Understanding the Interests of Justice

A Study of Discretion in the Determination of Applications for Representation Orders in Magistrates' Courts

Report to the Legal Services Commission

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The views expressed in this report are those of the authors alone and are not to be taken as those of the Legal Services Commission or any other body or person.

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1. THE LEGAL FRAMEWORK

It has been recognised for over a century in this country that it is a denial of justice for the state to refuse to assist people of limited means to meet the costs of legal advice and assistance in appropriate cases.[1] This report is concerned not with the issue of means, but with how 'appropriate cases' are identified by magistrates' courts when determining applications for a representation order – more commonly known as applications for legal aid.

The legal framework governing this aspect of decision-making by magistrates' courts is set out in the Access to Justice Act 1999 and statutory instruments made pursuant thereto. Schedule 3, paragraph 5, of the 1999 Act stipulates as follows:

"5. - (1) Any question as to whether a right to representation should be granted shall be determined according to the interests of justice.
(2) In deciding what the interests of justice consist of in relation to any individual, the following factors must be taken into account -

> (a) whether the individual would, if any matter arising in the proceedings is decided against him, be likely to lose his liberty or livelihood or suffer serious damage to his reputation,
>
> (b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law,
>
> (c) whether the individual may be unable to understand the proceedings or to state his own case,
>
> (d) whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual, and
>
> (e) whether it is in the interests of another person that the individual be represented."

In brief, magistrates' courts must decide whether it is in the interests of justice to grant legal aid and in reaching that decision in relation to any individual they must consider the factors set out in para. 5(2). These factors derived from the 1966 report of an official committee chaired by Mr. Justice Widgery and are sometimes referred to as the 'Widgery criteria'.[2] The criteria were placed on a statutory footing for the first time by the Legal Aid Act 1988. The criteria are not exclusive and other factors may be taken into account. Thus in *R v Havering Juvenile Court ex parte Buckley*[3] Forbes J noted that the fact that

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1 Statutory provision for legal aid was first made in the Poor Prisoners' Defence Act 1903.

2 See the Report of the Departmental Committee on Legal Aid in Criminal Proceedings (1966) Cmnd. 2934, London: HMSO, (hereafter 'the Widgery Report') at para. 180. The Committee was chaired by Mr. Justice Widgery.

3 Lexis CO/554/83.

the prosecution was legally represented was something that could properly be taken into account, while stressing that it did not follow that a grant of legal aid must be made in such circumstances.

It should be noted that there are various statutory restrictions on a court passing custodial sentences on a person who is not legally represented.[4] For example, a magistrates' court may not pass a sentence of imprisonment on a person who is not legally represented and who has not previously been sentenced to such a punishment (unless an offer of representation is declined). It may further be noted that courts must consider withdrawing legal aid 'where any charge or proceedings against the assisted person are varied'.[5] An example of when this might occur is if the prosecution dropped the charge from a serious offence for which custody was a likely outcome (e.g. s 47 assault) to a less serious offence where custody was unlikely (e.g. a common assault outside the context of 'domestic violence').

The process of applying for legal aid is currently governed by the Criminal Defence Service (General) (No.2) Regulations 2001 (SI no. 1437) as amended by the Criminal Defence Service (General) (No.2) (Amendment) Regulations 2002 (SI no. 712). In the magistrates' courts applications may be made in open court orally or in writing. Much more commonly, however, applications are made to 'an appropriate officer', meaning the justices' clerk – often referred to as a legal advisor – or a designated subordinate officer. For the sake of convenience we will use the term 'court clerk' to encompass both categories of appropriate officer, and the term 'decision-maker' to encompass magistrates and District Judges as well as court clerks.

Regardless of to whom an application is made, the applicant must complete a prescribed form ('Form A') setting out the reasons why legal aid should be granted in terms of the Widgery criteria. Since these criteria are not the only factors that can bear on the 'interests of justice' test, space is left on Form A for 'other reasons' to be advanced. In practice Form A is almost invariably completed by a solicitor or other defence representative and the client's contribution is limited to a signature. Where an application is made to the court, it may be referred to a court clerk for determination. Where an application is refused, the decision-maker must provide to the applicant written reasons for the refusal and details of the appeal process.

The appeals process is prescribed by the Criminal Defence Service (Representation Order Appeals) Regulations 2001 (SI no. 1168). A person whose application for the grant of legal aid has been refused may appeal against such refusal by way of a renewed application. The renewed application may be made either orally or in writing to the same court, or in writing to a court clerk of that court. If the latter course is adopted, the application may either be granted or referred to the court, or a single justice or District Judge within that court, who may either grant or refuse the application. Reasons must be given for any refusal and these must be in writing if the application was in writing.

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4 Powers of the Criminal Courts (Sentencing) Act 2000 s 83.

5 Criminal Defence Service (General) (No.2) Regulations 2001 (SI no. 1437, reg. 17(1).

Any further challenge to a refusal to grant legal aid must be made by way of judicial review according to the usual principles governing discretionary acts by public officials. Thus, decision-makers must act in good faith, use their powers for the purpose they were given, take into account relevant matters and disregard the irrelevant, and avoid acting in a way so unreasonable that no reasonable decision-maker could have so acted.[6] In assessing whether decision-makers have exercised their discretion lawfully and reasonably, the higher courts must heed the right to a 'fair and public hearing' under Article 6 of the European Convention on Human Rights (incorporated into English law through the Human Rights Act 1998). Under Article 6 the accused has the right 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.

The European Court of Human Rights has repeatedly held that when assessing the interests of justice test within Article 6 regard must be had to the seriousness of the offence and the severity of the penalty at stake, and the complexity of the case.[7] In *Quaranta v Switzerland*[8] the Court drew attention to the defendant's personal situation as exacerbating the problems he faced in dealing adequately with the complexities of the case. It noted that he was a young adult of foreign origin from an underprivileged background who took drugs on a daily basis, had a long criminal record, and lived with his family on social security benefits. These personal circumstances were seen as strengthening the argument that the interests of justice test was satisfied. In the case of *Benham v United Kingdom*[9] the Court held that, in principle, where deprivation of liberty is at stake, the interests of justice call for legal representation.

Prior to the Human Rights Act 1998, the Divisional Court had made it plain in a series of judicial review cases that those taking decisions on criminal legal aid had a very wide discretion when applying the interests of justice test.[10] It had been held, for example, that even when the circumstances of a case appeared to fall squarely within the Widgery criteria, a refusal to grant legal aid was not necessarily sufficiently unreasonable to enable the High Court to intervene.[11] That a large degree of restraint was shown during this period is illustrated further by the fact that the higher judiciary sometimes made it plain in an action for judicial review that, had it been their task to determine the initial decision on legal aid, they would have granted. Indeed, in their judgments they even dropped heavy hints that decision-makers should respond favourably to any renewed application.[12]

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6 These principles derive from *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223.

7 See, in particular, *Quaranta v Switzerland* (1991) Eur Court HR Series A 205; *Benham v United Kingdom* (1996) 22 EHRR 293.

8 (1991) Eur Court HR Series A 205.

9 (1996) 22 EHRR 293.

10 See, in particular, *R v Macclesfield Justices, ex parte Greenhalgh* (1979) 144 J.P. 142; *R v Cambridge Crown Court, ex parte Hagi* (1979) 144 J.P. 145, and *R v Havering Juvenile Court, ex parte Buckley*, (Lexis CO/554/83, July 12, 1983).

11 *R v Cambridge Crown Court, ex parte Hagi* op cit; *R v Stratford Magistrates Court, ex parte Gorman* (Lexis CO/687/89, 12 June 1990).

12 The clearest examples of this are to be found in the judgments of Drake J. and Roskill L.J. in *R v Cambridge Crown Court, ex parte Hagi* op cit.

Over time, the Divisional Court became increasingly willing to substitute its own view for those of decision-makers by quashing refusals to grant legal aid.[13] That willingness appears to have become even more pronounced following the Human Rights Act 1998. In the recent case of *R (on the application of Matara) v Brent Magistrates Court*[14] the Divisional Court was asked to review a refusal to grant legal aid in the case of a defendant charged with failing to give a breath specimen under the Road Traffic Act 1988. The applicant had invoked various criteria including 'inadequate English'. The magistrates' court had discounted this criterion on the basis that an interpreter would be provided. The Divisional Court, however, noted that the requirement that the proceedings be in a language that the defendant understood was 'merely one aspect of the requirement that a person must be able to effectively participate in criminal proceedings against them pursuant to the guarantee of a fair trial under Article 6 of the ECHR, and does not of itself negate the need for legal representation.' On the facts the Divisional Court found that the applicant's poor English undermined his ability to state his own case. The key part of the judgment for present purposes, however, is where Mr Justice Simon stated: 'While not wishing to express a concluded view as to whether all the [Widgery] criteria were made out to the necessary standard, I am satisfied that at least one of the criteria is met, which makes the refusal of legal aid unreasonable to a degree which entitles this court to intervene.' The decision refusing legal aid was accordingly quashed and the legal aid application remitted to a differently constituted bench for reconsideration. The implication of this judgment is that the High Court, in recognition of the importance of the Art. 6 rights, is likely to quash any refusal to grant legal aid where *any* of the Widgery criteria are met 'to the necessary standard'.

Since the Widgery criteria are specified in law, it follows that their interpretation is also ultimately a matter of law. Another form of legal constraint to which court decision-makers are thus subject is judicial guidance as to the meaning of those criteria. The Divisional Court, in *R v Liverpool City Magistrates ex parte McGhee*,[15] decided, for example, that defendants who are likely to receive community service orders if convicted are not at risk of losing their liberty. There are, however, many aspects of the Widgery criteria that have yet to be interpreted definitively by the higher courts. Guidelines on the application of the interests of justice have been issued by a range of bodies over the years but they have taken very different approaches to the same issues.[16] At the time of this research the main guidelines available to the courts were those issued by the Criminal Defence Service in November 2002.[17]

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[13] See *R v Brigg Justices ex parte Lynch* (1983) 148 JP 214; *R v Gravesham Magistrates Court, ex parte Baker* Times Law Reports 30 April 1997; *R v Scunthorpe Justices, ex parte S*, T.L.R., 5 March 1998; and *R v Chester Magistrates' Court ex parte Ball and another* (1999) 163 JP 757.

[14] [2005] EWHC 1829.

[15] [1993] Crim LR 609.

[16] For example, guidelines provided by the Justices' Clerks' Society and endorsed by the Legal Aid Board in January 1991 concentrated on explication of the Widgery criteria, whereas guidelines issued by the Justices' Clerks' Society at the end of 1991 did little more than provide lists of offences where legal aid should normally be granted or refused as the case may be.

[17] Criminal Defence Service, *Guidance to courts on Grant of a Right to Representation and Recovery of Defence Costs Orders* (Lord Chancellor's Department: November 2002). We understand that these were drawn up by the Lord Chancellor's Department primarily in the context of Recovery of Defence

It can readily be seen that discretion over the grant of legal aid is subject to a number of structuring and constraining factors and controls. For many years, however, there has been concern about apparent inconsistency in the determination of legal aid applications. The present research study was commissioned in part because of such concern. In the next chapter of this report we set out the background to this study and the research questions we were asked to address.

Costs Orders which are restricted to the Crown Court. It is recognised that more detailed guidelines for the magistrates' courts are needed and these were being formulated by the Justices' Clerks' Society during 2005.

2. BACKGROUND TO THE RESEARCH

The research brief

The present study was commissioned to investigate variation in the rates at which magistrates' courts grant applications for legal aid. The official statistics collated by the Legal Services Commission showed that while the overall grant rate in 2004 was close to 95%, grant rates in individual courts ranged from 80-100%. To put this more vividly, in some courts 1 in 5 applications for legal aid are refused compared with virtually none in other courts.

We were asked to establish:

1. How the interest of justice test is currently applied.
2. What, if any, differences there are in the way the interests of justice test is applied by different court staff.
3. Whether the Criminal Defence Service guidance on this test is used and adhered to within magistrates' courts.
4. The extent to which inconsistent application of the interests of justice test is a factor in the variation in the rate of grant of legal aid.
5. What other factors, if any, may have led to the variance in the rate of grant.
6. Ways in which the interest of justice test might be amended better to ensure a consistent approach by all decision-makers.
7. Ways in which internal guidance might be amended better to ensure a consistent approach by all decision-makers.
8. Other ways to improve the consistency of decision-making.

The research was restricted to the application of the interests of justice test and the associated Widgery criteria. One of the authors of this report was the lead-author of a report published in 1992 on the same subject.[18] The present study represents something of a replication of that earlier work and thus enables us to address a further question posed to us by the LSC:

9. Has there been any change in the rate of variance in decision-making detected in the 1992 study within and between magistrates' courts?

Historical development of the 'interests of justice' test

To put the research into context, it is helpful to provide a brief outline of the development of this aspect of the legal aid scheme. We do this not to add historical flavour but rather because, as will become clear, the deep rooted nature of the current system has implications for day-to-day decision-making and for attempts to enhance consistency of approach.

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[18] R. Young, T. Moloney and A. Sanders, *In the Interests of Justice? The Determination of Criminal Legal Aid Applications by Magistrates' Courts in England and Wales: Report to the Legal Aid Board* (University of Birmingham, 1992).

Statutory provision for legal aid was first made in the Poor Prisoners' Defence Act 1903 and was confined to trials on indictment where it appeared desirable in the interests of justice, having regard to the nature of the defence set up before the justices on committal. An Act of the same name passed in 1930 removed the condition that a person to be tried on indictment who sought legal aid must disclose a defence in the lower courts. This Act also gave a power to grant legal aid for committal proceedings and summary trials where it appeared desirable in the interests of justice 'by reason of the gravity of the charge or of exceptional circumstances'. The quoted wording and their limiting effect was removed by the Legal Aid and Advice Act 1949. This Act also introduced the provision that any doubt on the determination of an application for legal aid should be resolved in the applicant's favour. Finally, it confirmed the power of the court to grant legal aid for defendants pleading guilty.

The implementation of the 1949 Act[19] marked the culmination of a gradual relaxation of the conditions governing the grant of legal aid. The position reached by 1964 at the setting up of the Departmental Committee on Legal Aid in Criminal Proceedings, chaired by Mr Justice Widgery, was that magistrates' courts simply had to decide whether it was in the interests of justice to grant legal aid. The enquiries of this Committee 'confirmed the common view that there is little uniformity in the criteria applied by the courts when deciding applications for legal aid.'[20] For example, some courts took into account the possible sentence and likely plea while others did not. The Committee, notwithstanding its general conclusion that the present system was working 'tolerably well',[21] considered that more uniform standards were desirable.

The Committee accepted that the interests of justice test was open to subjective interpretation but concluded that a more precise formula was impracticable.[22] Its only gesture towards promoting a more consistent approach was to provide guidance – the Widgery criteria – to which it proposed regard should be had in deciding whether the interests of justice required a grant of legal aid. These criteria duly formed the basis of guidance issued to court decision-makers and were also taken into account by the High Court when exercising judicial review over the discretionary power to grant legal aid.[23]

The problem of apparent inconsistency persisted, however. The Royal Commission on Legal Services reported in 1979 that it had received compelling evidence that the Widgery criteria were not working well. The criteria were said to be both complex and imprecise, and were open to a wide range of interpretation in cases of the same type.[24]

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19 Post-war austerity resulted in some of the provisions of the 1949 Act not being brought into force for a number of years. For example, the quoted limiting words of the 1930 Act were in fact not repealed until 1963.

20 Widgery Report, para. 52.

21 Ibid, para. 75.

22 Ibid, paras. 161-162.

23 See, for example, *R v Havering Juvenile Court ex parte Buckley* (Lexis CO/554/83, July 12, 1983). (CO/554/83) per Robert Goff L.J.: 'What this court has to do is to ask itself whether, having regard to the Widgery criteria, a reasonable bench of justices, properly directed, could have reached the conclusions reached by the magistrates in the present case.'

24 Cmnd 7648 (1979) vol. 1, p.157 at para.14.7.

The Royal Commission proposed that there should be a statutory right for legal aid in all cases save for summary only offences, for which legal aid should still be granted unless there was no likelihood of a custodial sentence or substantial damage to livelihood or reputation, *and* adequate presentation of the case did not require representation.[25] At the time, this would have generated a large increase in the legal aid bill and the Government rejected the recommendations outright.

The Widgery criteria were first incorporated into statute by the Legal Aid Act 1988. This Act also created the Legal Aid Board which took over responsibility for the operation of the legal aid system from the Law Society. It was the aim of the Government at that time that the Legal Aid Board should eventually have overall responsibility for all aspects of legal aid unless there were good reasons for not doing so. The 1988 Act accordingly made provision for powers to grant legal aid to be removed from the courts and given to the Board. In its Report to the Lord Chancellor in 1989 the Board stated that transferring the power to grant criminal legal aid should not be contemplated unless the Board were to at least match the current levels of service. At that time its view was that transfer would not be justified: legal aid applications were dealt with speedily; the existing system combined expertise and flexibility, and there was no pressure for change from the courts.[26]

The Board was concerned about variation in grant rates, however. Using the 1990 figures covering 384 courts, for example, there were eight courts which refused at least a quarter of all applications, whereas, at the other extreme, 97 courts refused no more than one in 20.[27] It therefore commissioned independent research by a team based at the University of Birmingham to investigate what lay behind this variation.

The 1992 research findings

The research report by the Birmingham University team, entitled 'In the Interests of Justice?' was published in September 1992. Its main findings were as follows:

1. Analysis of national statistics revealed that the proportion of indictable defendants in a court was a reliable predictor of the rate at which applications are made for legal aid in that court. Thus, solicitors in low granting courts generally applied for legal aid in the same kinds of cases as solicitors in high granting courts. The explanation for differing grant rates by courts did not, therefore, lie in the rate at which solicitors made applications for legal aid.

2. Study of particular courts (three low grant and three high grant) revealed that changes in grant rates over time were often attributable to personnel changes. When a new set of court clerks took over responsibility for one court, for example, the grant rate immediately jumped from 75 to 90 per cent. Although the risk of custody was a key

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25 Ibid, at paras. 14.9-14.11 and 14.30-14.33.

26 *Legal Aid Board: Report to the Lord Chancellor* (Cm.688, 1989), pp.17-18.

27 R. Young, T. Moloney and A. Sanders, *In the Interests of Justice? The Determination of Criminal Legal Aid Applications by Magistrates' Courts in England and Wales: Report to the Legal Aid Board* (University of Birmingham, 1992) appendix 2, p.111 (hereafter *In the Interests of Justice?*).

factor in legal aid decision-making, variation in grant rates between courts was not found to be related to variation in sentencing policies. Rather, the analyses conducted indicated that variation in grant rates was due to decision-makers taking different approaches to granting or refusing legal aid.

3. Interviews with court clerks indicated a reasonable degree of accuracy and consistency in the *interpretation* of the Widgery criteria although there was a tendency for clerks in low grant courts to interpret the loss of liberty and loss of reputation criteria more restrictively than the clerks in the high grant courts. Too narrow an interpretation of the 'expert cross-examination' criterion was detected across all six courts. In addition, the poor wording of some of the prompts on the standard application form in use at that time was possibly misleading court clerks into adopting too restrictive an interpretation of some of the criteria.

4. In order of importance, court clerks gave greatest *weight* to the Widgery criteria concerned with loss of liberty, inadequate English and disability. Other criteria such as expert cross-examination and substantial question of law were seen as much less important for two reasons. First, these criteria were seen as applying to contested matters only and claims by applicants that a not guilty plea would be entered were frequently disbelieved. Second, clerks believed they could adequately protect a defendant's interests themselves. More generally, it was apparent that court clerks frequently found legal aid applications unpersuasive in terms of the Widgery criteria. The information provided was (with good reason) often seen as unreliable and inadequate; the frequent claims that applicants were at risk of losing their liberty were discounted in most instances. There was a general tendency for low grant courts to take a tougher line on all these issues. They required more specific information to be provided on application forms, were more sceptical about pleas of not guilty being maintained and were more doubtful about the need for solicitors in courts. This finding provided part of the explanation for variation in grant rates between courts. Even in the high grant courts, however, it was striking how often court clerks said that they gave little weight to a particular criterion. The researchers concluded that 'many (perhaps most) grants of legal aid are made in situations where the Widgery criteria do not apply, or where if they do apply they are given little weight by court clerks.'[28]

5. Many court clerks operated on the basis of looking primarily at the gravity of the offence charged rather than specifically at the Widgery criteria. For certain offences legal aid was almost automatically granted, for others almost automatically refused, whilst in the middle lay a grey area in which a detailed case in terms of those criteria would have to be argued by solicitors in order to obtain a grant. The precise scope of this tariff-based approach, and the location and size of that grey area, varied from clerk to clerk (even within the same court) and depended on a decision-maker's attitudes towards the desirability of legal aid and the weight given to the notion that a grant would aid the efficiency of court proceedings. In general, those operating in high grant courts had a more positive attitude to the value of legal representation, and the band of offences

[28] *In the Interests of Justice*, para. 7.22.

attracting automatic grant was more broadly drawn, than was the case for those based in low grant courts.

6. Substantial differences in decision-making were revealed when the court clerks interviewed were all presented with the same six fake applications to decide. For any given application, some decisions turned on the interpretation of the Widgery criteria, others on the weight attached to those criteria, and still others on factors outside those criteria altogether. 'Generous' and 'restrictive' approaches to the grant of legal aid were no more than general tendencies, however. Thus, clerks who took a particularly narrow view of a criterion were not invariably those who confined themselves within the Widgery criteria. Moreover, those in high grant courts sometimes refused legal aid for fake applications that were granted by those in low grant courts. Within the same court, clerks sometimes reached different decisions, or reached the same decision for radically different reasons. Variation within a court was less than that which existed between courts, however, which suggests that local court culture had some importance in legal aid decision-making.

Post 1992 developments

The findings of this research, combined with concerns about the spiralling costs of legal aid in the1990s, led to warnings from the Lord Chancellor of the time that unless greater care was taken in determining legal aid applications in future, the power to do so would be transferred from the courts to some other agency.[29] In the event, however, relatively little has changed since 1992, at least so far as the legal-framework for decision-making is concerned. The power to determine legal aid still lies with the magistrates' courts. The interests of justice test remains in place, as do the Widgery criteria, as does the ability of court clerks to take into account factors outside of those criteria. There are some important changes worth noting, however:

1. The Access to Justice Act 1999 resulted in the replacement of the Legal Aid Board by the Legal Services Commission as from 1 April 2000.

2. The right of appeal to an Area Committee of the Legal Aid Board (made up of practising solicitors and barristers) for applications in respect of indictable offences has been removed. The only right of appeal that now exists is to the same court that refused the application in the first place. This change has removed one of the ways in which variation between courts in terms of grant rates could have been addressed.

3. The re-enactment of the Widgery criteria in the Access to Justice Act 1999 incorporated subtle changes of wording from that to be found in s.22 of the Legal Aid Act 1988. Section 22(2) was worded as follows:

"22. (2) The factors to be taken into account by a competent authority in determining whether it is in the interests of justice that representation be granted for the purposes of proceedings to which this section applies to an accused shall include the following—

[29] Lord Chancellor's Department, *Legal Aid – Targeting Need: The future of publicly funded help in solving legal problems and disputes in England and Wales*, Cm 2854, London: HMSO, 1995, para. 10.11.

(a) the offence is such that if proved it is likely that the court would impose a sentence which would deprive the accused of his liberty or lead to loss of his livelihood or serious damage to his reputation;

(b) the determination of the case may involve consideration of a substantial question of law;

(c) the accused may be unable to understand the proceedings or to state his own case because of his inadequate knowledge of English, mental illness or other mental or physical disability;

(d) the nature of the defence is such as to involve the tracing and interviewing of witnesses or expert cross-examination of a witness for the prosecution;

(e) it is in the interests of someone other than the accused that the accused be represented."

It will be noted that in relation to the loss of liberty, loss of livelihood, and serious damage to reputation, the 1988 Act uses the formulation 'the offence is such that if proved it is likely that the court would *impose a sentence* which would...' result in one of these consequences (emphasis added). By contrast the Access to Justice Act 1999 uses the broader triggering formulation of 'if *any matter* arising in the proceedings is decided against him' (emphasis added). Similarly, whereas the substantial question of law criterion was placed in the 1988 Act in the context of arising in 'the determination of the case', the 1999 formulation of 'determination of any matter arising in the proceedings' is broader. It would seem that the broader wording now used means that the 'loss of liberty' criterion could be engaged where a remand in custody is likely.

As a final (and more clear-cut) example, whereas in the 1988 Act the inability to understand the proceedings or state own case criterion was restricted to cases where this inability was ascribable to inadequate knowledge of English, mental illness, or other mental or physical disability, in the 1999 Act no such restriction was included.

4. The stipulation in s.21(7) of the Legal Aid Act 1988, that where a doubt arises as to whether legal aid should be granted to a person that doubt shall be resolved in that person's favour, was not re-enacted in the Access to Justice Act 1999 and no longer applies. It is possible that this change has increased the scope for variation in grant rates given that different decision-makers may now adopt different approaches to the question of whether the benefit of doubt should be given to an applicant.

5. The design of the standard application form has changed and some of the questionable aspects of the wording used in 1992 have accordingly been eliminated. Another change is that the form no longer specifically requires applicants to indicate their likely plea.

6. New sets of guidelines have been issued, most recently by the Criminal Defence Service in November 2002.

There have also been many changes to criminal law and procedure since 1992 and we will have cause in the course of this Report to draw attention to the various ways in which these may have impacted on legal aid decision-making.

The immediate policy context

Imminent changes to the system for administering the merits test for criminal legal aid formed the immediate policy context within which our research took place. In May 2004 the Department for Constitutional Affairs issued a consultation paper on its proposal to transfer authority to grant criminal legal aid from the courts to the Legal Services Commission. Under this proposal the Commission would have delegated the grant/refusal decision to Criminal Defence Service solicitors in clear-cut (serious) cases. The Department for Constitutional Affairs reasoned, in part, as follows:

> This change is proposed as part of a raft of measures aimed at gaining better control over grant because expenditure on criminal representation has been increasing in a seemingly uncontrolled manner. One of the reasons for the increase has been the apparent willingness of courts, especially magistrates' courts, to grant representation orders. There is some evidence that courts have been too favourable to defendants, and certainly inconsistent, in applying the interests of justice test ... there is also some evidence that the test has not been applied rigorously in all courts.[30]

The House of Commons Constitutional Affairs Committee took evidence on these proposals. Both the Magistrates' Association and Justices Clerks' Society argued that the Government's critique (as quoted above) was unsubstantiated. Neil Clarke of the Justices' Clerk Society told the Committee that 'We have been audited regularly and there is no empirical data to say that we are too generous, just a belief that we are because [spending] is increasing all the time... We are quite happy to be tested and have the point established rather than just saying generally "You are doing it badly because we think you are."'[31] The Constitutional Affairs Committee itself noted that it had received only anecdotal evidence concerning the alleged failings of magistrates' courts in applying the interests of justice test and questioned what evidence the Department for Constitutional Affairs had to substantiate its claims.[32]

A number of other concerns were raised before, and by, the Constitutional Affairs Committee and, in the event, the Government decided to adopt a rather different set of reforms. These included the proposal that decisions on granting criminal legal aid should remain with the courts but that the process of decision-making should cease to be a

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30 Department for Constitutional Affairs, Criminal Defence Service Bill, Consultation Number CP 17/04, CM 6194, para. 40 and para. 45.

31 House of Commons Constitutional Affairs Committee, Draft Criminal Defence Service Bill, Fifth Report of Session 2003-04, HC 746-1 para. 74 and para. 67.

32 Ibid, para. 67 and para. 87.

judicial function. Instead, court staff would carry out this work as an administrative function under a service-level agreement with the Legal Services Commission, which would become accountable for the application of the merits test. It was envisaged that accountability in practice would require the Legal Services Commission to exercise more robust control over the grant process through the generation and use of management information but also through providing improved support and guidance to decision-makers. The present research was therefore commissioned with a view to providing a firmer evidence-base on such issues as whether there is a need to revise existing procedures and guidance, the content of training for decision-makers, and the matters to be covered by the service level agreement.

3. METHODOLOGY

As noted in chapter 2, this study builds on research conducted in 1992, which was published as a report to the Legal Aid Board entitled 'In the Interests of Justice'. In that research, six courts which had very high or very low rates of grant were visited. Five of these courts are still in existence and we asked the justices' chief executive at each whether their court would be able to take part in the current study. Three of these courts were able to do so. Since none of these three courts were, in 2004, low granting courts we selected an additional five courts to provide a spread of grant rates.

Selecting the courts

Data provided to us by the Legal Services Commission showed that grant rates during a six month period in 2004 varied from 74.2% to 99.7%, while the median grant rate was 95.5%. We categorised the courts into low, medium and high rates of grant. Rather than have equal numbers of courts in the three categories, we decided to set the cut off points so as to increase the difference in grant rates between high and low courts in order to aid the comparative nature of the research. We defined low medium and high grant rates as shown in table 1.

Table 1 Definition of grant rates

Category	Definition	No. of courts in category
Low	90% or less	18
Medium	Over 90% and less than 97%	95
High	97% and higher	44

In addition to the grant rate, we decided to concentrate on courts with a reasonable throughput of cases, which we defined as 1,000 or more applications per year. Our thinking here was that grant rates for such courts are less prone than low volume courts to spurious statistical fluctuations and also make a heftier contribution to the overall grant rate. Courts were also chosen with a view to achieving a reasonable geographical spread. The eight courts discussed in this report are drawn from Wales and, within England, the south-west, the West Midlands, the north-east, the north-west, and London. Finally, since participation of the courts was voluntary, the final selection of the courts was dependant on their agreement to take part. All the courts taking part in the research were offered full anonymity and are not named in this report. Instead, we have given each court a fictitious name (these are: Alsbury, Brinswick, Curborough, Dultham, Elswich, Fyford, Granton and Highfield). Similarly, all those who were interviewed (both court staff and solicitors) were also given full anonymity.

The fieldwork, which took place between May and August 2005, had two main elements. The first involved analysis of a sample of application forms, while the second comprised interviews with solicitors and court clerks.

Sampling application forms

In each of the eight courts we proposed to look at 200 applications for representation orders made in the calendar year 2004, comprised of approximately 160 successful applications and 40 refusals. The Department for Constitutional Affairs informed us that, in order to comply with data principle 7 of the Data Protection Act 1998, we could not select these forms or have access to filing systems ourselves. Instead, we provided instructions for court staff that cases should be selected on as random a basis as possible. Inevitably, the filing systems and procedures operating in the eight courts varied, as did the resources each court was able to allocate to this task. This meant that there were some differences in terms of the representativeness of the files selected. For example, in two courts, no records were kept of the application form for legal aid if the defendant was subsequently committed to the Crown Court. Secondly, although we asked for applications for both adults and youths, the proportion of youths in the cases that were selected for us varied, for reasons that were not clear. Thirdly, the completeness of the files selected differed from court to court. In one court, around 30 per cent of the files contained no application form. Finally, in three courts information on disposal was kept separate from the legal aid application form and we were told that to collate this as well as the application forms would take disproportionate amounts of staff time. Therefore disposal information was only available in five of the eight courts. The position is summarised in table 2 which gives the number of files eventually used in each court, whether or not they included cases committed to the Crown Court, whether youths were approximately equally-, under- or over-represented and whether disposal information was available.

Table 2 Number and representativeness of application forms in sample by court

Court	No. of forms	Crown Court cases	Proportion of youths	Disposal information
Alsbury	189	No	=	No
Brinswick	194	Yes	=	No
Curborough	200	Yes	=	No
Dultham	188	Yes	Over-represented	Yes
Elswich	144	Yes	Under-represented	Yes
Fyford	199	Yes	=	Yes
Granton	200	No	Under-represented	Yes
Highfield	178	Yes	=	Yes

While such differences in the mix of application forms between courts is disappointing, and illustrates the problems that may arise when researchers are prohibited from drawing samples of cases in person, the proportion of Crown Court committals (about 10%) or youths (about 15%) was, nonetheless, small. We do not believe that these sampling difficulties were such as to invalidate the results of the analysis of applications discussed later in this report. Care should be taken, however, when interpreting the quantitative data from the application forms.

Weighting procedure
Since refusals were deliberately over-selected (20% of all files), to calculate the overall true grant rate per offence, the weighting of refusals had to be reduced to its overall proportion in the population. In the eight courts visited the average grant rate in 2004 was 91.7% (i.e. 8.3% refused). Thus in calculating grant rates the weight of refusals was reduced by a factor of 2.4 (20 per cent divided by 8.3 per cent).

In calculating the true grant rate for offences in each court a similar procedure was used to take account of each court's individual grant rate. Thus the weight of refusals was reduced by a factor of between 1.2 and 20. Where the analysis was largely qualitative (e.g. chapter 9) weighting has not been used.

Interviewing
In the 1992 research, two court clerks and two solicitors at each court were interviewed. We decided in this study to try to interview three court clerks and solicitors at each of the eight courts. Court clerks were approached on our behalf by the court manager, and in each court three of them agreed to be interviewed (24 interviews in total).[33] Interviews with court clerks took around 45 minutes, and the interviews were followed by a dummy rating exercise, in which participants were asked to decide, for seven fake applications, whether they would grant or refuse the applications. Completion of this exercise took around a further 15 minutes (i.e. just over two minutes per application). The interview schedule can be found in appendix 1. The dummy applications are fully described in chapter 8.

We also planned to interview in each court three solicitors who regularly made applications for legal aid in their respective court. In order to determine which solicitors to approach, we asked the Legal Services Commission to provide us with details of the three or four solicitors' firms in each of the court areas making the most applications for legal aid. In six of the eight courts this information enabled us to arrange interviews with solicitors from those firms. However, for Curborough court, the Legal Services Commission was unable to provide this information, while the details of solicitors provided for Granton court turned out to be inaccurate. In those two courts we approached solicitors directly at court and asked for interviews. In three of the courts (Brinswick, Elswich and Fyford) we were able to interview only two solicitors during the time we were at the court, therefore in total we conducted 21 interviews with solicitors. These took on average 45 minutes to conduct. The interview schedule can be found in appendix 2. All decision-makers and solicitors interviewed gave permission for the interviews to be tape recorded, and these were then fully transcribed.

It is important to acknowledge that the qualitative information derived from interviews with solicitors and court clerks is not necessarily representative of the totality of decision-makers or solicitors working in each court. This is particularly likely to be the case in courts where there were numerous decision-makers – it is possible that the views of the three we interviewed were unrepresentative of their colleagues. In the next chapter we

[33] In one court, two decision makers were interviewed together, giving a total of 25 *interviewees*.

provide details of the number of court clerks in each court, as well as the proportion of decisions taken by the three we interviewed. The same caveat applies to the views of solicitors – in some of the courts visited, there were over a hundred solicitors who made applications for legal aid. The fact that interviewees may not be representative of a particular court does not, however, invalidate our ability to explore sources of variation and suggest ways in which such variation could be minimised.

Reliability of statistics on grant rates

Before proceeding to the main empirical part of this study it is important to sound a strident note of caution about the official statistics on grant rates which formed the basis of how courts were selected. Through the course of the fieldwork it became apparent that differences in decision-making practices and the way these were then reflected in the statistics rendered direct comparisons in terms of grant rates unreliable. As will be shown later in this report, not all applications for legal aid contain sufficient information to enable an informed decision on legal aid to be made. When we asked court clerks 'how well are criminal legal aid application forms completed in your view', only half were generally satisfied with the level of detailed provided. Not surprisingly, it was noted that the quality of applications varied from solicitor to solicitor, and legibility of the information on the forms was sometimes a problem. Of those who did not believe forms were well completed, the main reason given was the paucity of information provided. It was suggested that the reason for this was the speed at which forms were completed, itself a consequence of solicitors' workload and the accelerated rate at which criminal cases are nowadays processed through the magistrates' courts:

> ... it is part of the Martin Narey review proposals, people are coming in within three or four days of arrest as opposed to 5 or 6 weeks as it used to [be].... most people haven't instructed a solicitor until the day, they choose from one of the ones here... So it quite often is the first meeting so they fill the form in and hand it in straight away... Generally they are not well completed, I think maybe because they are filling them in at speed on the day with people they have just met and are taking on too many clients possibly. (Alsbury, DM2)[34]

> You can tell when they are busy and you can tell when it is a Narey day and they have had 20 to fill in. (Dultham, DM2)

Almost all decision-makers believed that the information provided on the forms was reliable (if not always sufficiently detailed) in the sense that they did not believe solicitors were deliberately trying to mislead them. A few commented that they took things at face value on the basis that, as 'officers of the court', solicitors were duty bound to provide reliable information:

> I have to just believe it is reliable. I can't believe any other way; otherwise I will be questioning everything. (Brinswick, DM1)

[34] Identifiers given after interview quotes in this report show which court (in this case Alsbury) the interviewee was from, and whether they were a decision-maker (DM) or solicitor (S). The final number indicates whether they were the first, second or third of each category to be interviewed in that court.

> I do normally trust the lawyer. If the lawyer's said 'magistrates said "all options report"' I believe the lawyer and I grant it... As officers of the court I would feel obliged to trust them, because I think if that turned out not to be the case, they'd be in far more trouble for putting it [in] than I would be for believing them. We rely on them not to lie. (Curborough, DM2)

Some noted that, with the exception of previous convictions, it was not, in any event, possible to check the accuracy of what had been put on the form.

The level of detail provided on applications was identified as an important influence on decision-making in the 1992 research,[35] and we accordingly asked decision-makers in the current study if they tended to refuse applications for criminal legal aid where insufficient information was given on the application form.

Overall, 13 of the 23 decision-makers who responded to this question said that they would usually refuse an application outright if it contained insufficient information.

> I will refuse it…it is their fault, they are experienced enough to know what needs to be provided, they have the right of appeal. (Brinswick, DM1)

In one court this policy seemed to have been adopted recently for reasons of efficiency:

> We used to return them saying there is not sufficient information on this to make a decision. We were doing that in quite a lot of cases and it was causing quite a lot of administrative costs so recently we have been told 'consider it on the application, if it is not there refuse it, they can always reapply.' (Alsbury, DM2)

Such an approach seems to be at odds with the Criminal Defence Service guidance on the issue, which states that 'if an application does not contain sufficient information, further details should be sought' (CDS, 2002: 10). This encouragement to 'return rather than refuse' reflects equivalent guidance issued by the Lord Chancellor's Department in 1996, itself endorsed on this point by the High Court.[36]

The other ten decision-makers indicated that they would return forms to allow solicitors to add further information. Where cases were decided in court, such information might be requested orally:

> Technically we could refuse it … but from a practice point of view to basically ensure the greatest degree of efficiency … we will ask the solicitor 'is there anything else you want to put on it?' If he answers no then we will consider it, if

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35 *In the Interests of Justice?* at pp.25-33.

36 *R v Scunthorpe Justices, ex parte S* T.L.R., 5 March 1998. It should be noted, however, that the Divisional Court was there reviewing a refusal of a *renewed* application. It thus remains unclear whether a policy of refusing an *initial* application where insufficient information is provided would attract judicial criticism.

> he answers yes, then the chances are he has probably realised he has slipped up. We won't draw their attention to actual specifics … but if they have missed out the box 'seriousness of the offence' and this is robbery, then I might well say 'well anything you would like to say about the seriousness of the offence before I consider this?' (Fyford, DM1).

The fact that individuals take different approaches might not be a concern (in terms of the reliability of official grant rates) if such differences were evenly distributed between courts. However, if one compares the refusal/return policy expressed by decision-makers to the official grant rate of their courts, a pattern emerges. As table 3 below shows, decision-makers in low granting courts were more likely to say they would refuse applications (10/12 interviewed) than those in high granting courts (2/8).

Table 3 Decision-makers' responses to applications with insufficient information

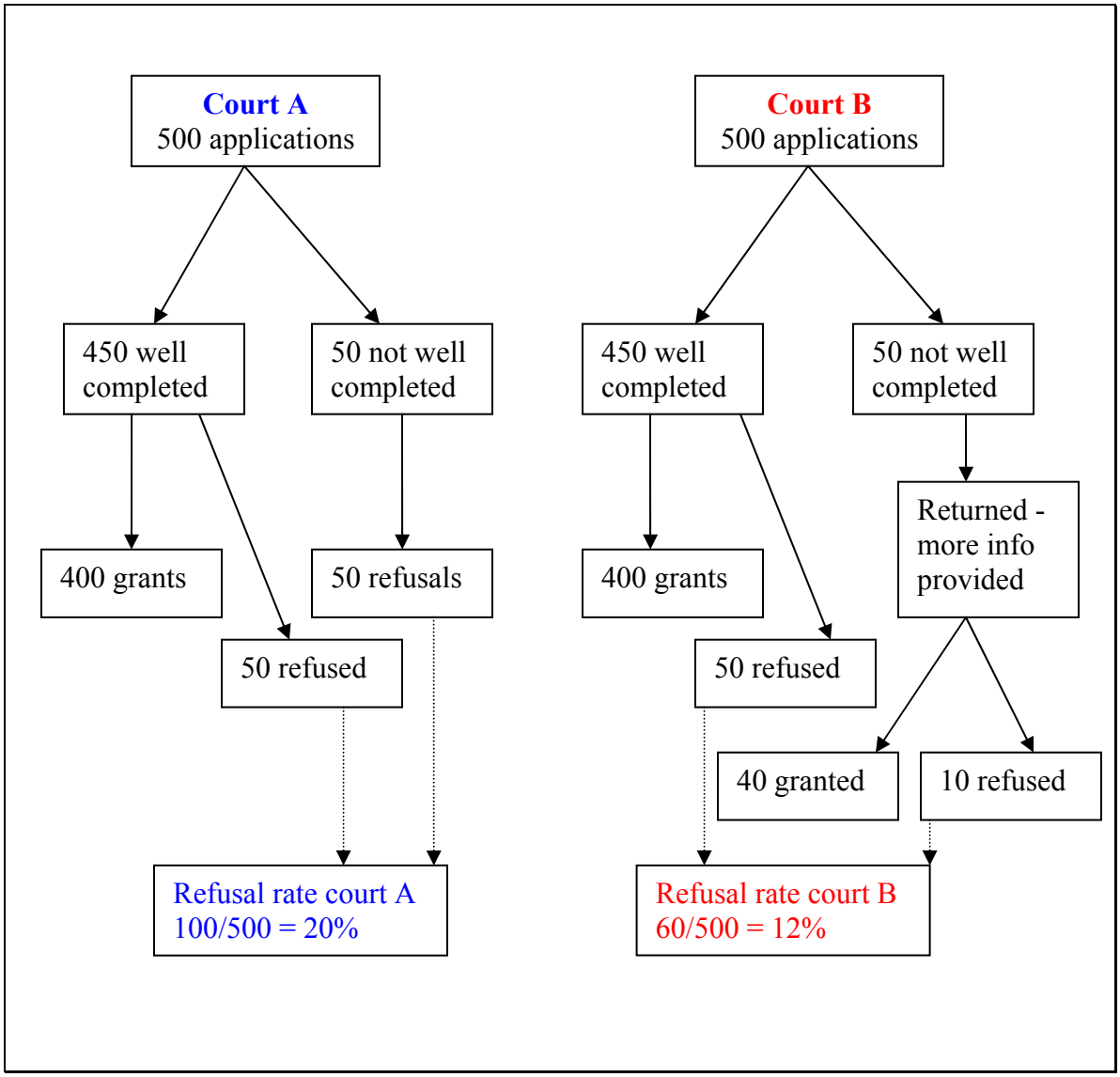
Court	Refuse	Return	% returned in dummy exercise	Official grant rate
Dultham	3	-	0	Low
Curborough	3	-	5	Low
Brinswick	2	1	5	Low
Granton	2	1	5	Low
Alsbury	2	1	9	High
Elswich	1	2	4	Medium
Fyford	-	3	14	High
Highfield	-	2	19	High

* One decision-maker had no typical approach, and is not therefore included in the refuse/return columns.

The fourth column of table 3 shows the percentage of dummy applications in each court which were returned for more information or referred to a legal advisor. This provides further evidence that courts with high and low grant rates differ in their approach to applications with inadequate information. In Dultham, a low granting court, none of the dummy applications were returned/referred, whereas as in Highfield 19 per cent were.

What does this mean for the interpretation of official grant rates? Some of the difference in these rates may be due to differences in how applications with insufficient information are treated. Figure 1 below illustrates the issue with reference to two fictional courts, A and B. In both courts the proportion of well completed applications is the same, and of these the same proportion is granted. In court A, however, all the forms which were not well completed are refused, giving an overall refusal rate of 20 per cent. In court B, by contrast, the 50 poorly completed forms are returned for more information. When more information is provided, 40 of these are then granted and 10 refused. The refusal rate in that court is then 12 per cent.

Figure 1 Decision-making in court A and court B



To make this example more realistic we can add to this model renewal of refused applications. In court A let us assume that all of those refused on the ground of insufficient information will then be re-submitted as new applications (with more information provided) and that 40 of them will be granted and 10 refused. These will count as new applications. Thus the refusal rate for court A remains at 20 per cent (110/550) compared with the 12 per cent for court B, and this is so even though both courts have now granted exactly the same number (440) of the original 500 applications.

In other words, a high granting court may apply the interests of justice criteria in the same way as a low granting court, the difference in grant rates being due not to differences in the nature of the applications with which each court is presented but rather to a policy of returning forms adjudged incomplete rather than refusing them. For the

same reason, two courts dealing with equivalent legal aid caseloads could have identical official grant rates but radically different approaches to applying the criteria.

We examined our qualitative data to investigate whether there was further evidence that this phenomenon was indeed distorting the official grant rates. The clearest cut-example we found was Brinswick. This is a low grant court according to the official statistics, but has a strong refuse rather than return policy. Although only two of the clerks of the three we interviewed there pursued that policy (see Table 3), one of those two accounted for nearly all legal aid decisions taken in that court. The interview with this clerk revealed a relatively generous interpretation of the Widgery criteria and this was confirmed by the dummy application exercise (6 grants, 1 refusal). Moreover, interviews with solicitors in this court revealed that they did not regard Brinswick as a low granting or unduly restrictive court and compared it favourably to another court they appeared in (which they did regard as low grant). Our conclusion is that Brinswick is an example of an officially low grant court which is in reality a high grant court. There are many initial refusals on the ground of insufficient information but (presumably) these are virtually all granted on a more fully argued renewal due to the generous policies at work. We say 'presumably' because we were usually unable to tell from the court files whether refusals had been appealed or not, or what the result had been if an application had been renewed. It is interesting to note, however, that Brinswick was the court with the highest number of refusals (20 out of 39 sampled) that clearly were marked as appealed and of these 18 had been marked as successful and two as unsuccessful.

The clearest cut counter-example amongst the officially low grant rate courts was Dultham. Here, the interviews with court clerks (who were responsible for about three-quarters of all the initial legal aid decisions) indicated a strong refuse rather than return policy on inadequately completed applications. That, however, is where the similarities with Brinswick end. The expressed views of the court clerks in Dultham revealed a relatively narrow interpretation of the Widgery criteria such that it is plausible to suppose that renewed applications would be less likely to attract a grant from a court clerk than a renewed application would in Brinswick. That in itself would not entail a true low grant rate, however, given that court clerks cannot refuse a renewed application but must refer it to the bench. If the bench in Dultham granted renewed applications as frequently as court clerks did in Brinswick then both would have high true grant rates. However, court clerks in Dultham indicated that they would endeavour to ensure that magistrates did not go against their view that the renewed application should be refused and that the bench in fact rarely did grant such applications. All three of the solicitors we interviewed in Dultham complained in strong terms about the decision-making practices of court clerks and spontaneously identified this court as low grant compared to others they appeared in. That two of them identified various difficulties in mounting successful appeals provides the final piece of evidence that the official and true grant rates for this court are the same.

What all this means is that one has to resist the temptation to regard the range of official grant rates as indicative of widely differing interpretations of the interests of justice test. Rather that range may be at least partly explicable in terms of bureaucratic factors such as a refuse rather than return policy. For this reason, in the remainder of the report we do not

place a great deal of weight on differences between courts in terms of their official grant rates.

Another possible confounding factor is the application rate by solicitors. It is possible, for example, that courts with restrictive approaches to legal aid display high grant rates in the official statistics simply because solicitors do not think it worth applying other than in the most clear-cut cases, or because they are insufficiently attuned to local court policies. By the same token, generous courts may encourage solicitors to apply in virtually every conceivable case, resulting in a lower than average grant rate (because even generous court clerks tend to refuse legal aid for minor driving offences). As noted in chapter 2, this was explored fully in the 1992 research through an analysis of national statistics and it was concluded that application rates were predominantly a product of caseload composition. In other words, solicitors were in the great majority of courts (whatever their grant rate) reasonably consistent in the types of offences for which they applied for legal aid.[37] It did not prove possible to repeat this statistical exercise as part of this research but there was no evidence from our in-depth study of eight courts to suggest that the picture has changed.[38]

The possibility that official grant rates are not an accurate reflection of the courts' severity or leniency in the interpretation of the Widgery criteria should not be seen as weakening the research design. It was not part of our research brief to find out why *particular* courts are low grant and others are high grant. Rather, the research aim was to explore factors which might help to explain variations in grant rate. We have discovered that one of these relates to courts' practice in relation to applications deemed to contain insufficient information. In the rest of this report we examine other important factors which bear on the question of the consistency of approach by decision-makers.

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37 *In the Interests of Justice?*, pp. 9-12.

38 Just as in 1992, there are no doubt some courts nationwide that deviate from this norm.

4. CHARACTERISTICS OF THE COURTS

The eight courts were selected according to the criteria set out in the previous chapter. Of the eight courts four had low (official) rates of grant in 2004, one was a medium granting court and the other three had high rates of grant. The grant rates for these courts over the period 2001-2004 are given in table 4 below, rounded to the nearest integer in order to preserve anonymity.

Table 4 Legal aid official grant rates 2000-2004 (%)

Court	2001	2002	2003	**2004**	Category
Alsbury	98	99	99	**99**	High
Brinswick	92	92	92	**90**	Low
Curborough	91	89	88	**84**	Low
Dultham	83	82	84	**85**	Low
Elswich	97	95	97	**95**	Medium
Fyford	96	95	96	**97**	High
Granton	88	87	89	**88**	Low
Highfield	99	98	99	**99**	High

As can be seen, not all courts had a stable grant rate over the period. Curborough, in particular, stands out, as its grant rate declined from 91% in 2001 to 84% in 2004 (moving from the medium into the low grant category). One of the decision-makers there suggested that this was because in the immediate aftermath of the Human Rights Act 1998 (which was implemented on 2 October 2000) 'we were granting legal aid for everything', but that things had since returned to normal.[39] Brinswick also declined from being medium (92%) in 2001 to low (90%) in 2004.

One factor which might legitimately influence decision-makers, given the Widgery criterion concerning the likely loss of liberty, is the sentencing practice in the various courts. All things being equal one might expect courts with low grant rates to have low rates of custody and vice versa. As noted above, three courts were unable to provide information relating to the disposal of the case for which legal aid had been applied. Thus, the following two tables relate to the five courts where this information was available.

[39] Research confirms that the Human Rights Act did not have the large impact on the magistrates' courts that many court staff had feared. Functioning of the courts quickly returned 'to normal', with only relatively minor adjustments in practice: J. Raine and C. Walker, 'Implementing the Human Rights Act into the Courts in England and Wales: Culture Shift or Damp Squib?' in S. Halliday and P. Schmidt (eds.), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* Oxford: Hart, 2004.

Table 5 Main disposal by court – all cases (weighted)

Court	Custody	Community	Discharge	Fine	Other
Elswich (medium)	27.2	44.0	10.4	14.1	4.3
Fyford (high)	26.9	36.1	13.3	16.1	7.7
Dultham (low)	23.3	51.1	10.8	11.3	3.5
Granton (low)	20.0	43.4	6.2	27.4	3.0
Highfield (high)	18.2	43.3	15.7	11.1	11.6

Table 5 shows that Dultham (low) had a higher rate of custody than Highfield (high), and overall there was no clear association between grant rate and use of custody (although differences in the use of custody were not great). While one must bear in mind the potential unreliability of grant rate statistics discussed in the previous chapter, we saw there that Dultham does seem to be a true low grant rate court.

It is important to look at the outcomes for cases where legal aid was refused, and this is shown in table 6.

Table 6 Main disposal by court – refused cases

Court	Custody	Community	Discharge	Fine	Other
Dultham (low)	4.3	39.1	26.1	30.4	-
Granton (low)	8.3	29.2	4.2	50.0	8.3
Elswich (medium)	5.3	21.1	31.6	31.6	10.5
Fyford (high)	-	24.2	6.1	69.7	-
Highfield (high)	3.2	12.9	29.0	51.6	3.2

It can be seen that occasionally legal aid is refused in cases where the defendant subsequently receives a custodial sentence (one each in Dultham, Elswich and Highfield and two in Granton). In each of these cases the decision was successfully appealed. If one extends the analysis to include community penalties, which might be considered as alternatives to custody, an interesting pattern emerges. To enable the reader to observe this pattern the Table has been ranked in terms of the proportion of refused cases that ended in *either* a community or a custodial sentence. As can be seen, courts with a high proportion of high tariff sentences amongst their cases in which legal aid was refused tend to have lower grant rates. At the extremes, in Dultham (low) 43.4 per cent of applicants refused legal aid ended up with a community or custodial disposal, compared to just 16.1 per cent in Highfield (high). On the face of it this suggests that Dultham is far more likely to refuse legal aid for applications which would generally be granted in Highfield.

The analysis so far suggests that the explanation for variation in official grant rates does not lie in the seriousness of the cases coming before the courts, and this mirrors the findings of the 1992 research.[40] The extent to which the eight courts vary in their

[40] *In the Interests of Justice?*, pp. 15-18.

determination of similar cases is explored in more detail in chapter 8 on dummy applications. In the rest of this chapter we look at the differences between courts in terms of staffing and training, organisation and application procedures.

Experience, training and targets

In our interviews with staff we began by asking how long they had been involved in taking decisions on legal aid, and roughly what proportion of all applications in their court they personally decided. As can be seen from table 7 in all but one of the courts (Fyford) at least one of the decision-makers had at least 10 years experience in determining legal aid applications. In most courts there seemed to be a mix of longer serving staff with up to 25 years' experience and decision-makers who had more recently (in the past five years or so) begun to take on this role. Training for new decision-makers was evidently somewhat cursory in some cases. For example, an administrative clerk operating with delegated powers explained her induction into the subtleties of legal aid decision-making as follows:

> To be honest I was just given a fifteen minute chat and the folder [containing sentencing guidelines] and just told to get on with it. That's what I did, sorry. (Highfield, DM1)

The number of staff routinely involved in deciding applications varied considerably, from just 3 in Brinswick (where one decision-maker claimed to take 99% of decisions) to 15 in Alsbury, where decision-making was fairly evenly spread out amongst the legal advisors. As a consequence, the proportion of applications dealt with by the three interviewees in each court varied also, from 25 per cent in Alsbury to 100 per cent in Brinswick, and was 50 per cent or over in four of the courts. In terms of the proportion of applications dealt with, then, we can be confident for at least four courts (Brinswick, Curborough, Elswich and Dultham) that the decision-makers we interviewed were representative of the wider population of decision-makers in those courts.

Table 7 Years experience and per cent of cases decided by the 3 interviewees

Court	Range of experience (years)	No. of staff involved in decision-making	Per cent of all applications decided by the 3 interviewees
Alsbury	10-20	15	25
Brinswick	4-16	3	100
Curborough	4-20	5	75
Dultham	7-20	4	75
Elswich	1-25	5	50
Fyford	2-9	8	40
Granton	12-20	10	35
Highfield	2-10	11	30

When asked whether or not there were any performance targets that decision-makers were expected to meet, 17 of the 24 interviewees mentioned that they were expected to 'turn around' the applications within two days of receipt. This target seemed to be closely

monitored and most decision-makers had clearly internalised the norm that applications should be processed speedily. The other seven interviewees, however, were either unsure as to whether there were any targets or said that the only target was to consider the applications according to the interests of justice criteria. None of the decision-makers said that they had any targets concerning either the proportion of cases to be granted or the quality of their decision-making.

It is worth pausing and considering the issue of targets a little further. The Criminal Defence Service guidance states that: 'The grant of representation takes effect from the date the court receives a properly completed application' (CDS, 2002: 4). This leaves open the question of what constitutes a properly completed application. A clue is provided elsewhere in the guidance:

> If an application does not contain sufficient information, further details should be sought. When seeking further information, the granting authority may declare to the applicant that the application will not be considered for grant until such time as the information is received and that it would be prudent for him to wait [sic] a final decision before incurring any further costs (CDS, 2002: 10).

Although not crystal clear, this wording could be taken as implying that the fact that an application contains insufficient information does not of itself entail that it is not 'properly completed' for the purpose of determining the date from which the grant takes effect (and, therefore, the date which is used as the baseline for the two day turn-around target). The significance of this is that there appears to be an institutional incentive to either refuse an 'insufficient but properly completed' application or to obtain the missing information immediately. On the other side of the coin, there appears to be an institutional disincentive to return such applications to solicitors through the post with a request for further information to be submitted. As one court clerk responded, when asked if she sent back to solicitors applications written in illegible handwriting:

> I try not to because of the stats. If we send an application back and it comes back with further information later we have to grant it from the original date and not the second date it comes in. So if we can make the phone call on the day that we received it, and they say 'it says this'... then usually when you have heard someone say it, you can actually read it... and then you can either agree or disagree from that, and it doesn't affect the statistics. There isn't anywhere that says you can't do that. (Highfield, DM1)

We saw in the previous chapter that, while the better view is that insufficiently completed applications should be returned (or queried) rather than refused, many court clerks in fact refuse rather than return. We cannot ascertain from our data the extent to which the target of a two-day turnaround underpins a refuse rather than return practice. It is evident, however, that it may prove difficult to bring about a change in that practice without addressing the inter-relationship of targets concerned with speed and any targets or expectations concerned with appropriate and accurate decision-making.

Monitoring and supervision

Decision-makers were also asked whether their decision-making was monitored or supervised in any way. Nine were either unsure as to whether this was the case or thought that no such supervision took place (in six of these cases both of their colleagues had indicated that supervision did take place). Fifteen interviewees said that there was supervision, and in most cases this amounted to an internal audit of a sample (usually 10 per cent) of decisions, with the aim of ensuring that decision-makers had followed the correct procedures; in other words the quality or correctness of the decisions themselves were not assessed. However, in Highfield court, where the majority of decisions are taken by administrative staff, the correctness of 10 per cent of all decisions was checked by a legal advisor, with the aim of improving the consistency of future decision-making, although it did not appear that feedback was routinely provided. Three staff said that while there was no official monitoring or supervision, in practice advice could always be sought from colleagues if difficulties arose with particular applications, while two viewed the fact that their decisions could be appealed as a de facto form of supervision or monitoring.

Thus most decision-makers in the eight courts operated under conditions of loose or non existent supervision and this autonomy meant they were able to exercise considerable unchecked discretion in their decision-making. The extent to which this discretion led to variation in practice is explored later in this report.

Organisation

As noted earlier, not all decision-makers are legal advisors. We encountered two different models in the courts we visited. In half the courts (Alsbury, Curborough, Dultham and Granton) legal advisors were responsible for taking all decisions on legal aid (in the 1992 study all the courts operated this model). However, in the other four courts (Brinswick, Elswich, Fyford and Highfield), day to day decision-making was assigned to administrative staff who had been given 'delegated powers' to decide applications. That is not to say that legal advisors in these courts never became involved in decisions on legal aid. In fact, in each of these courts administrative staff indicated that they would refer a matter to a legal advisor for advice or a decision if they came across something in an application which they felt unsure about (e.g. substantial point of law, see further chapter 5). Secondly, where applications for legal aid were made direct to the court (rather than handed in to the administrative office) legal advisors would then decide the application in court.

It is open to magistrates to take decisions on legal aid. Most interviewees said, however, that the only type of application that magistrates would determine was one that had been renewed which a court clerk was not minded to grant. It was noted that, unless solicitors took the opportunity to add further information to the application, the prospects of success on appeal were poor.

Channelling the application

There were different practices evident in the courts regarding the receipt and processing of applications. In Alsbury, for example, legal advisors took decisions on legal aid usually in court, while the case was progressing or immediately before it started:

> We grant most applications or refuse them in court when we're sitting. Um, because of staffing levels we're encouraged to have the application handed in while the case is about to start and to make a decision as we go. So generally I'm looking at it with the case papers in front of me. (Alsbury, DM2)

Applications not handed in direct to the court would be considered by the duty legal advisor in the office, usually on the day on which they were handed in.

Legal advisors similarly took all the decisions in Curborough court but here solicitors were asked to hand written applications into the legal aid office. As one clerk explained:

> I try to avoid dealing with it in court unless there are particular grounds of expediency for doing so. We very much encourage the solicitors to write in and not to make oral representations … you want to get through your list, you don't want to spend time [in court] dealing with legal aid… (Curborough, DM1)

Curborough was the only court in which solicitors were informed of the decision immediately by email, and the representation order or refusal would then follow by post. In the other courts, solicitors would have to wait for the representation order to arrive by post (unless the application was made in court) before knowing whether their application had been successful. Given the speeding up of summary justice that has taken place in recent years we think the Curborough practice has much to commend it.

In both Granton and Dultham, where decisions were also taken only by legal advisors, there seemed to be no particular policy with regard to the method of application and applications were in practice handed in to court and in to the legal aid office in roughly equal proportions.

There were similar variations in approach amongst the courts which relied mainly on administrative staff to decide applications. In Elswich and, to a lesser extent, in Highfield and Brinswick, the policy of handing applications in to the office rather than to the court was strictly enforced; whereas in Fyford legal advisors would consider applications made to the court. Even in the latter court, however, fewer than 30 per cent of applications were decided in court, according to interviewees.

In our interviews with solicitors it was evident that the majority were well aware of the particular procedures and processes operating in their local court. Those solicitors who appeared before other courts sometimes commented on the differences in approach, but expressed no views as to the strengths or weaknesses of one approach compared to another.

Additional information

It is useful to consider here the use made by decision-makers of additional information when deciding applications. There are a number of sources of information apart from the application form itself that decision-makers *could* use, for example the defendant's list of previous convictions, details of the charges, personal knowledge of the defendant, or the complete court file. Decision-makers in all courts indicated that any list of previous convictions or a covering letter attached by a solicitor to the application would be taken into consideration. However, since in the vast majority of cases there were no such attachments,[41] decision-makers were left with considerable discretion as to whether such additional information should be sought out.

Whether or not such information was sought depended not only on the court in question, but also on *where* applications were being considered. In Elswich a decision was taken early in 2005 that applications would be returned to solicitors if they had mentioned the applicant's previous convictions but failed to attach them to the form. The reason for this, we were told, was to provide an 'audit trail'; obtaining the list of convictions may have facilitated more accurate decision-making but that is not what motivated the decision.

In Fyford, all three decision-makers said that they would routinely check the court computer system or court file to get more information about the charges and defendant's previous convictions, while in Granton details of the charges only would usually be consulted.

In Brinswick, Curborough and Highfield, decision-makers generally only considered the application form (in the former two courts the case papers were filed separately), although some did say that if there was an ambiguity (for example, about the charge) then they might ask for the court file. Decision-makers in Elswich and Dultham generally only made use of the application form and any information attached to it; none said that they would seek out other information even in borderline cases.

The variable practice and stance of court clerks on this point clearly has implications for the rate at which legal aid applications will be refused (or returned) across the different courts on the ground of insufficient information. It may prove difficult, however, to seek to change existing practices given that court clerks generally feel under pressure as it is and most consider the onus is on the applicant to make our their own case. As one put it, when explaining why he would not look in the court file to fill in gaps left on an application form,

[41] The fact that in five of the eight courts the application form was held within the main court file made it difficult to be certain whether previous convictions had been attached by the solicitors or were already there as part of the court file. We could only be certain in 26 cases (2 per cent) that the solicitor had attached additional information to the form. This consisted in 11 cases of the defendant's previous convictions, in the rest the solicitor had attached a covering letter in which additional reasons in support of the application were set out.

> To be honest, that is all too much bother, and I don't really have the time. So I just tend to say, you know, reject it, and if they want to come back with their argument, then that is fine. (Curborough, DM1)

Some court clerks went a significant step further, however, by refusing even to draw on their personal knowledge of a defendant.

> ... we have got a defendant here called [Fred Bloggs] and I know that every time [Fred Bloggs] goes to court he is going to prison, but if a legal aid application lands on my desk and it says '[Fred Bloggs], theft, I am likely to receive a custodial sentence', I have got to deal with it properly haven't I, and there is no clue there to me that this man needs legal aid... some people might say it is [Fred Bloggs] so it should be granted, but I am looking at a legal aid application and I have got to deal with it properly. (Dultham, DM1)

By contrast, other clerks said they would draw on their personal knowledge of defendants in making a decision – for example, where it was claimed that a grant of legal aid would be in the court's interests:

> Sometimes there is maybe a person's name that is known to us, that we know is going to be particularly disruptive, so yes, they are right, I know that for a fact, so we will maybe grant it. (Brinswick, DM1)

Even within the same court, the sources of information consulted could differ according to whether the application was being considered in court or in the office. Perhaps the most obvious source of 'information' available when deciding applications in court is the defendant himself. In Curborough, as we have already noted, decision-makers tended to deal with applications in the office, and did not generally refer to additional information. However, the quote which follows from one decision-maker in that court reveals that decisions made in the 'office' may not always be the right ones:

> If [the solicitor] came into court and said legal aid has been refused, but as you can see this man is a real handful, doesn't really know what is going on, I would just say to the legal aid clerk, can you bring me the application, I will put it before the magistrates and I'd sort of give them the nod, or they'd be able to tell, I'd say 'do you want to deal with this man unrepresented?' And they'll say no. But you only get the privilege of that when they're actually in front of you. (Curborough DM2)

One of the decision-makers in Alsbury, where decisions were usually taken in court, made a similar point when asked whether he used any additional sources of information:

> The lists, um oral submissions made in court as well, there might be additional information, you know an example of actually seeing the defendant in court and in reality mental illness is something very difficult to you know, say he has some difficulty or learning difficulty or something, but in court, you know, you can see

> that he is unable to know what is going on. People could put that on [the form], of course they could, but it might be something that they could have forgotten about, or it might be something they weren't told at the time, or, if they have only picked the case up at court, that you know that the defendant has only just told them in instruction … So yes there is additional information sometimes that comes to light in court. (Alsbury, DM1)

What this chapter has shown is that there are many different vectors along which the eight courts differ (and indeed on which staff *within* the courts differ), including whether decisions are routinely taken by legal advisors or administrative staff, how many staff are involved, whether decisions are taken in the office or in court and what additional sources of information, if any, are used when deciding the application. It would be surprising if such variation had no impact on the observed variations in grant rates. For example, we have seen that decisions relating to the disability criterion can differ according to whether they are made in court in the presence of the applicant, or decided in an office on the basis solely of the application form. It is also possible that the use of non-legally trained staff in some courts may affect the decisions taken with respect to the criteria relating to legal complexity such as the substantial question of law criterion (see further chapter 5).

What this suggests is that even if identical applications were received by each of the courts, there would be reasons to suppose that grant rates may differ, due to the different backgrounds (some legally trained some not) and lengths of experience of the staff, the arena in which decisions are made (whether in court or in the office), and what use is made of other sources of information. We turn in the next chapter to a consideration of the ways in which decision-makers and solicitors interpret the statutory criteria.

5. INTERPRETATION AND WEIGHT ATTACHED TO THE INTERESTS OF JUSTICE CRITERIA

The design of the standard application form includes prompts worded in terms of each individual Widgery criterion. Next to each prompt is a box in which the applicant can provide reasons why a particular criterion is satisfied and an adjoining box for the court clerk to record their reaction to the reasons given. The way in which decision-makers and solicitors interpret the Interests of Justice criteria is not, however, always readily apparent from reading the application form. In order to illuminate this issue we asked interviewees the following questions:

- Do you use any written guidelines in determining legal aid applications? (decision-makers only)
- Do you use any written guidelines on the operation of the 'interests of justice' criteria in deciding whether it is worth applying for legal aid? (solicitors only)
- What, in your view, are the most important criteria to be applied in deciding whether or not someone gets criminal legal aid? (decision-makers only)
- What, in your view, are the most important criteria to stress when applying for criminal legal aid in your local court? (solicitors only)

In addition, in relation to each of the interests of justice criterion, both decision-makers and solicitors were asked:

- Could you look at the list of the Access to Justice Act Criteria and indicate on a scale of 1-5 how significant each one is in your decision-making? The scale goes from 1 – not at all important – to 5 – very important.
- How do you interpret this criterion (when can it apply?)

Use of guidelines

As noted in chapter 2 of this Report, there have been numerous sets of guidelines issued over the years concerning how to interpret the interests of justice test and associated Widgery criteria. The research study conducted in 1992 found that most court clerks relied on their own experience and knowledge of the criteria rather than locally or nationally issued guidelines. However, that research also found that court clerks' confidence in the accuracy of their understanding of the law was often misplaced.[42] Further attempts have been made since that research was published to encourage court clerks to use guidelines, which have themselves been revised in the light of the research findings and subsequent caselaw. The present study provides an opportunity to reflect further on the potential for guidelines to make a difference to this aspect of legal aid decision-making.

We began by asking decision-makers whether any use was made of local or national guidelines on the proper interpretation of the Interests of Justice criteria. In four of the eight courts, none of the decision-makers said that they made use of written guidelines,

[42] *In the Interests of Justice?*, pp 19-24.

and only a few said that they were even aware of the existence of those produced by the Criminal Defence Service.

In the other four courts, either one or two of the three decision-makers said that they did refer to guidelines. Although two decision-makers said they occasionally referred to the Criminal Defence Service guidelines, each of these courts also had a form of local guidelines. In two courts these consisted largely of advice, or even instructions, on which offences should and should not normally receive a grant of legal aid. In a third court, one of the clerks was in the process of drawing up some guidelines designed to help magistrates interpret the criteria. In the fourth court, a file was kept in the legal aid office, which staff could refer to, and which contained extracts from the relevant legislation, case-law on the criteria and press clippings about legal aid. Thus, out of the 25 decision-makers interviewed, only 6 admitted to making use of written guidelines and a surprisingly large number displayed no awareness that guidelines even existed.

The main reason why those who were aware of the guidelines did not use them was that they had, over time, come to rely on experience.

> I used to [use guidelines] when I started. I used to have a great big manual which had all the various ways in which you should interpret it, but to be honest I don't use it any more. (Curborough, DM2)

> I think they are useful when you start out because it is difficult to get consistency when you are first doing them but when you are doing them day in day out, to be honest with you, you tend to just think you know what you are doing really. (Dultham, DM2)

One factor underlying the non-use of guidelines is undoubtedly the design of the application form itself, which reminds both applicants and decision-makers of the wording of the Widgery criteria. One clerk explained why he made no use of guidelines as follows:

> In the actual legal representation forms it does spell out various categories and those categories correlate to the regulations, for example, 'it is a serious offence, likelihood of custody, likelihood of loss of livelihood' and so on. So normally we don't look at the actual regulations... (Fyford, DM1)

Another factor in the minds of some court clerks is the sense that there is little point in using guidelines now that the vast majority of defendants facing anything other than straightforward summary offences are seen as meriting legal representation. As one put it:

> I've got them [Criminal Defence Service guidelines] on my desk but I don't refer to them. Probably 'someone else's interests', if someone filled something in on there I might look that one up. But I don't now refer to it on each occasion. You do now grant the majority so.... (Curborough, DM3)

The fact that court clerks relied so heavily on experience might not matter if solicitors themselves cited the guidelines when formulating their applications or when challenging refusals in open court. If that happened, one would expect the norms of court clerks to gradually converge with those in the guidelines. The use of written guidelines was, however, even less frequent amongst solicitors; indeed only one of the 21 interviewed indicated that they personally used guidelines, although most were aware that guidance was available either in the standard legal texts or in the form of internal guidance in their firm. The overwhelming view amongst those solicitors interviewed was that applying for legal aid was something one quickly picked up, and guidance was only really needed for newly qualified lawyers:

> There is bound to be something on the Legal Services Commission website but I haven't seen it because it becomes second nature after a while to apply for legal aid. (Alsbury, S1)
>
> I don't now, I did when I started. But I think when you've been doing it for years, you get to know what legal advisors in any court, not just in Alsbury are going to be looking for. So really, no I don't now. (Alsbury, S2)
>
> I don't consult any bible now, I hope by now I know what the criteria are! (Fyford, S1)
>
> No. It has always been something that when you first start filling the forms in, obviously you are told by people who have been doing it for many years what it all means. (Curborough, S1)
>
> Um, no, no guidance within the office, I think we're all quite experienced in what we're doing... And I think the legal aid application [forms] are very helpful really, because it's all nicely boxed as to what people are looking for. (Granton, S2)
>
> It's experience... I can't remember ever seeing anything saying this is how you fill them in. You pretty much make them up as you go along. I remember reading something about the Widgery criteria but that was some time ago. But to be honest, no, we just fudge and fuddle it on a daily basis. Trying to make a living! (Dultham, S3)

The above quotes usefully reinforce one of the key messages that we seek to convey in this report – that the current system is extremely deep-rooted. Decision-making is based on a test and associated criteria that have been in place for some forty years (see chapter 2). Moreover, many decision-makers have been determining legal aid applications for 20 years or more. In all eight of the courts we visited at least one of the three interviewees had a minimum of nine years experience. These experienced decision-makers are naturally relied on when those new to the task require advice or training. Thus, experience is relied upon even by the inexperienced, and new guidelines tend to have

little impact because they are regarded as merely restating in a different way the standard ways of doing things.

The danger in this situation is that subtle changes to the legal framework, such as new case-law or a tweaking of the statutory language, may be overlooked. An example of this problem came in an interview with a court clerk of around fifteen years of experience: 'I was always taught, if in doubt, if you've got any doubt, then you grant' (Elswich, DM2). As we noted in chapter 2, this 'benefit of the doubt' provision appeared in the Legal Aid Act 1988 but does not appear in the Access to Justice Act 1999. There is also the point that some of the sets of guidelines issued over the years, which may have been consulted at the start of a court clerk's career, contained ambiguities or even errors regarding the correct legal tests to be applied.[43] The same could be said of the standard application form (both in 1992 and now).[44] Thus it seems that lessons learnt long ago are still being applied and even passed on to new court clerks when in some cases the ingrained norms are not conducive to accurate decision-making. The scale of this problem may not seem great, given that there have been relatively few changes to the merits test governing the grant of legal aid over the last forty years. However, the problem would obviously be much bigger if any of these ingrained norms were erroneous to begin with. As one solicitor put it:

> You can't sometimes teach old dogs new tricks and somebody 20 years ago wasn't told the right way to do it; it doesn't matter how many times you tell them now, it still isn't going to change what they do. (Dultham, S1)

In short, both decision-makers and solicitors appear to have considerable faith in their ability to interpret correctly the interests of justice criteria. Whether this faith is well founded is examined in the rest of this report. However, one implication of the above discussion is that any attempt to improve consistency simply through the provision of further guidelines is likely to prove futile.

Most important criteria

Before inviting interviewees to comment on the interests of justice criteria in turn, we asked them what, in their view, were the most important criteria. Table 8 shows the proportion of respondents spontaneously mentioning individual Widgery and other criteria.

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[43] In one judicial review case, for example, it transpired that a Justices' Clerk had issued guidelines to legal advisors to the effect that magistrates should be reminded that legal aid should be reserved for cases where loss of liberty was likely (omitting reference to any other Widgery criterion): *R v Havering Juvenile Court ex parte Buckley* (CO/554/83) 12 July 1983.

[44] For 1992 see *In the Interests of Justice?* at pp.22-23; for the current application form see our subsequent discussion of the so-called 'inadequate English or disability' criterion.

Table 8 Most important criteria - percentage of decision-makers and solicitors mentioning each criterion[45]

Criteria	Decision-makers	Solicitors
Loss of liberty	100	100
Subject to sentence	13	5
Loss of livelihood	8	19
Damage to reputation	0	10
Question of law	17	5
Lack understanding – English	21	5
Lack understanding – disability	38	33
Tracing witnesses	0	0
Expert cross-examination	4	10
Someone else's interests	29	5
Plea	24	19
Age of defendant	16	5

Decision-makers and solicitors were unanimous in agreeing that loss of liberty was the most important criterion:

> Is someone going to lose their liberty, because that is kind of definitive. And if they have a good chance of losing their liberty or it is definitely something the magistrates are going to consider I will grant it, even if the application is not up to standard, even if the application is badly completed. (Curborough, DM2)

> I think the first one has got to be loss of liberty, and on the loss of liberty then obviously that is going to depend not only on whether the offence is imprisonable but whether there is a real likelihood he is going to lose his liberty. (Dultham, DM3)

> Well you can pretty much narrow them down to two. Which is, 'am I going to jail or not going to jail?'…It's pretty much the first and the last. (Dultham, S3)

> Custody, liberty, it's a number one of the old Widgery criteria, as I still refer to them…Liberty primarily, I would always expect legal aid where liberty is at risk. So that to me is the most important, that's what underpins the whole system. (Elswich, S2)

Of the other criteria, none was mentioned by more than 40% of respondents. The defendant's inability to understand proceedings due to disability was the second most common criterion nominated by both solicitors and decision-makers. After that, solicitors tended to stress loss of livelihood, damage to reputation and the defendant's plea, while

[45] Although interviewees were prompted to state which (one) criterion they thought most important, many chose to emphasise more than one, which is why percentages sum to more than 100.

decision-makers emphasised other people's interests, plea, and the defendant's inability to understand proceedings due to inadequate English. Neither plea nor age of the defendant are specifically covered by the Widgery criteria, and it is interesting that 24 and 16 per cent respectively of decision-makers regarded these as among the most important criteria (see further chapter 6). When responses to this question were considered separately for low and high granting courts, no significant differences of opinion emerged, either amongst solicitors or decision-makers. In the next section we look at the importance attached by decision-makers and solicitors to the Widgery criteria as broken down on the standard application form.

Significance of the criteria

Interviewees were asked to rate each of the criteria on a five point scale as to how important each was in relation to their decision-making (for decision-makers) or how significant it was in terms of having an application granted (for solicitors). In the two tables below, the overall weight attached to the criteria for, firstly, decision-makers and secondly, solicitors are presented. The importance of the criteria ranges from 1 (not at all important) to 5 (very important).

Table 9 Decision-makers' ratings of the importance of the interests of justice criteria (%)

Criteria	1	2	3	4	5	Average
Loss of liberty	-	-	-	12	88	4.9
Subject to sentence	-	-	24	32	44	4.2
Loss of livelihood	-	16	32	40	12	3.5
Damage to reputation	-	28	32	36	4	3.2
Question of law	-	-	16	32	52	4.4
Lack understanding – English	-	16	28	24	32	3.7
Lack understanding – disability	-	2	24	36	32	3.9
Tracing witnesses	8	20	44	24	4	3.0
Expert cross-examination	-	8	40	32	20	3.6
Someone else's interests	8	12	28	28	24	3.5

Table 10 Solicitors' ratings of the importance of the interests of justice criteria (%)

Criteria	1	2	3	4	5	Average
Loss of liberty	-	-	-	-	100	5.0
Subject to sentence	-	-	19	24	57	4.4
Loss of livelihood	-	5	33	24	38	4.0
Damage to reputation	5	-	33	29	33	3.9
Question of law	-	5	19	5	71	4.4
Lack understanding – English	-	14	19	19	48	4.0
Lack understanding – disability	-	-	14	38	48	4.3
Tracing witnesses	-	5	33	38	24	3.8
Expert cross-examination	-	-	10	29	62	4.5
Someone else's interests	14	19	29	19	19	3.1

The first point to note about the two tables is that both decision-makers and solicitors as a whole regarded all of the interests of justice criteria as important – none of them scored less than 3.0. Secondly, there was agreement between decision-makers and solicitors as to the most important criterion – loss of liberty, which both groups rated as extremely important. For most of the other criteria there was a close match between the ratings from both groups. For only three criteria – damage to reputation, tracing witnesses and expert cross-examination – did the average score diverge by more than 0.5 points (and no criterion by more than 1.0). With the exception of the 'someone else's interests' criterion, solicitors rated the criteria higher than did decision-makers, although not markedly so. The aggregate picture therefore suggests that there was a reasonably close fit between how the two groups rated the various criteria. A comparison of ratings given by staff in (officially) low and high granting courts found no significant differences.

However, overall ratings are of limited utility in understanding *how* criteria are interpreted and applied. It is possible that similar scores can disguise differences in interpretation, and we look at this in the next section.

Interpretation of the criteria

While views on the correct interpretation of the Widgery criteria can legitimately differ in some cases, in others the statutory language as interpreted by the higher judiciary is relatively clear. It is obviously desirable that the official guidance, as well as the design of the standard application form (Form A), cohere with the legal definitions, and express the legal criteria in an understandable way. If these desiderata are not met, inaccurate and inconsistent decision-making may result. In the sections which follow we therefore refer, where relevant, to the guidance produced in 2002 by the Lord Chancellor's Department entitled 'Criminal Defence Service: Guidance to Courts on Grant of a Right to Representation and Recovery of Defence Costs Orders', henceforth referred to as (CDS, 2002). We also refer to the Access to Justice Act 1999, case-law, and the wording on Form A.

i) Likely to lose liberty

Our interviewees expressed a broad degree of agreement concerning the first criterion – likelihood of loss of liberty, although some differences emerged. Both solicitors and decision-makers agreed, for example, that those who had been remanded in custody and those whose cases were being committed to the Crown Court required legal representation. When asked how they determine whether loss of liberty is likely, decision-makers said they took into account the severity of the offence, the defendant's previous convictions and other aggravating factors, as well as the sentencing entry points contained in the Magistrates Guidelines:

> Well several factors I mean the first one is gravity of the offence. As I said earlier you know if it is a robbery charge, whether the guidance is for a first time offender to go to prison then that would be enough. If it is something where custody isn't necessarily a likely outcome for that type of offence then I would be looking for secondary factors, be they significant, relevant previous convictions

> which would mean that loss of liberty is likely or be they aggravating factors in that particular case which makes it a lot more serious as opposed to the general one. So the Magistrate Association guidelines are the starting point really. (Alsbury, DM2)

> Well the sentencing guidelines, every offence has a sentencing entry point, so ABH for example, you know the entry point is custody, there are aggravating or mitigating factors, the entry point is custody, so that is where the magistrates have to start, so if the entry point is custody I would always grant it. The other way I'd assess it is, if they say this is a standard shoplifting but I've committed 30 other offences this year, or I'm already on a suspended sentence, or I committed this offence on bail, the classic aggravating features I suppose, so it's either the offence itself or the circumstances which would be their previous record. (Curborough, DM2)

Solicitors also mentioned the seriousness of the offence and circumstances of the defendant but also tended to emphasise their knowledge and experience of the courts:

> I have been in the business, in the profession for many years. I can just look at the case and look at the previous convictions and tell whether they are going to, and have a look at the local magistrates that are sitting and tell instantly if is going to end in a particular way, what kind of disposal, it is just experience. (Curborough, S2)

> Oh well that is experience isn't it? Yeah, that's down to experience, knowing the courts, knowing the tribunal, the judges, knowing the client and his record, umm knowing how the prosecutor's going to open it and so on. (Alsbury, S2)

There were three main areas in which there was some disagreement among interviewees. The first concerned what constitutes a likely loss of liberty, the second was whether local sentencing policies ought to be taken into account when assessing the likelihood of loss of liberty and the third was the weight attached to breaches of court orders.

With regard to the first issue, authoritative direction has been provided by the case of *McGhee* in 1993.[46] Here the Divisional Court made plain that this criterion should be reserved to cases where there was a likelihood of imprisonment or other form of confinement (such as under a hospital order made under the Mental Health Act 1959). Community sentences that involved *restrictions* of liberty, such as probation orders and community service orders, were not to be regarded as involving a *loss* of liberty. At the same time the court acknowledged that the Widgery criteria were not exclusive and accepted that the fact that a demanding non-custodial penalty was likely to be imposed could be a factor which legitimately bore on the interests of justice test.

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[46] *R v Liverpool City Magistrates ex parte McGhee* CO/0289/927, 3 March 1993.

The relevant section of the CDS guidance (2002: 13-14) is not as helpful as it might be on this point. First, the section is headed 'Likelihood of deprivation of liberty' and the 'deprivation of liberty' formulation appears repeatedly. Whereas the Legal Aid Act 1988 used the term 'deprivation of liberty' the Access to Justice Act 1999 substituted the plainer 'loss of liberty' and it would be sensible to eradicate the superseded language from the guidance. Second, the guidance uses a variety of phrases to describe the degree of probability required to establish the criterion. These include (i) 'the accused's liberty would be at risk' (which might be interpreted as any degree of risk), (ii) 'a real and practical risk of imprisonment' (language borrowed from the Widgery Report which leaves it unclear what level of risk is required) and (iii) 'likely to lose his liberty' (which is in accordance with the 1999 Act and has the added virtue of signalling that the test requires that loss of liberty should be more likely than not). Third, the guidance states that 'deprivation of liberty includes...' a suspended sentence of imprisonment but fails to cite authority or explain why this amounts to a 'loss of liberty'. It would perhaps be worthwhile explaining in the guidance that a suspended sentence should only be imposed when the offence is serious enough to justify a custodial sentence.[47] It follows that anyone thought likely to receive a suspended sentence must be regarded as someone likely to receive a prison sentence. If the guidance is not clarified in this way there is a danger that those not versed in sentencing law will come to argue by analogy that if suspended sentences (which do not entail any immediate or total loss of liberty) fall within this criterion then so can high-tariff non-custodial sentences.

The decision-makers in the present study, however, all took the view that a loss of liberty referred to a custodial penalty, and not to community based penalties, as the following quotes indicate:

> I thought loss of liberty was fairly cleared up now and I thought that had to be a likely loss of liberty as in custody. I know there used to be a lot of talk over whether it should be probation, community service as was, but I thought that was all cleared up now and that wasn't considered loss of liberty and it really referred to whether it was likely that you would be sent to prison for offences... (Alsbury, DM2)

> That means to me custody, not some restriction of liberty which I have had two of today and even though they [solicitors] know there is a case-law which says it is not a restriction of liberty, it is custody. (Curborough, DM2)

Not all decision-makers understood the legal position, however. When we asked one court clerk if there was any case-law on the meaning of 'loss of liberty, he replied:

> Do you know there is, there is *Liverpool City Magistrates' Court ex parte McGhee* which holds that a community service order *could* be regarded as a loss of liberty. (Dultham, DM1)

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47 See Criminal Justice Act 2003, s.189.

His personal decision-making, however, was based on his view that the term loss of liberty did not cover community punishments.

Most decision-makers clearly understood that the loss of liberty had to be *likely*, or a 'real and practical risk' as many described it. A few, however, applied a lower standard, as in the following example:

> We have to conduct a sentencing exercise looking into the future... we decide is it likely on the guidelines that we have got... is this person likely to have a risk of custody? That doesn't mean that they are going to get custody but is the question of custody even going to enter the magistrates' minds... If the answer is they would have to consider it, we would have to grant it. (Fyford, DM1)

Generally speaking, solicitors tended to apply less strict criteria than decision-makers. For example, five solicitors said they interpreted 'likely to lose liberty' as meaning anyone in 'danger' of receiving a custodial sentence, 'at risk' of doing so, or even, as in the next example below, where a custodial sentence was a 'possibility'. This quote also serves to illustrate that some solicitors (albeit a small minority) took a broader approach than court clerks to the question of what *loss* of liberty means.

> When I think there is a possibility of losing or having their liberty restricted, and by restrictions on liberty I'm talking about curfews, suspended sentences, and community penalties, because I interpret those as a restriction on their liberty. If you have to go work in a charity shop for 4 hours or something, that is a restriction on your liberty because for that period of time you are not free to, so that is what I'm looking at. (Curborough, S3)

The differences in interpretation between solicitors and court clerks creates a potential point of friction as it inclines some of the former to apply in cases which some of the latter see as unjustified. We will see subsequently that the mechanisms for exchanging views on such points are currently under-developed which means that friction tends to endure without abatement.

The second area of divergence in relation to the liberty criterion concerned the emphasis that interviewees believed should be placed on local sentencing policy. In determining the risk of custody the guidance advises decision-makers to 'take account of the sentencing approaches both of courts generally and of your court…' (CDS, 2002: 14).

Amongst decision-makers, nine out of 24 believed that local sentencing policy should be taken into account, although there was no clear difference between high and low granting courts, nor much consistency between decision-makers in the same court: in just two courts were all three in agreement. Eight of the 21 solicitors said that they would take into account local sentencing policy, but again there was little consistency of view among solicitors at the same court. The justification given by these interviewees was that they recognised that for certain offences their court departed from national guidelines, for

example, in the sentencing of driving while disqualified, and this knowledge would affect their decision:

> Yeah, if you know the Bench here is quite keen on sending people down for driving whilst disqualified then you know, even though the entry point under the sentencing guidelines has been reduced now to community penalty you have got to be realistic, so you bear that in mind. (Alsbury, DM1)

Of those decision-makers and solicitors who believed local sentencing policy should not be taken into account, this was generally either because they believed that there was no significant departure from national guidelines in their court, or because they thought it would be impractical to do so, given the number of, and variation between, sentencers in their court. As one solicitor put it:

> If you have got a choice of two District Judges, and you go before one and not the other, you may not go to prison. At the same time you could have certain magistrates who are harsher than District Judges... you go to your client and say 'oh you are fine today, you should be ok', you know, 'pretty soft bench' and all that, and [then] the court declares they are too busy, they are moving the case to court number 8. So you go to court number 8 and here sitting is District Judge X who will send you to prison – it is a lottery. (Brinswick, S2)

The implication of this type of perception is that it makes it more likely that solicitors will invoke the loss of liberty criterion because, in order to protect their client's interests, they will tend to assume the worst-case scenario. We found little evidence, however, that decision-makers assumed such a scenario when assessing the likelihood of a custodial outcome.

As noted above, decision-makers in the same court often held opposing views. In Brinswick for example, one (administrative) decision-maker claimed to be unaware of local sentencing policy and relied on national guidelines, while a (legal advisor) colleague said that the court rarely imposed custody for breach of bail, contrary to the national sentencing guidelines, and that such applications would therefore generally be refused (despite recent case-law suggesting that such a practice is unlawful).[48]

The importance attached by decision-makers to breaches of court orders also varied. In one court (where applications were usually determined out of court), it was the policy to refuse all applications for legal aid in respect of breach proceedings and ask solicitors to reapply to the Bench, on the basis that the court would be in the best position to judge the seriousness of a defendant's position. Other courts had a policy of refusing first breaches of a court order, as sentencers would be unlikely to revoke the order and impose custodial sentences. In this respect at least, there was consistency in the way in which decision-makers in the same court dealt with breaches. Comments from solicitors indicated that

[48] In *R v Chester Magistrates' Court, ex parte Evans* [2004] EWHC 536 a refusal of legal aid for a breach of bail offence was quashed on the ground that national sentencing authorities and guidelines entailed that a custodial sentence should have been regarded as likely.

they were not always aware of court policies regarding breaches, thus it was not surprising to find that they generally thought breaches were always worth applying for, and this may help explain the wide variation in grant rates for breaches (see chapter 7).

Thus, while decision-makers and solicitors agreed that the seriousness of the offence, the offenders' previous convictions and sentencing guidelines are all factors which should be taken into consideration with regard to applications for legal aid, there was evidence of inconsistency in how likely loss of liberty was defined, how breaches were dealt with and in whether local sentencing policies ought to be taken into account, all of which are likely to contribute to variation in grant rates.

Interestingly, none of the court clerks and only two solicitors raised the possibility that 'loss of liberty' might cover the case of someone who was not at risk of a custodial sentence but was at risk of a custodial remand. An example would be someone accused of repeatedly flouting the law by committing minor offences who might be refused bail on the ground that if released he or she would commit an offence. As noted in chapter 2 there has been a change in the statutory language which seems designed to accommodate this possibility. The Access to Justice Act 1999 specifies that the loss of liberty criterion can be engaged 'if any matter arising in the proceedings is decided against' the defendant, and that wording seems broad enough to encompass an application for bail. As the solicitors who used the criterion in this way put it:

> If the offence is perhaps not particularly serious, say it's a criminal damage offence and the prosecution are opposing bail, clearly they require assistance to make a bail application. If they don't get that assistance, they may remain in custody. (Alsbury, S3)

> We do use that ground if somebody appears in custody and the prosecution are applying for remand in custody, i.e., not granted bail, so we'll say if it is likely that person will lose their liberty during the course of the proceedings, even if at the end of the day it is going to be a non-custodial sentence, we still say that category applies and put in an application for people who are remanded in custody. (Dultham, S2)

Ordinarily, of course, those remanded in custody are those at most risk of a custodial sentence, so it is perhaps not surprising that the unusual situation just described did not occur to any of the court clerks or many of the solicitors to whom we spoke. The Criminal Defence Service guidance on this criterion is couched entirely in terms of custodial sentencing, and the design of Form A does nothing to draw attention to the possibility that 'loss of liberty' may include a remand in custody.

Any future guidelines on this criterion should also refer to the views of the Sentencing Guidelines Council. The Council published its views on the 'custody threshold' (see s.152(2) of the Criminal Justice Act 2003) in December 2004, stressing that prison is to be reserved for the 'most serious' offences.[49]

[49] See: http://www.sentencing-guidelines.gov.uk/docs/Seriousness_guideline.pdf

ii) Loss of livelihood

A curious ambiguity lies at the heart of the Widgery criteria relating to the seriousness of the consequences of conviction (custody, loss of livelihood, or loss of reputation) in that they make no reference to plea or, indeed, to the likelihood that a grant of legal aid would make any difference to the consequences that may ensue. One possible interpretation of these criteria is that it is in the interests of justice that defendants facing any of these serious consequences should be legally represented quite regardless of whether it is thought that legal representation would make any difference to the outcome of the case. The argument here would be that justice must not only be done but be seen to be done and that requires the presence of a legal representative in cases where the defendant faces serious consequences on conviction. A less extreme form of this argument would hold that while it might appear that a legal aid applicant has no defence to a charge (or no intention to contest that charge) a grant of legal aid may result in the case taking on a different trajectory. In other words, given the seriousness of the consequences at stake, it is worth granting legal aid if only to decrease the risk of an inappropriate guilty plea. The long-accepted view, however, is that legal aid should only be granted where it is evident that legal representation might result in the avoidance or amelioration of the feared serious consequence.[50]

The Criminal Defence Service guidance (2002: 13), for example, states that: 'if an applicant offering no defence to a charge of driving with excess alcohol has ticked the third box (It is likely that I will lose my livelihood) and written "Effect of disqualification" in the details box, then the entry in the reasons box might be "No – disqualification mandatory penalty for this offence". This clearly implies that if legal representation can make no difference to the feared consequence then it is not in the interests of justice to grant legal aid. The guidance does not say, however, that 'loss of livelihood' can only apply if a not guilty plea is indicated and this is clearly correct. Legal representation may make the difference between a sentence that enables a person to keep a job (such as a fine) and one that so interferes with liberty that employment may no longer be possible (such as a community sentence with onerous requirements).

There was little inconsistency of view evident amongst decision-makers concerning this criterion although they tended towards taking a somewhat more restrictive approach than the official guidance. For example, the importance of plea was often mentioned – if the defendant was pleading guilty this criterion was seen to have little, if any, weight.

> If they are pleading guilty and they are going to lose their job because they did it then I wouldn't consider it very important. (Alsbury, DM1)

In line with the guidance, this criterion was regarded as rarely applying in excess alcohol cases, where disqualification was mandatory (absent special reasons), and thus representation could make no difference to whether the defendant lost his or her livelihood:

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[50] Cases in the High Court which have turned on the loss of livelihood criterion have all involved defendants planning to plead not guilty so the point lacks judicial authority.

> Lots of people are self employed, and they get done for drink driving and then they say 'we'll lose our livelihood', well our standard response to that is, 'that's inevitable', there is no way legal aid is going to help you. The only way it becomes an issue is if they are arguing special reasons. (Curborough, DM2)

Even where a person was in employment and pleading not guilty, this criterion may not be satisfied. The guidance states that the applicant must explain why 'he believes that it is likely that he will lose his livelihood... as a direct consequence of the conviction or sentence' (CDS, 2002: 15). In both decision-makers' and solicitors' reasoning, it was clear that this was more likely to apply to those in professional jobs:

> I had a case here I was just dealing with, a young lady just qualifying as a solicitor, during her undergraduate period she screwed the DSS of 17 grand or so, I'd say she is in big trouble, it's going to the Crown Court. That's obviously a case which will affect her career. Otherwise if you look at the average, say a lorry driver nicks a bottle of whisky from a shop, is he going to lose his job? It all depends on the job and his position and that sort of thing. (Alsbury, S2)

> If I went into HMV and shoplifted at lunchtime then I would expect to lose my job, the guy who comes door to door selling double glazing, if he shoplifts at HMV they might let him stay on, more likely to stay on. So again the key word is likely. (Dultham, DM1)

> Loss of livelihood for someone who has been in and out of work for a long time and it is not a, I was going to say professional, a more permanent position, is going to be different, I mean if it's unlikely it's going to have a serious effect on their livelihood in the general scheme of things I wouldn't tend to grant. (Granton, DM2)

Decision-makers commented that this was one of the criteria which applicants sometimes misinterpreted, for example, by claiming loss of livelihood for an unemployed applicant, or with reference to future employment prospects. These types of claims were dismissed by decision-makers:

> Sometimes solicitors put things like 'this may affect my future employment prospects', well I usually just disregard that really because it has to be a current job. (Fyford, DM1)

The Criminal Defence Service guidance states that while someone who is not currently employed would be less likely to meet this criterion 'an exception might be where someone is genuinely unemployed for a very short period between jobs...' (CDS, 2002: 15). Decision-makers seemed alert to the possibility that applicants might exaggerate their immediate prospects of gaining employment in order to bolster the case for legal aid. As one put it: 'We have got a high rate of unemployment in this court, the number of

people who produce letter saying "I am starting the job on Monday" is incredible' (Dultham, DM1).

Both decision-makers and solicitors agreed that this was one of the less often used criteria due to the fact that many applicants did not have jobs:

> To be honest with you, in this area the vast majority of people, it doesn't come up very often because they are mainly unemployed. (Curborough, DM1)

> I think it is probably one of the least important criteria to be honest. Very often you will find that the little scamps you are dealing with, you know careers and ambitions, well they don't have them. (Curborough, S2)

While there is clearly a high degree of consistency of approach on this criterion, in view of the evident tendency to disbelieve claims of loss of livelihood except in the case of relatively high status jobs, there is something to be said for advising applicants in any new guidelines that claims of loss of livelihood should be backed up with clear arguments or evidence wherever possible. While it may seem intuitively plausible that thieving lorry drivers are less likely to lose their jobs than thieving solicitors, it is also plausible to suppose that social stereotypes may blind us to the norms that actually operate within occupations with which we are personally unfamiliar.

iii) Serious damage to reputation

As with the livelihood criterion, the defendant's plea was seen by decision-makers as a mediating factor in the importance of reputation: for those pleading guilty, damage to reputation was thought to be inevitable. Some solicitors agreed with this: 'on a guilty plea I don't think it would persuade the court and I don't think it should do.... they shouldn't have committed the offence if they were worried about it' (Alsbury, S1). A few solicitors disagreed. One spoke passionately about this aspect of the interests of justice test:

> Oddly enough, it is very often... where it is a first offence, where the court and we diverge. We put a lot of emphasis as solicitors on trying to make sure that a client doesn't get convicted of that first offence because you know the first offence leads on to more difficult consequences for them... I think [with] first offending, it is important to try and keep people out of the criminal justice system altogether. We do our damndest and our best to get them cautioned... if you can get someone sentenced to a conditional discharge which is not in fact a conviction unless and until they commit a further offence, that is often what we are fighting for and that is often why we would like legal aid even when they are pleading guilty. (Curborough, S3)

This line of argument is supported by the Criminal Defence Service guidance (2002: 16) which notes that 'An effective plea in mitigation may lessen the severity of the sentence and thereby lessen the seriousness of the damage to reputation.' Because this line of reasoning seems so alien to decision-makers (and most solicitors), it would be worth making clear in the guidance that this criterion can be satisfied even in guilty plea cases

but that applicants should make clear *how* they believe legal representation might help them preserve their reputation.

Decision-makers and solicitors had some difficulty in interpreting exactly what was meant by 'serious' damage to reputation. The CDS guidance adopts the formula that the disgrace of conviction should 'greatly exceed the direct effect of the penalty', and that reputation 'for these purposes is a question of good character, including honesty and trustworthiness. Social class and position should not be taken into account.' It adds that previous convictions should not preclude consideration under this criterion since someone with a previous conviction 'for a minor assault might still suffer serious damage to reputation if convicted of an offence of dishonesty or a sexual offence' (CDS, 2002: 16). While this guidance is generally couched in quite broad terms, on one point it takes a more restrictive approach. It states: 'As a general rule, offences of varying degrees of seriousness attract different levels of damage to reputation. The Act refers to <u>*serious*</u> damage as justifying the grant of a right to representation' (CDS, 2002: 16) [emphasis in original]. This, when taken together with the emphasis on sexual and dishonesty offences, could easily be taken as implying that the criterion only applies in relation to serious offences. That this would be an incorrect interpretation is made clear by the following two cases, neither of which is cited in the guidance.

In *R v Scunthorpe Justices ex parte S.*[51] a 16 year old A-level student was arrested under s.5 of the Public Order Act 1986 and subsequently charged with obstructing a police officer. He applied for legal aid and invoked the reputation criterion, arguing that he was of good character, pursuing study that he hoped would lead to university and beyond, and expressing concern that a criminal record would affect his future prospects. The court clerk denied legal aid in part because he took the view that there was insufficient evidence to suggest that the applicant's circumstances were such that the disgrace of conviction and consequent damage to reputation would greatly exceed any punishment the court might impose. This view was also taken by the bench when the application was refused. The Divisional Court quashed the decision as 'plainly wrong' and 'irrational' declaring it to be 'obvious that... if the offence were proved even a modest sentence could seriously damage the reputation of a young man of good character on the threshold of life.' In the subsequent case of *R v Chester Magistrates Court ex parte Ball and another*[52] two adults of good character were charged with offences under s.5 of the Public Order Act 1986 but were denied legal aid on the ground that the offence was minor and that a court clerk's assistance would be sufficient. The Divisional Court quashed the decision and remitted it to a differently constituted bench who were directed to pay particular attention to the loss of reputation criterion.

These cases indicate that even relatively minor public order offences, with no hint of dishonesty, violence, or sexual wrongdoing, should be seen as posing a risk of serious damage to reputation for those without a criminal record. That being so, it is arguable that anyone without a criminal record should be granted legal aid on the ground of serious

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51 T.L.R. 5 March 1998.

52 (1999) 163 JP 757.

damage to reputation unless charged with summary motoring offences that, perhaps unfortunately, carry very little social stigma (e.g., speeding).

It was evident in our interviews with solicitors that some took a much narrower approach to the issue of which offences might engage the serious damage to reputation criterion. In addition, it was evident that, contrary to the guidelines, social class and position loomed large in their thinking:

> Bank clerk, somebody like that appearing for an allegation of shop theft. Little old lady, never been in trouble before, works in a charity shop, for shop theft – something like that. (Dultham, S1).

> In cases of dishonesty, where somebody doesn't have any previous convictions, that could be absolutely vital, if an accountant, for example, is accused of shoplifting, it may not be regarded as a very serious offence to some, but to the accountant, who could lose his whole career over it, it is vital. In those sorts of circumstances, yes, but if you've got an assault case, it may not. Assault cases, let's say he's a manual worker, he's not automatically going to get the sack just by being involved in a minor assault, and clearly damage to reputation is less important. So I think it depends on the charge and the nature of the occupation of the person facing the charge. (Brinswick, S1)

> That's where someone is a first time offender and I would say that if it simply a straight shoplifting and someone nicks a couple of biros... and they are convicted they will end up with a criminal record, but does it affect their reputation? It depends on who they are and what they do. I would say the average person it won't affect them unduly. I don't rate that as very important. (Alsbury, S2)

> You can have a middle aged lady, for example, who has been charged with shoplifting, and has a whole host of problems on her mind, and previous good character, say 45 years of age, it's very significant to that lady not to have a conviction. (Highfield, S3)

Other solicitors seemed somewhat more sympathetic to the notion that what mattered was good character rather than social status but accepted that damage to reputation was a difficult criterion to establish to the satisfaction of the court:

> Well, if they've got no previous convictions, if they've never been in trouble before... and I think this is one of the ones that is turned down quite a lot, they'll say, well, the court clerk can help in this respect, and the serious damage to reputation isn't so great. Because the moment someone appears in court, if they are an adult, their name can be in the paper, so their reputation is shot... It's one that you're more likely to be refused on to be honest. (Highfield, S1)

Consistently with this, interviews with decision-makers revealed a narrow interpretation of the loss of reputation criterion and a disinclination to give it much weight. One clerk

stated that she would never grant on this criterion alone, taking the view that if there was no risk of loss of liberty then there was equally no risk of serious damage to reputation. Other clerks made similar comments about the lack of influence this criterion had on their thinking. Moreover, there was little awareness shown of the point stressed in the guidelines that reputation is not a matter of social class or position. Indeed, in one low grant court there seemed to be a particularly narrow focus which did not extend much further than men and women of the cloth:

> If you have got a vicar or a lawyer or a teacher then fine, but the average run of the mill kind of person without a job that is really seriously going to be impacted by that then I wouldn't tend to be very impressed by that criteria. (Curborough, DM1)

> You have to justify that you have a reputation to lose, otherwise everybody who was of previous good character would get legal aid and that is not I think what we're supposed to do. I think the guidance says you have to be someone of reasonable standing in the community... if you're the town vicar, then you can be charged with anything and that would probably justify that ground, or a magistrate and that would satisfy it. (Curborough, DM2)

> I don't find that very often that there's real genuine reasons for that. One I did grant was a vicar who was charged with [a sexual offence]. (Curborough, DM3)

This was a criterion that produced widely differing interpretations within a court area. Taking Dultham as an example, there was a clear difference of approach between two of the clerks interviewed, one of whom took a strict approach to the criterion, while the second admitted to a more lenient (although still too narrow) interpretation:

> So they have got to have a reputation to lose and very often you would expect it to be a not guilty plea otherwise for certain offences it is inevitable. I question a 17 year old girl, in town drunk and disorderly and probably going to get a fine for it, what reputation she is going to lose. It certainly has a lot to do with age, obviously a 13 year old lad up for motoring offences that would be a nonsense isn't it, so there has got to be a reputation for a person to lose first of all. Solicitors very often just write no previous convictions in that box. That just goes without saying it is not enough is it. (Dultham, DM1)

> I think I am quite lenient I must admit on that one because I feel that as long as you are a person of previous good character, you can only use that once can't you, you have never taken anything out of the public system, probably paid in all your life then you probably deserve one crack at getting a solicitor but again you would have to have a not guilty, so you would have to convince me you were pleading not guilty in any event. But I am prepared to think about that perhaps, depends on the nature of the offence, as I say a wee in the street I'd say no, but anything in the dishonesty range or anything I would tend to say I would. (Dultham, DM2)

Interestingly, solicitors from the same court area were equally divided over this criterion:

> As a department we have formed the view that [Dultham] magistrates sometimes don't apply [this criterion] properly because we would say that anybody who is of good character who is accused of what could be classed as a minor offence nevertheless can lose standing in the community and severely damage their reputation. (Dultham, S2)
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> Reputation in my mind is of no significance at all. Once you're in court, your reputation is knackered anyway. Never used it, I don't think I've ever used it! (Dultham, S3)

Thus for some of those interviewed absence of previous convictions would seem to satisfy this criterion, even in the case of minor offences, while for others this would only apply for those of significant standing in the community, and minor offences were seen as carrying no risk to reputation. Both decision-makers and solicitors acknowledged that it would be unlikely for a case to be granted legal aid on either of these criteria on their own. These restrictive approaches need to be challenged in the light of the case-law discussed above.

iv) Substantial question of law

This is one of the criteria where the language of Form A departs from that used in the Access to Justice Act 1999. That Act asks decision-makers to consider 'whether the determination of any matter arising in the proceedings *may* involve consideration of a substantial question of law', whereas Form A's prompt is worded 'A substantial question of law *is* involved' (our emphases). The requirement of greater certainty on Form A makes the criterion appear more difficult to satisfy.[53] This probably makes little difference in practice but there is no good reason for the inconsistency between the Act and the standard application form. This gap between statutory language and bureaucratic form was highlighted in the 1992 research[54] and it is high time it was eradicated. That leaves open the question of how the gap should be closed. In principle, it seems to us that the statutory language expresses the test in the appropriate way. It would be wrong to require solicitors to express themselves with certainty on an application form given that they will receive remuneration for researching difficult questions of law and their potential application to the case only following a grant of legal aid.

Another questionable aspect of Form A is that it assumes that the point of law will arise from case-law (see further below) and this is backed up by the official guidance: 'The application form makes clear that where a point of law arises, it should be specified and the relevant case-law quoted' (CDS, 2002: 4). Substantial points of law often arise in relation to statutory provisions. Indeed, what frequently makes them substantial is that there is a *lack* of case-law on the proper application and interpretation of such provisions.

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[53] The same point applies in relation to all of the criteria relating to legal complexity (see sections 5f, 5g, 5h and 5i of Form A (unable to understand proceedings, trace/interview witnesses, expert cross-examination and someone else's interests, respectively).

[54] *In the Interests of Justice*?, p.23.

The wording of the guidance and Form A should therefore be changed to encompass these possibilities.

There is little case-law available on what is meant by a substantial question of law. In *R v Cambridge Crown Court, ex parte Hagi* (1979) 144 JP 145 the Divisional Court seems to have accepted that 'difficult points of law' would, in principle, satisfy this criterion. In that case the legal question was whether the amount of cannabis found in an undergraduate's college room was so small as to be unusable for any purpose prohibited by the Misuse of Drugs Act 1971. In *R v Scunthorpe Justices, ex parte S.*[55] 'a significant issue... of law' was regarded as meeting the interests of justice test. A 16 year old was part of a noisy group of young people whom two mounted police officers were attempting to disperse. He was arrested when he proved reluctant to 'move on', walking only slowly away. The High Court accepted that this raised a significant issue of law as to whether what happened could properly be described as obstruction.

According to the Criminal Defence Service guidance, this criterion should apply only where the question of law is substantial, relevant to the case, and the defendant cannot deal with it himself unaided (CDS, 2002: 17). It adds that if the applicant intends to plead guilty, the likelihood of this criterion being satisfied 'must generally be remote, though there may be exceptions, such as "special reasons" (e.g. laced drinks) in drink/driving cases. There may also be some instances in which sentencing considerations could give rise to a substantial question of law' (CDS, 2002: 17).

The substantial question of law criterion provided one of the clearest examples of a divergence of opinion between decision-makers and solicitors. The main disagreements related to the definition of substantial and whether or not the defendant could deal with it himself. The majority of decision-makers in both high and low granting courts thought that, in practice, this criterion was hardly ever satisfied, because although it was often invoked, the information provided was regarded as unpersuasive or the question of law seen as insubstantial:

> Your feeling really is that it is the last refuge of the desperate solicitor, substantial question of law, a bit like a PACE argument or Human Rights argument you think they have got no defence it is the only….um we have got people who quote *Ghosh* a lot which is the dishonesty case, and what they are thinking is a substantial question of law and what I would agree is a substantial question of law often don't agree, and we often refuse even when they apply for that... it is one of the things that is easy to raise for a solicitor who doesn't have any other grounds to go on. Just think of a point of law and stick that in and see if looks confusing enough! (Dultham, DM2)

> Quite often solicitors or defendants will use that category to try and justify a representation order when all else has failed; they are trying to sneak a representation order through one of the other categories. (Fyford, DM1)

[55] T.L.R. 5 March 1998.

> It does get mentioned quite often on applications but hardly ever is there a substantial question of law. They quite often put 'yes', to which I just wouldn't grant it on that ground. (Alsbury, DM1)
>
> Very few solicitors actually put a substantial question of law in that box; they put any old rubbish in thinking that they might get it granted. (Alsbury, DM2)
>
> That doesn't tend to carry much weight because the substantial question of law that is usually promulgated is *Turnbull* or something that the courts come across time after time after time and know how to deal with. (Brinswick, DM2)

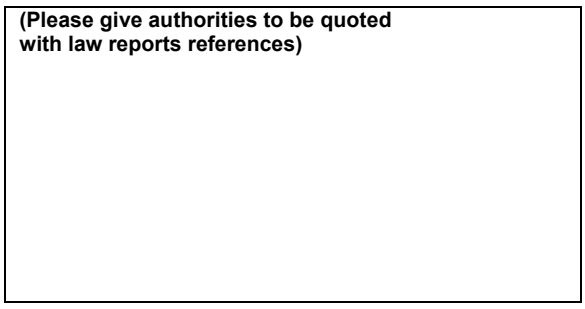
Some court clerks took a different view, however, as the following quote illustrates:

> They might argue the *Turnbull* guidelines in relation to identity; quite often I will grant legal aid in relation to that... It can't be expected that the man on the street will, you know, put over the *Turnbull* guidelines and how they apply to a particular case... (Granton, DM3)

Not surprisingly, solicitors were more likely than court clerks to consider issues such as identification or self defence as substantial questions of law:

> Ok, even something like self defence sounds easy to a lay person – well I was defending myself – but you know you have a subjective test followed by an objective test and then matters of reasonableness, so when you mix all that together you have some of the most complex scenarios imaginable. (Fyford, S1)

Decision-makers tended to complain about the lack of detail provided by solicitors on questions of law. One explanatory factor for this lack may lie in the belief that the defence should not disclose its case in advance of trial. As one solicitor put it: 'It's important for the defence solicitor to make clear what the [legal] issue might be, without giving away the defence' (Brinswick, S1). How much detail is expected? The application form requests 'authorities to be quoted with law reports references'. As will be seen in chapter 9, it is only rarely that these are provided. A solicitor told us that 'you're making these things up in the court corridor, you don't have bloody case citations there' (Dultham, S3). However, the same solicitor also pointed out that the design of the forms discouraged the provision of detailed reasons: 'you're not going to get a very fulsome entry in a little box that size, I mean have you seen the size of them?' (Dultham, S3). The size of 'substantial question of law' box in Form A shown below:



Some decision-makers who considered this criterion to be relatively unimportant argued that the defendant would not be disadvantaged by the lack of legal representation because of the assistance that they could provide in court:

> Where they simply say 'this person's lying I deny the offence etc' it is a matter of fact. As court clerks, legal advisors at a trial we will be able to assist them to put their case to some extent, therefore just on that information we would not grant legal representation on those grounds. (Fyford, DM1)

> It does depend on what the offence is and what it is that the question of law is, because a legal advisor is in court to give advice also to the person in front of them as much as it is to give advice to Magistrates; they would be there to help them with the law side of things. (Highfield, DM3)

By contrast, solicitors thought that this was not properly part of the role of legal advisor and that it was unrealistic in any case to imagine that a clerk would deal adequately with difficult points of law.

> In the reasons they give for refusing legal aid is that the legal advisor will be able to assist the defendant at the time. Well if you can play umpire, batsman and everything else all in one, it rather baffles me. The legal advisor is there to advise the justices, not to advise a defendant. (Curborough, S2).

> In practical terms, that is not going to happen with a busy court, and you are not going to have clerks advising on points of law to represent defendants. (Granton, S1).

A few solicitors contended that substantial points of law may arise in advance of the trial (where a court clerk could offer no assistance):

> Substantial questions of law aren't necessarily particularly complex. It might be if somebody has pleaded not guilty to a fairly straightforward offence, if all the papers are going to be served section 9, so that the prosecution are saying, 'we don't want to bring these witnesses to be questioned, do you accept what's written here?' I call that a substantial question of law. I wouldn't expect a lay client to sit down and work out who he needs to cross-examine and who he doesn't. (Alsbury, S1)

The Criminal Defence Service guidance does not specifically address the question of whether decision-makers can appropriately take into account the argument that points of law in favour of the defendant can be handled by legal advisors. Its formulation that a grant should be made only if the applicant cannot be expected to deal with the point of law unaided seems to imply, however, that it is wrong for court clerks to substitute the rather different test of 'the applicant cannot be expected to deal with the point of law

even with our help'. Clarification of this issue would seem desirable given the strong differences of opinion we uncovered when talking with court clerks and solicitors.

Solicitors also argued that, even in a relatively simple trial, the points of law which could emerge were sufficiently complex as to require independent legal representation. As one noted, 'road traffic... has some of the most complex bits of legislation anywhere' (Alsbury, S3). There was a general recognition amongst solicitors, however, that it was unlikely that a case involving a minor offence would attract a grant of legal aid on the ground of substantial question of law alone.

As noted above, in four courts the majority of decisions were taken by administrative staff and it is interesting that in these courts two different approaches were taken in relation to this criterion. In one court, staff had been advised that if a case had been cited (e.g. *R v Turnbull*) then it could be granted without having to check with the legal advisor. In other courts, any application in which the substantial question of law criterion was invoked would generally be referred to a legal advisor.

Finally, we should note that decision makers saw this criterion as relevant only in not guilty cases. 'If he's admitting it, it doesn't make any difference to him' (Elswich, DM3) was a fairly typical comment from court clerks on this issue, although a few did acknowledge the possibility of a substantial question of law arising in a guilty plea case in the context of a *Newton* hearing.[56]

v) Inability to understand proceedings

This is the criterion where there is the greatest gap between the statutory language on the one hand, and the guidance and design of Form A on the other. The Access to Justice Act 1999 uses the formulation "whether the individual may be unable to understand the proceedings or to state his own case" without ascribing those incapacities to particular causes such as inadequate understanding of English or a disability. As noted in Chapter 2, the earlier Legal Aid Act 1988 did make use of those exact ascriptions. In principle, the 1999 Act seems to have adopted the right approach here since if individuals are unable to state their own case or understand proceedings the case for legal aid seems strong, regardless of why that inability exists. However, the 'restricted ascriptions approach', as we shall call it, continues to underpin practical understandings of the Widgery criteria.

Thus, section '5f' on Form A begins with the following prompt: 'I shall be unable to understand the court proceedings or state my own case because (i) My understanding of English is inadequate* (ii) I suffer from a disability* *Delete as appropriate'.[57] The Criminal Defence Service guidance similarly adopts the restricted ascriptions approach. 'Inadequate knowledge of English' and 'Mental or physical disability' appear as sub-

[56] A *Newton* hearing is a procedural device whereby a court can, at the post-conviction pre-sentencing stage, hear evidence to resolve a conflict between the prosecution and defence on the factual matrix of a guilty plea case.

[57] As with some of the other criteria, it is notable that the statutory word 'may' has become 'shall' on Form A. See our earlier discussion of the 'question of law' criterion on this point. Here, we have bigger fish to fry.

headings under 'Reasons for wanting a right to representation' (CDS, 2002: 12-18). In other words, they are given the status of free-standing Widgery criteria, albeit that both are linked to an inability to follow proceedings or state own case. Thus, as far as the guidance and Form A are concerned, that inability is not seen as a criterion in its own right. Not surprisingly, given the design of Form A, the change in the statutory language between 1988 and 1999 seems to have passed over the heads of decision-makers and solicitors. While changes to the guidance and standard application form are evidently called for, it may take some time (and focussed effort) to shift entrenched understandings of the scope of this particular criterion.

In the rest of this section we consider whether these overly restrictive understandings of decision-makers are nonetheless in line with the (similarly restrictive) Criminal Defence Service guidance. In relation to 'inadequate English' the guidance states that:

> A right to representation should not be granted unless the applicant's knowledge is sufficiently poor to prevent him from following the proceedings or conducting his case. The fact that the services of an interpreter are available is not a sufficient ground for refusing[58]…The level of understanding may differ with the complexity of the case; the applicant may be able to manage in a very straightforward case… (CDS, 2002: 18)

In four of the courts it was evident from the comments of decision-makers that there was a court policy regarding lack of adequate English. In two of the courts, the decision-makers adopted the guidance set out above; in other words, for straightforward matters, legal aid would not usually be granted:

> If they are pleading guilty and it is a relatively minor charge that the magistrates' guidelines don't suggest they are going to get custody for, or a non-imprisonable offence say, then I would say the interpreter was enough with me there to explain things to them. Providing it was relatively straightforward. (Curborough, DM1)

> I think it is partly going to depend on the seriousness of the offence, we have a lot of immigrants here, we have a lot of interpreters, we don't need a solicitor to employ an interpreter, we can do it ourselves … the more serious the offence the more likely it is you would grant it because there is more need perhaps to have a deeper understanding of the law, because generally the law for say a speeding offence is quite simple. (Dultham, DM1)

In the other two courts, however, decision-makers adopted a policy which seemed to be at odds with the guidance, in that legal aid was almost invariably granted for applicants who could not understand English, although the reasons for this varied from it being in the interests of justice to being in the interests of the court:

[58] Reinforced in the judgement *R (on the application of Matara) v. Brent Magistrates' Court* [2005] EWHC 1829.

> If they need an interpreter then I normally grant legal aid under that, basically for any offence…mainly for the convenience of the court I would say! (Alsbury, DM3)

> Yes English is very important because that affects you know article 6.
> *Q: Even for minor road traffic, you would tend to grant?*
> Yes, well they wouldn't be able to have a fair trial at all, they wouldn't be able to take part in the proceedings. Importantly they wouldn't be able to understand their sentence so if you just disqualified them you know they have got to be able to understand that, so, very important. (Alsbury, DM1)

The views of solicitors were also split between those who thought that legal aid should always be granted in cases where defendants did not speak English and those who thought it should depend on the seriousness of the offence and complexity of the case. Interestingly, solicitors either did not seem to be aware of the policies of the courts (where these were extant), or believed them to be different from what had been indicated by decision-makers themselves. For example in Dultham, where decision-makers indicated a close adherence to the guidance, one solicitor commented:

> I think in that case the court's wish to have the case dealt with quickly and smoothly overrides necessarily their usual reluctance to apply the categories very strictly. I think that is one category where I would say probably Dultham clerks don't exercise their discretion according to the strict letter of the criteria, if anything are slightly more generous. (Dultham, S2)

Generally speaking, solicitors and court clerks placed most emphasis on whether a defendant would be able to *understand* the proceedings *in court*. There was little emphasis on the ability to *state one's own case*, and that is understandable given the relative scarcity of contested matters in the magistrates' courts. However, some solicitors argued that there was a need to state one's own case effectively even in guilty plea cases, noting that defendants with poor English could not be expected to make effective speeches in mitigation even with the assistance of an interpreter (e.g., Dultham, S1). There was also an acceptance amongst some interviewees that 'proceedings' should be seen as including the *pre-court* stage in which documents might have to be read and acted on. In one court it was evident that a recent High Court decision[59] (in relation to someone who was contesting a failure to provide a breath specimen charge) had led to a rethink on these points:

> Well we always provide them with an interpreter. There is a recent case about legal aid, I forget the name of it, and the Brent magistrates' court refused. If they are going to have a trial then I think they need a lawyer as well as an interpreter for virtually anything they face because they are not going to be able to understand the papers that are served on them and things like that, and they are not going to be able to effectively run their own defence. (Curborough, DM1).

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[59] *R (on the application of Matara) v. Brent Magistrates' Court)* [2005] EWHC 182 (discussed in chapter 1 of this report.)

> I think there's been a case on it recently, so they've just changed our policy. There was a case where magistrates were overruled for refusing legal aid for somebody who was a non-English speaker who was having a trial, and that obviously builds in a new dimension, because you provide an interpreter for court, but, for trial, you really need to see all the papers in advance, you possibly need to find witnesses, take statements, I think it gets too complicated. (Curborough, DM2).

In most courts, however, no reference was made to this recent authority. The extent to which decision makers (and solicitors) are attuned to developing case-law is likely to be another source of variation in grant rates, and this is one area where the closer involvement of the Legal Services Commission in future may prove beneficial.

With regard to the 'disability criterion', the guidance states that representation should be granted if the applicant cannot understand proceedings or conduct his case due to 'substantial physical disability, for example deafness or blindness or a speech impediment, or by reason of mental disorder' (CDS, 2002: 18).

Decision-makers seemed to interpret this criterion according to the guidance. Thus, applications which stated that the defendant had a mental illness would usually be granted, as would those with a physical disability, such as deafness or speech impediments, which would adversely affect their ability to take part in proceedings. Where the disability was physical and not relevant to understanding it would not. There was a grey area as to what comprised mental illness – some solicitors routinely put in applications for alcoholics or drug addicts on the grounds they could not conduct their own case. Most decision-makers, however, did not generally view that as a relevant disability, unless additional information was provided:

> The most common thing they put is, 'I am a drug addict' and I don't grant just on that. I don't say you couldn't grant on someone who is a drug addict if they had side effects that meant they couldn't properly present their case, but if you just say you are a drug addict I think that is too generic and I wouldn't grant on it. (Alsbury, DM1)

A second grey area related to the age of the defendant. Some solicitors interpreted the defendant's youth as a disability:

> Now, that's where, if I'm making an application for a youth I would always put down 'I am 15 years old and cannot be expected to conduct the case on my own'. (Alsbury, S1)

In some courts, this reasoning was accepted and there was a de facto policy of granting automatically for any case involving a youth; in others, youths would be granted representation only if the case met one of the other statutory criteria. Age of the defendant is an issue on which the guidance is silent. This major omission may stem in

part from the fact that this guidance was drawn up mainly with Crown Court cases in mind[60] and in part from the 'restricted ascriptions approach' since one would not normally think of youth as a disability or as an indicator of a lack of adequate English. But as soon as one thinks in terms simply of the ability to state one's own case, the relative immaturity of young people and their tendency to clam up when in the presence of adults become much more obviously relevant factors. Similarly, psychologically vulnerable defendants may not appear to be covered if one adopts the 'restricted ascriptions approach', as illustrated by the comments of the following solicitor:

> It is interesting, some of the criteria aren't there, vulnerability of clients meaning that... they don't strictly speaking have a mental health problem, they can read and write after a fashion, but because of their mental makeup, their psyche if you like, their psychology, easily led, very impressionable, can be made to say or do anything in court really, or with the police. (Curborough, S3)

In short, there is a case for a major rethink of the ambit of this criterion.

vi) Tracing and / or interviewing witnesses

The guidance for the criterion relating to the tracing and/or interviewing of witnesses is confined to the following terse paragraph:

> The application should provide details of the witnesses, and state why representation is necessary to trace and/or interview them. If details of witnesses are not included, consideration of the application should be deferred until the applicant has provided sufficient information to make a determination.' (CDS, 2002: 18-19).

It will be recalled from table 9 above that this criterion received the lowest overall rating from decision-makers and this is reflected in the dismissive comments made by many (in both high and low granting courts), which tended to centre on the ability of the defendant to trace his own witnesses:

> That doesn't carry very much weight with me. I think I don't believe them usually when they say that. (Brinswick, DM2)

> No not very important! Most of the time I think witnesses often are people known to the defendants themselves and therefore they are quite able to trace them. (Curborough, DM1)

> I haven't found this one very appealing at all, tracing witnesses, because often they will say 'there were people in the car with me', well why do you need to trace them, or you know 'my mother needs to be traced and interviewed' – why, you live with her! (Dultham, DM2)

[60] Personal communication from the Legal Services Commission.

Part of this scepticism may stem from a sense that this criterion is only relevant when the case is going to be contested; only a relatively small proportion of cases in the magistrates' courts result in a full-blown trial. The criterion clearly has wider relevance than that, however. Witnesses may need to be traced and interviewed with a view to constructing an effective speech in mitigation, for example. Moreover, the Divisional Court has accepted that it would be proper to grant legal aid to enable someone pleading guilty to a drink-driving charge to trace witnesses to the alleged lacing of her drink, so as to support her argument that there were special reasons to refrain from the usual disqualification penalty.[61]

A much more prominent theme in our interviews with decision-makers', however, was that solicitors often failed to provide sufficient detail in support of this criterion (the analysis of application forms in chapter 9 suggests this was not an unfounded belief):

> Very rarely I think we grant it on these grounds because we don't get enough information. They tend to just say 'witnesses have to be traced. Client has got four witnesses'. 'Great – refused!' (Granton, DM3)

> Well they never give any kind of useful description of what that involves in my experience, they'll just put 'yes', or 'witnesses have to be traced', you think 'why, don't you know them, if you do what are they going to say?' (Curborough, DM2)

The assumption in the final quote that an applicant should indicate what the witnesses are going to say seems wrong-headed. The statute only requires that an applicant establishes that there *may* be a need to trace and/or interview witnesses.[62] Consistent with this is the ruling in *R v Scunthorpe Justices ex parte S.*[63] (discussed under the serious damage to reputation sub-heading above). One of the grounds for declaring the refusal to grant legal aid as 'irrational' and 'plainly wrong' was that (per Kennedy L.J.) 'it was obvious that the applicant would want to have those who were nearby traced and interviewed *to see if they could give evidence which could assist his case*' (our emphasis). When one bears in mind that this case concerned a relatively minor obstruction charge it seems clear that the higher courts would want the magistrates' courts to apply this criterion in a much less restrictive fashion than they currently do. Not a single clerk or solicitor mentioned this case in relation to this criterion and it is regrettable that the Criminal Defence Service guidance does not cite or discuss it.

Some decision-makers did provide examples of when they would grant under this criterion, including cases where CCTV evidence needed to be obtained for the defence, or where the offence took place in a public place (e.g. public order) and the police had not interviewed all the potential witnesses. However, such cases were seen as the exception rather than the rule.

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61 *R v Gravesham Magistrates' Court, ex parte Baker* T.L.R. 30 April 1997.

62 Form A uses the more demanding formulation of 'witnesses *have* to be traced and/or interviewed...' (our emphasis). For a critique see the discussion of the substantial question of law criterion, above.

63 T.L.R. 5 March 1998.

On the whole solicitors were quite realistic about their chances of getting legal aid on this ground, and it was recognised that, in common with some of the other criteria, this was partly dependant on the seriousness of the offence. Others said that this criterion would be used in conjunction with others to strengthen an application:

> They all have to link in, you would never get a rep. order if you just fill one of these boxes in. If you went straight for, 'witnesses need to be traced', you wouldn't get a rep. order, you'd find some remark in the corner such as 'why?' So, you would link that in with one underneath, 'any other reasons', which would be, 'Damn it, I'm pleading not guilty, and there were other people in the pub, and the taxi driver, all need to be traced and interviewed and witness statements taken', so you'd always link that in. As a stand alone, I've never known it work, never used it as a stand alone, never even considered that. It has to be in conjunction with a process up to trial. (Dultham, S3)

It became apparent in our interviews with court clerks and solicitors that this criterion was often seen primarily in terms of tracing witnesses rather than interviewing them. Where interviewing was mentioned at all, it was virtually always seen as something that came into play only if witnesses needed to be traced in the first place. This is despite the fact that the statutory language, the guidance, and Form A all indicate that the criterion is satisfied if there is a need either to trace witnesses *or* to interview them. Only a small minority of solicitors spoke of the value of legal representation for the purpose of interviewing witnesses:

> How can [the defendant] do that themselves? Do they know how to take these witness statements? Do they know what they are looking for?... What would you ask them? What information would you take from them? Can you do it yourself? Answer, no, you need a solicitor. (Brinswick, S2)

> The average punter isn't going to be able to do all that... They may know who the witnesses are, but they won't necessarily know how to get the right information from them, they might not have the standing that will make the witnesses respond to them, whereas if a solicitor conducts the interview they are more likely to get a result. It is pretty important, yeah. (Alsbury, S2)

> The interviewing of a witness is probably a specialist job because there is the law of relevance, there is the law of admissibility, the law of hearsay, it isn't straightforward. (Elswich, S2)

It would be helpful if the official guidance could give examples of when a grant of legal aid might be justified simply in order to enable *interviewing* of defence witnesses. At present, most solicitors are generally doing a poor job of providing adequate information and justification in this respect which perhaps reflects the fact that they themselves mostly do not see much value in interviewing defence witnesses other than the client. While this remains the case, court clerks will (understandably) continue to place little

weight on this criterion. We have, however, indicated a number of ways in which current understandings of this criterion are unduly restrictive. These could be addressed and challenged through new guidelines.

vii) Expert cross-examination

The last two criteria – expert cross-examination of a prosecution witness and where it is in someone else's interests that the accused be represented – were the criteria most likely to be misinterpreted by both decision-makers and solicitors. Taking first the issue of expert cross-examination, the guidance states that this is for cases where professional cross-examination is needed, and might arise where the witness is an expert, but also in cases 'where shades of emphasis in the evidence can make an action appear more sinister than it was in fact' (CDS, 2002:19). The guidance goes on to say that in considering applications, decision-makers should focus on the nature of the evidence rather than the status of the witness providing it (ibid). In fact, hardly any reference was made by either decision-makers or solicitors to the 'nature of the evidence', but there were indications that solicitors (and less often decision-makers) were influenced by the standing of the witness.

Some interviewees were genuinely confused by this criterion, and admitted they were not entirely sure when it was intended to apply:

> I am never quite sure what expert cross-examination means. Does that mean it has to be someone who has done it before? Someone who is very good at it? Or someone who is just a qualified barrister or solicitor? (Curborough, S1)

A minority of decision-makers (five) and solicitors (four) believed that this criterion only applied where the prosecution was an expert witness:

> I think what it implies there is that the witness is an expert who you have to cross-examine. Not that you're so skilled that you're a real expert at cross examining anybody. (Curborough, S3)

> You see expert cross-examination means expert, not just I am a poor member of the public and you are a policeman, we don't take that as expert, expert means you have got somebody with an expert knowledge of an area that needs cross examining on that area. (Dultham, DM2)

This is a troubling finding given that there is clear authority of over a decade's standing that this criterion does not only arise in the case of expert witnesses: *R v Liverpool City Magistrates ex parte McGhee.*[64] The case is cited in the Criminal Defence Service guidance (2002: 19) which itself emphasises that, 'The Act refers to expert cross-examination of any witness and **not** only to cross-examination of an expert witness' (emphasis in original). The fact that so many of those operating within the magistrates' courts are labouring under this misapprehension provides further evidence of the limited impact that guidelines and case-law have on everyday understandings of the interests of justice test.

[64] [1993] Crim LR 609.

An important divergence in view between solicitors and decision-makers concerned police witnesses. Many solicitors argued that police officers would require expert cross-examination due to their training in giving evidence:

> You've only got to hear an unrepresented defendant trying to cross-examine a police officer. He's out of his league. (Highfield, S3)

> If you know your client is going to be pleading not guilty, then straight away emphasise the fact that prosecution witnesses will have to be cross-examined, especially if they're police officers, stress that, and that's a big criterion for granting legal aid in my book. (Fyford, S3)

This was not a view generally shared by decision-makers:

> I don't necessarily agree with most defence advocates' views that police officers are expert at giving evidence in court and require expert cross-examination. (Curborough, DM1)

Some assistance in resolving this issue can be gained from the higher courts. In *R v Stratford Magistrates Courts ex parte Gorman*[65] an 18 year old man was charged with having a large knife in a public place. He applied for legal aid arguing that there was a need for expert cross-examination of the two police officers who were going to give evidence against him. The refusal of legal aid was upheld on the ground that it could not be said that discretion had been exercised wrongly given that the case was comparatively trivial, although both judges in the Divisional Court indicated that on the facts of the case they 'would have thought it right for legal aid to be granted to this young man' (per Alliot J.). A stronger case is *R v Scunthorpe Justices, ex parte S.*[66] in which it was ruled that a refusal of legal aid on a charge of obstructing a police officer was plainly irrational because 'as a 16 year old boy, with what may have been a viable defence, he would obviously be seriously handicapped if left to conduct his own defence and cross-examine one or more police officers on his own. There was an obvious need for expert cross-examination.'

It seems to us, in the light of these cases (neither of which is cited in the Criminal Defence Service guidance on expert cross-examination), that any new guidelines should deal specifically with the issue of prosecution witnesses who are police officers and make clear that evidence of a need for cross-examination of such witnesses should militate in favour of a grant. That is not to say that a grant of legal aid should be automatic wherever police officers are to give evidence, but the presumption should be that it is unreasonable to expect unrepresented defendants, particularly when they are fairly young, and especially when the charge is other than minor, to cross-examine the very people who have helped to put them in court in the first place.

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65 (CO/687/89) 12 June 1990.

66 The Times, 5 March 1998.

The most obvious misinterpretation of this criterion was where it was thought to apply to the cross-examination of victims, particularly those of domestic or sexual offences:

> If it is a domestic violence case it is inappropriate for a defendant to cross-examine his or her spouse. (Fyford, DM1)

Although this is a relevant ground for granting legal aid, according to the guidance this should properly be considered under the last criterion, which is 'someone else's interests'.

viii) Someone else's interests

The guidance for this criterion states that those charged with sexual or violent offences, or offences involving children or other vulnerable people, should not directly cross-examine the victim, and therefore it would be in the victim's interests for the defendant to be represented (CDS, 2002: 19). The 'someone else', in other words, is a vulnerable prosecution witness. Most of the interviewees had grasped this, but a substantial minority (five decision-makers and six solicitors) had not.

Those who had misinterpreted the expert cross-examination criterion also tended to misinterpret the 'someone else's interests' one, or simply not understand it at all. It was believed by two decision-makers and one solicitor to refer to the interests of the court:

> That would be in the courts' interests, if you get a difficult defendant which we do get, even if the offence is of a minor nature, it is better to have a solicitor there than them rattling on. (Alsbury, DM2).

This is contrary to the guidance on this criterion which states that this ground should not be used to fund representation in order to remove delay in court proceedings (CDS, 2002: 20).

The second area in which there was some confusion (expressed by one decision-maker and two solicitors) was whether this criterion was meant to apply in the interests of the defendant's family. The guidance clearly states that funding should not be given for this reason (ibid).

The fact that five further interviewees (two decision-makers and three solicitors) were unable to offer any explanation as to the meaning of this criterion suggests once again that the current guidelines have had a disappointingly limited effect:

> Yeah that's the one I don't understand. I've never understood that. I've never looked it up but I've never used it no. In whose interests is it unless it's [pause] no I don't understand. (Alsbury, S2)

> That one to be honest, I don't understand how it can be in the interests of someone else. It's got to be to in your own interests hasn't it? (Elswich, DM2)

Dynamic interpretations of the Widgery criteria

There have been numerous changes in criminal law and procedure in recent years,[67] and we asked decision-makers whether they thought any of these had altered the probability of an application being granted legal aid – 20 of the 24 decision-makers thought that this was indeed the case. Most commonly mentioned (10) was the introduction of new sentences such as Anti Social Behaviour Orders (ASBOs) or football banning orders, which because of their implications for restriction of liberty, had increased the likelihood of grant:

> You know ASBO came along and suddenly fairly minor offences you possibly were going to get an ASBO for, and, depending on the type of case and ASBO, it may be that there is quite a lot of law to argue and it may be that it has a profound restriction on your liberty. I am not talking about the first ground [likely loss of liberty] now, I mean that in the wider sense, that is making it more important that you properly argue your case against it. (Brinswick, DM2)

Changes in sentencing guidelines (mentioned by seven decision-makers) were also viewed as a factor in altering the probability that applications will be successful. Some of the changes have had the effect of increasing the risk of custody, and therefore grant of legal aid, while others have had the opposite effect:

> Certainly failing to surrender to bail now the guideline is custody, conversely driving whilst disqualified actually went down, it was custody and we always used to grant it, but now for a first offence they won't get custody unless there's an aggravating feature… (Curborough, DM3)

> A big change to me is assault, section 39, I never used to grant legal aid for it, now I do. It's because the offence is viewed as more serious now. (Elswich, DM2)

Ed Cape has noted that, in recent years, 'many laws and procedures have been introduced that, in effect, assume that a defendant will be legally represented' such as the inference provisions under the Criminal Justice and Public Order Act 1994 and the disclosure provisions under the Criminal Procedure and Investigations Act 1996 (as amended by the Criminal Justice Act 2003). He adds (citing as an example the 'plea before venue' procedure introduced in 1996):

> Furthermore, the complexity of many modern laws and procedures means that courts would be in some difficulty if they could not rely on defence lawyers to explain them satisfactorily to the accused.[68]

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[67] For a review, see Wasik, M. (2004) 'Going Round in Circles? Reflections on Fifty Years of Change in Sentencing' Criminal Law Review 253.

[68] E. Cape, 'The Rise (and Fall?) of a Criminal Defence Profession' [2004] *Crim LR* 406. See also the Criminal Procedure Rules 2005. It is difficult to see how unrepresented defendants can comply with these voluminous rules. For example, rule 2.1 requires that 'each participant' must prepare and conduct the

Consistent with this, when we asked court clerks and solicitors why an increasing proportion of applicants for legal aid were successful, increasing legal complexity featured prominently in their responses. New bad character provisions (whereby defendant's previous convictions can be admissible in court where it is relevant) were introduced by the Criminal Justice Act 2003, and this was mentioned by four decision-makers as a factor likely to increase grants of legal aid, due to the complexity of points of law to be argued:

> The bad character provisions under the Criminal Justice Act – now defendant's previous convictions can be adduced which clearly the prosecution wish to do, it could be highly prejudicial to a defendant who wanted to plead not guilty to an offence. I think it is only right because of the complexity of the law and I think the legal advisors are finding it a little complex as it is, that a solicitor should deal with that. (Granton, DM1)

The increasing complexity of criminal law and procedure was also seen by some solicitors as a reason in itself for seeking legal aid. The Criminal Justice Act 2003 was singled out for special mention in this regard:

> A lot of the time you are arguing for legal aid on the basis of new rules of evidence or procedure which have to be argued. (Brinswick, S2)

> It's the way in which legislation has become so complex, you know the amount of legislation which has come through, it's almost impossible for us to keep up with it, every time you turn around there's a new Act of Parliament come out... in the good old days, you had the simple offence of theft and yes/no we'll give you a [Community Rehabilitation Order or Community Punishment Order]. Now of course we've got community orders which can be made up of so many different aspects, curfew order, unpaid work, it's very difficult for clients to work out what they should and shouldn't be agreeing to. Also, one of the most complex areas is the ASBO because it seems to me that the council and prosecution department are using those orders in a way that was never intended by the legislation. They are very draconian powers... (Alsbury, S3)

Finally, the Human Rights Act 1998 was said by three decision-makers to have increased the likelihood that cases would be granted, at least in the immediate aftermath of the Act's implementation. They noted that fewer solicitors were now using the 'equality of arms' argument, and they themselves were now less likely to accept it.

Conclusion

We have seen evidence of varying levels of disagreement and differences of interpretation of the interests of justice criteria. Disagreement amongst decision-makers as to the correct interpretation of criteria was most evident in relation to the 'inability to

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case in accordance with the 'overall objective', comply with the rules, and inform the court and other participants of any significant failure to take a procedural step.

understand proceedings due to inadequate English', 'expert cross-examination' and 'someone else's interests' criteria. Part of the reason for such variation seems to lie in different attitudes to factors such as inadequate information and the role of the legal advisor in advising the defendant.

There was no evidence, for any of the criteria, that differences in interpretation were associated with the grant rate of the court. Rather they seemed to reflect individuals' varying levels of knowledge of the criteria and guidance on them. Thus, with the exception of the inadequate English and substantial question of law criteria, there was no evidence that courts adopted consistent policies in relation to any of the criteria.

In some areas it is clear that too restrictive an interpretation is being taken by court clerks and, less frequently, by solicitors. This was particularly evident in the case of serious damage to reputation where there was general ignorance evident of the position taken by the guidance and judicial authority. Erroneous understandings of the criteria were also evident for expert cross-examination and someone else's interests. In addition, few respondents were able to see the value in tracing and (particularly) interviewing witnesses. Widespread adoption of the (misconceived) 'restricted ascriptions approach' to the ability to understand proceedings and state one's own case is more understandable given the design of Form A and the wording of the guidance.

We have seen that the guidance is helpful in some areas but questionable in others, and there are some glaring omissions. The significance of an indication of a guilty plea needs to be spelt out in relation to a number of the criteria, and the question of how legitimate it is for clerks to refuse legal aid on the basis that they can adequately support unrepresented defendants needs to be addressed. In addition, the application of the criteria in the case of youthful and vulnerable defendants needs discussion, as does the possibility that legal aid might be needed in order to enable a solicitor to interview defence witnesses (whether they need tracing or not). More High Court authorities should be cited and their significance more fully drawn out. Finally, greater clarity is needed on the question of the degree of risk which engages the custody criterion; this is one of the few areas in which the guidance can be read as not restrictive enough.

We have argued that the wording on Form A requires revision in that it requires too high a degree of predictive certainty from applicants in relation to the criteria concerned with legal complexity, assumes (wrongly) that substantial questions of law necessarily involve case-law, and adopts the erroneous restricted ascriptions approach.

What responses to our questions about why the grant rate may have increased over recent years demonstrated is that solicitors and decision-makers are well aware of the wider policy and sentencing environment in which they operate, and that they are willing to respond to changes. Inevitably, understandings of the torrent of new legislation diverge, as do views on the extent to which any given procedural, substantive, or sentencing innovation engages the Widgery criteria.

To sum up, the sources of inaccurate and inconsistent understandings of the Widgery criteria are multiple and some of them are of a long-standing nature. Those aiming to promote more accurate decision-making in future need to be clear about the scale and nature of the problems they are up against.

6. COURT POLICIES ON LEGAL AID AND FACTORS OUTSIDE THE INTERESTS OF JUSTICE CRITERIA

It is crystal clear that the Widgery criteria are not exclusive; other factors may be taken into account in applying the interests of justice test. The Criminal Defence Service guidance acknowledges this and states that when a non-statutory factor is held to have supported the grant of legal aid this should be clearly specified on the application form (CDS, 2002: 20). The standard version of that form has a separate box prompting the applicant to supply 'any other reasons' adding that full particulars should be given. The only non-statutory factor that the guidance mentions is the defendant who is so disruptive that only a grant of representation will permit the judicial function of the court to continue (CDS, 2002: 20).

To determine whether this or other factors are taken into account we asked both decision-makers and solicitors firstly whether the court had any particular policy with regard to legal aid applications, and secondly, whether any factors outside the criteria were ever taken into account in deciding applications. Finally, we asked whether they believed there was a need for any changes to, or clarification of, the interests of justice criteria.

Policy with regard to legal aid applications?

There was no evidence from responses to the first question that courts took additional factors into account when deciding applications. The large majority of decision-makers and solicitors said either that the court had no particular policy regarding applications, or that the 'policy' was simply to apply the interests of justice criteria:

> It is the Widgery criteria which are the beginning and the end of it. (Fyford, S3)

> No, I mean we apply the rules, the Access to Justice Act. (Alsbury, DM1)

Interviewees were more likely to mention differences in procedure (rather than policy) in response to this question. For example, in two courts, it was the policy that when solicitors referred to previous convictions, they would be asked to provide a copy of these with the application form. In another court, decision-makers said they consulted a list of offences which had been drawn up by the legal advisors, for which grant of legal aid could automatically be made.

Another comment made in response to this question concerned the relationship between court staff and solicitors. It emerged that in none of the courts was there a regular channel of communication between decision-makers and solicitors regarding the correct interpretation of criteria. The attitude of decision-makers seemed to be 'it's up to the solicitors to give good reasons why the representation order should be granted' (Fyford, DM1); solicitors for their part did not tend to expect any feedback or guidance. While experienced solicitors may arrive at the same understanding of the criteria as do decision-makers (as one said 'we know generally what they're looking for, you know what to put down, what not to waste their time with' Elswich, S2), the lack of feedback for inexperienced solicitors might explain some of the variation in grant rates.

Factors other than the Widgery criteria?
The second, more specific, question revealed additional factors which might be taken into account. Ten of the decision-makers said that they did consider factors outside the interests of justice criteria.

(i) Age
Four decision-makers said that they would take the age of the defendant into account (this reflects the finding from table 8 where 16% of decision-makers spontaneously identified age to be one of the most important criteria when determining applications).[69] In each of these cases, those aged 17 or under would be more likely to be granted legal aid.

> If they are a youth I know before I get to the text the reasons I am going to grant it... If they haven't written within the reasons that the defendant is a youth, I will still grant it. (Brinswick, DM1)

We saw in the preceding chapter that age is a factor that the Divisional Court has seen as relevant to the interests of justice test. It was also noted in chapter 1 that the European Court of Human Rights requires that those assessing the interests of justice test under Art.6 should have regard to the personal circumstances of the defendant, including age. The silence of the CDS guidance on the issue of age as a possible 'other factor' will need to be addressed in future guidelines.

(ii) Efficiency in court
There was a view among some decision-makers and solicitors that certain unrepresented defendants will take an inordinate amount of time to deal with, and thus disrupt court proceedings. Six decision-makers said they would take into account the efficiency of the court when deciding applications. In some cases, solicitors did not even need to submit an application, as court clerks would, on occasion, approach them and ask them to represent a difficult defendant. This was justified as being either in someone else's interests (i.e. the court's) or in the defendant's, due to a quasi-disability:

> We often grant for a difficult defendant but we would try to put it into one of the other factors to say it is in somebody else's interests that he be represented, and that somebody else is me (because I don't want to have to deal with him) or the magistrates. Very often there are petty criminals that are violent who we grant legal aid to because a solicitor takes the sting off the situation. So we do have some people who constantly get legal aid because they are difficult. (Brinswick, DM2)

> I suppose you do, whether it's subconsciously or not, you do think about the smooth running of the court, which is why, as I said, you're more influenced by things like mental health issues, and you know how difficult it is dealing with an

[69] It might come as a surprise that this figure was not higher. However the fact that this was not spontaneously mentioned by most decision-makers does not mean it was not taken into account in practice – it may just have seemed too obvious to mention.

> unrepresented defendant when he's got mental health issues, and it does help if you've actually been in court and seen the person, and then you get the legal aid form the next day and you think 'oh yeah I'm granting that I don't want to deal with him unrepresented.' So that's a factor definitely. So it's partly selfish, but it's in the interests of justice because it's the smooth running of the court because you know you can get the trial done quicker if he's represented. (Curborough, DM3)

The Criminal Defence Guidance draws (CDS, 2002: 20) a somewhat artificial distinction between the court's judicial and administrative performance:

> An example of a non-statutory factor could be where the behaviour of a defendant is so disruptive as to distract the court from the exercise of its judicial function. That alone could justify a grant of a right to representation if the presence of a lawyer would mitigate the distraction and allow the court to continue the hearing in the absence of the defendant but in the presence of his legal representative. Behaviour that affects the court's administrative performance is unlikely to bear on the interests of justice and so could not be the basis for a grant of a right to representation.

These are not mutually exclusive factors: there comes a point when administrative delay due to a disruptive defendant impacts on the court's judicial function. For example, it may be that an obstreperous defendant can be dealt with without representation but only at one quarter of the court's normal speed. This may lead to the adjournment of other cases, potentially causing distress and inconvenience to victims, defendants and other witnesses, as well as associated administrative and legal costs. Nonetheless, not all decision-makers thought such reasoning was valid:

> No, I don't think that is a ground, even if someone takes so long, well unfortunately you have got to sit there and deal with the case, just because it is taking longer might be awkward but isn't necessarily a ground to [grant]. (Dultham, DM3)

Nor did all solicitors believe efficiency of the court was a proper reason for grant:

> If the application doesn't fulfil the criteria then that's it. You can't just grant it because the pal in the back row and the defendant at the front is kicking up a fuss. (Elswich, S2)

Can case-law provide any assistance in resolving this issue? In *R v Cambridge Crown Court ex parte Hagi*[70] Roskill L.J. observed that 'It is common experience that in trials on indictment the overall interests of justice are better served if a defendant who wishes to have legal representation is given it. Time and therefore money are saved.' Mars-Jones J. agreed: '... in my experience cases of this kind and every trial on indictment are conducted more expeditiously and more efficiently if counsel appears for the defendant than if the defendant is unrepresented.' If the Crown Court is permitted to take into

[70] 144 J.P. 145.

account the 'overall interests of justice' in this broad sense, there seems no reason why the magistrates' court should not do so in appropriate cases.[71]

A question remains, however, as to whether the obstreperous defendant qualifies as an appropriate case. If it became widely known that 'the squeaky wheel gets the oil' in the magistrates' courts, a perverse incentive to be disruptive would have been created. It may be that the best solution to this conundrum is to leave it to court clerks to resolve this issue on a case-by-case basis, according to their own sense of whether they could manage a particular unrepresented defendant within the bounds of reasonable efficiency.

(iii) Personal beliefs

Since the interests of justice test is relatively open ended, it is possible that the personal beliefs of solicitors and decision-makers may play an influential role in the application and decision-making processes respectively. With that in mind we asked them whether they personally believed 'that the criminal justice system would be fairer if the defendant was always granted legal aid?'

The responses to this question were striking in that a clear majority of both decision-makers (71%) and solicitors (62%) did not believe that a blanket approach to granting legal aid would produce greater fairness. The reasoning given by the majority not in favour of universal legal aid was that for minor offences, especially where the plea was guilty, there was no need for legal representation:

> For minor traffic offences, you don't need a solicitor to stand up and waffle on about why you haven't got, why your tax certificate's a day out of date. So there's no real need for a general blanket. (Elswich, S1)

> I think at the bottom end type of offences, pleading guilty, I think you quite often get a better, fairer hearing without a lawyer because we get used to hearing the same lawyers everyday saying, 'my client apologises for this and is very sorry for doing it', blah, blah, blah, and it becomes very samey…if you have committed a minor infringement and you do it personally the magistrate can hear how sorry you are, I think you end up with a better result from your point of view. So no, I don't think it's necessary for everyone to be represented. (Alsbury, DM2)

Among those who thought legal representation should always be granted, the reasons were not always articulated. However, reference was sometimes made to the fact that since the prosecution was always represented, then so should the defendant, regardless of the charge. This was a view more likely be held by solicitors:

> I've always believed that such is the weight and might of the state prosecutorial system that anybody who is alleged to have committed a crime should

[71] This proposition seems to have formed part of the reasoning in *R v Gravesham Magistrates Court, ex parte Baker* Times Law Reports 30 April 1997 where, in an admittedly terse report, McCowan L.J. is said to have observed that a grant of legal aid would be to the benefit of the court as well as to the applicant.

automatically be entitled to be legally represented. (Dultham, S3)

As an aside we may note that this viewpoint is inconsistent with the discretionary nature of the interests of justice test and is not supported by case-law. As noted in chapter 1, in *R v Havering Juvenile Court ex parte Buckley*[72] Forbes J noted that the fact that the prosecution was legally represented was something that could properly be taken into account in applying the interests of justice test, while stressing that it did not follow that a grant of legal aid must be made in such circumstances.

Not only did over two thirds of decision-makers disagree that the system would be fairer if everyone was granted legal aid, but those of a contrary view were spread across different courts, and, within our sample, were outnumbered by colleagues taking a different view more often that not. When we compared the two groups in terms of the number of dummy applications (chapter 8) that they granted, we found no significant difference. It thus seems unlikely that the personal beliefs of decision-makers on this point play much of a role in explaining variation between particular courts.

That conclusion also applies to the rather different question we put to court clerks on whether they thought the courts would be more efficient if all defendants were represented.[73] Consider, for example, the comments of the following court clerks, both of whom are based in low grant courts, both of whom themselves adopted fairly restrictive approaches to the Widgery criteria (one describing himself as 'Mr Refusal'):

> We have a huge bulk of people for petty offending and the duty solicitor can't act and legal aid can't be justified, and it takes up a huge amount of court time, because people don't speak English and they don't even understand what the rules are... my kind of standing joke is a petty traffic offence, not represented will take 20 minutes, whereas a serious GBH will take two minutes.... In an ideal world, from a legal advisor's point of view, everybody would be represented... I take the point that the expense can't be justified, which is why we sift them the way we do. (Curborough, DM2)

> It strikes me that the system would be fairer and quicker if everybody was represented. (Dultham, DM1)

On the other side of the coin, court clerks whose interviews revealed a relatively generous approach to the grant of legal aid did not necessarily support the values underpinning the system. Thus, when asked if the criminal justice system would be fairer if everyone was legally represented, one such court clerk replied:

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72 Lexis CO/554/83.

73 Nine out of 24 decision-makers thought the system would be more efficient if legal aid was universally provided. Some clearly took into account cost-effectiveness considerations in answering in the negative, believing that while some costs might be saved in court these would be outweighed by the cost to the legal aid budget; others simply thought that, in straightforward cases, a greater use of solicitors would slow court proceedings down.

> Probably, but then it is going to be very expensive isn't it. I do get angry at the amount of money that is paid on people who continually break the law, but then that is part of it isn't it, they have their right to apply for representation, and for representation to be granted, so that is the only thing that frustrates me on a personal level. (Brinswick, DM1)

What these findings suggest is that fidelity to legality is more influential in decision-making than personal beliefs. While decision-makers do vary substantially in their approach to decision-making, we found no evidence to suggest that this was attributable to their *personal* values or beliefs. Rather, they sought to put into effect the correct legal test *as they understood it*. Those understandings vary greatly, as we saw in the preceding chapter. While *some* variation along the axis of personal values is probably unavoidable the greater role played in decision-making by legal fidelity means that such variation should be reducible through the provision and use of better guidance on the Widgery criteria.

While legal fidelity should not be underestimated, nor should it be overstated. Magistrates' courts are bureaucratic institutions as much as they are judicial ones, and, like all bureaucracies they have institutional targets to meet. We saw in chapter 4 that the two-day target for processing a legal aid application may conflict with the norm that applications with inadequate information or argumentation should be returned rather than refused. One solicitor's comments, when asked if court clerks took efficiency in court into account when determining legal aid applications, highlight the danger of another such conflict:

> I gather that this court is one of the higher granting courts in the country, um, and I think probably the payback for this court is that it has one of the fastest throughputs of cases in the country... I gather court funding comes through the speed of throughput... If there's no merit, they are not going to grant it, but if it's a borderline case I think they will give the defendant the benefit of the doubt and grant it, because, realistically, with such a high number of cases coming before the court, they waste an awful lot of time with unrepresented defendants, extra hearings, trials that collapse on the day, so I'm sure that comes into it, yes. (Alsbury, S3)

Fidelity to bureaucratic imperatives may sometimes conflict with legal fidelity and how this is resolved is likely to differ from court to court, and from court clerk to court clerk.

(iv) Plea

There were no other factors beside age and efficiency in court which were spontaneously mentioned as being taken into account when deciding applications. However, when interviewees had been asked what were the most important criteria to take into account (see table 8 above), plea had been mentioned by a quarter of decision-makers and a fifth of solicitors. In a subsequent question, we asked decision-makers whether they were influenced by the plea of the defendant. All but two of the decision-makers said they were, and in all those cases, they said that a not guilty plea would make it more likely an

application would be granted. The reason given for this was that a not guilty plea would mean more of the criteria (such as loss of reputation, question of law) became relevant. For some, simply the fact of a trial was seen as a reason to grant:

> You can't use loss of reputation as one of the criteria to be regarded as a factor if he is going to plead guilty, the plea in itself takes away that argument. (Brinswick, DM1)

> Well, yes, to the extent that I tend to think that if it's a trial I think they should be represented in most cases. (Curborough, DM3)

> Yeah definitely. I mean that is key to so many of the criteria as I said you know reputation, livelihood, cross-examination, all of those things, I might decide differently if it is a guilty plea or a not guilty plea, because your needs of representation are completely different. (Alsbury, DM2)

Solicitors, too, were aware of the significance of plea, and seventy per cent thought it was important to indicate the likely plea on the application – although this was seen to relate only to a not guilty plea; there was no advantage to be gained from indicating a guilty plea:

> If you are wise, and you want to get legal aid, you put down that you want to plead not guilty, even though at some stage you might say you want to plead guilty. (Curborough, S3)

> I think if somebody is to be pleading not guilty, I think there are substantially more reasons why you can say to the court why it is important they are represented. (Dultham, S2)

Not all solicitors thought plea should be mentioned when applying for legal aid, as one would not necessarily know the likely trajectory of a case at that point. However, as one commented, such uncertainty did not dissuade most of his colleagues from doing so:

> I don't think you should [indicate plea] because you haven't got disclosure by then and we don't know what the case is about…. A lot of people put not guilty, they don't know either. (Brinswick, S2)

As we have seen in the discussion of the criteria in the preceding chapter, there are a number of criteria which were seen by both decision-makers and solicitors as being linked to plea. In particular the expert cross-examination, damage to reputation and tracing of witnesses criteria were usually seen as relevant only in the context of a not guilty plea. To a lesser extent so was the criterion relating to the substantial question of law. The quality of reasoning in applications is discussed in depth later in this report (chapter 9). It is interesting here, though, to compare the use made by solicitors of criteria linked to not guilty pleas and the average rate of not guilty pleas in magistrates' courts. These criteria were invoked individually in between 20 and 28 per cent of the 1,493

applications which we sampled. However, the proportion of applications in which *one or more* of the expert cross-examination, damage to reputation or tracing of witnesses criteria were used was 41.6 per cent. If a substantial question of law is included, the proportion rises to 47.3 per cent. In other words, almost half of the applications invoked criteria which usually rely for their relevance on a not guilty plea, yet the proportion of cases prosecuted by the CPS in the magistrates' court in which the defendant ultimately pleads not guilty is considerably less.

It is difficult to determine a precise figure for not guilty pleas due to the way data are compiled and the various forms of case attrition that characterise criminal proceedings.[74] However, the proportion of cases in which a guilty plea can be said to have effectively been tendered is 69.3% (guilty pleas and cases proved in absence). Of the remainder, it is unlikely that every single discontinued case (12.8%) would, but for the discontinuance, have resulted in a contested trial, and some of those cases proceeding to the Crown Court (7.3% of all cases starting in the magistrates' court) will be dealt with by way of a guilty plea. In other words, the proportion of cases involving not guilty pleas is somewhat below 30 per cent. This compares to the 47.3% of applications invoking criteria related to not guilty pleas.

The difference between the two figures is partly attributable to the fact that these criteria can be relevant in cases where the applicant pleads guilty (see preceding chapter). However, this is unlikely to account for all or even most of the difference given the views of court clerks on the importance of a not guilty plea to the applicability of these criteria and the lack of weight they place on these criteria in any event (ibid). This suggests that in a significant proportion of cases the defendant's (ultimate) plea is at odds with the (predictive) information provided on the form. We are not suggesting that solicitors deliberately try to mislead decision-makers; we found no evidence of this. Some of the quotes above suggest, however, that knowledge that the case for legal aid would be helped by an indication of a not guilty plea did incline some solicitors to over-state the probability that the case would be contested. A more powerful explanatory factor was found, however, in the responses to the following question we asked solicitors: 'Do your clients ever change their plea from not guilty to guilty?'

All of those interviewed said that this happened 'frequently', 'a lot of the time', 'often' or 'sometimes'. Defendants were said to change their mind for a number of reasons. It was asserted that some defendants simply wanted to drag the process out, perhaps in the hope that witnesses would fail to turn up or the case be discontinued, perhaps out of bloody-mindedness or personal convenience:

> Human nature sometimes comes into play where a defendant, regardless of the advice given to them, 'well the evidence is overwhelming', etc etc, the defendants often take the view that they would rather go to prison in four months time than today, birth of a child, Christmas, summer holidays you name it – that's human

[74] The figures which follow have been derived from tables in Annex A to the Crown Prosecution Service's *Annual Report 2003-2004*. Available online at www.cps.gov.uk/publications/reports/annualreport04annexa.html

> nature. And the door of the court, when witnesses attend, concentrates the mind sometimes and they think well actually yes, fair enough, I will plead guilty. (Dultham, S2)

> A lot of people I represent have nothing to do with society, quite frankly. They're like a sub-class, a criminal sub-class... When it's convenient for them, for whatever reason they wish to plead, they will plead, whether the evidence is there or it's not. A lot of them are versed in the system, they hate police, they hate the system, they hate the magistrates, and these sorts of people are very, very difficult to deal with. And it's sometimes very difficult to give them the advice; they don't want to hear what we've got to say.... I'll have lads saying to me, 'pleading not guilty' and that's the last instruction you'll get from them. (Elswich, S2)

More commonly, however, plea-changing was said to be the result of advice from the solicitor, once the strength of the prosecution evidence had been assessed. One consequence of the speeding up of justice in the magistrates' courts in recent years (see chapter 3) has been that defendants are swept into court shortly after arrest and applications for legal aid accordingly are nowadays often made at a point when the client is the only source of information about the case:

> If you don't know the case thoroughly by the time you meet them at the first hearing at Court, and they say 'well I didn't do it', you have got no choice but to accept what they say. And then you find a few days later, when you get all the paper work, that they are stuffed. That happens every day of the week and I can't see how you get round that. (Alsbury, S2)

> ...your first appearance in court if that's the first time you've seen them, and they're shouting 'I'm pleading not guilty'. By the time you've gone through the papers with them it will be a guilty plea. Even if you put in an application saying this client wants to plead not guilty and therefore will have to be advised on this, this and this, and then maybe the court is thinking well we'll give him that [legal aid] because the requirements of running a trial are too complex for an unrepresented defendant. But they very often, you know, calm down a little bit as the case proceeds and then listen to advice. So yes people change their pleas all the time, in the end minute to minute frankly, quite frequently. (Alsbury, S1)

One of the decision-makers suggested that one way to overcome the problem of granting on the criteria which may later turn out not to apply, would be to have a two stage process, whereby a grant of legal aid could be made initially for advice on plea. The order could then be extended or discontinued once plea was known. Whether the additional bureaucratic complexity (and unintended consequences) created by such a two-stage process would be justified is difficult to assess.

The quick turnover of cases in the magistrates' courts may help explain why we found no evidence whatsoever of any re-consideration of the initial legal aid decision, even though it is widely acknowledged that the Crown Prosecution Service often reduces the

seriousness of charges that a defendant faces following the commencement of proceedings.[75] This reduction sometimes results from a bargain struck with the defence in which the defendant agrees to plead guilty to a lesser charge. As we saw in chapter 1, where the proceedings have been varied in this way, the court should consider withdrawing the relevant representation order.[76] Withdrawal of legal aid would seem proper, for example, where the only reason for granting legal aid was a likely loss of liberty and a charge reduction now makes a custodial outcome unlikely. While court clerks sometimes made rueful comments demonstrating awareness that some defendants who claim they intend to contest a charge will eventually plead guilty, none of them raised the possibility of withdrawing a representation order, and no solicitor spoke of this happening. It might be possible to create an institutional mechanism whereby a reduction in charge triggered a review of the legal aid decision but there would remain the problem of unintended consequences to deal with. As with the two-stage process of determining legal aid discussed in the preceding paragraph, the most problematic such consequence may be that some solicitors will tend to encourage clients to maintain not guilty pleas in order to protect a valued source of income.

(v) Appeal

The fact that their decisions can be appealed could be seen as a factor outside the interests of justice criteria which might influence decision-makers. There was complete unanimity of view among decision-makers when we asked them about this – they all said that the possibility of their decisions being appealed did not affect their decision-making in the slightest. Some went on to comment that solicitors only had themselves to blame for not providing sufficient information in the first place:

> No, I mean if I feel it doesn't merit a grant I'll refuse it. They've always got the right to appeal. (Elswich, DM2)

> No. I can only make the decision based on what is in the application form. I mean quite often they will appeal because they filled in the application so quickly they have left off half the relevant information. (Brinswick, DM1)

> No, because if I believe it should be refused, it is refused. If they have got further information that the solicitor puts at a later date, I am not offended at all. It would just have been easier for them to put that information in the first place. (Highfield, DM1)

These quotes suggest that court clerks are not afraid of the potential scrutiny of the correctness of their decisions that refusals of legal aid applications might bring about.

These answers do not, of course, establish that the provision of a right to appeal has no impact on first-line decision-making. A few clerks recognised that the right of appeal helped promote accountability; we saw in chapter 3 that two spontaneously identified it as a form of supervision or monitoring of their work. Thus, it is likely that the right of

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75 A Sanders and R Young, *Criminal Justice* (London: Butterworths, 2000) at p 445.

76 Criminal Defence Service (General) (No.2) Regulations 2001 (SI no. 1437, reg. 17(1).

appeal promotes care in decision-making. Moreover, we saw in the same chapter that some court clerks have a policy of refusing rather than returning applications that contain insufficient information or argument. This practice was justified, in part, with the comment 'they can always appeal'. Thus it seems that the existence of a right of appeal does not make grants more likely but rather makes refusals more likely.

The contribution the appeals process makes to accurate and consistent decision-making is nonetheless somewhat limited by the fact that only refusals are subject to appeal. 'Overly generous' grants are not subject to this checking mechanism.

Change or clarification necessary?

The final question we asked interviewees in our attempt to discover whether factors outside the criteria were taken into account was whether they believed any changes or clarifications needed to be made to the criteria. Very few solicitors (three) or decision-makers (three) felt that the interests of justice criteria needed changing. The general view was that they covered every eventuality:

> No I don't think so, I think they can be interpreted quite widely anyway. (Brinswick, DM3)

> No I don't think so, I think everything is covered there down to the 'any other reasons you may care to mention', it's got the catch-all at the end. (Brinswick, S3)

Even among those who did think some change was needed, it was not that any of the criteria were considered superfluous, rather it was suggested that an additional criterion could be added. One decision-maker, for example, thought that age should be a factor, so that youths could receive legal aid regardless of the offence. A second decision-maker thought that the criteria should be scrapped altogether so that legal aid could be granted for all offences. One solicitor thought that a box should be added so that cases going to the Crown Court could automatically receive legal aid, while another solicitor believed that the disability criterion was overly restrictive and favoured a criterion based on 'vulnerability'.

A minority of decision-makers (eight) and solicitors (six) believed that there was a need for improved guidance relating to the interests of justice criteria. This should not be taken as implying that the majority of interviewees thought existing guidance was adequate. As we saw in chapter four, the large majority of decision-makers (75%) and solicitors (95%) made no use whatsoever of existing guidelines in interpreting the criteria, and in many cases their knowledge of what these contained was vague:

> Um, there's, I think there's a file on the cabinet out there. (Fyford, DM3)

> I seem to remember having, I think it might have been something published in the [Law Society] gazette many years ago. And obviously there's legal texts which cover it. (Alsbury, S3)

Two implications follow from this finding. Firstly, if solicitors and decision-makers were more generally aware of the content of existing guidance, it may be that the proportion who thought they needed clarification would be higher. Secondly, to reiterate one of our main messages in this report, the consistency of decision-making and the quality of solicitors' applications may be only marginally affected by the issuing of new guidelines unless a strategy is adopted to maximise their profile and use.

Of those who called for the existing guidelines to be clarified, one felt that example-based guidance should be provided for all the criteria and said this should be made available to solicitors in order to improve the quality of applications:

> All of these questions about how we interpret different things, it would be very helpful if we had some guidance which gave us a pattern, you know. Obviously each case has to be decided on its merits, there aren't absolute black and whites in these types of things, but it would be helpful to have some clarification. For example, as I said earlier, people do discuss what does liberty mean, it would be helpful if we had definitive answers to those. And the things that can't be definitive, if we had examples of types of situations, I think that would lead to more uniformity. And of course that applies really to all of them, you know, what sort of circumstances would loss of livelihood be considered generally, you know, just something at the bottom saying this isn't exhaustive, because there are situations which are different, but something like that I think would make our job easier, would make our life easier. It may stop some of the applications we refuse if the solicitors had that guidance as well. I think that would give more clarity. I think as opposed to the tests themselves, I think they cover all the areas they need to, and I think they are ok, it is just how we interpret them and apply them. (Brinswick, DM2)

Other respondents thought that the 'someone else's reasons' criterion and the criterion relating to the defendant's inability to understand proceedings were in particular need of clarification.

We have seen (above, and in chapter 3) that the quality and completeness of applications was a concern for some decision-makers, and four of these suggested that guidance was needed for solicitors in order to stress the importance of providing detailed and legible information. It is worth quoting all four comments on this issue:

> The only criticism I have, and it is not the legal aid application forms, it is the information provided by the solicitors. I would much rather they provided much more information and quite often their handwriting is illegible, I can't read their writing, they are asked within the case detail section to give full details and they don't. I would just want … maybe a note made on the application forms to provide, it would make them a bit more robust, that we would need to have much more information first to make a fuller decision. (Brinswick, DM1)

> I think we should just have more information available at the beginning. I think they should be aware that we can much more readily, much more easily, grant it if they actually tell us the full story, rather than we normally get an indignant letter a week later saying 'how could you possibly, you must be aware our client has previous for', well no, how would we! (Curborough, DM2)

> Actually it might be quite nice if they made it so that they could only be typed because sometimes it is so hard to read the handwriting. There are some firms that we really struggle with the handwriting and if you have got an application, it is 50/50 and you don't quite know which way to go and you can't read the writing, that vital sentence might make you grant it and you can't read it. (Highfield, DM1)

> I don't know whether, for example, to assist a first time solicitor if it would be helpful to say 'list previous convictions, list aggravating features' things like that, 'list the guideline for this offence', because that is not actually spelt out as far as I can remember. (Elswich, DM1)

Solicitors' responses to this question raised two issues which have been touched on elsewhere in the report. The first relates to the role of legal advisor. One of the reasons given by decision-makers for refusing applications based on expert cross-examination or substantial question of law (see chapter 9) was that the court (i.e. legal advisor) can assist. Solicitors did not believe that this properly formed part of the legal advisor's role:

> They do, in their refusals, say a court clerk will assist. We constantly say that is not a court clerk's role during a criminal trial to intervene and start cross-examining, so I think it's really clarification, I would say, rather than any great change in policy. (Dultham, S2)

> I don't think it's their job to advise defendants on 'the law', in respect of their specific circumstances. They can't do it. I mean they can't do it in private to start with, they have to do it in open court, and you can't give someone legal advice in open court, you could expose them to, they could say something that a prosecutor picks up on, it could lead to something else. (Dultham, S3)

The second concern expressed by some solicitors was the belief that decision-makers, on occasion, used their knowledge of the outcome of the case in making their decision on legal aid, rather than judging the application on the basis of how it appeared at the outset of the case. This 'after-the fact' approach can work both ways, making an application more or less likely to be granted than if it had been considered solely on the information on the form, as the following two quotes illustrate:

> The difficulty I have with some clerks here is the application of hindsight to the application, because obviously you apply at a stage, you know you're dealing with it on what you can see, if the clerk then watches the court fine somebody,

> they're less likely to accept he is at risk of losing their liberty, and they will use that to refuse legal aid. (Highfield, S2)
>
> Quite often, you'll be representing someone on the day, for example, there'll be a client of yours there asking for your services, and you'll say, 'ok, we'll fill out a legal aid application' on the day, and quite often the clerk will look at it and say 'he's not going to get legal aid for this, I'll grant it, but only if the magistrates indicate they are looking at custody', so, that's probably not how it should work. I know there are cases on that which say they shouldn't grant legal aid depending on the magistrates' decision, they should look at it how it is before them when it's handed in, but sometimes that's the response you get, 'look, I see from your application it's unlikely your client is going to get custody for this, but if the magistrates say that's what they're thinking, I'll grant it'. (Granton, S2)

That court clerks are able to delay determining a legal aid applications until the sentencing phase of a case reflects the fact that some applications are submitted to the legal advisor in open court (see chapter 4). One consequence of the speeding up of summary justice in recent years is that there is often no longer a sufficient interval between arrest and first court appearance to allow for the legal aid application to be submitted by post and dealt with 'behind the scenes' in advance of court proceedings. It was not entirely clear from our interviews whether court clerks who received applications in open court were forced into post hoc decision-making due to workload pressures or whether they chose to put off a decision in order to see whether, for example, custody really was 'likely'. It seems to us wrong in principle for a legal advisor deliberately to delay taking a decision on legal aid until an indication of sentence has been given since this requires solicitors to chose between representing a client knowing that there is a risk that the service will remain unpaid for, or leaving a defendant (unable to pay privately) unrepresented.

Conclusion

From what decision-makers said during interviews, it is clear that there are differences in how far they are prepared to consider factors which are not strictly within the interests of justice criteria; of which plea was the most common. However, age of defendant and efficiency of the court were also regarded as legitimate factors by some, and the different interpretations of these add to the complex set of reasons for variation in grant rates for legal aid.

We have set out the views of court clerks and solicitors on the need for fresh guidance. In the preceding chapter we set out our own views on how the guidelines might be clarified or extended in relation to the various Widgery criteria. Here we confine our comments to the guidance concerning 'other factors'. It is distinctly odd that the Criminal Defence Service guidance only mentions one 'other factor' (managing disruptive defendants) when a number of other factors have been specified in case-law as of potential relevance to the interests of justice test. These include:

(i) The fact that the prosecution is legally represented.[77]
(ii) The fact that a demanding community penalty is likely.[78]
(iii) The youth of the defendant.[79]
(iv) The need for careful examination of *defence* witnesses.[80]
(v) The need to retain an expert *defence* witness.[81]
(vi) The fact that the interests of justice can encompass considerations of saving time and money.[82]

Our suspicion is that the bodies responsible for drawing up guidance in the past have lacked an institutional mechanism for monitoring case-law and ensuring that guidelines reflect judicial authority. This is no doubt something that the Legal Services Commission will wish to rectify as part and parcel of its taking on accountability for the operation of the interests of justice test.

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77 *R v Havering Juvenile Court ex parte Buckley* Lexis CO/554/83 12 July 1983. When this case was decided, some prosecutions were still conducted by the police in person. The advent of the Crown Prosecution Service meant, for a while, that all routine prosecutions involved legal representation, but the CPS now makes use of lay presenters for straightforward prosecutions.

78 *R v Liverpool City Magistrates ex parte McGhee* CO/0289/927, 3 March 1993.

79 *R v Scunthorpe Justices, ex parte S* T.L.R. 5 March 1998.

80 *R v Gravesham Magistrates Court, ex parte Baker* Times Law Reports 30 April 1997.

81 *R v Gravesham Magistrates Court, ex parte Baker* Times Law Reports 30 April 1997

82 *R v Cambridge Crown Court ex parte Hagi* (1979) 144 J.P. 145. See also *R v Gravesham Magistrates Court, ex parte Baker* Times Law Reports 30 April 1997.

7. OFFENCES

Much of our discussion to date has proceeded on the assumption that legal aid decision-making is a nuanced exercise in which various relevant criteria are interpreted and weighted on a case-by-case basis. The 1992 research found, however, that decision-making in practice was largely driven by offence-based rules of thumb. In this chapter we look at actual grant rates for particular offences in the eight courts, and then at the results of an exercise in which decision-makers were asked to rate the likelihood that they would grant legal aid to people charged with different offences.

In an attempt to establish which offences, if any, were more or less likely on average to result in a grant of representation, offences were classified into five bands of likelihood of grant. The bands were as follows:

Band	Description	Grant rate
1	Offences for which legal aid was almost invariably granted	95% or higher
2	Offences for which a grant of legal aid was likely but by no means certain	>67% and <95%
3	Offences for which a grant of legal aid was uncertain	33% to 67%
4	Offences for which a refusal of legal aid was likely but by no means certain	>6% and <33%
5	Offence for which legal aid was almost invariably refused	6% or lower

The mean grant rate for various offences is shown in table 11.[83] Also shown, for comparison, is the grant rate for the same offences in 1992.[84]

[83] Offences which occurred only rarely (fewer than 10 times) have been excluded from the analysis. Weighted figures.

[84] *In the Interests of Justice?*, Table 8.

Table 11 Overall grant rate by type of offence

Offence	No of applications (2004)	Grant rate 2004 (%)	Grant rate 1992 (%)
S18 & s20 wounding	25	100	100
Affray	32	100	94.6
Indecent assault / rape	18	100	100
S47 assault	65	100	89.9
Threats to kill	14	100	n/a
Assault PC	25	100	n/a
Robbery	23	100	100
Drug supply	11	100	93.8
Burglary commercial	14	100	97.2
Burglary domestic	52	99.2	99.5
Possess offensive weapon	43	99.1	81.3
Common assault	103	97.5	n/a
Drive while disqualified	118	95.1	96.9
Handling stolen goods	22	93.8	92.3
TWOC	34	93.2	93.8
Theft	135	93.2	100
Breach community order	166	90.3	96.4
Fraud / deception	33	89.9	100
Threatening behaviour/words (ss 4 and 5 POA)	74	89.6	81.2
Shop theft	116	88.8	86.5
Possess drugs	38	78.6	88.6
Fail to provide specimen	21	76.1	n/a
Drink drive	75	75.3	83.9
No insurance & other summary motoring offences	84	48.9	60.3

Looking just at the 2004 figures, of the 24 offence types listed in table 10, 13 fell into band 1 (almost certain grants) and a further 10 into band 2 (likely grants). Indeed, with the exception of no insurance and other summary motoring offences, the mean grant rate for the most commonly applied for offences was 75% or higher. This is not to suggest that most defendants would be successful in their application for legal aid whatever the charge, rather that there are no offences (with one exception) where applications are more likely to be refused than granted.

The grant rates for most of the offences in 2004 are remarkably similar to those in 1992. For just five of the offences did the grant rate in 2004 differ from that in 1992 by 10 percentage points or more. Possession of an offensive weapon and s.47 assault were both more likely to result in a grant of legal aid in 2004 than in 1992, while no insurance and other summary motoring offences, fraud / deception and possession of drugs were less likely – the latter perhaps reflecting the 2003 decision to downgrade cannabis from a class ‘b’ to a class ‘c’ drug.

The fact that that applications are not routinely being made for offences associated with refusals of legal aid is likely an indication of solicitors' sense of which offences it is worth applying for. When we asked solicitors for which offences they would normally expect to be refused legal aid, they had no difficulty in answering. Two thirds mentioned summary motoring offences such as no insurance, or careless driving; while over a half said that they would expect to be refused legal aid for minor public order offences such as drunk and disorderly and section 5 public order. Five said that they would expect to be refused legal aid for most non-imprisonable offences and offences where the magistrates' guidelines entry point was a discharge or a fine. Other offences mentioned included minor criminal damage, loitering and possession of cannabis. Solicitors were also aware that some courts were more generous than others:

> I find at [court X] they grant you legal aid for driving without insurance and driving without due care – you'd never get that in [this court], and yet in [court X] I had a chap charged with theft and they refused legal aid. So I can't make head or tail of it. I don't think there has ever, ever, in my 25 years, been any real consistency... I don't like the inconsistency because it's a nuisance. You know, you go to court fully expecting legal aid to be granted in a certain case because for years you have always had it granted for that sort of case and then they reject it, so that's a bit of a kick in the goolies. (Alsbury, S2)

> I used to work [in court J], which is [a few] miles from here, smaller court, and it really depends on the court legal advisor who is processing your application, to be frank with you; in that court we were getting legal aid refusals for ridiculous cases, you know, serious assaults, affrays, offensive weapon matters etc. (Brinswick, S2)

> It is quite a big practice and we go all over the country. Let's say I am asking for legal aid at Birmingham or Newcastle or Middlesborough or Bristol, it wouldn't make much difference, they tend to do it on the criteria, but I notice if you are in a country area, I think you're less likely to be granted legal aid. (Curborough, S3)

> [Court Q] is [a few] miles away, but administered by different legal aid clerks, with different policies for granting legal aid, and grant more frequently than [Dultham] does, and that's noticeable, because we found that cases in which [court Q] grant legal aid, [Dultham] don't.... They would say, the [Dultham] clerks, and we've asked them, 'we are applying the criteria correctly', and I think that their view is that [court Q] grant legal aid too often in cases where it is not merited. Our view is that, no, if anything [Dultham] are applying the rules too strictly, some of the refusals we get are mind boggling really, where you wouldn't ever expect legal aid to be refused. (Dultham, S2)

> I found it quite shocking when I came here. It's almost as if they adopt the policy, this is my money, and you're not going to have it! (Dultham, S3)

> Some courts are recognised by regulars on the circuit as easier than others. (Highfield, S3)

That these perceptions are rooted in real differences between courts is supported by the information presented in Table 12. This breaks down the grant rates for specific offences by court, and shows the variation in percentage points between the highest and lowest grant rates for each offence (offences occurring with a frequency of 10 or fewer in any court have been excluded).

Table 12 Grant rate by court for selected offences (weighted figures)

Offence	Alsbury	B'wick	C'boro	Dultham	E'wich	Fyford	Granton	H'field	Variation
Breach court order	99.5	69.7	70.6	100	*	97.0	80.5	100	30.3
Common assault	*	*	100	91.4	100	99.5	100	99.2	8.6
Drink drive	95.2	*	78.2	*	*	83.1	82.4	95.3	17.1
Drive while disqualified	99.5	90.9	93.5	91.7	*	97.9	97.2	*	8.6
Theft from shop	100	73.8	82.8	76.5	94.6	98.2	*	*	26.2
Theft	99.4	95.9	*	79.6	95.9	96.2	85.3	99.7	19.8

*indicates too few cases to analyse

As might be expected, the overall average grant rates presented in table 11 hide variations between courts. For shop theft, theft and breach of a court order there were variations in grant rates between courts of more than 19 percentage points. In Brinswick and Curborough, for example, around 30% of applications for breach of a court order were refused, whereas in both Dultham and Highfield none of the applications were refused. What this analysis suggests is that although courts do differ in their treatment of (broadly) similar cases, the variation is not such that, for the offences considered, there were any offences in any one court for which the grant rate was less than 69.7%.

To what extent variation in grant rates is due to differences in approach by different decision-makers, or to relevant differences between offences in different courts is not clear from this analysis. No two applications are identical in every respect and it is possible (although unlikely) that offences labelled as shop theft in Alsbury, for example, differ in seriousness from shop thefts in Brinswick. In order to explore whether variations between offences remained when there were no relevant differences to take into account, we asked each of the decision-makers interviewed to rate twenty (generic) offences as to the likelihood that someone charged with that offence would be granted legal aid. The results of the exercise are presented in table 13.

Table 13 Overall rating of offences by decision-makers

Court	Band (%)[85]					Average	Official Grant rate
	1	**2**	**3**	**4**	**5**		
Dultham	15	10	28	30	17	3.23	Low
Curborough	25	17	18	22	18	2.92	Low
Alsbury	18	22	23	23	13	2.92	High
Granton	23	17	35	12	13	2.75	Low
Brinswick	20	22	32	17	10	2.75	Low
Highfield	22	32	33	12	2	2.33	High
Fyford	32	30	23	8	7	2.28	High
Elswich	31	26	31	11	0	2.23	Medium

Key to bands:
1 = Almost certainly will get legal aid whatever the circumstances
2 = Probably will get legal aid depending on the circumstances
3 = It all depends on the circumstances of the case
4 = Probably will not get legal aid depending on the circumstances
5 = Almost certainly won't get legal aid whatever the circumstances

The rating exercise reveals that there is considerable variation between courts in terms of the proportion of offence ratings placed in the five bands and the overall average score. One might expect that in courts with high grant rates that more offences would be assessed as likely to get legal aid, and there was some support for this hypothesis. In Fyford, a high granting court, the proportion of offence ratings in band 1 ('almost certain to get legal aid') was more than twice as high as in Dultham, a low granting court. Conversely, in Curborough (low), 18% of ratings were in band 5 ('almost certainly won't get legal aid'), compared to just 2% in Highfield (high).

The relationship between official grant rate and offence seriousness was close, but not perfect. Of the three courts with an average rating of 2.9 or higher (i.e., the more restrictive end of the spectrum) two were low granting and one high, while of the three courts with an average rating of 2.4 or lower, two were high, and one was medium. As discussed in chapter 3 of this report, one reason for the lack of perfect fit may be that the official grant rates are unreliable. Our qualitative analysis there showed that Dultham is a genuinely 'very restrictive' court and that is consistent with its top ranking in the above table. We also contended that Brinswick is a court with a low grant rate in the official statistics but a high true grant rate. Its location in the table (with a relatively low ranking) is consistent with that argument. Even were official grant rates totally reliable, however, one would not expect a perfect fit; since offence seriousness is only of the factors taken into account by decision-makers.

In table 14, the results of the offence rating exercise are broken down by each of the twenty offences. The average ratings from the 1992 research are also provided.

[85] Rounded to nearest integer

Table 14 Rating of individual offences by decision-makers

Offence	Bands (% in band)					Average	
	1	**2**	**3**	**4**	**5**	**2005**	**1992**
S2 public order	84	12	4	0	0	1.2	1.3
Criminal damage (under £25)	0	4	20	36	40	4.1	4.2
Burglary of a dwelling	80	16	4	0	0	1.2	1.2
Possession of cannabis	4	4	24	40	28	3.8	3.5
S47 assault	64	28	4	4	0	1.5	2.6
Theft (value £100 or more)	12	16	60	12	0	2.7	2.9
Driving with excess alcohol	8	16	44	16	16	3.2	3.9
S3 POA (affray)	64	20	16	0	0	1.5	2.1
Breach of community service order	28	16	32	16	8	2.6	2.0
S5 POA (cause distress)	0	20	8	24	48	4.0	4.3
Obstruct PC	12	4	44	28	12	3.2	3.4
Possess offensive weapon	36	40	24	0	0	1.9	3.0
Abstraction of electricity	0	8	36	52	4	3.5	3.3
Burglary of commercial premises	48	32	16	4	0	1.8	2.3
Theft (value £25 or less)	0	4	32	32	32	3.9	3.5
Handling/receiving stolen goods	0	56	36	8	0	2.5	3.0
S4 POA (cause fear of violence)	8	52	24	16	0	2.5	3.1
Making off / bilking	0	12	64	20	4	3.2	3.5
Common assault (s39)	20	52	20	8	0	2.2	4.2
TWOC	4	28	52	16	0	2.8	3.1

Key to bands:
1 = Almost certainly will get legal aid whatever the circumstances
2 = Probably will get legal aid depending on the circumstances
3 = It all depends on the circumstances of the case
4 = Probably will not get legal aid depending on the circumstances
5 = Almost certainly won't get legal aid whatever the circumstances

If this exercise has validity (in the sense of indicating real decision-making norms) one would expect it to reflect actual grant rates as shown in Table 11. There does seem to be a reasonably good fit between the two tables. For example, the three offences shown in Table 14 with 64% or more of the ratings in band 1 ('almost certain to get legal aid') and which also appear in Table 11 (burglary of a dwelling, s.47 assault, and affray), all exhibit actual grant rates of 100%. Moreover, offences rated in table 14 as less likely to get legal aid had significantly lower rates of grant in reality (as revealed through analysis of our samples of actual applications). These included possession of cannabis (70.6%), section 5 POA (72.7%) and low value theft (88.8%) (although this is not an exact equivalent of shop theft as shown in table 14). The fit between the two Tables is by no means perfect, however. The ratings of many of the offences by court clerks would imply substantially lower actual grant rates than those shown in Table 11. The ratings exercise

does usefully differentiate high grant offences from low grant offences but it tends to exaggerate the range between the two ends of the granting spectrum.[86]

Table 14 shows that a considerable amount of disagreement exists between the 25 court staff interviewed as to the likelihood that people charged with certain offences would be granted legal aid. There was not one single offence for which there was complete agreement, or even agreement within one band between the court staff. In fact, for four offences (possession of cannabis, driving with excess alcohol, breach of a court order and obstruct PC) the scores ranged across all five bands, indicating that some clerks thought these offences would invariably be granted legal aid, while others thought them certain to be refused. There were a further 11 offences where the variation was across four bands.

Comparing the average scores given in 2005 with those from 1992, one finds that there were three offences for which the average score differed by more than one band's width. Common assault was deemed in 2004 to be exactly two bands more likely to be granted legal aid than in 1992, and s.47 assault and possession of an offensive weapon were both just over one band more likely to be granted in 2004 than in 1992. Although it was not possible to determine from the data the reason for this, one obvious explanation is that the risk of custody for these offences has increased since 1992.

Comments made by court staff when completing the offence question gave some clues as to the reasons for variation. In one court, for example, there was a list of offences for which grants were automatically made, thus removing the possibility of disagreement between staff:

> It is something we have got in the department, that there are certain offences which we consider them automatic grants, they will always get legal aid, apart from things like murder and rape which very obviously will but there are other things which our legal advisors have made a list and said I don't even have to make a decision, the girls who check the applications will know that because it is an automatic grant, it doesn't need to have a decision made. (Brinswick DM1)

Other decision-makers commented that it was difficult to judge the likelihood of grant on the basis of the offence alone, and referred to factors such as plea, age of defendant, and mental health issues, all of which would alter the probability that they would grant a case, as the following quotes illustrate:

> All of this would depend on the plea you see and their list [of previous convictions] as well. (Alsbury, DM1)

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[86] One explanation of this would be that for most offences the tendency to grant is more pronounced, and less dependent on the circumstances of individual cases, than court clerks appear to think. A complicating factor here, however, is that Table 14 is based on generic offence descriptions whereas Table 11 is based on actual applications. Since solicitors tend not to apply where they think the case for legal aid is weak, one would predict that grant rates for low tariff offences would be higher in reality than those suggested by an abstract offence rating exercise.

> Just on the basis of the offence with nothing else at all? It depends on the reading of number 7 [excess alcohol] as to assessing the risk of custody. Number 9 [breach of court order] depends whether it is the first or second crime they have breached …. Depends on whether it is going to trial. (Curborough DM1)
>
> The thing is within that is that obviously if any of those people have any sort of disability regarding representing themselves like stone deaf or if there was somebody that didn't speak English I would put '1' for all of them. (Dultham, DM1)
>
> I don't agree with 'whatever the circumstances', because I think if you fill a form in correctly you can get it for anything, as long as you put the proper reasons down, if you're a clever solicitor. So I think in a lot of these, although the starting point for us would be that we wouldn't grant it, I would always say dependant on the circumstances. If you put down he has got mental health problems, it could be minor traffic offence, you think shouldn't really be driving a car if he's got mental health problems! So, there could always be that, and obviously the ones I've put in that category [1] custody is a starting point, so I would always grant it just on that basis. And the middle range, the 2s and the 3s are really where it does depend on the way the form is filled in for me, they are the ones where I do grant them for, I probably start by thinking I will grant it, but I'd want the form to be filled in properly, if they haven't given me enough information then I wouldn't grant. The first thing I do is look at the offence. If the offence comes in category 1, then as long as they've filled in the box 'seriousness of offence' then it's granted. (Curborough DM3)

Local knowledge also clearly influenced some decision-makers in their ratings of offences. The two quotes from the decision-makers which follow acknowledge the fact that sometimes local sentencing policy is slow to react to national guidelines, and that such variation needs to be taken into account:

> Theft of £100 or more, probably fairly likely to get legal aid for a theft, there is a lot of shoplifting, the case-law has changed from the higher courts so the guidance is that shoplifters shouldn't really be getting custodial sentence, a low custodial sentence a month, two months, but the practice here would still be to, for shoplifting it will still be for legal aid, especially because a lot of shoplifters tend to have drug habits and tend to do large offending behaviour. So they are probably likely to get legal aid. (Highfield, DM2)
>
> We have got policies, offensive weapon we know that the sentencing policy that we adopt here is, if it is produced or in any way used, then that is custody. But if you just happen to be searched then, no, it isn't custody, so we would take that into account when considering a legal aid application. (Dultham, DM2)

Variation within a court

Whether decision-makers are following local or national policies, these policies are expressed in the thousands of individual decisions made by court staff on a day-to-day basis. In all the courts visited there were at least three people, often many more, involved in deciding applications for legal aid. The potential therefore exists for variation in approach within the same court. Although this is explored further in chapter 8 on dummy applications, one can examine this in relation to the rating of the offences, as set out in table 15 below.

Table 15 Level of agreement of offence ratings between raters in the same court (N)

Court	Complete agreement	One band	Two bands or more	Total no. of court clerks	Official grant rate
Granton	6	9	5	10	Low
Brinswick	5	10	5	3	Low
Curborough	4	8	8	5	Low
Dultham	3	15	2	4	Low
Highfield	3	8	9	11	High
Elswich	2	10	8	5	Medium
Fyford	1	11	8	8	High
Alsbury	1	9	10	15	High
Total	25	80	55	61	-

Columns 2-4 of Table 15 display the level of agreement achieved by the three court clerks we interviewed. Column 5 displays the total number of court clerks taking decisions on legal aid in a particular court, and column 6 shows the grant rate for each court based on the official statistics.

What table 15 shows is that even within the same court, complete agreement between raters was rare. In Alsbury and Fyford, the three decision-makers agreed on the rating for only one of the 20 offences, and overall, just 25 of the 160 ratings (15.6%) resulted in complete agreement. To disagree over the rating by two or more bands can be considered to be a significant variation – for example, the difference between 'probably will get legal aid' to 'probably won't get legal aid'. On this basis, over a third of all offence ratings (55/160) resulted in considerable disagreement, and in one court this was as high as 50 per cent. It will be recalled that in Brinswick, decision-makers were given a list of offences for which grant of legal aid was automatic. One might expect, therefore, to see a greater degree of agreement between the three decision-makers interviewed, yet even here, there was complete agreement for only five of the 20 offences. The fact that such variation exists within courts suggests that individual discretion still plays an important role, and that the culture of a court or the existence of local or national policies is not necessarily sufficient to generate consistency between court staff.[87]

[87] It is interesting to note that clerks in the officially low grant rate courts generally were more consistent amongst themselves than the clerks in the officially high grant rate courts. The position of

Few comments were made by court clerks in interview that related to inconsistency within a court, although some ventured the thought during the dummy application exercise (see chapter 8) that their colleagues might well reach a different decision to the one they favoured. One court clerk noted that:

> You can get circumstances where solicitors will go from one court to another one and say 'will you look at this legal aid application?' That does happen, knowing that certain people look more favourably, or certain people are having a bad day. (Highfield, DM2)

Interviews with solicitors produced more comments concerning variation between courts rather than variation within a court. One solicitor, however, complained in forceful terms about inconsistency within his local court. His insights are worth reproducing at some length:

> I find sometimes they give you legal aid for things that they shouldn't, and they don't give you legal aid for things that they should, and that is down to the individual people making those decisions. So that's basically what I think of it [laughs]... it seems to me that each court should have a legal aid officer who does nothing but consider legal aid applications... if you've got someone looking at it properly, every day, someone with the right experiences and knowledge, it will all be done quickly and clearly, expeditiously, efficiently, and we'd all benefit. But what you have at the moment is a load of clerks in the court [and] a load of clerks in the office all doing it, and having to make quick decisions while they're in court. You say, 'oh will you consider granting this please before the hearing?', the guy's in the dock, the magistrate's sitting there, 'oh granted Mr [name]' [laughs], I mean that's pretty haphazard isn't it. What you need is someone there who grants it all, and does it quickly, so that the solicitors can get on with the job knowing they are being paid. (Alsbury, S2)

It is interesting to note that this solicitor worked primarily in Alsbury court, which, as Table 15 shows, had the lowest level of agreement between the court clerks interviewed as far as the rating of offences is concerned. His comment about 'a load of clerks' is rendered understandable by the penultimate column in that table, which shows that no court made use of a greater number of decision makers than Alsbury. That table lends some support to the reasonable hypothesis that the fewer the decision-makers in a court, the easer it is to achieve consistency. Granton is clearly an anomaly in this regard as it has the third highest number of decision-makers but achieved the highest level of consistency on the offence rating exercise. There is nothing in our data which enable us

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Brinswick might seem to buck this trend, however, given that we believe it to be in reality a high grant court (see chapter 3). As just noted, however, Brinswick clerks used a list of offences for which a grant was automatic and that practice presumably explains why they achieved levels of internal consistency more characteristic of low grant rate courts than high grant rate courts. What is not clear is why low rate courts generally achieve greater consistency on this exercise.

to explain this, although, given the wide range of factors that can impact on grant rates, it should not be surprising to find that no one factor correlates perfectly with those rates.

By presenting court clerks with dummy applications which reflected factors such as offence seriousness, interpretation of criteria and adequacy of information we were able to examine how the many different factors that court staff take into account interact. The results are presented in the following chapter.

8. DUMMY APPLICATIONS

At the end of our interviews with decision-makers we invited them to complete seven dummy applications. These were based on real applications made by solicitors to courts, and six of the applications were identical to those used in the 1992 research.[88] In addition, one new application was created (breach of ASBO). In the sections which follow we set out the contents of each dummy application in turn and then analyse how the clerks responded to the information we thereby presented to them.

Before doing so, we discuss the similarities and differences between the dummy applications and real ones, and the nature of the exercise itself. In terms of the number of words used, the dummy applications contained 113 words on average, significantly more than did the applications we sampled in the eight courts, where averages ranged from 35-70 words (see table 19, chapter 9). However, it should be noted that in the dummy applications offence descriptions accounted for an average of 80 of the 113 words. Indeed, some of the decision-makers we interviewed commented on the fulsomeness of the offence descriptions:[89]

> This is posh, I would just normally get ABH and not any details at all. (Highfield, DM1)

> There's a lot more information on here than we normally get! (Elswich, DM2)

We saw in chapter 4 that decision-makers in some courts routinely looked up further information regarding the offence, either from the computer system or court file. We can justify the provision of offence information on the form itself, therefore, on the basis that decision-makers could, and sometimes did, seek this out themselves when considering applications. The exercise also provides some insight into how court clerks might react if reforms were made to the system that had the result of generating more fulsome applications.

The average number of words used in the reasons themselves (33) was slightly lower in the dummy applications than in the ones sampled in the courts. This is because we wished to isolate decision-makers' responses to particular criteria in the different applications and decided to concentrate on just one or two criteria in each application (in the real applications solicitors tended to invoke three criteria per application).

Any dummy exercise is artificial in the sense that decision-makers know they are not taking 'real' decisions. However, from the comments made during the exercise we are confident that decision-makers approached the dummy applications in the same way as

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88 The design of Form A has changed since 1992. Appendices 3 and 4 show examples of the forms used in 1992 and 2004 respectively.

89 That the 1992 team did not hear this kind of comment may be an indication that applications have become sparser over the past 13 years. The design of the form A may explain why this has occurred, as it leaves very little room for the solicitor to write in details to support the applications (see further chapter 9).

they would real applications, and that the exercise throws light on how particular criteria were interpreted.

Overall results

The clerks in each court were asked to decide the applications in the same way as they handled real cases. This provided us with 21 'decisions' for each court (a total of 175 decisions).[90] The percentage of applications granted, refused and returned/referred in each court is given in table 16.

Table 16 Per cent of dummy applications granted, refused and returned/referred in each court

Court	Granted	Refused	Returned/ referred	Official grant rate
Highfield	76	5	19	High
Brinswick	76	19	5	Low
Elswich	75	21	4	Medium
Fyford	67	19	14	High
Alsbury	62	29	9	High
Curborough	57	38	5	Low
Granton	57	38	5	Low
Dultham	43	57	0	Low

The first point to note is that decision-makers did not always feel able to make a decision on the basis of the information provided on the dummy applications. In 7% of cases, the applications were either marked as 'returned' or 'referred to legal advisor'. The former meant that the decision-maker, had s/he received a similar application in reality, would have returned the form to the solicitor seeking further information before making a decision. For example, in Alsbury, one of the decision-makers said while considering a dummy application for criminal damage: 'I would return for more info. I need to ensure a not guilty plea is entered before I consider these grounds relevant' (Alsbury, DM1).
As for 'referred to legal advisor', in some courts the majority of decisions are made by administrative staff with no formal legal training (see chapter 4). Where applications mentioned a 'substantial question of law', the administrative staff would tend to seek the advice of a legal advisor before making a decision. With reference to the application for 'making off', for example, one decision-maker said 'I would seek advice from the legal advisor as to whether it's a question of fact or law' (Highfield DM2).

In over 90% of cases interviewees were able to make a decision, and as table 16 shows there was considerable variation in the proportion of cases granted legal aid – from 76% in Highfield (high) to just 43% in Dultham (low). As in the case of the offence ratings (chapter 7), the relationship between a court's grant rate and the grant rate for the dummy applications was largely as predicted, although not entirely so. Thus, of the four courts

[90] In Elswich four clerks completed the exercise, thus the total number of decisions in that court was 28.

with the highest rates of grant for the dummy applications, two were high grant courts, one medium and one low. This 'low' grant court, however, is Brinswick, which was shown in chapter 3 to be a court with a high grant rate in reality. Once that is taken into account, the relationship between actual grant rate and grant rate for the dummy exercise is revealed to be a close one.

Table 17 breaks the dummy exercise down by case. With the exception of the breach of ASBO, all dummy cases received grants in some courts and refusals in others. The applications (other than the ASBO one) had been designed to be borderline cases, and this is reflected in the fact that the grant rate for the dummy applications (65%) is significantly lower than the 2004 grant rates for these 8 courts overall (which ranged from 84 to 99 per cent).

Table 17 Decisions by court staff on dummy applications by case (%)

Court	Granted	Refused	Referred / Returned
Breach of ASBO	100	0	0
S47 assault	72	16	12
Making off / bilking	68	16	16
S5 POA	60	36	4
Criminal damage	56	36	8
Theft of ladders	56	36	8
Possession cannabis	40	56	4
Total	**65**	**28**	**7**

One way in which variation between decision-makers can be explored is to compare the total number of grants made by the decision-makers in each court. As there were seven applications, there were a maximum of seven grants that could be made. One might expect, if decision-makers in the same court were consistent between themselves that the range of grants made would vary little. In fact, in *none* of the courts did all three decision-makers make the same number of grants, and in just one court was there a range of one (Highfield). Indeed, in both Alsbury and Granton, the number of cases granted by the decision-makers ranged from two to six.

In order to understand why such variation within as well as between courts exists, it is worth considering in more detail each of the dummy applications. In the sections which follow, the reasons that decision-makers wrote on the dummy applications as well as comments they made while deciding them are used to illuminate their decision-making process. As each of the offences for which the dummy applications were made were also on the list of 20 offences for which decision-makers had rated the likelihood of custody, comparisons are made between the two decisions in the following sections. Where courts are referred to in the main text, their official grant rate is indicated in brackets.

Case 1 Mr Smith, age 20: s47 assault

Offence description:
S47 ABH – punched IP in face, causing black eye, in course of fight. Mr Smith hit the victim after words were exchanged, causing a black eye and minor cuts. The victim attended out-patients and was x-rayed but no fractures were detected. He was sent home after the cuts and bruises were cleaned.
Reasons
[5a] Nature of offence (assault). Subject to bind over for assaulting wife (case dismissed after complaint withdrawn) [no other criteria were invoked] .

In only two courts were all three decision-makers in agreement as to the decision – in Granton (low) and Highfield (high) this case was granted by all three. S.47 assault was an offence which had been rated as very likely by interviewees to result in a grant of legal aid, with 64% rating it as 'almost certainly will get legal aid whatever the circumstances, and this is reflected in the fact that this was granted by 72% of clerks.

As loss of liberty was the only ground invoked, not surprisingly the main divergence of views among clerks was as to whether this offence was likely to result in loss of liberty. The majority view was that s.47 was a serious offence, and in some courts there was clearly a policy of granting for all such offences:

> Section 47 is one of our offences automatic grants so it is always deemed as a quite serious offence so on that basis I would grant it, in fact a section 47 would never come to me it would just automatically be granted by the other girls. (Brinswick, DM1)

> Nature of offence, subject to bind over for assaulting wife, right at this point I would immediately write 'agreed'. Entry point is custody. … In a way I don't have to go any further because I know I'm going to grant it. (Curborough, DM2)

All of the four decision-makers who refused this case were from low granting courts, and they were less willing to accept the 'seriousness of the offence' argument, despite the fact that three of them had previously ranked this offence (see chapter 7) as being either 'almost certain' or 'probable' to result in a grant of legal aid:

> It is obviously a reasonably serious offence but there isn't necessarily a likely loss of liberty on it. There are no fractures it is a fairly minor injury as ABH's go, the only ground they have put is likely loss of liberty. They are saying it is aggravated by subject to being, subject to a bind over for assaulting a wife. The thing with that I would see is whilst he is going to be in breach of the bind over if he has committed this assault, assuming the bind over was widely drawn and not just for agreeing to keep the peace just in relation to his wife… it is one matter that didn't even lead to a conviction just led to a bind over so I would say it has a marginal impact on that and I would say that without anything extra, no previous

> convictions that it probably isn't a likely loss of liberty. There is no suggestion here that it is necessarily denied so I wouldn't be looking at anything like expert cross-examination which they could have put on here if that was the case, so I would be refusing that application. I would say they haven't given me sufficient grounds to justify a likely loss of liberty. (Alsbury, DM2)

One decision-maker who refused this application clearly struggled with this case, as he wanted to grant it on the seriousness of the offence but did not believe the reasons given on the form were sufficient to allow him to do so:

> So the first thing is just to check what the offence is, so ABH is one I regard as a usual grant, but, so I'd usually say if there's a trial I'd grant it on the grounds that there's cross-examination of the victim. And if he's pleading guilty I'd be looking at is it serious enough for custody, I think custody would be the starting point unless there's anything, here looking at the facts, magistrates might want to consider custody so I'd grant that, but my initial thing would be to look for the cross-examination, it's not there, so I'd have to go back to this one [seriousness] and see that he does have a previous matter for assaulting his wife, but it's someone else, it's a bit borderline this one. I'd look at his age as well possibly. I could be tempted, because that form has been filled out so badly, I could be tempted to refuse it on the grounds insufficient information to justify likelihood of custody, that's what I'll do. This would be a classic example I think of where, if I did that, almost certainly I'd get a letter the following day from the solicitors with more information. (Curborough, DM3)

This dummy application was one that some clerks thought lacked sufficient information to make an informed decision. In three cases clerks decided to return the application for further information regarding plea, relationship to the victim and details of the offence, while a further four clerks made a reluctant decision to either grant or refuse while making clear that they would have liked to have had more information:

> I think it is a serious offence and I would grant that. What I don't know is whether the victim is the same victim and I can't assume that it is, but in my own mind I would be thinking 'I wonder if it is and she is being brave enough this time to go through with it', would go through my mind, and then there are probably things like the vulnerability of the witness if that is the case. But I would be assuming that, maybe I would look at the papers and check that, without knowing that it is his wife, it is only if it has got the same surname will I be able to determine and then I probably would in the circumstances. (Highfield, DM3)

This dummy application demonstrates, therefore, not only the different approach to offence seriousness, but also the way in which applications with incomplete details are dealt with.

Case 2 Mrs White, age 24: criminal damage

Offence description:
Damage to glass door, value £161.52. Mrs White went to the alleged victim's home and accused her of sleeping with her boyfriend. When refused entry to the flat she became abusive and the victim closed the door. The police case is that she punched and kicked it, breaking the glass. She admitted kicking the door (but not hard enough to break it) and explained the cut to her hand by saying she hit her own door. Mrs White's boyfriend was at the property at the time, he says that Mrs White did not damage the glass since it was already cracked.
Reasons:
[5d] I have no previous convictions.
[5h] Alleged victim will be cross-examined in court - I will say that the glass door was already damaged.

In just one court (Dultham, low) were all three decisions makers in agreement as to the decision in Mrs White's application – they all refused. In five of the other courts the balance was in favour of granting. Of those who granted this application, four had rated the offence 'criminal damage value under £25' as almost certain to be refused (although the value in this case was higher at £161). The overall grant rate of 56% was virtually identical to that found in 1992 (58%).

The reasons put forward in this application revolved around two issues, that of 'serious damage to reputation' and the need for 'expert cross-examination'. Decision-makers' responses to the first were almost unanimous, while the second issue generated more disagreement.

In Mrs White's application in the box 'it is likely I will suffer serious damage to my reputation' the solicitor had simply written, 'I have no previous convictions'. Only two of the decision-makers agreed that this was a sufficient ground to grant, although they did not elaborate as to why. The rest of the decision-makers, including some of those who ended up granting the application, did not accept that a conviction for criminal damage would lead to serious damage to reputation. In justifying their decisions, court staff referred either to the lack of information about the defendant's employment or the failure to show that the conviction would lead to serious damage to reputation, as the following quotes illustrate:

> Don't agree, this is an offence to which a stigma would not be attached. (Dultham, DM2)

> No details of current situation, employment etc. in other words what reputation are we talking about…I'm tempted to put 'no damage to reputation, just door!' (Dultham, DM1)

> Not <u>serious</u> damage to reputation. (Granton, DM1)

> This particular box here, they do tend to put 'I've got no previous' therefore they're going to suffer serious damage. What I tend to do there is say that it's not 'serious' damage to reputation because of the nature of the offence. I wouldn't be persuaded by that for criminal damage, because I don't think these days people are that bothered if someone has a conviction for that sort of thing. (Curborough, DM3)
>
> Insufficient information to show serious damage to reputation. What job does she do? (Granton, DM3)

If we recall the discussion in chapter 5 it will be noted that these decision-making norms are in line with the general views expressed by court clerks when asked about the damage to reputation criterion. In the light of judicial authority, we reached the judgment there that court clerks place too much emphasis on social status and position, and on the seriousness of the offence, and too little emphasis on 'clean record'. Dummy applications can make visible these kinds of questionable norms and it may be that any new training for decision-makers could usefully include such an exercise.

The second reason advanced in support of Mrs White's application was that the alleged victim would be cross-examined, and this was put under the 'expert cross-examination' box. Among the 14 clerks granting this application, only three referred explicitly, either in the reasons they wrote on the form, or in the verbal comments they made, to the fact that they had granted it due to the need for 'expert cross-examination'. In most cases, decision-makers justified their decision to grant by stressing that a grant was in the interests of the victim due to the quasi-domestic nature of the offence. In the first two quotes below, there is a hint that a grant would also assist the court:

> Due to the cross-examination of the complainant, because it is a domestic background really it could be quite difficult if she is trying to cross-examine this person, it could get quite heated. I think in that situation it is important to grant it for all parties, in the interests of justice that she be represented... If it is a domestic background I would normally grant that really because it is very difficult, you don't want them directly cross-examining. I normally put 'detrimental to the defendant'. (Brinswick, DM3)
>
> Well, my instinct is to say this is messy, but let's hope I can find a good reason to grant legal aid... I'd probably decide I would grant it because it's denied, and I would write 'borderline application, because offence'. I might go so far as to check it's a not guilty plea, become sometimes they infer it's denied and then come and plead guilty, in which case I'd be cross... '[The charge] is denied, and the allegation is of a close domestic nature, inappropriate for defendant to cross-examine alleged victim', that's what I'd put on that. (Curborough, DM2)
>
> I would grant because I tend to err more to granting than refusing, and because it is going to be her word against somebody else's word and in a way, in an emotional, because I have got all this information here, she did it in an emotional

> state so I think she herself is going to be vulnerable because of the circumstances relating to the victim. Now when we talked about these [criteria] I did say I probably wouldn't grant them on [expert cross-examination] on its own but I have done that really. (Highfield, DM3)

As the application itself had not argued that it would be in 'someone else's interests', the fact that decision-makers used this line of reasoning shows that they sometimes 're-interpret' what solicitors have written, or draw their own inferences from the application in order to support their decision. Indeed, this was acknowledged by one of the interviewees:

> Interesting you have put it under '5h' [expert cross-examination]. I would more expect to see that there ['5i' – someone else's interests] as a reason to grant because it is not in the alleged's interests to be, but that is fine, I get the point. So I am not actually sure whether I agree it should be '5h', but I certainly would agree under '5i'. I would say I would grant for that one because it seems like to me there is going to be a trial in this matter because she is disputing what went on, so I would say 'not in alleged victim's', although victim in inverted commas, 'interests to be cross-examined by defendant' basically. Because there seems to be some animosity there. (Curborough, DM1)

Not all clerks, however, were prepared to interpret the applications in this way:

> It's not been properly argued. … I would refuse this or send it back. It would have been better to argue it is not in the interests of these people to cross-examine. They are not getting along with each other; it is not going to be good for, I think it is, his wife to be cross examining the victim, the complainant of the case, at the trial. The application would have been better argued on those lines than to try to say expert cross-examination, because it is a charge of criminal damage and the defence is going to be the glass door was already damaged which his wife could say. Why can't Mrs White say the door was already damaged, do they need a solicitor to say that? No. (Granton, DM3)

The fact that some decision-makers are willing to 'interpret' applications while others are not is undoubtedly one contributory factor to the variations in grant rates that we have seen. The decision-maker in the quote above went on to comment that had he received this application in court, as opposed to through the post, he might have prompted the solicitor to add something under the 'someone else's reasons' box. This provides another illustration that the method of application can be a factor in whether or not an application is granted and in the variation in grant rates (see further chapter 4).

Not surprisingly, those decision-makers who refused Mrs White's application made no reference to 'someone else's interests'. In their reasons for refusal they stated instead that they did not believe there was a need for expert cross-examination, as the case was not, in their view, complex:

> I don't think it needs expert cross-examination I think the defendant can adequately cross-examine the IP [injured party]. (Highfield, DM2)
>
> I would normally grant it for cross-examination of a victim but I think that because it's a minor criminal damage I think the issues would be very narrow, wouldn't require, again, this is where you can [get] round the expert cross-examination, I could justify not granting it by saying 'factual dispute' and it's not an assault, if it was an assault I would grant it, but it's a door, so once they've calmed down and they're in the same room... (Curborough, DM3)
>
> Straightforward cross-examination – factual dispute. (Brinswick, DM2)

This dummy application has demonstrated differences in the way that decision-makers interpret the need for cross-examination, and shown that on occasion they are willing to give applicants the benefit of the doubt and grant, even though applicants had not argued their case well. It has also illustrated the potential value of using a dummy application exercise within a training package for new (or existing) decision-makers.

Case 3 Mr Bloggs, age 25: S.5 POA

Offence description:
S.5 POA 1986 (disorderly behaviour at football match). Mr Bloggs was a regular supporter of Burnley FC. On the day in question he and his friend (X) found himself in a section of the stand occupied by supporters of the opposing team (Blackpool). There was no trouble until Burnley scored whereupon Bloggs and X jumped up and down in delight. At this point the evidence of the police and that of Bloggs and X differs. According to the police Bloggs and X began to 'v' sign the Blackpool supporters, thus causing a fight in which they were willing participants. According to Bloggs and X, the Blackpool fans turned on them immediately after Bloggs and X jumped to their feet, spitting at Bloggs and X and verbally abusing them. Bloggs and X say that they remonstrated with the Blackpool fans who then physically attacked them. All Bloggs and X did then, they say, was to defend themselves.
Reasons:
[5a] Nature of offence. Previous for related offences (2 football hooliganism, assault. Fines on each).
[5h] Cross-examination of arresting police officers.

With the exception of the breach of ASBO case (below), this application generated the highest level of agreement amongst decision-makers within the same court, with all three court staff at four of the courts being in agreement. However, in two courts, Curborough (low) and Dultham (low), the decision-makers all refused the application, whereas in Brinswick (officially low, actually high) and Fyford (high) they all granted it. Section 5 of the Public Order Act was the offence that decision-makers had indicated in the offence exercise that they would be least likely to grant, with 48% claming it would almost certainly be refused whatever the circumstances. In the event, five of the decision-makers who claimed this, from four different courts, decided to grant Mr Bloggs' application.

The first reason put forward on the application form related to the likely loss of liberty, mentioning the applicant's two previous convictions for like offences. Fifteen of the clerks did not accept this reason, noting that section 5 POA is a non-imprisonable offence. However, a significant minority of decision-makers granted on this ground, on the basis that the occurrence of the incident at a football match was an aggravating factor, and some made reference to the possibility that a football banning order may be applied for, which they interpreted as a significant restriction, or even loss, of liberty:

> Even though it's a non-imprisonable offence, because it's a public order incident I would probably grant it on the fact that he may well be subject to a football banning order as well if convicted. (Alsbury, DM3)

> Based on the fact that he has got previous for football hooliganism and assault they might well look at a football banning order so I would say that would make it, although section 5 is not very serious at all, based on the circumstances of where he is and his previous convictions, again I would grant that. (Brinswick, DM1)

> Custody is not an option, because the offence is not imprisonable, but the gentleman has got previous for hooliganism. It is likely the magistrates will have to consider a football banning order, which is complex by itself, then he could be told he can't go and see his favourite football match for two years... it is a significant loss of liberty in that sense. It is a complex subject so I would grant on that reason. If it was a normal section 5 public order I probably wouldn't. (Fyford, DM1)

> Right, well here is probably one where I would take a factor into account that isn't in the Widgery criteria and which isn't on the application form and that would be the question of whether a football banning order would be made. Because of the draconian nature of those orders I would grant it, and I would grant for that reason and not for any other reason on the form.
> *Q: That is on the possibility they might apply for one?*
> Yes. Well they would. I know the CPS would. (Brinswick, DM2)

As in White's application above, these quotes show that some decision-makers are willing to grant on the basis of what they think will happen with a case, even if the information has not been provided on the application form. Again, other clerks were unwilling to make this leap of faith:

> That's quite a common one where they fill it in there, and it's not imprisonable. Then again there, I'd be tempted, because I don't really want to grant it for section 5, I'd probably get round this box by saying that they haven't justified the need for anything other than a factual dispute, so I'd just put 'insufficient details of issues in dispute to justify expert cross-examination'. Having said that, what I would grant it for, if they had filled it in, if convicted there was a likelihood of an

> application for a football banning order. If they don't put it on the form I'm not going to do that. (Curborough, DM3)

The second ground on which the application was based was the need for expert cross-examination of police officers. Of the 18 decision-makers who wrote reasons next to this box, half accepted that the dispute in question required the expert cross-examination of police officers, as one said

> I don't think Bloggs could sufficiently argue that himself. … It wouldn't be appropriate for a clerk to try to enter the arena and to expertly cross-examine a police officer where there is a dispute on the facts. (Granton, DM3)

However, the other decision-makers did not feel that expert cross-examination was required, describing the dispute as factual or straightforward, and the cross-examination as something that the defendant could do himself 'with the assistance of a legal advisor in court' (Curborough, DM2). What these two quotes confirm is that decision-makers differ not only in how they interpret the need for expert cross-examination, but also in how they view their own role as legal advisor. We noted in chapter 5 that those court clerks who dismiss the notion that it would be justifiable to grant legal aid for the purpose of cross-examining police witnesses are somewhat out-of-step with judicial authority on the point.

Case 4 Mr Jones, age 30: making off without payment

Offence description:
Making off without payment (S.3 theft act 1978) Taxi fare £4.80. Mr Jones was out for the evening with friends. He got drunk, so his friends called a taxi for him, which took him home. He refused to pay, although he had £25 in cash on him. He says that he did not call the taxi and was too drunk to make a contract, which he says will be confirmed in court by his friends. He says that he did not 'make off' but simply went indoors, and was not dishonest.
Reasons:
[5d] No previous convictions.
[5e] s.3 Theft Act 1978. Did not 'make off'. Too drunk to make a contract with the taxi driver. Friends called for taxi, I did not.
[5h] Taxi driver – as to how drunk I was.

This application relied on three of the statutory criteria – serious damage to reputation, a substantial question of law, and expert cross-examination. It was granted by 68% of decision-makers, and in three courts all three clerks were in agreement that the application should succeed. Although almost identical wording was used in the reputation box as in Mrs White's application, clerks were more likely to agree that Mr Jones was at risk of serious damage to reputation, due to the fact the offence was one of dishonesty, albeit a relatively minor one:

> Probably grant this one as well, although it's a minor offence, it's one of dishonesty, I would grant it on that basis. (Alsbury, DM3)

> I might be tempted to grant because it is a theft offence and I think when employers look, you always look at how will other people see it, and I think an offence contrary to the Theft Act is always likely to cause you damage in your future prospects really. (Dultham, DM2)

This was the first application in which a 'substantial question of law' had arisen. Given their lack of legal training, it is not surprising that three of the seven administrative staff said that they would refer the application to a legal advisor for this reason. Among the legal advisors themselves, however, there was disagreement as to whether the issue in dispute related to a question of fact or law, and, if law, whether the question was substantial:

> They said the offence is not made out, therefore it is a question of law, but it's dependant on the facts found by the magistrates as well. I like to think if it's purely on intent or an element like that the court is going to assist anyway, and therefore it is not a substantial question of law. (Granton, DM2)

> Now, there is an issue of dishonesty, dishonesty is quite complicated, I think I'd just about be satisfied on that, potentially complex area of law. Again this is one I'd probably make sure it [the charge] was denied, because I definitely wouldn't grant it if it wasn't. (Curborough, DM3)

> I mean his point turns upon whether he is contractually bound, which is more difficult, is more of a civil point, but also the mens rea of the offence, so whether he has made out not just the act but also the mental knowledge of the offence, which I think is something which is difficult for normal non-lawyers to get their heads around - the difference between the act itself and the mens rea. (Alsbury, DM2)

The third criterion invoked was expert cross-examination. Views on this were, as in Bloggs' application, fairly evenly split between those who thought the defendant, either with or without the help of the legal advisor, could deal with the cross-examination, and those who believed the case was sufficiently complex as to merit legal representation.

In interviews some decision-makers had indicated that they would rarely grant on criteria such as expert cross-examination or loss of reputation on their own, and there was evidence from comments made during the dummy exercise that, in borderline cases, the decision could be tipped in favour of the applicant simply by the fact that more boxes had been completed:

> He has got no previous convictions, also a substantial question of law is involved. And case involves expert cross-examination. But just one of those on its own I would not be so inclined to grant it but if you take all of those three together. (Granton, DM1)

> I think I might be tempted to grant this one, this would probably come into the category of this would be an awkward trial if he wasn't represented and the fact he has made the effort to fill in a couple of things in on the box. There's no particular point of law there as such, I mean too drunk to make a contract, pretty unlikely, but I might be tempted to sort of say 'possible legal arguments'. I could equally justify refusing it, but there is a victim here, so I think I'd put cross-examination of victim, and that could get quite heated. (Curborough, DM3)

This approach is justifiable in terms of the official guidance (CDS, 2002: 10), which provides that:

> In some cases the interaction of two or more of the factors may dictate that a right to representation should be granted when neither by itself would have sufficed. For example, where a minor question of law might be dealt with under Advice and Assistance, or a person's knowledge of English may be adequate rather than good, these two factors in combination could merit a grant of a right to representation.

We have noted the complaints by decision-makers (chapter 5) that solicitors sometimes fail correctly to interpret the criteria and have a tendency to put down irrelevant reasons. However, one might respond that the official guidance encourages solicitors to invoke criteria for which they only have a weak case with a view to developing a strong case (through the interaction of the criteria invoked) overall. It certainly seems from the comments of some decision-makers that solicitors would be well advised to fill in as many of the boxes as they possibly can.

Case 5 Mr Bate, age 23: possession class 'c' drug

Offence description:
Possession class 'c' drug (1/2 oz cannabis)
Client searched outside club well known as a 'drugs haunt' at night. Cannabis found on his person, made no attempt to hide it.
Reasons:
[5a] Nature of charge. Previous similar offences. CSO and probation previously imposed for cannabis offences and theft/burglary.

Mr Bate's application had the lowest grant rate of all the applications at 40%. Decisions as to grant tended to mirror those they had made on the offence rating; in other words those who had said someone charged with possession of cannabis was unlikely to get legal aid tended to refuse this application and vice versa. Decision-makers were in agreement in three courts; in two (including one high grant court) the application was refused; in the third it was granted.

This application rested solely on the likelihood of custody criterion and as the low grant rate suggests, the majority of decision-makers did not believe there was a real risk of custody:

> The recent guidelines for cannabis make loss of liberty extremely unlikely, and his previous convictions, I think, don't really aggravate simple possession in those circumstances, and so I don't think there is any justification for granting legal aid in that sort of case. (Alsbury DM2)

> I totally disagree, not at all likely. None of the statutory criteria have been made out. I am not going to grant for cannabis. Dealing different, but not just having it. (Curborough, DM1)

> I would refuse that one on the basis that, even though he has previous convictions for like offence, there's no real risk of his going to prison for possession of class C. He's not indicating a not guilty plea, so I would assume it's guilty, so I would refuse that one. (Alsbury, DM3)

Given the firmness of these expressed views, it can be taken as a sign of the wide variation in legal aid decision-making that a minority of court clerks granted this application. Those who granted were much more likely to stress the aggravating relevance of the applicant's criminal record. This is illustrated by the following quotes, the first of which also demonstrates how some clerks are willing (quite properly – see chapter 5) to take into account the seriousness of the penalty that is likely to be imposed, even if custody itself is unlikely.

> I would grant that one, not because it is a guilty plea, it is not that much cannabis, but because there are previous convictions here. He is building up previous convictions... I would grant that because he is going to get at least a community penalty, for that matter possibly custody, depending on how many previous convictions. (Brinswick, DM3)

> Normally for simple possession of cannabis it is unlikely that they will go into custody but this guy has got previous for it and had a community service order... he is at the top of the tree so I would put 'yes, custody likely', and whoever is sending that off knows what I mean by that, which means subject to an existing community service order. (Dultham, DM1)

As far as the last quote is concerned, it is worth pointing out that the dummy application did not state that the community service order was still operative. The rapidity of legal aid decision-making means that these kinds of cognitive mistakes are quite likely in practice.

Another issue that this application raised was in how decision-makers responded to the lack of detail regarding previous convictions. Seven interviewees commented that they would like to have more information regarding the nature and currency of Mr Bate's previous convictions, but in only one case was the decision made to return the application to the solicitor for further information. In the rest of the cases the application was refused despite decision-makers hinting that they would have granted it had the convictions been relevant and recent:

> I would want to know there I think how long ago, you know if it was ten or twenty years ago, and also if the sentences were that long ago I wouldn't regard them, although the courts are entitled to see them, they would be spent under the Rehabilitation of Offenders Act … I think I would probably refuse that one. I will put 'no risk of custody' unless recent convictions and possibly including supply, and I would say that this list [of convictions] not relevant. (Alsbury, DM1)

> I would want to know if the previous cannabis offences were for supplying or were they for possession or was it class B, were they class C? So there is not enough information on that. I wouldn't grant it on the grounds that they are likely to lose their liberty, I wouldn't be satisfied that on that information there was a real and practical risk of custody. So, refused. (Fyford, DM3)

This case was one of the clearest cut which perhaps explains why decision-makers were content to refuse applications despite not having all the information they would like on the form. This contrasts with the more borderline application of Mrs White, where there was evidence that decision-makers would sometimes grant applications which lacked sufficient information.

Finally, this dummy usefully illustrates the way that some clerks will use other sources of information in resolving the uncertainty in their mind. At its most extreme, this may involve the post-hoc, wait-and-see approach to decision-making that we saw (at the end of chapter 6) that solicitors find so irksome, although the second quote below falls just short of that:

> Not knowing how much half an ounce of cannabis is off the top of my head, I would have to be guided by the prosecution, whether that is for personal use. Although he is just charged with possession and not possession with intent, if it is a large amount then you are more likely to grant it... I would ask to see the previous convictions... I would also check with the prosecutor how much cannabis that is, not being a cannabis user myself I couldn't tell you if that was a lot of cannabis or not very much cannabis. (Highfield, DM2)

> If at the end of the day a magistrate indicates a custodial sentence it can be reconsidered, but at this stage custody is not likely so I would refuse it. (Granton, DM1)

This dummy application provides a useful illustration that even the most apparently mundane matter can be handled in widely differing ways by court clerks.

Case 6 Mr Tan, age 18: theft/handling

Offence description:
Theft/handling (ladders)
Client was walking across field with friend where they saw a set of apparently broken ladders by the side of a skip. After checking to see if anyone (the owner) was around the friend decided to take the aluminium steps for their scrap value. Interviewed by the police, my client stated that he did not steal, or intend to steal the ladders, and only 'helped him to carry them'. A member of the public saw the youths carrying the ladders and informed both the owner and the police. The owner stopped the youths while in possession of the ladders and held them until the police arrived. In interview client agreed that he knew the ladders belonged to someone, and they would split the proceeds between them.
Reasons:
[5e] The law applying to joint enterprise, handling, and when criminal intent is formed.
[5h] Cross-examination of owner and member of the public.

This application was granted by 56% of decision-makers and in none of the courts were all three decision-makers in agreement, although in 7 out of 8 courts, decision-makers 'voted' two to one in favour of grant. Handling stolen goods was the only offence in the offence exercise which received no scores of 1 or 5; in other words the decisions on the dummy application could not be said to be at odds with their assessment on the offence exercise.

This application was based on two criteria – question of law and expert cross-examination – which had appeared in earlier applications and similar issues arose in their interpretation here. Again, administrative staff either tended to refer the application to a legal advisor or simply to grant it: just one administrative decision-maker refused the application on the question of law ground (whereas 8 of the 18 legal advisors refused it).[91] The majority of legal advisors questioned whether the reasons submitted related to a 'substantial' question of law, especially as the defendant seemed to be pleading guilty:

> Defendant admits being there, carrying the ladders and knowing they belonged to somebody else, and 'splitting the proceeds', suggests criminal intent. (Dultham, DM3)

> Refused – no authorities quoted and client admits in interview that proceeds would be split. (Fyford, DM1)

Another referred in their reasoning to the ability of duty solicitors or the court to assist the defendant:

[91] This reluctance to refuse applications which invoked a substantial question of law may explain why administrative decision-makers on average granted one more application (5.3) out of the seven than did legal advisors (4.2).

> This one I wouldn't grant either on the basis of this question of law, it is fairly substantial but this could easily be dealt with by the duty solicitor scheme, just the question of law bit, because joint enterprise criminal intent, I mean that is easy stuff that a lawyer could do on the day. (Alsbury, DM2)

Reactions to the expert cross-examination reasons were predictably split. Just over half of decision-makers did not accept the need for representation, arguing that the dispute was largely factual and that the 'court could assist'. Those who had already accepted the argument about the question of law were much more likely to agree that expert cross-examination was needed; they were also more likely to assume that the defendant was pleading not guilty. It was rare for a decision-maker explicitly to acknowledge that the relative youthfulness of the applicant (the youngest one in this exercise) was a legitimate factor to take into account when assessing whether a representation order was justified:

> There is cross-examination there so it is a not guilty plea. A joint enterprise thing, a not guilty plea is what I'd assume from that, so that would justify it. (Alsbury, DM1)

> The fact there is going to be a trial; I think I do agree here that there is a question of law here that a 19 year old can't be expected to deal with himself. Cross-examination of owner. (Curborough, DM1)

> Possibly, or just because, it says it is a joint enterprise I might grant it especially as there is cross-examination of a member of the public and the owner, so probably based on those two I would probably grant it, again erring on the side of caution on my part. (Brinswick, DM1)

In the last quote above, it will be noted that the decision-maker put into operation the principle expressed in s.21(7) of the Legal Aid Act 1988 which required that where the decision-maker was in any doubt as to whether an application should be granted, the doubt should be resolved in the applicant's favour. As pointed out in chapter 2, no such provision appears in the current legal framework under the Access to Justice Act 1999. Although 'the benefit of the doubt' principle was not often referred to during interviews, the practice of affording it to the applicant was quite often apparent in the dummy application exercise. Where decision-makers differed was in how much information they would require from solicitors in the first place, and how they interpreted the information that was provided. As this dummy application has shown, readings of the same application can produce diametrically opposed conclusions even on matters as important as plea.

Case 7 Mr Patel, age 69: breach of ASBO

Offence description:
Breach of ASBO
Reasons:
[5a] An ASBO was previously imposed on Mr Patel on the basis he had been engaged in a campaign of harassment against his neighbour, including verbal abuse and criminal damage. CPS are alleging that Mr Patel has breached the terms of the ASBO by spitting and swearing at his neighbour as the latter got into his car with his granddaughter. Were this order to be breached, Mr Patel is at risk of custody.
[5i] Mr Patel has no knowledge of the courts and unable to convey his defence properly. As required by the Human Rights Act, representation is needed to ensure 'equality of arms'.

The final application concerned a breach of ASBO, and unlike all the other cases, this one was granted by every single decision-maker. The application had been made on the basis of likely loss of liberty, as well as the 'equality of arms' argument under 'any other reasons'. Arguably, it would have been open for the applicant to also invoke the 'unable to state own case' criterion given his claim that he would be unable to convey his defence properly.

Decision-makers invariably granted due to the likely loss of liberty, and as some noted, there would be no need to look at the second reason proffered:

> As soon as I read that [breach of ASBO] I would grant it, even before reading anything else, because there is a risk of custody, he is in breach of a court order, quite a serious breach as well. As soon as I read that I would grant it, I wouldn't even look at that part ['equality of arms']. (Alsbury, DM3)

> Breach of ASBO, well that's easy straightaway, entry point is custody. Agreed. And there's been a case recently, even for a petty non imprisonable offence, if you breach an ASBO you're looking at 18 months. (Curborough, DM2)

> Breach of ASBO that's easy! I don't even have to read it, I just write 'likelihood of custody if convicted - seriousness'. (Curborough, DM3)

Where decision-makers did comment on the Human Rights argument, this was usually dismissed:

> I would take no notice of because you can say that in every application and some must be refused. (Brinswick, DM3)

> I wouldn't grant it for equality of arms; that annoys me when they put that. (Fyford, DM1)

> Oh human rights application, right to a fair trial and all that. Mr Patel has no knowledge of the courts, well he has managed to get himself an ASBO so he must have some knowledge of the courts! (Granton, DM3)

The final quote also hints at the lack of sympathy some court clerks demonstrated in chapter 5 for those who claim an inability to state one's case or understand the proceedings. As we saw there, however, this is understandable given the (erroneous) 'restricted ascriptions approach' adopted in Form A and the official guidance on this point.

Changes since 1992

It is interesting to compare across time the grant rate for the six dummy applications that were used both in this and the earlier equivalent research study. This is not as straightforward as it sounds; methods of dealing with cases have become more complex in recent years. In 1992 none of the dummy applications were marked as 'returned to solicitor for more information' or as 'referred to a legal advisor'. As these ways of determining the dummy might have led to an eventual grant decision we show in Table 18 the immediate grant rate in 2005, the maximum possible grant rate in 2005 (on the assumption that all those returned or referred were eventually granted) and the grant rate in 1992.

Table 18 Decisions by court staff on dummy applications by case in 1992 and 2005 (%)

Court	Grant rate in 2005	Maximum possible grant rate in 2005	Granted in 1992
S47 assault	72	84	25
Making off / bilking	68	84	75
S5 POA	60	64	33
Criminal damage	56	64	58
Theft of ladders	56	64	75
Possession cannabis	40	44	67

The biggest shift has occurred in relation to the s.47 case, which is now far more likely to attract a grant than in 1992. The next biggest shift is seen in the greater willingness to grant for the s.5 Public Order Act offence. We do not think these shifts signify greater liberality on the part of court clerks over time. The rest of the information presented in Table 18 is simply inconsistent with the greater liberality thesis. Thus, there has been relatively little change in the grant rates over time for making off, criminal damage and theft of ladders, and possession of cannabis was substantially more likely to attract a grant in 1992. The explanation for the shifts in grant rate is much more likely to lie in changing perceptions of offence seriousness and related sentencing provisions and patterns.

There can be little doubt, for example, that s.47 has moved up-tariff since 1992. The reasons for this shift include the introduction in the late 1990s of Crown Prosecution

Service charging standards (which resulted in some less serious assaults falling out of the s.47 category),[92] the wider use of magistrates' sentencing guidelines (which now specify that the entry point for s.47 is custody), and the increasing use of custody that has been witnessed since 1992. On this last point it has recently been pointed out that the '... total number of offenders sentenced to immediate custody increased by 83% from 1993 to 2003, with magistrates imposing 185% more custodial sentences at the end of the period compared to the beginning (compared to 34% more imposed in the Crown Court)...'.[93]

Section 5 of the Public Order Act was a non-imprisonable offence in 1992 and remains so today. However, our s.5 offence took place in the context of a football match, and sentencing provisions for such behaviour are now much tougher than they were in 1992. In the earlier research only one court clerk made reference to a football exclusion order under the Public Law Act 1986,[94] whereas several court clerks mentioned the more draconian football banning orders under the Football (Disorder) Act 2000.

Finally, cannabis has been downgraded from a class B to a class C drug with consequential changes in sentencing norms. By contrast, criminal damage, theft and making off carry much the same social and legal significance as they did in 1992.

Conclusion

When decision-makers were presented with identical applications, those based in courts with an overall high rate of grant tended to grant more applications than those based in low granting courts. This provides further confirmation that courts do differ in their interpretation and application of the interests of justice criteria.

The dummy rating exercise highlighted a number of issues, particularly around how decision-makers deal with inadequate information, and how they determine whether questions of law are substantial or whether expert cross-examination is needed. A wide spectrum of views on some of these matters is probably inevitable given the localised nature of decision-making and the different bureaucratic and legal norms at play in each court. But some views are simply erroneous (e.g., on the reputation criterion) and here better guidance could be of assistance in reducing unjustifiable disparity.

That inconsistency is to be found within the same court means that the localised nature of decision-making could not, in any event, provide a complete justification for current patterns of grants and refusals. The dummy application exercise produced evidence of variation in both approach and outcome between decision-makers based in the same court. What this shows is that one cannot assume that decision-makers in courts with either high or low rates of grant share a common understanding of the Widgery criteria or how best to deal with such issues as badly argued applications. It also suggests that court

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92 See A Ashworth and M Redmayne, *The Criminal Process* 3rd edn, (Oxford: OUP, 2005) at p. 176.

93 E. Cape and R. Moorhead, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (London: Legal Services Research Centre, Legal Services Commission, 2005) p. 45. See further chapter 10.

94 *In the Interests of Justice?*, p. 53.

policies, where they exist, are not necessarily sufficient to negate the variation in outcome which results from individual discretion.

Finally, we have argued that our evidence is inconsistent with the thesis that court clerks have become more liberal in their approach to decision-making since 1992. Rather it seems to be the case that shifts in the social and legal significance attached to particular offences and offence labels explain shifts in grant rates for the dummy applications.

9. APPLICATION RATES AND APPLICATION PRACTICES

Most of the analysis thus far has been concerned with the practices and opinions of decision-makers. In this chapter we explore the system from the perspective of applicants. Although the legal aid application form is completed in the name of the defendant, and signed by them, it was clear from interviews that applications were invariably completed by the solicitors:

> The reality of the situation is that you don't let the defendant anywhere near it, ok. (Dultham, S3)

> We prefer to do it ourselves because we're less likely to make a mess of it. Quite a bit of it is only stuff that lawyers can write, and reasonably expect to get the answers right. Defendants would write all kinds of crap. (Curborough, S3)

> We have the pen and we talk it through with them because a lot of them can't write and a lot of them can't read. (Alsbury, S1)

The role of the defendant in the process was a passive one. They were there to sign the form, and perhaps confirm that they agreed with what the solicitor had written. When we asked solicitors how reliable they thought was the information provided by defendants when they were completing the form, it became apparent that in most cases, solicitors were not dependent on applicants to provide substantive information relating to the interests of justice criteria:

> It's not really so much their information, it's ours. (Highfield, S3)

> I don't actually have to get a vast amount of information from them, because most of it will come from the list of previous convictions, the advance information… (Alsbury, S3)

> Well all the form contains is his name and address, from him, date of birth, the offence, and whether there are any co-defendants etc. The applicants do not respond to, not here anyway, are not responsible for filling in the content of the form. (Dultham, S1)

Given this, the discussion which follows focuses on the views and practices of solicitors, and is based on analysis of the 1,492 application forms which were sampled in the eight courts. We have already seen (chapter 7) that when solicitors were asked how applications were processed in their local court, many noted that practices and grant rates varied between the different courts they visited. However, they did not, on the whole, let such variation affect whether or not they would apply for legal aid. Such decisions seemed to be based on their sense of whether a case merited legal representation, rather than on the chances that an application would succeed. As one solicitor put it:

> We're very strict and proper about this. If we think this is a case which merits a grant of a representation order, given the kind of experience we've got in here, 20 odd years, then you've got a rough idea of what does and doesn't merit an application for a representation order... We do not take the view that we shouldn't apply for legal aid because we know we won't get it. So we will apply, and if it's refused, we will make an oral application... There are many cases where we don't apply on the basis that we know that, not only that it wouldn't be granted, but it wouldn't fall within the criteria. Don't know if you know this but there are LSC rules about applying, so that would be naughty to do that. (Dultham, S1)

In other words, solicitors in the courts visited seem to be reasonably consistent in terms of *what* they applied for. In the rest of this chapter we consider whether there were differences in *how* they did so. Table 19 below presents for each court the proportion of application forms in which the various criteria were invoked, as well as the average number of criteria invoked per application.

Table 19 Use of the criteria by applicants by court, and average number of criteria used (weighted figures)

Criterion	Alsbury (high)	B'wick (low)	Curboro' (low)	Dultham (low)	Elswich (medium)	Fyford (high)	Granton (low)	H'field (high)
Custody	94	86	86	87	92	87	94	90
Sentence	40	23	21	24	22	28	15	22
Livelihood	10	14	19	4	22	14	9	15
Reputation	13	19	28	18	27	14	14	19
Law	20	33	23	12	20	18	16	32
Understanding*	24	41	32	26	12	19	13	17
Trace	16	20	22	6	23	10	17	16
Expert	16	37	32	18	41	22	28	46
Else	12	24	10	11	7	10	15	17
Other	63	56	51	45	67	43	56	60
Average no. of criteria	3.0	3.4	3.2	2.5	3.2	2.6	2.8	3.3
Average no. of words	35	44	47	44	70	38	36	40

*In the form, the inability to understand proceedings criterion contains two subsections (lack of English and disability), so these are combined here also.

Table 19 shows that the way in which application forms are completed varies considerably from court to court. With the exception of the custody criterion, which is used on between 86 and 94 per cent of applications, the proportion of applications invoking particular criteria is up to five times higher in some courts than in others. For example, the loss of livelihood criterion was more than five times more likely to be used by applicants in Elswich (22%) than those in Dultham (4%), while expert cross-examination was used almost three times as often in Highfield (46%) than in Alsbury (12%). The average number of criteria used varied from 2.5 in Dultham to 3.4 in Brinswick. In seven out of the eight courts, the average number of words in the

applications was between 35 and 47; in one court (Elswich) it was as high as 70 words per application.

The patterns which emerge do not relate in a simple manner to the refusal rate of the court. This can be demonstrated by taking the courts with the highest and lowest rates of grant, Highfield and Curborough respectively. One can see that the proportion of applications in which the custody or sentence criteria were invoked was almost identical, as was the average number of criteria and words used. Differences between the two courts did exist – Curborough applications were more likely to use the reputation and understanding criteria but less likely to use the law, expert cross-examination and someone else's reasons criteria. But given that the custody criterion was considered by decision-makers at all courts to be by far the most important (see chapter 5), it is difficult to see how these patterns could explain the considerable difference in refusal rates in the two courts.

We have already noted (chapter 5) that one of the reasons decision-makers sometimes appear to give little weight to some of the criteria is due to their perception that the information provided by solicitors is inadequate or irrelevant. The most time consuming aspect of the fieldwork was the recording verbatim of the reasons put forward by solicitors on the 1,492 application forms in our sample. This data allowed us to examine this issue in some detail.

We begin by looking first at the loss of liberty criterion, and then at the other interests of justice criteria.

Loss of liberty

The loss of liberty criterion was used on the application form in over 86% of cases (65% of refusals and 91% of grants). This criterion essentially involves the making of a prediction as to the likely outcome of the case. In table 20 the predictions of solicitors on legal aid applications are compared with the actual sentences imposed by magistrates' courts (for the five courts where disposal information was available).

Table 20 Court disposal by solicitors' use of the 'likelihood of custody' criterion (%)

Disposal[95]	Criterion not used	Criterion used	Total
Custody	3.7	23.5	20.7
Community	25.6	42.8	40.5
Discharge	22.0	10.6	12.1
Financial	40.2	18.6	21.5
Other	8.5	4.5	5.2
Totals	100	100	100

[95] We have excluded from this table non convictions (where the case was discontinued, or the defendant acquitted), and cases where the conviction was not recorded. The category 'Other' contains disqualifications and bind-overs. The custody disposal includes one suspended sentence.

As can be seen from table 20, eventual disposal was strongly correlated with solicitors' use of the custody criterion. Where this criterion was used, custody (22.5%) and community penalties (42.8%) together accounted for almost two thirds of disposals. Where it was not used, custody (3.7%) and community penalties (25.6%) accounted for less than one third of disposals. One might question why any cases in which this criterion was not invoked went on to receive custody. Analysis of the use of this criterion by type of offence suggests the answer is that solicitors sometimes omitted to complete this criterion for very serious offences. For example, in two out of 21 cases of robbery and three of the 40 cases of possession of an offensive weapon, the loss of liberty criterion was not used. The explanation for this lies in the fact that many solicitors and clerks work on the tacit understanding that high-tariff offences always meet the loss of liberty criterion and are automatically granted. Naturally there is variation here too, both as regards the offences regarded as sufficiently high-tariff to engage this understanding and in the willingness of particular court clerks to work within it:

> You sometimes piss clerks off big time by not writing enough information and being a bit too brusque and assuming automatically, 'I am going to get legal aid' – especially when they [clients] are down in the cell. They are already in custody, so you think they are going to get legal aid, sometimes they don't. (Curborough, S3)

The overall figures show that when solicitors use this criterion, in the majority of cases the applicant receives a custodial or community penalty. That is not to say that solicitors always used the criterion appropriately. For example, the criterion was invoked in one third of careless driving and no insurance matters as well as in two thirds of other summary motoring offences, although absolute numbers of these were small.

It is interesting to compare these figures with those found in the 1992 study. In that study, the proportion of all cases receiving custodial sentences was around six per cent, and of those cases in which the criterion had been used the figure was almost seven per cent.[96] The fact that the corresponding figures in the current sample were 21 and 22 per cent respectively starkly illustrates the greatly increased likelihood of custody that applicants now face. This may also explain why the likelihood of custody criterion was more often completed by solicitors in 2004 than in 1992 (around 90% and 78% respectively).

Before going on to consider the other interests of justice criteria, we can also compare outcomes for cases in which the custody criterion had been invoked between those applications where decision-makers agreed with the solicitors' assessment and those where they disagreed.[97] It should be noted that decision-makers did not always write comments next to solicitors' reasoning (see further end of this chapter). In relation to the custody criterion, decision-makers made written comments in only 61 per cent of cases.

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96 *In the Interests of Justice?*, p.65.

97 As an aside we note that there was no evidence that court clerks systematically compared actual with predicted outcomes and very little ad hoc tracking of case outcomes appeared to take place. Administrative staff are not in a position to compare claims made on the application form with eventual sentence and even legal advisers only infrequently handle a case from start to finish.

Of these, they accepted the solicitors' reasoning 83 cent of the time. The table below shows the disposal given by decision-makers' comments.

Table 21 Comparison of outcomes for cases by decision-makers' acceptance of the custody criterion

Disposal[98]	Agree %	Disagree %
Custody	27	7
Community	46	36
Discharge	9	12
Financial	12	42
Other	4	3

As can be seen, decision-makers were able to categorise quite successfully those cases which were more likely to attract custodial sentences. Where they agreed with the solicitors' assessment regarding loss of liberty, 27 per cent of defendants received a custodial sentence, compared to seven per cent where they disagreed.[99] One should not read too much in to these figures, as there may be an element of self-fulfilling prophecy operating, inasmuch as magistrates may *feel* constrained not to sentence defendants to custody where the legal advisor has initially refused legal aid.[100] Indeed, one solicitor told us that he chose not to appeal refusals of legal aid in guilty plea cases where he had judged initially that custody was likely, simply in order to keep this perceived constraint in place:

> We say to the defendant, 'well, the court said you don't need a solicitor, because you are not going to prison. Go in on your own, because if that is their decision it would not be of service to you if we then appeal it simply to get you represented... the court clerk has effectively bound the court's hands.' (Dultham, S2)

As regards the other interests of justice criteria we are not in a position to compare the claims of solicitors with what subsequently happened. There is no way of knowing from the data available, for example, whether the defendant suffered serious damage to reputation or whether the tracing of witnesses proved necessary. In the criteria which follow we concentrate instead on the quality of reasoning employed in making these claims.

Loss of livelihood

Of the 207 forms where this criterion had been used, 103 (50%) were judged to have contained adequate supporting reasons or details (in 1992 this figure was 65%). A quarter of these related to driving offences where it was claimed that the defendant would lose

98 See footnote relating to the previous table for an explanation of categories.

99 It should not be assumed that in the 7% of applications where legal advisors disagreed that unrepresented defendants were sent to prison since legal aid may have been granted under other grounds.

100 Magistrates would not in law be precluded from sending a defendant to prison in this scenario, however, so long as legal representation was offered at the post-conviction, pre-sentence stage: s. 83, Powers of the Criminal Courts (Sentencing) Act 2000.

his or her job if disqualified – 'I am a Hackney cab driver and will lose my Hackney cab licence if convicted' (Elswich 82). In a further 22 cases (21%) the applicant claimed that loss of employment would result from any custodial sentence imposed – 'if given a custodial sentence I will lose my livelihood, as I will lose my job as an office manager' (Fyford 147).

In the remainder of the 103 cases the reasons given were varied; some linked the type of offence (e.g. dishonesty) to the position held (e.g. security guard), while others simply stated that the defendant's position would be lost as a result of conviction – 'I will lose my job if found guilty' (Fyford 50). It could be argued that the latter type of reason does not satisfy the grounds for grant as set out in the Criminal Defence Service guidance, which states that 'the applicant must explain *why* he believes that it is likely that he will lose his livelihood' (CDS, 2002: 15, emphasis added). In deciding to categorise such statements as adequate reasons we were guided by responses to one of our interview questions in which we asked decision-makers how reliable they thought the information provided on the form was. The majority view was that as officers of the court, the information provided by solicitors should be taken at face value (see also chapter 3). Thus statements of this kind were deemed to satisfy the criteria. Evidently, if one were to adopt a stricter evidentiary threshold the proportion of cases in which this criterion would have been satisfied would have been even lower than 50%.

In the 50% of cases where not even this threshold was met, the reasons submitted by applicants were split fairly evenly between those that simply stated the defendant's position, and left it up to the decision-maker to determine whether this bare information amounted to a claim that the applicant faced a likely loss of livelihood, and those in which the justifications were obviously irrelevant. Examples of the former included:

> I am a teacher. (Curborough 149 - offence of s4 POA)

> I run my own business. (Brinswick 9 – offence of using false insurance certificate)

> I am in full time employment. (Curborough 9 – offence of breach of community order)

If one took the 'officer of the court' argument to its logical extreme, one might regard these types of statement as adequate (if only barely) on the basis that they appeared next to the printed prompt: 'It is likely I will lose my livelihood.'

This left around a quarter of application form where applicants put forward irrelevant reasons, such as future employment prospects, which the CDS guidance makes clear is not a ground for grant:

> More convictions can only reduce my chances further. (Highfield 116)

> No, but may affect future employment prospects. (Granton 197)

> Now retired. (Alsbury 66)
>
> Student. (Curborough 47)

Reputation

Loss of reputation was used in 294 applications. This was the criterion most commonly characterised by the use of standard phrases. Five such phrases accounted for almost three quarters (73 per cent) of all responses given by applicants:

> [I have] no previous convictions [or cautions]. (116)
>
> I am a [man/woman/person] of [previous] [good/clean] character. (49)
>
> I have no convictions for [like offences/dishonesty/violence/drugs]. (22)
>
> I am [pleading] not guilty/I deny the offence. (19)
>
> I have had no convictions for [two/four/seven/twenty/many] years. (8)

With the exception of the 'not guilty' reason, all of these *could* be viewed as sufficient grounds for grant, as the guidance indicates that representation should be granted where the disgrace of conviction exceeds that of the direct effect of the penalty, and reputation includes 'good character' (CDS, 2002: 16). However, because in the reasons given above no mention is made of the employment or other position of the defendant, decision-makers would be forced to rely on their assessments of the gravity of the offence when deciding whether serious damage to reputation would be done. As we saw in chapter 5, some decision-makers were prepared to grant representation for almost any offence solely on the basis of the defendant having no previous convictions, so it may not be surprising that solicitors do not always feel the need to provide more fulsome responses to this criterion. However, other court clerks (erroneously) see this criterion as related to social class or position and they would be likely to give short shrift to applications of this ilk.

Cases where solicitors made the effort clearly to link the damage to reputation to the offence or to the defendant's position were rare. Two examples follow:

> A conviction for dangerous driving that caused the death of my daughter would seriously attack my reputation. (Dultham 71)
>
> I have a law degree and want to be become a solicitor. A conviction for dishonesty would prevent that. (Curborough 46)

Question of law

The question of law criterion provides a stark example of divergence between the guidance and the reality of the applicants' reasoning. It will be recalled that the CDS

guidance states that applicants should specify the point of law and demonstrate that it is substantial; the form itself prompts the applicant to provide details of the case-law invoked. Of the 332 forms where this criterion was used, just 34 (10%) made reference to a specific case; most of the cases cited were *R v Turnbull* in relation to identification

> R v Turnbull re: identification. The witness is alleged to have witnessed this incident during the night from an address some distance away. (Elswich 6)

Of the remainder it was difficult to determine if a substantial question of law had been identified due to the sparse nature of many of the justifications. However, in our view, applicants had clearly specified a substantial question of law in a further 24 (7%) cases:

> Whether my use of the article makes it 'offensive'. (Curborough 45)

> Admissibility of questions at police interview – police misled legal advisor as to strength and nature of the evidence. (Brinswick 161)

> Burglary, dispute over 'entry as trespasser'. (Granton 145)

Thus in over 80% of cases where this criterion was used, a substantial question of law had *not* clearly been identified. Most commonly, the reasoning was so vague or uninformative as to make it unclear as to whether a question of law was involved, as the following two examples show: 'Legal submissions to be made on my behalf' (Curborough 75), 'Issue re intent' (Alsbury 51).

In other cases, the only justification advanced under this heading was the fact (or even the possibility) that the defendant would be pleading not guilty: 'mixed pleas anticipated' (Brinswick 44), 'I deny the allegation' (Highfield 5). While it is unlikely that a substantial question of law would arise where defendants are pleading guilty, the simple fact of a not guilty plea does not in itself constitute such a question of law.

In most of the remaining cases, solicitors had identified merely a question of fact:

> Some dispute about value of goods taken. (Highfield 156)

> Ownership of the car which is the subject of one of the charges. (Brinswick 192)

In conclusion, few applications, in our view, contained clear and convincing descriptions of a substantial question of law – in 83% of cases the reasoning of solicitors was found to be unsatisfactory. It would appear that decision-makers' complaints about the quality of reasoning with regard to this criterion – 'the last refuge of the desperate solicitor' as one described it (see chapter 5) – are largely justified.

Inability to understand proceedings

The box on the application form relating to the defendant's inability to understand proceedings or state his own case conflates two separate ways in which this might arise,

namely where the defendant has inadequate understanding of English, and where the defendant suffers from a disability. Of the 344 cases where this box was used, the reasons used by applicants can be put into three categories. In the first, the age of the defendant was given as the reason for seeking legal representation (used in 97/344 cases). In all but two of these cases,[101] it was the fact of the defendant's youth (17 or under) that was said to render the applicant incapable of understanding or taking part in proceedings:

> I am a youth, I am 14 years old. I cannot conduct my own case. (Brinswick 137)
>
> Only 15 and never been to court, cannot be expected to put my argument unaided. (Dultham 52).

As discussed in chapter 6, the Criminal Defence Service guidance does not explicitly mention the issue of the defendant's age, but case-law makes clear that age can be a relevant factor when assessing this criterion.

The second type of reason advanced under this category related to defendants whose first language was not English (49/344). The guidance states that the fact that someone does not speak English is not an automatic ground for grant, but will depend on the complexity of the case. However, it also makes clear that the availability of an interpreter is not a reason for refusal of legal aid. In the reasons put forward under this category, solicitors very rarely referred to the complexity of the case. In fact applications covered all manner of offences from drink driving to threats to kill but there was no difference in wording according to the seriousness of the offence. Instead solicitors tended to refer to the need for an interpreter (rather than a solicitor):

> English is not my first language, will need an interpreter. (Affray charge, Alsbury 87)
>
> Iraqi citizen. Interpreter required. (Drink drive charge, Granton 127)

Complexity of the case depends not just on the nature of the offence but also on the plea. Since this was not always evident from the form, it was not possible to say in how many of these 49 cases there was 'sufficient complexity'.

The third type of reason used related to the defendant's disability (referred to in 198 of the 344 cases), and this was the category in which the quality of reasoning was most clearly inadequate. In just over a quarter of these cases (52/198) did the solicitor provide details of a disability which would be likely to impair the defendant's ability to understand proceedings. Amongst these were mental health conditions such as schizophrenia and ADHD, severe learning difficulties or behavioural problems:

> The defendant has mental health problems, diagnosed as schizophrenic paranoid, he is accompanied to court by a psychiatric nurse. (Curborough 28)

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[101] In the other two cases, the fact of the defendant being over 65 was used to justify legal aid.

> Yes, the FME [force medical examiner] certified at the police station I had a mental age of 11 years. (Fyford 101)

> Client had mental health and learning difficulties. Will be accompanied by social worker. (Alsbury 61)

In the remainder of these cases the reasons put forward were either vague, brief or fell outside the criterion altogether. For example, the fact that the client was an 'alcoholic', a 'drug addict', had 'low intelligence' or 'literacy problems' or was 'depressed' were among the brief reasons given. While it is possible that such factors may impair the defendant's ability to understand proceedings it is by no means certain, and when no further details are provided it cannot be assumed the criterion is satisfied. Sometimes solicitors mentioned disabilities which would be very unlikely to affect understanding of the case, such as diabetes, eye problems, rheumatism and even agoraphobia. Other reasons put forward, which also clearly fell outside the disability criteria, included the defendant's lack of means or previous court experience, as the following examples show:

> I lack the skills to represent myself. (Alsbury 53)

> Completely inexperienced. (Granton 172)

> I do not have resources to represent myself. (Highfield 53)

> I have never appeared in a court before and require the services of a solicitor to prepare and state my case on my behalf. (Fyford 51)

Court clerks provided other examples of poor reasoning for this criterion:

> We have had all sorts of examples of silly forms. In the one that says 'can't understand the proceedings due to a disability', I have had 'I am Irish' on there and another one said 'I have got crippled feet'. They have seen the box and put anything in there. (Brinswick, DM2)

Tracing or interviewing of witnesses

This was one criterion for which decision-makers in interview had said they thought applicants provided insufficient detail, and perhaps as a consequence it was also the criterion rated by them as the least important. The guidance relating to the tracing of witnesses is clear, and states that 'the application should include details of the witnesses and state *why* representation is necessary to trace and / or interview them (CDS, 2002: 18, emphasis added). Of the 224 applications in which this criterion was invoked, just 76 (34 per cent) managed to do this. The main reason for the low substantiation rate was the failure of solicitors to state why the witnesses needed to be traced. There are numerous examples where solicitors indicated only the type or number of witnesses to be traced, but gave no indication as to why:

> I have witnesses to call. (Highfield 145)

> The person who was with me needs to be seen by my solicitor. (Brinswick 113)
>
> Defence witnesses may need to be traced and interviewed. (Elswich 22)
>
> Those not yet interviewed by police. (Alsbury 120)

In other cases, solicitors gave a reason, (e.g. 'to confirm my version of events' – Dultham 38) but furnished no details of which witnesses needed to be traced. Even among the third of cases where both reasons and type of witnesses were specified, details were often vague, sketchy or downright cryptic, and it may well be that real decision-makers would have been harsher than we were in determining whether such reasoning merited a grant of legal aid, as the following examples indicate:

> Medical evidence regarding injury to nose. (Granton 39)
>
> My partner in relation to substantial breach. (Alsbury 154)
>
> A doctor's report will be necessary if I am to substantiate any defence. (Brinswick 143)
>
> Friends will corroborate my account. (Brinswick 69)

Unlike for the custody or disability sections, the information required for completing this part of the form may not always be available. If one recalls that the majority of applications for legal aid are made on the first meeting with the client, and at an early stage in proceedings (see further below), it is not surprising that the reasoning here is not fulsome, since the exact nature of the defence may not yet be clear. The vagueness in reasoning may simply reflect the fact that solicitors are keeping their client's options open. A second explanation, offered by one solicitor was the reluctance to give too much away in case this helped the prosecution (Brinswick S2).[102] The same reasoning could be said to apply to the next criterion.

Expert cross-examination of witnesses

This criterion was one of the more frequently used (423), but as in the tracing of witnesses criterion, detail was more often than not lacking, and in just 75 cases (17 per cent) did the applicants provide details of *why* expert cross-examination was needed as required by the guidance (CDS, 2002: 19). Where such justifications were given, these tended to refer to the need to cross-examine evidence provided by an expert (e.g. a doctor), examine CCTV footage, or to challenge the evidence of a witness in relation to a specified point. Some examples of such reasons are given below:

> Group 4 employees who attempted to install monitor. (Elswich 95)

[102] It might be objected that solicitors are transmitting this information to courts clerks, not the CPS, so have no reason to worry, but the problem is that court clerks do sometimes discuss the contents of a legal aid application with a prosecutor (see chapter 8, dummy application 5, for an example).

> A doctor will need to give evidence on the causation of the injuries and will need to be cross-examined on my behalf. (Brinswick 100)
>
> Prosecution relies on CCTV evidence which has been edited prior to handing over to police, needs explanation. (Fyford 141)

Some of the reasons put forward by solicitors in this part of the form did not relate to the need for *expert* cross-examination, rather they referred to the fact that it would not be in the interests of the victim to be cross-examined by the defendant (generally in cases of domestic violence or assault). While this is clearly one of the appropriate grounds for grant of legal aid, such reasons should properly be put forward in the subsequent box relating to 'someone else's interests'.

Of the 80 per cent of so of reasons which did not obviously fulfil the expert cross-examination criterion, this was largely because solicitors only listed the people who needed to be cross-examined. Thus it was common to see reasons which simply asserted that 'the [complainant/witness/police officer] will need to be expertly cross-examined'. With regard to police officers, it was sometimes additionally argued that since police officers were trained in giving evidence, they would need expert cross-examination in any trial. As we saw in chapter 5, this was not a view generally shared by decision-makers, although it does find some support in case-law.

Someone else's interests

The section of the form relating to 'someone else's interests' was completed in 205 cases and in just 86 (42 per cent) of these did the reasons, in our view, accord with the official guidance. The latter states that this section is to be used, for example, where it would be in the *interests of victims* of violent, domestic or sexual offences not to be cross-examined by the defendant, or where *witnesses were children* (CDS, 2002: 20). The main reason that 58 per cent of reasons did not meet the criteria was that the 'someone else' whose interests had been identified was a member (or even a pet) of the defendant's family, which the guidance states is not a reason for grant. The following are examples of reasons falling outside the criterion:

> My two children, especially with Christmas upon us. (Granton 173)
>
> My family are worried for me. (Curborough 122)
>
> Without legal representation my dog will be put down. I deny that my dog is dangerous. (Brinswick 163)
>
> Mother, step father and social worker. (Dultham 132)

Where solicitors had indicated that it would be in *the court's* interests to grant representation it was more difficult to judge whether the criterion was engaged appropriately. As discussed above (chapter 6) the guidance distinguishes between the

judicial and administrative functions of the court and says that disruptions to the former, but not the latter, may be a reason to grant. In practice it can be hard to differentiate the two and the decision as to the validity of the reason is dependant on the solicitor spelling this out. In the first of the examples which follow, the reason appears to relate to the administrative function (thus outside the criterion, according to the guidelines) whereas the second hints at disruption to the judicial function (thus included):

> Smooth running of the court. (Alsbury 120)
>
> The court's. Without a solicitor I do not have the necessary training and experience and would seriously disrupt court proceedings. (Brinswick 66)

An argument was made in chapter 6 that case-law supports the view that cost-effective considerations might legitimately be taken into account in the magistrates' courts, thus putting into some doubt the distinction made in the guidance between the administrative and judicial functions of the court. Nonetheless, one would still expect to see more by way of reasoning than 'smooth running of the court'. Providing all court personnel with their own high-tech laptop computer and personal assistants might also assist the 'smooth running of the court' but the appropriate question to ask is whether the lavish resources thereby expended would be cost-effective. Similarly, it cannot be assumed that the grant of a representation order would always be cost-effective in promoting efficiency in court.

As in the previous criterion (expert cross-examination) some reasons put down in this section might be considered to be an appropriate reason to grant, but did not obviously relate to this criterion. For example, 15 solicitors mentioned here that the client was in custody and therefore required a bail application. Whereas this might be reason to grant under the 'loss of liberty' ground, it does not satisfy the 'someone else's reasons' one.

Any other reasons

The final box on the application form was used in well over half of the forms sampled. That is not to say that in over half of all cases solicitors had identified a circumstance falling outside the interests of justice criteria which nonetheless justified a grant of legal aid. Rather, this section tended to be used to restate or summarise facts already recorded elsewhere (for example to reiterate that the defendant had mental health problems, was a youth, or that the case 'was a serious one') or to emphasise that the defendant would be pleading not guilty.

The section also contained a number of stock phrases which revealed solicitors' generally held belief that legal aid should be granted in all but the most straightforward cases. For example, representation was sought because it would be 'in the interests of justice', for the 'equality of arms', or because a solicitor was needed to 'prepare and present the case' or 'advise and mitigate'. In the minority of cases where new information was provided this was usually to note that the defendant appeared in custody and therefore required assistance with a bail application.

Understanding the sparse nature of legal aid applications

In this section we attempt to put the above findings in context. The poor quality of the information and argumentation on legal aid application forms might be explained in a number of ways. For example, it might be as a result of personal incompetence – perhaps unqualified and untrained staff are filling in these forms rather than solicitors, perhaps solicitors themselves are hopeless at form-filling. Alternatively it might be that the explanation lies in the situational context within which applications are completed. A third explanation turns on the interactive nature of the relationship between solicitors and court clerks. These are not mutually exclusive explanations nor do they exhaust the possible explanatory factors. But these three possibilities are worth discussing in turn, as we shall now demonstrate.

(i) Personal incompetence?

We asked solicitors who, in their firm, would normally help the applicant complete the application form. Not surprisingly, arrangements differed from firm to firm. The most common arrangement was for the person who saw the client on the first occasion (for example at the police station) to complete the form. That person would not necessarily be a solicitor:

> In our office we have five solicitors and one accredited representative,[103] she's got her exams passed. So it would always be one of those who filled in the application form. It would not be a non fee-earner, it wouldn't be secretarial staff, it wouldn't be administrative staff, it would be one of the solicitors or accredited representatives. (Granton S2)

> It will be whoever goes out to the police station, which may be a trainee or legal exec., but they're all police station qualified. None of the secretaries, always someone legally trained or in training. (Highfield S1).

In the 1992 research it was noted that non-solicitors (legal executives, articled clerks and other junior staff) were often used to fill in application forms, and there was some evidence that this led to poor quality applications.[104]

The position since then has changed, in that anyone giving legal advice at a police station now needs to be registered with the Legal Services Commission as an 'accredited police station representative'.[105] In order to register, candidates must first pass an examination organised by the Law Society, which covers, among other things, the candidate's knowledge of criminal law and procedure.

Moreover, under the General Criminal Contract which now governs criminal practitioners in receipt of public funding, mechanisms are in place (e.g. audit) designed to ensure that a quality service is provided. A form of contracting was first introduced in

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103 The role of accredited representative is explained later in this section.

104 *In the Interests of Justice?* pp 81-86.

105 See http://www.legalservices.gov.uk/docs/stat_and_guidance/police_register.pdf

1994 so it might be expected that firms of solicitors are nowadays putting more effort into training and supervising junior staff than was the case in 1992.

As far as supervision is concerned, in some cases senior partners indicated that they would check or 'sign off' any forms which had been completed by non-lawyers:

> Whilst a non-qualified person can fill it in as best they can, it has to be signed by a solicitor. So a non-qualified member of staff could see a client today, would fill in the boxes as best they could from the training we implement here. So they are told what to be looking out for and let's assume they're not entirely au fait with it, they're not entirely sure of it, it will come to a senior solicitor who will then quickly look at it and then ask a few questions, 'has he got previous convictions' yes, 'fill that in', 'is he on a suspended sentence'? (Brinswick S1)

> Anybody who sees that client will complete the application for legal aid. That then is an item of post, I sign the post, if for any reason I don't, I have another business partner who will sign the post so all the post comes out of the office having been seen or checked by me. (Elswich, S1)

When we asked what guidance was available to those completing application forms, seven replied that their firm provided in-house training on the interpretation of the criteria:

> We operate an in house training programme and every now and again one of the training sessions we do is on the Widgery criteria. (Alsbury, S3)

> I've trained the trainee solicitors how to complete applications for legal aid. I've sat down and I've done it with them, I've gone through the Widgery criteria literally on day one. (Dultham, S1)

Solicitors in another four firms said that accredited representatives or trainee solicitors received guidance on how to complete the application as part of their overall legal training. However, in six firms new members of staff were expected to pick this up through experience or trial and error – 'it is just something you pick up and learn, experience' (Granton S3). A few solicitors conceded that sometimes trainee staff submitted inadequate applications and that this led to court clerks refusing them:

> It is basically lack of information, sometimes inexperience of the juniors filling them out, trainees filling them out. They are very often the ones who find themselves in the police station, don't quite know how to... for example, they often don't write in that they are going to contest the case. One of the important things to put down in the 'any other reasons' is 'I am pleading not guilty, I will need professional help when going to court.' Courts, for whatever reason, hate defendants in person. (Curborough, S3)

By comparison to the situation in 1992 it seems that the use of staff who lack legal training is now much less common, and it is unlikely that the poor quality of many application forms is strongly related to this. It was not possible to investigate this further, however, since we could not tell from the names of legal representatives signing the forms whether or not they were solicitors or accredited representatives, and none of the firms we came across relied solely on accredited staff to complete the application forms.

One court clerk wondered aloud in interview whether solicitors sometimes put in weak applications (e.g., for summary motoring offences) simply to mollify a demanding or difficult client. Only one solicitor spontaneously mentioned this as a problem, although it was clear that he had resolved it quickly:

> If I found a member of staff who is always having legal aid refused then I would take it up with that member of staff. I sign all the mail. We had a time where people were trying to, were wanting to apply for no insurance and no driving license. Complete waste of my time, complete waste of their time. I get the member of staff up, 'why are you applying for legal aid, you know, have a look at it?' 'Oh I was frightened to say, I was frightened in the interview to say' and that's not good business for us, and it's not good business for the client... 'you go half cocked you end up disappointing the client... You could have spent ten minutes writing them a letter of mitigation and done it for free, you'd have had a happy client and a happy boss.' (Elswich, S2)

As in 1992, however,[106] we did uncover some evidence that not all solicitors were themselves fully competent. We should stress that this evidence is anecdotal in nature, and that our general sense was that application practices within criminal defence firms have improved substantially over the last decade (we say more about this in the next chapter). But we do believe it implausible to suppose that personal incompetence plays no part at all in explaining the poor standard of many legal aid applications. We are fortified in that belief by the fact that there are those within the legal profession of the same view. One solicitor, for example, told us that:

> I do know of a firm of solicitors with 20 years experience who could do with putting it [legal aid application work] through with somebody else... I mean we are pretty ignorant as a profession, ignorant and arrogant I suspect is the biggest criticism, they'd put in 'serious offence, likely to contest it, likelihood of custody'. Well you know, I mean, I get these refusals back and I have a look at them and I think 'well no wonder the clerk refused this', and I go to the solicitor and say 'what were you trying, how would expect anybody to assess that application on a proper basis? You have told them nothing. What are the client's convictions, outline the last three.' Something like that, you know, so time should be spent doing the application and doing it properly. (Dultham, S1)

Most solicitors reading that quote would no doubt agree with the sentiments in the last sentence, but might nonetheless query whether they any longer have the luxury of time to

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106 *In the Interests of Justice*, p. 86.

do the application properly. This brings us to the second way of explaining the sparse nature of many applications.

(ii) Situational context of form-filling?

We saw in chapter 3 how court clerks attributed the poor quality of some applications to the pressure that solicitors are under following the speeding up of justice under the Narey reforms. Interviews with solicitors confirmed the accuracy of this attribution, while also highlighting the significance of the large caseloads that legally aided lawyers tend to carry:

> Sometimes applications are done extremely quickly, there's not too much time for quiet contemplation on them. You do them extremely quickly in court and sometimes they are not as well filled out as they should be. (Fyford, S2)

> Because of these Narey provisions, we turn cases around very, very quickly. We could have a client in a police station today, they could be remanded in custody, could be before the court tomorrow, could have their case dealt with tomorrow... very often these things [legal aid applications] have to go in quickly, you can't put all the information in, because you haven't got their previous convictions in advance... very often they are rushed and you do what you can and you have limited information. (Brinswick, S2)

> Often when you make the application you haven't got all the information. We are required under the terms of the contract from the LSC [Legal Services Commission] to submit the application at the earliest opportunity, but you don't often have all the information... It is only when you get to court, for instance, that you see a full list of his previous convictions. (Granton, S1)

> Say last night someone is arrested and they are in court today. If I go down there I'm not going to have any information about that person. So we fill in a legal aid application form which is name first, date of birth, what the charge is, which court it is, and that's fine, and then all the reasons for wanting legal aid. Well, I don't know anything about the case, ok, theft, I haven't seen any papers, I don't know if there is a defence or not, and I've got to sort of make it up if you like. I don't mean that in a dishonest way, I've got to get what information I get in seconds from somebody, and I'm usually more interested in progressing his case and finding out about it rather than filling in a bloody form. So, you have to do it quickly and you don't have the best information, so you stand a good chance of being rejected, and then you have to go through the appeal process and help the client in the meantime. So it's all a bit of a circus... if you go to court you've got six or seven cases in a day, and the court is saying 'are you ready for court 3?', 'oh, Mr [X] can you come to court 2, we're waiting?', um, and you've got to fill in these forms – zoom! – you know, you can hardly read your own writing, you've got to do it so quickly and put it in! So I suppose that's a problem as well, and if they can't read it, they probably won't grant it. (Alsbury, S2)

> Sometimes it [task of completing the application form] is in the context of being the court duty solicitor down in the cells and you are under pressure, there are seven or eight of them [clients]. (Curborough, S3)

These types of complaints were simply not heard in 1992 with anything like the degree of frequency that now obtains. Criminal defence firms may have become more professional since the original research study, but they also work under much greater pressures than they used to. Arguably they now have greater *ability*, but less *time*, to formulate accurate and persuasive applications. As the next section will explain, however, they lack the *motive* to change their existing practices, just as they did in 1992.

(iii) Interactive nature of the clerk-solicitor relationship?

One reason for there being little information on some application forms is very likely to be that solicitors know that little information is expected or needed by court clerks. There are two common situations in which this arises. The first is where the offence is so serious that it is obvious that loss of liberty is likely, and we commented on this at the beginning of this chapter. The second is where there has been prior communication between the decision-maker and the solicitor to the effect that an application will be granted.

> I've known instances where they've come and said, 'look, will you represent this chap? I'll grant you legal aid.' Simply because it gets them home earlier than they would otherwise be home. (Highfield, S1)

An apparently badly formulated application is not, therefore, necessarily an ineffective one. As with other aspects of legal aid decision-making, understandings develop between the personnel involved which make detailed reasoning on the application form somewhat redundant. As one solicitor explained:

> '... you have an understanding with the court clerks sometimes, they know particular defendants, they know who they are, they know no matter how trivial their case is, they know they are going to play up. So you don't fill in any of the criteria apart from, as I said, the disability, and the disability is, 'I am [Fred Bloggs]', and that says it all. The court go "we will grant it because [Fred Bloggs] is a pain in the arse, we can't deal with him on his own without him being legally represented"... there is a lot of people like that.' (Brinswick, S2)

The above example concerns a very specific interaction between a clerk and a solicitor. But the point is also of more general application. Over time solicitors and clerks become attuned to one another's practices and expectations and adjust accordingly. The brute fact is that the vast majority of the poorly completed applications we examined in this study were granted. Both the legal aid grant rate and the proportion of defendants in the magistrates' courts who are legally represented is historically very high and has been for some years. Solicitors are unlikely to submit more fulsome applications for as long as court clerks continue to grant at current rates. It would simply not be cost-effective for solicitors to spend more time and effort on legal aid applications under current conditions

Given the situational context in which they tend to make them, one can hardly expect any innate sense of professional duty to outweigh cost-effective considerations.

None of this is very satisfactory from the point of view of ensuring the accountability of the system. It seems to us that fairly substantial improvements to the present state of affairs are achievable without requiring any disproportionate use of resources. What is needed is for accurate understandings of the Widgery criteria to be shared and for the reasoning on legal aid application forms to be couched in *those* terms, however briefly. After all, it scarcely takes longer to write: 'I have good character: see *Scunthorpe Justices*' than 'I am a man of previous clean character'. In promoting accurate understandings of the factors relevant to the interests of justice test, it would be useful if there were appropriate mechanisms within the courts for sharing information and providing feedback. One possible mechanism is the space left on Form A for court clerks to provide reasons for grant or refusal. In assessing the potential of that mechanism it is useful to examine how it currently operates, and it is to that which we now turn.

Quality of decision-makers' reasoning

We had hoped in this chapter to be able to compare the quality of solicitors' reasoning for each of the criteria to decision-makers' comments on whether they thought the criteria had been met. The application form provides space next to each of the criteria for the decision-maker to add reasons for grant or refusal. An extract from a typical form is given below:

	Details	Reasons for grant or refusal (for court use only)
5a. It is likely that I will lose my liberty (*you should consider seeing a solicitor before answering this question)*		

The figures in table 22 show why such a comparison was not possible. Column A displays the number of applications in which solicitors used each of the criteria. Column B shows in what proportion of these cases decision-makers wrote down their reasons next to the criteria. The final column shows in what proportion of the latter cases decision-makers agreed with the solicitors' reasoning.

Table 22 Decision makers' use of reasoning by criterion

Criterion	A	B	C
	No. of cases where criterion invoked (out of 1493)	% of cases in column A where reasons given by decision-maker	% of cases in column B where solicitors' reasons accepted
Custody	1287	61	83
Livelihood	207	31	50
Reputation	294	36	50
Law	332	23	51
Understanding	344	36	73
Tracing	224	17	46
Expert	423	25	62
Someone else's	205	23	67

The table reveals that for the custody criterion, which was viewed by both decision-makers and solicitors as the most important of the criteria, decision-makers only wrote reasons in 61 per cent of cases. The proportions for the other criteria were even lower; just 17 per cent for the tracing and interviewing of witnesses for example. As a result, the figures in column C should be interpreted with caution. They do not necessarily provide an accurate reflection of how often decision-makers agreed with the reasoning for particular criteria – given the often large proportion of cases in which they wrote nothing, the representativeness of these views cannot be ascertained.

Even where decision-makers wrote down their reasons, these were characterised by brevity and the use of standard phrases. Where the criterion was accepted, typical comments were 'yes', 'accepted', or the box was simply ticked. In the case of refusals, written reasons were also sparse. For example, in relation to the reputation criterion, common reasons included 'Not "serious"', 'Not type of offence to cause serious damage' and 'More information required', while reasons for refusing the question of law criterion included 'question of fact not law', 'not a substantial question of law' and '[court or clerk] can assist'.

The boxes next to the criteria are not the only place on the form where decision-makers can write down their reasoning. On the final page of the form, there is a substantially larger box in which decision-makers are asked to set out the reasons for their overall decision. One might expect that the reasons given here would be more complete. In fact, the average length of reasoning in this box is just seven words. This section of the form is reproduced below, and one of the standard phrases used appears within it:

Decision on Interests of Justice Test

I have considered all available details of all the charges and it/is not in the interests of justice that representation be granted for the following reasons: None of the criteria for grant have been met

Almost half of all the reasons given in this box were accounted for by just eight variations of standard phrases. These are shown in table 23 below:

Table 23 Most frequent reasons given for decision on grant of legal aid

Reason	No.
5(2) a of the Access to Justice Act applies in this case	248
As above / see above	191
[no reason given]	131
Risk of custody / custody likely / liberty at stake	81
As at 5a / see 5a	48
Fails to merit grant under schedule 5(2) a of the Access to Justice Act 1999	21
Youth	14
None of the criteria for grant have been met	13
Total	747

As can be seen, in almost nine per cent of cases, no reason at all was given by the decision-maker. What this brief analysis shows is that examination of the written reasons throws little light on the decision-makers' cognitive processes. One implication of this is that solicitors receive virtually no feedback on how their applications are being viewed. This was something that some of the solicitors we interviewed commented upon:

> We get a 'yes' or a 'no', that's all we get. If they say 'no' they will give us the reasons and it tends to be 'low likelihood of a custodial penalty' or... 'insufficiently serious', those are the most common ones, but having said that, beyond that we don't have any sort of feedback. (Alsbury, S1)

> One thing that we do get when we have refusals is two sort of standard phrases, the first one is 'defendant not in serious position', that probably refers to not in serious position with regards to custody or loss of livelihood, and, secondly, 'there are no complications in the case'. Neither of these refers to the interests of justice criteria precisely. They are just standard phrases that are used, so I think that could be tightened up. I think that's too loose and lazy really. (Brinswick, S1)

> We had this bog standard refusal back, 'no complications in the case, not in a serious position'. It is this usual thing all the time when you get the refusals, it's always those two boxes, 'no complications' and 'not in a serious position'. (Brinswick, S2)

The analysis in this section suggests that decision-making is largely tariff/offence based (risk of custody was the one criterion against which reasons were put in the majority of cases) and that decision-making is a swift, summary affair. The latter conclusion is supported by the ease with which decision-makers completed the dummy applications (chapter 8), and the speed with which they did so (an average of 2 minutes per application). In these two respects, the situation has not changed significantly since 1992.

Conclusion

The analysis contained in this chapter has shown that the quality of applicants' reasoning is often deficient. On occasion this was because solicitors or accredited representatives were putting forward irrelevant reasons (e.g. 'it is in my partner's interests', 'I do not have the resources to represent myself'). More often than not, however, solicitors simply failed to provide sufficient supporting information (e.g. stating that 'defence witnesses need to be traced' without saying why).

It emerged in our interviews that decision-makers take different approaches to such inadequacies; some give the benefit of the doubt and grant, while others refuse on the ground of lack of information. Either way, little guidance is provided to solicitors about why the application was granted or refused. Thus the educative benefits that can result from providing reasons for decisions are nowhere to be seen within this particular administrative setting.

Were solicitors to provide more reliable information, not only might this reduce the refusal rate, but it is also likely to raise the consistency of decision-making. There is, therefore, a need for accurate guidance on the criteria to be widely disseminated to court clerks and defence solicitors, and for ways to be found to encourage them to use it, in making applications, taking decisions and giving reasons.

At present, bog-standard applications for bog-standard offences are met with bog-standard decisions backed up with bog-standard reasons. The trick will be to find ways of improving on this situation without destroying the best features of the current system – such as speed, flexibility, decision-making that is sensitive to local circumstances, and overlapping professional understandings of when a grant of legal aid will serve the overall interests of justice.

10. SUMMARY AND RECOMMENDATIONS

Summary

In the methodology chapter we noted our concerns that official statistics on the rate of grant may be unreliable. The reason for this was that courts and individuals within courts differed in their treatment of applications which contained inadequate information. In some cases these were returned to the solicitor so as to allow them to add further information and be reconsidered (thus not counting as a refusal); in others these were refused outright. We have therefore not sought to emphasise in this report differences between courts officially designated as high and low granting.

A comparison of the disposal of a sample of applications and the official grant rates of the courts suggested that the reasons for variation in grant rates did not lie with the seriousness of the cases coming before the courts. We explored other possible explanations through our interviews with decision-makers. These revealed variations in the organisation and practice of decision-making in the eight courts. In half the courts visited, delegated administrative staff took the majority of decisions on legal aid. The number of staff involved and their experience varied. For example in Brinswick 99 per cent of decisions were taken by just one administrative member of staff, whereas in Alsbury decision-making was fairly evenly spread among 15 legal advisors. Furthermore, in some courts, decisions on legal aid were taken mainly in court, whereas in others solicitors were strongly encouraged to hand in applications to the office.

In almost all courts there was a notable lack of 'quality checking' of the correctness of decision-making, although auditing of the procedures was somewhat more common. Almost all staff were aware that they had to 'turn around' applications within two days, and accordingly process applications speedily. Most staff operated under conditions of considerable autonomy.

Decision-makers adopted different approaches to the determination of applications in respect of which other sources of information they would use or seek out. Lists of previous convictions, details of the charges or the court file would be consulted by some decision-makers and not others. Where decisions were taken in court, factors relating to the demeanour of the defendant might also be taken into account. The variation in practice between courts on this point clearly has implications for the rate at which applications are refused on the grounds of insufficient information.

In chapter five, we investigated by means of interview the ways in which decision-makers and solicitors interpreted the interests of justice criteria. We found that guidelines relating to the interpretation of the criteria were rarely used by either decision-makers or solicitors. The reason for this was that once they were introduced to the criteria, either by colleagues or through reading guidance or receiving training, they then tended to rely on experience and had confidence that they could interpret the criteria correctly.

When we asked decision-makers and solicitors what they thought were the most important criteria when deciding on, or applying for, legal aid, all interviewees

mentioned loss of liberty. Factors outside the interests of justice criteria which were mentioned included the plea and age of the defendant. When we asked both groups to give a weight to the importance of each of the statutory criteria, loss of liberty was ranked as the most important. For most of the other criteria there was a close match between the rankings given by the two groups, although solicitors were more likely to rank damage to reputation, tracing of witnesses and expert cross-examination more highly than decision-makers.

When asked to comment on their interpretation of the criteria separately, differences emerged both within and between courts and between decision-makers and solicitors. Both groups agreed in relation to the loss of liberty criterion that this should apply to defendants already in custody, and that the factors to be taken into account in determining the likelihood of loss of liberty included seriousness of the offence, previous convictions and other aggravating factors. There was evidence that some solicitors interpreted the loss of liberty criterion more widely than the guidance suggests. Both groups were split over whether local sentencing policy ought to be taken into account; this seemed to depend on whether they thought the local court's sentencing practice diverged appreciably from national guidelines. Decision-makers and solicitors at the same court often held opposing views on the matter. Finally, there differences in how breaches of court orders were dealt with by different courts; in one these were routinely refused for reconsideration by the bench, whereas in others first breaches tended to be refused, while subsequent ones would result in a grant.

Decision-makers were largely in agreement regarding the interpretation of the loss of livelihood criterion. They tended to say that they would grant where the defendant was currently in employment (as opposed to seeking work), where the employment was of a permanent or professional nature, and where the defendant was pleading not guilty (a guilty plea was seen as negating this criterion).

Plea was also seen by decision-makers as a factor in determining the importance of damage to reputation. There was disagreement, however, as to how 'serious' damage to reputation should be defined. For some, the absence of previous convictions would be sufficient, while others considered also the nature of the offence and the defendant's standing in the community. However, there was evidence that some decision-makers and solicitors took an overly restrictive approach to this criterion, contrary to case-law which indicated that even relatively minor offences could seriously damage the reputation of those without a criminal record.

There was a clear difference of interpretation over the substantial question of law criterion between decision-makers and solicitors. Most decision-makers followed the strict interpretation of this criterion as set out in the Criminal Defence Service guidance; in other words that the point of law had to be substantial, relevant and not something the defendant could deal with alone. Solicitors tended to adopt a wider interpretation.

Decision-makers were most likely to disagree over the correct interpretation of the following three criteria.

- Inability to understand proceedings due to inadequate English. Some decision-makers said that they almost invariably granted legal aid for defendants who did not speak English; others said this would depend on the complexity of the case. There was a large gap between the statutory language on the one hand and the guidance and design of the form on the other; the latter being more restrictive than intended by the legislation.

- Expert cross-examination. A minority of decision makers and solicitors believed this only applied where the witness was an expert, despite long-standing case-law stating that this criterion does not only arise in the case of expert witnesses. Others misinterpreted this as applying to the examination of vulnerable victims.

- Someone else' interests. A few claimed not to know what this meant. There was some confusion as to whether the interests of the court or the defendant's family could be taken into account here.

The explanation of these findings lies in part in the different approaches taken by decision-makers to factors such as inadequate information, or the role of the legal advisor in advising the defendant. There was no evidence that the court's grant rate was associated with particular interpretations of the criteria. Instead, differences in interpretation seemed to be due to the fact that individuals have varying levels of knowledge of the criteria and of the guidance available.

A second explanation concerns the way in which the statutory criteria are expressed on the form A. In some cases (e.g. question of law) these have been shown to be incorrect, with the consequence that the criterion becomes harder to meet. Consideration therefore needs to be given to the wording on the form, and some suggestions are given below. Further thought also needs to be given as to the scope of certain of the criteria, for example in relation to the weight that should be placed on the age or plea of the defendant.

In chapter six we investigated whether any factors outside the interests of justice criteria were taken into account by decision-makers and solicitors. A minority of decision-makers said that they took factors such as age or plea into account, and there was some evidence that concerns about efficiency in court were also influential. (The Criminal Defence Service guidance is silent on the issue of age, does not give sufficient consideration to the relevance of plea, and takes, in the light of case-law, an unduly restrictive approach to the question of whether efficiency is a legitimate factor to take into account.)

When interviewees were asked their personal views as to whether the system would be fairer if everyone were legally represented, a majority of both decision-makers and solicitors thought that this would not necessarily be the case. For many minor offences, especially where the plea was to be guilty, there was seen to be no advantage to be gained from legal representation. While decision makers do vary in their approach to decision making, we did not find evidence that this was due to their personal beliefs or values

concerning fairness or efficiency. Instead, decision makers sought to put into effect the statutory criteria, as they understood them, and as we have seen it is their comprehension of the criteria which vary.

When asked specifically about plea, almost all decision makers said they were influenced by the defendant's likely plea, in that a not guilty plea would be seen as a factor favouring a grant of legal aid. Solicitors too were aware of the significance of plea, and we found that in almost half of all applications solicitors invoked one or more criteria which rely largely on a not guilty plea. The fact that the proportion of cases which end up being contested is less than 30 per cent, is largely due to the fact that many defendants decide to change their plea from not guilty to guilty. Most of the time this was as a result of advice from solicitors once the strength of the prosecution evidence became clear.

Very few solicitors or decision-makers felt that the criteria themselves needed to be changed in any way; although a larger number thought that clarification of the criteria would be useful. Decision-makers, for example, thought that solicitors would benefit from general guidance on how to complete applications to an adequate standard, as well as more specifically on the loss of livelihood, inability to understand proceedings and someone else's interests criteria. Solicitors called for clarification on the role of legal advisor and on the use of hindsight in judging applications.

The role of offence seriousness was examined in chapter seven. We began by considering the overall grant rates for 24 types of offence. With two exceptions, the mean grant rate for the most commonly applied for offences was 75 per cent or higher, and for most offences the grant rates were very similar to 1992. Comparisons of grant rates for certain offences revealed variations in grant rates between the courts of up to 30 percentage points (for breach of court orders).

In order to determine whether such variation was due to differences in approach or to relevant differences between offences in different courts, we asked decision-makers to rank certain offences according to how likely they would be to grant legal aid for someone charged with that offence. The results provided some evidence that decision-makers in officially high granting courts were more likely to say they would grant legal aid than those in low granting courts, although the relationship was not perfect. In part this was because decision-makers in the same court often disagreed over the rating of particular offences.

In chapter eight we presented the results of the exercise in which each of the decision makers considered seven fake applications. There was considerable variation between the courts in the proportion of applications granted, and the relationship between a court's official grant rate and the grant rate for the dummy applications was largely as predicted. The exercise provided further evidence that courts differ in relation to how the criteria are interpreted and in the response to applications which lack adequate information. There was also evidence of variation in outcome between decision makers within the same court – in none of the courts did the three decision makers make the same number of grants.

It was clear from interviews that solicitors invariably completed the application form on the defendant's behalf, so in chapter nine, we focused on the application practices of solicitors. Looking first at the use of the criteria, we found that, with the exception of the loss of liberty (which was used in all courts in the large majority of cases), there was considerable variation in the frequency of their use. The proportion of applications invoking certain criteria was up to five times higher in some courts than in others. An analysis of the reasoning used by solicitors for each of the criteria showed that it was often deficient. Depending on the criterion, up to 80 per cent of the reasons given were deemed inadequate. Most often, this was simply because solicitors had failed to provide sufficient supporting information.

Recommendations: Brief answers to the research questions

In this section we set out our concise answers to the questions we were originally set in our research brief. The detailed support for these answers can be found in the body of the report. In the course of answering these questions we make a number of recommendations for enhancing the accuracy and consistency of legal aid decision-making. In some places these recommendations have been fortified by the comments received on a draft of this report, and we would like to acknowledge here the supportive comments received from two legal advisors from one of the courts we visited.

1. How is the 'interests of justice' test currently applied?

It is applied by court clerks in a rapid but conscientious manner. They are reminded by the design of the legal aid application form (Form A) itself of the relevant decision-making test and criteria and they draw on personal experience in interpreting and giving weight to those criteria. However, the design of Form A is open to criticism, and some of the understandings of court clerks are erroneous. In practice, a complex legal test is simplified, with most decisions turning primarily on the seriousness of the offence and the punitive bite of the likely sentence. Criteria concerned with legal complexity (such as expert cross-examination, or the need to trace and/or interview witnesses) are given little weight by comparison.

2. What, if any, differences are there in the way the 'interests of justice' test is applied by different court staff?

There are differences evident both within and across courts that cannot be explained by caseload factors. Court clerks differ in their views on quite how serious an offence (or how harsh a predicted sentence) needs to be to justify a grant of legal aid. They also differ on the question of the degree of legal complexity that makes legal representation desirable. Looking beyond the Widgery criteria to 'other reasons' that might support a grant of legal aid, differences were found in decision-makers' views on the ability of court clerks to help unrepresented defendants, the significance of plea, the relevance of the defendant's age, and the notion that a grant of legal aid might be justified to assist in the smooth running of the court. Finally, court clerks differ in their willingness to 'read in' or locate information that is missing from the application form, and in their preparedness to 'move' arguments presented on the application form against an inapplicable criterion so that they engage a different criterion that is applicable.

3. Is the Criminal Defence Service guidance on the interests of justice test used and adhered to within magistrates' courts?
No. This guidance was rarely referred to or used by either solicitors or decision-makers. After an initial induction into the Widgery criteria most decision-makers and solicitors thereafter rely on experience (either their own, or a colleague's).

4. To what extent is inconsistent application of the interests of justice test a factor in the variation in the rate of grant of legal aid?
Rates of grant for legal aid are high in all magistrates' courts so the scope for variation is not huge. In borderline cases, however, there is substantial variation in outcomes between court clerks, as evidenced by the dummy application exercise. Solicitors interviewed for this research were easily able to identify courts where decision makers had adopted a particularly restrictive interpretation of the interests of justice test and were in no doubt that this explained the substantial variation in rates of grant that they experienced. However, there are many other factors that influence the variation in the rate of grant of legal aid (see next answer) and it is not possible on the basis of this research to quantify precisely the contribution to variation made by inconsistent application of the interests of justice test. What can be said is that the extent is substantial and that much of the variation can probably be eliminated in a relatively simple manner (see answer to q.8).

5. What other factors, if any, may have led to the variance in the rate of grant?
There are many such factors. Three of the most important concern: the refuse or return policy in play; the use of extraneous information; and bureaucratic factors.

(i) One key factor identified in this research is the policy of the court, or individual court clerks, on whether to refuse outright incomplete or inadequately argued applications or instead to return them to solicitors with a request for further information. All other things being equal, the former policy will result in a court having an artificially depressed grant rate. The official grant rates as recorded in statistics collated by the Legal Services Commission are not, therefore, reliable as indicators of true grant rates.

(ii) The sources of information that are tapped by court clerks in addition to the material provided on the application form vary widely. Clerks vary in their ability and willingness to consult court files, lists of previous convictions and prosecuting and defence lawyers. They even vary in their willingness to draw on their personal knowledge of a defendant.

(iii) Magistrates' courts are local, largely decentralised, institutions. They differ widely in their bureaucratic procedures, staffing, allocation of tasks, filing systems, flows of information and so forth. All of these differences are likely to have implications for variations in grant rates. For example, it is intuitively plausible to suppose, and there is some evidence to suggest, that courts with large numbers of decision-makers will be more inconsistent than those which concentrate decision-making in fewer hands. Similarly, courts which require legal aid applications to be submitted to, and decided within, an administrative office are likely to generate different (not necessarily better)

patterns of decision-making than courts which encourage solicitors to apply in open court.

6. In what ways might the interests of justice test be amended to better ensure a consistent approach by all decision-makers?

There are strong arguments why the interests of justice test itself should remain in place. Primary amongst these is the fact that this test appears in Article 6 of the European Convention on Human Rights. There is also the point that neither decision-makers nor solicitors favoured changing this test, and there was little support for a shift towards a blanket approach to the grant of legal aid.

We have noted, however, that there is some ambiguity in the wording of the test in that it makes no reference to the significance of plea nor to the issue of whether legal aid should only be granted when representation might ameliorate or avoid a specified consequence (loss of liberty, livelihood or serious damage to reputation).

Thought might be given to making clear through the design of Form A that all of the criteria *can* apply regardless of the intended plea but that they are likely to apply *with greater force* when the defendant intends to contest the matter. It might then be left to guidance to explain in detail how the criteria can apply even when the defendant intends to plead guilty.

This question can be reformulated as meaning: 'In what ways might the Widgery criteria be amended to better ensure a consistent approach by all decision-makers?' We look at each briefly in turn:

(i) 'Likely to lose his liberty' is a relatively clear phrase which is generally well understood by decision-makers. The degree of risk involved could perhaps be signalled with even greater clarity if the phrase was changed to 'more likely than not to lose his liberty'. The point that loss of liberty is not confined to custodial sentencing but can also apply to remands in custody (see chapter 5) is not well understood at present but this is best dealt with through the design of Form A and guidance.

(ii) 'Likely to lose his livelihood' is also generally well understood by decision-makers although the above point about degree of risk applies here too.

(iii) 'Likely to suffer serious damage to his reputation' is understood by many decision-makers and solicitors to apply only to those of high social status. This long-standing, erroneous interpretation conflicts with case-law. In the light of the relevant judicial authorities, the wording might be better phrased as 'more likely than not to suffer serious damage to his reputation (as would normally be caused by a first conviction)'.

(iv) 'May involve consideration of a substantial question of law' is a phrase that does lead to differences of interpretation, but it is difficult to see how 'substantial' could be further elucidated in legislation. Given our critique of the assumption in the official guidance (and in the design of Form A) that such questions necessarily involve case-law,

there is something to be said for adding to this phrase '... whether arising from statute, judicial authority or other source of law'.

(v) 'May be unable to understand the proceedings or state his own case' is a phrase that should work well once the guidance and design of Form A actually reflect it (see question 7).

(vi) 'Proceedings may involve tracing and/or interviewing of defence witnesses' is interpreted restrictively by decision-makers and some solicitors. It tends to be assumed that the criterion is concerned primarily with tracing witnesses and the notion that a defence solicitor may be needed to take a statement from a witness is given little credence. The statutory language does not seem to be the source of the problem, however, and the issue is best tackled in other ways.

(vii) 'Proceedings may involve expert cross-examination' is a phrase that has long befuddled some decision-makers and solicitors. It would be relatively easy to change the wording to make it crystal clear that this criterion can apply irrespective of whether the prosecution witness in question is an expert. For example, the wording could be changed to 'Proceedings may involve skilful cross-examination of a witness (whether an expert or not) for the prosecution.'

(viii) 'In the interests of another person' is another phrase that puzzles a minority of those determining, or making, legal aid applications. It could be changed to 'In the interests of another person (such as the complainant or other witness in the proceedings)'.

Reflecting on this last suggestion, we acknowledge that statutory definitions do not usually proceed by way of example. However, we have attempted to set out here where the main ambiguities seem to lie in the current wording of the Widgery criteria. We leave it to those skilled in legal drafting to decide how best to give effect to our suggestions, if indeed they are taken up at all.

7. In what ways might internal guidance be amended to better ensure a consistent approach by all decision-makers?

In chapter 5 of this report we provided a close analysis of the Criminal Defence Service guidance and demonstrated a number of ways in which it was deficient. We also documented there a number of ways in which the design of Form A itself is open to criticism. In practice, Form A guides solicitors and decision-makers to a much greater degree than formal guidance (which is rarely consulted), and we do not think this situation is likely to change simply because new guidance is issued.

We believe that the biggest single improvement that could be made to the existing system is to re-design Form A so that it (i) accurately reflects the wording of the Access to Justice Act 1999 and (ii) conveys certain key guidelines – particular those that run counter to current, erroneous understandings of the Widgery criteria - as part of the form (in 'guidance boxes'). We are confident that this will prove to be the most cost-effective way of improving the accuracy and consistency of decision-making. We have designed

our own version of Form A (in so far as it relates to the Widgery criteria) in order to make it easier to understand the explanatory text that follows. The amendments to this re-designed Form A, which is displayed below, met with the full support of the two legal advisors who commented on a draft of this report.[107]

[107] It should be noted, for the sake of accuracy, that our point about bail applications engaging the 'loss of liberty' criterion was not included in the draft report.

Re-design of Form A

5. Reasons for wanting representation

To avoid the possibility of your application being delayed, or publicly funded representation being refused because the court does not have enough information about the case, you must complete the rest of this form. When deciding whether to grant publicly funded representation the court will need to know why it is in the interests of justice for you to be represented. If you need help in completing the form you should speak to a solicitor.

You are advised to see a solicitor before completing this form

5a. It is *more likely than not* that I will lose my liberty if any matter in the proceedings is decided against me	Loss of liberty does **not** include non-custodial sentences but does include remands in custody and sentences of imprisonment (including hospital orders) whether immediate or suspended. If the entry point for this offence in the Magistrates Guidelines is not custody, please explain why you think custody is likely in this case (e.g. **relevant** previous convictions, aggravating factors). Please give dates of **relevant** convictions, if known.
5b. I am currently subject to a sentence that is suspended or non-custodial that if breached may allow the court to deal with me for the original offence.	Please indicate, if known, whether this is a first or subsequent breach, and whether a revocation of the order is being sought.
5c. It is *more likely than not* that I will lose my livelihood	The loss of livelihood should be a direct consequence of conviction or sentence - please provide supporting evidence where possible. This would normally refer to **current** livelihood, although it can apply if someone is genuinely unemployed for a short period between jobs. If you intend to plead guilty, please explain **how** legal representation might help avoid loss of livelihood.

5d. It is *more likely than not* that I will suffer *serious* damage to my reputation (as would normally be caused by a first conviction)	Reputation refers to good character, including honesty and trustworthiness, and is **not** related to social class or position. 'Serious' damage is judged to occur in cases where the disgrace of conviction greatly exceeds the direct effect of the penalty. If you intend to plead guilty please explain **how** legal representation might help you avoid **serious** damage to reputation.
5e. A substantial question of law may be involved (whether arising from statute, judicial authority or other source of law)	This applies where the determination of any matter in relation to the proceedings raises a point of law which you cannot be expected to deal with unaided. Please explain why the question of law is **substantial** and relevant to the case. Questions of fact alone are irrelevant. Where possible, please specify the cases or legislation which give rise to the question of law.
5f. I may be unable to understand the court proceedings or state my own case	There may be a number of reasons why you may be unable to understand court proceedings or to state your own case. These may include (but are not limited to) mental or physical disability, inadequate knowledge of English, age, or vulnerability. The ability to understand proceedings or to state one's own case is likely also to depend on the complexity of the case.
5g. Witnesses may need to be traced and/or interviewed on my behalf	You may require witnesses to be traced or interviewed to see whether they can assist your case (if pleading not guilty) or to help with constructing a plea in mitigation (if pleading guilty). You should explain why legal representation is needed in order to trace and/or interview witnesses.

5h. The proceedings may require the skilful cross-examination of a prosecution witness (whether an expert or not)	Skilful cross-examination is likely to be required where you are pleading not guilty and you expect the prosecution to call witnesses whose evidence you wish to probe or challenge. You are likely to require a lawyer to conduct skilful cross-examination on your behalf if the evidence to be given by the prosecution witnesses is complex, technical or is capable of bearing more than one shade of meaning. Factors which bear on this criterion include the complexity of the case, as well as the age or vulnerability of the defendant.
5i. It is in the interests of another person (such as the complainant or other witness) that I am represented	Where you are charged with a sexual or violent offence, or where the complainant or other witness is a child, it would be inappropriate for you to cross-examine in person. This box should **not** be used to argue that legal representation is in the general interests of your family or of the court.
5j. Any other reasons	Please provide **full** details of any other reasons (which you have not mentioned elsewhere on the form) why you think it would be in the interests of justice that you be represented. For example, legal representation might be justified if you are likely to receive a demanding community sentence if convicted or if defence witnesses require skilful examination.

Please note: To make best use of this form, you may wish to consult the guidelines issued by the Legal Services Commission. These can be found in the office of any firm of solicitors engaged in criminal defence work or online at

http://www.legalservices.gov.uk/

In what follows, we take each of the criteria boxes as used on Form A and make suggestions as to how the guidance (whether on the form itself or elsewhere) could be improved. In making our suggestions we have borne in mind judicial authorities including those of the European Court of Human Rights (see chapter 2).

The first point to note about our re-designed form is that it increases the space available to solicitors to argue their case for legal aid. In this study, decision-makers often complained about the paucity of information provided by solicitors. As we have seen, however, decision-makers tended to write little or nothing next to most of the criteria boxes used by solicitors. One way to encourage more detailed applications would be to remove these decision-makers' boxes and expand those available to solicitors. Decision-makers would still be able to write in the reasons for grant or refusal on the back of the form.

It is possible, however, that the current design of the form has the virtue of requiring court clerks to focus on each criterion in turn and provide a reasoned response to the argument provided by the applicant. While little by way of reasoned responses were evident in our sample of application forms, the Service Level Agreement may induce greater compliance. A compromise suggestion would be to include a small decision-makers' box next to each criterion where they could either place a tick or a cross to indicate whether or not they had accepted the applicant's argument that a particular criterion was engaged. That would preserve the sense of a structured, box-by-box decision-making process while maximising the space available to solicitors.

One should be realistic, however, as to what can be achieved given the situational context in which application forms are typically completed (see chapter 9). It is realistic to expect solicitors to construct better argued applications than they currently do, but it is unrealistic to expect highly detailed information to be provided given that solicitors are expected to apply for legal aid at a point where limited information is available to them and they, and the courts, are under pressure to handle a heavy case-load in a swift and summary manner.

i) 5a Loss of liberty

There is an inconsistency between the language used in the Criminal Defence Service guidance (which refers to deprivation of liberty) and the Act (which uses the phrase loss of liberty). The wording in the guidance should therefore be amended to reflect the legislation.

There was some evidence that solicitors used this criterion where loss of liberty was 'a risk' rather than a likelihood, and some of the language in the guidance could be seen as encouraging the use of that watered down standard. One way to signal the degree of risk would be too change the wording from 'likely to lose my liberty' to 'more likely than not to lose my liberty'.

The 'guidance box' notes that if the entry point for the offence on the magistrates' guidelines is not custody, then justification should be provided as to why loss of liberty

was likely, for example due to the nature of the defendant's previous convictions or the aggravating features of the offence. In order to clear up the confusion around which sentences constitute a loss of liberty, the guidance box states that this applies only to custodial sentences (including hospital orders) and that suspended sentences also meet this criterion, (since these should only be imposed where the offence is serious enough to justify a custodial sentence – a point which could be explained in more general guidelines). In addition, the guidance box draws attention to the point that a remand in custody also amounts to a relevant loss of liberty (see chapter 5).

ii) 5b Subject to sentence

In order to help the decision-maker determine to what extent this raises the likelihood of loss of liberty, the guidance box prompts the applicant to provide details of whether this is a first or subsequent breach and whether revocation is being sought.

iii) 5c Livelihood

The Criminal Defence Service guidance in relation to this criterion is fairly complete; except that it is not made clear that this criterion can be satisfied where the plea is guilty (for example representation would be justified where it might help the defendant avoid a penalty which would interfere with his employment). The reason decision-makers tended to give this criterion little weight was due to the lack of detail provided by applicants. As general guidelines are so rarely referred to, the guidance box on the form itself prompts applicants to provide clear arguments or evidence where possible to support claims of loss of livelihood. As with the loss of liberty criterion, the word 'likely' could be replaced by the phrase 'more likely than not' in order to emphasise the degree of risk required.

iv) 5d Reputation

Although most decision makers believed this criterion applied only where the plea was not guilty, the Criminal Defence Service guidance notes that the credit given for a guilty plea can lessen the severity of sentence and thus of the damage to reputation. Applicants should be asked to state how they believe legal representation might help them preserve their reputation where they are planning to plead guilty. Lastly, Form A should make crystal clear that, as established by case-law, reputation is a matter of good character and is not related to social status or position. The guidance box has been designed accordingly.

Given the case-law on the issue, consideration should be given to whether legal representation ought to be automatic for anyone of good character who is facing any charge other than summary motoring offences. Our proposed addition to the wording of the prompt ('as would normally be caused by a first conviction') would help to remind decision-makers to decide the application in the defendant's favour where there are no previous convictions.

v) 5e Law

In order to reflect accurately the statutory language, the prompt should be changed to read 'a substantial question of law may be involved'. As we noted in chapter five, the assumption that such questions necessarily involve case-law is false, and the wording of

the criterion should therefore be amended by adding the words 'whether arising from statute, judicial authority or other source of law'. Consistently with this, the guidance box on our Form A reads, 'Where possible, please specify the cases or legislation which give rise to the question of law.' This use of the word 'possible' recognises that application forms are sometimes completed in court corridors or cells, under conditions of extreme pressure.

Clarification is needed on the issue of whether it is permissible for decision-makers to take into account the argument that points of law in favour of the defendant can be handled by legal advisors. This is such a bone of contention between solicitors and court clerks that the authoritative resolution of this point should be summarised on the face of Form A as well as explained more fully in the general guidelines.

vi) 5f Unable to understand proceedings or state one's case

As noted in chapter five, there is a considerable gap between the statutory language and the wording of Form A. Removing the reference in the wording of the criterion to disability or inadequate English would help close this. It is useful to give these as examples in the guidance box, but it should be made clear that they are not exhaustive. Indicating that age and vulnerability may also be taken into account would bring the guidance in line with the practice of many court clerks as well as help establish in the mind of other court clerks that their present practice of focussing only on disability or inadequate English is misconceived.

vii) 5g Tracing and interviewing of witnesses

The wording on Form A is more restrictive than the legislation and case-law intends. Changing the wording from 'witnesses *have* to be traced…' to 'witnesses *may* need to be traced…' would remedy this. (This point about not requiring certainty at the time of application also applies to 5e (law) 5f (understanding) and 5h (cross-examination).) As noted previously, this criterion was primarily viewed in terms of tracing rather than interviewing witnesses, despite both being accorded equal importance in the legislation. It would be helpful, therefore if examples could be provided in the general guidelines of when legal aid could be justified simply to interview witnesses (for example where the admissibility or relevance of evidence is an issue). The guidance box on Form A itself is designed to remind applicants that this criterion can apply even in guilty plea cases and that they should explain why legal representation is needed to trace and/or interview witnesses.

viii) 5h Expert cross-examination

A minority of both decision makers and solicitors mistakenly believe that this criterion is restricted to cross-examination of expert witnesses. The wording on Form A should be amended to make such mistakes less likely in future. We have proposed the following text for the guidance box:

> Skilful cross-examination is likely to be required where you are pleading not guilty and you expect the prosecution to call witnesses whose evidence you wish to probe or challenge. You are likely to require a lawyer to conduct skilful cross-

> examination on your behalf if the evidence to be given by the prosecution witnesses is complex, technical or is capable of bearing more than one shade of meaning. Factors which bear on this criterion include the complexity of the case, as well as the age or vulnerability of the defendant.

Formal guidelines need to address the commonly encountered issue of police witnesses, as there is case-law which has favoured the grant of legal aid in such cases especially where the defendant is young or inexperienced. It is not necessary to make a grant of legal aid automatic where police officers are involved, but the presumption should be in favour of grant in any but the most minor cases, especially where the defendant is a youth or otherwise in need of assistance.

ix) 5i Someone else's interests

We saw that solicitors often seek to engage this criterion with reasoning which fell outside its intended scope – which was primarily vulnerable prosecution witnesses. Thus, solicitors sought legal aid on the basis of the interests of the defendant's partner, children and even pets. Providing in the guidance box examples of where this does apply (where the defendant is charged with a violent or sexual crime or an offence against a child) and where it does not (the general interests of the defendant's family or of the court) should help to address this.

x) 5j Any other reasons

Our re-design of the form here seeks to remind solicitors that they should not merely restate information that appears elsewhere on the form. The question of what other factors might legitimately fall within this box is so open-ended that it must largely be left to the general guidelines. However, we think there is merit in signalling to solicitors the *kinds* of reasons that are relevant here. Our proposed wording for the guidance box therefore includes this text:

> For example, legal representation might be justified if you are likely to receive a demanding community sentence if convicted, or if defence witnesses require skilful examination.

We saw in chapter 6 that the Criminal Defence Service guidance does a woeful job of explicating the 'other reasons' at present. The various factors we set out at the end of that chapter (based on case-law) should certainly be discussed in any new guidelines. The guidance should reflect at some length on the various ways in which the involvement of a legal representative may further the interests of justice other than those specifically identified in the Widgery criteria. Case-law has identified one such way (skilful examination of defence witnesses – see chapter 6) but other possibilities are the tracing or checking of relevant evidence (such as CCTV footage, documents and so forth). It is simply not safe to assume that the police and prosecution will gather, evaluate accurately and disclose all such evidence.[108]

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[108] See, for example, the recent case of *R v Brady* [2004] EWCA 2330 in which failings by the police and prosecution led to the wrongful conviction and imprisonment of the defendant for robbery.

Finally, it will be noted that we have suggested inserting a reference to the formal guidelines on Form A itself, so that applicants can consult these if they wish. In practice, this reference is most likely to have the following instrumental benefits:
(i) it will bring to solicitors' attention (and the attention of their staff) that guidelines exist;
(ii) it will remind them that they ought to have a copy in their office;
(iii) it will tell them where they can easily get a copy of the guidelines should they realise they do not have a copy in the office;
(iv) it will provide decision-makers with a useful reminder of where to locate the guidelines should they mislay their own copy; and,
(v) it will ensure that the guidelines remain highly visible on the website of the Legal Services Commission.

As an aside we note that we ourselves found it very difficult to locate a copy of the Criminal Defence Service guidelines. We could not find them on the websites of the Legal Services Commission, the Department for Constitutional Affairs (formerly the Lord Chancellor's Department, the body which drew up these guidelines in 2002) or the Justices' Clerks' Society. The visibility of formal guidelines needs to be enhanced considerably if there is to be any hope at all of them being used.

8. What other ways can be suggested that might improve the consistency of decision-making?

(i) Consideration should be given to whether it would be useful to identify a list of offences for which the grant (or refusal) of legal aid should be automatic (as already occurs in some courts). One could, for example, place all imprisonable offences on the automatic grant list and all charges connected with certain minor motoring offences on the automatic refusal list. This would have the advantage of simplifying decision making considerably as well as increasing its consistency. The main disadvantage, from a cost point of view, is that this is likely to lead to an increase in the number of grants of legal aid. Given the current very high rates of grant for imprisonable offences the increase in the number of grants may not be significant, and this change might even be cost-effective if it brought about a reduction in the costs of decision-making. It would certainly eliminate some of the more extreme forms of what is sometimes called justice by geography. The difficulty with this proposal is that it flies in the face of the decision in *R v Highgate Justices ex parte Lewis* (1977) 142 JP 78 which held that offence-based decision-making norms were inconsistent with the 'interests of justice' test established by Parliament. The *ratio* for this decision was that the discretionary nature of that test showed that the legislature had intended each case to depend upon its own facts.[109] It would therefore require primary or subordinate legislation to effect this change.

[109] Lord Widgery CJ added: 'The court would entirely lose control over the grant of legal aid if individual offences acquired, as it were, a label saying that they were or were not suitable for the grant of such assistance'.

(ii) An alternative approach would be to include in an automatic grant list only those offences for which the entry point in the magistrates' guidelines is custody and / or for which the most likely disposal is custody. Since this approach focuses on offences where custodial sentencing is likely, it is (probably) compatible with the Widgery criteria as they stand, so amending legislation would not be required. Given the rapidity of changes in sentencing policy, any list would have to be revised regularly, to ensure that only those offences for which custody is a 'likely' disposal are included. It may be simpler, therefore, for the Legal Services Commission to stipulate in the Service Level Agreement that there should be a very strong presumption in favour of grant for any offence for which sentencing guidelines specify custody as the entry point. This would be broadly in line with current practice but might encourage more systematic reference by applicants and court clerks to the sentencing guidelines.

(iii) There was little evidence of any structured, or consistent, training in legal aid decision-making for court staff. One way of supporting decision-makers under the Service Level Agreement would be for the Legal Services Commission to devise and provide a training pack for use nationally. This could be something that individual decision-makers work through individually, before coming together to discuss their views and conclusions on the various training exercises. Those exercises might include consideration and discussion of dummy applications. This would highlight the differences in interpretation of criteria which individuals in the same court may have, and enable training to be focused on those areas with most disagreement. The training pack would have to be regularly updated in order to take account of relevant changes in law, practice and procedure, and should ideally be flexible enough to be of use to small or large groups of trainees, as well as to an individual coming fresh into this area of work.

(iv) New guidance should be publicised and made easily available to both court staff and solicitors. We suggested at the end of our answer to question 7 one way in which decision-makers and solicitors could be easily and repeatedly reminded of the existence of the guidance and where to locate it. In addition, the training pack for decision-makers should include a copy of the guidance and require them to make use of it when determining one or more borderline dummy applications.

(v) Another way of supporting decision-makers (and solicitors) would be for the Legal Services Commission to take responsibility for monitoring and publicising case-law developments. The relevant judgments should be placed on an easily accessible part of its website. There are not many such judgments but they are hard to find and few of them appear in the main law reports. The guidance could provide website citations to the case-law so that those who doubted the guidance could read the judgments for themselves. This could be an important service given the ingrained nature of some of the erroneous understandings of the Widgery criteria we uncovered – some court clerks and solicitors will need to see the judgments for themselves if they are to be persuaded that they should change their ways. We are optimistic that this service would be used since, as we have noted, court clerks do seek conscientiously to apply the correct legal test as they understand it. Their fidelity to law makes us hopeful that certain ingrained norms, once recognised as erroneous, will cease to be operative. Consideration could also be given to

including the relevant judgements in the training pack and to disseminating updates through the standard Her Majesty's Courts Service communication channels.

(vi) It is arguable that the need to take into account *local* sentencing policy (when considering loss of liberty, reputation, or livelihood) has diminished over time as the promulgation and use of sentencing guidelines has grown. The process of national standardisation in sentencing looks set to accelerate further in the light of the setting up of the Sentencing Guidelines Council under the Criminal Justice Act 2003. Recently, for example, the Court of Appeal has warned sentencers that they should not draw on their personal views concerning the prevalence of an offence locally (when considering 'the need' for an element of local deterrence) in the absence of statistics or other relevant evidence, especially for offences or situations where the Sentencing Guidelines Council has issued guidance on appropriate sentencing standards.[110] The contention that apparent variations in legal aid decision-making may be justifiable in terms of local sentencing policies has therefore lost much of its force over time. Nonetheless, it cannot be assumed that all courts implement the national sentencing guidelines faithfully; perceptions that sentencing in practice amounts to 'a lottery' were reported in chapter 5.

There is a case for including in the planned Service Level Agreement between the Legal Services Commission and the magistrates' courts a requirement that any reliance on local sentencing norms (which depart from national sentencing guidelines) should be made explicit in the reasons for granting (or refusing) legal aid. That would make those local sentencing norms more visible (and open to measurement and challenge where they are not justifiable) and provide the Legal Services Commission with the information it needs if it is to be fully accountable for decision-making.

(vii) Channels of communication between court clerks and solicitors are not working particularly well at present, at least not on paper. It would be helpful if court clerks recorded fuller reasons when determining legal aid applications, particularly when rejecting arguments that particular criteria should be regarded as engaged. That might help educate solicitors into what court clerks are looking for and encourage a reasoned exchange of views on the correct interpretation of the Widgery criteria. If the new guidelines are publicised in the ways we have suggested, there is reason to hope that these exchanges will take place on an informed basis, and that common (and accurate) understandings of appropriate application and decision-making norms will develop.

It is unlikely that solicitors will pay much attention to any reasoning provided on granted applications, however. There is, therefore, something to be said for confining the ambit of any new exhortations to court clerks to record fuller reasons to those applications that they refuse. These exhortations could be backed up by auditing procedures or supervisory arrangements. (In parenthesis we note that an auditor might want all decisions to be fully supported with extensive, discursive reasons. For ourselves, we think it enough for accountability purposes that court clerks indicate which criteria they accept have been

[110] *R v Lee Oosthuizen* 13 July 2005 (The Times, 5 September 2005).

engaged by the application. We are fortified in that view by the degree of legal fidelity exhibited by those we interviewed. To require full reasons for all grants would be akin to using a sledgehammer to crack a nut.)[111]

(viii) One possible source of 'feedback' for decision-makers is the systematic provision to them of information on sentencing outcomes according to whether a defendant was granted legal aid or not. This information might persuade some decision-makers that they sometimes grant too readily (if there are many cases in which a legally aided defendant whose application they determined ultimately receives a low level disposal) or refuse too readily (if there are many cases in which an unrepresented defendant whose application they determined receives a high tariff community penalty, or legal aid has to be granted at a later stage because the magistrates indicate that they have a custodial sentence in mind).

We are ourselves doubtful about the utility of such feedback for a number of reasons. First, the information would only have educative potential if (i) it was broken down by individual decision-maker and (ii) the grant or refusal turned on the 'loss of liberty' criterion (rather than other criteria playing a part) in relation to final sentence (rather than a remand in custody). Generating such precise information would not be easy. Second, the information would be difficult to interpret given that the grant or refusal of legal aid may itself have influenced the final sentencing outcome (e.g., a grant may result in the defendant having a solicitor put forward an effective plea in mitigation or obtaining a reduction in charges). Third, the vagaries of sentencing at a local level entails that court clerks could not be sure that their initial prediction of a high-tariff sentence was wrong; the defendant may simply have been fortunate enough to come before a lenient bench. Fourth, differences between courts in their filing systems and practices (see chapter 3) would make it difficult to be sure that the feedback was accurate and consistently delivered. A pre-condition to setting up a valid and reliable system of feedback would be the introduction of standardised systems for collecting, storing, retrieving and interpreting information. We consider that other approaches should be attempted first as they are likely to be more cost-effective and less problematic for the courts themselves.

(ix) One proposal that was put to us was for legal aid to be granted (perhaps automatically) solely for advice on plea. The idea here would be that in many 'guilty plea' cases legal aid would be terminated once plea was known because either (i) the case would then have insufficient legal complexity to merit a representation order or (ii) the effect of the guilty plea on sentencing norms would be that custody became an unlikely outcome. This two-stage decision-making process would involve paying solicitors for the time needed to gather relevant information (advance disclosure, previous convictions etc) relevant to advising on plea. As well as promoting more defensible decision-making, this might ultimately save money if the subsequent terminations of legal aid sufficiently offset the increased number of initial grants.

We have two main doubts about this proposal. First, summary justice moves too fast to cope with the additional bureaucracy such a two-stage process would introduce without

[111] All aspects of this recommendation were supported by the two legal advisors who commented on a draft of this report.

costs (e.g., through court delays) being generated elsewhere. Second, it would probably have the unintended consequence of increasing the number of not guilty plea cases in the magistrates' courts because solicitors (whether consciously or not) would tend to encourage not guilty pleas in order to maximise income.

Something like a two-stage process already operates, however, where the first advice received by a defendant is from a duty solicitor at court (although this is not available for non-imprisonable offences or, we were told, in cases where a representation order has been refused). Some solicitors also spoke of a 'measly hour' for which they could claim remuneration for work done prior to the grant of a representation order, although it is doubtful that this is sufficient for providing informed advice on plea.[112] We were also told that solicitors were obliged under the terms of the General Criminal Contract to apply for a representation order as early as possible. It is beyond the remit of this research to consider the interrelationship of these different schemes and mechanisms for funding legal advice and representation, or how they might be adjusted to maximise the chances of a two-stage process working effectively.

(x) It is possible that encouraging courts to confine decision-making to a relatively small number of staff would promote greater consistency, especially within a court but perhaps across courts too. We advance this proposition hesitantly because our evidence on the point is not clear-cut and there is a danger here of allowing the tail to exert too much influence over the dog. Not all variations between courts are undesirable; there may be good reasons why courts adopt different approaches. For example, decisions as to whether or not applications are considered in court or in the office, or by decision makers or delegated administrative staff, are probably best left to the courts themselves. The two legal advisors who commented on a draft of this report suggested that groupings of courts (say at area or regional level) might nonetheless be encouraged to generate and share thoughts on 'best practice' on such issues, including the important issue of how to handle applications for legal aid that are deemed to contain insufficient or inadequate information.

(xi) We caution that all our suggestions for how improved consistency might be achieved are somewhat speculative. It was not part of our research brief to introduce experimental innovations into magistrates' courts and assess their impact on decision-making. Ideally, that kind of careful piloting work should form the next stage in any reform strategy. It may be thought that this research report is overly-lengthy. We could easily have doubled it if our research aim had been to convey the complexities of interpersonal relationships within magistrates' courts, the rich complexity of the work those courts carry out, and the myriad ways in which legislation, case-law, and bureaucratic prescriptions influence their day-to-day functioning.

As we noted at the end of chapter 9, the trick is to find ways of improving consistency and accuracy in legal aid decision-making without destroying the best features of the current system – such as speed, flexibility, decision-making that is sensitive to local

[112] Public funding for general advice from a solicitor is available under an 'Advice and Assistance' scheme but it does not cover criminal proceedings after charge or summons.

circumstances, and overlapping professional understandings of when a grant of legal aid will serve the overall interests of justice. That trick will be all the harder to pull off given the complex setting in which it must take place. If any of the reforms we have suggested are to qualify as truly evidence-based, and if the risks of them producing costly unintended consequences are to be minimised, a period of piloting in a small number of courts would be sensible. This piloting should be accompanied by further evaluation - not necessarily conducted by academics.

9. Has there been any change in the rate of variance in decision-making detected in the 1992 study within and between magistrates' courts?

It is difficult to provide a definitive answer to this question, first, because only three of the eight courts included in the present study were visited as part of the 1992 study, and secondly, because those we interviewed within these three courts were not necessarily representative of all decision-makers in those courts. Moreover, we do not have access to the raw data on which the 1992 research drew, which makes certain kinds of comparisons problematic. There have also been many amalgamations and closures of magistrates' courts since 1992 which makes direct comparisons on the basis of national statistics inadvisable. We can, however, make the following observations:

(i) The rate of variance within and between magistrates' courts is probably less now than in 1992 for the simple reason that grant rates are now generally higher (and very high).

(ii) Just as in 1992, however, solicitors interviewed in the present study had no difficulty in identifying 'low grant' courts, and this study found other evidence to support the view that variation between courts persists. This variation is not explicable in terms of case-load composition or sentencing patterns.

(iii) Variation within the same court also continues to manifest itself. This was demonstrated by the dummy application exercise and was confirmed by the comments of some of our interviewees. It is possible that the rate of variance within the same court has increased since 1992 simply because there appears to have been a trend towards greater use of relatively large numbers of staff in decision-making. Where administrative staff form part of the decision-making cadre in a court, the potential for even wider variation exists since legal advisors and administrative staff are likely to draw on widely different *types* of experience in applying the Widgery criteria. The interests of justice test is probably best applied by those with experience of working in the courts themselves; it is hard, for example, for administrative staff to judge when a question of law is substantial or when skilful cross-examination may be needed.

(iv) Decision-making in 2004 is far more defensible in terms of the Widgery criteria than it was in 1992. The increased use of custodial sentencing in the magistrates' courts entails that a much greater proportion of grants can be defended on the basis that there truly was a risk of loss of liberty than was the case in the earlier study. Moreover, the shift away from the just deserts philosophy in sentencing has seen a proliferation of

demanding community penalties (e.g., Drug Testing and Treatment Orders; Intensive Supervision and Surveillance Programmes) and new forms of preventive orders (e.g., ASBOs and football banning orders). In addition, the drive to 'bring more offenders to justice' while at the same time minimising expenditure on criminal justice has led to a multitude of procedural and evidential innovations (for example, abolition of the right to silence, plea before venue mechanism, conditional cautions, bad character provisions in the Criminal Justice Act 2003). All of this has added to the legal complexity of summary justice and made the case for granting legal aid more difficult to resist. At the same time, these innovations have greatly increased the number of points on which decision-makers may take different views when considering whether the Widgery criteria are engaged.

(v) While this issue is not strictly within our terms of reference, there is no evidence that decision-makers have become more liberal or generous since 1992. As we saw at the end of chapter 8, the explanation for the shifts in grant rate seen in relation to particular offences is much more likely to lie in changing perceptions of offence seriousness and related sentencing provisions and patterns.

Conclusion

In this chapter we have summarised our findings and addressed the questions included in our research brief. In 1992 the researchers concluded their report by questioning whether 'a decision making process as open-ended and opaque as that now operated by magistrates' courts is in the best interests of justice.'[113] They were particularly concerned that the open-ended nature of the process allowed irrelevant considerations to come into play: 'Whether an applicant receives legal aid can depend as much upon the personal views and idiosyncrasies of court clerks as it can upon the strength and nature of the defence mitigation to be put forward at court.'[114] Those conclusions drew on the core finding of the research that decision-making was largely tariff based and bore little relationship to the Widgery criteria.

The present study of the same discretionary backwater found that the context within which decisions are now made has changed almost out of all recognition. Sentencing is much tougher, procedures are substantially more complex, and the journey from arrest to conviction is markedly swifter. One implication of these changes is that the 1992 critique no longer applies with anything like the same force. Legally-informed, court-based, flexible, rapid, legal aid decision-making is now essential to the functioning of summary justice. Understanding what the interests of justice require in this new landscape is not something that can easily be achieved from afar.

It would be wise, therefore, for the Service Level Agreement between the Legal Services Commission and the magistrates' courts to be couched in such a way that promotes accountability, accuracy and consistency while avoiding heaping disproportionate (and potentially counter-productive) bureaucratic burdens on already busy staff. While our central suggestion of a redesigned standard application form may seem rather modest, its very simplicity is likely to guarantee its rapid assimilation. And its modest nature seems

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113 *In the Interests of Justice?*, p. 109.

114 Ibid.

appropriate given that we have found patterns of decision-making to be largely defensible in terms of the Widgery criteria and associated case-law. Given the way the criminal justice system has evolved since 1992, cautious and moderate reform to this aspect of the legal aid scheme is what is needed. There is plenty of work for the sledgehammer elsewhere.

APPENDIX 1

Questionnaire for Court Based Decision Makers

1	Could you briefly explain the process by which decisions are made on criminal legal aid applications in this court?
2	(In this court) what proportion of decisions on criminal legal aid do you take in person each month? (Who else takes decisions and how often?)
3	For how long have you been taking decisions on whether to grant representation orders?
4	Do magistrates ever get involved in taking decisions on representation orders?
5	Does this court have any particular policy on applications for representation orders?
6	Is this policy made known to solicitors operating in this court?
7	Whether someone gets legal aid or not may depend to a large extent on what offence they are charged with. Could you look at this list and indicate on a scale of 1-5 how likely it is that someone charged with a particular offence will be granted legal aid?
8	What, in your view, are the most important criteria to be applied in deciding whether or not someone gets criminal legal aid?
9	There are a number of criteria listed in the Access to Justice Act. Could I ask you to comment on each in turn? 9a How significant is this criterion in your decision making? 9b How do you interpret this criterion (when can it apply?) A: Likelihood of **custody** B: Subject to community order, which if **breached** could lead to **re-sentence**. C: Likelihood of loss of **livelihood** (if offence proved) D: Likelihood of serious damage to **reputation** (if offence proved) E: The case may involve consideration of a substantial question of **law** F: The accused may be unable to **understand** the proceedings or to state his own case because of his inadequate knowledge of English G: The accused may be unable to understand the proceedings or to state his own case because of **mental** illness or other mental or physical disability H: Nature of the defence involves the **tracing** and interviewing of witnesses I: Nature of the defence involves **expert** cross-examination of a prosecution witness J: It is in the interests of **someone** other than the accused that the accused be represented
10	In assessing the risk of custody, is it important to take in to account this particular court's sentencing policies?
11	Is there any respect in which you think the 'IOJ' criteria should be clarified or changed?

12	Are there any other factors besides the 'interests of justice' criteria which can be influential in deciding whether or not to grant a criminal legal aid application?
13	Are you influenced at all by the applicant's likely plea?
14	Are you influenced at all by the prospect that an appeal against a decision to refuse could be made to the magistrates?
15	Are there any performance targets you are expected to meet in determining legal aid applications?
16	Is your decision making supervised or monitored in any other ways? (Do these kinds of managerial pressures affect your decision making in any way?)
17	Do you personally believe that the CJS would be fairer if the defendant was always granted legal aid?
18	Do you think that court proceedings are more efficient where the defendant is legally represented? (Is that ever a reason why you would grant legal aid?)
19	How well are criminal legal aid application forms completed in your view? (Is sufficient information provided?)
20	Do applicants and solicitors interpret the IOJ criteria properly when completing the legal aid application form? (Do they have a tendency to put down irrelevant points against certain of the criteria?)
21	Do you tend to refuse applications for criminal legal aid where insufficient information is given on the application form?
22	In your view how reliable is the information given by applicants on the application form?
23	Do you use any additional sources of information when deciding legal aid applications? (e.g. consult CPS, charge sheet, precons)? (How often?)
24	Can you think of any changes in criminal law or procedure over the last 5 years that have affected the likelihood that an application for a representation order will be granted?
25	Do you use any written guidelines in determining legal aid applications? (e.g. JCS. How, if at all, do these differ from any used in the past?)
26	The proportion of defendants who are granted legal aid has increased significantly year on year. Why do you think this has happened?
27	Do you think decision making on legal aid should be kept within the magistrates' court, or should the LSC take over this function

APPENDIX 2

Questionnaire for solicitors

1	Can I ask you what your understanding is of the process by which decisions are made on criminal legal aid applications in your local court?
2	Does your local court have any particular policy on criminal legal aid applications? (Do you appear before any other courts with noticeably different policies in criminal legal aid?)
3	[IF YES] Is the local court policy made known to the solicitors operating in the court?
4	[IF YES] Do you take account of this policy when deciding whether or not to apply for legal aid? (In what way?)
5	Would you ever try to have a magistrate take the decision on a legal aid application rather than a court clerk? (Do they tend to be more generous than the clerks?)
6	What, in your view, are the most important criteria to stress when applying for criminal legal aid in your local court?
7	There are a number of criteria listed in the Access to Justice Act. Could I ask you to comment on each in turn? 9a How significant is this criterion in terms of having an application granted? 9b How do you interpret this criterion (when can it apply?) A: Likelihood of **custody** B: Subject to community order, which if **breached** could lead to **re-sentence**. C: Likelihood of loss of **livelihood** (if offence proved) D: Likelihood of serious damage to **reputation** (if offence proved) E: The case may involve consideration of a substantial question of **law** F: The accused may be unable to **understand** the proceedings or to state his own case because of his inadequate knowledge of English G: The accused may be unable to understand the proceedings or to state his own case because of **mental** illness or other mental or physical disability H: Nature of the defence involves the **tracing** and interviewing of witnesses I: Nature of the defence involves **expert** cross-examination of a prosecution witness J: It is in the interests of **someone** other than the accused that the accused be represented
8	In assessing the risk of custody for a client, is it important to take into account this particular court's sentencing policies?
9	In your view, do clerks and magistrates in your local court interpret the 'interests of justice' criteria properly when determining legal aid applications?

10	Is there any respect in which you think the criteria should be clarified or changed?
11	In your experience, are there any other factors besides the 'interests of justice' criteria which are taken into account in deciding whether or not a criminal legal aid application is granted (efficiency in court?)
12	Are there any offences in relation to which you would normally expect to be refused legal aid by the local court?
13	Are there are any offences where you would always appeal to the magistrate if you were refused legal aid by the clerk?
14	Do you personally believe that the CJS would be fairer if the defendant was always granted legal aid?
15	Do you think that court proceedings are more efficient where the defendant is legally represented? / Do you think that is ever a reason why clerks grant legal aid?
16	Defendants normally need help in completing legal aid application forms. Who, within your firm, usually helps clients do this? (Does that person have any guidance on how the forms should be completed?)
17	How important is it to indicate on the application form the applicant's likely plea?
18	Do defendants sometimes plead guilty after indicating on their legal aid form that they would be pleading not guilty? (Why does this happen?)
19	How reliable, in your experience, is the information given by applicants when the legal aid application form is being completed?
20	Do you use any written guidelines on the operation of the 'interests of justice' criteria in deciding whether it is worth applying for legal aid? (e.g. JCS. How, if at all, do these guidelines differ from any used in the past?)
21	The proportion of defendants who are granted legal aid has increased significantly year on year. Why do you think this has happened?
22	Do you think decision making on legal aid should be kept within the magistrates' court, or should the Legal Services Commission take over this function?

APPENDIX 3 EXAMPLE OF DUMMY APPLICATION FORMS USED IN 2005

APPLICATION FOR THE RIGHT TO REPRESENTATION IN CRIMINAL PROCEEDINGS

FORM A

I apply for the right to representation for the purposes of criminal proceedings in accordance with the Access to Justice Act 1999 and the Criminal Defence Service (General, No.2) Regulations 2001

1. Personal details

1a. Surname	**Smith**
1b. Forenames	**Adam**
1c. Title (Mr,Mrs,Ms,Miss or another)	**Mr**
1d. Date of birth	**Age 20**
1e. Home address	
1f. Present address (if different from above)	

2. Case Details

2a. What charges have been brought against you? Describe briefly what it is that you are accused of doing: e.g. theft of £10 worth of CDs or assault on a neighbour	**S47 ABH – punched IP in face, causing black eye, in course of fight.** **Mr Smith hit the victim after words were exchanged, causing a black eye and minor cuts. The victim attended out-patients and was x-rayed but no fractures were detected. He was sent home after the cuts and bruises were cleaned.**
2b. Are there any co-defendants in this matter?	No/Yes (if yes give their names) **No**
2c. Give reasons why you and your co-defendants cannot be represented by the same solicitors	**N/A**

3. The Court Proceedings

3a. I am due to appear before	The	City		court
	Date	14 June	at	3pm

or

3b. I appeared before	The			court
	Date		at	am/pm

And	My case has been sent to the Crown Court for trial under Section 51 of the Crime and Disorder Act 1998	
	My case has been transferred to the Crown Court for trial	
(tick whichever applies)	I was committed for trial to the Crown Court	
	I was convicted and/or* sentenced and I wish to appeal against the conviction/ sentence* to the Crown Court/Court of Appeal/ House of Lords* (*Delete as appropriate)	
	I was convicted and committed for sentence to the Crown Court	
	A retrial has been ordered under Section 7 of the Criminal Appeal Act 1968	
	Other (please specify nature of hearing)	

4. Outstanding matters

If there are any other *outstanding* criminal charges or cases against you, give details including the court where you are due to appear.	

5. Reasons for wanting representation

To avoid the possibility of your application being delayed, or publicly funded representation being refused because the court does not have enough information about the case, you must complete the rest of this form. When deciding whether to grant publicly funded representation the court will need to know why it is in the interests of justice for you to be represented. If you need help in completing the form you should speak to a solicitor.

	Details	Reasons for grant or refusal (for court use only)
5a. It is likely that I will lose my liberty (*you should consider seeing a solicitor before answering this question)*	**Nature of offence (assault). Subject to bind over for assaulting wife (case dismissed after complaint withdrawn)**	
5b. I am currently subject to a sentence that is suspended or non-custodial that if breached may allow the court to deal with me for the original offence. *(Please give details)*		
5c. It is likely that I will lose my livelihood		
5d. It is likely that I will suffer serious damage to my reputation		
5e. A substantial question of law is involved. *(You will need the help of a solicitor to answer this question)*	(Please give authorities to be quoted with law reports references)	

5f. I shall be unable to understand the court proceedings or state my own case because: i) My understanding of English is inadequate* ii) I suffer from a disability* *(* Delete as appropriate)*		
5g. Witnesses have to be traced and/or interviewed on my behalf *(State circumstances)*		
5h. The case involves expert cross-examination of a prosecution witness *(give brief details)*		
5i. It is in someone else's interests that I am represented		
5j. Any other reasons *(Give full particulars)*		

6. Legal Representation

a) If you do not give the name of a solicitor, the court will select a solicitor for you.
b) You must tell the solicitor that you have named him.
c) If you have been charged together with another person or persons, the court may assign a solicitor other than the solicitor of your choice.

The solicitor I wish to act for me is:

Give the firm's name and address (if known)

Declaration to be completed by the legal representative
[The legal representative may wish to confirm with the Legal Services Commission the status of the above named solicitor should he/she not be sure of the above named solicitor's authorisation to provide publicly funded representation]

I,....., representing the above named applicant, certify that the named solicitor above is authorised to provide representation under a crime franchise contract, or a general criminal contract, or an individual case contract.

I understand that only firms with a general criminal contract or individual case contract may provide representation in the magistrates' court.

or

I,....., representing the above named applicant, certify that the named solicitor above is employed by the Legal Services Commission in a Public Defender Office and is authorised to provide representation.

Signed.....Date.....

7. Declaration

If you knowingly make a statement which is false, or knowingly withhold information, you may be prosecuted.

If convicted, you may be sent to prison for up to three months or be fined or both (section 21 Access to Justice Act 1999)

I apply for representation for the proceedings set out in Section 3 of this form.

I understand that should my case proceed to the Crown Court or any higher court, the court may order that I pay for some or all of the costs of representation incurred in the proceedings by way of a Recovery of Defence Costs Order.

I understand that should my case proceed to the Crown Court or any higher court, I will have to furnish details of my means to the court and/or the Legal Services Commission.

Signed.....dated.....

FOR COURT USE ONLY

Any additional factors considered when determining the application, including any information given orally.

Decision on Interests of Justice Test

I have considered all available details of all the charges and it/is not in the interests of justice that representation be granted for the following reasons:

Signed.....Appropriate Officer

Date.....

To be completed where right to representation extends to Crown Court

Statement of means Form B given to defendant on.....(date)

Indicate type of case:

Sent case under S51 Crime and Disorder Act 1998	
Transferred for trial	
Committal for trial/sentence*	
Appeal against conviction/sentence*	
Retrial under S7 of the Criminal Appeal Act 1968	
Other (specify).....	

(* Delete as appropriate)

First date of hearing at Crown Court.....

APPENDIX 4 EXAMPLE OF DUMMY APPLICATION FORMS USED IN 1992

(Please note, because the image below is scanned in, it appears slightly smaller than in reality)

(3)

LEGAL AID BOARD
LEGAL AID ACT 1988

APPLICATION IN CRIMINAL/CARE PROCEEDINGS

Legal Aid

Defendant's Details

Title: Mr Initials I DOB: Age 25

Surname Bloggs Sex: M/F

Address:

Occupation: Process Worker

Solicitor's Details PLEASE SEE NOTES OVERLEAF

Account No. Sol's Ref:

Solicitor's Name:

Firm's Name and Address:

Dx No.

Tel. No.

Offence Tick one box based on most serious offence

Violence	01		Fraud	07	
Sex	02		Criminal Damage	08	
Burglary	03		Drugs	09	
Robbery	04		Road Traffic	10	
Shoplifting	05		Social Security	11	
Other Theft	06		Misc inc care cases	12	X

Application Type Tick one box only

Review of refusal of Legal Aid	01	
Prior authority for expenditure	02	
Assignment of Counsel	03	
Instruct Q.C without Junior	04	
Change Solicitors	05	
Withdrawal of Legal Aid Order	06	

Court/Charge Details:

Court name:

Plea (if not known what will you advise)
NG

Nature of Charge(s)
(inc statute and section) S.5 POA 1986 (Disorderly behaviour at football match).

Date and purpose of next hearing

Have any previous applications been made to the Area committee? YES/NO

Full reasons for application including details of other defendants (See note 2) continue on separate sheet if necessary

See summary

Summary of case against your client (enclose copy advance disclosure if available)

" "

Summary of defence/mitigation (enclose, if available, your client's statement and details of any previous convictions).

" "

COMPLETE IF APPLYING FOR PRIOR AUTHORITY FOR EXPENDITURE

Nature of Expenditure:
e.g. Medical Report

Details of Charging Rates per hour

Preparation	£	
Travel	£	
*Court Attendance	£	
Other	£	

*Please quote even if not required at this stage

Value of Authority sought £

Name and address of Expert or other person to be instructed:

Qualifications:

Solicitor's Signature: Date:

(3)

IMPORTANT NOTES

1. When applying for review of refusal of legal aid you must forward Form 2 & 3 and you should enclose a copy of the original application and any additional information which is relevant. Please specify which of the factors in S22(2) Legal Aid Act 1988 are considered to apply.
2. When applying for prior authority for expenditure in Magistrates' Court proceedings you must enclose the copy of Legal Aid order marked **BOARD COPY**. When applying for prior authority for expenditure in the Crown Court, you must enclose the **BOARD COPY** of the Legal Aid Order covering Crown Court proceedings. You must also give details of any other defendants who would benefit from the expenditure and enclose their Legal Aid Orders if you are instructed by them.
3. When applying for authority for medical reports you must give details of the relevant medical history and indicate clearly the purpose of the reports.
4. When a medical report has been ordered by the court for the purpose of sentencing the cost is payable from central funds and not under the Legal Aid Order.
5. In intoximeter/excess alcohol cases you must give the intoximeter reading/blood level and the nature and amount of alcohol consumed by your client before and after driving. You should specify the times of consumption and the time of the intoximeter test.
6. In care proceedings you must indicate whether a guardian ad litem has been appointed and whether the child is separately represented.
7. Application for the assignment of counsel and/or amendment of the Legal Aid Order should in the first instance be made to the court. Please see Regulation 51 of the Legal Aid in Criminal and Care Proceedings (General) Regulations 1989.
8. When completed this form should be sent to the Legal Aid Area Office in whose area the court is situated. No covering letter is required.

FOR AREA OFFICE USE

REFERENCE NUMBER: / 44 / / /

COURT CODE:

DECISION: DATE:

G10	Granted – Delegated		CL4	Out of Time	
G12	Granted – Committee		W10	Withdrawn	
R21	Refused – Committee		CL5	No Jurisdiction	

DOCUMENT CODES AND STANDARD WORDINGS CODES REQUIRED:

SUMMARY FOR COMMITTEE

Mr Bloggs was a regular supporter of Burnley FC. On the day in question he and his friend (x) found himself in a section of the stand occupied by supporters of the opposing team (Blackpool). There was no trouble until Burnley scored whereupon Bloggs and x jumped up and down in delight. At this point the evidence of the police and that of Bloggs and x differs. According to the police Bloggs and x began to 'v' sign the Blackpool supporters, thus causing a fight in which they were willing participants. According to Bloggs and x the Blackpool fans turned on them immediately after Bloggs and x jumped to their feet, spitting at Bloggs and x and verbally abusing them. Bloggs and x say that they remonstrated with the Blackpool fans who then physically attacked them. All Bloggs and x did then, they say, was to defend themselves.

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Reasons for wanting Legal Aid	*Note: If you plead NOT GUILTY neither the information in this form nor in your statement of means will be made available to the members of the court trying your case unless you are convicted or you otherwise consent. If you are aquitted, only the financial information you have given in your statement of means will be given to the court.* *Tick any boxes which apply and give brief details or reasons in the space provided.*	
1. I am in real danger of a custodial sentence for the following reasons [X] *(You should consider seeing a solicitor before answering this question)*	Nature of offence. Previous for related offences (2 football hooliganism, 1 assault. Fines on each).	For court use only
2. I am subject to a: suspended or partly suspended prison sentence [ ] conditional discharge [ ] probation order [ ] supervision order [ ] deferment of sentence [ ] community service order [ ] care order [ ] *give details as far as you are able including the nature of offence and when the order was made*		
3. I am in real danger of losing my job because: [ ]		
4. I am in real danger of suffering serious damage to my reputation because: [ ]		
5. I have been advised by a solicitor that a substantial question of law is involved [ ] *(You will need the help of a solicitor to answer this question)*		
6. Witnesses have to be traced and interviewed on my behalf [ ] *(State circumstances)*		

Reasons (Cont) *Tick any boxes which apply and give brief details or reasons in the space provided.*		
7. I shall be unable to follow the court proceedings because: *a)* My understanding of English is inadequate ☐ *b)* I suffer from a disability *(give full details)* ☐		*For court use only*
8. The case involves expert cross examination of a prosecution witness ☒ *(give brief details)*	Cross examination of arresting police officers.	
9. The case is a very complex one. for example, mistaken identity *(You may need the help of a solicitor to answer this question)* ☐		
10. Any other reasons ☐ *(give full particulars)*		

Reasons for Refusal

This section must be completed by the Justices' Clerk if the application is refused because:
(a) It does not appear desirable in the interests of justice, and
(b) The applicant is entitled to apply for legal aid to the area committee.
State briefly the reasons for that decision.

Signed Justices' Clerk

For court use only Date