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Understanding Decision Making in Legal Services: Lessons from Behavioural Economics

Professor John Maule, June 2013



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Understanding Decision Making in Legal Services: Lessons from Behavioural Economics

Executive Summary

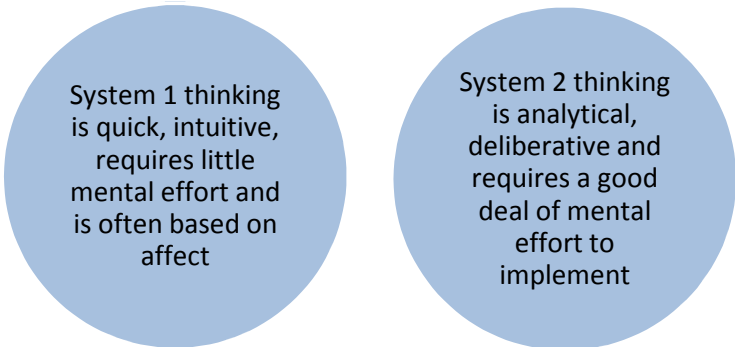
Behavioural economics is an emerging academic discipline that helps to explain how people think and act. From programmes to reduce obesity and manage carbon emissions, through to initiatives to increase retirement savings and speed up tax payments, behavioural economics is increasingly being applied in both the public and commercial sectors in the UK and across the world.

This report looks at behavioural economics in the context of the legal services sector. The primary aim is to consider how consumers and potential consumers of legal services make decisions. A second aim of the report is to outline the insights that behavioural economics can provide about the decisions taken by legal services professionals. The third aim is to use the latest theory and research to increase understanding of the strategic decisions taken by legal services organisations in response to major changes in the marketplace. The final aim is to suggest approaches for improving the decisions of consumers and legal services suppliers.

The document is primarily based on an extensive academic review of the latest and most significant research literature. It is also informed by a number of qualitative interviews with professionals working in different parts of the legal services sector and consumer support groups.

Two Forms of Thinking

The review begins with an introduction to behavioural economics (Section 3). There is a brief history of the development of behavioural economics and how this has led to a key distinction between two different forms of thinking – System 1 and System 2. The implications for legal services are also briefly discussed.



System 1 thinking is quick, intuitive, requires little mental effort and is often based on affect

System 2 thinking is analytical, deliberative and requires a good deal of mental effort to implement

Key Behavioural Economics Concepts

In the next section (Section 4) the outcome of an extensive review of theory and research on behavioural economics is presented, considering the implications of key concepts for an understanding of legal services decision making. Concepts reviewed are listed in the table below:

Concept	Page	Description
<i>Availability</i>	16 - 17	People use the ease with which they can remember events occurring in the past as a basis for predicting how likely these events will occur in the future e.g. the outcome of a celebrity divorce is memorable, leading people to overestimate the likelihood of a similar outcome for themselves.
<i>Representativeness</i>	17 - 18	People make sense of the current situation by matching it to their existing categories of knowledge e.g. the competence of a new solicitor assessed by matching first impressions to their stereotypes of good and bad solicitors; determining whether to seek legal advice by matching their current situation to their beliefs about the key characteristics of legal problems.
<i>Anchoring</i>	18 - 19	When people estimate quantities they first derive a ball park figure (an anchor) which is often inappropriate and too influential in determining their final judgement e.g. initial anchors can lead people to miscalculate how long a legal case will take to resolve or how much compensation they should expect in a personal injury case.
<i>Confirmation thinking</i>	19	When people make sense of the world around them they focus on information that supports their prior beliefs and expectations and ignore or discount information that does not e.g. in a divorce case people focus on information that confirms their negative view about an errant partner and overlook positive behaviours that are inconsistent with this view.
<i>Framing</i>	20 - 21	Small changes in the way information about a problem is presented can fundamentally alter how people make sense of the situation and the actions they believe they should take e.g. people who think about a legal problem in terms of the losses involved are more likely to take risky actions whereas those who think in terms of the gains are likely to be risk averse.
<i>Simulation heuristic</i>	21 - 22	People predict the likely outcomes of key events by running mental simulations of how events may evolve over time. These simulations tend to focus on positive aspects and neglect negative aspects leading to unrealistic optimism e.g. overestimating the likelihood of success of litigation and to underestimate the time, money and other resources needed to resolve a legal problem.
<i>Motivated reasoning</i>	22 - 23	People process information in biased ways that accord with their immediate intentions and goals, then construct seemingly rational justifications to make this biased reasoning appear rational e.g. a

		short-term desire to punish an errant spouse during a divorce may lead a person to interpret all their spouse's actions negatively so jeopardising longer-term needs to maintain reasonable relations in order to settle financial and custody issues.
<i>Mental accounting</i>	23 - 24	People use a broad range of simplifying forms of thinking to make sense of financial situations and how to act in them. In legal situations this may lead people to mismanage their budget for legal costs thereby jeopardising other financial commitments. This is a particular problem for low income groups.
<i>Decision strategies</i>	24 - 25	People resolve complex problems by using relatively simple ways of making decisions e.g. choosing the first option that seems reasonable or one that has just one positive feature such as low price, recommended by a friend or located close by. This leaves consumers vulnerable to choosing a provider who does not have the appropriate skills or knowledge.
<i>Choice context</i>	25 - 26	Contextual features such as the number of options available and the specific characteristics of these options can bias how people make decisions. Legal services suppliers need to be aware of the biases that they may induce unintentionally by presenting too many legal options to their clients or by presenting these options in inappropriate ways.
<i>Escalation of commitment</i>	26 - 27	People demonstrate a strong tendency to continue allocating further resources to failing courses of action despite a low probability of future success. This effect may lead consumers who are entrenched in an existing course of action to reject legal advice or to continue with legal action when there is little likelihood of success.
<i>Prospect theory</i>	27 - 29	The predominant theory in behavioural economics. It explains why people succumb to: the framing bias (different attitudes to risk when problems are thought about in terms of their gains rather than their losses); loss aversion (losses have a much bigger impact than gains); the endowment effect (people overvalue what they own) and the omission bias (people prefer to stick with the status quo rather than changing). These biases are major reasons why clients often do not follow legal advice and provide insights about the best ways of presenting legal advice.
<i>Emotion</i>	29 - 32	How an individual feels affects the information they use and their depth of thinking when making a decision. It can also affect the degree to which a person feels in control, how they attribute blame for what has occurred and makes particular responses more likely e.g. angry people want to hurt others. Legal situations such as divorce and personal injury claims are often emotionally charged and energy draining. The emotions associated with these legal situations play an important part in determining how consumers make judgements and take decisions.

Expert Decision Making

In Section 5 there is a review of research on how experts make decisions, considering the implications of this for legal services professionals. Research shows that experts try to match new cases to previous cases and then act in ways that have worked well in the past. Where a new case weakly matches with past cases experts use mental simulation to think through how to adapt the usual action. Although this approach streamlines the decision process and allows experts to draw on their knowledge and previous experience it leaves them exposed to error and bias e.g. the background of cases used for matching may be outdated and not reflect important changes in the decision environment.

The Organisational Context

Section 6 focuses on the organisational context, reviewing behavioural economic research on strategic decisions taken by organisations. Key concepts are discussed in terms of their implications for the ways that legal services firms are adapting to the current changes in the legal services market. Work in three areas is reviewed:

- *Individual heuristics in the organisational context* (Pages 36 - 37): This section argues that System 1 forms of thinking, reviewed in Section 4, are universal across individuals so underpin organisational decisions as well. This is particularly likely in single owner organisations or where organisational decisions are dominated by a single individual.
- *Group heuristics in the organisational context* (Pages 37 - 39): Organisational decisions are often taken by groups of individuals. This section reviews the heuristics used by groups that reduce the group's effectiveness:

Heuristic	Description
<i>Conformity</i>	Individuals with good ideas often change what they say in order to fall in with the majority view.
<i>Biased information pooling</i>	Groups tend to discuss and make use of information that is available to all members and are less likely to exchange and discuss information that is unique to a single individual.
<i>Evaluation apprehension</i>	When individuals feel that they are being judged or evaluated by others in or outside the group, they self-censor their contributions even though these may be constructive and relevant to group goals.
<i>Confirmation bias</i>	Groups focus on information that confirms their initial views and ignore or discount disconfirming information. They often do this to a greater extent than single individuals.
<i>Groupthink</i>	There are particular characteristics of groups that make them vulnerable to poor decision making e.g. they work together often, have a strong leader and do not have structured procedures for making decisions.

- *Organisational heuristics* (Pages 39 - 41): There are organisational heuristics, described at the level of the firm, that underpin specific business activities such as product development and forging alliances. In

addition, heuristics and other behavioural economic concepts are discussed in the context of three capabilities crucial to the evolutionary and economic fitness of firms: sensing and shaping threats and opportunities; seizing opportunities; and reconfiguring structures and assets to maintain competitiveness.

Overcoming Bias

Section 7 outlines ways of overcoming bias. It contains a review of two sets of procedures for improving the decisions taken by consumers and legal services professionals: developing smarter ways of thinking and using structured procedures that prescribe key steps that should be taken.

Applications Elsewhere

Section 8 reviews reports from government departments, professional bodies and other sources concerned with behavioural economics and choice behaviour to elaborate the discussion of theory and research contained within the earlier sections of the review.

Key Findings and Implications

Section 9 summarises the key findings and considers the implications of these for achieving the objectives of the report.

Recommendations

Section 10 outlines two broad sets of recommendations concerned with the need for primary research and how to apply the insights derived from the report to improve current practice of legal services consumers and professionals.

The need for primary research: The evidence from behavioural economics provides a compelling and insightful account of how decisions are taken by consumers and practitioners of legal services. However, there is a need for a rigorous evaluation of these ideas based on primary research. We need to know:

- How System 1 thinking in consumers and potential consumers of legal services actually plays out in legal settings. This should involve investigating which forms of System 1 thinking predominate and the impact these have on how consumers interpret and act in legal settings. This work is now very important given that the reduction in legal aid is likely to lead to more individuals making key decisions unaided by legal services professionals.
- The extent to which legal services professionals also use System 1 forms of thinking and the impact this has on their understanding of a consumer's legal problem and the advice they give.
- How legal services professionals categorise customers' problems, the validity of these as guides to legal action and advice, and the extent to which different specialists use similar patterns (a failure to use similar patterns is likely to indicate inconsistency across the profession). This will provide the foundation for evaluating the effectiveness of the decisions taken by legal services professionals and a basis for identifying legal training needs and decision support.

- How legal services professionals should provide advice in the light of their clients using System 1 thinking. For example, advice should not fall foul of the similarity or compromise context effects, framing effects and the like.
- How legal services firms are making strategic choices and the extent to which they take account of the three key capabilities underpinning the fitness of firms. This is a crucial precursor for the development of effective support for legal firms and the development of a thriving legal services sector.
- Which forms of decision support are appropriate to aid the decisions taken by consumers and legal services professionals and how they should be introduced in order to have maximum impact

Applying insights from the report: The reviews outlined in the report provide some insights about ways of improving the current practice of consumers and legal services professionals. There are a number of options, outlined below, in which the lessons from these insights might be applied to improve outcomes in legal services. Each option would first need to be tested empirically to demonstrate their effectiveness in practice. Options include:

- Briefing documents for both consumers and legal services providers to alert them to the primary pitfalls from using System 1 thinking. This should be supported by an information campaign involving both general and professional outlets highlighting the availability of these documents. Training could also be designed to inform practitioners about these forms of thinking, their pitfalls and how they may be managed.
- The development of simple decision aiding techniques such as decision trees or lists that consumers could use to clarify problems, assess whether they should take legal action and, if so, how to choose an appropriate professional. Legal services regulators and consumer bodies could support these techniques through web-sites, pamphlets and other means. The need for these techniques grows stronger since reductions in legal aid may lead to consumers taking action without professional guidance.
- Briefing documents for professionals about advice giving and some of the pitfalls and biases that may lead consumers to act in unintended ways. This could be supplemented by considering the use of simple decision aids such as trees and lists.
- Briefing documents and a targeted campaign to help legal services firms to understand and adapt to changes in the legal market. This should focus on the three capabilities that underpin fitness in firms and introduce structured approaches that can be used to help strategic thinking and decision making. This could be supported by training that provides legal services professionals with the skills to implement these techniques and interpret their output.

Overall, this report shows that behavioural economics has much to offer the legal services sector. It can explain how consumers, professionals and legal services organisations make decisions, some of the errors and biases that may occur and how these can be minimised by encouraging different forms of thinking and the use of structured decision aids. In addition, it can provide a sound basis for improving the effectiveness of all those involved in legal situations.

1. Introduction

The LSB was set up to reform and modernise the legal services marketplace by putting the interests of consumers at the heart of the system, reflecting the objectives of the statute that created it, the Legal Services Act 2007. However, research commissioned by the LSB suggests inefficiencies in this market. For example, fewer than half of those experiencing legal problems actually seek advice from regulated providers¹. Indeed little is actually known about the drivers of legal services decisions taken by consumers. This makes it difficult to assess whether consumers are taking decisions that further their interests and what, if anything, the LSB needs to do to support these interests.

In addition, changes to the rules governing the ownership of legal services organisations have led to a range of new providers. For the first time, several well-known high street organisations are offering legal services in their existing outlets. These changes, along with reductions in the legal aid budget and significant increases in online services² are having a big impact upon existing providers, though the eventual form this will take is uncertain. It is not at all clear whether existing providers are making appropriate strategic decisions that are adaptive in the context of these market changes.

The primary purpose of this report is to understand and evaluate the decisions taken by consumers and legal services suppliers by drawing on theory and research from behavioural economics. By applying psychological research in areas of interest to economists, this new area provides important insights about how individuals, groups and organisations take decisions. It helps to explain why they often make poor decisions and outlines procedures designed to help them improve the quality of their decision making^{3 4}.

The primary objectives of this report are to:

1. Review those aspects of contemporary theory and research in behavioural economics that increase understanding of the decisions taken by consumers and suppliers of legal services. Research indicates that experts and novices make decisions in different ways so there will be crucial differences between consumer decisions and those taken by experienced legal services suppliers.
2. Review those aspects of contemporary theory and research in behavioural economics that increase understanding of the strategic decisions taken by legal services organisations in response to the turbulence in the legal service market. This involves shifting the focus from individual processes (reviewed in 1) to group and organisational processes.
3. Review applications of behavioural economics in other professional domains.
4. Outline insights and approaches that determine how decisions taken by consumers and suppliers can be improved by using a broad range of decision aiding techniques discussed in the research literature.
5. Show how the understanding derived from 1 - 4 can be used by the LSB to deliver its regulatory objectives.

To meet these objectives the report begins with a brief description of different kinds of legal services decisions. This is followed by a section on the background to behavioural economics and then separate sections outlining behavioural economic explanations of consumer, expert and strategic decision making and a short section on how the decisions may be improved. In each section there is a discussion of the relevance of the research to legal services decision making. Finally, there is a section summarising some of the major issues for legal services that emerge from the reviews and a set of recommendations about future actions and research.

¹ BDRC Continental (2012). *Legal Services Benchmarking*. Report prepared for Legal Services Board.

² Ames, J. (2013). Farewell tweedy high street, hello online. *The Times*, 14 March 2013, 65.

³ Wilkinson, N. & Klaes, M. (2012). *An Introduction to Behavioural Economics*. Basingstoke: Palgrave Macmillan.

⁴ Kahneman, D. (2011). *Thinking Fast and Slow*. London: Allen Lane.

2. Legal Services Decisions

People become consumers of legal services when they need to solve a problem. Typically this involves up to four decisions: whether or not to seek legal advice; which legal professional to approach; who else to involve in the process; and whether to follow the advice given. The processes underlying these decisions are likely to be broadly comparable to those used in other domains of their life. A recent review⁵ identified some of the factors that informed these decisions. For example, people tend not to seek legal advice when they think that they can resolve the problem themselves or when it is thought to be not resolvable by legal means.

Suppliers of legal services make two decisions of interest to the present report: what advice to give to clients; and strategic decisions about their business which, at present, are dominated by the need to adapt to the turbulence in the legal services market.

The six decisions described above provide the primary focus of the present report. To gain further insight about how these decisions are taken and to provide a context in which to illustrate key behavioural economic concepts we completed interviews with ten legal service professionals (a full description of the methodology and the analysis are presented in Appendix A). Below we present a brief summary of those aspects of the findings that are relevant to key behavioural economic concepts reviewed later in this document:

- *Decision whether or not to approach a legal adviser:* Approaching a legal adviser depends on whether people can deal with the problem themselves, their financial state and their trust in the legal system. Their emotional state is also thought to be important.
- *Decision about which legal provider to choose:* When the provider is part of a commoditised package choice is passive. When choice is active, people sometimes simplify by using just one or two factors e.g. price, family recommendations, but on other occasions take account of a lot more information. Our interviewees believed that by using just one or two factors consumers were more likely to end up with poor outcomes.
- *Decision about whether to follow the professional advice given:* Following advice was thought to depend on how it was given e.g. people are more likely to take advice when given as a single option rather than the pros and cons of several options; what the advice was e.g. more likely to take it if it matches their wishes and expectations; if the advice giver's characteristics were positive e.g. seen as competent and supportive; if the emotional state of the consumer allowed; and if they were not already entrenched into an existing course of action.
- *Decision about whether to involve other people in the decisions:* Some legal problems necessarily involve others e.g. family conflicts; sometimes other people are involved to provide social and emotional support.
- *Does the decision process differ across different legal problems?* Legal problems differ in terms of their predictability e.g. pricing is predictable for conveyancing but not for personal injury claims; emotionality e.g. divorce is high whereas conveyancing is low; and phasing e.g. most discussions with legal services professionals occur relatively early for probate but relatively late for conveyancing.
- *What deters consumers from following legal advice?* Factors deterring consumers include negative characteristics of legal services professionals e.g. not available, approachable or comprehensible when giving advice; uncertainty about outcomes that follow from taking advice; failure to understand the advice; and emotional response to the advice.
- *What mistakes do consumers make when taking legal decisions?* Common mistakes include using too little information; using incorrect information e.g. from the internet; having unrealistic expectations about what

⁵ BDRC Continental (2012). *Op cit*

can be achieved; affected by emotions; misunderstanding the advice provided; and going to the wrong legal services expert.

- *How legal services professionals decide what advice to give to their clients:* Professionals begin by extracting as much information as possible from the client and then match this against previous cases. The advice is based on the usual advice given in this class of cases along with some customisation to take account of distinguishing characteristics of the case in hand.
- *How legal services organisations keep abreast of changes in the legal services market:* Changes are detected by monitoring the following - legal press, regulators and other legal updates and bulletins, the actions of competitors and new market entrants, parliamentary activity, academics, horizon-scanners, web-sites and thought leaders in the market. Some organisations use all these sources whereas others do nothing and are at the mercy of market changes.
- *The processes followed when responding to changes in the legal services market:* The response to changes is derived in the context of existing strategic plans often working with specialists and outside experts and/or determined by special working groups responsible for informing the rest of the organisation.
- *How responses to change are evaluated:* Evaluation is based on business parameters such as profitability, turnover and business stability and on more social dimensions such as reputation, customer satisfaction and number of complaints.
- *Are recent changes a threat or an opportunity:* Some organisations (estimated by those we interviewed to be fewer than 10% of all businesses) see change as an opportunity; these organisations see themselves as a business, with good management structures, marketing skills and willing to adapt to change. There is a large group of the legal services profession in the middle trying to change but hindered by structure or management or particular individuals making it difficult. These and the small, under-resourced high-street solicitors almost universally see change as a threat. Shrinking of legal aid is seen as a threat to all, leading to legal services becoming less available and the public looking for other ways to solve their problems.

In this section we have identified six legal services decisions of interest and provided contextual information on each derived from interviews of legal services professionals. These findings are used in the following sections to help in:

- Prioritising which behavioural economic concepts are explored in greater depth.
- Illustrating the relevance of the academic concepts by describing them in the context of these findings.

However, the review of behavioural economic research is the primary purpose of the report. The interviews play a secondary role by helping to contextualise these findings rather than providing a justification for the concepts included in the review.

Before reporting the outcomes of the academic literature reviews in the next section we provide a brief introduction to behavioural economics, explaining how it has developed and some of the key concepts. This provides a context for understanding key features of the more detailed literature reviews which follow.

3. Behavioural Economics

Until recently explanations of how individuals and organisations make decisions have been dominated by views held by economists that people are rational⁶. People are assumed to be perfectly informed about all the options available to them and about their own beliefs, values and preferences associated with each option. In addition, it is assumed that they can use all this information to calculate the best option. However, in recent years there has been a growing body of research in psychology challenging these assumptions and in doing so questioning whether people always choose the best or in some cases even a reasonable option⁷. This work has provided the basis for behavioural economics. By applying psychological research in areas of interest to economists this new area has overcome some of the previous criticisms of traditional economic approaches. It has also provided some important insights about how individuals, groups and organisations actually take decisions, explained why they often make poor decisions and how we can help them to improve their effectiveness.

The development of behavioural economics can be traced back to the work of Nobel laureate Herbert Simon in the mid 1950s⁸. He suggested that people do not have the thinking capacity to carry out all the mental activities necessary to be a rational decision maker of the kind assumed by classical economists. Drawing on psychological research at that time he argued that people use simplified forms of thinking that are much easier to implement. For example, in some situations people 'satisfice' - they choose the first option that is reasonable rather than the one that is best overall. This strategy considerably reduces the computational demands on limited thinking capacity but still leads to a reasonable outcome, even if it is not the best. This is a sensible trade-off given people's inability to deal with large amounts of information. If they tried to process all the information they are likely to end up with 'paralysis by analysis'!

Since this early work, there has been an ever increasing body of research exploring the simplifying forms of thinking that people use and the implications these have for the effectiveness of human decision making. Recently the research agenda has broadened out in recognition of the fact that there are some occasions where people make decisions in ways that are more akin to those assumed by traditional economists⁹. This has led researchers to suggest that people have two different systems of thinking. In the next section we expand on these ideas.

Two Systems of Thinking

There is now a good deal of research supporting the idea that people have two different systems of thinking. Which system is adopted not only determines how people make a decision but also which decision is actually taken and how effective it is. There is, however, less agreement about the precise nature of these two different forms of thinking and the relationship between them¹⁰. In popular science the distinction is often made between thinking based on 'gut' and 'brain' or 'reason' and 'instinct'. Academic researchers have preferred to describe two systems of thinking which have the following characteristics:

System 1 thinking: is quick, intuitive, requires little mental effort and is often based on affect i.e. how options make people feel. These relatively simple forms of thinking are often called heuristics. They generate

⁶ Wilkinson, N. & Klaes, M. (2012) *op cit* Chapter 1.

⁷ French, S., Maule, J., & Papamichail, N. (2009) *Decision Behaviour, Analysis and Support*. Cambridge: Cambridge University Press. Chapter 2.

⁸ Simon, H. A. (1957) *Administrative Behaviour*. New York: Free Press.

⁹ Kahneman, D. (2012) *op cit*

¹⁰ Evans, J.St.B.T. (2010). *Thinking twice: Two minds in one brain*. Oxford: Oxford University Press.

impressions and feelings effortlessly and automatically and these are often used to determine which option to choose. We are aware of the outcomes of System 1 thinking but rarely aware of the processes involved.

System 2 thinking: is analytical, deliberative and requires a good deal of mental effort to implement. It often involves systematic analysis and evaluation under conscious control so we tend to be aware of the process involved as well as the outcome of that process. System 2 thinking is constrained by capacity limitations and effortful to implement so used sparingly. People are sometimes thought of as ‘cognitive misers’ who try to minimise effort by reducing the volume of System 2 thinking.

In the present report we draw on the distinctions between the two systems of thinking made by Nobel laureate Daniel Kahneman⁷.

System 1 thinking

Kahneman suggests that System 1 thinking occurs continuously in the background usually outside conscious control. Its main function is to maintain and update a person’s mental model of the world around them. This builds on the idea that people internally represent the world around them in terms of small-scale mental models of external reality and the actions they might take¹¹. The mental model provides an immediate assessment/interpretation of the current situation and the actions that can be taken. This interpretation occurs automatically and involves very little intention or effort. It captures a person’s intuitive understanding of their current situation, including their interpretation of what is happening as well as why and what, if anything, needs to be done.

System 1 thinking has a very strong propensity to develop mental models that are causal explanations of the world even when the information available is partial or flawed. This leads people to attribute causes to the events around them that are often inappropriate and incorrect. An excellent illustration of this striving to develop causal explanation comes from classic research by Heider & Simmel¹². They showed a film of shapes such as squares and triangles moving around a rectangular figure that was schematic of a house. When viewers of this activity were asked to describe what they saw they automatically derived causal explanations of the evolving scene e.g. seeing an aggressive large triangle bullying the smaller one along with a terrified circle.

System 1 thinking also leads people to quickly and effortlessly jump to conclusions about what is going on in the world around them and providing causal explanations of why it is happening. These conclusions are founded solely on the information available with little regard to other information needed to confirm or refute this interpretation. Kahneman¹³ introduces the notion of WYSIATI (What You See Is All There Is). System 1 jumps to confident conclusions on the basis of the information available with no account taken of what is missing or needed to support the conclusion. For example, System 1 thinking might lead us to quickly conclude that a solicitor we have just met for the first time is inefficient and ineffective on the basis of a negative evaluation of speech and appearance even though we have no evidence about actual experience or past performance. Similarly, in a divorce case an individual may quickly arrive at a confident explanation for an ex-partner’s actions and intentions on the basis of very limited information. This may lead them to misattribute blame and act inappropriately.

¹¹ Craik, K. (1943). *The nature of explanation*. Cambridge: Cambridge University Press.

¹² Heider, F. & Himmel, M. (1944). An experimental study of apparent behaviour. *American Journal of Psychology*, 13, 243 – 259.

¹³ Kahneman, D. (2012) *op cit* Chapter 7.

System 2 thinking

System 2 thinking is analytical and deliberative and often associated with concentration and feeling that one is in control. It allocates attention to key mental activities including complex evaluations such as comparing the price and services of two legal firms. This form of thinking receives and generates key questions that need answering if people are to interact successfully with the world around them e.g. ‘Do I trust this person’, ‘Should I seek legal advice’, ‘Which legal supplier should I choose’. It can activate an organised memory search to look for an answer or undertake a systematic evaluation of evidence derived from the outside world to determine an appropriate course of action. In contrast to System 1 thinking these activities use up mental energy and scarce thinking resources. This means that the amount of System 2 thinking possible at any point in time is limited and becomes more problematic when people are tired or busy doing other things.

System 2 also monitors the output of System 1 to determine whether it can by-pass all this extra work and simply go with the interpretation derived from System 1 output. There is a relatively strong tendency for System 2 to accept the output of System 1 in a relatively uncritical way; hence System 2 is often referred to as a ‘lazy controller’ of the intuitions emanating from System 1¹⁴. For example, consider the following problem:

A bat and a ball cost £1.10 in total. The bat costs £1 more than the ball. How much does the ball cost?”

A large proportion of people give the answer 10p even though this is wrong (if the ball is 10p, then the bat is £1.00 so the price difference is 90p!). The reason for this error is that there is an intuitively plausible partition at £1.00 (there is a strong tendency to partition continuous variables such as cost at ‘natural’ boundaries – one pound is a natural boundary thereby separating £1 and 10p). System 1 thinking uses this intuitive partition to arrive at the answer 10p. System 2 tends to be a lazy controller so accepts this solution because it seems reasonably plausible, even though it is wrong¹⁵. In mathematical situations like this some people do have the knowledge necessary to make a correct response i.e. the rules of arithmetic, but often do not use them. There will be many occasions where people have insufficient knowledge or understanding to make an effective System 2 evaluation of any System 1 thinking output. In these situations System 1 thinking will predominate.

Implications

Members of the public with legal problems will be continuously trying to make sense of their current situation by updating their mental model using System 1 thinking. They will develop intuitive mental models that determine how they attribute responsibility and blame for the events that have occurred. WYSIATI means that they will be insensitive to the lack of information available e.g. about others’ intentions or legal procedures, leading them to be confident about their interpretation. Their lack of knowledge and experience of legal situations and the difficulties that arise when processing large amounts of information are likely to limit the ability of System 2 thinking to monitor System 1 output. Taken together these features of how individuals think in legal situations suggest that System 1 processes underpin the way the public makes legal decisions. In addition, the errors and biases associated with System 1 thinking are likely to have an adverse effect on the decisions made by the public.

The next section looks in more detail at different forms of System 1 thinking that consumers of legal service use and considers the implications of each for determining the effectiveness of these choices.

¹⁴ Kahneman, D. (2012) *op cit.* Chapter 3.

¹⁵ The actual answer is 5p!

4. Consumer Choice in Legal Settings

The primary purpose of this section is to review behavioural economics research relevant to an understanding of how consumers and potential consumers of legal services make the key decisions outlined in Section 2. The review process was in two phases:

- *Phase 1 - An initial sifting for key concepts:* This involved an extensive search of books on behavioural economics and a search using key social science databases for key concepts likely to be relevant (using key terms such as ‘consumer choice’, ‘consumer decision making’ etc). We recorded these along with a brief definition and notes indicating their possible relevance for understanding legal services decision making.
- *Phase 2 – An intensive review of those concepts identified in Phase 1 thought to be relevant to legal services decision making.* Relevance was determined in part with reference to the description of key legal services decisions described in Section 2. Phase 2 of the review is presented next.

The two phases generated a broad range of academic concepts that have the potential to explain how legal services consumers make key decisions. Each concept focused on a different aspect of human decision making, with each analysed separately and rarely incorporated into a more general theory of human decision making. The Phase 2 review, reported below, necessarily follows this structure and involves describing a broad range of separate concepts rather than presenting them in the context of a unified account of human decision making. However the review is organised by considering aspects that are loosely concerned with judgement first and then choice with a section on emotion last.

Availability Heuristic

There are many occasions where consumers have to estimate the likelihood of a particular event occurring e.g. assessing the likelihood of being granted custody of children after a divorce, the likely success of a personal injury claim. These estimates are often critical in determining whether or not a consumer launches legal proceedings. However, it is unlikely that consumers have the knowledge or experience to make an assessment based on actual case data. Instead they are likely to use the availability heuristic – they judge the frequency in terms of the ease with which they can bring instances of previously successful cases to mind^{16 17}. If it is relatively easy to bring previous successful instances to mind then the likelihood of them being successful is judged to be relatively high; if it is difficult to bring successful instances to mind then the likelihood is judged to be relatively low.

The availability heuristic has some face validity since, all other things being equal, the more often something has occurred in the past so the more traces in memory there will be. And the more memory traces the easier it should be to retrieve a past case. However, there are other factors that affect retrievability of past memories. For example, events that are dramatic, of personal significance or recent leave highly accessible memory traces leading to an overestimation of their frequency of occurrence. For example, plane crashes tend to be more dramatic than car crashes so cases are more readily brought to mind. This helps to explain why people feel that air travel is more risky than car travel, despite the reverse being true. This bias becomes even stronger if there was an air crash very recently (the memory trace will still be strong).

Implications

Legal services consumers are likely to use availability when judging the likelihood of such factors as the likelihood of success of litigation or the riskiness associated with actions they are considering. For example, a

¹⁶ Kahneman, D. (2012) *op cit* Chapter 12.

¹⁷ Newell, B. R., Lagnado, D. A. & Shanks, D. R. (2007) *Straight choices*. Hove: Psychology Press. Chapter 6.
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recent, highly publicised case where a celebrity was granted custody of their children is going to be highly retrievable from memory, leading to an overestimation of how often this actually occurs. This may lead a consumer to be overconfident about the likely success of their own custody case.

Representativeness Heuristic

Representativeness is a form of System 1 thinking that involves people making sense of new situations by matching them to their existing categories of knowledge about these kinds of situations^{16, 18}. For example, when a consumer meets a solicitor for the first time they are likely to match their first impressions against their existing knowledge about the characteristics of competent and incompetent solicitors. If these first impressions are a better match to their existing knowledge relating to incompetent rather than competent solicitors then the overall judgement will be of incompetency. The stronger the match the more confident this judgement will be. Similarly, people are likely to have their own understanding of what distinguishes legal and non-legal problem categories. A new problem will be matched against this knowledge to determine whether to resolve it by legal or non-legal means. The more the new problem matches existing knowledge of the characteristics of legal problems so the more confident people will be that it can be solved through legal means.

Similar to availability, the representativeness heuristic has some face validity in that it allows people to use their past knowledge and experience to make sense of new situations. However, there are some potential problems leading to bias when judgements are made in this way¹⁹.

Most people have limited knowledge and experience of legal situations so the categories they are using may not be valid. For example, most people have very limited personal experience of solicitors and what distinguishes good from bad. In addition, people are likely to have acquired some of their categorical knowledge vicariously through the news media, fiction, TV and other informal means. These sources are likely to be biased given their focus is often on dramatic, newsworthy and entertaining situations rather than common situations representative of the broader legal context.

People are insensitive to the amount of information being used in the match. For example, they ought to be more confident in their assessment if it is based on a match between 10 characteristics of a solicitor rather than just 2. However, this is not the case; people are insensitive to the amount of information being used. They can be very confident about their assessment even when it is based on a match of just one or two aspects derived from a very short interaction with a solicitor.

When people make these kinds of judgements they fail to take account of base rates of each category i.e. how frequently each category actually occurs overall. For example, consider two mythical countries A and B. In country A the vast majority of solicitors are highly competent, whereas in country B most are incompetent. At the outset you are much more likely to find an incompetent solicitor in Country B. When assessing the competency of a particular solicitor this overall likelihood (called a priori likelihood) should be incorporated in to the judgement. Thus the same degree of match between an individual solicitor and the incompetent category information should be interpreted differently in each country given this difference in the initial likelihood of finding good and bad solicitors. However, people neglect this base rate information. Instead judgements are simply based on the matching process. Neglect of base rates is endemic.

¹⁸ Kahneman, D. (2012) *op cit* Chapter 14.

¹⁹ Kahneman, D., & Frederick, S. (2002). Representativeness revisited: Attribute substitution in intuitive judgment. In T. Gilovich, D. Griffin, & D. Kahneman (Eds.), *Heuristics and biases*. Chapter 2. New York: Cambridge University Press.

Implications

We have presented just two of what is likely to be many situations where crucial decisions taken by legal services consumers depend on judgements derived from the representativeness heuristic. This raises some important issues:

Despite having limited and often biased knowledge and experience of legal services contexts people will be using these sources of information to make very confident judgements that, in turn, feed into the decisions they take. This highlights the need for professional bodies, regulators and the providers themselves to ensure that consumers have access to accurate information to judge the quality and appropriateness of legal services suppliers e.g. complaints data, insurance, firm specialisms. In addition, consumers need to be informed about the importance of this information and how to use it when choosing a legal services provider. These interventions would improve the accuracy of consumers' choices of provider based on representativeness.

As indicated in the section above, when consumers judge the competency of a particular provider they are likely to base this on representativeness alone and ignore base rate information about the proportion of all service providers that are competent. Taking account of this base rate information is crucial to making accurate judgements – the same level of representativeness should be interpreted differently in situations where most providers are good as compared to situations where most are poor.

There are likely to be many other examples where consumers are relying on representativeness in legal settings.

Anchoring and adjustment

People are often required to estimate a quantity e.g. how much compensation should they expect for an injury, how long will the legal case take to resolve, what fee they should expect to be charged by a solicitor. In these kinds of situation an intuitive estimate often comes to mind first (a 'ball park figure'), called an anchor. The anchor may be generated internally through System 1 thinking or be present externally in the decision environment e.g. last year's sales figures. System 2 thinking is then likely to recognise that the anchor is wrong so will adjust in the appropriate direction by finding arguments to move away from this estimate^{20 21}.

There are several problems that arise when using this heuristic. First, people never adjust enough so the anchor is too influential over the final judgement. Second, people often anchor on quantities that are irrelevant. For example, in one experiment people were first asked whether Gandhi was younger or older than either 140 or 9 when he died. Then they were asked to estimate his actual age on death. Those given 140 in the initial judgement provided considerably higher estimates of his age on death (mean of 76) than those given 9 (mean of 50). They latched on to the initial numbers and then adjusted even though these numbers were irrelevant (and quite silly!).

Research shows that anchors also affect what people think about i.e. they tend to focus on information that support the anchor. More surprising, anchoring effects do not disappear when participants have expertise in the

²⁰ Kahneman, D. (2012) *op cit* Chapter 11.

²¹ Chapman, G., & Johnson, E. J.. (2002). Incorporating the irrelevant: Anchors in judgments of beliefs and values. In T. Gilovich, D. Griffin, & D. Kahneman (Eds.), *Heuristics and biases*. Chapter 6. New York: Cambridge University Press

field. In one study²² experienced judges were given a written outline of a rape case where the prosecutor demanded a sentence of either 2 months or 34 months. These experienced judges anchored on these demands with the average sentence being 28 months in the former and 36 months in the latter!

Implications

This heuristic has important implications for consumers and professionals alike:

- Anchors can be used as a marketing ploy. For example, in a supermarket shoppers were given information about a 10% reduction in price on a brand of soup. On some days shoppers were told there was a limit of 12 cans per person; on other days there was no limit. On average shoppers bought 7 cans when the limit was in operation, nearly twice as many as they did when no limit was in operation!²³
- In legal settings the first fee presented to a consumer may act as an anchor. This means that any fee that is cheaper than this anchor seems a good deal when, in comparison to the norm, it may be exorbitant.
- Those organisations subject to personal injury and other claims often argue that there should be cap on the amount of compensation. However, this may actually be counterproductive if the cap amount becomes an anchor for all claims, including those that are relatively minor and would normally involve much smaller amounts of compensation.

Confirmation Thinking

Confirmation thinking is predominant and is critical to how people make sense of the world around them and how they should act. When people try to make sense of the world they demonstrate a strong tendency to focus on information that supports their prior beliefs and expectations and ignore or discount information that does not^{24 25}. Research shows that people gather information from memory and the outside world in ways that confirm their initial views. They overlook and discount disconfirming information unless it is overwhelming. The confirmation bias has the advantage that it is simpler to implement than a more thorough, balanced evaluation but it can lead people to be very confident about beliefs and expectations that are wrong. Confirmation thinking is a feature of both System 1 and System 2 thinking.

Implications

There are likely to be many situations where legal services consumers are drawing on information from their memories and the outside world to make sense of a particular legal situation. In these situations they are likely to be using confirmation thinking. For example, making sense of the actions of a partner in a divorce case may involve confirming the initially held negative attitudes to the separation. Thus the initial negative evaluation will be enhanced by focusing on subsequent actions that are deemed or interpreted as being negative and overlooking any positive or conciliatory actions. This will lead to an evaluation of the partner that is far too negative which may, in turn, may lead to the rejection of crucial cooperative and other actions that can lead to a resolution of the situation. Confirmation is so predominant that it is highly likely to underpin a large amount of the thinking and interpretation undertaken by legal services consumers.

²² English, B. & Mussweiler, T. (2001) Sentencing under uncertainty: Anchoring effects in the courtroom. *Journal of Applied Social Psychology*, 31, 1535-1551.

²³ Wansink, B., Kent, R. J. & Hoch, S. J. (1998). An anchoring and adjustment model of purchase quantity decisions. *Journal of Marketing Research*, 35, 71 – 81.

²⁴ Nickerson, R. (1998). Confirmation bias: A ubiquitous phenomenon in many guises. *Review of General Psychology*, 2, 175–220.

²⁵ Kahneman, D. (2012) *op cit*. Chapter 7.

Framing effects

As indicated earlier, people make sense of the world around them by building in their minds small scale models of the situation and the actions that they might take. In decision situations the model is often called a 'decision frame' and the underlying mental activity responsible for developing the model is called 'framing'^{26 27}. People assume that their decision frame accurately captures the situation in hand, though often this is not the case. To illustrate, consider the following problem:

Imagine that the US is preparing for the outbreak of an unusual Asian disease, which is expected to kill 600 people. Two alternative programmes to combat the disease have been proposed. Assume that the exact scientific estimates of the consequences of the programmes are as follows:

If Program A is adopted, 200 people will be saved.

If Program B is adopted, there is one-third probability that 600 people will be saved and two-thirds probability that no people will be saved.

Which of the two programs do you favour? Research shows that most people prefer Programme A. However, now consider programmes C and D below:

If Program C is adopted, 400 people will die.

If Program D is adopted, there is one-third probability that nobody will die and two-thirds probability that 600 will die.

Which of these two programs do you favour? Under these circumstances most people choose Programme D. This represents a reversal of preference since programmes A and C are equivalent as are B and D e.g. if 200 are saved then 400 will die. Thus people preferring A over B should also prefer C over D since they are equivalent choices. However, research shows that people consistently choose A and D.

This is a specific example of a more general phenomenon revealing that people tend to be risk averse when choosing between options that involve gains and risk seeking when choosing between options that involve losses. However, as indicated in the Asian disease problem above, changing the way a situation is worded or presented can lead the options to be framed in terms of either gains or losses and in doing so determine which option is chosen. Thus the way the problem is presented determines choice rather than the individual's beliefs and values. This effect, called risky choice framing, has also been observed in the choices made by experts in business strategy²⁸ and medicine²⁹. This suggests that legal services professionals may be subject to framing effects when giving advice to clients. Those providing information and advice to decision makers as well as those actually making decisions are generally unaware of these framing effects and the bias they introduce into the decision making process.

There are two other types of framing effect³⁰. First, research on attribute framing has shown that evaluations of objects or people are different depending on whether the key attributes are described in positive or negative terms e.g. a meat product consists of 80% beef is evaluated more positively than when the same product is described as containing 20% fat.

²⁶ Kahneman, D. (2012) *op cit* Chapter 34

²⁷ Tversky, A. & Kahneman, D. (1981) .The framing of decisions and the psychology of choice. *Science*, 211, 453 – 458.

²⁸ Hodgkinson, G. P., Bown, N. J., Maule, A. J., et al. (1999). 'Breaking the frame: An analysis of strategic cognition and decision making under uncertainty'. *Strategic Management Journal*, 20, 977-985.

²⁹ McNeil, B., Pauker, S. Sox, H et al (1982). On the elicitation of preferences for alternative therapies. *New England Journal of Medicine*, 306, 1259-1263.

³⁰ Levin, I. P., Schneider, S. I. & Gaeth, G. J. (1998). All frames are not created equal: A typology and critical analysis of framing effects. *Organizational Behavior & Human Decision Processes*, 76, 149-188.

Second, goal-framing effects highlight the importance of differences between messages that stress either the positive consequences of performing an act or the negative consequences of not performing that act³¹. This effect has been used to develop health campaigns. Comparisons between campaigns that present the positive outcomes of engaging in an act such as breast self-examination rather than the negative outcomes of not engaging in this act have revealed the latter to be considerably more effective.

Recently, research has shown that most decision frames are severely bounded with little account taken of the information that is missing³² - referred to as WYSIATI in Section 3. This leads people to make very confident judgements and decisions on the basis of incomplete information.

This is a very brief review of what is a very large area of research indicating that people's choices are determined as much by the way decision problems are worded and presented as they are by that person's beliefs and values.

Implications

These findings indicate that how consumers and legal services professionals frame legal problems is crucial in determining the key decisions they take. Consumers' frames are likely to be influenced by the dialogue they have with legal services suppliers, with those suppliers unaware of this and how they are affecting consumer choice. Consumers are likely to have bounded frames leading them to develop very confident interpretations of situations that show little or no awareness of the information they have overlooked. Similarly, suppliers' own framing of legal problems e.g. whether they frame in terms of gains or losses and how bounded their frames are, are highly likely to influence the recommendations they make to consumers. These findings present a challenge to practitioners wishing to present legal information in an objective and bias free way so that clients can make informed choices. They also present a challenge to regulators responsible for ensuring that consumers receive appropriate and bias free information and advice.

The Simulation Heuristic

Consumers often need to assess the probability of key outcomes e.g. the likelihood they will be successful in a personal injury claim; the likelihood that a third person will accept an offer preventing further litigation. People often use the simulation heuristic to make these judgements. They construct a mental model of the situation and then run simulations of this model using different parameters³³. That is, they think about what the outcome would be if some of the key parameters of the model changed. The ease with which they can imagine achieving their desired outcome across these simulations determines how confident they are that it will actually occur. Unfortunately, these simulations are biased in favour of finding positive outcomes – people are overly optimistic about the control they have over events and their skills and knowledge to overcome difficulties. Consequently they are overly optimistic and overconfident about the chances of good outcomes.

One important aspect of this heuristic is the planning fallacy³⁴ – people are poor at predicting the amount of time, money and other resources it will take to complete projects. There are many high profile examples of this

³¹ Maule, A. J. & Villejoubert, G (2007). What Lies Beneath: Reframing framing effects. *Thinking & Reasoning*. 13-24

³² Bazerman, M. H. & Moore, D. *Judgment in managerial decision making*. Chichester: Wiley. Chapter 3.

³³ Kahneman, D & Tversky, A (1982). The simulation heuristic. In D. Kahneman, P. Slovic & A Tversky (Eds). *Judgment under uncertainty*. Cambridge: Cambridge University Press.

³⁴ Buehler, R., Griffin, D & Ross, M. (2002). Inside the planning fallacy: The causes and consequences of optimistic time predictions. In T. D. Gilovich, D. W. Griffin & D. Kahneman (Eds) *Heuristics and biases*. New York: Cambridge University Press.

fallacy e.g. Sydney opera house had a predicted finish by 1963 at \$7 million – a scaled down version was actually completed ten years later at a cost of \$102 million! The fallacy is thought to occur because of ‘inside’ thinking – a tendency to focus on the specific positive features and characteristics of the problem/situation in hand. This means that possible difficulties and problems tend to be neglected and little account is taken of negative experiences from past cases.

Implications

The simulation heuristic and planning bias have the potential to lead consumers to underestimate the time, money and other resources that may be needed for a successful resolution of a legal problem. These biases are likely to be exacerbated in legal situations where there is a good deal of uncertainty about pricing, total amount of advice needed and the time that a professional may need to represent a client. This uncertainty provides people with greater licence for positive evaluations.

Motivated Reasoning

People’s motives affect how they perceive and interpret information^{35 36}. For instance, people process information in biased ways that are most beneficial to them and that accord with their immediate intentions and goals. This bias is tempered by a desire to appear rational and objective to themselves and others. To achieve this desire they construct seemingly rational justifications to make their biased reasoning appear rational and objective. For example, there are occasions where people may wish to satisfy short-term needs e.g. to punish an errant spouse during a divorce despite recognising longer-term needs to maintain reasonable relations in order to settle financial and custody issues. In this situation people have three options:

- Simply ignore the longer-term consequences, though this is likely to be associated with regret and guilt at having sacrificed long-term needs.
- Give up their short-term desire for punishment, though this is likely to be difficult and very painful, particularly if the desire is strong.
- A compromise approach that involves satisfying the short-term desire for punishment along with generating a set of reasons to justify this decision to themselves and others to mitigate long-term regret or guilt³⁷. This is a common strategy.

The third, or motivated reasoning option is more likely to occur when the situation is vague thereby providing more latitude for generating justifications that help resolve the conflict between appearing objective and yet pursuing a desired outcome³⁸.

There are several other aspects of motivated reasoning that are important. For example, people tend to have an unrealistically positive view of themselves e.g. see themselves as more honest, demonstrating more integrity

³⁵ Kunda, Z. (1990). The case for motivated reasoning. *Psychological Bulletin*, 108(3), 480–498.

³⁶ Bazerman, M. H. & Moore, D. *Judgment in managerial decision making*. Chichester: Wiley. Chapter 5.

³⁷ Mishra, A & Mishra, H. (2011). The influence of price discount versus bonus pack on the preference for virtue and vice foods. *Journal of Marketing Research*. 48, 196 – 206.

³⁸ Mishra, H., Shiv, B, & Nayakankuppam, D. (2008). The blissful ignorance effect: Pre- versus post-action effects on outcome expectancies arising from precise and vague information. *Journal of Consumer Research*, 35, 573-585

and being more cooperative than is actually true³⁹. They also tend to be overly optimistic about their ability to control external events⁴⁰.

Implications

Legal settings are often associated with strong motivational states involving a need to satisfy short term goals of revenge or retribution at the expense of more important longer term goals such as maintaining family relationships. This makes legal settings open to motivated reasoning leading clients to develop what appear to be convincing and rational reasons for taking inappropriate actions. In addition, consumers with an unrealistically positive view of their own honesty, integrity and cooperativeness may be less willing to accept solutions to legal problems that require compromise with others.

Mental accounting

Thaler⁴¹ defines mental accounting as ‘the set of cognitive operations used by individuals and households to code, categorize and evaluate financial activities’. Research shows that people use a broad range of System 1 thinking when making sense and taking decisions in financial situations. Relevant areas include:

Framing: In previous sections of the report we show how the way decision problems are framed affects the choices people make. For example, the difference between framing in gains or losses was shown to be particularly important. The same is true in financial situations. Research⁴² shows that when people are given unexpected sums of money in ways that lead them to frame in terms of losses i.e. called a tax rebate (thought of as a return of a loss), there is a relatively strong tendency for them to save it. However, when the same amount of money is given in ways that induce a positive framing i.e. called a bonus (thought of as a gain), they are less likely to save and more likely to spend it.

Budgeting: Research shows that people manage their money by thinking in terms of separate mental accounts for particular aspects of their spending and then derive budgets for each account. This is similar to the accounting systems used by organisations⁴³. Thaler suggests people set budgets to simplify financial decision making and as a self control mechanism to ensure that essential activities are protected e.g. don’t eat out so often that they cannot pay the heating bills. As compared with the wealthy, people on low incomes tend to set budgets that are strict, formal and operate over shorter periods⁴⁴. However people often fail to budget properly particularly when they have strong short-term needs that jeopardise their medium and long-term interests⁴⁵. In these situations they engage in ‘creative accounting’ e.g. if we are desperate to eat out but have already exceeded our ‘entertainment budget’ for this month a visit to a fast food restaurant may be justified by posting the cost to the ‘housekeeping budget’.

Accounting Dynamics: Mental accounts are dynamic; they change over time as the financial and broader social/legal context evolves. Accounts are opened at the beginning of a transaction and not closed until it is

³⁹ Dunning, D., Heath, C. & Suls, J. M. (2004) Flawed Self-Assessment: Implications for Health, Education, and the Workplace. *Psychological Science In The Public Interest*, 5, 69 – 106.

⁴⁰ Langer, H. (1975) The illusion of control. *Journal of Personality and Social Psychology*, 32, 311 – 328.

⁴¹ Thaler, R. H. (1999). Mental accounting matters. *Journal of Behavioral Decision Making*, 13, 183–206.

⁴² Epley, N., Mak, D., & Idson, L. C. (2006) Bonus or rebate? The impact of income framing on spending and saving. *Journal of Behavioral Decision Making*, 19, 213 – 227.

⁴³ Wilkinson, N. & Klaes, M. (2012) *op cit* Chapter 6.

⁴⁴ Heath, C., & Soll, J. B. (1996). Mental budgeting and consumer decisions. *Journal of Consumer Research*, 23, 40 – 53.

⁴⁵ Cheema, A. & Soman, D. (2006) Malleable mental accounting: The effects of flexibility on the justification of attractive spending and consumption decisions. *Journal of Consumer Psychology*, 16, 33 – 44

completed. Keeping accounts open helps people to remember current commitments and reduces the chances of over-committing financially. However, research shows that people often manage accounts poorly over time. For example, loss aversion often prevents people from closing mental accounts that are in loss⁴⁶. Later in this document this strong tendency to continue allocating resources such as money to losing courses of action is described in terms of escalation of commitment.

Implications

Setting budgets for legal activities is very difficult given the amount of activity to be charged for and the length of time taken is often uncertain at the outset. This difficulty is compounded by the continuing dominance of hourly billing (though this may become less of an issue as the industry responds to demands for fixed fees from individual and business consumers). How these budgets are framed and managed in the context of other financial commitments is crucial for the longer-term wellbeing of consumers. This is likely to be a problem with the reduction in the legal aid provisions. Also, it is known to be a particular problem for lower income groups given their preference for setting stricter budgets that operate over shorter periods given the fewer resources they have at the outset. These groups may need extra help in managing their legal budgets to prevent ‘creative mental accounting’ that leads them to satisfy short-term commitments at the expense of their longer-term needs and interests. This might be achieved by making billing arrangements more certain.

Decision Strategies

As indicated in Section 3, mainstream economists assume that people are rational decision makers. This involves: knowing and evaluating the full set of available alternatives; taking account of all their beliefs and values; calculating the value of each option; then choosing the option with the highest value. However, research indicates that people actually use much simpler strategies because⁴⁷:

- The mental activities and calculations required to implement a rational strategy is beyond their capacity for thinking.
- They are cognitive misers trying to minimise effort by reducing the amount of cognitive work undertaken.
- They do not have the time available to complete such a complex activity.

As indicated earlier, Simon was the first to show that people actually use simpler strategies. He demonstrated that people ‘satisfice’ - they choose the first option that meets minimum requirements rather than the best. Since that time, a broad range of simplifying strategies has been identified including very simple ones such as the disjunctive strategy where people choose the first option that has anything positive about it!

Up until recently simpler strategies have been assumed to lead to poorer decision making since they make use of less information and are based on a simplified decision logic. In recent years this view has been challenged⁴⁸. Gigerenzer and his colleagues have shown that there are situations where simpler strategies actually do better than more complex ones! They have researched one particular strategy - ‘Take the Best’⁴⁹. People first see

⁴⁶ Shefrin, H. M. & Statman, M. (1985). The disposition to sell winners too early and ride losers too long. *Journal of Financial Economics*, 40, 777 – 790.

⁴⁷ Payne, J.W., Bettman, JR, & Johnson E.J. (1993). *The adaptive decision maker*. Cambridge: Cambridge University Press.

⁴⁸ Gigerenzer, G. & Brighton, H. (2011) Homo heuristics: Why biased minds make better inferences. In G Gigerenzer, R Hertwig & T. Pachur (Eds). *Heuristics: The foundations of adaptive behaviour*. Oxford: Oxford University Press.

⁴⁹ Newell, B. R., Lagnado, D. A. & Shanks, D. R. *op cit*. Chapter 3.

whether one of the choice options is recognised. If one is recognised and the others are not, then it is chosen. If not, then they work through particular features of the choice alternatives one by one to see whether one alternative is better than the rest. They start with the attribute considered to be most important and then work in descending order until one alternative stands out as better than the others. There are circumstances where this strategy can lead to better decision making than more complex ones based on all the available information. A range of other simplifying strategies, called 'fast and frugal heuristics' has been identified each of which has the potential to perform well.

The contradictions between these two bodies of research are likely to reflect differences in the decision situations under investigation. The original research, showing that simpler strategies tend to perform worse, looks at more complex decision situations. The research on fast and frugal heuristics tends to involve simpler situations where key sources of information are more readily determined. However, the contradiction currently remains unresolved.

Implications

The interviews supported conclusions drawn from the research literature in showing that consumers often choose by taking account of a single factor. In the legal services context this could involve choosing a provider by taking account of a single factor such as price, availability or recommendation from family or friends. The use of simplifying strategies provides a serious challenge to the view that consumers are able to make informed choices between legal services providers. The research literature suggests that choice based on a single factor is often sub-optimal leading to poor outcomes. The interviewees supported this conclusion by suggesting that decisions based on a single factor such as price often led consumers to employ professionals that were not appropriate to their particular needs. If this is the case then providing support for consumers' choosing of a legal supplier could be crucial in helping consumers to find legal suppliers appropriate to their needs.

The Choice Context

There are features of the choice context that are crucial to the ways that consumers make decisions⁵⁰. Context effects show variations in choice behaviour due to the number and characteristics of the options available:

- *The complexity effect*: People have a general belief that having more options to choose between is better. For instance, one study⁵¹ showed that more consumers stopped to taste a jam from a stand with a large selection of 24 varieties than from a stand with a selection of just 6 varieties. However, when it comes to making a decision having too many options actually disrupts choice. This same study showed that fewer participants redeemed a voucher to acquire jam when they received it in front of the 24 variety display than the smaller display of just 6. Too much choice also increases the likelihood that a person defers making a decision and reduces confidence and satisfaction they have in that choice.⁵² This phenomenon has been called 'the paradox of choice'⁵³ and plays out in many everyday situations. However, people with a clear idea

⁵⁰ Busemeyer, J. R., Barkan, R., Mehta, S. & Chaturvedi, A. (2007) Context effects and models of preferential choice: implications for consumer behaviour. *Marketing Theory*, 7, 39 – 58.

⁵¹ Iyengar, S. S., & Lepper, M. R. (2000). When choice is demotivating: Can one desire too much of a good thing? *Journal of Personality and Social Psychology*, 79(6), 995–1006.

⁵² Chernev, A. (2003). Product assortment and individual decision processes. *Journal of Personality and Social Psychology*, 85, 151–162.

⁵³ Schwartz, B. (2004). *The paradox of choice: Why more is less*. New York: Ecco.

of what they need and those that have a stronger propensity to engage in System 2 thinking are less disrupted⁵⁴.

- *The similarity effect:* Consider a consumer choosing between two legal services providers: provider A is more expensive but has a better reputation than provider B. This leads to a difficult cost/value trade-off when choosing between these providers and this difficulty may lead the consumer to search for other options. If they discover a third option C that is very similar to provider B (slightly cheaper but a slightly worse reputation) then the increased conflict associated with this similarity 'hurts' B and C making them less attractive thereby increasing the likelihood that A is chosen.
- *The compromise effect:* Consider a consumer facing the same difficult choice as above between providers A and B. This time they discover a provider D that it is much more expensive than A but also has a much better reputation. If these options are evenly spaced in terms of cost/value then people tend to choose the 'compromise option' - the one in the middle, in this case option A. This is one example of a more general tendency to choose a mid-placed option over more extreme ones.

Implications

The decisions taken by consumers of legal services are likely to be influenced by a broad range of context effects. In some instances these effects are driven by characteristics of the situation e.g. the number of suppliers available in a location and on others driven by such factors as the way advice is given by the legal services professional. Suppliers need to be aware of the biases that they may induce unintentionally through presenting too many options or describing each in ways that lead to the effects described above.

Escalation of Commitment

Research indicates if people are responsible for making a decision that subsequently goes wrong they demonstrate a strong tendency to continue allocating further resources to it despite there being a low probability of turning the decision around⁵⁵. Those not responsible for making the initial decision are much less likely to continue allocating resources and more likely simply to terminate the action. There are many everyday situations where individuals escalate their commitment e.g. continue investing money in a losing stock, continue working for an organisation where their expectations about promotion are unfulfilled; staying on hold while waiting for a utility to answer the phone. In some cases escalation can have catastrophic outcomes as witnessed by several banks when their staff escalated their commitment to failing stocks.

Research indicates that people are more likely to escalate when:

- They are responsible for the initial decision. It seems the loss (personal or financial) that follows terminating a decision is just too much to bear, particularly if there is some chance of redeeming the situation, albeit a very small one.
- The failure can be explained in terms of factors that are unrelated to the initial decision e.g. investment failed because of a downturn in the economy rather than a poor choice of stock.
- Decision makers think that terminating the decision may lead others to develop a bad impression of them.

⁵⁴ Amit, A., & Sagiv, L. (In press) The role of epistemic motivation in individuals' response to decision complexity. *Organizational Behavior and Human Decision Processes*.

⁵⁵ Bazerman, M. H. & Moore, D. *op cit*. Chapter 6.

Implications

Escalation of commitment is likely to be an important factor in legal services consumers' behaviour. For example, interviewees said that consumers may become so entrenched in their existing course of action that they reject advice given to them by their legal representative. Also, escalation is likely to be a factor in situations where consumers have to decide whether to continue on to a new stage of legal activity having received negative feedback about the current one e.g. whether to appeal against a rejected planning application. Escalation can be a very strong motivating force that leads consumers to spend large amounts of money on legal problems that are highly unlikely to be resolved positively.

Prospect Theory of Choice

Prospect Theory has become the predominant theory in behavioural economics to explain how people choose between options^{56 57}. In this report we provide a very brief description of the theory, focusing instead on the key biases predicted by the theory and the implications of these for legal services decision making. The theory breaks the decision process down into two phases:

Phase 1 Editing:

- Editing is responsible for building a mental model of the problem inside the head of the decision maker – what we called decision framing earlier in the report. A key feature of editing concerns how the values of the outcomes that may follow from taking an action are modelled. In Prospect Theory the values of outcomes are framed as *changes in wealth* rather than as *final states of wealth* as prescribed by traditional economic and finance theories (it is easier for people to do it this way!). Changes are always assessed from a particular point of reference – this is the neutral point from which change is assessed.
- To illustrate, consider the Asian disease problem described earlier (see page 20). The first version of the problem is framed in terms of saving lives implying a reference point of the worst outcome of 600 deaths. The outcomes of the two programmes are evaluated as a change from this reference point i.e. from this reference point we may save different numbers of people with particular probabilities as specified in the descriptions of the two programmes. The second version of the problem is framed in terms of losing life with the implied reference point of no deaths i.e. from this reference point the outcomes of the two programmes are represented in terms of losing different numbers of people with particular probabilities. Thus changing the wording leads to different reference point which in turn leads to the two options being framed either as a choice between gains, or a choice between losses. Many decision problems can be framed in different ways, yet most people are unaware of this or the implications that adopting one reference point rather than another has on their decision.

Phase 2 Evaluation:

- The theory makes very specific predictions about how people evaluate different amounts of gains and losses. The precise nature of these characteristics lies outside the remit of this report. However, the way people evaluate options leads to a number of important effects and anomalies:
 - *Attitude towards risk:* People tend to be risk averse when decision problems are framed in terms of gains but risk seeking when problems are framed in terms of losses. This explains why, in the Asian

⁵⁶ Kahneman, D. (2012) op cit Chapter 26

⁵⁷ Newell, B. R., et al (2007) op cit. Chapter 9

Disease problem, people go for the safe option (programme A) when the problem is framed in gains and the risky option when framed in losses. This finding shows that people's attitudes to risk and their final choices are determined by how the problem is presented and framed rather than their beliefs and values as we might expect. This effect occurs across different domains such as finance and health and with experts as well as non-experts.

- *Loss aversion*: the impact of a loss is much greater than the impact of a comparable gain. For example most people refuse a bet that involves a 50% chance of winning £200 and a 50% chance of losing £100⁵⁸. Despite the single play of the gamble having a positive expected value (i.e. $(£200 \times .5) + (-£100 \times .5) > 0$) loss aversion means that the potential loss weighs more heavily than the potential gain, despite being numerically smaller. This means that people often reject a relatively good option that is highly likely to return a big gain but has a small chance of realising a small loss. Instead they choose an inferior option that is certain to realise a very small gain. The effect occurs in non-monetary situations as well. Loss aversion means that people often reject options that are best for them.
- *Endowment Effect*: this is related to loss aversion. Once a person owns something they value it more, since giving it up is conceptualised as a loss. This effect was demonstrated in a seminal study with three different groups of participants⁵⁹. One group, called the 'sellers', were given a mug (so owned it) and asked to indicate the minimum price they would accept to sell the mug. A second group, the 'buyers', were given a sum of money that they could keep or buy a mug with. They had to indicate their maximum price they would pay to buy a mug. A third group, the 'choosers', were given a choice between the mug and various amounts of money. On average sellers required \$7.12 dollars for their mug, whereas buyers and choosers were unwilling to pay more than \$2.87 and \$3.12 respectively for a mug. Ownership made the mug much more valuable! The tendency to over value what we already have is a very strong bias that occurs across most situations.
- *The omission bias*: this bias, which is related to the endowment effect, reflects a very strong tendency to stick with the *status quo* i.e. the default option that one is given or the option one usually chooses⁶⁰. The endowment effect means that a new alternative needs to be much better than the status quo or default option otherwise it will not overcome the loss associated with giving up this option. However, what is considered to be the status quo or default is often arbitrary. A natural experiment illustrating this phenomenon occurred in 1988 when motorists in the USA were given a choice between two different kinds of car insurance – the usual one with full rights to sue (the old policy) and a new but cheaper option with reduced rights to sue (the new policy)⁶¹. This was introduced in different ways in two different states. In New Jersey motorists were given the new policy unless they said they did not want it, whereas in Pennsylvania the default was the old policy and they had the right to change to the new one. In both states the majority of individuals kept the default option though in New Jersey this was the new policy, whereas in Pennsylvania this was the old policy! Thus the actual attractiveness of the policies seems to have been of secondary importance; rather, whichever was determined as the default or status quo was the preferred option.

⁵⁸ Samuelson, P. A. (1963). Risk and uncertainty: A fallacy of large numbers. *Scientia*, 98 108–113.

⁵⁹ Kahneman, D., Knetsch, J. L., & Thaler, R. H. (2000) Anomalies: The endowment effect, loss aversion and the status quo bias. In D. Kahneman & A. Tversky (Eds) *Choices, values and frames*. New York: Cambridge University Press.

⁶⁰ Johnson, E. J., & Goldstein, D. G. (2003). Do defaults save lives? *Science*, 302, 1338–1339.

⁶¹ Johnson, E. J., Hershey, J., Meszaros, J., & Kunreuther, H. (1993). Framing, probability distortions, and insurance decisions. *Journal of Risk and Uncertainty*, 7, 35–53.

Implications

Prospect theory has important implications for the decisions taken by consumers and suppliers of legal services. The research shows that how a problem is framed, e.g. in gains rather than losses, depends on chance factors such as how the problem is presented or worded. However, this factor can have a profound effect and can be the primary driver of a decision. This highlights the need to understand the factors that influence decision frames of legal services consumers. In particular:

- Are there predominant ways that consumers frame particular legal problems that bias them towards choosing one particular legal option over others?
- Do legal services suppliers have characteristic ways of presenting and communicating information and advice to consumers that induce consumers to frame in ways that unwittingly favour one legal solution over others? For example, framing in losses is likely to lead a person to take a case to court (risky because the outcome is uncertain) rather than accepting an out-of-court settlement (riskless because the outcome is known); framing in gains would lead to the opposite.

Research is needed to investigate how consumers frame legal problems, the extent to which this is dependent upon professional advice and whether these factors lead to a framing bias.

Loss aversion is also likely to be present in legal settings. It may lead consumers to be very reluctant to follow advice that involves giving up things they currently own even if it is in their longer term interests. For example, loss aversion makes it more difficult to give up possessions when splitting households during divorce settlements. Also, it is harder for consumers to follow advice that involves loss, even if the chances are very small. Instead they may prefer to follow inferior advice that has no potential for loss. The endowment effect leads people to overvalue what they own. This also has legal implications. For example, people are likely to require higher amounts of compensation for the loss of anything that they previously owned e.g. articles, services, activities, than the value thought appropriate by a third party. Finally, the omission bias means that people have a strong tendency to stick with the option that they currently have or is usually chosen. This may make it difficult for professionals to persuade consumers to take, or even think about other options.

The biases associated with Prospect Theory are highly likely to be a key factor in determining the advice and decision taken by legal services professionals as well as the decisions made by the consumers of these services. Research is needed to investigate the impact of these biases across a broad range of legal settings.

Emotion

Traditional economics and to some extent the emerging field of behavioural economics have neglected the effects of emotion. However, the last 15 years has seen an explosion of research in psychology on emotion^{62 63}⁶⁴. Prior to this, emotions were thought to be a disruptive and unnecessary aspect of human decision making. Now it is recognised that emotions play an important role and their impact is much better understood. Also, the negative effects of emotion on legal services decisions making was mentioned frequently by interviewees. Research has identified a number of ways in which emotional states can affect human judgement and decision making:

⁶² Kahneman, D. (2012) *op cit* Chapter 13

⁶³ Peters, E., Vastfjall, D., Garling, T. & Slovic, P. (2006) Affect and decision making: a “hot” topic. *Journal of Behavioral Decision Making*, 19, 79 – 85.

⁶⁴ Newell, B. R., Lagnado, D. A. & Shanks, D. R. (2007) *op cit*. Chapter 13

Affect as information: Zajonc⁶⁵ argues that emotional reactions associated with feelings of like and dislike precede more cognitive evaluations of decision alternatives. He suggests that we often delude ourselves into thinking that our choices are based on careful evaluations of pros and cons when, in reality, they are based on these simple feelings. These ideas have been further developed by research showing that decision makers often use how they feel at the time as a guide to the attractiveness of the option being considered. Thus people in a negative emotional state, because of some prior difficulties or problems, may wrongly attribute these feelings to their evaluation of a decision alternative. This false attribution will lead to a more negative evaluation of the decision alternative than would occur if they had been in a neutral or positive emotional state. Feelings are also often used as a basis for assessing risk. Paul Slovic and his co-workers⁶⁶ have shown that if an event induces negative emotions it is judged as relatively risky. If, however, it induces positive emotions it is judged as relatively safe.

Comparing disparate options: When people have to compare decision options that have few or no attributes in common they may use how each makes them feel as a basis for comparison e.g. do I spend my money on litigation or having a family holiday. Since they cannot compare 'chalk and cheese', affect provides a common currency for comparison purposes. Decision makers can compare and integrate the good and bad feelings elicited by each option rather than having to make sense out of disparate features of each option.

Influences which information is considered: Damasio and colleagues⁶⁷ developed the somatic marker hypothesis arguing that memories include information about the emotional state that was evident at the time the information was stored. When people are experiencing a particular emotional state memories associated with that state are primed i.e. temporarily more accessible. This is called 'affect priming' and influences the information likely to be used when people make judgements and take decisions. This means that the information people use to make a decision will differ according to their current emotional state.

Influences the thinking strategy used: Research shows that people in negative states think more analytically, systematically and in a more focused way i.e. System 2 thinking. In contrast to this people in positive states think in a simpler and more expansive way that is often more creative i.e. System 1 thinking⁶⁸. These effects reflect the fact that emotions indicate how effectively a person is interacting with the world around them. Negative emotions indicate problems with this interaction, so focused analytical thinking is appropriate to understand and solve the problem. Positive emotions indicate an effective interaction, so simpler but expansive and creative thinking is possible since there are no particular difficulties that need to be addressed.

Fatigue: Many legal services consumers are likely to be in a state of fatigue brought about by the amount of mental and physical activity required to manage the situation and worry about the problem and how it will turn out. Research shows that fatigue leads people to rely to an even greater extent on simple forms of System 1 thinking due largely to the limited amount of energy available for System 2 to monitor the appropriateness of the System 1 output. For example, research on parole decisions made by very experienced judges shows that immediately after a food break the likelihood of a defendant receiving a favourable ruling is 65%. As the time since the last break increases so the percentage of favourable rulings drops such that just before the next break the actual percentage is very close to zero! As fatigue increases so the judges had less mental capacity available so they increasingly opted for the default option which is to deny parole.

⁶⁵ Zajonc, R. B. (1980). 'Feeling and thinking: preferences need no inferences.' *American Psychologist*, 35(2), 151–75.

⁶⁶ Slovic, P., Peters, E., Finucane, M. L. & MacGregor, D. M. (2006) Affect, Risk, and Decision Making. *Health Psychology*, 24, S35–S40.

⁶⁷ Damasio, A. R. (1994). *Descartes' error: Emotion, reason, and the human brain*. New York: Avon.

⁶⁸ Schwarz, N. (2000). 'Emotion, cognition, and decision making.' *Cognition and Emotion* 14, 433–40.

Managing emotions: Some have argued that many of the actions that people take are based on a desire to manage emotions, rather than maximise the value of outcomes or achieving goals. Thus people will have a preference for options that help sustain positive mood states and reverse negative mood states. For example, research shows that people in positive emotional states preferred less risky options because they were more likely to lead to positive outcomes than riskier options, making it more likely that this choice would sustain this positive state⁶⁹. The research on negative mood states is more contradictory largely because researchers have often failed to distinguish between different types of negative affect e.g. being angry is very different from being frightened. This distinction has been the lynchpin in the most complete analysis of the effects of emotion on judgement and choice developed by Jennifer Lerner and her colleagues in the Appraisal Tendency Framework.

Appraisal Tendency Framework: This provides the current and in many ways the most complete account of the effects of emotion⁷⁰. The framework distinguishes between emotions that are:

- *Integral to the decisions:* feelings and emotions engendered by the decision situation itself. For example, consumers of legal services may have difficulty choosing between providers that all seem very similar or have to make choices where all possible outcomes are negative. Both situations are likely to induce negative emotions.
- *Incidental affect:* feelings that are ‘in the background’ and not directly related to the choice in hand but can be misattributed to it or can influence underlying decision processes. For example, legal episodes are often associated with negative life events that may induce a broad range of negative emotions such as anger, fear sadness that will be in the background when people make key legal decisions.

Most research has focused on incidental emotions, though findings are relevant to the first as well. The framework moves beyond previous research that has simply distinguished between positive and negative emotional states. Instead Lerner and colleagues argue that emotions are based on an appraisal mechanism that assesses one’s progress to achieving key goals. For example, in the legal setting the goal might be separating from a partner, claiming compensation for an injury or moving house. Negative emotions are induced when progress is thwarted and people’s appraisal of how and why these are thwarted is crucial in determining emotional states. Lerner argues that there are different appraisal patterns that can be defined in terms of six key dimensions - certainty, pleasantness, attentional activity, control, anticipated effort, and responsibility. For example, the appraisal leading to anger is associated with *certainty* or confidence about what has or is happening and the cause of the anger. It is also associated with a belief that another person was *responsible* rather than attributing the cause to oneself or the situation. Finally anger is associated with a belief that one has sufficient *control* to influence the situation and is able to cope with it. Sadness is similar in that it is associated with an appraisal of *certainty* about what has happened but different in that it is associated with a feeling of low personal *control* over events i.e. people believe that there is little they can do to affect things. In contrast to this, fear is associated with an appraisal of *uncertainty* about what is actually happening and low personal *control* over events.

Crucially these appraisal patterns spill over to other situations. While a person is still feeling angry from a previous situation they are also likely to be overconfident about their understanding of the current situation and the amount of personal control they have over events. Similarly, a person who is still feeling sad is likely to

⁶⁹ Isen, A., and R. Patrick (1983). ‘The effect of positive feelings on risk-taking: when the chips are down.’ *Organizational Behavior and Human Performance*, 31, 194–202.

⁷⁰ Han, S., Lerner, J. S & Keltner, D, Feelings and Consumer Decision Making: The Appraisal-Tendency Framework. *Journal of Consumer Psychology*, 17, 158–168.

underestimate the amount of personal control they have in a new situation so fail to act when it is appropriate to do so.

Finally, the Appraisal Tendency Framework draws on previous research suggesting that emotions are associated with particular action tendencies – automatic responses for dealing with the emotion. For example, anger is associated with a desire to change the situation and to “move against” another person or obstacle by fighting, harming, or conquering it. Anger may also be associated with an urge to hurt a target.

These findings are crucially important in legal situations. For example, during a messy divorce a consumer may be in a state of anger (at least on those occasions when they are thinking about the situation). This will mean they are likely to be overconfident about their interpretation of what is actually happening and their ability to influence future events. In addition, action tendencies may lead them to a very strong desire for changing the situation and to move against protagonists even to the point of harming them. Since these tendencies are likely to remain over time (at least while the person remains angry) the consumer may be operating with a biased view of what is occurring, their ability to influence key events and the actions that are appropriate. In addition their thinking may be dominated by thoughts of revenge.

In contrast to this, a consumer dealing with probate following the loss of a partner may feel very sad. The appraisal pattern associated with sadness is associated with an overconfident interpretation of the cause of the sadness that may be difficult to change. But even more important is that sad people believe they have very low personal control over the current and future situations. This is likely to lead the person to feel there is little point in taking action to remedy problems. These appraisal patterns may combine to leave an individual unable to make key decisions about both legal and non-legal matters for some considerable period of time following the loss of a partner.

Finally, a person who is wrongly accused of a crime is likely to be frightened. The appraisal associated with fear will lead a person to feel very uncertain about what is actually happening that may lead to them to remain confused even as situations are clarifying. In addition, the feelings of low personal control may limit them from taking actions that are necessary to remedy the situation.

Implications

Legal situations are often emotionally charged and energy draining making it highly likely that the effects described above play an important part in consumer judgements and decisions in legal settings. This view is consistent with interviewee statements suggesting that emotion often has a detrimental effect upon the key decisions taken by consumers. The findings provide important insights about the nature of these changes showing that emotions affect how confident people are in their interpretation of a legal situation, whether and how they lay blame on others and the degree to which they believe that they can affect the situation. The emotion may also predispose people to particular actions such as revenge. Fatigue leads people to stick with the default option. These changes may lead consumers to misunderstand legal situations and act inappropriately. Research is needed to explore these effects specifically in legal settings. However, the current research provides important insights for legal services professionals about how different emotions may be affecting their clients. It also raises issues about the timing of advice. For example, should advice be given later when the consumer is in a neutral emotional state? A neutral state will allow them to process legal advice in a less biased way. Or should this advice be given earlier as a means of counteracting rash actions that may otherwise be taken because of this emotional state?

5. Expert Decision Making

Research indicates that experts make decisions in different ways from novices⁷¹. Experts are able to use their knowledge and experience to streamline the process. The first option they consider is often the appropriate action to take and this saves them from having to consider a wide set of other options as prescribed by the rational theory of decision making. The most influential explanation of expert decision making has been developed by Gary Klein in his Recognition Primed Decision Making (RPD) model⁷². He argues that through experience people build up patterns of typical situations in their memory— these are akin to prototypes of typical situations. Each pattern contains:

- The most typical features of the situation and how these are expected to change over time as the situation develops.
- A set of plausible goals i.e. what would an expert normally try to achieve in the situation.
- The usual action or actions taken in this situation.

When experts make decisions they first engage in a ‘situational assessment’. This involves making sense of the current problem in terms of its key features and the goals that should be achieved. The situational assessment may be determined, in part, by many of the System 1 forms of thinking described in the previous section. Having completed the situational assessment experts then try to match it to the patterns of typical situations that they have built up through previous experience that are stored in their memories. They match in terms of the key features of the situation, expectations about how these may change over time and the goals to be achieved. If there is a strong match with an existing pattern derived from previous experience then the usual action taken when this pattern occurs is implemented. In this case the decision is made quickly and effortlessly and has all the characteristics of intuitive System 1 thinking. If the match is less strong then the decision maker may engage in mental simulation. This involves thinking how the usual action may play out in the current situation and the modifications necessary to take account of key differences between the current and typical situations. Mental simulation is more akin to System 2 thinking. If it is not possible to find a satisfactory match then other analytical System 2 thinking procedures are implemented more akin to those described in the rational model.

Much of the research supporting the RPD model has been in military and emergency situations. For example, fire chiefs and tank commanders build up patterns in their memories of situations through training and extensive experience. These patterns are matched against new situations to determine what actions are appropriate. This allows these experienced professionals to make quick and efficient decisions; this is crucial in the fast changing environments in which they work. Doctors also use this form of decision making. Much of medical training is focused on developing patterns in doctors’ memories that include the symptoms, treatment goals and interventions associated with particular illnesses.

Other research on expert decision making also provides important insights about RPD type processes. An investigation of differences between expert and novice probation officers showed that both groups followed an RPD type process when making client based decisions⁷³. These patterns were akin to stereotypes e.g. ‘the petty criminal’, ‘the drug user’. Experts had fewer patterns/stereotypes (an average of 8 rather than 12 for novices) but each was more elaborate in terms of key features and involved finer distinctions in terms of the action

⁷¹ Klein, G (2011) *Streetlights and Shadows: Searching for the Keys to Adaptive Decision Making*. Cambridge USA: Bradford Books

⁷² Klein, G. (2008). Naturalistic decision making. *Human Factors*, 50, 456-460.

⁷³ Lurigio, A. J. & Carrol, J. S. (1985) Probation Officers' Schemata of Offenders: Content, Development, and Impact on Treatment Decisions. *Journal of Personality and Social Psychology*, 48, 1112-1126.

deemed appropriate. This finding has been replicated across a broad range of domains⁷⁴.

Recently, research has found similar processes underlying strategic decision making in expert managers⁷⁵.

An RPD type process is highly appropriate since it ensures that decisions are made quickly and on the basis of a good deal of pre-existing knowledge and experience. However, there are some potential disadvantages of this approach to decision making:

- Once developed, the patterns which capture expertise can remain fixed despite changes in the decision environment –referred to as cognitive entrenchment⁶⁰. RPD processes are automatic so there is little immediate opportunity for the reflection or evaluation necessary for professionals to learn about significant changes in their environment. As a consequence changes in the professional environment may only be adapted to slowly and may occur only after costly mistakes signal the need for such change. This highlights the importance of training that addresses key changes in the professional environment in ways that lead to modifications in the patterns held by these experts.
- Some groups tend to use RPD processes when there is little justification for doing so. For example, relatively inexperienced decision makers may use RPD processes despite having insufficient cases to build up valid patterns. In other cases professionals seem to use simple matching rules even though there is not the body of knowledge to support them. For example, managers often match new situations to those they have experienced in the past and simply do what they did on the last couple of occasions given it worked. This occurs even when there is nothing to support this link and the previous success is due to chance alone.

Implications

Our interviews with practitioners support the conclusions drawn from the research literature that legal services professionals are very likely to be similar to other professional groups in using an RPD approach when making decisions for or suggesting options to their clients. (This suggests that a categorisation process and a thorough situational assessment underpin their legal reasoning and decision making).

Recognising the crucial role of RPD processes in legal reasoning has four important implications for the profession:

- There is a need for research to understand better the actual patterns/categories used by legal professionals, their validity as guides to legal action and advice, and the extent to which different specialists use similar patterns (a failure to use similar patterns is likely to indicate inconsistency across the profession).
- The interviews distinguished between legal services activities that linked specifically to points of law and precedence e.g. activities of barristers, and those that were associated with broader legal advice giving e.g. activities of family solicitors. It is not clear whether these two groups operate in the same way. One possibility is that barristers use case law much in the same way as doctors use medical science whereas family solicitors develop client types in the same way as social workers e.g. stereotypes such as ‘the petty criminal’, ‘the drug user’ (as described in section 5). If there are these differences then it may be necessary to think differently about how these different groups use RPD processes. The differences may also impact negatively on communications between the two groups about specific cases.
- Legal training needs to address the implications of changes in the legal services market. Without this there is a danger that suppliers are using patterns and categories that are inappropriate given changes in the legal environment. Turbulence in this market may fundamentally change the key characteristics of legal problems

⁷⁴ Dane, E. (2010) Reconsidering the trade-off between expertise and flexibility: a cognitive entrenchment perspective. *Academy of Management Review*, 35, 579 – 603.

⁷⁵ Gary, M. S. & Wood, R.E (2011). Mental models, decision rules, and performance heterogeneity. *Strategic Management Journal*, 32, 569–594.

that consumers present and the advice that professional should provide. The RPD model provides a framework for developing training of this kind.

- Previous applications of the RPD approach have highlighted the importance of developing support for situational awareness. Our interviewees highlighted that some practices have already developed checklists and structured interviews for this purpose. However, there is considerable scope for more work in this area that involves using principles and procedures developed in other professional domains and the sharing of existing practice in the legal domain. This is crucial given the critical role of situational awareness in expert decision making.

6. The Organisational Context

Legal services firms are facing turbulent times with significant changes in: the legal aid provision; regulations concerning ownership of law firms; the introduction of new providers in the legal services market; and the increased availability of on-line information and advice. The interviews highlighted that:

- These changes are very important and legal services need to respond to them appropriately if they are to be successful.
- If legal firms do not adapt to the changes they are in danger of being damaged by them.
- Small and single-owner firms may be particularly vulnerable.
- Changes involve important reputational issues.
- In general, these changes are perceived negatively as a threat rather than an opportunity.

Theory and research in behavioural economics on how firms make strategic choices has the potential to provide important insights about the ways in which legal services providers are making decisions in the face of the turbulent market. In addition, this work has the potential to suggest ways of helping firms make more effective decisions.

Although the central focus of behavioural economics research has been on individual decision making there has been a body of this work that has been used to explain the strategic decisions taken by organisations⁷⁶. This work is nascent so is much less developed and less coherent in terms of underlying theory. However, there are three bodies of work that are relevant to an understanding of organisational decisions in the legal context.

Individual heuristics in the organisational context

One approach has been to assume that the individual System 1 forms of thinking associated with heuristics and biases also play a part in the strategic decisions at the organisational level⁷⁷. There are two reasons why this should be the case:

- First, these forms of thinking are assumed to be universal across individuals so likely to operate in a similar way for those involved in organisational decisions.
- Second, in situations where powerful individuals dominate organisations (by dint of personality or position) there is the potential for the simplifications and biases inherent in individual decision making to be present in key decisions taken at the organisational/strategic level. For example, the head of an American retail organisation held a very strong belief that there was going to be a depression at the end of the Second World War⁷⁸. This belief was based on the knowledge that a depression had occurred at the end of the First World War and through matching (representativeness) the new situation (end of the Second World War) to this. So strongly held was this belief that the individual decided not to expand his business, unlike his rivals. His poor decision led to a permanent loss of market share.

We may conclude that the heuristics and biases reviewed earlier are likely to be an important feature of organisational and strategic decisions.

⁷⁶ Powell, T. C. Lovallo, D. and Fox, C. R. (2011). Behavioral strategy. *Strategic Management Journal* 32: 1369–1386.

⁷⁷ Maule, A. J. & Hodgkinson, G. P. (2002) Heuristics, biases and strategic decision making. *The Psychologist*, 15, 68-71.

⁷⁸ Schwenk, C.R. (1984). Cognitive simplification processes in strategic decision making. *Strategic Management Journal*, 5, 111–128.

Implications

The strategic decisions taken by legal firms in response to rapid changes in the legal services market are likely to be underpinned, at least in part, by the kinds of System 1 thinking described earlier in the sections on consumer decision making. This is particularly likely to occur in those legal firms that are single-owner or dominated by a single individual. Decisions heavily dependent on System 1 thinking run the risk of the errors and biases associated with this form of thinking.

For example, the interviewees suggested that current choices related to new market conditions are framed negatively by many individuals and organisations. Framing research reviewed earlier indicates that negative framing by individuals and organisations leads to riskier choices thereby making the organisation more vulnerable. Similarly, the threats associated with these changes may induce a broad range of emotions each of which affects the choice process e.g. anger leading to overconfidence about the level of control they have over events. There is a need for research to explore in more detail the actual processes in operation in legal services contexts, their efficacy and the procedures that are appropriate to improve the decisions taken.

Group heuristics in the organisational context

A second approach recognises that groups of individuals are often responsible for the decisions taken by firms and has identified a range of heuristics and biases that operate at the group level⁷⁹. Groups should make more informed decisions than single individuals given they have greater knowledge and intelligence than any of these individuals. However, there are a number of group processes that can inhibit the sharing of this information or bias the outcome of this sharing. Some of these processes are briefly reviewed below:

Conformity

Individuals often change what they say in group discussions in order to be seen to be consistent with the majority view, particularly if this view is being endorsed by a strong leader. This occurs out of fear of being 'different' from everyone else and being rejected by other group members. New or younger group members may be particularly prone to conformity thereby inhibiting the introduction of new ideas. Conformity deprives strategic groups of crucial information that challenges emerging views, assumptions and intelligence that are outmoded and, in some instances, incorrect. In addition conformity often leads the group to hold more extreme views. For example, research shows that if individuals are broadly risk averse at the outset, then following discussion the group judgement becomes even more risk averse. Similarly, if individual views are broadly risk seeking at the outset the group's attitude to risk shifts towards more risk taking⁸⁰.

Biased information pooling

Research shows that groups are much more likely to discuss and make use of information that is available to all members ('shared' information) and less likely to exchange and discuss information that is unique to a single individual ('unshared' information). Thus the unique contribution that individuals can make is often not realised

⁷⁹ French, S., Maule, J., & Papamichail, N. *op cit.* Chapter 11.

⁸⁰ Isenberg, J. (1986) Group polarisation: a critical review and meta-analysis. *Journal of Personality and Social Psychology*, 50, 1141-1151.

(see Hinz et al 1997 for a review of this work). This challenges a key rationale for group decision making – that in comparison to individuals, groups are informed by a more diverse range of information.

Evaluation apprehension

When individuals feel that they are being judged or evaluated by others in (or outside) the group, they may self-censor their contributions even though these may be constructive and relevant to group goals. This is particularly likely in new group members so reducing the extent to which they feel able to present new ideas.

Confirmation bias

Similar to individuals (as described earlier) groups tend to focus on information that confirms their initial views and ignore or discount disconfirming information. Research indicates that groups are less likely to suffer from this bias, but when they do the effect is even more extreme. On some occasions this leads groups to be extremely confident about incorrect interpretations of the decision context and the action that needs to be taken.

Groupthink

Janis analysed a dozen or so spectacularly bad policy decisions in the USA to determine what each had in common in terms of the underlying influences and processes⁸¹. He discovered a set of sub-optimal processes similar to those described above. More importantly he argued that these sub-optimal processes were more likely to occur when there are:

- High levels of cohesiveness between group members from working together often.
- Group insularity i.e. little or no inputs or influences from outside the immediate group.
- A leader who dominates the group.
- A lack of systematic decision procedures for making decisions e.g. no use of structured procedures such as PESTs, decision trees, cognitive mapping.
- A turbulent environment that is seen as threatening.

Implications

The interviews suggested the following groupthink factors:

- Firms often devolve key organisation / strategic decisions to specific groups.
- These groups are often made up of just the partners, all of whom are likely to have worked together a lot in the past. It is unknown whether these groups seek regular inputs from others in or outside the firm.
- Most groups do not have established procedures that scan for changes in the legal market and for making decisions with respect to these changes.
- Many legal services firms see the current market changes as turbulent and threatening.

Taken together these factors suggest that groupthink could be a factor underpinning the strategic decisions taken in legal firms. Even where key strategic decisions involve groups that include individuals other than partners, conformity, biased information pooling and evaluation apprehension could still inhibit the contributions so leaving the group vulnerable to groupthink. Research indicates that these negative processes

⁸¹ Janis, I. L. (1972). *Victims of Groupthink: A Psychological Study of Foreign Policy Decisions and Fiascos*. Boston, Houghton-Mifflin.

can be managed by structuring the group process in particular ways (e.g. use of the Delphi technique that involves groups interacting remotely rather than face-to-face⁸²).

If legal services firms are to respond effectively to market changes they need to develop strategic groups with a diversity of knowledge and backgrounds that adopt appropriate processes. This is crucial if firms wish to prevent groupthink and other factors known to limit the effectiveness of their strategic decision making. There are a broad range of structured procedures available to help strategic groups in legal firms to maximise their potential (French et al, 2008). Further work is needed to consider how strategic groups in legal firms are making decisions, how vulnerable they are to groupthink and other group biases and how training and structured procedures can be introduced to overcome these errors and biases.

Organisational heuristics

Decision processes can also be described at the level of the firm. These processes describe the actions of the firm as a whole rather than actions associated with specific individuals or groups. This work suggests that firms learn processes from experience, with repeat engagement allowing firm members to draw inferences and gain insight from the outcomes of their actions.

One branch of this research has drawn on theory and research in behavioural economics by looking at the heuristics that firms may learn through experience⁸³. Initially researchers thought that heuristics were idiosyncratic to specific firms (in contrast to research on consumer decision making described above showing that the same heuristics were used by most people). However recent work has found evidence for common organisational heuristics when investigating specific business activities such as product development or forging alliances. For example, research indicates that firms acquire portfolios of heuristics for dealing with their business activities⁸⁴. This work has identified a set of heuristics used by firms for capturing business opportunities. These heuristics consist of:

- ‘Boundary rules’ to determine which opportunities to pursue and which to ignore.
- ‘How to’ rules determining how to deal with opportunities.
- ‘Priority’ rules to determine how to rank order acceptable opportunities.
- ‘Timing’ rules for phasing and executing opportunities.
- ‘Exit’ rules to determine when to drop opportunities.

For example, when a firm is new to acquiring other firms it is likely to use a set of boundary rules based on matching (representativeness) between the activities of their own firm and those being considered for acquisition. A greater degree of match increases the attractiveness of the option making it more likely that the firm will be selected. With more experience, other aspects are used for determining the degree of interest such as ease of integration and complementarity of markets. Similarly, priority rules for choosing between options included heuristics such as ‘take the best’ described earlier in the section on consumer decision making.

These findings show that there are sets of organisational heuristics that are similar to those used by individuals. Firms are thought to use heuristics because they provide quicker, less resource intensive, easy to access and remember ways of resolving decision problems. Findings also show that these heuristics are actually surprisingly

⁸² French, S., Maule, J., & Papamichail, N. (2009) *op cit*. Chapter 11

⁸³ Bingham, C. B. & Eisenhardt, K. B. (2011). Rational heuristics: The ‘simple rules’ that strategists learn from process experience. *Strategic Management Journal*, 32: 1437–1464.

⁸⁴ Eisenhardt, K. M., Sull D. (2001). Strategy as simple rules. *Harvard Business Review*, 79, 107–116.

accurate and sometimes out-perform rational based approaches⁸⁵. Firms with better developed heuristics have been shown to be better performers.

Tecce presents a useful framework for thinking more generally about how heuristics and other behavioural economics concepts are involved in the key activities of firms⁸⁶. He argues that the evolutionary and economic fitness of firms depends on three capabilities:

Sensing and shaping threats and opportunities

Dynamic markets, such as the legal services market, are constantly in a state of flux. This means that organisations need to monitor the business environment for threats and opportunities relating to changes in consumer needs, technological opportunities, competitor activity and, in the case of legal services, regulatory structure. A major problem is that organisations often have engrained views of the world. They have fixed lenses through which they observe what is happening and engage in confirmation thinking when making sense of what they see. Also, many organisations do not have mechanisms in place to scan and interpret intelligence about market changes. These problems lead organisations to maintain an inaccurate mental model of the world that leads to missed opportunities and overlooked threats.

In a recent publication Hodgkinson & Healey⁸⁷ argue that there are also a range of emotional factors that limit the effectiveness of sensing and shaping in organisations (similar to those described earlier in the emotion subsection in consumer decision making). For example, people suffer from the 'ostrich effect'. They bury their heads in the sand to shield themselves from information about changes in the business environment that causes them psychological discomfort. This represents an effective way of managing negative emotions but not of managing firms to success.

A number of techniques have been developed to improve sensing and shaping e.g. Porter's Five Forces that identifies the factors that need to be considered when assessing a firm's competitive position.

Seizing opportunities

Once an opportunity or threat has been sensed it must be addressed by unlocking and evaluating existing strategies and then determining appropriate actions to take. This usually requires choosing one among a number of possible actions. Tecce argues that this activity involves strategising to ensure that decisions are timely, build on increasing returns advantages and leverage products and services from one application to another. He also highlights the importance of developing business models that define commercialisation strategies and investment priorities.

Many of the consumer choice heuristics and biases reviewed earlier affect managers when they are making choices about seizing opportunities. This makes managers vulnerable to the biases when engaging in this form of thinking. In addition, group decision making biases and those associated with emotion are also likely to be

⁸⁵ Bingham, C. B. & Eisenhardt, K. M. (2011). Rational heuristics: the 'simple rules' that strategists learn from process experience. *Strategic Management Journal*, 32, 1437–1464.

⁸⁶ Teece, D. J. (2007). Explicating dynamic capabilities: the nature and micro-foundations of (sustainable) enterprise performance. *Strategic Management Journal* 28, 1319–1350.

⁸⁷ Hodgkinson, G. P. & Healey, M. P. (2011) Psychological foundations of dynamic capabilities: reflexion and reflection in strategic management. *Strategic Management Journal*, 32, 1500 – 1516.

evident and influence both what is chosen and how effective it turns out to be. For example, Hodgkinson & Healey argue that emotional commitment to decisions is quite as important as commitment based on System 2 like evaluation processes.

Reconfiguring structures and assets to maintain competitiveness

Once actions have been implemented successful organisations transform the firm in the light of changes to ensure fitness of purpose. This may involve recombining or reconfiguring assets and organisational structures to take account of changes in the nature of the enterprise, market conditions and technologies. The speed of change depends in part upon how dynamic the market changes are. Similar to seizing opportunities, many of the individuals and group heuristics and biases, reviewed earlier, limit the effectiveness with which firms reconfigure. In addition, firms may need to manage the negative emotion in staff required to change roles and responsibilities as part of this process.

Implications

The interviewees suggested that some legal services firms are aware of the importance of sensing and seizing. For example, they kept abreast of changes in the legal service market by monitoring a broad range of information sources. However, interviewees also mentioned that many, if not most, firms did not and so were at the mercy of market changes.

Evidence for seizing comes from interviewees' comments indicating that changes are interpreted in the context of the current strategic plan or through specialist groups set up specifically for that purpose. In addition, experts and/or specialists may be involved to help members of the firm. However, empirical research is needed to test whether legal firms use systematic or much more haphazard processes. Whether legal firms recognise the importance of reconfiguration remains an open question.

Taken together the evidence suggests that many legal services firms may be ill-equipped to deal with the changes that are taking place in the legal services market. The interviewees suggested that firms are poor at sensing, seizing and reconfiguring so are vulnerable to the changes that are occurring in the legal services market. There is a need for further research to investigate and evaluate how legal firms are currently engaging in strategic thinking and action in order to assess the extent to which the problems discussed above are present and to assess the damage they are having. However, there are three broad approaches available to help legal services firms deal with these changes:

- One approach involves the use of structured techniques designed to facilitate key aspects of strategic thinking. A full review of these techniques lies outside the scope of this report. However, techniques such as Porter's Five Forces, PESTLEs and cognitive mapping all provide structured approaches that facilitate the strategic thinking underpinning sensing. Techniques such as decision trees, decision analysis and scenario planning provide useful ways of facilitating seizing and reconfiguration. For a general discussion of these techniques see French et al⁸⁸.
- A second approach involves training that introduces senior staff in legal firms to the principles of strategic thinking and decision making. Courses could provide these individuals with better ways of thinking about and managing key strategic issues, particularly those relevant to turbulent business environments.
- A third approach involves the use of consultants who can facilitate key strategic groups in ways that induce appropriate ways of thinking and acting in a strategic way.

⁸⁸ French, S., Maule, J., & Papamichail, N. *op cit*

7. Overcoming Bias

The preceding sections have identified forms of System 1 thinking that lead to biased decision making in legal services consumers, professionals and organisations. Researchers have identified two broad strategies for overcoming these biases: one targeted on problems associated with a specific aspect of System 1 thinking; the other prescribing a structure to follow which induces System 2 thinking⁸⁹. Each of these is explored briefly in the next two sections.

Minimising bias from specific aspects of System 1 thinking.

Techniques targeted on the errors associated with specific aspects of System 1 thinking include:

Consider the opposite: Research shows that biases such as confirmation thinking and anchoring can be overcome by asking people to think about or write down why their initial judgement or the existing anchor might be wrong^{90 91}. This is often hard to do because it runs counter to the usual way of thinking i.e. there is a strong bias in favour of thinking about why initial views are correct. One way of overcoming this difficulty is a technique called *prospective hindsight*. This involves asking a person first to imagine that their judgement or anchor is actually wrong and then ask them to give reasons why this might be the case. Research shows that this technique makes it easier to consider contrary reasons, so is more effective at de-biasing. These techniques have been shown to reduce the chances that people are confident about incorrect interpretations or are too influenced by anchors.

Think like a statistician: In situations where there are numerical data available to make a judgement e.g. success rates in particular areas of litigation, people make better judgements if they are instructed to ‘think like a statistician’. This instruction leads them to take more account of the numerical data, thereby leading to a more informed judgement or choice.

Taking an outside view: The planning fallacy outlined earlier leads people to be overly optimistic about the resources needed to complete an activity or task. This occurs even when they have feedback from past predictions indicating they were too optimistic. Lovallo and Kahneman argue that one important limitation underpinning these kinds of judgements is an over-dependence on ‘inside’ rather than ‘outside’ thinking⁹². As indicated earlier, inside thinking focuses on the specific positive features and characteristics of the problem/situation in hand and uses these to make predictions about such aspects as its likelihood of success, profitability or time to completion. Lovallo & Kahneman argue that people need to engage in outside thinking by focusing on the outcomes of similar problems that have been completed in the past. This involves looking at the range of outcomes from previous cases and assessing where the current case fits within that distribution. Lovallo and Kahneman present a 5-step procedure for generating outside thinking.

Framing elaboration: Research indicates that framing biases may be overcome by getting people to develop more elaborate decision frames⁹³. At the heart of this approach is the assumption that people who ‘think harder’ will develop more elaborate mental models of the problem that are less susceptible to the framing bias. Simply telling people to think harder is rarely successful. Instead techniques such as cognitive mapping should be used.

⁸⁹ French, S., Maule, J., & Papamichail, N. (2008) *op cit*

⁹⁰ Larrick, R. P. (2004). Debiasing. In D. J. Koehler & N. Harvey (Eds) *Blackwell handbook of judgment and decision making*. Oxford: Blackwell.

⁹¹ Galinsky, A. D. & Mussweiler, T. (2001) First offers as anchors: The role of perspective taking and negotiator focus. *Journal of Personality and Social Psychology*, 81, 657 – 669.

⁹² Lovallo, D. P., & Kahneman, D. (2003). ‘Delusion of success.’ *Harvard Business Review* 81(7), 57–63.

⁹³ Arkes, H. R. (1991). Costs and benefits of judgment errors: Implications for debiasing. *Psychological Bulletin*, 110, 486 – 498.

As explained in the next section in more detail, cognitive mapping involves individuals drawing a diagram that identifies all the key concepts and the relationships that exist between them.

Implications

The techniques identified above can help consumers gain a better understanding of their problem and the actions they should take, as well as helping them to determine whether they need legal advice. These techniques could be included in general information and advice provided by bodies responsible for consumer support e.g. frontline regulators. They could also be used by legal services suppliers when exploring a consumer's problem. For example, with training legal services professionals could be taught to incorporate 'consider the opposite thinking' into interviews designed to identify and understand a client's problem. The interviews indicated that it was often hard to get to a client's root problem – these techniques have the potential to do this. It is also worth noting that legal services professionals are highly likely to find these techniques useful in their own professional and strategic decision making. Similar to other professionals, System 1 thinking is highly likely to underpin many of their decisions making them vulnerable to error and bias. There is considerable potential for incorporating these techniques into their usual ways of making professional and strategic choices.

Structured approaches

There is a broad range of structured techniques to help individuals, groups and organisations make better decisions⁹⁴. In this short review we identify two different types of technique:

Problem Structuring Techniques

It is very important to develop a full understanding of a problem before deciding on which action to take to deal with the problem. This is true for individuals thinking about whether to take legal action and for legal services organisations determining how they should respond to changes in the legal services market. A number of techniques have been developed to help individuals and organisations to structure problems:

- *Lists*: These act as a prompt to decision makers to ensure all the relevant factors are considered. For example, in a SWOT analysis (Strength, Weakness, Opportunity, Threat) individuals or groups generate features of the problem relevant to each heading. This overcomes confirmation and motivational biases that lead people to focus on positive aspect alone. There is a broad range of lists that are particularly relevant for strategic decisions taken by organisations. These are likely to be very helpful to legal services organisations when trying to decide how to deal with the increased turbulence in the legal service market.
- *Plots*: Much can be done by drawing two axes with appropriately defined dimensions and getting decision makers to locate key elements of the problem across the four quadrants produced by these axes. French et al illustrate this by showing that using the dimensions of 'power' and 'stake' can help in working out how to respond to key stakeholders involved with a problem. For example, those with power to affect key issues may need to be managed and involved differently from those with limited or no power. Plots can prevent decision makers from overlooking the impact that others may have on the actions they plan to take.
- *Trees and network*: The problem can often be better understood by using a tree like structure that identifies all the actions that a decision maker can take, the outcomes that may follow and how the

⁹⁴ French, S., Maule, J., & Papamichail, N. op cit

decision maker might respond to these outcomes. Drawing a tree using paper and pencil or on a computer allows the decision maker to develop a more complex and complete model of the problem than would be possible if they held this model in their mind i.e. people have limited capacity for this kind of thinking. Also, people are more likely to identify errors and omissions in their model of the problem when it is in front of them rather than held inside their head. There is research showing that structuring medical information in terms of a decision tree increases people understanding of the problem and the options available to them as well leading them to feel more informed about their treatment decisions⁹⁵.

Comparing decision alternatives

Decision Analysis is a term often used to describe a broad range of techniques that aim to help decision makers to act in accordance with the rational model of decision making. There are a suite of techniques designed to help decision makers generate a broad set of choice alternatives, identify the key objectives and values that need to be maximised and ways of evaluating and comparing alternatives to determine which is best. Although the procedures involve generating and comparing numbers, most advocates argue that it is the insights from generating numerical estimates that are just as crucial as the numerical outcomes themselves.

Implications

Structured techniques for supporting decision making have the potential to help both consumers and suppliers of legal services. Similar to the thinking techniques described in the previous section list, plots, trees and networks may be incorporated into general information and advice given by bodies responsible for supporting consumer decision making. These techniques can help consumers develop an elaborate mental model of their problem that includes their options, how to evaluate them and the possible role of legal services in providing the solution. Research indicates that these techniques lead consumers to feel more informed and confident about their decision making. These techniques can also help legal services organisations to understand better their strategic and business problems and the options they have available to meet difficulties and problems. Again these are relatively easy to use and have been shown to be very effective. There is also the potential for these techniques to be built into decision analysis designed to evaluate different options in terms of the organisation's key strategic objectives. Decision analysis can only be effective if it is facilitated by an appropriate expert who understands the full process and has the necessary software support to carry out all the steps involved.

⁹⁵ Carrigan, N., Gardner P. H., Conner M., and Maule A. J. (2004). The impact of structuring information in a patient decision aid. *Psychology and Health*, 19, 457–77.

8. Review of Behavioural Economics in Other Domains.

Overview

This section reviews reports from government departments, professional bodies and other sources concerned with behavioural economics and choice behaviour. The primary aim is to help identify which aspects of the academic review are relevant and to elaborate the discussion of theory and research contained within the review.

Methodology

We conducted initial exploratory desk research to identify behavioural economics research completed by Government and business. This included searching the websites of Government departments, professional bodies, prominent businesses, think-tanks, local authorities, charities and universities. In addition, a media review was conducted of major national press and of internationally renowned publications such as *The Economist* and *Harvard Business Review*. In all cases, the relevant sources were documented. In some instances information was not provided on the specific aspect of behavioural economics being used so we conducted further research and incorporated them into the review.

Selective Review of Behavioural Economics in non-legal domains

UK Government / Behavioural Insights Team

The Prime Minister and his supporters within Government have shown strong support for the use of behavioural economics for the development and delivery of Government policy. The Government announced the formation of a Behavioural Insights Team (BIT) in July 2010. The team draws on insights from academic research in the fields of behavioural economics and psychology and has, according to the Cabinet Office, identified public savings of at least £300m since its launch in 2010. BIT has been involved in a number of areas, including tax evasion and fraud, energy efficiency and data access⁹⁶. These successful applications of behavioural economics suggest it has considerable potential for understanding and influencing decisions in the legal services domain. We support this contention by looking in more detail at a number of recent applications.

Department for Health

Government policy has drawn on behavioural economics to reduce obesity. The Change4Life campaign involved over 200 partners drawn from the voluntary sector, businesses and local government, as well as over 50,000 local community groups. Several health charities including Cancer Research UK, Diabetes UK and the British Heart Foundation were also involved.

Businesses supported the movement by providing free gym access, discounted fruit and vegetables and low-cost bikes. These worked to 'change the choice architecture' by changing default options e.g. those defaulting to the cheapest but not necessarily healthiest option were encouraged to try discounted healthy food. Change4Life also adopted the behavioural economics framework of MINDSPACE⁹⁷ through its collaboration with a children's TV programme called *LazyTown*. Characters in this programme extolled the virtues of healthy lifestyles. This

⁹⁶ https://update.cabinetoffice.gov.uk/sites/default/files/resources/Behavioural-Insights-Team-Annual-Update-2011-12_0.pdf

⁹⁷ https://update.cabinetoffice.gov.uk/sites/default/files/resources/403936_BehaviouralInsight_acc.pdf

approach drew on key behavioural economics concepts such as ‘priming’ – current judgements and decisions are influenced by what has been just presented.

Over 400,000 families joined Change4Life in its first year and over 1 million mothers claimed to have made changes to their children’s behaviours as a direct result of the programme

A number of commentators have praised Change4Life for developing approaches based on a solid evidence base. The Sustainable Development Commission, for example, said that the programme made good use of messengers and provided a good example of how to integrate behavioural sciences into the design of an intervention.

However, the programme has not been without criticism. The Great Swapathon provided vouchers to families for discounted food products and activities. But far from encouraging healthy eating, some evidence suggested that providing discounted healthy products actually encouraged people to buy more unhealthy ones. Also the Department of Health has been criticised for its poor evaluation of the long-term effects of the programme.

Department for Transport

The Government has committed itself to reducing car use in order to reduce carbon emissions, improve health and reduce congestion. Behavioural economics has been used to try to achieve these policy objectives. For example, they have provided information and personalised travel planning through the Sustainable Travel Towns (STT) pilots. The STT initiative ran between 2004 and 2009 in Darlington, Peterborough and Worcester. The pilots were designed to explore the effectiveness of "smarter choices" measures, instead of the usual reliance upon fiscal and regulatory measures. Each of the towns employed multi-faceted packages of interventions incorporating a range of non-regulatory and non-fiscal measures, such as:

- The provision of new services, such as car sharing schemes, car clubs and community transport services.
- The provision of education and propaganda.
- Emphasis on community involvement.
- The engagement of individuals through consultation exercises, competitions, newsletters and feedback.

Surveys indicated that the three Sustainable Travel Towns saw reductions in car journeys of 7-9 per cent and increases across a total targeted population of 56,650 households in walking, cycling and bus use.

Jobcentre Plus

The BIT team has worked with three Jobcentres in different parts of the Country (Essex, North London, and Durham and Tees Valley) redesigning a range of different processes, focusing in particular on:

- Redesign of the initial contact with Jobcentres, so that initial work-focused conversations happen much sooner.
- Developing new tools which seek the active commitment of job seekers to engage in specific activities, linked to aspects of their daily routines. These are referred to as ‘commitment devices’ in behavioural economics.
- Building resilience and motivation of job seekers, for example by breaking down the process of finding work into manageable steps and enabling job seekers and advisors to understand their individual strengths. This meant that individual tasks did not over tax an individual’s capacity for thinking (a key concept in behavioural economics).

Local government

A number of local authorities have also looked into using behavioural economics concepts and principles to drive behaviour change in the public. In some instances they have been supported by the BIT.

Southend-On-Sea Borough Council, for example, is currently looking at using behavioural economics theories to reduce traffic congestion by increasing the number of people cycling and walking locally. Its campaign uses the Theory of Interpersonal Behaviour as a starting point. This model recognises the complexity of the decision-making process and acknowledges the importance of habit and the impact of environmental factors.

Legal services context

Behavioural economics theories have already been implemented successfully to effect behavioural change within the legal services context. With support from BIT the Courts Service managed to considerably increase the number of fine payments made. This was achieved by sending personalised texts rather than letters or emails. This approach relies on the MINDSPACE idea of 'salience', that people are more likely to be influenced by what their attention is drawn to and the extent to which it seems relevant to them. Personal texts worked by conveying a sense of specific relevance to the person receiving them. The programme has effectively reduced the number of bailiff interventions by 150,000 and generated around £30m of annual savings.

International examples

An initiative in Ontario, Canada, involving Durham Water⁹⁸, experimented with several mechanisms to reduce household water consumption. The scheme included an approach called 'building motivation over time.' This is founded on a branch of social learning theory⁹⁹ that suggests people learn from their environment and seek acceptance from society by learning through observing and imitating the actions of others. As a result, the programme used face-to-face interaction over a long period to demonstrate methods to reduce water consumption and influence behaviour change. Initially the program reduced peak water use in targeted neighbourhoods by 30%. After one year, this levelled off at around 17%. It cost \$19 per household in 2004 and is considered to be 1/5 the cost of the alternative - which is to expand the water supply infrastructure.

In Portland, USA, the timings of traffic signals were changed in order to reduce the petrol used by motorists when idling or accelerating. This intervention changed behaviour by re-scripting the practice of driving and was effective in reducing carbon emissions. This ensured that the default behaviour of individuals was changed. This relatively straightforward intervention saved 15,460 tons of CO2 emissions each year (equivalent to the emissions associated with the annual energy use of 1,194 US households). It cost \$533,000 to initiate but the returns were significant in terms of CO2 reductions and annual financial savings for motorists estimated at over \$4,000,000.

In Japan a campaign initiated by the Ministry of Environment¹⁰⁰ aimed at reducing energy use in buildings by setting air conditioners at no lower than 28 degrees centigrade throughout the summer months. Authorities drew on aspects of behavioural economics concerned with how people learn in social contexts and habituate to consumption behaviours. A new dress code was implemented for workers that involved removing ties and blazers and wearing clothing made from 'breathable' fibres. This helped to reinforce the practice as a social norm. Not only was the regulation of air conditioning achieved but the social norms surrounding workplace

⁹⁸ <http://www.toolsofchange.com/en/case-studies/detail/156/>

⁹⁹ <http://www.toolsofchange.com/en/tools-of-change/building-motivation-over-time/>

¹⁰⁰ <http://www.bbc.co.uk/news/business-13620900>

clothing attire changed. The Ministry estimated a 1.14 million ton reduction of CO2 emissions (equivalent to the annual emissions associated with the average energy use of 85,000 US homes).

Criticisms of the behavioural economics approaches

In July 2011 the House of Lords Science and Technology Committee published a report¹⁰¹ on the role of behavioural economics in Government attempts to influence behaviour change. The report concluded that non-regulatory measures such as those espoused by behavioural economists Thaler and Sunstein in the book 'Nudge' were less likely to be effective if used in isolation. The report argued that the Government's preference for non-regulatory interventions has encouraged officials to exclude consideration of traditional regulatory measures when thinking about behaviour change. It also suggested that a strong evidence base for the strength of behavioural economics led approaches would need to be built for future proposals to gain popular support.

Think-tanks play an important role in influencing Government policy and have been heavily involved in the debate on behavioural economics role in public policy. Many have written articles on the wider role of behavioural economics¹⁰², others have focused on specific areas of policy such as reducing carbon emissions¹⁰³. It is highly likely that further publications will be produced by think tanks evaluating the successes and failures of the Government's Behavioural Insights Team.

Implications

This brief review illustrates that behavioural economics provides a powerful basis for developing and implementing policy designed to change people's behaviour. The key concepts provide powerful insights about how and why people behave as they do as well as suggesting techniques for effecting behavioural change. This work provides further evidence supporting the relevance of behavioural economics for explaining and predicting human decision making.

¹⁰¹ <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldsctech/179/17903.htm>

¹⁰² <http://www.ippr.org/articles/56/8788/giving-government-a-harder-nudge>

¹⁰³ <http://www.policyexchange.org.uk/media-centre/blogs/category/item/can-the-nudge-agenda-help-the-uk-s-businesses-cut-emissions>

9. General Conclusion

In this section we summarise the key findings and consider the implications of these for achieving the objectives outlined at the beginning of the document. We close with some recommendations.

Understanding the decisions made by legal services consumers

A primary aim of the report is to outline the insights and understanding that behavioural economics provides about the decisions taken by consumers of legal services. The interviewees provided descriptions of how consumers make choices that are consistent with behavioural economic explanations of human decision making. For example, the interviews highlighted the importance of simplified forms of thinking and the influence of emotions. The review of the research literature suggests that the decision making processes of legal services consumers have the following characteristics:

- Lack of thinking capacity leading consumers to struggle when dealing with complex problems. They are likely to be ‘cognitive misers’ who try to minimise the use of scarce mental resources even in important situations where deeper analytical thought is appropriate. This increases the likelihood that interpretations based on System 1 thinking predominate. These tendencies are likely to become even more pronounced when people are fatigued by the demands of solving complex legal problems.
- They are continuously trying to make sense of their legal problem by developing and then updating a mental model of the situation using different kinds of System 1 thinking. The mental model determines how they make sense of the situation, including how they attribute responsibility and blame for the events that have occurred. It also determines how they frame actions that they can take and how they should choose between these actions. WYSIATI means they are often insensitive to the lack of information they have e.g. about others’ intentions, what their options are or legal procedures. Combined with confirmation thinking this often leads them to be very confident about their interpretation of the situation and actions they should take even if these are biased or completely wrong.
- Forms of System 1 thinking likely to be involved in developing and updating a mental model and determining choice include:
 - Availability to judge the likelihood of key factors such as the likely success of litigation or the risks associated the different actions they can take. This may lead to an overestimation of these factors when they are associated with high profile events e.g. the outcomes of a celebrity divorce, but an underestimation when they are associated with low profile events and activities.
 - Representativeness for such activities as choosing a legal services supplier or determining whether a problem should be solved through legal means. Using goodness of match between new and old situations leaves consumers open to error. For example, consumers may have acquired inaccurate information about the characteristics that distinguish good and bad suppliers and about appropriate and inappropriate problems for legal action. Also, representativeness overlooks other key elements such as: the base rate of the different categories e.g. the proportions of all problems that can be solved by legal means; and the amount of information used to determine the degree of match e.g. consumers may determine that a supplier is inappropriate on one piece of information such as how they look.

- Anchoring when evaluating the appropriateness of legal fees or determining appropriate levels of compensation in a personal injury situation. People often focus on inappropriate anchors that exert too much influence.
- Confirmation thinking to develop and update their understanding of the legal problem leading them to focus on information supporting their initial interpretations and impressions and to neglect contrary information. This may lead consumers to be very confident about biased and incorrect interpretations of legal situations, their causes and the actions needed.
- Framing to establish which reference point is adopted when evaluating the outcomes associated with particular actions. The reference point chosen determines whether outcomes are represented in terms of gains or losses. This crucially affects the decision by changing a consumer's attitude to risk e.g. to prefer taking risky actions in legal settings when a problem is framed in losses rather than gains.
- Mental simulation of the events likely to happen in a legal situation to evaluate the length and likely success of legal interventions. These simulations lead to the planning fallacy since they involve focusing on positive rather than negative features of the situation. This leads to overconfident and overly optimistic forecasts about the likelihood of good outcomes occurring and an underestimation of how long the legal process will take.
- Motivated reasoning that leads consumers to focus on and evaluate information in biased ways that are beneficial to their impulsive short-term intentions and goals. They often construct seemingly rational justifications to make this biased reasoning appear justified and objective. Motivated reasoning also leads people to have an overly positive view of themselves e.g. see themselves as more honest and cooperative than is justified, and to be overconfident about their ability to control events.
- Escalation of commitment leading them to continue allocating more personal and financial resources to an action that is currently not working and is unlikely to do so in the future (as judged by an external observer or legal services professional). Legal services consumers who are using up their own resources are particularly vulnerable to this effect.
- Mental accounting to make sense of the financial aspects of legal action. Normally consumers like to set budgets related to price and time to complete financial activities. Lack of knowledge and the inherent uncertainties surrounding some aspects of litigation may make this very difficult for legal services consumers. This may lead them to spend too much time and money on legal activities, thereby neglecting other vital commitments.
- Decision strategies that are much simpler than those advocated by rational choice theory. In some cases choice may be determined by a single factor such as price or availability of a professional. The interviewees suggested that these simple strategies were a major source of error and bias, though this should be tempered by research showing that, in some situations, simple strategies are best.
- Choice processes that are sensitive to the immediate context. For example, the complexity effect leads consumers to believe that it is better to have more rather than fewer options, yet they are actually disrupted when the number of options increases. The similarity and compromise effects demonstrate that an option can be evaluated as more or less attractive depending upon characteristics of the other options being considered at the same time. This has important

implications for how professionals present advice to clients about the different options available to them.

- Processes outlined in Prospect Theory. For example, consumers' actions will be influenced by loss aversion making them particularly sensitive to negative outcomes such as giving up possessions in a divorce settlement. It also may lead people to reject advice that contains a very small likelihood of loss even if it is the best action to take. Related to this is the endowment effect that leads consumers to look for larger amounts of recompense than is reasonable for losses of objects, services and other facilities that they previously owned. Finally, the omission bias means that people tend to stick with their current action or the one that is usually chosen. This may make it difficult for professionals to persuade consumers to take or even think about different options.
- Processes that are being affected by emotion. Problems due to consumers' emotional responses were frequently mentioned by interviewees, suggesting this may be a critical factor influencing consumer decision making. Legal situations involve a broad range of strong emotions such as: anger at an errant spouse; sadness and depression at the loss of a close relative; anxiety having been charged with criminal activity; and happiness at the prospect of receiving compensation. These emotions change how decisions are taken in terms of the depth of thinking, which information is used to make the decision, how much control a person believes they have over events and how confident they are about their evaluations. The emotion can also push people towards taking inappropriate action e.g. a desire in angry people to "move against" persons or obstacles by fighting, harming, or conquering them. Emotion can also be used as the primary source of information for evaluating options e.g. if it makes me feel good it must be the right thing to do. Current emotion can also determine how risky an option is judged to be e.g. options associated with negative emotion are judged more risky.

This section provides a rich description of the factors that underpin consumer decision making in legal settings and outlines the errors and biases that can creep in to the process. It highlights the different ways in which a reliance on System 1 thinking can have detrimental effects on the quality of consumer choice. It can also help legal services professionals to understand why consumers act in ways that may seem inappropriate, and provides insights about how to overcome these problems.

It is important for professionals to recognise that:

- System 1 forms of thinking are fundamental to the way people make sense of the world around them and determine how to act. This means that the errors and biases in reasoning and decision making are in-built into thinking rather than temporary aberrations.
- System 1 thinking is often functional and appropriate since it allows people to simplify and act in complex situations. It generally serves people quite well in that it helps them arrive at a reasonable solution to a complex problem. Without these simplifications people are likely to suffer a worse fate - 'paralysis by analysis'. That is, they attempt but fail to deal with the complexity given their limited thinking capacity and so end up with no understanding of their problem or what to do about it.
- However, in situations where the environment is not forgiving of errors and biases and it is critical that actions taken are correct, people are vulnerable if they simply rely on System 1 thinking.

Understanding the decisions made by legal services professionals

A second aim of the report is to outline the insights and understanding that behavioural economics can provide about the decisions taken by legal services professionals. The interviewees' descriptions of professionals' decision making were consistent with the RPD model of expert decision making. This suggests that through experience legal services professionals go through the following steps:

- A situational assessment of each new case is undertaken that involves identifying its key features and a reasonable set of goals to be achieved. This is broadly comparable to developing a mental model of the problem as described when discussing consumer decision making.
- Matching the assessment to previous patterns developed on the basis of past legal cases they have experienced either directly or through training and education.
- If there is a strong match with a previous pattern then the action that has proven effective in the past is implemented. If there is a weak match then simulation occurs. This involves thinking how the usual action may play out in the current situation and the modifications necessary to take account of key differences between the current and previous situations.
- If there is no match then decision making involves the kinds of processes described above in the context of consumer choice.

This process allows the legal services professional to make quick and efficient decisions based on their experience. It resonates with the legal process based on precedence set by past cases. However, earlier we identified key issues and potential problems with this approach:

- Cognitive entrenchment may occur, where patterns which capture expertise can remain fixed despite changes in the decision environment. This may be particularly important at present given the turbulence in the legal services market.
- Using RPD type processes when the decision maker is inexperienced or where there is not an appropriate body of external knowledge to justify it. Medicine is underpinned by a body of science that supports ways of categorising problems and the actions that are needed for each. For some aspects of the legal services this may not be true e.g. giving advice about how to discuss a settlement with an ex-partner. There is a danger of using invalid RPD type processes e.g. simply doing what worked last time in a similar situation is not appropriate.

Understanding the decisions made by legal services organisations

A third aim of the report is to use theory and research in behavioural economics to increase understanding of the strategic decisions taken by legal services organisations in response to the current turbulence in the legal services market. This involved exploring three areas:

- Research shows that many of the System 1 forms of thinking identified when discussing consumer decision making also underpin strategic decision making in firms. This is particularly likely to occur in single owner organisations or where a single powerful person dominates a firm's strategy. Also, even when groups of individuals are responsible, there are likely to be occasions where all members of the groups use similar forms of thinking, leading to a consensus based on biased reasoning.
- Research on group decision making shows that the potential advantages that groups have over individuals are often not realised because of flawed group processes e.g. conformity, biased information pooling and groupthink.

- Research at the organisational level reveals that firms use a broad range of System 1 forms of thinking (usually referred to as heuristics in this area). The evolutionary and economic fitness of firms was shown to depend on three capabilities:
 - *Sensing and shaping threats and opportunities*: The interviewees suggested that many legal services firms have engrained views of the world with no mechanisms in place to scan and interpret intelligence about market changes. This means they are blind to the threats and opportunities afforded by these changes. This is often reinforced by strong emotional responses such as the ‘ostrich effect’ i.e. burying their heads in the sand.
 - *Seizing opportunities*: The interviewees suggested that many legal services firms had no procedures for unlocking and evaluating existing strategies and then determining how they needed to be changed in the light of market changes. This suggests that legal firms may be unable to adapt or indeed take advantage of these changes. Also many legal firms underestimate the importance of another key feature of seizing opportunities - developing business models that define commercialisation strategies and investment priorities. The interviewees suggested that many legal firms fail to reflect on the business aspects of their operations.
 - *Reconfiguring structures and assets to maintain competitiveness*: The interviews provided little evidence suggesting that legal services firms were transforming in the light of changes to ensure fitness of purpose to new market conditions e.g. no evidence they were recombining or reconfiguring assets and organisational structures to take account of changes in the nature of the enterprise, market conditions and technologies.

The picture is not all bleak. Some interviewees indicated that a minority of legal services firms are aware of the importance of these factors and have strategies in place that deal with all three of these capabilities. However, most were not. There is a need for these legal services firms to become aware of these three capabilities and their implications for adapting to the large number of changes taking place in the legal market.

Overcoming bias

A fourth aim of the report is to outline insights and approaches for improving the decisions taken by consumers and suppliers. Techniques were outlined that support individual, group and organisational decisions. They involve procedures targeted on specific forms of System 1 thinking e.g. consider the opposite, and structured techniques for modelling problems, identifying viable options and choosing between these options. These have considerable potential as mechanisms for professionals to use to help their clients understand their legal problems and determine which actions they should take. They also have considerable potential for the professionals themselves as ways of facilitating strategic thinking and decision making. However, to date these techniques remain largely unused by legal services operations.

Review applications of behavioural economics in other professional domains

The review showed that behavioural economics is very successful in increasing understanding of the decisions taken in a broad range of non-legal domains. A distinctive feature of much of this work is the focus on using behavioural economics as a mechanism for behavioural change. Knowing the kinds of System 1 thinking that people are likely to use in a situation allows policy makers to structure that situation in ways that lead people to choose a ‘socially desired’ option. The central idea is that people are being ‘nudged’ rather than coerced to choose this option. Nudges have already proven successful in legal settings. Applying behavioural economic

concepts to the payment of fines reduced the number of bailiff interventions and generated considerable financial savings. Exploring the nudge aspects of behavioural economics is not a primary aim of the report. However, the success of this work suggests that it might be appropriate in situations where legal policy makers wish to encourage consumers to choose 'socially desired' options. This work also provides further evidence to support a major contention of this report - that behavioural economic concepts provide powerful and appropriate ways of understanding how people make decisions.

This report also showed that the application of behavioural economic techniques has generated much media interest, though not all of it is positive. It highlights the growing acceptance of its importance and the role it can play in helping individuals and organisations make effective decisions.

10. Recommendations

There are two broad sets of recommendations concerned with the need for primary research and how to apply the insights derived from the report to improve current practice of legal services consumers and professionals.

The need for primary research: The evidence from behavioural economics provides a compelling and insightful account of how decisions are taken by consumers and practitioners of legal services. However, there is a need for a rigorous evaluation of these ideas based on primary research. We need to know:

- How System 1 thinking in consumers and potential consumers of legal services actually plays out in legal settings. This should involve investigating which forms of System 1 thinking predominate and the impact these have on how consumers interpret and act in legal settings. This work is now very important given that the reduction in legal aid is likely to lead to more individuals making key decisions unaided by legal services professionals.
- The extent to which legal services professionals also use System 1 forms of thinking and the impact this has on their understanding of a consumer's legal problem and the advice they give.
- How legal services professionals categorise customers' problems, the validity of these as guides to legal action and advice, and the extent to which different specialists use similar patterns (a failure to use similar patterns is likely to indicate inconsistency across the profession). This will provide the foundation for evaluating the effectiveness of the decisions taken by legal services professionals and a basis for identifying legal training needs and support.
- How legal services professionals should provide advice in the light of their clients using System 1 thinking. For example, advice should not fall foul of the similarity or compromise context effects, framing effects and the like.
- How legal services firms are making strategic choices and the extent to which they take account of the three key capabilities underpinning the fitness of firms. This is a crucial precursor for the development of effective support for legal firms and the development of a thriving legal services sector.
- Which forms of decision support are appropriate to aid the decisions taken by consumers and legal services professionals and how they should be introduced in order to have maximum impact.

Applying insights from the report: The reviews outlined in earlier sections of the report provide some insights about ways of improving the current practice of consumers and legal services professionals. These insights, which remain speculative until tested empirically, include:

- Briefing documents for both consumers and legal services providers to alert them to the primary pitfalls from using System 1 thinking. This should be supported by an information campaign involving both general and professional outlets highlighting the availability of these documents. Training should also be designed to inform practitioners about these forms of thinking, their pitfalls and how they may be managed.
- The development of simple decision aiding techniques such as decision trees or lists that consumers could use to clarify problems, assess whether they should take legal action and, if so, how to choose an appropriate professional. Legal services regulators could support these techniques through web-sites, pamphlets and other means. The need for these techniques grows stronger since reductions in legal aid will increasingly lead to consumers taking action without professional guidance.
- Briefing documents for professionals about advice giving and some of the pitfalls and biases that may operate in negative ways to lead consumers to act in unintended ways. This should be supplemented by considering the use of simple decision aids such as trees and lists.

- Briefing documents and a media campaign to help legal services firms to understand and adapt to changes in the legal market. This should focus on the three capabilities that underpin fitness in firms and introduce structured approaches that can be used to help strategic thinking and decision making. This could be supported by training that provides legal services professionals with the skills to implement these techniques and interpret their output.

Overall, this report shows that behavioural economics has much to offer the legal services sector. It can explain how consumers, professionals and legal services organisations make decisions, some of the errors and biases that may occur and how these can be minimised by encouraging different forms of thinking and the use of structured decision aids. In addition, it can provide a sound basis for improving the effectiveness of all those involved in legal situations.

Appendix

We interviewed 10 individuals drawn from a broad range of different legal services organisations: the Citizens Advice Bureau, the Law Society, Bar Council, new entrants to the legal services market, barristers, legal services consultants and ‘high-street’ firms. The interviews included questions about decisions taken by: consumers; legal services professionals; and legal services organisations. The interviews were conducted by telephone, recorded and then analysed to identify key themes used to explain how each decision was taken. The interview outputs are used to contextualise the discussion of the key behavioural economic concepts; they are not used as the foundation for the primary ideas presented in the report.

The following pages contain the tables of synthesised comments across the ten interviewees. There is a separate table for each question. The legend of the table indicates the question being discussed.

- Believed they had the skills and knowledge necessary to deal with the situation themselves so did not seek advice.
- A search of the internet had not revealed an answer to the problem.
- Whether they have the money.
- Had the money but not the skills and knowledge so opted to seek legal advice.
- How serious the issue is.
- Whether there is a good legal advisor in the area.
- Their psychological state.
- Legal services professionals seen as unapproachable and not ‘like us’.

Table 1. The decision whether to seek legal advice

- Are offered legal services as part of commoditised products where choice of legal representative is part of a larger package. Their legal representative has no prior history or knowledge of them and the client may not know the provider. Consumers tend to stick with the provider included in the package even if there is an opportunity to employ their own representative.
- Simply ask family and friends and go with their recommendation. These may be positive (choose) or negative (reject). The appropriateness/skill base/experience of the provider and other relevant criteria are likely to be overlooked.
- Use just one or two criteria for choosing. This may involve choosing a provider who has *high visibility* e.g. advertises on the web, media or on LinkedIn; *flexibility* e.g. able to come to the client’s house at the week end; *cheapest* e.g. particularly for simple issues such as conveyancing; *most understandable* e.g. understand what they say at first meeting. One or two of these criteria drive the decision.
- Use an elaborate search of possible providers taking account of a broad range of criteria including fit between problem and supplier’s expertise.
- Check out the internet using Google, comparison sites and other on-line resources then choose on the basis of information provided and/or recommendation.
- Base their decision on price alone. Consumers are increasingly sensitive to price in terms of transparency and pricing structure as well as overall amount.
- Simply choose the first provider that is available.
- Are proactive rather than reactive. That is there will be possible differences in the process when individuals initiate the action themselves rather than responding to a problem.
- Choose a professional whose skills and knowledge matched the legal problem

- May vary with their understanding/interpretation of the problem.
- Gravity of situation – if grave probably choose the first available regardless of quality or appropriateness.
- Brand is going to play an increasingly important role. There wasn't this choice before.

Table 2: Decision about which legal provider to choose

- Reject advice because it is given in terms of outlining the pros and cons of different options rather than a clear recommendation endorsing just one action.
- Reject advice because they expected an answer that was legally impossible e.g. not to pay inheritance tax.
- Reject advice because the quality of the service or the advice itself is judged to be inadequate leading to lack of confidence in advice provided.
- Reject advice because of the emotion engendered.
- Reject advice because requires big behaviour change.
- Accept advice because the provider has empathy with them and presents advice in a clear and understandable way.
- Accept the advice because they 'are entrenched and have gone so far so will carry on and take the advice. Feel they have nowhere else to go'.
- Accept advice because the professional judged to be competent, has appropriate experience leading to trust and /or acted well in the past.
- Accept advice because it is perceived to help achieve their needs e.g. keep out of prison.
- Accept if outcomes are significant e.g. large financial implications.
- Affordability and understandability.

Table 3. Decision about whether to follow the advice given

- In some cases family conflicts/issues are at the heart of the legal problem so others are necessarily involved. However, even in these cases sometimes consumers do not wish to involve others in the process even when they are affected by it.
- 'People seek comfort from people they feel have gone through similar experience. Either family or friends down the pub. Problem is that they may get 'old war stories' that are not helpful and very skewed and unhelpful'.
- People with problems or disabilities often need others to help them and in extreme examples make the decision for them.
- Likely to involve others in some legal issues e.g. family, criminal or personal injuries but not others e.g. commercial, planning and property.
- Generally not helpful because others change client's mind.

Table 4. Decision about whether to involve others in the decisions

- Predictability of problems is important. Some are predictable such as conveyancing where activities that need to be undertaken and price can be reasonably well specified in advance. Other problems are less predictable such as family issues or personal injury claims. In these cases consumers may have unrealistic expectations about cost and what is involved.
- Different age groups also important - in conveyancing 'young people and generation Y less likely to buy face-to-face and instead go for pricing and convenience. As we got older 'branded solicitor' more important'.
- Some problems engender much emotion e.g. divorce - others more neutral and these can affect the process.
- Some problems necessarily involve much discussion early on e.g. probate, some much less and then only at the end e.g. conveyancing.
- Some problems are very 'legal' and there are specific laws that one can fall foul of. Other problems are more about best advice.

Table 5. Does the decision process differ across different legal problems?

- When the cost is too high or unknown and lawyers are remote.
- Uncertain about the legal process and whether will understand the advice.
- The availability and accessibility of services.
- Profession is male dominated and includes individuals who do not seem approachable.
- Too much small print in agreements.
- Worried about whether they will understand the advice given.
- Hopefully that fear factor is disappearing as people become more savvy.

Table 6. What deters consumers from taking legal advice?

- Buying on the basis of price alone; not realising that you get what you pay for and cheaper is often worse.
- Going to wrong professional - partly fault of professional who do not communicate their specialisms clearly enough in magazines, internet etc. Not researching enough to identify the best.
- Not willing to disclose all the relevant information e.g. personal information.
- Involving so much emotion (e.g. old family wounds) that unable to understand/enact advice.
- Mis-communication between professional and consumer leading consumer to misunderstand the advice given.
- People erroneously think they have a right to something.
- Get wrong information from the Internet about the quality of service from some providers.
- Don't ask for fixed price even when one is available.
- Misunderstand the information provided or not sufficiently informed.
- There are huge unmet legal needs, particularly among normal working people who think legal advice is not for them.
- Making emotionally based decisions.
- Difficult to build trust when the meter's running on calls.

Table 7. What errors/mistakes do consumers make when taking the decisions about their legal problems?

- Extract as much of the key information from client as possible (including use of questionnaire and other methods). Then present back the range of legal issues and to allow client to determine which to consider further. This may include guidance about which is best option.
- Use matching based on previous cases, but with caution because all different. Match to previous cases. However there is a tendency to categorise and say 'This is a so and so case...'. However, for people seeking advice it may be their first involvement and overlooks the fact that all cases are different. So balance between matching and custom based.
- Key information extracted by 'mental checklist' and questionnaire.
- In big companies receptionists should direct clients appropriately.
- Take account of contextual factors such as family.
- Make sure that the actual problem is revealed before progressing – sometimes people misperceive their problem.
- Consider whether there is another way outside of legal action?
- The days of common lawyers are gone.
- It needs to be holistic and listen to the specific issues of the person. Must take into account the level of their understanding and how much information they can process themselves. Also about managing their expectations.
- So you would ask what is your knowledge of the legal issue. You'd characterise the nature of the problem or issue you're dealing with and the possible solutions to resolve it.
- Does this person have a valid issue and stake in that issue? Is the case one I want to be involved in, how might it affect the firm's reputation? Do I have enough expertise or should I refer to a colleague?
- Categorising is important.
- A proper and complete diagnosis of a person's problem is vital first. Sometimes there are a number of secondary underlying issues. Need to match them with the right practitioner. The client has to be the driver and decision maker.
- We first establish the financial parameters around what we've been asked to do. Each case is different but generally there's an information gathering stage and then a chronology of events document. There's a kind of categorisation along the lines of 'is it litigation, is it mediation'.

Table 8. How do you decide what advice to give to a particular client?

- A big problem with 'survival' often difficult so leading people to overlook the signs indicating the need to change.
- Financial stability allows flexibility to do what is needed e.g. new technology.
- Each specialist team / specified individuals monitoring what is happening around them and what problems they are presented with and these are reported back to meetings of board and managing partners. This item is a regular feature of major committees.
- Keeping abreast through legal press, regulators and other legal updates and bulletins.
- Managers are expected to keep up to date every week and update others within the organisation. Someone also updates through going to the key websites.
- Volunteering to be involved in new developments
- Some have many individuals involved others just one person.
- Keep an eye on regulatory structures and what we're obligated to do and what opportunities there are.

- We look at competitors and market entrants and how they are using technology re marketing as well as regulations to drive business and to better handle case.
- Keep engaged with representative organisations and parliamentary activity, and academics, horizon-scanners, thought-leaders in the market. We spend a lot of money, time and energy keeping on top of this to inform our strategic thinking and make more informed decisions.
- We spend a lot of time on specific websites looking at the prevailing winds and topics and talking to others.

Table 9. How does your organisation / profession keep abreast of changes in the legal service market?

- 3 year strategic plan with annual review looking at how each area progressing and reasons for differences from plan and related challenges and opportunities.
- Little strategic thought in the organisation often caused by lack of managerial experience.
- Information gathering, what are other people up to, how is it likely to affect them? How much is years down the road and how imminent, assess opportunities and threats, assess risks (e.g. financial).
- May be 'top-down' but partnership model means need to take colleague with you.
- Set up working group.
- Our PA goes through and determines who the information should go to, and who it is useful for.
- Specialist committees of practitioners whose views are sought.
- Monitoring new entrants and competitors and then assess the risks of financing and capital investment costs and assess what does it do to the rest of the business?
- Keep an eye on regulatory and statutory changes. The response to these more about maximising compliance while minimising costs.
- Need to assess the reputational risks.
- Gather and analyse information, including bringing in experts to provide best possible analysis.
- Many businesses are not waking up and smelling the coffee. Many don't accept we're in a market, and one that is changing very quickly. People need to see themselves as service providers.
- We won't lose a client over fees unless we absolutely have to.

Table 10. What process do you follow when determining how to respond to changes in the legal services market?

- Both since organisation energetic and flexible enough make opportunity out of a threat.
- We believe in London there will always be demand for our non-commoditised products.
- Often seen as a threat by the older male dominated organisations.
- For those organisations that see themselves as a business, with good management structures, marketing skills and willing to change it is a good opportunity. Others think they deserve a living and work will land on their desk.
- Probably fewer than 10 per cent have 'got it', a large group in the middle trying to change but hindered by structure, or management or individuals making it difficult.
- Threat. Legal aid finance has shrunk over the last ten years; the likelihood is that it will continue to fall. The reason for us being used is probably going to narrow as well as the budgets are cut. As a result our service may become less available people will take more responsibility and look for other ways to solve issues.
- We may need to look at other forms of funding.
- The introduction of certain new entrants is a threat commercially. We also see some as a threat to the reputation of the market.
- Small, under-resourced high-street solicitors almost universally see it as a threat, if they understand it. New entrants or well capitalised ones see it more as an opportunity.
- Larger parts of sector uncertain whether they like or approve of the changes or whether a more mercantile approach is something that's in the interests of the client.

Table 11 Do you and/or your organisation see these recent developments as a threat or an opportunity

- In time if firm is successful, a good place to work, is work interesting and challenging then will develop.
- Yearly explicit review.
- Continue some work (e.g. related to children) that is barely profitable but thought interesting and important (social responsibility). Other work (e.g. financial advice) rejected because not good fit with rest of work undertaken.
- Worries lead professionals to stay with the status quo as safe option.
- Difficulty for lawyers to admit they tried something that did not work.
- Ultimately your reputation and business stability are the two major indicators. Two legal directories unfortunately are the main route to this. Measurement comes with the fact that appearance in directories going up and figures going up.
- We monitor client satisfaction through surveys and there's constant reviewing between trustees and myself and management to see whether we're delivering what we say we are and whether it is effective.
- If number of complaints go down.
- We also invest a lot in research and consumer testing. Lots of checks and balances monitored regularly to see if we need to change tack.
- Have we increased our client base, is our turnover up, is client satisfaction up and so forth.

Table 12. How would you know whether your response to these changes is effective or appropriate?