

Alternative Funding Models for Free Legal Advice

Stakeholder Engagement Workshop

Context

Funding for free legal advice continues to be a critical social, economic, and political issue following Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), a decade of austerity policies and new challenges in need, demand and supply following the pandemic and energy and cost of living crisis.

Providers of legal advice are familiar with mixed funding models, and it is unlikely that any one scheme will solve all the problems currently being faced by the sector. There is a need to explore additional funding models and solutions, outside those currently being used, to build a portfolio of potential solutions to support a more sustainable future for free legal advice provision. The drivers for this include the growing demand for services and unmet legal need, the reduction in resource base for free legal advice, and the potential of unexplored international examples of alternative funding models.

The need for a robust evidence base

There is currently a lack of evidence that allows us to build robust policy asks. The Access to Justice Foundation together with the Centre for Socio-Legal Studies have submitted a bid for funding to provide a rigorous evidence base to support discussion of six models which will facilitate an in-depth interrogation of the opportunities, barriers, and consequential impacts of each.

Workshop focus

This workshop was designed to provide an opportunity for key stakeholders to come together to learn more about alternative funding models, provide feedback on their experience of them, consider the options and discuss how different models would create impact in England and Wales.

Levies on large commercial law firms

Raising levies on large commercial law firms is an idea that has been around for some time, initially suggested by Conservatives but later also taken up by the Labour party. Specific suggestions have varied but all contain an element of “large” or “rich” commercial firms paying a levy that would be used to fund the provision of free legal advice. The levy concept has already been introduced on a small scale domestically with the economic crime levy.

This model presents some substantial implications for law firms, and raises several key questions and challenges including contentions that:

- The levy essentially represents a tax on top of preexisting taxes high wealth firms are subject to.
- The questionable rational of subjecting law firms specifically to a levy, but not other businesses or legal services such as members of the Bar and claims firms.
- Free legal advice for the public should remain publicly funded.
- The fee could be circumvented by re-defining the work of law firms and legal, a change in business structures.
- The risk that firms subject to a levy would choose to grow and invest in their business overseas rather than in the UK.
- The risk that a levy would impact the pro bono and other Corporate Social Responsibility (CSR) offerings from affected firms.

There are additional alternative levy models which could be explored such as a voluntary levy scheme, potentially offset against pro bono contributions, or levies on other legal services/ interventions such as court costs, inter-partes costs, or use of the system by non-residential parties.

Despite political party backing, appetite for introducing a levy on large commercial law firms is anticipated to be low, particularly in a first term government.

Collective Actions

Collective Action in competition cases were permitted under the Consumer Rights Act 2015. Under this legislation, unclaimed damages are awarded to The Access to Justice Foundation for distribution to legal advice initiatives across the UK, in order to support further access to justice.

The potential for unclaimed damages to generate significant funds is still being tested. There are currently 21 certified cases with a total of £16bn in damages under consideration. We are awaiting the first judgment, though two cases have already settled with residue damages reverting to the defendant.

The legislative framework for this model is already in place and there is a potential to extend this to other areas of law. However, the process for damages distribution is still undecided leaving a high level of uncertainty over the amount of funds that could be generated under this scheme.

There are a variety of unanswered and challenging questions including:

- The extent to which funds distributed are aligned to the intent of the case vs directed to meet more holistic need.
- The scale of potential amounts vs. the one-off nature of disbursements, whether we spend or save, and whether we risk replacing public funding.
- The type of funding that would be made available to the sector, and what if any strategic focus should be applied to the distribution of funds.
- The role technology will play in automating the damages distribution process which may result in limited residual funds.

Some examples of international implementation include:

- The United States where there is an estimated £15bn in unclaimed damages generated by class actions. Unclaimed damages are allocated on a case-by-case basis, sometimes on a predistribution basis, and so not necessarily an easy comparator.
- The Public Purpose Fund in New South Wales which was initially established using collective action damages.

Interest on Lawyer Trust Accounts (IOLTA)

Interest on Lawyer Trust Accounts (IOLTA) schemes generate billions of pounds globally by pooling small amounts of interest on client funds held by law firms for short periods of time e.g., land registry fees and negotiated settlements. The level of income generated depends on the nature of the scheme. Funds involving the pooling of interest from clients' accounts, or the pooling of law firm accounts enable firms to generate larger amounts of interest only a portion of which can be legitimately claimed by clients.

There are over 70 IOLTA schemes in operation globally which support a variety of initiatives including free legal advice. Some mature IOLTA schemes date back to the 1960s which gives us greater insight and quality of data on the impact, and implementation styles, of IOLTA schemes.

The American Bar Association estimated in 2020 that US IOLTA funds from each of its 50 State schemes totalled over \$175 million.

IOLTA schemes typically generate funds according to one of four models:

1. Client Waiver of interest - Clients or the State agree to transfer interest to a fund e.g., British Columbia, Quebec, Texas, France.
2. Account pool – Multiple client funds held by one law firm are pooled into a single firm account. The additional interest generated establishes an IOLTA fund e.g. Allen & Overy voluntary scheme, Zimbabwe, California.
3. Law firms pool – Several law firms pool their client money to generate a third layer of interest e.g. New South Wales.
4. Investment - Funds generated are invested to create a more sustainable and reliable income stream e.g. Victoria.

Each IOLTA scheme operates according to its own set of rules and there is considerable variety in who collects the money, the causes it supports, how schemes are regulated, what is funded, and whether participation is mandatory.

Previous discussions about a potential IOLTA scheme for England and Wales have occurred but with limited reference to the variety of IOLTA schemes and how they operate in other jurisdictions. Views on the viability of an IOLTA scheme in England and Wales offered by stakeholders include:

- Protecting client money, and the client's best interest is key from a regulatory perspective. Any waivers of client interest must involve informed consent.
- While the current legislative framework does not allow for the imposition of a levy to raise money for such purposes, the Legal Services Board would be open to playing a role in levy collection if the government chose to pursue this option.
- Model 2 is already used to support firm cashflow, and redirecting these funds would negatively impact law firm cashflow. The introduction of a scheme would require significant financial and cultural shifts in the legal profession.
- Tech enabled transfers will reduce the amount of money held in client accounts with the result that firms will move away from holding client money and (Project Meridian).
- Other financial structures such as Third-Party Managed Accounts (TPMAs) can be used in IOLTA schemes.
- Other jurisdictions have legislated to protect the revenue from IOLTA schemes where it is directed to support charitable aims, e.g. Victoria.

While complex, these challenges are not insurmountable and have been addressed in other jurisdictions.

Legal Expenses Insurance (LEI)

Legal Expenses Insurance (LEI) is most often used in personal injury, contract, and employment cases.

The usual criticism of LEI as a funding mechanism for free legal advice is that the people who are most in need are unlikely to be homeowners or have any other type of household insurance.

There are several examples of LEI being used in other jurisdictions including:

- Sweden under a social democratic government, have shifted away from utilising Legal Aid in favour of LEI.
- Germany also has a large LEI market, 46% of Germans have access to LEI, and 35% of case funding comes from LEI. This has been supported by a governmental push for insurance to be made available and taken up.
- Canada has also reduced their reliance on Legal Aid and are utilising LEI in an alternative structure where LEI is sold by the equivalent of a Legal Aid Agency.

Some key questions and discussion points include:

- The relative benefits of a publicly funded LEI scheme vs. a competitive private sector model. The state may be best placed to support LEI schemes where the private sector is not incentivised to respond.
- Whether schemes would be mandatory, and if so, who would pay for those unable to meet the cost of insurance.
- The need to develop governance structures that ensure a cohesive approach to funding, and allow for effective oversight of different funding mechanisms, reducing the impact of unforeseen consequences across different decision-making bodies.
- The nature of litigation in the UK mean that costs are relatively high and unpredictable compared to other jurisdictions, meaning that the setting of premiums would be challenging. A move towards Fixed Recoverable Costs (FRCs) would address this, though this has its own challenges in an adversarial system.
- There is a mismatch between need vs what the insurance sector would likely cover.
- There is a lack of awareness around LEI which suggests wider contextual changes would be needed to scale this solution.
- Insurers need to demonstrate the value of LEI. The low claim rate places an obligation on them to promote LEI.
- Data suggests that consumer satisfaction with services paid for via LEI is much lower.
- The advice sector has explored an LEI scheme where social housing landlords purchase LEI on behalf of their tenants. This is done on the basis that this investment is close to cost neutral through consequential savings to housing associations having to pay for advice services later down the line.
- Using LEI to provide funding for pre-action support, e.g. via an advice line is also of interest.

Other providers such as Unions and consumer rights groups are increasingly exploring providing advice via a subscription model.

Apprenticeship Levy

There is a recruitment and retention of staff crisis in the free legal advice sector due to low rates of pay and lack of job security brought about by short term funding. Supervising solicitors are particularly difficult to recruit.

Lack of capacity could be addressed through the apprenticeship levy which requires firms to invest in apprenticeship training for the workforce or transfer a significant proportion of the sum available to other organisations such as Law Centres or Citizens Advice, so that they can invest in apprenticeship training for their employees. There are strong incentives to do this as funds not used within 2 years are returned to the treasury.

Challenges include:

- Apprenticeship Levy funds can only be used to support training costs of apprentices. Further lobbying work is planned to allow for levy funds to be applied to salaries and supervision costs.
- The current scheme presents a large administrative burden on law firms. Again, further lobbying is being explored to allow Apprenticeship Levy funds to be pooled and administered by the third sector.

In London, the Advice Workforce Development Fund uses the Apprenticeship Levy to support the training and development of apprentices in the advice sector using levy contributions of large law firms. It has proved a flexible tool with the amount available to transfer to third sector partners being repeatedly increased, the scheme has the potential to adapt and create change quickly.

Residual Client Balances

The donation of Residual Client Balances (RCBs) which have laid dormant for some time in law firm accounts could be used to support access to justice initiatives and a growing group of charities are targeting these funds.

The Solicitors Regulation Authority receives requests for approval of donation of balances over £500. In 2023 they received requests totally £700,000 and approved £350,000 of these. The extent of dormant funds, especially those under £500, is unknown and there could be potential to harvest more funds from this source.

Regulation guidance around holding client funds and administering returns quickly may reduce the amount of RCBs but is unlikely to eradicate them entirely.

The SRA has the power to change rules around donating RCBs and are yet to investigate alternative or additional funds that could be redirected to support justice causes such as fines.

Other key questions

How will any potential funds be distributed?

We don't currently know enough about the models outlined to be able to anticipate a process for distributing the funds these models could generate. A key reason for exploring the different models in more depth should be to examine what restrictions if any could or should be put on the use of the funds generated.

A key part of later stage discussions should include examination of the process that would be used to collect, govern, and distribute the funds. This should include exploration of the appropriate level for decision making at a national and local level.

What can we do to build rather than replace funding?

There is the potential risk that as alternative funding sources for free legal advice grow, government will reduce their financial support for free legal advice.

It would be useful to have a clearer understanding of how advice services are already funded, including the funding they receive from local authorities and other social services.

Next steps

- Share learning from this workshop, gather additional insights, and undertake research.
- Developing a framework of the models discussed to enable us to appraise the relative benefits and challenges of each model.