

# Public Legal Education and Access to Justice

Gemma Crompton continues her series of articles on PLE

In last month's edition of *SCOLAG Legal Journal*, I discussed the perceptions and understandings of PLE amongst some key justice stakeholders. All stakeholders interviewed agreed that Public Legal Education had value, but disagreed about the level of priority this type of activity should be afforded. This article explores in more detail some of the current problems identified in achieving access to justice and how PLE might have a key role to play in helping to overcome these.

## What do we mean by access to justice?

Discussions around access to justice commonly focus on access to legal advice. The problems in accessing legal aid, particularly for civil problems, are well known (although the increase disposable income limit for civil legal aid eligibility may improve the situation), and many advice services are pushed to capacity. The recent focus on 'unmet need for legal services' has therefore tended to concentrate on people's ability to access legal advice; the importance of meeting this need is often used as a strong argument for more investment in advice provision. However, the need for access to legal services must be thought of as more than simply the need for legal advice. The Hughes Commission, set up in 1980 to examine the provision of legal services in Scotland, recommended the need for legal services be thought of in two stages: "firstly enabling the client to identify and if he judges it appropriate, to choose a legal solution; and secondly enabling the client to pursue a chosen legal solution."<sup>1</sup>

## The current problems

However, while focus on access to justice commonly concentrates on this second point, we know from research such as the *Paths to Justice* studies<sup>2</sup> that a significant proportion of people do not successfully navigate the first stage. These studies present interesting evidence to suggest that people in Scotland might have particular difficulties in identifying when they have a problem with a potentially legal solution. *Paths to Justice* found that only 26 per cent of respondents in Scotland reported having experienced a justiciable event in the previous five years, compared to around 40 per cent in England and Wales.<sup>3</sup> Subsequent studies have also reported a rate of justiciable problems in Scotland that is around 10 per cent lower than that in England and Wales.<sup>4</sup> The authors of *Paths to Justice* thought it unlikely that there are fewer justiciable problems experienced in Scotland but were not able to give a definitive answer as to why that might be the case. Among the suggestions was that there may be "a greater sense of fatalism or powerlessness" in Scotland, particularly amongst older respondents and those with lower levels of education, who were found to report justiciable events less frequently.<sup>5</sup>

*Paths to Justice* also found that many who had identified they had a problem, had difficulty in identifying the potential solutions available to them. Although only three per cent of respondents in Scotland took no action to resolve their problem(s), over half of those said they took no action because nothing could be done. About one in four respondents had considered seeking legal advice but chose not to, the most common reason being because they thought an adviser "could not or

would not help" with a further eight per cent saying nothing could be done.<sup>6</sup> As the authors noted, however, these conclusions were based on the individuals' own opinions rather than on any advice they had received. These results were found to indicate "a widespread feeling of ignorance about legal rights that exists across most social groups."<sup>7</sup>

The difficulties encountered when faced with problems were highlighted by Felstiner et al's study of the transformation of disputes in 1980, which described the processes which a person must go through to find themselves embroiled in a dispute: firstly, an individual must recognise that they have been wronged, the "naming" stage; secondly, they must attribute blame for this wrong to another, the "blaming" stage; and thirdly, the individual must pursue a remedy from the party that he perceives to have wronged him, the "claiming" stage. If this claim for a remedy is rejected, the claim becomes a dispute.<sup>8</sup> The study found however, that relatively few 'wrongs' transform into disputes, the majority of potential disputes being lost during these key stages: failure to perceive a wrong or pursue a remedy, for example. Felstiner's concern was that "too few wrongs are perceived, pursued and remedied."<sup>9</sup> This appears to be supported by findings from *Paths to Justice*.

Failure to identify problems or take action to resolve problems through ignorance of potential remedies is particularly worrying in light of two phenomena commonly identified in research: firstly, that certain types of problems often "cluster" together and experience of one problem often leads to a higher chance of experiencing another type of problem; and secondly, that experience of certain problems can lead to a "cascade" of problems, for example, an employment problem, leading to debt, leading to marital breakdown, leading to mental health problems.<sup>10</sup> *Paths to Justice* suggested these phenomena show the importance of early and effective intervention and resolution of problems, from the appropriate adviser, to ensure that problems do not escalate.<sup>11</sup> The importance of reaching the appropriate advisor for problems is particularly important because the more times people are referred from one advisor to another, the less likely they are to follow up that referral, so-called "referral fatigue."<sup>12</sup> *Paths to Justice* suggested that emerging from this research therefore was a clear need for increased and improved knowledge of legal rights and responsibilities, and how to enforce these rights and resolve disputes.<sup>13</sup>

## What benefits can PLE offer?

The above shows that many people have real difficulties identifying when they have a problem, and knowing what to do about it when they do, even before they have to contend with trying to access advice services. As per the Hughes Commission's definition, this would indicate an unmet need for legal services.

As was discussed last week, public legal education has a role in helping people to understand more about their rights and responsibilities. PLE therefore could play an important part in helping people identify when they have a legal problem. If people have a better understanding of their rights, they may

be more likely to realise when they have a problem or a potential problem. Yet, as well as widespread ignorance about legal rights, *Paths to Justice* found that many people held negative perceptions of the legal system and had a sense of “alienation” from the law.<sup>14</sup> The law is often couched in very negative terms, particularly in the media. However, there is a suggestion that increased knowledge of the law makes people feel more engaged by society.<sup>15</sup> Increased knowledge of systems and structures and how they can benefit individuals rather than be something to fear or resent, might encourage more people to take some course of action when presented with a problem that might benefit from a legal solution

As was seen above, however, even those who knew they had a problem were often unable to identify potential solutions. This is a major obstacle to access to justice and tackling this problem is where PLE can be said to offer benefits beyond mere information. As was recognised by the English and Welsh definition, integral to PLE is the idea that it goes beyond simple information, also equipping people with the skills to act upon their knowledge.<sup>16</sup> Research in England and Wales assessing materials designed to help people with their problems found that materials often provided good information about the problem but usually lacked any information or support about how to act on that information.<sup>17</sup> An important consideration for PLE should therefore be not only to help provide knowledge to identify when individuals have a problem but to back up this knowledge with more awareness and information about what steps to take to resolve this. Advicenow’s “Seven Steps to Solving a Problem”<sup>18</sup> is a good example of a general information resource that gives handy tips about what action to take when experiencing a problem.

Equipping people with the knowledge and skills to take action to resolve a problem highlights another benefit of PLE. As outlined by Felstiner, not all wrongs or problems become disputes, but neither should they. Public Legal Education should be about helping people deal with problems in the appropriate way. It is not inevitable that all problems will become disputes. While in some cases such a course may be unavoidable, it is likely many problems could be resolved before they reach the crisis management stage if only people had more information about what to do themselves, or where they could go for help. If problems can be resolved at an earlier stage, or even avoided altogether through greater knowledge of rights and responsibilities, this may help prevent problems worsening or cascading, and may stop so many problems escalating.

There will be those detractors, however, who maintain that, particularly in these times of financial restraint, resources must always be directed to where the need is greatest: those people with the most serious problems. Whilst that is a valid argument, Felstiner et al in fact criticised attempts to improve access to justice which focus only on the dispute phase for increasing inequality: they benefit those who have successfully navigated the naming, blaming and claiming stages and thus create an even bigger divide with those who have not.<sup>19</sup> Greater investment in PLE offers the potential to enable more people to get help, ideally at an early stage. It is a mechanism to assist people identify when they have a problem, and try to help them find the best course of action for that problem. This may help

filter out of the advice system those people who could take action themselves with a bit of assistance, which may in turn leave more time for agencies to deal with the people and problems that really require their help.

### Implications for Future Development

While the above highlights some of the benefits increased Public Legal Education might offer in helping individuals achieve access to justice, there are a number of points I believe important to consider when thinking about how best to progress this area.

First, PLE and its objectives cannot be looked at in isolation.

The discussion above has highlighted that people face an obstacle course of challenges when meeting a problem with a potentially legal solution. In a perfect world, they would be able to identify when they have a problem, they would be able to make an informed decision about the best course of action to address that problem, and there would be sufficient support and assistance available to them should they require it. PLE might be used to help people navigate each of those stages. However, the stages cannot be looked at in isolation from each other. It would be foolish to tell people about their rights, without giving information about how to enforce these, and there is no point helping people identify when they need assistance unless there is sufficient advice provision available when they require that support. In such circumstances, you are not addressing the unmet legal need, but simply changing its composition. There is therefore a need to think about the implications of PLE activity on future needs.

Secondly, the approach taken to PLE will depend on what it is trying to achieve.

The problem of talking about ‘PLE’ is that there is a broad range of activity that fits within this heading, and a multitude of aims that are trying to be addressed. There is no one approach that will fit all situations. A lot of the help and information currently available, for example, is web-based. While this approach has a lot to commend it, in particular having one central portal where people can find information, to my mind this approach requires individuals to have successfully navigated several of the stages previously identified: they must have identified they have a problem, know there may be a potential solution, and must be knowledgeable enough and confident enough to have found this source of help. There may be limits to what such an approach in isolation can do to meet the needs of those people who don’t know they have a problem, or don’t know where they can go for help. Depending on what PLE is trying to achieve, a more proactive approach may be required. In planning an approach to PLE, consideration should always be given to the obstacles we know people face.

Thirdly, we should always put individuals and what we know about their problems and behaviour at the heart of our approach to PLE.

In order to make PLE most effective, we must have regard for what we know about problems and people’s responses to them. Evidence suggests that 20 – 25 per cent of the working age population may have very low numeracy and literacy skills,<sup>20</sup> which has a huge impact on their ability to cope with

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problems and respond to them. We also know, for example, that problems for many people tend not to occur in isolation, and often the presenting problem is a symptom of other underlying issues. PLE initiatives might therefore require to reflect the wider issues that people face.

A commonly reported behaviour is that many people stick their head in the sand, avoiding seeking help because the whole situation is too difficult to deal with. If one of the aims of PLE is to enable people to get help for their problems earlier, overcoming such behaviour is a real challenge. Innovative ways will need to be found to reach such people, who could potentially stand to benefit massively from assistance. In response to concerns that people with mounting problems often stop opening mail for example, a pilot study in London arranged with the local county court for the telephone number of Community Legal Advice, a national helpline funded by legal aid, to be stamped on the outside of envelopes.<sup>21</sup> Putting what we know of the problems and challenges people face, and common responses to such problems at the heart of our approach to PLE is vital to ensure that Public Legal Education initiatives stand the best chance of being effective in helping the people they are trying to benefit.

1. Hughes Commission (1980) Report of the Royal Commission on Legal Services in Scotland. Edinburgh: HMSO (Cmd. 7846)
2. Genn, H. (1999) *Paths to Justice: What People Do and Think About Going to Law*. Oxford – Portland Oregon: Hart Publishing; Genn, H., and Paterson, A. (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law*. Oxford – Portland Oregon: Hart Publishing.
3. Genn, H., and Paterson, A. (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law*. Oxford – Portland Oregon: Hart Publishing.
4. See for example Law, J., Baker, D., Barrow, S., Barton, S., Assenti, S., McKissock, K., and Cookson, D. (2004) *Community Legal Service: Assessing Need for Legal Advice in Scotland: Overview Report*. Edinburgh: Social Research, Scottish Executive.
5. See note 3
6. See note 3.
7. See note 3.
8. Felstiner, W.L.F., Abel, R.L. and Sarat, A. (1980) 'Transforming of Disputes: Naming, Blaming and Claiming,' *Law and Society Review*, 15(3-4), 631-649.
9. See note 8.
10. See note 3.
11. See note 3.
12. Pleasance, P., Buck, A., Balmer, N., O'Grady, A., Genn, H., and Smith, M. (2004) *Causes of Action: Civil Law and Social Justice. The Final Report of the First LSRC Survey of Justiciable Problems*. Norwich: TSO (The Stationary Office).
13. See note 3.
14. See note 3.
15. Legal Services Society (2007) *PLE Review: Reflections and Recommendations on Public Legal Education Delivery in BC*, Legal Services Society, BC [http://www.lss.bc.ca/assets/communityWorkers/pleReview\\_en.pdf](http://www.lss.bc.ca/assets/communityWorkers/pleReview_en.pdf).
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17. Advicenow (2007) *Community Legal Service Direct Expansion Project. Research report on the selection and scoring of information materials for inclusion on the CLS Direct operator database*. Available at [http://static.advicenow.org.uk/files/Advicenow\\_research\\_report\\_22.01.07-1491.pdf](http://static.advicenow.org.uk/files/Advicenow_research_report_22.01.07-1491.pdf)
18. Advicenow, *Seven Steps to Solving a Problem*, available at <http://static.advicenow.org.uk/files/seven-steps-to-solving-a-problem-2008-43.pdf>
19. See note 8.
20. *Scotland Performs* <http://www.scotland.gov.uk/About/scotPerforms>
21. Southwark Law Centre (2007) *Report on the work of the Possession Prevention Project, April 2004 – April 2007*, Southwark Law Centre, [www.lawcentres.org.uk/uploads/Possession\\_Prevention\\_Project\\_July\\_2007.pdf](http://www.lawcentres.org.uk/uploads/Possession_Prevention_Project_July_2007.pdf) [cited 31 August 2008].

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### The Case for Equity Fines and Independent Financial Enquiries - Continued from page 167

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Bill — that pertaining to equity fines — may not lie within the competent authority of the Scottish Parliament. The argument runs that, as the imposition of equity fines will require the use company law, and that as company law is reserved, the ability to impose equity fines is also reserved. While this is a bridge yet to be crossed, the evidence suggests that this is not the case.

The argument revolves round the “respection” doctrine. The doctrine (sometimes interchanged with “pith and substance”) deals with the judicial interpretation of the phrase “in respect of” or “relates to” as they occur in constitutional statutes. In effect, this doctrine allows the Scottish Government to legislate on devolved matters even though they may impinge upon reserved issues. Thus the Scottish Government could legislate on fish farm licensing, although the cages might be anchored to the shore, which falls within the remit of the Crown Estate. As a reserved issue the Scottish Government cannot legislate upon the Crown Estate’s rights to manage the shoreline. However, as the intent in such a case would not be to affect a reserved matter (the rights of the Crown Estate), but rather a devolved matter (aquaculture), the legislation could proceed.

The proposed Bill would not introduce a new law or amend existing criminal law. It merely creates a new sentencing option. This area of policy is firmly within the scope of the Scottish Parliament, since sentencing policy is a matter that is in the portfolio of the Justice Minister and is administered by Scot-

tish Courts. It is our contention that the issue of equity fines falls within the respection doctrine and, as such, is a devolved matter.

### Conclusion

In summary, the proposed Member’s Bill is a relatively simple piece of legislation that might have a big effect in deterring corporate crime in Scotland, thus saving lives, protecting the environment, reducing corruption and, not least, promoting Scotland as an innovative moral force in the world. Voltaire said: “We look to Scotland for all our ideas of civilisation”. The Criminal Sentencing (Equity Fines) Bill might, we hope, be a small but significant contribution to restoring this statement to currency.

You can read more, and find a link to the consultation, at: <http://www.billwilsonmsp.org>

We encourage all interested parties to respond.

1. Note, however, that the equity fines element of the present proposal would only apply to public companies and so would have had no direct bearing on the ICL Stockline case. This element is envisaged as a simple but significant first step to improving the accountability of companies, within the restrictions of devolved legislation. More elaborate legislation, conceivably extending the concept to private companies, might follow
2. <http://www.celent.com/PressReleases/20070313/SRL.htm>; cited 22 July 2008