



THE LAW SOCIETY  
of SCOTLAND

[www.lawscot.org.uk](http://www.lawscot.org.uk)

# LEGAL ASSISTANCE IN SCOTLAND

## FIT FOR THE 21<sup>ST</sup> CENTURY

### LAW SOCIETY OF SCOTLAND DISCUSSION PAPER



THE LAW SOCIETY  
of SCOTLAND  
[www.lawscot.org.uk](http://www.lawscot.org.uk)



# INTRODUCTION

Scotland's legal aid system was introduced in the same post-war era which saw the creation of the welfare state. There was then, just as today, recognition of the need for a system to ensure all members of society, regardless of wealth or status, had access to comprehensive legal assistance. Access to justice and the upholding of the rule of law are as important to the social security of individuals in society as healthcare and education, and legal aid is how we make these concepts a reality. Legal aid is, in essence, the fourth pillar of the welfare state.

A well-functioning legal aid system can prevent small issues turning into serious problems, both for the individual and for other key public services and budgets. Without the ability to seek resolution, civil justice issues can lead to serious impacts on mental and physical health, relationship breakdowns, and loss of income and confidence. It is essential that people who may not have the necessary financial resources, can still access legal advice and services. Being involved in the criminal justice system can be a terrifying experience. Access to a solicitor at all stages is vital to ensure that when an individual is facing the full resources of the State, they do not stand alone. Full protection and representation in criminal matters, and a fair accessible system for civil disputes helps avoid miscarriages of justice and maintains society's trust in and respect for the justice system.

The current legal assistance system is no longer fit for purpose and the time is right for a root and branch change. The Legal Aid (Scotland) Act 1986 is almost 30 years old. The legal aid landscape has changed substantially as have our courts and the wider justice system. Significant amounts of secondary legislation and guidance have created a complex system which even expert practitioners find difficult to navigate. The existing system lacks clarity, is inefficient, and is administratively burdensome. It leads to unnecessary time and resources being spent by SLAB and solicitors at every stage of the process.

At a time of reforms to modernise the wider court and justice system, our system of publicly-funded legal assistance must be rethought to ensure an effective and sustainable service. We must ensure the service remains available across Scotland and that the best advice possible is available to everyone, regardless of their wealth or status. Those who provide this essential service must also be fairly paid to ensure we maintain our high standards and encourage new entrants to the profession.

We support the Scottish Government's commitment to work with stakeholders in a positive spirit to address these serious issues. The best solutions for legal aid are found when government, its agencies and the legal profession work constructively and in a spirit of shared understanding. The recommendations and proposals presented in this paper will not draw universal support from the profession. Indeed there remain divergent views within our committees on some of the proposals presented here, particularly for the future of civil legal aid provision. These suggestions are only a starting point for discussion. We have not made any final decisions on what would be the best way forward for legal assistance in Scotland. We are relying on our members and others to help inform our views on these important issues. The issues faced by legal aid in Scotland, coupled with the challenging public spending climate, mean there are no easy solutions, but we share a passion for protecting access to justice and strongly encourage a full and open discussion on the contents of this paper and on the legal aid system overall.

*Mark Thorley and Ian Moir, Co-Conveners of the Law Society of Scotland's Legal Aid Committee*



# CONTENTS

<b>Introduction</b> .....	1
<b>Contents</b> .....	2
<b>Executive Summary</b> .....	4
Key Issues.....	4
Key Proposals.....	4
Conclusion and Call for Feedback.....	5
<b>The Current System</b> .....	6
Legal Assistance in Scotland.....	6
Advice and Assistance.....	6
Criminal Advice and Assistance.....	6
Civil Advice and Assistance.....	7
Children’s Advice and Assistance.....	8
Assistance by way of Representation (ABWOR).....	8
Criminal ABWOR.....	8
Civil ABWOR.....	9
Children’s ABWOR.....	9
Legal Aid.....	10
Criminal Legal Aid.....	10
Civil Legal Aid.....	12
Children’s Legal Aid.....	13
<b>The Need for Change</b> .....	15
Simplification, Modernisation and Enhancing Efficiency.....	15
The need to simplify a complex system.....	15
Accounts.....	17
The need to increase efficiencies throughout the justice system.....	17
Efficiency in the criminal justice system.....	17
Efficiency in the civil justice system.....	19
Updating the system to be fit for purpose for the 21st century.....	20
<b>Funding</b> .....	23
Sustainable Funding for a Valued Service.....	23
Rates.....	23
Unpaid Work - areas of routine practice.....	24
The decline in funding for legal assistance.....	24
State funding for legal assistance – implicit in ensuring access to justice.....	26



Calls to ensure adequate remuneration for legal assistance in Scotland .....	27
Re-investment of savings into legal assistance fund.....	28
Previous re-investment strategy.....	28
Importance of re-investment.....	29
<b>The Proposed System</b> .....	30
Rethinking the Framework .....	30
Criminal Legal Assistance .....	30
Streamlined system of criminal legal assistance .....	30
Police station interviews and other relevant interviews – preliminary block fee .....	31
Summary work.....	32
Solemn procedure.....	33
Appeals – appeal certificate.....	35
Exceptional case status .....	36
Special urgency .....	36
Civil legal assistance .....	36
Single Continuing grant.....	37
Financial Eligibility.....	37
Scope of Civil Legal Assistance .....	38
Alternative Sources of Advice .....	40
Alternative sources of funding.....	40
Exceptional Case Status .....	41
Children’s legal assistance.....	41
General System .....	42
Late Payment of Commercial Debts .....	42
<b>Use of Technology</b> .....	43
Legal Services in a Digital Age.....	43
<b>Conclusion and Call for Feedback</b> .....	45
Conclusion .....	45
How to respond .....	45
Contact details.....	46



# EXECUTIVE SUMMARY

## KEY ISSUES

- The landscape of the justice system has altered substantially in recent years. Major reviews of the courts and justice system have been conducted and substantive reform is being implemented. The legal assistance system has not always kept pace with these changes.
- Existing legal aid arrangements are not structured in a way that fully supports early resolution of cases. A delay in legal assistance aggravates delays in court procedure.
- The large number of legislative amendments and increasing volume of guidance over the years has made the legal assistance system increasingly difficult to navigate. A complex system means that court users may have difficulty understanding what type of legal assistance is available. In addition, there are frequent disagreements between solicitors and SLAB over interpretation of legal assistance regulations.
- There has been a real term decline in legal assistance expenditure for years. Lack of investment or re-investment of efficiency savings in legal assistance has made it increasingly difficult to maintain a sustainable, high quality legal assistance system across Scotland.

A new approach to legal assistance is required in order to prioritise simplicity, efficiency, quality, and sustainability.

## KEY PROPOSALS

The recommendations made in this paper are designed to stimulate discussion on how to modernise and streamline the legal assistance system, and improve efficiency in the wider justice system. These proposals are simply one approach, and we welcome other ideas and a wide ranging discussion.

### *Legal Assistance*

- Structural reform of the legal assistance system including the 1986 Act
- System should be designed to be easily processed using Legal Aid Online and supporting the increasing use of technology in the courts and in society as a whole, including the Digital Strategy for Justice
- Bringing legal assistance payments under the protection of the Late Payment of Commercial Debts (Scotland) Act 1995
- Savings should be reinvested into the legal assistance system
- Legal assistance rates should be regularly assessed in light of inflation

### *Criminal Legal Assistance*

- Single criminal legal assistance certificate rather than range of categories
- Certificate to be underpinned by streamlined system of block fees



- Financial verification to be required at initial application stage only
- Fresh approach should be taken to eligibility criteria against backdrop of changes to welfare
- Appropriate cover for advice to suspects at police stations and appeals
- Block fees to be designed to encourage early resolution of cases, e.g. appropriate level of fee for S.76 pleas or early disposal is required

#### *Civil Legal Assistance*

- Single continuing grant of civil legal assistance, abolishing the distinction between advice and assistance, assistance by way of representation, and legal aid
- Reducing eligibility levels to ensure that public funds are focused on those most in need
- Redefining the scope of legal assistance to ensure that advice and legal assistance is provided in the most appropriate way
- Introducing affordable legal assistance loans, provided through SLAB to assist individuals with payment for legal services outwith the legal assistance system

## CONCLUSION AND CALL FOR FEEDBACK

This is a discussion paper, with the intention of starting a conversation and encouraging new ways of thinking about legal assistance reform.

It has become increasingly clear that the system we have, although admirably delivering high standards of advice to a wide section of the population, cannot continue in the long term. We believe that a robust system of publicly funded legal assistance is fundamental for maintaining meaningful access to justice for people in Scotland. Such a system needs to be simple, efficient, and work smoothly with the wider justice system. The solicitors that deliver the service need to be adequately remunerated, to ensure that they can continue to run their businesses and invest in training new members of the profession to carry on the work in the long term.

The legal aid committee of the Law Society of Scotland has suggested these proposals as a starting point, one option for a more sustainable system.

We are seeking views on these proposals, and suggestions for other ways that legal assistance could be reformed to be sustainable for the future and fit for the 21<sup>st</sup> century. If you would like to respond, please contact us. We are happy to accept written feedback, or to arrange a meeting if appropriate.



# THE CURRENT SYSTEM

## LEGAL ASSISTANCE IN SCOTLAND

Legal assistance is help towards the cost of legal advice and representation so that people on low and moderate incomes can gain access to the legal system. It is paid for out of public funds and administered by the Scottish Legal Aid Board (SLAB).<sup>1</sup>

The legal assistance system in Scotland covers a range of categories of help for people in need of a solicitor. Legal assistance is divided into criminal legal assistance, civil legal assistance, and children's legal assistance.

- Criminal legal assistance supports those accused of a crime by the state.
- Civil legal assistance enables people to enforce legal rights and obligations under civil law.
- Children's legal assistance provides support for those involved in Children's Hearings proceedings.

The main categories of legal assistance are:

- Advice and Assistance;
- Assistance by way of Representation; and
- Legal Aid.

## ADVICE AND ASSISTANCE

### CRIMINAL ADVICE AND ASSISTANCE

#### WHAT DOES IT COVER?

This type of legal assistance allows for advice to be given on any matter of Criminal Scots law.

Criminal advice and assistance was heavily used in the past, but is now rarely used other than in connection with advice given at a police station.

#### *Police Station Advice*

<sup>1</sup> The phrase "legal assistance" is used in this paper as a collective term for all types of assistance which are available. The phrase "criminal legal assistance" is used to refer to all types of assistance available in criminal cases and, similarly, the phrase "civil legal assistance" is used to refer to all types of legal assistance available in civil cases. The terms are not to be confused with "criminal legal aid" and "civil legal aid" which are two specific forms of legal assistance.



Following the judgement in *Cadder v HMA*,<sup>2</sup> Scots Law recognised that a suspect must have the opportunity to consult a solicitor before being questioned in relation to a criminal allegation.

The work carried out by solicitors at the police station is charged under criminal advice and assistance regulations. In these circumstances a contribution may be payable even where the duty solicitor is in attendance.

---

#### WHO IS ELIGIBLE?

Criminal advice and assistance may be available subject to two tests: financial eligibility and whether the issue is a matter of Scots law. The solicitor's work is charged on a time and line basis up to an initial limit, with increases available for exceptional circumstances.

Criminal advice and assistance is generally available to individuals with a disposable income of £245 per week or less, and disposable capital of £1,716 or less.

If the client has a disposable income of between £105 and £245, the client has to pay a contribution. Contribution levels are on a sliding scale and are set out in the SLAB keycard.<sup>3</sup>

#### *Police Station Advice*

For police station advice, suspects are not subject to the upper weekly income and capital thresholds of £245 and £1,716. Clients with weekly disposable income between £105 and £245 will be eligible, but will still have a contribution to pay, the level of which is set out in the SLAB keycard. A suspect with weekly disposable income above the £245 will have the maximum contribution of £135 to pay towards the cost of this advice.

---

#### CIVIL ADVICE AND ASSISTANCE

---

##### WHAT DOES IT COVER?

Civil advice and assistance allows for advice to be given on any matter of Scots law. It does not, however, generally cover steps in connection with instituting, conducting, or defending proceedings.

Currently there are significantly more grants of civil advice and assistance than there are grants of legal aid. With the exception of diagnostic grants of civil advice and assistance (a grant allowing an initial meeting with a solicitor when the issue is not one of the standard categories for civil advice and assistance) there is a list of proved categories for which the solicitor can certify that a client is covered by. Subject then to financial verification the client can be admitted to civil advice and assistance.

---

<sup>2</sup> UKSC [2010] 43

<sup>3</sup> SLAB Keycard - <http://www.slab.org.uk/common/documents/profession/documents/KeyCard.pdf>



---

#### WHO IS ELIGIBLE?

Civil advice and assistance is generally available to individuals with a disposable income of £245 per week or less, and disposable capital of £1,716 or less.

Contributions are payable on a sliding scale, and the cost of legal assistance can be reclaimed from property recovered or preserved as a result of the legal action.

The solicitor's work is charged on a time and line basis up to an initial limit, with increases available for exceptional circumstances.

---

#### CHILDREN'S ADVICE AND ASSISTANCE

---

##### WHAT DOES IT COVER?

Children's advice and assistance is advice and assistance in relation to the Children's Hearings (Scotland) Act 2011, or the Children (Scotland) Act 1995 for proceedings in the Children's Hearings system and associated court proceedings.

---

##### WHO IS ELIGIBLE?

Children's advice and assistance is available to both children and adults involved in the proceedings. A child with sufficient capacity can instruct a solicitor directly, or an application can be made on their behalf by the child's parent/carer.

Children's advice and assistance is generally available to individuals with a disposable income of £245 per week or less, and disposable capital of £1,716 or less. Contributions are payable on a sliding scale. Unlike where a child applies for civil advice and assistance, if the child is capable of giving instructions and receiving advice, the resources of any person owing a duty to aliment are not aggregated for the purposes of assessing the child's resources.

The solicitor's work is charged on a time and line basis up to an initial limit, with increases available for exceptional circumstances.

---

#### ASSISTANCE BY WAY OF REPRESENTATION (ABWOR)

---

##### CRIMINAL ABWOR

---

##### WHAT DOES IT COVER?

A system of Criminal ABWOR is generally available where the applicant pleads guilty.

Criminal ABWOR also allows for representation in certain other categories of cases which were not envisaged back in 1986, such as first appearances from custody and at bail undertakings. In



addition, Criminal ABWOR is generally available for breaches of Court orders, parole hearings, and certain proceedings under proceeds of crime legislation which, again, were not envisaged in 1986. The full list of detailed Criminal ABWOR offences is contained within Regulation 4 and 5 of the Advice and Assistance (Assistance by Way of Representation (Scotland) Regulations 2003.

The block fee for Criminal ABWOR will generally cover all work, including up to 2 diets of deferred sentences. Additional payments can be made in certain circumstances.

---

#### WHO IS ELIGIBLE?

Criminal ABWOR is likely to be available subject to two tests: financial eligibility and whether the issue is a matter of Scots law. For some types of Criminal ABWOR there are other more detailed tests to be applied.

Since 10 April 2012, the eligibility thresholds have been £245 for weekly disposable income and £1,716 for disposable capital. If the client has a disposable income of between £105 and £245, the client has to pay a contribution. Contribution levels are set out in the SLAB keycard.<sup>4</sup>

---

#### CIVIL ABWOR

---

##### WHAT DOES IT COVER?

Civil ABWOR is a type of advice and assistance that allows for a solicitor to take steps in connection with instituting, conducting, or defending certain defined types of proceedings. For example, Civil ABWOR can be provided in mental health and immigration cases.

---

##### WHO IS ELIGIBLE?

A person must be eligible for advice and assistance if they are to receive Civil ABWOR. However, the financial tests are not applied, and there is no contribution, where Civil ABWOR is provided in relation to proceedings in front of the Mental Health Tribunal for Scotland or for custody appearances under the Matrimonial Homes and Protection from Abuse Acts.

---

#### CHILDREN'S ABWOR

---

##### WHAT DOES IT COVER AND WHO IS ELIGIBLE?

Children's ABWOR is available automatically to a child, without means or merits testing, for certain 'specified hearings' and for certain applications made by a sheriff.

ABWOR is also available to a child for any other children's hearing under the 2011 Act ('unspecified hearings') and for some pre-hearing panel meetings, but subject to financial eligibility tests, as well

---

<sup>4</sup> SLAB Keycard - <http://www.slab.org.uk/common/documents/profession/documents/KeyCard.pdf>



as a merits test to satisfy SLAB that the child requires legal representation in order to enable the child to effectively participate in the proceedings.

Children's ABWOR is also available to those considered 'relevant persons' under the 2011 Act, subject to means and merits testing.

## LEGAL AID

### CRIMINAL LEGAL AID

#### WHAT DOES IT COVER?

Criminal legal aid can cover funding for the defence in summary criminal proceedings, first custodial sentence cases, contempt of court cases, solemn criminal proceedings and criminal appeals.

Criminal legal aid can be provided in both the lower and higher courts as well as appeals to the Supreme Court as specified in the 1986 Act. It covers representation by a solicitor or advocate or solicitor advocate (as appropriate) and the assistance of a solicitor.

#### *Summary Criminal Proceedings*

There is a system of summary criminal legal aid which is generally available where the applicant pleads not guilty. The system of summary criminal legal aid is made up of a combination of block fees and time and line payments.

The majority of summary criminal legal aid cases are chargeable on a fixed payment basis in terms of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. The block fee for criminal summary legal aid will generally cover all work, including up to the first 30 minutes of trial. Additional payments can be made in certain circumstances.

Time and line payments will apply where the matter was originally to be heard under solemn proceedings but has been reduced to summary proceedings or where exceptional case status has been granted.

#### *First Custodial Sentence Cases and Contempt of Court Cases*

Section 23(1)(b) of the Legal Aid (Scotland) Act 1986 allows the court to grant legal aid for those deemed to be at risk of receiving a first custodial sentence.

Criminal legal aid can also be granted under Section 30 for contempt of court cases. However, contempt of Court in the High Court is dealt with under the Criminal ABWOR system (see above).

#### *Solemn Criminal Proceedings*

The solemn criminal legal aid system is made up of a hybrid of inclusive fees and detailed charges, with some time and line features for certain matters (e.g. perusals). There is also the ability to have exceptional case status granted.

Under section 76 of the 1995 Act, an accused may give notice in writing "that he intends to plead guilty and desires to have his case disposed of at once".

There have been various changes to the rates chargeable under solemn criminal legal aid as a result of bringing into force the application for exceptional case status.

### *Appeals*

Lastly, solicitors can also apply to SLAB for criminal legal aid in respect of appeals.

---

## WHO IS ELIGIBLE?

### *Summary Criminal Proceedings*

Summary criminal legal aid is granted by SLAB and is used in summary cases in the Justice of the Peace Courts, Stipendiary Magistrate Courts and Sheriff Courts. The applicant must be eligible under the financial eligibility test and the interests of justice test.

Since 11 April 2011, the eligibility thresholds have been set at £222 for disposable weekly income, and £1,716 for disposable capital. In assessing disposable income SLAB take into account income from various sources, including benefits other than passport benefits.

Clients whose income and capital exceed these limits may still be eligible, if it can be shown that it would cause undue hardship to expect the applicant to pay for their own legal costs. The client does not have to pay a financial contribution in criminal legal aid cases.

### *First Custodial Sentence Cases and Contempt of Court Cases*

The court may grant criminal legal aid for those deemed to be at risk of receiving a first custodial sentence if it is satisfied that the expenses of the case cannot be met without undue hardship to him or his dependents.

The court may grant criminal legal aid for contempt of court if it is satisfied that the expenses of the proceedings for contempt of court cannot be met without undue hardship to him or his dependents and that in all the circumstances of the case it is in the interests of justice that criminal legal aid should be made available to him.

### *Solemn Criminal Proceedings*



Solemn criminal legal aid is available only in solemn cases in the Sheriff Court and High Court. Granting solemn criminal legal aid is subject to an eligibility test based on undue financial hardship.

An applicant for solemn criminal legal aid must pass an undue hardship test. An applicant whose disposable income is £222 per week or less and whose disposable capital is below £1,716 will receive criminal legal aid on the grounds of undue hardship. Where income and/or capital exceed these thresholds, then SLAB considers whether the excess is sufficient to cover the likely costs of the case. Where it is not, then criminal legal aid will be granted. Otherwise it will be refused.

### *Appeals*

If criminal legal aid had been granted for first instance proceedings, a financial eligibility test is not applied in respect of the appeal. For other applications, depending on the type of appeal, an eligibility test based on undue hardship may be applied. In some types of appeal, leave to appeal must also have been granted by the courts and in others the Board must consider if it is in the interests of justice that criminal legal aid is made available.

### *Regulation 15 Cover*

SLAB has the facility to make legal aid available in situations of special urgency under Regulation 15 of the Criminal Legal Aid (Scotland) Regulations 1996. Regulation 15 allows SLAB to make limited legal aid available, even where it has not been fully satisfied on all the eligibility criteria to allow urgent work to be carried out, including appearances at court hearings.

---

## CIVIL LEGAL AID

---

### WHAT DOES IT COVER?

Civil legal aid can be provided in a wide variety of cases in both the Court of Session and the Sheriff Court, as well as for appeals to the Supreme Court, and in other courts and tribunals as specified in the 1986 Act. It covers representation by a solicitor or advocate or solicitor advocate (as appropriate) and the assistance of a solicitor in all of the steps in relation and incidental to proceedings or settlement of a case.

---

### WHO IS ELIGIBLE?

There is a tripartite test for eligibility for civil legal aid, assessed by SLAB.

- Means test
  - Civil legal aid is generally available to individuals with a disposable income of £26,239 or less, and disposable capital of £13,017 or less. Contributions are payable on a sliding scale, and the cost of civil legal aid can be reclaimed from property



recovered or preserved as a result of the legal action. It is estimated that around 75% of people in Scotland meet the financial eligibility criteria for civil legal aid

- Merit test
  - There must be probable cause, indicating a legal basis for the case
- Reasonableness test
  - SLAB will ask whether it is reasonable for the case to be funded through public funds, considering, for example, the prospects of success and recovery
  - SLAB will also seek to confirm that assistance is not available to an individual through other means, such as a union or professional body, or an insurance company.

In the Sheriff Court cases are dealt with primarily on a block fee basis but can also be dealt with on a time and line basis. Cases in the Court of Session are dealt with on a time and line basis. In both the Court of Session and the Sheriff Court civil legal aid is now subject to case cost limitations, restricting the amount that can be paid in relation to a case.

---

## CHILDREN'S LEGAL AID

---

### WHAT DOES IT COVER?

Children's legal aid is available only for specified proceedings under the 2011 Act, including proceedings relating to child protection orders, compulsory supervision orders, and those following the arrest and detention of a child.

---

### WHO IS ELIGIBLE?

Children's legal aid is available to the child in all instances, and to a relevant/deemed relevant/seeking to be deemed relevant person and to 'section 126 individuals' for certain proceedings.

#### *Child applicants in Sheriff Court proceedings*

There is a tripartite test for child applicants for children's legal aid for Sheriff Court proceedings, assessed by SLAB:

- Means test
  - Children's legal aid is generally available to a child with disposable income of £222 per week, and disposable capital of £7,405 or less. Contributions are payable on a sliding scale.
  - If the child's disposable income or capital exceeds the limits, the financial test can only be met if it is shown that it would cause undue hardship if children's legal aid is not granted.
  - Unlike where a child applies for civil legal aid, the resources of any person owing a duty to aliment are not aggregated for the purposes of assessing the child's resources.



- Best interests of the child
  - SLAB must be satisfied that it is in the best interests of the child that legal aid be granted.
- Reasonableness
  - This is a wide-ranging discretionary test allowing SLAB to satisfy itself that it is reasonable in the particular circumstances of the case for legal aid to be granted.

*Other applicants in Sheriff Court appeal proceedings*

SLAB applies financial and reasonableness tests in all instances. For persons seeking to appeal a decision regarding their status as a relevant person, SLAB also must be satisfied that the applicant has substantial grounds. Where the applicant is a section 126 individual, SLAB must be satisfied that legal representation is required to enable the individual to effectively participate in the proceedings.



# THE NEED FOR CHANGE

## SIMPLIFICATION, MODERNISATION AND ENHANCING EFFICIENCY

We believe that the existing legal assistance arrangements are unsatisfactory because they are unduly complex, outdated and should better support reforms to court procedure which are intended to ensure that cases progress more speedily through the court system.

### THE NEED TO SIMPLIFY A COMPLEX SYSTEM

Audit Scotland's report on Scotland's criminal justice system of 2011 states:

"There have been significant changes to the criminal justice system since devolution, which have delivered major reform but have also contributed to its complexity."<sup>5</sup>

The report also states:

"Processing cases through summary courts involves several different stages. There are many different, often independent, bodies and people involved, some of whom need to prepare for each stage and many of whom need to be present at court. Evidence may need to be shared, **eligibility for legal aid may need to be checked** and witnesses need to be present. **Given the complexities involved, many cases end up repeating stages in the process** until all the necessary elements are in place."<sup>6</sup> (Emphasis added)

In 2008, in its response to the Civil Courts Review, Which? Stated:

"The system is currently too complex and difficult for people to find their way through. It is too formal and often so prohibitively expensive that this must act as a barrier for many sections of the community looking for justice."<sup>7</sup>

In 2011, in responding to proposals to introduce contributions into criminal legal aid, Families Outside stated:

"The assessment for financial eligibility should be similar for different type[s] of legal processes. Any differences do not appear to have any rationale behind them and are confusing for those who are subject to such assessments. Legal processes are confusing and

<sup>5</sup> Audit Scotland, *An Overview of Scotland's Criminal Justice System 2011*, [http://www.audit-scotland.gov.uk/docs/central/2011/nr\\_110906\\_justice\\_overview.pdf](http://www.audit-scotland.gov.uk/docs/central/2011/nr_110906_justice_overview.pdf)

<sup>6</sup> Audit Scotland, *An Overview of Scotland's Criminal Justice System 2011*, [http://www.audit-scotland.gov.uk/docs/central/2011/nr\\_110906\\_justice\\_overview.pdf](http://www.audit-scotland.gov.uk/docs/central/2011/nr_110906_justice_overview.pdf)

<sup>7</sup> Civil Courts Review Response from Which?, 15 April 2008 - <http://www.which.co.uk/documents/pdf/civil-courts-review-scottish-executive-which-response-177111.pdf>

intimidating enough for the lay population without applying different criteria to legal aid as well.”<sup>8</sup>

Similarly, the Scottish Independence Advocacy Alliance stated:

“The assessment of financial eligibility for ABWOR, summary and solemn legal aid should be similar. This will keep any payments consistent and additional administration to a minimum.”<sup>9</sup>

There are attempts to address these issues through comprehensive reforms to the justice system. Further, the Scottish Civil Justice Council and Criminal Legal Assistance Act allows for regulations to ensure that eligibility tests for criminal legal aid and criminal ABWOR are harmonised. However, the differing categories of legal assistance means that eligibility often has to be checked repeatedly during the lifetime of a case. More thought needs to be given to the simplification of the legal assistance regime generally, and how this can support the wider reforms as well as become more effective and efficient itself.

It is not surprising that solicitors and members of the public have difficulty understanding what type of legal assistance is available in a particular circumstance and the different eligibility criteria and payment rates that apply.<sup>10</sup>

Over the years, the 1986 Act and associated regulations have been amended leading to a highly complex system of legal assistance provision in Scotland. The changing interpretation of the legislative framework has led to an overly complex system.

This is not in the interests of the public who access this service, the legal profession that provides it, or SLAB who administers it.

Significant amounts of secondary legislation and increasing volumes of guidance has created a complex system that lacks clarity and is administratively burdensome. For example, at the date of publishing this paper, SLAB has already issued over 40 mailshots to legal aid solicitors this year.<sup>11</sup> The majority of these contained guidance or clarification on the regulations or SLAB procedures. There is a need to minimise complexity for solicitors, applicants and SLAB. Guidance and regulations should be condensed, summarised and catalogued so that it is easier for solicitors and the public to understand how regulations operate in practice. This simplification should be underpinned by structural changes in the legal assistance framework.

---

<sup>8</sup> Families Outside, 2011 - <http://www.scotland.gov.uk/Resource/Doc/353312/0119028.pdf>

<sup>9</sup> Scottish Independent Advocacy Alliance, Consultation Response to The Introduction of Financial Contributions in Criminal Legal Aid and Changes to Financial Eligibility  
<http://www.scotland.gov.uk/Resource/Doc/353312/0119030.pdf>

<sup>10</sup> It is worth highlighting that the SLAB Civil Solicitors Survey states “The most common reasons for dissatisfaction with the civil legal aid application process (C2b) given by those who were dissatisfied were in relation to bureaucracy, complexity or inefficiency of the application process.”

<sup>11</sup> 2014 Mailshots - <http://www.slab.org.uk/providers/mailshots/>



The system should be streamlined and easy to apply. The system should be designed to be easily processed using Legal Aid Online.

---

## ACCOUNTS

The process for preparing and negotiating accounts for legal assistance has become a complex and specialised process. 61% of solicitors surveyed by SLAB use a law accountant to prepare civil legal assistance accounts. The most common reasons given for doing so was that the process “Takes too much time for solicitors / speeds up the process” and that it is a “Specialist role / complex process”.

Certainty in relation to accounts is important in encouraging solicitors to undertake work, and is vital for the sustainability of legal aid practices. The accounting process has become so complex and time consuming and solicitors cannot always be confident that fair payment will be made for work that is undertaken in good faith.

There are regular disputes around payments. Accounts are frequently abated, meaning that payment a solicitor is expecting to receive is not in fact received. In the past year, about 15% of the total amount claimed in civil legal assistance accounts was abated from the accounts paid. This suggests there is considerable difficulty being had in accurately understanding and being able to claim appropriately for the work being done. It also suggests that solicitors are not being paid the amount expected, which may lead to cash flow and sustainability issues for firms.

Taxation is a formal process where the solicitor and SLAB have the opportunity to make representations to an independent auditor who makes a decision on the fee to be paid. This is currently common place. The system of taxation is not transparent, and creates an element of inconsistency throughout the country. This results in SLAB dealing differently with the same issue depending on the location of the solicitor, and further uncertainty around what a solicitor can expect to be paid.

## THE NEED TO INCREASE EFFICIENCIES THROUGHOUT THE JUSTICE SYSTEM

Legal assistance has an important role to play in the proper running of the justice system as a whole. Inefficiency in the wider justice system is currently being tackled through a significant programme of court reforms, and must also be dealt with in the structure of the legal assistance system.

---

## EFFICIENCY IN THE CRIMINAL JUSTICE SYSTEM

Involvement in the justice process can be a stressful and highly charged experience particularly for victims and/or witnesses, but also for parties, accused persons, and for solicitors.

In 2011, Audit Scotland found that:



“Many cases still have to repeat stages, costing around £10 million in 2009/10, others are subject to late decisions not to proceed, costing an additional £30 million. Much of this inefficiency is avoidable.”<sup>12</sup>

The summary justice reforms, implemented in 2007 and 2008, were designed to bring about fewer summary cases scheduled for trial, and then not going ahead and therefore fewer victims and witnesses being cited to court to give evidence.

In 2012, a Scottish Government a Social Research Group evaluated the impact of summary justice reform. It found:

“Among information, support and advice professionals, there was consensus that victims, and particularly witnesses, are still subject to inconvenience during their case due, primarily, to waiting times for trial to come to court, adjournments (colloquially known as ‘churn’) and waiting times in court. There was also consensus that the system was neither quick nor simple for victims or witnesses, and in some cases, the reforms had introduced new concepts which needed to be more clearly explained to victims, which staff sometimes found challenging.”<sup>13</sup>

The Research Group also found that:

“Efficiency was something that most people found difficult to define, although there was consensus that the system could probably be streamlined further to ensure savings to the public purse. For both police and expert witnesses there remains an element of inconvenience due to being cited to appear at court for cases which are later dismissed following a guilty plea. This was regarded as being the biggest barrier to achieving efficiency.”<sup>14</sup>

In 2010 Sheriff Principal Bowen made recommendations to make sheriff and jury business more efficient and cost-effective. Sheriff Principal Bowen identified that the section 76 procedure:

“is an opportunity for the accused to deal with the matter early and he is likely to receive a discount in his sentence from the sheriff in light of his early plea”.<sup>15</sup>

In support of early resolution, in 2013, Victim Support Scotland stated:

“A guilty plea at an early stage of the proceedings would spare much stress for victims and witnesses, since they will not be forced to attend trial to give evidence.”<sup>16</sup>

<sup>12</sup> <http://www.audit-scotland.gov.uk/media/article.php?id=175>

<sup>13</sup> Summary Justice Reform: Victims, Witnesses and Public Perceptions Evaluation, Scottish Government Social Research 2012 - <http://www.scotland.gov.uk/resource/0038/00386764.pdf>

<sup>14</sup> Summary Justice Reform: Victims, Witnesses and Public Perceptions Evaluation, Scottish Government Social Research 2012 - <http://www.scotland.gov.uk/resource/0038/00386764.pdf>

<sup>15</sup> Independent Review of Sheriff and Jury Procedure, 2010  
<http://www.scotland.gov.uk/Resource/Doc/314393/0099893.pdf>

<sup>16</sup> Response from Victim Support Scotland to Reforming Scots Criminal law and Practice:

There is clearly a need to ensure that justice is done as swiftly as possible. However, the existing legal assistance arrangements are not structured in a way that supports this aim. For example, at the moment:

- Summary criminal legal aid can be easier to obtain than criminal ABWOR. This can encourage not guilty pleas in order to access funding for representation.<sup>17</sup>
- SLAB estimates that 6% of applicants who received summary criminal legal aid would not have been eligible for criminal ABWOR. Again, this might encourage the accused to tender a plea of not guilty in order to access funding.<sup>18</sup>
- Current legal aid arrangements do not provide an appropriate incentive to use the s.76 procedure which provides an opportunity for the accused to intimate that he wishes to plead guilty to the offences on the Petition.<sup>19</sup>

The recent reviews into criminal court practice and procedure have suggested reforms to ensure that cases are disposed of quickly whilst retaining flexibility to accommodate more complex cases. We believe that, in order for the Scottish Government's reforms to be achieved, there must be appropriate funding arrangements to ensure cases are resolved at the earliest possible stage.

---

#### EFFICIENCY IN THE CIVIL JUSTICE SYSTEM

The problem is equally acute for cases within the civil justice system. Lord Gill stated in his Scottish Civil Courts Review that:

“Inefficiency in procedure comes at three main costs: the public cost in unnecessary and avoidable judicial and administrative procedures; the cost to the client or to the Scottish Legal Aid Board in payment for avoidable court appearances and for unnecessarily complex procedural steps; and the unquantifiable costs in stress and frustration to the litigant. All of these diminish public respect for the law and cause a loss of confidence in society's ability to resolve disputes justly.”<sup>20</sup>

In 2013, in relation to women, children and young people experiencing domestic abuse, Scottish Women's Aid stated:

---

Reform of Sheriff and Jury Procedure, 15 March 2013 -

<http://www.scotland.gov.uk/Resource/0042/00425551.pdf>

<sup>17</sup> Scottish Civil Justice Council and Criminal Legal Assistance Bill, Policy Memorandum (2012)

[http://www.scottish.parliament.uk/S4\\_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd-pm.pdf)

<sup>18</sup> Scottish Civil Justice Council and Criminal Legal Assistance Bill, Policy Memorandum (2012)

[http://www.scottish.parliament.uk/S4\\_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd-pm.pdf)

<sup>19</sup> Sheriff Principal Bowen's Independent Review of Sheriff and Jury Procedure provides an outline of the advantages of the S.76 procedure - <http://www.scotland.gov.uk/Resource/Doc/314393/0099893.pdf>

<sup>20</sup> Report of the Scottish Civil Courts Review, Volume 1, 2009 - <http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>

“Given that their lives are already disrupted and they have experienced considerable distress through the perpetration of abuse against them, the justice system has a legal and moral duty to ensure that the unwanted and unwelcome experience forced on them of engaging with the courts, through no fault of their own, is as short and trouble-free as possible.”<sup>21</sup>

When cases are delayed and there are long periods of apparent inactivity, this does little to instil confidence among those involved in the system that their cases are being progressed with an appropriate sense of urgency. Applications for civil legal aid are measured in weeks if not months. This aggravates the delays in court procedure, and adds to the overall inefficiency and damaged credibility of the justice system.

It is essential, both in business management terms and in order to instil confidence and improve the experiences of those involved in the system that the courts function effectively.

#### UPDATING THE SYSTEM TO BE FIT FOR PURPOSE FOR THE 21ST CENTURY

Structural changes to the criminal justice system through developments in legislation and the common law have had a significant impact on the way the justice system operates. Similar structural reform of the civil justice system is underway in the form of civil courts reform and the wider Making Justice Work programme.

Legal assistance has not always kept pace with these developments.

#### *Example 1 – Police Station Advice*

In the case of *Cadder v HMA*<sup>22</sup> the United Kingdom Supreme Court stated that the European Convention on Human Rights (ECHR) requires that a person who has been detained by the police has the right to have access to a solicitor prior to being interviewed. Following the decision, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 was introduced to ensure that the right to access a solicitor was enshrined in legislation.

The 2010 Act did not include appropriate funding arrangements for solicitors. Instead, the existing advice and assistance payment arrangements were adopted to fund this work. However, advice and assistance provisions were never designed for police station advice and the funding arrangements are, unsurprisingly, not fit for purpose (e.g. the provisions state that clients might have to pay a financial contribution but this is clearly impractical for police station interviews).

<sup>21</sup> Written submission from the Scottish Women’s Aid on Scottish Court Service recommendations for a future court structure in Scotland, 21 May 2013

[http://www.scottish.parliament.uk/S4\\_JusticeCommittee/Inquiries/SCS8G\\_Scottish\\_Womens\\_Aid\\_-\\_general.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/SCS8G_Scottish_Womens_Aid_-_general.pdf)

<sup>22</sup> [2010] UKSC 43

In 2011, SLAB assured the profession that these funding arrangements were being used as interim measures, until something more appropriate was introduced.<sup>23</sup> However, these arrangements are still in place today, despite the publication of the Criminal Justice (Scotland) Bill, which will extend the right to legal advice to suspects further.

#### *Example 2 – Solemn Legal Aid, Section 76 Cases*

Under Section 76 of the 1995 Act, an accused may give notice in writing "that he intends to plead guilty and desires to have his case disposed of at once". If the Crown accepts the plea, no preliminary hearing or first diet will be necessary.

The Scottish Government's Evaluation Report of the High Court Reforms states that such pleas:

"...save the greatest amount of court time and result in as little inconvenience to victims and witnesses as possible....."<sup>24</sup>

Section 66 of the Criminal Justice (Scotland) Bill introduces a requirement on the prosecution and the defence to communicate and lodge a written record of their state of preparation in advance of the first diet.

It is clear that the rationale for the introduction of this engagement is to encourage the early resolution of cases where possible. Solicitors will be required to attend managed meetings with prosecutors and assist in the preparation of written records.

However, at the moment, solemn legal aid fees do not support resolution at the earliest stage of the case. The fee for preparation for a hearing under section 76 of the 1995 Act (procedure where accused decides to plead guilty) is in the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 as amended by the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013.<sup>25</sup> The absence of an early disposal fee at a suitable level means that there is no financial incentive to resolve matters early where appropriate. An early resolution fee is essential to support the cost effectiveness and efficiency of the wider criminal justice system.

#### *Example 3 – Chapter 33AA Ordinary Cause Rules*

From 3 June 2013 the Act of Sederunt (Sheriff Court Rules)(Miscellaneous Amendments) (No. 2) 2013 came into effect. This refers to Section 11 of the Children (Scotland) Act 1995 cases and is termed as "expeditious resolution of certain causes".

---

<sup>23</sup> For example, see SLAB mailshot of 1 July 2011 - <http://www.slab.org.uk/common/documents/profession/mailshots/2011/CriminalMailshotPoliceDuty1July2011FINAL.pdf>

<sup>24</sup> An Evaluation of the High Court Reforms Arising from the Criminal Procedure (Amendment) (Scotland) Act 2004 - <http://www.scotland.gov.uk/Publications/2007/02/19111137/0>

<sup>25</sup> Regulations at: - <http://www.legislation.gov.uk/ssi/2013/320/regulation/6/made>



The introduction of Chapter 33AA introduces three new aspects to a Section 11 case proceeding to proof:

1. The pre hearing conference
2. The Joint Minute of the pre hearing conference
3. The case management hearing

The intention of the new rules is to enhance case management and limit the length and scope of the proof. This is an aim that we support, and that should result in a more efficient, less costly procedure that is better for the court system, parties, and children.

The new rules clearly introduce new elements to procedure in certain cases. These are not currently fully covered by existing civil fee regulations. As a result, the solicitors required to undertake this work cannot be confident that they will be fairly paid for work ordered by the court and done in good faith.

#### *Conclusion*

We believe that the legal assistance system has not always kept pace with changes to the justice system. However, if legal assistance is successfully developed as legislative needs evolve, court users and justice system stakeholders will obtain maximum benefit from the changes to the justice system.



# FUNDING

## SUSTAINABLE FUNDING FOR A VALUED SERVICE

Overall expenditure on legal assistance has been declining in real terms for years. The Government remains committed to further reductions in expenditure. In 1994/95, the total expenditure on legal assistance was £132.1 million. The Scottish Government's budget allocation for 2014-15 for legal assistance is £132.1 million. This is the same amount in cash terms but is significantly less in real terms. This is only around 57.6% of where it would have been had it reflected inflationary rates.<sup>26</sup>

Legal assistance provides financial assistance to enable those on low and moderate incomes to access legal services. Its continuation is vital in ensuring the right to a fair trial, enshrined in both common law and human rights legislation. If trends continue, solicitors are going to find it difficult to continue to offer these services and remain economically viable.

We believe that the Government should re-invest wider system savings into legal assistance expenditure before underfunding leads to a crisis in access to justice.

## RATES

We believe that there should be increases in legal assistance rates. In 2011, the Scottish Government stated:

"The Scottish Government has also remained committed to enabling the legal profession to be fairly remunerated for the work they do, whilst also ensuring value for money for the taxpayer."<sup>27</sup>

Current rates of payment to solicitors for all types of legal assistance are significantly underpaid in comparison to current private rates of charging.

Following the introduction of the 1986 Act the rates of legal assistance were set at approximately 10% less than the then charged private rate. This was on the basis that legal assistance was "guaranteed" as against the private client paying which was not always guaranteed.

Payment rates have not been revised upwards on an annual basis, in line with inflation. Some of the rates have remained static for more than 20 years. In April 1992, the summary criminal legal aid (and advice and assistance) hourly rate which applies in non-fixed fee summary cases was set at

<sup>26</sup> UK inflation data calculator - <http://www.thisismoney.co.uk/money/bills/article-1633409/Historic-inflation-calculator-value-money-changed-1900.html>

<sup>27</sup> The Scottish Government, A Sustainable Future for Legal Aid, 2011 - <http://www.scotland.gov.uk/Resource/Doc/359686/0121521.pdf>



£42.20. The rate has not been increased since.<sup>28</sup> This is in contrast to some other public sectors where pay has more closely been kept in line with inflation over the years. It is also in contrast to Sheriff Officer Fees which are reviewed and increased annually to ensure that there are appropriate increases in line with inflationary rates.<sup>29</sup> We believe that legal assistance rates should also be regularly assessed in light of inflation.

Without any significant increase in legal assistance rates since the introduction of the 1986 Act the rates of charging in private fees compared to legal assistance fees has grown hugely.

Although there have been attempts at targeted increases for solicitors in legal aid practice, these are often offset by fee reductions. Structural reforms have been designed to lead to increases in fees but it is not clear that the increases have in fact been achieved. For example, in 2010 a new fee structure for solemn fees was introduced, designed to provide a 7% increase in solicitors' fees. It has never been established that the 7% increase has, in fact, ever been achieved. Overall, the changes in the rates have not been successful in achieving a sustainable system of legal assistance provision.

If the proposals outlined in this paper are implemented there will be savings made, particularly in terms of case efficiencies and administrative savings in the SLAB budget. We believe that these savings should be re-allocated to allow solicitors to be properly funded.

#### UNPAID WORK - AREAS OF ROUTINE PRACTICE

There are a number of areas of routine practice for which legal assistance solicitors are not paid, including the verification of a client's eligibility and the processing of accounts online. The volume of unpaid work has increased as these procedures and processes have increased in complexity and scope over the years.

There should be consideration given to the funding of solicitors for these areas of routine practice. Alternatively, the processes should be simplified to ensure that unpaid work is kept to a minimum.

#### THE DECLINE IN FUNDING FOR LEGAL ASSISTANCE

The real term decline in expenditure on legal assistance has been ongoing for years. In 2011 Audit Scotland commented on criminal legal assistance expenditure:

<sup>28</sup> Gerry McClay, Journal of the Law Society of Scotland, 2011 - Shall we party for our friend's 21st? - <http://www.journalonline.co.uk/Referendum/1011784.aspx>

<sup>29</sup> For recent increases see Act of Sederunt (Fees of Sheriff Officers) (Amendment) <http://www.legislation.gov.uk/ssi/2013/345/contents/made>; <http://www.legislation.gov.uk/ssi/2012/341/contents/made> and <http://www.legislation.gov.uk/ssi/2011/432/note/made>



“The Scottish Legal Aid Board’s main area of expenditure is legal aid fees paid to private solicitors. SLAB reduced these costs by 15 per cent in five years, from £104 million in 2005/06 to £98.5 million in 2009/10 (in real terms).”<sup>30</sup>

The real term decline of legal assistance can be traced further back than 2005/06. In 1994/95, the total expenditure on legal assistance was £132.1 million.<sup>31</sup> According to an inflation calculator which uses official UK inflation data to show how prices have changed, £132.1 million would equate to around £229.3 million today.<sup>32</sup> In fact, legal assistance expenditure was £150.5 million in 2013/14.<sup>33</sup> Given these figures we can see that legal assistance expenditure has seen a significant reduction in real terms over the 20 year period.<sup>34</sup>

In a report made by the SLAB to the International Legal Aid Group Conference 2011 in Helsinki:

“Legal aid expenditure has been reducing in real terms for many years. In 2009-10 the cost of legal aid was around 10% less (£13m) than in 1998-99.”<sup>35</sup>

SLAB’s report to the Helsinki Conference suggests that in real terms, there has been a decline of almost 8% for criminal legal aid between 1998-99 and 2010-11 when expenditure was at its highest in cash terms.

The reason for the decline in real terms might be down to a number of factors-

- The general economic climate – recessions of the 1990s and 2008 onwards
- Political choices – e.g. successive Governments choosing not to invest in the legal assistance sector and introducing reforms to reduce expenditure
- The fall in crime - crime rates have been on a steady downward trajectory for years and this would also have had an impact on the overall expenditure over the years.

A consequence of the real-term decline in legal assistance expenditure is that the Scottish Government spends less on legal assistance in Scotland than anywhere else in the United Kingdom. In England and Wales, expenditure is around £39 per capita<sup>36</sup> and in Northern Ireland, around £55.<sup>37</sup>

<sup>30</sup> Audit Scotland, An overview of Scotland’s criminal justice system, 2011 [http://www.audit-scotland.gov.uk/docs/central/2011/nr\\_110906\\_justice\\_overview.pdf](http://www.audit-scotland.gov.uk/docs/central/2011/nr_110906_justice_overview.pdf)

<sup>31</sup> Scottish Legal Aid Board, Annual Report 1994-95

<sup>32</sup> <http://www.thisismoney.co.uk/money/bills/article-1633409/Historic-inflation-calculator-value-money-changed-1900.html>

<sup>33</sup> Scottish Legal Aid Board, Annual Report 2013-14

<sup>34</sup> Inflationary rates are based on estimates of UK inflation data.

<sup>35</sup> International Legal Aid Conference Helsinki 2011: National Report from Scotland, Scottish Legal Aid Board, 2011

<sup>36</sup> Reform of Legal Aid in England and Wales: the Government Response, Ministry of Justice, July 2011

<sup>37</sup> Based on expenditure stated in Northern Ireland Legal Services Commission Annual Report 2011-12 and Northern Ireland Statistics and Research Agency mid-2011 population estimates

In Scotland, for 2010-11 when expenditure was at its highest in cash terms, expenditure was around £29 per capita.<sup>38</sup>

#### STATE FUNDING FOR LEGAL ASSISTANCE – IMPLICIT IN ENSURING ACCESS TO JUSTICE

Access to legal assistance for those with insufficient resources is recognised as being implicit in the right of access to justice by case law and the ECHR.

Article 6 of the ECHR guarantees the right to a fair trial in both civil and criminal proceedings. This has been interpreted as providing for a general requirement of some measure of “equality of arms” between the state and the individual or between the parties in the case.<sup>39</sup> As such, in criminal proceedings an adversarial justice system requires a degree of equality of arms with the prosecution service. In civil proceedings, the right to a fair hearing means the right to present one's case to a court under conditions that do not place one at a substantial disadvantage compared to the other party to the litigation.

The right to access legal assistance is reflected in ECHR case law:

- In *Airey v Ireland*<sup>40</sup>, the European Court of Human Rights held that an indigent wife, who had been refused legal aid to bring proceedings in the High Court for an order of judicial separation, was entitled to legal aid in order for her right of access to the court to be effective.
- In *Poitrimol v France*<sup>41</sup>, the Court declared: “Although not absolute the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial.”

Where legal assistance is not funded appropriately this risks limiting the effectiveness of legal assistance. Article 6 (3) (c) requires that the assistance of the lawyer be effective. The ECHR is intended to guarantee rights that are not theoretical or illusory but are practical and effective.

- In *Artico v. Italy*<sup>42</sup>, the court found that the right to free legal assistance in Article 6 (3) (c) is not satisfied only by a formal appointment of a lawyer if that assistance is not effective. The state must take “positive action” to ensure that the applicant effectively enjoys his or her right to legal assistance.

<sup>38</sup> Per capita expenditure derived from General Register Office for Scotland mid-2011 population estimates

<sup>39</sup> *Bertuzzi v. France*, Judgment of February 13, 2003

<sup>40</sup> 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305

<sup>41</sup> App No 14032/88, A/277-A, [1993] ECHR 54, (1994) 18 EHRR 130, IHRL 2956 (ECHR 1993), 23rd November 1993

<sup>42</sup> [1980] ECHR 4, (1981) 3 EHRR 1, IHRL 26 (ECHR 1980), 13th May 1980, European Court of Human Rights [ECtHR]



The right to legal assistance is also explicitly recognised in the EU Charter:

"Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."<sup>43</sup>

#### CALLS TO ENSURE ADEQUATE REMUNERATION FOR LEGAL ASSISTANCE IN SCOTLAND

Over the years, while funding for legal assistance has been in decline in real terms, there have been calls to ensure that there is adequate remuneration for lawyers in legal aid practice:

In 2002 Lord Bonomy stated:

"The defence of virtually all High Court trials is funded by criminal legal aid. The rates payable to counsel and solicitors have not increased for over ten years. Revisal of these rates is an issue that requires to be addressed at an early date."<sup>44</sup>

In 2009 Lord Gill stated:

"If there is a substantial differential between legal aid rates and private market rates this may act as a disincentive for solicitors to take on legal aid cases except where they are very confident of winning the case. In our view the differential should not be allowed to become too large or there will be a risk to the supply of solicitors willing to undertake legal aid work."<sup>45</sup>

In 2010, Sheriff Principal Bowen stated:

"It is important to ensure solicitors are properly remunerated for the work involved in representing a client on a sheriff and jury indictment and that working in this branch of criminal law practice is a realistic business proposition for solicitors."<sup>46</sup>

Similarly, in 2011, Lord Carloway highlighted the importance of legal aid funding for police station advice:

"...the manner in which the right of access to a lawyer is made "practical and effective" will depend very much on that [legal aid] provision."<sup>47</sup>

<sup>43</sup> EU Charter of Fundamental Rights, Article 47 - [http://www.eucharter.org/home.php?page\\_id=56](http://www.eucharter.org/home.php?page_id=56)

<sup>44</sup> Lord Bonomy, Improving Practice - the 2002 Review of the Practices and Procedures of the High Court of Justiciary - <http://www.scotland.gov.uk/Publications/2002/12/15847/14122>

<sup>45</sup> Lord Gill, Report of the Civil Courts Review, <http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>

<sup>46</sup> Sheriff Prinsipal Bowen, Independent Review of Sheriff and Jury Procedure - <http://www.scotland.gov.uk/Resource/Doc/314393/0099893.pdf>

<sup>47</sup> The Carloway Review, 2011 - <http://www.scotland.gov.uk/Resource/Doc/925/0122808.pdf>



And, in 2012, the Scottish Human Rights Commission noted that:

“While it is important to maximise the value of legal aid expenditure, in a time of austerity, it is essential to maintain a fair, high quality and equitable system which maintains public confidence and guarantees access to justice.”<sup>48</sup>

The Society wants the profession to have more of a stake in future reform and has taken the decision to propose a system to the Scottish Government which is efficient, straightforward, and user-friendly and will save public expenditure across the justice system.

We believe that there should be increased legal assistance funding available particularly given the real term decline in expenditure on legal assistance over many years.

#### RE-INVESTMENT OF SAVINGS INTO LEGAL ASSISTANCE FUND

We believe that the Government should re-invest wider system savings into legal assistance expenditure.

#### PREVIOUS RE-INVESTMENT STRATEGY

In relation to proposals arising out of the summary justice reforms, on 28 February 2008, SLAB stated:

“Under the revised legal aid proposals the Government has agreed to a substantial re-investment of the savings into additional fees for solicitors.”<sup>49</sup>

In 2012, the Scottish Government’s Social Research Group outlined that the summary justice reforms had made savings:

“In 2007/8 the total expenditure on summary criminal legal assistance – that is on A&A, ABWOR and SCLA - for cases going through the Sheriff Courts was £58.2 million. In 2009/10 the equivalent figure was £47.2 million, a decrease of £11 million.

As noted earlier, there is little evidence to suggest that typical per case costs for summary legal assistance have reduced since the reforms. As such, these savings appear to have arisen largely from the reduced volume of cases now reaching court.

<sup>48</sup> Scottish Human Rights Commission, Written Submission to the Justice Committee in relation to the Scottish Civil Justice Council and Criminal Legal Assistance Bill, September 2012

<sup>49</sup> Summary Criminal Legal Assistance Reform -

[http://www.slab.org.uk/common/documents/profession/summarycriminal/2007/summary\\_justice\\_reform\\_march2008\\_proposals.pdf](http://www.slab.org.uk/common/documents/profession/summarycriminal/2007/summary_justice_reform_march2008_proposals.pdf)



However, some of the savings will also have occurred from the increase in the proportion of cases receiving ABWOR payments and the corresponding decrease in duty solicitor, advice and assistance, and summary criminal legal aid payments. This shift, at least in part, is attributable to the increase in earlier case disposal following the reforms.”<sup>50</sup>

There has been no indication that the Government intends to re-invest any of the savings into additional fees for solicitors.

---

#### IMPORTANCE OF RE-INVESTMENT

Research has shown that investment in legal assistance can deliver savings to public services, to the wider economy, and add value to both clients and communities.<sup>51</sup>

Early and necessary interventions from advice and legal support prevent problems and expense further down the line. The funding landscape needs to be based on what works, and what works for the long term.

In an environment where reductions in public expenditure are required it is important that savings are made. However, against the backdrop of a real-term decline in legal assistance expenditure for years, it is equally important that efficiency savings are re-invested to ensure that legal assistance remains sustainable.

---

<sup>50</sup> Evaluation of the Reforms to Summary Criminal Legal Assistance and Disclosure, <http://www.natcen.ac.uk/media/46403/evaluation-reforms-summary-criminallegalassistance.pdf>

<sup>51</sup> Citizens Advice Bureau, Towards a business case for legal aid, July 2010 - [www.citizensadvice.org.uk/towards\\_a\\_business\\_case\\_for\\_legal\\_aid.pdf](http://www.citizensadvice.org.uk/towards_a_business_case_for_legal_aid.pdf); University of Sussex, Social Welfare Advice Services, A Review, May 2014 - <http://www.lowcommission.org.uk/dyn/1405934416401/Social-Welfare-Advice-Services-Final-Report-20140603-Main-Text.pdf>



# THE PROPOSED SYSTEM

## RETHINKING THE FRAMEWORK

The problems with the current system are clear – the framework has become overly complex and administratively burdensome, the system has not kept pace with changes to the wider justice system, and there is continuing pressure on the budget which has resulted in legal aid practice becoming an increasingly unsustainable option for solicitors.

We have begun the process of rethinking the framework. These are our initial thoughts on a new way of approaching legal assistance, with a view to ensuring that the system is efficient, fair, making the best use of resources, and sustainable in the long term. We believe that these proposals can form the basis for significant reform. Although the general structure remains familiar, the proposals suggest a more streamlined and common sense approach to providing legal assistance in the context of our justice system in the 21st century.

This is just one proposal, we hope that it will form the basis for a discussion moving forward, to encourage innovative thinking around how we ensure access to justice through publicly funded legal assistance in Scotland.

## CRIMINAL LEGAL ASSISTANCE

### STREAMLINED SYSTEM OF CRIMINAL LEGAL ASSISTANCE

We propose that a new system of criminal legal assistance is established. The system would not have separate categories of “criminal advice and assistance”, “criminal ABWOR”, “criminal summary legal aid” and “criminal solemn legal aid” and instead would introduce a single system of “criminal legal assistance”.

Financial verification would be required at initial application stage only and we recommend that a fresh approach is taken in relation to eligibility assessment. We would welcome a wider discussion on this issue. We believe that such a discussion is important given the recent changes to the welfare system.<sup>52</sup>

In order to put in place a single streamlined system for criminal legal assistance we propose that a single legal assistance certificate is introduced, underpinned by a system of block fees. This will ensure greater consistency and understanding of criminal legal assistance across the justice system and will simplify its operation.

<sup>52</sup> UK Government – Simplifying the welfare system and making sure work pays - <https://www.gov.uk/government/policies/simplifying-the-welfare-system-and-making-sure-work-pays>



Other than for police station work and for pre-sift appeals work, a criminal legal assistance certificate would be used to provide funding cover in all criminal matters. For all matters, there would be provisions for exceptional case status where the solicitor could charge on a time and line basis where necessary.

Overall, the system would be easier to administer because, other than in a narrow range of cases, funding would be entirely block based.<sup>53</sup> A simplified system will not only help solicitors but may also help with the administration of legal assistance by SLAB.

---

## POLICE STATION INTERVIEWS AND OTHER RELEVANT INTERVIEWS – PRELIMINARY BLOCK FEE

---

### WHAT WOULD IT COVER?

Dealing first with attendance at police station interviews and also at other relevant interviews, it is suggested that a block fee should automatically apply to all matters where a solicitor is required to attend an interview in order to advise a suspect at any point during the interview process.

There should be two different block fees depending on whether the solicitor provides telephone advice or attends at the interview.

The attendance block fee would be set at a rate which would appropriately reflect the important role of the solicitor during the interview to represent, protect and advance the legal interest and rights of the suspect as well as the length of time spent at the interviews and the often antisocial hours involved in attendance.

The block fee also needs to reflect that solicitors have to ensure adequate staffing levels so that there is sufficient availability of staff cover and as well as having to ensure there are appropriate systems and infrastructure in place to travel to police stations, communicate with the SLAB helpline and submit forms online.

This change would bring the legal assistance system in line with the wider justice system reforms in relation to police station advice.

There should be a provision for exceptional case status if required.

---

### WHO WOULD BE ELIGIBLE?

Advice for suspects at interviews should be a non-means tested benefit.

---

<sup>53</sup> At the moment there is a low level of grants for exceptional case status.



In relation to both the telephone and attendance blocks, there should be no contributions applicable, thereby removing any need for a financial eligibility check of the client at this stage of the process.

At the moment, suspects at the police station are not subject to the upper weekly income and capital thresholds. However, contributions will apply and a suspect with weekly disposable income above £245 will have the maximum contribution of £135 to pay towards the cost of this advice. This contributory system creates a practical problem. A suspect is unlikely to have documentation to hand to confirm income and capital, presenting the solicitor with substantial difficulty in satisfying him or herself as to the suspect's disposable income or disposable capital level with any accuracy.

Having no contributions applicable at this stage of the process would ensure that every member of the public who needs the services of a solicitor whilst questioned in a police station gets free automatic legal assistance, thereby increasing access to justice significantly. Such an approach would be consistent with other jurisdictions.

---

## SUMMARY WORK

---

### WHAT WOULD IT COVER?

The criminal legal assistance certificate would cover all types of summary case and all types of plea.

As such, instead of having a grant of “criminal advice and assistance”, “criminal ABWOR” or “criminal summary legal aid”, the client would simply have one grant of criminal legal assistance.

---

### WHO WOULD BE ELIGIBLE?

The criminal legal assistance certificate should be granted by SLAB subject to a financial eligibility and interests of justice test.

The initial application for criminal legal assistance would be the only time that financial verification would be required for the grant. Following the grant of the legal assistance certificate it would be a matter for the solicitor to apply for the appropriate blocks.

During the course of the case, there would still be a duty upon the applicant to update the solicitor and the Legal Aid Board with any change in financial circumstances and any false declaration would obviously carry a criminal penalty.

Ensuring that there is generally only one point in a case where eligibility is checked will simplify the procedure for SLAB, solicitors and clients and will assist with the processing of the case through the courts system.

---

### BLOCK FEES – PLEA OF GUILTY AND NOT GUILTY



Where the accused pleads guilty, the solicitor would receive a block fee.

Where the accused pleads not guilty, the solicitor would receive a block fee.

The block fees for both pleas should be set at the same rate and should be of a similar level to the fee that is currently in place for summary legal aid. The current arrangements have been criticised for allowing perverse incentives which “damage the efficient and effective operation of the justice system.”<sup>54</sup> Having the block fees set at the same rate creates a unified system and ensures that the solicitor and his or her client have adequate funding arrangements in place to resolve matters early where appropriate.

This block fee would cover all work up to two diets of deferred sentences or the first 30 minutes of trial.

If there are further deferred sentences or if there is further work to be carried out then the solicitor would receive an additional block payment. In relation to additional deferred sentences, the amount of the fixed fee for the additional deferred sentences would be the same whether the client pleads guilty initially or whether he proceeds to trial.

---

#### ADDITIONAL BLOCK FEES

A system of additional block fixed fees could be used to cover the work of the solicitor at trials, bail appeals, further deferred sentences or the obtaining of expert reports.

The criminal legal assistance certificate would continue to apply to post-conviction work. Again, this would be dealt with by way of block fees. In this regard, the solicitor would receive a block fixed fee for each of the following matters:

- Parole board hearings;
- DTTO hearings;
- Proofs in mitigation;
- Breaches of court orders;
- Proofs of breaches of court orders; and
- Proceeds of crime.

---

#### SOLEMN PROCEDURE

---

#### WHAT WOULD IT COVER?

---

<sup>54</sup> Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, Policy Memorandum [http://www.scottish.parliament.uk/S4\\_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Scottish%20Civil%20Justice%20and%20Criminal%20Legal%20Assistance%20Bill/b13s4-introd-pm.pdf)



The criminal legal assistance certificate would cover all types of solemn case and all types of plea.

#### INITIAL APPEARANCE

A criminal legal assistance certificate would be granted automatically to any applicant who is prosecuted under solemn procedure.

There would be a system of block fees automatically payable to the solicitor for the first appearance.

#### WHO WOULD BE ELIGIBLE?

When the accused person is bailed or fully committed he or she would then become subject to an eligibility test. This would be the only time that financial verification would be required for the grant of criminal legal assistance.

During the course of the case, there would still be a duty upon the applicant to update the solicitor and SLAB with any change in financial circumstances and any false declaration would carry a criminal penalty.

Where the accused does not meet the eligibility test, the solicitor would still be entitled to the block fixed payment for any first appearance.

#### EARLY RESOLUTION

Following the first appearance, in order to facilitate their resolution at the earliest possible stage, fees should be structured so that the solicitor receives an early resolution fee for achieving a resolution by way of a section 76 hearing or at the first calling on indictment.

Early resolution fees mean that fewer victim and witness citations will need to be issued, facilitated by cases being dealt with at the earliest possible stage and more effective preparation resulting in fewer adjournments. It would also mean a reduction in the costs for trial preparation for cases that do not go to trial.

Early resolution fees support the cost effectiveness and efficiency of the wider criminal justice system and will reduce court delays.

#### CASE CONTINUED – BLOCK FEE SYSTEM

In relation to further diets and continuations, there should be a set of additional block fees for each diet, but the amount of each block these would be reducing on a sliding scale as the case progresses. This sliding scale would provide a further incentive to try and resolve cases at an early stage.



There could be a further block fee to cover work in preparing paper productions and witness statements.

---

#### CASE PROCEEDS TO TRIAL

Where a matter does proceed to trial we suggest that fees should be chargeable on an hourly basis. This is appropriate given the level of work involved, particularly towards the end of a trial where the evidence is reviewed and speeches and submissions are prepared.

---

#### POST-CONVICTION WORK

Where the solicitor is required to carry out post-conviction work, this could also be dealt with via block fees.

---

#### APPEALS – APPEAL CERTIFICATE

---

##### INITIAL APPEAL STAGE – PRE-SIFT COVER

The solicitor would apply to SLAB for cover for appeal funding, providing information about a ground of appeal. At this stage the appeal certificate will specify that the cover is for taking instructions, lodging the appeal and any other necessary work which has been outlined by the solicitor.

Initial cover would be through a system of funding which would continue until the appeal had passed, or had been refused by, the sift process.<sup>55</sup>

The time-limits are applied strictly by the appeal courts so urgent cover is necessary. The funding arrangements would also have to ensure due regard to economy in relation to the preparation of Appeals.

---

##### POST-SIFT COVER

Where the appeal passes the sift process, a criminal legal assistance certificate would be granted. The certificate would cover all types of appeal, regardless of the type of case or the type of court where it is to be heard.

Again, there should be a block system in relation to appeals, with additional blocks becoming applicable where appeal work is continued.

There would be a provision for exceptional case status.

---

<sup>55</sup> We would suggest a system of cover for appeals that is similar to existing arrangements for Regulation 15 (special urgency) cover.

---

#### WHO WOULD BE ELIGIBLE?

If a criminal legal assistance certificate had been granted at first instance, the financial eligibility test would not be applied in respect of the appeal, unless the accused had had a change of financial circumstances since the date of the original criminal legal assistance grant.

If a criminal legal assistance certificate had not been granted a financial eligibility test would apply.

---

#### EXCEPTIONAL CASE STATUS

Although a comprehensive system of fixed fee payments is proposed, there would need to be exceptions built in for where time and line is essential (e.g. where the case is unduly complex or lengthy). There would have to be provision for exceptional case status for all cases – interviews, summary, solemn and appeals.

The volume of cases with exceptional case status is currently monitored by SLAB and we would expect this monitoring to continue under any new arrangements.

---

#### SPECIAL URGENCY

It would be important that any new system introduced would continue to allow SLAB to make legal assistance available in situations of special urgency, currently available under Regulation 15 of the Criminal Legal Aid (Scotland) Regulations 1996.

In certain circumstances, SLAB should be able to make legal assistance available, even where it has not been fully satisfied on all the eligibility criteria to allow urgent work to be carried out.

---

#### CIVIL LEGAL ASSISTANCE

In 2011, the Scottish Government's white paper, *A Sustainable Future for Legal Aid*, set out four overarching themes for legal assistance reform:

- Focusing legal assistance on those who need it most
- Ensuring wider access to justice - the right help at the right time
- Maximising the value of legal assistance expenditure
- Making the justice system more efficient

We have kept these themes in mind when considering how the legal assistance system can be maintained in the long term, ensuring that those who are most in need are able to access the advice they need, and that legal assistance work remains a sustainable career option for solicitors across Scotland while legal assistance expenditure is kept at a level that can continue to be funded by the Scottish Government.

We suggest that one way of achieving this aim may be by revisiting the issues of eligibility and scope, and reconsidering the different means of providing advice. We suggest that it is possible to reduce the number of cases dealt with under legal assistance, while ensuring that appropriate advice remains available from a range of providers. The savings and capacity created by reducing the number of legal assistance cases must then be reinvested into the legal assistance system itself, ensuring that it becomes a robust, high quality, and sustainable system for the long term.

In addition, removing the distinction between different types of legal assistance will simplify and streamline the system, making it easier to understand, and better able to adapt to the needs of each case without causing unnecessary delay and confusion.

---

#### SINGLE CONTINUING GRANT

The distinction between advice and assistance and legal aid should be removed, and replaced with a general reference to “Legal Assistance”.

SLAB would grant legal assistance after assessing an application, and applying the relevant financial, merits, and reasonableness tests. The financial tests will require modification to account for the introduction of a single eligibility threshold, rather than separate thresholds as currently exist for advice and assistance and legal aid. There would be financial checks on parties made on an ongoing basis, and the requirement to notify SLAB of any material changes in circumstance would be retained. However, the single grant of legal assistance would continue throughout the life of the case, being extended as required in response to the development of the case.

This could take the form of, at the outset, effectively a grant of the equivalent of advice and assistance but providing the ability to progress through the life of the case on a single grant of legal assistance. A cost limit could be in place for pre-court procedure, and ongoing stage reporting will ensure that it remains appropriate for legal assistance to be provided. Sanction will continue to be required for exceptional expenditure and items such as reports and instruction of counsel.

This would simplify the structure of the legal assistance system, and allow for a more natural development of the case and greater flexibility in case management by the client and his or her solicitor. Regular stage reporting would ensure that SLAB remained informed of the progress of the case. Reviews of financial, merits, and reasonableness grounds should be built in to the reporting process to ensure that SLAB remains satisfied that legal assistance remains appropriate.

---

#### FINANCIAL ELIGIBILITY

Around 75% of the Scottish population are currently financially eligible for civil legal aid, with varying levels of contribution.

Although we support the underlying notion that access to a solicitor for legal advice should be available to all who need it, given the pressure on the legal assistance budget, and the agreed need



to focus on those who need it most, we believe that the current high eligibility thresholds for legal assistance are unnecessary for meeting these goals.

---

## THRESHOLDS

The increasing availability of alternative funding structures together with our proposal for strengthening and expanding the network of advice centres in Scotland (discussed below) will ensure that affordable and appropriate advice will remain available to all in Scotland. At the same time, the pressure on the legal assistance system will be reduced, and solicitors will have a wider range of business options, allowing them to form sustainable business plans that enable them to continue to provide legal assistance work where appropriate.

As part of the removal of the distinction between different types of legal assistance, and the introduction of a single continuing grant, there would be a single eligibility test on initial application for legal assistance. We suggest that the financial element of the eligibility test should be set between the current levels for advice and assistance and legal aid. The precise level will require further careful consideration, but the intention would be to considerably reduce the number of people eligible for legal assistance, removing those who are currently subject to high contributions. Those who have the financial resources to make high contributions should more appropriately be working with solicitors to arrange an affordable payment option as a private client. Only those most in need, who would be unable to realistically obtain legal assistance at a private rate, should qualify for publicly funded legal assistance.

---

## SUBJECT MATTER OF DISPUTE

In addition to reducing the eligibility thresholds, we propose that the current practice of disregarding subject matter of dispute should be abolished.

Those who have good prospects of gaining access to considerable resources should reasonably be expected to be able to arrange a speculative fee agreement, access a loan for legal services, or agree an alternative payment plan to enable them to access legal services as a private client.

Individuals making a recovery of resources through legal action are currently likely to be subject to clawback through the legal assistance system, meaning that any property recovered or preserved can be used to pay the cost of legal assistance. As a result, the removal of the subject matter of dispute rule would not deprive individuals of resources they would otherwise retain. Instead, this proposal will increase the ability for solicitors and clients to make flexible and tailored arrangements that best suit the situation of the individual.

---

## SCOPE OF CIVIL LEGAL ASSISTANCE

Civil legal assistance is currently available to some extent for all issues of Scots law. The inclusive scope of legal assistance in Scotland is admirable, and has the intention of ensuring that people have

access to support for all issues. However, it may be that the near universal scope is no longer necessary or appropriate in today's landscape of funding and advice options.

Our proposal to consider removing certain areas from the scope of legal assistance in Scotland is contingent on there being a properly funded and widely available advice network, separate to the traditional network of firms of solicitors providing pro bono and legal assistance work. We acknowledge that there are many qualified and experienced advisors working outwith the solicitor-client framework, and that, in many circumstances, these advisors will be able to provide the right support and advice to individuals without the need for a solicitor to be involved.

This does not negate the need for solicitors to be available to provide legal advice and representation when required. We propose a very limited number of areas for consideration to be removed from scope, and would not support a wide scale exclusion of legal assistance, as has been seen in England and Wales. In addition, our proposals must be taken in the context of the development and maintenance of a strong network of advice agencies, and the implementation of reforms to costs and funding and access to justice. Publicly funded legal assistance should be developed in light of the changes being made through the Taylor Review, Making Justice Work, and the Digital Justice Strategy.

We suggest that consideration should be given to the following areas being removed from the scope of civil legal assistance:

- Breach of contract
- Debt
- Employment law
- Financial only divorce
- Housing/heritable property
- Personal injury (with the exception of medical negligence)

In addition, we support the introduction of means testing for Adults with Incapacity applications that include a financial element. Other areas may also warrant consideration for removal, and some of the areas suggested here may not be deemed appropriate after further discussion. However, we feel that this is an appropriate starting point for the discussion.

Removing some areas from scope would see a reduction in the number of civil legal assistance applications and corresponding reduction in expenditure on legal assistance.

We believe that the types of issues that would be removed from legal assistance by excluding the suggested areas are such that could easily and properly be provided either by the advice sector or on a private client basis through a range of funding options including speculative fee agreements, loans for legal services, and payment plans involving deferral or instalments. These arrangements encourage more careful assessment of the merits and prospects of success of a case at an early stage, and provide greater flexibility for both clients and solicitors to agree a suitable funding model.



This allows firms to operate on a more commercial basis, and will encourage competition between firms and the growth of alternative affordable funding options.

Some of these areas, although technically in scope, are now often dealt with outwith the legal assistance system. Many solicitors will choose not to accept these cases on a legal assistance basis. In other areas, individuals may seek advice from other sources, such as Citizens Advice, in court advisors, or organisations that specialise in areas such as debt or housing. Removing these areas from scope would modernise the legal assistance system, and align it with the current best practice in the context of a modern advice sector.

---

#### ALTERNATIVE SOURCES OF ADVICE

A number of organisations currently provide excellent support and advice to individuals who are experiencing problems which may have a legal dimension. Law centres, advice shops, and specialist organisations can offer support ranging from help accessing information, to support in a court context. It is critical for a modern and effective society that the right help is available at the right time, and the effective reform of the courts and of legal assistance is dependent on the proper funding of a robust advice sector.

If, as we propose, legal assistance is removed from certain areas of law, it is critical that the organisations that currently provide high quality specialist advice in many of these areas (such as housing, employment, and debt) are able to continue to provide such advice with the confidence of secure and adequate funding.

---

#### ALTERNATIVE SOURCES OF FUNDING

These proposals would result in fewer cases being dealt with through legal assistance. These cases will still require to be supported, and many will still require solicitors. However, there are alternative ways to fund an individual accessing a solicitor without going through legal assistance.

---

#### PRIVATE CLIENT OPTIONS

As discussed above, we believe that the majority of cases taken out of the legal assistance system, whether by changes to scope or eligibility, that require a solicitor will be able to be dealt with by solicitors on a private client basis. The Taylor Review envisages an increasing range of options for managing the cost and funding of litigation, and solicitors already provide a variety of payment options including speculative fee agreements (particularly useful for areas such as personal injury and employment), unbundling of services or staged fees (allowing the solicitor and client to agree a fee for a specified item or stage of work, for example drafting a writ or progressing a case to the stage of a hearing), and instalment plans, which can help to make legal services affordable for those of moderate means while still allowing firms to manage cash flow.



In addition to agreements with the solicitor, commercially available sources of funding, such as after the event insurance and specialist legal loans, can help to protect against costs orders, and enable payment of legal fees and outlays in advance of an award being made.

---

#### LEGAL ASSISTANCE LOANS

In addition to commercially available loans, we suggest that it might be appropriate for the Scottish Government, through SLAB, to provide affordable loans for legal services to individuals who do not qualify for legal assistance. These loans could be used to cover outlays, or the cost of a solicitor. This would provide an alternative source of funding for individuals who may have difficulties obtaining an affordable commercial loan.

This would be a more efficient approach to the situation in the current system where an individual may qualify for legal assistance, but with a contribution of 100%. SLAB already arranges payment plans with individuals, and converting the system to a loan would reduce the amount of administration required by SLAB by removing the need to become involved in case management and assessing solicitors' accounts. Instead, an arrangement would be made with the individual for a specified amount, based on information provided about the case, and potentially secured if there are existing available assets.

As is currently the case with clawback, the solicitor would pay outstanding sums from any settlement or award before transferring the remainder to the client.

---

#### EXCEPTIONAL CASE STATUS

In order to have a meaningful commitment to access to justice, it is essential that a system is in place to ensure that, in exceptional cases, legal assistance can be made available by discretion. This would apply where an individual would not otherwise be able to secure funding to progress a case that is assessed as having merit and reasonable prospects of success, or where an individual's ECHR rights are at risk of being compromised due to a lack of legal representation.

This system must be designed and implemented with the intention of providing a real and meaningful mechanism for ensuring that legal assistance, as the funder of last resort, is not denied in a case where it is needed. We note that there has been some criticism of the exceptional case provisions introduced in England and Wales following the recent considerable reforms to the scope of civil legal assistance. Care must be taken to ensure that any system put in place is trusted and that members of the profession and public are confident in the fair operation of the decision making process.

---

#### CHILDREN'S LEGAL ASSISTANCE



We would propose that children’s legal assistance should follow the model suggested for civil in terms of a single continuing grant, removing the distinction between advice and assistance, initial appearances and subsequent legal aid.

We do not propose amending the scope of children’s legal assistance at this point, as this was recently reviewed and reformed by the Children’s Hearings (Scotland) Act 2011.

## GENERAL SYSTEM

### LATE PAYMENT OF COMMERCIAL DEBTS

The UK is required to implement the terms of Directive 2011/7/EU on Combating Late Payment in Commercial Transactions, which provides for interest on late payments in commercial transactions. It is our understanding that legal assistance payments made to solicitors fall under the protection of this Directive, and should qualify for statutory interest in the event of late payment. However, the Late Payment of Commercial Debts (Scotland) Act 1998, which implements the Directive in Scotland, does not allow for legal assistance payments to be subject to the late payment interest. In addition to the fact that the Directive is not currently being properly implemented in Scotland, legal assistance payments to Advocates are specifically included in the legislation and it is incongruous that payments to solicitors are not similarly protected.

Any reform to the legal assistance system as a whole should ensure that the services being provided by solicitors are provided with the same protections as other commercial transactions, and on the same terms as Advocates within the legal assistance system.

As SLAB currently performs well on its targets for timeliness, this should not create a significant additional cost or burden to the legal assistance system. It would, however, correct the anomaly in the current system, provide comfort and protection to solicitors undertaking this important area of work, and would ensure that Scotland is in compliance with its obligations in the EU, protecting the UK from potential enforcement action if the issue of non-compliance was pursued.

# USE OF TECHNOLOGY

## LEGAL SERVICES IN A DIGITAL AGE

The ways in which legal services are provided are changing dramatically, in large part because of new technology.

SLAB's Legal Aid Online service has been used extensively since 2011 and document disclosure in criminal cases also takes place online.

The Law Society is currently providing smartcards to all solicitors, allowing them to carry out work without the need for traditional signatures and paper-based documents. The smartcard provides a secure digital signature and acts as a professional I.D. recognised across Europe. From next year it will replace the current practising certificate meaning the Society can offer a robust and reliable confirmation of credentials, helping reassure the public they are consulting a trusted legal advisor. The physical I.D. of the smartcard will be used by solicitors to access courts, prisons and police stations. Court practitioners can use the smartcard to lodge documents digitally in court. In terms of legal assistance, we hope that the smartcards will be fully integrated with the legal aid online system to assist solicitors and SLAB in processing applications and accounts.

We believe that significant advances can be made through wider deployment of technology. For the majority of cases, our court processes do not readily facilitate electronic working. The UK Supreme Court is an example of effective court technology: electronic bundles can be submitted and these bundles can be accessed on-screen in court. With the significant cost to the legal aid fund from photocopying case bundles, considering how electronic bundles could be used in trials and appeals could offer significant cost and efficiency savings. We are pleased to note the Digital Strategy for Justice in Scotland, which aims to provide "a modern, user-focussed justice system which uses digital technology to deliver simple, fast and effective justice and value for money, across the full extent of administrative, civil and criminal justice".<sup>56</sup> Reform of the legal assistance system should take place in the light of the wider development of the Digital Strategy and increasing role of technology in the justice system.

Outlays for sheriff officers and for shorthand writers in civil cases are also met from the legal aid fund. For the former, as the primary communications channel for an increasing number of people is online, there may be secure and reliable ways to carry out these functions online. For the latter, most courtrooms have the facilities for digital dictation and this is used when required in criminal cases; for civil cases, however, though the facilities are available, shorthand writers are instead engaged. We see no clear reason for the distinction.

---

<sup>56</sup> The Scottish Government, The Digital Strategy for Justice in Scotland, 20 August 2014



The use of videoconferencing is increasing, for instance, to clients detained in prison and for criminal appeals. There are potential savings to be realised through the wider deployment of these facilities. We believe, though, that the lack of wi-fi in the majority of courts across Scotland is a significant barrier for practitioners' adoption of new technology.

We have also been following developments in other jurisdictions, particularly in the way that legal advice is provided to the public. We have followed the development of telephone advice services in England and Wales, for instance, and the online advice platform developed by the Dutch Legal Aid Board, the Rechtwijzer. We can see the potential for online services. Some caution, however, around the 'digital divide' is needed: recent research suggests that young people may be less capable than anticipated with online legal services. Some cases will also be complex, and not particularly suited to an online process.

The Scottish Government has published *The Digital Strategy for Justice in Scotland* which sets out the Government's vision of how digital technology will transform the justice system.<sup>57</sup> The paper describes how the Government intends to

"Use digital technology to transform the way in which we deliver justice services in the civil, criminal and administrative justice systems in Scotland".<sup>58</sup>

It sets out three main objectives. The first is to allow people and businesses to access information on a range of areas of interest, to inform their decisions and help them resolve any disputes that arise, or that is relevant to any court case. The second objective relates to fully digitised processes and systems within the justice system. The third objective is greater use of data analysis to predict future pattern.

We broadly welcome the aim outlined in the paper:

"To use digital technology wherever possible to broaden access to justice, improve quality of service and safeguard the rights of citizens and users."<sup>59</sup>

We are aware of the innovative changes and opportunities that new digital solutions bring. It is important that these opportunities form an integral part to any reform to legal assistance.

---

<sup>57</sup> The Digital Strategy for Justice in Scotland, 2014 <http://www.scotland.gov.uk/Resource/0045/00458026.pdf>

<sup>58</sup> <http://www.scotland.gov.uk/Publications/2014/08/5429/downloads#res458026>

# CONCLUSION AND CALL FOR FEEDBACK

## CONCLUSION

This is a discussion paper, with the intention of starting a conversation and encouraging new ways of thinking about legal assistance reform.

It has become increasingly clear that the system we have, although admirably delivering high standards of advice to a wide section of the population, cannot continue in the long term. The system is in decline. This problem is not unique to Scotland – we only have to look to England and Wales to see the risks of failing to address the need for reform in a careful and thoughtful way. Funding pressures, reforms to the wider justice system, changes to the way that solicitors work and how people seek advice – all of these factors need to be taken into account. We believe that a robust system of publicly funded legal assistance is fundamental for maintaining meaningful access to justice for people in Scotland. Such a system needs to be simple, efficient, and work smoothly with the wider justice system. The solicitors who deliver the service need to be adequately remunerated, to ensure that they can continue to run their businesses and invest in training new members of the profession to carry on the work in the long term.

The legal aid committee of the Law Society of Scotland has suggested these proposals as a starting point, one option for a more sustainable system. We believe that a streamlined approach to criminal legal assistance will ensure greater consistency and understanding of criminal legal assistance across the justice system and will simplify its operation. In civil law, we believe that legal assistance could be much more focused on the areas where people may genuinely struggle to obtain a private solicitor to assist them with a case that has real merits, and suggest that there are ways in which the system could support and complement a robust advice sector and a competitive private market.

We encourage members and stakeholders to take our proposals as a starting point, and to engage in a wide-ranging discussion on how best to secure a sustainable system of legal assistance and access to justice for everyone in Scotland.

## HOW TO RESPOND

We are seeking views on these proposals, and suggestions for other ways that legal assistance could be reformed to be sustainable for the future and fit for the 21<sup>st</sup> century. We welcome feedback from our members, SLAB, the Scottish Government, and other stakeholders. If you would like to respond, please contact us. We are happy to accept written feedback, or to arrange a meeting if appropriate.



## CONTACT DETAILS

Legal Aid Committee  
26 Drumsheugh Gardens  
Edinburgh  
EH3 7YR

[legalaid@lawscot.org.uk](mailto:legalaid@lawscot.org.uk)