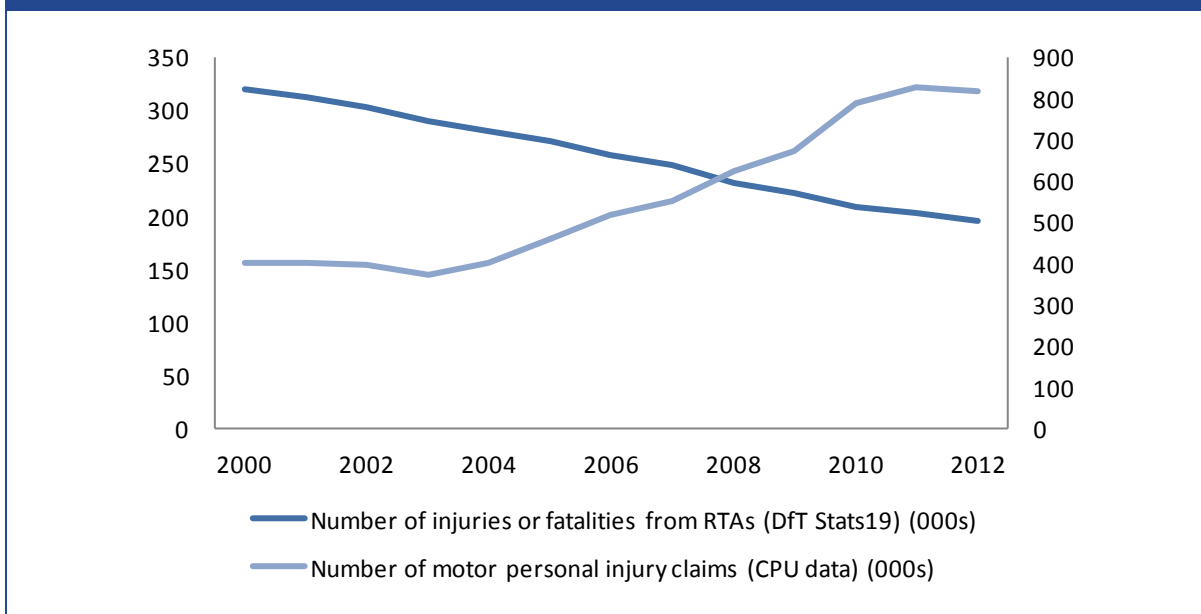
Comparing data on the number of claims from the CRU with data on personal injury problems from the LSB Benchmarking Legal Services Survey (BLSS) shows that individuals with a potential motor personal injury legal need are much more likely to make a claim than those experiencing other personal injury problems. In the BLSS, 41% of personal injury legal problems were from road traffic accidents, yet motor claims represented 78% of total personal injury claims in 2013.

The fact that a large portion of those who experience motor personal injury go on to make a claim is backed up using data from the Department for Transport (DfT) on the number of road traffic accidents reported to the police: As shown in Figure 5, there has been a steady decline in the number of road traffic accidents since 2000, while there has been an increase in the number of motor claims. The number of injuries from RTAs reported to the police is much smaller than the number of claims made, although the DfT estimates that the actual number of road accidents is more than three times the number that are reported to the police.<sup>75</sup> In all, the data does suggest that a large majority of people injured in RTAs go on to claim compensation.<sup>76</sup>

<sup>75</sup> Charles River Associates (2010)

<sup>76</sup> Lewis and Morris (2011)

Figure 5: Potential and actual demand for motor insurance claims



Source: Claims Recovery Unit and Department for Transport Stats19 data

In contrast to motor claims, individuals are currently highly unlikely to make medical negligence claims. In the BLSS, 16% of personal injury legal problems were from medical or dental negligence, yet only 1.5% of personal injury claims registered with the CRU are for medical negligence.

The striking feature of the data on demand for personal injury legal services is how significantly the trend in motor claims differs from other personal injury problems. One key reason for this may be because motor claims are generally low value and relatively easy to settle. This means they may be especially profitable for providers of legal services, which has encouraged them to reach out to individuals with legal needs.

The following are some reasons identified by others that motor claims could be particularly profitable:

- Motor claims are often relatively easy to settle compared to other personal injury claims, because liability for accidents is quickly agreed between insurance companies.<sup>77</sup>
- The speed with which motor claims are settled may also be related to the fact that the 'real defendant' is typically an insurer. Lewis (2005) highlights that insurers as defendants often settle quickly to avoid legal costs: 'insurers determine how the defence is to be conducted and, for example, commonly take admissions without the consent of the insured, and settle cases in spite of the policyholder's objection... It is unusual for insurers to contest liability'.<sup>78</sup>

<sup>77</sup> Lewis and Morris (2011)

<sup>78</sup> Lewis (2005)

- In addition, claims-handling procedures have become more routine and streamlined.<sup>79</sup>

Another potential factor explaining why motor claims may have experienced such a different trend is cultural. It may be that individuals have less concern about making motor claims because they are aware that the costs will be borne by an insurer, and there is an industry wide pool to cover claims against uninsured drivers. In contrast, they may feel less inclined to make employer-liability claims, for example, due to personal relationships with their employer.

In contrast to motor claims, other types of personal injury may not have proved as financially attractive to legal services providers because they are more difficult to settle. Charles River Associates argued that the lack of an increase in employer-liability claims is because there has not been a comparable increase in advertising as there has been for motor claims.<sup>80</sup> The lack of advertising could be interpreted as a signal that legal service providers do not expect such claims to be as profitable as motor claims.

Consideration of the different types of legal services offers some support for hypothesis 1 (outlined in section 5.1.1) that conditional fee agreements increased access to justice through reducing the financial risk to the individual. However, the evidence suggests that this effect may have been confined to motor claims, and not felt by individuals for other types of personal injury.

### ***Paths to justice***

Analysis of data from the Civil and Social Justice Survey, 2001 to 2012, suggests that there has not been a significant shift in the ways that people respond to a personal injury legal problem or in the ways that they access legal services (see Figure 6). Whilst there is some evidence that the proportion of people seeking legal advice increased slightly between 2001 and 2012, there is no evidence of a significant increase.

The change in the proportion of people seeking advice looks initially puzzling. However, many of the differences are explained by changes in survey methodology.<sup>81</sup>

Annex 2 gives a more detailed overview of individuals' responses to legal needs in the Civil and Social Justice Surveys and the Benchmarking Legal Services Surveys.

Looking at this issue from another source, the Legal Services Consumer Panel surveys show little change in the proportion of the public using legal services in relation to an accident or injury, with reported levels being 11% in 2011 and 2012, 9% in 2013, and 10% in 2014.<sup>82</sup>

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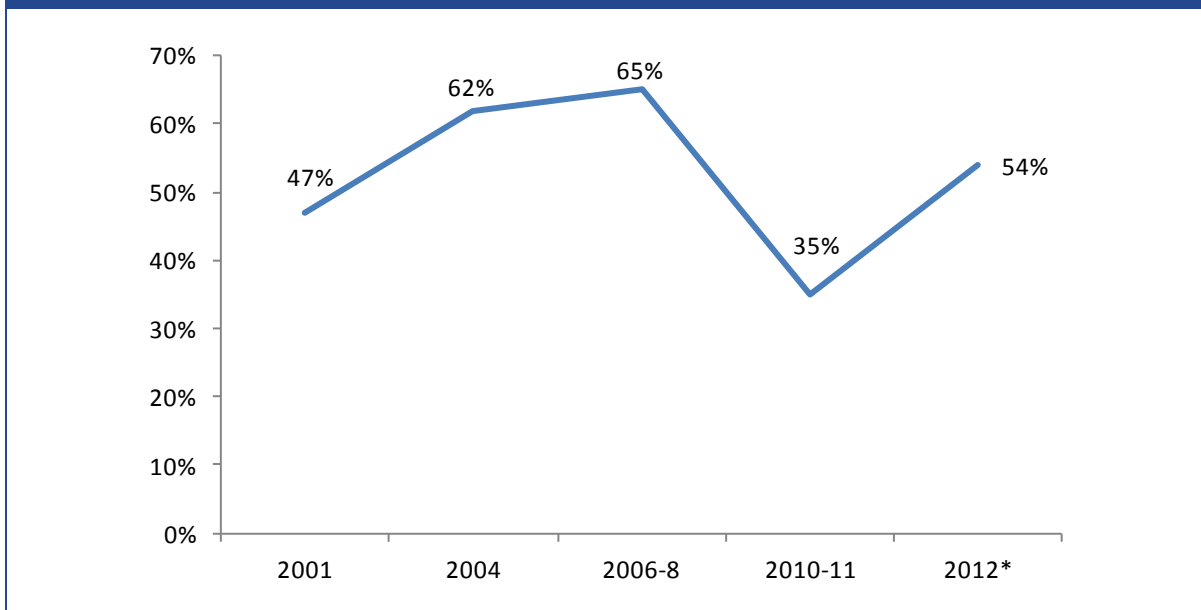
<sup>79</sup> Lewis and Morris (2011)

<sup>80</sup> Charles River Associates (2010)

<sup>81</sup> For example, in the 2004 2006-8, and 2010-11 surveys, individuals that only sought advice from a doctor were included in 'seeking advice'<sup>81</sup>, in contrast to the other surveys which focussed on legal advice. The low proportion of people seeking advice in the 2010-11 CSJPS was probably to do with the phrasing of the question, which focussed on an individuals' 'main action'; hence some individuals that did seek legal advice but predominantly tried to resolve the problem alone or decided not to take action may be excluded in this case. The phrasing of the question most comparable to the 2001 Civil and Social Justice Survey was in the 2012 Benchmarking Legal Services Survey

<sup>82</sup> Tracker Survey 2014 data release 2014 – service users sample available at [http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/index.html](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/index.html)

Figure 6: Proportion of people with a personal injury problem that seek advice



Note: The survey methodologies used make it difficult to make direct comparisons between surveys conducted in different years.

Source: *Civil and Social Justice Surveys, and Benchmarking Legal Services Surveys*

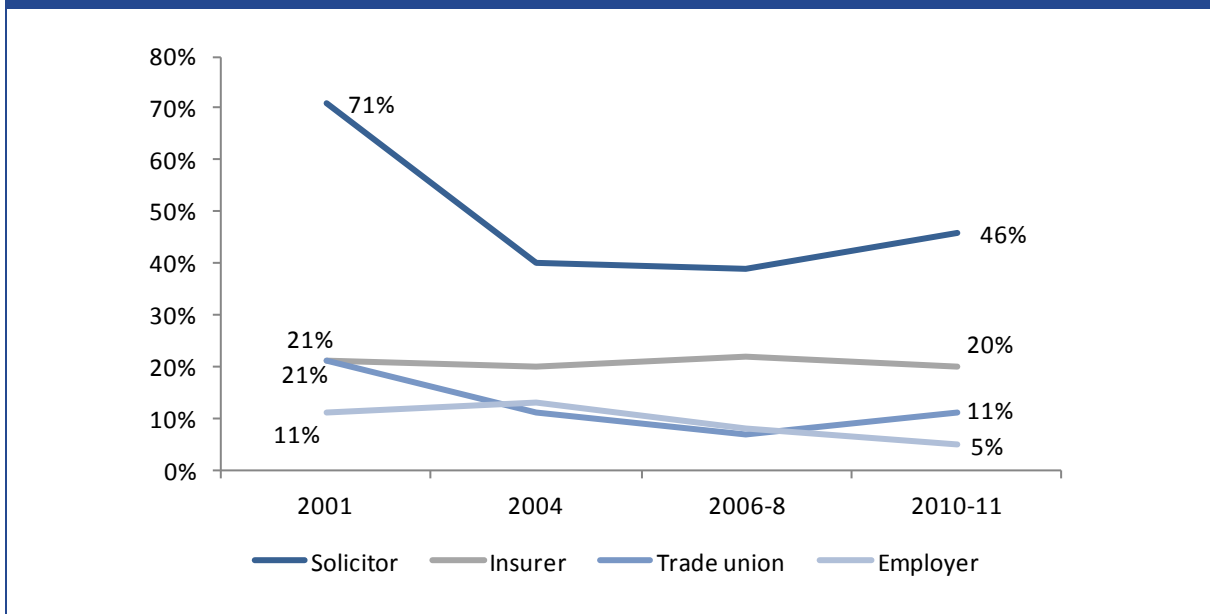
Consumer surveys also suggest there has been only limited change in where people seek legal advice (see Figure 7). Again, it is difficult to compare the figures on the proportion of people seeking legal advice from different sources in 2001 to figures in later years.<sup>83</sup>

An important point to note is that solicitors remain by far the most important source of legal advice in all years of the CSJS, despite the changes in market structure brought about by the 1999 Access to Justice Act and the liberalisation of the use of referral fees. Interestingly, despite the increasing number of motor insurance claims documented above, there does not appear to be a major increase in the proportion of people seeking legal advice from insurers, although this may be related to how insurers deal with legalities largely independent of the insured party.

Unfortunately, the CSJS does not ask any questions about whether advice was sought from CMCs so it is not possible to assess whether their role changed between 2001 and 2011. Surprisingly, in the BLSS just 4% of those with a personal injury legal needs said they sought advice from a CMC, though this may partly reflect a disparity between industry terminology and consumer understanding.

<sup>83</sup> Those that seek health advice but not legal advice from doctors were included in the category of those seeking advice in the CSJS in all years other than 2001. Unfortunately there is no way to tell in the CSJS from 2004 onwards the number of people that seek health advice from the doctor but do not go on to seek legal advice from another source; hence it is not possible to exclude these individuals to make the data comparable to 2001

Figure 7: Proportion of those seeking advice from specific sources



Source: Civil and Social Justice Surveys

In all, the evidence presented above suggests that both advertising and the growth of CMCs have had only a limited effect on the ways that individuals respond to personal injury legal needs.

Relating to the hypotheses developed in section 5.1.1, there is little evidence in favour of hypothesis 2, suggesting that advertising has not significantly increased knowledge of legal rights. Regarding hypothesis 3, whilst the regulatory and legislative liberalisation may have led to rapid growth of claims management companies, there is little evidence this growth of CMCs has had a significant effect on access to justice.

### Costs of legal services

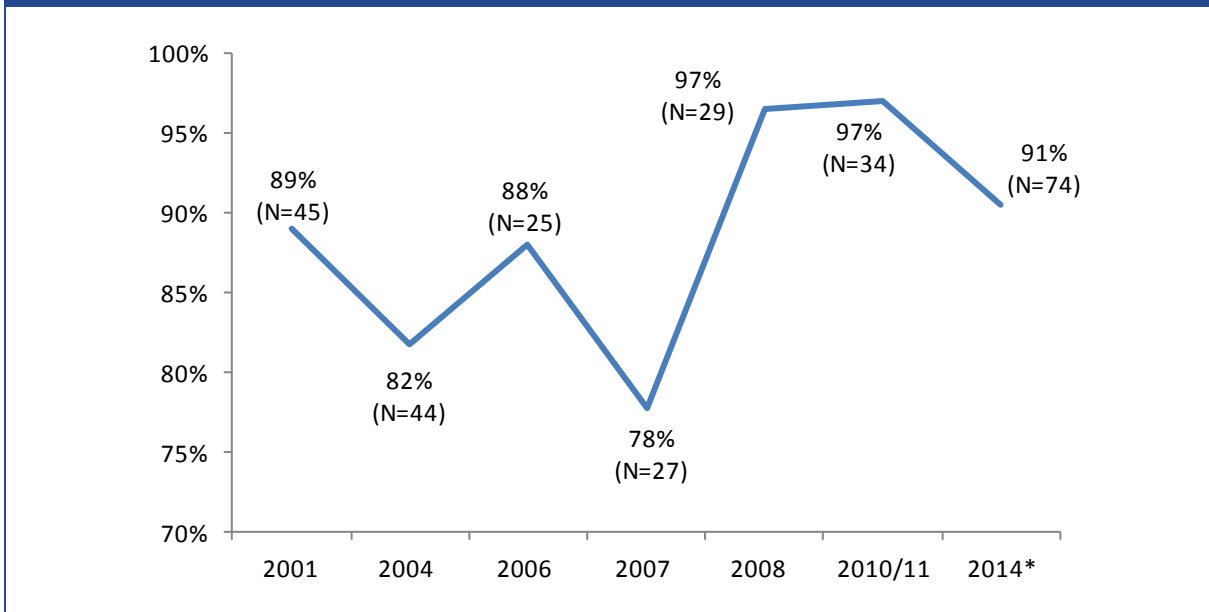
Given that the Access to Justice Act had significant implications for the funding of personal injury cases through the withdrawal of legal aid and the expansion of conditional fee agreements, it is important to consider indicators for access to justice based on the costs of legal services.

Analysis of responses to the CSJS between 2001 and 2008<sup>84</sup> suggests that the proportion of people in each year of the CSJS for whom solicitors' services are provided free of charge have increased over time (see Figure 8). This suggests that individuals' ability to access legal services free of charge was not hampered by the reduction of legal aid, the effects of which were potentially more than offset by the expansion of conditional fee agreements. However, it should be noted that this observation is based on small sample sizes.

<sup>84</sup> Due to a change of survey methodology, data from the CSJS for 2010 and 2011 are not included



**Figure 8: Proportion of people using solicitors' services for whom the service was provided free of charge**

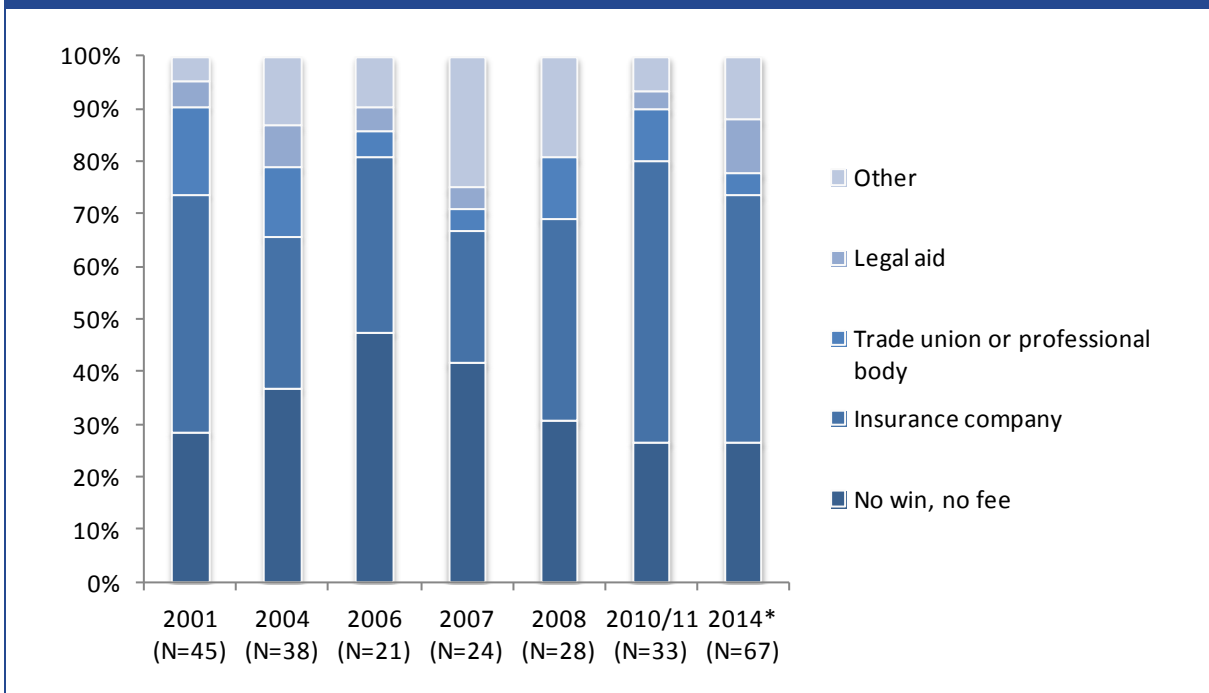


Source: Civil and Social Justice Surveys 2001 to 2011, \* 2014 data is from the Consumer Panel Tracker Survey 2014

Examining the sources of funding for those that received subsidised solicitors' services suggests that legal aid and conditional fee agreements are only part of the story (see Figure 9). Again, results are based on only a small number of observations, but there appears to have been an initial increase in the proportion of claims funded through no-win-no-fee agreements between 2001 and 2006, but the proportion fell thereafter. In no year were more than half the claims funded through no-win-no-fee agreements.

There is some evidence of an increase in the proportion of claims funded by insurers, which may reflect the increasing proportion of claims related to road traffic accidents.

**Figure 9: Sources of funding for solicitors' fees (excluding when paid for by the consumer)**



Source: Civil and Social Justice Surveys 2001 to 2011, \* 2014 data is from the Consumer Panel Tracker Survey 2014

The above analysis suggests that between 2001 and 2011, personal injury legal services achieved relatively high access to justice relating to the costs of legal services to individuals, since a large proportion of those accessing solicitors services were able to access them free of charge and therefore without taking on any financial risk to themselves. This fact lends support to hypothesis 1.

However, conditional fee agreements appear to play a smaller role in funding legal services than do insurance companies, meaning that conditional fee agreements may be a smaller part of the overall story of how high access to justice in the personal injury market is achieved.

### **Perceptions of legal services**

A final important indicator of access to justice is individuals' perceptions of legal services. Unfortunately the CSJS only allows a limited assessment of changes in perceptions of legal services.

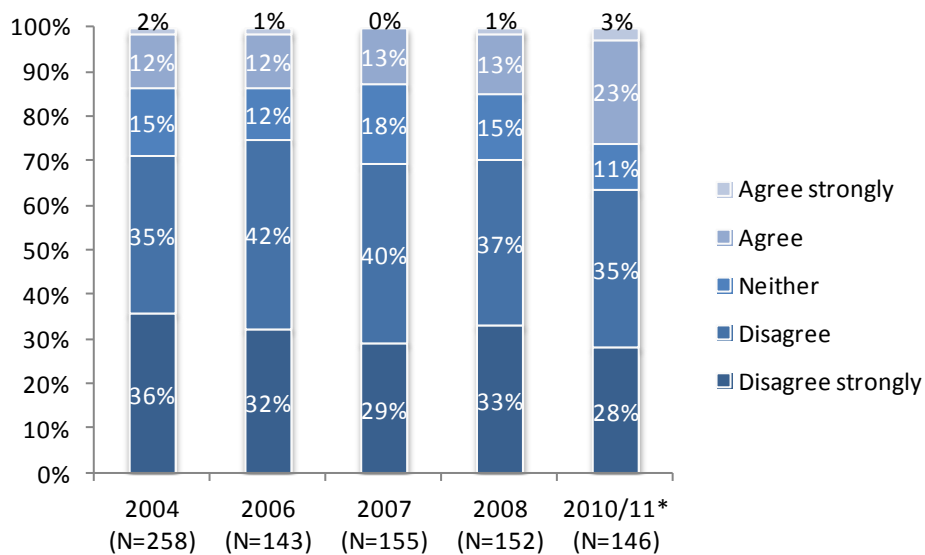
Typically, each survey since 2004 has asked five questions on attitudes to justice, but these questions have often not been consistent across the surveys. The only two questions that have been consistent across all five surveys are questions about the fairness of courts; since few personal injury claims are settled in courts we would not expect personal injury legal needs to impact on personal views about the fairness of courts.

One question that changes only slightly and is relevant to personal injury legal services is on lawyers' charges, although the question was rephrased between the 2008 and 2010 surveys. Overall, those with personal injury legal needs were more likely than not to view lawyers' charges

as unreasonable, and there is not much evidence of a change in attitudes towards legal services over time.

Whilst perceptions of legal services are an important part of access to justice, the data available allows only a limited analysis of changes in perceptions of legal services over time. Therefore, the results in Figure 10 have only limited relevance to the hypotheses developed in section 5.1.1.

**Figure 10: Responses to the statement 'Lawyers' charges are reasonable'**



Note: \* The question in the 2010/11 survey was 'Lawyers are not affordable for people on low incomes' – the answers have been inverted (for example, those strongly agreeing with the statement 'lawyers are not affordable for people on low incomes' were assumed to strongly disagree with the statement 'lawyers' charges are reasonable') to be comparable to the question in previous years.  
**Source: Civil and social justice surveys**

More recently, the Legal Services Consumer Panel surveys show little change in the public's level of trust in lawyers over time, with 47% trusting lawyers to tell the truth in 2011, and 43% in 2012, 2013, and 2014.<sup>85</sup>

<sup>85</sup> Legal Services Consumer Panel (2014)

### 5.1.5 Assessment

In light of the evidence presented in the previous two sections, this section returns to the three hypothesis posed at the beginning of this chapter to examine how the regulatory and legislative reforms may have impacted access to justice.

***Hypothesis 1: The introduction and reform of Conditional Fee Agreements increased access to justice by reducing the financial risk of claiming to the individual.***

The evidence on whether the introduction and reform of conditional fee agreements increased access to justice is mixed. The main pieces of evidence in favour of the hypothesis is that there was an increase in the overall number of personal injury claims between 2005 and 2010, and that solicitors' services are provided free in an increasing proportion of personal injury cases.

However, the increase in the number of personal injury claims following the Access to Justice Act was seen only for motor claims. In addition, the increase in the proportion of claims provided free may reflect the growing proportion of motor claims in total personal injury claims, since they are disproportionately likely to be covered by insurers. In the latest Civil and Social Justice Survey, no win no fee agreements were the source of funding for only 30% of cases where solicitors' fees were provided free.

A consideration of why the effects of the regulatory and legislative reforms may be different for different types of personal injury can be made in the context of the personal injury legal services framework described in chapter 4. One of the key reasons that motor personal injury claims increased rapidly could have been that they became more profitable for legal service providers to handle.

The following features of motor injury claims may be particularly relevant in explaining why they followed a different trend to other types of personal injury.

- Most motor claims are settled without the defendant disputing the claim, possibly in part because of the role of insurers as the defendants for motor claims; consequently motor claims have a high likelihood of success.
- Legal aid had not been in scope for low value motor claims prior to the Access to Justice Act, whereas it had for higher value personal injury claims, so for these claims in particular the financial risk to individuals was reduced by the introduction of conditional fee agreements.
- Because solicitors' could recover success fees as well as legal costs from the defendant, the size of the damages did not affect the profitability of taking on claims to the solicitor, and consequently they were motivated to take on low value motor claims.

The personal injury legal services framework suggests that all of the features outlined above are likely to have increased the likelihood that individuals would make claims, and may provide some of the reasons as to why there was a dramatic increase in the number of motor personal injury claims.

Conversely, the framework may be used to suggest reasons that this increase in the number of claims wasn't seen for other personal injury cases, since they are more likely to be disputed and have a lower success rate. For example, the Jackson Review examined 1000 clinical negligence cases and found a success rate of 56%, compared to a success rate of around 90% for motor claims.<sup>86</sup>

In assessment of hypothesis 1, it seems that conditional fee agreements may have increased access to justice in the sense of being able to make a claim for some types of claims, but not necessarily for all types of personal injury claims. In addition, it is important to recognise that the number of claims is not informative on other aspects of access to justice, such as the quality of legal services provided.

***Hypothesis 2: The liberalisation of advertising rules led to an increase in access to justice through increasing individuals' awareness of their legal rights and of the services available to them.***

One of the most surprising pieces of evidence presented above is perhaps that analysis of the CSJS does not show significant changes in the proportion of people seeking legal advice following personal injuries. This finding suggests that the liberalisation of advertising rules did not significantly change how people respond to personal injury legal needs; although it should be noted that little data is available from before advertising rules were liberalised.

There is some evidence personal injury is an area in which individuals are knowledgeable about their legal rights and about the possibility of making claims. In addition, the increase in the number of motor claims appears to be partly because of the role that CMCs have performed in advertising and thereby informing individuals of their legal rights.

Overall, there is little evidence to suggest the liberalisation of advertising rules played a large role in increasing individuals' awareness of their legal rights in personal injury cases. One reason for this may be that personal injury problems are particularly likely to be framed as 'legal problems', and people are likely to respond to them as such.

Relating this to personal injury, a study by Pleasence, Balmer and Reimers using the Civil and Social Justice Survey found that around 80% of those who had experienced a personal injury problem saw the problem as a legal problem<sup>87</sup>, thereby suggesting that the framing of personal injury as a legal issue may be one key factor explaining the fact that a large proportion of individuals access legal services.

However, it is important to note that, as the data comes from 2010, a long time after the liberalisation of advertising rules, it is not possible to assess whether advertising has played a role on people's perception of personal injury as a legal problem. More discussion of this issue is included in response to question 6 in section 6.3.

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<sup>86</sup> Lord Justice Jackson (2009)

<sup>87</sup> Pleasence, Balmer and Reimers (2010a)

Recent additional analysis of the Civil and Social Justice Surveys shows that how people characterise problems has a significant bearing on whether they use a lawyer or not, but not whether they sought advice at all.<sup>88</sup> On that basis, it seems likely that the effect of advertising has been to shift existing demand to different channels, as opposed to generating new demand.

***Hypothesis 3: The reforms to Conditional Fee Agreements and the liberalisation of referral fees led to an increase in the range of providers of legal services and increased competition which led to an increase in access to justice.***

There was clearly an increase in the number of CMCs following the Access to Justice Act and the liberalisation of the use of referral fees, and both reforms appear to have played an important role in encouraging this growth. But how far did this lead to an increase in access to justice?

As discussed above, there is some evidence that CMCs may have played an important role in informing individuals of their legal rights, and helping to create a situation in which individuals are well informed about their ability to claim following personal injury. In addition, the Legal Services Consumer Panel survey found that ‘there were some personal injury claimants who felt marketing by claims management companies or solicitors had persuaded them to pursue their case’.

However, it was also the case that ‘in most of the more serious cases the claimant would have initiated a claim regardless of their insurance company suggesting it’<sup>89</sup>. It may also be argued that individuals were relatively well informed of their legal rights prior to the growth of CMCs and that CMCs have played only a limited role due to the perception that personal injury is a ‘legal’ problem.

It is also unclear how far CMCs were responsible for the increase in the number of motor personal injury claims, as in these cases individuals using CMCs may otherwise still have accessed legal services through insurers.

Overall, there is evidence that conditional fee agreements and the liberalisation of referral fees did increase the range of providers of personal injury legal services. However, the evidence on whether the increase in the range of providers led to an increase in access to justice is mixed. It is also important to highlight the concern that referral fees may have also led to a reduction in the quality of legal services by solicitors.<sup>90</sup>

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<sup>88</sup> Pleasence and Balmer (2014)

<sup>89</sup> Vanilla Research (2010)

<sup>90</sup> Lord Justice Jackson (2009)

## 5.2 The introduction of Alternative Business Structures in 2011

Alternative Business Structures were introduced by the 2007 Legal Services Act. However the first ABS was not licensed until 2011. Alternative Business Structures allow the formation of companies consisting of a mix of solicitors, claims managers and others and can carry out reserved and unreserved activities. They provide increased flexibility for company structure in providing personal injury services and may effectively play the role of both introducer and lawyer.

### 5.2.1 How may the introduction of Alternative Business Structures affect access to justice?

Alternative business structures give greater flexibility to the providers of legal services in terms of how they best structure their businesses to deliver legal services across the whole market. For firms delivering personal injury legal services, rather than introducers having to refer cases on to solicitors when they require reserved activities such as litigation, ABS allow companies to perform claim management, pre-litigation and reserved activities within the same organisation. ABS could potentially increase access to justice by increasing the range of firms available to individuals, reduce costs through enabling the vertical integration of different activities, as well as increase the efficiency with which legal services are provided.

**Hypothesis 4: The introduction of Alternative Business Structures has further led to an increase in access to justice through increasing the number and diversity of providers of legal services**

### 5.2.2 Regulatory risks

The main regulatory risks from the introduction of ABS come from the change in incentives associated with the vertical integration of introducer and solicitor activity. By allowing introducers and solicitors to be effectively brought into the same company, the whole range of activity is subject to regulation by the Solicitors Regulation Authority, including both the reserved and unreserved activities of the company.

In addition, by forming an ABS with solicitors some stakeholders suggested that this may allow introducers such as insurers or CMCs to respond to the referral fee ban (discussed in the next chapter). It is possible this will mean arrangements between introducers and solicitors continue to lack transparency as under the previous regulations, where research into the relationship between introducers and solicitors under referral fees criticised the lack of transparency.<sup>91</sup>

Additionally, the referral fee ban was not designed to ban specific types of companies from offering legal services, but to remove the issues associated with behaviour that may have a negative impact on the quality of work provided by individual solicitors. The argument made by Lord Justice Jackson was that, when referral fees were permitted, solicitors put less hours into cases to make up for the costs of the referral fees. As Lord Justice Jackson states:

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<sup>91</sup> Vanilla Research (2010) and Charles River Associates (2010)

*“The more of that sum is paid to the referrer, the less are the resources available to devote to the handling of the case. In the context of fixed costs the effect of referral fees is either to drive up the level of fixed costs or to drive down the quality of service or both”.<sup>92</sup>*

An organisation that brings this activity in house, monitors the quality of its employees, and has a consumer brand to protect, arguably faces greater incentives to ensure the quality of its work overall.

### 5.2.3 Analysis - intermediate market outcomes

There is evidence that Alternative Business Structures have proved attractive to providers of personal injury services. LSB analysis of data from the SRA showed that there had already been over 50 ABS registrations in the area of personal injury in 2013. More recently ABS accounted for a fifth of turnover of the personal injury firms regulated by the SRA in 2012-13.<sup>93</sup>

It is clear that ABS have already had a big impact on the personal injury market. However, it is not yet possible to assess whether this had led to an increase in access to justice. If the introduction of Alternative Business Structures increases the scope of personal injury legal firms and leads to greater competition in the market, it is likely that it will increase access to justice.

However, it may be that ABS simply replace the role of CMCs and insurers, but do not have a significant impact on access to justice. There was a notable fall in the number of CMCs between 2011 and 2013 (see Figure 3), although this is also likely to have been driven by the LASPO Act (as explained in the next chapter). Overall, it is currently too early to tell what the impact of the introduction of ABS will be on the overall makeup of the market and on access to justice.

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<sup>92</sup> See paragraph 4.4 in Jackson (2010)

<sup>93</sup> Legal Services Board (2013a)



### 5.3 The Legal Aid, Sentencing and Punishment of Offenders Act 2012

The LASPO Act in 2012 followed the Jackson Review of civil litigation funding and costs, which raised a number of issues related to the costs of personal injury legal services. The LASPO Act in effect repealed the main reforms of the 1999 Access to Justice Act and the liberalisation of referral fees in 2004. This came into effect from 1<sup>st</sup> April 2013, meaning its impacts are not yet visible in the data used in this analysis.

The Jackson Review argued that both the elimination of recoverability of success fees and after the event insurance premiums ‘will lead to significant costs savings, whilst still enabling those who need access to justice to obtain it’<sup>94</sup>. Nevertheless, whilst the LASPO Act is aimed at reducing the costs of legal services, the stakeholder groups interviewed highlighted a risk that it may reduce access to justice in personal injury cases by the reverse of the mechanisms hypothesised for the regulatory and legislative liberalisation in section 5.1.1.

The most important regulatory and legislative changes were:

- success fees and after the event insurance premiums can no longer be recovered from the losing side;
- referral fees are banned in personal injury cases;
- success fees have to be taken from damages, and are capped at 25%; and,
- the introduction of a fixed fee for solicitors’ services.

It should be noted that, following the LASPO Act, conditional fee agreements are still available but the major changes have been that success fees and insurance premiums are not repayable by the other side.

#### 5.3.1 Potential impacts on access to justice

##### *Effects on the ease with which individuals can make a claim*

Overall, the LASPO act can be seen to be a legislative tightening. It is aimed at reducing the costs of PI legal services, but this may also have consequences for access to justice. The Act reverses many of the key reforms of the regulatory and legislative liberalisation between 1999 and 2004, and therefore it could be expected to have opposite effects to the Access to Justice Act and the allowing of referral fees.

Just as the regulatory and legislative liberalisation may have increased access to justice, the LASPO Act could potentially reduce access to justice for the following reasons.

- By disallowing success fees and after the event insurance to be recovered from the losing side, there may be a fall in access to justice because the financial risks of making a claim are increased.

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<sup>94</sup> Lord Justice Jackson (2009)

- The withdrawal of referral fees could diminish the role of CMCs in performing pre-litigation work, thereby reducing the number and variety of legal providers and reducing access to justice.
- By capping the fees received by solicitors for personal injury work, the benefits to solicitors of taking on personal injury work could be reduced, thereby making solicitors less willing to take on some types of personal injury cases.

**Hypothesis 5: The regulatory tightening of the LASPO Act might reduce access to justice by increasing the financial risk of making claims and reducing the returns to companies active in personal injury.**

In light of the evidence on the effects of the Access to Justice Act and the liberalisation of the use of referral fees on access to justice, it should be highlighted that it is difficult to determine the extent to which the regulatory and legislative liberalisation between 1999 and 2004 did in fact lead to an increase in access to justice.

Whilst it is clear that there was a significant increase in the proportion of those with motor injuries making motor insurance claims, this was not matched by increases for other types of personal injury. In addition, there is a surprising lack of change in the proportion of people seeking legal advice following personal injury problems evident in CSJS data. Additionally, it is important to consider that the reverse of a reform may not necessarily have a symmetric effect to its introduction. For example, following the LASPO Act, claims management companies may expand into other activities, or develop new ways of working. These effects may have implications for access to justice and create regulatory risks.

### ***Effects on the costs faced by individuals***

The effects of the LASPO Act may or may not affect the ability of individuals to make personal injury claims. However, one way the act will certainly affect access to justice is in the ability of individuals to claim the full extent of the damages they are entitled to, since solicitors' success fees will now have to be paid out of the damages.

In this sense, the LASPO Act limits access to justice, and this effect was highlighted by the Law Society in their response to the Jackson Review:

*'The Society remains committed to the principle that victims should receive 100% compensation for their losses... We believe that there is a significant danger that, given that CFAs are, for most people, the most practical way of financing claims, the inability to recover success fees will mean that consumers will lose significant amounts of their damages in order to pay the success fee to their solicitor.'*<sup>95</sup>

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<sup>95</sup> Law Society (2010)

### 5.3.2 Regulatory risks

In that the LASPO Act is aimed at reducing the costs of personal injury legal services, one of the key regulatory risks is that it will also reduce access to justice, for the reasons discussed above. However, it is too early to tell whether it will in practice do so.

There are a number of further regulatory risks that have been highlighted, as set out below.

- The banning of referral fees may lead to non-transparent practices to get around the ban (although the relationship between introducers and solicitors under referral fees has also been criticised as non-transparent). One of the justifications for the liberalisation of referral fees in 2004 was that it was 'recognising reality' because referral fees were already being paid but in a non-transparent manner.<sup>96</sup>

Similarly, it is possible that the banning of referral fees through the LASPO Act will lead to actions to get around the referral fee ban and thereby less transparency in the role of introducers. Professor Richard Moorhead writes that referral fees are 'alive and well if slightly adjusted', highlighting the example of the LegalGo services provided by Epoq, which attempts to get around the referral fee ban by sending the client information about how to contact a lawyer by email, so it is the client making contact with the lawyer rather than Epoq.<sup>97</sup>

- As discussed in section 5.2, creating an ABS and integrating services is one way of responding to the new legislation. In addition, as the LASPO act reduced the returns to low-value personal injury cases, personal injury practitioners may turn to other types of personal injury such as medical negligence cases, which are more specialised and harder.

### 5.3.3 Initial indication of intermediate market impacts

Whilst it is too early to present any concrete data on the market impacts of the LASPO Act, one early effect appears to have been the reduction in the number and turnover of CMCs (see Figure 3). The reduction in the number of CMCs could have been caused by the withdrawal of referral fees, most likely because their role in performing pre-litigation work before referring claims has been reduced.

One additional effect of the LASPO Act may have been to increase the proportion of introducers taking advantage of the opportunity to become an ABS. As noted in section 5.2, a fifth of the personal injury turnover of firms regulated by the SRA came from ABS in 2013. The LASPO Act may create a significant incentive for an introducer to become an ABS because they are then able to integrate pre-litigation and litigation work into one organisation. If the consequence of the LASPO Act is that CMCs are replaced by ABS it may be that there is no overall effect on access to justice.

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<sup>96</sup> Charles River Associates (2010) show that prior to 2004 referral fees would take the form of charges for insurance policies, marketing fees or administrative fees

<sup>97</sup> Moorhead (2014)

### ***The Civil Justice Council call for evidence on the impact of the Jackson reforms***

In April 2014, the Civil Justice Council published responses to a call for evidence on the initial impacts of the Jackson Reforms.<sup>98</sup> It is too early to fully evaluate the extent of the effect of the Jackson reforms, and much of the evidence presented by respondents is either anecdotal.

Nevertheless, many respondents make very important points about the likely effects of the Jackson Reforms on access to justice, as discussed below.

Among a variety of respondents, there is concern that the Jackson Reforms have limited access to justice for specific groups or for specific types of claims, in particular lower-value or riskier claims, that have become unprofitable. It is important to note that riskier or lower value claims do not necessarily imply that such claims are less meritorious than others.

- The Association for Personal Injury Lawyers (APIL) state that *'riskier cases are being turned away by solicitors who advise that their cases are not financially viable'*, whilst caps on success fees as a proportion of damages may have led to a reduction in the number of lower value claims.<sup>99</sup>
- The Law Society also argue that low value claims are likely to be the worst affected: 'It is therefore likely that some people with meritorious claims (for lower value public liability cases) who would have been able to sue and recover damages before 1 April 2013 are no longer able to find a solicitor to bring the case'.<sup>100</sup>
- Referring to complex and difficult to predict cases, the Bar Council argue *'Practitioners will simply not be able to take on such cases and could mean that claimants are denied access to justice.'*<sup>101</sup>

There is also a concern that the Jackson Reforms will lead to a closure of PI firms which may further limit access to justice by reducing the variety of legal service providers. The Association of Personal Injury Lawyers (APIL) find that anecdotal evidence suggests that solicitors firms are planning for a 30% reduction in the number of personal injury claims<sup>102</sup>, whilst the Law Society report cases of solicitors firms ceasing to undertake personal injury work because of 'high cost of alternative marketing and the reduction in recoverable costs'.<sup>103</sup>

It is important to note that the reforms are likely to have a lagged effect on the number of solicitors firms since many cases currently ongoing were issued before the implementation of the LASPO Act so are being governed by previous rules. It is only once these cases have ended that the full effects of the reforms will be felt by solicitors firms.

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<sup>98</sup> Responses are available at <http://www.judiciary.gov.uk/NR/exeres/70AFE8DC-CFD1-4CC4-971B-A5278AB1D1C2.htm> [accessed 06/05/2014]

<sup>99</sup> APIL (2014)

<sup>100</sup> Law Society (2014)

<sup>101</sup> Bar Council (2014)

<sup>102</sup> APIL (2014)

<sup>103</sup> Law Society (2014)

These groups also suggest that the LASPO Act has led to claims no longer being financially risk-free for some claimants, which in the context of the framework developed in section 4 could have a significant effect on access to justice. Despite the introduction of qualified one-way cost shifting (QOCS), the Law Society state that clients are taking out after-the-event (ATE) insurance at their own expense *'because they remain liable for their own disbursements if they lose'*.<sup>104</sup>

There are also concerns that the Jackson Reforms may have had unintended effects on the quality of legal services, for a number of reasons.

- Firstly, the reduction in revenues available to solicitors firms may have led to efforts to cut costs by pushing work to the most junior level of fee earner.<sup>105</sup>
- There is anecdotal evidence that personal injury firms are shifting inexperienced practitioners into the clinical negligence market, which is more complex than personal injury and thereby may reduce the quality of clinical negligence legal services overall.<sup>106</sup>
- Lastly, the Personal Injury Bar Association (PIBA) reported that the number of litigants in person appearing before civil courts increased by more than a third between January 2013 and January 2014, arguing that some of this rise is likely to be due to legal service providers refusing risky personal injury cases. They argue that *'it is predictable'* that litigants will commit procedural breaches and thereby lower the quality of services they would otherwise have had access to if they had sought professional representation.<sup>107</sup>

It is important to also note contrary views to those presented above that suggest the LASPO Act may not have had a negative effect on access to justice. For example, the Forum of Insurance Lawyers (FOIL) state that, whilst it is too early to say confidently, 'the view from FOIL members is that there is no evidence to indicate that the new regime has impacted upon access to justice or has acted to reduce claims volumes'.<sup>108</sup>

Whilst it should be stressed that there is currently no clear-cut evidence and much of the evidence provided so far is anecdotal, nevertheless, for the reasons described above, there are potential risks that regulators should monitor.

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<sup>104</sup> Law Society (2014)

<sup>105</sup> APIL (2014)

<sup>106</sup> Ibid.

<sup>107</sup> PIBA (2014)

<sup>108</sup> FOIL (2014)

## 5.4 Summary

Table 3 summarises the main analysis performed in this chapter. For each regulatory and legislative change, there is a main hypothesis for how access to justice could have been increased or decreased. The final two columns recap evidence for and against each of the hypotheses and provide a brief assessment of the extent to which the evidence supports or rejects each hypothesis.

Table 3: Overview of analysis of access to justice indicators			
Regulatory and legislative change	Hypotheses	Evidence	Assessment
Expansion of conditional fee agreements (1999)	The introduction and reform of Conditional Fee Agreements increased access to justice by reducing the financial risk of claiming to the individual.	<ul style="list-style-type: none"> <li>■ The rapid growth of CMCs between 1999 and 2011 seems to have been driven partly by the introduction of CFAs.</li> <li>■ Motor personal injury claims doubled from 2005 to 2013.</li> <li>■ There was no comparable increase for other personal injury claims.</li> <li>■ Solicitors' services are provided free to a high (and possibly increasing) proportion of individuals.</li> <li>■ Conditional fee agreements are the source of subsidy for only around 30% of these cases, with insurers more likely to be the source of funding.</li> </ul>	<ul style="list-style-type: none"> <li>■ There was an increase in access to justice in the sense of being able to make a claim for motor claims.</li> <li>■ There may also have been an increase in access to justice through an increasing proportion of individuals being able to access legal services free of charge.</li> <li>■ Increases in access to justice do not appear to have been matched for other types of personal injury.</li> </ul>
Liberalisation of advertising rules (1999)	The liberalisation of advertising rules led to an increase in access to justice through increasing individuals' awareness of their legal rights and of the services available to them.	<ul style="list-style-type: none"> <li>■ No significant change in the proportion of people seeking legal advice following personal injury between 2001 and 2011.</li> <li>■ Evidence from the Legal Services Consumer Panel suggests some claimants were influenced by marketing to pursue a claim.</li> <li>■ 80% of those with PI problems see it as a 'legal problem', meaning advertising may have little</li> </ul>	<ul style="list-style-type: none"> <li>■ Personal injury is an area in which individuals are relatively well informed about their legal rights, and they think of PI as a 'legal' problem.</li> <li>■ However, there is little evidence that an increase in advertising has significantly shifted the ways that individuals respond to personal injury legal needs.</li> </ul>

**Table 3: Overview of analysis of access to justice indicators**

Regulatory and legislative change	Hypotheses	Evidence	Assessment
		impact on whether they pursue a claim or not.	
Liberalisation of the use of referral fees (2004)	The reforms to Conditional Fee Agreements and the liberalisation of referral fees led to an increase in the range of providers of legal services and thereby increased access to justice.	<ul style="list-style-type: none"> <li>■ The rapid growth of CMCs between 1999 and 2011 seems to have been driven partly by the liberalisation of referral fees.</li> <li>■ In 2012 Legal Needs Survey, only 4% of respondents with a personal injury said a CMC was their main legal service provider.</li> </ul>	<ul style="list-style-type: none"> <li>■ Both the liberalisation of conditional fee agreements and the liberalisation of referral fees appear to have encouraged the growth of CMCs.</li> <li>■ However, there is little evidence that the growth of CMCs has shifted the ways that individuals access legal services.</li> </ul>
Introduction of Alternative Business Structures (legislation passed 2007; began to be registered 2011)	The introduction of Alternative Business Structures has further led to an increase in access to justice through increasing the number and types of providers of legal services.	<ul style="list-style-type: none"> <li>■ ABS accounted for a third of turnover of the personal injury firms regulated by the SRA in 2012-13, demonstrating rapid growth.</li> </ul>	<ul style="list-style-type: none"> <li>■ There has been a rapid growth of ABS in the personal injury market, demonstrating that they are seen to be profitable.</li> <li>■ Nevertheless, it is too early to assess the impact on access to justice.</li> </ul>
LASPO reforms (2012): <ul style="list-style-type: none"> <li>■ Ceasing of recoverability of success fee and after the event insurance</li> <li>■ Banning of the use of referral fees</li> <li>■ Introduction of a fixed fee for solicitor's services</li> </ul>	The regulatory and legislative tightening of the LASPO Act might reduce access to justice by increasing the financial risk of making claims and reducing the returns to companies active in personal injury.	<ul style="list-style-type: none"> <li>■ The number of CMCs declined between 2012 and 2013, as did their reported total turnover from personal injury.</li> <li>■ There is some anecdotal evidence of non-transparent processes to get around the referral fee ban.</li> </ul>	<ul style="list-style-type: none"> <li>■ It is too early to assess the full impact of access to justice in terms of the quantity, price and quality.</li> <li>■ One important effect is that access to justice in the sense of being able to claim the full amount of compensation has been reduced.</li> </ul>

Source: London Economics, based on the analysis and data sources used in section 5.

## 6 Regulatory lessons

This chapter draws lessons for regulating legal services markets (other than for PI legal services) based on the analysis of regulation in the personal injury legal services market. In order to focus the lessons from the analysis, the Legal Services Board identified questions relevant to regulating legal services markets with regard to access to justice, across the following topics:

- developing an evidence base for regulation;
- demand side issues;
- supply side issues; and,
- key regulatory lessons.

As well as providing responses that may be relevant to regulators, the question and answer format seeks to highlight the approach of this research to legal services regulation for stakeholders in these legal services markets to respond to. This research forms one part of the evidence base needed to regulate markets for legal services, which stakeholders may or may not agree with, therefore debate and challenge to the views presented here are encouraged.

### 6.1 Developing an evidence base for regulation

#### Question 1:

**Given that the legal needs surveys suggests no significant shift in the way that people respond to a personal injury problem, is the LSB using the wrong measures in looking at changes in access to justice? If so, what alternatives are there?**

One of the puzzles highlighted in this analysis is that, despite a great deal of regulatory and legislative change, consumer surveys provide little evidence that there has been a significant shift in the way individuals respond to personal injury problems. One potential explanation for this puzzle could be that the *indicators* of access to justice do not capture the *concept* of access to justice very well.

However, it is argued here that the concept of access to justice are captured well by indicators; but there are some shortcomings with the data available, which mean that it may not fully capture changes in access to justice.

***The indicators for access to justice capture the concept of access to justice but they could be grouped***

Access to justice involves a range of issues around knowledge and perceptions of legal services, the costs and risks involved in accessing legal services, the quality of legal services, and whether or not an individual chooses and is able to access to legal services.<sup>109</sup>

Nonetheless, one recommendation for improving the access to justice indicators is to distinguish between indicators that represent an intrinsic feature of access to justice from indicators that

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<sup>109</sup> The access to justice indicators developed by LSB (see Annex 1) capture these main areas of access to justice



represent a feature of the personal injury market that is thought to support access to justice. This potential grouping is discussed below.

Considering the nine broad areas of access to justice defined by the Legal Services Board, the following have been considered as intrinsic features of access to justice:

- demand for legal services;
- paths to justice;
- use of legal services;
- costs of legal services; and,
- access to the courts.

The areas that have been considered as representing features of the market that are thought to affect access to justice are the following:

- number of agents delivery – depth of services;
- scope of delivery – breadth of services; and,
- geography of services.

A distinction should be made between indicators relating to features of the personal injury market that represent ‘intermediate outcomes’ and intrinsic features of access to justice. While making this distinction is relatively straightforward, it has the benefit of focusing regulation on ultimate outcomes of access to justice rather than intermediate outcomes whose relationship to access to justice per se may be changing over time.<sup>110</sup> In response to the Legal Services Board’s proposed framework on measuring changes in access to justice indicators, therefore, it is recommended that this distinction is made more sharply in regulatory analysis.

### ***The data available only imperfectly capture the access to justice indicators***

Whilst it is believed that the indicators for access to justice capture the concept of interest, a problem for measuring changes in access to justice over time is that the available data only imperfectly capture these access to justice indicators.

There are a number of issues relating to both a lack of indicators of latent demand for personal injury legal services and details of consumer surveys.

Firstly, whilst the Compensation Recovery Unit provides very good data on actual demand for personal injury legal services over the duration of the period of interest, there is a lack of data on the potential demand for personal injury cases. Therefore, it is difficult to make inferences about access to justice based on the relationship between the number of personal injury cases and regulatory and legislative changes because there may also be changes in the underlying potential demand for legal services.

One area for which there is a relatively useful indicator of potential demand is motor personal injury cases, where there is data on the number of road traffic accidents reported to the police (as discussed in section 5.1.4). Nevertheless, even this is an imperfect potential demand indicator

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<sup>110</sup> An example in this regard would be encouraging access in the sense of physical presence of legal services in different geographies

since it is likely that it captures only around one third of total accidents.<sup>111</sup> For other types of personal injury, there is much less information available on the potential number of claims.

Secondly, the way in which consumer surveys are used to track indicators for access to justice raise a number of issues.

- The CSJS has small sample sizes when looking only at one specific type of problem, hindering analysis of particular aspects of access to justice. In each survey, approximately 5% of individuals experienced a personal injury or clinical negligence problem, leaving total sample sizes for personal injury problems of between 180 and 322 individuals in each year<sup>112</sup>, and fewer for the examination of particular PI legal services questions (for example, cost).
- Small sample sizes in consumer surveys also make it difficult to consider how regulatory and legislative changes affect access to justice for specific groups. Distributional changes in access to justice could be important because examining access to justice indicators in aggregate could obscure important changes for specific groups, as has been highlighted in this report. For example, the introduction of conditional fee agreements was intended to increase access to justice amongst those just above the income threshold for legal aid. It has not been possible to examine this issue given the sample sizes in the CSJS.
- The CSJS did not distinguish motor claims from other types of personal injury. Doing so would have been useful since the CRU data suggests that regulatory and legislative changes may have had much more significant effects on responses to motor personal injury than for other types of personal injury.

One potential explanation for the apparent lack of change in individuals' response to personal injury problems overall is that changes occurred mainly for motor claims, but that because motor claims are just a subset of personal injury, the changes are not apparent from examining aggregated data on responses to all types of personal injury problem.

- It would also be beneficial if it were possible to distinguish the value of claims, though it is recognised, among other things, that individuals may not wish to report this information.
- Some questions in the CSJS were not stable over time so that it was difficult to make comparisons across years. For example, questions relating to seeking advice changed over time, with some years seeing a doctor included as seeking advice and other years more narrowly focussed on legal advice.

A lack of stability in the questions makes it difficult to compare indicators for access to justice across time. In particular, it is not possible to detect relatively small changes in access to justice since these could be due to the change in survey questions.

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<sup>111</sup> Charles River Associates (2010)

<sup>112</sup> See Annex 2

- Since the questions in the CSJS were designed to examine responses to a broad range of legal problems, it was found that, when considering a single personal issue such as personal injury, the questions asked were not on the most salient issues. Two examples are as follows.
  - There were no questions in the CSJS about the use of claims management companies though it is noted it may be difficult to design questions on the use of CMCs as individuals may not be familiar with the term.
  - Questions about the use of legal services concentrated on whether legal advice was sought and whether there was contact with the other side, and then questions about action taken focus on the use of courts and tribunals, which are unlikely to be used for personal injury cases.

It is important to note that many of the problems relating to the use of consumer surveys raised in response to question 1 have been mitigated in more recent surveys, such as the Legal Needs Survey. In particular, the Legal Needs Survey has a larger sample size for personal injury cases, distinguishes between different types of personal injury, and includes a broader range of questions including on the use of claims management companies.

## Question 2:

### Based on the limitations identified with existing data, ideally what information should be collected to understand the changes in personal injury over time?

Building on the answer to question 1, there are a number of suggestions for improving the data collected in order to more accurately track access to justice indicators for personal injury legal services over time.

- For consumer surveys that cover a range of legal issues, ideally their sample size would be increased.
 

One advantage of the Legal Needs Survey is that it was conducted with respondents that had experienced a legal need, in contrast to the CSJS which was conducted with a random sample of the population. The approach of the Legal Needs Survey achieves higher sample sizes for personal injury problems for a given number of survey participants than the CSJS (15% of survey participants for the Legal Needs Survey experienced a personal injury legal need, compared to 5% of CSJS survey participants).
- It would be very useful for consumer surveys, as was done in the Legal Needs Survey, to distinguish between types of personal injury problem, in particular to address motor personal injury claims separately to other types of personal injury.
- There is a need for survey questions that focus on the issues most salient to regulation. With regard to PI legal services, it would be useful for there to be more questions that help to understand the following.
  - The role of introducers, such as claims management companies and insurers, including the relationship between individuals, introducers and solicitors.

- The use of fast-track procedures or out of court settlement, rather than traditional routes to justice such as courts or tribunals.
- One important issue relating to including such questions is individuals' awareness of the process. Individuals are unlikely to have heard of claims management companies, even if they have used their services, and therefore surveys may underestimate the use of CMCs.<sup>113</sup> A better approach may be to ask about the nature of the company first approached and the interviewee could be responsible for classifying companies as claims management companies, other types of introducer or as a solicitor (or ABS).

Another consideration is that adding additional questions to a survey adds costs. One approach to limit costs could be to add surveys focusing on particular issues of regulatory interest in some years but not in others. This is the approach taken to carrying out economic surveys (for instance, by Eurostat).

- Lastly, even if additional survey questions are added over time, there is a need to ensure the stability of common questions across time.

## 6.2 Demand side issues

### Question 3:

**From the consumer's perspective is access to justice simply about the cost of legal services? Does the 'free offer' that CFAs imply override all other aspects?**

The framework for access to justice outlined in chapter 4 suggests that the costs of legal services are likely to be a very important factor determining whether individuals access legal services. In particular, CFAs are especially appealing for individuals because, relative to a baseline case in which they pay for solicitors' services by the hour, they remove the financial risk of making a claim.

However, the framework also suggests that there are likely to be other important factors determining whether an individual will make a claim, as follows.

- Firstly, there are non-financial benefits and costs involved in making a claim. The amount of stress, effort and time involved in making a claim could have significant effects on whether or not an individual chooses to access legal services.
- Secondly, alongside the potential costs, the potential size of the financial gain is also important, and therefore how CFAs are regulated is relevant. For example, following the LASPO Act individuals are likely to have to pay success fees from their damages payments, thereby reducing the potential financial gain of making a claim.

The framework gives a clear indication that financial costs are likely to be one of the most important factors determining an individual's decision, but they are unlikely to be the sole consideration. Unfortunately, there is currently little data available that allows a close examination

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<sup>113</sup> For example, the Legal Needs Survey suggests that only 5% of those seeking advice in response to a personal injury problem use a CMC.

of which are the most important factors in influencing individuals' choices in accessing legal services.

One argument that has been made is that CFAs were an important factor in increasing the number of motor claims. However, it is also possible that a key factor has been that the time and effort required for individuals to make such claims has been reduced through civil procedural rules and efforts by introducers to capture specific claims.

The Legal Needs Survey provides some evidence on the most important factors that currently deter individuals from seeking legal advice. Of the 260 individuals that experienced a personal injury and dealt with the problem alone or did nothing in response to the problem, there were a broad range of reasons given. The most common reasons were that they thought nothing could be done to resolve the problem (12%), that it would involve too much hassle (10%) and that they thought it would cost too much (9%).

Therefore, there is some limited evidence that both financial and non-financial costs are important factors determining individuals' responses to legal need, although there was no overwhelming reason given by the majority of participants. It is also important to note that the survey was conducted whilst CFAs were allowed, and so it is plausible that many more respondents would have been put off making a claim by the financial costs involved if CFAs were not allowed.

For the purposes of regulation, the lesson is that a continuing focus on cost is essential to aspects of access to justice.

However, in addition, non-financial costs of legal proceedings such as stress (or, for example, that they "would involve too much hassle") are important too. This is particularly the case in the context of uncertainty of what legal proceedings involve and likelihood of success.

Further research is therefore recommended into what regulatory actions, industry standards, etc. may be required to overcome non-financial costs that individuals face. Broad areas of interest include whether there is a role for better information provision (that is, whether individuals would respond more positively than they do presently if they were better informed) or how *behavioural biases* can be overcome to encourage individuals to pursue appropriate resolution to their legal problems.

Research that has already been conducted on these issues provides useful reference points for further work.<sup>114</sup> Recent reports published by the LSB explore these areas in greater depth.<sup>115</sup>

#### Question 4:

**Does that suggest that legal service providers wishing to access latent demand in other legal markets should look to carry more of the financial risk involved?**

Consideration of the framework for access to justice outlined in section 4 suggests that arrangements whereby legal service providers take on financial risk, thereby reducing the financial

<sup>114</sup> Maule (2013) and Pleasence, Balmer and Reimers (2010a)

<sup>115</sup> See Pleasence and Balmer (2014) and Maule (2013), available at <https://research.legalservicesboard.org.uk/>

risk faced by the consumer, are likely to be preferable to the consumer. In addition, they are likely to be particularly attractive to risk averse consumers.

However, an important regulatory consideration is that, for legal service providers to be willing to take on the financial risk for cases, regulators and legislators have to provide the conditions whereby firms want to – that is, it has to be more attractive to firms to use CFAs than other contracts.

For example, a consistent story put forward to explain the rapid growth of motor claims includes not only that consumers faced lower risks to making claims, but that the legislative changes, including the recoverability of success fees and the liberalisation of referral fees, meant that it was profitable for legal service providers to take on the financial risks.

However, it may be more difficult for regulators to encourage legal service providers to take on financial risks in other legal markets, including for other types of personal injury cases. Firms are more likely to take on cases where the expected financial benefit to them is higher. Therefore, factors that make them more likely to take on a claim include:

- a low chance the claim will be disputed;
- a high chance of the claim being successful;
- where handling of claims is simple and follows a routine, so costs are low and predictable; and,
- where there is little uncertainty of the likelihood of success.

The above factors suggest, for example, that some form of CFAs would be more attractive to firms for motor personal injury claims than more complex, unpredictable claims such as clinical negligence. This logic can also be applied beyond the personal injury market, and some examples relating to employment law and family law are given below.

One important lesson, therefore, is that the regulation required to incentivise firms to take on risks is not the same across legal market markets, and must adapt to reflect market dynamics. In particular, for bespoke cases where there is significant uncertainty over the chance of success, it is likely be more difficult to encourage firms to take on financial risks.

In such cases, CFAs are likely to be less effective at increasing access to justice. Therefore, a different form of regulatory environment may be required to provide low-risk or risk-free legal services to individuals.

A second, broader lesson for market-based regulation is that regulatory and legislative change (e.g., permitting new fee arrangements) that establishes new market conditions is likely to spur supply-side innovation in the form of a variety of business models and offerings to potential clients. This is beneficial but it also leads to risks that should be monitored, and regulators need to adapt accordingly.

### 6.3 Supply side issues

#### Question 5:

**If all the regulatory and legislative changes appear to have had limited effects on how an individual responds to a personal injury legal issue – access to justice – is market change**

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### **solely driven by suppliers adapting to new incentives and responding to the new balance of risk?**

The above analysis of the effects of regulatory and legislative changes shows that there was a rapid growth of CMCs from 2000 to 2007, and there has recently been growth of Alternative Business Structures. However, analysis of consumer surveys shows little evidence of significant shifts in the ways that individuals respond to personal injury legal needs.

A potential conclusion from this analysis, therefore, is that the market change that has occurred has been mainly around suppliers adapting to the new environment rather than demand-side changes in access to justice.

It is important to note that many of the regulatory and legislative changes have been supply-side interventions, and therefore have been attempts to bring about changes in demand (access to justice) through changes in supply. For example, the liberalisation of advertising rules, referral fees, the introduction of alternative business structures and even the introduction of CFAs were all dependent on legal service providers introducing changes.

A key consideration, therefore, is as to whether this approach of targeting supply-side interventions to generate demand-side outcomes is the best approach to take.

However, once again it should be noted here that the limitations of the data (highlighted in response to questions 1 and 2) mean that it is difficult to draw broad conclusions from the evidence.

For example, it could be that supply changes did encourage motor personal injury claims, which did experience rapid growth over the period, in contrast to other types of personal injury. It could be that, because motor personal injuries make up only a fraction of all types of personal injury, the effects of the growth in supply on consumers' responses to legal need in consumer surveys is not evident, but nevertheless was significant.

### **Question 6:**

**The legal needs surveys found that problem characterisation is the key determinant of response, and that 80% of respondents viewed personal injury as a legal problem.<sup>116</sup> Given this, is it likely that advertising is not acting to significantly increase the number of claims?**

The above analysis found no significant change over time in how individuals respond to personal injury legal needs, and therefore found no evidence that advertising had increased the number of claims overall. One potential conclusion, therefore, is that advertising has acted more to determine which provider a consumer will use than to increase the number of consumers.

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<sup>116</sup> Pleasence, Balmer and Reimers (2010a)

The argument that advertising may have had a limited effect on the proportion of people seeking legal advice following personal injury is supported by two findings from research by Pleasence et al. (2010).<sup>117</sup>

- Consumers are more likely to respond to any legal problem by seeking legal advice from a lawyer if they frame the problem as a “legal” one: ‘respondents said they would seek help from a lawyer in relation to 44% of problems characterised as “legal”, the same was true of only 11% of problems not characterised as such’.
- Compared to other types of legal problem, consumers are particularly likely to see personal injury as a legal problem – around 80% of consumers see personal injury problems as legal problems.

Research by the Maule (2013) highlights the importance of the ‘representativeness heuristic’ in shaping responses to legal needs:

*‘People are likely to have their own understanding of what distinguishes legal and non-legal problem categories. A new problem will be matched against this knowledge to determine whether to resolve it by legal or non-legal means. The more the new problem matches existing knowledge of the characteristics of legal problems so the more confident people will be that it can be solved through legal means.’<sup>118</sup>*

However, it is important to highlight that there are reasons why this argument could be misleading.

- Firstly, the data for the study comes from the Legal Needs Survey, conducted in 2012. It could be that advertising since 1999 has played a role in shaping the view of personal injury problems as legal problems.  
Considering the representativeness heuristic, as the research by the Legal Services Board points out, information from advertising and other sources is likely to affect individuals’ categorisation of problems into legal and non-legal.
- Secondly, it is important to again highlight the limitations in the data that lead to uncertainty around the finding that there was little change in individuals’ response to legal needs over time. In particular, questions around responses to legal need were not stable over time, so it could be that there were relatively small changes in responses to legal need that are not possible to detect in the data.

In summary, the evidence base does not show advertising has had a significant impact on increasing the number of claims coming forward.

However, given the data available, it does not mean advertising cannot play a role in bringing claims forward. Cases, for instance payment protection insurance compensation, show that advertising can have an impact on individuals; further research would therefore be useful on the parallels between such cases and advertising in various legal services markets.

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<sup>117</sup> Ibid.

<sup>118</sup> Maule (2013)



## 6.4 Regulatory risks

### Question 7:

#### **How have the regulatory and legislative risks changed and how has regulation been tailored to address these risks?**

This section highlights four types of regulatory and legislative risks that have either evolved or developed since the introduction of conditional fee agreements in 1995. Over the period, regulatory and legislative changes have been introduced to attempt to limit certain risks but they have also had unintended consequences. A consideration of the changing nature of regulatory risks also highlights a number of trade-offs – for example between increasing access to justice and the costs of civil litigation.

#### ***Risks of limited access to justice for specific groups or for specific types of claims***

The main risk that the introduction of conditional fee agreements were intended to address in 1995 was the existence of an access to justice ‘gap’. This gap was thought to occur for those whose income was above the threshold for legal aid but was small enough that aversion towards potential financial losses to put them off making a claim. CFAs were intended to address this gap by allowing such individuals to access legal services without incurring any upfront costs.

Given the data available, it is not possible to assess the change in distribution of access to justice across individuals of introducing conditional fee agreements and whether they were successful at reducing this risk.

However, one interesting change in the nature of this regulatory risk is that there is now a concern that CFAs may have led to a growth of motor claims but no comparative growth of other personal injury claims.

The above discussion raises an issue in that alternative regulatory structures may lead to access to justice gaps of different kinds: under the pre-1995 system of legal aid and no conditional fee agreements there was concern about access to justice for *income groups*; under the current system there may be lower access to justice for certain *types of claims*.

#### ***Risks of ‘too much’ access to justice***

One point of view that was expressed during consultations with stakeholders is that the regulatory and legislative liberalisation may have led to ‘too much’ access to justice, in particular relating to motor claims. The argument is that, because it became easy for individuals to make claims, a ‘compensation culture’ developed and there was an increase in fraudulent claims.

This claim highlights another potential trade-off between increasing access to justice and reducing the number of illegitimate claims – it may be difficult to increase the number of legitimate claims without also increasing the absolute number of illegitimate/fraudulent claims. However, if the number of legitimate claims increases at a faster rate than illegitimate/fraudulent claims, supporting greater access to justice may be viewed as a net benefit from a wider public policy perspective.

However, it is important to highlight that to date there has been little concrete evidence that a compensation culture exists.

A lesson in this regard is that it may be possible to reduce the number of illegitimate claims through alternative regulations whilst still supporting access to justice for legitimate claims, for example by introducing stricter rules for whiplash claims to be taken forward.

### ***Risks of allowing a range of providers into the market***

Regulatory and legislative changes since 1999 have been associated with significant changes in the nature of supply in the personal injury legal market, most notably the growth of CMCs and, recently, ABS. This diversification of the supply side may have brought benefits, but it may have also brought risks in terms of a significant amount of legal services being provided unregulated by the main reserved activity regulators.

The growth of claims management companies, following the 1999 Access to Justice Act and the liberalisation of the use of referral fees, required the new regulation and the creation of a new regulator – the Claims Management Regulator – in 2007. The CMR was created due to concerns about unethical practices of CMCs.

The recent creation of ABS may have generated regulatory risks due to reduced transparency of the contracting between introducers and solicitors. The arrangement between introducers and solicitors when referral fees were allowed was found to lack transparency in a 2010 investigation<sup>119</sup> – before ABS were permitted. This risk remains in ABS organisations where they shift pre-litigation work from solicitors to other individuals without a clear contracting method – with this work potentially taking place within the same organisation. This form of vertical integration has the potential to reduce overall costs. Regulation does not necessarily have to take a view on whether consolidation in the legal services markets is beneficial but should seek to monitor market developments, as identified by the SRA recently,<sup>120</sup> with regard to access to justice, as discussed above (for example, through responses to questions 1 and 2).

### ***Risks of the costs of civil litigation***

Throughout the period there have been ongoing concerns about the costs of civil litigation. There was concern about the costs of civil litigation at the start of the period, feeding into the 1999 Access to Justice Act, as well as at the end of the period, as civil litigation costs were one of the overriding concerns of the Jackson Reforms.

However, there has been a shift from concern about the *public* costs of civil litigation funding to concerns about the *private* costs of civil litigation funding, the costs of which are eventually also born by consumers or taxpayers, either through higher insurance premiums or through increased NHS costs.

An important issue is the extent to which there is a trade-off between promoting access to justice and reducing the costs of litigation. Firstly, more cases (an increase in access to justice) mean

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<sup>119</sup> Charles River Associates (2010)

<sup>120</sup> See SRA (2014)

higher overall costs of the system. Secondly, regulatory and legislative changes may also change the costs per case. For example, by removing the recoverability of success fees from the defendant, the LASPO Act was intended to reduce the litigation costs per case, but may also reduce access to justice.

### Question 8:

**Based on this analysis, to what extent are the positive and negative features unique to the personal injury market, as opposed to legal services generally? How far are they transferrable to other market segments?**

The analysis in section 5 demonstrates the importance of considering the incentives of all agents involved in the legal services market to understand how regulatory and legislative changes affect access to justice. The framework for access to justice introduced in section 4 provides one way to analyse how regulatory and legislative changes affect the incentives of each agent and how these effects depend on features of the market.

Some of the key lessons from applying the framework for access to justice to the personal injury market are as follows.

- The extent to which low risk (for the consumer) funding options are financially attractive to legal service providers depends on the likelihood that the claim will be successful and the size of costs that they will be able to recoup either from the claimant or the defendant in the case that the claim is successful. Legal service providers are especially likely to take on claims that have a high likelihood of success and if there is high recoverability of costs.
- The expected actions of the defendant – in terms of their likelihood to dispute a claim, and their ability to pay legal costs – have a significant effect on both the actions of the individual and the legal services provider. In this regard, insurers are a case in point as they are characterised as having a low likelihood of disputing a claim and are able to pay legal costs.

In considering to what extent lessons are transferrable to other market segments, this section considers the lessons learned in two example areas – employment law and family law – selected for their similarity to personal injury (using Oxera’s cluster analysis<sup>121</sup> – see Annex 1 for more details).

One important point to note is that, in general, the regulatory environment in these markets has been similar to the personal injury market, while the nature of disputes is very different as are the associated court and tribunal procedures. For example, conditional fee agreements were available for all of these markets other than family law from 2000 onwards, whilst solicitors were allowed to pay referral fees in each of these markets from 2004 onwards.

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<sup>121</sup> Oxera (2011)

Notable differences in the regulatory and legislative environment are that legal aid was in scope for family law until 2012, and the LASPO Act banned referral fees only in the personal injury market – they are still in scope in the other identified markets.

The important question for markets that have experienced the same regulatory and legislative changes as personal injury is whether the effects are likely to have been similar or different to those in personal injury, based on the features of those markets.

## **Employment law**

Employment law has many similar features to personal injury. In both cases the claimant will be an individual and the respondent is likely to be an organisation. Both are contentious areas of law, and both require legal services in the form of advice on potentially litigious matters and/or representation.

The regulatory and legislative environment is also largely similar to that of personal injury. Some aspects of the work are encompassed by reserved activities and some are not. Conditional fee agreements were allowed for employment cases from 2000 onwards, and referral fees were allowed from 2004 onwards.

This section discusses whether conditional fee agreements, referral fees and advertising are likely to have played a similar or different role in employment law than personal injury legal services.

### ***Conditional fee agreements***

Analysis of the Legal Needs Survey shows one striking difference between the employment legal services market and the personal injury market. Over half of those seeking advice from a solicitor for an employment problem paid for the service themselves, compared with less than a quarter for personal injury cases.

For employment cases that did receive funding from another source, in over three quarters of cases this source was a trade union, an employer or the solicitor themselves, and in only 7% of cases the action was funded through a ‘no-win-no-fee’ agreement.

The contrast between personal injury and employment law suggests that conditional fee agreements have not proved as attractive a proposition to suppliers of employment law services as they have for personal injury. A reason for this may be that employment law cases are less profitable, and therefore less well-suited, to a conditional fee agreement funding structure. Employment law cases:

- may be more likely to be disputed because most are taken through a tribunal;
- may have a lower success rate; and,
- may involve the ability of solicitors to recover costs from the defendant differing from in personal injury because the defendant is an employer rather than an insurer.

The discussion above of conditional fee agreements in employment law cases underlies the point that conditional fee agreements will not always be an effective way of reducing the financial risks of making a claim to an individual, as there will not always be legal service providers willing to accept CFAs.

A consequence is that, in markets where conditional fee agreements do not prove attractive to legal service providers, they are unlikely to be an effective way of replacing legal aid in allowing access to justice for those on low incomes.

### ***Referral fees***

In section 5 it was argued that the liberalisation of referral fees contributed to the rapid growth of claims management companies in the personal injury legal market. However, it is not clear whether the growth of CMCs had a positive or negative effect on access to justice.

A notable contrast between employment legal services and personal injury is that there has been very little growth of claims management companies providing services for employment cases. Whilst CMCs specialising in employment law were the third largest group of CMCs in 2013, their turnover was only 0.5% of the turnover of employment law solicitors firms, compared to 17% for personal injury.<sup>122</sup>

The most likely reason there has been much more limited growth of CMCs in employment law relates to the profitability of such companies. There may be a number of reasons for this:

- individuals are much more likely to use introducers related to employment, such as trade unions; and,
- because employment cases are less profitable for solicitors, they are unable to pay referral fees sufficient to make it profitable for CMCs to manage claims.

However, referral fees may still play a role in employment law due to the important role of Trade Unions in the legal services market – 22% of those seeking advice for an employment problem used a Trade Union as their main legal provider.

Competition for referrals for trade unions could have similar effects in employment law as it does in personal injury. But it is not clear how much of a role referral fees currently play in the employment legal services market. Because the role of referral fees is largely unknown, this remains speculative and it is difficult to assess any need for regulatory reform.

### ***Advertising***

Analysis of the personal injury market suggested that advertising has had a limited effect on the ways that people respond to legal need, and that potential reasons include that they were already relatively well informed and likely to see personal injury as a ‘legal’ problem.

Individuals are less likely to see employment problems as ‘legal’ problems – just under two thirds of those with an employment issue see them as ‘legal’ problems, compared with around four fifths of those with personal injuries.<sup>123</sup> This finding suggests that there may be more scope for advertising to change how individuals respond to legal needs for employment problems than personal injury problems.

<sup>122</sup> Data on the turnover of CMCs from Claims Management Regulator (2013) and on the turnover of solicitors’ firms from Legal Services Board (2013b)

<sup>123</sup> Pleasence, Balmer and Reimers (2010a)

## Family law

Family law again exhibits several similar features to personal injury. Family law is a contentious area of law, the claimant is an individual, and legal services include advice on potentially litigious matters and representation. The key difference in the regulatory and legislative environment between family law and personal injury is that conditional fee agreements are not allowed in family law cases.

### ***Conditional fee agreements***

Consideration of the framework for access to justice introduced in section 4 suggests that conditional fee agreements would not be an effective way of increasing access to justice for family law cases. The 2014 LSCP tracker survey found that 11% of people paid for their family law cases through insurance and 13% through a no-win-no-fee agreement.<sup>124</sup>

The key difference between family law and personal injury legal services lies in the nature of the defendant. In personal injury cases the defendant is normally either an insurer or another large institution that can absorb large costs. In contrast, in family law cases the defendant is another member of the same family. Disputes, therefore, are over how to divide the family's wealth or assets, which is a fixed amount.

Since the size of resources available for solicitors' to reclaim success fees and costs is limited, conditional fee agreements are less likely to provide an attractive contract structure in these cases.

### ***Referral fees***

In family law cases, such as divorce cases, individuals have to use legal services, and so there is perhaps less of a role for introducers to encourage claims than there is in other legal markets such as personal injury.

However, introducers could potentially play a role in altering the sources of supply of legal services from solicitors to introducers. If referral fees were used in such a way this could cause consumer detriment if referral fees imply higher legal costs, since family law cases are disputes over a 'fixed pot' of assets. Alternatively, if introducers offered services cheaper, they could prove attractive to individuals, but could also reduce access to justice if this meant providing legal services of a lower quality.

### ***Advertising***

Since for family law cases, individuals will access legal services anyway, advertising does not have such a role to play in encouraging the use of legal services, but may be used by introducers to change the nature of supply. This could have similar effects on access to justice as those outlined under the role of referral fees, so for example, could affect the quality of legal services.

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<sup>124</sup> Tracker Survey 2014 data release 2014 – service users sample  
[http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/index.html](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/index.html)

**Question 9:****Overall, what are the key learning points for regulators from the substantial number of changes introduced between 1999 and 2013?**

Whilst the scope of this study is broad, and data limitations mean that the conclusions drawn are sometimes tentative, there are some important lessons that can be drawn from the regulatory and legislative changes introduced from 1999 to 2013.

***Tailoring regulation to individual markets***

One learning point from the experience of regulation of the personal injury market is that regulation needs to be tailored to the features of individual markets if it is to have the desired effect.

To take an example from the analysis of personal injury legal services, there is a risk that the post-1999 framework was particularly effective in increasing access to justice for motor claims but not for personal injury claims. In addition, the different experiences for motor claims and other personal injury claims are most likely to be explained by the specific characteristics of motor claims that made them particularly attractive to legal service providers.

Increasing access to justice, in the sense of increasing the number of claims, for other types of personal injury may require different approaches to that for motor claims. For example, clinical negligence cases require more specialist litigation and the chance of success is highly uncertain. Therefore, CFAs involve significant financial risk for legal service providers and so are likely to be less attractive to them. A different regulatory and legislative environment may be required to, for example, increase the number of clinical negligence cases, and similarly to increase access to justice for other types of legal services.

***Regulation targeting incentives and market conditions that enable a variety of business models to match the variety of legal services required***

Related to the above point is that regulatory and legislative changes need to encourage a variety of business models to match the variety of features of the legal services that are required.

Regarding personal injury services, one risk of the regulatory and legislative structure put in place by the 1999 Access to Justice Act may have been that it led to legal service providers focussing on specific types of cases – ones that are relatively low-cost and have a high chance of success – potentially diverting resources from other cases.

As discussed above, different regulations may be required to make a variety of business models financially attractive to firms, thereby encouraging them to provide the range of legal services that society needs

***Research into the impact supply-led market changes on access to justice***

Bearing in mind the data limitations outlined above and in response to question 1, one tentative conclusion is that regulatory and legislative changes in the personal injury market have had more significant effects on the nature of supply of personal injury legal services than on demand. Since the eventual aim of regulatory and legislative changes was to affect the demand for legal services,

this may suggest that regulatory and legislative changes aimed at the supply side are not the most effective changes.

In this context, there is a need for more research to understand the key factors affecting individuals' use of legal services, such as the research by Pleasence et al. (2010), which suggested that the framing of personal injury as a legal problem was a significant determinant of how individuals react to legal needs.

However, there is a need also to reflect on cases of successful supply-led market changes – such as payment protection insurance compensation, that showed that advertising brought forward a large number of claims – to determine whether lessons from these experiences can be transferred to legal services markets.



## 7 Concluding remarks

This report has provided an assessment of the effects of regulatory and legislative changes on access to justice in the personal injury market across three periods of regulatory and legislative change.

- The regulatory and legislative liberalisation from 1995 to 2004 that included the introduction of and expansion of conditional fee agreements through allowing the recoverability of success fees and after-the-event insurance premiums, the liberalisation of advertising rules, and the liberalisation of the use of referral fees.
- The introduction of Alternative Business Structures in 2011.
- The regulatory and legislative tightening of the LASPO Act in 2012, which included the reversal of many elements of the regulatory and legislative liberalisation, including ceasing the recoverability of success fees and ATE insurance and banning referral fees.

Considering the regulatory and legislative liberalisation, evidence on whether the various reforms increased access to justice is mixed. There was a rapid increase in the number of motor personal injury claims between 2005 and 2013, and this may have been facilitated by conditional fee agreements. However, this growth was not seen for other personal injury claims, suggesting that if there was an increase in access to justice, this may have been relatively concentrated in a certain group of claims.

Further, one of the most surprising results is perhaps that there was little change in the way that individuals accessed legal services between 2001 and 2011, suggesting that advertising and the rapid growth of claims management companies may have had little effect on the ways individuals respond to legal needs.

Whilst there are some limitations to how effectively indicators for access to justice can be tracked using data available for the period, there are some important regulatory and legislative lessons that can be drawn.

- Firstly, the effects of regulatory and legislative changes depend largely on the features of the markets in which they are implemented. Therefore, there is a need for regulation to be tailored to individual markets.

The framework for access to justice developed in section 4 of this report provides one framework for considering the features of markets most salient to how they will be affected by regulatory and legislative changes.

- Secondly, even within markets, the effects of regulatory and legislative changes are not the same for all individuals or all types of claims. Trade-offs frequently exist meaning that addressing one sort of access to justice gap may lead to a reduction of access to justice for other people or in different areas.

For example, the regulatory and legislative liberalisation in the personal injury market appears to have affected motor claims very differently to other types of personal injury claim.

- In this context, there is a need for regulation to encourage a variety of business models to match the variety of potential claims. For example, in the personal injury market some stakeholders suggested there may have been too much of a focus by legal service providers on low-value, low-risk claims, potentially at the expense of more complex claims. The resolution to this issue may not necessarily involve a reversal of regulatory and legislative measures already in place. It may need complementary policies to support them.
- Reforms targeted at changing the nature of supply may have limited effect on the demand for legal services. There may be a need to further consider the drivers of behavioural change among legal service consumers.

A final lesson from this report draws on the limitations in the data that mean that only tentative conclusions about changes in access to justice can be drawn. Many of the problems relating to consumer surveys have already been improved upon in the Legal Needs Survey. For example, the Legal Needs Survey provides a larger sample size for personal injury problems than was available in the CSJS and the Legal Needs Survey distinguishes motor claims from other types of personal injury.

However, going forward there is a need to ensure the consistency of data collected across time, including the consistency of question type and form, to improve the data available for future evaluations, for example to assess the full effects of the LASPO Act once they have taken shape.

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## Annex 1 Methodological annex

### A1.1 Measuring access to justice

#### A1.1.1 What is access to justice?

Access to justice is a broad concept. In a discussion paper, the Legal Services Board define access to justice as follows:

*'We define access to justice as the acting out of the rule of law in particular or individual circumstances. The tools to achieve that outcome range from informing the public about their rights, routine transactional legal services and personalised advice, through to action before tribunals and courts. The agents of delivery are wide and, of course, legal professionals are at the heart of this along with many other actors in legal services and the wider justice sector.'*<sup>125</sup>

Access to justice is defined with reference to: Consumers; costs; proximity of supply (geographic and otherwise); and, the quality of legal services. This definition draws *inter alia* on the 2004 Clementi Review<sup>126</sup>, which developed the LSA regulatory framework.

#### A1.1.2 Access to justice indicators

Since the development of the Legal Services Board definition of access to justice, the Legal Services Board has suggested a number of indicators in order to both determine baseline access to justice in England & Wales and monitor how it changes over time.<sup>127</sup> Eighteen different indicators within nine different broad areas were suggested, as set out in the table below.

Table 4: Access to justice indicators	
Demand for legal services	Proxy indicators of demand for legal services
Paths to justice	Breakdown of responses to legal need over time (take no action, handle alone, seeking legal advice).
Use of legal services	Breakdown of the different ways in which consumers use legal services – information, advice, representation etc
Perception of legal services	General perceptions of legal services including affordability, understanding of what's required etc.
Costs of legal services	Trends in the overall cost of legal services
	Trends in charging methods
	Sources of funding for legal services
Number of agents of delivery – depth of services	No. of individual authorised persons compared to the population
	No. of people working in the legal sector compared to the

<sup>125</sup> Legal Services Board (2012a)

<sup>126</sup> Clementi (2004)

<sup>127</sup> Legal Services Board (2012a)

**Table 4: Access to justice indicators**

	population
	No. of businesses offering reserved services compared to the population
	No. of legal advice businesses and charities compared to the population
Scope of delivery – breadth of services	Range of categories of work in which regulated entities report turnover
	Proportion of consumers getting advice on clusters of problems from the same provider
Geography of services	Proportion of agents of delivery by local authority (geographical location)
	Methods of communication and interaction
Access to the courts	Trend in volumes of trials across range of problem types
	Trend in number of days sat by judges per trial, and length of time between court proceeding being issued and resolution of the case
	Trends in satisfaction with the justice system

*Source: Legal Services Board (2012)*

This report uses these 18 indicators as a starting point for the analysis, and focuses on the indicators of access to justice most relevant from an individual's perspective, reflecting the focus on consumer survey data. Hence the report focuses on the following areas in particular:

- the number of claims, in comparison with the number of potential claims;
- responses to legal need and how legal services are used;
- costs of legal services; and,
- perceptions of legal services.

### **A1.1.3 Other indicators**

In addition, applying the Oxera segmentation framework suggests that a number of other indicators for access to justice are important from the perspective of intermediate market outcomes – which are the ways that regulatory and legislative changes feed through to access to justice outcomes. In this report the focus on the number of agents of delivery and the nature of firms in the personal injury market – for example the role of CMCs and other introducers – is treated as an intermediate market outcome.

### **A1.1.4 Data sources**

A number of data sources are used to track indicators for access to justice in personal injury over time.

#### ***Consumer surveys***

A key contribution of this report is the tracking of access to justice indicators using consumer surveys, and the report makes particular use of the Civil and Social Justice Survey, with the analysis

also complemented by the Legal Services Consumer Panel and the Benchmarking Legal Services Survey. Some details of these surveys are given below.

- The Civil and Social Justice Survey (CSJS) was conducted in 2001 and 2004, and as a continuous survey from 2006 to 2008, and as a panel survey in 2010 and 2011. The CSJS asked questions on legal needs and a range of related issues in the three years prior to when the survey was conducted. Hence the CSJS gives time series data on legal needs and responses to legal need dating back to 1998, when legal aid was still in scope for all personal injury cases. Questions in the CSJS allow this report to consider changes in access to justice indicators relating to the demand for legal services, the use of legal services, perceptions of legal services, costs of legal services and access to the courts.
- The Benchmarking Legal Services Survey (BLSS) was conducted in 2012 and asked questions on legal needs and responses to legal need similar to those posed in the CSJS. The BLSS is used in this report to provide some further data points to the analysis of access to justice, building on the analysis of the CSJS.
- The Legal Services Consumer Panel (LSCP) provides further analysis of legal needs and responses to legal needs and was conducted in 2011, 2012 and 2013. The LSCP is again used to complement the main analysis using the CSJS by provided further information on, for example, the role of advertising on consumers' choice of legal services provider.

### ***Other data sources***

Whilst highly useful, there are some issues with the tracking of access to justice indicators using consumer surveys. Firstly, due to small sample sizes when looking only at personal injury problems, it can be difficult to place confidence in the results. Secondly, because the consumer surveys are limited in scope, it is not possible to address all indicators for access to justice using consumer surveys.

The analysis of consumer surveys is complemented by analysis of a range of other data sources, as detailed below.

- Data on the number of personal injury claims from the Department for Work and Pensions Claims Recovery Unit (CRU), alongside STATS19 data from the Department for Transport on the number of road traffic accidents.
- The survey of solicitors' firms.
- Data on the number and turnover of Claims Management Companies, contained in Claims Management Regulator annual reports.
- Data on Alternative Business Structures collected by the Solicitors' Regulation Authority.

### **A1.1.5 Time lags in consumer surveys**

An additional issue with the use of consumer surveys to evaluate changes in access to justice are the time lags in both the way surveys are conducted and also the length of time taken for policies to be implemented and for effects to feed through to access to justice indicators.

Each consumer survey covers the three years prior to when the survey was conducted, since questions are asked about legal problems faced in the past three years. For example, the 2001 CSJS covers personal injury problems dating back to 1998. It therefore includes some personal



injury problems from before the Access to Justice Act, when there was a more restrictive form of conditional fee agreements in place and legal aid was still in scope for all personal injury claims.

Regulatory and legislative changes may also take time to have market impacts and would therefore have lagged effects on access to justice for individuals. For example, one hypothesis is that the lifting of the ban on referral fees in 2004 made Claims Management Companies more profitable and therefore may have led to an increase in access to justice through the growth of CMCs leading to more routes for accessing legal services. However, it is likely that there was a lagged effect as CMCs grow so the effects on access to justice may have only be felt by individuals a few years later.

The two types of lags discussed above mean that it may be difficult to link specific regulatory and legislative changes to changes in access to justice. In particular, it is difficult to differentiate the effects of the 1999 Access to Justice Act and the liberalisation of the use of referral fees. Nevertheless, it should still be possible to address whether there has been increased access to justice because of the overall regulatory and legislative liberalisation between 1999 and 2004.

The time lags in both data sources and the implementation of regulatory and legislative changes mean that it is particularly difficult to analyse the effects of the recent regulatory and legislative changes – the introduction of Alternative Business Structures and the LASPO Act – on access to justice. In these cases, the focus of the analysis is on understanding intermediate market effects (as explained below in the context of the Oxera segmentation framework) rather than attempting to link the effects with notable changes in outcomes for consumers.

## **A1.2 The market segmentation framework**

The market segmentation framework in this report is based on the Oxera market segmentation framework, which ‘presents a framework that can be applied to collect evidence in order to understand how the market is changing’<sup>128</sup>. The framework suggests identifying effects of regulatory and legislative changes through analysing groups of market indicators, as outlined below.

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<sup>128</sup> Oxera (2010)

**Figure 11: Groups of market indicators**

**Drivers** - these indicators monitor the emergence of changes, shocks or trends that are likely to drive changes in the legal services sector.

- In this report, the key drivers considered are regulatory and legislative changes: the 1999 Access to Justice Act; the liberalisation of the use of referral fees; the introduction of Alternative Business Structures; and the 2012 LASPO Act.

**Market functioning** - these indicators help to understand the mechanisms and processes through which the drivers may alter the composition of supply and/or market outcomes.

- In this report, the key indicators for market functioning considered relate to the composition of firms providing legal services, including lawyers, insurers, claims management companies, and Alternative Business Structures.

**Market outcomes** - these indicators monitor the performance of markets.

- For the purpose of this report, the most important market outcome is considered to be the level of access to justice. Therefore, the relevant market outcomes are considered as the access to justice indicators outlined above.

*Source: Based on 'A framework to monitor the legal services sector', Oxera Consulting Ltd 2011, and London Economics*

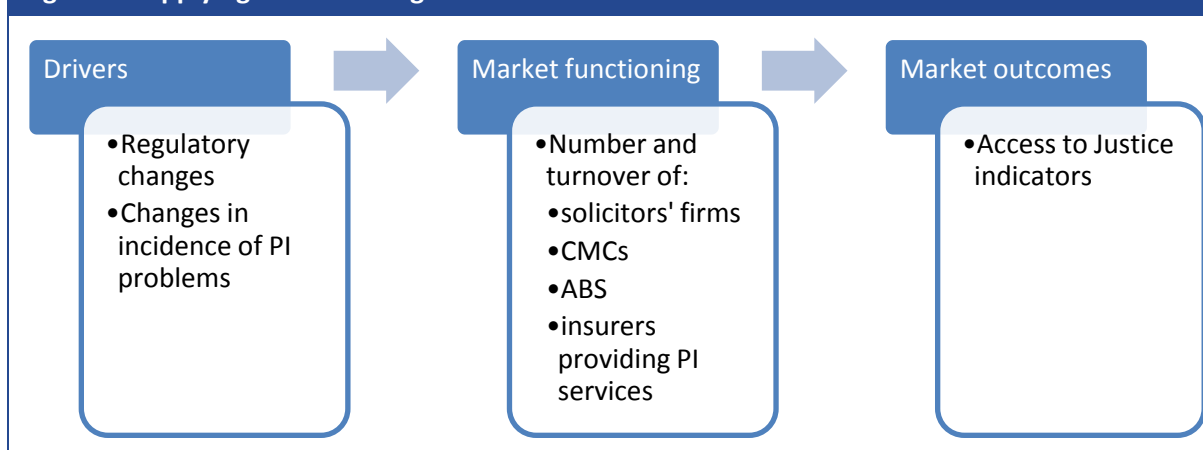
### A1.2.1 Understanding intermediate outcomes

As outlined above, there are a number of data limitations to measuring changes in access to justice over time. Therefore, an important part of the analysis is on understanding how regulatory and legislative changes have affected market functioning, which can also be thought of as 'intermediate outcomes' since the change in market functioning may have implications for access to justice over time.

Figure 12 outlines how this report applies the Oxera segmentation framework, and what the drivers, indicators for market functioning, and indicators for market outcomes, are considered to be in this context.

Intermediate outcomes are also important in the development of hypotheses: As stated by Oxera (2010) 'to assess the impact of any specific regulatory and legislative change, it is crucial to establish a conceptual framework identifying the mechanism through which regulation is hypothesised to affect the market, before considering what changes can be observed'.

This is the approach followed in this report: First hypotheses are developed as to how regulatory and legislative changes may have affected access to justice via effects on market functioning; secondly data on both market functioning and access to justice is considered; and, thirdly a view is taken on whether or not the data supports the hypotheses proposed.

**Figure 12: Applying the Oxera segmentation framework**

*Source: London Economics' application of the Oxera segmentation framework (Oxera 2011)*

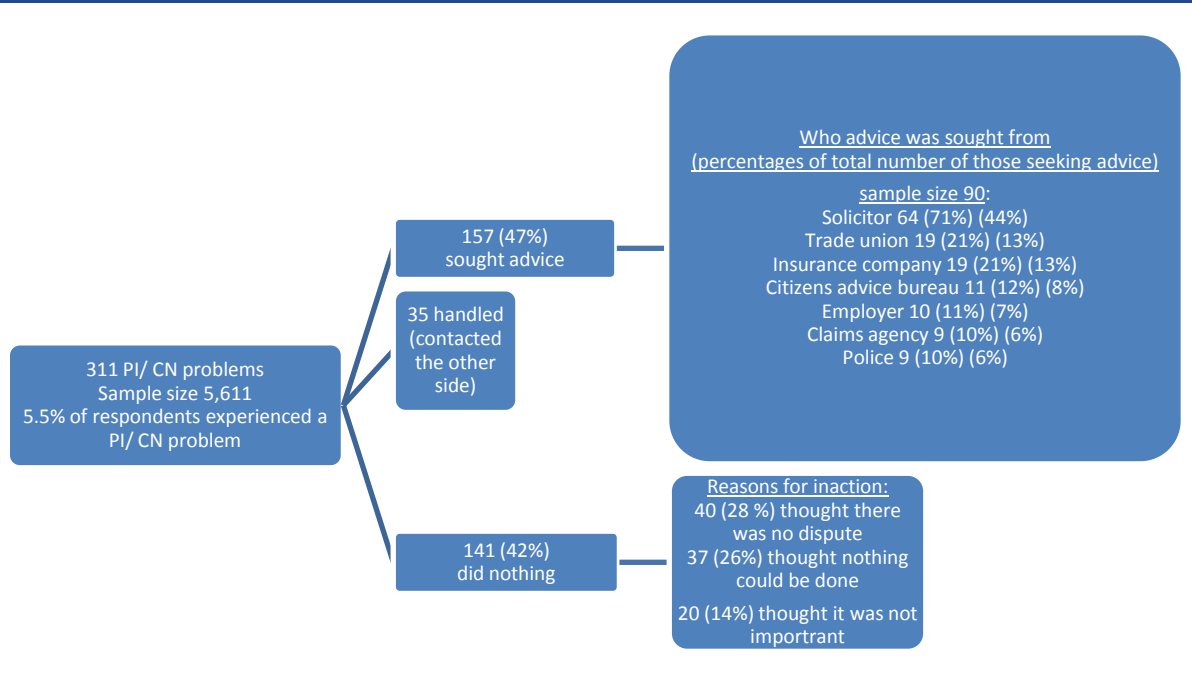
### A1.3 Stakeholder discussions

Bearing in mind the consumer survey data limitations outlined in section A1.1.5, stakeholder consultations played a key role in the analysis. Consultations were held to solicit views on how regulatory and legislative changes have affected both the market structure and access to justice outcomes, with participants from academic institutions and the following organisations:

- Association of British Insurers;
- Association of Personal Injury Lawyers;
- Claims Management Regulator;
- Ministry of Justice; and,
- Solicitors' Regulation Authority.

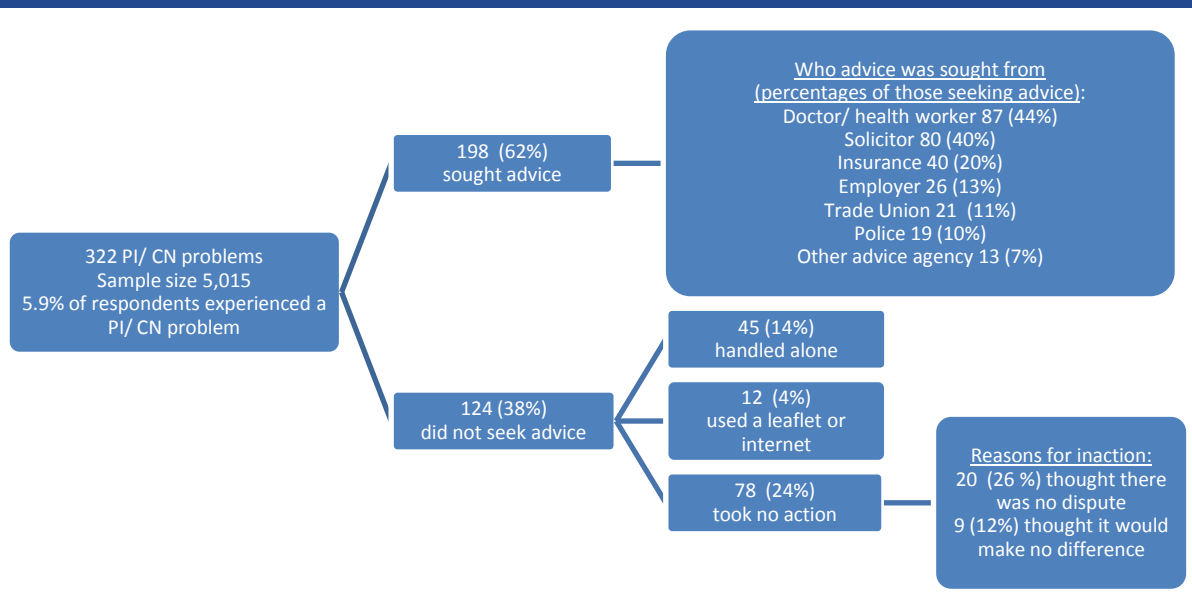
## Annex 2 Paths to justice from the Civil and Social Justice Surveys

Figure 13: Paths to justice in the 2001 Civil and Social Justice Survey



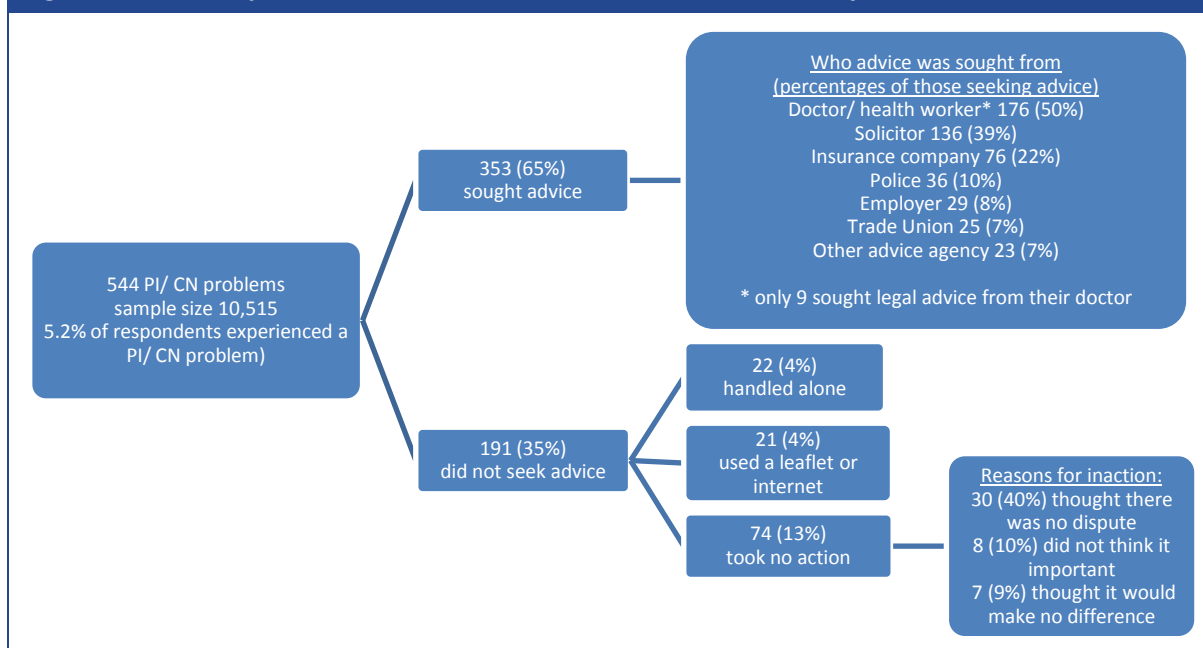
Source: London Economics' analysis of the 2001 CSJS

Figure 14: Paths to justice in the 2004 Civil and Social Justice Survey



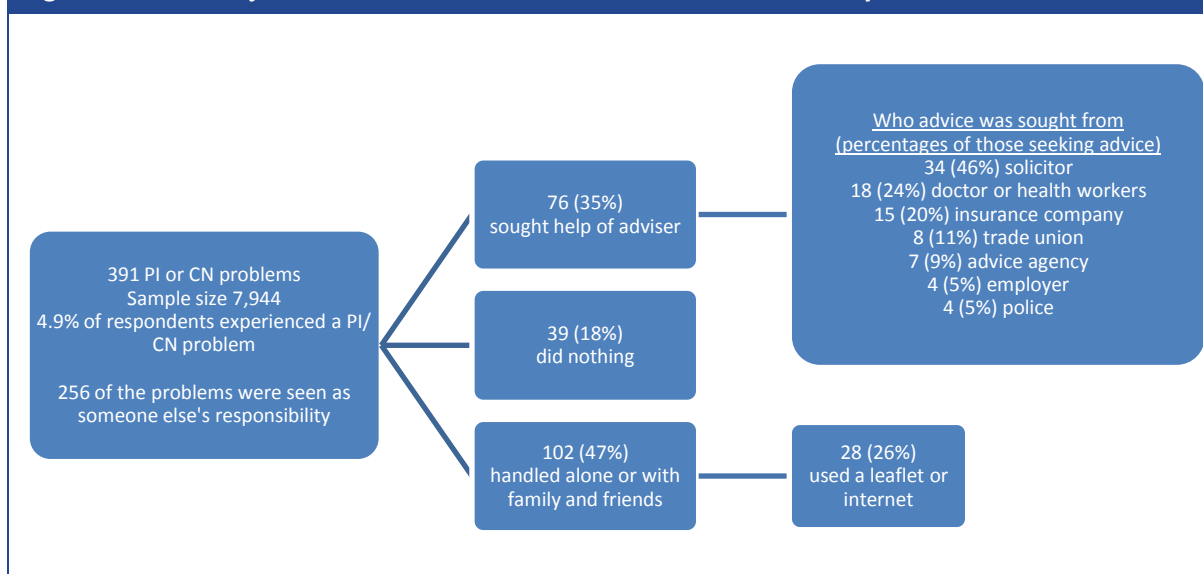
Source: London Economics' analysis of the 2004 CSJS

Figure 15: Paths to justice in the 2006-8 Civil and Social Justice Survey



Source: London Economics' analysis of the 2006-8 CSJS

Figure 16: Paths to justice in the 2010-11 Civil and Social Justice Survey



Source: London Economics' analysis of the 2010-11 CSJS



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