



Law Society
of Scotland

Independent Strategic Legal Aid Review

Response to the Independent Strategic Legal Aid
Review call for evidence

May 2017



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Introduction

Legal aid provides social justice. It gives people in Scotland a voice, often at the most challenging times of their lives, whether unfairly dismissed, unlawfully evicted, resolving contact or residence of their children or defending themselves from criminal charges. It helps to tackle the significant inequalities in our society. It helps to build safer and stronger communities where people know their responsibilities and can enforce their rights. It improves the life chances of children, young people and families at risk. It helps to provide equality before the law, ensuring that everyone is able to resolve disputes and legal issues effectively. Legal assistance provides assistance to a wide range of the population in Scotland, with legal help in around 250,000 cases in the last year.

The Minister for Community Safety and Legal Affairs, Annabelle Ewing MSP, highlighted the importance of legal aid in delivering social justice in her announcement to the Scottish Parliament of the establishment of the Independent Strategic Legal Aid Review¹:

“Publicly funded legal assistance plays a vital role in providing citizens with the ability to enforce their rights and in upholding social justice. In Scotland, we have, notwithstanding budgetary pressures, maintained wide access to legal assistance across criminal and civil cases. We have a demand-led system that has a high eligibility rate, which means that all those who apply and are eligible receive publicly funded legal assistance.

“The system is founded on the Legal Aid (Scotland) Act 1986 – a statute that pre-dates devolution, human rights legislation and other major reforms to the justice system, and which is now more than 30 years old. The 1986 Act has, appropriately, been updated over those 30 years to ensure that it has reflected current needs in relation to human rights, and that it has met government’s social justice ambitions.”

Although Scotland has perhaps the earliest organised system of legal aid, established in 1424, our modern system of legal aid was forged in the post-war aftermath, argued by some as the fourth pillar of the welfare state. On the advent of the 60th anniversary of legal aid across the UK in 2009, the Legal Services Commission spoke proudly about the establishment of legal aid in England and Wales in a press release²:

¹ Scottish Parliament, *Official Report: Meetings of the Parliament*, 1 February 2017

² Legal Services Commission, *Legal Aid – 60 Years of Justice for All*, press release, 30 July 2009

“Legal aid was a turning point. Until that date, access to justice for people of limited means depended on the charity and social conscience of lawyers.

“From that day on, legal aid became a right and expectation for the most disadvantaged people in our society... the legal aid scheme has grown to fund cases in a multitude of areas of law, giving people hope to make their lives better. Be it the recent success of the Gurkhas in their fight for UK settlement rights, or Colin Ross’ High Court victory in his battle for life-prolonging cancer treatment, it’s legal aid that funds the test cases that help improve the justice system, sometimes changing the law itself.”

Similarly, legal aid in Scotland has funded a range of landmark cases, such as establishing the right of access to legal advice at a police station. Legal aid is not simply a public subsidy to a private sector service. It is a mainstay of the requirement for access to justice. It is an articulation of the way in which our democracy ensures the rule of law. It is a protection of human rights, including the right to a fair trial.

As we move towards 70 years of legal aid in Scotland, the opportunity for the Independent Strategic Legal Aid Review to recommend ways forward over the next five to ten years or beyond is welcomed. There has not been a comprehensive review of legal aid since 2004³, and now we are at a stage where legal aid, like all public services, has seen persistent financial constraint since the economic downturn, a strategic overview is required. We stated in our 2015 strategy paper and maintain that the current legal aid system is not fit for purpose and is in need of reform. We believe that any reform of the legal aid system should aim to ensure that:

- legal aid coordinates with, and contributes towards, the broad social justice outcomes that the Scottish Government aims to achieve
- legal aid enables solicitors to meet the requirement for equality of arms
- legal aid offers value for money and commands public confidence
- legal aid protects the human rights of people across Scotland
- legal aid provides, in so far as is practicable, a consistent and quality service across Scotland
- in light of the Christie Commission⁴, that legal aid services achieve outcomes, are focused on service users, build resilience, and generate preventive benefits
- providers of legal aid are treated equitably

³ Scottish Executive, *Strategic Review on the Delivery of Legal Aid, Advice and Information: Report to Ministers and the Scottish Legal Aid Board*, 2004, <http://www.gov.scot/Resource/Doc/26800/0025003.pdf> (accessed 18 May 2017)

⁴ Commission on the Future of Public Services, *Commission on the Future of Public Services*, 2011, <http://www.gov.scot/Resource/Doc/352649/0118638.pdf> (accessed 18 May 2017)

Our approach

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

Our overall approach to legal aid issues is guided by our statutory objectives. First, under the Solicitors (Scotland) Act 1980, to represent the interests of the solicitors' profession in Scotland and the interests of the public. Second, under the Legal Services (Scotland) Act 2010, including: supporting the constitutional principle of the rule of law and the interests of justice; protecting and promoting the interests of consumers and the public interest generally; promoting access to justice and competition in the provision of legal services; and promoting an independent, strong, varied and effective legal profession. Our approach is also informed by our strategy, *Leading Legal Excellence*, which aims to influence the creation of a fairer and more just society, communicating the views of our members and the clients they serve⁵.

Our response to this call for evidence is led by our Legal Aid Committee, with expertise in criminal, civil and children's legal aid practice. Input has also been received from a range of other Law Society committees, including those responsible for access to justice, administrative justice, criminal law, equality law, family, immigration and asylum, public policy and mental health and disability; and from our Board and Council. These committees comprise solicitor and non-solicitor members and members from across civic society in Scotland, and our response reflects their experience, whether as legal aid practitioners or solicitors working in other areas of practice, the experience of their clients, and experience drawn from public life in Scotland, whether involved with the justice system or other areas. We have also engaged with local faculties and practitioners to reflect the diversity of views within the profession, around the country and the range of different practice areas.

⁵ Law Society of Scotland, *Leading Legal Excellence*, 2015, <https://www.lawsot.org.uk/media/572056/Strategy-2015.pdf> (accessed 18 May 2017)

Our response to this call for evidence also draws on previous work we have carried out around legal aid, including our strategy paper on legal aid published in 2015, *Legal Assistance in Scotland: Fit for the 21st Century*⁶, the development of which involved extensive engagement with legal aid practitioners and key stakeholders across the justice and third sectors, and our recently commissioned research, *The Financial Health of Legal Aid Firms in Scotland*⁷.

Legal aid and access to justice are fundamental concerns for the profession overall, not simply those engaged in legal aid practice. With diminishing funding and providers, the current health of the legal aid system affects the entire profession and the public they serve. This is reflected in our regular surveys of members from all areas of practice. In 2016, for instance, 80% of members overall agreed with the statement that current Scottish Government policy on legal aid risks undermining the principle of access to justice for the poorest in our society (with 8% disagreeing)⁸.

Executive summary and key recommendations

We considered the reform of legal aid through a policy development and consultation process in 2014 and 2015, which culminated in our strategy paper, *Legal Assistance in Scotland: Fit for the 21st Century*. This strategy paper highlighted a number of the challenges to legal aid in Scotland, including bureaucracy, funding, rural provision, court and police duty requirements, keeping pace with justice sector developments and the development of new technology. Many of the recommendations contained within that strategy paper remain valid in 2017.

Funding

Urgent additional funding is required to ensure that our system of legal assistance remains vibrant and that every person in Scotland who requires assistance to resolve their dispute is able to access it. Recent research highlights that the system for providing legal assistance has become overly complex, administratively burdensome and is not sustainable in the longer term. Both civil and criminal legal aid

⁶ Law Society of Scotland, *Legal Assistance in Scotland: Fit for the 21st Century*, 2015, <https://www.lawscot.org.uk/media/505409/legal-aid-reform-document.pdf> (accessed 18 May 2017)

⁷ Otterburn Legal Consulting, *The Financial Health of Legal Aid Firms in Scotland*, February 2017, <https://www.lawscot.org.uk/media/1033810/Legal-Aid-Financial-Health-Report-February-2017.pdf> (accessed 18 May 2017)

⁸ Ipsos MORI, *Law Society of Scotland Members Survey 2016*, <https://www.lawscot.org.uk/media/1064131/Law-Society-of-Scotland-Members-Survey-2016-for-website-.pptx> (accessed 18 May 2017)

practitioners are undertaking work for clients that they are never paid for. They are effectively working pro bono.

Recommendations:

- the Scottish Government makes an investment in legal assistance by allocating additional resource to the legal aid fund
- the Scottish Government uses this additional resource to increase legal assistance rates
- the Scottish Government makes the necessary legislative changes to the Late Payment of Commercial Debts (Scotland) Act 1998
- The Law Society and advice sector work together to ensure that funding, both for legal assistance and other advice services, is provided in such a way as to generate certainty and confidence in the system, and remunerate those providing the service at a sustainable rate.

Preventive Benefits

Research has shown that investment in legal assistance helps to limit the costs to the public from unresolved legal issues and the associated costs that flow from it, including, for example, healthcare and housing costs. There is a benefit to everyone in society of resolving a legal issue before it becomes intractable.

Recommendation

- we believe that the Scottish Government should now undertake further research in this area

Criminal legal aid

Criminal legal aid is divided into police station advice, summary, solemn and appeals. We recommend a new structure of funding and a simplified financial verification procedure. It is vital that any person suspected or accused of a crime has the benefit of access to legal advice, and that this advice should be provided free if that person does not have sufficient means to pay for it.

Recommendations:

- the Scottish Government reviews existing funding arrangements for solicitors carrying out police station work as a matter of urgency
- the Scottish Government introduces a system of block fees, payable to solicitors for providing police station advice
- the Scottish Government explores harmonising and streamlining, as much as possible, all funding arrangements in relation to summary crime
- the Scottish Government takes steps to restructure solemn fee arrangements so that the solicitor receives an appropriate level of fee for achieving effective and efficient resolution of a case
- the Scottish Government reviews the funding structures for criminal appeals to ensure funding arrangements support existing court practices and procedures
- the Law Society enters discussions with the Scottish Legal Aid Board (SLAB) and the advice sector to consider the development of a single grant system, removing current distinctions between advice and assistance, assistance by way of representation (ABWOR), and legal aid
- the Scottish Government considers developing a legal aid loan to individuals requiring some level of financial support to access legal services.

Civil legal aid

Civil legal assistance is available to allow individuals to enforce their rights and obligations under civil law. However, we are told by practitioners that it is becoming unsustainable to continue offering civil legal assistance and that fees paid to them by private individuals or organisations are subsidising their legal aid work. This is of great concern when considering the long-term sustainability of civil legal assistance.

Recommendations:

- as noted above, the Law Society enters discussions with SLAB and the advice sector to consider the development of a single grant system, removing current distinctions between advice and assistance, ABWOR, and legal aid
- as noted above, the Scottish Government considers developing a legal aid loan to individuals requiring some level of financial support to access legal services.

Children's legal aid

Children's legal aid generally relates to proceedings before the children's panel relating to state intervention in the private lives of families. The arrangements are similar to civil legal aid. It is vital that the views of any child are properly and appropriately heard and considered when reviewing the circumstances of any action, especially as any decision may have a fundamental affect on the future of that child.

Recommendations:

- a simplified structure of legal aid would assist applicants in understanding the processes and eligibility criteria
- it would be appropriate to make legal assistance available for pre-hearing panels given the increased frequency of those panels and the important decisions they take

Legal aid – geography and demography of supply

One of the strengths of the current legal aid system is the broad network of providers offering local services across a range of advice areas. However, there are a number of areas in Scotland where there are concerns around supply. The demography of legal aid practice is also an area of significant concern. The number of solicitors registered for criminal legal aid does not reflect the overall age profile of the profession.

Recommendations:

- a review of the types of work that can be undertaken by first-year trainee solicitors under the legal aid scheme, with the aim of increasing these types of work, thereby providing greater incentives to firms to recruit trainees
- SLAB could also consider funding trainee solicitors in legal aid practices

Legal aid and technology

It is likely that technology will have a significant impact on future delivery of legal assistance and legal services more generally. New technology can offer efficiency savings through new or streamlined processes.

Recommendations:

- further research is carried out by the Scottish Government into the effectiveness of video conferencing
- the Scottish Government and Scottish Courts and Tribunals Service consider the use of digital recording technology to replace shorthand writers in civil proceedings
- a reassessment of the ways in which client communication takes place
- a review of the reliance on paper-based systems should be undertaken, in light of the advances in technology and court processes.

Values and ethos of legal aid providers

We believe that the current values and ethos of legal aid providers in large part overlap with those for public services more generally and provide an effective foundation for helping the public during some of the most challenging events of their lives.

Recommendation:

- a review of the current treatment of funding of community action in Scotland

Enabling effective delivery

We believe that the legal aid system does enable effective delivery of access to justice to people across Scotland, though the system is urgently in need of structural reform.

Recommendations:

- the Scottish Government reviews the use of sheriff officers in legal assistance cases
- the Law Society and advice sector carry out further investigation into the possibilities of further integrating solicitors into the work of the third sector.

It is from these recommendations that our response to the call for evidence stems. Notwithstanding, for instance, consultation work carried out by SLAB around simplification of the legal aid system or recent proposals from the Scottish Government around reform of police station advice fees, we believe that the recommendations that we made in 2015 remain relevant and pressing today.

Recommendations to the Scottish Government, the Scottish Legal Aid Board and the independent review

- We recommend that the independent review contacts practitioners in all practice areas, both civil and criminal, to obtain additional evidence on how the current legal aid system works in practice.
 - We recommend that SLAB explains how the figure of a 7% increase in fees was determined, and what evidence and information was available to SLAB when reviewing this. It is not clear that these structural reforms have led to any increases in fees. Has there been any increase in fees as a result of this measure?
 - We recommend that the Scottish Government updates the fees that are currently set at 1992 levels.
 - We recommend that both the Scottish Government and SLAB review the process of decision making in relation to accounts to ensure consistency to allow certainty for solicitors on what will and what will not be paid. In particular, we request that SLAB considers the issue of abatements and the funding of expert reports to ensure that solicitors can easily understand the processes around these areas and have clarity on what SLAB will pay.
 - We recommend that the Scottish Government commissions research into whether there are preventive benefits to legal aid in excess of the costs of provision to allow these outcomes to be accurately assessed in Scotland.
 - We recommend that the Scottish Government undertakes further research into the ways in which early intervention can resolve legal disputes.
 - We recommend that the Scottish Government explores harmonising and streamlining, as much as possible, all funding arrangements in relation to summary crime.
 - We recommend that SLAB publishes all taxation results for accounts to give practitioners an increased understanding of the system overall.
 - We recommend that SLAB considers funding trainees who work in legal aid practices.
-

Funding

We believe that every person in Scotland should be able to access advice and progress any claims or disputes they may have through to resolution, regardless of their personal finances. Legal aid helps combat the significant inequalities in our society. Legal aid provides equality before the law.

Legal assistance provides financial assistance to those individuals who are on low and moderate incomes to access legal services. Overall expenditure on legal assistance has been declining in real terms for several years. The real-term decline in total expenditure is substantial. In 1994/95, the total expenditure of legal assistance was £132.1 million. According to an inflation calculator which uses official UK inflation data to show how prices have changed, £132.1 million would equate to around £247.2 million today.⁹

Like all public services, legal assistance has seen budget reductions through the economic downturn. A great strength of legal assistance in Scotland relates to the budget, which is not fixed, but is flexible to meet demand. The economic position has changed and Scotland's economic recovery is now well established.¹⁰ We are anxious to ensure that legal assistance is not unduly limited through further reductions.

The cost to the public from unresolved legal problems can be huge and legal assistance helps to mitigate these costs. 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.¹¹ An early and necessary intervention from advice and legal support prevents future problems and expense.

As the Scottish Human Rights Commission noted in 2012:

“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.”¹²

⁹ <http://www.thisismoney.co.uk/money/bills/article-1633409/Historic-inflation-calculator-value-money-changed-1900.html>

¹⁰ Scottish Government, *Growing Scotland's Economy – Scotland aims to join Europe's best*, <http://news.scotland.gov.uk/News/Growing-Scotland-s-Economy-Scotland-aims-to-join-Europe-s-best-16c1.aspx>

¹¹ Citizens Advice Bureau, *Towards a business case for legal aid*, July 2010 (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>)

¹² 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

We have a regulatory duty to promote access to justice and an independent, strong, varied and effective legal profession, and to protect and promote the public interest.¹³ It is also fundamental that legal assistance adapts appropriately to keep pace with developments in the justice system. It is in this context that we must now review the legal assistance system and ensure that it is, and can remain, fit for purpose.

Certainty and equitable treatment

The equitable treatment of legal aid practitioners is a consistent theme across our call for evidence. The legal aid system in Scotland is underfunded. We have highlighted this consistently. There are rates of pay, for mainstream areas of work such as police station advice and appeals, that were last revised in 1992. The Minister for Community Safety and Legal Affairs, Annabelle Ewing MSP, in correspondence with the Justice Committee of the Scottish Parliament, stated¹⁴:

“The ‘1992 rates’ have not been updated since 1992 as a result of negotiations with the Law Society of Scotland in 2008... This table of fees is rarely used. In 2015/16, the 1992 fees cost the legal aid fund £2.83 million or 5.2% of the total expenditure of solicitors fees for criminal legal assistance.”

It is unsurprising that fees last updated in 1992 would form only 5.2% of the total expenditure on legal aid. Updating these fees on a GDP deflated basis, rather than a cost of £2.83 million, would see a cost of around £4.8 million to the legal aid fund. Updating the 1992 fee levels was a proposal that we made as recently as 2015 with the introduction of the Sheriff Appeal Court but which the Scottish Government rejected.

This stance illustrates the key challenge around the funding of the current legal aid system. Under the legal aid system governed by the Legal Aid (Scotland) Act 1986, elements of the regulations made under that Act, notwithstanding the scarcity of parliamentary time, are reviewed annually: for instance, the eligibility thresholds for legal aid applicants. However, rates of pay for service providers are not revised annually. The remuneration of other participants in the justice system is reviewed on a consistent and periodic basis, from judiciary to court staff, from prosecutors to sheriff officers, yet there is no mechanism for legal aid to

¹³ Legal Services (Scotland) Act 2010 s1

¹⁴ Annabelle Ewing MSP, Minister for Community Safety and Legal Affairs, *Legal Aid Update*, correspondence to Convener of Scottish Parliament Justice Committee, 27 October 2016, http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/20161027MfCSLAtoMM.pdf (accessed 18 May 2017)

be reviewed similarly. Rates of pay across the public sector were static or below inflation in recent times as a result of the economic downturn¹⁵. Had a similar mechanism been in place for legal aid, there may have been similar results; equally, there would have been an opportunity for practitioners to make representations around remuneration against the costs that they face, a number of which have significantly increased recently, including the introduction of the living wage, pension auto-enrolment and business rates increases.

No other participant in the justice system is working at rates set a quarter of a century ago. We again raised the issues around the 1992 rates in relation to police station work in discussions this year. Following six years of an interim scheme and in advance of the implementation of the Criminal Justice (Scotland) Act 2016, the Scottish Government provided fee arrangements, subsequently amended following discussion with the Law Society. Under current 1992 rates, expenditure on police station advice by defence practitioners in 2014/15 was £412,500. This expenditure accounted for police station advice on a nominated solicitor – an individual or firm requested by the person detained – or on a duty basis to a person who had not requested a specific solicitor. By comparison, the equivalent expenditure in England and Wales, a jurisdiction ten times the size of Scotland, was around £170 million for the same period. Across the range of registered practitioners for criminal legal aid, the average payment for covering requests for police station advice is around £300 per annum for each registered solicitor.

The correspondence from Annabelle Ewing MSP, Minister for Community Safety and Legal Affairs, also narrates the changes to civil and children's legal aid fees: for civil and children's advice and assistance and assistance by way of representation (ABWOR), fees were last increased 17 years ago by around 15%; for civil legal aid, block fees were last increased by around 10.5% almost a decade ago. There have been no increases to these fees since and no indication from either the Scottish Government or the Scottish Legal Aid Board (SLAB) around future fee reform for civil or children's work.

The failure to revise, or even contemplate revision of, fees that may have last been updated 25 years ago for criminal work or 17 years ago for civil work, is a huge challenge for the profession. It exacerbates the common challenge of providing access to justice. It becomes more pernicious as an unresolved issue as time progresses. It distracts from the wider challenge of ensuring that the legal aid system is fit for the justice system and the focus of shaping legal aid around the clients that it serves.

¹⁵ For instance, UK Parliament Scrutiny Unit, *Public Sector Pay*, June 2010, <https://www.parliament.uk/documents/commons/Scrutiny/Economics-in-practice-public-sector-pay-FINAL.pdf> (accessed 18 May 2017)

2015 report: Legal Assistance in Scotland – Fit for the 21st Century

We consulted with members and stakeholders in 2015 on the issue of legal aid, which resulted in recommendations for reform in our report, *Legal Assistance in Scotland – Fit for the 21st Century*¹⁶. This report noted that:

“There has been a real-term decline in legal assistance expenditure for years. Lack of investment or reinvestment of efficiency savings in legal assistance has made it increasingly difficult to maintain a sustainable, high-quality legal assistance system across Scotland.”¹⁷

As part of the consultation and research that formed the basis of that report, we heard that law centres, the advice sector and other frontline services have similar challenges around funding.

The large number of legislative changes and the volume of guidance issued over the years have led to the development of a legal assistance system that is complex and difficult to navigate. A difference of opinion over the interpretation of these rules and guidance is costly for both SLAB and practitioners. Legal assistance is divided into criminal legal assistance, civil legal assistance, and children’s legal assistance. Detailed consideration has been given to the issues of funding – including thresholds, rates of pay, abatements, financial verification and the potential to streamline the system of block fees – in relation to different areas of work in the relevant chapters in this report. Therefore, these issues will not be considered in detail here.

Following our 2014/15 consultation and discussions with the Scottish Government and SLAB, we commissioned a report from Otterburn Legal Consulting LLP to gather information on the viability and affordability of legal aid firms in Scotland.

In February 2017, we published this commissioned research in a report entitled *The financial health of legal aid firms in Scotland*¹⁸.

¹⁶ <http://www.lawscot.org.uk/media/391321/legal-assistance-in-scotland-discussion-paper.pdf>

¹⁷ <http://www.lawscot.org.uk/media/391321/legal-assistance-in-scotland-discussion-paper.pdf>, page 4

¹⁸ <http://www.lawscot.org.uk/media/1033810/Legal-Aid-Financial-Health-Report-February-2017.pdf>

Key results of the commissioned research

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.

The commissioned research highlighted that:

- the financial viability of suppliers of legal aid services related to their size
- approximately one-third of the hours worked by civil legal aid practitioners and approximately one-quarter of criminal legal aid work undertaken by practitioners is not paid
- the legal aid system appears to be in difficulty and is in need of urgent reform
- there is a risk that firms which undertake only small amounts of legal aid may cease to offer it at some point in the future
- the concerns and issues raised by legal aid practitioners may have an impact on access to justice for members of the public
- according to the authors of the commissioned research, there is a “risk that people in rural areas who would be eligible for legal aid will not be able to find solicitors to take their cases”¹⁹

Analysis

The commissioned research shows that the legal aid system is in “great difficulty”.²⁰ The impact of the issues identified in the report affects both firms specialising in legal aid work and those where legal aid forms only a small part of their business. Some firms may require to subsidise their legal aid work with the fees paid by private clients.

The fact that solicitors undertake legal assistance work at present does not mean that, long term, they will be able to do so at the rates of pay presently offered.

¹⁹ Commissioned Research, page 5

²⁰ Commissioned Research, page 5

Following the introduction of the 1986 Act, the rates of legal assistance were set at approximately 10% less than the then charged private rate. Payment under legal assistance was “guaranteed” but ensuring that a private client paid was not always guaranteed.

In 2011, the Scottish Government stated that it:

“...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.”²¹

Despite this commitment from the Scottish Government in 2011, current rates of payment to solicitors for all types of legal assistance are significantly underpaid in comparison with current private rates of charging.

As our 2015 report states:

“...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.”²²

Legal assistance 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. This is in contrast to sheriff officer fees, which are reviewed annually and increased to ensure that there are appropriate increases in line with inflationary rates.²³ Although there have been attempts at targeted increases for solicitors who undertake legal aid work, 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. Overall, the changes in the rates have not been successful in achieving a sustainable system of legal assistance provision.

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.

The issue of abatements was highlighted in our 2015 report which noted that “about 15% of the total amount claimed in civil legal assistance accounts was abated from the accounts paid”.²⁴ This suggests that solicitors are encountering significant difficulty in accurately understanding and being able to claim

²¹ The Scottish Government, *A Sustainable Future for Legal Aid*, 2011 (<http://www.scotland.gov.uk/Resource/Doc/359686/0121521.pdf>)

²² <http://www.lawscot.org.uk/media/391321/legal-assistance-in-scotland-discussion-paper.pdf> page 23

²³ For recent increases see <http://www.legislation.gov.uk/ssi/2016/100/schedule/made> and <http://www.legislation.gov.uk/ssi/2013/345/contents/made>

²⁴ <http://www.lawscot.org.uk/media/391321/legal-assistance-in-scotland-discussion-paper.pdf> page 17

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. The topic of abatements was raised again in section 7 of the commissioned research. One respondent to this research said that:

“The time incurred in arguing over necessary work undertaken that SLAB will not then pay for is undermining the system. We are expected to undertake necessary work then be told by SLAB that it was not necessary at the account stage.”²⁵

The situation can arise where a solicitor and SLAB cannot agree the amount of an account. Taxation is a formal process where a solicitor and SLAB both have the opportunity to explain their position to an independent auditor who makes a decision on the fee to be paid. The 2015 report states that this “is currently commonplace”. 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 on what a solicitor can expect to be paid.

The Low Commission’s evidence review of research on the economic value of legal aid and social welfare advice showed that, both within the UK and across a range of international jurisdictions, “all of the studies reviewed concluded that legal aid not only pays for itself, but also makes a significant contribution to households, local economies and reducing public expenditure”.²⁶

Other considerations

An overarching consideration that impacts on legal assistance is that of additional funding or special measures for persons with protected characteristics. It is essential that some form of funding remains in place for these individuals.

Access to legal assistance for those with insufficient resources to obtain it is recognised as being implicit in the rights of access to justice by case law and the European Convention on Human Rights (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.²⁷ As such, in criminal proceedings, an

²⁵ Commissioned Research page 22

²⁶ Professor Graham Cookson and Dr Freda Mold, *The business case for social welfare advice services: An evidence review – lay summary*, 2014

²⁷ *Bertuzzi v. France*, Judgment of February 13, 2003

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 legal assistance is also explicitly recognised in the EU Charter of Fundamental Rights:

“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.”²⁸

Where legal assistance is not funded appropriately, this risks limiting the effectiveness of legal assistance.

Conclusions

The commissioned research findings are of great concern to us. A properly funded legal aid system is vital to prevent small issues turning into serious problems for both individuals and other key public sector services and their budgets. An urgent and wholesale review has long been required of how the provision of advice funded by legal aid is administered, focusing on maintaining and improving meaningful access to justice for people in Scotland and we welcome the role of the Independent Strategic Legal Aid Review in considering these issues. Reforms to the legal assistance system are urgently required to protect the fundamental principle that everyone should be entitled to have access to legal advice to allow them to resolve their dispute. The reforms need to be efficient, straightforward and user friendly. A holistic approach to reform, possibly achieved through looking at legal assistance in its widest sense, should be sought.

It has become increasingly clear that the system we have cannot continue in the long term. The potential impact of this on the public and on access to justice is significant.

²⁸ EU Charter of Fundamental Rights, Article 47, http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed 18 May 2017)

Preventive benefits

The legal aid system in Scotland provides assistance in around 250,000 cases each year, across criminal, civil and children's legal aid. Legal aid provides a voice to citizens facing criminal charges, prosecuted with the full resources of the state, or having unfairly lost their job, or facing homelessness, or family breakdown, or the trauma of domestic abuse, or discrimination, or other legal problems.

The prevalence and cost of unmet legal need

People in Scotland face legal problems on a frequent basis: 21% of people have faced a civil legal issue in the last three years; 14% have faced problems with home, family or living conditions; 7% have faced problems around money or finance; 4% around unfair treatment; and 4% around health and wellbeing²⁹. Though the occurrence of legal problems appears to have reduced marginally since the end of the economic downturn³⁰, these remain prevalent, with significant financial costs from unresolved legal problems, as well as financial, psychological and emotional issues for the individuals involved, while also affecting wider relationships, from families to local communities to the wider public.

Research from the Department of Constitutional Affairs in 2006 suggested that the cost of unmet legal need was around £3.5 billion annually across the UK³¹. As a direct result of unmet legal need, it was estimated that more than 372,000 people lost their jobs, corresponding with lost earnings of over £2 billion. More than 1.1 million people suffered a stress-related illness serious enough to require medical intervention. More than 250,000 relationships broke down. More than a million people suffered from a serious loss of self-esteem, which as the research stated, "is accepted as being a trigger for people losing control of their lives, which can result in domestic violence, relationship breakdown and substance misuse". Costs estimated by this research included around £200 million in unemployment benefits because of unfair dismissal, around £300 million in police intervention because of violent conduct, and around £1 billion in medical intervention due to physical and mental health issues. From this research, the financial cost of unresolved legal issues is vast; the human cost, for a society committed to the rule of law, to access to justice, to social justice, is equally vast.

²⁹ Scottish Crime and Justice Survey 2014-15, Scottish Government (<http://www.gov.scot/Resource/0049/00496532.pdf>)

³⁰ For instance, by comparison to the Scottish Crime and Justice Survey 2010-11

³¹ *Getting Earlier, Better Advice to Vulnerable People*, Department for Constitutional Affairs, 2006

The value of research

One of the challenges of the economic downturn for public services has been that at a time-critical stage, evidence-led policy interventions have been required to determine how to best allocate diminishing resources; an early casualty of the same economic and time pressures has been the capacity for research to assess and evaluate these changes. There have been similar challenges in England and Wales around the capacity to evaluate the impact of changes to legal aid, with the Low Commission stating³²:

“We are concerned it will also prove difficult to record the longer term-effects, because the austerity cuts to public services have meant that the capacity of organisations to monitor and report on the impact of the LASPO Act³³ changes has been reduced. In particular, the closure... of the Legal Services Research Centre, which commissioned, as well as undertook, some very important research, and the loss of its civil and social justice panel survey, instantly reduces the volume and quality of information we have about people’s experiences of the justice system. The reduction of EHRC funding and the loss of the Administrative Justice and Tribunals Council further adds to this lack of research capacity. It will therefore be very important that funders – such as the Nuffield and Leverhulme Trusts, the Economic and Social Research Council and the Big Lottery Fund – all support universities and other research bodies to undertake research.”

Around preventive benefits overall, research undertaken by the University of Surrey on behalf of the Low Commission considered that the various sources of research available demonstrated a clear preventive benefit to legal aid, observing³⁴:

“There is a large volume of research into the social value of legal aid, in terms of the impact of resolving issues for the individual and both short and long-term changes in their circumstances. However, there are very few quantitative studies on the economic value of legal aid which include any economic breakdown of costs vs investment in legal aid. What evidence exists tended to largely originate from the United States. A minority of evidence originated from the UK.

³² Tackling the Advice Deficit: A Strategy for Access to Advice and Legal Support on Social Welfare Law in England and Wales, Low Commission, 2013 (<http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>)

³³ The Legal Aid, Sentencing and Punishment of Offenders Act 2012, which removed a number of areas of civil practice from the scope of legal aid in England and Wales

³⁴ Social Welfare Advice Services – A Review: Final Report, Prof Graham Cookson, Dr Freda Mold, University of Surrey, 2014 (<http://www.lowcommission.org.uk/dyn/1405934416401/Social-Welfare-Advice-Services-Final-Report-20140603-Main-Text.pdf>)

All of the published cost-benefits analysis (CBA) or any social return on investment data concludes that legal aid not only pays for itself, but it also makes a significant contribution to families/households, to the local area economics, and also contributes to significant public savings.”

In line with these findings, we believe that the legal aid system in Scotland offers substantial financial preventive benefits, based on the research projects that we highlight in this section of our response to the call for evidence. We call on the Scottish Government to consider such research in Scotland, to help to understand the costs of unmet legal need, the drivers of demand for legal aid and advice services and the most effective means of intervention.

Civil legal aid and preventive benefits

One of the key drivers in preventive benefits research around legal aid was the removal of large areas of civil law from the scope of legal aid in England and Wales, as a result of the cost-saving measures introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. A number of sources of research indicated that the costs of legal aid were significantly less than the preventive benefits elsewhere in public service delivery. It was argued, taking a holistic approach to attempts to save public funds, that cuts to the scope of civil legal aid – intending to save around £350 million – were counter-intuitive.

Towards a business case for legal aid

One research project conducted by Citizens Advice in 2010, itself a provider of legal aid in England and Wales, showed the scale of preventive benefits emerging from its data on legal aid provision. *Towards a Business Case for Legal Aid* suggested that for every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34; for every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98; for every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80; and for every £1 of legal aid expenditure on employment advice, the state potentially saves £7.13. This research looked to quantify the costs of legal aid provision for particular categories of social welfare advice and the financial consequences avoided by this intervention. In housing cases involving homelessness, for instance, some of the financial consequences included the cash implication to the landlord from a failed tenancy, local authority temporary accommodation, support services, health services, criminal justice intervention, potential resettlement costs and lost economic output. The research cited analysis by Crisis, which had estimated the costs of homelessness ranging widely from £4,500 to £83,000 depending on individual circumstances. In employment cases, some of the financial consequences from loss of

employment included an average of 19 weeks of unemployment benefit claimed, at a cost of around £1,057, and lost economic output over the same period of around £8,140; for problems around work-related stress, it was estimated that this could affect around 500,000 people annually, with each incidence resulting in an average of 29 working days lost and an overall economic cost of between £3.7 billion to £3.8 billion each year.

Similarly, research from NEF Consulting on debt and housing cases indicated that there was a preventive benefit of around £9 for every £1 spent on legal aid.

Identifying effective points of intervention

Even accounting for, as the University of Surrey research noted, “some rather heroic assumptions that are not well justified” around the potential benefits of legal help in some research studies, the clear conclusion from this work is that there are clear preventive benefits to legal aid in excess of the costs of provision. We recommend that the Scottish Government commissions research in this area to accurately assess these outcomes in Scotland.

One of the areas that we consider helpful in such research is an identification of the effective points of intervention through the process of a legal issue emerging. Intervention through legal aid tends to be found later, once issues have formalised, or problems have clustered or escalated. Resolving legal issues through different interventions at earlier stages may prove critical.

Demand failure

One research study, involving Advice UK and Nottingham City Council, found that around 40% of requests for advice were the result of “failure demand”³⁵:

“What this means for advice services in Nottingham is that in excess of 40% of their capacity is taken up dealing with demand that has been generated by the failure of the advice agencies, or other external organisations whose actions have an impact on the wider advice system, to do something or get it right for clients.”

³⁵ Radically Re-thinking Advice Services in Nottingham: Interim Report of the Nottingham Systems Thinking Pilot, Advice Nottingham, Advice UK and Nottingham City Council, 2009 (<https://01testsite01.files.wordpress.com/2015/07/radically-rethinking-advice-services.pdf>)

The impacts of failure demand can be obvious: an incorrect benefit assessment may lead to rent arrears, eviction and homelessness, while tackling demand failure could avoid these consequences and their financial and human cost. The increasing use of mandatory reconsideration for benefit decisions attempts to address this demand failure and could have potential to reduce the demand on the legal aid system. Research suggests, however, that the outcomes for individuals who receive legal assistance through welfare redress forums are significantly higher than those without, even though these systems are designed for unrepresented parties.

Mandatory reconsideration

For decisions around the homelessness duty in England and Wales, research by Dave Cowan, Abi Dymond, Simon Halliday and Caroline Hunter has shown some of the benefits of mandatory reconsideration but also, for instance, 37% of local authorities indicated that half or more internal reviews involved legal representation in 2014 (by comparison with 10% in 1998)³⁶. One of the reasons for this is that housing managers recommend legal advice, with one stating:

“And what we say to people when they ask for a review ... is if you’re going to ask for a review, it’s best if you seek some advice because of the complexities of the reviews and what people are looking for ... at review. So they’re encouraged to, to go away and to, we don’t give individual names, we don’t point them towards [local solicitor] or law centre, but they get the information to make their own choice and we do encourage people, at review stage, to actually get representation.”

Another manager highlighted the benefits of this legal representation:

“You get a nice and neat presented package when you get a representative ... a solicitor or whatever writing out five pages of why their client is vulnerable or whatever and the reasons why, and I think that does make a big difference... if it’s nicely presented by somebody, it’s a much more straightforward process... whereas a chaotic person who isn’t accessing anything is going to be less likely to present a coherent... argument.”

Mandatory reconsideration in the public sector is one of several early interventions that can deal with legal problems and there may be others that can also assist. Some of these are maybe of use as legal issues

³⁶ Reconsidering Mandatory Reconsideration, Dave Cowan, Abi Dymond, Simon Halliday, Caroline Hunter, Public Law, 2017 [P.L. 2017, Apr, 215-234]

emerge, and how technology can assist in the identification and resolution of justiciable issues will be considered elsewhere. At later stages, wider use of alternative dispute resolution could be helpful and one of the features of the new simple procedure in Scotland, which replaces small claims and, in large part, summary cause – between them, civil claims below a threshold of £5,000 – is the encouragement of the use of alternative dispute resolution³⁷. The conciliation service offered by Acas for employment disputes and the opportunity for judicial mediation for cases proceeding to employment tribunals are, we believe, effective, though the level of fees required by claimants has been a significant deterrent to access to justice³⁸.

Early Legal Advice Project

Effective system design and evaluation is critical. However obvious the benefits of preventive benefits and early intervention, there have been situations in which anticipated outcomes from system redesign have not materialised. An example of this is the Early Legal Advice Project (ELAP), a pilot project in the Midlands and east of England area of the UK Border Agency, which ran from 2010 to 2012. The Home Office evaluation of the pilot in 2013 concluded that costs had increased and the quality of decisions had only improved marginally³⁹. The pilot aimed to provide earlier advice to improve decision making by the UK Border Agency in asylum claims by introducing greater flexibility into the asylum process before the initial decision is made, whether to grant or refuse asylum, to improve confidence in the asylum process and to generate efficiency savings. The ELAP process made a number of changes to the process, including three meetings between the asylum seeker and client before the asylum interview and the preparation of a witness statement before the formal interview with the UK Border Agency, and a post-interview discussion between the UK Border Agency case manager and the legal representative. The evaluation by the Home Office, however, found that the costs per case for the ELAP process were between £222 and £538 more on average than for legal aid cases prior to ELAP.

We recommend further research into the ways in which early intervention can resolve legal disputes. This will likely involve consideration of different issues for different areas of law: the interventions that may be suitable for a housing case will differ from those of a family case, or an immigration and asylum case, or a

³⁷ For instance, Rule 12.4: “The sheriff must ask the parties about their attitudes to negotiation and alternative dispute resolution”

³⁸ *Employment Tribunal Fees – Report – July 2014*, Law Society of Scotland (<https://www.lawscot.org.uk/media/334389/employment-tribunal-fees-report.pdf>)

³⁹ *Evaluation of the Early Legal Advice Project: Final Report*, Mike Lane, Daniel Murray, Rajith Lakshman, Claire Devine, Andrew Zurawan, Home Office, May 2013 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/199962/horr70.pdf)

criminal case. Equally, with the clustering and escalation of problems because of unmet legal need, there will be a degree of overlap. There are also complexities around earlier and informal dispute resolution, as research around interventions by legal professionals being more cost-effective than internal decision-making processes and the experience of mandatory reconsideration suggests. We have highlighted that legal aid in Scotland, and the 1986 Act that structures the current system, predates several of the administrative justice forums and the restructuring of the Scottish Courts and Tribunals Service. Mandatory reconsideration was designed for unrepresented individuals, though the outcomes for those who do receive legal assistance is far more positive. The legal aid system does not currently offer widespread representation for tribunal and other administrative justice forums. One of the eligibility tests for access to legal aid is “effective participation”, namely whether an individual would be unable to participate without legal representation. It may be, despite system design intended to make these forums accessible to the public, that a better test would be effective outcome and the opportunity for publicly funded legal assistance to deliver these more effective outcomes.

Criminal legal aid and preventive benefits

The vast majority of the research around preventive benefits has focused on civil legal aid and, in particular, social welfare law. The majority of expenditure in Scotland and in a number of other developed legal aid jurisdictions, however, is around criminal legal aid.

The triggers for intervention by criminal defence practitioners are activated by other agencies, principally Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS), as a result of arrest or charge. Reducing crime or breaking reoffending cycles can create huge preventive benefits, though, structurally, this is not the role, or within the power, of criminal defence practitioners to achieve. Rather, the preventive benefits from criminal legal aid are found in reducing the overall cost to the criminal justice system from the effective defence of people suspected of, or charged with, criminal offences. Designing intelligent systems to achieve these benefits is critical, and we outline ways to do so in this response to the call for evidence, for instance, through reform of the solemn fee system.

Conclusions

We believe that there are substantial preventive benefits to the provision of legal aid, both civil and criminal. These benefits exceed the costs of provision of legal aid many times over. The Low Commission

in England and Wales broadly identified that the benefits of legal aid exceeded the costs of provision by a factor of ten.

Legal aid in Scotland is diminishing: expenditure is diminishing; the number of providers is diminishing; fees for legal aid work are diminishing, either in cash or real terms. Financial pressures are diminishing all public services, and the recent Scottish Parliament Justice Committee report on the role and purpose of COPFS highlights the resource challenges faced by the prosecution; and very much the same challenges exist for the defence and for the principle of equality of arms that the rule of law requires.

Criminal legal aid – police station advice

The right to request a private consultation with a solicitor for people detained at a police station is a critical – and relatively recent⁴⁰ – component of criminal defence and the right to a fair trial.

One of the main challenges for provision of police station advice is balancing universal protection of human rights against geographic demand. Even if access to a solicitor may be requested only once a fortnight on average in a rural area such as Lochgilphead, a number of these detainees may be vulnerable, some may be accused of serious crimes and all will be in need of expert professional advice, often at anti-social hours. It is important to avoid a two-tier justice system, where people detained by the police in urban areas receive prompt assistance and where people in rural areas face delays or cannot secure face-to-face advice. Not least because of the sporadic nature of requests for advice from people detained by the police in rural areas.

The challenges of providing this professional advice at a critical stage, with the judiciary observing that the landscape post-Cadder sees the trial start at the police station, are cast into light by the terms of the draft SLAB Code of Practice. This draft would require personal attendance at a police station within one hour, unless because of circumstances outside the control of the solicitor, failing which sanctions upon the solicitor may include removal from the duty scheme or deregistration from criminal legal aid work. By comparison, in England and Wales, a jurisdiction with a mature system of police station advice, arguably less geographic challenge around provision, but also longer detention periods, research indicates that, on average, the time taken to receive advice is “three and three-quarter hours, despite nearly half of first contacts taking place over the telephone”⁴¹.

The distribution of criminal practitioners can make duty obligations challenging in more rural areas. Though the number of cases where advice is requested may be fewer than in urban areas, the periods for which solicitors may be on duty can be far greater (and in some areas, potentially large parts of a year). There are no on-call payments, rather remuneration is on a case-by-case basis with travel paid at a largely uneconomic rate.

⁴⁰ Following the Supreme Court judgment in *Cadder v HMA* [2010] UKSC 43 and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

⁴¹ ‘Lets’ Get it Over With’: *Early Findings on the Factors Affecting Detainees’ Access to Custodial Legal Advice*, L Skinns, Policing and Society, 2009, vol. 19 (1)

Criminal Justice (Scotland) Act 2016

The 2016 Act will extend the right of access to legal advice for suspects held at a police station and will:

- include persons held at a police station, whether interviewed or not
- explicitly include attendance at the police interview, whereas the Criminal Procedure (Legal Aid, Detention and Appeals) Act 2010 permitted a “private consultation” with a solicitor
- include mandatory personal attendance by a solicitor for children up to 16, young people between 16 and 18 subject to a supervision order (including interim) and vulnerable adults (section 33 of the 2016 Act)

The extension will increase the number of requests for advice made to the SLAB Solicitor Contact Line and, in cases involving a named or duty solicitor, to the wider profession. The financial memorandum to the legislation forecast the additional number of requests:

| Scenario | Total people seeking legal advice |
|--|-----------------------------------|
| 53.6% take-up for interviews; 20% take-up for non-interviews | $22,224 + 32,672 = 54,896$ |
| 53.6% take-up for interviews; 35% take-up for non-interviews | $22,224 + 57,176 = 79,400$ |
| 53.6% take-up for interviews; 53.6% take-up for non-interviews | $22,224 + 87,561 = 109,785$ |

On the basis of these scenarios, the increase in numbers of requests for advice would be 2.5 times more, 3.5 times more or five times more respectively, with the Scottish Government believing the middle estimate most likely.

We believe these figures may underestimate the overall demand for advice at a police station. First, though the Scottish Government projections do not suggest a change to the rate of waiver around police station advice, significant concerns have been raised around the rate of waiver under existing conditions.

JUSTICE Scotland, announcing its first working group led by Lord Eassie, stated:

“Practitioners have long considered that the safeguards for vulnerable suspects within the Scottish system are inadequate. However, the impetus for the working party came from the evidence collected by the Bonomy Review on the provision of legal advice to suspects. Police Scotland confirmed that a startling 75% of suspects waived the right to legal advice prior to police interview. In expressing its concern at this development, the review noted that the corresponding figure from England was 55%.”

Changes to the rate of waiver by suspects who will be subject to police interview will have a clear impact on the number of requests made for advice.

Interim duty scheme

The police station duty scheme established by SLAB on 4 July 2011 was intended as an interim scheme.

At the launch of the interim police duty scheme, SLAB advised practitioners⁴²:

“This is an interim scheme. The Scottish Government has always made clear that although this is now a regulatory scheme, it would be an interim arrangement until the outcome of Lord Carloway’s review is known and the Scottish Government has decided on the way forward. It was not the government’s intention to make changes to the feeing arrangements with the introduction of this new interim scheme, although some changes to fees were made to take account of out-of-hours work. However, it was recognised that all aspects, including feeing arrangements, would be reviewed once the outcome of Lord Carloway’s review was known.”

Lord Carloway’s review was published in November 2011⁴³. The proposed revisions to the police station duty scheme have followed around five-and-a-half years later. It was only in March 2017, ahead of the commencement of part 1 of the 2016 Act, that revised arrangements were proposed by the Scottish Government for the fees for this work⁴⁴ and by SLAB for the regulatory requirements expected from the

⁴² *Interim Police Station Duty Scheme Q and A’s*, Scottish Legal Aid Board, July 2011 (<http://www.slab.org.uk/news/archive/articles/news-0073.html>)

⁴³ *The Carloway Review: Report and Recommendations*, The Carloway Review, November 2011 (<http://www.gov.scot/Resource/Doc/925/0122808.pdf>)

⁴⁴ (<https://www.lawscot.org.uk/media/1054256/revised-cjsa-fees-proposal-23-march-2017.pdf>)

scheme, through the publication of a consultation on a revised Code of Practice for criminal legal assistance⁴⁵.

It is unacceptable to provide revised proposals four months before the anticipated commencement of part 1 of the 2016 Act, when the volume of requests for advice that solicitors receive could increase by up to fivefold, and when firms would have to consider capacity, cover arrangements, revised terms of employment, issues around minimum wage legislation, working time regulations, equalities, additional recruitment and a range of other issues while the fees for this work were still subject to discussion. It was on this basis that we asked SLAB to postpone work on the revised Code of Practice for criminal legal assistance; SLAB increased the deadline for consultation responses by two weeks. The announcement that the commencement of part 1 of the 2016 Act would be delayed until later in 2017, as commencement at Westminster cannot be secured as a result of the UK general election on 8 June 2017, will see delay to new police station arrangements. This does not obviate the need for effective fee structures.

Advice to suspects at a police station is crucial to the functioning of the criminal justice system. A mark of the profession's commitment to the importance of this is the huge level of advice provided to suspects without any recourse to public funds or any charge to the client; equally, this is a mark of the unworkable and bureaucratic nature of the interim scheme. It is regrettable that proposals have been brought forward only four months before the implementation of legislation fundamentally reforming access to legal advice, following a commitment in 2011 to review and the introduction of legislation to reform the police station advice process having been laid in 2013.

Police station advice in England and Wales

As we have noted elsewhere, the level of funding for police station advice is extremely low for a service provided across Scotland on 24 hours a day, 365 days a year. As already observed, expenditure for work in this area was £412,500 in 2014/15. For the same period in England and Wales, expenditure for this area of work was around £170 million. Practically, this level of funding in England and Wales has allowed for differentiation in roles between court solicitors and police station representatives, while in Scotland, this has not been practicable, leading to the challenge that a solicitor may be called on to provide advice overnight at a police station while also expected to represent in court during the day. Even with the level of remuneration available for police station advice in England and Wales, there remain tensions. One solicitor

⁴⁵ (<http://www.slab.org.uk/about-us/what-we-do/consultations/current/Criminal.html>)

in England and Wales observed in a research exercise published by the Legal Services Research Centre in 2010⁴⁶:

“If you spend time qualifying as a solicitor you want to do something which is going to be financially rewarding. People have always gone into crime because of the level of job satisfaction rather than the salary, but there has to be a stage where you say enough is enough and the solicitor who is going to the police station at 3am should be being paid as much as the custody sergeant who is standing behind the desk. They are both equally important jobs in ensuring justice is done and people are treated fairly.”

By contrast, police station advice in Scotland is being provided on a largely pro bono basis by members of the profession.

Proposed fees

We have indicated a level of remuneration that we believe practicable for police station advice in Scotland. Work is already undertaken at a police station, for instance, attendance at police video identification parades by electronic recording (VIPER) and at a fee level we consider reasonable. These VIPER rates would meet the challenge of providing police station advice and offer reasonable remuneration to encompass the range of costs expected from the increase in the volume of requests for advice. We have communicated this position to the Scottish Government and SLAB and await a response.

⁴⁶ *Transforming Legal Aid: Access to Criminal Defence Services*, Dr Vicky Kemp, Legal Services Research Unit, September 2010 (<http://eprints.nottingham.ac.uk/27833/1/Kemp%20Transforming%20CD%202010.pdf>)

Criminal legal aid – summary

We recommend that the Scottish Government explores harmonising and streamlining, as much as possible, all funding arrangements in relation to summary crime.

“VSS supports the simplification of the current schemes; for example, requiring financial verification at the initial application stage only would reduce delays through avoidance of repeated scrutiny of the claim for legal assistance.”⁴⁷

This would mean replacing the existing advice and assistance, assistance by way of representation (ABWOR) and legal aid systems with a single system of legal assistance, underpinned by block fees.

Criminal procedure

Serious criminal offences are prosecuted on indictment before a judge and jury of 15 people. These proceedings are called solemn proceedings, as distinct from summary proceedings before a sheriff or Justice of the Peace sitting without a jury.

For summary cases, there are Justice of the Peace courts, which deal with less serious matters. Justice of the Peace courts hear cases dealing with less serious offences. The judge is called a Justice of the Peace (JP) and sits alone; there is no jury. The maximum sentence a JP can impose is a fine of £2,500 or imprisonment for up to 60 days.

Sheriff courts deal with summary and solemn criminal prosecutions. In the sheriff court, summary cases are heard only by a sheriff. In a summary case, the sheriff can sentence an accused person up to 12 months in prison or a maximum fine of £10,000. In the sheriff court, solemn cases are heard by a sheriff and jury. In a sheriff and jury case, the sheriff can sentence an accused person up to five years in prison or impose a fine of any amount.

The High Court of Justiciary is Scotland’s supreme criminal court, prosecuting the most serious solemn cases before a judge and jury. In the High Court, there are no limits on the length of prison sentence or the fine a judge can impose. Solicitors have rights of audience to appear in the JP courts and the sheriff courts (both sheriff summary and sheriff solemn proceedings). In the High Court, solicitors instruct solicitor

⁴⁷ Victim Support Scotland, consultation response January 2015 (www.victimsupportsco.org.uk/wp-content/uploads/2015/08/January-2015-VSS-Response-to-Legal-Assistance-in-Scotland.pdf)

advocates or advocates who have extended rights of audience before that court, the UK Supreme Court and all other Scottish courts.

Current fee structure – criminal ABWOR

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 two diets of deferred sentences. Additional payments can be made in certain circumstances.

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 Scottish Legal Aid Board (SLAB) keycard⁴⁸.

Summary criminal proceedings

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) with the assistance of a solicitor.

⁴⁸ For instance, Scottish Legal Aid Board, *Advice and Assistance and Civil Legal Aid Keycard 2017*, http://www.slab.org.uk/export/sites/default/common/documents/profession/documents/AxA_and_Civil_Keycard.pdf (accessed 18 May 2017)

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 granted⁴⁹.

Summary criminal legal aid is granted by SLAB and is used in summary cases in the JP courts and sheriff courts. The applicant must be eligible under both 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 takes 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

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).

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 the accused or their dependants.

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 the accused or their

⁴⁹ For instance, under Regulation 7A (1) to (5) of the Legal Aid (Scotland) (Fees) Amendment Regulations 2013, as will be described later

dependants and that, in all the circumstances of the case, it is in the interests of justice that criminal legal aid should be 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.

Recommended structure

On behalf of the accused person, the solicitor would apply to SLAB for criminal legal assistance. The granting of the application would be subject to a financial eligibility and interests of justice test. This initial application would be the only time that financial verification would be required during the case. Ensuring that there is 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. The requirement to repeatedly provide a client's details was highlighted in our commissioned research. One respondent said there was a "need to spend an inordinate amount of time uploading applicants' [information] and attachments".⁵⁰

Following the grant of the legal assistance certificate, it would be for the solicitor to apply to SLAB for payment of the appropriate block fees.

The level of fee for guilty and not guilty pleas should be set at the same level. This creates a unified system and ensures that there are 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 (following a guilty plea) or the first 30 minutes of trial (following a not guilty plea).

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

⁵⁰ Commissioned Research page 23

fee for the additional deferred sentences would be the same whether the client pleads guilty initially or whether he or she proceeds to trial.

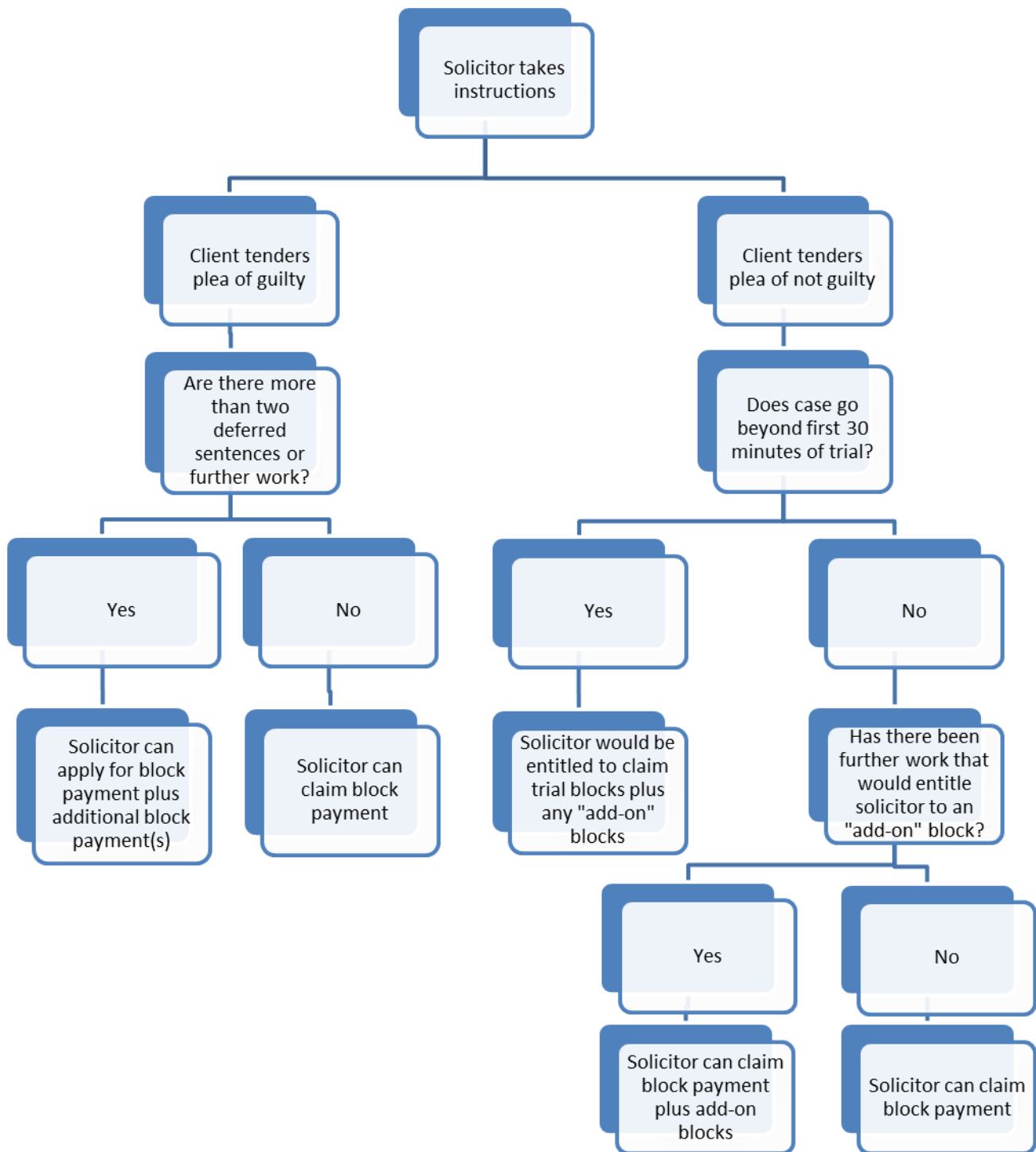
A system of additional block fixed fees could be used to cover the work of the solicitor at trials, bail appeals, further deferred sentences or the obtaining of expert reports.

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

- parole board hearings
- drug testing and treatment order hearings
- proofs in mitigation
- breaches of court orders
- proofs of breaches of court orders and
- proceeds of crime

Within the structure, it is recommended that, where there are exceptional circumstances in a case, the solicitor would be able to charge for work under a time-based system. We are recommending this broad structure for criminal legal assistance in summary criminal matters.

It is recognised that there are areas of detail that will require further discussion but this structure should offer a starting point for simplifying the legal assistance system for summary crime.



Cost analysis

The alternative block fee structure for summary work is closely aligned to the existing structure and we believe that there would be no significant additional cost to the legal aid fund.

The key difference in the alternative structure is in the fresh approach to the administration of the system. We believe that this proposal will create administrative savings in ensuring that the application and granting processes are harmonised across all summary work. There will also be administrative savings in achieving simplicity through an easily administered block fee system.

The proposals would also create wider justice system savings by encouraging early resolution where appropriate.

Solemn legal aid

At a time of reforms to modernise the criminal courts and justice system, our system of publicly funded legal assistance must be rethought to ensure effective and sustainable service. Legal aid must remain available across Scotland. The legal assistance system must keep pace with the proposed changes. Criminal legal assistance supports those accused of a crime by the state.

Existing legal aid arrangements are not structured in a way that supports early resolution of cases. Any delay in the provision of legal assistance aggravates delays within the criminal court system. A system of block fees may encourage early resolution of cases.

Eligibility

An accused in a solemn case is automatically entitled to legal aid while in custody, and until a decision is made about whether to grant legal aid, or the accused is released on bail.

Solemn criminal legal aid is available only in solemn cases in the sheriff court and High Court. An applicant for solemn legal aid must pass an eligibility test based on undue hardship to the individual, or their dependants. 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 the Scottish Legal Aid Board (SLAB) considers whether the excess is sufficient to cover the likely costs of the case. Where it is not, criminal legal aid will be granted. Otherwise it will be refused.

Current fee structure

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 (eg perusals). There is also the ability to have exceptional case status granted. 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. The changes were made following the case of *HMA v McCrossan* [2013] HCJAC 95 as there was a concern that a number of the aspects of the solemn criminal legal aid fee structure for solicitors may not be wholly compatible with the European Convention on Human Rights.

Regulation 7A (1) to (5) of the Legal Aid (Scotland) (Fees) Amendment Regulations 2013 offer a solicitor the option to apply for exceptional case status where he/she can demonstrate that the case is one where there is a risk that the assisted person would not receive a fair trial because of the amount of fees otherwise payable under the 1989 regulations, and where certain conditions are met. The application must be made before the case is concluded. If exceptional case status is granted in a solemn case, none of the inclusive or block payments can be claimed for. All work carried out under the grant of legal aid becomes chargeable on a time and line basis. Exceptional case status could be viewed as a means of opting out of the fee structure on the basis of ECHR grounds.

Early resolution of cases - section 76 of the Criminal Procedure (Scotland) Act 1995

We believe that, in order to support investigation and preparation of cases to facilitate their resolution at the earliest possible stage, fees should be structured so that the solicitor receives an early resolution fee. Such an approach would support the cost-effectiveness and efficiency of the wider criminal justice system and would give practical effect to the justice system reforms.

There will always be cases which commit the full resources of both the state and the accused through to trial. This recommendation seeks only to target those cases capable of early resolution or simplification and to deal with them in a way which is efficient, effective, and consistent with the better administration of justice.

Under section 76 of the Criminal Procedure (Scotland) Act 1995, 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...”⁵¹

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:

⁵¹ 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>

“...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.”⁵²

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.”⁵³

There is clearly a need to ensure that justice is done as expeditiously as possible. However, the existing legal assistance arrangements are not structured in a way that supports this aim. 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.⁵⁴

The recent reviews⁵⁵ 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.

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 2013.⁵⁶ 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.

In 2015, we made a recommendation that the Scottish Government takes steps to restructure solemn fee arrangements so that the solicitor receives an appropriate level of fee for achieving effective and efficient resolution of a case.

⁵² Independent Review of Sheriff and Jury Procedure, 2010 <http://www.scotland.gov.uk/Resource/Doc/314393/0099893.pdf>

⁵³ Response from Victim Support Scotland to Reforming Scots Criminal law and Practice:

Reform of Sheriff and Jury Procedure, 15 March 2013 - <http://www.scotland.gov.uk/Resource/0042/00425551.pdf>

⁵⁴ 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>

⁵⁵ [Evidence and Procedure Review - Next Steps - February 2016](#)

⁵⁶ Regulations at: - <http://www.legislation.gov.uk/ssi/2013/320/regulation/6/made>

“Section 76 hearings are a far more efficient way of resolving cases for the criminal justice system than a plea at first diet.” Crown Office and Procurator Fiscal Service, consultation response

There was extensive agreement amongst respondents that the system could benefit from being reformed to enhance efficiency⁵⁷. Inefficiencies are seen to be affecting the proper running of both the legal assistance system, and the wider justice system. It is clear that respondents believe that fees should be structured appropriately to facilitate early resolution.

The fee for preparation for a hearing under section 76 of the 1995 Act is provided for in regulations⁵⁸. The fee for preparation for the hearing is £38⁵⁹. The fee for appearance of counsel at the hearing is £1,250⁶⁰. Generally speaking, the solicitor will have carried out all of the work to get the case and the client to the point of a plea. 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.

Early resolution of cases - section 80 of the Criminal Justice (Scotland) Act 2016

Part 3 of the 2016 Act follows up on recommendations of Sheriff Principal Bowen’s *Independent Review of Sheriff and Jury Procedure*. In particular, section 80 of the Criminal Justice (Scotland) Act 2016⁶¹ 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. The requirement for Crown and defence to communicate, the participation in, and creation of, a joint written record as to preparation, and the conduct of first diets has been in place since 1 December 2015 (practice note No 3/2015)⁶².

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.

⁵⁷ [Legal Assistance in Scotland, 2015, Consultation Responses](#)

⁵⁸ The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 as amended by the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013

⁵⁹ <http://www.legislation.gov.uk/ssi/2013/320/regulation/6/made>

⁶⁰ The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 - <http://www.slab.org.uk/handbooks/Legislation%20master%20copy/wwhelp/wwhimpl/common/html/wwhelp.htm#ref=Criminal/Criminal%20fees%201989.html&single=true>

⁶¹ [Criminal Justice \(Scotland\) Act 2016](#)

⁶² [Criminal Courts Practice Note 3 of 2015 - Sheriff Court Solemn Procedure](#)

Since the introduction of joint written record for the preparation of first diets in December 2015, the Law Society of Scotland's legal aid team had repeatedly asked for funding to be made available for the additional work involved in preparing the document. In November 2016, SLAB confirmed⁶³ that it would allow a time-based charge of up to one hour for the work related to the completion of the joint written record by the defence solicitor where the solicitor elects to claim a fee on that basis as an alternative to the standard framing charge (based on sheetage), which remains available. This applied to work done on or after 1 December 2016 in a sheriff and jury matter in which counsel is not instructed.

Recommended structure

Following the first appearance, in order to facilitate case 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 preliminary hearing. There should also be a set of block fees for each further diet or continuation, but the number or the level of subsequent blocks available would reduce as the case progresses. The sliding scale would provide an incentive to try and resolve cases at an early stage. There should also be add-on block fees to cover work in preparing paper productions and witness statements.

The structure of the block system for solemn legal assistance could be as follows:

- I. A core unit block fee for case resolution.
- II. A block fee for consultations with the client (whether in custody or not).
- III. A block fee for perusal of paper productions and witness statements.

The feeing structure could be as follows:

- S.76 hearing – block fee paid to the solicitor. The fee chargeable for achieving resolution by way of S.76 hearing consists of three core unit blocks: (core block unit fee x 3).
- Resolution at first preliminary hearing – the fee chargeable for achieving resolution at the first preliminary consists of two core unit blocks: (core block unit fee x 2).

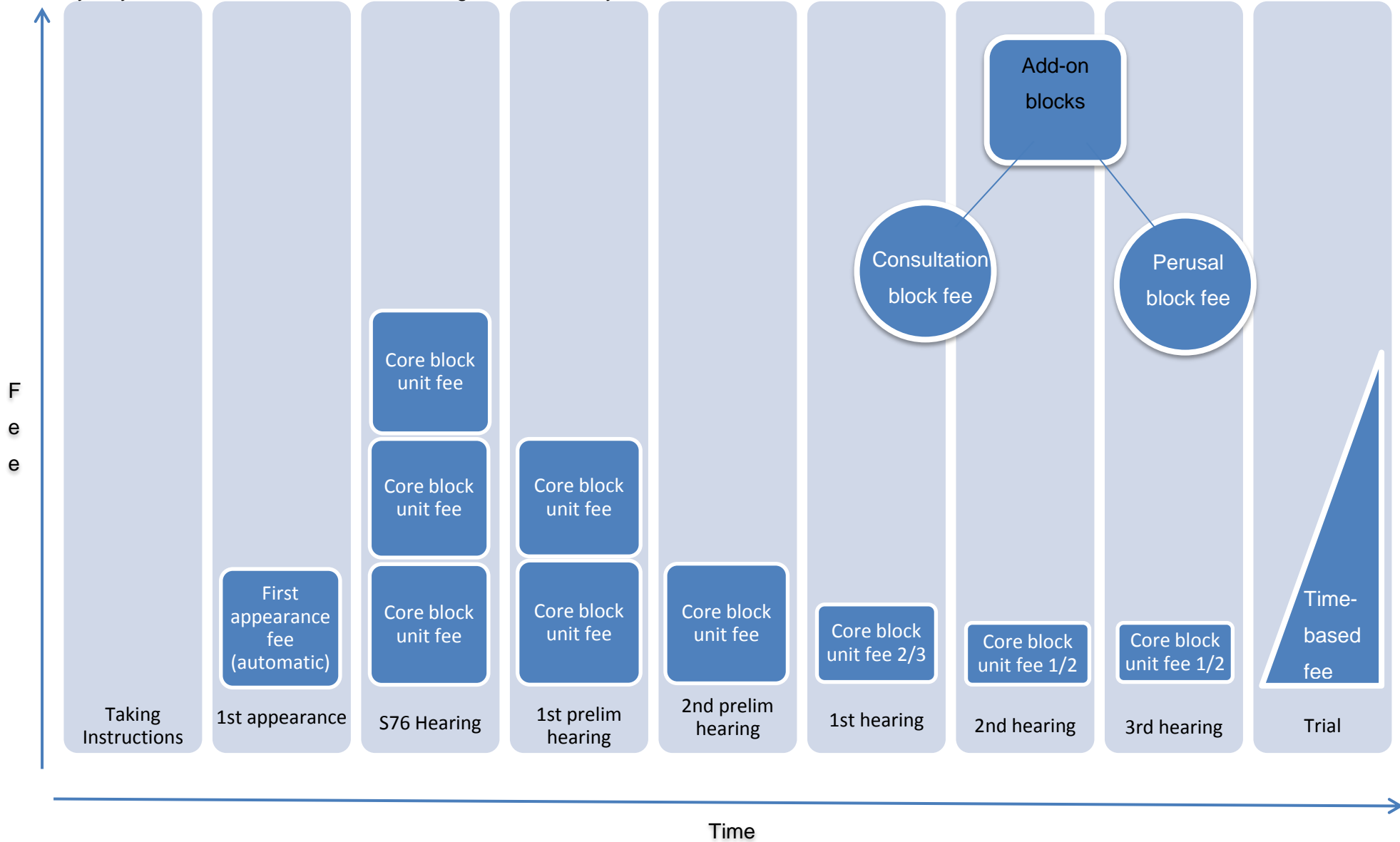
⁶³ <http://www.slab.org.uk/providers/mailshots/newsfeed/solemnprocedure.html>

- Resolution at subsequent preliminary hearing – the fee chargeable for achieving resolution at subsequent preliminary hearings consists of one core block unit (core block unit fee).
- First hearing – the fee for resolution at a first hearing would be two-thirds of the core unit block (two-thirds of the core block unit fee).
- Second hearing – the fee for resolution at a second hearing would be half of the core unit block (half of the core block unit fee).

If a trial is fixed, there would be no core block unit fee payable and the solicitor would be able to charge on a time-based system (eg a daily rate). The blocks for perusals and consultations would be added on top of the time-based system for trial. Where the solicitor is required to carry out post-conviction work, this could also be dealt with through a series of block fees.

Within the structure outlined above, it is recommended that, where there are exceptional circumstances for any solemn matter, the solicitor would be able to charge for work under a time-based system. We believe that our recommended structure would support investigation and preparation of cases and would facilitate case resolution at the earliest possible stage.

By way of illustration, the recommended legal assistance system for solemn cases is as follows:



In some cases, where a section 76 letter has been sent to the Crown to seek early resolution, there might be factors outwith the control of the solicitor or accused, which can cause delay to case disposal.

For example, in a drugs case, the Crown might respond that they do not have a forensic report, and as such cannot accept a section 76 letter. By the time the Crown is in a position to accept a plea, the indictment is likely to have been served, and the plea can then only be tendered at the first diet.

On that basis, the full section 76 fee must also be available where the solicitor has taken all reasonable steps necessary to secure resolution at the section 76 hearing but, through no fault of the accused or the solicitor, the plea can only be tendered at the first diet.

Cost analysis

The cost of solemn legal aid in 2013/14 was £41.7 million⁶⁴. It is not straightforward to estimate the potential change in expenditure under the recommended solemn block fee system but it should be kept in mind that the proposal is predicated on an overall increase in funding. In the context of the recommendation being taken forward, it should be with an aim to increase expenditure in this area but also to drive efficiencies in order to generate substantial savings in the wider justice system. Ensuring that any changes are made with a view to an overall increase in fees is critical given the significant amount of work involved in solemn cases as well as the nature and the complexity of cases.

There are too many variables for us to estimate additional costs to the solemn legal aid budget under the proposed system at this stage. Some of the factors involved in a cost analysis would include:

- a mapping of all cases to highlight where cases currently resolve during existing solemn procedures and the costs attached to each of the points of resolution and costs attached to cases which proceed to trial
- of the cases which resolve, an estimated number of cases that would be more likely to resolve by way of S.76 procedure under the recommended structure
- of the cases which resolve, an estimated number of cases that would be more likely to resolve at first preliminary hearing under the recommended structure

⁶⁴ Scottish Legal Aid Board Annual Report 2013-14 - http://www.slab.org.uk/common/documents/Annual_Report_2013_2014/A_-_Annual_Report_2013-14.pdf

- of the cases which resolve, an estimated number of cases that would be more likely to resolve at subsequent preliminary hearings under the recommended structure
- of the cases which resolve, an estimated number of cases that would be more likely to resolve at the first hearing under the recommended structure
- of the cases which resolve, an estimated number of cases that would be more likely to resolve at the second or subsequent hearings under the recommended structure
- an estimated number of perusal block fees payable for all cases under the recommended structure
- an estimated number of consultation block fees payable for all cases under the recommended structure
- the level of the core block unit fee for resolution
- the level of the perusal block fee
- the level of the consultation block fee
- the level (and estimated number) of other add-on blocks

In terms of savings to the taxpayer, we believe that the recommendation would make substantial savings across the justice system. Early resolution means that fewer victim and witness citations would 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 also supports the efficiency of the wider criminal justice system and would reduce court delays.

The summary justice reforms introduced an early resolution fee for summary matters. These reforms generated significant savings in criminal legal assistance and dealt with other problems in the wider justice system, such as reducing court delays. The summary justice reforms provide useful indicators that restructuring of legal assistance can be successful in achieving early resolution. Annual expenditure on summary criminal legal assistance reduced following the summary justice reforms⁶⁵. There were also enhanced efficiencies for the wider justice system⁶⁶. We believe that the improved efficiencies in summary matters can be replicated in solemn cases, creating substantial justice system savings.

⁶⁵ SLAB Annual Report 2011-12 http://www.slab.org.uk/common/documents/Annual_report_2011_2012/Annual_Report_2011-2012.pdf

⁶⁶ National Centre for Social Research <http://www.natcen.ac.uk/our-research/research/evaluation-of-the-reforms-to-summary-criminal-legal-assistance-and-disclosure/>

Criminal legal assistance and appeals

The appeals process in Scotland is a vital safeguard, ensuring fairness, avoiding miscarriages of justice and protecting the rule of law. In 2015/16, there were 673 criminal summary and 866 criminal solemn appeals lodged and 238 civil appeals (or reclaiming motions) at the Court of Session⁶⁷. There were 402 grants of legal assistance for criminal appeals in 2015/16 and 1,088 appeals cases paid at a total cost to the taxpayer of £1.34 million⁶⁸.

Though this is a small proportion of the criminal legal aid budget overall, the importance of legal aid to an effective appeals process is critical. Appellants may not have the financial resources to meet the costs of effective representation, particularly in the event of a custodial sentence. Appeals are on points of law rather than fact and there is a sifting process to ensure that unmeritorious cases do not proceed.

Sheriff Appeal Court

The way in which appeals are heard has recently changed, with the introduction of the new Sheriff Appeal Court. The *Report of the Scottish Civil Courts Review*, published in September 2009, made recommendations for the establishment of a new judicial tier to consider criminal appeals: rather than consideration by the High Court of Justiciary, instead these cases would be heard at sheriff court level, by specifically appointed members of a new Sheriff Appeal Court with a criminal and civil jurisdiction. The legislative framework to implement this change was the Courts Reform (Scotland) Act 2014. The criminal jurisdiction of the Sheriff Appeal Court commenced in September 2015 and the civil jurisdiction in January 2016.

There were several aims in establishing this new court structure, including ensuring both the effective and prompt resolution of appeals and the principle that cases are dealt with at a level appropriate to the points or issues in dispute. In terms of the former, the Scottish Courts and Tribunals Service reported in its *Annual Plan and Accounts 2015/16* that the new court structure was delivering effectively:

⁶⁷ *Annual Report and Accounts 2015-16*, Scottish Courts and Tribunals Service (<https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/scts-annual-report-accounts---2015-16-final.pdf?sfvrsn=2>)

⁶⁸ *Annual Report and Accounts 2015-16: Key Statistics*, Scottish Legal Aid Board (http://www.slab.org.uk/common/documents/Annual_report_2015_2016/Key_Stats.pdf)

“The implementation of the court went smoothly, with all summary appeal business continuing to be processed efficiently. Solemn and summary appeals against sentence continued to be disposed of within an average of six weeks from the date that leave to appeal was granted during 2015/16.

Solemn appeals against conviction were disposed of by the criminal appeal court within an average of 21 weeks from the date that leave to appeal was granted during 2015/16. This is a reduction of seven weeks on the average compared with the previous two years.”

In terms of the latter, we expressed concerns around the legal aid implications of the new court structure in advance of its establishment in relation to client choice of representation, the inflexibility of the legal aid system, the fee levels available and, ultimately, the ways in which reform and resourcing of legal aid can be overlooked in the wider reform of the justice system.

Before the introduction of the Sheriff Appeal Court, criminal appeals were heard by the High Court of Justiciary sitting as a court of appeal. As proceedings at a higher court, these cases automatically saw the deployment of instructing solicitor and counsel – whether solicitor advocate or advocate – to conduct the appeal. The move of these appeals to the new Sheriff Appeal Court intended these cases to be conducted by a solicitor in most cases, or by an instructing solicitor and counsel – whether solicitor advocate or advocate – in the minority of cases, where the circumstances were complex enough to justify the sanction from the Scottish Legal Aid Board (SLAB).

One of the challenges of the initial Sheriff Appeal Court proposals was that the choice of higher court advocate, in the minority of more complex cases where sanction had been granted, would be restricted. Because these appeal proceedings would now take place at sheriff court level, and as this would not engage the higher rights of audience held by solicitor advocates, appearance by solicitor advocates would not be possible (though they could appear as solicitors and be paid as such).

Fees for the new appeal court

The fee levels available for solicitors to conduct this work, in many ways a new area of court advocacy as appeals work before up to a three-judge bench had previously been restricted to the High Court, were proposed to be limited to payment rates that had last been uplifted by the Scottish Government in 1992. As we observed at the stage that these new arrangements were introduced:

“Solicitors will have difficulty in conducting the appeals themselves because of low payment. The fee rates available for this work were fixed in 1992. In a little over a year, the fee rates will have

been frozen for a quarter of a century. It is a matter of concern that rates of remuneration have not been kept under review by the government and have reduced in real terms.

“We are supportive of the court reforms overall and we want to reach a position whereby solicitors are able to undertake appeal work for clients directly – without the need to appoint an advocate or solicitor advocate. The Scottish Government is committed to reviewing arrangements within six months. We will participate fully in the review process to ensure that in the longer term the Sheriff Appeal Court can operate effectively and efficiently and that full consideration can be given to the rates for solicitors to enable them to undertake appeal work directly as was intended by the reforms.”

However, the level of fees for counsel was, and is, significantly higher. We argued that the rates available for solicitors were not an adequate reflection of the level of work and advocacy required. Our proposal was to develop a fee structure somewhere between the 1992 rates and the fees available for counsel, which we believed would make a cost saving as only one representative rather than two would be engaged on an appeal and at a rate below that for counsel. However, the Scottish Government decided against increasing fees for solicitors in appeal cases, though agreed to review the impact of the fee arrangements six months following implementation. The then Minister for Community Safety and Legal Affairs, Paul Wheelhouse MSP, advised the Scottish Parliament Justice Committee on 15 September 2015:

“The Scottish Legal Aid Board will take a pragmatic and flexible approach to sanction for counsel, which will help solicitors to make the transition to the new Sheriff Appeal Court. If it is evident that solicitors do not want to take on this work in the immediate term, SLAB has indicated that it will sanction counsel for cases in the new court.”

In a letter to the convener of the Justice Committee on 27 October 2016, his successor as Minister for Community Safety and Legal Affairs, Annabelle Ewing MSP, advised on the status of that review:

“While the new court is operating well, the automatic availability of counsel or solicitor advocates under the current legal aid arrangements may be contributing to them continuing to present appeals in the Sheriff Appeal Court. The [Scottish Legal Aid] Board is not aware of any publicly funded cases where a solicitor has presented an appeal. As at 28 September 2016, 129 cases have submitted accounts to the Scottish Legal Aid Board... In 127 of those cases, either an advocate or solicitor advocate was instructed to present the case. The remaining two did not proceed to an appeal hearing.

“As a result, the Board has no data on which to monitor the solicitor fee arrangements and it has been impossible to undertake an evidence-based review of the fee model put in place.”

We highlighted the challenges of solicitors undertaking appeal work for fees last uplifted in 1992. While the automatic use of counsel in these cases ensures that appeals still see representation, replicating the automatic counsel provisions from the High Court was not the intention of the new court structure at the Sheriff Appeal Court. The inflexibility of the legal aid system has frustrated the policy intention of the reform and has offered no cost or efficiency savings. We maintain that a viable fee for solicitors to undertake this work would offer a saving to the public purse and believe it is unacceptable not to review this situation when the lack of solicitor participation was clear and predictable from the outset. In addition, the proposals around the fees available for work at the Sheriff Appeal Court were another example of consultation around legal aid reform where defence practitioners were consulted late, with proposals that were unrealistic and which has resulted in a missed opportunity for efficiency savings, an apparently intractable impasse around solicitor participation, and the frustration of a key policy intention of the new court structure.

Civil legal aid

Around 1312⁶⁹ solicitors currently deliver civil legal assistance across Scotland, covering a wide scope of subject matters including family, immigration and incapacity law to name only a few. It is provided via three main categories: advice and assistance, assistance by way of representation (ABWOR) and legal aid. Through these categories, service users are able to seek to enforce their rights and obligations under civil law.

Advice and assistance

Advice and assistance enables advice to be given on any matter but does not, generally, cover steps in connection with instituting, conducting or defending proceedings. There are standard categories of advice and assistance under which a solicitor can certify that a client is covered, following which, and subject to financial verification of the client, the solicitor is able to provide advice.

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, with contributions payable on a sliding scale. The cost of advice and assistance can be reclaimed from an asset recovered or preserved as a result of a legal action. The solicitor's work is charged on a time and line basis up to an initial limit, which may increase in exceptional circumstances.

ABWOR

ABWOR allows a solicitor to work in connection with instituting, conducting or defending specific types of proceedings. Generally, an applicant must be eligible for advice and assistance in order to be eligible for ABWOR. In most cases, solicitors are also required to apply a merits test and secure the approval of SLAB prior to providing ABWOR.

⁶⁹ Figure includes second year trainees and is for the most recent 12 month period.

Civil legal aid

Civil legal aid is available in a variety of cases in the sheriff court, Court of Session, Supreme Court and other courts and tribunals specified in the Legal Aid (Scotland) Act 1986. It includes representation by a solicitor, solicitor advocate or advocate as appropriate. It also includes all of the assistance by a solicitor incidental to the proceedings or settlement of a case.

There is a three-part test applied in determining an applicant's eligibility for civil legal aid. Firstly, there is a means test; generally, civil legal aid will only be available to individuals with a disposable income of £26,239 or less and disposable capital of £13,017 or less. Secondly, there is a merits test; there must be probable cause which indicates a legal basis for the case. Thirdly, there is a reasonableness test, which asks whether it is reasonable for the case to be funded by public funds given consideration of, for example, the likelihood of success and recovery. The Scottish Legal Aid Board (SLAB) will also seek to establish that assistance is not available through another avenue such as a union, professional body or insurance company. Contributions are payable on a sliding scale and costs can also be reclaimed from an asset recovered or preserved as a result of the action.

Generally, sheriff court cases are paid on a block fee basis, although time and line is also available in some circumstances. Court of Session cases are paid on a time and line basis. Both sheriff court and Court of Session cases are subject to case cost limitation, restricting the amount that can be paid in relation to a case.

Current issues

We are told by practitioners that it is becoming unsustainable for firms to provide civil legal assistance. The level of bureaucracy involved and the continued communication with SLAB that is necessary throughout the life of a file often means that the funds received must cover more time than is reflected in the accounts. Firms that undertake a mix of legal aid and privately funded work have reported that their privately funded work subsidises the cost of working for legal aid rates. Similarly, some providers of civil legal assistance must subsidise their work through grants. Our research into the financial health of legal aid firms supports this contention; it found that approximately one-third of the hours worked by solicitors providing civil legal assistance are unpaid. This clearly impacts on the profitability of the work overall.⁷⁰

⁷⁰ <https://www.lawscot.org.uk/media/1033810/Legal-Aid-Financial-Health-Report-February-2017.pdf>

A comprehensive review of civil legal assistance must include a review of funding. Funding is key to its sustainability, not only in relation to operating a viable business while safeguarding the ability to provide a quality service to clients but also in attracting newly qualified lawyers to do the work. Newly qualified lawyers will always be the future of the system and the disparity between legal aid pay and that of private work appears to be increasing. This may act as a disincentive for those who might otherwise wish to pursue a career in this area.

We also have concerns about the increasing likelihood of advice deserts both geographically and in terms of the sufficiency of the number of solicitors providing the service within certain fields of law. While the scope of subject areas for which legal assistance is available is a strength of the system, without solicitors to provide services across the full spectrum of subject areas, in practice, advice in these areas may not be accessible.

It should be said that law centres play an important role in the provision of legal advice and provide a good service to those in need. However, if as a result of fewer law firms providing civil legal assistance law centres are expected to increase their level of service, there will be funding requirements in order for them to do so. It would then follow that there is no economic benefit to allowing law firms and/or sole traders providing legal assistance to disappear due to the unprofitability of the work.

The Civil Legal Assistance Office does serve to bridge some of the gap in the provision of advice but its service could not be said to solve the whole problem. We would also suggest that the disappearance of service providers is a symptom of an underfunded civil legal assistance system and should not be ignored, even if other services may serve as a partial fix. If the current trend continues, the problem could become increasingly exacerbated.

Putting aside the issue of the viability of solicitors being able to provide civil legal assistance, there are also issues around process that would appear to be common to most, if not all, areas of civil law.

We have been told by our members that the process for a grant of an application for civil legal aid is commonly measured in weeks if not months. This delay can aggravate delays in court procedure. It also increases stress for the parties involved and decreases the efficiency and perceived credibility of the system. Special urgency cover is available, but only in limited circumstances and often requires the prior approval of SLAB. We are also told that the process for obtaining special urgency cover is unduly cumbersome, requiring hours just to complete the required forms. This process would appear to be out of step with the nature and purpose of the cover.

There are also issues with abatements to accounts. It is common to have repeated negotiations with SLAB over recurring low value costs and, because of this, solicitors often feel forced to accept abatements only because they do not have the time to negotiate. The work required in justifying and analysing accounts at the abatement stage is well in excess of that which a solicitor would experience in dealing with a private

client, where the work would normally be more remunerative in the first instance. Where they do enter into negotiations over recurrent abatements, this takes up a considerable amount of time and resource. However, from the solicitor's perspective, it is sometimes thought to be necessary as there is a sense that abatements are not imposed consistently or transparently. This means that an unsuccessful challenge to an abatement on one file does not necessarily mean that the same challenge to the same abatement on another file will also be unsuccessful. This results in uncertainty of what will be recoverable once work has been completed.

One approach to try to resolve recurring abatements is to rely on styles and standard letters. However, increasing this reliance also means that solicitors are less able to offer a tailored or comprehensive service to their clients. This is the cause of a great deal of stress and frustration for professionals trying to run profitable businesses whilst trying to provide the best service practicable to each client at the same time. It can also cause a tension between satisfying professional standards and duties but limiting work to that for which they will be paid. There are clients who, for a variety of reasons including mental health, addiction or disability, may require additional time to be spent either in person or by increased correspondence or both. Practitioners report feeling unable to properly exercise their professional discretion to assess how much time is necessary and reasonable (having due regard to the expenditure of public funds) in the circumstances as SLAB will often refuse to pay for what they deem to be excessive time spent on a matter. While we agree that public funds need to be properly accounted for and responsibly administered, we suggest that, at times, this is weighted too heavily towards the accounting aspect without due regard to proper access to justice for all individuals, including those with additional needs.

A specific issue arises in relation to advice and assistance. The basic fee for advice and assistance is generally able to cover initial work that later leads to a full legal aid certificate. It becomes less viable where the whole matter will be completed under advice and assistance. This could be work in any field of civil law but is common in relation to asylum, mental health detentions and homelessness. These areas may have complex factual issues, require extensive legal or factual research or include a client with complex needs but the limited funding makes it difficult for solicitors to run their businesses unless they use a business model that is based on a high volume of clients.

So far, this chapter has covered the basic structure and some current issues common across the landscape of civil legal assistance. The following sections discuss particular differences in civil legal assistance across several areas of law and identifies issues specific to those individual areas.

Family law

Family law is a significant area of legal assistance spending. In 2013/14, grants of civil legal aid for family law matters constituted approximately 60% of all grants of legal aid.⁷¹ Legal assistance in this area is available for a broad spectrum of legal issues, from divorce or dissolution of a marriage/civil partnership to issues of residence or contact with children among others. Family law issues fall within the normal eligibility requirements as outlined above with the exception of appearances from custody under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and Protection from Abuse (Scotland) Act 2001 for which there are no financial tests or contributions.

In financial provision cases, the consequence of SLAB's policy on recoupment for advice and assistance means that, often, solicitors are not able to secure any payment for pre-litigation work – which can often include bearing the costs of significant outlays such as actuarial reports and valuations of property – until the entire case has concluded. That can be a year or more in contentious cases.

In such cases, the block fees themselves do not provide for any discrimination based on the complexity of the case or work involved. It is possible to apply for exceptional case status to be entitled to submit a time and line account, but those accounts are often the subject of considerable abatement and – given that these are the most complex cases – the time required in negotiating those can be a significant disincentive, often leading to agents submitting block accounts even where the case would meet exceptional case criteria.

In contact and residence cases, an action can only be raised with a full grant of civil legal aid or the prior approval of SLAB. In practice, prior approval is granted in only exceptional cases (SLAB requiring to be satisfied that the circumstances are “especially urgent”). That means that, for example, a parent upon separation, deprived of contact or the shared care of their child, may have to wait two to three months before being able to raise these issues in court. In cases where the court requires a degree of inquiry prior to making interim orders (such as a child welfare report), such a person can often be waiting up to four or five months before a decision is taken on an interim basis. Clients often struggle to understand the reasons for this delay, and this can often lead to unwarranted criticism of solicitors.

In determining whether to grant civil legal aid in contact and residence cases, SLAB places an increasing focus now on alternatives to litigation (eg mediation) and extra-judicial negotiations. There is no discrete provision for remuneration for this work.

⁷¹ [http://www.slab.org.uk/common/documents/Annual_Report_2013_2014/A - Annual_Report_2013-14.pdf](http://www.slab.org.uk/common/documents/Annual_Report_2013_2014/A_-_Annual_Report_2013-14.pdf) at page 4

In addition, once an action has been raised, there is an ongoing expectation to try to settle matters extra-judicially (tested via both stage reporting and information required at the point of seeking an increase in case cost limit) but there has been no alteration of the existing blocks to remunerate for that additional work.

Similarly, the block fees available for civil legal aid for contact/residence actions have not been satisfactorily updated to reflect the new case management and associated work required under the present rules.

Finally, there is no incentive to resolve cases early as, for example, there may be in criminal cases where an early plea attracts a significant block fee.

Immigration and asylum

There has been an increase in the volume of asylum cases in 2015/16 which has had an impact on the overall civil legal assistance spend, particularly because asylum cases tend to have a high average case cost.⁷² The majority of asylum seekers in Scotland are provided with housing in Glasgow.⁷³ Unsurprisingly, the result is that the majority of solicitors who specialise in asylum work are also located in Glasgow. One current concern of solicitors working in this area is how services will be provided if the Home Office decides to disperse asylum seekers outside of Glasgow as is currently suggested. Given the known existence of advice deserts within the specialism, this would inevitably mean that asylum specialists would need to travel to see their clients. While it is suggested that clients should travel to their solicitor, or that technology may facilitate meetings by video, the nature of asylum work is such that these options will often not be suitable. Asylum seekers are often vulnerable, may require a translator, will not be in receipt of many funds by way of benefits and may well have additional mental health and/or health needs that make any expectation of travel by them not only impractical but not possible having due regard to their wellbeing. Solicitors have to be in a position to travel to such clients and, if there is going to be an increase in the numbers of clients who require advice in relation to asylum law, the rate of remuneration for travel time is of particular importance in this field. Any review of payments for travel would also need to look at ancillary services often required, in particular, translation services.

⁷² http://www.slub.org.uk/common/documents/Annual_report_2015_2016/Annual_Report_and_Accounts.pdf at page 6.

⁷³ <https://www.theguardian.com/world/2017/apr/09/its-a-shambles-data-shows-most-asylum-seekers-put-in-poorest-parts-of-britain>

Mental health

Mental health issues fall within the normal eligibility requirements as outlined above, with the exception of proceedings in front of the Mental Health Tribunal for Scotland, for which there are no financial tests or contributions. However, any advice requested by a detained patient prior to an instruction being given to proceed to a tribunal is not covered and financial assessment is required. In these circumstances, acutely mentally unwell patients are not entitled to advice and assistance without being means-assessed. The process of assessing detained patients where financial assessment is required is cumbersome, time consuming for the practitioner and is not fit for purpose. Documentation that SLAB insists on being produced by the applicant is usually not readily available or necessarily easy to obtain. From the practitioner's standpoint, it is also speculative as it often requires a visit to see the applicant with no guarantee that the applicant will be admitted to advice and assistance or that they will pay contributions.

Where ABWOR is available from the outset (except in the case of a compulsory treatment order application), increases in expenditure beyond the initial grant are not automatic. In recent years, SLAB has adopted a default position involving a standard level of expenditure being granted initially in almost all types of cases (£1,500 to cover all work in any case up to the first calling, including £420 for an independent psychiatric report). Where exceptional travel is involved, some modest additional authorisation will be given. Reconsideration requests are possible but they are time consuming and not chargeable expenditure as they are considered administrative. Challenging SLAB restrictions on expenditure is both time consuming and not cost-effective.

Adults with incapacity

Adults with incapacity (AWI) issues fall within the normal eligibility requirements as outlined above, with the exception of guardianship applications that include a welfare element for which no financial assessment for civil legal aid is required.

There are issues with abatements particular to adults with incapacity work where clients may often require repeat or longer meetings to discuss specific powers. The limits imposed on solicitors' time through the payment structure (including but not limited to abatements) means that it is increasingly difficult for solicitors to properly identify and support their clients to exercise their legal capacity as well as for the solicitor to frame any powers included in a power of attorney or guardianship in the least restrictive way. Where there are joint or substitute guardians, SLAB will refuse funding for speaking with the second guardian on the basis that they should have a separate legal aid certificate. We are also aware that SLAB will not pay for meetings held after the guardian is appointed to discuss the monitoring period by the Public

Guardian because, from SLAB's perspective, the guardian will have been given this information at the beginning of the process. This is not in the guardian or the incapax adult's interest but without payment solicitors are unable to offer this meeting.

The experience is that firms can only make a profit using styles, standard letters and forms going with high volume and quick turnover. This means it is very difficult, if not impossible, to provide a comprehensive and personalised service. The result is that it is very difficult for the solicitors in this area to remain compliant with the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which has been ratified without reservation and which the UK is bound by. Article 12 of the CRPD states:

1. State parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. State parties shall recognise that persons with the disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. State parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. State parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the persons rights and interests.

Without taking the views of the adult fully into account, in not being able to consider and explore the least restrictive option and consequently tailoring the powers and measures sought, solicitors will be in breach of article 12. SLAB could also be in breach. Solicitors need to be in a position to appropriately take full instructions, to be able to tailor their applications proportionality to the needs of the adult and to reflect the view of the adult as required by the Adults with Incapacity (Scotland) Act 2000, CRPD and the European Convention on Human Rights (ECHR). The recent case of *A-MV v Finland*⁷⁴, a judgment of the European Court of Human Rights, made it quite clear that guardianship and similar arrangements must be accurately tailored to the adult's needs and circumstances and must have "fully heard the voice" of the adult in order to be ECHR compatible. There has also been increased scrutiny regarding the view of the adults by sheriffs when considering AWI applications.

⁷⁴ 53251/13 [2017] ECHR 273 (23 March 2017)

Our most serious concern is that there could be unlawful discrimination against people with intellectual disabilities; that the government and solicitors will be in breach of CRPD, as well as articles 6 and 8 of the ECHR, with their actions open to challenge on these grounds.

There is concern that if a family of an incapable adult feel they cannot afford to instruct a solicitor to seek guardianship, then it falls on the local authority to make such an application and to ask for the appointment of the local authority's chief social work officer to be the welfare guardian. This would mean that the adult would not be able to have the benefit of a trusted relative making key personal decisions for him or her but instead would be obliged to have an official of the local authority look after his or her interests. Although this is a protective measure when there is no family or other willing suitable guardians, it is discriminatory to the adult if this is caused by a failure to provide adequate funding for access to the appropriate representation.

There are issues with the funding of medical reports. As with abatements generally, there is a sense that the decision-making process with regard to what SLAB will pay is not consistent or transparent. The requirement to receive three quotes is time consuming and burdensome and it is generally agreed that all parties' resources could be better spent. It is not uncommon to have instructed a report only to find out that SLAB will not cover the full cost after the fact.

Finally, there is no civil legal assistance funding available for advice on trusts. This is of particular significance to clients who care for a disabled child and who may wish to set up a liferent trust in their will to benefit the child. The clients will only receive £200 for advice in relation to this work, which does not reflect the complexity or time that it takes to establish a trust – whether in life or on death via a will. Again, solicitors are then unable to provide the proper advice or appropriate service for their client.

Housing and benefits

Both housing and benefits cases have seen an increase in volume in recent years. Indeed, housing in particular represents an increasing proportion of the total number of civil cases, and these cases come with their own challenges. The substantive law in this area has become increasingly complex, requiring greater skill, time and knowledge to undertake the work.

A particular difficulty arises in the bureaucracy around financial verification. Solicitors in this field rely on a high turnover of files in order to run viable businesses and the time taken up on these steps appears to be unduly burdensome.

In actions for mortgage arrears, clawback may operate if the client is successful in retaining the property. In these circumstances, a client may not have sufficient available funds to repay SLAB and may therefore end

up owing a debt to SLAB. This may create further anxiety and financial difficulty. We do not believe that contributions should be sought in such cases and, likewise, in eviction cases, where an additional debt is likely to antagonise an already volatile situation.

Recommendations

Under the current system, around 75% of the population is eligible for civil legal aid, with varying levels of contribution. We support the underlying notion that legal assistance should be available to everyone who needs it. However, given the current financial pressures on the budget, we would support a review of eligibility thresholds.

Our 2015 strategy paper made a series of recommendations for change. One recommendation, that we repeat here, is that a clear and effective way of simplifying and streamlining civil legal assistance would be to abolish the distinction between the three categories (civil legal aid, ABWOR and advice and assistance) and replace them with a single continuous grant of legal assistance. This recommendation is supported by the Scottish Courts and Tribunals Service Evidence and Procedure Review⁷⁵ in chapter 8 of their 2017 report. This report highlights the review's position on a single form of legal aid and a simplified financial test. Currently, the categories and eligibility requirements are complex and can act as a barrier for people seeking justice who can find the structure and attached costs difficult to understand. In abolishing the categories, the system would be easier to navigate and more able to adapt to the individual needs and circumstances of clients and solicitors, resulting in less delay and confusion.

The eligibility criteria for the three categories would need to be harmonised and, while the lower threshold would be a matter for the Scottish Government to consider, we suggest that it would be reasonable for this to be a figure between that for advice and assistance and legal aid. A client would simply complete one application, satisfy the financial requirements and the case would be assessed on merit. Thereafter, a single continual grant would be made for legal assistance for the duration of the matter. Requirements to inform SLAB of any material change in circumstances would be retained and the grant could be extended if required. A cost limit could be in place for pre-court procedure, and ongoing stage reporting would ensure that it remains appropriate for legal assistance to be provided. Sanction would continue to be required for exceptional expenditure and items such as reports and instruction of counsel.

⁷⁵ Scottish Courts and Tribunals Service, *Evidence and Procedure Review Proposition Paper: A New Model for Summary Criminal Court Procedure*, February 2017, <https://www.scotcourts.gov.uk/docs/default-source/SCS-Communications/epr---a-new-model-for-summary-criminal-court-procedure.pdf?sfvrsn=7> (accessed 18 May 2017)

If these changes were made, there would need to be support available for those who would not satisfy the revised eligibility criteria. One suggestion we made was to introduce a legal aid loan system. As mentioned above, civil legal assistance is currently available subject to a sliding scale of contributions up to 100%. Provisions for clawback mean that where resources are recovered or preserved, the funds due back to SLAB are recovered from those resources. The operation of contributions and clawback mean that, in effect, SLAB already operates as a quasi-loan provider for legal services for many service users. Having a legal assistance loan instead would reduce the administrative burden by removing SLAB's involvement after approval but before collection. We believe that this system would also promote transparency. Low-cost loans would be a fair and affordable way of ensuring that those who are currently at the upper end of the eligibility threshold still had access to legal advice and representation as needed.

Solicitors consistently tell us that they would like increased transparency and clarity on how decisions are made both generally but in particular with regard to abatements and the funding of expert reports. One repeated request of this nature has been for SLAB to publish all taxation results, increasing practitioners' understanding of the system overall. There have also been requests for detailed guidance and uniformity on how decisions are made. It is felt that the provision of guidance and uniformity would lessen the administrative burden and associated cost on SLAB and practitioners and therefore improve the overall performance of the system.

With regard to expert reports, an alternative would be to look at whether the process should be changed completely. It may be that, for public bodies, the duty to write expert reports such as medical reports could be included in their standard NHS contract, thus removing the requirement to seek three quotes and have these reviewed by SLAB in advance of instructing such reports. We appreciate that this may only be possible by changing new NHS contracts rather than by amending the existing ones. If this was not possible, it may be worth considering a more structured approach to allowable fees for expert reports. This would streamline the process and remove the possibility of instructing work that is later not fully recoverable from SLAB.

Children's legal aid

Introduction

Children's legal assistance denotes the combined legal aid scheme for the provision of legally assisted advice or representation in cases under the Children's Hearings Scotland Act 2011 (or any residual cases under part 2 of the Children (Scotland) Act 1995, the 2011 Act's statutory predecessor). It generally relates to proceedings before the court or children's hearings relating to state intervention in the private lives of families. The assistance available falls into three categories: advice and assistance, assistance by way of representation (ABWOR), and children's legal aid. The arrangements are similar to civil legal aid, although there are discrete applications and criteria for eligibility.

For a solicitor to be eligible to provide children's legal assistance, they must be on the Children's Legal Assistance Register, which is maintained by the Scottish Legal Aid Board (SLAB). To be eligible to be on the register, solicitors must demonstrate competences in relation to certain criteria and they must sign up to additional requirements and obligations, including a requirement to have the welfare of children as the paramount consideration in any case.

Advice and assistance

Advice and assistance is distinguished from the other types of legal assistance as it does not concern (and cannot cover) representation or steps in proceedings. In effect, it covers steps prior to those. It is based solely on financial assessment and, if a solicitor is satisfied of the applicant's financial eligibility (having seen appropriate vouching), they can admit them to the scheme with immediate effect.

The current limits for financial eligibility are £245 per week net income and capital of £1,716. The financial assessment is aggregated where the person has a partner. There are certain amounts that can be deducted for certain types of outgoings (such as maintenance) or for financial dependants.

The expenditure is cost limited, with an initial limit of £95, and an increase in authorised expenditure for advice and assistance can be sought. Contributions may be due which are collected by the solicitor. Where a solicitor is unable to collect a contribution, this is a loss to their account.

ABWOR

ABWOR is an extension of advice and assistance. It is granted where someone has been admitted to advice and assistance. A solicitor requires to seek the prior approval of SLAB to provide ABWOR and, in the case of children's legal assistance, must address four issues relating to the case: the complexity; whether there are legal issues; whether the assisted person can understand or challenge documents; and whether the assisted person could put their own position forward/represent themselves. ABWOR can be provided from the point approved by SLAB and increases in authorised expenditure will then be available to undertake the relevant further work.

Given ABWOR is an extension of advice and assistance, the same financial eligibility limits apply. There is at present no provision for template increases, but SLAB will generally authorise certain amounts (up to £350 for a children's hearing, for example) unless the circumstances are particularly novel or complex.

ABWOR is available for representation at children's hearings and in limited types of court proceedings (such as a child protection order application, where there is a choice to seek ABWOR or apply for children's legal aid).

Only certain persons are eligible to receive ABWOR: the child; relevant persons (which would include the child's mother and father and anyone else who had parental rights and responsibilities); and persons who have been, or who are seeking to be, deemed as relevant persons. To be deemed as a relevant person, a person must show that they have, or have recently had, a significant involvement in the upbringing of the child.

Children's legal aid

Children's legal aid covers proceedings before the sheriff court, Sheriff Appeal Court, and Court of Session under the 2011 Act (and three types of children's hearings, but only for the child). Whereas under the previous scheme of legislation children's legal aid involved such applications being determined by the sheriff (other than in appeals), all such applications are now determined by SLAB. An application must be submitted and prior approval sought, although special urgency cover may be available in certain circumstances. Unlike civil legal aid, there are no categories of automatically available special urgency cover and all such applications must also be the subject of approval prior to work being undertaken.

Children's legal aid is automatically available to the child without the need for prior approval in four circumstances: for a child protection order variation or recall application; a second working day hearing (following a child protection order); a secure accommodation hearing; and a section 68(3) hearing. The first of these is before a sheriff and the latter three are before a children's hearing.

We believe that children's legal aid should also be automatically available where there is an offence-based ground of referral to the children's panel and where there is consideration of a restriction of liberty order.

Applications are assessed based on both a financial assessment and merits assessment. The financial assessment is based upon consideration of whether the applicant's disposable income and disposable capital fall below the prescribed limits.

Capital and income are aggregated where the applicant has a partner living with them. The disposable capital limit is £7,405. In terms of income, a tapered system exists and an applicant is financially eligible where they have disposable income of under £222 per week. If their disposable income is between £68 and £222 per week, they would normally require to pay an assessed contribution towards their case. The assessment of income is different to that in the case of ABWOR and advice and assistance, and the applicant is entitled to deduct from their net income certain types of essential outgoings (such as rent/mortgage, loans, work expenses etc).

A person above those limits will only be eligible for children's legal aid if they can show that meeting the costs of the case themselves would cause them undue financial hardship.

In terms of the merits, different tests apply to proceedings before the sheriff and proceedings on appeal. In respect of the former, the applicant must show that it is reasonable in the whole circumstances that legal aid is made available. The test is a wide one, and SLAB is entitled to (and should) take into account all relevant circumstances, although they give general guidance as to factors they consider to be relevant. In addition, although the application does not seek that the applicant specifically addresses this, SLAB also considers whether legal aid being made available is in the best interests of the child (even where the applicant is not the child). SLAB can refuse legal aid if it considers that the grant would not be in the child's best interests. Under the 1995 Act, this latter element was the sole merits test and concern was often raised by practitioners as to the restrictive and subjective nature of an analysis based solely on that consideration, particularly where the application was made by someone other than the child.

In relation to appellate proceedings, in addition to the question of reasonableness, the applicant must identify the grounds of appeal and demonstrate that he or she has substantial grounds of appeal. This goes beyond an appeal simply being stateable or arguable.

Whilst children's legal aid has no cost limitation, SLAB's prior approval is needed for the instruction of experts, unusual work, or the instruction of counsel, much like civil legal aid. Cases can also be cost monitored by SLAB, and those where sanction for counsel is granted normally are automatically selected for cost monitoring.

Current Issues – solicitors

Practitioners have similar concerns about the sustainability of the provision of children's legal assistance as they do in relation to civil legal assistance. Whilst the application process is not as involved or time consuming as that for civil legal aid, for example, the complexity in such cases together with the additional, onerous obligations on solicitors in children's legal assistance often leads to significantly more work being undertaken than that paid for at the accounts stage.

Solicitors have concerns about the particularly demanding – and often formulaic – approach taken in the assessment of accounts. They find themselves requiring to, retrospectively, justify work undertaken or the approach taken in a case, which itself can be time consuming. In addition, practitioners often find that SLAB has a particular expectation that preparation for court hearings, perusals, and other work be undertaken within certain specific limits, irrespective of the complexity or circumstances of a case. Solicitors find themselves having to provide more and more information to justify charges. That can often – particularly in lower value accounts – lead to solicitors deciding that it is not cost-effective to pursue payment for work that they otherwise consider is legitimately charged.

Practitioners are also concerned about inconsistency in the manner in which accounts are assessed.

All of this has an impact on the viability of the provision of children's legal assistance by solicitors as a business.

Separately, there is an increasing concern on the part of solicitors about their future roles in children's hearings, and the linked issue of SLAB's Children's Legal Assistance Register. In dealing with cases of this type, practitioners have the unique duality of obligation in both (a) trying to represent their client and achieve the best possible outcome for their client; and (b) acting in the best interests of the child. Whilst it may be suggested that the best interests of the child is something determined at the end of the process and includes – and indeed necessitates – the effective participation of all relevant parties, there can still be natural tension between those issues in some cases. Solicitors are concerned that the performance of their duties – particularly in children's hearings – is sometimes deemed to be adversarial and at odds with the

ethos of the system. It can be difficult for practitioners to strike that balance without falling foul of expectations, or failing to perform one or other of their duties.

SLAB now operates a system of complaint for persons on the register (although there is not, as yet, a set policy or procedure) and solicitors are concerned that there may be an increase in complaints. There appears to be a lack of understanding of the role and responsibilities of solicitors in children's hearings, in some instances, and some solicitors are concerned that this might adversely affect their ability to act in their client's interests.

Current issues – other

Firstly, solicitors find that it can sometimes be difficult for applicants to understand the different types of legal aid and different eligibility criteria which, in the case of children's referral proceedings, are effectively part of a single, ongoing process. Given the high grant rate and the administrative and other work involved in making applications, it may be that consideration could be given to ABWOR or legal aid being automatically available in certain circumstances, based on solicitor certification.

Secondly, whilst it is positive that legal aid is automatically available for children in certain circumstances, it could be said that the discrimination as to when it is available is somewhat arbitrary. Given the importance of decisions being made, the restrictions may require to be revisited. This is particularly important in the context of ongoing, research-based concerns being expressed by various agencies about the impact on children attending hearings themselves and the possibility that, in the future, children's views will be taken in another manner as the norm. Whilst that may be sufficient to take their views, there is a risk that without easy access to a solicitor such children may be deprived of their right of effective participation in practice, a right that goes beyond simply receiving an opportunity to express a view.

Finally, legal assistance for representation is generally not available for most pre-hearing panels (other than where the panel is considering the assisted person's application to be deemed a relevant person). Given the increasing frequency of such panels and the important decisions they take, this may be – or become – a gap in cover. If an assisted person is deemed unable to effectively represent themselves at a substantive hearing, then many of the same reasons that led to that conclusion might affect their ability to do likewise at a pre-hearing panel.

Legal aid – geography and demography of supply

Introduction

The geography of Scotland is diverse. One of the strengths of the current legal aid system is that there is a broad network of around 500 firms registered for criminal legal aid and around 600 firms registered for civil legal aid in locations across Scotland. This allows for a system in which legal aid services are readily accessible to people in urban and rural areas across Scotland. It does also, however, present practical challenges in ensuring access to justice and on a consistent basis across Scotland. In addition to the accessibility of legal aid services across cities and towns in Scotland, legal aid supports the resolution of cases across the court estate in Scotland, in locations across the country.

Sheriff court locations



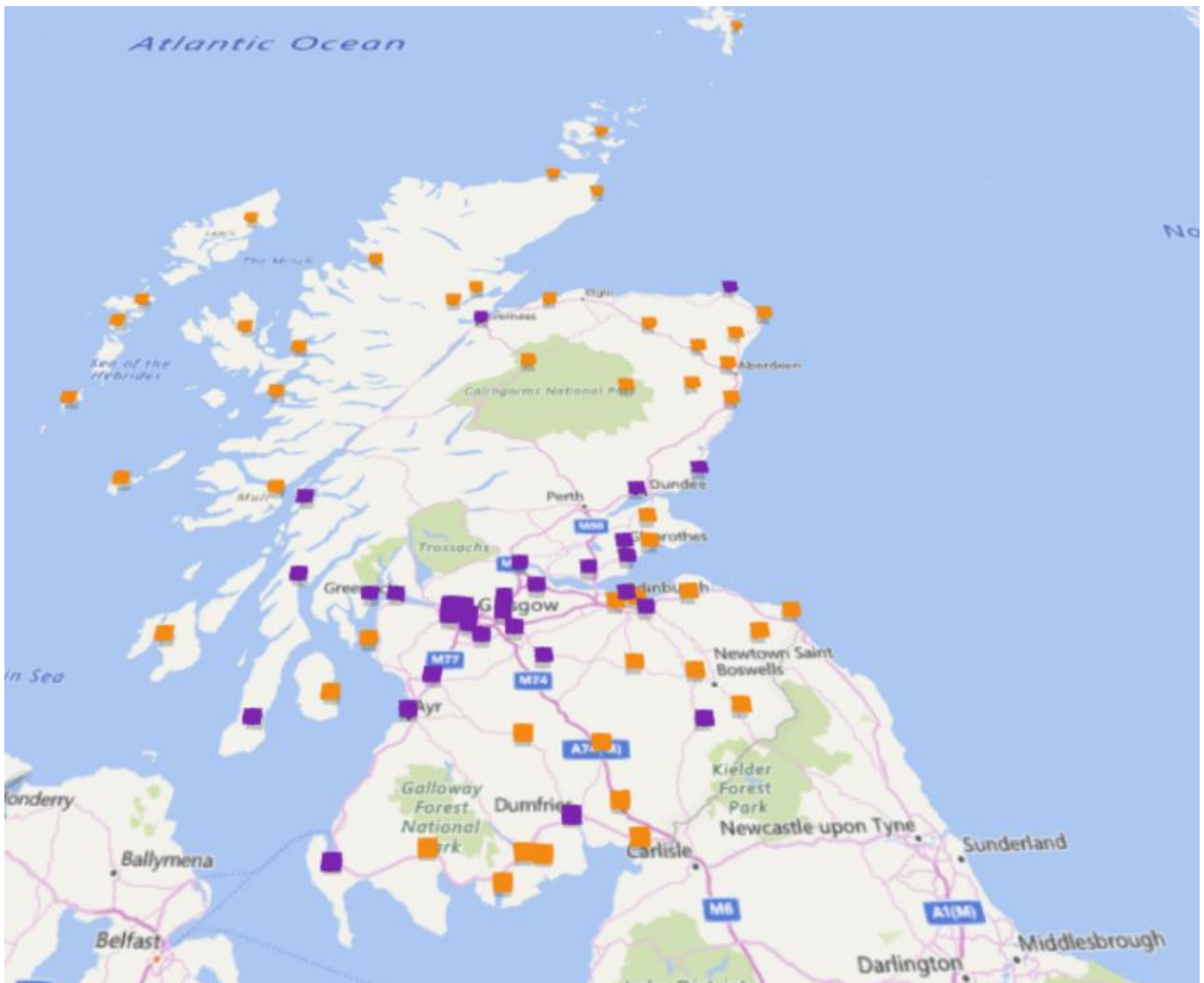
The current scale of the network of legal aid providers across Scotland supports local justice, and though the development of new technology may allow for different ways to resolve civil disputes and process criminal cases in future, the ability to access justice locally is important to maintaining confidence in the

justice system overall. The judiciary in Scotland reflected on the importance of local justice in February 2012, stating⁷⁶:

“[I]t is desirable that criminal justice be delivered locally. Quite apart from the convenience of witnesses and the interest of victims, this engages the local community in the administration of justice, including providing the opportunity to serve as justices or jurors.”

Criminal legal aid involves work at courts across Scotland, as well as prisons and police stations. The recent implementation of the right of access to legal advice at police stations has placed new responsibilities on participating solicitors, including the requirement to provide personal attendances at police custody centres for particular categories of person. The geographic diversity of these locations is significant, as the following map indicates.

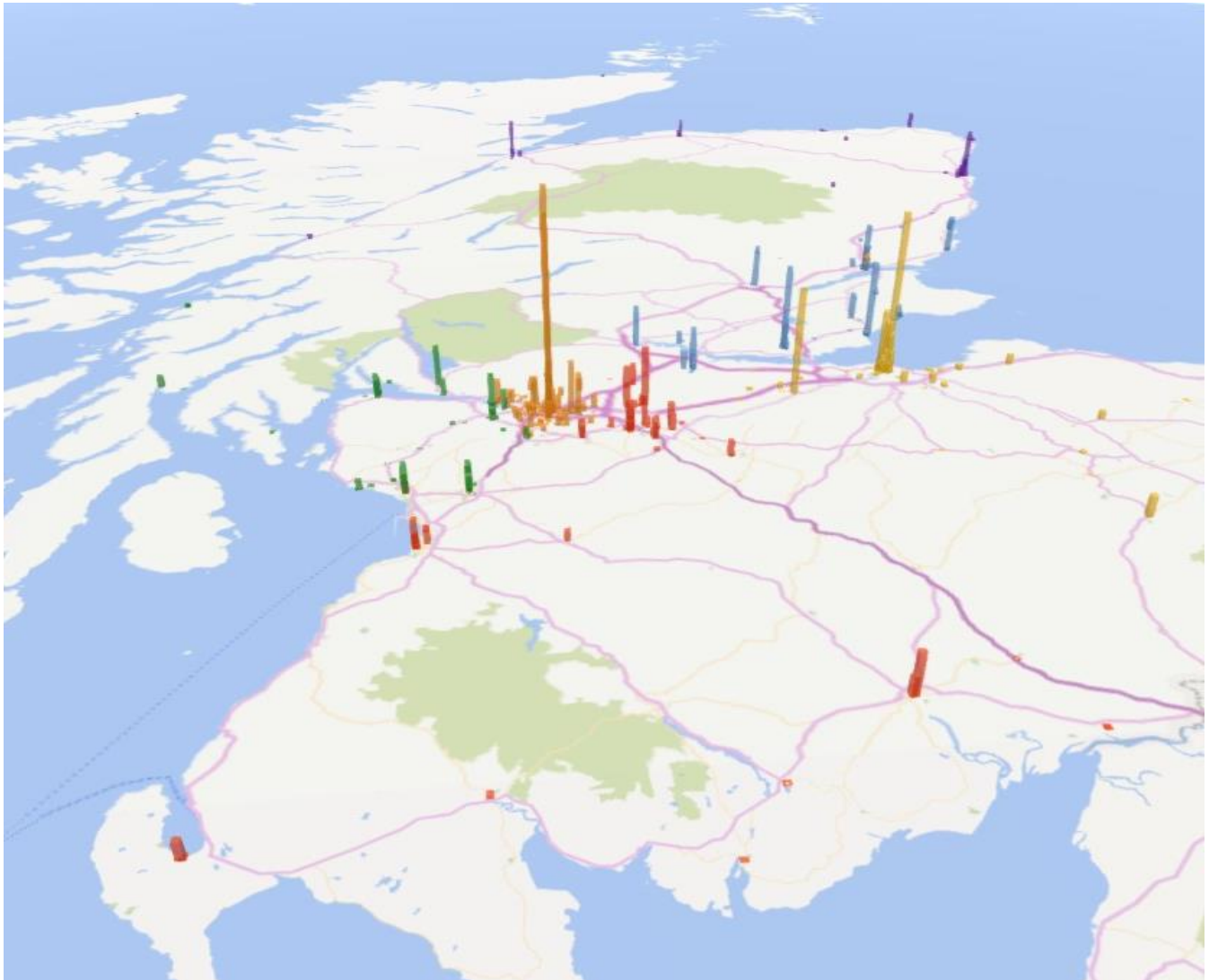
⁷⁶ Judicial Office for Scotland, *Principles for the Provision of Access to Justice*, February 2012, http://www.scotcourts.gov.uk/docs/default-source/scs-consultation-court-structures/statement_of_principles.pdf (accessed 18 May 2017)



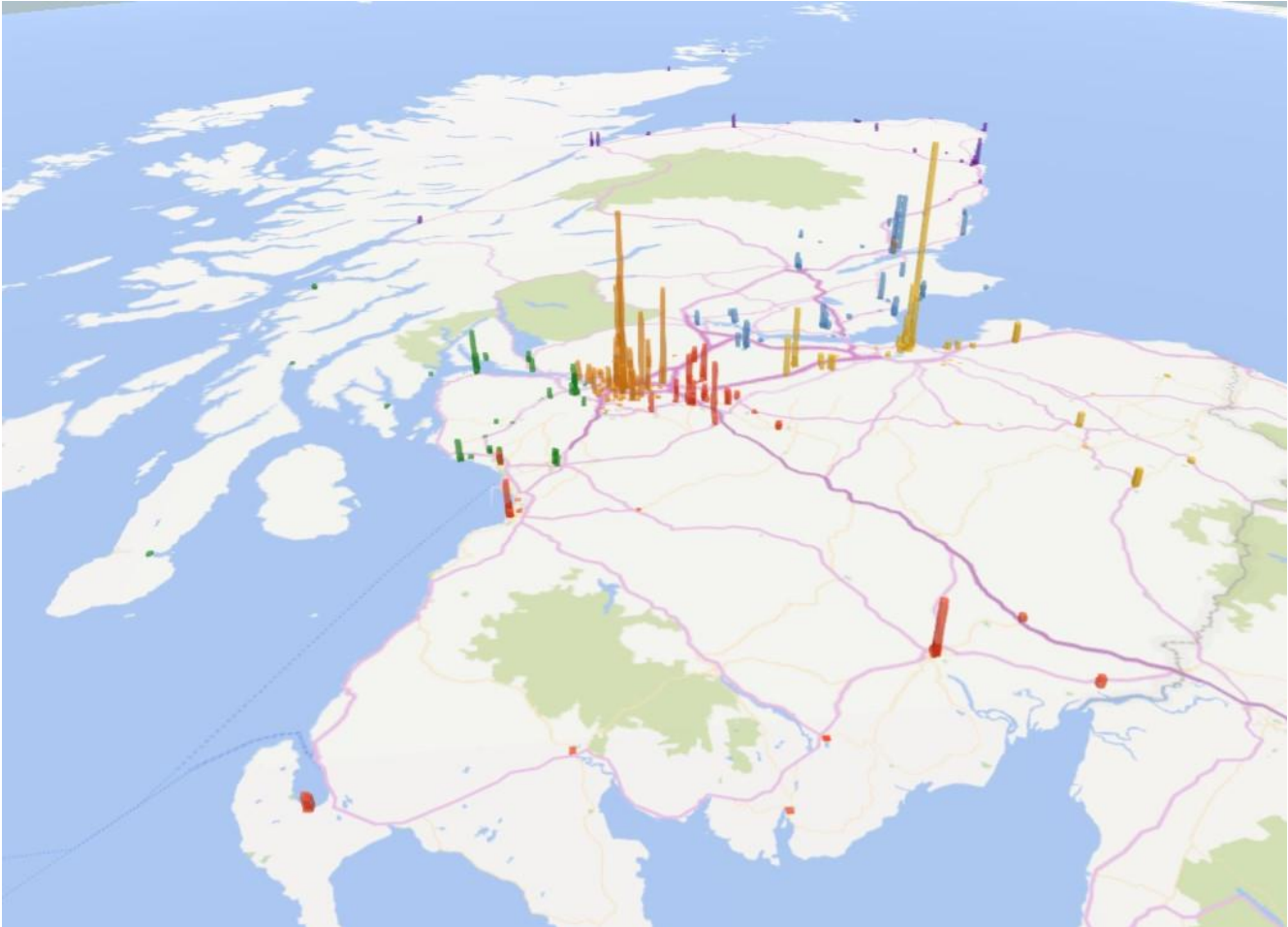
Primary custody centres (marked in purple) account for around 92% of all police detentions; secondary custody centres (marked in orange) account for the remainder.

One of the strengths of the current legal aid system is the broad network of providers, with over 500 firms registered for criminal legal aid and over 600 firms registered for civil legal aid across Scotland, offering local services and a range of choice in advice and representation. Indicative of the range and scale of work provided, the following maps provide an illustration of legal aid fee income by postcode for criminal and civil legal aid work (coloured to represent each of six sheriffdoms across Scotland).

Criminal legal aid fee expenditure by postcode



Civil legal aid fee expenditure by postcode



There are, however, a number of areas in Scotland in which there are concerns around supply. Respondents to recent research commissioned by the Law Society highlighted issues in a number of areas, particularly rural areas but also in major urban centres. One respondent said:

“Legal aid for criminal cases is harder to get in [the] Glasgow area, because of heavy reliance on prosecuting cases before lay magistrates. I constantly come across cases out of town which are prosecuted at sheriff summary level and which would only be prosecuted at lay magistrate level in Glasgow. Consequently the threshold for granting is higher and the fees are lower, albeit, the cases can be quite serious and complex.”

Another highlighted the scarcity of housing services in the Aberdeen area:

“We are aware that, despite the significant work of the Civil Legal Assistance Office and the work that the Shelter Housing Law Service does, that there are still too few legal aid solicitors practising housing law to cover the demand for this type of work.”

Another mentioned children's work in Fife:

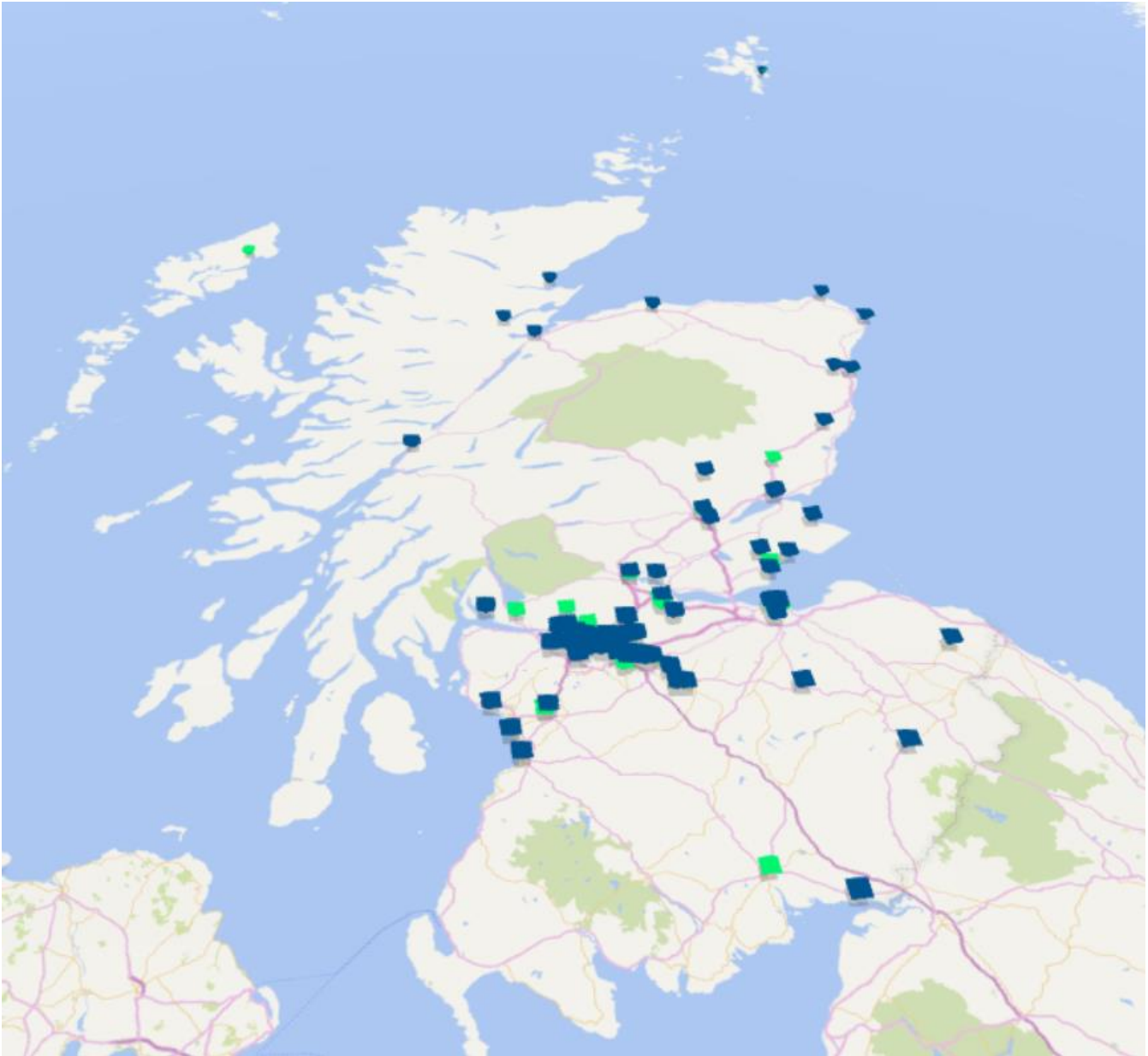
“It is particularly difficult to obtain legal aid cover in Fife on an emergency basis where a child has been retained in contravention of an existing residence order and I have experience of the delays in legal aid leading to the client being unable to obtain return of a child as, by the time the matter is brought to court, some changes have been made to the child's life (eg change of school) with which the court is reluctant to intervene.”

We are aware of challenges from our role as an organisation, responsible under the Maintenance Orders (Reciprocal Enforcement) Act 1972 for the distribution of work under the legal aid scheme for the enforcement in Scotland of child maintenance orders from other jurisdictions. We hold a register of firms willing to undertake this work, currently 34 across Scotland, only four of which are prepared to undertake work outside their immediate locale. We currently have no firms willing to undertake work in Aberdeen, Airdrie, Banff, Campbeltown, Dundee, Dunfermline, Edinburgh, Elgin, Falkirk, Lochmaddy, Peterhead, Perth, Portree, Stranraer or Wick.

Geography of legal aid providers

The number of providers is decreasing, with a 15% reduction in the number of firms providing criminal legal aid in the last four years: from 577 registered firms in 2013 to 491 in 2017. Some caution is required around these declining numbers: first, though some firms may be registered to carry out legal aid, they may not conduct many cases; second, the declining number of registered firms may be for a range of reasons, such as declining to continue providing legal aid, two or more firms merging into one or indeed closing as a business overall.

However, an analysis of the locations either where firms registered in 2013 and were no longer registered in 2017 (broadly, departing providers) or where firms were not registered in 2013 but were in 2017 (broadly, emerging providers) suggests a number of concerns. For criminal legal aid, this map indicates departing providers in blue and emerging providers in green.



Between 2013 and 2017, 154 firms ceased to be registered for criminal legal aid; 68 firms registered during the same period. This was not the result of significant market consolidation into larger practices, as the average number of registered practitioners for firms departing was 1.61, and for emerging firms was 1.76. There has been a degree of reorganisation of firms in urban areas, particularly in Glasgow, where a number of firms have departed and a number of firms have also emerged. However, outside the major cities, most areas in Scotland have seen firms depart from criminal legal aid without replacement.

Responses to the independent research we commissioned from Otterburn Legal Consulting suggested a number of reasons for the decline. One practitioner, the dean of a local faculty, said:

“My firm has stopped doing legal aid as it was no longer profitable. The administrative cost of doing legal aid was too high when weighed against the number of cases we were dealing with and the remuneration received for each case. A couple of firms in the faculty still do legal aid for guardianships, but not for anything else. Another is doing a small amount of legal aid, albeit reluctantly. All other firms in the faculty have stopped doing legal aid apart from these very limited circumstances. I rather suspect that other rural firms across Scotland, faced with the same considerations as us, will have made similar decisions and that there will now be a real lack of availability of legal aid across rural Scotland. There certainly is in this area.”

The reduction in the number of providers raises issues around recruitment and retention of legal aid practitioners. Another respondent to our recent research stated:

“We are unable to recruit anyone to carry out civil legal aid, which is one of the main reasons we now do very little. Newly qualified solicitors know that there is no future in a career as either a family or criminal lawyer because these types of cases are funded in the main by legal aid. The criminal bar is growing older and in the next five years, I believe will come to a cliff edge when a vast number will cease to do the work due to legal aid rates or simply retire through age and there will be a massive shortage of suitably experienced solicitors to provide the public access to justice.”

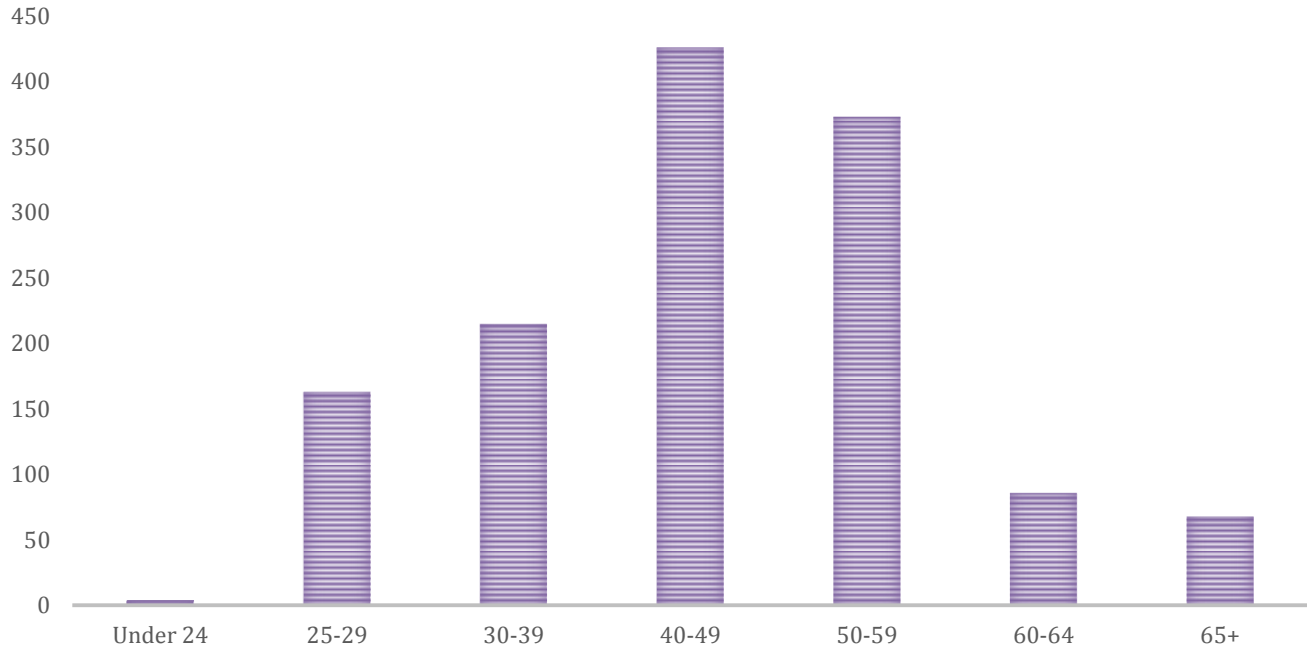
We believe that concerns around advice deserts, locations in which legal aid services are harder to access, will continue. Various reasons were suggested for this decline in coverage in our recent research, including the level of fees, the high degree of complexity and bureaucracy and also the practical challenges in recruiting and retaining new lawyers into legal aid practice.

Demography of legal aid providers

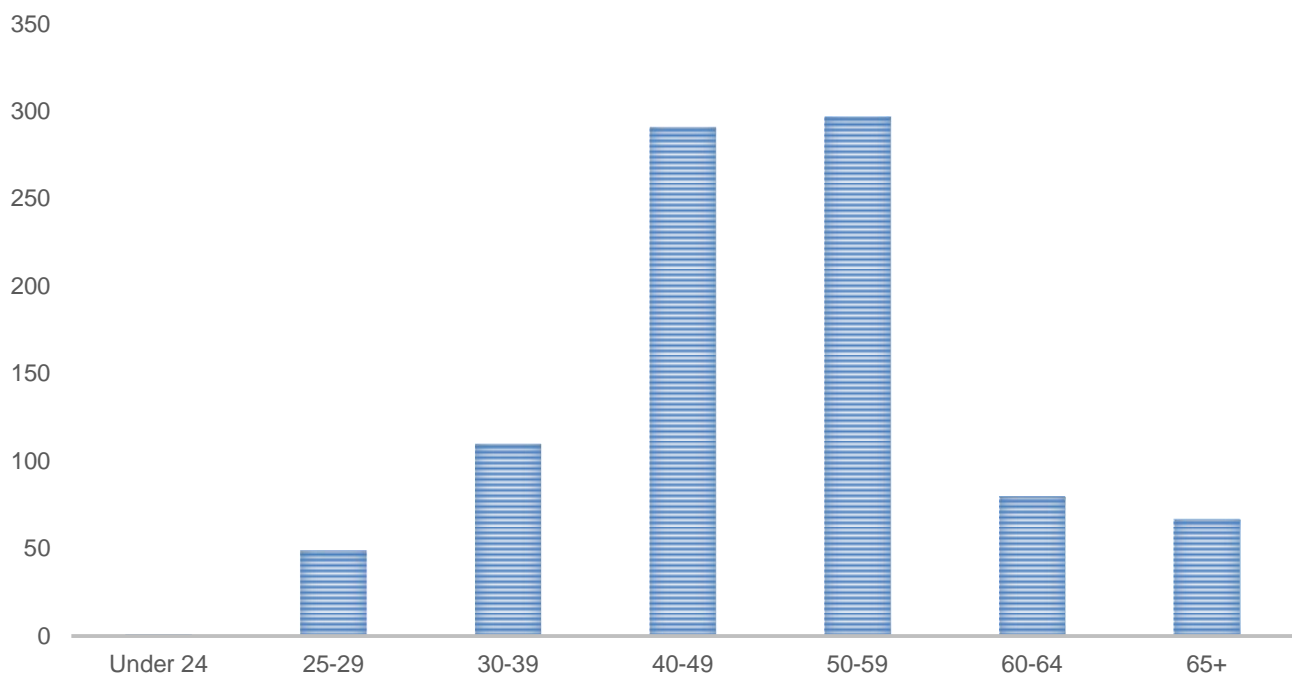
The demography of the legal profession in Scotland is changing significantly, for instance, with the majority of the profession now female. An analysis of criminal legal aid practice suggests that this area is not reflective of the wider trends within the profession⁷⁷.

⁷⁷ As criminal legal aid requires both registration of firms and solicitors within firms providing legal aid, it is possible to analyse providers by age and gender; civil legal aid requires only registration of firms, and so such an analysis is not possible.

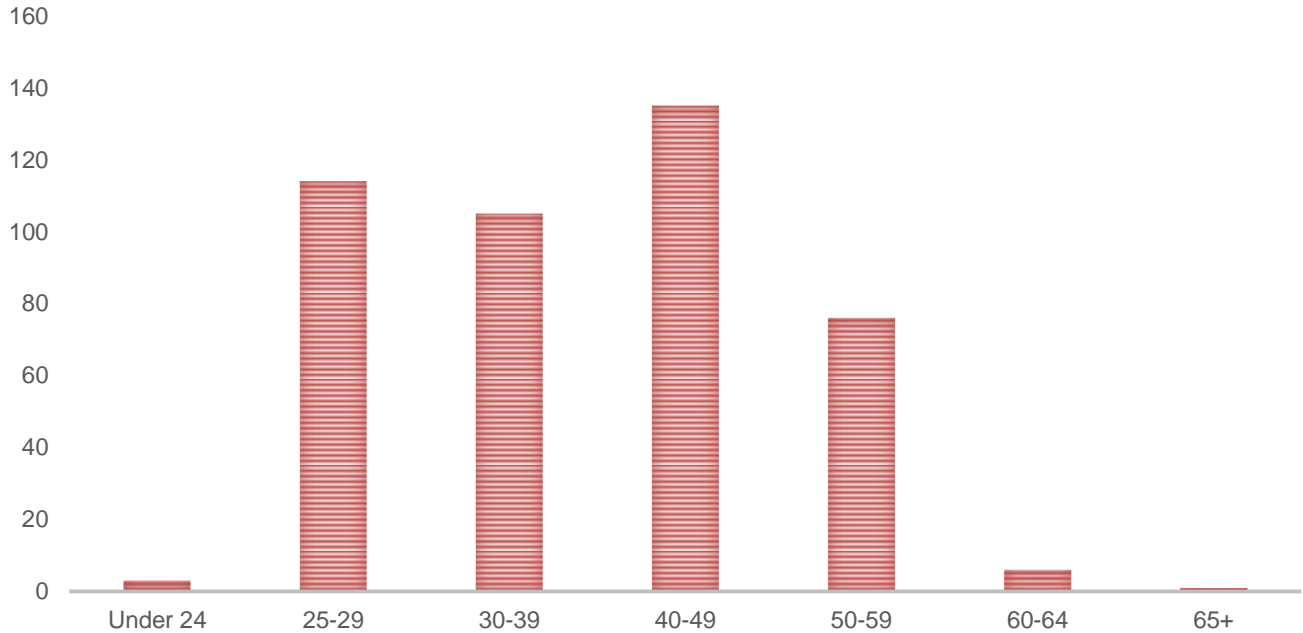
Registered practitioner age - overall



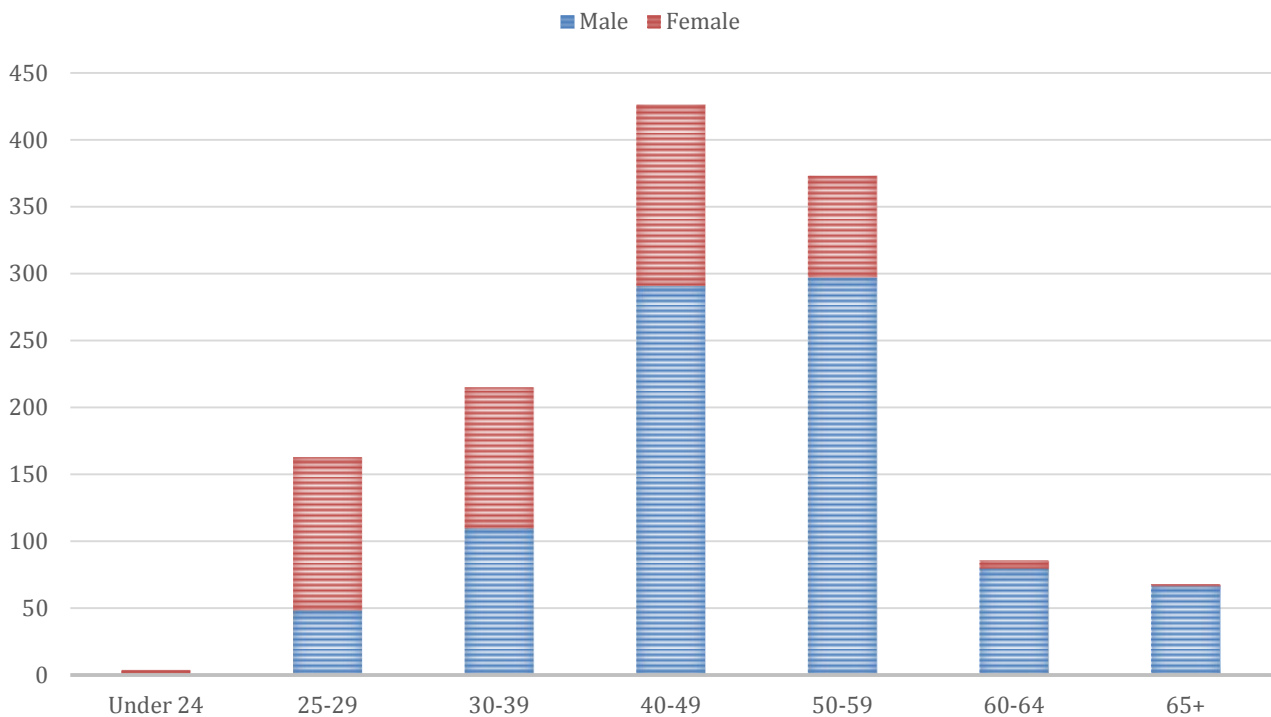
Registered practitioner age - male



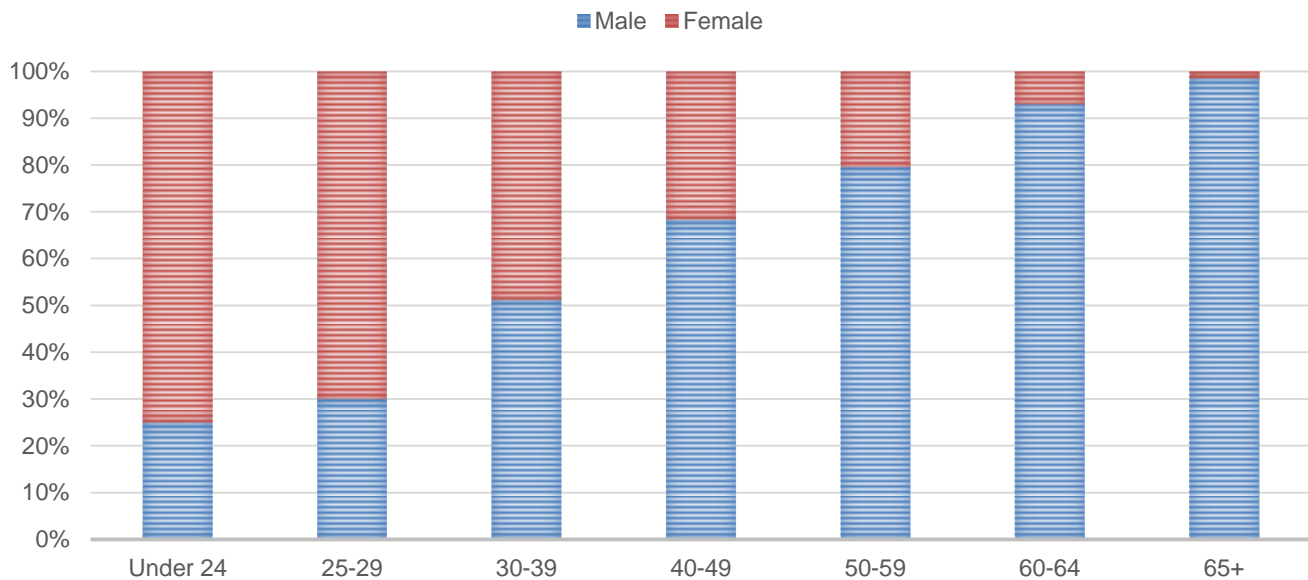
Registered practitioner age - female



Registered practitioner age - male and female

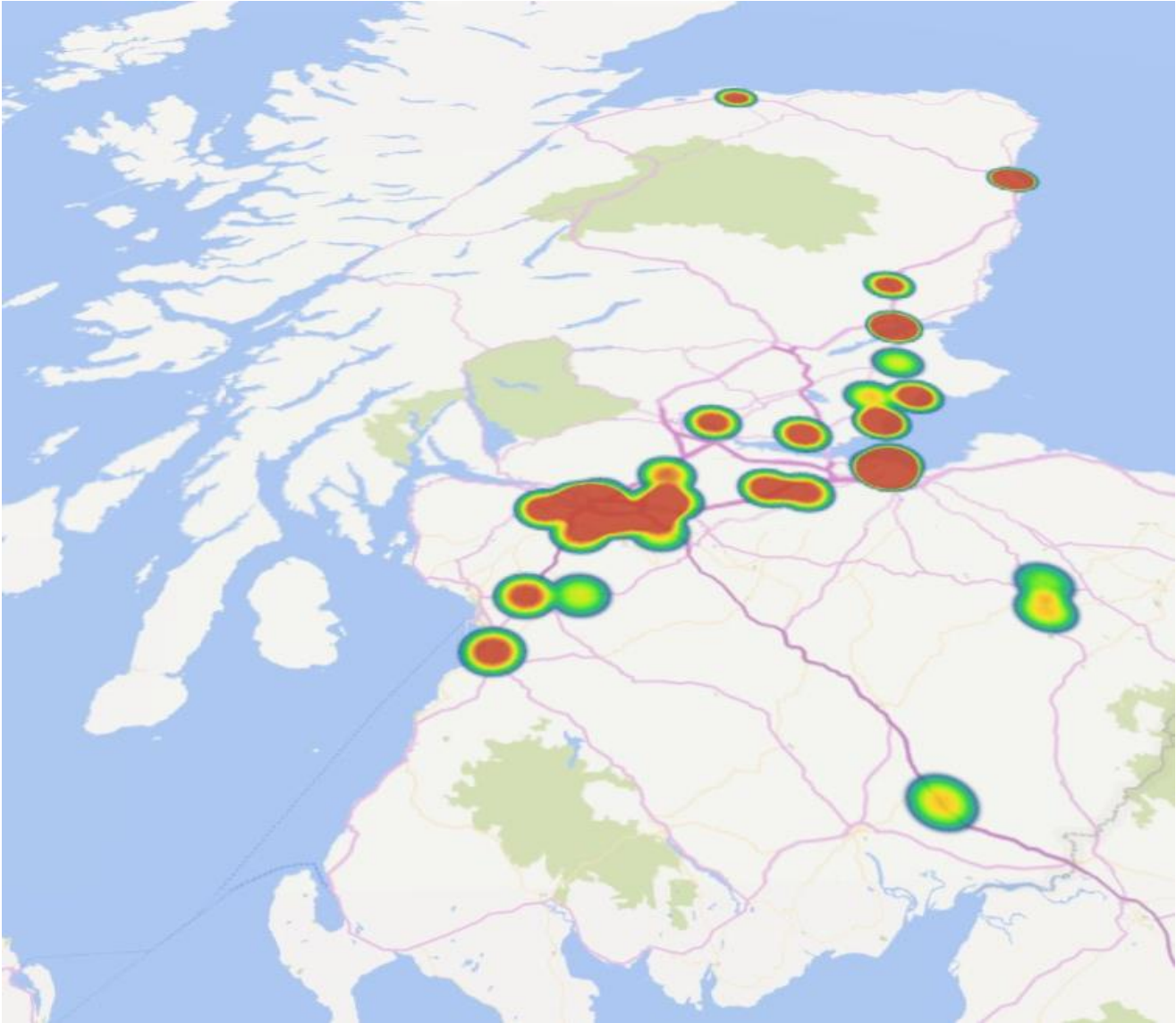


Registered practitioner age - gender ratio

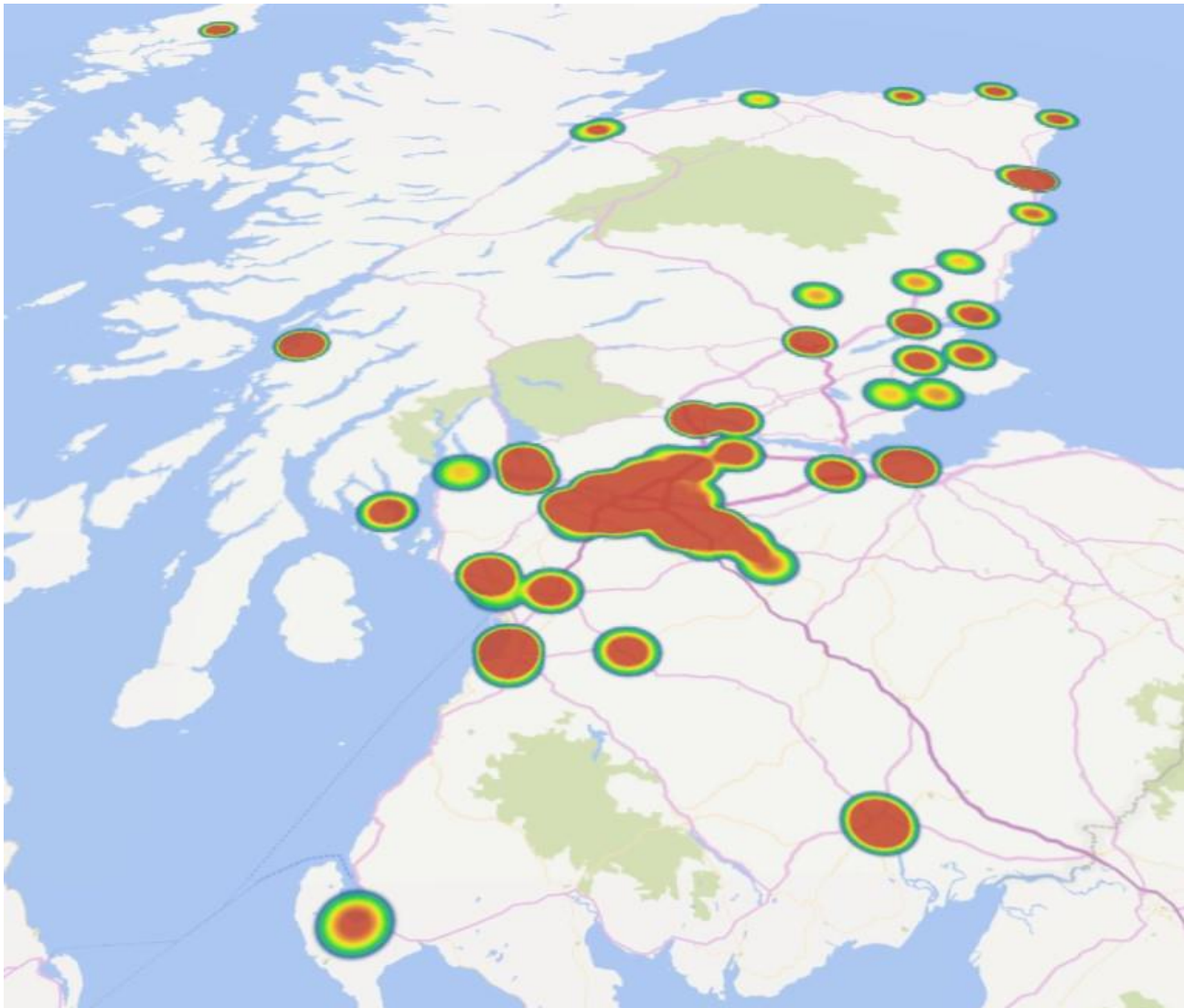


It is clear from this data that there is a longer-term issue around the overall sustainability of the legal aid system. Criminal legal aid practitioners fall predominantly into the 40-49 and 50-59 age categories, and there may be future challenges around recruiting sufficient practitioners into the legal aid system to ensure sustainability. The age profile of criminal defence practitioners is also reflected across the geography of Scotland. The following two maps indicate, first, the locations of practitioners under 35 providing criminal legal aid and, second, the locations of practitioners above 55 providing criminal legal aid.

For practitioners below 35, the locations are largely based in the central belt and along the east coast:



For practitioners over 55, the locations are far more geographically diverse:



There may be a number of reasons for the differences in location by age group. For newly qualified lawyers, as the large majority of traineeships across the profession as a whole are located in cities such as Aberdeen, Dundee, Edinburgh and Glasgow, it may be unsurprising to see a concentration in urban areas. There are also far fewer practitioners below 35 than above 55, which is possibly indicative of the restricted geographic diversity of the former category. Wider trends around the employment market may be involved, such as the increasing urbanisation of job opportunities. However, combined with the overall age profile of criminal legal aid practitioners, this is an area of concern. Proportionately, there are far fewer young solicitors working in legal aid practice than in other sectors of the profession.

We have suggested some steps that could be taken to encourage recruitment into legal aid practice. The nature of the current legal aid system entails that there is little or no chargeable work that a trainee solicitor can undertake in their first year, particularly for criminal practices. If this were changed, there might be

more incentive to offer traineeships. In England and Wales, one of the ways that the Legal Services Commission, the equivalent of the Scottish Legal Aid Board (SLAB), had encouraged sustainability within the sector was through funded traineeships and, during the course of this programme, around £14 million was spent on supporting new legal aid lawyers. We also highlight the recent establishment of the Lawscot Foundation, which aims to provide funding for a number of people from a range of backgrounds to enter the profession⁷⁸.

Conclusions

The geography of Scotland presents challenges in delivering consistent and effective access to justice, of which legal aid is a key element. There may be, as will be discussed later in our response to the call for evidence, potential for new technologies and online court processes to change the ways in which people access justice. However, there will remain aspects of the justice system that cannot easily be replicated online: for instance, solicitors and their clients will still need to attend court hearings in person, even if procedural hearings can be carried out online, and people will still be detained by the police in locations across Scotland and require a personal attendance from a solicitor in a range of circumstances.

In the context of a legal aid system that is diminishing in terms of funding and providers, the challenges of rural provision are particularly acute:

- it is clear that the level of provision in rural areas is currently diminishing – over the last four years and across large areas of Scotland, firms have ceased to be registered for legal aid and with no replacement
- there is a longer-term demographic trend that may exacerbate this challenge, with older practitioners located on a far more geographically diverse basis across Scotland than younger solicitors
- the reduction in the travel fees available for legal aid in 2011 may have contributed to the diminution of provision outside the central belt in Scotland – these rates are largely uneconomic and require review to ensure access to justice in rural areas

The demography of legal aid practice is also an area of significant concern. The number of solicitors registered for criminal legal aid does not reflect the overall age profile of the profession. There is a

⁷⁸ <http://www.lawscotfoundation.org.uk> (accessed 18 May 2017)

significant proportion of currently registered practitioners in older age groups, and concern around overall sustainability as these solicitors exit the profession. We have suggested two ways in which encouraging younger solicitors into legal aid practice could be achieved:

- the types of work conducted by first-year trainees under the legal aid scheme could be changed, providing greater incentives for firms to recruit
- similar to the programme of trainee solicitor funding deployed by the Legal Services Commission in England and Wales, SLAB could consider funding of trainees into legal aid practice

The geographic and demographic factors that we have highlighted are also proxy indicators of the overall sustainability of the legal aid scheme in Scotland. The future of legal aid practice, and the prospects of attracting new solicitors into this sector, was highlighted repeatedly during consultation on our legal aid strategy paper in 2015, and repeatedly in engagement with local faculties, firms and practitioners.

Legal aid and technology

Introduction

Looking to the immediate future of legal aid in Scotland, in common with other public services, it is likely that technology will have a significant impact on future delivery. The role of technology in delivering legal aid must be seen in the wider context of the technological transformation of the courts process currently under way. Lady Dorrian, the Lord Justice Clerk, recently highlighted the challenges and the potential for new technology in the justice system⁷⁹:

“There are fundamental reasons why it is important to ensure that the justice system keeps abreast of the digital revolution. In any modern society, the administration of justice must retain the trust and confidence of the people and organisations it serves. And it will only do that if it keeps pace with the times, and remains relevant to the experience of those people and organisations. We are now in an era, according to research published in 2014, when Britons spend more time using technology devices than they do sleeping. The increased use of modern technology has magnified the expectations placed on public services. In society generally, people and organisations communicate and transact business instantly and electronically yet the Scottish court system remains relatively unchanged. Rather than modernising, our system has been one that clings to paper, postal-based practices and face-to-face meetings when speedier and more convenient alternatives are reasonably and readily available. If people and businesses communicate instantly by email, Skype or Facebook, they will expect public services to do likewise. They will increasingly fail to understand, or have sympathy with, any system that still relies on extensive documentation, sent by post, in triplicate or worse, and by the requirement to appear in person for the handling of routine matters.”

Similarly, the legal aid system in Scotland must also retain the trust and confidence of the people it serves by keeping abreast of digital technology. The Independent Strategic Legal Aid Review is looking at the ways in which legal aid could be reformed in the next five to ten years: the role of technology in this change process will be crucial. A number of projects currently under way will impact the way in which legal aid is delivered, including the development of the various workstreams emerging from the criminal Evidence and

⁷⁹ Lady Dorrian, Lord Justice Clerk, *The 21st Century Court*, SYLA Annual Lecture 2016, <http://www.scotland-judiciary.org.uk/Upload/Documents/SYLAAnnualLecture2016LJC271016.pdf> (accessed 18 May 2017)

Procedure Review, wider use of videoconferencing facilities and the development of advice and information on the mygov.scot website. Several technologies, projects or innovations deployed in other jurisdictions, including the Rechtwijzer online dispute resolution platform funded by the Dutch Legal Aid Board⁸⁰ or the proposed triage systems of Her Majesty's Online Court might have a positive effect if deployed in Scotland. There may also be unforeseen new technologies and platforms emerging over the period which the Independent Strategic Legal Aid Review is considering that may have an impact on the ways in which access to justice may be delivered.

New technology can offer efficiency savings through new or streamlined processes. It can offer improved accessibility to legal services, both for people who might otherwise have found these hard to reach and more generally. It can support changing models of service delivery. We believe new technology has the potential to deliver against the various regulatory objectives and deliver a legal aid system fit for the 21st century. New technology also has the capacity to make significant efficiency savings across the justice system, including legal aid. In its review in 2015, *Efficiency of prosecuting criminal cases through the sheriff courts*, Audit Scotland estimated that the deployment of new technology could save between £20 million and £25 million annually across the criminal justice system⁸¹.

The challenges of technology

There are challenges in developing systems that place greater reliance on digital technology. Access to justice needs to be universal and to bring all participants in the justice system together.

There are persistent issues across Scotland around digital participation. We note the recent research from the Royal Society of Edinburgh, *Spreading the Benefits of Digital Participation*⁸², which highlighted the challenges in deprived and rural areas. One example cited, based on market research by Ofcom, was the low level of internet use in Glasgow city as an area, at 57% of the population. In more rural areas, there are challenges around developing the infrastructure to be able to support internet services. This challenge will diminish over time: the most recent Ofcom market research indicates that home internet usage has

⁸⁰ www.rechtwijzer.nl (accessed 16 May 2017)

⁸¹ Audit Scotland, *Efficiency of Prosecuting Criminal Cases through the Sheriff Courts*, 2015, http://www.audit-scotland.gov.uk/uploads/docs/report/2015/nr_150924_sheriff_courts.pdf (accessed 18 May 2017)

⁸² (<http://www.rse.org.uk/wp-content/uploads/2016/09/Digital-Report-High-Res-EQ5.pdf>)

increased from 82% to 86% of the population between 2014 and 2016⁸³ but will remain a feature over the next decade that the independent review is considering.

There are issues around people with protected characteristics having difficulty accessing online systems. A debate about online participation has considered services such as universal credit from the Department for Work and Pensions and filing tax returns with HM Revenue & Customs.

The nature of the cases and clients within the legal aid system indicates that technology should be a supplement rather than a substitute for existing processes and systems. As highlighted elsewhere in our response to the call for evidence, one of the strengths of the legal aid system is that there is a network of firms across Scotland that provide legal services locally and on a face-to-face basis.

Another issue is around ensuring that legal aid practitioners can adapt to these systems effectively. Public bodies such as Police Scotland, the Scottish Courts and Tribunals Service (SCTS), Scottish Legal Aid Board (SLAB) and Crown Office and Procurator Fiscal Service (COPFS) have significant IT budgets, and the opportunity to influence at Justice Board level and as part of the *Digital Strategy for Justice in Scotland* programmes. The nature of a wide network of firms and practitioners, operating a range of different IT systems, presents challenges. Involving legal aid practitioners in system design to ensure that technology is fit for purpose, developing standards that do not require disproportionate IT investment, and aiding with training and potentially IT support can help to ensure effective use of technology in the justice system. As part of the consultation process for our strategy paper in 2015, the Legal Aid Online system was often highlighted as an effective example.

Digital Strategy for Justice in Scotland

In 2014, the Scottish Government published the *Digital Strategy for Justice in Scotland*, which establishes a vision of how digital technology will transform the justice system⁸⁴. The vision, as the strategy sets out, “is to have modern, user-focused justice systems which use digital technology to deliver simple, fast and effective justice at best cost” and the paper establishes three objectives.

First, allow people and businesses to access the right information at the right time, through a justice portal that will provide relevant information to help individuals and businesses to resolve any disputes:

⁸³ *Communications Market Report 2016*, Ofcom (https://www.ofcom.org.uk/data/assets/pdf_file/0024/26826/cm_r_uk_2016.pdf)

⁸⁴ Scottish Government, *Digital Strategy for Justice in Scotland*, 2014, <http://www.gov.scot/Resource/0045/00458026.pdf> (accessed 18 May 2017)

- interactive online systems and online dispute resolution, and links to independent advisers and professionals
- advice on how to access relevant information on cases, processes and the ways in which this process can be followed electronically

Second, fully digitised justice systems:

- digital recording of evidence, reports, decisions and judgments, including submission of pleadings and the use of digital warrants
- live videoconferencing TV links throughout the justice system
- a secure digital platform to store all information relevant to a case or individual

Third, make data work for us, through data analytics and analysis:

- drive further transformation as the capabilities offered by digital technology are understood and grow
- link securely to other sectors, including health, social care and education
- engage with citizens and users, and seek comment on their confidence and experience in our justice systems

For the public-facing systems that the *Digital Strategy for Justice in Scotland* recommends, the aim is to develop content at the mygov.scot website: by the end of 2014, information on housing issues; by the end of 2015, advice and guidance on a range of different subjects; by the end of 2016, all static justice advice and information; by the end of 2017, “our platform will have evolved into an interactive tool providing online help and support... civil litigants, tribunals users and victims of crime will be able to track their case”.

We believe that there is great potential to the development of an interactive justice portal for the public. We understand that work on the content for this platform is progressing, and attended a CivTech challenge meeting hosted by Scottish Government in March, looking at the types of content that could be included on the platform for family separation. Linking this information into the services available through legal aid could be a significant step forward in signposting the availability of legal help at a crucial stage.

Courts, the justice system and technology

There are several ways in which technology will transform the court process, and legal aid in turn, through the decade ahead. The court system has not kept abreast of changes in technology, though significant developments are in progress. There are some key changes that will be required to assist practitioners in adapting to this new environment. We suggested in our legal aid strategy paper in 2015, *Legal Assistance in Scotland: Fit for the 21st Century*⁸⁵, that the introduction of wifi in courts would be crucial to this process, and hope that this will be made available imminently.

Evidence and Procedure Review

The SCTS Evidence and Procedure Review is developing “proposals for changes to the law, procedures and practice that will contribute to the modernisation of the criminal justice system so that it meets the highest standards of justice now and in the foreseeable future”.⁸⁶

SCTS published its *Evidence and Procedure Review Report* in March 2015⁸⁷, examining the ways in which best evidence could be secured from child and vulnerable witnesses, from witnesses more generally, and the role of new technology in facilitating best evidence. Work following this report has progressed in several areas, including around summary case management, with SCTS publishing a proposition paper on *A New Model for Summary Criminal Court Procedure* in February 2017⁸⁸.

The legal aid funding to support the implementation of any changes introduced ought to be considered. The Evidence and Procedure Review highlights these concerns and states that:

“...the legal aid system, as currently designed, will not be able to facilitate the changes in practice and procedure which are required to make the proposals succeed.”⁸⁹

It is important to note that an approach that sees digital disclosure and active case management through online platforms will have a significant effect on the role of the solicitor as these technologies embed. There

⁸⁵ (<http://www.lawscot.org.uk/media/505409/legal-aid-reform-document.pdf>)

⁸⁶ <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2>

⁸⁷ (<http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2>)

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⁸⁹ https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/epr_a-new-model-for-summary-criminal-court-procedure_28-feb-2017.pdf?sfvrsn=2 – section 151 on page 39

will be a front-loading of the work required by solicitors, more sources of evidence including body-worn cameras, the potential for early resolution of cases and other benefits.

The creation of a 'digital vault', from which all the participants in the criminal justice system can access evidence in electronic format, combined with the facilities for online case management, offers some opportunities for efficiency savings in legal aid. There may be the opportunity for better decision making by SLAB and the opportunity to remove duplication of information by solicitors through the Legal Aid Online system if this information is already hosted centrally. There may be issues around the proportionality of information sharing, should SLAB have access to a wide range of information from this digital vault – though it is noted that the information powers held by SLAB under the 1986 Act are wide – though the potential for this coordinated information sharing should be explored further.

As part of the Evidence and Procedure Review, in relation to solemn criminal court procedure, there are two working groups which are considering the evidence of vulnerable witnesses and children. One group is looking at the pre-trial process of joint investigative interview and the other group considered taking the evidence of vulnerable witnesses by a commissioner, which has resulted in practice note 1 of 2017⁹⁰.

To facilitate and support the operation of practice note 1 of 2017, and allow defence counsel to be properly prepared and funded in order to carry out this process, will require timeous communication between COPFS and SLAB to identify that the case has been marked as a High Court case. Further, upon receipt of a legal aid application, sanction ought to be granted by SLAB timeously and without delay.

The recommendations from the Evidence and Procedure Review will have a profound effect on the ways in which legal aid operates for summary criminal cases. The efficiency savings that this can deliver will be substantial and we hope that legal aid fees can be reorganised to meet these challenges effectively.

Civil ICMS

SCTS is developing an integrated case management system (ICMS) for all civil claims under the new simple procedure, which broadly replaces small claims and summary cause proceedings, namely civil cases at a threshold below £5,000. This ICMS is designed to allow both legal practitioners and the public to lodge and track the progress of these claims online. As these cases constitute around 60% of the civil

⁹⁰ [Practice Note 1 of 2017](#)

business of courts in Scotland, this represents a significant step towards end-to-end online processing of civil cases.

The development of the civil ICMS has been described as the first step towards digital processing of civil court business and, like the development of a digital vault, there may be potential for efficiency savings to legal aid through this transition. Linked systems could allow, for instance, a significant change to court scheduling made by SCTS, such as increasing the number of days' proof, to be notified or accessible to SLAB. SLAB could then take a view on whether a stage report would be required from the solicitor, rather than the current obligation on the solicitor to advise and report. As with the development of a digital vault for criminal cases, there may be concerns around the proportionality and degree of information sharing involved, though again the potential of these new systems should be explored.

Videoconferencing

The use of videoconferencing in the justice system has significant potential, for instance, in criminal cases, removing the need for and cost of transport to and from prison, or in civil cases, providing greater accessibility and removing the need for personal attendance, particularly for procedural issues. Efficiency savings can be generated across the justice system, including for legal aid. Indeed, in its 2011 White Paper on legal aid, the Scottish Government outlined the anticipated savings⁹¹:

"[T]he Board is leading the project studying the feasibility of greater utilisation of videoconferencing in court proceedings, legal agents' prison visits and advice from solicitors at police interviews. The aim is that videoconferencing will reduce the need for solicitors and others paid through legal aid to travel unless it is absolutely necessary, with a view to making savings from the legal aid fund of in excess of £1.2 million by 2014/15."

For the criminal justice system, there are three main videoconferencing projects: from courts to prisons in work led by SCTS, from practitioners to prisons in work led by SLAB, and from practitioners to police stations, again led by SLAB. There has been recent progress around the first of these streams, with an increasing number of courts using videoconferencing for full committal proceedings, while work continues on the other streams, though it appears that the savings estimated by the White Paper have not yet materialised. There could also be greater coordination between the court-to-prison and practitioner-to-

⁹¹ *A Sustainable Future for Legal Aid*, Scottish Government, October 2011 (<http://www.gov.scot/Resource/Doc/359686/0121521.pdf>)

prison videoconferencing streams, particularly to deal with situations in which urgent consultation with a client detained at prison is required before a videoconferenced hearing.

As we outlined in our 2015 strategy paper, we are supportive of the move towards greater videoconferencing across the justice system. We remain cautious about this becoming the sole means by which client communication will be afforded – or, in the terms of the White Paper, to be used “unless it is absolutely necessary” – as there will be instances in which face-to-face communication is necessary or desirable, whether for reasons of a client’s protected characteristics or otherwise. The use of videoconferencing for police station advice, envisaged for both private consultations and for police interviews, raises some issues. One of the rationales for the *Salduz* case⁹², which led to the Supreme Court judgment in *Cadder*, requiring the right of access to a legal professional while detained by the police, was for that professional to be able to inspect the conditions of detention. Though videoconferencing may be able to facilitate this more effectively than by telephone, the nature and consequences of police detention require the ability for practitioners to appear in person (even though the largely uneconomic rates for travel and the unrealistic rates for police station work overall already militate against personal attendance). We would also be concerned if videoconferencing became a crude solution to the challenges of providing advice across the disparate geography of Scotland, where, for instance, suspects detained in urban areas could receive advice in person, with those in more rural areas in practice only receiving advice virtually.

In addition to securing access to a solicitor at a police station, videoconferencing could be used to allow, for instance, British Sign language (BSL) interpreters to video sign. SLAB, in common with other public bodies, already has access to such a service and we believe that this could be rolled out to legal aid practitioners more widely.

We also believe that wider use of videoconferencing could be helpful in securing evidence from experts, removing travel costs and potentially increasing the pool of expertise that may be called upon.

Further recommendations

We suggested in our 2015 strategy paper that with digital recording present in courts for criminal proceedings, the use of shorthand writers paid through the legal aid fund in other proceedings be considered.

⁹² *Salduz v Turkey* (36391/02), (2009) 26 BHRC 223

In an age of mobile communications, we also thought that service by sheriff officers, again at cost to the legal aid fund, merited further consideration. A simple service or intimation costs £93.72 – broadly comparable to two hours of advice at a police station under current advice and assistance arrangements – and unlike legal assistance fees, these are regularly increased. There will always remain the need for surety of service in court proceedings, though, in many cases, different ways of communicating with parties will be sufficient. Some solicitors have suggested that a lesser fee be available to solicitors to arrange service, for instance, electronically or simply through recorded delivery.

More widely, we also consider that the legal aid system should reassess the ways in which client communication takes place in modern society. As observed elsewhere, there are challenges around requirements placed by regulators such as the Law Society around client communication, which are unpaid under the legal aid system, such as client reminder letters. However, the use of these can avoid significant system costs, such as a reminder about court attendance to prevent a case from being continued for non-attendance. Similarly, text reminders may be more effective than formal letters, but there is no mechanism under the current legal aid system to allow these to be paid.

Similarly, despite advances in technology and court process, there is still a reliance on paper-based systems. As one respondent to a recent survey by Otterburn Legal Consulting on behalf of the Law Society observed:

“Whilst technology is helpful... the difficulty is that, certainly in relation to court work, there is still a need to have everything printed and available on paper. Suggestions by SLAB that a ‘working file’ involving notes of important parts of statements could be used is ridiculous. Our costs in respect of printing and paper have risen since the introduction of disclosure because of the need to print everything.”

Values and ethos of legal aid

The development of a common public sector ethos in Scotland was one of the key themes emerging from the Christie Commission, an ethos centred on “the conviction that public services exist to support a fair and equal society, and to protect the most vulnerable.... While public services do not determine the nature of Scottish society, they both reflect the ethical foundations of that society, and help to shape its development. We ignore this at our peril – reform which did not embrace this ethos could result in the erosion of the collective nature of social responsibility, which has long been a defining characteristic of our country”.

The Christie Commission further considered this common ethos, as well as the beliefs and motivations of people who are contributing to public services – the providers, the service users and local communities:

“What defines this ethos must be:

- *a respect for the autonomy and potential of the people and communities of Scotland, and the ambition to help maximise both*
- *the ambition to improve the lives and opportunities of the people and communities of Scotland, and a commitment to work with them to achieve their aspirations*
- *a commitment to get maximum value and impact for public resources, and to account openly to the public for what is done in their name*

These elements stand alongside the established principles and standards of public life, including integrity, honesty and openness and are the counterpart to what we believe to be a wider public service ethos...”

The elements of a public sector ethos have been debated widely in recent years, as more public services are delivered by complex mixed models. Recent research by Localis, surveying 1,415 senior managers and executives across the UK public sector in September 2016, showed a consistent understanding of the elements of the public sector ethos across the UK: the five most important factors described were community responsibility, integrity, accountability, customer service and social justice⁹³. There is a large

⁹³ Localis, *A New Public Service Ethos: Next Generation Public Service Reform*, November 2016, <http://www.localis.org.uk/wp-content/uploads/2016/11/Localis-A-New-Public-Service-Ethos.pdf> (accessed 18 May 2017)

degree of overlap between the articulation of the public service ethos by the Christie Commission and the findings of public sector workers in practice.

Legal aid and the public sector ethos

Much of the debate across the UK around the ethos of public service has been in response to the growing involvement of the private sector in the delivery of public services and the commitment to this ethos when financial constraints place greater pressure on the ways in which these services are delivered and the outcomes to be achieved. Unlike several other key public services, legal aid has historically been delivered largely by frontline providers from the private sector. Currently, these frontline providers are solicitors, assisted by advocates or informed by experts, where the complexity or nature of the case requires it⁹⁴.

In addition to the primarily private sector delivery model that has been deployed for legal aid historically, there are other aspects of legal aid to consider around the development of a public sector ethos. Legal aid is provided to individuals rather than to communities. Where there is a shared interest between members of a community, all members of that community need to be eligible for legal aid so that public funds can be provided; as such, community actions do not generally proceed under legal aid, unlike in some other jurisdictions, in which partial funding can be made available. There has been some discussion, particularly during the process of the Taylor Review⁹⁵, about the prospect of establishing a supplementary legal aid scheme (SLAS), which might provide funding to those who are individually eligible but collectively ineligible for a multi-party or community action. There have also been concerns raised, bearing in mind the requirements of the Aarhus Convention around effective participation by communities in environmental actions, around the lack of provision for collective public funding.

Also, legal aid is provided in the wider context of an adversarial court system, in which an individual's interest may be directly opposed to those of the wider community. Though decisions in individual cases may have aggregate benefits over time, in addressing criminal behaviour and promoting safer and stronger communities, or in providing effective means to resolve civil disputes, the duty incumbent on a solicitor is to represent the individual client's best interests: these may, but sometimes may not, coincide with the interests of the overall community.

⁹⁴ The Legal Aid and Legal Profession (Scotland) Act 2007 amended the 1986 Act to include a register of advice organisations that could provide advice and assistance under the legal aid scheme, but we understand that no advice organisations are currently registered

⁹⁵ The Review of Expenses and Funding of Civil Litigation in Scotland, *Report of the Review of Expenses and Funding of Civil Litigation in Scotland*, September 2013, <http://www.gov.scot/Resource/0043/00433831.pdf> (accessed 18 May 2017)

The public sector ethos looks to respect the autonomy and the potential of people and communities across Scotland, though a further factor around the adversarial process in Scotland for formal dispute resolution makes this more complex. For many criminal cases, and indeed some civil cases, the participants, whether the accused, the parties to a dispute or indeed witnesses to the facts of a case, may be reluctant or even hostile participants in the process.

Legal aid and administrative justice

By legal aid services we mean services, instructed by an individual person, designed to assist that individual in the identification and determination of his or her rights, liabilities or interests. There should be no restriction on such assistance that excludes any processes simply because they might not fall within the traditional definitions of civil justice or criminal justice; those would be derogations requiring to be stated separately and separately justified.

The current legal aid system in large measure predates the development of the tribunals and administrative justice system, and the ombudsmen and similar complaints resolution systems. Those systems are at present largely excluded from access to legal aid.

By underlying shared values and ethos, we take it as read that ensuring access to justice for all and reducing unmet legal need are key considerations, which sit at the core of and underpin any system of justice, including identifying legal aid services relevant to that system.

Civil, criminal, administrative justice and tribunals, affect the rights of individuals and can potentially result in disadvantages to individuals. On one analysis, the adjudication of issues by a court does not differ from the adjudication of an issue by a tribunal, or the determination by, for example, mediation or arbitration. A central shared value or ethos for legal aid services should therefore include ensuring that legal aid extends across that whole wider field. And if that is true, then the central shared value for a legal aid system should be that it ensures, so far as possible, that no individual may be subjected to a process in which their individual rights are adjudicated on by a third party without the realistic opportunity of having real access to advice and representation in connection with that process should they wish it.

Arguably, such a principle ought to be the ambition for legal aid services regardless of whether that ambition is realistically achievable at any particular point in time for cost or any other reason. In any event, restricting the application of the principle on cost, considerations would have to be treated as derogations from the principle.

Solicitors and the public sector ethos

We believe that the current values and ethos of legal aid providers overlap in large part with those for public services more generally and provide an effective foundation for helping the public during some of the most challenging events of their lives. Acting with integrity is critical to the role and responsibility of being a solicitor: as a regulated professional; as a legal services provider; and as an officer of the court.

Accountability is demonstrated in a number of ways: a complaints process through which any party – not just the client – can raise concerns about the conduct or service of a solicitor; effective and proportionate regulation – which we are campaigning to improve through legislative reform; and robust arrangements for indemnity insurance. Social justice is central to legal aid and to the legal sector overall with, for instance, the Legal Services (Scotland) Act 2010 establishing several regulatory objectives, including: supporting the rule of law and the interests of justice; protecting and promoting the interests of consumers and the public interest generally; and, promoting access to justice. As a foundation for embedding shared values and ethos, the legal aid system in Scotland should at least meet the requirements of the regulatory objectives established by the Legal Services (Scotland) Act 2010.

Research conducted by Ipsos MORI for the Law Society of Scotland in 2014 demonstrates that solicitors are meeting this ethos. For members of the public that had used the services of a solicitor in the last five years:

- 97% agreed that their solicitor was trustworthy
- 89% agreed that solicitors overall were trustworthy
- 89% agreed that their solicitor was an expert in their area of law
- 89% agreed that their solicitor had provided good customer service
- 82% agreed that they would recommend their solicitor to other members of their family or friends

This research asked about the experience of members of the public across all types of legal services, not just those funded through legal aid, though research from the Scottish Legal Aid Board on civil applicants for legal aid in 2013 held similar findings⁹⁶.

⁹⁶ Scottish Legal Aid Board, *Civil Legal Aid Applicants Survey 2013*, 2013, http://www.slab.org.uk/export/sites/default/common/documents/about_us/research/stakeholders/Civil_Legal_Aid_Applicants_Survey_2013.doc (accessed 18 May 2017)

- 83% of applicants felt that their situation would have been worse without legal aid
- 91% were satisfied or neutral around the legal aid service they had received so far
- 96% were satisfied or neutral around their solicitor treating them with courtesy and respect

Promoting equality and fairness

Legal aid provides support to some of the most vulnerable in society, often directly assisting people in Scotland in tackling discrimination in education, employment, housing, immigration, mental health and a range of other areas. Providing equality before the law is a key way in which discrimination can be eliminated and equality of opportunity promoted for groups with protected characteristics, whether gender, race, disability or others.

Supporting the most vulnerable

The legal aid system in Scotland does much to support vulnerable people. The prevalence of mental health and addiction issues amongst people brought into the criminal justice system is high. For work at a police station, for instance, we know that a recent review of custody records showed that 68% of suspects were considered vulnerable⁹⁷. Evidence presented to the Christie Commission by the Equality and Human Rights Commission showed that half of all young people in prison have been in care (and 80% of those who have been convicted of violent offences). By comparison, only 1% of children in Scotland have been in care. Research from other jurisdictions supports this overall finding. For instance, in England and Wales, research by HM Inspectorate of Prisons showed that 50% of prison entrants had primary or secondary mental health needs and around 17% disclosed a psychiatric history⁹⁸.

⁹⁷ HM Inspectorate of Constabulary in Scotland, *Thematic Inspection of Police Custody Arrangements in Scotland*, August 2014: "Of the 310 custody records we sampled, 68% of detainees declared either medical, mental health or substance misuse issue, <http://hmics.org/sites/default/files/publications/Thematic%20Inspection%20of%20Police%20Custody%20Arrangements%20in%20Scotland.pdf> (accessed 18 May 2017)

⁹⁸ HM Inspectorate of Prisons, *The Mental Health of Prisoners: A Thematic Review of the Care and Support of Prisoners with Mental Health Needs*, October 2007

Similarly, the civil and children's legal aid systems often involve vulnerable people at times of life challenge, such as family separation, or in situations in which their vulnerabilities are the grounds for the legal intervention, including adults with incapacity work, or representation at mental health tribunals.

There are structural ways in which the legal aid system in Scotland supports the most vulnerable. The commencement of part 1 of the Criminal Justice (Scotland) Act 2016 will change the ways in which police station advice is provided (and legal aid is automatically available without contribution in such circumstances). The provisions of the Act will see additional protection for vulnerable suspects, including mandatory personal attendance for children below 16 years of age, persons between 16 and 17 subject to a supervision order under the children's hearings system or adults assessed as vulnerable.

Supporting and empowering individuals

The legal aid system in Scotland provides support to individuals across a range of criminal and civil issues, though the extent to which it empowers individuals is less clear (or may even be less desirable). It is axiomatic that legal aid provides equality of arms, a particularly acute issue for defending a criminal prosecution where the full apparatus of the state is deployed against the individual accused. Support in these cases is usually provided on a comprehensive basis, from police station to court case and potentially to appeal. In civil cases under the legal aid system, support may not be offered on a similarly comprehensive basis. For instance, cases in which initial help is provided may not see representation under the legal aid scheme, such as in cases involving tribunals. As an example, for employment work in 2013/14, there were 1,544 intimations of advice and assistance but one intimation of civil assistance by way of representation⁹⁹. As discussed above around administrative justice, we believe that consideration of the role of legal aid in the wider dispute resolution arena would be helpful. Issues determined in administrative justice tribunals and other fora can often involve complexity.

⁹⁹ Scottish Legal Aid Board Annual Report 2013-2014: Civil Legal Assistance, Scottish Legal Aid Board (http://www.slabb.org.uk/common/documents/Annual_Report_2013_2014/SLAB_Annual_Report_2013-2014_-_Appendix_3_-_Civil_legal_assistance.pdf)

Conclusions

We believe that it is important to consider what kind of ethos and values should inform the provision of legal aid over the next decade. At a time when there is wide-ranging discussion on the nature of service delivery, the respective roles of public and private sector provision and how successful outcomes can be maintained in a persistently challenging financial climate, there are benefits in moving towards an ethos shared with other public services. There are clear links between outcomes in justice, education, health and other areas and a number of ways that services can coordinate, mutually learn and build capacity.

There is one significant concern around the values and ethos of public service in the context of legal aid. This is around the current treatment of funding for community action in Scotland. We anticipate the introduction of an Expenses and Funding of Civil Litigation (Scotland) Bill into the Scottish Parliament in the current parliamentary session and an effective process for multi-party actions may provide wider access to justice. The development of crowd-funding models for funding may also assist, though further consideration of how the legal aid system could meet challenges around community participation, whether through a SLAS or otherwise, would be helpful.

Enabling effective delivery

We believe that the legal aid system does enable effective delivery of access to justice to people across Scotland, though the system is urgently in need of structural reform. The Legal Aid (Scotland) Act 1986, predating the re-establishment of the Scottish Parliament and the human rights settlement under the Scotland Act 1998, is no longer fit for purpose. It has been amended on numerous occasions, an accretion over time of changes, amendments and revisions that makes the system unnecessarily complex. In response to our recently commissioned research on legal aid, one respondent highlighted the challenge:

“Currently, the online handbook and associated ‘guidance’ must extend to thousands of pages... We are expected to know the lot... rules are too prescriptive and should be reduced to operate on the basis of more general principles. For example, in applications we will give quite a bit of information about the type of work proposed, but if we apply the wrong type of code (and there are dozens of them) the application is likely to be refused, or payment refused after the work is done.”

Effective processes

We argued for the simplification of the legal aid system in our strategy paper of 2015, making a number of recommendations around how this could be achieved, for instance, through the implementation of a single grant of legal aid rather than structural divisions into advice and assistance, assistance by way of representation (ABWOR) and legal aid. One respondent to our commissioned research said:

“If the system of legal aid is front-loaded with immediate grants (not advice and assistance grants with a figure), early evidence gathering and examination of witnesses would be achievable. If the system is as cumbersome as now, ie advice and assistance grants to a fixed figure then legal aid being required after that, the system is impossible to work in an efficient manner. Advice and assistance should be repealed and one certificate of legal aid from start to finish, including the appeal, should be granted.”¹⁰⁰

¹⁰⁰ Commissioned Research page 29 <https://www.lawscot.org.uk/media/1033810/Legal-Aid-Financial-Health-Report-February-2017.pdf>

We understand that the Scottish Legal Aid Board (SLAB) has been considering ways in which simplification could be achieved without primary legislative change. We look forward to the outcome of SLAB's consideration.

Partnership or joint working

The paramount requirements for client confidentiality and independent legal advice structurally limit the ability for partnership or joint working. There is broad collaboration between legal aid providers and other justice agencies. The level of coordination between justice agencies has improved significantly in recent years, as highlighted by Audit Scotland¹⁰¹. We have previously highlighted that it would be helpful to have legal aid practitioners represented at Justice Board level alongside organisations such as the Scottish Government, Crown Office and Procurator Fiscal Service, SLAB, Scottish Courts and Tribunals Service (SCTS) and other organisations.

There may be opportunity for greater joint working or coordination in civil areas as well.

Information about performance

It is important that information about the performance of legal aid services is collected, assessed and made publicly available. This helps to ensure public confidence in legal aid as a service. There are some limitations on information about performance from individual cases, as client confidentiality is a key requirement in the delivery of legal services generally. Information is currently published by SLAB around solicitor, solicitor advocate and advocate fees from legal aid. Research is conducted with applicants around overall satisfaction with legal aid. SLAB has previously conducted best value reviews in areas such as mental health and immigration and asylum and there is a duty on SLAB under the Legal Services (Scotland) Act 2010 to monitor the availability and accessibility of legal services, not just those funded publicly.

We believe that the commissioning of independent research would assist with the development of a more effective system of legal aid. We have recently conducted research into the financial sustainability of the

¹⁰¹ Audit Scotland, *Efficiency of prosecuting criminal cases through the sheriff courts*, September 2015, http://www.audit-scotland.gov.uk/uploads/docs/report/2015/nr_150924_sheriff_courts.pdf (accessed 18 May 2017)

system of legal aid¹⁰², and suggest that the Scottish Government conducts research into the preventive benefits of legal aid. Wider outcomes-based reporting could be facilitated by the development of the new online processing and case management models proposed by SCTS for criminal and civil cases.

There is also a debate around ways in which technology can assist legal service users and consumers to assess quality and price¹⁰³. With fees set by regulations, there is not price competition for legal aid in Scotland. Also, a large number of firms provide legal aid in addition to a range of services funded in other ways, from speculative fee agreements to legal expenses or other insurance to private payment by the client.

We also believe that the provision of information around the availability of publicly funded legal services is important. There may be a role for technology in improving the visibility of these systems and effective signposting and referral from one service to another.

Public, third sector and private sector delivery

As a frontline service, legal aid in Scotland is primarily provided by solicitors in Scotland, assisted by counsel – whether advocates or solicitor advocates – in more complex cases, as well as experts, interpreters and translators and other third parties. It was noted in the previous section around values and ethos of legal aid that the 1986 Act allows for registered advice agencies to provide advice and assistance, though we understand that no advice agencies are currently registered to conduct this work. One of the challenges of third sector delivery may be that, by comparison to other advice services provided free at point of use, civil advice and assistance has a financial contribution element and also recovery to the legal aid fund from clawback.

There was also the establishment of lay representation through the Home Owner and Debtor Protection (Scotland) Act 2010, which provided legal assistance in mortgage repossession cases, particularly during the economic downturn. Defending these cases highlights a structural challenge to the legal aid system: because a successful resolution of a mortgage repossession case would maintain a financial position, this

¹⁰² Otterburn Legal Consulting, *The Financial Health of Legal Aid Firms in Scotland: A Report for the Law Society of Scotland*, February 2017 <https://www.lawscot.org.uk/media/1033810/Legal-Aid-Financial-Health-Report-February-2017.pdf> (accessed 18 May 2017)

¹⁰³ For instance, in England and Wales, though specifically excluding criminal legal aid from scope, the Competition and Markets Authority, *Legal Services Market Study: Final Report*, December 2016 <https://assets.publishing.service.gov.uk/media/5887374d40f0b659370001a/legal-services-market-study-final-report.pdf> (accessed 18 May 2017)

would require recoupment of legal aid costs through clawback, at a stage at which a party defending a mortgage repossession could least afford it.

In terms of public and private sector delivery, there are three schemes involved in the provision of legal aid: the Public Defence Solicitors' Office (PDSO), the Solicitor Contact Line and the Civil Legal Assistance Office (CLAO). There are 79 whole-time equivalent staff working across these three schemes: 37 for the PDSO (with 24 operations and legal services staff); 13 for the Solicitor Contact Line (with 11 operations and legal services staff); and 29 for the CLAO (with 13 operations and legal services staff)¹⁰⁴. Solicitors working for these three schemes are members of and regulated by the Law Society of Scotland. The ways in which these publicly employed solicitors provide legal services is broadly similar to that in private practice, though they are paid salaries from the legal aid fund rather than on a case-by-case basis.

One of the regulatory objectives for the Law Society, and for other bodies across the justice system, is to promote competition in the provision of legal services and also promote an independent, strong, varied and effective legal profession. We believe that a level playing field between public and private provision of legal aid is important to secure these goals. For instance, there are over 500 firms registered for legal aid in Scotland and the PDSO receives a third of duty allocations in the areas in which it operates: we believe that a more even allocation of duty work would be more equitable. Public sector delivery has also been used as a policy response to deal with unmet legal need, such as the establishment of CLAO offices. The statutory power to employ solicitors under part V of the 1986 Act should not, however, reduce the responsibility on the Scottish Government to ensure a sustainable legal aid system in which private practitioners (or indeed third sector) can participate.

Range of delivery vehicles

The current delivery vehicles for legal aid are the firms within which solicitors work. There is the potential, under the Legal Services (Scotland) Act 2010, for alternative business structures to change the structures under which these firms operate. Until the provisions of this legislation commence, it is difficult to assess how this may change the delivery vehicles for legal aid. The experience in England and Wales suggests little impact to the ways in which criminal legal aid is provided. Because the scope of civil legal aid in

¹⁰⁴ *Annual Report and Accounts for the year ending 31 March 2016*, Scottish Legal Aid Board, 2016 (http://www.slab.org.uk/common/documents/Annual_report_2015_2016/Annual_Report_and_Accounts.pdf)

England and Wales was reduced so dramatically, the impact of alternative business structures for civil work is not possible to evaluate.

There has also been a debate in Scotland, and in other jurisdictions, around the size and scale of traditional law firm structures, particularly the role of sole practitioners or small firms within the legal aid sector and the efficiencies of scale that might be achieved by larger practice units. Currently, the average number of fee earners per registered legal aid firm is around 2.4: criminal legal aid firms are, in large part, micro-businesses. We have highlighted earlier in this call for evidence the diverse geography of Scotland and, in a number of locations, there may not be the demand for legal aid services to allow for 'scaling up'. In terms of our regulation of the legal services market overall, we are keen to see a range of delivery vehicles available, to ensure that there is adequate business support for solicitors and firms, but not to mandate the adoption of any particular business structure. We believe that a similar approach is suitable for legal aid.

Complaints inspection and scrutiny

Solicitors providing the frontline services offered under the legal aid system, are regulated by the Law Society. Complaints can be made to the Scottish Legal Complaints Commission on a service or conduct basis and the rules and guidance for the ways in which services are provided is set by the Law Society. There are some specific requirements around legal aid contained within these rules and there is also a Code of Conduct for Criminal Work, outlining requirements for practitioners in this area.

There are systems of peer review for criminal, civil and children's legal aid, conducting case file reviews on a six-year cycle of assessment. There has been discussion, both in Scotland and in other jurisdictions, of extending this peer review process to include advocacy elements.

There are also requirements set down by SLAB, for instance, in the *Code of Practice for Criminal Legal Assistance*. A recent consultation was conducted around this code, which had not been revised since 1999. We highlighted a number of concerns around the draft code consulted on, including: the inclusion of operational requirements around police and court duty schemes, which had previously been outlined separately; and the significant overlap between requirements established by SLAB in the draft code and pre-existing requirements in the regulation of solicitors overall, including confusion around the representation of co-accused and a range of other issues.

We note the recent establishment of an independent review of legal services regulation by the Scottish Government, due to report in 2018, which we have welcomed.

Capacity for innovation

The capacity for the legal aid system to innovate is limited, in part, by its statutory nature. A number of potential changes to the legal aid system would require either primary legislative change or the introduction of regulations. We maintained in our strategy paper in 2015 that simplification was required, particularly as the 1986 Act predates the re-establishment of the Scottish Parliament and the human rights settlement of the Scotland Act 1998.

The powers that SLAB holds under the 1986 Act are wide, however, and we believe that there is capacity for innovation that does not require statutory revision.